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Book Reviews

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Power and Constraint: The Accountable Presidency After 9/11 by Paul E. Mirengoff

Volume 13, Issue 2

July 2012

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Letter from the Editor...

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Likewise, we hope that members find the work in the pages to be well-crafted and informative. Articles are typically chosen by our Practice Group chairmen, but we strongly encourage members and general readers to send us their commentary and suggestions at info@fed-soc.org.

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Administrative Law & Regulation

GMAIL.GOV: WHEN POLITICS GETS PERSONAL, DOES THE PUBLIC HAVE A RIGHT TO KNOW?

By Michael D. Pepson* and Daniel Z. Epstein**

Note from the Editor:

This paper examines whether e-mail regarding official government business sent on personal accounts is subject to disclosure under the Freedom of Information Act ("FOIA"). As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the authors. The Federalist Society seeks to foster further discussion and debate about this issue. To this end, we offer links to other resources on this topic and invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

Related Links:

- The Freedom of Information Act, 5 U.S.C. § 552, as Amended by Public Law No. 104-231, 110 Stat. 3048: http://www.justice.gov/oip/foia_updates/Vol_XVII_4/page2.htm
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- Editorial, *Preserving D.C.'s Public Record*, WASH. POST., July 22, 2012 (on District of Columbia's version of FOIA): http://www.washingtonpost.com/opinions/preserving-dcs-public-record/2012/07/22/gJQAJpKz2W story.html
- Democratic Nat'l Comm. v. U.S. Dept. of Justice, 539 F. Supp. 2d 363 (2008): http://www.leagle.com/xmlResult.aspx?x mldoc=2008902539FSupp2d363 1868.xml&docbase=CSLWAR3-2007-CURR
- Ryan J. Stanton, State Court Rules that Government Officials' Personal E-mails Aren't Subject to FOIA, Ann Arbor.com, Jan. 27, 2010: http://www.annarbor.com/news/state-court-rules-that-government-officials-personal-e-mails-arent-subject-to-foia/

etween 2005 and 2006, former Attorney General Alberto Gonzales dismissed several United States Attorneys—a decision that generated much public attention. In response to congressional inquiries concerning the U.S. Attorney dismissals, the White House disclosed that its political staff had used Republican National Committee ("RNC") e-mail accounts to engage in communications related to these dismissals.1 This disclosure became central to a congressional investigation into whether the White House's political staff had used RNC e-mail accounts "to circumvent record-keeping requirements."2 A report from the United States House of Representatives Committee on Oversight and Government Reform found that it was common for many of the eighty-eight White House officials who received RNC email accounts to use them for official government business.³ On March 19, 2007, the Democratic National Committee ("DNC") submitted a Freedom of Information Act ("FOIA") request to the U.S. Department of Justice ("DOJ") seeking documents "relating to . . . the appointment, performance, and dismissal of the United States Attorneys."4 In responding to the DNC, the DOJ withheld certain e-mails based on Exemption 5 of the FOIA, which exempts from disclosure records that are privileged as part of a deliberative process.⁵ Each of the

withheld e-mails was addressed to or received from one or more individual White House staff members using an e-mail account owned and assigned by the RNC.6 In deciding whether e-mail communications on RNC accounts were subject to exemption from disclosure under FOIA, U.S. District Court Judge Ellen Huvelle concluded that it was clear RNC e-mail accounts were used both for official and RNC business.⁷ Judge Huvelle found that Exemption 5 provided grounds for the DOJ refusal to disclose these e-mails, conceding by implication that the emails would have been subject to disclosure under the FOIA if an exemption did not apply, without addressing the question whether agency employees' e-mails discussing official business that are exclusively sent from or received on personal e-mail accounts or communications devices are subject to the FOIA's disclosure provisions.8 It is an open question, then, whether the use of non-government e-mail addresses to discuss official agency business can put those communications beyond the FOIA's reach. We argue that such communications are well within the province of the FOIA's disclosure mandate.

FOIA, codified at 5 U.S.C. § 552, is a disclosure statute that places a general obligation on federal executive branch agencies to "make information available to the public" and prescribes "specific modes of disclosure for certain classes of information." FOIA provides a "statutory mechanism that permits the public to request and to obtain government data." FOIA grants private actors a right of access to federal "agency records," thereby meaningfully safeguarding "citizens" right to be informed about what their government is up to." The statute imposes an affirmative obligation on federal executive branch agencies to "make available for public inspection and copying" certain agency materials. ¹³ More importantly, FOIA

^{*} Regulatory Counsel at Cause of Action, a nonprofit government accountability law firm in Washington, D.C. He advises Cause of Action and its clients on constitutional and regulatory matters.

^{**} Executive Director at Cause of Action. He previously served as an investigative counsel at the Committee on Oversight and Government Reform at the U.S. House of Representatives.

allows "any person" to gain access to a wide variety of "agency records" upon request. 14

The Supreme Court has "emphasized [that] the basic thrust of" FOIA is "disclosure, not secrecy. . . ."¹⁵ FOIA was designed to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."¹⁶ In *NLRB v. Robbins Tire & Rubber Co.*, ¹⁷ the Court explained that "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."¹⁸

Today, the advent of technological developments, such as e-mail and text messaging, and the proliferation of personal electronic communications devices (e.g., home computers, laptops, Blackberrys) has presented new challenges to FOIA's transparency mandate and given rise to uncertainty about what constitutes an agency record. These technological developments have raised new threshold questions, e.g., are agency-related communications made on government-owned Blackberrys outside of work hours subject to FOIA? Does the possibility that federal employees might use personal electronic communications devices and personal e-mail accounts in an attempt to conduct agency business outside the reach of FOIA threaten to undermine FOIA's fundamental purpose and frustrate the very public policy concerns that gave impetus to its passage?¹⁹ The practical reality is that, whether for nefarious or innocent reasons, federal agency employees have and will continue to conduct agency business using personal e-mail accounts and personal communications devices. Until Congress or the courts definitively clarify whether these work-related communications are subject to FOIA's disclosure provisions, a dangerous loophole enabling unscrupulous agency employees to intentionally evade the light of public scrutiny may exist.

The public's right of access to agency records, while broad, is subject to exemptions.²⁰ FOIA's disclosure provisions only apply to executive branch agencies; the courts and Congress are expressly excluded from FOIA.²¹ And disclosure under FOIA is limited to "agency records." 22 While it is a question of first impression whether federal employees' personal e-mail records concerning agency matters are subject to disclosure as "agency records" under FOIA, FOIA's text, history, and structure as well as the application of existing case law provide a sound basis for concluding that these records are subject to disclosure under FOIA—like any other species of agency record. The mere fact that an e-mail is sent or received via a nongovernmental e-mail address (e.g., an agency employee's Gmail account) or communications device (e.g., a home computer) does not, standing alone, take the content of that e-mail, as a categorical matter, outside of the scope of FOIA's disclosure provisions: the medium of a communication cannot trump its content, purpose, use, and the context in which it was sent.

I. Practical Realities: Government Employees Use Personal E-Mail Accounts and Communications Devices to Conduct Agency Business

While there have not been any comprehensive empirical studies concerning the frequency with which employees of federal executive branch agencies use personal e-mail addresses and communications devices to conduct agency business, there is considerable anecdotal and circumstantial evidence indicating that the use of personal e-mail and communications devices to engage in agency business is a persistent concern. A panoply of recent federal court decisions illustrates the need for final judicial—or congressional—resolution of these questions. Moreover, a June 2007 Interim Report issued by the Committee on Oversight and Government Reform of the U.S. House of Representatives and a June 2008 Government Accountability Office ("GAO") report suggest that some federal employees deliberately use private e-mail accounts to evade public scrutiny of their conduct. E

II. The "Agency Records" Threshold for Triggering a FOIA Requester's Right of Access

A. Statutory Framework

Although "[t]he system of disclosure established by the FOIA is simple in theory," ²⁶ the practical reality is far different. Because FOIA, like many federal statutes, does not define vague but important statutory terms, courts have felt compelled to engage in a considerable amount of interstitial lawmaking to elucidate the precise contours of FOIA's disclosure provisions. This proposition holds particularly true with respect to questions regarding whether work-related communications authored or received by federal executive branch personnel constitute "agency records" under FOIA.

As a threshold matter, the sine qua non of a requester's right of access to agency materials is that the requested materials be "agency records," within the meaning of FOIA, as only "agency records" are within the ambit of FOIA's disclosure requirements. FOIA's disclosure requirements. FOIA's disclosure requirements. FOIA's judicially enforceable disclosure obligations is that the requested agency materials must constitute "agency records." Therefore, as Professor Janice Toran has explained, the "agency records" requirement for triggering a right of access under FOIA performs "a significant gatekeeping function," given that "[a] request for a record that does not have agency record status . . . need not be honored or even acknowledged."

Although FOIA statutorily defines the term "agency," ocnspicuously absent from FOIA is a comprehensive definition of the term "agency records." The legislative history of FOIA is unclear on this point as well. And notwithstanding that the 1996 amendments to FOIA added a definition of the term "record," the definition of "record" only clarified that the "format" by which an agency maintains information is inapposite to the analysis of whether agency information constitutes an "agency record" under FOIA, making clear that even agency records maintained in an "electronic format," e.g., e-mails, are subject to FOIA's disclosure provisions.

B. The Judicial Gloss

Because the FOIA statute does not define "agency records," the meaning of that term has largely been fleshed out by courts adjudicating concrete cases and controversies, and the Supreme Court and lower federal courts have developed a number of benchmarks for determining whether documents, communications, and other agency materials obtained or generated by agency personnel constitute "agency records" that are subject to FOIA's disclosure provisions. Two distinct

but related strands of jurisprudence have emerged that attempt to prescribe a principled framework for determining whether materials are "agency records" that are subject to FOIA: the first line of cases attempt to elucidate broad principled distinctions between materials that are "agency records" and those that are not; the second line of cases attempt to establish limits on FOIA requesters' right of access to personal materials that are created or used by federal employees who are employed by executive branch agencies that are subject to FOIA. The judicial gloss on FOIA's reference to "agency records," however, has not always been a model of clarity.

i. The Supreme Court Weighs In: General Touchstones

The seminal Supreme Court case expounding on the question of what agency materials constitute "agency records" within the meaning of FOIA is Department of Justice v. Tax Analysts, 35 which delineated a two-pronged test for determining whether agency information and materials are "agency records" that are subject to FOIA: "First, an agency must 'either create or obtain' the requested materials 'as a prerequisite to its becoming an "agency record" within the meaning of the FOIA.' . . . Second, the agency must be in control of the requested materials at the time the FOIA request is made."36 The Tax Analysts Court explained that "[b]y control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties," reconciling that requirement with "Kissinger[] [v. Reporters Comm. for Freedom of Press's] teaching that the term 'agency records' is not so broad as to include personal materials in an employee's possession, even though the materials may be physically located at the agency."37 In Tax Analysts, the Court applied the foregoing conjunctive two-part test in the course of holding that FOIA "requires the United States Department of Justice (Department) to make available copies of district court decisions that it receives in the course of litigating tax cases on behalf of the Federal Government."38 Lower federal courts have subsequently refined the analysis for the "control" prong of the Tax Analysts test, frequently adopting a four-factor rubric for determining whether an agency has sufficient control over requested documents to render them "agency records" subject to FOIA;39 and lower courts have consistently concluded that, under some circumstances, an agency can constructively control records that it does not have in its physical custody or possession.⁴⁰ Concordantly, Congress has since extended the scope of FOIA's disclosure provisions to include federally funded research data and agency information maintained by government contractors.41

ii. The Blurred Boundaries Between "Personal" and "Public"

Dovetailing with the uncertainty concerning the distinction between agency information and materials that are outside the scope of FOIA's disclosure provisions and "agency records" within that scope, a related question arises: how do courts demarcate the boundary between "agency records" and personal materials of executive branch agency personnel? Today, with the advent of technological developments, such as e-mail and text messaging, and the practical reality that federal employees frequently telecommute or even "webcommute" and use their personal communications devices (e.g., Blackberrys,

laptop computers, tablets) and personal e-mail accounts for work-related purposes, this distinction is now a more salient one. 42

As Bureau of National Affairs v. Department of Justice⁴³—an early attempt to elucidate a distinction between "agency records" subject to FOIA and personal material outside of the ambit of the statute—and its progeny make abundantly clear, courts have consistently eschewed bright-line tests in favor of more functional totality-of-the-circumstances-type analyses. 44 In Bureau of National Affairs, for example, involving the "novel question . . . whether appointment calendars, phone logs and daily agendas of government officials are 'agency records' subject to disclosure under FOIA,"45 the D.C. Circuit rejected a bright-line test and explained that the analysis "must . . . focus on the totality of the circumstances surrounding the creation, maintenance, and use of the document to determine whether the document is in fact an 'agency record' and not an employee's record that happens to be located physically within an agency."46 The Bureau of National Affairs court noted in dictum that "[t]he term 'agency records' should not be manipulated to avoid the basic structure of the FOIA "47

The Bureau of National Affairs court elucidated that, with respect to documents and communications authored by agency employees, notwithstanding that "use [of that document or communication] ... is not dispositive" of the question whether that document or communication is an "agency record" subject to FOIA,48 "consideration of whether and to what extent that employee used the document to conduct agency business is highly relevant for determining whether that document is an 'agency record' within the meaning of FOIA."49 The Bureau of National Affairs court indicated that "the purpose for which the document was created, the actual use of the document, and the extent to which the creator of the document and other employees acting within the scope of their employment relied upon the document to carry out the business of the agency" are "important considerations" for distinguishing between "agency records" and personal materials. 50 Although the Bureau of National Affairs court opined "that appointment materials that are created solely for an individual's convenience, that contain a mix of personal and business entries, and that may be disposed of at the individual's discretion are not 'agency records' under FOIA,"51 it specifically concluded that daily agendas created "for the convenience of" and distributed to agency personnel "for the express purpose of facilitating [agency] activities" were "agency records."52

More recently, in *Consumer Federation of America v. Department of Agriculture*,⁵³ addressing the question "whether . . . electronic appointment calendars" of agency personnel qualified as "agency records" within the meaning of FOIA,⁵⁴ the D.C. Circuit intimated that a virtue of a totality-of-the-circumstances test is that it is capable of adapting to changed circumstances: unlike a rigid, bright-line test, a flexible, functional analysis has sufficient play in the proverbial joints to accommodate "technological advances." Applying a functional, totality-of-the-circumstances analysis in the course of concluding that electronic appointment "calendars of . . . five senior USDA officials . . . [qualified as] 'agency records,'" the *Consumer Federation of America* court reasoned that the way in

which the electronic calendars were used was dispositive under the facts of the case.⁵⁷

Common sense, case law, and FOIA's plain language compel the conclusion that, irrespective of federal executive branch agencies' employees' reasons for using personal e-mail accounts or personal communications devices to conduct agency-related business within the scope of their employment, their work-related communications must be subject to FOIA's disclosure provisions.⁵⁸ Courts have consistently concluded that FOIA creates a presumption of disclosure,⁵⁹ placing the burden on the agency to justify withholding requested agency materials.⁶⁰ And at least one court has invalidated an agency regulation that was specifically designed to evade FOIA's disclosure requirements. 61 FOIA's structure and purpose, coupled with a logical extension of existing precedent, provides a sound basis for concluding that courts will not allow unscrupulous federal employees to shield their work-related communications from FOIA's disclosure requirements—and thereby avoid public scrutiny of their professional activities—through the simple expedient of using their personal e-mail accounts and personal communications devices to conduct agency business within the scope of their employment.

The precise question whether these categories of communications are subject to FOIA's disclosure requirements is nonetheless an issue of first impression. 62 And without any firm guidance from Congress or the courts making clear that workrelated communications sent from personal e-mail addresses and communications devices are not categorically exempt from FOIA, federal agencies and their employees may be able to effectively evade public scrutiny of their actions, implicating the very concerns that gave impetus to promulgation of the FOIA statute in the first place.⁶³ But notwithstanding that the issue has yet to be litigated in federal court, application of existing precedent requires the conclusion that the foregoing communications are, in fact, "agency records" that are subject to FOIA's disclosure provisions. If it were otherwise, FOIA's transparency mandate could be frustrated at the caprice of executive branch agency employees.

C. Lessons from Existing Federal Regulations

Existing federal regulations buttress this conclusion. As a June 2007 GAO report explains, existing National Archives and Records Administration ("NARA") regulations implementing the Federal Records Act ("FRA") expressly contemplate the possibility that federal employees' work-related e-mails via private e-mail accounts can be "records" within the meaning of the FRA:

According to the regulations, . . . [a]gencies are . . . required to address the use of external e-mail systems that are not controlled by the agency (such as private e-mail accounts on commercial systems such as Gmail, Hotmail, .Mac, etc.). Where agency staff have access to external systems, agencies must ensure that federal records sent or received on such systems are preserved in the appropriate recordkeeping system and that reasonable steps are taken to capture available transmission and receipt data needed by the agency for recordkeeping purposes.⁶⁴

If federal employees' work-related communications via "external e-mail systems" can be "records" for purposes of the FRA under existing NARA regulations, then it follows that those communications can be agency records subject to FOIA. Indeed, the U.S. Supreme Court has found the way in which the term "record" has been defined in other federal statutes, such as the Records Disposal Act and Presidential Records Act of 1978, to be highly persuasive in FOIA litigation addressing whether requested materials constitute "agency records." 65

Moreover, several agencies have prescribed regulations implementing FOIA that provide that employees' private email addresses are exempt from disclosure under 5 U.S.C. § 552(b)(6),66 indicating that the drafters of those regulations believed that those e-mail addresses would otherwise be subject to disclosure under FOIA, as explained in greater detail below. And indeed, the DOJ has taken the position in litigation that federal employees' work-related communications via private e-mail addresses are subject to FOIA's exemptions, tacitly conceding that such communications are "agency records" otherwise subject to disclosure under FOIA: "There is simply no basis for the Court to conclude as a matter of law that federal employees communicating through 'GWB43.com' email accounts were necessarily acting as political advisors . . . [and] that any documents reflecting those communications fail to satisfy the intra-agency requirement."67

III. Lessons from the States

Analysis of recent state court cases construing analogous state statutes also supports the conclusion that agency employees' work-related communications sent or received via personal e-mail accounts and communications devices are subject to FOIA's disclosure provisions to the same extent as those sent or received via government-issued e-mail addresses and communications devices. ⁶⁸ All fifty states have enacted FOIA-like records-disclosure statutes that allow the public to access state government records. ⁶⁹ It is clear that state courts often use a content-based, functional analysis to determine whether government employees' e-mails are subject to disclosure under state records-disclosure statutes, ⁷⁰ rather than categorically excluding government employees' work-related communications sent from personal e-mail addresses from disclosure under those statutes.

Indeed, at least two state courts have, in fact, addressed the question whether government employees' work-related communications using personal e-mail addresses are subject to public disclosure. *Mechling v. City of Monroe*,⁷¹ for example, involved a request under the state of Washington's Public Disclosure Act for "all emails sent by, or received by Monroe City Council members, including those emails contained on their home or business computers, in which city business is discussed . . . not limiting the emails to those contained on the City's computer system."72 In Mechling, the Court of Appeals of Washington reversed "the trial court's decision that personal e-mail addresses of the council members in e-mails discussing city business are exempt from disclosure under the personal information exemption of the public disclosure act (PDA)" and squarely "h[e]ld that the personal e-mail addresses used by city council members to discuss city business are not exempt from

disclosure "73 Concordantly, in 2003, the Court of Appeals of Arkansas expressly declined to limit the scope of the Arkansas Freedom of Information Act's disclosure provisions to e-mails sent or received government e-mail addresses:

We find nothing in the [state] Freedom of Information Act that specifies that the communications media by which the public's business is conducted are limited to publicly owned communications. The creation of a record of communications about the public's business is no less subject to the public's access because it was transmitted over a private communications medium than it is when generated as a result of having been transmitted over a publicly controlled medium. Emails transmitted between . . . [a state employee] and the governor that involved the public's business are subject to public access under the Freedom of Information Act, whether transmitted to private email addresses through private internet providers or whether sent to official government email addresses over means under the control of the State's Division of Information Services.74

And in 2010, in Howell Education Association MEA/NEA v. Howell Board of Education, 75 although the Court of Appeals of Michigan "conclude[d] that under the [state] FOIA statute the individual plaintiffs' personal e-mails were not rendered public records solely because they were captured in a public body's email system's digital memory,"76 the court pointedly noted that "[t]his is not to say that personal e-mails cannot become public records."77 (The Howell Education Association court explicitly invited the state legislature to provide guidance on this issue: "[W]e believe the issue in this case is one that must be resolved by the Legislature, and we call upon the Legislature to address it "78 Federal policymakers have the authority to amend FOIA to make clear to courts, agencies, and executive branch employees alike that work-related communications by federal executive branch agency employees cannot be insulated from disclosure under FOIA merely by virtue of the e-mail address from which they are sent or received or the fact that those communications were authored from or are stored on federal employees' personal communication devices.)

IV. Do Courts and Agencies Already Treat Federal Employees' Work-Related Communications from Private E-Mail Accounts as a Kind of "Agency Record" by Analyzing Whether These Communications Must Be Disclosed Through the Rubric of Exemptions?

By implication, when courts and agencies claim that "personal e-mail addresses" are exempt from disclosure, they effectively concede that they are "agency records." Federal courts only have jurisdiction to grant relief under FOIA when an agency's refusal to provide a FOIA requester with "agency records" is at issue.⁷⁹ It is well-established, black-letter law that a federal court can *only* reach the merits of a plaintiff's claim after satisfying itself that it has subject-matter jurisdiction to adjudicate that claim.⁸⁰ Thus, in the context of FOIA litigation, if a court does not conclude, as a threshold matter, that the requested agency materials are "agency records" under FOIA, it cannot reach the merits of the requester-plaintiff's underlying

claims because it lacks subject-matter jurisdiction. ⁸¹ For example, a court cannot conclude that requested agency materials need not be disclosed because those materials are exempted from disclosure by the FOIA statute *unless* the court first concludes that the requested materials are "agency records." ⁸² In other words, a federal district court's determination that a statutory exemption to FOIA applies to bar disclosure of materials requested under FOIA is necessarily predicated on a finding that the requested materials are, in fact, "agency records."

A survey of recent FOIA case law reveals numerous instances where courts have analyzed whether personal e-mail addresses of various stripes are exempt from disclosure under FOIA without questioning their status as "agency records." In 2011, in Erika A. Kellerhals, P.C. v. IRS, the federal district court did not question the "agency record" status of a work-related e-mail sent from an IRS employee's personal e-mail account but rather indicated in passing that that e-mail may be exempt from disclosure. 83 In 2010, in Government Accountability Project v. U.S. Department of State,84 the U.S. District Court for the District of Columbia concluded that the State Department properly "withheld the personal email addresses of several [private] individuals" under Exemption 6 of the FOIA.85 In 2011, in Smith v. Department of Labor, 86 the D.C. District Court observed that "a personal e-mail address" may be exempt from disclosure under FOIA Exemption 6 when the public's interest in disclosure is outweighed by the individual's interest in keeping his or her personal e-mail address private.⁸⁷ Several other recent federal district court opinions suggest that both courts and agencies do not question the "agency records" status of personal e-mail addresses but rather question whether personal e-mail addresses are exempt from disclosure for privacybased reasons.88 And the Ninth Circuit recently opined that "[i]f ... a particular email address is the only way to identify... [an individual, in this case a lobbyist] from. . . disputed records, such information is not properly withheld under Exemption 6 because this minor privacy interest does not counterbalance the robust interest of citizens' right to know 'what their government is up to."89 There is no principled distinction between the personal e-mail addresses of private citizens and those of government employees; to the extent that the identity of the owner of a personal e-mail address alters the analysis for whether such an address is an "agency record," common sense dictates that an agency employees' personal e-mail address is more likely to constitute an "agency record" than that of a private citizen. If the content of e-mail communications sent by private citizens via their personal e-mail accounts to federal employees is not categorically exempt from FOIA, the same should hold true a fortiori with respect to communications sent or received by government employees via their personal e-mail accounts.

More germane to this article, in 2008, in *Democratic National Committee v. United States DOJ*,⁹⁰ in the course of upholding DOJ's decision to withhold federal employees' emails sent from RNC e-mail accounts (using the domain name GWB43.com) that were the subject of a FOIA request by the DNC and granting the government's motion for summary judgment,⁹¹ the D.C. District Court explicitly rejected the DNC's invitation "to adopt a per se rule that any e-mails sent on the RNC servers are not covered by FOIA." Many of the

e-mails in question "were sent between officials in the White House and the Department of Justice and were sent to or from an e-mail address with the domain name 'GWB43.com.'"93 The DOJ invoked FOIA Exemption 5 to withhold the content of those e-mails on the ground that those communications were deliberative, predecisional interagency communications that would be privileged in discovery.94 U.S. District Judge Ellen Huvelle noted that the DNC "fail[ed] to point to any case law that would indicate that the server where an e-mail is housed is relevant to its treatment under FOIA" and—correctly reasoned that "because the form of the document does not factor into the analysis under FOIA, the Court cannot adopt a per se rule that any e-mails sent on . . . [nongovernmental] servers are not covered by FOIA."95 As Judge Huvelle explained, to adopt the categorical, per se rule proposed by the DNC "would presumably mean that any e-mail sent or received from a personal account would no longer be 'official' or 'inter-agency' and therefore would not be covered by FOIA."96

Judge Huvelle's analysis is entirely consistent with the purpose, text, history, and structure of FOIA—a statute that is simply not amenable to bright-line rules. The logical corollary to the proposition that e-mails sent to or from personal e-mail accounts (even via nongovernmental servers and computers) can be properly withheld pursuant to a FOIA exemption is that those e-mails can also constitute "agency records," under certain circumstances, which must be disclosed in response to a FOIA request unless otherwise exempt. And logical extension of Judge Huvell's analysis in *Democratic National Committee* requires the conclusion that agency employees' communications sent to or from personal e-mail addresses are not categorically exempt from FOIA's disclosure provisions but rather subject to those provisions to the same extent as communications sent to or from government e-mail addresses or via other communications mediums.

Implicit in courts' and agencies' apparent practice of analyzing the question whether agency personnel's work-related communications via private e-mail accounts must be disclosed in response to FOIA requests through the lens of Exemption 6 or other FOIA exemptions is a tacit recognition that these communications are not categorically exempt from FOIA's disclosure provisions but rather subject to Exemption 6's balancing test, unless properly analyzed under another FOIA exemption. Exemption 6, codified at 5 U.S.C. § 552(b)(6), provides that FOIA does not require disclosure of "personnel and medical files and similar files the disclosure of which would constitute a *clearly unwarranted* invasion of personal privacy "97 (Exemption 6 may properly be invoked under some circumstances to justify withholding agency personnel's personal e-mail addresses and communications sent from those addresses, in whole or in part, as such information almost certainly qualifies as a species of "similar file" that is subject to this exemption.)98 Exemption 6, by its terms, invites courts and agencies to weigh countervailing interests, and it has been interpreted by the Supreme Court to require "a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.""99 And indeed, the plain language of Exemption 6 creates a statutory presumption of disclosure and instructs both courts and agencies to "tilt the balance in favor of disclosure." 100

To be sure, federal executive branch agency personnel do have a reasonable expectation of privacy with respect to purely personal records, and their cognizable privacy interest in such information is frequently invoked to justify withholding of agency records pursuant to Exemption 6.¹⁰¹ But as the D.C. Circuit suggested in the course of rejecting the claim that names of agency personnel below a certain grade were categorically exempt from disclosure, "[t]he scope of a privacy interest under Exemption 6 will always be dependent on the context in which it has been asserted."¹⁰² And notwithstanding that the precise boundary between professional and personal information is far from clear, ¹⁰³ "[c]ourts have frequently held that disclosure of information about an individual's business or professional activities does not impinge significantly on cognizable interests in personal privacy."¹⁰⁴

To the extent that federal executive branch agency employees have a cognizable privacy interest in their workrelated communications sent from personal e-mail addresses, that interest must be balanced against the underlying purpose of FOIA: "[T]o permit the public to decide for itself whether government action is proper "105 The public interest in disclosure is at its acme, of course, when requested communications are sent or received by agency personnel via personal e-mail addresses and personal communications devices in connection with the agency's performance of its statutory duties and contain information that will enable the public to better understand the workings of government and shed light on agency behavior (or misbehavior)—i.e., where the requested information is within the heartland of FOIA's disclosure mandate and implicates "citizens' right to be informed about 'what their government is up to.'"106 Because Exemption 6 analysis is fact-specific and on a case-by-case basis, application of the foregoing balancing test to communications sent or received by agency personnel via personal e-mail addresses concerning agency business may very well militate toward the conclusion that those communications must be disclosed. This proposition holds true a fortiori when such communications are authored or received by agency personnel during working hours, discuss matters that are within the scope of their employment, and are sent or received on government-owned communications devices.

The Ninth Circuit's recent discussion of e-mail communications in *Yonemoto v. Department of Veterans Affairs* is instructive insofar as it illustrates that FOIA's basic structure is generally not amenable to bright-line, categorical rules, instead requiring functional, content-and-use-driven, case-by-case analysis:

Insofar as the district court made a categorical privacy judgment, it erred. Such categorical determinations are rarely proper under the FOIA; they are appropriate only in those circumstances in which disclosing a type of record defined by its content, such as an identifiable individual's rap sheet, will invariably result in an invasion of personal privacy.

An email, however, is defined not by its content but by its mode of transmission. We could no more conclude that

releasing emails would inevitably invade someone's privacy in the FOIA sense than we could conclude that disclosing all letters, faxes, telegrams, or text messages would do so. With regard to all these modes of communication, the privacy interests at stake, "the public interest in disclosure, and a proper balancing of the two, will vary depending upon the content of the information and the nature of the attending circumstances." 107

The Yonemoto court's reasoning holds true with respect to work-related communications sent from private e-mail addresses: the content, use, and function of the communication is more important than the mode of communication. If it were otherwise, reductio ad absurdum, agency employees could effectively insulate the vast majority of their work-related communications from disclosure through the simple expedient of exclusively conducting agency business via Gmail and Gchat.

V. A Word About Segregability Analysis

Another feature of the FOIA that buttresses the conclusion that work-related communications sent or received via agency personnel's personal e-mail addresses are subject to the statute's disclosure provisions bears brief mention: pursuant to 5 U.S.C. § 552(b), even where portions of a requested agency record are properly exempt from disclosure, nonexempt portions that are "reasonably segregable" must be disclosed.¹⁰⁸ As a general proposition, then, agency records that are partially exempt from disclosure under Exemption 6 or another statutory exemption must nonetheless be provided to requesters, albeit in a redacted form 109—the mere fact that a portion of a requested agency record is exempt from disclosure generally does not allow an agency to withhold the entire agency record. In practice, requesters are frequently, though not invariably, more interested in the content of work-related communications sent or received by agency personnel via personal e-mail addresses than the personal e-mail addresses from which those communications were sent or received or portions of such e-mails in which purely personal matters are discussed. In those situations, requesters can simply stipulate in their FOIA request that the personal e-mail addresses and any discussion of purely personal matters may be withheld, thereby effectively preempting any Exemption 6 claim. 110

VI. Conclusion

In theory, the FOIA's disclosure provisions should apply to work-related communications sent and received by executive branch agency personnel exclusively via private email accounts and personal communications devices, such as text messages sent on personal cell phones and e-mails that are only accessed and sent from personal computers using personal e-mail addresses. But it would be practically impossible for even the most well-intentioned, experienced FOIA officer to gain access to these communications on behalf of a requester without resort to extraordinary means, e.g., subpoenaing government employees' e-mail records from Google. As a practical matter, at this time it is only feasible for requesters to gain access to work-related communications sent via personal communications devices and/or using

personal e-mail addresses that are sent from or accessed on a government-issued computer or communication device, such as a Blackberry; forwarded or sent to at least one government e-mail address; or otherwise captured on government servers. Moreover, practical considerations aside, FOIA's transparency mandate must be balanced against competing normative values.

The tension between the compelling need for transparency in government and federal employees' reasonable expectations of privacy with respect to their purely personal electronic communications is not limited to the subject of this article.¹¹¹ On March 5, 2012, Congressman Darrell Issa, Chairman of the U.S. House of Representatives' Committee on Oversight and Government Reform, and Senator Charles E. Grassley, Ranking Member on the U.S. Senate's Committee on the Judiciary, sent a letter to Jeffrey D. Zients, Acting Director of the Office of Management and Budget ("OMB"), "request[ing] that OMB conduct a comprehensive survey . . . to determine agencies' policies with respect to monitoring federal employees' personal e-mail accounts."112 Among other things, the proposed survey would address questions such as "[w]hether . . . [an] agency has an official policy for monitoring e-mail" and would request "description[s] of any such policy, including whether and to what extend the agency distinguishes between personal e-mails and official e-mails."113

The concerns giving rise to Congressman Issa and Senator Grassley's letter—the FDA's alleged unlawful selective monitoring of personal e-mail accounts of FDA employees "who raised concerns . . . about the effectiveness of the FDA's process for approving medical devices,"114 which may have entailed the FDA gaining "access to personal e-mails that may have been transmitted from home computers or cell phones," as well as "intercept[ing] passwords to the personal e-mail accounts of . . . [those] employees"115—are distinguishable from those addressed in this article but illustrate a salient point: technological developments, such as e-mail and text messaging, have changed the way in which federal employees conduct agency-related business. As is often the case, the law has yet to catch up with the advent of technological advances and the practical reality that, for better or worse, federal employees have used and will continue to use personal e-mail addresses and personal communications devices to send and receive work-related communications. And it is difficult to articulate with clarity and specificity the appropriate balance between transparency and privacy—two legitimate competing values. If the OMB conducts the "comprehensive survey" of agencies' policies of monitoring federal employees' personal e-mail accounts that Congressman Issa and Senator Grassley advocate, it is likely that much-needed light will be shed on the extent to which federal employees' personal e-mail accounts are used to conduct agency business.

As Congressman Issa and Senator Grassley noted in their letter, "[i]n 2009, the Office of Legal Counsel (OLC) in the Department of Justice issued an opinion concluding that a government agency may monitor employees' computers in pursuit of a lawful purpose." Moreover, as Congressman Issa and Senator Grassley point out, "[t]he current policy of the U.S. Office of Personnel Management (OPM) makes clear

that employees do not have the right to privacy when using government equipment and that such use may be monitored or recorded."¹¹⁷ The 2009 OLC opinion and current OPM policy coupled with not only FOIA's public-policy goals and statutory language but the judicial gloss that has been placed on FOIA's disclosure provisions seem to require the conclusion that work-related e-mails sent from personal e-mail accounts that are sent or received via government computers are indeed subject to disclosure under FOIA.

The more difficult question is whether federal executive branch agency employees' work-related communications sent from and received on personal e-mail accounts and personal communications devices—i.e., agency-business-related communications that are never captured on government computers or servers—are (or should be) subject to FOIA's disclosure provisions. Although federal agencies do not—and, as a normative matter, should not—have untrammeled carte blanche authority to monitor federal employees' purely personal communications sent from personal communications devices, federal executive branch agency personnel should not be able to use personal communications devices, such as home computers, and personal e-mail accounts to intentionally circumvent the FOIA's disclosure provisions and evade public scrutiny of their professional conduct. Theoretically, such communications fall within the ambit of FOIA's disclosure provisions. In practice, however, it would not be technically feasible or reasonable to require FOIA officers to obtain such communications.

To illustrate why e-mail and other communications from nongovernmental addresses dealing with official agency business ought to be subject to disclosure under FOIA, consider an e-mail obtained by Cause of Action during its investigation into ex parte communications at the National Labor Relations Board (NLRB) (reproduced below).

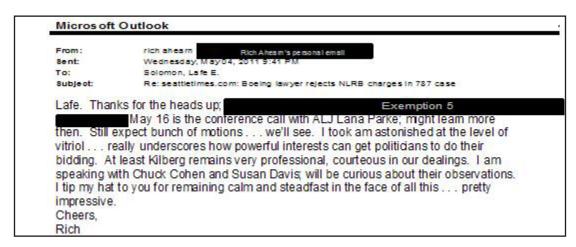
This e-mail, sent from NLRB Region 19 Director Richard Ahearn to Acting NLRB General Counsel Lafe Solomon on Ahearn's personal e-mail account, was produced by the NLRB to Cause of Action in compliance with FOIA while redacting personal information or any information that is allegedly deliberative and thus exempt from disclosure pursuant to Exemption 5. This example highlights the standard that all federal agencies must meet, in our view, when determining whether personal e-mails or Blackberry messages dealing with official agency business are FOIAble agency records. Otherwise,

use of private e-mail accounts and communications devices will become a mechanism for agencies and agency employees to engage in official business beyond the scope of public oversight. And that is the precise sort of behavior FOIA was established to protect against.

Ultimately, unless Congress legislatively clarifies whether the FOIA's disclosure provisions apply to communications sent or received via private e-mail accounts and personal communications devices, a federal district court will be compelled to squarely and comprehensively opine on the application of FOIA's disclosure provisions to federal employees' work-related communications sent through personal channels in the course of adjudicating whether a particular agency has improperly withheld agency records. The test case will, of course, begin with a FOIA request.

Endnotes

- 1 Sheryl Gay Stolberg, Missing E-mail May Be Related to Prosecutors, N.Y. Times, Apr. 13, 2007, at A1.
- 2 Democratic Nat'l Comm. v. U.S. DOJ, 539 F. Supp. 2d 363, 364 (D.D.C. 2008) (citations omitted and alterations in original).
- 3 See U.S. House, Committee on Oversight and Government Reform, Interim Report: Investigation of Possible Presidential Records Act Violations, Exec. Summary (June 2007).
- 4 Democratic Nat'l Comm., 539 F. Supp. 2d at 364.
- 5 See id. at 365-66 & n.4.
- 6 See id.
- 7 See id. at 367-68.
- 8 See id. at 368.
- 9 Chrysler Corp. v. Brown, 441 U.S. 281, 292 (1979) (citation omitted); see 5 U.S.C. § 552(a).
- 10 Robert M. Gellman, Twin Evils: Government Copyright and Copyright-Like Controls over Government Information, 45 Syracuse L. Rev. 999, 1004 (1995).
- 11 Compare 5 U.S.C. § 552(a) (imposing general obligation on federal executive branch agencies to upon request from "any person" provide access to "agency records"), and Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983) (discussing agencies obligation to "conduct[] a search reasonably calculated to uncover all relevant documents" in response to FOIA request), with 5 U.S.C. § 552(b) (listing nine categories of agency records that are statutorily exempt from disclosure, prescribing limits on public right of access to agency records).



12 U.S. Dep't of Defense v. Fed. Labor Relations Auth., 510 U.S. 487, 496 (1994) (citation and internal quotation marks omitted); see Clarifying and Protecting the Right of the Public to Information and for Other Purposes, S. Rep. No. 89-813, 89th Cong. 1st Sess., at 10 (1965) ("[G] overnment by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.").

13 See 5 U.S.C. § 552(a)(1)-(2). Such materials would include final opinions, orders, and statements of policy.

14 See 5 U.S.C. § 552(a)(3)(A) ("Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.").

15 Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976).

16 Id. (citation and internal quotation marks omitted).

17 437 U.S. 214 (1978).

18 Id. at 242.

19 See infra notes 105 & 109 and accompanying text.

20 See 5 U.S.C. § 552(b); see also U.S. DOJ v. Julian, 486 U.S. 1, 8 (1988) ("A federal agency must disclose agency records unless they may be withheld pursuant to one of the nine enumerated exemptions listed in § 552(b)."). See generally Rose, 425 U.S. at 361 (1976) ("[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.").

21 See 5 U.S.C. § 552(f) (defining "agency" for purposes of the FOIA); 5 U.S.C. § 551(1)(A)-(B) (excluding Congress and the courts from the definition of "agency").

22 A federal executive branch agency is only obligated to provide nonexempt "agency records" on request. See 5 U.S.C. § 552(a)(4)(B) ("On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." (emphasis added)).

23 See infra notes 24-25; see also Alexander J. Yoakum, Technical Problem: How City of Dallas v. Dallas Morning News, LP Exposed a Major Loophole in the Texas Public Information Act, 42 St. Mary's L. J. 297, 300 (2010) (arguing that the Texas Public Information Act creates problems when a person conducts official business through a private e-mail account or personal cell phone). Yoakum contends that the burden of establishing the right to withhold information within personal e-mails discussing public business should be on the government, as opposed to placing the burden of establishing that the content of the communication is subject to disclosure on the requesting party. Yoakum outlines a bright-line rule that Freedom of Information laws should ensure disclosure of all electronic records that relate to government business, regardless of the source. Id. at 300; cf. Peter S. Kozinets, Access to the E-mail Records of Public Officials Safeguarding the Public's Right to Know, 25 A.B.A. COMM. Law. 17, 18 (2007) (e-mail has become the regular forum for public employees to communicate within their respective agencies). See generally Richard J. Peltz, Arkansas's Public Records Retention Program: Finding the FOIA's Absent Partner, 28 U. ARK. LITTLE ROCK L. REV. 175, 175 (2006) (indicating that if agencies maintain poor records-retention programs, threshold questions concerning public records requests will be rendered moot).

24 Although no federal court has directly opined on the issue addressed in this article, careful parsing of several recent cases indicates that this issue arises with some frequency. In a September 30, 2011 memorandum opinion issued by the U.S. District Court for the District of the Virgin Islands, for example, the court described a one-page document that the "IRS [had] withheld . . . in full" from a FOIA requester as "an email from a personal email account of an IRS employee containing his thoughts about then-proposed Notice 2007-19." Erika A. Kellerhals, P.C. v. IRS, 2011 U.S. Dist. LEXIS 113156, *5 (D.V.I. 2011). A September 29, 2011 Federal Communications Commission ("FCC") memorandum opinion and order noted that a document withheld

from a FOIA request under Exemption 5 (which applies to certain intraagency communications) had been "sent by an agency employee to his FCC email account from the personal email account of his spouse to which he has access on a home computer. . . ." In re Elec. Frontier Found. on Request for Inspection of Records, 26 FCC Rcd 13812, 13815 (F.C.C. 2011). In 2004, in a footnote, the U.S. District Court for the District of Columbia alluded to a "search of personal email accounts of employees" in the Department of Interior's Office of the Solicitor in response to a FOIA request. See Wilderness Soc'y v. United States DOI, 344 F. Supp. 2d 1, 21 (D.D.C. 2004) ("The plaintiff initially alleged that the defendants also improperly failed to search personal email accounts of DOI employees. Since this search has now been completed, the plaintiff appears to have abandoned this argument, except to the extent that the defendants have not searched the email accounts of employees in the SOL. Since DO search of the SOL has [sic] been completed yet, this Court assumes that a search of personal email accounts will occur as was done in other departments. Thus, the Court need not address this issue at this time. If the defendants fail to undertake a search of the personal email accounts of the SOL employees, the plaintiff is welcome to again challenge the sufficiency of the search."). In 2008, the D.C. District Court dismissed, without reaching the merits, a Federal Records Act claim based on an alleged Department of Education policy permitting employees to "use private e-mail accounts to conduct official business" on the ground that the plaintiff lacked standing to bring that claim. See Citizens for Responsibility & Ethics v. Dep't of Educ., 538 F. Supp. 2d 24, 25-29 (D.D.C. 2008), summary judgment granted in part and denied in part, 2009 U.S. Dist. LEXIS 4629 (D.D.C. 2009). A 2009 report and recommendation issued by a U.S. magistrate judge in the Northern District of California repeatedly referred to e-mails disclosed in response to a FOIA request with the "personal email addresses" of government employees redacted, without making clear whether the withheld e-mail addresses were government-issued or private e-mail accounts. See, e.g., Ctr. for Biological Diversity v. OMB, 2009 U.S. Dist. LEXIS 82769, at *51-52 (N.D. Cal. 2009) ("Document 518: This email, dated 08/22/05, was sent by Wood[, then-Chief Counsel for the NHTSA,] to Toy, Theroux, Glassman, Rosen, and Runge. In the email, Wood sends copies of a draft of the CAFE regulations and of the EA (the attachments were not provided for review). With the exception of the personal email address of Wood, which the agency has withheld on privacy grounds, the email has been released." (emphasis added)).

25 The June 2007 Interim Report issued by the Committee on Oversight and Government Reform of the U.S. House of Representatives addressed whether alleged use of nongovernmental e-mail accounts for work-related communications violated the Presidential Records Act. See Interim Report: Investigation of Possible Presidential Records Act Violations, U.S. House Committee on Oversight and Government Reform (June 2007). The June 2008 GAO Report, entitled "Federal Records: National Archives and Selected Agencies Need to Strengthen E-Mail Management," noted that EPA officials "discovered an e-mail message from a former Acting Administrator instructing a private consultant not to use the Administrator's EPA e-mail account to discuss a sensitive government issue (World Trade Center issues) but to use a personal e-mail account." U.S. Govt. Accountability Office, Federal Records: National Archives and Selected Agencies Need to Strengthen E-Mail Management, GAO-08-742, at 38-39 (June 2008) (hereinafter "GAO Report").

26 U.S. DOJ v. Julian, 486 U.S. 1, 8 (1988).

27 See 5 U.S.C. § 552(a)(4)(B). See generally U.S. DOJ v. Tax Analysts, 492 U.S. 136, 142-46 (1989) (noting that FOIA's disclosure provisions only apply to "agency records"). The Supreme Court has made abundantly clear, however, that FOIA creates a presumption of disclosure and requires agencies seeking to withhold requested materials to rebut that presumption. See id. at 142 ("The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought . . . have not been 'improperly' withheld.'" (citations omitted)).

28 See 5 U.S.C. § 552(a)(4)(B) (federal courts have jurisdiction "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld"); see also Kissinger v. Reporters Comm. for Freedom of Press, 445 U.S. 136, 150 (1980) ("[F]ederal jurisdiction is dependent upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records.'").

29 Janice Toran, Secrecy Orders and Government Litigants: "A Northwest Passage Around the Freedom of Information Act"?, 27 Ga. L. Rev. 121, 133 n.26 (1992).

- 30 See 5 U.S.C. § 552(f)(1) ("'[A]gency' as defined in section 551(1) of this title [5 U.S.C. § 551(1)] includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency").
- 31 See Forsham v. Harris, 445 U.S. 169, 183 (1980) (noting that "Congress . . . supplied no definition of agency records in the FOIA").
- 32 See McGehee v. CIA, 697 F.2d 1095, 1106 (D.D.C. 1983) ("As has often been remarked, the Freedom of Information Act, for all its attention to the treatment of 'agency records,' never defines that crucial phrase. A reading of the legislative history yields insignificant insight into Congress' conception of the sorts of materials the Act covers."), vacated in part and aff'd in part, 711 F.2d 1076 (D.C. Cir. 1983). The Forsham Court noted the dearth of legislative history on this point:

The only direct reference to a definition of records in the legislative history, of which we are aware, occurred during the Senate hearings leading to the enactment of FOIA. A representative of the Interstate Commerce Commission commented that "[since] the word 'records' . . . is not defined, we assume that it includes all papers which an agency preserves in the performance of its functions."

Forsham, 445 U.S. at 184 (quoting Administrative Procedure Act: Hearings on S. 1160 et al. Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 244 (1965)).

- 33 See 5 U.S.C. § 552(f)(2) ("'[R]ecord' and any other term used in this section in reference to information includes—(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and (B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.").
- 34 See id. The final House Report is probative of the policy justification for this amendment:
 - [A] "record" under the FOIA includes electronically stored information. This articulates the existing general policy under the FOIA that all Government records are subject to the Act, regardless of the form in which they are stored by the agency. . . . The format in which data is maintained is not relevant under the FOIA. Computer tapes, computer disks, CD-ROMs, and all other digital or electronic media are records. Microfiche and microforms are records. When other, yet-to-be invented technologies are developed to store, maintain, produce, or otherwise record information, these will be records as well. When determining whether information is subject to the FOIA, the form or format in which it is maintained is not relevant to the decision.

The primary focus should always be on whether information is subject to disclosure or is exempt, rather than the form or format it is stored in

H.R. Rep. No. 104-795, at 6 (1996), reprinted in 1996 U.S.C.C.A.N. 3449. 35 492 U.S. 136 (1989).

36 Id. at 144-45 (citation omitted).

37 *Id.* at 145 (quoting Kissinger v. Reporters Comm. for Freedom of Press, 445 U.S. 136, 157 (1980)). Courts have subsequently refined the analysis for the "control" prong of the *Tax Analysts* test, prescribing a general four-factor rubric for determining whether an agency has sufficient control over requested documents to render them "agency records" subject to FOIA. *See infra* note 39.

38 Id. at 138

39 Given the comparative frequency of FOIA litigation in the District of Columbia, this article focuses primarily on D.C. case law. See Harry A. Hammitt et al., Litigation Under the Federal Open Government Laws 2010, at 382 (2010) ("Because the vast majority of FOIA lawsuits are filed in the District of Columbia, the district court and court of appeals there have developed a substantial body of expertise in FOIA matters that may

be lacking in other jurisdictions."). The D.C. Circuit has described the four factors that are relevant to the *Tax Analysts* control inquiry this way:

- (1) the intent of the document's creator to retain or relinquish control over the records;
- (2) the ability of the agency to use and dispose of the record as it sees fir:
- (3) the extent to which agency personnel have read or relied upon the document; and
- (4) the degree to which the document was integrated into the agency's record system or files.

United We Stand Am., Inc. v. IRS, 359 F.3d 595, 599 (D.C. Cir. 2004). This four-factor analysis traces its genesis to Burka v. United States Department of Health & Human Services., 318 U.S. App. D.C. 274 (D.C. Cir. 1996); as a result, these four factors are often referred to as "Burka factors." See, e.g., Judicial Watch, Inc. v. Fed. Hous. Fin. Agency, 744 F. Supp. 2d 228, 234-236 (D.D.C. 2010), aff'd, 2011 U.S. App. LEXIS 16140 (D.C. Cir. 2011). This framework requires courts to balance the four factors. See, e.g., Citizens for Responsibility & Ethics in Washington v. United States Dep't of Homeland Sec., 527 F. Supp. 2d 76, 97 (D.D.C. 2007), appeal dismissed, 2008 U.S. App. LEXIS 14714 (D.C. Cir. 2008). However, recent precedent suggests that the third and fourth factors may be the most significant. See, e.g., Judicial Watch, Inc. v. Fed. Hous. Fin. Agency, 744 F. Supp. 2d at 235 ("Based on the four factor Burka test, two factors favor the plaintiff, but the two most important factors favor the defendant. The strength of the third and fourth factors tips the scales in favor of the defendant."). But cf. Bureau of Nat'l Affairs v. U.S. Dep't of Justice, 742 F.2d 1484, 1492 (D.C. Cir. 1984) ("Use alone, however, is not dispositive; the other factors mentioned in Kissinger must also be considered: whether the document is in the agency's control, was generated within the agency, and has been placed into the agency's files.").

- 40 See, e.g., Burka v. Dep't of Health & Human Servs., 87 F.3d 508, 515 (D.C. Cir. 1996) (a data tape in the possession of a government contractor nonetheless constitutes an agency record); Los Alamos Study Group v. Dep't of Energy, No. 97-1412, 1998 U.S. Dist. LEXIS 23504 (D. N.M. 1998); In Def. of Animals v. NIH, 543 F. Supp. 2d 70 (D. D.C. 2008); Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys., 601 F.3d 158 (2d Cir. 2010).
- 41 See Shelby Amendment, Pub. L. 105-277, 112 Stat. 2681 (Oct. 21, 1998); 5 U.S.C. § 552(f)(2)(B).
- 42 See U.S. Office of Personnel Management, Status of Telework in the Federal Government: Report to Congress (Feb. 2011), available at http://www.telework.gov/Reports_and_Studies/Annual_Reports/2010teleworkreport.pdf (last visited April 9, 2012) (detailing frequency with which federal workers telecommute). See generally Corey A. Ciocchetti, iBRIEF: eCOMMERCE: Monitoring Employee E-Mail: Efficient Workplaces vs. Employee Privacy, 2001 Duke L. & Tech. Rev. 26 (2001) ("Employee use of electronic mail (e-mail) during business hours is a common characteristic of the 21st century American workplace. According to a recent study, over 130 million workers are currently flooding recipients with 2.8 billion e-mail messages each day.").
- 43 742 F.2d 1484 (D.C. Cir. 1984). Opinions of the U.S. Court of Appeals for the D.C. Circuit are often highly persuasive in and adopted by other federal jurisdictions. *See, e.g.*, Tybrin Corp. v. U.S. Dep't of the Air Force, 2009 U.S. Dist. LEXIS 12612, at *11-12 (S.D. Ohio 2009) ("Given the predominant role of the District of Columbia Circuit in applying the FOIA . . . [and] the absence of controlling authority in the Sixth Circuit, . . . this Court elects to follow the D.C. Circuit definition."); *see supra* note 39.
- 44 See infra notes 45-57 and accompanying text.
- 45 Bureau of Nat'l Affairs v. U.S. Dep't of Justice, 742 F.2d 1484, 1486 (D.C. Cir. 1984).
- 46 *Id.* at 1492-93. Indeed, the *Bureau of National Affairs* court expressly "reject[ed] the government's invitation to hold that the treatment of documents for disposal and retention purposes under the various federal records management statutes determines their status under FOIA." *Id.* at 1493.

47 Id. at 1494.

48 Id. at 1492.

49 Id.

50 *Id.* at 1493; *see* Consumer Fed'n of Am. v. Dep't of Agric., 455 F.3d 283, 288 (D.C. Cir. 2006) (describing the "principal factors identified in *Bureau of National Affairs* as 'creation, location/possession, control, and use'").

51 Bureau of Nat'l Affairs, Inc., 742 F.2d at 1486.

52 Id. at 1495.

53 455 F.3d 283 (D.C. Cir. 2006).

54 Id. at 285.

55 *Id.* at 287-88 ("We must nonetheless be careful to ensure that '[t]he term "agency records" . . . not be manipulated to avoid the basic structure of the FOIA: records are presumptively disclosable unless the government can show that one of the enumerated exemptions applies.' . . . Mindful of this caution, our circuit has adopted a totality of the circumstances test to distinguish 'agency records' from personal records There is no precedent in which we have applied that test to facts directly paralleling those before us. This is due, at least in part, to the technological advances of recent years." (citations omitted)). The normative debate concerning whether totality-of-the-circumstances tests are appropriate or desirable is beyond the scope of this article. The authors do not express a position concerning that issue herein.

56 Id. at 293.

57 See id. at 288, 290 ("[U]se is the decisive factor here. As in Bureau of National Affairs, with creation, possession, and control not dispositive in determining whether the calendars are 'agency records,' we must shift our attention to the manner in which the documents were used within the agency.").

58 *Cf.* Yeager v. Drug Enforcement Admin., 678 F.2d 315, 321 (D.C. Cir. 1982) ("Although accessing information from computers may involve a somewhat different process than locating and retrieving manually-stored records, these differences may not be used to circumvent the full disclosure policies of the FOIA. The type of storage system in which the agency has chosen to maintain its records cannot diminish the duties imposed by the FOIA.").

59 See, e.g., Wis. Project v. U.S. DOC, 317 F.3d 275, 279 (D.C. Cir. 2003) ("FOIA . . . mandates a 'strong presumption in favor of disclosure,' under which the statutory exemptions to disclosure are to be 'narrowly construed'" (quoting U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991)); accord id. at 164 (noting that the basic purpose of the Freedom of Information Act is "to open agency action to the light of public scrutiny"); see Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976); see also Yeager, 678 F.2d at 321 (FOIA "makes no distinction between records maintained in manual and computer storage system "); Long v. IRS, 596 F.2d 362, 365 (9th Cir. 1979) (Kennedy, J.), cert. denied, 446 U.S. 917 (1980) ("[C]omputer stored records, whether stored in the central processing unit, on magnetic tape or in some other form, are still 'records' for the purpose of the FOIA. . . . [T]he FOIA applies to computer tapes to the same extent it applies to any other documents"). Additionally, any application of Exemption 6 applies to personal, not business, privacy. See Wash. Post Co. v. Dep't of Agric., 943 F. Supp. 31, 37 n.6 (1996) ("[C]orporation, business and partnerships have no privacy interest whatsoever under Exemption 6 ").

60 See Ray, 502 U.S. at 173 ("Consistent[] with th[e FOIA's] purpose, as well as the plain language of the Act, the strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents.").

61 See, e.g., Teich v. FDA, 751 F. Supp. 243, 247 (1990) ("As counsel for the FDA conceded in oral argument, the presubmission review procedure was adopted specifically to avoid public disclosure of information as required by the FOIA. This is clearly an attempt by the agency to nullify a congressionally enacted law.").

62 Cf. infra Part IV.

63 See supra notes 15-18 and accompanying text.

64 GAO REPORT, supra note 25, at 37.

65 See Forsham v. Harris, 445 U.S. 169, 183-86 (1980) (using definitions of the term "record" in the Records Disposal Act, 44 U.S.C. § 3301 et seq., and the Presidential Records Act of 1978, 44 U.S.C. § 2201, to determine the meaning Congress intended the term to have in FOIA).

66 See, e.g., 32 C.F.R. § 518.13(f)(2) ("Home addresses, including private e-mail addresses, are normally not releasable without the consent of the individuals concerned." (emphasis added)).

67 Reply in Support of Defendant's Motion for Summary Judgment and Opposition to Plaintiff's Cross-Motion for Summary Judgment, Democratic Nat'l Comm. v. U.S. Dep't of Justice, Civil Action No. 07-712 (ESH), 2007 U.S. Dist. Ct. Motions 345068, at *6 (D.D.C. Mar. 6, 2008).

