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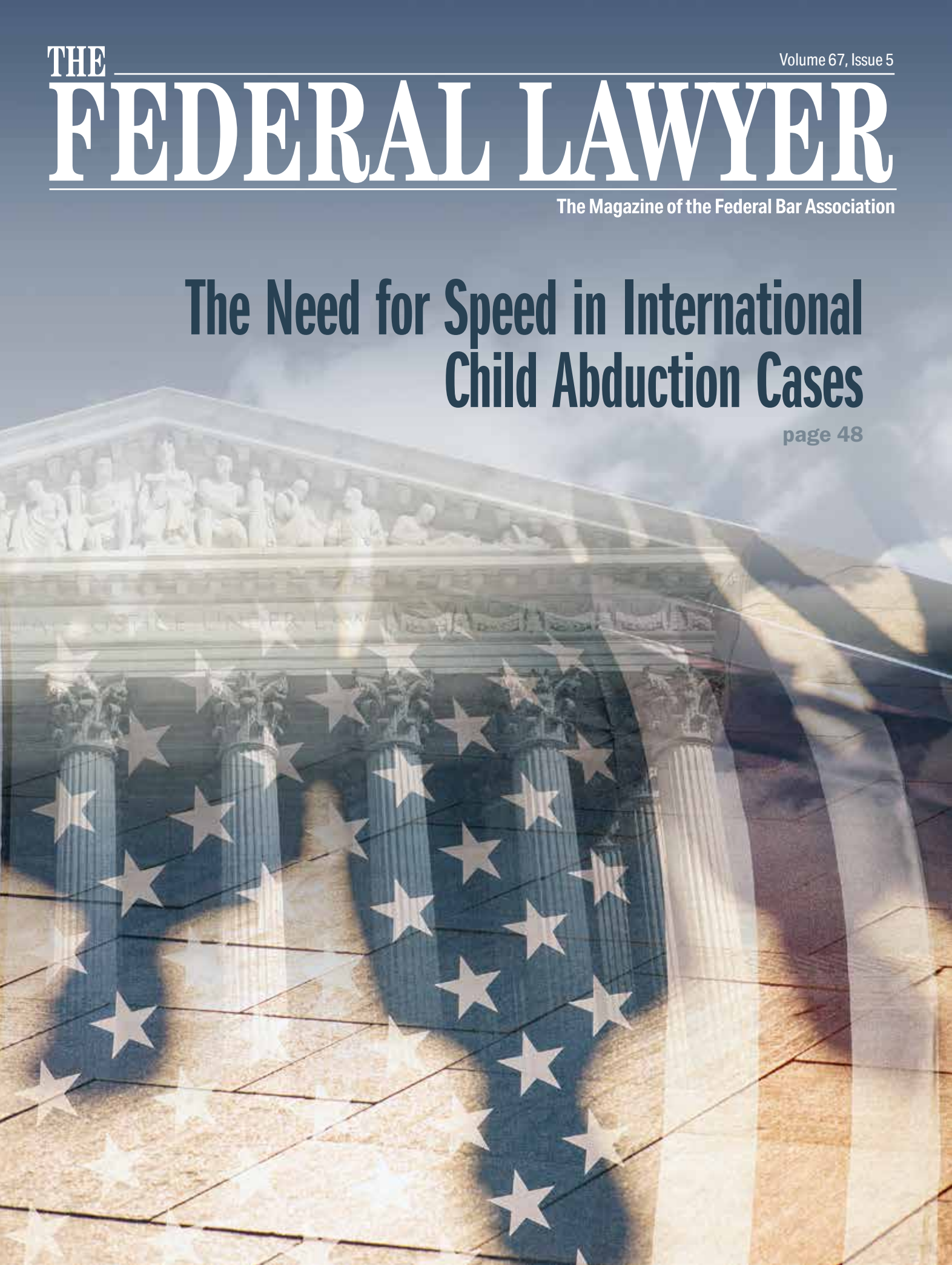
The Need for Speed in International Child Abduction Cases

page 48



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Volume 67, Issue 5

The Magazine of the Federal Bar Association

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September/October 2020: Voting Law

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We Are the Guardians of the Constitution: Remembering Our Oath and Covenant of Citizenship

W. West Allen

W. West Allen is an intellectual property litigator and counselor in Las Vegas who represents a wide variety of international clients in federal courts. He served as chair of the FBA's Government Relations Committee for seven years and has served as a member of the FBA's board of directors for much of the past decade. In 2016, Allen received the FBA's President's Award for longstanding service to the FBA and as chair of its Government Relations Committee.

Federal Bar Association Presidential Installation Ceremony Remarks by W. West Allen, Lloyd D. George United States Courthouse, Las Vegas, Nevada, Thursday, September 17, 2020

U.S. Senate Oath

"I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: So help me God."

Federal Bar Association Oath

"I do solemnly swear that I will support and defend the Constitution of the United States; that I will adhere to, and abide by, the Constitution and Bylaws of the Federal Bar Association; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: So help me God."

Thank you Chief Judge Du, Judges of our U.S. District Court, Clerk of Court Kempi, Friends, and Fellow Citizens:

It is with gratitude to God for our nation, and for my dear wife, family, parents, and wise mentors who teach me every day, that I accept the presidency of the Federal Bar Association and its solemn responsibility, foremost to support and defend the Constitution of the United States.

For those watching, my name is West Allen. I have been elected to serve as national president of the Federal Bar Association, the foremost professional organization of nearly 20,000 federal judges and lawyers throughout the United States who seek to strengthen the federal legal system and the administration of justice. I invite you to join the FBA if you are a lawyer and have not done so yet. Perhaps these brief remarks will help you understand why.

Today, I would like to share a few words regarding the U.S. Constitution and the oath just administered by our chief judge.

It is fitting and proper that we do this today, as we remember the founding of Our Constitution; in this season of remembrance, even high holy days for many faiths; and that we do so here within these venerated walls of a U.S. Courthouse.

It is right here in this solemn, set-apart space—the American Courtroom—that justice is done. It is here, we as citizens take solemn oaths to be truthful. It is here we take civic oaths to support and defend the Constitution. These promises constitute a constitutional oath applicable to all citizens.

I invite us all to remember our constitutional oath—this *Covenant of Citizenship*—that we as Americans engaged in the work of this nation have taken upon ourselves.

Our oath incorporates the duty to faithfully discharge the responsibilities of our office with which we have been entrusted. But most significantly, our collective oath and covenant—whether undertaken in this room as a newly naturalized citizen, a young lawyer, or a federal judge—is to support and defend the Constitution of the United States, and to bear true faith and allegiance to the same.

Why do we do this? We do this for the same noble purpose that inspired 56 brave representatives to sign the Declaration of Independence in 1776: to pledge their lives, their fortunes, and their sacred honor. We do this for the eternal cause of freedom. Freedom lies at the heart of the U.S. Constitution.

As judges and lawyers, we are the standard bearers of freedom—the *Guardians of the Constitution*. Our duty is to watch, warn, and protect. As guardians, we understand that freedom comes at a cost. Sadly, a human cost, one that at times requires the shedding of

blood and the sacrifice of lives ... at Lexington, Concord, Gettysburg, Normandy, and thousands of other sacred places known only to the heroes who gave their lives *that we might live*.

And live *freely*.

To *that* end, our forefathers and foremothers forged a new nation on this land, with a just government *of* the People, *by* the People, and *for* the People. A nation predicated upon the truth that *all* are created *equal*; that they are endowed by their Creator with certain unalienable rights, including Life, Liberty and the Pursuit of Happiness; and that these rights exist independently of government, for government exists *only* to protect them.

Our U.S. Constitution *is* the written embodiment of that philosophy. It is that *hope*. It is the firm and sure foundation—established by the wisest among us raised up for this very purpose—to protect the rights and freedom of *all* People.

Two centuries and 33 years later, it is the duty of *this* generation to defend and build on the foundation they have laid. We are to understand and to teach ourselves, our children, and their children of this Constitution and its founding principles of good government. This responsibility requires *resoluteness*, for our nation, as any nation, is only one generation away from losing that understanding and the freedom it protects.

George Washington understood that our Constitution was paramount to the eternal cause of freedom on earth. He also understood that it was only *a beginning*. To this day, in our nation's first capitol, New York City, President Washington's words are inscribed on a magnificent arch in Washington Square Park. They read:

"Let us raise a standard to which the wise and honest can repair; the event is in the hand of God."

Washington understood that his founding generation, with the guiding Hand of Providence, was laying a foundation for the cause of freedom among *all* nations. It would be for later generations to build the superstructure of a more perfect union upon it.

The cause of freedom in government is a continuing, noble work—established line upon line, precept upon precept, generation by generation. It is advanced each day by covenanted citizens who remember and understand the miracle that is our U.S. Constitution, and its founding principles.