68 See infra notes 69-78 and accompanying text.

69 See Martin E. Halstuk, Shielding Private Lives from Prying Eyes: The Escalating Conflict Between Constitutional Privacy and the Accountability Principle of Democracy, 1 COMMLAW CONSPECTUS 71, 81 (2003) ("[T]he legislatures in all fifty states have enacted freedom of information statutes, which, to varying degrees, open government records to public inspection.").

70 See, e.g., Pulaski County v. Ark. Democrat-Gazette, Inc., 260 S.W.3d 718, 722-724 (Ark. 2007); Denver Publ. Co. v. Bd. of County Comm'rs of Arapahoe County, 121 P.3d 190, 199-200 (Colo. 2005) (using content-driven analysis).

71 222 P.3d 808 (Wash. Ct. App. 2009).

72 Id. at 811-12 (citation omitted).

73 Id. at 810-11.

74 Bradford v. Dir. Empl. Sec. Dep't, 128 S.W.3d 20, 27-28 (Ark. Ct. App. 2003).

75 789 N.W.2d 495 (Mich. Ct. App. 2010), cert. denied, 791 N.W.2d 719 (2010).

76 Id. at 497 (emphasis added).

77 *Id.* at 504. Expounding on this statement, the court provided the following example:

[W]ere a teacher to be subjected to discipline for abusing the acceptable use policy and personal e-mails were used to support that discipline, the use of those e-mails would be related to one of the school's official functions—the discipline of a teacher—and, thus, the e-mails would become public records subject to [the state] FOIA.

Id. at 505.

78 Id. at 497.

79 See 5 U.S.C.S. § 552(a)(4)(B) ("On complaint, the district court of the United States... has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." (emphasis added)); U.S. DOJ v. Tax Analysts, 492 U.S. 136, 142-43 (1989) (characterizing "agency records" as a "jurisdictional term[]"); see also Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1244 (2010) ("If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue.").

80 See Ruhrgas Ag v. Marathon Oil Co., 526 U.S. 574, 577 (1999).

81 Consistent with Article III's case-or-controversy requirement, federal courts must determine that they have jurisdiction to adjudicate the merits of a plaintiff's claims. This inquiry is conducted on a claim-by-claim basis—sua sponte, if necessary. *See* Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382 (1884) (if the parties fail to raise a defect in subject-matter jurisdiction, a federal court has a duty to raise and decide the point sua sponte).

82 In essence, the FOIA statute prescribes an order of operations for courts to use: first, the court must satisfy itself that the requested materials are "agency records," sua sponte, if necessary; second, the court will determine whether "agency records" must be disclosed or are statutorily exempt from disclosure.

83 Erika A. Kellerhals, P.C. v. IRS, 2011 U.S. Dist. LEXIS 113156, at *20 ("The IRS is withholding one document in part because it contains the personal information of an employee. In applying the personal privacy exemptions under FOIA, courts must balance the private and public interests involved. Kellerhals has not challenged the withholding of this document and asserts no public interest in its disclosure. The Court adopts the Magistrate Judge's recommendation that this document was validly withheld. Accordingly, the Court finds that the IRS has satisfied its burden to demonstrate that it is entitled to summary judgment on this issue.").

84 699 F. Supp. 2d 97 (D.D.C. 2010).

85 *Id.* at 105-06. Exemption 6 refers to 5 U.S.C. § 552(b)(6), which exempts from FOIA "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

86 798 F. Supp. 2d 274 (D.D.C. 2011).

87 See id. at 283-85.

88 *E.g.*, Ctr. for Biological Diversity v. OMB, 2009 U.S. Dist. LEXIS 82769, at *54-55, 63-64 (N.D. Cal. 2009); People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 2d 284, 307 (D.D.C. 2007); Sakamoto v. U.S. EPA, 443 F. Supp. 2d 1182, 1192 (N.D. Cal. 2006); Kortlander v. BLM, 2011 U.S. Dist. LEXIS 103264, at *29-30 (D. Mont. 2011); Amnesty Int'l USA v. CIA, 2008 U.S. Dist. LEXIS 47882, at *19-20 (S.D.N.Y. 2008).

89 Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence, 595 F.3d 949, 961 (9th Cir. 2010) (citation omitted).

90 539 F. Supp. 2d 363 (D.D.C. 2008).

91 See id. at 367-68.

92 Id. at 368.

93 Id. at 364.

94 See id. at 365-66; see also 5 U.S.C. § 552(b)(5) ("[I]nter-agency or intraagency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" are exempt from the FOIA's disclosure provisions.); DOI v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001) ("To qualify [under Exemption 5], a document must . . satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it.").

95 Id. at 368.

96 Id. at 368 n.7.

97 5 U.S.C. § 552(b)(6) (emphasis added). FOIA Exemption 7(C), codified at 5 U.S.C. § 552(b)(7)(C), by its terms, requires a similar balancing analysis, exempting from disclosure "records or information compiled for law enforcement purposes . . . to the extent that production of such . . . records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy"

98 See, e.g., Gov't Accountability Project v. U.S. Dep't of State, 699 F. Supp. 2d 97, 106 (D.D.C. 2010) ("Because . . . [personal] email addresses can be identified as applying to particular individuals, they qualify as 'similar files' under Exemption 6"); see U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 600 (1982) ("Congress' statements that it was creating a 'general exemption' for information contained in 'great quantities of files,' suggest that the phrase 'similar files' was to have a broad, rather than a narrow, meaning. This impression is confirmed by the frequent characterization of the 'clearly unwarranted invasion of personal privacy' language as a 'limitation' which holds Exemption 6 'within bounds." (citations omitted)).

99 Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976) (citation omitted); *accord* Dep't of State v. Ray, 502 U.S. 164 (1991).

100 Getman v. NLRB, 450 F.2d 670, 674 (D.C. Cir. 1971), stay denied, 404 U.S. 1204 (1971); see Wash. Post Co. v. Dep't of Health & Human Servs., 690 F.2d 252, 261 (D.C. Cir. 1980) (explaining that "under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the act"). See generally Rose, 425 U.S. at 371 (explaining that "[j]udicial interpretation has uniformly reflected the view that no reason would exist for nondisclosure in the absence of a showing of a clearly unwarranted invasion of privacy, whether the documents are filed in 'personnel' or 'similar' files," and listing cases).

101 See, e.g., Beck v. Dep't of Justice, 997 F.2d 1489, 1492-1493 (D.C. Cir. 1993) ("The public's interest in disclosure of personnel files derives from the purpose of the Act—the preservation of 'the citizens' right to be informed about what their government is up to.' . . . Information that 'reveals little or nothing about an agency's own conduct' does not further the statutory purpose; thus the public has no cognizable interest in the release of such information. The identity of one or two individual relatively low-level government wrongdoers, released in isolation, does not provide information about the agency's own conduct." (citations omitted)).

102 Armstrong v. Executive Office of the President, 97 F.3d 575, 581 (D.C. Cir. 1996); cf. Stern v. FBI, 837 F.2d 84 (D.C. Cir. 1984) (distinguishing privacy expectations of federal employees based on the scope of employees' authority).

103 See, e.g., Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1188-89 (8th Cir. 2000) ("An overly technical distinction between individuals acting in a purely private capacity and those acting in an entrepreneurial capacity fails to serve the exemption's purpose of protecting the privacy of individuals.").

104 HAMMITT ET AL., *supra* note 39, at 179; *see*, *e.g.*, Wash. Post Co. v. Dep't of Health & Human Servs., 690 F.2d 252, 261-62 (D.C. Cir. 1982); *see also* Cohen v. EPA, 575 F. Supp. 425, 429 (D.D.C. 1983) ("The privacy exemption does not apply to information regarding professional or business activities."). *See generally* Sims v. CIA (I), 642 F.2d 562, 575 (D.C. Cir. 1980) ("Exemption 6 was developed to protect intimate details of personal and family life, not business judgments and relationships.").

105 Int'l Bd. of Elec. Workers, Local No. 41 v. Dep't of Hous. & Urban Dev., 763 F.2d 435, 436 (D.C. Cir. 1985) (citation omitted).

106 U.S. DOJ v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 773 (1989).

107 Yonemoto v. Dep't of Veterans Affairs, 2012 U.S. App. LEXIS 1108, at *31-32 (9th Cir. 2012) (citation omitted).

108 See 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."); see also Trans-Pacific Policing Agreement v. U.S. Customs Serv., 177 F.3d 1022, 1026-1027 (D.C. Cir. 1999) ("FOIA specifically requires that, if a requested record contains information that is exempt from disclosure under one of the FOIA exemptions, 'any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." (citation omitted)).

109 See generally Arieff v. Dep't of Navy, 712 F.2d 1462, 1466 (D.C. Cir. 1983) ("[T]he exemptions of the FOIA do not apply wholesale. An item of exempt information does not insulate from disclosure the entire file in which it is contained, or even the entire page on which it appears.").

110 "A requester's willingness to accept non-personally identifiable data may help substantially in overcoming an Exemption 6 claim." Hammitt et al., supra note 39, at 211. In the course of determining whether lobbyists' e-mail addresses could be withheld under Exemption 6, the Ninth Circuit reasoned that, absent a showing that a lobbyists' e-mail address was necessary to identify the author of the communication, release of his or her e-mail address would constitute an unwarranted violation of personal privacy. See Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence, 595 F.3d 949, 961 (9th Cir. 2010) ("[T]he public interest in disclosing the identities of the lobbyists' names is to shed light on which companies and which individuals influence government decision making [T]he carriers' agents' email addresses, when not needed to identify the party communicating with the government, are protected from release by Exemption 6. If, however, a particular email address is the only way to identify the carriers' agent at issue from the disputed records, such information is not properly withheld under Exemption 6 because this minor privacy interest does not counterbalance the robust interest of citizens' right to know 'what their government is up to." (citations omitted)).

111 See generally Justin Conforti, Somebody's Watching Me: Workplace Privacy Interests, Technology Surveillance, and the Ninth Circuit's Misapplication of the Ortega Test in Quon v. Arch Wireless, 5 Seton Hall Cir. Rev. 461, 462 (2009) ("[A] piece of technology like the BlackBerry has further blurred already fuzzy lines setting the workplace from an individual's personal world outside the office. Despite the ostensible benefits of employer-provided technology, such as laptops, cell phones and BlackBerries, this blurring has serious implications for employee expectations regarding privacy in communications sent on employer-provided technology.").

112 Letter from Chairman Darrell Issa, U.S. House Oversight Committee, and Ranking Member Charles E. Grassley, U.S. Senate Judiciary Committee, to Acting Director Jeffrey D. Zients, U.S. Office of Management and Budget, at 2 (March 5, 2012) (hereinafter "Issa-Grassley Letter").

113 Id.

114 Id. at 1. The content of the FDA employees' e-mails sent from their

personal e-mail accounts may very well constitute protected disclosures under the Whistleblower Protection Act. See 5 U.S.C. § 2302(b)(8).

115 Issa-Grassley Letter, supra note 112, at 2.

116 *Id.* at 1 (citing Memorandum for Fred F. Fielding, Counsel to the President, from Steven G. Bradbury, Principal Deputy Ass't Att'y General, Office of Legal Counsel, U.S. Dep't of Justice, Re: Legal Issues Relating to the Testing, Use, and Deployment of an Intrusion-Detection System (EINSTEIN 2.0) to Protect Unclassified Computer Networks in the Executive Branch (Jan. 9, 2009)).

117 $\it Id.$ at 2 (citing 5 U.S.C. § 7501 $\it et$ $\it seq.$; OPM Personal Use of Government Office Equipment Policy (June 2000)).



STATE EFFORTS TO IMPOSE "AMAZON TAX" ON INTERNET VENDORS

By Kenneth K. Lee*

Burdened by unfunded pensions and other fiscal calamities, cash-strapped states have scoured for new and creative sources of revenue. One seductive scheme that has tempted many states is the so-called "Amazon tax," a tax that would apply to out-of-state online retailers that have no physical presence within that particular state.

The "Amazon tax" technically is not a tax on out-of-state online companies such as Amazon or Overstock. Most states cannot directly tax them because these online-only retailers do not have any employees, offices, or stores in those states. For the same reason that, say, New Mexico cannot tax New Yorkers who do not live or have any property there, New Mexico cannot tax out-of-state companies that have no physical presence within the state. Rather, the "Amazon tax" would compel out-of-state online retailers to collect sales taxes from out-of-state customers who are obligated (but almost certainly neglect) to report and pay a "use tax" on their out-of-state purchases.

States find the "Amazon tax" politically enticing because it brings in potentially millions of dollars into the states' coffers—at the expense of faceless out-of-state companies and citizens who have no political clout. As far as most states are concerned, a tax obligation imposed on Seattle-based Amazon.com is a political and economic problem for the state of Washington. And brick-and-mortar businesses have lobbied hard for such a tax, claiming that certain out-of-state internet companies have a competitive advantage because their customers do not pay any sales tax.

But upon closer scrutiny, the "Amazon tax"—like internet get-rich schemes—is too good to be true. It likely will not yield the gusher of tax revenues that states anticipate, and ultimately may not pass constitutional muster.

The landmark Supreme Court case that poses as a major obstacle to the "Amazon tax" is *Quill Corp. v. North Dakota.*In that case, the state of North Dakota attempted to compel Quill, an office supplies company, to collect taxes on items sold within the state, even though Quill had no employees, stores, or facilities in North Dakota. The Supreme Court struck down the tax on the grounds that it placed an undue burden on interstate commerce in violation of the Dormant Commerce Clause. Specifically, the Supreme Court held that the company lacked a "substantial nexus" with North Dakota to justify the tax. Substantial nexus has been defined as physical presence within the state (e.g., offices, stores, or employees).

But online retailers typically have a physical presence in only their home state and possibly a few other states where they may have, for example, warehouses. Faced with this *Quill* precedent, New York, California, and several other states have concocted an ingenious idea to purportedly establish "substantial nexus": These states have revised or proposed altering the state

tax code to require an out-of-state internet retailer to collect sales taxes if it enters into any agreement with an out-of-state resident or business which refers potential purchasers via an internet link in exchange for a commission.

For example, Amazon sponsors the Amazon Associates program in which individuals and businesses advertise an item on their websites with a link, which if clicked, sends the user to Amazon's website. If the user purchases the item, the Amazon Associate receives a portion of the sales proceeds. Overstock and other online retailers have similar affiliate marketing arrangements.

These states have latched onto these affiliate marketing programs to claim that out-of-state internet retailers now have a "substantial nexus" with the taxing state. But this legal fig leaf falls apart under the strain of precedent and logic.

States typically rely on the Supreme Court's half-centuryold decision in *Scripto v. Carson* to defend their bills.² The Supreme Court in that case found that Florida could impose a tax collection obligation on Georgia companies, despite the lack of employees or facilities in the Sunshine State, because they had independent contractors who solicited sales within the state. The reasoning in *Scripto* makes sense. Otherwise, companies like Avon or Mary Kay could avoid tax collection obligations altogether because they rely almost solely on independent contractors to sell their goods.

Online affiliates, however, are not like "Avon ladies" or other independent contractors who roam a state and solicit sales from individuals within the state. Advertising links by online affiliates are more akin to standard advertisements in flyers, periodicals, or even internet banner ads, which are not sufficient to establish "substantial nexus." A Nevada company that has no connection to California, for instance, cannot be compelled to collect sales taxes merely because it advertised in the *Los Angeles Times* newspaper or website.

Taken to its logical conclusion, the legal justification for the "Amazon tax" scheme would arguably allow *any* state to impose tax collection obligations on *any* out-of-state business if it merely advertises on the internet because the reach of the internet is global. The fact that independent "affiliates" of online retailers receive commissions does not matter because the constitutionality of a tax should not hinge on the type of compensation.

Like most relatively obscure constitutional issues, clear precedent on this issue is sparse. A state trial court in New York upheld New York's version of the Amazon tax, but that case is on appeal and Amazon is currently collecting use taxes in New York. But some states' decisions suggest that they may not follow New York's lead.

For example, in *Borders Online, LLC v. State Board of Equalization*, the California Court of Appeal relied on the Supreme Court's *Tyler Pipe v. Washington Department of Revenue*⁴ decision in emphasizing that "the crucial factor governing nexus is whether the activities performed in [the] state on behalf of the taxpayer are significantly associated with the taxpayer's ability

^{*} Kenneth K. Lee is a litigation partner at Jenner & Block's Los Angeles office. He previously served as an Associate Counsel to President George W. Bush. A different version of this article appeared in the Los Angeles Daily Journal.

to establish and maintain a market in [the] state for the sales." The court held that Borders Online, an out-of-state bookseller without any physical presence in California, had to collect sales taxes because of its intertwined relationship with its sister bricks-and-mortar company, Borders Books. The two Borders entities shared financial data and filed tax returns on a combined report, and further engaged in synergistic marketing (e.g., a customer of Borders Online could return books to Borders Books). Under the reasoning in this case, it seems unlikely that a court will find that Amazon or other online retailers share such a similar relationship with its independent affiliates or rely on them to "establish and maintain" a market in a particular state.

But this constitutional issue may not be resolved in the courts. Many states, ranging from California to Indiana, have reached agreements with Amazon in which the states agreed to defer taxation for a number of years in return for Amazon agreeing to build distribution centers there. In other states such as North Carolina and Rhode Island, Amazon has cut ties with its affiliates, most of which are small business owners that relied on the affiliate marketing programs to generate revenue. In these cases, the expected tax revenues did not materialize and, indeed, the "Amazon tax" has reduced revenues and crippled job growth. As The New York Times reported earlier this year, the founder of the Illinois-based FatWallet took his fifty-four employees to nearby Wisconsin after the Land of Lincoln imposed a new birth of taxation.⁶ In light of these unintended consequences, some in Congress have pushed for a streamlined federal law to address the issue of state taxation in the 21st century, but no bill has come close to being enacted.

In addressing this issue, legislators and judges may want to thumb through Federalist Paper No. 22, in which Alexander Hamilton cautioned that "interfering and unneighborly regulations of some States, contrary to the true spirit of the Union," would lead to "injurious impediments" to national economic growth. That warning from the 18th-century parchment of Publius remains just as relevant in today's information technology world.

Endnotes

- 1 504 U.S. 298 (1992).
- 2 362 U.S. 207 (1960).
- 3 See Quill, 504 U.S. 298.
- 4 482 U.S. 232, 250 (1987).
- 5 29 Cal. Rptr. 3d 176, 188 (Cal. App. Ct. 2005).
- 6 See Ian Mount, States' Drive to Collect Taxes on Internet Sales Is a Blow to Marketers, N.Y. Times, Jan. 25, 2012, at B4.



United States v. Home Concrete & Supply, LLC and Its Implications for Administrative Law

By Elizabeth Milito*

I. Introduction

n April 25, 2012, the United States Supreme Court decided United States v. Home Concrete & Supply, LLC,1 in a ruling that married tax and administrative law principles and ultimately invalidated the action of the Internal Revenue Service ("IRS"). Home Concrete's immediate implications in tax law could help provide some certainty to thousands of taxpayers who otherwise might have been vulnerable to charges if the statute of limitations for "overstatement of basis" actions could be extended from three to six years. Furthermore, the Court's analysis of the regulation at issue required that it review some of its seminal administrative law decisions, most notably Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,2 and whether or not executive agencies may issue new rules that appear to contradict Court precedent during litigation. Ultimately, the Court's decision in Home Concrete reaffirmed the past twenty-eight years of administrative law jurisprudence and did not expand executive agency deference.

II. Background

The issue in *Home Concrete* began in December 2006, six years before the U.S. Supreme Court heard arguments. The IRS sought to assess a deficiency against Home Concrete & Supply, LLP, and several other taxpayers, based on 1999 tax returns because those returns involved an "overstatement of basis." "Overstatement of basis," as used by the Internal Revenue Code ("I.R.C."), occurs when a taxpayer overvalues the tax basis of an asset and thereby lowers the amount of gross income reported in his or her tax return, resulting in paying less taxes.³ The general rule, set out in I.R.C. §6501(a), states:

Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed *within 3 years after the return was filed* (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of *3 years* after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.⁴

Thus, the statute has a three-year statute of limitations. Home Concrete's three years expired in April 2003. To salvage its attempt to collect the taxes, the IRS turned to another provision in the tax code, I.R.C. §6501(e)(1)(A), which states:

If the taxpayer *omits from gross income* an amount properly includible therein and—

* Elizabeth Milito is Senior Executive Counsel with the National Federation of Independent Business (NFIB) Small Business Legal Center. NFIB filed an amicus brief in the Home Concrete case. The opinions expressed in this article are solely those of the author.

- (i) such amount is in excess of 25 percent of the amount of gross income stated in the return, or
- (ii) such amount—
 - (I) is attributable to one or more assets with respect to which information is required to be reported under section 6038D (or would be so required if such section were applied without regard to the dollar threshold specified in subsection (a) thereof and without regard to any exceptions provided pursuant to subsection (h)(1) thereof), and
 - (II) is in excess of \$5,000,

the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.⁵

The IRS interpreted this provision to provide it three additional years to assess the deficiency against Home Concrete and the other taxpayers. To utilize the new law and its six-year statute of limitations, the IRS claimed that Home Concrete's overstatement of basis qualified as an *omission* from gross income under the I.R.C.⁶ For the IRS to succeed, therefore, it needed to show that when Congress used the word "omissions" in the statute, Congress meant to include the acts that constitute "overstatements of basis" on a tax return.⁷ Unfortunately for the IRS, two federal appeals courts had already struck down this interpretation.⁸ Those decisions were based on the Supreme Court's 1958 ruling in *Colony, Inc. v. Commissioner*.⁹

In *Colony*, the U.S. Supreme Court concluded that an understatement of gross income was not an omission from gross income under a provision in the 1939 I.R.C., § 6501(e)(1)(A), that was substantially identical to the provision at issue in *Home Concrete*. The *Colony* Court construed "omits" by studying the context of the I.R.C. and the definition from Webster's Dictionary, and then, not finding those definitions conclusively unambiguous, by reviewing legislative history. After reviewing this history, the Court determined that the legislature's choice of the word "omits" was based on the specific intent that it would only cover actual omissions in reporting taxable items—and so only then may actions fall under the regulation with the six-year statute of limitations. 12

In 2009, fifty-one years after that decision, the Court of Appeals for the Ninth Circuit was faced in *Bakersfield Energy Partners*, *LP v. Commissioner* with the same issue and determined that "overstatement of basis" is not included under the umbrella of I.R.C. \$6501(e)(1)(A).¹³ Accordingly, under the statute codified in 2009, the courts have held that the IRS has only three years to bring a case against parties who engage in overstatement of basis. The Supreme Court's decision in *Home Concrete* affirmed the holding in the *Colony* case and applied this holding to the 2009 provision at issue.

III. Chevron Deference for Contrary Regulations?

Facing unfavorable rulings in past attempts to include overstatement of basis under I.R.C. §6501(e)(1)(A), the IRS issued a new regulation, Treasury Regulation §301.6501(e)-1, which states in relevant part: "[A]n understated amount of gross income resulting from an *overstatement of unrecovered cost* or other basis *constitutes an omission from gross income* for purposes of section 6501(e)(1)(A)(i)."¹⁴

The new regulation addressed the IRS's timeliness issue by referring to an "overstatement of basis" as an omission from gross income, thus including it under the six-year statute of limitations umbrella. Effective on December 14, 2010, the IRS asserted that the regulation allowed it to assess the deficiency against Home Concrete for overstatement of basis while it was involved in litigation over that very subject. 15 In the preamble to the Regulation, the Treasury stated that the rule merely "clarifies" the meaning of \$6501(e)(1)(A).16 In response, the taxpayers argued that the IRS's actions were an attempt to overturn Colony, and that they defied federal administrative agency practice and Supreme Court precedent. 17 The taxpayers based their arguments on principles set forth in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., the seminal administrative law case establishing the rules of judicial deference to agency statutory interpretation.

In Chevron, the EPA promulgated a regulation pursuant to the Clean Air Act Amendments of 1977 relating to permits for "stationary sources" of air pollution that allowed states to categorize entire industrial groupings with multiple sources of emissions as a single source of pollution (known as the "bubble" theory) for purposes of issuing such permits.¹⁸ The NRDC challenged this regulation on the basis that it was not a "reasonable construction" of the statutory term "stationary source" as written in the law.19 The Court held that while executive agencies are charged with implementing the legislation created by Congress and need flexibility in how they do so in many cases, the discretion they are allowed in interpreting statutes is limited to those laws that have ambiguous language (Chevron step one), and, beyond this, to "permissible constructions" of such ambiguous laws (*Chevron* step two).²⁰ Additionally, an agency's action is limited in that it may not issue a regulation that changes or modifies a court's determination if the court reviewed a law and determined that the statute is unambiguous, and Congress did not amend the statute following the court's interpretation.²¹ Finally, courts will not give deference to agency regulations that are deemed "arbitrary, capricious, or manifestly contrary to the statute."22

The *Chevron* decision recognized that, in order to carry out congressional directives, federal agencies are charged with interpreting them to some degree. But executive agencies may not exceed their interpretive powers by creating rules or regulations not warranted by the statutes. In short, agencies may implement, not legislate. In order to keep the actual law-making in the hands of Congress, *Chevron* provided specific standards for how much discretion the agencies are permitted when interpreting and then implementing the laws. The *Chevron* parameters have largely held since 1984, with subsequent decisions offering a more nuanced understanding of how to apply the parameters, without ultimately changing them.²³

According to the taxpayers in the *Home Concrete* case, Chevron step one—limiting agency deference to situations where the statute is ambiguous—halts the IRS's attempt to change its interpretation of the regulation in order to assess their tax deficiencies under the longer statute of limitations. The wording of I.R.C. §6501(e)(1)(A), which sets out the six-year statute of limitations for certain circumstances, matches that of the statute that went through the two-step *Chevron* analysis in the Colony decision. Previously, the Court found the meaning of this language to be unambiguous.²⁴ The fact that the Court decided *Colony* prior to promulgation of the process set forth in *Chevron* is generally considered to be irrelevant, as the provision of the 1939 Tax Code at issue in *Colony* carried over to the 1954 Tax Code with substantially identical language. Moreover, the taxpayers argued, the Colony Court's review fulfills the Chevron analysis because the Court found that Congress unambiguously included in the statute only actual omissions in reporting taxable items.²⁵ Home Concrete maintained that unless Congress amends the statute, the IRS has no discretion to interpret the corresponding section of the I.R.C., and the Court owed no deference to the IRS's new regulation.²⁶

Both parties used the Court's decision in *National Cable & Telecommunications Association v. Brand X Internet Services* to support their arguments. The government and taxpayers offer contradictory interpretations of *Brand X*'s holding as to when *Chevron* deference may be applied to agency decisions following a court's construction of the statute. The Court in *Brand X* stated: "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."

The government argued in *Home Concrete* that unless a statute unambiguously forecloses a specific interpretation of its language, conflicting precedent will not displace implementation of that particular interpretation by administrative agencies (within the "permissible construction" limitations).²⁸ In response, the taxpayers argued that Brand X means that when a court decides that a statute is unambiguous and issues an interpretation based on the statute's unambiguity, then the court's interpretation will trump an agency's interpretation and prohibits contrary agency regulations.²⁹ Furthermore, the taxpayers contended that the Court's holding in Colony—that the IRS regulation in question was unambiguous and that "overstatement of basis" is not included as an omission in the tax code—applies to the new regulation, rendering the further "clarification" provided by the new Treasury regulation moot.30

Had the Court, after analyzing the statute at issue under the first step of the *Chevron* test, determined that the law was ambiguous on its face, it would have asked whether the IRS's subsequent interpretation was a "permissible construction of the statute" under *Chevron*'s second step. The government would have been forced to show that the new regulation was a permissible reading of the statute, and, perhaps by showing that all formal processes for rule-making were followed, overcome the fact that it had issued these rules following the initiation of the *Home Concrete* lawsuit.³¹

The Supreme Court ultimately decided the case in favor of the taxpayers. The Court relied on Justice Harlan's opinion from *Colony* and principles of stare decisis in affirming the decision below. The Court reasoned that the *Colony* decision made clear that the statute in question is unambiguous and therefore there is "no gap" under *Chevron* analysis for the agency to fill. Thus, "the Government's gap-filling regulation cannot change Colony's interpretation of the statute." The Court essentially preserved the status quo and held that overstatements of basis, and the resulting understatement of gross income, do not trigger the extended limitations period of \$6501(e)(1)(A).³²

IV. Conclusion

What is the import of this case? It represents a victory for the taxpayers, and it would appear to maintain the status quo by reiterating the rules of *Chevron*. Further than this, the Supreme Court answered a contentious tax question affecting many citizens and businesses, and it also sent a message regarding its own role in the *Chevron* analysis. Specifically, if a court determines that a law is unambiguous and interprets the law on this basis, administrative agencies are required to adhere to the court's interpretation absent congressional action.

The outcome of this case has implications not just for the IRS but for all executive agencies tasked with implementing the will of Congress. The Court's decision holds tight to past norms expounded in *Chevron* and *Colony*. It reaffirms *Chevron*'s two-pronged analysis and its instructions on the judiciary's role when faced with shifting agency regulations. Finally, the ruling brings certainty to taxpayers as to what the tax code actually requires of them and reaffirms a regulatory position the IRS finds troubling and costly.

Endnotes

- 1 United States v. Home Concrete & Supply, LLC, No. 11-139 (U.S. Apr. 25, 2012).
- 2 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
- 3 See Bakersfield Energy Partners, LP v. Commissioner, 568 F.3d 767, 768 (9th Cir. 2009); see also Bernard J. Audet, Jr., Note, One Case to Rule Them All: The Ninth Circuit in Bakersfield Applies Colony to Deny the IRS an Extended Statute of Limitations in Overstatement of Basis Cases, 55 VILL. L. Rev. 409, 410-13 (2010).
- 4 26 U.S.C. §6501(a) (emphasis added).
- 5 26 U.S.C. § 6501(e)(1)(A) (emphasis added).
- 6 Brief for National Federation of Independent Business Small Business Legal Center and Cato Institute as Amici Curiae Supporting Respondents at 3-4, United States v. Home Concrete & Supply LLC, No. 11-139 (U.S. Jan. 17, 2012).
- 7 *Id.*
- 8 Bakersfield, 568 F.3d 767 (9th Cir. 2009); Salaman Ranch Ltd. v. United States, 573 F.3d 1362 (Fed. Cir. 2009); see also Audet, supra note 3, at 413-14
- 9 See Colony, Inc. v. Commissioner, 357 U.S. 28 (1958); Audet, supra note 3, at 414.
- 10 Colony, 357 U.S. 28; Audet, supra note 3, 413-14.
- 11 Colony, 357 U.S. at 32-36 (1958).
- 12 Id.

- 13 Bakersfield, 568 F.3d at 768.
- 14 Treas. Reg. § 301.6501(e)-1 (emphasis added).
- 15 Brief for National Federation of Independent Business, *supra* note 6, at 4.5.
- 16 Id. at 4; see also Brief for the Petitioner at 13, United States v. Home Concrete & Supply LLC, No. 11-139 (U.S. Jan. 17, 2012).
- 17 See generally Brief for National Federation of Independent Business, supra note 6, at 3.
- 18 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 839-840 (1984).
- 19 Id. at 840.
- 20 Id. at 842-43.
- 21 Id.
- 22 Id. at 844.
- 23 See generally Christensen v. Harris County, 529 U.S. 576 (2000) (holding that Chevron deference may apply to formal agency documents which have the force of law); see also William N. Eskridge, Jr. & Lauren E. Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan, 96 Geo. L.J. 1083 (2008).
- 24 See Audet, supra note 3, at 414.
- 25 See Audet, supra note 3, at 414; Brief for National Federation of Independent Business, supra note 6, at 6.
- 26 Brief for National Federation of Independent Business, *supra* note 6, at 6
- 27 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).
- 28 Brief for the Petitioner at 37, United States v. Home Concrete & Supply, LLC, No. 11-139 (U.S. Jan. 17, 2012).
- 29 Brief of Respondent at 38-39, United States v. Home Concrete & Supply, LLC, No. 11-139 (U.S. Jan. 17, 2012).
- 30 Id at 42
- 31 Christensen v. Harris County, 529 U.S. 576, 586-87 (2000).
- 32 United States v. Home Concrete & Supply, LLC, No. 11-139, slip op. at 11 (U.S. Apr. 25, 2012).



CIVIL RIGHTS

No Conservative Consensus Yet: Douglas Ginsburg, Brett Kavanaugh, and Diane Sykes on the Second Amendment

By Nelson Lund*

Note from the Editor:

This paper examines the largely unexplored subject of the different approaches courts are taking with regard the right to possess firearms following the Supreme Court's 2008 recognition of this right in *District of Columbia v. Heller*. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about this issue. To this end, while there is currently a limited amount of scholarship on this subject, we offer links below to various court decisions discussing this issue, and we invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

Related Links:

- District of Columbia v. Heller, 554 U.S. 570 (2008): http://www.supremecourt.gov/opinions/07pdf/07-290.pdf
- Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011) (*Heller II*): http://www.cadc.uscourts.gov/internet/opinions.nsf/DECA496973477C748525791F004D84F9/\$file/10-7036-1333156.pdf
- Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011): http://www.ca7.uscourts.gov/tmp/ID0XPIFF.pdf

Introduction

For several decades, the District of Columbia banned the possession of handguns or any other operable firearm in the home. In *District of Columbia v. Heller*, the Supreme Court concluded that the Second Amendment protects a private right to arms, which enables individuals to exercise their inherent right of self-defense, including the right to defend oneself against criminal violence. This conclusion was strongly supported by evidence about the original meaning of the constitutional provision. The Court then invalidated D.C.'s handgun ban on the ground that handguns are the most popular weapon for self-defense in the home today. Justice Scalia's majority opinion went on to endorse a broad range of gun control regulations without justifying them with evidence about the original meaning of the Second Amendment.² These included:

- Bans on the possession of firearms by felons and the mentally ill.
- Bans on carrying firearms "in sensitive places such as schools and government buildings."
- Laws imposing conditions and qualifications on the commercial sale of arms.
- Bans on carrying concealed weapons.
- Bans on "those weapons not typically possessed by lawabiding citizens for lawful purposes, such as short-barreled shotguns" and apparently also machine guns.

This is an abbreviated version of Second Amendment Standards of Review in a Heller World, forthcoming in the Fordham Urban Law Journal, published here with permission.

In 1791, American citizens enjoyed an almost unlimited right to keep and bear arms because legislatures had chosen to impose almost no restrictions on that right. We have virtually no historical evidence about constitutional limits on the government's discretion to alter those legal rights because it had not become a matter of public controversy.

Heller might have been regarded as an exercise in judicial restraint if it had simply invalidated the D.C. law on the ground that it severely compromised what the Court called "the core lawful purpose of self-defense." Unfortunately, the opinion's approval of various regulations not at issue in the case, combined with its lackadaisical reasoning in support of its various conclusions, created a mist of uncertainty and ambiguity.

After *McDonald v. City of Chicago*⁴ held that the Fourteenth Amendment made the Second Amendment applicable to the states, the need for a workable framework of analysis became more acute. The lower courts have not enjoyed the luxury of confining their rulings to anomalous laws aimed at disarming the civilian population, which *Heller* said would be invalid "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights."⁵

Faced with harder cases, and with the fogginess of the *Heller* opinion, these courts have understandably adapted the "tiers of scrutiny" framework widely used in other areas of constitutional law. They have quickly and fairly uniformly coalesced around an interpretation of *Heller* that provides an intelligible framework. The emerging consensus can be roughly summarized as follows:

- Some regulations, primarily those that are "longstanding," are presumed not to infringe the right protected by the Second Amendment.
- Regulations that severely restrict the core right of selfdefense are subject to strict scrutiny.
- Regulations that do not severely restrict the core right are subject to intermediate scrutiny.

Engage: Volume 13, Issue 2

^{*} Patrick Henry Professor of Constitutional Law and the Second Amendment, George Mason University School of Law

The *Heller* Court seems to have self-consciously refrained from adopting such a framework, but neither did it specify any alternative. We might therefore expect Second Amendment jurisprudence to continue developing through the application of this model.

Maybe it will. But a vigorous challenge was recently advanced in a dissenting opinion by Judge Brett Kavanaugh of the D.C. Circuit. He rejected the consensus approach adopted by his court, arguing that a very different framework is dictated by Justice Scalia's opinion in *Heller*. It is therefore worth considering the differences between Judge Kavanaugh's approach and the one adopted by his colleagues and by other courts of appeals.

I conclude that the analytical framework in Judge Douglas Ginsburg's majority opinion is superior to Judge Kavanaugh's. The majority, however, misapplied that framework. A variation developed and applied by Judge Diane Sykes of the Seventh Circuit illustrates how the inferior federal courts can best approach novel Second Amendment issues.

I. Heller II

Prior to 2008, the District of Columbia had sought through its laws to effect an almost complete disarmament of the civilian population. After losing the *Heller* case, the D.C. government went back to the drawing board in an effort to restrict civilian access to guns as much as possible in light of *Heller*. In *Heller II*, the named plaintiff in that case, along with other individuals, challenged several provisions of the city's revised gun control laws.⁶

The plaintiffs in *Heller II* challenged three main elements of the D.C. gun control regime:

- A requirement that gun owners register each of their firearms with the government. The registrant is required to submit detailed information about himself and the weapon, and to renew the registration every three years. Citizens are forbidden to register more than one pistol in any thirty-day period.
- Every applicant for registration must in effect be licensed to register by passing a series of tests, attending a training course, and being fingerprinted and photographed.
- D.C. also prohibited a wide range of semi-automatic firearms, as well as any magazine with a capacity of more than ten rounds.

A. The Majority Opinion

Judge Ginsburg's majority opinion offered the following analysis and conclusions:

- The basic registration requirement, as applied to handguns but not long guns, is similar to longstanding regulations that are presumptively constitutional, and the plaintiffs failed to overcome this presumption by showing that the requirement has more than a *de minimis* effect on their constitutional rights.
- Some of the specific registration provisions are novel rather than longstanding, and are therefore subject to additional scrutiny. The court reached the same conclusion about the

licensing requirements and about all of the registration and licensing requirements for long guns.

Relying largely on First Amendment free speech decisions, the court concluded that none of these requirements imposes "a substantial burden upon the core right of self-defense," and that strict scrutiny is therefore inappropriate. Instead, the court concluded that intermediate scrutiny should be applied, which requires the government to show that the regulations are "substantially related to an important governmental objective." Finding that the record was insufficient to apply this standard of scrutiny, the court remanded for further proceedings.

• The court declined to decide whether semi-automatic rifles and large-capacity magazines receive any protection at all under the Second Amendment. Assuming *arguendo* that they do, the court then concluded that it was reasonably certain that the prohibition does not substantially burden the right. Accordingly, it applied intermediate rather than strict scrutiny.

The court upheld the ban on certain semi-automatic rifles, primarily because of evidence suggesting that they are nearly as dangerous or prone to criminal misuse as the fully automatic rifles that *Heller* had excluded from constitutional protection. The ban on high-capacity magazines was upheld on the basis of evidence that they are useful to criminals and that they encourage an excessive number of shots to be fired by those engaged in legitimate self-defense.

B. The Kavanaugh Dissent

Judge Kavanaugh thought that the majority's approach to the case was based on a complete misinterpretation of *Heller*. In his view, the Supreme Court has rejected the tiers-of-scrutiny approach. Instead, *Heller* teaches that courts are to assess gun regulations by looking to the Constitution's text and to history and tradition, and by drawing analogies from these sources when dealing with modern weapons and new circumstances.

Judge Kavanaugh analyzed the new case as follows:

• He argued that D.C.'s entire registration and licensing scheme is unconstitutional because it does not meet *Heller's* test approving of "longstanding" regulations. He conceded that registration requirements imposed on gun *sellers* meet *Heller's* test, but pointed out that there is no tradition of imposing such requirements on gun *owners*. The city's licensing requirements, which are inseparable from the registration requirement, are similarly novel and therefore also invalid.

Judge Kavanaugh's analysis was based on a misreading of *Heller*. The Supreme Court said that certain longstanding regulations are at least presumptively constitutional, and Judge Kavanaugh is right that registration requirements on gun owners are not longstanding. But *Heller* nowhere said that novel regulations are always unconstitutional. The Court rested its decision on a perception that many Americans today have good reasons for making handguns their preferred weapon for defense of the home. The Court did not say that the novelty of the handgun ban rendered it unconstitutional, or that a longstanding ban on handguns would have been upheld.

• Judge Kavanaugh also concluded that D.C.'s ban on semiautomatic rifles is unconstitutional because (1) they are not meaningfully different from semi-automatic handguns, which *Heller* had already decided may not be banned, and (2) they have not traditionally been banned and are in common use today.

This reading of *Heller* is also technically flawed. The Supreme Court's holding involved only a particular handgun, which was a revolver, not a semi-automatic. *Heller* did not say, one way or the other, whether a ban on semi-automatic pistols would be unconstitutional.

Judge Kavanaugh also misread *Heller* on the common use test. In that case, the Supreme Court concluded that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." The awkward double negative in this statement strongly suggests that the Court was careful to avoid saying that all weapons typically possessed for lawful purposes *are* protected. Whatever the Court may decide in the future, it has not yet said that all weapons in common use for lawful purposes are *ipso facto* protected by the Second Amendment.

III. Applying Heller

A. The Rights and Wrongs of the Majority Approach in Heller II

Judges Ginsburg and Kavanaugh engaged in a detailed debate about the appropriate framework for analysis. Neither judge made a plausible case that his preferred framework can be derived from the *Heller* opinion. The real problem is that *Heller* is so Delphic, or muddled, that the kind of methodological debate found in *Heller II* is unresolvable. That said, Judge Ginsburg's approach seems to me to be clearly preferable.

First, as explained above, Judge Kavanaugh's approach required him to misread *Heller* in order to find guidance precise or clear enough to provide rules of decision in *Heller II*.

Second, and perhaps more important, Justice Scalia's *Heller* opinion itself shows that his use of history and tradition is little more than a disguised version of the kind of interest balancing that he purported to condemn. At crucial points, he simply issued *ipse dixits* unsupported by any historical evidence, and at other points, he misrepresented historical facts.¹¹ He could hardly have avoided doing so, given the paucity of relevant historical evidence about the original meaning of the Second Amendment. That problem is even more acute in cases dealing with less restrictive regulations. Covert interest-balancing dressed up as an analysis of history and tradition is no better than more straightforward interest-balancing in the form of strict or intermediate scrutiny, and almost certainly worse.

This is not to say that *Heller II* was correctly decided. Judge Kavanaugh's most powerful arguments are directed against the majority's application of its framework to the challenged regulations. Those regulations were manifestly meant to suppress the legitimate exercise of constitutional rights, and the majority was far too deferential to the government in reviewing them.

Judge Kavanaugh is right that D.C.'s registration and licensing scheme is quite different from the limited registration

requirements that have been widely imposed for many decades. The important point, however, is not their novelty, but their lack of an adequate rationale. Whether under strict or intermediate scrutiny, they should not be upheld without a showing by the government, at a minimum, that they can make a significant contribution to public safety.

The government tried to do so by arguing that a registration system enables police officers who are executing warrants to determine whether residents in the dwelling have guns. This rationale is woefully inadequate. Even the greenest rookie officer in the District of Columbia would know that many residents possess unregistered guns. The regulation cannot accomplish the purpose advanced to justify it, and the justification cannot satisfy any form of heightened scrutiny.

Apart from the government's failure to show a substantial relation between public safety and its registration requirements, this kind of registration system has traditionally been resisted in American history for a reason closely bound up with an important purpose of the Second Amendment. When the government collects this kind of detailed information about individuals and the guns they own, it gives itself a powerful tool that it could use for the unconstitutional confiscation of guns or the unconstitutional harassment of gun owners. 12 Even a narrow reading of the Second Amendment would have to acknowledge that its purpose includes the prevention of such illegalities. For that reason, the District of Columbia should have an especially heavy burden to bear in justifying regulations that would help it to do what it has already demonstrated that it wants to do, namely disarm the civilian population. The government did not come close to meeting that burden.¹³

The majority's decision to uphold D.C.'s ban on a wide range of semi-automatic rifles is also inconsistent with heightened scrutiny. The banned rifles are defined primarily in terms of cosmetic features, and they are functionally indistinguishable from other semi-automatic rifles that are not banned. The regulation is therefore arbitrary and without any real relation to public safety. It certainly fails the majority's own test, under which "the Government has the burden of showing there is a substantial relationship or reasonable 'fit' between, on the one hand, the prohibition . . . and, on the other, [the Government's] important interests in protecting police officers and controlling crime." ¹⁴ That failure alone should have sufficed to invalidate the ban.

Heller assumed that fully automatic rifles are outside the protection of the Second Amendment. The Heller II majority analogized semi-automatic rifles to these unprotected weapons on the ground that semi-automatics can fire almost as rapidly as those that are fully automatic. This argument is fallacious. Heller treated fully automatic weapons as a special case, apparently on the basis of history and tradition, without saying anything at all to suggest some kind of penumbral rule that protected weapons must have a significantly slower rate of fire than those that are fully automatic.

Even assuming, *arguendo*, that such a penumbral rule was implied by *Heller*, D.C. allows other semi-automatic rifles that can fire just as quickly as those that are banned. The underinclusiveness of the regulation confirms it was not

based on a functional similarity between automatic and semiautomatic weapons. The putative similarity therefore cannot justify the regulation under heightened scrutiny.

The majority offered two justifications for the ban on large-capacity magazines. First, it accepted testimony that such magazines give an advantage to "mass shooters." Maybe they do. But how could the District's regulation possibly reduce this problem? Large-capacity magazines are freely available by mail order and at stores in nearby Virginia. The government apparently assumed that criminals bent on mass shootings will refrain from obtaining such magazines out of respect for D.C.'s regulation. Rather than accept this assumption, the court might well have taken judicial notice of the opposite. Or at least required the government to prove such a counterintuitive notion.

The majority also credited testimony that large-capacity magazines can tempt legitimate self-defense shooters to fire more rounds than necessary. This testimony shows at most that banning such magazines could conceivably have some good effects on some occasions. But the same could be said about D.C.'s original and unconstitutional ban on all handguns, which illustrates why the argument is fatally flawed. Banning medical books containing photos of corpses might save some children from psychological trauma, which would be a good thing, too. But nobody would consider such a book ban constitutional.

Assuming that intermediate scrutiny is appropriate, the government is required at a minimum to show a *substantial* relation between the regulation and public safety. The *Heller III* majority cited no evidence showing that the magazine ban would save any significant number of lives, or any lives at all. Nor did it even consider the possibility that innocent civilians might lose their lives because they ran out of ammunition while trying to defend themselves. The government failed to meet its burden of showing that the magazine ban satisfies even intermediate scrutiny, and the ban should therefore not have been upheld.

B. A Better Approach: Ezell v. City of Chicago

Chicago responded to *McDonald* in much the same fashion as the District of Columbia had responded to *Heller*: by adopting a sweeping and burdensome new regulatory regime to replace the handgun ban that the Supreme Court had invalidated. In *Ezell v. City of Chicago*, ¹⁵ the Seventh Circuit reviewed Chicago's decision to require one hour of range training as a prerequisite to lawful gun ownership, while simultaneously banning from the city any range at which this training could take place.

Judge Diane Sykes began by offering a more detailed and somewhat different interpretation of *Heller* and *McDonald* than that of the D.C. Circuit. ¹⁶ Briefly stated, she interpreted the Supreme Court's opinions as follows:

• Just as some categories of speech are unprotected by the First Amendment as a matter of history and tradition, some activities involving arms are categorically unprotected by the Constitution. To identify those categories, courts should look to the original public meaning of the right to arms (as of 1791 with respect to the Second Amendment and as of 1868 with respect to the Fourteenth Amendment).

• If an activity is within a protected category, courts should evaluate the regulatory means chosen by the government and the public benefits at which the regulation aims. "Borrowing from the Court's First Amendment doctrine, the rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." Broadly prohibitory laws restricting the core Second Amendment right—like those at issue in *Heller* and *McDonald*—are categorically unconstitutional. All other laws must be judged by one of the standards of means-end scrutiny used in evaluating other enumerated constitutional rights, and the government always has the burden of justifying its regulations.

The court concluded that firing ranges are not categorically outside the protection of the Second Amendment. The evidence cited by the City fell "far short of establishing that target practice is wholly outside the Second Amendment as it was understood when incorporated as a limitation on the States." ¹⁸

The more difficult question for the court involved the choice of a standard of review. Judge Sykes interpreted *Heller* to permit the use of First Amendment analogies, and she summarized the rather intricate set of tests generated by the Supreme Court in that area. From those cases, she distilled an approach to the Second Amendment. Severe burdens on the core right to self-defense will require an extremely strong public-interest goal and a close means-ends fit. As a restriction gets farther away from this core, it may be more easily justified, depending on the relative severity of the burden and its proximity to the core of the right.

Applying this test to the gun-range ban, the court concluded that the right to maintain proficiency in the use of weapons is an important corollary to the meaningful exercise of the core right. This requires a rigorous review of the government's justifications, "if not quite 'strict scrutiny." ¹⁹ The City did not come close to satisfying this standard. It produced no evidence establishing that firing ranges necessarily pose any significant threat to public safety, and at least one of its arguments was so transparently a makeweight that "[t]o raise it at all suggests pretext." ²⁰

The analytical framework adopted by Judge Sykes in this case is broadly similar to the one adopted by the *Heller II* majority. Her approach, however, is superior in at least two important respects.

First, Heller II adopted a view reflecting a somewhat loose consensus of other circuit courts. Judge Sykes, however, relied almost entirely on Heller, McDonald, and other Supreme Court decisions, and she exhibited a detailed and thoughtful familiarity with the Court's opinions. It is true that Heller and McDonald can be read differently, as Judge Kavanaugh showed in Heller II, but Judge Sykes' analysis has better support in the text of the opinions. Inferior federal courts are required to follow the Supreme Court,²¹ but not to follow the lead of other circuits. It is therefore generally a better practice to focus on what the Supreme Court itself has said—to look, so to speak, for the Court's "original meaning"—than to play a kind

of telephone game by interpreting Supreme Court opinions on the assumption that other courts have read them correctly.

Second, and this is more important, Judge Sykes took the importance of the Second Amendment more seriously than the *Heller II* majority. Whereas *Heller II* casually applied intermediate scrutiny in a way that too often accepted flimsy justifications for the regulations, Judge Sykes insisted on the kind of rigor that courts routinely demand in First Amendment cases. Unlike the *Heller II* majority, she gave appropriate attention to the fundamental principle, expressly adopted by the Supreme Court, that the Second Amendment should not "be singled out for special—and specially unfavorable treatment." If enough other judges will follow her lead, perhaps the Second Amendment will not return to its pre-*Heller* status as a kind of constitutional pariah.

Conclusion

The Supreme Court's *Heller* opinion disapproved a governmental ban on keeping a handgun in the home, while endorsing a number of other gun control regulations. The Court refused to adopt any clear analytical framework for resolving the countless issues about which *Heller* said nothing. Some of its reasoning, or rhetoric, suggests that such issues should be resolved solely by consulting American history and tradition, along with the text of the Constitution. Other parts of the opinion can be read to point toward the use of the Court's "tiers of scrutiny" approach.

The federal courts of appeals have declined to follow the history-and-tradition approach. The effort by Judge Brett Kavanaugh to take that approach in his *Heller II* dissent illustrates why this approach is not likely to prove fruitful, or even workable. The D.C. Circuit's majority opinion in *Heller II* illustrates the perils of adapting the "tiers of scrutiny" approach without an adequate regard for the value of Second Amendment rights. Judge Diane Sykes' opinion for the Seventh Circuit in *Ezell* shows that circuit judges who are so inclined can show appropriate respect both to the Supreme Court and to the Second Amendment. She deserves to be widely imitated.

Endnotes

- 1 554 U.S. 570 (2008).
- 2 For a detailed analysis, see Nelson Lund, *The Second Amendment*, Heller *and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1356-68 (2009), *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=1324757.
- 3 554 U.S. at 630.
- 4 130 S. Ct. 3020 (2010). In this case, the Court struck down a handgun ban similar to the one at issue in *Heller*. For further details, see Nelson Lund, *Two Faces of Judicial Restraint (Or Are There More?) in* McDonald v. City of Chicago, 63 Fl.A. L. Rev. 487 (2011), *available at* papers.srn.com/sol3/papers.cfm?abstract_id=1658198.
- 5 554 U.S. at 628-29.
- 6 Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011).
- 7 Id. at 1257 (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 661 (1994)).
- 8 Id. at 1257-58 (citing Clark v. Jeter, 486 U.S. 456, 461 (1988)).

- 9 The court also refused to consider issues involving semi-automatic pistols and shotguns, on the ground that none of the plaintiffs had tried to register such weapons.
- 10 554 U.S. at 625.
- 11 For a detailed proof of these claims, see Lund, supra note 2, at 1356-67.
- 12 This is not a paranoid fantasy. See, e.g., Stephen P. Halbrook, "Only Law Enforcement Will Be Allowed to Have Guns": Hurricane Katrina and the New Orleans Firearm Confiscations, 18 GEO. MASON U. C.R. L.J. 339 (2008) (discussing the aftermath of a police decision that only law enforcement officers would be allowed to possess guns in New Orleans after Hurricane Katrina struck the area).
- 13 To its credit, the majority recognized that the government had failed to meet its burden with respect to some of the registration and licensing requirements. In calling for further development of the record on remand, however, the court merely required the government "to present some meaningful evidence" to justify its predictions about enhanced public safety. 670 F.3d at 1259. That doesn't sound like much of a hurdle.
- 14 Id. at 1262.
- 15 651 F.3d 684 (7th Cir. 2011).
- 16 After the district court denied the plaintiffs' motion for a preliminary injunction, the Seventh Circuit reversed and remanded with orders to grant the motion. Because of the procedural posture of the case, the court of appeals did not issue a decision on the merits. In explaining why the plaintiffs had demonstrated a strong likelihood of success on the merits, however, the court provided a detailed analysis that I will treat for simplicity of exposition as though it were a merits decision.
- 17 651 F.3d at 703.
- 18 Id. at 704-06.
- 19 Id. at 708.
- 20 Id. at 709-10.
- 21 State courts may have more latitude than federal courts in dealing with guidance from the Supreme Court. See Nelson Lund, Stare Decisis and Originalism: Judicial Disengagement from the Supreme Court's Errors, 19 GEO. MASON L. REV. 1029, 1039-41 (forthcoming 2012), draft available at papers. ssrn.com/sol3/papers.cfm?abstract_id=2033946.
- 22 McDonald v. City of Chicago, 130 S. Ct. 3020, 3044 (2010); cf. United States v. Skoien, 614 F.3d 638, 651-54 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (criticizing Judge Frank Easterbrook's majority opinion for relieving the government of its burden of justifying its disarmament regulation and for depriving a criminal defendant of an opportunity to contest the dubious non-record evidence on which the majority relied).



TESTIMONY ON THE "DEMOCRACY RESTORATION ACT"

By Roger Clegg*

Note from the Editor:

This paper is based on testimony given by the author before the House Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Liberties on March 16, 2010 regarding H.R. 3335, the "Democracy Restoration Act." The testimony is available at the following link: http://judiciary.house.gov/hearings/pdf/Clegg100316.pdf. A bill with substantially the same provisions was reintroduced in the current House of Representatives on June 16, 2011, and in the current Senate on December 16, 2011. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about the constitutional and policy issues involved in federal legislation related to felon voting. To this end, we offer links below to different testimony on the issue from the same hearing, and we invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

Related Links:

- Testimony of Hilary O. Shelton, Director, NAACP Washington Bureau & Senior Vice President for Advocacy and Policy: http://judiciary.house.gov/hearings/pdf/Shelton100316.pdf
- Testimony of Prof. Burt Neuborne, Inez Milholland Professor of Civil Liberties at New York University School of Law and Legal Director of the Brennan Center for Justice: http://judiciary.house.gov/hearings/pdf/Neuborne100316.pdf
- Testimony of Hans A. von Spakovsky, Senior Legal Fellow, Center for Legal and Judicial Studies, Heritage Foundation: http://judiciary.house.gov/hearings/pdf/Neuborne100316.pdf
- Testimony of Carl Wicklund, Executive Director, American Probation and Parole Association: http://judiciary.house.gov/hearings/pdf/Wicklund100316.pdf

Introduction

hank you, Mr. Chairman, for the opportunity to testify this afternoon before the Subcommittee.

My name is Roger Clegg, and I am president and general counsel of the Center for Equal Opportunity, a nonprofit research and educational organization that is based in Falls Church, Virginia. Our chairman is Linda Chavez, and our focus is on public policy issues that involve race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. I should also note that I was a deputy in the U.S. Department of Justice's Civil Rights Division for four years, from 1987 to 1991, and that I testified against a very similar bill in 1999.

With all respect, Mr. Chairman, I do not think Congress should pass H.R. 3335, and for two reasons. First, it does not have authority under the Constitution to do so, since it is the states' prerogative to disenfranchise felons if they choose to do so. Second, even if Congress had the authority to pass this bill, it would not be good policy, because it is a matter best left to individual states, and there are sounds reasons why the states may decide that at least some felons should not vote—that is, that those who are not willing to follow the law should not have a role in making the law.

I. Lack of Congressional Authority to Enact Felon Re-Enfranchisement Legislation

A. Description of the Bill

The heart of H.R. 3335 is section 3, which provides:

* President and General Counsel, Center for Equal Opportunity

disenfranchised because of their race, nor could it plausibly do so, as I discuss later on. Without an assertion of its authority under the Fourteenth or Fifteenth Amendment, Congress may not dictate to states the requirements of electors in state

serving time from voting.

elections, and wisely H.R. 3335 does not do so. H.R. 3335 does, however, propose to cover federal elections.