No greater immediate responsibility rests upon citizens of this republic, or of any republic, than to protect the freedom vouchsafed by the Constitution of the United States.

What are the foundational constitutional principles for this standard of which Washington spoke that has been raised to the world? I'll highlight *five*:

First, *Popular Sovereignty.* The People are the *only* lawful source of governmental power. Government is chartered by limited, enumerated powers to be exercised only as authorized by the People according to their *written* law, which is the Constitution.

Second, *Federalism.* The division of power between state and federal government *must* exist to diffuse centralized power.

Third, *Separation of Powers.* The People's government has three coordinate and equal branches, which further diffuse centralized power: The Legislative, the Executive, and the Judiciary. Each has unique abilities to check and balance the others.

Fourth, *the Bill of Rights.* The People's enumeration of certain unalienable rights must be held inviolable by government. These include the freedom of religion, speech, the press, the right to peaceably assemble, and the right to petition government for a redress of grievances. No action by government should ever subvert these rights.

Fifth, *the Rule of Law.* All citizens are governed by and held accountable to laws that are just, publicly promulgated, *equally* enforced, and independently adjudicated. Vague, incoherent, arbitrary, or unwritten law is no law at all.

To these could be added the unspoken constitutional principles of hope, faith, virtue, knowledge, fortitude, patience, kindness, humility, diligence, and gratitude.

Upon these constitutional principles is good government built. Yet, as our founders understood, the success of a republic is neither inevitable nor complete. It is not enough to believe in democracy, liberty, free enterprise, or justice under the law. We must work for it, extend past our belief, and truly know and understand the constitutional principles that make these noble pursuits possible.

This is what we do as judges and lawyers, as members of the Federal Bar Association. "We few, we happy few"; we band of constitutional brothers and sisters—it is our duty to repair and improve the standard of which Washington spoke. We are to build the American superstructure of freedom and equal justice upon the sure foundation of the Constitution and its enduring principles. Our role as guardians and teachers is to *act*, and not *be acted upon*.

This work is more important today than any generation since our nation's founding, for we fight against apathy and ignorance, against state oppression and spiritual darkness in high places.

I commit as the president of the Federal Bar Association to support and defend the Constitution of the United States, to do everything in my power to strengthen the federal legal system and administration of justice. During my term of office, the FBA will collaborate with other organizations who join us in this endeavor—including the National Constitution Center, the Administrative Office of the U.S. Courts, and the Federal Judicial Center—to promote constitutional civics and public service, to sustain and strengthen the independence of our federal courts, and to ensure the personal security and safety of our federal judiciary and their families.

I invite every judge and lawyer across this nation to engage in this noble work. Join us! Work with us!

I invite every American lawyer and citizen who cherishes justice and freedom to *rise up* and do the same. Defend the Constitution and the freedoms it guarantees. Contribute to the Foundation of the Federal Bar Association. Download the National Constitution Center's mobile Interactive Constitution App. Learn and teach the Constitution and its founding principles to yourselves and your children. Read and study again George Washington's Farewell Address—more applicable today than ever. These are simple, concrete acts that will extend the reach of freedom to the next generation.

May we remember our constitutional oaths. May we together and united as Americans of this great, promised nation remember our *Covenant of Citizenship*. And may we do so always with gratitude for all that we have been given.

On this so much depends, for our Constitution hangs tenuously in the balance. Our choices decide our fate: whether we act or are acted upon.

May the Hand of Providence protect each of you listening today, and may He who is the Author of Liberty forever bless this nation, as we, together—members of the Federal Bar Association and *Guardians of the Constitution*—be not weary in well-doing and with gratitude, honor *valiantly* our Oath and Covenant of Citizenship.

Thank you. ⊙

Federal Bar Association

Welcome

W. West Allen

FBA National President

We are honored to announce that W. West Allen was installed as the FBA's 93rd National President during a live broadcast on October 1, 2020. Join us in congratulating him and the entire FBA FY2021 Board of Directors.

W. West Allen is an intellectual property litigator and counselor in Las Vegas who represents a wide variety of international clients in federal courts. West served as chair of the FBA's Government Relations Committee for seven years. He has served as a member of the FBA's Board of Directors for much of the past decade, serving two terms from 2011 to 2015 and from 2015 to 2018. In 2016, West received the FBA's President's Award for longstanding service to the FBA and as chair of its Government Relations Committee.