B. Possible Fonts of Authority

The right of an individual who is a citizen of the United States to vote in any election for Federal office shall not

be denied or abridged because that individual has been

convicted of a criminal offense unless such individual is

serving a felony sentence in a correctional institution or

Thus, with the exception of those currently serving time in

prison for a felony conviction, H.R. 3335 would require

that all persons convicted of crimes—those serving time for

misdemeanors or in "any residential community treatment

center" for a felony, those on probation or parole for felonies or

misdemeanors, and those who have completed their sentences

for felonies or misdemeanors—be allowed to vote in federal

elections. Also, since it is logistically difficult for states to have

one voting list, set of ballots, and set of voting booths for federal

elections and another for state and local elections, it is likely

that this bill would change who is allowed to vote in state and

local elections. This is a dramatic change because currently the

vast majority of states bar at least some felons not currently

H.R. 3335 makes no claim that criminals are

facility at the time of the election.

The Supreme Court reaffirmed in *United States v. Lopez*¹ what is obvious from the text of the Constitution: "The

Constitution creates a Federal Government of enumerated powers." Accordingly, Congress must point to some font of authority in the Constitution for passing H.R. 3355.

There are three theories under which Congress might be asserting authority for passing this bill. First, if Congress has authority to pass this bill under Article I, Section 4 of the Constitution, it can simply assert its conclusion that all criminals (excepting felons currently in prison) are entitled to vote. Under this theory, Congress would not rely on any claim that it is addressing racial discrimination. Under the last two theories, Congress could assert authority to pass this bill under the enforcement clauses of the Fourteenth or Fifteenth Amendment, either because of the disparate impact that disenfranchisement of felons has on some minority groups or because this disenfranchisement is in fact racially motivated.²

C. Article I, Section 4

To be valid, the Article I, Section 4 justification must overcome the explicit language of Article I, Section 2 of the Constitution, which provides that electors for the House of Representatives—and, by extension, for all federal elections—"shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Thus, the Constitution gives authority for determining elector qualifications to the States.

It might be asserted that Article I, Section 4 gives Congress authority to trump the States, insofar as it allows Congress to "make or alter such [state] Regulations" regarding "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." And, indeed, it appears that this is what H.R. 3335 principally relies on.³

As a textual matter, however, this interpretation is unpersuasive, since Article I, Section 4 discusses "holding Elections," not who is allowed to vote, which is the express focus of Section 2.

This is what the words of Article I, Section 4 mean and meant; and it is also what the Framers intended them to mean. In *The Federalist* No. 60, Alexander Hamilton said of Article I, Section 4 that the national government's "authority would be expressly restricted to the regulation of the times, the places, and the manner of elections. The qualifications of the persons who may choose or be chosen . . . are defined and fixed in the Constitution, and are unalterable by the legislature." In *The Federalist* No. 52, James Madison had written of Article I, Section 2: "To have left [the definition of the right of suffrage] open for the occasional regulation of the Congress would have been improper" Hamilton and Madison believed that generally the state constitutions would determine who voted; Congress, in any event, would not.

The Supreme Court's decision in *Oregon v. Mitchell*th should be discussed here. In a highly fractured series of opinions, five Justices voted to uphold legislation that required states to allow eighteen-year-olds to vote in federal elections. Justice Black wrote one opinion, Justice Douglas another, and Justice Brennan a third, in which he was joined by Justices White and Marshall. None of those writing or joining one of these opinions joined any of the others, and four other Justices—Harlan, Stewart, Blackmun, and Chief Justice Burger—dissented. The

issue was superseded six months later with the ratification of the Twenty-Sixth Amendment, which provided that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

Although a majority of the Justices upheld a statute that dictated who could vote in federal elections, only one, Justice Black, relied on Article I, Section 4. The other four Justices relied on interpretations of Congress's enforcement authority under the Fourteenth and Fifteenth Amendments that are inconsistent with the Court's subsequent ruling in *Richardson v. Ramirez*⁵ combined with *City of Boerne v. Flores*. Accordingly, reliance on Article I, Section 4 lacks textual support and has been endorsed by only a 1970 opinion written by Justice Black. *Oregon v. Mitchell*, therefore, provides little support today for H.R. 3335.

Finally, it is not at all clear that the Framers were wrong in letting states determine who should vote. Some states are more conservative than this bill would allow, but two other states are more liberal, and it is difficult to see why we should insist on a one-size-fits-all approach. The bill complains about a lack of uniformity, but it is hard to take this complaint seriously when it allows nonuniformity so long as it is in the more liberal direction.⁷

D. The Fourteenth and Fifteenth Amendments

If Article I, Section 4 does not give Congress the power to trump the states' authority to determine voting qualifications in Article I, Section 2, then we are left with the claim that Congress may pass H.R. 3335 under its authority to enforce the Fourteenth and Fifteenth Amendments. The bill's findings suggest that it might be relying in part on these constitutional provisions as well.⁸

Laws that have a mere disparate impact but no discriminatory intent do not violate the Fourteenth and Fifteenth Amendments. The Supreme Court has so held repeatedly with respect to the Fourteenth Amendment. A plurality has so held with respect to the Fifteenth Amendment,9 and it is hard to see how the standard could be different for one Reconstruction amendment than for another. When the Supreme Court in Hunter v. Underwood¹⁰ considered a claim that a state law denying the franchise to those convicted of crimes "involving moral turpitude" was unconstitutional race discrimination, it said: "[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 11 Accordingly, Congress cannot credibly assert its enforcement authority if it can point to nothing but disparate impact.

It is true that the Supreme Court has upheld congressional bans on certain voting practices and procedures—like literacy tests—that are not themselves discriminatory on their face but have disproportionately excluded racial minorities from voting. But, as the Court stressed in *Boerne*, these cases involved bans aimed at practices that historically have been rooted in intentional discrimination.

H.R. 3335 does not assert that the reason states disenfranchise criminals is racial, nor could this assertion be

plausibly made. To begin with, Section 2 of the Fourteenth Amendment itself contemplates disenfranchisement. It acknowledges that "the right to vote" may be "abridged . . . for participation in rebellion, or other crime." Surely this is recognition in the most relevant part of the Constitution itself that there are typically nonracial reasons for disenfranchising criminals.

That an overwhelming number of states have passed such disenfranchisement laws also indicates that something other than racial discrimination is indeed the motive. Rather, as the Sentencing Project and Human Rights Watch—vigorous supporters of felon re-enfranchisement—acknowledge, "Disenfranchisement in the U.S. is a heritage from ancient Greek and Roman traditions carried into Europe." In Europe, the civil disabilities attached to conviction for a felony were severe, and "English colonists brought these concepts with them to North America." ¹² Consider the following ¹³:

- (1) Only two New England states—Maine and Vermont—allow all felons to vote.
- (2) Thirty states prohibit felons who are on probation from voting.
- (3) Thirty-five states prohibit felons who are on parole from voting.
- (4) The states that prohibit all felons from voting—whether in prison, on probation, on parole, or having fully served their sentences—are Alabama (for certain offenses); Arizona (for a second felony); Delaware (certain offenses, five years); Florida (certain offenses); Kentucky; Mississippi (certain offenses); Nebraska (2 years); Nevada (except first-time nonviolent); Tennessee (certain offenses); Virginia; and Wyoming (certain offenses, 5 years). This is hardly the old Confederacy; indeed, fewer than half the states fall in that category. Or consider this: Only one state in the old Confederacy, Virginia, disenfranchises all felons (and there the governor has frequently re-enfranchised felons).
- (5) Furthermore, a majority of the states in the old Confederacy—Texas, Arkansas, Louisiana, North Carolina, South Carolina, and Georgia—do allow felons to vote, so long as they are no longer in prison, on parole, or on probation.

It is true that, between 1890 and 1910, five Southern states (Alabama, Louisiana, Mississippi, South Carolina, and Virginia) tailored their criminal disenfranchisement laws to increase their effect on black citizens. ¹⁴ But these states have all changed their laws to one degree or another, and in any event, the judiciary has been willing to strike such laws down when it is shown that they were intended to discriminate on the basis of race. For example, the Supreme Court struck down an Alabama law in *Hunter v. Underwood.* The meat-ax approach of H.R. 3335 is as unnecessary as it is unwise. We can continue the historical narrative by consulting another key source for the felon-voting proponents: an article by professors Christopher Uggen and Jeff Manza in the *American Sociological Review*. It concedes, "Restrictions [on felon voting] were first adopted by some states in the post-Revolutionary era, and by the eve

of the Civil War some two dozen states had statutes barring felons from voting or had felon disenfranchisement provisions in their state constitutions." That means that over 70 percent of the states had these laws by 1861—when most blacks could not vote in any case because they were still enslaved.

During the period from 1890 to 1910, when five Southern states passed race-targeted felon-disenfranchisement, a graphic in an American Sociological Review article by Christopher Uggen and Jeff Manza indicates that over 80 percent of the states in the U.S. already had felon-disenfranchisement laws. Alexander Keyssar's book The Right to Vote—cited in the Uggen and Manza piece—says that, outside the South, the disenfranchisement laws "lacked socially distinct targets and generally were passed in a matter-of-fact fashion." Even for the post-Civil War South, Keyssar has more recently written, in some states "felon disfranchisement provisions were first enacted [by] . . . Republican governments that supported black voting rights." Thus, to quote Uggen and Manza, "In general, some type of restriction on felons' voting rights gradually came to be adopted by almost every state, and at present 48 of the 50 states bar felons—in most cases including those on probation or parole—from voting."15

The Supreme Court's decision in *City of Boerne v. Flores*, discussing the scope of Congress's enforcement powers for the Reconstruction amendments, declared, "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." The Court concluded that Congress could not bar state actions with a discriminatory effect on the free exercise of religion when the underlying constitutional right was to be free from state actions with discriminatory intent. Likewise, there is no "congruence and proportionality" between guaranteeing people the right to vote irrespective of race and a requirement that criminals be allowed to vote, just because there is a specific, transitory racial imbalance at this particular time among felons.

II. Policy Objections to Felon Re-Enfranchisement

Those who are not willing to follow the law cannot claim a right to make the law for everyone else. And when you vote, you are indeed making the law—either directly, in a ballot initiative or referendum, or indirectly, by choosing lawmakers.

Not everyone in the United States may vote—not children, for example, or noncitizens, or the mentally incompetent, or criminals. We have certain minimum, objective standards of responsibility, trustworthiness, and loyalty for those who would participate in the solemn enterprise of self-government. And it is not unreasonable to suppose that, in particular, those who have committed serious crimes against their fellow citizens may be presumed to lack this responsibility, trustworthiness, and loyalty.

It is not too much to demand that those who would make the laws for others—who would participate in self-government—be willing to follow those laws themselves. A ballot initiative in November 2000 removed Massachusetts from the states allowing felons now in prison to vote (as noted above, there are now only two, Vermont and Maine). Francis Marini, GOP leader of the state house, said of the state's repealed practice, "It makes no sense." Marini stated, "We

incarcerate people and we take away their right to run their own lives and leave them with the ability to influence how we run our lives?" (Massachusetts governor Paul Cellucci decided to back the repeal after prisoners began to organize a political action committee.)

These are, in my view, strong arguments—and certainly strong enough to refute a claim that Congress must intervene here to prevent some sort of irrational malfeasance in the states by dictating a one-size-fits-all national policy.

The policy arguments in favor of felon voting, on the other hand, are unpersuasive. For the balance of my testimony, I will address them.

"We let everyone else vote." Again, this is simply not true. We also deny the vote to children, noncitizens, and the mentally incompetent, because they, like felons, fail to meet the objective, minimal standards of responsibility, trustworthiness, and loyalty we require of those who want to participate in the government of not only themselves but their fellow Americans.

"Once released from prison, a felon has paid his debt to society and is entitled to the full rights of citizenship." This rationale would apply only to felons no longer in prison, of course, and might not apply with respect to felons on parole or probation. Even for these "former" felons, the argument is not persuasive. While serving a sentence discharges a felon's "debt to society" in the sense that his basic right to live in society is restored, serving a sentence does not require society to forget what he has done or bar society from making judgments based on his past crimes.

For example, federal law prohibits felons from possessing firearms or serving on juries, which does not seem unreasonable. Here is a more dramatic example: Most would agree that a public school ought to be able to refuse to hire a convicted child molester, even after he has been released from prison. In fact, there are a whole range of "civil disabilities" for felons after prison release that apply as a result of federal and state law, listed in a 144-page binder (plus two appendices) published by the U.S. Justice Department's Office of the Pardon Attorney. Society is simply not required, nor should it be required, to ignore someone's criminal record once he gets out of prison.

Finally, I should note that it is unlikely that those on the other side of the aisle really take this argument seriously. If they did, then presumably they would agree that, if you have *not* paid your debt to society, then you should *not* be able to vote. But this is frequently not the case. Marc Mauer, executive director of the ACLU's Sentencing Project, for example, believes that "people in prison should have the right to vote."

"Disenfranchisement can be a disproportionate penalty." Common sense would dictate that some felons be allowed to vote and others not. Some crimes are worse than others, some felons have committed more crimes than others, and some crimes are recent while others are long past. At one extreme, it is hard to see why a man who wrote a bad check in 1933 and has a spotless record since then should not be entrusted with the franchise. At the other extreme, however, it is hard to see why a man just released after serving time for espionage and treason, and after earlier convictions for murder, rape, and voter fraud, should be permitted to vote.

Yes, not all crimes are equal, even among felons, and one cannot presume that all felons are equally to be mistrusted with the ballot. But it does not follow that therefore all felons should be allowed to vote. Rather, it would be more prudent to distinguish among various crimes, such as serious crimes like murder, rape, treason, and espionage on the one hand, versus marijuana possession on the other; and between crimes recently committed and crimes committed in the distant past; and among those who have committed many crimes and those who have committed only one.

But this line-drawing is precisely why the matter should be left to the states, and why it should be addressed on a case-by-case basis. It will be difficult for Congress to undertake this power—even if it had the authority to do so, which, as discussed earlier, it does not—since, for one thing, every state has its own array of offenses. Further, these offenses are constantly changing, so Congress would have to be constantly updating any statute it wrote that drew distinctions among various crimes. It would also be difficult to draft a statute that drew intelligent lines with respect to how recent a crime was and the number of crimes committed. Accordingly, it is wiser for Congress to leave the line-drawing to the states, where it has always been.

Finally, I should note that, even at the state level, drafting a statute that would properly calibrate seriousness of offenses, number of offenses, and how recently they occurred is probably impossible. The better approach is a general presumption against felons voting but with an efficacious administrative mechanism for restoring the franchise on a case-by-case basis through an application procedure. (If those procedures are not working well, as is sometimes complained, then those complaining should work to improve them, rather than arguing that the solution is to let all felons vote automatically.)

"These laws have a disproportionate racial impact." Undoubtedly the reason that there is heightened interest in this subject is that a disproportionate percentage of felons are African Americans. According to the NAACP at one point, thirteen percent of African American males (1.4 million) are prohibited from voting, a much higher percentage than other demographic groups. The NAACP has in the past pointed to Alabama and Florida as particularly egregious examples, where "more than 30 percent of all African American men have lost their rights to vote forever." It blamed, in particular, the war on drugs, arguing that between 1985 and 1995 there was a 707 percent increase in blacks in state prison for drug offenses, compared to a mere 306 percent increase for whites. Other traditional civil-rights groups and leaders, like Jesse Jackson, have also supported felon re-enfranchisement.

As discussed earlier, the racial impact of these laws is irrelevant as a legal matter. It should also be irrelevant as a matter of policy. Legislators should determine what the qualifications or disqualifications for voting are and then let the chips fall where they may. In *The Souls of Black Folk*, W.E.B. Du Bois wrote: "Draw lines of crime, of incompetency, of vice, as tightly and uncompromisingly as you will, for these things must be proscribed; but a color-line not only does not accomplish this purpose, but thwarts it."

The fact that these statutes disproportionately disenfranchise men and young people is not cited as a reason

for changing them—as "sexist" or "ageist"—nor does it matter that some racial or ethnic groups may be more affected than others. That criminals are "overrepresented" in some groups and "underrepresented" in others is no reason to change the laws. This will probably always be the case, with the groups changing with time and with the country's demography. If large numbers of young people, black people, or males are committing crimes, then our efforts should be focused on solving those problems. It is bizarre instead to increase criminals' political power.

Much has been made of the high percentage of criminals—and, thus, disenfranchised people—in some communities. But the fact that the effects of disenfranchisement may be concentrated in particular neighborhoods is actually an argument in the laws' favor. If these laws did not exist there would be a real danger of creating an anti-law-enforcement voting bloc in local municipal elections, for example, which is hardly in the interests of a neighborhood's law-abiding citizens. Indeed, the people whose votes will be diluted the most if criminals are allowed to vote will be law-abiding people in high-crime areas—people who are themselves disproportionately poor and minority. Somehow, the liberal civil-rights groups often forget them.

"We should welcome felons back into the community." The bill suggests that re-enfranchising felons is a good way to reintegrate them into society. I am sympathetic to this, but it should not be done automatically, but carefully and on a caseby-case basis, once it is shown that the felon has in fact turned over a new leaf. When that has been shown, then holding a ceremony—rather like a naturalization ceremony—in which the felon's voting rights are fully restored would be moving and meaningful. But the restoration should not be automatic, because the change of heart cannot be presumed. Richard Freeman, of Harvard University and the National Bureau of Economic Research, has found, "Two-thirds of released prisoners are re-arrested and one-half are reincarcerated within 3 years of release from prison Rates of recidivism necessarily rise thereafter, so that upwards of 75%-80% of released prisoners are likely to be rearrested within a decade of release."

Felon re-enfranchisement sends a bad message: We do not consider criminal behavior such a serious matter that the right to vote should be denied because of it. Alternatively, consider that not allowing criminals to vote is one form of punishment and a method of stigmatization that tells criminals that committing a serious crime puts them outside the circle of responsible citizens. Being readmitted to the circle is not automatic. It is true that a disproportionate number of African Americans are being disenfranchised for committing serious crimes, but their victims are disproportionately black, too. Perhaps the logical focus of an organization like the NAACP should be on discouraging the commission of such crimes, rather than minimizing their consequences.

Conclusion

In sum, Mr. Chairman, in my opinion Congress does not have authority to pass this bill and, even if it did, it would be unwise to do so. Thank you again for the opportunity to testify today.

Endnotes

1 514 U.S. 549 (1995).

2 The Task Force on Constitutional and Federal Election Law of the National Commission on Federal Election Reform, in its Task Force Report prepared by Professor Daniel Ortiz, likewise concluded that Congress lacked authority under these possible fonts, and also rejected the Commerce Clause as a possibility. Nat'l Comm'n on Fed. Election Reform, To Assure Pride AND CONFIDENCE IN THE ELECTORAL PROCESS: TASK FORCE REPORTS 40-41 (Aug. 2001), available at http://www.google.com/url?sa=t&rct=j&q=&esr c=s&source=web&cd=2&ved=0CFQQFjAB&url=http%3A%2F%2Ffl1.findlaw.com%2Fnews.findlaw.com%2Fhdocs%2Fdocs%2Felection2000% 2Felectionreformrpt0801.pdf&ei=Ye_9T9i1NIfq6wGZtbj6Bg&usg=AFQj CNGwTAhj94u9AvNybeRo0ZTAp-Fv1Q&sig2=7B5sb7rXCBRMMTyh8 u3O3Q. The Task Force concluded, however, that Congress might use its Spending Clause authority. Id. at 41. However, the report also conceded that this would not work if a state was willing to refuse whatever funds were being tied to such a prohibition, and the Commission itself apparently rejected this suggestion, concluding, "[W]e doubt that Congress has the constitutional power to legislate a federal prescription on this subject." Id. at 45. I agree with the Commission. If Congress tied participation in a spending program to reenfranchising felons, the courts would likely and properly conclude that this was unrelated to the purpose of the spending and perhaps coercive as well, making the requirement unconstitutional. See South Dakota v. Dole, 483 U.S. 203, 207-08, 211 (1987) (holding that spending program regulations must be reasonably relevant to the federal interest in the program and may not be coercive).

- 3 See Section 2(2).
- 4 400 U.S. 112 (1970).
- 5 418 U.S. 24 (1974).
- 6 521 U.S. 507 (1997).
- 7 Compare Sections 2(4) and 2(5) with Section 7(a).
- 8 See, e.g., Sections 2(3), 2(8), and 2(9).
- 9 See City of Mobile v. Bolden, 446 U.S. 55, 62-65 (1980).
- 10 471 U.S. 222 (1985).
- 11 *Id.* at 227-228 (quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-265 (1977)).
- 12 See also Nat'l Comm'n on Fed. Election Reform, supra note 2, at 44-45.
- 13 Source: The Sentencing Project.
- 14 See Andrew L. Shapiro, Note, Challenging Criminal Disenfranchisement Laws under the Voting Rights Act: A New Strategy, 1032 Yale L.J. 537 (1993).
- 15 For more on the non-racist history of felon disenfranchisement in the United States—from the Founding, up to the Civil War, after the Civil War (with the limited exceptions noted above), including the Reconstruction Congress, on to the present day, see Roger Clegg, George T. Conway III & Kenneth K. Lee, The Bullet and the Ballot? The Case for Felon Disenfranchisement Statutes, 14 J. GENDER Soc. POL'Y & L. 1, 5-8 (2006). See also John Dinan, The Adoption of Criminal Disenfranchisement Provisions in the United States: Lessons from the State Constitutional Convention Debates, 9 J. POL'Y HIST. 282 (2007); Richard M. Re & Christopher M. Re, Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments, 121 YALE L.J. 1584 (2012).



The Economic Freedom Amendment: A States-Based Response to the Nationalizing Effects of Bailouts and Federal Ownership of Corporate Stock

By Aaron Jack*

Note from the Editor:

This paper discusses a proposed state constitutional amendment that would deny federal ownership of stock in state-chartered corporations. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about the constitutional and policy issues surrounding such an amendment. To this end, while this is a new proposal and thus has been the subject of little debate to date, we offer links below to different views on the financial crisis, and we invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

Related Links:

- Barbara Black, *The U.S. as "Reluctant Shareholder": Government, Business and the Law*, 5 Entrepreneurial Bus. L.J. 561 (2010): http://moritzlaw.osu.edu/eblj/issues/volume5/number2/black.pdf
- Steven M. Davidoff, *Uncomfortable Embrace: Federal Corporate Ownership in the Midst of the Financial Crisis*, 95 MINN. L. REV. 1733 (2010): http://www.minnesotalawreview.org/articles/uncomfortable-embrace-federal-corporate-ownership-midst-financial-crisis/
- Marcel Kahan & Edward B. Rock, *When the Government Is the Controlling Shareholder*, 89 Tex. L. Rev. 1293 (2011): http://www.texaslrev.com/sites/default/files/issues/vol89/pdf/KahanRock.pdf
- Benjamin A. Templin, *The Government Shareholder: Regulating Public Ownership of Private Enterprise*, 62 Admin. L. Rev. 1127 (2011): <a href="http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1636491&http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&ved=0CF8QFjAG&url=http%3A%2F%2Fpapers.ssrn.com%2Fsol3%2FDelivery.cfm%3Fabstractid%3D1636491&ei=ZIcEUJ6_GceP0QHi9dDnBw&usg=AFQjCNEx2KYZ520oPgKa3lSnwkyOEVLH8g&sig2=bwdsY3hyFAeGAQYAVEJPLQ

The founding ideals of our Republic include adherence to the notion that we are a nation of laws and that these laws must be predictable and consistently enforced. However, during the 2008 financial crisis, the federal government set new precedents that may make it more likely that in the event of a future financial crisis, various high-ranking officials, some of whom are unaccountable to Congress or the President, could suspend current rules and contractual agreements. The federal intervention during the most recent crisis substantially changed lien laws, bankruptcy priority rules, interest rate risk, freedom of contract, and private property rights, causing many to argue that the federal government promoted uncertainty and thus adversely impacted investors. State corporate law has neither anticipated nor accounted for adequately protecting shareholders in the midst of these changes.

I. The Financial Crisis and the Federal Response

In response to the 2008 financial crisis, the United States government instituted a massive bailout of banks, financial institutions, and automobile manufacturers.² While there

* Aaron Jack, J.D., M.B.A., is the Kansas Securities Commissioner, a position he was appointed to by Kansas Governor Sam Brownback in 2011. Aaron was previously the West-Central Zone Director for New York Life where his 3,200 registered representatives produced over \$1.5 billion in sales annually. Aaron was the first director in the history of New York Life to raise \$1 billion in new assets for the company's investment management subsidiary, NYLIM.

had been isolated instances in the nation's history of direct governmental intervention intended to stem perceived threats to the national economy,³ the methods used by the federal government to implement the 2008 bailout were unprecedented in nature and scope.⁴

In March 2008, when it appeared inevitable that the investment bank Bear Stearns was going to fail, the Treasury Department orchestrated a deal for J.P. Morgan to acquire Bear Stearns.⁵ This government-sponsored merger contained provisions that did not follow established corporate law precedent.⁶ During the implementation of the Troubled Asset Relief Program ("TARP"), there were instances in which the Treasury Department and the Federal Deposit Insurance Corporation ("FDIC") essentially required healthy banks to accept bailout funds.7 Nearly a year later, General Motors ("GM") and Chrysler went into bankruptcy proceedings that were pre-negotiated by the federal government and contained terms that went beyond established bankruptcy procedure and creditor priority laws.8 In short, throughout the 2008 financial crisis, the federal government suspended the rule of law in its efforts to stabilize the country's financial system. While some use a "success narrative" to defend these actions, the methods employed by the government during the financial crisis amount to what could be deemed the equivalent of the implementation of economic martial law.9

The bailout also led to the de facto nationalization of several state-incorporated companies. ¹⁰ Starting with the September

2008 bailout of insurance giant American International Group, Inc. ("AIG"), the federal government acquired equity stakes in a multitude of private companies and became the controlling shareholder in some of the nation's largest auto manufacturing and financial companies.¹¹ As will be discussed in detail below, a myriad of ongoing issues are caused by this novel reality. 12 In its newfound role as controlling shareholder of private enterprise, the federal government has pressured these companies to take actions that are not intended to maximize shareholder value. Moreover, the federal government's sovereign immunity likely prevents minority shareholders from suing the government in shareholder suits. As a result, it will be more difficult for minority shareholders in these circumstances to protect their investment. This level of entanglement between the federal government and private industry is unprecedented in the United States.¹³

This article discusses the ability of individual states to enact legislation preventing the federal government from acquiring equity interests in state-incorporated companies. ¹⁴ Specifically, this article concludes that the federal government could be prevented from acquiring such interests if individual states amended their constitutions to ban the transfer of equity interests in companies to the federal government.

Some will argue such action is unnecessary due to the fact that the crisis is past and the federal government is not actively acquiring equity in private companies. ¹⁵ Others will maintain that the precedent of acquiring equity in private companies has been set, ¹⁶ and, if it is not prohibited from doing so, the federal government will be able to resort to such actions in times of stability or crisis. Passing a state constitutional amendment would ensure the ability of minority shareholders to protect themselves, create an obstacle to nationalization of private industry, and restore greater predictability to our national economy. ¹⁷

II. Federal Government Ownership of State-Incorporated Companies During The Financial Crisis

The 2008 financial crisis began with the collapse of Bear Stearns in March 2008. ¹⁸ Although the federal government never acquired equity in Bear Stearns, it did orchestrate a deal that allowed J.P. Morgan to acquire Bear Stearns. ¹⁹ This involvement by the federal government in the Bear Stearns deal was significant because it sent a signal that large financial firms would not be allowed to fail. ²⁰ However, in September 2008, the federal government allowed Lehman Brothers to fail, ²¹ opening itself to criticism by some that it was engaged in the practice of arbitrarily picking winners and losers. ²²

At the same time that the Bear Stearns and Lehman Brothers saga was playing out, insurance giant AIG was faltering.²³ The government employed a different strategy with AIG than it did with Bear Stearns. Instead of orchestrating an acquisition of AIG, the Federal Reserve gave AIG an \$85 billion loan.²⁴ In exchange, the federal government received preferred shares in AIG that were convertible into common stock.²⁵ These shares represented 79.9% of the voting interest in AIG.²⁶ Eventually, the preferred shares were converted, and by March 2011, the government owned 92.1% of the outstanding shares of AIG common stock.²⁷ With this transaction, the federal

government was in the business of owning equity stakes in state-incorporated companies.²⁸

In October 2008, Congress passed the Emergency Economic Stabilization Act ("EESA"), which created TARP.²⁹ TARP authorized the Secretary of the Treasury to purchase toxic assets, including credit default swap obligations and other mortgage-backed securities, from struggling financial institutions.³⁰ The Act did not specifically authorize the government to purchase equity in the companies themselves.³¹ Nonetheless, in its implementation of TARP, the Treasury Department continued the practice of purchasing equity interests in state-incorporated companies that it began with its pre-TARP acquisition of AIG.³² Many scholars have stated that little evidence exists to suggest that Congress intended TARP funds to be used in this manner.³³

In its implementation of TARP, the federal government also acquired interests in the financial conglomerate Citigroup. 34 By September 2009, the government held approximately 33.6% of Citigroup's common stock. 35 The Treasury Department began selling its Citigroup common stock in April 2010 and was fully divested by the end of that year. 36 This interest in Citigroup, though short-lived, led to criticism from some sectors that the federal government was willingly exercising control over the company to advance political goals. 37

The Treasury Department used the Capital Purchase Program ("CPP"), an initiative of TARP, to purchase smaller equity stakes in a vast array of banks.³⁸ Reports indicate the Treasury Department spent \$205 billion to acquire equity interests in 707 institutions.³⁹ Of the \$205 billion, approximately \$134 billion was injected into eight of the United States' largest financial institutions.⁴⁰ The remaining funds were invested in banks and financial institutions of various sizes across the country.⁴¹ Notably, many of these banks were pressured by regulators to accept the TARP funds against their wishes.⁴²

Starting in December 2008, the Treasury Department interpreted TARP to give itself the authority to intervene in the automobile industry by pouring capital into both GM and Chrysler. ⁴³ Subsequently, both companies were restructured in bankruptcies that were pre-negotiated by the federal government. When the restructuring was completed, the federal government held 61% of the "new" GM and 8% of the "new" Chrysler. ⁴⁴ While the federal government later entirely divested its equity interest in Chrysler in a deal coordinated with the Italian automaker Fiat, the new GM completed an initial public offering in November 2010. As of February 15, 2012, the federal government still held 31.9% of GM's outstanding common stock. ⁴⁵

Additionally, GMAC (later renamed Ally Financial), the financing company closely associated with GM, also received significant TARP funds when the federal government purchased large blocks of preferred stock.⁴⁶ This preferred stock was later converted into common stock.⁴⁷ As of February 28, 2012, the federal government held approximately 74% of Ally Financial's common stock voting power.⁴⁸ GMAC was clearly eligible to receive TARP assistance because GMAC was a bank holding company and TARP was specifically designed to assist such financial institutions.⁴⁹ However, as one scholar has illustrated, GM and Chrysler (as automobile manufacturers) did not

fall within TARP's plain-meaning definition of a financial institution:

For GM and Chrysler to fit [the] definition [of a "financial institution" under TARP], one must read the phrase "any institution, including, but not limited to" to sweep in institutions that are not financial institutions under any normal understanding of the term. As a matter of statutory interpretation, that argument hardly passes the smell test. As a matter of politics, the Treasury had little choice: Congress had already rejected a request to authorize funds to bail out the auto industry and had only passed the EESA on its second try. But however thin the basis under the EESA, it did not help the secured bondholders who objected in the Chrysler bankruptcy; they found out that they did not have standing to make the argument.⁵⁰

The Treasury Department thus interpreted the EESA and TARP broadly to effectuate its bailout policies.

III. The Consequences of Nationalizing State-Incorporated Companies

Significant consequences are incurred when the federal government purchases equity in private companies. These consequences apply to the companies that were nationalized, their shareholders, and their competitors. The consequences manifest themselves through a series of conflicts of interest called "moral hazard."⁵¹ Importantly, the effects of such conflicts of interest are not isolated to wealthy shareholders. These conflicts affect large institutional investors as well as small retail investors. Every person holding a mutual fund, individual retirement account, 401(k) account, or pension fund is touched. ⁵² In this manner, the consequences of nationalizing private industry are borne by the average Main Street investor.

One conflict of interest that can affect ordinary shareholders occurs when the federal government pressures a company to choose actions intended to advance the public interest rather than actions intended to maximize firm value because "[t]he government's interests are political not financial." Thus, when the federal government is involved in a business as a going concern, the company might embark on a mandated course of action designed to enhance the federal government's political objectives at the expense of ordinary shareholders.

This type of conflict is not merely theoretical. The post-bailout landscape contains many examples of companies being forced to take actions that advanced the government's goals but were not necessarily beneficial to the company's bottom line. For instance, in October 2009, Citigroup sold a highly profitable energy trading unit at a bargain price due to the federal government's displeasure with a bonus that the unit's chief was scheduled to receive. The federal government was more concerned with cracking down on executive compensation than maximizing shareholder value. One Citigroup shareholder summarized the situation in this fashion: The message is that Vikram Pandit is not the C.E.O. of the company. You take the only division in the last 10 years that has consistently made money, and you give it away because you can't take government

backlash. Nobody in their right mind would make this deal."55 In an effort to explain the sale, a Citigroup executive is reported to have said, "We had to think of the risks the company would be under from an irritated administration or pay master."56

The Citigroup sale of its energy trading unit is not an isolated case. Since its restructuring, GM has increased its emphasis on hybrid and electric vehicles at the behest of the Administration and not because of sound economic reasons. ⁵⁷ Both the Obama Administration and Congress pressured banks that had received bailout funds to increase lending, despite the banks' fears that such lending was unsound. ⁵⁸ The most recent 10-Ks for GM and Ally Financial contain statements disclosing the fact that the Treasury Department owns a substantial interest in the companies and that the Treasury Department's interests "may differ from those of our other stockholders." ⁵⁹ GM and Ally Financial view the moral hazard created by federal ownership as material enough to be disclosed to other shareholders.

Federal ownership of equity in private industry also allows individual members of Congress to pressure companies to choose actions that advance the congressperson's political interests rather than actions intended to maximize shareholder value. When GM decided to close several dealerships across the country, members of Congress stepped in to "save" dealerships in their districts. For example, Sens. Amy Klobuchar of Minnesota and Jay Rockefeller of West Virginia (among several others)⁶⁰ intervened to rescue dealerships in their home states.⁶¹ Rep. Barney Frank of Massachusetts apparently persuaded GM to postpone the closing of a parts distribution center in Norton, Massachusetts. 62 Additionally, when GM decided to quit purchasing palladium from a mine in Montana and instead purchase it from cheaper suppliers in Russia and South Africa, Sens. Max Baucus and Jon Tester of Montana convinced GM to continue using the more expensive Montana supplier. 63 As a result of these actions, members of Congress were able to garner the favor of constituents while putting shareholder value at risk. While a member of Congress fighting for what is best for his or her constituents is not problematic in itself, moral hazard occurs when that member of Congress must choose between protecting their constituents and fulfilling their fiduciary duty as a controlling shareholder.

At a more basic level, the federal government's traditional role within the marketplace has been as regulator, not co-owner or competitor. But now that the federal government has an ownership interest in a few hand-picked companies that it regulates, companies in which the government has an interest may consequently receive preferential treatment compared to their competitors and new entrants. In other words, preferential treatment from regulators gives companies that are owned by the federal government a competitive advantage. The result is an uneven playing field that could negatively impact the value of shares in firms that compete with federally owned firms.

Once again, this is more than a theoretical concern. One scholar has observed that "government-owned banks receive regulatory preferences and are more likely to obtain government backing than non-government institutions." ⁶⁴ Additionally, as part of GM's restructuring, the IRS allowed certain operating losses from the old GM to pass forward to the new GM. The

new GM was given a tax break that could be worth up to \$45 billion. However, a company that restructures as GM did is not normally entitled to such a tax break.⁶⁵

The Treasury Department's equity stake in TARP recipients, combined with its ability to influence the management of those companies, likely makes it a controlling shareholder under state corporate law. The risk disclosures within AIG's February 2012 10-K report specifically acknowledge the federal government as a controlling shareholder. 66 Ordinarily, minority shareholders in a corporation can sue a controlling shareholder in state court for breach of fiduciary duty in order to remedy certain conflicts of interest. 67 However, the doctrine of sovereign immunity "holds that the U.S. Government cannot be sued except insofar as it has waived its immunity."68 Because the federal government is legally a controlling shareholder in TARP companies, it is likely that its sovereign immunity, unless waived, will block any shareholder suit for breach of fiduciary duty against the federal government.⁶⁹ Consequently, the protections that state law affords minority shareholders mean little when the federal government acquires equity in state-incorporated companies.⁷⁰ Our current corporate law structure does not contemplate federal ownership of these companies and is therefore inadequate to deal with these developments.

IV. A Proposal to Prevent Federal Government Ownership of Private Industry

In the last few years, scholars have proposed various new laws, regulations, and rules that attempt to provide an expanded legal framework for federal ownership of private industry.⁷¹ Although echoing these scholars in concluding that our current political and legal system is ill-suited to cope with the federal government as a shareholder, this paper proposes that a prohibitory, rather than a regulatory, approach should be adopted. This proposal is based on the belief that the nationalizing effect of the federal government's ownership in private companies is in fundamental disagreement with our founding principles and constitutional framework.⁷² By prohibiting the transfer of equity interests in private companies to the federal government, policymakers can more aptly restore the rule of law within our legal system and, correspondingly, will more amply protect shareholders.

a. Current Federal Law Does Not Prevent Federal Ownership of Private Enterprise

Despite stated attempts to "end too big to fail" and "end bailouts," Congress has not yet prohibited governmental ownership of state corporations in the wake of the 2008 crisis. In 2010, Congress responded to the public outcry caused by the pre- and post-TARP bailouts by enacting the Dodd-Frank Wall Street Reform & Consumer Protection Act ("Dodd-Frank").⁷³ Dodd-Frank was intended to end future bailouts and the policy of "too big to fail."⁷⁴ A discussion of whether Dodd-Frank is an effective solution in preventing another financial crisis is outside the scope of this article.⁷⁵ However, for purposes of this proposal, no Dodd-Frank Act provision or corresponding agency-adopted rule directly prohibits the federal government from acquiring interests in state-incorporated companies.⁷⁶

Furthermore, although an amendment to our Federal Constitution would be the most effective method of limiting the federal government's ability to acquire ownership interests in private companies, no such constitutional ban has been enacted to date. In January 2011, Rep. Michael Turner of Ohio introduced such a proposal in the U.S. House of Representatives, but the proposed amendment never passed and did not receive a full chamber debate.⁷⁷

b. States-based Response to Federal Ownership of Private Companies

If Congress is unwilling, either statutorily or constitutionally, to effectively limit the federal government's ability to nationalize private industry, it is left to the states to lead. States can act by amending their constitutions to prohibit the transfer of equity stakes in entities that are formed under state law to the federal government. Proposed language for such an amendment is as follows:

Any transfer to the United States, or any entity controlled by the United States, of any ownership interest in any entity formed pursuant to the laws of this state shall be prohibited, provided, the foregoing prohibition shall not apply to any investments through pension funds operated by the United States or any entity controlled by the United States.

This proposed amendment allows states to adopt an absolute policy against the nationalization of private industry. By inserting the prohibition in its constitution, an adopting state will be placing a premium on the issue and enabling itself to protect shareholders against the effects of federal government ownership in state-incorporated companies.

It should be noted that a broadly drafted amendment, absent a phrase exempting federal pension plans, may prevent pension funds that are operated by the U.S. government from holding stock in companies formed under state law. Many of the same criticism of federal ownership of private companies as a means of preventing systemic collapse can and have been made of federal investment in the stock market by federal pension plans. However, enforcing a prohibition that would extend to federal pension plans may create a complicated legal framework and corresponding unforeseen consequences. To alleviate this concern, an appropriate limiting phrase has been included in the language of the proposed amendment.

c. The Constitutionality of the Proposed Amendment

1. The Supremacy Clause

A state prohibition on federal government action immediately raises questions of constitutionality. After all, the Supremacy Clause of the U.S. Constitution makes it clear that valid federal laws prevail over conflicting state laws. ⁸⁰ However, U.S. Supreme Court jurisprudence has traditionally held that the general power to charter corporations is the province of the states. ⁸¹ In this role, states have had the authority to determine the privileges and rights associated with corporate shares. ⁸² Such authority has been held to extend to regulating and even prohibiting certain types of corporate share transfers. ⁸³

Therefore, a state constitutional amendment that prohibits certain transfers of corporate shares is well within a state's power.

Moreover, the fact that the proposed amendment prohibits "transfers" to the federal government does not make the amendment unconstitutional. Notably, the Supreme Court has previously upheld a state's prohibition on transferring property to the U.S. government. In *United States v. Fox*, the Supreme Court upheld a New York statute prohibiting testamentary transfers to the U.S. government of real estate located within the state of New York.⁸⁴ In support of its conclusion, the Court stated:

The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated The title and modes of disposition of real property within the State, whether inter vivos or testamentary, are not matters placed under the control of federal authority. . . . Every person must, therefore, devise his lands in that State within the limitations of the statute or he cannot devise them at all. His power is bounded by its conditions.85

The Court reached this conclusion despite the federal government's argument that "its power to take and hold lands, either by gift, contract, or force, is not derived from, nor can it be defeated by, State legislation." 86

The Fox decision was reaffirmed in 1950 by the Court in United States v. Burnison.⁸⁷ In Burnison, the federal government challenged a California statute that prohibited a California resident from making an unrestricted testamentary gift to the United States.⁸⁸ The federal government argued that such a statute violated the Supremacy Clause and asked the Court to overrule the Fox decision.⁸⁹ Instead, the Court upheld the California statute.⁹⁰ Furthermore, the concept that a state can prohibit the testamentary transfer of real estate to the federal government was extended to also include personal property.⁹¹ As a result, just as a state can prohibit testamentary transfers of real or personal property to the federal government and because equity interests are personal property, a state can also prohibit the transfer of equity interests in entities that are incorporated under state law to the federal government.⁹²

2. The Dormant Commerce Clause

A state prohibition on the transfer of corporate shares to the federal government does not violate the Dormant Commerce Clause. In CTS Corp v. Dynamics Corp of America, the Supreme Court affirmed the constitutionality of an Indiana statute that regulated the acquisition of "control shares" for companies that were incorporated in Indiana. The Court began by pointing out that the statute would have the same effect on both Indiana residents and residents of other states,

and thus the statute did not "discriminate against interstate commerce."94 The Court went on to declare that the statute did not subject shareholders to inconsistent regulations. 95 The Court found that as long as each state regulates only "the corporations it has created, each corporation will be subject to the law of only one State."96 The Court supported this conclusion by stating that "no principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations "97 Finally, the Court explained that the corporation exists as a creature of state law.⁹⁸ Thus, "it possesses only those properties which the charter of its creation confers upon it "99 Furthermore, the Court found that the state that creates a corporation has an interest in protecting the rights of shareholders and "promoting stable relationships among parties involved in the corporations it charters "100 Consequently, when a state regulates its own corporations, even to the extent that certain transactions are prohibited, the Dormant Commerce Clause is not violated.

The proposed constitutional amendment is similar to the Indiana statute that was affirmed in *CTS*. First, it applies evenly to both residents and non-residents of an adopting state. Second, it only applies to entities formed under the adopting state's law. Third, states have a strong interest in protecting shareholders and corporations formed under state law. Therefore, Supreme Court precedent establishes that the proposed amendment does not violate the Dormant Commerce Clause. ¹⁰¹

3. The Takings Clause

Finally, the proposed amendment does not violate the Takings Clause. The amendment effectively prohibits both individuals and corporations from transferring ownership interests in companies formed under state law to the federal government. It could be argued that this prohibition amounts to a regulatory taking because it restricts the free alienation of corporate shares and thus reduces their value. However, such an argument is not likely to succeed.

Traditionally, the Takings Clause has only been applied to real property. Personal property has been treated as being "less protected from regulatory takings than real property." Moreover, the Supreme Court has implied that even regulation that renders personal property economically worthless would not violate the Takings Clause. 103 Because ownership interests in companies are undisputedly personal property, a regulation that restricts the alienability of corporate shares is not likely to violate the Takings Clause.

Furthermore, even as applied to real property, the Takings Clause is not violated unless a governmental regulation prohibits all economically beneficial use of the property. ¹⁰⁴ Prohibiting the transfer of corporate shares to the federal government will not render the shares worthless. In fact, the proposed amendment may increase the value of those investments by removing the risks created by the uncertain legal framework for government ownership. Accordingly, it is not likely that the proposed amendment would violate the Takings Clause.

V. Conclusion

In order to deal with the unprecedented federal ownership of private companies in the wake of the 2008 financial crisis,

the nation and the individual states face the choice of either expanding the administrative state in an attempt to protect shareholders from possible harms caused by this ownership or drawing a bright-line rule prohibiting such nationalization. The overall policy of the amendment proposed above is based on fostering state and national markets in which clear rules of law govern the conduct of competing entities. A state ban on the transfer of equity interests in companies to the federal government would slow the nationalizing and market-distorting effects of this type of government intervention. The proposed amendment would protect non-government shareholders in these companies from being exposed to the unique risks created when the federal government becomes a controlling shareholder of private companies. Moreover, because states have broad authority to regulate companies that are formed under state law, a state prohibition on transfers of interests in those companies to the federal government would likely survive constitutional challenges under long-standing Supreme Court jurisprudence.

The proposed amendment will not prevent all types of future market intervention by the federal government, but it will prevent the most egregious form of intervention— federal acquisition of equity stakes in state-incorporated companies. As a result, the proposed amendment realigns state and federal economic policies with our founding principles by limiting the federal government to its proper role as a neutral regulator rather than a vested owner of private enterprise.

Endnotes

- 1 See C. Boyden Gray & John Shu, The Dodd-Frank Wall Street Reform & Consumer Protection Act of 2010: Is It Constitutional? Engage, Vol. 11, Issue 3, at 66 (2010).
- 2 See generally Steven M. Davidoff & David Zaring, Regulation by Deal: The Government's Response to the Financial Crisis, 61 ADMIN L. Rev. 463 (2009).
- 3 Baird Webel, Marc Labonte & N. Eric Weiss, Cong. Research Serv., The Cost of Governmental Financial Interventions, Past and Present 6-8 (Jan. 8, 2009).
- 4 J.W. Verret, Treasury Inc.: How the Bailout Reshapes Corporate Theory & Practice, 27 Yale J. on Reg. 283, 293 (2010). The U.S. government has a long history of federally chartering corporations in order to accomplish a public purpose. See generally Kevin Kosar, Cong. Research Serv., Federal GOVERNMENT CORPORATIONS: AN OVERVIEW (June 8, 2011). This history includes national use of state-incorporated companies to accomplish federal goals. See Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 386-91 (1995) (discussing the "long history of corporations created and participated in by the United States for the achievement of governmental objectives"). Prior to the 2008 financial crisis, however, never before had the federal government taken a controlling stake in publicly traded, state-incorporated businesses solely in order to save the profitability of (and thus reduce systemic risk caused by) those companies. J.W. Verret, Treasury Inc.: How the Bailout Reshapes Corporate Theory & Practice, 27 Yale J. on Reg. 283, 293 (2010). "Despite a rich history of government involvement in creating business and privatizing government functions as business, there is no precedent for the unique confluence of factors for those businesses that have taken TARP funding in exchange for giving the government an ownership, and often controlling,
- 5 Steven M. Davidoff & David Zaring, Regulation by Deal: The Government's Response to the Financial Crisis, 61 Admin L. Rev. 463, 473 (2009).
- 6 Id. at 475.

- 7 Documents: Paulson forced 9 banks to take TARP, Hartford Business.com, May 14, 2009, http://www.hartfordbusiness.com/news8920.html.
- 8 Todd Zywicki, *The Auto Bailout and the Rule of Law*, NAT'L Aff., Issue 7, at 66, 74-76 (Spring 2011).
- 9 Todd Zywicki, *The Auto Bailout and the Rule of Law*, Nar'l Aff., Issue 7, at 66, 69-70 (Spring 2011); Vern McKinley, Financing Failure: A Century of Bailouts 32 (2011) (describing "success narrative").
- 10 As used in this article, the term "state-incorporated" is used to mean any private or publically traded company incorporated or otherwise formed under the business entity formation laws of a state.
- 11 Steven M. Davidoff & David Zaring, Regulation by Deal: The Government's Response to the Financial Crisis, 61 ADMIN L. REV. 475 (2009). Part of the contemporaneous arguments and later "success narratives" used to justify the government's purchase of equity in troubled firms included the assertion that U.S. taxpayers would end up profiting from the "investments." See, e.g., Bob Blandeburgo, U.S. Turning a Profit on TARP, But Big Loans Remain in Banks' Hands, Money Morning, Sept. 1, 2009, available at http://moneymorning. com/2009/09/01/tarp-profit; Philip van Doom, TARP Yields \$20 Billion Profit, Treasury Says, The Street, Mar. 17, 2011, available at http://www. thestreet.com/story/11049777/tarp-yields-20-billion-profit-treasury-says. html; Steve Schaefer, Treasury Says TARP Turning into a Moneymaker for Taxpayers, Forbes, Apr. 13, 2012, available at http://www.forbes.com/sites/ steveschaefer/2012/04/13/treasury-says-tarp-is-turning-into-a-moneymakerfor-taxpayers. However, arguments against the "moral hazard" created by such governmental ownership supersede the "profit-motive" justification. See infra notes 51-71 and accompanying text. Moreover, the federal government's claims that U.S. taxpayers have actually profited from its TARP "investments" have been recently called into question, most notably by the Special Inspector General for TARP ("SIGTARP"), Christy Romero. See Office of the SIGTARP, QUARTERLY REPORT TO CONGRESS (Apr. 25, 2012), available at http://www.sigtarp.gov/Quarterly%20Reports/April_25_2012_Report_to_ Congress.pdf (hereinafter "SIGTARP Report"); see also John Lott, Obama and GM Cook the Books, Nat'l Rev., May 16, 2012, available at http://www. nationalreview.com/articles/300075/obama-and-gm-cook-books-john-lottjr#. According to the April 25, 2012 SIGTARP report, "[i]t is a widely held misconception that TARP will make a profit. The most recent cost estimate for TARP is a loss of \$60 billion. Taxpayers are still owed \$118.5 billion (including \$14 billion written off or otherwise lost.)" See SIGTARP REPORT at 5; see also David Harsanyi, Inspector General Report Ends Myth that TARP 'Turned A Profit,' Human Events, May 7, 2012, available at http://www. humanevents.com/article.php?id=51297.
- 12 See infra section III.
- 13 See supra note 4.
- 14 The state legislation proposed in this article would apply to all non-governmental business entities formed under the general laws of a state and not just those taking the corporate form (e.g., limited liability companies, limited liability partnerships, etc.). To distinguish from those companies and corporations "chartered" by a governmental entity, this article uses the term "state-incorporated" as opposed to "state-chartered" to describe these types of non-governmental for-profit businesses. *Contra* J.W. Verret, *Treasury Inc.: How the Bailout Reshapes Corporate Theory & Practice*, 27 YALE J. ON REG. 283, 293 (2010) (distinguishing corporations created by "government charter" from "state-chartered" companies).
- $15\,$ Baird Webel, Cong. Research Serv., Troubled Asset Relief Program (TARP): Implementation and Status 3 (Mar. 4, 2011).
- 16 See Louise Story & Gretchen Morgenson, In U.S. Bailout of A.I.G., Forgiveness for Big Banks, N.Y. Times, June 29, 2010, available at http://www.nytimes.com/2010/06/30/business/30aig.html?pagewanted=all.
- 17 See infra section IV, subsection b.
- 18 See Steven M. Davidoff & David Zaring, Regulation by Deal: The Government's Response to the Financial Crisis, 61 ADMIN L. REV. 463, 473 (2009).
- 19 See id. at 474.
- 20 See id.
- 21 See id. at 493.

- 22 This paper does not fundamentally challenge the decision of the federal government to allow Lehman Brothers to fail, but rather the decision to treat similarly situated businesses unequally. In fact, the decision to allow Lehman Brothers to fail was more consistent with the federal government's traditional role as regulator rather than market intervener. As one scholar has noted, the failure of Lehman Brothers actually more quickly infused certainty into the markets, while the decision to "bail out" and nationalize AIG created residual uncertainty: "[One of the benefits of the Lehman Brothers failure was that] Lehman [now] is resolved and no longer hangs over the financial system as an uncertainty, unlike the status of bailed-out, nationalized institutions like AIG, Fannie Mae, and Freddie Mac, which have lingered on for many years after the initial bailout." Vern McKinley, Financing Failure: A Century of Bailouts 32 (2011).
- 23 See Steven M. Davidoff & David Zaring, Regulation by Deal: The Government's Response to the Financial Crisis, 61 ADMIN L. REV. 463, 494 (2009).
- 24 Steven M. Davidoff, Uncomfortable Embrace: Federal Corporate Ownership in the Midst of the Financial Crisis, 95 MINN L. Rev. 1733, 1738 (2010-2011).

25 Id.

26 Id.

- 27 BAIRD WEBEL, CONG. RESEARCH SERV., TROUBLED ASSET RELIEF PROGRAM (TARP): IMPLEMENTATION AND STATUS, 3 (Mar. 4, 2011). It is now reported that the government ownership interest is approximately 70%. See Carol Massar & Noah Buhayar, AIG's Miller Says U.S. Exit Could Be Done Within 12 Months, Bus. Rep. (2012), available at http://www.bloomberg.com/news/2012-04-13/aig-s-miller-says-u-s-exit-could-be-done-within-12-months-1-.html.
- 28 AIG, along with all other companies discussed in this article (e.g., Citigroup, GM, Chrysler, and GMAC/Ally) are companies formed under state law. Although the federal government also nationalized Fannie Mae and Freddie Mac, which were federally chartered institutions, the scope of this article deals solely with the government's acquisition of equity interests in state-incorporated companies.
- 29 Baird Webel, Cong. Research Serv., Troubled Asset Relief Program (TARP): Implementation and Status (Mar. 4, 2011).
- 30 Id. at 3.
- 31 Marcel Kahan & Edward B. Rock, When the Government Is the Controlling Shareholder, 89 Tex. L. Rev. 1293, 1343 (2011).
- 32 See generally Baird Webel, Cong. Research Serv., Troubled Asset Relief Program (TARP): Implementation and Status (Mar. 4, 2011).
- 33 Marcel Kahan & Edward B. Rock, When the Government Is the Controlling Shareholder, 89 Tex. L. Rev. 1293, 1343 (2011); Matthew R. Shahabian, The Government as Shareholder and Political Risk: Procedural Protections in the Bailout, 86 N.Y.U. L. Rev. 351, 357 (2011); J.W. Verret, Treasury Inc.: How the Bailout Reshapes Corporate Theory & Practice, 27 Yale J. On Reg. 283, 294 (2010).
- 34 Baird Webel, Marc Labonte & N. Eric Weiss, Cong. Research Serv., The Cost of Governmental Financial Interventions, Past and Present 6-8 (Jan. 8, 2009).
- 35 Steven M. Davidoff, *Uncomfortable Embrace: Federal Corporate Ownership in the Midst of the Financial Crisis*, 95 MINN L. Rev. 1733, 1742 (2010-2011).
- 36 Id. at 1744.
- 37 Matthew R. Shahabian, *The Government as Shareholder and Political Risk: Procedural Protections in the Bailout*, 86 N.Y.U. L. Rev. 351, 362 (2011); *see infra* notes 52-54 and accompanying text.
- 38 J.W. Verret, Treasury Inc.: How the Bailout Reshapes Corporate Theory & Practice, 27 Yale J. on Reg., 283, 294 (2010).
- 39 U.S. Dep't of the Treasury, Investment Programs: Capital Purchase Program, http://www.treasury.gov/initiatives/financial-stability/programs/investment-programs/cpp/Pages/capitalpurchaseprogram.aspx (last visited June 8, 2012); Marcel Kahan & Edward B. Rock, When the Government Is the Controlling Shareholder, 89 Tex. L. Rev. 1293, 1303 (2011).

- 40 J.W. Verret, Treasury Inc.: How the Bailout Reshapes Corporate Theory & Practice, 27 Yale J. on Reg. 283, 294 (2010).
- 41 See generally Troubled Asset Relief Program (TARP), Monthly Report to Congress, March 2012 (Apr. 10, 2012).
- 42 Documents: Paulson Forced 9 banks to take TARP, HARTFORDBUSINESS.COM, May 14, 2009, available at http://www.hartfordbusiness.com/news8920.html.
- 43 Marcel Kahan & Edward B. Rock, When the Government Is the Controlling Shareholder, 89 Tex. L. Rev. 1293, 1311-12 (2011); see Todd Zywicki, Government by Waiver, Nat'l Aff., Issue 7, at 66, 68-69 (Spring 2011) (describing the history of the auto bailouts and the corresponding political process).
- 44 Todd Zywicki, *The Auto Bailout and the Rule of Law*, Nat't Aff., Issue 7, at 66, 68-69 (Spring 2011).
- 45 See Press Release, U.S. Dep't of the Treasury, Treasury Exits Investment in Chrysler Group LLC (July 21, 2011), available at http://www.treasury.gov/press-center/press-releases/Pages/tg1253.aspx; Todd Zywicki, The Auto Bailout and the Rule of Law, Nar'L Aff., Issue 7, at 66, 68-69 (Spring 2011).
- 46 Baird Webel, Cong. Research Serv., Troubled Asset Relief Program (TARP): Implementation and Status 8 (Mar. 4, 2011).