West served as an FBA Circuit Vice President (CVP) for the Ninth Circuit, where he assisted in the development of 16 FBA chapters from 2007 to 2013. During this time, West was twice elected to serve as the Chair of the Circuit Vice Presidents. In 2013, while serving as Government Relations Committee chair, West testified before the U.S. Senate Judiciary Committee regarding the effect of sequestration on the federal courts. He helped institute the FBA's annual "Capitol Hill Day" and taught at the FBA's annual leadership training. Prior to serving as an FBA national officer, West was the Nevada Chapter president from 2000 to 2001 and co-chair of the 2006 FBA National Convention held in Las Vegas. West has been a Life Fellow with the FBA Foundation since 2009.

To view the recorded broadcast, visit: www.fedbar.org/event/fy21installation

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A Historic First: Consultative Status for the FBA at the United Nations

By Bruce Moyer

Bruce Moyer is government relations counsel for the FBA.
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The year 2020 marks the 75th anniversary of the United Nations as well as the centennial of the FBA. This year also witnessed the beginning of a mutual relationship between the UN and the FBA. Specifically, on June 18, 2020, the UN Economic and Social Council (ECOSOC) granted "consultative status" to the FBA as a nongovernmental organization eligible to participate in policy dialogue with ECOSOC, its subsidiary bodies, human rights mechanisms of the UN, and special events of the General Assembly. With that action, the FBA joined a roster of several thousand nongovernmental organizations around the globe holding observer and participatory privileges in the world body.

The mission of the FBA and its fidelity to the rule of law properly align with the opportunities that UN consultative status will afford to the association. Indeed, the strengthening of the rule of law is embodied in the mission of ECOSOC and its focus on the capacity of democratic institutions to bolster human rights; eradicate poverty; and uphold the economic, social, and environmental dimensions of sustainable development.

What Does "Consultative Status" Mean?

Consultative status at the UN will permit credentialed FBA leaders and members to observe and participate in UN-sponsored events, meetings, and activities. With that opportunity will come a reciprocal obligation to inform the FBA membership of those proceedings and raise awareness about UN issues relevant to the federal legal community.

FBA consultative activity at the UN initially will involve observation and information-gathering. Over time, FBA activity may expand into more robust endeavors. Monitoring of ECOSOC meetings and debate also will provide information and intelligence to FBA members on international cooperative efforts relevant to treaties and other international agreements co-signed by the United States, as well as their impact on federal law and individuals and entities subject to U.S. jurisdiction

How Can Members Participate?

Because of the COVID pandemic, all UN meetings and events are being hosted virtually on the UN website (see UN.org.). When post-pandemic times arrive, in-person events at the UN will return to the use of ground passes for entry to facilities in New York, Geneva, and Vienna. A limited number of ground passes will be made available to the FBA. Further information can be found on the FBA website under the Government Relations tab.

A Tireless FBA Campaign

The history of the FBA's campaign for consultative status was an international marathon that began with the filing of the association's application with ECOSOC in 2016. Over the next three years, the FBA's application was delayed by questions from several countries, particularly China and Cuba. As time dragged on, the FBA took a more personal and direct approach, including my presentation in January 2020 to the ECOSOC Committee on Nongovernmental Organizations as well as talks with representatives of U.S., Chinese, and Cuban delegations. These efforts ultimately led to the NGO Committee's recommendation to approve the FBA's application on Feb. 7, 2020. ECOSOC approved the recommendation on June 18, 2020.

The FBA's acquisition of consultative status was the product of tireless effort by many FBA leaders, especially Judge Mimi Tsankov of the International Law Section, whose vision and dogged persistence and intellect sustained the effort. Other significant contributions came from the members of the FBA UN Consultation Task Force, the Southern District of New York Chapter, the Government Relations Committee, Michele Forzley, and Stacy King.

Now, a new opportunity exists for the FBA to advance the cause of peace and the rule of law. In the days ahead, we need to remain mindful that just, peaceful, and inclusive societies do not merely happen; they are the result of sustained effort by principled people. Even as the ideal of global governance falters, the need for international cooperation, respect for human rights, and multilateralism remains. ☉

Trial and Tchaikovsky: Harmony Across Litigation and Music

By Hope Forsyth

Hope Forsyth is vice president of the Northern/Eastern Oklahoma Chapter of the FBA. She is a trial and appellate associate at GableGotwals in Tulsa, Okla. Before graduating from law school in 2018, she interned for federal appellate, district, and magistrate judges in the Tenth Circuit. Forsyth is also a lifelong musician, an alumna member of Sigma Alpha Iota International Music Fraternity, and a first alto in the Tulsa Chorale, a nonprofit choral society of volunteer musicians.
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Attorneys do not have a monopoly on juries. Granted, we may hope and work for a monopoly on a specific jury's attention and judgment at a specific time in the pursuit of justice. Nevertheless, we share the experience of assessment by jury—and many other similarities—with another type of artist: musicians.