47 Id

- 48 Ally Financial Inc., Annual Report (Form 10-K), at 22 (Feb. 28, 2012).
- 49 Marcel Kahan & Edward B. Rock, When the Government Is the Controlling Shareholder, 89 Tex. L. Rev. 1293, 1311-12 (2011) (citing 12 U.S.C. § 5202(5)).
- 50 Marcel Kahan & Edward B. Rock, When the Government Is the Controlling Shareholder, 89 Tex. L. Rev. 1293, 1311-12 (2011).
- 51 See generally Kevin Dowd, Moral Hazard and the Financial Crisis, 29 CATO J. 141 (2009); see also, Benjamin A. Templin, The Government Shareholder: Regulating Public Ownership of Private Enterprise, 62 ADMIN. L. REV. 1127, 1128-29 (2010) (listing a series of ethical questions posed when the government intervenes in the marketplace as an active shareholder). Although one scholar has referred to such instances of moral hazard as mere "misunderstandings," the concessions she makes in her justifications of these instances are notable:
 - Of course there has been government involvement [in board decisions of bailed-out companies], and indeed the government would be acting recklessly if it did not act to protect the billions of dollars of government funds at risk. Accordingly, the government has intervened behind the scenes principally in its roles as creditor, regulator, and politician. The government has intervened in a less systematic and more confrontational manner that has led to misunderstandings, as for example: the TARP Special Master making decisions on executive compensation that made no business sense to the AIG Chairman; Citigroup being confused about what the various federal regulators expected from it; and Congress placing restrictions on the ability of the automakers to cancel dealerships and downsize.
- See Barbara Black, The U.S. as "Reluctant Shareholder": Government, Business and the Law, 5 Entrepreneurial Bus. L.J. 561, 593 (2010).
- 52 J.W. Verret, Treasury Inc.: How the Bailout Reshapes Corporate Theory & Practice, 27 Yale J. on Reg. 283, 288 (2010).
- 53 Mathew R Shahabian, *The Government as Shareholder and Political Risk:* Procedural Protections in the Bailout, 86 N.Y.U. L. Rev. 351, 364 (2011).
- 54 Marcel Kahan & Edward B. Rock, When the Government Is the Controlling Shareholder, 89 Tex. L. Rev. 1293, 1305 (2011).
- 55 Eric Dash & Jack Healy, Citigroup Sheds Energy Unit and Its \$100 Million Trader, N.Y. Times, Oct. 9, 2009, available at http://www.nytimes.com/2009/10/10/business/10citi.html.

56 Id.

- 57 Todd Zywicki, *The Auto Bailout and the Rule of Law*, Nat't Aff., Issue 7, at 66, 76 (Spring 2011).
- 58 Marcel Kahan & Edward B. Rock, When the Government Is the Controlling Shareholder, 89 Tex. L. Rev. 1293, 1303 (2011).

- 59 GM 10-K at 22-23; Ally 10-K at 22.
- 60 Arizona Representative Gabrielle Giffords, New York Senator Charles Schumer, and New York Representative Dan Maffei also directly intervened in GM affairs to keep open dealerships in their districts. Todd Zywicki, *The Auto Bailout and the Rule of Law*, Nar'l Aff., Issue 7, at 66, 77 (Spring 2011).
- 61 Id
- 62 Marcel Kahan & Edward B. Rock, When the Government Is the Controlling Shareholder, 89 Tex. L. Rev. 1293, 1304 (2011).
- 63 Todd Zywicki, *The Auto Bailout and the Rule of Law*, Nat't Aff., Issue 7, at 66, 68-69 (2011).
- 64 Verret, supra note 4, at 306.
- 65 Randall Smith & Sharon Terlep, *GM Could Be Free of Taxes for Years*, Wall St. J., Nov. 3, 2010, *available at* http://online.wsj.com/article/SB100014240 52748704462704575590642149103202.html.
- 66 American International Group, Inc., Annual Report (Form 10-K), at 40 (February 23, 2012).
- 67 Marcel Kahan & Edward B. Rock, When the Government Is the Controlling Shareholder, 89 Tex. L. Rev. 1293, 1323 (2011).
- 68 Id. at 1325.
- 69 See id. at 1323-45.
- 70 See id.
- 71 See generally J.W. Verret, Treasury Inc.: How the Bailout Reshapes Corporate Theory & Practice, 27 Yale J. on Reg. 283 (2010); Mathew R Shahabian, The Government as Shareholder and Political Risk: Procedural Protections in the Bailout, 86 N.Y.U. L. Rev. 351 (2011); Marcel Kahan & Edward B. Rock, When the Government Is the Controlling Shareholder, 89 Tex. L. Rev. 1293 (2011).; Benjamin A. Templin, The Government Shareholder: Regulating Public Ownership of Private Enterprise, 62 Admin. L. Rev. 1127, 1128-29 (2010). One scholar concludes that, while governmental ownership of private enterprise is "inherently unstable," nevertheless, because he believes that instances of government ownership are likely to be rare in the future due to the political and legal atmosphere, "there is no need at this point to wade into the debate about whether government ownership is ever appropriate, and if so, under what circumstances it is justified." Steven M. Davidoff, Uncomfortable Embrace: Federal Corporate Ownership in the Midst of the Financial Crisis, 95 Minn. L. Rev. 1733, 1736, 1773-74 (2010-2011).
- 72 See Barbara Black, The U.S. as "Reluctant Shareholder": Government, Business and the Law, 5 Entrepreneurial Bus. L.J. 561, 567 (2010).
- 73 See Wall Street and Consumer Protection Act, H.R. 4173, 111th Cong. (2010).
- 74 *Id.* "An Act To promote the financial stability of the United States by improving accountability and transparency in the financial system, *to end too big to fail'*, *to protect the American taxpayer by ending bailouts*, to protect consumers from abusive financial services practices, and for other purpose." *Id.* (emphasis added).
- 75 For a micro-sample of the literature discussing whether Dodd-Frank has or will accomplish its stated purpose, see Andrew Verstein & Roberta Romano, Roundtable on Assessing Dodd-Frank, Apr. 1, 2011, available at http://www.law.yale.edu/documents/pdf/WGM_Roundtable_July.pdf; Jeffrey Gordon & Christopher Muller, Confronting Financial Crisis: Dodd-Frank's Dangers and the Case for a Systemic Emergency Insurance Fund, 28 Yale J. on Reg. 151, 152-53 (2011); Peter J. Wallison, The Error at the Heart of the Dodd-Frank Act, Fin. Services Outlook, Sept. 6, 2011, available at http://www.aei.org/article/economics/financial-services/the-error-at-the-heart-of-the-dodd-frank-act.
- 76 See generally Wall Street and Consumer Protection Act, H.R. 4173, 111th Cong. (2010).
- 77 Proposing an Amendment to the Constitution of the United States to Prohibit the United States from Owning Stock in Corporations, H.R.J. Res. 22, 112th Cong. (2011) (introduced in U.S. House in January 2011). The proposed amendment reads: "The United States shall not own, subscribe to, or otherwise have any interest in the stock or equity of any company, association or corporation: *Provided*, That the foregoing prohibition shall not apply to any investments through any pension funds." *Id.*

- 78 Cong. Budget Office, Evaluating and Accounting for Federal Investment in Corporate Stocks and Other Private Securities 4-7 (Jan. 2003).
- 79 This type of exception was included in the proposed amendment to the United States Constitution discussed above.
- 80 U.S. Const. art. VI, par. 2.
- 81 See, e.g., Burks v. Lasker, 441 U.S. 471, 477-79 (1979). "Corporations are creatures of state law, . . . and it is state law which is the font of corporate directors' powers. By contrast, federal law in this area is largely regulatory and prohibitory in nature—it often limits the exercise of directorial power, but only rarely creates it." *Id.* at 478.
- 82 CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 91 (1987)
- 83 See id. at 90.

- 84 94 U.S. 315 (1877).
- 85 Id. at 320.
- 86 Id. at 318.
- 87 339 U.S. 87 (1950).
- 88 United States v. Burnison, 339 U.S. 87, 89-90 (1950).
- 89 Id. at 91.
- 90 Id at 93.
- 91 Id.
- 92 It is a near-universal principle that equity interests are personal property. See, e.g., Del. Code Ann. tit. 8, § 159 ("The shares of stock in every corporation shall be deemed personal property and transferable"); Stevenson v. Metsker, 120 Kan. 251 (1930) (Harvey, J., dissenting) (quoting 26 Am. & Eng. Ency. Of Law (2d Ed.) 826 for the proposition that "it is now settled that stock is personal property"); Lawyers Coop. Publ'g Co. v. Muething, 65 Ohio St.3d 273 (1992) ("We hold that [party's] claim of a loss in value of his interest in his law practice is essentially a claim of injury to personal property").
- 93 481 U.S. 69 (1987).
- 94 Id. at 87.
- 95 Id. at 89.
- 96 Id.
- 97 Id.
- 98 *Id.* at 94.
- 99 Id. at 89.
- 100 Id. at 91.
- 101 Following the Supreme Court's decision in *CTS*, some lower courts have invalidated certain state anti-takeover statutes. However, such statutes applied to companies formed both in-state and out-of-state. The decisions are distinguished from *CTS* on those grounds. *See, e.g.*, Rocket Acquisition Corp. v. Ventana Med. Sys., Inc., 2007 WL 2422082 (2007).
- 102 Bridget C. E. Dooling, Take It Past the Limit: Regulatory Takings of Personal Property, 16 Feb. Circuit B.J. 445, 446 (2007).
- 103 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027-28 (1992).
- 104 Id. at 1015-16.



Criminal Law & Procedure

Criminal Jurisdiction of Indian Tribes: Should Non-Indians Be Subject to Tribal Criminal Authority Under VAWA?

By Tom Gede*

ver since the U.S. Supreme Court issued its 1978 decision in *Oliphant v. Suquamish Tribe*, holding that ✓Indian tribes do not have inherent criminal jurisdiction over non-Indians, there has been a high level of demand that Congress overturn the decision through legislation. Scholarly literature, policy studies and political analysis have heavily criticized the decision² and many have suggested an "Oliphantfix," along the lines of the 1991 "Duro-fix," in which Congress amended the 1968 Indian Civil Rights Act ("ICRA")3 to recognize the inherent authority of tribes to prosecute and punish non-member Indians. 4 An "Oliphant-fix" would extend that recognition of authority, in full or in part, over non-Indians. Oliphant has long been considered by tribes and tribal advocates as a wound in the side of federal Indian law and policy; it has been described as "the most serious judicial onslaught on tribal territorial sovereignty."5 Scant literature has been published supporting Oliphant, yet there has been little movement in Congress, outside of the Senate Indian Affairs Committee, to further a full or partial repeal. However, the first significant move came with the Senate's April 26, 2012 passage of the reauthorization of the Violence Against Women Act ("VAWA") containing a partial Oliphant repeal. The VAWA reauthorization bill, S. 1925, with its incorporated SAVE Native Women Act, S. 1763, included in Title IX a provision, like the Duro-fix, recognizing *inherent* authority of tribes to prosecute and punish certain domestic violence crimes committed by non-Indians against Indian women in Indian country.

Along with other controversial provisions of the Senate version of S. 1925, the partial *Oliphant*-fix in S. 1925 was rejected by the House of Representatives, which offered its own version of the VAWA re-authorization in H.R. 4970. Rarely has federal legislation involving tribal jurisdiction garnered the kind of front-page publicity that arose when the House rejected the tribal special domestic violence jurisdiction in the Senate bill.⁶ Contentious debate also arose, mostly aired through the news media, with political and policy objections and counter-objections focusing on, among other topics, whether tribal courts could and should properly try non-Indians for crimes committed in Indian country.⁷ Aside from the jurisdictional questions raised, however, others questions persist as to whether there is a significant number of non-Indians responsible for domestic violence and sexual assault crimes against Native

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women and whether the extension of tribal inherent criminal jurisdiction over non-Indians in these cases will actually make any difference to public safety in Indian country.

This paper examines some of the legal and public policy issues relating to the proposed extension of tribal criminal law jurisdiction over non-Indians for domestic violence, and concludes that while some objections are ill-founded, there are still significant reasons to be concerned that such an extension may raise difficult constitutional issues and serious policy objections. As this paper is written before final action on the VAWA re-authorization bill(s), the discussion here must be read as addressing these topics in the abstract.

Before addressing objections and counter-objections to the proposed Oliphant-fix in the Senate VAWA bill, it should be noted the proposal to extend tribal criminal jurisdiction was viewed as an essential means to deal with a major public safety issue occurring in Indian country, as reported in the Senate Report accompanying S. 1925: an especially high level of rape, sexual assault, and domestic violence victimizing American Indian and Native Alaskan women in numbers far out of proportion to the levels of these crimes outside of Indian country.8 The Senate Report cited studies that "showed that nearly three out of five Native American women had been assaulted by their spouses or intimate partners, and a nationwide survey found that one third of all American Indian women will be raped during their lifetimes,"9 often, or much of the time, by non-Indian men. 10 Additionally, the Report notes, "on some reservations, Native American women are murdered at a rate more than ten times the national average."11

The Senate Report acknowledged the "limited concurrent tribal jurisdiction to investigate, prosecute, convict, and sentence non-Indian persons who assault Indian spouses, intimate partners, or dating partners, or who violate protections orders, in Indian country."12 Generally speaking, with the exception of where Congress extended state criminal law jurisdiction to Indian country under Public Law 280,13 only federal and tribal law applies to prosecute and punish those accused of crimes involving Indians in Indian country, and under Oliphant, tribal jurisdiction does not reach non-Indians. As a result of these limitations, the bill provided a "partial" Oliphant-fix, giving tribes "special domestic-violence criminal jurisdiction" to hold non-Indian offenders accountable, but only for crimes of domestic violence, dating violence, and violations of protection orders that are committed in Indian country. It would cover only those non-Indians with significant ties to the prosecuting tribe, those who reside in the Indian country of the prosecuting tribe, are employed in the Indian country of the prosecuting tribe, or are either the spouse or intimate partner of a member of the prosecuting tribe.¹⁴

The proposed Senate bill provision also provided that if a term of imprisonment of *any* length is imposed under

^{*} Tom Gede is of Counsel at Bingham McCutchen LLP and a principal in Bingham Consulting LLC in Sacramento, California, and serves as a Commissioner on the Federal Indian Law and Order Commission. For more than a decade, he has served as an adjunct professor for Federal Indian and Gaming Law at Pacific-McGeorge School of Law in Sacramento.

The views expressed in this article are those of the author and do not necessarily reflect positions or views of the Indian Law and Order Commission or any federal agency.

the special domestic-violence criminal jurisdiction, the tribe must provide the defendant with the protections provided by the Tribal Law and Order Act of 2010 ("TLOA"),15 which (as applicable to prosecutions against member and nonmember Indians) amended ICRA to allow a tribe to seek a three-year imprisonment on the condition that the tribe provide the defendant with the "right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution,"16 and, for indigent defendants, qualified counsel at tribal expense.¹⁷ This incorporation of the TLOA provisions into the special domestic-violence criminal jurisdiction allowed the bill to reflect a higher standard of constitutional protection for non-Indians subject to tribal criminal jurisdiction, at least as to the provision of effective assistance of counsel. Additionally, the proposed Senate bill provided that tribes must afford the non-Indian defendant "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise criminal jurisdiction over the defendant." What this actually means, however, is the subject of debate, as discussed below.

Among the principal objections to the extension of tribal jurisdiction to non-Indians in this legislation was that it would be unprecedented, was insufficiently studied, is ill-advised and premature. Some of these initial objections were raised in two sets of Minority Views to S. 1925.18 The objections expressed concern that the easing of restrictions against tribal criminal jurisdiction in the domestic violence context will inevitably lead to easing it in all respects and that tribal courts lack the experience or resources to protect constitutional rights of criminal defendants.¹⁹ Reciting the Supreme Court's decision in Santa Clara Pueblo v. Martinez,20 the views acknowledged that "tribes have historically been regarded as unconstrained by those constitutional provisions [of the Bill of Rights] framed specifically as limitations on federal or state authority," and that tribal governments are not bound by the Constitution's First, Fifth, or Fourteenth Amendments,²¹ but only by the statutory analogues to the Bill of Rights in ICRA. The views then noted ICRA can only be enforced in tribal court, "[where] the absence of separation of powers and an independent judiciary in most tribal governments makes them an unsuitable vehicle for ensuring the protection of civil rights."22 The tribal issues portion of the principal Minority Views (which includes Senator Grassley) suggested that greater federal resources be dedicated to the problem, ²³ while the separate Minority Views (which do not include Senator Grassley) suggested that states could pick up the jurisdiction for these crimes.²⁴ The views also discuss impediments to justice as the result of sovereign immunity enjoyed by tribal governments and assert that the tribal court systems lack civil-rights guarantees, which has resulted in failure to provide due process.²⁵ Read objectively, these views generally assert policy objections, apart from the facial constitutionality of Congress easing the restrictions of *Oliphant*.

Offering a counter to arguments that the tribal jurisdiction provisions would be unconstitutional, a coalition of law professors sent a letter ("Law Professors' Letter") to the leadership of the Senate Judiciary Committee shortly before the passage of the bill.²⁶ The Law Professors' Letter quoted *Oliphant*

for the proposition that Congress has the authority to permit tribes to prosecute non-Indians. The *Oliphant* Court stated the proposition in the negative, namely that tribal governments do not have the authority to prosecute non-Indian criminals "except in a manner acceptable to Congress."27 The law professors also relied on the Supreme Court's 2004 decision in United States v. Lara²⁸ that upheld the *Duro*-fix, the congressional recognition of the inherent authority of tribal governments to prosecute nonmember Indians. In passing the Duro-fix, the professors noted, Congress did not delegate federal powers to the tribal governments but recited that it was a recognition of pre-existing inherent powers. Importantly, Lara stands for the authority of Congress to expand tribal criminal jurisdiction by easing or "relaxing" the restrictions earlier placed on tribal criminal jurisdiction by the political branches, strictly as a matter of common law.²⁹ While this paper does not permit an extended discussion of Lara, it is now reasonably settled that, at least as to non-member Indians, nothing in the Constitution prevents Congress from relaxing the restrictions on tribal criminal jurisdiction. Even Justice Thomas, concurring in the judgment, maintained that the Court's precedents on these matters are "classic federal-common-law decisions." Additionally, the law professors noted that ICRA already requires tribal governments "to provide all rights accorded to defendants in state and federal court, including core rights such as the Fourth Amendment right to be secure from unreasonable searches and seizures, and the Fifth Amendment privilege against self-incrimination," and "that federal courts have authority to review tribal court decisions which result in incarceration, and they have the authority to review whether a defendant has been accorded the rights required by ICRA."31

As the Law Professors' Letter was prepared before the Senate passage of the bill, it only indirectly countered some of the arguments presented in the Minority Views. The two sets of views might be summed up as follows: where the law professors are confident the tribal governments can provide the requisite constitutional protections, the Senators are not so trusting. As is usually the case in such matters, there is a little bit of truth on all sides. And there is no certainty that the Supreme Court will disapprove of *Oliphant* at some point in the future, any more than there is certainty that Lara's "relaxing"-of-restrictions formula will be extended without hesitation to tribal criminal jurisdiction as to non-Indians. The core of the dispute may not center on the ability of Congress to relax restrictions on tribal inherent jurisdiction, or even on the prudential objections raised by the Senators in April 2012. The real uncertainties relate to the assertion, presented by the law professors, that ICRA requires tribal governments "to provide all rights accorded to defendants in state and federal court," and that federal courts can offer a full review of those rights. Lara did not answer these questions, as the defendant there was not challenging his tribal conviction on any of these grounds, but only his subsequent federal prosecution on double-jeopardy grounds. And the Duro Court noted: "[ICRA] provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts."32 While the Senate VAWA re-authorization incorporates the TLOA's provision of effective assistance of counsel, it cannot answer

whether all remaining ICRA rights are "equivalent" to Fourth Amendment and other Fifth Amendment guarantees. Indeed, one commentator has noted: "[T]o mandate the application of the Bill of Rights to tribal-court prosecutions would seriously interfere with tribal culture and the values incorporated in tribal laws. Imposing such a requirement would, therefore, interfere with tribal self-government by transforming these courts from 'tribal' institutions into American ones."³³

Following the passage of the Senate version of the VAWA re-authorization, the Congressional Research Service ("CRS") weighed in on the special domestic-violence criminal jurisdiction recognized for tribes.³⁴ The research paper advised Congress that if inherent sovereignty is recognized under the special domestic-violence criminal jurisdiction and only statutory ICRA protections are triggered, then non-Indian criminal defendants may be subjected to double jeopardy for the same act, may not be able to exercise fully their right to counsel, may have no right to prosecution by a grand jury indictment, may not have access to a representative jury of their peers, and may have limited federal appellate review of their cases.³⁵ Notably, the CRS report focuses on the unclear language in the bill that tribes must afford the non-Indian defendant "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise criminal jurisdiction over the defendant." The CRS authors suggest two plausible interpretations: on the one hand, it would "effectively" provide the same constitutional rights guaranteed in state court criminal proceedings, or on the other hand, only those statutory rights outlined in ICRA and the TLOA.³⁶ In the first alternative, the tribe would have to provide those rights that would transform the court from a "tribal" institution into what Professor Alex Skibine calls an "American" one. If one assumes the first interpretation, it also implies a congressional delegation of authority, notwithstanding the language purporting to recognize "inherent" tribal authority over the non-Indians. Similarly, if one assumes the second interpretation, it appears the rights would be part of the recognition of "inherent" authority. The only other possible view is that the enumerated ICRA rights are precisely coterminous with the applicable Bill of Rights protections as interpreted by the federal courts, which defies reason and is offensive, if not fatal, to tribal sovereignty. The CRS report notes that the distinction here has constitutional consequences, as delegated rights will require adherence to the constitutional rulings of the federal courts; inherent authority over the non-Indians, on the other hand, will leave non-Indians subject to tribal authority without the same full set of Bill of Rights protections. With the exception of the TLOA-incorporated rights to counsel, the statutory ICRA protections are left to tribal courts to develop and apply.

Where the CRS report succeeds in laying out the issues, it fails to find anything particularly earth-shaking about the application of inherent tribal criminal law jurisdiction. That a defendant would be subject to double jeopardy if the tribe exercises "inherent" jurisdiction is unremarkable, as that is the holding of *Lara* in any case. When multiple sovereigns seize upon a criminal suspect for prosecution, the issues of

which state goes first and what the consequences may be are generally routine questions that are regularly worked out by those sovereigns. Additionally, the Senate VAWA provisions already accord a Sixth Amendment right to counsel, as well as the Fifth Amendment-based right to counsel if the defendant cannot afford one, if the possibility of imprisonment is present. In such a case, there is less distinction between a delegated and inherent application of tribal criminal jurisdiction. More significantly, the CRS report looks to certain other guarantees, including the indictment-by-grand-jury requirement, noting that ICRA does not contain a statutory requirement for a grand jury indictment for felonies. If it is a delegated power, the grandjury requirement would apply in tribal prosecutions. Similarly, under an inherent jurisdiction theory, there is no requirement that a tribe provide the non-Indian defendant a jury of his peers; the CRS report acknowledges the irony that Indians themselves hauled into federal court often fail to have this right respected. Finally, tribal-court convictions based on the tribe's exercise of an inherent power are not reviewable in federal court. Such judgments are subject only to habeas corpus review³⁷ after exhaustion in tribal forums, and "protections under ICRA will primarily be construed and enforced in tribal forums. Important civil rights such as equal protection and due process will be construed by tribal courts, which may not be bound by the U.S. Constitution."38 Referring to this "gap," the CRS report authors suggest that Congress may want to reconsider using habeas as the sole form of review if tribal criminal jurisdiction is extended over non-Indians, as "[a]uthorizing the same federal appellate review as is received in federal courts could close this gap."39 What this really suggests is a solution based on a delegation of authority to the tribal court over non-Indians; relying solely on the inherent authority of tribes apparently leaves dangling too many constitutional threads. While it is offensive to tribal sovereignty, a delegation theory as to prosecuting and punishing non-Indians may be tighter and more defensible in an uncertain Supreme Court, and, as importantly, it would effectively allow tribal prosecutors and courts to deal locally and immediately with suspected non-Indian rapists, domestic violence offenders, and batterers.

Among the unanswered questions posed by a congressional attempt to "relax" the restrictions on tribal inherent criminal authority over non-Indians is whether it might violate the principle of original, and continuing, consent of the governed. This issue came notably to the forefront in the Lara opinion and has generated commentary.⁴⁰ Whether the Court would re-affirm Lara in the next tough case is an open question. Of the Justices remaining on the Court, several did not join in the majority opinion, including Justice Kennedy, who concurred in the judgment, and Justice Scalia, who dissented. The latter two found, from different perspectives, constitutional implications in the notion of Congress extending tribal criminal jurisdiction to non-member Indians, with Justice Scalia maintaining that the congressional act could only be a delegation of federal authority.41 Justice Kennedy presented the "consent of the governed" argument that is, to this day, not cleanly resolved by the case law or the scholarly literature:

To hold that Congress can subject [the defendant], within our domestic borders, to a sovereignty outside

the basic structure of the Constitution is a serious step. The Constitution is based on a theory of original, and continuing, consent of the governed. Their consent depends on the understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State. Each sovereign must respect the proper sphere of the other, for the citizen has rights and duties as to both. Here, contrary to this design, the National Government seeks to subject a citizen to the criminal jurisdiction of a third entity to be tried for conduct occurring wholly within the territorial borders of the Nation and one of the States. This is unprecedented. There is a historical exception for Indian tribes, but only to the limited extent that a member of a tribe consents to be subjected to the jurisdiction of his own tribe.42

In objecting to the "relaxing restrictions" language used by the Lara majority, Justice Kennedy complains that "it should not be doubted that what Congress has attempted to do is subject American citizens to the authority of an extraconstitutional sovereign to which they had not previously been subject."43 In reacting to the majority's declaration that due process and equal protection claims are still "reserved" for a criminal defendant, Justice Kennedy states that this statement "ignores the elementary principle that the constitutional structure was in place before the Fifth and Fourteenth Amendments were adopted. . . . The political freedom guaranteed to citizens by the federal structure is a liberty both distinct from and every bit as important as those freedoms guaranteed by the Bill of Rights."44 Professor Matthew Fletcher argues that Justice Kennedy postulates a "literal consent," to be contrasted with a "hypothetical consent," where it can be asked "whether a reasonable person subjected to government control would consent to such control,"45 as in certain regulatory or civil law contexts. In the criminal law context, however, Justice Kennedy addressed a fundamental difference. In the majority opinion in Duro, he noted, "Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States."46 While Congress in the *Duro*-fix readjusted, or un-did, that "surrender" of power, it has to be asked whether a majority of the Court would agree with Justice Kennedy now, as it did in Duro (as to a non-member Indian), that the consent of a non-Indian, in the criminal law context, is central to whether he or she can be subject "to the authority of an extraconstitutional sovereign to which [he or she] had not previously been subject."47

Of course, the special domestic-violence criminal jurisdiction for tribes in the Senate VAWA re-authorization is restricted only to those non-Indians with significant ties to the prosecuting tribe, those who reside in the Indian country of the prosecuting tribe, are employed in the Indian country of the prosecuting tribe, or are either the spouse or intimate partner of a member of the prosecuting tribe. An argument can be made that this restriction reflects the notion that those non-Indians are deeply familiar with and in many respects already "subject to" the authority of the tribal government—at least in the

civil and regulatory context. Perhaps this is the "hypothetical" consent. However, it is unclear whether this kind of consent is legally sufficient to subject someone to the "serious... intrusion on personal liberty" inherent in the criminal process by what Justice Kennedy called a "third entity" within the territorial boundaries of the United States.

Finally, there remain questions of due process and equal protection, as applied. The *Lara* majority did not, nor did it need to, reach the questions of whether Lara's due process and equal protection rights were violated. ⁴⁸ In at least one prominent case, an equal protection argument was rejected, in an application of one tribe's criminal jurisdiction over an Indian of another tribe, the very situation contemplated by the *Duro*-fix. However, it was the Indian's status as an Indian that militated the outcome. In *Means v. Navajo Nation*, Russell Means, a well-known American Indian activist and enrolled member of the Oglala-Sioux Indian Tribe, sought to prevent the Navajo Nation from criminally prosecuting him in Navajo tribal court for an incident that occurred on the Navajo Reservation. ⁴⁹ The Ninth Circuit noted that Means's equal protection argument "has real force":

Although he is an Indian, Means is nonetheless a citizen of the United States, entitled to the full protection of the United States Constitution. But unlike states, when Indian tribes exercise their sovereign authority they do not have to comply with the United States Constitution. As an Oglala-Sioux, Means can never become a member of the Navajo political community, no matter how long he makes the Navajo reservation his home.⁵⁰

However, the court resolved the matter against Means by observing that his status as an Indian is "political rather than racial in nature," citing Morton v. Mancari. 51 While Mancari goes to the status of an Indian (and in Means, an Indian subjected to the criminal process of a tribe not his own), it is of no relevance to a non-Indian. This certainly raises questions as to the viability of an equal protection claim that could be raised by a non-Indian subject to tribal prosecution under the envisioned special domestic-violence criminal jurisdiction. The Means court also had a due process challenge before it, but ruled as a facial matter that Means will not be deprived of any constitutionally protected rights despite being tried by a sovereign not bound by the Constitution.⁵² This conclusion appears to assume that the tribal court's application of ICRA's statutory rights covers the same due process rights protected in state and federal courts. Indeed, how tribal criminal trial courts and appellate courts may interpret due process rights inherent in ICRA, in contrast to how they are interpreted by state and federal courts, is not entirely clear, any more than it is as to search-and-seizure law, the right against self-incrimination, speedy-trial rights, compulsory process for obtaining witnesses, the confrontation right, and others rights enumerated in ICRA. As there is no federal appellate right of review as to an allegation of a violation of any one of these rights in tribal court—only a habeas remedy—there is no guarantee that the protections will be consistently applied or be consistent with federal constitutional law as interpreted by the federal courts.

As a policy matter, Congress must consider whether the "relaxing" of restrictions on inherent tribal criminal jurisdiction

over non-Indians is warranted, given that it would subject non-Indian citizens to the authority of an extraconstitutional sovereign to which they had not previously been subject, and where the customary guarantees of federal constitutional protections may be questioned. Unlike the Duro-fix, which related to non-member Indians, a full or partial Oliphant-fix that relies on reaffirming inherent tribal criminal jurisdiction will bring significant constitutional and prudential questions that will likely have to be tested at the highest levels. An Oliphant-fix that grants federal delegated authority to tribal governments and includes federal appellate review likely will be more palatable to non-Indians and to a Supreme Court that looks to constitutional structure guarantees, among others, but does nothing to respect tribal sovereignty. The real question ought to be what instrument most effectively and expeditiously permits the local prosecution and punishment of domestic violence and sexual assault and other crimes committed by non-Indians in Indian country.

Endnotes

- 1 435 U.S. 191 (1978).
- 2 See, e.g., Philip P. Frickey, A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers, 109 Yale L.J. 1, 34-39 (1999); Katherine J. Florey, Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty, 51 B.C. L. Rev. 595, 609-613 (2010); Samuel E. Ennis, Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of Oliphant, 57 UCLA L. Rev. 553, 556-557, esp. n.18 (2009); Troy A. Eid, Beyond Oliphant: Strengthening Criminal Justice in Indian Country, 54 APR Fed. Law. 40, 44 (2007); Matthew L.M. Fletcher, Tribal Consent, 8 Stan. J. Civ. Rts. & Civ. Liberties 45, 100 (2012).
- 3 25 U.S.C. 1301-1303.
- 4 Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(d), 104 Stat. 1893; Pub. L. No. 102-137, § 1, 105 Stat. 646 (1991) (codified at 25 U.S.C. § 1301).
- 5 Judith V. Royster, Oliphant and Its Discontents: An Essay Introducing the Case for Reargument Before the American Indian Nations Supreme Court, 13 Kan. J.L. & Pub. Pol'y 59, 62 (Fall 2003).
- 6 Timothy Williams, For Native American Women, Scourge of Rape, Rare Justice, N.Y. Times, May 22, 2012, at A1.
- 7 See, e.g., David B. Muhlhausen & Christina Villegas, The Violence Against Women Act: Reauthorization Fundamentally Flawed, Heritage Foundation Backgrounder, No. 2673 (Mar. 28, 2012); Rob Capriccioso, More Conservatives Criticize Tribal Courts; White House Rebuts, Indian Country Today, Apr. 26, 2012.
- 8 S. Rep. No. 153, 112th Cong., 2d Sess. 7 (2012).
- 9 Id. (citations omitted).
- 10 Id. at 9.
- 11 Id. at 8.
- 12 Id. at 9.
- 13 Pub. L. 83-280, Aug. 15, 1953, codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360; 25 U.S.C. §§ 1321–1326 (notably the six "mandatory" states, including, with exceptions for certain tribes, California, Oregon, Minnesota, Wisconsin, Nebraska, and Alaska; and "optional" states that elected to apply state jurisdiction in Indian country, notably Washington, Florida, Idaho, and others, before the 1968 amendments to ICRA required tribal consent).
- 14 S. Rep. No. 153, 112th Cong., 2d Sess. 7 (2012).
- 15 Tribal Law and Order Act of 2010, Pub. L. 111–211, 124 Stat. 2258 (July 29, 2010) (amending, *inter alia*, 25 U.S.C. 1302).

- 16 25 U.S.C. § 1302(c)(1).
- 17 Id. § 1302(c)(2).
- 18 S. Rep. No. 112-153, at 36-39 (minority views From Senators Grassley, Hatch, Kyl, and Cornyn); *id.* at 48-52 (separate minority views from Senators Kyl, Hatch, Sessions, and Coburn).
- 19 Id. at 38.

- 20 436 U.S. 49, 71 (1978).
- 21 S. Rep. No. 112-153, at 44 (minority views).
- 22 Id. at 49.
- 23 Id. at 38.
- 24 Id. at 52.
- 25 Id. at 49-50.
- 26 Letter from Kevin Washburn, Dean and Professor of Law, University of New Mexico School of Law, et al. to Sen. Patrick Leahy et al., Constitutionality of Tribal Government Provisions in VAWA Reauthorization (Apr. 21, 2012) [hereinafter Law Professors' Letter].
- 27 Id. at 2 (emphasis added) (citing Oliphant v. Suquamish Tribe, 435 U.S. 191, 204 (1978)).
- 28 541 U.S. 193 (2004).
- 29 Law Professors' Letter, supra note 26, at 3.
- 30 United States v. Lara, 541 U.S. 193, 221 (2004) (Thomas, J., concurring in the judgment).
- 31 Law Professors' Letter, supra note 26, at 5.
- 32 Duro v. Reina, 495 U.S. 676, 693 (1990).
- 33 Alex Tallchief Skibine, Duro v. Reina and the Legislation that Overturned It: A Power Play of Constitutional Dimensions, 66 S. Cal. L. Rev. 767, 801 (1993).
- 34~ See Jane M. Smith & Richard M. Thompson II, Cong. Research Serv., Tribal Criminal Jurisdiction over Non-Indians in the Violence Against Women Act (VAWA) Reauthorization and the SAVE Native Women Act (May 15, 2012).
- 35 *Id.* at 7, 8-14.
- 36 *Id.* at 4.
- 37 See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 67 (1978).
- 38 SMITH & THOMPSON, supra note 34, at 15.
- 39 Id.
- 40 See, e.g., Matthew L.M. Fletcher, Resisting Federal Courts on Tribal Jurisdiction, 81 U. Colo. L. Rev. 973, 991 (2010); Matthew L.M. Fletcher, Tribal Consent, 8 Stan. J. Civ. Rts. & Civ. Liberties 45 (2012).
- 41 United States v. Lara, 541 U.S. 193, 227 (2004) (Souter, J., dissenting).
- 42 Id. at 212 (Kennedy, J., concurring in the judgment) (citations omitted).
- 43 Id. at 213.
- 44 Id.
- 45 Fletcher, Resisting Federal Courts on Tribal Jurisdiction, supra note 40, at 991.
- 46 Duro v. Reina, 495 U.S. 676, 693 (1990).
- 47 Lara, 541 U.S. at 213.
- 48 Id. at 209.
- 49 Means v. Navajo Nation, 432 F.3d 924 (2005) (resubmitted after U.S. Supreme Court decision in *Lara*).
- 50 Id. at 932 (citations omitted).
- 51 Id. (citing Morton v. Mancari, 417 U.S. 535, 553 (1974)).
- 52 *Id.* at 935.

Environmental Law & Property Rights

SACKETT V. ENVIRONMENTAL PROTECTION AGENCY

Compliance Orders and the Right of Judicial Review¹

By Damien M. Schiff*

he United States Supreme Court's decision in *Sackett v. Environmental Protection Agency* promises to be important for practitioners and members of the public who must deal with the Clean Water Act,² the scope of which, according to Justice Samuel Alito, "is notoriously unclear." The decision may also affect other federal statutes and administrative law generally. This short essay sets forth a synopsis of the case, the Court's opinions, and the decision's possible impacts.

I. Background Facts

In 2005, Mike and Chantell Sackett purchased a 0.63-acre lot within an existing residential subdivision in Priest Lake, Idaho. The Sacketts obtained all local building permits. In the spring of 2007, the Sacketts' employees began home construction by placing rock and gravel on the site to prepare for the home's foundation. A few days later, agents from the Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers entered the property and verbally ordered the Sacketts' employees to stop work. The agents stated that the lot contained wetlands protected under the Clean Water Act.

Shortly after the agents' visit, the Corps provided the Sacketts an after-the-fact wetlands fill permit application. The Sacketts were concerned, however, with submitting the application, because it required that they first concede that the Clean Water Act applied to their property. Over the course of the summer and fall of 2007, the Sacketts contacted EPA several times to request some written justification for the agency's verbal stop-work order. EPA reciprocated in November 2007, when it issued the Sacketts a compliance order under the Clean Water Act. Pursuant to that Act, EPA may issue a compliance order whenever, "on the basis of any information available," the agency believes that certain enumerated provisions of the Act have been violated. In the Sacketts' case, EPA charged the couple with having illegally filled in wetlands on their property without a permit. After a number of amendments, the order directed the Sacketts to remove the dirt and gravel that they had placed on the site, return the property to its alleged predisturbance wetlands status, and give EPA agents open access to the site and the Sacketts' business records to ensure that the compliance order would be carried out. The order also threatened the Sacketts with civil fines of up to \$32,500 per day if the Sacketts did not immediately comply.⁵

The Sacketts next requested an administrative hearing with EPA, which the agency denied. At that point, the Sacketts turned to the courts, filing a lawsuit in federal district court in Idaho to challenge the compliance order under the Administrative Procedure Act ("APA")⁶ and the Fifth

Amendment's Due Process Clause. The Sacketts' complaint advanced three claims. The first contended that the compliance order was arbitrary and capricious and therefore null and void under the APA. The second and third claims asserted that the compliance order deprived the Sacketts of liberty and property without due process of law.

Shortly after the complaint's filing, EPA moved to dismiss on the ground that a compliance order is not the type of agency action subject to judicial review. The district court agreed and dismissed the lawsuit. On appeal, the Ninth Circuit Court of Appeals affirmed. The court concluded that Congress did not want compliance orders to be judicially reviewable.8 The court reached that conclusion based on several factors, principally the statute's enforcement scheme and legislative history. By holding that the Sacketts could not seek review under the APA, the court was forced to address the Sacketts' constitutional argument that such preclusion would violate their due process rights. The Ninth Circuit concluded that there was no due process violation. To begin with, the Sacketts could not be subject to any sanction from EPA unless and until EPA decided to enforce the compliance order by bringing a civil action in federal court. At that point, the Sacketts would be offered plenary review of the compliance order as defendants.9 Moreover, the Sacketts could have avoided enforcement altogether by first seeking a wetlands fill permit from the Corps. If the Corps denied that permit, the Sacketts could sue in federal court and raise their jurisdictional claims.10

After an unsuccessful attempt to seek rehearing en banc, the Sacketts submitted a petition for writ of certiorari to the Supreme Court. The Sacketts' cert petition asked the Court to take up the case to answer the question whether the APA allows for judicial review of compliance orders. The Sacketts also requested that the Court address a circuit split between the Ninth and Eleventh Circuits. The Sacketts' petition pointed out that the Eleventh Circuit had held that Clean Air Act compliance orders are merely warning letters that have no legal impact, 11 whereas the Ninth Circuit had held that Clean Water Act compliance orders impose liability. 12

The Supreme Court granted review in June 2011. The Court chose to rewrite the questions presented. The first question presented was whether the Sacketts may obtain judicial review of the compliance order under the APA. The second question presented was whether the Sacketts' due process rights would be violated if they were denied a hearing under the APA.

III. The Decision

The Court issued its decision on March 21, 2012. Justice Scalia delivered the opinion for a unanimous Court. Justices Ginsburg and Alito wrote concurrences.

^{*} Pacific Legal Foundation. The author represented the Sacketts as the lead attorney for the Foundation in this litigation.

A. The Unanimous Opinion of the Court

Justice Scalia's majority opinion begins with a brief recitation of the facts and law, while also noting that the Court would not address the merits of the Sacketts' challenge to the compliance order. The opinion does, however, go over the Court's recent case law concerning the scope of EPA's and the Corps' authority under the Clean Water Act. It notes that in *Rapanos v. United States* —the most recent case in which the Court addressed this issue—the Chief Justice wrote a concurrence strongly suggesting to the agencies that they issue new regulations interpreting the scope of their Clean Water Act authority. Several years have passed since *Rapanos* was decided, and no new regulations have been finalized. The Sacketts' struggles highlight the import of the agencies' decision not to adopt such regulations.

Following this short introduction, Justice Scalia's majority opinion moves on to address EPA's arguments as to why the Sacketts should not be able to challenge their compliance order under the APA. These arguments were, first, that the compliance order is not a "final agency action"; 16 second, that the Sacketts already have opportunities for meaningful judicial review under the Clean Water Act; 17 and third, that Congress affirmatively precluded judicial review under the APA in enacting the Clean Water Act. 18

1. Is the Compliance Order a Final Agency Action?

A condition to judicial review under the APA is that the agency action in question be "final." The Supreme Court has established a two-part test for determining finality. First, is the action the consummation of the agency's decision-making process? Second, does the action have legal effects? Accordingly, in arguing against finality, EPA contended that a compliance order is not "final" because it does not represent the end of the agency's enforcement decision-making. To support that contention, EPA relied on the compliance order's terms, which invite the Sacketts to discuss the order with EPA if the Sacketts disputed any of the order's components.

Also to undercut finality, EPA asserted that a compliance order has no significant real-world impact. A compliance order does not create any legal obligations above and beyond what a regulated party must abide by in the Clean Water Act. Although a compliance order does impose liability, EPA dismissed that legal impact on the ground that, generally speaking, the liability of a regulated party under a compliance order will not exceed the liability that the landowner would have incurred directly under the statute if the compliance order had never been issued. Last, EPA asserted that even with a compliance order outstanding, its recipient could still apply to the Corps for an after-the-fact permit.

The majority opinion rejects these arguments, noting that the Sacketts' compliance order "has all the hallmarks of APA finality that our opinions establish." The order is the end of the administrative process, a conclusion buttressed by the fact that EPA denied the Sacketts an administrative hearing. Simply because the order invites further "informal" discussion between the Sacketts and the agency does not undercut the order's finality. The order has several legal consequences. It

requires the Sacketts to restore their property to its alleged predisturbance wetlands status, an obligation nowhere explicitly found in the statute. The order also imposes a potential civil liability of \$37,500 per day for noncompliance. Finally, the order makes it much less likely that the Sacketts would be able to obtain an after-the-fact permit.²¹

2. Does the Clean Water Act Provide Sufficient Opportunities for Judicial Review?

Having established that the compliance order is a final agency action, the majority opinion goes on to address EPA's argument that the Sacketts already have meaningful review under the Clean Water Act. EPA made two arguments on this score. First, EPA argued that the Sacketts could not be fined or otherwise injured unless and until EPA brought a civil action in federal court, at which point the Sacketts would receive plenary review as defendants. The majority opinion rejects this argument on the grounds that the Sacketts cannot force EPA to bring such an action and that the Sacketts should not be required to risk immense civil liability as a condition of getting their day in court.²²

Second, EPA contended that the Clean Water Act's permitting regime offered meaningful review to the Sacketts of their jurisdictional challenge to the compliance order. The majority opinion rejects this contention as well, reasoning that the Sacketts should not have to initiate new agency action with a new agency, i.e., submit a wetlands fill permit application to the Corps, in order to receive tangential review of an existing agency action issued by a different agency, i.e., EPA's compliance order.²³

3. Did Congress Intend to Preclude Judicial Review of Compliance Orders?

In addition to its finality and "adequate review" arguments, EPA contended that the Sacketts should not be allowed to proceed with their APA challenge to the compliance order because the Clean Water Act precludes such review. The Court's decision rejects this "preclusion" argument, beginning its analysis by noting that the APA codifies a presumption in favor of judicial review of final agency action.²⁴ According to the decision, none of EPA's arguments against such review overcomes that presumption. EPA argued that allowing landowners to sue over compliance orders would frustrate Congress's intention to give EPA the enforcement discretion to choose between issuing a compliance order and bringing a civil action; thus, judicial review of compliance orders would undermine EPA's statutory choice to select between compliance orders and civil actions.²⁵ But Justice Scalia's opinion explains that it is improper to presume that the only relevant difference between these enforcement options is that one requires the agency to go to court whereas the other does not. Rather, a different but more reasonable basis to distinguish the two, concludes the majority opinion, is that compliance orders can encourage voluntary and expeditious compliance without resort to judicial process.26

Adverting to its earlier "finality" discussion, the majority opinion again rejects EPA's contention that the compliance order is merely the beginning, not the end, of EPA's enforcement

process. The opinion also underscores that the APA provides review of final agency action whether or not an agency must resort to further judicial process before imposing any sanctions.²⁷ Indeed, the decision emphasizes its earlier observation that, once a compliance order issues, EPA's deliberation over its terms is basically at an end. The only decision left to the agency is over whether and when to bring a civil action.²⁸

EPA also argued that the statute's express authorization for review of administrative penalty orders should be read impliedly to preclude review of compliance orders. The majority rejects this argument, concluding that to infer preclusion based on such slender evidence would nullify the presumption in favor of judicial review.²⁹

Finally, the decision addresses EPA's central concern that judicial review of compliance orders would impede the agency's administration and thereby endanger the environment. With this argument, the majority opinion finds no merit. It reasons that, even assuming that EPA is correct in anticipating the effects of allowing judicial review, such review should still be allowed because the APA represents the judgment that the interests of judicial review supersede concerns about agency efficiency.³⁰ Notwithstanding judicial review, the majority opinion reminds EPA that a compliance order will still be a useful means of obtaining quick action, especially where there is little reason to question the order's legality.³¹

B. The Concurring Opinions of Justices Ginsburg and Alito

Although all nine Justices joined the majority opinion, two Justices wrote concurring opinions. Justice Ginsburg's concurring opinion sets forth her view that the majority decision is precedent only for the proposition that challenges to EPA's jurisdiction to issue compliance orders may be brought under the APA. She reasons that, because the Sacketts did not challenge the terms of their compliance order, it follows that the majority decision could not resolve whether such a challenge would be judicially cognizable.

The second concurrence was penned by Justice Alito. The gist of his concurrence is two-fold: EPA has mistreated the Sacketts and other property owners by denying them judicial review; and the underlying problem can be traced to the uncertain scope of EPA's and the Corps' authority under the Clean Water Act. Justice Alito's concurrence also appears to reveal indignation with the lack of process granted to the Sacketts. For example, it comments that, in "a nation that values due process, not to mention private property, such treatment [as the Sacketts received] is unthinkable." The concurrence concludes with an exhortation to Congress to pass legislation that clarifies (and presumably narrows) the Clean Water Act's scope.

IV. What Will Be the Impact of Sackett v. EPA?

Unquestionably, the surest impact of *Sackett* will be that the many hundreds of Clean Water Act compliance orders that EPA issues every year will now be eligible for judicial review. The decision may also have important impacts on other agency actions under the Clean Water Act. For example, the Corps by regulation issues "jurisdictional determinations" to interested landowners. ³² These determinations set forth the agency's formal

opinion as to whether a site contains jurisdictional waters or wetlands. Before *Sackett*, one court of appeals had ruled that a landowner cannot seek judicial review of a jurisdictional determination.³³ The court reasoned that such a determination is not final because it has no legal impact. The Supreme Court's discussion of finality in *Sackett* may, however, lead to a reassessment of that conclusion. Another likely impact is that the regulated community can expect fewer compliance orders and, in their place, less formal communications (such as notices of violation). Moreover, the regulated community can expect that EPA will do its homework before issuing any compliance orders going forward, given that the agency knows that its record could be subject to judicial oversight.

The decision may also affect the reviewability of "cease and desist" orders that the Corps issues.³⁴ A cease and desist order need not be just a notice of violation; instead, such an order can go beyond a notice and impose corrective measures. Recall that the *Sackett* majority opinion found support for its holding that a compliance order is final agency action in the fact that such an order can impose remedial obligations not explicit in the statute itself. Thus, it is reasonable to conclude that, where a cease and desist order has a similar remedial component, that order should be deemed final agency action subject to judicial review.

Will Sackett affect the reviewability of agency action taken pursuant to other statutes? The Clean Air Act³⁵ as well as the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")³⁶ have compliance order provisions. Nevertheless, Sackett's impact on these statutes will probably be minimal. In the case of Clean Air Act compliance orders, the Supreme Court has already ruled that they are subject to review under the statute's own judicial review provision.³⁷ With respect to CERCLA compliance orders, most judicial review is precluded by statute.³⁸ Many parties have contended that, because such review is statutorily precluded, CERCLA compliance orders violate their recipients' due process rights. The Supreme Court in Sackett had an opportunity to address this question if it had ruled that the Sacketts could not seek judicial review under the APA. Because the Court ruled that such review is available, the Court had no occasion to address the CERCLA due process issue.

Another area of agency practice that the decision may affect is the issuance of warning letters. For example, the United States Fish and Wildlife Service routinely resorts to "warning" letters to coerce compliance with the Endangered Species Act. If such letters could qualify as final agency action, then *Sackett* would be a strong defense against the expected agency charge that judicial review of such letters would hamstring agency enforcement.

V. Conclusion

One interesting facet to *Sackett* is that, prior to the Supreme Court's decision, every lower court that had the chance to address the judicial review issue had ruled that a landowner is *not* entitled to judicial review of a compliance order.³⁹ The unanimous decision of the Supreme Court therefore stands out in even starker relief. The mismatch between the lower courts and the Supreme Court on this issue is probably owing to two

points. First, the lower courts accepted more readily than the Supreme Court EPA's contention that allowing landowners to sue over compliance orders would lead to maladministration and environmental harm. Second, in prior cases the lower courts were usually presented with factual scenarios much less attractive than the Sacketts' story: for example, big corporations as plaintiffs or individuals accused of having committed serious environmental crimes.

Finally, it is worth noting that the majority opinion is rather succinct. The opinion does not cite many of the precedents that the parties relied on in their merits briefing, such as Ex parte Young,⁴⁰ Thunder Basin Coal Co. v. Reich,⁴¹ and Alaska Department of Environmental Conservation v. EPA.⁴² The majority opinion also does not address the circuit split on which the Sacketts' cert petition was in part based. Later cases will have to address these issues. In any event, the full impact of Sackett will depend on EPA's willingness to ameliorate its enforcement program and to adopt a more modest understanding of its statutory authority.

Endnotes

- 1 For a lengthier treatment, please see my article, "Sackett v. EPA: Compliance Orders and the Right of Judicial Review," in the forthcoming volume of the Cato Supreme Court Review. A version of this article has appeared in the Summer 2012 volume of the Journal of the James Madison Institute.
- 2 33 U.S.C. § 1251, et seq.
- 3 Sackett v. Envtl. Prot. Agency, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).
- 4 33 U.S.C. § 1319(a)(3).
- 5 By the time the Supreme Court decided the case, EPA had increased the penalty maximum to \$37,500 per day. *See* 74 Fed. Reg. 626, 627 (Jan. 7, 2009).
- 6 5 U.S.C. §§ 701-706.
- 7 622 F.3d 1139 (9th Cir. 2010).
- 8 See id. at 1142-44.
- 9 See id. at 1146-47.
- 10 See id. at 1146.
- 11 Tenn. Valley Auth. ("TVA") v. Whitman, 336 F.3d 1236 (11th Cir. 2003).
- 12 See Sackett, 622 F.3d at 1144-46.
- 13 Sackett v. Envtl. Prot. Agency, 132 S. Ct. 1367, 1369-70 (2012).
- 14 547 U.S. 715 (2006).
- 15 See id. at 757-58 (Roberts, C.J., concurring).
- 16 *Cf.* 5 U.S.C. § 704 (authorizing judicial review of "final" agency action); Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (holding that an agency action is final if it is the consummation of the agency's decision-making and if it has legal effects).
- 17 Judicial review under the APA is limited to agency actions "for which there is no other adequate remedy in a court." 5 U.S.C. \S 704.
- 18 The APA's judicial review provisions apply except to the extent that "statutes preclude judicial review" or "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1)-(2).
- 19 Sackett v. Envtl. Prot. Agency, 132 S. Ct. 1367, 1371 (2012).
- 20 Id. at 1372.

- 21 *Id.* In its merits briefing in the Supreme Court, EPA had conceded that the compliance order produces these effects. The Court assumed for the sake of argument that EPA was correct, without actually deciding whether EPA's interpretation of the Clean Water Act and the Corps' permitting regulations was correct. *See id.* nn.2-3.
- 22 Id.
- 23 Id.
- 24 Id. at 1373.
- 25 The Clean Water Act directs EPA, whenever it determines that certain enumerated provisions of the Act have been violated, to "issue an order requiring...compl[iance] *or* [to] bring a civil action." 33 U.S.C. § 1319(a)(3) (emphasis added).
- 26 Sackett, 132 S. Ct. at 1373.
- 27 Id.
- 28 Id.
- 29 Id.
- 30 Id. at 1374.
- 31 Id.
- 32 See 33 C.F.R. § 320.1(a)(6).
- 33 See Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs, 543 F.3d 586, 597 (9th Cir. 2008).
- 34 Cf. 33 C.F.R. §§ 326.3(d), 326.4(d)(3).
- 35 42 U.S.C. § 7401, et seq.
- 36 42 U.S.C. § 9601, et seq.
- 37 See Alaska Dep't of Envtl. Conservation ("ADEC") v. EPA, 540 U.S. 461, 483 (2004).
- 38 42 U.S.C. § 9613(h).
- 39 See, e.g., Laguna Gatuna, Inc. v. Browner, 58 F.3d 564 (10th Cir. 1995), cert. denied, 516 U.S. 1071 (1996); S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement, 20 F.3d 1418 (6th Cir. 1994), cert. denied, 513 U.S. 927 (1994); S. Pines Assocs. v. United States, 912 F.2d 713 (4th Cir. 1990); Hoffman Group, Inc. v. EPA, 902 F.2d 567 (7th Cir. 1990).
- 40 209 U.S. 123 (1908).
- 41 510 U.S. 200 (1994).
- 42 540 U.S. 461 (2004).



Intellectual Property

An Attack on Separation of Powers and Federal Judicial Power? An Analysis of the Constitutionality of Section 18 of the America Invents Act

By Charles J. Cooper* and Vincent J. Colatriano**

Note from the Editor:

This paper analyzes constitutional challenges to Section 18 of the recently passed America Invents Act. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the authors. The Federalist Society seeks to foster further discussion and debate about the structure of the U.S. intellectual property system. To this end, we offer links below to various sides of this issue and invite responses from our audience. To join the debate, you can e-mail us at info@fed-soc.org.

Related Links:

- America Invents Act, Pub. L. No. 112-29: http://www.govtrack.us/congress/bills/112/hr1249/text
- Letter from Michael W. McConnell, Professor, Stanford Law School, to Lamar Smith, Chairman, House Judiciary Committee, and John Conyers, Jr., Ranking Member, House Judiciary Committee (June 16, 2011): http://judiciary.house.gov/issues/Patent%20Reform%20PDFS/McConnell%20analysis.pdf
- Memorandum from Viet D. Dinh, Bancroft PLLC, to Financial Services Roundtable (June 20, 2011): http://judiciary.house.gov/issues/Patent%20Reform%20PDFS/Constitutional%20Analysis%20Memorandum.pdf
- Letter from Michael W. McConnell, Professor, Stanford Law School, to Lamar Smith, Chairman, House Judiciary Committee, and John Conyers, Jr., Ranking Member, House Judiciary Committee (June 23, 2011): http://judiciary.house.gov/issues/Patent%20Reform%20PDFS/M%20McConnell.pdf
- Letter from Richard A. Epstein, Professor, New York University School of Law, and F. Scott Kieff, Professor, George Washington University School of Law, to the House Judiciary Committee (Mar. 30, 2011): http://www.scribd.com/doc/57945172/Letter-from-Richard-Epstein-and-F-Scott-Kieff

n a patent "reexamination" proceeding, the Patent and Trademark Office ("PTO") considers whether a patent it ▲ had previously issued is legally valid. The PTO's statutory authority to reexamine, and invalidate, a patent is indifferent to whether the validity of the patent at issue had previously been challenged in federal court and upheld in a final decision.¹ Appeals from PTO reexamination decisions are taken to the Court of Appeals for the Federal Circuit, the Article III court with essentially exclusive appellate jurisdiction over patent disputes. Last December, Circuit Judge Pauline Newman, a long-serving and highly respected Federal Circuit jurist, began an opinion in an otherwise run-of-the-mill patent reexamination appeal by posing the following queries: "This reexamination appeal raises a fundamental question—is a final adjudication [upholding a patent's validity], after trial and decision in the district court, and appeal and final judgment in the Federal Circuit, truly final? Or is it an inconsequential detour along the administrative path to a contrary result?"2

One would think that, given the established constitutional underpinnings of our tripartite system of government, the

answers to Judge Newman's questions would be an obvious, and unremarkable, "of course" and "of course not", respectively. But Judge Newman's queries were posed in her *dissent* from a majority opinion that gave its blessing to the opposite result. Indeed, the panel majority found no separation of powers difficulty with the PTO invalidating a patent "on the strength of a reference that the requesting party [an accused infringer] had unsuccessfully asserted as prior art in litigation involving the same patent, even where this court had affirmed the district court's judgment of validity." The majority dismissed the constitutional question raised by Judge Newman in a footnote, in which it relied heavily on *In re Swanson*, a 2008 decision reaching a similar conclusion.

Thus, the panel majority in effect allowed an accused, and previously adjudged, infringer to initiate PTO reexamination proceedings that led to the invalidation of the same patent that a federal court had earlier upheld in a final judgment affirmed by the Federal Circuit itself. Judge Newman decried the panel majority's opinion as countenancing "the curious, as well as unconstitutional, situation whereby the court's final decision has devolved into an uncertain gesture, stripped of value in commerce as well as in law." 5

Five months after the decision in *Construction Equipment*, the Federal Circuit decided *In re Baxter International.* Once again, a panel of the court affirmed a PTO reexamination decision invalidating claims of a previously issued patent,

^{*} Partner, Cooper & Kirk, PLLC. The views expressed in this article are based upon a legal analysis of Section 18 of the America Invents Act undertaken on behalf of a client who had retained Cooper & Kirk to examine the constitutionality of the legislation as it made its way through Congress.

^{**} Partner, Cooper & Kirk, PLLC.

even though a validity challenge to those same patent claims, initiated by the same party who then initiated the reexamination proceedings, had been rejected on the merits by a federal district court that had then been affirmed by the Federal Circuit itself. Once again, the panel majority relied on the 2008 *Swanson* decision as having approved this result. And once again, Judge Newman authored a strong dissent remarking that the panel majority, which "appear[ed] unperturbed by the [PTO's] nullification of this court's final decision, had reached a decision that "violate[d] the constitutional plan." Noting that "[j]udicial rulings are not advisory [but are instead] obligatory, and that "[f]inality is fundamental to the Rule of Law," Judge Newman stressed that "[n]o concept of government authorizes an administrative agency to override or disregard the final judgment of a court."

The separation of powers concerns voiced by Judge Newman in *Construction Equipment* and again in *Baxter* have recently been compounded by Congress. In the comprehensive patent reform legislation enacted last year—the America Invents Act ("AIA")¹¹ —Congress significantly expanded the PTO's power to reexamine and invalidate patents whose validity has been sustained in final judicial decisions.¹²

In particular, Section 18 of the AIA establishes a so-called "transitional program" that subjects a special class of business method patents in the financial services field to their own distinctive post-grant PTO reexamination process. Section 18 defines a "covered business method patent" as a patent that claims "a method or corresponding apparatus for performing data processing or other operations used in the practice, administration, or management of a financial product or service, except that the term does not include patents for technological inventions." Operating in conjunction with the provisions of Section 6 of the Act, Section 18 authorizes parties who have been sued for infringement of, or accused of infringing, covered business method patents to seek the invalidation of those patents by the PTO in special "post-grant review" reexamination proceedings. Patents that have been sustained in final judicial decisions can be reexamined by the PTO under Section 18.

We believe that, *Construction Equipment*, *Baxter*, and *Swanson* notwithstanding, by allowing an accused infringer who has unsuccessfully challenged the validity of a covered patent in a federal court to seek reexamination by the PTO of the validity of that same patent, Section 18 contravenes bedrock principles of separation of powers as well as the related principle that federal courts are not empowered to issue "advisory opinions."

While the pertinent constitutional principles are of ancient vintage, they were forcefully restated and enforced by the Supreme Court in its 1995 decision in *Plaut v. Spendthrift Farm.* ¹³ In *Plaut*, the plaintiffs brought a securities fraud action, but it was later dismissed as time-barred because of the Supreme Court's intervening decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* ¹⁴ which established that such suits were governed by a specific federal statute of limitations. Congress then amended the Securities Exchange Act to include a new Section 27A(b), which purported to revive a narrow class of actions—those filed pre-*Lampf,* which were timely under applicable state law, but which were dismissed as time-barred

post-*Lampf*. The *Plaut* plaintiffs sought to refile their complaint in federal court pursuant to the new statute, but the Supreme Court held that Section 27A(b) was unconstitutional.

The Court squarely held that Section 27A(b) offended the separation of powers:

The record of history shows that the Framers crafted this charter of the judicial department [i.e., Article III] with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that "a judgment conclusively resolves the case" because "a 'judicial Power' is one to render dispositive judgments." . . . By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle. ¹⁵

As the Court concluded, "[w]hen retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than 'reverse a determination once made, in a particular case." The Court noted that its decisions from the time of *Hayburn's Case*¹⁷ had "uniformly provided fair warning that such an act exceeds the powers of Congress."

Moreover, the Supreme Court in *Plaut* made clear that this "categorical" rule applies whether Congress amends substantive standards or merely alters a procedural rule, such as the statute of limitations: "It is irrelevant as well that the final judgments reopened by § 27A(b) rested on the bar of a statute of limitations. The rules of finality, both statutory and judgemade, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: as a judgment on the merits." Accordingly, it mattered not at all "that the length and indeed even the very existence of a statute of limitations upon a federal cause of action is entirely subject to congressional control." As the Court noted:

[V]irtually *all* of the reasons why a final judgment on the merits is rendered on a federal claim are subject to congressional control. Congress can eliminate, for example, a particular element of a cause of action that plaintiffs have found it difficult to establish; or an evidentiary rule that has often excluded essential testimony; or a rule of offsetting wrong (such as contributory negligence) that has often prevented recovery. To distinguish statutes of limitations on the ground that they are mere creatures of Congress is to distinguish them not at all.²¹

Because Section 18 subjects a patent whose validity has been sustained in federal court to reexamination in the PTO at the behest of the same parties, it cannot be squared with the basic and longstanding principles of separation of powers reaffirmed in *Plaut*.

This straightforward application of separation of powers principles, however, has been rejected by the Federal Circuit. As noted, the panel majorities in both *Construction Equipment* and *Baxter* dismissed Judge Newman's constitutional concerns, relying on the court's 2008 decision in *Swanson* rejecting a similar separation of powers challenge to another provision

of the Patent Act allowing for reexamination. In *Swanson*, the Federal Circuit construed section 303(a) of the Act, and in particular the provision allowing the PTO to reexamine the validity of a patent if it determines that a "substantial new question of patentability" has been raised. In construing this provision, the court addressed whether the separation of powers bars legislation allowing the PTO to reexamine the validity of a patent on the same grounds rejected by a federal court in a final decision upholding the patent.²² The court of appeals held that *Plaut* did not bar such reexamination by the PTO of the same validity challenges previously rejected by a federal court in litigation between the same parties.

The *Swanson* court relied primarily on the differing standards of proof governing patent validity challenges in the courts (where the Federal Circuit had long held that the party challenging a patent's validity must prove invalidity by clear and convincing evidence) and before the PTO in reexamination proceedings (where the examiner need only find invalidity by a preponderance of evidence).²³ Emphasizing that "the court's final judgment and the examiner's rejection are not duplicative [but are instead] differing proceedings with different evidentiary standards for validity," the court of appeals held that "no Article III issue [is] created when a reexamination considers the same issue of validity as a prior district court proceeding."²⁴

Declaring itself bound by *Swanson*'s discussion of the differing standards of proof governing validity challenges before the courts and before the PTO, the panel majority in *Baxter* concluded that while the PTO "ideally" should not reach a different conclusion in cases in which "a party who has lost in a court proceeding challenging a patent, from which no additional appeal is possible, provokes a reexamination in the PTO, using the same presentations and arguments," such an "ideal" result was not constitutionally compelled.²⁵

The Federal Circuit's decision in *Swanson* (and therefore its decisions in *Construction Equipment* and *Baxter*) cannot be squared with the separation of powers principles discussed and applied by the Supreme Court in *Plaut*. The constitutional infirmity identified in *Plaut* concerns the *power* of Congress to reopen final judgments of Article III courts or to authorize Executive Branch agencies to reconsider the issues that were, or could have been, resolved by those judgments. Congress has no power to reopen a final judicial decision (or to authorize a federal agency to reopen such a decision), and thus reduce it to the equivalent of an advisory opinion, and it matters not what standard of proof is to be used in the course of the administrative reconsideration of that decision.

Plaut makes this point explicitly. As discussed previously, the Supreme Court in Plaut rejected the argument that legislation altering procedural or evidentiary rules is outside the constitutional prohibition against retroactive statutes reopening federal court judgments. In the course of rejecting this argument, the Court explicitly noted that a law reopening final judgments for relitigation under new standards of proof would not pass constitutional muster:

To mention only one other broad category of judgmentproducing legal rule: Rules of pleading and proof can similarly be altered after the cause of action arises, Landgraf v. USI Film Products, supra, 511 U.S., at 275, and n. 29..., and even, if the statute clearly so requires, after they have been applied in a case but before final judgment has been entered. Petitioners' principle would therefore lead to the conclusion that final judgments rendered on the basis of a stringent (or, alternatively, liberal) rule of pleading or proof may be set aside for retrial under a new liberal (or, alternatively, stringent) rule of pleading or proof. This alone provides massive scope for undoing final judgments and would substantially subvert the doctrine of separation of powers.²⁶

Thus, the Supreme Court in *Plaut* specifically rejected the "standard of proof" distinction relied upon by the *Swanson* court in its effort to distinguish *Plaut.*²⁷

The essential point is this: the bedrock constitutional principle that Article III courts render final, not advisory, judgments in cases or controversies properly before them cannot be evaded by Congress through the simple expedient of adjusting the standard of proof applicable to the issue in dispute. Indeed, were the rule otherwise, Congress could render virtually any judicial decision advisory, for the "standard of proof" distinction drawn in Swanson to avoid application of Plaut cannot be confined to patent examinations. To the contrary, the Federal Circuit's holdings in Swanson, Construction Equipment, and Baxter would allow Congress effectively to authorize federal agencies in countless other contexts to reopen final judicial judgments for relitigation or agency reconsideration. The clear and convincing standard of proof governing a court's decision whether to invalidate a patent is simply a manifestation of the general rule that agency decisions concerning matters within their particular field of jurisdiction and expertise are entitled to judicial deference. Thus, under modern administrative law, very few agency decisions are reviewed by courts under a de novo standard; most administrative decisions not involving pure issues of law are reviewed by courts under a deferential standard of some kind. This principle holds true across virtually the entire range of federal agencies, with respect to nearly every type of decision, under scores of federal statutes. Indeed, under the generally applicable Administrative Procedures Act, courts are empowered to set aside most agency decisions only if such decisions are found to be "arbitrary" or "capricious." 28 Under this "narrow" standard of review, courts are not to substitute their own judgment for that of the agency,29 and should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."30 Under the Swanson Court's reasoning, Congress is free to reopen virtually any administrative issue finally resolved by judicial decision and to subject it to reconsideration by the relevant agency, so long as Congress prescribes a lower (or at least different) standard of proof.

In short, if the *Swanson* "standard of proof" distinction is correct, then there is no constitutional impediment to Congress enacting a similar "reexamination" procedure for virtually every agency decision, despite the entry of final judicial judgments respecting those decisions. *Plaut* recognizes the "massive scope for undoing final judgments" that such a rule would create.³¹

Nor is Section 18's constitutionality supported by the fact that a criminal defendant can be acquitted under a beyonda-reasonable-doubt standard, but found civilly liable under a

preponderance standard. When an individual is acquitted in a criminal proceeding but later held civilly liable in tort, the second judgment does not render the first one advisory not merely because the two cases involved different legal standards of proof, but because the first was a *criminal* proceeding (which could result in imprisonment or even death) and the second one was *civil* (which could result only in the transfer of money from one party to another in the form of damages). But here the legal issues of patent validity and the remedies for patent infringement that would be subject to the dueling Federal Circuit judgments are identical. That outcome violates the constitutional principle that the Article III branch has no jurisdiction to issue advisory opinions. ³²

Swanson, in short, is inconsistent with *Plaut*, and any argument seeking to justify the constitutionality of PTO reexamination proceedings on the basis of the different standard of proof applicable in court challenges to patent validity would violate the *Plaut* rule that Congress cannot retroactively apply a new "liberal rule of proof" (preponderance) to a dispute that has been finally decided by the federal courts, albeit under a more "stringent" rule, and require that the dispute be reopened and re-decided under the new rule.³³

It must be noted that some highly respected constitutional scholars disagree with our analysis of Section 18's constitutional defects.³⁴ They argue that a finding of invalidity by the PTO in a Section 18 reexamination would *not* be binding on a court that had rendered a prior final judgment sustaining the same patent against the same infringer. In other words, the PTO's determination in a Section 18 reexamination that a patent claim is invalid would itself be, in effect, advisory only.

Under this understanding of the intended effect of Section 18, an accused patent infringer who had been sued for infringement, had asserted that the patent was invalid, had failed to prove the patent invalid, had been found to have infringed the patent, and had unsuccessfully appealed the judgment to the Federal Circuit, could then go to the PTO and assert the same arguments against the validity of the same patent in a postgrant review under Section 18. But, according to this view, if the PTO then invalidated the patent and that ruling was affirmed by the Federal Circuit, the previously adjudicated patent infringer would nevertheless still be bound by the original final judicial judgment sustaining the patent's validity and finding infringement. This second trip through the PTO under Section 18 would not control over the court's prior judgment sustaining the validity of the patent; the earlier, flatly inconsistent district court judgment would remain in full force against the infringer. The infringer's only recourse would be to return to the original district court and move, under Federal Rule of Civil Procedure 60(b), to be relieved of the prior adverse judgment in light of the PTO's subsequent ruling of invalidity.

It is difficult to imagine that Congress actually intended for Section 18 to create a purely advisory reexamination regime whenever reexamination resulted in two diametrically opposed judgments involving precisely the same disputes over the validity of precisely the same patent between precisely the same parties, both affirmed by the Federal Circuit. But even accepting this understanding of Section 18 at face value, the provision would nonetheless violate the separation of powers principles

enforced by the Supreme Court in Plaut. For regardless which of the conflicting Federal Circuit decisions prevails, one of the decisions of the Federal Circuit would be rendered advisory. If the PTO's reexamination decision prevails, then the Federal Circuit's decision affirming the original district court judgment sustaining the patent's validity would be effectively overruled and rendered advisory. If instead the original district court decision prevails, then the Federal Circuit's affirmance of the later PTO judgment of patent invalidity would be rendered purely advisory as to the party who had petitioned the PTO under Section 18 for reexamination and who had, supposedly, prevailed there. One of the inconsistent final judicial judgments must give way to the other. Thus, even under this implausible reading of Section 18, that provision will operate to render a final judicial decision advisory, a result that cannot be squared with separation of powers principles.

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One final argument raised in support of Section 18's constitutionality warrants discussion. Some of the legislation's supporters have suggested that the separation of powers analysis discussed above is undermined by the Supreme Court's 2005 decision in National Cable & Telecommunications Association v. Brand X Internet Services. 35 Brand X involved a court challenge to a Federal Communications Commission ("FCC") rulemaking addressing whether cable companies providing broadband internet access provided "telecommunications servic[es]" within the meaning of the Communications Act of 1934, as amended. The Court of Appeals for the Ninth Circuit concluded that cable modem service did not constitute such telecommunications services under the statute. The Ninth Circuit held that the FCC's interpretation of the statutory term was not entitled to deference under the "Chevron doctrine," in part because the Ninth Circuit had given a contrary construction to that term in a prior case to which the FCC was not a party.³⁶

The Supreme Court reversed, holding that *Chevron* deference applies to an agency's statutory interpretation that is different from a previous judicial interpretation of the statute unless the court had also held that the statute was unambiguous. Because the previous decision by the Ninth Circuit only provided what it believed to be the "best" interpretation of the statute and had not held that the statute was unambiguous, *Chevron* deference applied to the agency's subsequent, and contrary, construction.³⁷

As relevant here, the majority rejected the suggestion made by Justice Scalia in dissent that the majority's application of *Chevron* would result in an unconstitutional scenario in which an agency would be free to "reverse" a decision by an Article III court.³⁸ The majority reasoned:

Since *Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes. In all other respects, the court's prior ruling remains binding law (for example, as to agency

interpretations to which *Chevron* is inapplicable). The precedent has not been "reversed" by the agency, any more than a federal court's interpretation of a State's law can be said to have been "reversed" by a state court that adopts a conflicting (yet authoritative) interpretation of state law.³⁹

Brand X thus did not present the scenario presented in Plaut (and presented by Section 18) in which an executivebranch agency is authorized to review and essentially overrule a federal court judgment entered in an action between private parties. The case, rather, was analogous to the common situation where a federal court is required to decide an issue of state law without the benefit of a controlling state judicial interpretation, and then the issue arises again in a later federal lawsuit between different parties, only this second time the federal court has the benefit of an intervening (and authoritative) ruling on the meaning of the state law by that state's highest court. The second federal court would, of course, be bound by that state supreme court ruling, and the decision to follow that rule rather than the prior federal court effort to interpret the state law would by no means render the prior federal decision "advisory"—that earlier decision had finally decided, and resolved, the controversy between those two earlier, different parties. The concept of "advisory" opinions simply did not enter into the Brand X analysis.40

In sum, Section 18 of the America Invents Act is a recipe for "undoing final judgments and would substantially subvert the doctrine of separation of powers." There can be little doubt that at some point, a patent holder whose property right is threatened by the operation of Section 18 will challenge the provision's constitutionality. The Supreme Court will thus inevitably be presented with the question whether a final adjudication by a federal district court, affirmed in a final judgment of a federal appellate court, is, indeed, "truly final."

Endnotes

- 1 *See generally* 35 U.S.C. ch. 30 (provisions governing *ex parte* reexamination); 35 U.S.C. ch. 31 (provisions governing *inter partes* reexamination).
- 2 In re Construction Equipment Company, 665 F.3d 1254, 1257 (2011) (Newman, J.).
- 3 Id. at 1256 n.3.
- 4 Id. (citing In re Swanson, 540 F.3d 1368 (Fed. Cir. 2008)).
- 5 Id. at 1257 (Newman, J., dissenting).
- 6 2012 WL 1758093 (Fed. Cir. May 17, 2012).
- 7 Id. at *7.
- 8 *Id.* at *6-7.
- 9 Id. at *8 (Newman, J., dissenting).
- 10 Id. at *9 (Newman, J. dissenting).
- 11 Pub. L. No. 112-29.
- 12 Although issued after the enactment of the AIA, the decisions in *Construction Equipment* and *Baxter* applied reexamination provisions of the Patent Act (35 U.S.C. §§ 301 *et seq.*) which existed prior to enactment of the legislation.
- 13 514 U.S. 211 (1995).

- 14 501 U.S. 350, 364 (1991).
- 15 Plaut, 514 U.S. at 218-19 (citation omitted) (emphasis in original).
- 16 Id. at 225 (citing The Federalist No. 81 (Alexander Hamilton)).
- 17 2 Dall. 409 (1792).

18 *Id.* The Court here cited to a string of decisions, dating back to the time of the founding, making this same point:

See, e.g., Chicago & Southern Air Lines, Inc. [v. Waterman S.S. Corp.], 333 U.S. [103], at 113 [(1948)]. . . ("Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government"); United States v. O'Grady, 22 Wall. 641, 647-648, 22 L.Ed. 772 (1875) ("Judicial jurisdiction implies the power to hear and determine a cause, and . . . Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal"); Gordon v. United States, 117 U.S.Appx. 697, 700-704 (1864) (opinion of Taney, C.J.) (judgments of Article III courts are "final and conclusive upon the rights of the parties"); Hayburn's Case, 2 Dall., at 411 (opinion of Wilson and Blair, JJ., and Peters, D.J.) ("[R]evision and control" of Article III judgments is "radically inconsistent with the independence of that judicial power which is vested in the courts"); id., at 413 (opinion of Iredell, J., and Sitgreaves, D.J.) ("[N]o decision of any court of the United States can, under any circumstances, . . . be liable to a revision, or even suspension, by the [l]egislature itself, in whom no judicial power of any kind appears to be vested"). See also Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421, 431, 15 L.Ed. 435 (1856) ("[I]t is urged, that the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby. . . . This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it").

Plaut, 514 U.S. at 225-26; see also In re Construction Equipment Company, 665 F.3d 1254, 1258 (2011) (Newman, J., dissenting) ("The plan of the Constitution places the judicial power in the courts, whose judgments are not thereafter subject to revision or rejection. Neither the legislative nor the executive branch has the authority to revise judicial determinations."); In re Baxter Int'l, 2012 WL 1758093, at *11 (Newman, J., dissenting) ("From the inception of the judicial process in the nation, it was established that decisions of Article III courts are not subject to negation by proceedings in the other branches.").

- 19 Plaut, 514 U.S. at 228.
- 20 Id.
- 21 Id. at 228-29.
- 22 In re Swanson, 540 F.3d 1368, 1378 (Fed. Cir. 2008).
- 23 Id. at 1378-79.
- 24 Id. at 1379.
- 25 Baxter, 2012 WL 1758093, at *7.
- 26 514 U.S. at 229 (emphases added).
- 27 See also Baxter, 2012 WL 1758093, at *12 (Newman, J., dissenting) ("The nature of the burden of proof does not overcome the strictures of judicial finality.").
- 28 5 U.S.C. § 706(2)(A).
- 29 Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).
- 30 Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974); *see also* F.C.C. v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009).
- 31 514 U.S. at 229.
- 32 Section 18 has a second, independent constitutional vice, recognized but not actually present in *Plaut* itself. The Supreme Court in *Plaut* emphasized the venerable constitutional "principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch. *See*,

e.g., Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 ... (1948)." Plaut, 514 U.S. at 218. Section 18 violates this rule, and is thus unconstitutional twice over.

33 Indeed, the *Swanson* court acknowledged in a cryptic footnote that "an attempt to reopen a final federal court judgment of *infringement* on the basis of a reexamination finding of invalidity might raise constitutional problems." *In re* Swanson, 540 F.3d 1368, 1379 n.5 (Fed. Cir. 2008) (emphasis added). The constitutional basis for the distinction the *Swanson* court drew between final court judgments on validity and final court judgments that also find infringement is unclear. But accepting that distinction at face value, what is clear is that under *Swanson*, Section 18 presents serious separation of powers concerns.

Along similar lines, the Supreme Court's recent decision in Microsoft Corporation v. i4i Limited Partnership, 113 S.Ct. 2238 (2011), confirms that the clear and convincing standard of proof applies as a general matter to patent validity challenges in federal court. But Justice Breyer's concurrence (joined by Justices Scalia and Alito) emphasized that while the clear and convincing standard applies to questions of fact pertaining to validity issues, it does not apply to questions of law, including questions regarding how to apply the law to a given set of facts. "Where the ultimate question of patent validity turns on the correct answer to legal questions—what these subsidiary legal standards mean or how they apply to the facts as given—today's strict standard of proof has no application." Id. at 2253 (Breyer, J., concurring) (emphasis added) (citing, inter alia, Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 17 (1966)). At a minimum, the fact that certain aspects of the validity inquiry—which aspects in many cases and for many patents may be the only relevant considerations driving that inquiry—are not analyzed under a clear and convincing standard of proof underscores that even under Swanson, there will be numerous cases in which the validity analysis conducted by the PTO in a reexamination proceeding will be based on the same standard previously used by the court in its own validity analysis. Cf. Baxter, 2012 WL 1758093, at *13 (Newman, J., dissenting) (rejecting standard of proof justification for "PTO's authority to overrule judicial decisions" as "flawed" in cases involving obviousness, "which is a question of law, and the PTO, like the court, is required to reach the correct conclusion on correct law."). On a more basic level, then, the fact (not addressed by the Federal Circuit in Swanson) that not all aspects of the judicial validity analysis are governed by the clear and convincing standard of proof serves to underscore the error of the court in Swanson in placing such dispositive significance in the separation of powers analysis on the standard of proof question.

34 In particular, during the legislative debates over the AIA, supporters of the legislation cited analyses by Professor Michael W. McConnell and Professor Viet Dinh, each of whom concluded that Section 18's reexamination regime does not run afoul of separation of powers principles. *See* Letter from Michael McConnell to House Judiciary Chairman Lamar Smith and Ranking Member John Conyers, Jr. of June 16, 2011; Letter from Michael McConnell to Chairman Smith and Ranking Member Conyers of June 23, 2011; Letter from Viet Dinh to Chairman Smith and Ranking Member Conyers of June 23, 2011.

35 545 U.S. 967 (2005).

36 Id. at 979-80.

37 Id. at 982-85.

38 See id. at 1017 (Scalia, J., dissenting).

39 Id. at 983-84.

40 Indeed, in *Brand X*, the Court was dealing with a federal agency's *interpretive* authority: its power, in cases in which its organic enabling statute is ambiguous, to decide upon one of a range of reasonable interpretations of that statute. It thus makes sense that the agency would not be bound by a particular prior judicial construction of that ambiguous statute and would be free, going forward, to adopt a different interpretation. That is to be contrasted with the power to *adjudicate*: to decide the rights of particular parties in a specific dispute and to make the essentially binary choice of which party is to prevail. This type of adjudicative power was at issue in *Plaut* and is implicated by Section 18 of the AIA, which authorizes the PTO to reopen final judgments in cases between private parties that deal with quintessentially *adjudicative* issues—i.e., the scope and validity of a property right.

41 Plaut v. Spendthrift Farm, 514 U.S. 211, 229 (1995).



Litigation

Philadelphia Tort Litigation: Forum Shopping and Venue Reform

By Mark A. Behrens*

Note from the Editor:

This paper analyzes the issues of forum shopping and potential judicial reforms in the Philadelphia court system. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about venue reform. To this end, we offer links below to different sides of this issue and invite responses from our audience. To join the debate, you can e-mail us at info@ fed-soc.org.

Related Links:

- Taking Back Our Courts: http://takingbackourcourts.org
- American Tort Reform Foundation, Judicial Hellholes 2011/2012 (2011): http://www.judicialhellholes.org/wp-content/uploads/2011/12/Judicial-Hellholes-2011.pdf
- David Ward, Not Guilty of "Hellhole" Charge, Phila. Inquirer, May 3, 2012: http://articles.philly.com/2012-05-03/ news/31556807 1 civil-jury-cases-civil-courts-state-courts
- Alison Frankel, *Tort Reform by Fiat in Philly*, Thomson Reuters, Feb. 16, 2012: http://newsandinsight.thomsonreuters.com/Legal/News/2012/02 February/Tort reform by fiat in Philly/

I. Introduction

Tort plaintiffs generally prefer to sue in local courthouses to potentially benefit from favorable bias by local judges and juries. This advantage may be augmented if the trial court judge is elected and the defendant is an outof-state corporation. Even the Framers understood the risk of favoritism in cases pitting local residents against nonresident defendants; they created federal court diversity-of-citizenship jurisdiction to provide a balance. Plaintiffs also find local courthouses more convenient as a practical matter. The plaintiff can meet in-person with counsel without having to travel or be billed for travel expenses. Local lawyers are often familiar with local court personnel, police officers, treating physicians, and insurance adjusters. From a societal perspective, the tendency of plaintiffs to bring suit in a local forum with a connection to the plaintiff and the injury helps distribute the burden of lawsuits in accordance with the population.

Therefore, plaintiffs voluntarily giving up a natural "home court" advantage to flock to forums that have little or no logical connection to their claims is evidence that other factors are in play. Philadelphia is an example of such a forum. Plaintiffs' attorneys often file suit there because they believe Philadelphia will offer them an advantage in litigation, and because Pennsylvania's permissive venue rules often allow plaintiffs to forum shop. Defense interests have criticized the Philadelphia Court of Common Pleas for "placing expediency"

over fairness."² For two consecutive years (2010 and 2011), the American Tort Reform Foundation named Philadelphia its number one "Judicial Hellhole."³

Recently, state officials have introduced some reforms. In 2011, Pennsylvania's General Assembly adopted the Fair Share Act, moving Pennsylvania into the legal mainstream in the area of joint and several liability. In February 2012, the Philadelphia Court of Common Pleas significantly changed its protocol governing mass tort cases. The court's order addressed some of the ways in which trial procedures had been applied in an unfair manner, especially in asbestos cases. Together, these changes may curb some of the enthusiasm plaintiffs' lawyers have shown for Philadelphia, but they do not prevent forum shopping.

Some observers say that Pennsylvania should take the next step and adopt venue reform, whether through legislation or court rule. In the meantime, trial courts could help address forum shopping abuse by granting defendants' *forum non conveniens* motions in cases that can and should be heard elsewhere.

II. PENNSYLVANIA'S TORT CLAIM VENUE RULES

Pennsylvania law generally requires tort plaintiffs to file cases against individuals in a county in which (1) the defendant may be served, (2) the cause of action arose, or (3) the transaction or occurrence out of which the cause of action arose took place.⁶ Venue against a corporate defendant is proper where (1) the company has its registered office or principal place of business; (2) the company regularly conducts business; (3) the cause of action arose; (4) the transaction or occurrence out of which the cause of action arose took place; or (5) the property or a part of the property which is the subject matter of the action is located, provided that equitable relief is sought with respect to the property.⁷ These "venue rules give plaintiffs

^{*} Mark Behrens is a partner in the Washington, D.C.-based Public Policy Group of Shook, Hardy & Bacon L.L.P. and co-chair of the Tort and Product Liability Subcommittee of the Federalist Society's Litigation Practice Group. In 2010, he was a Distinguished Practitioner in Residence at Pepperdine University School of Law. He received his J.D. from Vanderbilt University Law School in 1990 and his B.A. in Economics from the University of Wisconsin-Madison in 1987.

various choices of different possible venues, and plaintiffs are generally free to 'shop' among those forums and choose the one they prefer."8

III. PHILADELPHIA: A LITIGATION "MAGNET"

While Pennsylvania law provides significant discretion to plaintiffs' lawyers as to where to file their cases, Philadelphia is often the preferred forum. For example, in 2010, Philadelphia hosted almost 21% of the Commonwealth's total civil action docketed cases, while accounting for only 12% of the population. Philadelphia siphons cases away from adjacent counties and other states. According to Philadelphia Common Pleas Judge John W. Herron, the percentage of out-of-state claims in Philadelphia's Complex Litigation Center (CLC) began at about one-third of filings from 2001 to 2008, "soared to 41%" in 2009, and "reached an astonishing 47%" in 2011. 10

Much of Philadelphia's "litigation tourism" involves the CLC. Touted by some as a "national model for mass torts litigation," the CLC handles mass tort litigation, such as pharmaceutical and asbestos cases. Philadelphia judges recognize that a rigid mandate to bring mass tort cases to trial within two years of filing makes the CLC attractive to plaintiffs from across the country. There are efficiencies and some advantages with a sophisticated litigation center like the CLC, but critics point out that problems can occur when too much emphasis is placed on efficiency and fairness takes a back seat.

"Marketing" of the CLC by the Philadelphia judiciary has also contributed to the concerns of potential defendants. Soon after Common Pleas Judge Sandra Mazer Moss replaced Judge Allan Tereshko as coordinating judge of the mass tort program in 2009, she declared that it was "a new day" in the CLC. Common Pleas President Judge Pamela Pryor Dembe also undertook a "public campaign to lay out the welcome mat for increased mass torts filings," expressing a desire to make the CLC even more attractive to attorneys, "so we're taking away business from other courts."

Some recent changes with regard to the CLC have reduced these concerns. In November 2011, Pennsylvania Supreme Court Chief Justice Ronald Castille appointed Judge Herron Administrative Judge of the Trial Division of the Court of Common Pleas of the First Judicial District. ¹⁶ The First Judicial District is the judicial body governing Philadelphia County. Chief Justice Castille noted that appointing Judge Herron would "give the Supreme Court more direct control and involvement in some of the issues facing the First Judicial District." ¹⁷

On February 15, 2012, Judge Herron significantly altered the CLC's protocol governing mass torts cases. ¹⁸ General Court Regulation No. 2012-01 ends involuntary reverse bifurcation of mass tort cases and significantly limits consolidation of mass tort cases at trial (absent agreement of the parties). The order also continues the court's practice of deferring punitive damage claims in asbestos cases and extends the deferral practice to all mass tort cases. ¹⁹

With respect to nonresident filings, however, General Court Regulation No. 2012-01 takes only a modest step, limiting *pro hac vice* admissions to two trials per year. In so

doing, the order limits the work of non-Pennsylvania bar members, but not the filing of claims that arise outside of Pennsylvania (or elsewhere in the Commonwealth). Thus, the order effectively preserves and potentially increases the business of local law firms.

IV. CASE STUDY: MEDICAL MALPRACTICE REFORM

The history of medical malpractice litigation in Philadelphia demonstrates both the extent of the forum shopping issue and a potential solution with respect to other types of civil cases. In 2002, nearly half of all medical malpractice claims filed in Pennsylvania landed in Philadelphia's Court of Common Pleas. ²⁰ Plaintiffs' lawyers chose Philadelphia as the hot spot for medical malpractice claims for the same reasons they continue to choose Philadelphia for other personal injury actions today. Philadelphia was perceived as a favorable forum in part because of pre-reform data indicating that plaintiffs were more than twice as likely to win jury trials there than the national average and over half of these Philadelphia medical malpractice awards were for \$1 million or more. ²¹

The Pennsylvania legislature sought to improve this medical malpractice litigation environment by adopting the Medical Care Availability and Reduction of Error Act (MCARE) in 2002. MCARE included a special venue rule for medical malpractice claims directing plaintiffs to file such claims "only in a county in which the cause of action arose." Soon thereafter, the Pennsylvania Supreme Court incorporated this provision into the Rules of Civil Procedure. The year after the venue reform went into effect, medical malpractice claims filed in Philadelphia fell from 1365 to 577, a decline of 58%.

The Pennsylvania Supreme Court's 2010 data on medical malpractice filings show a shifting of the cases since adoption of the venue rule and other MCARE civil justice reforms.²⁵ Court statistics reveal that medical malpractice lawsuits filed in Pennsylvania declined by 45% from the average of the three years preceding the 2003 reforms; in Philadelphia the decline was 68%.²⁶ There were only 381 medical malpractice claims filed in Philadelphia in 2010. Medical malpractice claims filed in other counties that had hosted a disproportionate share of the Commonwealth's litigation compared to their population also declined. On the other hand, medical malpractice lawsuits in such counties as Montgomery, Lancaster, Lawrence, and Washington have increased since implementation of venue reform. Now, medical malpractice lawsuits are more evenly dispersed throughout the Commonwealth because claims are filed in the county where the plaintiff received medical treatment.

V. VENUE REFORM IN PENNSYLVANIA

It is not unusual for state legislatures and courts to intervene when litigation "hot spots" develop in certain areas of their states with respect to specific types of claims or when abusive practices become apparent. Many states have enacted venue reforms over the past decade.

Venue reform for all personal injury cases in Pennsylvania modeled after the rule for medical injury cases might bring about greater uniformity in the law and build on the progress of the 2011 Fair Share Act and Philadelphia General Court Regulation No. 2012-01. Alternatively, the Commonwealth could allow personal injury claims (other than for medical negligence) to be brought in the county (1) where the plaintiff resides; (2) where all or a predominant part of the cause of action arose; or (3) where the defendant resides, if the defendant is an individual, or where the defendant has its principal place of business if the defendant is a corporation or similar entity. If the action involves multiple corporate defendants, then venue could be limited to the county where the plaintiff resides or where all or a predominant part of the cause of action arose.

VI. Conclusion

The legislature and courts in Pennsylvania have implemented reforms to improve the image of Philadelphia following its classification as the nation's leading "Judicial Hellhole" for two consecutive years. Pennsylvania may be poised to take another step and adopt venue reform, whether through legislation or court rule. One approach would be to extend the venue provision for medical liability actions so that all tort claims have to be brought in the county where the cause of action arose. That approach would achieve greater uniformity and predictability in the law. Alternatively, tort actions not involving medical liability could be brought in the county (1) where the plaintiff resides; (2) where all or a predominant part of the cause of action arose; or (3) where the defendant resides, if the defendant is an individual, or where the defendant has its principal place of business if the defendant is a corporation or similar entity. If the action involves multiple corporate defendants, then venue could be limited to the county where the plaintiff resides or where all or a predominant part of the cause of action arose. Either approach could have the effect of refocusing Pennsylvania litigation on Pennsylvania citizens, helping ensure that claims are heard in the county with the most logical connection to the case, and discouraging joinder of remote local defendants simply for the purpose of having a case heard in a particular county. In the meantime, trial courts could play a role by granting defendants' forum non conveniens motions in cases that can and should be heard elsewhere.

Endnotes

- 1 See Joshua D. Wright, Are Plaintiffs Drawn to Philadelphia's Civil Courts? An Empirical Evaluation (Int'l Center for Law & Econ. 2011).
- 2 See, e.g., Am. Tort Reform Found., Judicial Hellholes 2010/2011 at 3-4 (2010), available at http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2010.pdf.
- 3 See id.; Am. Tort Reform Found., Judicial Hellholes 2011/2012 at 3 (2011), available at http://www.judicialhellholes.org/wp-content/uploads/2011/12/Judicial-Hellholes-2011.pdf.
- 4 See 2011 Pa. Legis. Serv. Act 2011-17 (S.B. 1131) (Purdon's) (amending 42 Pa. C.S.A. § 7102).
- 5 See General Court Regulation No. 2012-01, In re Mass Tort and Asbestos Programs (Ct. Com. Pl. Phila. County, Pa. Feb. 15, 2012).
- 6 See Pa. R. Civ. Pro. 1006(a)(1).
- 7 See Pa. R. Civ. Pro. 2179(a).
- $8\ \ Zappala\ v.\ James\ Lewis\ Group, 982\ A.2d\ 512, 521-22\ (Pa.\ Super.\ Ct.\ 2009).$

Judges have discretion to apply the doctrine of *forum non conveniens* to transfer a case for the convenience of parties and witnesses where venue is proper in multiple counties, but Pennsylvania courts give weighty consideration to the plaintiffs choice of forum and will rarely disturb it. *See* Cheeseman v. Lethal Exterminator, Inc., 701 A.2d 156, 162 (Pa. 1997).

- 9 See Admin. Office of Pa. Courts, 2010 Caseload Statistics of the Unified Judicial System of Pennsylvania 23 (2010) (Philadelphia had 29,104 civil action docketed cases in 2010 out of a statewide total of 140,764 such cases, or 20.68%); Unified Judicial Sys. of Pa., Pennsylvania Common Pleas Caseload Statistics 1-2 (2010) (The 2010 Pennsylvania Population Estimate was 12,702,379, and Philadelphia's 2010 Census Population was 1,526,006, or 12%).
- 10 See General Court Regulation No. 2012-01, supra note 5.
- 11 Amaris Elliott-Engel, For Mass Torts, a New Judge and a Very Public Campaign, Legal Intelligencer, Mar. 16, 2009.
- 12 See Amaris Elliott-Engel, Judge: FJD Mass Torts Programs in Step with ABA Standards, Legal Intelligencer, Mar. 9, 2011 (reporting on the strict two-year deadline imposed by Judge Moss).
- 13 See Elliott-Engel, For Mass Torts, a New Judge and a Very Public Campaign, supra note 11.
- 14 Amaris Elliott-Engel, Common Pleas Court Seeing More Diabetes Drug Cases, LEGAL INTELLIGENCER, Mar. 19, 2009, at 1.
- 15 See Elliott-Engel, For Mass Torts, a New Judge and a Very Public Campaign, supra note 11.
- 16 See Jeff Blumenthal, Herron Appointed Administrative Judge, Phila. Bus. J., Nov. 10, 2011.
- 17 Pennsylvanians for Modern Courts, Administrative Judge Herron Appointed to Chair Administrative Governing Board, Dec. 14, 2011.
- 18 See General Court Regulation No. 2012-01, supra note 5.
- 19 On May 3, 2012, the court requested additional comment from the legal community on the deferral of all punitive damages claims. Notice to the Mass Tort Bar (Ct. Com. Pl. Phila. County, Pa. May 3, 2012).
- 20 See Admin. Office of the Pa. Courts, Table 1: Pennsylvania Medical Malpractice Case Filings: 2000–2010 (2011) [hereinafter "Medical Malpractice Case Filings"].
- 21 See Randall B. Bovbjerg & Anna Bartow, Understanding Pennsylvania's Medical Malpractice Crisis: Facts About Liability Insurance, the Legal System, and Health Care in Pennsylvania 32 (Project on Med. Liab. in Pa. 2003).
- 22 42 Pa. Consol. Stat. § 5101.1(b).
- 23 Pa. R. Civ. Pro. 1006(a.1).
- $24\,$ Medical Malpractice Case Filings, supra note 20.
- 25 MCARE required claimants to file a certificate of merit from a medical professional before filing a claim, strengthened expert testimony standards, and abrogated the collateral source rule in medical malpractice cases.
- 26 MEDICAL MALPRACTICE CASE FILINGS, supra note 20.



Religious Liberties

Which Religious Organizations Count as Religious? The Religious Employer Exemption of the Health Insurance Law's Contraceptives Mandate

By Stanley W. Carlson-Thies*

n August 1, 2011, the Health Resources and Service Administration issued guidelines specifying that, among the preventive health services that, under the Affordable Care Act, must be covered, without cost sharing, by group and individual health insurance plans, are "all Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." The requirement applies to plans or plan years that begin on August 1, 2012, or later.² The Catholic Church opposes birth control drugs and sterilization; the Church and others regard some of the FDA-approved contraceptives—Plan B (levonorgestrel), the so-called "morning after pill," and ella (ulipristal acetate), the "week-after pill"—to be abortifacients. On that same August day, the Department of Health and Human Services ("HHS") announced an amendment to its July 19, 2010, interim final regulations, the regulations governing the requirement that health plans must cover preventive health services.³ The amendment provided an exemption from the coverage requirement (hereinafter, "contraceptives mandate") for "religious employers." The Administration noted that some commenters on the interim final regulations had "asserted that requiring group health plans sponsored by religious employers to cover contraceptive services that their faith deems contrary to its religious tenets would impinge upon their religious freedom." The religious employer exemption responded to this conscience or religious freedom concern.

However, the religious employer exemption met immediate and growing criticism from religious organizations and religious communities. During the comment period it drew more than 200,000 responses; while many supported the exemption as announced or sought a narrowing of the definition or elimination of the exemption, other commenters protested the narrowness of the definition and thus the limited scope of the exemption. Representatives of various religious organizations noted that their own institutions did not fit within the boundaries of the definition; in effect, they were defined as not being religious organizations whose conscience claims needed to be respected by the government and by insurers. The Catholic Health Association, for example, commented:

The religious and moral objections of the Catholic Church and others to contraception and sterilization are well known. The Interim Final Rule (IFR) acknowledges these objections and attempts to accommodate them by creating a religious employer exemption to the mandated coverage for contraceptive services. While we appreciate the recognition

of the need for such an exemption, the proposed definition of religious employer is wholly inadequate to protect the conscience rights of Catholic hospitals and health care organizations in their role as employers. It is imperative that the definition of religious employer in the regulation be broadened to provide sufficient conscience protections to religious institutional employers.⁷

Criticism that the exemption was so narrow that many religious organizations with religious objections to some or all of the contraceptive services would nonetheless be required to include them in their employee plans only grew during the next months, sparking an outpouring of public commentary, petitions and letters to the administration, lawsuits against the federal government, and an unsuccessful effort in the Senate to broaden the exemption to a much wider set of organizations (and to certain individuals).8

The "religious employer" definition and the exemption were nevertheless finalized on February 10, 2012.9 However, on the same day, the President and the Administration announced further action: additional measures to respond to the conscience claims of religious organizations not deemed to be "religious employers" by the now-finalized definition and thus not exempt from the contraceptives mandate. The President announced that an "accommodation" would be developed to deal with the conscience concerns of such organizations. 10 And, to protect them while the new accommodation is being developed, the Administration announced a "temporary enforcement safe harbor," a promise by federal agencies that certain non-exempt organizations would be free from prosecution for a year despite not including the mandated contraceptives coverage in their plans.¹¹ On March 21, 2012, an Advance Notice of Proposed Rulemaking ("ANPRM") was published, setting out ideas for such an accommodation and requesting comments.12

The focus of this article is the August 1, 2011, definition of "religious employer," which is now incorporated into the Code of Federal Regulations. Some attention is given to the related, but alternative, definitions used in the temporary enforcement safe harbor and in the ANPRM. It is worth stressing that concern about the "religious employer" definition is not limited to religious organizations and religious communities that object to the contraceptive services as such. The definition circumscribes the organizations that are regarded by the Administration to be authentically religious such that they have a valid claim to religious freedom protections. Its narrowness thus not only has the consequence that some significant number of religious organizations that object to providing the mandated contraceptive services are not exempted from the requirement (although the Administration has promised

^{*} President, Institutional Religious Freedom Alliance

a different "accommodation" to some of them) but also that a specific—cramped, church-oriented—conception of a fully religious organization is revealed as operative in the federal government. A letter to the White House from a multi-faith group of religious leaders put the point like this:

The faith-based organizations and religious traditions represented by the undersigned leaders do not all share the same convictions about the moral acceptability of the mandated services. However, we do agree that the definition of religious employer that has been adopted is so narrow that it excludes a great many actual "religious employers" and probably most faith-based organizations that serve people in need, i.e., many of the religious employers whose conscientious objections supposedly are being honored. We believe it is detrimental to faith-based organizations, the services they deliver, and the people they serve if government decides to protect the religious freedom only of organizations that fit the narrow criteria set out in the amended regulations.¹⁵

Although the Administration has said that the definition is intended to be used only in connection with the contraceptives mandate and not in other contexts, ¹⁶ this is at best a statement of current intention and is not binding. The narrow definition was adopted from the contraceptive laws of certain states. ¹⁷ Its placement in the Code of Federal Regulations seems to make it more likely to be adopted for additional federal purposes.

The Definition of "Religious Employer"

"[F]or purposes of this subsection"—i.e., to define those organizations that are exempt from the contraceptives mandate—"a 'religious employer' is an organization that meets all of the following criteria:

- (1) The inculcation of religious values is the purpose of the organization.
- (2) The organization primarily employs persons who share the religious tenets of the organization.
- (3) The organization serves primarily persons who share the religious tenets of the organization.
- (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended."18

As the definition emphasizes, to be considered a "religious employer," a religious organization must match all four of these characteristics.

This definition of a "religious employer" has been criticized as empirically inaccurate; too narrow to encompass all religious organizations that should be exempted, requiring the federal government to engage in illicit line-drawing; and, because it is much narrower than existing federal conceptions of religious organizations, as creating a harmful federal precedent.

The most quotable objections have been evoked by criterion (3): a "religious employer" is a religious organization that "serves primarily persons who share the religious tenets of the organization." In a comment echoed by many others, Sr. Mary Ann Walsh, media relations director for the U.S.

Conference of Catholic Bishops, said, "Jesus himself couldn't pass muster." As she noted:

His chief teaching about serving one's neighbor highlights the Good Samaritan who took care of a woebegone stranger by providing medical care, food and lodging. Jesus did not say anything about checking the man's religious affiliation beforehand. There was no catechism test afterwards. The point of the story is to help anyone who needs help.¹⁹

That is, according to this "Good Samaritan" test, it is precisely by serving people without regard to their religion that a Christian charity manifests an authentically Christian character.²⁰ A number of Catholic organizations and leaders have quoted a remark attributed to the late Archbishop James Cardinal Hickey, "We serve [them] not because they are Catholic, but because we are Catholic."²¹

In addition to contradicting a primary defining characteristic of many religious service organizations, the definition's requirement that to be considered a "religious employer" an organization must primarily serve people of its own faith sets the Administration against itself. The faith-based initiative, which seeks to facilitate government partnerships with faith-based organizations, among other community organizations, forbids entities that receive federal grant or contract funds from discriminating on the basis of religion against people seeking help. A faith-based service organization that complies with this funding rule by that very compliance sets itself outside the definition of "religious employer" and cannot be exempted from the contraceptives mandate.²²

Criterion (1) specifies that, to be considered a "religious employer," the "purpose" of the organization must be "[t]he inculcation of religious values." On the face of it, this requirement appears to disqualify most or all religious organizations not engaged in religious teaching. As the U.S. Conference of Catholic Bishops commented, this element of the definition disqualifies "even the ministry of Jesus and the early Christian Church . . . because they did not . . . engage only in a preaching ministry." But perhaps that is too literal a reading of the requirement and other understandings of "purpose" and "inculcation" and "religious values" are possible. If so, then a range of service organizations might meet this part of the definitional test. Consider these statements of religionin-action:

- The Catholic Health Association: "We communicate our religious values through our deeds and our actions." ²⁴
- Rabbi Soloveichik: "For Orthodox Jews, religion and tradition govern not only praying in a synagogue, or studying Torah in a Beit Midrash, or wrapping oneself in the blatant trappings of religious observance such as phylacteries. Religion and tradition also inform our conduct in the less obvious manifestations of religious belief, from feeding the hungry, to assessing medical ethics, to a million and one things in between." ²⁵

Then again, perhaps such expressions of religious purpose do not fulfill the criterion. The Council for Christian Colleges and Universities, an association of Protestant organizations, has commented:

While our institutions do infuse their religious values into every aspect of what they do . . . as [they] are also fully accredited, degree granting, institutions of higher learning, we are concerned whether the government agent tasked with determining whether a group meets the four requirements . . . would indeed find that our institutions meet the first requirement. ²⁶

The definition, in short, seems to take as a necessary characteristic a religious purpose or activity—the "inculcation of religious values"—that is not the obvious or main religious purpose or activity of many faith-based service organizations. At best, this criterion requires government officials unconstitutionally to troll through the inner lives of religious organizations in an attempt to discern whether their "purpose" is religious, or religious in the intended way.²⁷ As the University of Notre Dame said in its lawsuit against the contraceptives mandate, "It is unclear how the Government defines or will interpret religious 'purpose."²⁸

A third, cumulative, requirement of the definition is that, to be considered an exempt "religious employer," an organization must "primarily employ[] persons who share the religious tenets of the organization." So-called religious or co-religionists hiring by religious organizations, although controversial to some, does not constitute illegal discrimination under Title VII, the employment title of the 1964 Civil Rights Act, as amended in 1972. The practice was upheld unanimously by the U.S. Supreme Court in *Corporation of the Presiding Bishop* v. *Amos* in 1987.²⁹ There appears to be only limited research on the religious hiring practices of religious organizations;³⁰ however, it is clear from anecdotal evidence that the religious hiring practices of organizations that hold themselves out to the public as religious are varied.

Some primarily or only employ persons who agree with the organization's statement of faith and abide by its faithbased code of conduct.31 On the other hand, the Catholic Health Association says, "Men and women of any or no faith who are willing to serve with us in a manner faithful to the teachings of the Catholic Church are welcomed to join us as colleagues and employees."32 (This raises the question: for the purposes of the definition, is being "faithful to" an organization's religious teachings equivalent to "shar[ing] the organization's religious tenets"?)33 In yet another variation, the Council for Christian Colleges and Universities notes that, as a condition of membership, its member institutions must have a policy of employing only "professing and practicing Christians" for administrative and full-time teaching positions, and yet those member institutions maintain varied policies with respect to the religious standards applied to support staff and adjunct faculty. However, the Council avers that even the variations from the Christian-only standards for these other employees "reflect [the institutions'] respective understanding of how best to accomplish their mission in light of their theological traditions."34

The fourth characteristic that must also be present for an organization to be regarded as a "religious employer" is that it be categorized as "a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal

Revenue Code of 1986, as amended." The Federal Register notice of the finalized definition notes that "Section 6033(a)(3)(A)(i) and (iii) refer to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order."35 Critics have pointed out that these Code sections are not intended to define religious organizations in federal law but rather simply to govern the disclosure of information to the government by different categories of "exempt organizations." The types of organizations referred to in the definition are not required to file the annual return that most nonprofit organizations must file, presumably to honor the First Amendment requirement that the government must respect the autonomy of churches. However, even in the Code it is not necessary for an organization to fall into the ranks of churches and religious orders to be classified as a "religious organization": the very same section of the Code sets out different reporting requirements for "a religious organization described in section 501(c)(3)" that in a taxable year does or does not have gross receipts of \$5,000 or more.³⁷

Taken together, it is clear that the four-part definition of "religious employer" does not encompass all religious organizations as recognized under federal law but only a subset of such organizations. In general terms, that subset comprises those religious organizations referred to in the fourth criterion: churches and religious orders—inward-looking and worshiporiented. Faith-based service organizations, such as religious colleges, charities, and hospitals do not, or at least do not unambiguously, fit the definition. Churches fit the definition and are exempt from the contraceptives mandate; "parachurch organizations," or faith-based service organizations, do not fit the definition and thus are not exempt.³⁸

"Religious Employer" Under Title VII

The narrowness of the "religious employer" definition is evident as well when considered in light of the 2011 decision of the Ninth Circuit in *Spencer* v. *World Vision*. World Vision describes itself as a "Christian humanitarian organization dedicated to working with children, families and their communities worldwide to reach their full potential by tackling the causes of poverty and injustice." After World Vision fired three employees for no longer holding to the organization's religious beliefs, they sued. And they alleged that the firings constituted illegal religious employment discrimination because World Vision is not a religious organization—a religious employer—and thus not covered by the religious exemption of Title VII of the 1964 Civil Rights Act of 1964, as amended.

Among other arguments, the plaintiffs alleged that, although World Vision claimed a religious purpose for its humanitarian work, the fact that it did not limit its services to coreligionists showed that it acted inconsistently with its purported religious mission. The court, however, rejected the view that serving persons without regard to their beliefs demonstrates that an organization is not a religious entity. The court similarly rejected the assertion that an organization must be a church or be church-like to be a religious employer eligible for the Title VII exemption. Against the challenge the court upheld World Vision as a religious employer, though its purpose is humanitarian, its services are not restricted to coreligionists,

and it is a 501(c)(3) nonprofit and not a church, an integrated auxiliary of a church, nor a religious order. For employment-law purposes, World Vision clearly is a religious employer, and yet it seems that it does not count as a "religious employer" according the contraceptive mandate regulations.

Temporarily Excused Nonprofit Organizations and Accommodated "Religious Organizations"

Various religious organizations have criticized the contraceptive mandate's "religious employer" definition in this way: our organization is a religious organization and yet it fails to match one or more of the four required criteria and thus, wrongly, it will be required to offer morally objectionable insurance coverage. For example, Dr. Samuel W. "Dub" Oliver, President of East Texas Baptist University, said this to a congressional hearing on the mandate: "East Texas Baptist University is a Christ-centered university that was founded in 1912. . . . Because East Texas Baptist University teaches and serves non-Christians (we accept students of all faiths and students of no faith), we do not qualify for the very narrow religious exemption offered by the Administration." And, not being exempt, "under the Administration's mandate, East Texas Baptist University will be required to buy insurance so that our employees can get abortion causing drugs for free, as if they are no different than penicillin. We believe that is wrong."43

In effect, the federal government has conceded the critics' argument. Although it has written the narrow definition of exempt "religious employers" into the Code of Federal Regulations, the Administration has promised a religious "accommodation" to (certain) non-exempt religious organizations and sanctuary against prosecution for a year while the accommodation is put into place. However, it has defined in more than one way the non-exempt religious entities whose religious freedom claims it has decided to acknowledge in some way.

In a February 10, 2012, guidance document, the Administration promised not to enforce the contraceptives mandate for a year in the cases of certain organizations that object to including the mandated coverage in their health plans. Organizations eligible for this "temporary enforcement safe harbor," however, are not every religious organization other than those exempted from the mandate because they fit the "religious employer" definition. Rather, to be eligible, an organization must meet all four of the following criteria: (1) it is organized and operates as a "non-profit entity"; (2) it has maintained a health plan that from February 10, 2012, and onward has not provided contraceptive coverage "because of the religious beliefs of the organization"; (3) it will ensure that its employees receive specific notice that the health plan, because of the temporary enforcement safe harbor, does not cover contraceptive services; and (4) it completes a self-certification form and makes that form available to its employees.44

At least two elements of this definition are particularly notable. First, *non-religious* organizations can fall within it, if they are organized as nonprofits and have "religious objections to contraceptive coverage." Second, and by contrast, some *religious* organizations with a religious objection to contraceptive coverage are not included: an organization otherwise eligible

whose insurance plan on February 10, 2012—when the temporary enforcement safe harbor was announced—or later did include coverage of contraceptives, or whose plan excluded contraceptive coverage but for a reason other than a religious objection, is not eligible for the protection from enforcement if the insurance it offers once the mandate comes into effect does not include all of the FDA-approved contraceptive services.

The ANPRM proposed yet another definition of religious organizations that have religious freedom or conscience claims that might be honored with respect to mandatory coverage of contraceptives. Most important and most striking is the creation by the government of a second major category of religious organizations, in order to deal with additional religious freedom issues raised by the contraceptives mandate. The ANPRM commits the Administration to an "accommodation" for "non-exempt, non-profit religious organizations with religious objections to contraceptive coverage." These accommodated organizations are termed "religious organizations" to distinguish them from "religious employers"—religious entities that are exempt from the mandate.