From the start of their professional training, both aspiring lawyers and aspiring musicians learn to integrate rich historical formation with swift current action. Law school is legendary for its entire-grade finals. After juris doctor candidates invest in intense study, outlining, and Socratic discussion reaching back to 18th-century Britain, their assessment comes down to a one-word command: Evaluate. Evaluate the applicable law and hypothetical facts from the past brought in a forum of law as it stands today. This educational system is preparation for practice. A fact finder or appellate panel does not amalgamate its decision from weekly pop quizzes and unit tests, but instead makes decisions based on counsel's real-time presentation of the case.

Musicians endure the same process. After music degree candidates invest in study, ear training, and hours of daily practice of music spanning centuries, their assessments come down to one word: Perform. Perform a piece composed in the past but brought by the student into the soundwaves of the world as it stands today.[1] Again, this system reflects preparation and practice. An audience may not be called on to make decisions the way a jury is, but it too relies on and comes to conclusions about a musician's real-time performance of a piece. It can't be an accident that educational assessments of a musician's skill are called juries.[2]

Like any comparison, of course, there are limits. A legal jury generally comprises laypeople with no background in the case or its features. These laypeople are examined through the *voir dire* process and restricted from outside research or discussion. A musical jury is comprised of the student's professors, who are far from unbiased laypeople and who have specialized training, education, careers, and experience to inform them.

I first noticed the intersections of legal and musical practice when I was earning my law degree and a dear friend was earning a graduate degree in violin performance. The jury comparison probably first arose over a glass of wine as we shared a sense of awed appreciation for the depth of the fields we were studying and a sense of intimidated urgency for the upcoming tests and performances we each faced. We understood the necessity of evaluation and the real-time qualities of practice but keenly felt the challenge to demonstrate mastery of three centuries of wisdom in three hours (me) or even three minutes (her). My older sister, who holds a degree in piano performance, shared similar insights from her college days. I went on to write my law review note on the significance of Russian neoclassical composer Dmitri Shostakovich in the development of American copyright law,[3] and I've continued to explore and appreciate the elegance of law, music, and their similarities as a practicing litigator.

Consider a piece of choral music. Much of Western choral music is based on familiar major and minor scales, but occasionally a modal or atonal piece appears—sometimes enticing and captivating, sometimes eerie and ominous. Whatever the piece, it depends on a collection of voice parts. Usually one voice part has the melody of the piece and the other parts carry various harmonies. The melody can move, however, from part to part during the piece. And within harmonies, voice parts may cue from other voice parts by beginning a phrase on the same note where another part concluded, exchanging motifs, or listening for the proper timing of a movement. Sometimes voice parts encounter dissonance: multiple notes that clash when played against each other. This dissonance may have a resolution, but it may well not.

Similarly, while much litigation falls into familiar areas, open questions and new considerations occasionally arise—sometimes attractive in their intrigue, sometimes unsettling in their risk of exposure to the client. Instead of a choir composed of multiple voice parts, litigation has multiple vocal parties. Like a melody shifting between vocal parts, burdens of proof or persuasion may shift depending on the elements

of claims or defenses. In complex litigation, rhetorical motifs may thread through similarly situated plaintiffs or a joint defense. And legal theories may strike dissonance: pleading in the alternative, an unexpected ruling, or a circuit split. Such dissonance may or may not see resolution.

Individual participation in law or music is both necessary and insufficient. To give the best performance possible, a choral singer must focus on several areas at once: his or her own notes, the other singers' notes, their harmonization under the careful eye of a conductor, and their impact on the audience. A choral piece will fail if individual singers are not acutely aware of their own responsibilities. No one wants a choir of singers who don't know their music. So too, however, will a piece fail if individual singers are *only* focused on their own responsibilities. If singers have tunnel vision, they will miss the space left by other parts' breathing or the voice leading in other sections that subtly but gracefully provides an on-ramp to their part's correct starting note. And beyond understanding what to expect the other parts *will* do, a singer must keep tabs on what the other parts *actually* do—all while keeping the ultimate goal and audience in mind.