"Who qualifies for the accommodation?" the ANPRM asks, 48 albeit without giving a definitive answer. Instead, comments are solicited. In general, it appears that the Administration intends to include in this category of accommodated organizations the faith-based service organizations that do not fit its definition of "religious employer." Yet, not all such organizations may be accommodated, while unexpected other organizations may receive an accommodation: the ANPRM states that the accommodation will apply "to some or all organizations that qualify for the temporary enforcement safe harbor, and possibly to additional organizations."49

Organizations eligible for the safe harbor that might not qualify as "religious organizations" presumably will include non-religious organizations that have a religious objection to contraceptives. Such an organization might be a pro-life group whose opposition to abortion (and thus to abortifacient drugs) is expressed in religious as well as moral terms and yet the entity is not organized as a religious organization. On the other hand, religious entities that are ineligible for the safe harbor but that might fit the new "religious organization" category might include faith-based service organizations that object to covering the mandated contraceptive services but that, due to inattention, resistance by their insurers, or a state contraceptives mandate, on February 10, 2012, or later, did cover the contraceptives in their insurance plans. The ANPRM does not indicate what the government will do about such religious entities; however, it does seek comment "on whether the definition of religious organization should include religious organizations that provide coverage for some, but not all, FDA-approved contraceptives consistent with their religious beliefs."50 Thus non-exempt religious organizations ineligible for the safe harbor because their insurance on Feb. 10, 2012, included some contraceptives but not others (e.g., abortifacients) might be included in the definition of accommodated "religious organizations."

Interestingly, in seeking comment "on which religious organizations should be eligible for the accommodation," the ANPRM asks "whether, as some religious stakeholders have suggested, for-profit religious employers with such

objections should be considered as well."51 The ANPRM also asks "whether an exemption or accommodation should be made for certain religious health insurance issuers or third-party [insurance] administrators with respect to contraceptive coverage."52 Assuming that some of these issuers or third-party administrators are commercial entities, it is possible that the eventual "religious organization" definition might drop "organized as a non-profit" as one criterion, and even that certain religious commercial entities involved with insurance might be swept into the "religious employer" category and be exempted from the mandate entirely.

The ANPRM, without committing the government, does suggest two possible sources for the eventual definition of a "religious organization": state or federal law. As to the former, "the definition used in one or more State laws to afford a religious exemption from a contraceptive coverage requirement" might be chosen.⁵³ No specific example is listed; presumably the definition would not be the one already selected for the category "religious employer."

As to federal law, the Administration suggests as a possibility "section 414(e) [of] the Code and section 3(33) of ERISA, which set forth definitions for purposes of 'church plan."54 Basing a definition on these existing provisions "may include organizations such as hospitals, universities and charities that are exempt from taxation under section 501 of the Code and that are controlled by or associated with a church or a convention or association of churches." The church connection is a positive element for a definition, the Administration says, because "we are cognizant of the important role of ministries of churches and, as such, seek to accommodate their religious objections to contraceptive coverage."55 However, including a requirement of a church connection as part of the definition of an accommodated "religious organization" would only reproduce the problem of the under-inclusiveness of the church-centric definition of exempt "religious employers." That is because some proportion of faith-based service organizations are not controlled by nor tied to a church or denomination but are rather religious entities in themselves⁵⁶ or have a multi-denominational or inter-faith character and set of connections.

Two Classes of Religious Organizations

The ANPRM is just that, an "advanced notice of proposed rulemaking"; although it proposes the distinct new category of "religious organizations" that are promised an "accommodation" for their conscience concerns, neither the precise boundaries of the category nor the precise features of the accommodation are specified in the document. Nonetheless, in proposing the new category of "religious organization" to parallel the now-finalized category of "religious employer," the federal government has chosen to create a two-class scheme of religious organizations, at least for the purposes of the contraceptives mandate. If the ideas in the ANPRM are finalized, some religious organizations will be categorized as "religious organizations" that receive only an "accommodation" of their conscience concerns—a workaround—while other religious organizations will be classed as "religious employers" that are wholly exempted from the contraceptives mandate.

Leaders of a range of faith-based service organizations have written to HHS Secretary Kathleen Sebelius to protest this two-class system. "Our organizations, as we ourselves, do not all share the same view of the moral acceptability of the contraceptive drugs and services that comprise the contraceptives/abortifacient mandate," the letter says. The signers hold different views about the acceptability of the Administration's designs for an "accommodation" for non-exempted religious organizations, they belong to different faiths, and their organizations operate in different areas of service. But there is one firm point of unity, the letter stresses:

[W]e are united in opposition to the creation in federal law of two classes of religious organizations: churches—considered sufficiently focused inwardly to merit an exemption and thus full protection from the mandate; and faith-based service organizations—outwardly oriented and given a lesser degree of protection. It is this two-class system that the administration has embedded in federal law via the February 15, 2012, publication of the final rules providing for an exemption from the mandate for a narrowly defined set of "religious employers" and the related administration publications and statements about a different "accommodation" for non-exempt religious organizations.

And yet both worship-oriented and service-oriented religious organizations are authentically and equally religious organizations. To use Christian terms, we owe God wholehearted and pure worship, to be sure, and yet we know also that "pure religion" is "to look after orphans and widows in their distress" (James 1:27). We deny that it is within the jurisdiction of the federal government to define, in place of religious communities, what constitutes true religion and authentic ministry.⁵⁷

The definitions of religious organizations that the federal government is deploying in the context of the mandate, which requires health plans to cover a wide range of contraceptive services, have great religious-freedom significance not only because they will determine which religious freedom and conscience claims will be honored, and to what degree, but because they embody a governmental conception of what is authentic religion. That evident conception has proven to be greatly troubling to many religious organizations, both houses of worship and faith-based service organizations.

Endnotes

- 1 The history and quotation are drawn from Certain Preventive Services Under the Affordable Care Act, Advance Notice of Proposed Rulemaking (ANPRM), 77 Fed. Reg. 16,501, 16,502 (Mar. 21, 2012) [hereinafter ANPRM].
- 2 Grandfathered plans that did not include contraceptives coverage as of July 19, 2010, are not subject to the contraceptives mandate as long as they retain their grandfathered status.
- 3 Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726 (July 19, 2010).
- 4 Press Release, U.S. Dep't of Health & Human Servs., Affordable Care Act

Ensures Women Receive Preventive Services at No Additional Cost (Aug. 1, 2011), available at http://www.hhs.gov/news/press/2011pres/08/20110801b. html. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, Interim Final Rules, 76 Fed. Reg. 46,621 (Aug. 3, 2011) [hereinafter Interim Final Rules]

- 5 Id. at 46,623.
- 6 For a summary of the responses, see Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, Final Rules, 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012) [hereinafter Final Rules]
- 7 Catholic Health Ass'n, Comments on Religious Employer Exceptions to Preventive Services (Sept. 22, 2011), *link available at* http://www.chausa.org/Pages/Advocacy/Issues/Faith-based_and_Ethical_Concerns/ [hereinafter CHA Comments]
- 8 Respect for Rights of Conscience Act of 2011, S. 1467, 112th Cong. (2011) (introduced by Sen. Roy Blunt of Missouri). The House of Representatives companion bill, H.R. 1179, was introduced by Rep. Jeff Fortenberry of Nebraska.
- 9 Press Release, The White House, Fact Sheet: Women's Preventive Services and Religious Institutions (Feb. 10, 2012) [hereinafter White House Fact Sheet]. The regulation was published in the Federal Register on Feb. 13, 2012 (Final Rules, *supra* note 6).
- 10 Press Release, The White House, Office of the Press Secretary, Remarks by the President (Feb. 10, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care; White House Fact Sheet, *supra* note 9.
- 11 Dep't of Health & Human Servs., Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code (Feb. 10, 2012), available at http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf [hereinafter Safe Harbor Guidance]
- 12 ANPRM, *supra* note 1. The ANPRM was first released as a Word document on Feb. 10, 2012.
- 13 45 C.F.R. §147.130(a)(1)(iv)(B).
- 14 Thus, although the various definitions of religious organizations are bound up with issues of conscience and religious freedom, this article does not touch on the many other conscience and religious freedom issues connected with the health reform law, such as abortion, the individual mandate, and the requirement that employers above a certain size must provide employee health insurance or else pay a penalty, and, for that matter, the public value of expanding access to contraceptives via employee health insurance and the public good of expanding access to health insurance as such.
- 15 Letter from Leith Anderson, President, National Association of Evangelicals, et al., to Joshua DuBois, Executive Director of the White House Office of Faith-Based and Neighborhood Partnerships (Aug. 26, 2011) [hereinafter Letter to DuBois]. (The letter was organized by the Institutional Religious Freedom Alliance. Signers included orthodox Jewish, Protestant, and Catholic leaders.)
- 16 See, e.g., Final Rules, supra note 6, at 8728; ANPRM, supra note 1, at 16 502
- 17 E.g., according to Interim Final Rules, *supra* note 4, at 46,623. The definition seems to be identical to that in California's Women's Contraceptives Equity Act, adopted in 1999 and upheld by the California Supreme Court in March 2004. Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento County, 85 P.3d 67 (Cal. 2004), *available at* http://caselaw.findlaw.com/ca-supreme-court/1240089.html. For discussions of state exemptions, including the associated definitions of exempt religious organizations, see, e.g., Cynthia Brougher, Cong. Research Serv., Preventive Health Services Regulations: Religious Institutions' Objections to Contraceptive Coverage (Feb. 22, 2012); Office of the General Counsel, U.S. Conference of Catholic Bishops, Comment on the

- Interim Final Rules on Preventive Services (Aug. 31, 2011), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08.pdf.
- 18 45 C.F.R. §147.130(a)(1)(iv)(B).

- 19 Jesus Won't Pass Muster at HHS, Posting of Sr. Mary Ann Walsh to USCCBlog, http://usccbmedia.blogspot.com/2011/09/jesus-wont-pass-muster-at-hhs.html (Sept. 12, 2011). The parable of the Good Samaritan is recorded in Luke 10:25-37.
- 20 Of course, some religious service organizations may be designed to serve those of a particular faith, such as a Jewish day school.
- 21 Do New Health Law Mandates Threaten Conscience Rights and Access to Care?: Hearing on the Respect for Rights of Conscience Act of 2011 Before the Subcomm. on Health of the H. Comm. on Energy & Commerce, 112th Cong. (2011) (statement of Jane G. Belford, Chancellor of the Roman Catholic Diocese of Washington) (quoting Caryle Murphy, A Steadfast Servant of D.C. Area's Needy, Wash. Post, Oct. 25, 2004), available at http://republicans.energycommerce.house.gov/Media/file/Hearings/Health/110211/Belford.pdf.
- 22 The point is made in Letter to DuBois, supra note 15. The requirement that organizations directly funded by federal money—i.e., not via a scholarship or voucher or other "indirect" means—not discriminate against service recipients or potential service recipients is part of the several "Charitable Choice" provisions enacted into law during the Clinton Administration. This requirement was applied to other federal funding through George W. Bush's Executive Order 13,279, entitled "Equal Protection of the Laws for Faith-Based and Community Organizations" (Dec. 12, 2002), and confirmed through President Barack Obama's Executive Order 13,559, "Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations" (Nov. 17, 2010). For a discussion of the principle in relation to the Bush Administration, see, e.g., IRA C. LUPU & Robert W. Tuttle, The Roundtable on Religion & Social Welfare Policy, The State of the Law—2008: A Cumulative Report on Legal DEVELOPMENTS AFFECTING GOVERNMENT PARTNERSHIPS WITH FAITH-BASED ORGANIZATIONS 45f (2008).
- 23 Office of the General Counsel, U.S. Conference of Catholic Bishops, Comment on the Interim Final Rules on Preventive Services 19 (Aug. 31, 2011), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08.pdf.
- 24 CHA Comments, supra note 7, at 3...
- 25 Lines Crossed: Separation of Church and State. Has the Obama Administration Trampled on Freedom of Religion and Freedom of Conscience?: Hearing Before the H. Comm. on Oversight & Gov. Reform, 112th Cong. (2012) [hereinafter Lines Crossed] (statement of Rabbi Meir Soloveichik, Director of the Straus Center for Torah and Western Thought, Yeshiva University).
- 26 Council for Christian Colleges & Univs., Comment on the Interim Final Rules on Preventative Services 2-3 (Sept. 30, 2011) [hereinafter CCCU Comment].
- 27 The charge that the definition requires an unconstitutional examination and assessment by government is made by, among others, the Council for Christian Colleges and Universities. *See id.*
- 28 Complaint and Demand for Jury Trial, Univ. of Notre Dame v. Sebelius, No: 3:2012cv00253, at 33 (N.D. Ind. May 21, 2012), *available at* http://opac.nd.edu/assets/69013/hhs_complaint.pdf.
- 29 483 U.S. 327 (1987). On religious hiring, see Carl H. Esbeck, Stanley W. Carlson-Thies & Ronald J. Sider, The Freedom of Faith-Based Organizations to Staff on a Religious Basis (2004).
- 30 But see, e.g., Stephen V. Monsma, When Sacred and Secular Mix: Religious Nonprofit Organizations and Public Money (1996); Stephen V. Monsma, Putting Faith in Partnerships: Welfare-to-Work in Four Cities (2004).
- 31 One example is World Vision, Inc., which successfully defended itself against a lawsuit charging it with illegal employment discrimination for discharging several employees who no longer agreed with the organization's faith statement. On World Vision's hiring practices, see the Ninth Circuit's decision in *Spencer v. World Vision*, 633 F3d 723, 739-740 (9th Cir. 2011)

(O'Scannlain, J., concurring). Note that the Administration justifies the narrow "religious employer" definition in part by its determination to ensure the widest possible access by women to contraceptive services, consistent with respect for religious freedom. So it says that, if, to be exempted, an employer must "primarily employ[] persons who share the religious tenets of the organization," then it is likely that the employees will not want access to the contraceptives anyway so that the exemption does not significantly reduce access. On the other hand, "[e]mployers that do not primarily employ employees who share the religious tenets of the organization are more likely to employ individuals who have no religious objection to the use of contraceptive services." Exempting such employers would result in reduced access to contraceptives by employees who are more likely to desire to use them. Final Rules, supra note 6, at 8728. Yet the definition of exempt "religious employers" is at war with this intention. World Vision, for example, as discussed in the case just noted, serves people without regard to their religion, thus violating criterion 3 of the "religious employer" definition. For that reason, if none other, it falls outside the "religious employer" category. And yet all of its employees are required to share the organization's "religious tenets," as the Ninth Circuit decision documents, and they presumably would agree with the organization's decisions concerning the coverage of contraceptive services. And yet World Vision is not exempted from the contraceptives mandate because it falls outside the definition. A definition of exempt "religious employers" that had only the single requirement that all or most employees share the religious tenets of the organization would better serve the Administration's reported rationale for the definition. However, such a one-characteristic definition would be defective in circumscribing religious organizations as such.

- 32 CHA Comments, supra note 7, at 3.
- 33 The University of Notre Dame states in its lawsuit:

It is unclear how the Government defines or will interpret vague terms, such as "primarily," "share" and "religious tenets." . . . It is unclear how the Government will ascertain the 'religious tenets' of a university those it employs, and those it serves. . . . It is unclear how much overlap the Government will require for religious tenets to be "share[d]."

Complaint and Demand for Jury Trial, supra note 28, at 33.

- 34 CCCU Comment, supra note 26, at 3.
- 35 Final Rules, supra note 6, at 8726.
- 36 IRC Sec. 6033 is entitled "Returns by exempt organizations."
- 37 26 U.S.C. § 6033(a)(3)(C)(i) (emphasis added).
- 38 Large churches with significant community-serving operations also would not fit the definition if, because of the community service, they are judged to have a broader or different purpose than required and to violate the requirement primarily to serve only those of the same faith.
- 39 World Vision's characterization of itself is quoted in *Spencer v. World Vision*, 633 F.3d 723, 725 (2011) (O'Scannlain, J., concurring).
- 40 42 U.S.C. § 2000e-1(a).
- 41 World Vision, 633 F.3d at 737-738.
- 42 *Id.* at 727-728
- 43 Lines Crossed, supra note 25 (statement of Samuel W. "Dub" Oliver, President of East Texas Baptist University).
- 44 Safe Harbor Guidance, supra note 11, at 3.
- 45 Id. at 2.
- 46 E.g., ANPRM, supra note 1, at 16,504.
- 47 Id.
- 48 Id.
- 49 Id
- 50 Id. at 16,505.
- 51 Id. at 16,504.
- 52 Id. at 16,507.
- 53 Id. at 16,504.
- 54 *Id*.

55 *Id.* Some religious commenters on the "religious employer" definition when it was first proposed suggested as a better substitute this church-plan alternative definition. *See, e.g.*, CHA Comments, *supra* note 7, at 5ff.

- 56 When the House of Representatives deliberated in 2007 on religious exemption language for H.R. 2015, that year's Employment Non-Discrimination Act ("ENDA"), a definition of exempt religious organizations that included only those educational institutions that are "in whole or substantial part controlled, managed, owned, or supported by a particular religion, religious corporation, association, or society" was rejected in part because it would have not encompassed institutions such as Wheaton College (Illinois) that are religious but not denominational or church-governed. See Steven H. Aden & Stanley W. Carlson-Thies, Catch or Release? The Employment ${\it Non-Discrimination\ Act's\ Exemption\ for\ Religious\ Organizations},\ {\it Engage},\ {\it Sept.}$ 2010, at 4-5. The church-plan definition recommended by the Catholic Health Association and others, see, e.g., CHA Comments, supra note 7, at 5ff, has been criticized for just this reason: it leaves outside of the definition and exemption "nondenominational Christian institutions," including "many Evangelical colleges, schools and other organizations that have a much stronger religious identity than many . . . Catholic institutions" that do have a formal church connection. Patrick J. Reilly, Religious Liberty: No Exceptions!, CRISIS MAG., Jan. 6, 2012, available at http://www.crisismagazine.com/2012/41931.
- 57 Letter from Stanley Carlson-Thies et al. to Kathleen Sebelius, Secretary, U.S. Department of Health and Human Services, June 11, 2012 (organized by the Institutional Religious Freedom Alliance), *available at* http://irfalliance.org/images/stories/pdf/letter-to-hhs-secretary-signed-6112012.pdf.



Sharia Law in American Courts

American Family Law and Sharia-Compliant Marriages

By Karen Lugo*

Note from the Editor:

This paper analyzes cases in which American courts and judicial systems in other countries have dealt with issues arising from marriages compliant with Sharia law. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about Sharia and the American court system. To this end, we offer links below to different sides of this issue and invite responses from our audience. To join the debate, you can e-mail us at info@fed-soc.org.

Related Materials:

- Sharia in America, The Role of Shari'a Law in U.S. Courts: http://shariainamerica.com/
- John L. Esposito & Natana J. DeLong-Bas, Women in Muslim Family Law (2001): http://books.google.com/books/about/Women in Muslim family law.html?id=MOmaDq8HKCgC
- The Alwaleed Bin Talal Center for Muslim-Christian Understanding: http://cmcu.georgetown.edu/
- Nathan B. Oman, *How to Judge Shari'a Contracts: A Guide to Islamic Marriage Agreements in American Courts*, 2011 Utah L. Rev. 287: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1969077
- Ann Laquer Estin, Toward a Multicultural Family Law, 38 FAM. L.Q. 501 (2004).

Introduction

The purpose of this American family law survey of cases that have addressed Sharia law-based customs is to explore the nature of potential conflict between the Islamic Sharia socio-religious practices and American family law traditions. This article considers the challenges and potential results of evaluating Muslim family law practices in American family law courts.

It is important to first contemplate the family structure, as the repository of cultural values, in respect to both Western or American and Islamic orientations.

Next, it is helpful to consider the process of negotiating and solemnizing marriages when a secular law-based society asks of an insular, clerically-dictated system respect for individual rights to bargaining, contracting, dividing property, and sharing custody of children.

This paper then presents significant cases where Islamic practice was adopted, either by the trial court or the appellate court, along with a listing of notable cases that provide reasoning for rejecting the Sharia terms.

In conclusion, there are references to the reactions and legislative responses of other Western countries as they confront similar cultural and legal dilemmas.

Western Versus Islamic Orientation to the Family

A civilization's social and cultural priorities are reflected in the laws that give structure to families. These laws regarding the organization of families are usually designed to reflect the family's role as the most important purveyor of core cultural values. Edmund Burke, one of Western civilization's most respected philosophers, called love for the "little platoon" we

belong to in society "the first principle (the germ as it were) of public affections." He identified this fundamental sense of family as "the first link in the series by which we proceed towards a love to our country, and to mankind."

When a Western-oriented culture with a constitutional compact based upon equal status of individuals before the law, as well as between each other, begins to accommodate familial cultural practices that assume the inferior legal and social status of one of the marital partners—based solely on gender—the commitment to equal treatment for any in the society comes into question.

Such signs now come from American family law courts as judges accept Islamic family agreements that disadvantage women. In the name of *comity*, an expectation judges will extend legal courtesies to agreements made in other states or nations, some courts are following what they see as a sense of multicultural sensibility. This reach for comity conflicts with the prohibition of judicial consideration of legal agreements that are in violation of core American public policy prescriptions. Adoption of Islamic practices or Sharia law to the result of institutional discrimination against women is in conflict with American laws, constitutional protections, and public policy.

United States Supreme Court Justice Robert Jackson, also chief United States prosecutor at the Nuremberg Trials, wrote this about Islamic law:

In its source, its scope and its sanctions, the law [i.e., Islamic Law, Sharia] of the Middle East is the antithesis of Western Law Islamic law . . . finds its chief source in the will of Allah as revealed to the Prophet Muhammad. It contemplates one community of the faithful, though they may be of various tribes and in widely separated locations. Religion, not nationalism or geography, is the proper cohesive force. The state itself is subordinate to the

^{*} Libertas-West Project; Co-Director, Center for Constitutional Jurisprudence; Adjunct Clinical Professor, Chapman University Law School

Qur'an, which leaves little room for additional legislation, none for criticism or dissent. . . . It is not possible to separate political or juristic theories from the teachings of the Prophet, which establish rules of conduct concerning religious, domestic, social, and political life. This results in a law of duties, rather than rights 2

Ayaan Hirsi Ali, former Somali Muslim who became a member of the Dutch Parliament, warns that "Holland's multiculturalism . . . was depriving many women and children of their rights. Holland was trying to be tolerant for the sake of consensus but the consensus was empty." As a translator in Holland for immigrant families who sought state support, Hirsi Ali observed that "[t]he immigrants' culture was being preserved at the expense of their women and children and to the detriment of the immigrants' integration into Holland." Ms. Ali also posits that the biggest obstacle to Muslim assimilation into Western cultures is the "subjugation of women" and the greater control of female sexuality in Muslim families beginning with compliance "with their father's choice of a mate," then to devotion "to the sexual pleasures of their husband(s)," and "a life of childbearing."

Historian and Western culture commentator Victor Davis Hanson observes, "[M]ulticulturalism is a good reminder that when standards are relative, there are no standards at all."⁵

FOUNDATIONS OF ISLAMIC LAW

It is important to understand the general origins and scope of Islamic law—what is commonly called Sharia law—before considering how Sharia may be included in American family law court decisions.

First, Islamic law differs from a secular legal system that recognizes consensual government based upon self-rule. Islamic law derives its legitimacy from Allah, not agreement among citizens to be ruled by laws as enforced by accountable state police power. Thus, power is concentrated in the religious adjudicators of the doctrine. This consolidation of power can invite arbitrariness, especially when violations of the law are not merely an infringement of the social order, but transgressions against God that are often punished in both the current life and afterlife.

World-recognized Islamic historian and scholar Bernard Lewis writes:

The idea that any group of persons, any kind of activities, any part of human life is in any sense outside the scope of religious law and jurisdiction is alien to Muslim thought. There is, for example, no distinction between canon law and civil law, between the law of the church and the law of the state, crucial in Christian history. There is only a single law, the shari'a, accepted by Muslims as of divine origin and regulating all aspects of human life: civil, commercial, criminal, constitutional, as well as matters more specifically concerned with religion in the limited, Christian sense of that word.⁶

Lawrence Wright, author of *The Looming Tower*, points out that Islamists believe that "the Sharia cannot be improved upon, despite fifteen centuries of social change, because it arises directly from the mind of God." While Wright also notes that contemporary Islamic modernists argue that the "stringent

Bedoin codes of the culture that gave birth to the religion are certainly not adequate to govern a modern society," reform efforts would have to challenge the systemic belief that "the five hundred Quranic verses that constitute the basis of Sharia are the immutable commandments of God."

There are four sources of authoritative Sharia law, although regional schools express generalized interpretations: the Quran (word of Allah), *Sunna* (actions and sayings of the prophet), *ijma* (consensus of scholars), and *qiyas* (reasoning by analogy). Clerical guidance or *ijtihad*, interpretive pronouncements by Islamic scholars as *fatwas*, is incorporated into Sharia jurisprudence.

Sharia rules have undergone little reform over the ages. As religiously ideological societies, Muslim cultures are typically intolerant of dissent and critical inquiry. Efforts to target "the Shari'a, as it governs personal status and family law" by the United Nations' Women's Convention initiatives have yielded little progress.¹⁰

As an example of Sharia's attitudes, Iranian Ayatollah Mutahari, creator of the policy on women in the workplace after the Iranian Revolution, described as recently as 1999 the limited role of women as "to marry and bear children. They will be discouraged from entering legislative, judicial, or whatever careers may require decision making, as women lack the intellectual ability and discerning judgment required for these careers."

The degree to which Middle Eastern Muslim women accept male misogyny is revealed in responses to a 2002 survey of 356 Jordanian women showing that "Jordanian women often blamed the wife for violence against her." Almost half of the women questioned in this relatively liberal Muslim society agreed that in most cases "a husband beats his wife due to her mistaken behavior, such as squandering money or neglecting the house and children," or that "the wife's behavior toward her husband or children is the cause of violence against her." 12

There are schools of thought that justify preventing women from receiving an education on the religious rationale that "learning the written word protects their religious purity and honor." When some forms of Sharia law address the entire range of human behavior from "how to respond to someone who sneezes" to "the permissibility of wearing gold jewelry," such mandates will be met with great resistance by Americans who have a broad view of individual liberty and freedom of conscience.

It is then no surprise that American and strict Islamic family cultural codes are clashing in U.S. family law courts. The comprehensive 2009 Emory Law School family law survey No Altars: A Survey of Islamic Family Law in the United States affirmed that "many Muslim couples are asserting their Islamic legal rights in American family courts . . ." for the reason that "[Muslim] religious identities [are] important enough not to sacrifice at any secular altar." These researchers then expressed satisfaction that "the law surrounding Muslim marriages is becoming an important and complicated part of the American legal landscape." ¹⁵

SHARIA AND AMERICAN FAMILY LAW

Family law has been called the heart of the Sharia and has been given "pride of place" in the Koran as "eighty percent of

Koranic rulings [that] are devoted to regulating marital relations and the conduct of women."¹⁷

The Sharia socio-religious emphasis on the family structure and place of women in the family poses problems on many levels for American family law courts. First, just the act of consulting Sharia religious codes calls into question important First Amendment constitutional prohibitions against judicial inquiry into religious doctrine. Furthermore, Supreme Court rulings preclude judicially-sanctioned coercion of religious practices, and judges are prohibited from ruling according to doctrinal mandates unless there is an independent legal ground for the determination. Thus, judicial entanglement in disputes over religiously-dictated Sharia is improper, from the attempt to decode extra-contractual marital terms to calling on a Sharia cleric as an expert witness to provide context.¹⁸

Judges are constrained from straying into the religious hazard zone by the boundary that calls for them to adjudicate disputes or marital dissolutions according to "neutral principles" of law. Yet some judges have justified incursion into this territory by claiming that the case entails "undisputed points of religious doctrine," where the determination ostensibly does not "involve consideration of doctrinal matters, rituals, or tenets of faith." When used to justify interpreting Sharia-based family arrangements, this claim usually fails first on the assertion that anything about Sharia is undisputed since, as the practitioners and analysts of Sharia readily admit, the various interpretive schools of Sharia are evidence of differing approaches to marital terms. Second, Sharia regulations are by nature a "doctrinal matter" since Sharia does not exist if the religious origin and authority are eliminated.

For purposes of legally—in distinction to religiously dissolving a union, marriages are treated as a contract between husband and wife. When American judges attempt to apply contract terms to Islamic marriages, they often find that there rarely is complete conformity with American civil expectations for a recorded marriage license and officiants are often not registered; sometimes they are not even imams. Also, Islamic marital negotiations are regularly conducted by a male representative and without the bride's participation. Sometimes the bride is underage. In many cases these practices violate American expectations for basic fair bargaining interests in contract creation. The agreement may be considered legally unconscionable if so unfair to the weaker party that a court should refuse to enforce the terms. Also, some of these marriages may qualify to be considered void ab initio (invalid from the start) or voidable.

Finally, there is a backstop—albeit a soft one—which is supposed to block foreign law that is at odds with American constitutional standards from creeping into judicial decisions. As judges extend comity—recognition of agreements made outside of a court's jurisdiction—conformity with sound American public policy is the do-not-cross bright line. Therefore, a judge should not approve an agreement originating in the legal terms from another culture if it is "injurious to interest of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with public welfare or safety, or if it is at war with interests of society and is in conflict with public morals."

When deferring to Sharia-cognizant family arrangements, the "not offensive to public policy" instruction asks judges to uphold constitutional, moral, and cultural imperatives like a woman's freedom to choose her marriage partner, her right to equal property distribution, due process standards requiring notice and process, and her interest in a fair custody determination.

If a judge's interest in accommodating a Muslim party's religious or cultural sensibilities overrides express American public policy standards, there is danger that such default rulings will undermine legislative will. The human rights prerogatives at stake involve "cultural accommodations or legal concessions to polygamy, forced marriage, the marriage of prepubescent girls, unilateral divorce by husbands, and the ban against Muslim women marrying non-Muslims (even though Muslim men are allowed to marry outside their faith)."²¹

Complicating matters further, when American judges recognize religious divorce terms that are at odds with American legal standards, the marital partner who files the divorce papers is invited to leverage forum advantages. Since it is customarily the husband who initiates the divorce proceeding in a Muslim marital dissolution, case histories show that he will often try to exploit the advantages offered by the religious interpretation of the marital contract. When this option is foreclosed by consistent enforcement of American contract and constitutional protections, both parties know what to expect when appearing before a civil judge for a hearing.

An initiative to fortify and harmonize state public policy baselines called American Law for American Courts (ALAC) has been adopted in four states.²² The ALAC measure precludes the state courts from giving effect to foreign laws or foreign judgments when the application of those would deprive a party of an essential constitutional right or liberty like due process or equal protection. In other words, a state court might very well apply Sharia or the law of England, as courts do all of the time in the appropriate circumstance (i.e., the parties agree to such laws in a contract), as long as the particular aspect of Sharia or the law of England does not undermine American state and federal constitutional protections in the matter being adjudicated.

As states enact family law according to constitutional health, safety, and welfare prerogatives, this study demonstrates that it would be useful for legislators to consider providing basic requirements for the licensing of marriages, registration of officiants, and prenuptial agreements. This threshold at least asks the marital partners to obtain civil recognition of the union. Unions not in compliance with the registration and solemnization standards are then on notice that potential defects in licensing, officiating, bargaining, or nuptial negotiations may mean that the judges must defer to common-law community property standards of equitable asset distribution, spousal maintenance, and best interests of the child.

A. Sharia-based Marriage Practices

In order to understand Muslim marriages, the key terms below should be defined:

Nikah Nama/Muta—Marriage:

The marriage, or *nikah*, is usually negotiated for the bride by her parents, or a relative as representative, called a *wali*. The marriage contract is often arranged once the woman is considered to have reached puberty. While practices vary by region, some girls as young as nine have been considered eligible for marital commitment.²³ Protestations by brides are rare since much familial esteem is invested in women as the "repositories of family honor"²⁴ and a bride resisting an arranged marriage could be viewed as "highly disrespectful and would risk permanent ostracism from her family and community and may even risk death."²⁵

Lindsey Blenkorn, who dedicated an entire study to *mahr* agreements, wrote that "tears, and sullen silence by the bride are deemed a sufficient sign of acceptance, not a refusal to marry the groom." Worse, she noted cases of coercion and observed that "marriages contracted . . . under duress are given effect." ²⁶

Talaq—Husband's Power to Verbally and Unilaterally Divorce

Talaq is the method utilized by the husband of divorcing his wife by repeating three times "I divorce you." In typical Sharia cultures, a woman can only sue for divorce based on one of four reasons: the husband cannot consummate the marriage, has a venereal disease, has leprosy, or is insane.²⁷ Even if the husband pronounces talaq while drunk, it is often still enforceable. Also, the husband has the luxury of three months, during which time he can reconsider. Anytime during these three months, the husband can take his wife back and thus cancel his repudiation. If he does take her back, she has no choice but to accept and become his wife again, bearing the duty of sexual relations with the man who has just threatened to get rid of her.²⁸

Idaa—Revocable Divorce

This has become a perfunctory three-month waiting period expected of the wife during which the husband may decide to reinstate the marriage. Originally, the period was calculated to anticipate a sufficient number of menses to ensure that the male parent of any offspring produced after the cessation of a *nikah* would be known.

Mahr/Sadaq—Dower

The *sadaq*, or marriage contract, includes the *mahr*, which acts as a deferred dower to be paid in the event of divorce or death. The *mahr* is thought to deter the husband from divorcing his wife by making divorce an expensive prospect. The deferred dower is also viewed as compensation to the wife for the man's unilateral right to divorce.

Although American courts struggle to apply the *mahr*'s terms within a marriage contract—either viewed as pre-nuptial or ante-nuptial—it functions as neither if analyzed according to legal contract standards. As noted above in the discussion on the marriage negotiation, the bride has little or no representation in agreeing to the terms of the deferred dowry, or *mahr*. In fact,

Blenkhorn's research found potential for "harmful physical consequences they might suffer were they to refuse or protest, ranging from familial fratricide—so-called dowry deaths, where the bride's in-laws kill her for protesting or failing to provide money to her new family."²⁹

As imagined, women are often destitute at the point of divorce since Sharia is often interpreted to forbid women from working outside the home or continuing their education. Also, in a strict Sharia culture the prospect of remarriage for a non-virgin is virtually nill. Predictably, families do not welcome the return of their now unmarriageable daughters.

Polygamy—Men Can Have up to Four Wives

Polygamy is allowed in some Sharia-based Muslim cultures, but with the limitation of four wives at one time. The husband is admonished to treat them all equally. If the man is unable to treat each equally, he must restrict himself to only one wife.³⁰ Polygamous Muslim marriages in the U.S. are increasing, with current estimates showing that 50-100,000 Muslims in the U.S. now live in a polygamous family.³¹

Child Custody

The Islamic Sharia Council of the United Kingdom's website offers an updated "Perspective on Child Custody After Divorce" that counsels maternal custody for young children with choice of parent occurring generally at age seven.³² The directive stresses that "Islamic upbringing" is required "to ensure that the child's welfare is properly cared for" and advises that "the child be given to the next eligible custodian" for enforcement purposes.³³

B. Examples of Sharia-based U.S. Family Law Rulings

The family law cases below only represent court decisions that contemplated Sharia elements. Some cases listed are noted as "unpublished," which means that the judge or judges do not offer them for official citation but they are included here for the purpose of noting compelling judicial reasoning. Trial courtlevel cases are not usually published in retrievable databases since the rulings do not have precedential value. Therefore, unless a ruling was appealed by one of the parties, it would not likely appear in one of the legal databases for purposes of this survey.

The cases are summarized for a succinct presentation of the Islamic marital terms, divorce actions, custody arrangements, and the court's determination. Some significant judicial dicta rejecting Sharia practices on the basis of non-compliance with public policy interests is shown in italics for emphasis.

The first section contains cases where the trial court implemented Sharia terms in the marital dissolution as well as cases where the appellate court affirmed the Sharia elements. The second section lists cases where the appellate court rejected Sharia terms of the cases and reversed the lower court's incorporation of the Sharia factors. Finally, the last section features family law cases that offered rationales as to the legal basis for rejecting Sharia elements in family law rulings. Cases are listed in alphabetical order.

Section One: Trial or appellate decisions implementing Sharia terms

Afghahi v. Ghafoorian, Unpublished, No. 1481–09–4, WL 1189383 (VA Ct. of Appeals 2010).

Husband and wife were married in Iran and executed an Islamic deed of marriage. The agreement showed that husband would give to wife "the gift of a tome of Holy Koran valued at 50,000 Rials. a bar of rock candy, and the pledge of 514 gold coins." Coins were worth approximately \$141,100 U.S. dollars.

The trial court ruled that the contract was a premarital agreement although the "marriage portion" was referred to as both a "gift" and an "obligation" with no due date in the contract. The court awarded all promised property to the wife.

The appellate court affirmed the lower court decision by enforcing the marriage contract (*mahr*) as a premarital agreement. The contract was considered binding according to Virginia law, where "parties are permitted to enter into premarital agreements, which are akin to contracts, in which they can 'contract with respect to . . . any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty."

Aghili v. Saadatnejadi, 958 S.W.2d 784 (Tenn. Ct. of Appeals, Mid. Sect., Nashville 1997).

Husband negotiated a marital agreement (*sadaq*) with wife's father in accordance with Islamic custom. In this contract, husband agreed that wife's dowry (*mahr*) would be 1400 Iranian gold coins and that he would pay wife 10,000 Iranian gold coins if he violated any provision of the contract. Because Islamic law permits a man to have four wives, husband also agreed that he would not marry anyone else if the parties ever returned to live in Iran. The couple obtained a marriage license, and an Islamic blessing was given in the presence of four witnesses. The couple and the Islamic official signed an Islamic marriage certificate that was filed with the mosque in Nashville. Months later, husband informed wife that he would not record their marriage license with the county unless wife would agree to relinquish her dowry and earlier marriage contracts. Husband then filed for divorce five months after the Islamic marriage ceremony.

The trial court concluded that the marriage was void, finding that the officiant was not qualified to perform the Islamic marriage and the license was not properly filed.

The Tennessee Court of Appeals held that an Islamic marriage ceremony or "blessing" qualified as a legal marriage, allowing for a partially completed and late-filed marriage license. The appellate court reversed the trial court's summary judgment that the Muslim ceremony without registration of the marriage or imam was void.

<u>Comment</u>: There is a key admission in this case by an expert witness, a professor of religion at Boston University and specialist in Islamic Studies, who compares the societal norms under Christianity and Judaism to the Islamic sense of a unified religious culture: "In contrast to Western religious teaching and practice Islam from its inception to the present *has consistently rejected the distinction between clergy and laity.*"

Finally, it is interesting to note that Tennessee law was changed the year after this case was decided to require that all who "solemnize the rite of matrimony: a minister, preacher, pastor, priest, rabbi, or other spiritual leader must be ordained or otherwise designated in conformity with the customs of a church, temple, or other religious group or organization, and such customs must provide for ordination or designation by a considered, deliberate, and responsible act." T.C.A. § 36-3-301(a)(2) (added by 1998 Public Chapter 745).

Ahmed v. Ahmed, 261 S.W.3d 190 (TX Court of Appeals, 14th Dist. 2008).

Husband and wife married in a civil ceremony in 1999. The marriage was arranged between the parties' families. They also had an Islamic ceremony in New York in 2000. At that time, the parties signed an Islamic marriage certificate that included a *mahr* provision of \$50,000.

The appellate court considered that the *mahr* was signed six months after the civil ceremony and decided that it could not be considered a *pre*nuptial agreement. Since the record was devoid of any evidence as to whether or not the parties intended the *mahr* payment to come from Amir's separate property or from the community property, the court ruled that the *mahr* was unenforceable. The appellate court remanded the case back to the trial court to determine if the *mahr* agreement was enforceable on other grounds.

<u>Comment</u>: The appellate court did not accept the *mahr* as a prenuptial agreement but gave the wife opportunity to pursue an alternate legal theory when the case was reconsidered before the trial court. See comment in dissent below:

Dissent (from the appellate decision): "I respectfully disagree with the majority's conclusion that, on these facts, the interests of justice are served by allowing [wife] the opportunity to re-characterize the *mahr* and re-litigate its enforceability under another theory."

Aqel v. Aqel, Unpublished, No. 2004-CA-001531-MR (KY Ct. of Appeals 2005).

Husband, a citizen of Jordan who was in the U.S. as a permanent resident, and wife, an American citizen, married in 1996 in Kentucky. Husband was previously married in Jordan and had initiated a divorce that was not finalized. Thus, the marriage in Kentucky was annulled. Husband re-filed for divorce in Jordan and proceeded with an Islamic divorce called an *idda* that entails a three-month revocation period. In 1997, husband and wife re-married in Kentucky before the three-month period for revocation of Jordanian divorce had expired. Wife filed for an annulment in 2001 on the grounds that husband was still legally married in Jordan at the time of his 1997 marriage to her.

The trial court determined that the Jordanian divorce of first wife was effective from the day it was filed even though Islamic experts for each party testified that a woman must wait until the expiration of the *idda* period before remarrying. (However, this requirement does not apply to a Muslim husband since men are generally permitted to have four wives.)

The appellate court upheld the trial court's ruling, referring to a non-binding Board of Immigration Appeals

determination (Matter of Hassan (11 I. & N. Dec. 179 (BIA)) in a similar matter, and recognized the validity of the Jordanian divorce based upon the fact that husband did not reclaim his Jordanian wife during the three-month *idda* period.

Comment: The case is flagged as one where the appellate court adopted provisions of Sharia law since the analysis to determine if husband's divorce was final turned on whether he re-claimed the previous wife during the waiting period as provided by Jordanian Islamic law. Although the result likely would have been the same, state law could have been applied since the Sharia policy was arguably offensive to state public policy standards. Also, wife complained on appeal that Islamic law was arbitrary and should not apply in American courts. She also made an equal protection claim. However, she raised neither of these complaints in the trial court, so they could not be considered on appeal.

Akileh v. Elchahal, 666 So. 2d 246 (FL Dist. Ct. of Appeal 1996).

Husband and wife were married in Florida in 1991. The wife's father negotiated the marriage, and wife had no previous association with any other man outside the presence of her family. They both signed a *sadaq* with a *mahr* (described by court as an antenuptial or postponed dowry) agreement that husband would pay wife \$50,000 at time of divorce. Husband never discussed the meaning of a *sadaq* with the wife or her father. The wife filed for divorce in 1993 after contracting a sexually transmitted disease from husband.

The trial court ruled that the *sadaq* of \$50,000 was unenforceable. Husband contended that *sadaq* was waived if wife initiated the divorce, but he acknowledged that spousal abuse would be grounds for a wife to retain the *sadaq*. Islamic experts who testified also presented an interpretation of *sadaq* that favored the wife's position. The trial court found the agreement invalid according to contract law requirements including the determination that there was no meeting of the minds.

The appellate court found what it considered to be secular terms of the *sadaq* valid and enforceable, saying that "courts may use 'neutral principles of law' to resolve disputes touching on religious concerns."

Aziz v. Aziz, 488 N.Y.S.2d 123 (1985).

Husband and wife married in New York in 1981 according to an Islamic ceremony. They agreed to a *mahr* of \$5032 (\$5000 deferred payment and \$32 prompt payment) as signed by an imam. Husband filed for the divorce that was granted on grounds of constructive abandonment. Wife claimed that the *mahr* was a religious document and not enforceable as a contract.

The court issued a second decision (original withdrawn) and upheld the *mahr* agreement, "in the interest of judicial economy," enforcing the payment of \$5000. The court cited New York's General Obligation Law, saying that the contract's "secular terms are enforceable as a contractual obligation, notwithstanding that it was entered into as part of a religious ceremony."

<u>Comment</u>: The Islamic marriage contract was upheld, but essential facts are not presented that would reveal how the contract was negotiated and whether New York laws governing licensing, contract negotiation, and notice were followed.

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<u>Chaudry v. Chaudry</u>, 388 A. 2d 1000 (N.J. Super. Ct. App. Div. 1978).

Husband and wife were married in Pakistan in 1961 and moved to the U. S. in 1963. The *mahr* agreement was negotiated for wife by her parents and included \$1500, or 15,000 rupees, in the event of divorce. In 1968, wife and children returned to Pakistan. Husband resided in New Jersey, but wife testified that husband prevented her from returning to the U.S. Wife filed for divorce in a New Jersey court, alleging that her husband had abandoned her. Husband answered the divorce suit by stating that he had already been granted a divorce under Pakistani law and that the trial court was without jurisdiction to divide the marital estate.

The trial court ruled that "there was an essential injustice in the defendant accepting all the benefits of living in New Jersey and earning a substantial income here while requiring his wife and family to live in Pakistan and be circumscribed by their law which is far less beneficial to them than the American law would be." The trial judge invalidated the Pakistani divorce and opened the process to wife "to prove by proper evidence that she would be entitled to certain support by way of separate maintenance." Trial judge opined that wife "had to waive, give up or not claim support or alimony in the event of a divorce, and it cannot be said that with that choice she chose to do it, because there was no choice involved."

The appellate court upheld the Pakistani divorce and determined that the wife was not entitled to equitable distribution by reason of the ante-nuptial agreement (*mahr*). The court found that although it limited her rights to some \$1500, or 15,000 rupees, there was no proof that the agreement was not fair and reasonable at the time it was made. The appellate court ruling affirmed the Pakistani divorce according to (1) the Pakistan citizenship of the parties, (2) the wife's residence there, even though it may have been against her will and by reason of the husband's acts, and (3) the judgment of the appellate court in Pakistan that validated the divorce.

<u>Ghassemi</u>, 998 So.2d 731 (LA Ct. of Appeal, 1st Circuit 2008).

Husband and wife married in Iran in 1976. Husband went to the U.S. on a student visa and married again "to enhance his legal status." He then divorced the American wife. Husband married another American wife in 2002. Husband arranged for Iranian son to join him in the U.S. in 1995 and in 2005 son arranged for Iranian wife (his mother) to enter the U.S. as a permanent resident. She settled in Louisiana, where she filed suit for divorce. Husband claimed that the Iranian marriage was invalid according to Iranian law since wife was a blood relative (first cousin) of husband.

The appellate court, striving to "uphold the validity of marriage," stated, "like the foregoing courts, we too find that although Louisiana law expressly prohibits the marriages of first cousins, such marriages are not so "odious" as to violate a strong public policy of this state. Accordingly, a marriage between first cousins, if valid in the state or country where it was contracted, will be recognized as valid." Yet, Iranian law forbids marriage "with the brother and sister and their children, or their descendants to whatever generation."

Hosain v. Malik, 671 A.2d 988 (Md. Ct. Spec. App. 1996).

Husband and wife were married in Pakistan in 1982. Their daughter was born in 1983. Mother left the marital home with daughter in 1990. Father obtained a custody decree in his favor in Pakistan. Wife and daughter left for the U.S. during the custody proceedings, traveling on wife's student visa. Father tracked down wife and daughter in Maryland in 1992.

This case was complicated with concerns about jurisdiction and removal of the child to the United States but was ultimately resolved by the Court of Special Appeals of Maryland, sitting en banc. The appellate court essentially considered 1.) whether the Pakistani court applied the best interest of the child standard; 2.) whether the trial court's determination should focus on the particular culture, customs, and mores of Pakistan and the religion of the parties, or, alternatively, whether the best interest standard was to be determined based on Maryland law, i.e., American cultures and mores.

The appellate court decided that applying relevant Pakistani customs, culture, and mores was appropriate and that the Pakistani court had sufficiently considered the best interests of the child. The majority reasoned that it was "beyond cavil that a Pakistani court could only determine the best interest of a Pakistani child by an analysis utilizing the customs, culture, relgion, and mores of the community and country" of origin. The court also posited that "the well being of the child and the child's proper development is thought to be facilitated by adherence to Islamic teaching" since the family was from the Pakistani culture.

Note: Wife/mother stated that she did not appear at the custody hearing in Pakistan to present her "best interests of the child" case for the reason that she feared punishment for committing adultery. She claimed that, if convicted, her punishment could be public whipping or death by stoning. The appellate court determined that as long as the mother was given notice and opportunity to be heard—and that as long as the Pakistani court applied a child welfare test—no further process was due the mother. The court was satisfied that she participated in the Pakistani hearings through her counsel and her father, who acted as attorney-in-fact.

<u>Comment</u>: Studies indicate that "the subordination of women in Pakistan is effectively written into the law." When American courts recognize a legal system "comprised of 'tribal codes, Islamic law, Indo-British judicial traditions and customary traditions' that have created an 'atmosphere of oppression around women, where any advantage or opportunity offered to women by one law, is cancelled out by one or more of the others," it is debatable whether any system would not be granted comity under this standard.³⁵

In re Marriage of Malak, 182 Cal.App.3d 1018 (Cal. Ct. App. 1986).

Husband and wife were married in Lebanon in 1970. Wife brought children to the U.S. in 1982 to live with her brother in California, without husband's permission. She then filed for legal separation in 1982, and husband was served while in San Jose. Husband commenced separate custody proceedings in Lebanon and the UAE (where the family had also resided). Husband then sued in California for enforcement of judgments granting him custody from the Lebanon and UAE courts.

The trial court declined enforcement of the child custody order of the Sherei Sunnit Court of Beirut, Lebanon on the ground that due process had been denied wife, with the added finding that the Islamic court did not appear to hold the "best interests of the child" as a central consideration in the determination of custody.

The appellate court reversed and awarded custody to the father, disregarding concerns that the Lebanese Court would prefer the father's custodial claim, and saying that the Lebanese Court did properly consider the best interests of the children. This determination was based in part upon the Lebanese Court finding of "the impossibility of obtaining the [I]slamic education and exercise of its rituals [in the U.S.A.]." The court also considered

the interest of the two children with regard to the material side, because the father has properties and work opportunities in Lebanon . . . and in particular that their divorced mother might not be able to provide them proper life with any means of subsistence because she is unemployed and it is quite possible that her stay in the U.S.A. is illegal, shakey [sic] and uncontinuous. . . . and she will not be able to bring them up properly in a strange country where the children have no relatives and are away from the protection, affection and tenderness of their father.

Odatalla v. Odatalla, 810 A.2d 93 (Superior Ct of New Jersey 2002).

Husband and wife were married in New Jersey in 1996 in a videotaped Islamic marriage ceremony with an Islamic marriage license. Wife sued for divorce, claiming extreme cruelty, and asked that the *mahr* agreement providing \$10,000 as postponed dower be enforced. Husband counterclaimed extreme cruelty.

The Superior Court of New Jersey granted a dual judgment of divorce and enforced the *mahr* agreement with equitable distribution and alimony dispositions, after applying this two-part test: (1) the agreement was capable of specific performance under neutral principles of law, and (2) once those neutral principles of law are applied, agreement meets state's standards for those neutral principles of law.

<u>Comment</u>: The court called for constitutional flexibility to dismiss the First Amendment prohibition against judicial inquiry into a religious issue:

In order for laws, indeed, constitutional principles, to endure, they must be flexible in their application to the

facts of the case presented. The community we live in today is vastly different from the community of the late 1700's when our Constitution was drafted by the founding fathers. Rather, the challenge faced by our courts today is in keeping abreast of the evolution of our community from a mostly homogenous group of religiously and ethnically similar members to today's diverse community.

This quote from Justice William Brennan was used to support constitutional adaptation to this diversity imperative:

We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be: what do the words of the text mean in our time? For the genius of the constitution rests not in any static meaning it may have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.³⁶

Rahman v. Hossain, Unpublished, 2010 WL 4075316 (NJ Superior Court, Appellate Div. 2010).

Husband and wife were married in Maryland in 2006. The marriage was an arranged Islamic union, and parties agreed to a *sadaq* of \$12,500 in the event of divorce. Husband filed for divorce in 2007 and provided an Islamic expert witness to testify that *sadaq* could be voided if wife were proven to be at fault for the divorce.

The trial court, relying specifically on the uncontroverted testimony of the expert, found that the ex-wife's "undisclosed mental illness constituted an impediment to the marriage under Islamic law." The appellate court cited *Alicea v. New Brunswick Theological Seminary*, 128 N.J. 303, 313 (1992) to support the proposition that "relevan[t] religious customs and principles in certain civil disputes, particularly with respect to contractual promises" can aid in the application of "neutral principles of law." The appellate court upheld trial court's ruling that wife was not entitled to the \$12,500.

<u>Comment</u>: Wife's pleadings were suppressed, and she defaulted in a separate hearing on her counterclaims regarding the mental illness question.

Sherif v. Sherif, 76 Misc.2d 905 (NY Family Court 1974).

Husband and wife married in Egypt in 1971 in an Islamic ceremony. They moved to the United States after the marriage and traveled back to Egypt in 1973, where husband filed for divorce. Wife then petitioned for support in New York. Husband countered that the Egyptian divorce should be recognized and that he was no longer married so not obligated to support wife.

The family court validated the Egyptian divorce based upon the practice of comity saying that it is a "firmly established principle of Anglo-American law that foreign judgments, subject to a few exceptions, are not open to re-examination on the merits before a local forum." The court defined the practice of comity as not an act "of mere courtesy and good will, upon the other, it is the legislative, executive, or judicial acts of another nation." While the court recognized that "Egyptian laws with regard to matrimony do not by any means meet with the approval of this Court," accepting the facts and circumstances

of the particular divorce "was not considered offensive to the public policy of this State." The family court determined that "it [was] not shocking to 'the conscience to conclude that people who marry under a certain set of laws may expect to be bound only so long as that set of laws required it."

<u>S.I. v. D.P.I.</u>, Unpublished, No. CN04-09156 (DE Family Court, New Castle Co. 2006).

Husband and wife were married in 2006 in Bangladesh. The Islamic marriage was arranged by wife's sister-in-law and included a *sadaq* providing for about \$17,000 to wife. Wife came to the U.S. in 2004, and husband arrived several months later. The parties were divorced in Delaware in 2005. Husband claimed that the contract should not be enforced since he thought that the agreement presented to him at the time of marriage allowed for a dowry of "a small amount" and that he signed it only for traditional purposes.

The family court considered whether the marriage contract was negotiated in an unconscionable manner and said that the party claiming so "must prove that there was 'an absence of meaningful choice and contract terms [are] unreasonably favorable to one of the parties'" and that the contract "terms must be so one-sided as to be oppressive." The court decided that husband provided no testimony or other evidence to support his argument that the agreement was unconscionable and should not be enforced.

<u>Comment</u>: The court applied state contract requirements to the dispute; however, the court noted the absence of "comparative evidence about similar marriage agreements in the Bangladeshi community" to accomplish a more detailed analysis.

Section Two: Trial court decisions that incorporated Sharia elements but appellate court reversed

Farah v. Farah, 429 S.E.2d 626 (Va. Ct. App. 1993).

Husband was a citizen of Algeria, and wife was a citizen of Pakistan. Proxies of both met in London to conduct a ceremony that married them. The ceremony did not conform to the formalities required of marriages by English law. The couple lived in Virginia and never had a civil marriage performed in the United States. Wife subsequently filed for divorce.

Trial court accepted as valid a marriage not performed according to law in the United Kingdom, the place where the marriage occurred. The trial court found that a valid marriage existed because the London proxy ceremony was valid under Islamic law and the law of Pakistan. The trial court reasoned that Virginia should grant comity and recognize the marriage because it was valid under the laws of Pakistan.

The appellate court reversed the trial court and held that the marriage was invalid. The *validity of a marriage in Virginia*, said the appellate court, is dependent on whether the marriage was valid in the place where the ceremony occurred, *not whether the marriage was religiously valid under Islamic law*.

<u>Hammoud v. Hammoud</u>, Unpublished, No. 302619 (MI Wayne Circuit Ct., Fam. Div. 2012).

Husband appealed divorce terms where couple was married according to Islamic terms and where wife's father evidently agreed to marital contract for wife. Included in the issues on appeal, husband complained that spousal support award was excessive and was imposed as a sanction for his refusal to grant wife an Islamic divorce.

The trial court imposed spousal support for an indefinite period unless terminated by plaintiff's receipt of an Islamic divorce by defendant, her death, or remarriage.

The appellate court reversed this part of the decision after determining that the trial court's ruling appeared to be pressuring husband to grant wife an Islamic divorce "despite the trial court's acknowledgement that it had no authority or jurisdiction over the parties obtaining a religious divorce." The appellate court considered the award of spousal support for "an indefinite duration" as apparently "designed by the trial court to force or pressure defendant to agree to an Islamic divorce" and so called it "improper."

Also of note, husband wanted to enter a document into the proceeding to show that wife waived rights to marital property if she filed for divorce. The appellate court agreed with the trial court's finding that the document was not properly certified and appeared to represent an agreement made by wife's father with husband, on wife's behalf, at the time of marriage. The appellate court concluded: "A parent has no authority merely by virtue of the parental relation to waive, release, or compromise claims by or against his child," citing 67 CJS, Parent & Child, \$58, at 764, and Schofield v Spilker, 37 Mich App 33; 194 N.W.2d 549 (1971).

<u>Habibi-Fahnrich v. Fahnrich</u>, Unpublished, No. 46186/93 (NY Supreme Ct., Kings County York 1995).

In 1983 American husband and Iranian wife were married in a civil ceremony in Brooklyn. Subsequently they were married in an Islamic religious ceremony officiated by an imam. Prior to signing the *sadaq* husband was given a one-hour explanation of the Islamic religion by the imam. Husband claimed that he signed the *sadaq* to appease wife's family. Less than one year after the marriage, wife filed for divorce and enforcement of the *sadaq*.

The trial court found that the *sadaq* was enforceable.

The division appellate court disagreed. The Supreme Court for Kings County ruled that the *sadaq* was not sufficiently specific to illustrate agreement when it did not define "postponed" or "possession" and "one half of the possessions." The court determined that the *sadaq was unenforceable on three different points of law. "The pertinent points of law include materiality, specificity, and insufficiency."*

Husein v. Husein, Unpublished, No. 2001CA00015 (OH Ct of Appeals, 6th Dist. 2001).

Husband and wife married in Palestine in 1970. Same year, the couple moved to Ohio. In 1992, Husband went to Palestine for three weeks and obtained a divorce.

Wife was not served with the divorce certificate. Husband then returned to Ohio and re-married in 1995. At this time first wife was made aware that husband had divorced her in Palestine at a Sharia Court in Ramallah.

In April 2000, husband was murdered in Arkansas not far from a convenience store he owned. In August 2000, one

of husband's sons filed a probate action to determine the legal heirs.

The trial court granted comity to the Palestinian divorce, meaning that the marriage to subsequent wife was also valid.

The appellate court reversed and held that the Palestinian divorce decree was not entitled to comity. The court reasoned that without expert testimony regarding Palestinian law on residency requirements, the court was to assume that Palestinian law would have similar residency requirements as Ohio. Since Ohio law required plaintiff to be a resident of Ohio for at least six months before commencing an action for divorce, husband's religious divorce in Palestine was not valid. The appellate court remanded for further proceedings consistent with its decision.

In re Marriage of Obaidi and Qayoum, 226 P.3d 787 (Wash. Ct. of Appeals, Div. 3 2010).

Husband and wife, both children of Afghan immigrants, signed a *mahr* agreement written in Farsi during an engagement ceremony known as a *nikah* ceremony. Husband, who did not speak, read, or write Farsi, did not know about the *mahr* until fifteen minutes before he signed it. Wife later filed for divorce

The trial court concluded that wife was entitled to the \$20,000 *mahr*, and accepted it as a prenuptial agreement based on Islamic law that provided an immediate and long-term dowry to the wife.

The appellate court called the lower court's consideration of Islamic law erroneous when the court validated wife's petition for divorce and said that the determination could not be reached by using neutral principles of law. The appellate court emphasized that "Islamic beliefs or policies" were not legally admissible and noted that a contract must be based on a "meeting of the minds on essential terms." The appellate court ruled that the mahr was invalid under contract law: there was no term promising to pay and no term explaining why or when the \$20,000 would be paid to wife; husband was not told that he would be required to participate in a ceremony that would include the signing of a mahr until fifteen minutes before he signed the mahr; husband was unaware of the terms of the agreement until they were explained to him by an uncle after the mahr had been signed; and agreement was written in Farsi, which husband did not read, write, or speak.

In re custody of R, 947 P.2d 745 (Wash. Ct. of Appeals, Div. 2 1997).

Couple was married under Muslim rights in Malaysia. Husband divorced wife by *talaq* in the Philippines. Philippines court recognized the *talaq* divorce and awarded custody to the father

The trial court gave full faith and credit to the Muslim Sharia Court order and granted custody of R. to father, with reasonable visitation to mother. During the hearing mother feared that she had offended the judge and asked, "Are you mad at me, your honor?" The judge responded, "I don't like what you did. You took his son with the intent of never telling him where he was. We don't like that as judges."

The appellate court reversed the trial court ruling and remanded the case to the trial courts to be reheard before a different judge, declaring that "Washington courts presented with custody judgments of foreign country should consider strong public policy favoring the best interests of the child" and "even if foreign court had jurisdiction, mother was entitled to an opportunity to prove that the court proceedings were not conducted in a manner contrary to Washington state law and public policy"

<u>S.D. v. M.J.R.</u>, No. A-6107-08T2 (Sup. Ct. of New Jersey, App. Div. 2010).

Husband and wife were married in Morocco when wife was seventeen years old. Husband and wife did not know each other before marriage. The couple moved to New Jersey, where wife filed first complaints of abuse in 2008. She requested a restraining order against husband while the divorce proceeded.

During the trial an imam testified that Islamic law requires a wife to comply with her husband's sexual demands, because the husband is prohibited from obtaining sexual satisfaction elsewhere. After acknowledging that this was a case in which religious custom clashed with the law, and that under the law, wife had a right to refuse husband's advances, and finding that domestic violence and assault did occur, the judge ruled that the husband did not act with a criminal intent when he repeatedly insisted upon intercourse, despite wife's contrary wishes.

This court does not feel that, under the circumstances, that this defendant had a criminal desire to or intent to sexually assault or to sexually contact the plaintiff when he did. The court believes that he was operating under his belief that it is, as the husband, his desire to have sex when and whether he wanted to, was something that was consistent with his practices and it was something that was not prohibited.

The appellate court reversed after performing an extensive analysis of American religious belief/action jurisprudence: "The case thus presents a conflict between the criminal law and religious precepts. In resolving this conflict, the judge determined to except defendant from the operation of the State's statutes as the result of his religious beliefs. In doing so, the judge was mistaken." And, "[husband's] conduct in engaging in nonconsensual sexual intercourse was unquestionably knowing, regardless of his view that his religion permitted him to act as he did."

Comment: This example of a judge excusing criminal behavior because the person committing violence justified his action under Sharia is not unique to the United States. A recent study of 78 honor killing cases by the German Max Planck Institute for Foreign and International Criminal Law revealed that "[i]n 15 cases, the judge even deemed the 'honor' motive as a cause for leniency" and—an interesting statistic to note considering the German law enforcement practice of officially classifying hate crimes—"[i]n around 40 percent of cases, the honor killing aspect wasn't even addressed." 37

Husband and wife were married in India. Husband obtained an Islamic summary divorce by verbally performing a *talaq* renunciation against his wife. The wife, possibly without knowing about the *talaq*, filed for divorce in Michigan. Husband filed a motion requesting that the Michigan trial court recognize the *talaq* divorce and dismiss wife's divorce complaint.

The trial court granted comity to the *talaq* verbal divorce husband pronounced in India and dismissed wife's complaint.

The appellate court reversed the trial court, holding that the *talaq* violated wife's right to due process because: (a) she had no prior notice of the *talaq* pronouncement, (b) she had no right to be present at the pronouncement and did not have an attorney, and (c) the *talaq* provided no opportunity for a hearing. The Michigan appellate court also held that the *talaq violates equal protection* because women do not also enjoy the right to pronounce *talaq*. Additionally, the appellate court held that the *talaq violates Michigan public policy* because, upon divorce, Islamic law allows women to recover only the property that is in their names, while *Michigan law provides for an equitable division of the marital estate*.

Tazziz v. Tazziz, 533 N.E.2d 202 (Mass. Ct of Appeals 1988).

Father and mother were married in Massachusetts according to an Islamic ceremony. Husband was Jordanian, and wife was a dual citizen of Jordan and the U.S. They then moved to Israel and lived for twenty-two years in East Jerusalem. Wife returned with minor children to Massachusetts and filed for custody of the children in state court. Husband wanted custody determined in Jerusalem by an Israeli Sharia Court.

The trial court deferred to the jurisdiction of the Israeli Sharia Court.

The appellate court returned the matter to the trial court with instructions to address several concerns, including "the nature and the composition of the Sharia Court and of the substantive law and principles which would be applied," and "the wishes, intentions, and purposes of each of the parties and of each of their minor children with respect to their continued residence in Massachusetts and in the United States." The appellate court instructed the lower court to inquire as to "whether and to what extent the law which the Sharia Court should apply is consistent with Massachusetts law . . . (in addition to due process requirements concerning such procedural matters as notices, representation by counsel, and opportunity to be heard)."

In re Marriage of Vryonis, 202 Cal. App. 3d 712 (Cal. Ct. App. 1988).

Wife participated in what she believed to be a temporary Shiite marriage ceremony with husband, a member of the Greek Orthodox faith. Husband continued to date other women. After husband told wife that he decided to marry another woman, wife filed for divorce. Wife claimed that she had a good-faith belief that she and husband were married; and that her good-faith belief in their alleged marriage entitled her to

spousal support and property rights as a putative spouse under California law.

Trial court accepted a Shiite ceremony that signifies "temporary marriage" as valid and considered her a putative spouse for purposes of spousal support and property rights.

Appellate court reversed. On appeal, the California Court of Appeals held that a person could not successfully claim that he or she is a putative spouse by virtue of having performed a *muta* ceremony because *muta* is insufficient to allow a person to form a good-faith belief that he or she had entered into a *legal California marriage*.

<u>Yaghoubinejad v. Haghighi</u>, 384 N.J. Super. 339 (Superior Court of New Jersey, Appellate Division 2006).

The parties were married in 2001 in New Jersey. Couple signed an Islamic marriage certificate but did not obtain a marriage license. They executed the document before two witnesses and an ostensible officiant. When the wife filed for divorce in 2005, husband claimed they were never legally married.

The trial court held that the marriage was valid and granted the wife a divorce, saying that the surrounding circumstances of the marriage ceremony cured any defect in the marriage.

The appellate court reversed, saying that "the pleadings reveal no more than a ceremonial union" and holding that the "ceremonial marriage of purported spouses was absolutely void, as they failed to obtain a marriage license prior to ceremony, as required by statute."

The New Jersey statute in question (N.J.S.A. 37:1-10) accomplished three things according to the appellate court: "First, it abolishes common law marriage. Second, it requires that a license to marry be procured before the ceremony. Third, it requires that the marriage be solemnized by an authorized person or entity." The opinion cited a New Jersey Supreme Court case where the statute was applied and the court called all non-conforming marriage "absolutely void," stating that "[i]t is axiomatic that a void act has no validity from the beginning, and this is a fortiori true where an act is declared 'absolutely void' by a mandatory command of a statute." Dacunzo v. Edgye, 19 N.J. 443, 450 (1955).

<u>Comment:</u> Muslim attorney Abed Awad, an advocate for court recognition of Sharia marriage practices, complains that courts should have more flexibility to recognize off-record marriages as he notes that Muslim husbands intentionally marry without obtaining a license in states where such marriages are considered void:

In our private practice, we regularly see Muslim women with marriage contracts who never procured a marriage license. There are probably thousands of Muslim marriage contracts in existence in New Jersey without the parties' first having obtained a license. Unscrupulous husbands are well aware that without a marriage license, their financial exposure in case of separation will be limited or nonexistent. Many intentionally marry without a marriage license purposefully to circumvent the applicability of New Jersey divorce and equitable-distribution laws.³⁸

Section Three: Cases of note that offer compelling rationale for rejection of Sharia terms

In re Marriage of Altayar, 139 Wash. App. 1066 (WA Ct. of Appeals 2007).

Husband and wife were married in Jordan in 2000. The marriage was arranged by family representatives after a three-day meeting, and bride's dowry was negotiated by her brother. At the time of the marriage, husband had been living in the U.S. for at least eighteen years. The couple resided in the U.S. after the marriage. The marriage certificate was issued under Islamic law and included a dowry (*mahr*) to wife consisting of one Quran and nineteen pieces of gold in the event of divorce or death. In 2001, wife—who had limited English language skills and testified that husband threatened to kill her—signed a quitclaim deed transferring her community property interests in the family home and husband's service garage to husband's brother. Husband divorced wife by saying "I divorce you" three times according to Islamic custom (*talaq*). Wife filed for divorce in 2005 in Washington State, alleging that husband beat her.

The trial court applied state law and found that the Islamic marriage certificate and dowry did not constitute a prenuptial agreement and that the quitclaim deed was signed under duress.

The appellate court affirmed the lower court's decision that the prenuptial agreement was invalid. The three-judge panel found that the exchange of nineteen pieces of gold for wife's equitable property rights under Washington law was not fair and that there was no evidence that wife received any independent advice during the three days between their initial meeting and marriage. The court rejected husband's argument that wife had an opportunity to seek independent advice because she anticipated an arranged marriage throughout her life: "The court must first determine whether the agreement was substantively fair and reasonable for the party not seeking to enforce it. If so, the court analyzes whether the agreement was entered into voluntarily and with full knowledge."

<u>Aleem v. Aleem</u>, 175 Md. App. 663 (Maryland Ct. of Special Appeals of Maryland 2007).

Husband and wife were married in 1980 in Pakistan. The couple eventually moved to Maryland, where wife filed for divorce in 2003. Husband then went to the Pakistani Embassy in Washington, where he performed *talaq* divorce, repeating three times "I divorce you" before witnesses. Husband asked that the Pakistani divorce terms according to Pakistani law apply.

The trial court refused to give the Pakistani divorce comity. The appellate court affirmed and stated that the "conflict is so substantial that applying Pakistani law in the instant matter would be contrary to Maryland public policy." The judge noted that the "'default' under Pakistani law is that the wife has no rights to property titled in husband's name, while the 'default' under Maryland law is that the wife has marital property rights in property titled in the husband's name."

Betemariam v. Said, So.3d 121 (FL Ct. of Appeal 2010).

In 2004 couple was married in Virginia according to Islamic ceremonial standards although wife was not Muslim.

The couple received a marriage certificate, written in Arabic and signed by husband's father and uncle as witnesses. No marriage license was obtained before their religious ceremony, nor was a marriage certificate filed with any clerk of court.

The appellate court upheld the trial court's ruling that the marriage was not valid in Virginia for lack of compliance with law requiring marriage license. The court noted that neither party could claim lack of knowledge of the marriage license requirement and said that both parties were equally responsible for the invalidity of the marriage. Thus the court had no authority to award alimony or order equitable distribution of assets. The court ruled that the unlicensed marriage was void ab initio.

<u>Chaudhary v. Ali</u>, Unpublished, No. 0956-94-4 (VA Ct. of Appeals 1995).

Husband and wife were married in 1982 in Pakistan and signed an Islamic marital agreement.

The appellate court upheld the trial court's ruling that the marriage agreement, *nikah nama*, was not valid according to Virginia law. The facts revealed that the agreement signed by the parties was not negotiable and required no disclosure of assets and, furthermore, custom demonstrated that parties do not receive legal counsel prior to signing the agreement. Finally, there was no evidence wife received independent advice prior to signing the agreement.

The appellate determination was based upon Virginia law and court precedent that defines a valid ante-nuptial agreement as including "a fair and reasonable provision therein for the wife, or—in the absence of such provision—there must be full and frank disclosure to her of the husband's worth before she signs the agreement, and she must sign freely and voluntarily, on competent independent advice, and with full knowledge of her rights."

Ellehaf v. Tarraf, Unreported, No. 257222 (MI Ct. of Appeals 2006).

Husband and wife were married in Michigan. Wife said she filed a marriage certificate in Lebanon, but there is no evidence that the parties ever traveled together to Lebanon to solemnize the marriage. The only evidence presented to support wife's claim that her marriage was valid in Lebanon was a registration that she unilaterally applied for four years after the marriage ceremony, after she had been granted two religious divorces from husband, and either shortly before or shortly after husband legally married another woman in Michigan.

Both the trial and appellate courts found that it was undisputed that the parties never obtained a marriage license from the clerk in the county in which both parties resided. Review of the record indicated that wife had translations of the marriage certificate and a letter by the imam notarized, but there was no certification of these documents by the Secretary of State. The appellate court denied validity of the marriage for failing to meet statutory requirements to form a legal marriage in the State of Michigan stating that the law "does not include an exception for substantial compliance."

Hage-Sleiman v. Hage-Sleiman, Unpublished, No. FA104033567S (CT Sup. Ct 2011).

Husband and wife married in Lebanon in 2003. They later moved to Connecticut, where wife filed for divorce in 2011. She petitioned for court enforcement of a prenuptial agreement that provided her \$50,000 upon the termination of the marriage. Wife requested financial support and equitable distribution of property. Husband challenged the court's jurisdiction, arguing that a divorce action had been filed and completed in Lebanon.

The court declined to give comity to the divorce filed in Lebanon since Connecticut law required that at least one party be domiciled where divorce occurred. Both husband and wife were represented by power of attorney.

The court then evaluated whether practical recognition should be given to the divorce in the interest of equity. Since there was no evidence that declaring the Lebanese divorce invalid would "upset relationships or expectations formed in reliance upon the divorce" the court was not compelled to give practical recognition to the Lebanese divorce terms.

Comment: The court acknowledged that comity should be determined according to whether the divorce "was obtained by a procedure which denies due process of law in the real sense of the term, or was obtained by fraud, or where the divorce offends the public policy of the state in which recognition is sought, or where the foreign court lacked jurisdiction." In the context of divorce proceedings, "an internationally foreign decree will be accorded treatment similar to a judgment of one of our sister states, unless it is found to be repugnant to some basic public policy of the state."

Maklad v. Maklad, Unpublished, No. FA000443796S (CT Sup. Ct. 2001).

Husband and wife married in 1984 in Egypt. The couple later moved to Connecticut. In 2000 husband took their three children to Egypt without notifying wife. Husband then obtained a divorce in Egypt in 2000, also without notifying wife. Husband claimed that they both participated in a religious ceremony in 2000 in Connecticut during which he divorced wife pursuant to the tenets of Islam. Wife filed for dissolution of the marriage in Connecticut.

The trial and appellate court denied the validity of the Egyptian certificate of divorce because the decree was obtained by husband without affording due process to the wife. "Comity does not countenance a court judgment that the plaintiff had no prior notice of and no opportunity to contest." The court also found no compelling grounds upon which to recognize the divorce for reasons of equity.

Mir v. Birhandi, Unpublished, Nos. 2006 CA 63, 2006 CA 71, 2006 CA 72 (Ohio Court of Appeals, 2d Dist. 2007).

Husband and wife were married in Iran in 1982. After they emigrated to the U.S., husband filed for divorce in Ohio. While the husband's divorce action was pending, wife went to Iran and obtained a divorce there. The trial court ruled that Ohio courts had jurisdiction to rule on the divorce disputes by determining that the Iranian divorce decree was not binding upon the Ohio court.

The appellate court also ruled that the Iranian divorce would not be recognized by comity:

The term "comity" refers to an Ohio court's recognition of a foreign decree, and it is a matter of courtesy rather than of right. The several states of the United States are empowered, if they freely elect to do so, to recognize the validity of certain judicial decrees of foreign governments where they are found by the state of the forum to be valid under the law of the foreign state, and where such recognition is harmonious with the public policy of the forum state, taking into consideration all of the relevant facts of the particular case. A decree of divorce will not be recognized by comity where it was obtained by a procedure which denies due process of law.

This case quoted *Rahawangi v. Alsamman*, No. 83543 (Ohio Court of Appeals, 8th Dist. 2004) where the Ohio trial court and appellate court also denied comity to a Syrian divorce because both courts found husband's divorce service of process (notice) defective:

A decree of divorce will not be recognized by comity where it was obtained by a procedure which denies due process of law in the real sense of the term, or was obtained by fraud, or where the divorce offends the public policy of the state in which recognition is sought, or where the foreign court lacked jurisdiction.

Moustafa v. Moustafa, Unpublished, 166 Md.App. 391 (MD Court of Special Appeals 2005).

Husband and wife were married in 1976 in Egypt. Couple moved to the U.S. in 1978 and divorced in Egypt in 1985. This divorce decree was adopted by the State of Maryland in 1987. In 1985 husband married another woman, telling his first wife that he only married second wife to become a U.S. citizen. Husband and first wife were re-married in Egypt in 1986. Husband divorced second wife in 1989. Husband claimed that he was divorced from second wife at time of re-marriage to first wife. He then told court that he had obtained a divorce from first wife in Egypt in 2002. The Maryland courts considered whether it was proper to apply Egyptian law to the annulment issue in deciding whether it must grant an annulment to first wife on the grounds that husband committed bigamy when he re-married her.

The appellate court recognized the trial court's determination that wife neither was notified nor participated in the Egyptian divorce proceeding and concluded that she was not afforded due process. The Egyptian divorce was not validated.

The appellate court declined to apply Egyptian law to the annulment issue since husband was required by Maryland law to (1) provide notice of his intent to rely upon that law, and (2) prove what that law is. Even if husband had complied with these requirements, the appellate court stated: "Although foreign judgments are entitled to a degree of deference and respect under the doctrine of comity, *courts will nonetheless deny*

recognition and enforcement to those foreign judgments which are inconsistent with the public policies of the forum state."

Mussa v. Palmer-Mussa, No. 10A12 (N.C. Sup. Ct., 2012).

In 1997 wife married husband #1 in North Carolina according to an Islamic ceremony. The couple did not obtain a marriage license. The religious ceremony was performed by a truck driver who was not an imam and who was not licensed to perform marriages. Wife and husband #1 lived together but claimed they never consummated the marriage. Later that year, wife performed an Islamic verbal divorce from first husband.

Later in 1997, wife married Mussa (husband #2) in North Carolina with benefit of a marriage license. In 2008, wife filed for divorce, after couple had 3 children. The district family court awarded her child and spousal support. Mussa filed for an annulment based on bigamy, alleging his marriage to wife was void because she was still legally married to first husband at time of their marriage. The family court dismissed Mussa's request for an annulment, holding that the wife was never legally married to first husband due to non-compliance with laws governing marriage formalities. Therefore, the second marriage (the subject of the dispute) was valid.

The court of appeal ruled that the wife's first Muslim marriage was voidable, but had not been voided. The appellate court then decided that the Islamic divorce that wife performed to end the first marriage was not valid since it had never been submitted for legal judgment. The holding quoted North Carolina law to say that there is no authority supporting the dissolution of a marriage by religious means that can be deemed to be the equivalent of a judicial determination regarding the validity of a marriage. Based upon the legally flawed divorce, the appellate court decided that the second marriage was bigamous and not valid.

The North Carolina Supreme Court did not get to an analysis of the Islamic divorce since the court found agreement with the family court that the first religious marriage was not valid based upon legal requirements that marriage officials had to be authorized ministers or magistrates. This final determination upheld the validity of the second marriage by agreeing that wife's first marriage was not valid.

Comment: In a footnote, the North Carolina Supreme Court echoed the district family court's "concern[] about the unfairness of the Plaintiff's inconsistent positions in the earlier proceedings" as to the validity of his marriage to defendant, "especially in light of record evidence that suggests plaintiff may have been aware of defendant's [prior] relationship." This footnote indicates that both courts were aware of the potential leverage available to husband if he produced the bigamy claim to the end of evading support obligations.

Rahawangi v. Alsamman, Unpublished, 2011 WL 6034745 (OH Ct. of Appeals 2004).

Husband and wife were married in 1991 in Syria. The couple then moved to Ohio. In 1999 husband filed for divorce in the Spiritual Court of Syria. Wife had no notice of those divorce proceedings and did not participate. Husband did not personally attend the proceedings, but was represented by a

family member. Husband then remarried and did not inform first wife.

The trial and appellate court found that the wife did not receive actual or constructive notice of the divorce proceedings in Syria. The trial court noted that Syria was not a signatory to the Hague Convention in considering what kinds of process might be provided to wife. The husband sent notice of the divorce proceedings to the wife's mother's house in Syria, with full knowledge that the wife was in the United States. Both courts found that this lack of due process fatally flawed the Syrian divorce proceeding and thus refused to uphold the Syrian divorce decree.

The appellate court affirmed that the practice of comity commends consideration of a foreign decree and is a *matter of courtesy rather than of right*. The opinion recognized that states "are empowered, *if they freely elect to do so*, to recognize the validity of certain judicial decrees of foreign governments where they are found by the state of the forum to be valid under the law of the foreign state, and *where such recognition is harmonious with the public policy of the forum state*, taking into consideration all of the relevant facts of the particular case."

<u>People v. Benu</u>, 87 Misc.2d 139 (New York City Criminal Court 1976*).

Wife testified that in 1975, when she was 13 years old, she was taken by her brother to her father's house. A young man that she recognized to be 17 was also picked up and rode with them to the father's home. Father informed wife that she was to be married to the 17-year-old, and a marriage ceremony was performed. Wife never consented. Officiant claimed that he had performed many marriages and spent much time at the mosque but was not an imam.

The criminal court judge noted that the officiant's lack of authorization to perform a marriage and the failure to obtain a license caused the validity of the marriage to be voidable but not void, but declared that the possible invalidity of the marriage was not a defense to the criminal charges. The judge said that "the public policy of this state is to discourage early marriage, or, at best, to demand that the parents of certain underage children consent to their assuming the responsibilities of matrimony," also noting that "persons of [this age] lack the awareness of the obligations and responsibilities owed by partners to a marriage to each other, to society, and to their children." The court "unreservedly" adopted language from State v Gans, 168 Ohio St. 174 (1958), to affirm the "general rule, whenever and wherever the scope of a 'wife's' activity is limited by custom, tradition or law merely to consortium and childbearing, she is looked upon as nothing much more than a chattel -- a piece of personal property to be treated and dealt with as such." The father was found guilty of endangering the welfare of a child.

*This was a criminal law case.

In re Ramadan, 153 N.H. 226 (NH Sup. Ct. 2006).

Husband and wife were married in 1986 in Lebanon. Prior to their marriage, the couple entered into an Islamic marriage contract where husband promised a deferred dower (*mahr*) payment of 250,000 Lebanese liras. Husband was, at the

time, a resident of the United States, and the couple settled in the U.S. shortly after they were married. In 2003, wife filed for divorce in New Hampshire where they resided. Wife said that the day before she filed for divorce husband performed *talaq* and said "I divorce you" to wife three times. Husband then traveled to Lebanon to sign divorce papers. Husband claimed that the Lebanese divorce prevailed and that the United States proceeding should be dismissed.

The trial court found that no valid judicial process was instituted by husband in Lebanon prior to the date wife filed for divorce. Appellate court affirmed and denied that comity should be given the Lebanon divorce action: "Comity is a discretionary doctrine that will not be applied if it violates a strong public policy of the forum state, or if it leaves the court in a position where it is unable to render complete justice."

In re Marriage of Shaban, 88 Cal.App.4th 398 (Cal. Ct. of Appeal, 4th Dist., Div. 3 2001).

Husband and wife married in 1974 in Egypt. The marriage agreement was signed by the husband and the father-of-the-bride. At time of divorce in California, husband offered three translations of the *sadaq*, which the court deemed lacking any substance. Husband claimed that they conveyed the couple's intent to "follow Islamic law" if there was a divorce.

The trial court held that the contract was unenforceable since "a writing must state with reasonable certainty what the terms and conditions of the contract are." The court of appeals upheld the trial court and said that the *sadaq* was not written in a manner that could be adjudicated according to American contract legal standards: "An agreement whose *only substantive term in any language is that the marriage has been made in accordance with "Islamic law" is hopelessly uncertain as to its terms and conditions."*

Zawahiri v. Alwattar, Unpublished, No. 07AP-925 (OH Ct. of Appeals, 10th Dist., 2008).

In 2006, the parties were married in Ohio and obtained a marriage license. They entered into an Islamic marriage contract that included a *mahr* provision. A Muslim imam solemnized the marriage. The *mahr* was divided into two parts: (1) requiring the husband to make an immediate payment of a ring and gold; and (2) deferring the payment of \$25,000 to a later date. Husband filed for divorce in 2007. Husband and wife used the words *mahr* and dowry interchangeably during ceremony. However, the court noted that "unlike a dowry, a *mahr* is not money or property that a wife brings her husband." Instead, the Islamic agreement entails a "specific sum that a husband owes to his wife, which is payable upon divorce or death of the husband."

The appellate court affirmed the trial court's refusal to enforce the *mahr* provision on two grounds: (1) the Establishment Clause of the Ohio Constitution prohibited court-ordered enforcement of a contractual provision requiring performance of a religious act, i.e., the payment of the *mahr*; and (2) the parties entered the marriage contract under circumstances that rendered the contract invalid and unenforceable as a prenuptial agreement.

Before considering whether the prenuptial agreement met Ohio legal requirements, the court engaged in a required preliminary analysis of whether the agreement met the standards of an ordinary contract. "Prenuptial agreements must include all the elements of a contract, including an offer, acceptance, contractual capacity, consideration, and manifestation of mutual assent."

Then the court analyzed the terms of the prenuptial according to Ohio law: (1) the parties entered into it freely without fraud, duress, coercion, or overreaching; (2) there was full disclosure, or full knowledge and understanding of the nature, value, and extent of the prospective spouse's property; and (3) the terms do not promote or encourage divorce or profiteering by divorce.

The appellate court found that the husband entered into the *mahr* as a result of overreaching or coercion by his wife. The imam had raised the issue of including a *mahr* provision in the contract only two hours prior to the ceremony, and the husband agreed to a postponed *mahr* of \$25,000 because he was embarrassed and stressed. Also, the husband did not consult with an attorney prior to signing the *mahr*.

C. European Encounters with Sharia Family Law and Arbitration Tribunals

The United Kingdom's Sharia Law Tribunals

A 2009 study by Civitas Institute for Civil Society³⁹ revealed that the United Kingdom now has more than eighty-five Sharia tribunals that settle financial and family disputes. Public officials, commenting on the study, highlighted the same conflicts with public policy and civil rights warned of by American commentators. Philip Davies, Tory MP, said: "[These courts] do entrench division in society, and do nothing to entrench integration or community cohesion. It leads to a segregated society." Davies also confirmed the potential for leveraging legal options when alternatives offer advantage to one party: "We can't have a situation where people choose the system of law which they feel gives them the best outcome. Everyone should be equal under one law."

There are also findings that suggest specific Sharia determinations in violation of basic civil rights:

Examples set out in his study include a ruling that no Muslim woman may marry a non-Muslim man unless he converts to Islam and that any children of a woman who does should be taken from her until she marries a Muslim. Further rulings according to the report, approve polygamous marriage and enforce a woman's duty to have sex with her husband on his demand.⁴¹

The House of Lords, in a 2008 unanimous ruling, said that there was no place in Sharia for the equal treatment of the sexes. Lord Hope of Craighead said that the right to non-discrimination was a core principle in the protection of human rights. "Sharia law as it is applied in Lebanon was created by and for men in a male-dominated society There is no place in it for equal rights between men and women," he said. ⁴²

The European Court of Human Rights in Strasbourg has also weighed in, saying that it is "difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on Sharia, which clearly diverges from Convention values." 43

Great Britain's Home Affairs Committee has commissioned several studies on the incidence of arranged marriage in the country. Results from three reports showed the number of *reported* arranged marriages to be between 5000 and 8000,⁴⁴ with 1500 cases *reported* in 2011.⁴⁵ In response to the increasing frequency of forced marriages as well as the revelation that the subjects are "much younger age than previously thought," a measure to criminalize forced marriage has been introduced.⁴⁶

The Baroness Caroline Cox of the UK House of Lords has introduced a measure to address this two-track legal system. According to Cox, "The Arbitration and Mediation Services (Equality) Bill⁴⁷ will seek to stop parallel legal, or 'quasi-legal,' systems taking root in our nation." Cox has expressed concern "about the treatment of Muslim women by Sharia Courts" and wants to assure that women who come to a Western culture like the United Kingdom will not say, "[W]e came to this country to escape these practices only to find the situation is worse here."

The UK Ministry of Justice attempted to evaluate the Sharia Court outcomes to determine the extent of divergence from UK law, but the investigation was canceled for lack of cooperation from the Muslim courts.⁴⁹

Sharia Conflict Resolution in Germany

German journalist Joachim Wagner recently investigated Islamic "shadow justice" for his new book on Sharia parallel arbitration procedures. Responding to an interview for *Der Speigel*, he described Islamic mediations as secret and "outside the German justice system." He noted that the settlement "compromise" was "often achieved through violence and threats." After nine months of study, he concluded that "Islamic arbitrators aren't interested in evidence when they deliver a judgment." ⁵⁰

Sharia Law Court in Belgium

The first Sharia court in Belgium is located in Antwerp's Borgerhout district, and it proposes to mediate family law disputes for Muslim immigrants in Belgium. "The self-appointed Muslim judges running the court are applying Islamic law, rather than the secular Belgian Family Law system, to resolve disputes involving questions of marriage and divorce, child custody and child support, as well as all inheritance-related matters." ⁵¹

France Has Banned Sharia Divorce Adjudication

In 2004, the French Cour de Cassation ruled that Islamic divorces are in fundamental contravention of French public policy since they infringe the principle of equality between spouses that is mandated by the European Convention of Human Rights (Article 5, Protocol VII).⁵²

<u>Dutch Legislature Proposes Ban on Forced Marriages and</u> <u>Curbs on Multicultural Policies</u>

The Dutch government has announced that it will stop offering special subsidies for Muslim immigrants, and new

legislation is expected that will outlaw forced marriages and will also impose tougher measures against Muslim immigrants who lower their chances of employment by the way they dress. The government will impose a ban on face-covering Islamic burqas as of January 1, 2013.⁵³

Greece Moves to Deny Sharia Family Law Authorities

Greece has initiated family law reforms designed to address Muslim polygamy and male-only divorce concerns. The Mufti will no longer have judicial authority and will "only be a religious leader." Greek marital, child, and heredity issues will be resolved according to Greek laws.⁵⁴

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Telecommunications & Electronic Media

Allocating Radio Spectrum for the "Mobile Data Tsunami"

By Thomas W. Hazlett*

I. A MOBILE DATA TSUNAMI?

The mobile sector is said to face a looming spectrum shortage. Policy-makers express great concern over a coming crisis.¹ But markets easily avoid shortages—with rising prices. This phenomenon discourages consumption while boosting production. Excess demand is eliminated and balance restored.

In mobile markets, price mechanisms operate, but regulators control the supply of a key resource input—radio spectrum. It is impossible, in fact illegal, for bandwidth underutilized in one market to be bid into use for mobile networks starving for bandwidth. This situation forces demand to be more tightly rationed. Operators deter deployments, restrict new offerings, and delay new technologies. Network growth is stunted. It is the silent heart attack.

The shortages strike first at more than 55 million highspeed wireless data users.2 Over 650,000 Apple App Store programs are available for iPhones, while Android, Blackberry, Symbian, and Microsoft users have hundreds of thousands of their own to choose from. Voice calls have been joined on the mobile platform by text or multimedia messages, e-mail, web surfing, and video streaming. New network overlays supply machine-to-machine ("M2M") applications, like the emergency phone call from an OnStar car installation, the book download from a Kindle, or the medical monitor increase, and quality of service improves. More applications launch. Video clips that streamed to a subscriber's handset in one minute might now do so in five seconds. Whole new business models become viable. Unforeseen innovation occurs.

Asking "How much bandwidth does the mobile sector need?"

Asking "How much bandwidth does the mobile sector need?" misses the point. This question cannot be fruitfully answered by dispassionate observers, whether or not they are government experts. Competitive markets, wherein rival networks seek to profit from efficiently combining network investments, services, and spectrum, form a process that best supplies an ever-changing answer. Putting as much bandwidth as possible into the market—via liberal licenses that permit any use within the specified frequency space—is the pro-consumer policy. Yet, vast bandwidth (in the TV band and elsewhere) is substantially under-employed and off-limits for market reallocation.

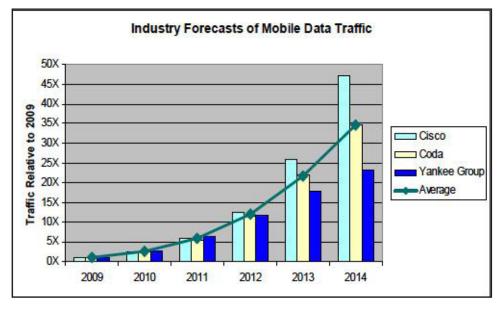


Fig. 1. Mobile Broadband Data Demand, Industry Forecasts³

running as a handset app. (See Figure 1.) The crowding pushes networks to split cells, upgrade technologies, offload data to fixed networks, and to access any newly available frequency spaces. Keeping productive spectrum bottled up in allocations determined by regulators decades ago imposes a tax that deters growth in perhaps the most dynamic sector of our economy.

Additional bandwidth loosens constraints. Whatever level of service might be supplied when a minute of network access costs five cents can now be supplemented by a range of new outputs when that cost drops to, say, three cents. A price shift signals the existence of more abundant capacity. Volumes

* Professor of Law & Economics, George Mason University. The author thanks Martin Morse Wooster for excellent editorial assistance, and Joe Rassenti for helpful comments on a previous draft. This article is based on a study produced for Mobile Future (Sept. 22, 2011).

Growth in mobile markets is seemingly inevitable, but at what pace? It is widely feared that new pricing structures will curtail the consumer's mobile experience. One pundit recently wrote in *Bloomberg Businessweek*:

The era of unlimited plans does have to end. The best way to allocate finite goods is through transparent, efficient markets. As traffic increases on mobile networks—it nearly tripled this year, and Cisco expects it to grow twenty-six fold by 2015—consumers will be forced to make smarter choices about how they use mobile data. Perhaps parents will be forced to download the toddler-pacifying Elmo videos at home rather than on-demand in the car. That's not a tragedy; it's what markets do.⁴

Mobile carriers generate more than \$160 billion in annual revenues. Each pricing rule has costs and benefits. Sometimes

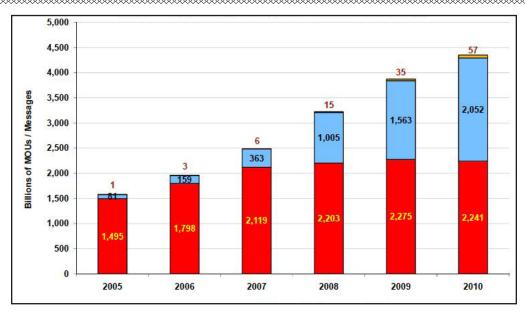


Fig. 2. U.S. Mobile Voice Minutes (Red), SMS (Blue), and MMS (Yellow)⁵

the bother of charging for minutes of talk time is not worth the trouble, particularly as customers do not like having to worry about how much a given minute of use is costing them. Buckets of minutes, available for a fixed monthly fee, are extremely popular, as are "free unlimited" off-peak or on-net minutes. Where the marginal cost of usage is low, the trick is to entice customers to support network costs via a monthly subscription fee.

How far this offer extends, and how much opportunity for consumption exists, is complicated. It requires billions of dollars in network construction, maintenance, and management dollars to answer. One thing is clearly known: the more spectrum that is available for the network to deploy, the lower the costs to customers will be.

Mobile systems are being transformed from voice-only platforms to multi-media, multi-network platforms. (See Figure 2.) The rise of SMS (short messaging service, or "texts") is one major trend, but these services claim little network capacity. But more bandwidth-intensive applications are also on a steep trajectory. (See Figure 3.) Wireless networks incur heavy capital costs to bring the new capacity to customers, and current trends suggest that for Canadian and U.S. carriers, revenue per gigabyte will fall below total cost per gigabyte sometime in 2013.

Leveraging existing assets is expensive and risky for operators, who are themselves constrained by capital markets. To the degree that additional spectrum resources are not available to help expand network capacity, such investments become even riskier. Enthusiasm for capital expenditures will

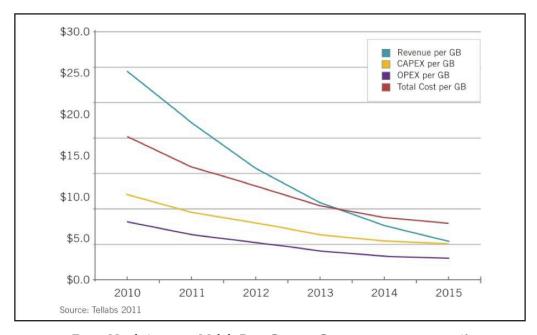


Fig. 3. North American Mobile Data Carriers: Costs, revenues, 2010-20156

wane. Yet, by permitting additional bandwidth to be bid into its most productive use, the mobile data tsunami can be not only accommodated, but also promoted.

II. PROLIFERATING MOBILE NETWORKS

A. 6 Billion Subscribers, 50 Billion Devices

Most people think of mobile networks as consisting of cell-phone carriers like Verizon Wireless, AT&T, Sprint, T-Mobile, MetroPCS, or Leap. Others see the emergence of a new wireless broadband competitor Clearwire as part of the mix. But the vertical growth in wireless services is sometimes less obvious.

Vertical services are those applications hosted by a given network that go beyond traditional, carrier-supplied voice calls. Mobile virtual network operators ("MVNOs") have formed, for example, buying wholesale access to physical networks. TracFone and Consumer Cellular, among several others, are MVNOs that sell retail services without operating their own infrastructure. This business model allows multiple systems (and their subscribers) to access spectrum and network resources on shared platforms.

Sharing intensifies when new services are added to the product menu. SMS, MMS (multimedia messaging service—texting with pictures or videos), and high-speed data are the most popular mass-market services. When a carrier upgrades its network from first-generation analog voice ("1G"), to second-generation digital ("2G"), to third-generation broadband data ("3G"), the platform becomes capable of hosting a new range of possible applications. Upgrades to fourth-generation ("4G") standards are now underway. With the improved speeds and capacities they bring, still more options become feasible.

Yet we have not even scratched the surface of what lies ahead. The emergence of M2M devices is already proceeding at breakneck pace. Truck fleets use them to monitor available transport slots, to track merchandise, and to optimize logistics. Vending machines report sales to computer servers, reducing inventory costs. Power meters do not have to be read by meter readers trekking from door-to-door, but automatically report to headquarters via wireless links. Automobiles, guidance-assisted, can be steered clear of traffic accidents. Electronic-payment systems have already become mass-market successes in developing economies, where banking infrastructure is relatively under-developed.

Industry experts predict that by 2020, six billion cellular phone subscribers will co-exist in a world of 50 billion connected mobile devices. They imagine everything from heart sensors monitoring vital signs 24/7 to location finders implanted in the family dog.

B. Emerging M2M Apps

When calculating the value of wireless services, economists generally focus on the consumer surplus received from making voice calls. The numbers derived from these calculations are very large. Yet there are other impressive innovations taking place all through the "mobile ecosystem." It is as if we are measuring the importance of the transcontinental railroad by examining how many people ride the trains, leaving out the

economic development of the American West made possible by the new infrastructure.

It is extraordinarily difficult to measure the gains in markets that are only now emerging. Moreover, it is unclear how we attribute those gains; radio spectrum is one of many inputs. That issue is quite vexing for statisticians and economists. But in a broader sense, there is not much scope for confusion. The simple fact is that such markets will be stunted if additional spectrum is not made available. The following examples are illustrative.

i. Vehicle Tracking and Collision Avoidance

One of the best-developed families of mobile applications rides the road. Among the earliest such devices are from OmniTRACS by Qualcomm. Launched in 1988, the system relies on satellite-radio links to communicate the location of vehicles. Truck fleets use the service, with on-board radio devices connected to computers with keyboards adjacent to the driver's seat. "The system consists of wireless devices installed on semi-trailer trucks that 'talk' to computers located in a network operations center (NOC), enabling transportation carriers to monitor driver performance; schedule and plan vehicle maintenance more effectively; and improve customer service." In addition, trucks are efficiently routed via information generated about local conditions and last-minute variations in pick-ups or deliveries, saving time and fuel, while reducing traffic.

The service became a "killer app" for trucking firms not only in the U.S. but around the world. In 1993 Irwin Jacobs, the co-founder and CEO of Qualcomm, was deemed "The Man Who Changed Trucking" by *Fleet Magazine*.9

Passenger vehicles also benefit from M2M applications. OnStar, developed by General Motors, has been available as a factory-installed feature on GM cars for several years. Using both satellite and terrestrial wireless networks, it not only notifies public safety authorities in the event of an accident emergency, it provides vehicle location and other services to subscribers. Competing vehicle-M2M devices have been developed by ATX and SYNC. Given new opportunities with faster 4G networks, services are able to extend coverage and features. A new "stand-alone" OnStar service is newly available to all cars in an after-market appliance sold at retail store Best Buy. The device, which is installed as a rear-view-mirror replacement, gives the customer "automatic crash response, turn-by-turn navigation, stolen vehicle location assistance, one-button access to emergency and roadside services and hands-free calling."10

Since 1986 the LoJack (opposite of "hijack") vehicle location tool has been sold to vehicle owners who wish to recover their property in the event of a theft. The wireless device, which uses a police band frequency, is small (about the size of a cigarette box) and emits a tracking signal when activated by remote-radio communication. The company boasts a 90% recovery rate for stolen cars. Such wireless applications have reduced criminal activity: "The fact that fewer vehicles were stolen in 2008 than 1980, despite the doubling in the number of vehicles on the road, is at

least partly the result of the great improvement in locking devices built into modern vehicles."11

The crime-preventing equipment deters car thefts generally. Because criminals do not know which vehicles are equipped with tracking devices and which are not, they attempt to steal fewer cars. This spreads the benefits of such wireless innovations far beyond those households that purchase the technology.¹²

Vehicle-based M2M apps under development could enhance collision avoidance. Advanced radio sensors are being tested using devices that monitor the environment surrounding a vehicle as it travels.

Computers can respond to a situation in approximately 0.3 seconds, as opposed to the human reaction time of one-half to one full second. . . . If these sorts of telematics can be integrated into automobile systems to not only keep people connected, but to also help them avoid deadly traffic accidents, then society may be well on its way to living up to science-fiction standards. ¹³

ii. Energy Conservation

Another M2M development involves coming up with optimized truck routes that can save energy by creating the most efficient truck-delivery routes, which save fuel and cut pollution:

Many M2M fleet management solutions . . . help reduce emissions. Fleet management solutions can issue alerts when a vehicle exceeds predetermined limits for idle time or speed. . . . M2M solutions help devise the best routes for truck deliveries to avoid unnecessary idling and to cut down on left-hand turns. According to UPS[,] . . . between 2004 and 2008 this simple technique shaved nearly 30 million miles off delivery routes, saved three million gallons of gas and reduced emissions by 32,000 metric tons of CO2—the equivalent of removing 5,300 passenger cars from the road for an entire year! 14

Electric utilities can also promote energy efficiency through M2M devices on meters. Vodafone, the largest international mobile carrier, notes that wireless SIM cards installed inside electrical outlets can both monitor consumption and communicate price changes in real time, incentivizing efficiencies. "During times when energy prices fluctuate rapidly, customers will transparently know what prices they are paying, precisely how much energy and utilities they are using, and where specifically it is being used." M2M devices are also being used in Smart Grids to redirect power consumption from expensive peak periods to lower-cost off-peak periods. The electric-power industry also uses M2M technology to monitor energy extraction and production. Energy production increases, while carbon emissions fall. 16

iii. Public Sector

Myriad M2M applications have emerged in the public sector. For instance, in New Hampshire, fifty school districts contract with a bus company to transport some 1500 special-needs children daily. Prior to M2M devices, essential coordination was often lacking: "Dispatching the company's

178 buses was tedious and cumbersome, requiring the use of a radio and constant manual checks to ensure buses with wheelchair lifts" were available where needed. To Combining mobile-network-connected devices with GPS services aided efforts. KORE Telematics reported the following in a case study,

- \$400,000 annual savings reported by reducing driver overtime
- 50% less time in routing the right bus to the appropriate location
- improved on-time performance through more efficient routing
- increased child safety achieved by monitoring driver speeds and rapid response to bus breakdown.¹⁸

Police departments use M2M applications to obtain criminal records, and to keep up with the constant stream of various alerts, bulletins, or "wanted" notices. M2M applications transfer such data over cellular networks.

In San Jose, California, each police patrol car is a broadband-connected office. Officers in the field have instant access to police databases via high-speed internet connections. The system, developed by Feeney Wireless and run over the Sprint mobile network, has such benefits as "cost and times savings[,] . . . on-demand access to real-time information[,] . . . [and] enhanced emergency response."¹⁹

In Austin, Texas, the police department acquired, in early 2011, 100 mobile devices that scan fingerprints. The radios then automatically identify the prints, and check for any outstanding arrest warrants. In just three months, the devices were used 340 times, resulting in the arrest of forty suspects. Not only do the devices deter the use of fake names and phony IDs, they keep officers in the field rather than in the station verifying suspects' identities.²⁰

Other services greatly improve police surveillance. Cameras used to record potential criminal activity had to be manned and located within a few hundred yards of a backhaul link. This limitation exposed surveillance operatives to potential discovery and consumed vast amounts of police officers' time. New systems developed for a Southern California police department, however, have produced remote, cellular-network-connected cameras that are movement-activated (eliminating data flows when there is nothing suspicious to observe) and controlled by police officers in a command center—or traveling with a notebook computer—miles away.²¹

C. Mobile Health

Perhaps the most exciting of all M2M opportunities lies in "mobile health" (also known as "wireless healthcare," "connected health," or "mHealth"). This burgeoning field holds tremendous promise in its potential to help improve health while reducing health-care costs. From securely delivering a critical patient's cardiac information to a doctor's smart-phone—wherever he is—to pill bottles that remind you to take your medication with an SMS message, innovative mHealth applications are almost without bounds.

The demand for wireless medical services is projected to increase by 58 percent annually over the next five years.²² The digital health market (which includes mobile applications) is estimated to have been \$1.7 billion in 2010, and is expected to grow to \$5.7 billion by 2015.²³ More than 200 million downloads of mHealth applications are in use.²⁴ Currently, U.S. mHealth revenues are approximately \$100 million annually, but the rapid evolution in mobile devices coupled with physician demand and the need to improve quality while reducing health-care costs is forecast to result in a \$1.7 billion market by 2014.²⁵

The top ten medical conditions being targeted for wireless health applications are breast cancer, heart failure, Alzheimer's, COPD, sleep disorders, depression, asthma, diabetes, hypertension, and obesity.²⁶ Mobile health devices monitor patient behavior, patient symptoms, or device performance (keeping heart pacemakers running properly). Using mHealth can lower costs and increase quality of life. Some developing applications give a sense of what is possible.

i. Biometric Sensors

Biometric sensors placed in mobile handsets transmit data to remote medical teams, generally at hospitals. These may be neighborhood facilities, or hospitals hundreds of miles away. Multiple wireless technologies convey data from small sensors such as glucose meters or blood pressure monitors to servers located in data centers. These data are monitored and recorded for further analysis.

In a typical pathway, a body sensor collects key biometric data. The sensor may be implanted in the body or embedded in the handset. Using a mobile broadband network, the portable device transmits the data for analysis wherever such monitoring can best be done, anywhere in the world. In effect, the patient's biometric data telecommutes, saving transport costs for patients and doctors. The new applications can be integrated with existing monitoring and diagnostic equipment. Two examples:

Obstetrics Airstrip Technologies' AirStrip OB™ service²⁷ sends critical patient information (such as fetal heartbeat and maternal contraction patterns) directly from monitoring systems in the delivery ward to a clinician's smart-phone or tablet. Data are transmitted securely in real time.

Radiology/Neurology Calgary Scientific's "ResolutionMD Mobil" service²⁸ provides remote access to CT and MR images through the clinician's smartphone. This information permits clinicians to closely observe and diagnose, 24/7, while attending other patients. One compelling application is for acute stroke, when doctors can immediately access brain scans for clinical assessments, no matter where they are located. This can markedly improve the quality of critical care.

ii. Medication Monitoring

Wireless applications are being used that remind patients to take their medicine. One such app²⁹ is a wirelessly embedded pill bottle that generates refill alerts and also reminds patients to take their medications via light or sound pulses, phone calls, or text messages. Progress reports are issued for patients, family members, and caregivers.³⁰

III. SPECTRUM ALLOCATION AND CONSUMER WELFARE

Economists have found that adding spectrum to mobile markets leads to lower prices for consumers. In a study published in the *RAND Journal of Economics* in 2009, Roberto Muñoz and I compared twenty-eight markets around the world to find out how different spectrum allocations ultimately impacted consumers.³¹ We found that additional allocations of radio spectrum strongly influenced economic efficiency, both because of better performance by carriers and the effect of the extra bandwidth in enhancing competition between them.

In one particular simulation, we tried to forecast the impact that an additional 30 MHz of spectrum would have on the mobile market in the U.S. We chose this range because of the delays in auctioning off PCS licenses, which were announced in 1989-92, but the auction was not completed until 1996. The Federal Communications Commission ("FCC") gave preference to heavily subsidized "designated entities" ("DEs").³²

These subsidies allowed DEs to launch artificially high bids knowing that they would be bailed out if they went bankrupt.³³ Many DEs that won bids found that bankruptcy courts let them keep their licenses in bankruptcy even as they slashed³⁴ payments they owed to the U.S. Treasury.³⁵ The result was that most of the C-block licenses did not become available to the market until 2005, when the FCC held a re-auction.

Our model projected the value that an extra 30 MHz of spectrum in the U.S. mobile market would have yielded if deployed in 1997-2003. The extra bandwidth would have lowered prices and expanded volumes, producing consumer welfare gains of about \$66 billion over the seven-year period (in total). This magnitude is very large, but it was not a surprise. Annual consumer surplus gains from the use of mobile phones—just for voice and texting—have been conservatively estimated at about \$200 billion.³⁶

IV. HOW THE U.S. FELL BEHIND THE E.U.—AND THEN CAUGHT UP

The problem of expediting the delays in spectrum allocation was studied by the FCC's National Broadband Plan Task Force, which issued its report in March 2010. It concluded, "The process of revisiting or revising spectrum allocations has historically taken 6-13 years." The statement is based on an analysis of key allocation episodes, summarized in Table 1.

The summary is forgiving in its measurements. The cellular-telephone spectrum allocation, which it lists as beginning in 1970 and ending in 1981, took far longer. AT&T filed an application for cellular bandwidth in 1958;³⁸ the FCC opened the official proceeding to do this in 1968. Licenses were assigned, not in 1981, but in multiple rounds (most using lotteries) between 1983 and 1989. The process could well be defined as lasting not eleven years, but thirty-two.

The FCC accurately presents the basic problem: "Historically, the FCC's approach to allocating spectrum has been to formulate policy on a band-by-band, service-by-service basis" ³⁹ The Report describes this framework as being "criticized for being ad hoc, overly prescriptive and unresponsive to changing market needs." ⁴⁰

Table 1. NBP Summary of Key Spectrum Allocation Lags ⁴¹			
Band	First Step	Available for Use	Approximate Time Lag
Cellular (AMPS)	1970	1981	11 years
PCS	1989	1995	6 years
Educational Broadband Service (EBS)/Broadband Radio Service (BRS)	1996	2006	10 years
700 MHz	1996	2009	13 years
AWS-1	2000	2006	6 years

A. How the U.S. Fell Behind the E.U. in 2G

One way to see the problem with regulatory lag is to compare spectrum allocation in the U.S. to that of the European Union ("E.U."). No other nation was faster in getting cellular-analog-voice-telephone services—1G ("first generation")—to market than the U.S. Not only did the U.S., via Bell Labs, develop the underlying technology, but AT&T was far more innovative than the state monopolies over post, telephone, and telegraph—the European PTTs.

The privatization wave of the 1980s swept away Europe's PTTs and replaced them, in part, with private telephone carriers. European regulators then looked to license additional wireless rivals. For next-generation, digital-voice ("2G") services, they pursued a policy designed to favor European producers by issuing mobile licenses that mandated deployment of a technical standard—"GSM"—developed by Nokia (Finland), Ericsson (Sweden), Alcatel (France), and Siemens (Germany). By establishing a large GSM market, both in handsets and network equipment, economies of scale would kick in and allow local manufacturers to compete successfully in the global electronics market.

The industrial policy pursued in Europe motivated policymakers to move quickly, and they did, relative to the U.S. While the FCC stalled in issuing so-called personal communications services ("PCS") licenses for 2G, the Europeans took an early lead in spectrum allocation. By 1992, twelve European countries had licensed GSM networks, 42 and services were launched—with over one million GSM subscribers. 43 In contrast, American PCS licenses were delayed for over five years until regulators could determine how to deal with 4500 point-to-point microwave stations already using the 1.9 GHz band. 44,45 The logjam was broken in 1994 when the FCC auctioned overlays, in which the bands were authorized for use by new PCS networks, but incumbent microwave licensees were allowed continued use of the frequencies. The (new) overlay licensees could then bargain with the (old) incumbents, arranging deals in which the incumbents were paid to relocate. To reduce bargaining costs, the FCC imposed an arbitration structure and mandated time limits. Soon, the incumbents relocated and new cellular competition—accessing 120 MHz of PCS spectrum—was made available to the public.46

Due to these FCC moves, mobile operators could by then select virtually any service to offer, any technology to deploy, and any business model to operate. Power levels were similarly left for the mobile operator to optimize; where radios needed high power to jump long distances to the network, they could do so. Today, cellular handsets search continuously for the lowest power levels they can use while still maintaining transmissions. They adjust power hundreds of times per second to minimize emissions, conserving battery life and bandwidth, helpfully accommodating other network users.

B. 3G Services Without 3G Licenses

While the E.U. was again licensing carriers with 3G authorizations in 2000-01, the U.S. was still mired in its 2G (PCS) licensing process. Not until 2006 and 2008 would new license auctions (for AWS and 700 MHz allocations) bring substantial new CMRS spectrum to market. This regulatory lag was a serious problem.

The offsetting factor was that the U.S. benefited from license liberalization. Flexible spectrum-use rights⁴⁷ meant that carriers did not have to wait for 3G licenses in order to deploy 3G networks. Canadian technology firm RIM, for example, introduced a pager, the "Inter@ctive," in 1998, by contracting with mobile carriers.⁴⁸ This innovation presaged the smart-phone revolution a decade later. The smart-phone, the paradigmatic device of the 3G network, was launched on U.S. networks having access to liberal licenses long before regulators got around to awarding "3G" licenses.

Of course, 3G and 4G devices deliver data services in addition to voice calls. Today, high-speed wireless services in the U.S. compare favorably with deployments in the EU. (See Figure 4.) As recently as 2006, the U.S. mobile allocation of less than 200 MHz paled in comparison to the average EU allocation of 266 MHz.⁵⁰ But flexible spectrum-usage rules enabled a competitive advantage for the U.S. market.

The U.S. system has, despite too-tight bandwidth constraints, been free to deploy efficient technologies. Prices, appropriately measured as mean revenue per minute of voice use, are lower in the U.S. than in any other high-income country. (See Figure 5.) The result is that mobile voice usage is easily the highest per capita anywhere. (See Figure 6.)

Yet we can do much better.⁵³ Vast bandwidth continues to lie virtually idle, representing a world of wasted opportunity. The intense growth in mobile services we have seen so far—Americans use over 2 trillion voice minutes per year, and send more than 2 trillion text messages—is simply the tip of the consumer-welfare iceberg. Demand is already observed for

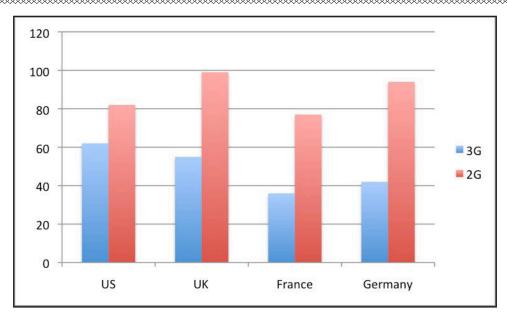


Fig. 4. 2G, 3G Subscribers per 100 Population, 2010⁴⁹

far-faster speeds, far-greater capacities, and far more bandwidth-consuming applications. Emerging networks, including those hosting M2M applications, represent the future of mobile communications. Continued spectrum liberalization is the key to generously accommodating that future.

V. LESSONS LEARNED

[E]normous economic value [will be] created by releasing 300 MHz of additional spectrum to meet growing demand for mobile data.

—FCC, Mobile Broadband: The Benefits of Additional Spectrum, OBI Technical Paper Series No. 6 (2010).

Everyone—including the economic experts at the FCC and the U.S. Department of Justice Antitrust Division⁵⁴—realizes that the central question of the wireless industry is radio spectrum. With many of the regulatory hurdles overcome, U.S. commercial networks have about 450 MHz of radio spectrum to deploy, using licenses that grant broad rights to use airwaves flexibly, without rigid rules or restrictions.

We can now productively use (at least) all of the 450 MHz of spectrum available. The FCC projects that upwards of another 300 MHz would also be efficiently utilized by U.S. mobile carriers as of 2014.⁵⁵ In contrast, the International Telecommunications Union (an arm of the United Nations) forecasts market demand in countries like the U.S. for a total of

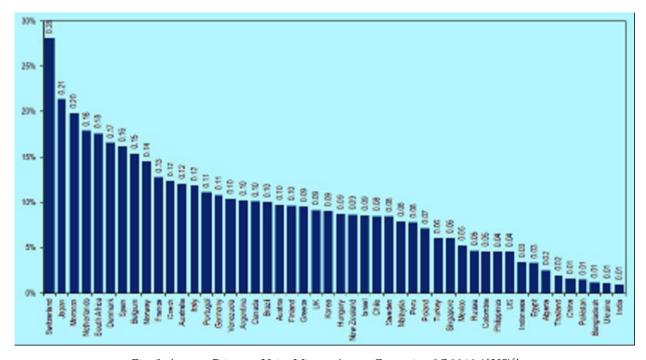


Fig. 5. Average Price per Voice Minute Across Countries, 2Q2010 (\$US)⁵¹

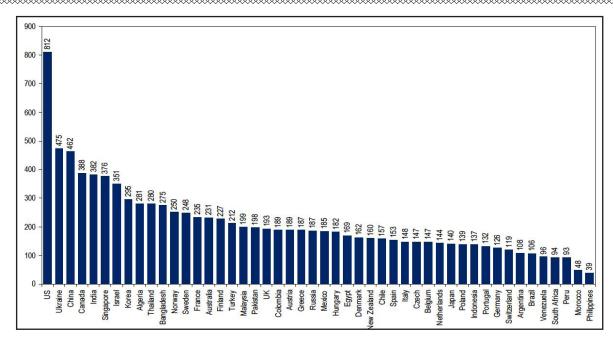


Fig. 6. Minutes of Use per Capita per Month Across Countries, 2Q2010⁵²

over 1,700 MHz by 2020.⁵⁶ In truth, there is no magic number for "demand." How much networks, and their subscribers, will gobble up depends on the price they must pay for access. But mobile markets will create far more value should input prices be lower. And the reliable way to lower those prices is for regulators to allow more spectrum to flow to the marketplace.

It is time for bold steps and fundamental reforms. These measures should capture the lessons we have learned.

- Spectrum creates its own wireless demand. Policy-makers need not worry about the precise amounts of bandwidth mobile carriers are going to utilize; they need simply to make copious amounts of bandwidth available to the marketplace. A more generous flow of spectrum will itself send the signal that technologists, carriers, and application innovators can profitably invest in developing the networks of tomorrow. Relieving spectrum bottlenecks by allocating substantially more frequency space will lower costs for consumers and entrepreneurs alike, encouraging competition and robust wireless growth.
- Spectrum markets prosper with permissive licenses. When bandwidth is allocated via licenses that permit operators to choose technologies, services, or business models, competitive markets replace administrative fiat. Licensees, given flexibility, have powerful incentives to build the most useful and popular networks, providing platforms that generate maximum economic value. Moreover, secondary markets are free to shift spectrum inputs from outmoded employments to more productive wireless applications. As technology options change, so do efficiencies—and networks evolve. Restrictions on spectrum use disrupt market forces, over-protecting the past and freezing out the future.
- Case-by-case spectrum allocation system is a barrier to progress. Fundamental reform calls for moving to a more liberal regime with spectrum-use rights that are flexible, not fixed.

The market should not have to wait for regulators to make specific determinations about the use of each frequency band, but be able to bid spectrum from one employment to another. Companies—wireless carriers, device makers, media producers, technology vendors, or daring upstarts—should be able to deploy new services, buying spectrum rights in markets without waiting for a six- to thirteen-year FCC proceeding.

The approach to airwave liberalization suggested in a formal letter to the FCC by "37 Concerned Economists" (Feb. 7, 2001) should be revived.⁵⁷ The letter read, in part:

Constraints on the use of spectrum cause both static and dynamic inefficiencies. At any moment, unnecessary restrictions prevent beneficial uses of spectrum. Over time, these regulatory rigidities can discourage innovation altogether. . . . Better rules would be permissive, allowing wireless licensees flexibility to use spectrum subject only to limits on out-of-band emissions and anti-competitive concentration.

Some of this policy vision has indeed permeated the FCC. The 2010 National Broadband Plan includes a chapter on the importance of additional spectrum allocations, and focuses attention on the prospect of allowing TV-band airwaves to be bid into the mobile market. 58 This thinking might be stretched further, and greater strategic attention given to the process of allocation reform. Beyond Five-Year Plans that target specific bands for reallocation, provoking FCC turf wars, our emerging information economy would be best supported by a systemic liberalization. This does not and cannot happen under top-down administrative allocation. It requires economically motivated asset owners facing competitive constraints. Using formats already tried and tested by regulators, such as the overlay rights used to move PCS spectrum out of historic uses and into vastly more productive employments, the process of spectrum

repurposing can be moved to the market. Such policy options offer hope for greater speed and efficiency in the quest to supply the radio-spectrum inputs demanded by wireless users.

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- 49 International Telecommunications Union.
- 50 Thomas W. Hazlett & Roberto Muñoz, Spectrum Allocation in Latin America: An Economic Analysis, 21 Info. Econ. & Pol'y 261, 261 (2009).
- 51 Bank of America/Merrill Lynch, Global Wireless Matrix $_3Q_{2010}$ 79 (Sept. 24, 2010).
- 52 Id. at 83.
- 53 One must be careful when playing the "global race" game. The key is not where America ranks, but how better policies might improve consumer welfare. Whether the U.S. is thought to rank #1 or #100, there are potential reforms that might improve performance. The confusion becomes even more pronounced when poor metrics are used for comparison, as so often happens in the vaunted "broadband race." *See* Thomas W. Hazlett, *We're Number Tiwo?* COMMENTARY (Dec. 2009).
- 54 Mobile Wireless Services Industry

Mobile wireless services allow customers to make and receive telephone calls and use data services using radio transmissions without being confined to a small area during the call or data session, and without the need for unobstructed line-of-sight to the radio tower. This mobility is highly prized by customers. . . . To provide these services, mobile wireless services providers must acquire adequate and appropriate spectrum

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- 56 International Telecommunications Union, *Estimated Spectrum Bandwidth Requirements for the Future Development of IMT-2000 and IMT-Advanced* 25 (Report ITU-R M.2078, 2006), *available at* http://www.itu.int/dms_pub/itu-r/opb/rep/R-REP-M.2078-2006-PDF-E.pdf.
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Assessing Competition in the Wireless Sector: How DoJ Can Clear Away the Fog from Proposed Mergers

By Harold Furchtgott-Roth*

I. Introduction and Background

ver the past twenty years, the American wireless sector has grown consistently more rapidly than the remainder of the economy. Growth has come partly from innovation, and partly from new services and products and services whose shelf-life is measured in months. From an array of vendors, consumers choose new products and use them in unimaginable and unpredictable ways. Today's equipment and services are obsolete two years from now, or sooner.

Growth has also come from an industry in transition: many firms have begun operations; others have ceased; and still others have merged.² It is difficult to look at the structure of the American wireless industry today and believe that the transition has been completed. We have not reached the end of wireless history with a permanent industry structure in place. The question is not so much whether another major merger of wireless firms will occur, but rather when and which parties will be involved.

Proposed major mergers in all industries are reviewed by the federal government for antitrust and other concerns. The Department of Justice ("DoJ") reviews mergers in the telecommunications industry under Section 7 of the Clayton Act to determine whether they would "substantially lessen competition." Together with the Federal Trade Commission, DoJ has developed the *Horizontal Merger Guidelines* to give guidance to merging parties about the standards of federal antitrust review.⁴

By many accounts, the wireless industry is and has been competitive. The Federal Communications Commission ("FCC") has assessed competition annually since the mid-1990s, and has never reached a conclusion that the industry is uncompetitive. The FCC has also reviewed nearly two dozen mergers in the industry over the past eleven years, and has never found the underlying industry to be uncompetitive. The industry has many of the hallmarks of competition: falling prices; rapidly improving quality; entry and exit; substantial advertising to attract consumers; and, for many firms, little if any net income.

DoJ's role under the Clayton Act is not to assess whether the industry is competitive today but rather whether it would be substantially less competitive under a proposed merger. DoJ analyses of proposed mergers are invisible to the public except in the rare circumstances where a proposed merger is challenged in court. Only one proposed wireless industry

* Harold Furchtgott-Roth is a senior fellow and the director of the Center for the Economics of the Internet, Hudson Institute, Washington, D.C. Mr. Furchtgott-Roth advised T-Mobile in the closing stages of it proposed merger with AT&T. This paper benefitted from a seminar presentation at the Hudson Institute, June 2012. The views expressed in this paper of those of the author alone and do not necessarily reflect the views of anyone else. Any errors in the paper are the author's alone.

merger, AT&T-T-Mobile, has been challenged in court by DoJ.¹¹ Because AT&T and Deutsche Telekom subsequently withdrew their merger application, the DoJ antitrust analysis was not tested in court.

Although DoJ reviews proposed mergers in many industries, those in the wireless sector face unusual challenges. Consider the following five observations:

- Another federal agency, the FCC, conducts parallel, public, and at times erroneous, merger analyses;
- The relevant markets for firms offering wireless services are difficult to define;
- The competitors in those markets are difficult to identify;
- Widely used data do not actually measure market concentration;
- Rapidly changing technology makes merger analyses difficult.

Each observation might be viewed as adding fog to the puzzle of antitrust analysis of mergers. Before DoJ can even attempt to solve the underlying puzzle, it must clear away the fog. Here are six steps for DoJ to consider:

- Give little weight to the FCC merger analyses;
- Consistent with the *Horizontal Merger Guidelines*, examine a wide range of potential relevant markets;
- Consistent with the *Horizontal Merger Guidelines*, identify competitors and potential competitors in each of those markets;
- Show humility regarding the use of information not intended for antitrust analysis; and
- Show humility in examining an industry with rapid technological change.

II. Give Little Weight to the FCC Merger Analyses

Mergers in the wireless industry are reviewed both by DoJ and the FCC. ¹² The FCC analyses, based largely on a public record and at least partly visible to the public through FCC decisions, claim to mimic the *Horizontal Merger Guidelines*. ¹³ But the FCC merger reviews are different from those conducted by the DoJ in several key respects:

- The FCC merger reviews are based on a "public interest" standard rather than an antitrust standard. ¹⁴ The two are not the same. The FCC can take into consideration factors not found in either the Clayton Act or the *Horizontal Merger Guidelines*.
- In most of its proceedings, the FCC has a different and primarily public information base in its proceedings, including merger reviews. DoJ's information is not shared with the public.

• A DoJ challenge to a merger is subject to court review; an FCC challenge is not.

Not only are the merger reviews different, but there are further reasons why DoJ cannot simply rely on the FCC to conduct antitrust analyses in its stead.

- The Clayton Act gives the FCC no authority. Indeed, the FCC in conducting its merger reviews does not cite the Clayton Act but instead cites only the "public interest" standard related to license transfers under the Communications Act. ¹⁵ The Communications Act provides no specific authority for review of mergers by the FCC.
- Nor does the Clayton Act give DoJ the authority to delegate antitrust review to another agency. ¹⁶ The *Horizontal Merger Guidelines* do not mention other federal agencies as a source of antitrust analysis.
- Despite separate legal authorities and despite separate sources of information, DoJ and the FCC are widely known to "coordinate" merger reviews.¹⁷
- As will be explained in more detail below, despite substantial efforts invested in them, the FCC merger reviews have many errors.

The parallel reviews of DoJ and the FCC have many potential unintended consequences that could undermine a DoJ court challenge. If the merger reviews of the agencies are identical or even closely similar, there is at least the appearance of DoJ having delegated its Clayton Act responsibility to the FCC. Yet it is DoJ, not the FCC, that must defend the analyses in court.

Also awkward would be the situation where the analyses are entirely different and even contradictory. Suppose an FCC merger review were to find no competitive harms, but DoJ attempts to block the merger for antitrust reasons. In court, the parties seeking the merger will reasonably point to the FCC analyses. Thus, an FCC merger review could limit and interfere with DoJ prerogatives.

Perhaps even more troubling is that the FCC in mergers in the telecommunications industry becomes a surrogate for the courts. Parties in other industries whose proposed merger is blocked by DoJ can and do seek relief in court. Parties whose proposed merger is blocked by the FCC do not, because the FCC's denial of a license transfer has, as a practical matter, little or no court review. For example, in the proposed AT&T-T-Mobile merger, the parties appeared to consider a court challenge to the DoJ complaint, but abandoned the deal only when the FCC issued the *Staff Analysis and Findings* against the merger. It was the FCC, not DoJ, and not the courts, that disciplined the behavior of the merging parties.

The parallel review of mergers in the wireless industry by the FCC ultimately undermines the professional antitrust review by DoJ. DoJ could take steps to discourage the parallel review and to give little weight to any merger analyses conducted by other agencies.

III. Consistent with the *Horizontal Merger Guidelines*, Examine a Wide Range of Potential Relevant Product and Geographic Markets

The *Horizontal Merger Guidelines* give specific instructions about how to determine relevant product and geographic markets for antitrust review. While not easily implemented for the wireless industry, DoJ could follow the *Guidelines* to define relevant product and geographic markets. Below, I examine in more detail the following issues:

- Following the *Guidelines* in defining relevant product markets:
- Consistent with the *Guidelines*, considering multiple product markets at different levels of trade rather than single markets for wireless mergers;
- Following the *Guidelines* in defining relevant geographic markets.

A. Follow the Guidelines in Defining Relevant Product Markets

The DoJ-FTC *Horizontal Merger Guidelines* describe how the agencies are to assess product markets.¹⁹ "Market definition focuses solely on demand substitution factors . . ."²⁰ The *Guidelines* focus on the "hypothetical monopolist test" and the likely demand response to a "small but significant and non-transitory increase in price ('SSNIP') on at least one product in the market."²¹ In the situation where merging firms have multiple products, as in the mobile services industry, there would correspondingly be multiple hypothetical monopolist tests

The *Horizontal Merger Guidelines* discuss how to implement the "hypothetical monopolist test" and SSNIP test.²² It is difficult to apply some of the analysis to the wireless industry. For example, the *Horizontal Merger Guidelines* present examples of measured demand response to price changes—price elasticities of demand.²³ Empirically verifiable estimates of such elasticities have not been used in wireless merger reviews.

Nor are the more qualitative approaches to the hypothetical monopolist and SSNIP test necessarily easy to implement for the wireless industry. For example, given that meaningful measures of price have been continually falling for retail wireless services, it is difficult to see how to implement the SSNIP test for such services. As prices are set nationally for retail wireless services, no meaningful regional price variations are available, regardless of regional differences in measured competition.

Particularly to the extent it has relied on qualitative reasoning to define a relevant product market, DoJ could recognize the limitations of its analysis. Reasonable people might have different views in a qualitative analysis, for example, on the breadth of the relevant market. Some might have a narrower view of market definition than DoJ, and some might have a broader view. Without persuasive quantitative evidence, DoJ's insistence on a single view of market structure may, to many, seem unreasonable.

The public is not privy to the detailed structure of the internal DoJ analyses in its review of mergers. Even in

its Amended Complaint in the proposed AT&T-T-Mobile merger, ²⁴ DoJ does not reveal the analyses that it conducted to reach the conclusion of exactly two relevant product markets: "mobile wireless telecommunications services" and "mobile wireless telecommunications services provided to enterprise and government customers." Perhaps as a result of coincidence or coordination, the FCC with little explanation defined two similar relevant markets. Perhaps as a result of coincidence or coordination, the FCC with little explanation defined two similar relevant markets. Perhaps as a result of coincidence or coordination, the FCC with little explanation defined two similar relevant markets.

It would also be helpful to the public and a potential reviewing court for DoJ to explain how and why relevant product markets have changed since previous merger reviews. Changing market definitions would be reasonable given rapidly changing technology. Perhaps DoJ is capable of such an explanation, but the FCC frequently states the opposite: relevant product markets are the same as before.²⁸

Should DoJ challenge a proposed wireless merger in the future, it would be helpful to the public and to a potential reviewing court for DoJ to explain in public documents why the relevant product is not broader or narrower than concluded. It is possible that such an explanation is in redacted documents that might be available to a court, but they are not available to the public, or to potentially merging parties.

B. Consistent with the Guidelines, Consider Multiple Product Markets at Different Levels of Trade Rather than Single Markets for Wireless Mergers

DoJ could use the *Horizontal Merger Guidelines* to consider a wide range of potential product market definitions. For example, DoJ might consider whether there are retail markets beyond wireless services in which the merging firms compete.²⁹ Wireless carriers compete in other retail markets besides wireless services including providing networking equipment such as wireless hubs or laptop sticks that enable electronic devices to connect to either WiFi or mobile networks. As the FCC discusses, consumers increasingly use wireless devices or WiFi devices for internet access.³⁰ Wireless carriers also hold large inventories and are large retail sellers of wireless handsets. As the FCC has documented on many occasions, wireless services also compete at the retail level with wireline services and satellite services.³¹

Wireless carriers also engage in a wide range of wholesale markets, transactions in which consumers do not directly participate. These wholesale markets include markets for spectrum, roaming, wholesale transactions between facilities-based carriers and MVNOs, wholesale purchasers of handsets, purchasers and sellers or wholesale backhaul services, wholesale purchasers of tower services, and wholesale purchasers of network equipment. Each of these wholesale markets is a potential relevant product market, particularly to the extent that each of the merging firms is a major participant in the market. None was examined as a separate market in the proposed AT&T-T-Mobile merger by either DoJ or the FCC.³²

DoJ could also use the *Horizontal Merger Guidelines* to consider potentially narrower markets within wireless services other than enterprise and government users. Common distinctions are made between contract and prepaid plans, and among facilities-based carriers and MVNOs and

resellers.³³ Merging parties may compete in one or all of these categories.

It is likely that two large wireless firms compete in a half-dozen or more product markets, not the two discovered by DoJ and, perhaps coincidentally, the FCC. The FCC may rationally limit its analyses to markets that it closely regulates,³⁴ but DoJ is not limited to reviewing specific markets, much less those selected by the FCC. It is possible that few if any of these markets have competitive concerns, but that judgment should be made by DoJ based on a record before it.

Should DoJ challenge a proposed wireless merger in the future, it would be helpful to the public and to a potential reviewing court for DoJ to examine a wide range of potential product markets at different levels of trade including wholesale markets.

C. Follow the Guidelines in Defining Relevant Geographic

Markets

The DoJ-FTC *Horizontal Merger Guidelines* describe how the agencies are to assess geographic markets.³⁵ Retail wireless services in the United States tend to be priced nationally. The amended complaint related to the AT&T-T-Mobile merger does not explain how geographic markets were determined by DoJ, much less why those markets were determined to be regional rather than national.³⁶ The DoJ geographic market definition is the same as that used by the FCC.³⁷ At least for retail services, a national market almost certainly makes more sense. On the other hand, for spectrum, tower leasing, backhaul and other wholesale markets, regional markets make sense. Should DoJ challenge a proposed wireless merger in the future, it would be helpful to the public and to a potential reviewing court for DoJ to explain in public documents why the relevant geographic market is not broader or narrower than concluded.

IV. Consistent with the *Horizontal Merger Guidelines*, Identify Competitors and Potential Competitors in Each of those Markets

The *Horizontal Merger Guidelines* give specific instructions about the consideration and inclusion of both competitors and potential competitors.³⁸ The *Guidelines* are unambiguous in counting any firm that "currently earns revenues in the relevant market" or "that have committed to entering the market in the near future."³⁹ Even firms that are not even considering the relevant market but "that would very likely provide rapid supply responses with direct competitive impact in the event of a SSNIP" must be included.⁴⁰ Simply stated, the count of competitors should be broadly inclusive.

In the narrow market definition of "mobile wireless services," neither DoJ nor the FCC count more than four competitors. This limited count of competitors is due to the assertion by each agency that only facilities-based "nationwide" wireless carriers compete, and that these firms are limited to AT&T, Verizon, Sprint, and T-Mobile.⁴¹ This finding is inconsistent with the *Horizontal Merger Guidelines*' requirement of broad inclusion.

The finding of these agencies may come as a surprise to other facilities-based carriers and their customers. Leap/Cricket claims to have "Nationwide Coverage."⁴² So does MetroPCS.⁴³ U.S. Cellular claims "national coverage."⁴⁴ Clearwire states that

its network "spans the nation."⁴⁵ There are thus at least another four facilities-based carriers that represent themselves as having nationwide coverage.⁴⁶

More importantly, other carriers represent themselves as competing with, among others, the "four" carriers. For example, MetroPCS compares itself as competitive with and superior to AT&T, Verizon, Sprint, T-Mobile, and Cricket. ⁴⁷ Cricket in turn compares itself favorably with AT&T, Verizon, Sprint, and T-Mobile. ⁴⁸ Smaller carriers also compare themselves to larger carriers. Cincinnati Bell claims that its 4G network is more than two times faster than AT&T, Sprint, or T-Mobile. ⁴⁹ CSpire compares its data plans favorably with AT&T and Verizon. ⁵⁰

Major national retailers do not limit customer choice to exactly four carriers either. Radio Shack has only three carriers: AT&T, Verizon, and Sprint.⁵¹ Walmart carries not only the FCC's four carriers but Tracfone, Cricket, and MetroPCS as well.⁵²Amazon has the FCC's four carriers plus Cricket, Fuzion, H2O, Kajeet, MetroPCS, Tracfone, Telestial, Alltel, Firefly, PlatinumTel, and Readymobile PCS.⁵³

Exclusion of Resellers and MVNOs

Even if wireless carriers were the proper product market, the Commission does not explain why it excludes MVNOs and resellers, which are heavily concentrated in the prepaid market. The prepaid and pay-as-you-go market accounted for more than 71.5 million customers at the end of 2011, or well over 21 percent of the wireless services market. ⁵⁴ Some of the MVNOs and resellers are owned by the facilities-based carriers, but many are not. The prepaid and pay-as-you-go segment accounts for roughly half of gross and net new additions. ⁵⁵

Data are not easily available to separate MVNOs and resellers from direct customers of facilities-based carriers.⁵⁶ It does not, however, follow that the proper analytical solution is to ignore MVNOs and resellers. Many of them are quite large, such as TracFone, which has more than 19 million customers.⁵⁷ In addition, Tracfone recently purchased the MVNO Simple Mobile from T-Mobile.⁵⁸

V. Show Humility Regarding the Use of Information Not Intended for Antitrust Analysis

In wireless merger reviews, DoJ should show humility about the use of information not intended for antitrust analysis. In the amended complaint relating to the proposed AT&T-T-Mobile merger, DoJ presents just one set of numbers, labeled as Herfindahl-Hirschman Indexes ("HHIs"), which purport to measure the concentration of firms in the "mobile wireless telecommunications services market" in regional markets before and after proposed merger. ⁵⁹ DoJ discusses the numbers as if they were actual measures of industry concentration and makes inferences about the effect of the proposed merger on industry concentration. ⁶⁰ Although similar numbers have been presented often by the FCC as measures of regional wireless industry concentration, ⁶¹ the numbers cannot plausibly measure actual wireless industry concentration. DoJ's reliance on these measures present a number of difficulties.

First, as noted above, there are many plausible product market definitions, and "mobile wireless telecommunications services" is only one such definition. Second, the FCC recognizes that the HHI calculation omits the competitive effect of MVNOs and resellers, and thus the shares associated with facilities-based carriers are overstated and the level of concentration overstated as well. ⁶² Third, the FCC bases shares on "connections"—not revenues—supposedly in a regional market. ⁶³ Fourth, the connections are only telephone numbers, and omit information on data-only devices, such as those offered by many carriers and exclusively by Clearwire.

Fifth, the concentration analysis is based on Numbering Resource Utilization and Forecast ("NRUF") reports from various carriers.⁶⁴ The NRUF reports are derived from Form 502⁶⁵ and are designed to monitor number utilization, not measure HHIs of concentration in the wireless services industry, particularly on a narrow, geographic basis. The NRUF data do not actually provide the number of "connections" in any particular geographic area. The FCC, and implicitly DoJ, merely infers the geographic area from the area code of a phone number.⁶⁶

Sixth, the Form 502 includes the original, not the current, carrier assignment of a telephone number.⁶⁷ Between the fourth quarter of 2003 and the first quarter of 2010, more than 80 million numbers were ported to wireless devices in the United States, usually from one carrier to another.⁶⁸ Thus, the association of a wireless carrier with a specific phone number in use today gathered through Form 502 is far from exact.

Seventh, wireless devices are mobile and portable. Thus a mobile device might have a phone number with an area code in one state, a billing address in a second state, a residential location in a third state, and a work or education location in a fourth state. This pattern is increasingly common, particularly among young people in college, in the military, or moving to different cities. From an economic perspective of the competitive choices facing a consumer, the least interesting aspect of a mobile device is the area code of the number associated with it. Yet the only geographic information from the NRUF data are the area codes associated with the phone numbers for the wireless devices. For phone numbers associated with wireless devices, the numbers are only coincidentally related to geography.

For at least the reasons listed above, the HHI calculations presented by DoJ and the FCC provide little or no useful information about concentration in regional markets. The numbers, which DOJ presents to three or four significant digits, ⁶⁹ are not even approximately right; they are wrong.

VI. Show Humility in Examining an Industry with Rapid Technological Change

Section 7 of the Clayton Act prohibits certain transactions under specific conditions, but the interpretation of when those conditions are met relies on the exercise of governmental discretion in interpreting markets, both today and in the future. The DoJ might show humility about its powers to understand the operations of markets with rapidly changing technology, and, consequently, it would recognize the limitations of the precision with which it can exercise Section 7 authority in such markets.

Few industries have had as much technological change as the wireless industry. Handsets more than two years old are obsolete; the same holds for network equipment more than

five years old. Mobile software and applications have a similar rate of obsolescence. The ways in which Americans use wireless services are constantly changing.

At least since Joseph Schumpeter, economists have examined the relationship between rapid technological change, market structure, and competition and the potential implications for competition policy.⁷¹ While technological change is universally recognized as important, no single conclusion emerges about the effect of antitrust merger reviews on innovation.

Less well-understood is the effect of rapid technological change on the precision of the antitrust merger review itself. Technological change creates a fog around market structure, competitors, and conduct. Governmental decisions within this fog are fraught with peril. A contemporary reviewer reviewing archived government antitrust documents in industries with rapid technological change may read with bemusement or wince in horror, but will rarely encounter an exact prediction of subsequent technological and market developments. In 2000, for example, DoJ blocked the acquisition of Sprint by World Com primarily on the basis that the combination would reduce competition in the market for long-distance telecommunications, a stand-alone industry that all but disappeared just a few years later.⁷²

Not all mergers involve firms engaged in technological change. The canonical *Brown Shoe* case involved shoe manufacturing and distribution, ancient industries that are little changed today.⁷³ But the wireless industry is different.

The fog of technological change does not mean that the government should abandon antitrust law when it encounters a proposed merger between firms engaged in rapid innovation. But it does mean that the government may consider reducing its expectations, and the expectations of courts and the public, about the precision with which markets, competitors, and conduct can be described, much less measured.

The federal government has as much if not more experience in dealing with high technology industries through enforcement of antitrust laws aimed at deterring anticompetitive behavior than merger reviews. Major antitrust cases and investigations involving Microsoft,⁷⁴ Google,⁷⁵ Intel,⁷⁶ Apple,⁷⁷ and other firms in rapidly changing technologies have been based on market conduct rather than mergers. Wireless firms, however, apparently have not been investigated.

Many explanations are available for this pattern of antitrust enforcement. Perhaps the wireless industry is so competitive that competition disciplines potential anticompetitive behavior. Perhaps the frequency of mergers and acquisitions in the wireless industry, each requiring governmental reviews, gives antitrust authorities enough opportunities to review corporate behavior to discourage anticompetitive behavior. The courts have given antitrust exceptions to firms complying with federal rules, 78 but these exceptions are not universal. Regardless of the actual reason, it is clear that the federal government has instruments other than merger reviews to protect the public against anticompetitive behavior that as yet have been largely unexercised with respect to wireless carriers.

Endnotes

- 1 For a view of industry growth through 2007, see Harold Furchtgott-Roth, *The Wireless Sector: A Key to Economic Growth in America* (CTIA 2009).
- 2 From 2003 through early 2012, the FCC reviewed at least twenty-two major mergers involving wireless firms, or more than two per year. These are listed on its mergers and acquisitions page. *See* Mergers and Acquisitions, http://www.fcc.gov/mergers (last visited Aug. 15, 2012).
- 3 15 U.S.C. § 18.
- 4 U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) [hereinafter Horizontal Merger Guidelines], available at http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf; see id at § 4
- 5 See Reports, http://www.fcc.gov/reports?filter_terms[0]=0&filter_terms[1] =96&topics[0]=0&op=Apply%20Filter (last visited Aug. 15, 2012).
- 6 See FCC Encyclopedia, Major Transactions, Archive of, http://www.fcc.gov/encyclopedia/major-transactions-archive (last visited Aug. 15, 2012).
- 7 FCC, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, at paragraphs 396, and 189-196 (2011) [hereinafter Fifteenth Report]; see also U.S. Bureau of Labor Statistics, PPI Detailed Report, Data for June 2012, available at http://www.bls.gov/ppi/ppidr201206.pdf; U.S. Bureau of Labor Statistics, CPI Detailed Report, Data for June 2012, available at http://www.bls.gov/cpi/cpid1206.pdf; CTIA, Wireless Industry Indices, Year End 2011 Results (2012); id. at 266-278.
- 8 Fifteenth Report, *supra* note 7, at paragraphs 396; *id.* at 104-128, 220-229
- 9 Id. at paragraphs 55-79.
- 10 Id. at paragraphs 129-137.
- 11 See Complaint, United States v. AT&T Inc., No. 1:11-cv-01560 (D.D.C. Aug. 31, 2011); Amended Complaint, United States v. AT&T Inc., No. 1:11-cv-01560 (D.D.C. Sept. 16, 2011) [hereinafter Amended Complaint]. The proposed merger of WorldCom-Sprint was challenged in 2000, but that proposed merger involved the wireless industry in only one of the two merging parties.
- 12 DoJ, along with the Federal Trade Commission, reviews mergers under Section 7 of the Clayton Act. In merger review coordination between the two agencies, proposed mergers of telecommunications companies have been reviewed by DoJ. For a skeptical observation on this redundancy, see Harold Furchtgott-Roth, *A Tough Act to Follow* (Am. Enter. Inst. 2006).
- 13 See FCC, Staff Analysis and Findings, Application of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket 11-65, at paragraphs 14-18 (Nov. 29, 2011) [hereinafter Staff Analysis and Findings].
- 14 *Id.* at paragraph 11. The FCC refers to 214(a) and 310(d) of the Communications Act as the foundation for the public interest standard in license transfers.

15 *Id*.

16 15 U.S.C. § 18.

17 See Continuing a Conversation About the FCC['s Merger Review Process, Posting of Jonathan Baker to FCC Blog, http://reboot.fcc.gov/blog?entryId=1340463 (Mar. 17, 2011) ("Working together, the FCC and DOJ are often more effective in addressing competition issues than either would be working alone. The FCC brings industry expertise and a greater practical ability to review and address concerns about a merger's impact on potential competition. Through collaboration, moreover, both agencies were able to conduct an extensive, careful, and cooperative review of that transaction without delaying the process.").

18 Horizontal Merger Guidelines, supra note 4, at 7-14.

19 *Id.* at § 4.

20 Id. at 7.

21 *Id.* at 9.

- 22 Id. at 8-12.
- 23 See, e.g., id. at 9 (examples 5 & 6).
- 24 See Amended Complaint, supra note 11.
- 25 Id. at paragraphs 11-12.
- 26 Id. at paragraph 13.
- 27 See, e.g., Staff Analysis and Findings, supra note 13, at paragraph 31. The FCC's relevant markets were "retail mobile wireless services" and "enterprise and government services."
- 28 Id.
- 29 In its merger reviews, the FCC does not appear to consider whether there are additional potential relevant retail markets.
- 30 See Fifteenth Report, supra note 7, at chart 15.
- 31 Id. at paragraphs 363-377.
- 32 The FCC mentions, but does not examine as a separate market, some of these wholesale activities. For example, the FCC discusses spectrum, Staff Analysis and Findings, *supra* note 13, at paragraph 64, backhaul, *id.* at paragraphs 112-116, and roaming, *id.* at paragraphs 99-105. But these discussions are ultimately in the context of their effect on retail wireless services, not as separate antitrust markets.
- 33 See, e.g., CTIA, Wireless Industry Indices, Year End 2011 Results (2012).
- 34 This explanation, however, does not explain why the FCC does not examine separate markets for spectrum, backhaul, and other heavily regulated services.
- 35 Horizontal Merger Guidelines, supra note 4, at 14-15.
- 36 Amended Complaint, supra note 11, at paragraph 14.
- 37 See Staff Analysis and Findings, supra note 13, at paragraphs 32-34.
- 38 Horizontal Merger Guidelines, supra note 4, at 15.
- 39 Id.
- 40 Id
- 41 Amended Complaint, *supra* note 11, at paragraph 2; *see also* Staff Analysis and Findings, *supra* note 13, at paragraphs 35-38.
- 42 See Cricket, http://www.mycricket.com/ (last visited Aug. 15, 2012).
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- 53 See Cell Phones & Accessories, http://www.amazon.com/gp/search/ref=sr_ex_n_1?rh=n%3A2335752011%2Cp_n_feature_ten_browse-bin%3A3310955011&bbn=2335752011&ie=UTF8&qid=1342540513 (last

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- 54 CTIA, Wireless Industry Indices, Year End 2011 Results, at Appendix C, 7-9 (2012).
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- 57 See TracFone, http://www.tracfone.com/ (last visited Aug. 15, 2012).
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- 59 Amended Complaint, supra note 11, at Appendix B.
- 60 Id. at paragraphs 17-18, 22-26.
- 61 See, e.g., FIFTEENTH REPORT, supra note 7, at paragraphs 48-54; see also Staff Analysis and Findings, supra note 13, at paragraphs 42-47.
- 62 Fifteenth Report, supra note 7, at paragraph 49.
- 63 Id
- 64 *Id.* at 8. The NRUF data are described in FCC, Numbering Resource Utilization in the United States (2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-303900A1.pdf.
- 65 See NANPA NRUF Services, http://www.nanpa.com/nruf/index.html (last visited Aug. 15, 2012).
- 66 Fifteenth Report, supra note 7, at n.528.
- 67 "In the case of ported numbers, if a carrier ports numbers for the purpose of transferring an established customer's service to another service provider, the porting-out carrier should classify the numbers as 'Assigned' and the numbers should not be counted by the receiving/porting-in carrier." NANPA, *JOB AID to Report Geographic Utilization and Forecast Data* 4 (NRUF Report Form 502, June 2012), *available at* http://www.nanpa.com/pdf/NRUF/GeoJobAid.pdf.
- 68 FCC, Numbering Resource Utilization in the United States, at Table 14 (2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-303900A1.pdf.
- 69 Amended Complaint, supra note 11, at Appendix B.
- 70 15 U.S.C. § 18.
- 71 See Joseph A. Schumpeter, Capitalism, Socialism, and Democracy 59-163 (1976). While Schumpeter held that monopolies had a tendency to innovate, Kenneth Arrow took the opposite view that competition leads to innovation. See Kenneth J. Arrow, Economic Welfare and the Allocation of Resources to Invention, in The Rate and Direction of Economic Activity 609 (Richard R. Nelson ed., 1962). More recently, see William J. Baumol, The Free-Market Innovation Machine: Analyzing the Growth Miracle of Capitalism (2002). In an antitrust context, see Michael L. Katz & Howard A. Shelanski, Mergers and Innovation, 74 Antitrust L.J. 1 (2007); see also Jonathan B. Baker, Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation, 74 Antitrust L.J. 575 (2007).
- 72 Complaint, United States v. WorldCom, Inc. (D.D.C. June 26, 2000), available at http://www.justice.gov/atr/cases/indx239.htm.
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- 76 See Cecilia Kang & Steven Mufson, U.S. Files Antitrust Suit Against Intel, Alleges Unfair Tactics Against Rivals, WASH. POST, Dec. 17, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/12/16/AR2009121601121.html.
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BOOK REVIEWS

Taming Globalization: International Law, the U.S. Constitution, and the New World Order

By Julian Ku and John Yoo Reviewed by Jeremy Rabkin*

aming Globalization has two great merits. First, it acknowledges that the explosive growth of international law in recent decades poses a threat to our traditional scheme of constitutional government in the United States. If more and more law is made for us in international negotiations, then less and less of our law will be made under our own constitutional system. Second, to cope with this challenge, the book proposes a set of relatively clear and direct constitutional barriers, designed to ensure that the law governing Americans will at least have passed through appropriate constitutional filters.

The main proposals are easy to summarize. First, Julian Ku and John Yoo propose that treaties should be presumed to be non-self-executing except when the text of the treaty itself (or the instrument of ratification approved by the Senate) clearly indicates otherwise. That means that while we may commit to other signatories in a treaty, the law enforced by American courts will be unaffected until Congress enacts separate implementing legislation. We will still be bound by the law enacted by our own representatives. To prevent treaties from altering our federal balance at home, however, they also insist that Congress can only enact such implementing statutes where it already has authority to legislate under its enumerated powers in Article I, Section 8. Where Congress lacks such constitutional power, treaty implementation will have to be left to the states.

For related reasons, the authors argue that states ought to have authority to implement customary international law standards through their own legislation or their own courts. Federal courts should be bound by state adaptations, except where Congress has legislated to the contrary (within its own jurisdictional limits) or the President has proclaimed a contrary national position on a particular customary law standard. Finally, Ku and Yoo insist that federal courts must not interpret the U.S. Constitution on the basis of foreign or international precedents, since that would amount to delegating U.S. judicial authority to foreign bodies.

Each of these proposals has much to commend it. But they also illustrate the larger thrust of the book. Proponents of "global governance" have looked to courts to play a leading role in stitching together a transnational network of legal standards, committing national legal systems to a kind of global constitutional structure—largely judge-made. Among the more prominent advocates of this approach are Harold Koh and Anne-Marie Slaughter, both of whom took leave from academic posts to serve in the Obama State Department in the last few years. Ku and Yoo urge the opposite: their proposals limit the authority of federal courts at every turn, relying instead on the President or Congress or state legislatures and state courts. When it comes to international commitments, Ku and Yoo prefer to rely on political bargaining or executive energy more than legal reasoning. They look to structural constraints ("checks and balances") more than legal doctrine to establish the proper balance between international obligations and domestic accountability.

There is much to be said for this strategy. The book certainly deserves serious consideration. Some of the remedies proffered by Ku and Yoo will arouse skepticism, however, even among readers who share their underlying concerns. Those who are less clear about the underlying challenge of globalization aren't likely to feel they have gained a firmer grip on the real-world issues from the rather schematic way they are set out here

The problems come into focus in the book's account of how states can implement international commitments. The Founders seem to have assumed that the federal government would have all necessary authority to implement international commitments. As an early paper of *The Federalist* put it:

Under the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner—whereas adjudications on the same points and questions in thirteen states . . . will not always accord or be consistent . . . from the variety of independent courts and judges appointed by different and independent governments as from the different local laws and interests which may affect and influence them.¹

The Federalist insisted that such uniformity was crucial to maintaining amicable relations with foreign nations.

It thus seems quite odd to insist that where treaties require implementing legislation, Congress might still lack the authority to enact such legislation because such authority is not within its enumerated powers. Why not rely on the last clause in Art. I, Sec. 8—power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other powers vested by this Constitution in the Government of the United States"? Certainly the Constitution vests the power to make treaties in the Government of the United States. The idea that Congress therefore had authority to make laws to implement treaties—"to carry them into execution"—was certainly embraced by many statesmen of the Founding era. To say now that we must rely on the states to implement various treaties seems to be falling back on the Articles of Confederation—the scheme the Constitution was designed to supplant.

The difficulty is that treaties today seem to cover a vast range of issues, so the power to implement treaties would give Congress almost unlimited power to preempt the legislative authority of the states. As Ku and Yoo note, human rights treaties now concern a great many issues (including ordinary

^{*} Professor of Law, George Mason University

Julian Ku and John Yoo's Taming Globalization is published by Oxford University Press.

enforcement of criminal law) which have traditionally been regarded as state concerns. *The Federalist* worried that failing to honor international obligations might provoke other nations to hostile acts, even to war. It is implausible that other nations will be provoked to attack the United States because we fail to conform to some disputed provision in the Covenant on Civil and Political Rights. It is not even plausible to claim that other countries will withdraw human rights protection from their own citizens in their own countries to protest American failures to heed what they embrace as human rights obligations.

The traditional answer to this challenge would be to challenge the permissible scope of the treaty power. Jefferson thought treaties could only cover a narrow range of subjects and certainly could not be extended to "the rights reserved to the states; for surely the President and Senate cannot do by treaty what the whole government is interdicted from doing in any way"²—implying that treaties could not extend beyond the enumerated powers of Congress. But Jefferson also thought the Constitution afforded no power to acquire new territory—until his own supporters insisted that he must swallow his constitutional scruples and go ahead with the Louisiana Purchase. If there are limits on the treaty power, it is not easy to say what they are.

Instead of engaging this question, Taming Globalization shrugs it off. The authors appear to think the United States can engage the treaty power for any sort of commitment on any subject, and it is then just a matter of domestic constitutional structure how we implement treaties. But if foreign commitments are important, it is questionable that we would leave the nation's good faith hostage to fifty jurisdictions. Ku and Yoo themselves seem to have some doubts, acknowledging at one point that Congress might ensure state adherence by providing a private right of action for enforcement in federal courts or by making federal grants contingent on federal compliance. If unlimited in their reach, such concessions threaten to swallow up the initial promise of state independence. If they are still limited by some other (unstated) restrictions on congressional power, they threaten to leave disturbing gaps in U.S. implementation of foreign commitments.

To reassure readers, the authors report that states have actually done much to implement foreign commitments, sometimes acting on treaties that the United States itself has not ratified—as with the Kyoto Protocol on reducing greenhouse gases or (less sensationally) a convention on probate procedures. They do not explain how such initiatives can be reconciled with clear indications in the Constitution that the Founders sought to keep states out of foreign policy—notably the prohibition in Article I, Section 10 against states making treaties with foreign nations without congressional consent. The authors are so indifferent to national authority that they don't explain which (if any) of the state compacts they discuss have actually received congressional consent. Nor do they analyze the legal status of state compacts with foreign governments that have not received that consent.

If, as they argue, states can have their own role in developing international norms, it makes sense that states can participate in the development of customary international law—even though (on their theory) federal courts cannot. It

is some check on the states that the President, in their view, can impose exceptions and corrections (and Congress, too, where it has a relevant enumerated power to legislate). But as it is odd to have fifty implementing statutes for international commitments, it is odd to have fifty different initiatives in customary law. The potential for mischief seems much greater in this area, since we may not have control over what foreign courts and foreign governments make of these state gestures.

As Ku and Yoo acknowledge, federal courts do now police exclusion of states from interfering in interstate commerce. They offer rather vague, general arguments about why courts are not as well-situated to police exclusion from interfering in foreign policy. Not all readers will find their claims compelling. Readers also might wonder whether the President is best-suited to carry this responsibility alone, if he can exercise an entirely unstructured, ad hoc intervention, perhaps winking at some state initiatives while denouncing similar ones.

Ultimately, the book would be more convincing if it gave more attention to its premises. In an initial chapter, the authors claim to be defending "popular sovereignty" as against "Westphalian sovereignty." They associate the former with the will of the people, in our case the will of the people to act through the Constitution. They associate the latter with unlimited power. But the 1648 treaties establishing the Peace of Westphalia actually committed signatories to respecting some rights of religious minorities in their own territories. It was left to 20th-century totalitarians to imagine that "sovereign" power had no limits at all. Conversely, if we think America stands for "popular sovereignty," why can't elected majorities always get their way under our Constitution? Why can't they delegate lawmaking authority to foreign bodies (as Europeans have done), if that is the popular will? If, on the other hand, we are bound by the will of the 18th-century ratifying conventions, what justifies the various changes Ku and Yoo now urge? Certainly, their proposal to exclude federal courts from ruling on customary international law is a change from the practice (and professed expectations) of the Founding generation and from common practice through the 19th and 20th centuries.

By declining to give more plausible or convincing accounts of sovereignty, *Taming Globalization* implies that the world could well give itself any sort of law on anything at all, so the only serious issues for lawyers are what procedures should be followed in implementing such laws within each nation. Even lawyers should try to grapple more directly with the substantive implications of sovereignty. How can we retain respect for our national Constitution if we don't retain a firm grip on what it means to be an independent nation?

Endnotes

- 1 The Federalist No. 3 (John Jay).
- 2 Thomas Jefferson, Manual of Parliamentary Practice (1800).

Power and Constraint: The Accountable Presidency After

9/11

By Jack Goldsmith

Reviewed by Paul E. Mirengoff*

n Power and Constraint: The Accountability Presidency After 9/11, Jack Goldsmith painstakingly describes the constraints on the President's power to combat terrorism that emerged in response to Bush Administration policy. Goldsmith, a key legal adviser during portions of President Bush's first term, thereby performs a great service.

Goldsmith also presents two theses. The first is that pushback against Bush's anti-terrorism policies produced a consensus about what tools the President can use in fighting terrorism, which explains why President Obama retained so many of Bush's policies as they stood in 2009. The second is that we should be relatively sanguine about the process that produced the current consensus, and about that consensus itself.

In my view, Goldsmith's first thesis is debatable and his second is incorrect. But *Power and Constraint* is compelling reading by virtue of the story it tells, whatever one thinks about its conclusions.

Goldsmith divides his story into four sections. They deal with the constraints imposed on presidential power by journalists, military lawyers, and courts, and with the persecution of CIA agents for actions taken in response to 9/11.

"Secrecy," Goldsmith stipulates, "is vital in wartime to avoid tipping off the enemy about government plans and operations and to promote candid deliberation inside the government about these plans and operations." After 9/11, however, journalists saw their function as "piercing the government's secrecy system."

They succeeded. "Very soon after top-secret counterterrorism programs became operational, they were discussed in some detail on the front page of the Washington Post and elsewhere," Goldsmith reports. The programs publicly discussed included monitoring of international financial transfers that support terrorism, data-mining techniques, interrogation techniques, CIA renditions, and secret prisons.

Consequently, General Michael Hayden declared that there are only a "very narrow number of specific operational acts" he was involved with that are as secret now as the day they were conceived. After 9/11, Hayden served in one key intelligence leadership position after another. Thus, he knew most if not all of America's important intelligence secrets. So, apparently, did journalists and, in many instances, their readers, including the terrorists we were fighting.

Should we be sanguine about this state of affairs? According to Goldsmith, President Obama is not. And Obama's

Jack Goldsmith's Power and Constraint: The Accountable Presidency After 9/11 is published by W. W. Norton & Company. Under Secretary of Defense for Intelligence has testified to Congress that leaks of classified information "place[] our forces, our military operations, and our foreign relations at risk."

Goldsmith, though, is relatively sanguine. He recognizes the harms that have resulted from the disclosure of secrets, but considers them a fair price to pay because disclosure increases the ability of the public and its representatives to evaluate the soundness of the executive's wartime efforts.

But wartime efforts become less sound when the enemy receives notice of their nature. And the public can evaluate the efficacy of the executive's efforts by looking at results.

Satisfactory results are sometimes achieved through debatable methods or in spite of the methods used. But our elected representatives have broad powers with which to ascertain what methods the executive is employing and with what efficacy. Thus, the executive can be held accountable without its secrets being splashed onto the front page of the newspaper.

Goldsmith notes that Congress has often been reluctant to become significantly involved. Presumably, this reluctance reflects public indifference to anything other than results. Wartime efforts should not be compromised to provide the public and its representatives with information they don't particularly care to know.

Goldsmith contends that "the United States has basically decided" that the benefits derived from publication of government secrets outweigh the harm to national security that sometimes results. He points out that Congress hasn't given the President much power to prosecute leakers and Presidents have been reluctant to use the power they possess.

It may be a stretch to characterize this inaction, probably caused by unwillingness to antagonize the press, as a decision based on the weighing of costs and benefit. In any event, the "decision" should be re-visited, and might very well be in the next serious crisis.

"Lawfare" refers to the relatively recent phenomenon of law and lawyers affecting the conduct of war. Lawyers, Goldsmith shows, are now at the heart of the military decisionmaking process. They not only review operational plans in advance, but also participate in the field, providing counsel to commanders regarding proper targets, for example.

This had been true for some time. But given the urgency of a strong response to attacks on our homeland, many expected the influence of lawyers over military operations to diminish after 9/11. Instead, Goldsmith shows, military lawyers became more deeply integrated than ever in military decision-making. They also grew closer to the fight, with two to three lawyers deployed with every army brigade, and a lawyer deployed for many special operations forces down to the battalion level.

Goldsmith makes clear that the constraining function of military lawyers goes beyond applying their view of the law. Lawyers also advise commanders on whether particular actions will pass "the CNN test." And even when it's not possible for lawyers to be present, they constrain action through the rules of engagement they write. These rules, too, embody not just legal considerations, but also political and diplomatic ones.

Goldsmith finds that "lawfare" constraints have impeded our military operations and increased the number of U.S.

^{*}Mr. Mirengoff is a retired attorney in Washington, D.C. and is a blogger at powerlineblog.com.

casualties. They even enabled Mullah Omar, the leader of the Taliban, to escape after a lawyer dissuaded the military from striking a building because civilians were probably present. As Goldsmith explains, "[S]urrounded by law and under the gaze of many potential retroactive critics, it is entirely rational for soldiers up and down the chain of command to hesitate before acting." Such hesitation is sometimes incompatible with waging effective warfare.

How did we get to the point where lawyers help manage, and adversely affect, combat operations? We got there, Goldsmith shows, mainly through the efforts of what he calls "warrior-lawyers."

These JAGs possess both a military and a legal education. The combination appears to be a heady mix. For example, General Mark Martins, Goldsmith's protagonist warrior-lawyer, claims that "law embodies and summarizes human experience about right action in a particular context."

Many experienced lawyers across a wide range of practice areas may find this statement naïve. They may also wonder about the quality of a summary of human experience under which suspected terrorists can be killed without legal process by drone strikes but, if captured in the hope that they will provide valuable intelligence, cannot be slapped in the face.

According to Goldsmith, the post-9/11 policies of the Bush Administration were "a direct affront to the JAG view of the world." And animated by an unrealistic view of the law and an emphasis on their personal honor, these warrior-lawyers seem to have forgotten that in the United States, civilians control the military, and the Commander-in-Chief is the chief law interpreter for the executive branch.

The JAGs set out to undermine Bush policy through all available means, including leaks, public testimony, coordination with sympathetic politicians, and even assistance from human-rights groups with whom, says Goldsmith, "they had a greater commonality of interest than with the President." Through these methods, they were able substantially to constrain their adversary, the President of the United States.

The JAGs could not have accomplished this had they not already gained vast influence within their base of operations, the military. They gained that influence primarily because they helped commanders identify and circumvent legal landmines.

But the JAGs were not the passive beneficiaries of a windfall of law they were then asked to help cope with. For decades, Goldsmith reports, they worked with human rights groups with whom they came to share a general outlook.

Not surprisingly, then, the JAGs were instrumental in the decision by the U.S. military to follow many aspects of customary international law, and in the writing of ever-expanding legal and policy manuals that they could then interpret and apply. And not surprisingly, when the Bush Administration sought greater flexibility through measures inconsistent with the shared outlook of the JAGs and their friends in the human-rights community, the JAGs counterattacked with great success.

Goldsmith appears troubled by the military's undermining of the President's ability to interpret the law on behalf of the executive branch. He also recognizes that the injection of lawyers into battle harmed U.S. counterterrorism efforts. Ultimately,

he is agnostic as to whether the harm is outweighed by the possible prevention of misguided polices and the blowback they would have caused.

Goldsmith's agnosticism is understandable. Both sides of the cost-benefit equation are impossible to measure. But this much should be clear: our elected executive is responsible for making the cost-benefit decisions. His decisions may be subject to judicial review, but they should not be undermined or thwarted by military lawyers. It also seems clear that in war, including war on terrorism, the president should err in favor of defeating the enemy, rather than minimizing "blowback."

The Supreme Court constrained presidential power after 9/11 in several landmark decisions. *Power and Constraint* deals with this development mainly by describing the work of the "GTMO Bar." Goldsmith admires its efforts, and justifiably so. Members of the GTMO Bar persuaded the Supreme Court to issue landmark decisions overturning Administration policy even though precedent was against them.

Power and Constraint does not pass on the merits of Supreme Court decisions. Goldsmith argues, persuasively, that the decisions should be understood in the context of both press reports about alleged government abuses and the antiadministration drumbeat emanating from military lawyers. This cacophony helped trump precedent even though courts had (1) no way of knowing the degree to which press reports were accurate (government refutation might well have compromised secrecy in many cases) and (2) no apparent sense of the extent to which the JAGs were an ideologically-driven interest group attempting to protect their turf.

Perhaps the saddest part of Goldsmith's story is the persecution of CIA agents. In a time of crisis, CIA agents obtained valuable information from terrorist detainees. That information led to the capture or killing of terrorists bent on attacking the U.S. It may well have prevented attacks.

The techniques used by the CIA agents were approved in advance by the Department of Justice. As Goldsmith puts it, "[t]he CIA sought all of the right assurances up front for its detention and interrogation mission; it dutifully reported its subsequent mistakes; and it cooperated with the many resulting investigations."

None of this mattered much. Sweeping initial internal investigations caused approximately twenty cases to be referred to the Justice Department for potential criminal prosecution. Only one resulted in prosecution, but the others were referred back to the CIA, which then considered whether to punish the agents. Some agents were cleared, some were punished, and some quit.

Then, Attorney General Holder ordered the reopening of cases that the Justice Department had already deemed unworthy of prosecution. Thus, agents who had been told the matter was finally behind them once again had to lawyer up, refresh their memories, and face a grand jury. Most agents eventually were cleared again, but the process demoralized the CIA.

Goldsmith believes that these experiences will make the CIA far more cautious and less inclined to take the initiative the next time the threat environment becomes severe. This ethos, he assures the human-rights lobby, provides a safeguard against future abuse. But Goldsmith can provide no assurances to those

who fear that, due to caution and risk aversion, the CIA will be less effective in combating terrorism the next time around.

Goldsmith also believes that the process by which executive power was constrained produced a consensus about what the law permits in the context of counterterrorism, and that thanks to this consensus Obama retained a great many of Bush's policies as they stood in 2009. It is true that presidential power was constrained prior to 2009 and that Obama retained most of the Bush policies as of that date. But does a causal relationship exist?

Goldsmith assumes that, had the Bush Administration not changed its policies, the Obama Administration would have abandoned many of them. But we know that Presidents are loath to give away their powers, and Obama has been no exception.

Having vocally denounced many of Bush's early policies, Obama was under great pressure to alter them. But suppose the media had not pierced the Administration's secrecy system and that military lawyers had not worked to undermine Administration policy? In this scenario, Obama likely would have inherited the largely uncontested ability to exercise more power with less constraint. Would Obama have imposed constraints on his own power? It's a question Goldsmith does not consider.

Goldsmith also does not consider the extent to which Bush's policies received pushback that would not have been directed at the same policies if initiated by a liberal Democratic President. But little else goes unconsidered in this valuable study.

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