Now consider the deposition process. An attorney taking a deposition is acutely aware of his or her strategy and the questions planned to get at the case's material issues. The goal is to not lose sight of those goals during the deposition: to employ that strategy, make a record of the deponent's testimony, and eventually put that testimony in harmony with an overarching theory of the case. At the same time, a deposition is an evolving situation with multiple other actors involved. Witnesses may stonewall or provide unexpected information. Opposing counsel may betray part of their case strategy through objections or the places where they look up with sudden interest. A strong deposition taker thus needs the dexterity to keep forward momentum with a planned strategy while studying, balancing, and responding to the opponents in the room—the same dexterity choral singers use to maintain both individual focus and responsive collaboration.

These are just some of the shared complexities between law and music on an individual level. The similarities on a broader level are striking as well. For instance, silence is as important as sound. Rests in music slow down tumultuous passages, allow for breaths and page turns, and give space to ponder unresolved harmonic tension. Open legal issues that remain for a later day because of ripeness issues, briefing strategies, or judicial restraint allow for the development of facts, the consideration of additional arguments, and the measured growth of jurisprudence. As Justice Ginsburg once described, "Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable."[4]

Both law and music originate and culminate as art, but both have a healthy dose of science in the middle. Advanced music theory resembles calculus more than Chopin, with frequencies, intervals, and scale degrees. This infrastructure generally isn't at the forefront of a song, but it supports compositions and brings order that turns noise into sound. Civil procedure resembles algebra more than Atticus, with statutes of limitation, burdens of proof, and joinder issues. This infrastructure is similarly unglamorous but essential, as it safeguards due process and brings order that turns trial by combat into adjudication.

Perhaps the cleverest combination of law and music is the brilliant comic opera *Scalia/Ginsburg*. Composer music and law professor Derrick Wang explained that as he read Scalia dissents for con law class in law school, he heard music. For him, opinions and opera intersected as "passionate, virtuosic [compositions] rooted in traditions of the 18th century."[5] He went on to write his own combination of law and music, "inspired by the opinions of U.S. Supreme Court Justices Ruth Bader Ginsburg and Antonin Scalia and by the 'operatic precedent' of Händel, Mozart, Rossini, Bellini, Verdi, Offenbach, Bizet, Sullivan, Puccini, Strauss, *et al.*"[6] The combination is epic. When the character of Justice Ginsburg sings of her living Constitution theory, the music evolves from opera to jazz to gospel pop, while Justice Scalia's lively dissenting is scored as an "originalist rage aria." These pairings provide an approachable and vivid introduction to constitutional jurisprudence while they simultaneously provide commentary on the interconnectedness of society, government, and media.

This interconnectedness can be seen in one final, overarching similarity for law and music: both are at once vaulted and mundane. Law, especially headline-making cases, often has an almost legendary or untouchable sense. Music, especially choral or orchestral music, often carries the connotation of luxury and inaccessibility. But while only a small percentage of America's population has walked the marble hallways of a federal appellate courthouse, almost everyone has stopped at a stoplight. And while only a small percentage of America's population has attended a [choose your own fancy philharmonic] concert, almost everyone has sung the happy birthday song. Certainly, there is room for improvement in accessibility to courts and concerts. But law and music fundamentally? They surround us, from the driver's licenses in our wallets to the songs stuck in our heads. ⊙

Endnotes

[1]Soundwaves may well be their own sort of forum. *See* Hope Forsyth, *Forum, in Digital Keywords: A Vocabulary of Information Society and Culture* 132 (Benjamin Peters ed., Princeton University Press 2016).

[2]*See Juries*, Eastman School of Music, https://www.esm.rochester.edu/facultystaff/handbook/juries/ (last visited July 7, 2020).

[3]Hope Forsyth, *Mutually Assured Protection: Dmitri Shostakovich and Russian Influence on American Copyright Law*, 53 Tulsa L. Rev. 559 (2018).

[4]Ruth Bader Ginsburg, My Own Words 239 (2016).

[5]TEDxTalks, *Scalia and Ginsburg on Broadway | Derrick Wang | TEDxBroadway*, YouTube (Apr. 14, 2016), https://youtu.be/opEVvTiuStU.

[6]Derrick Wang, *Scalia/Ginsburg: the opera*, http://www.derrickwang.com/scalia-ginsburg (last visited July 7, 2020). An early version of the opera's libretto was published in the Columbia Journal of Law & the Arts, formatted and footnoted in quintessential law review style. Derrick Wang, *Scalia/Ginsburg: A (Gentle) Parody of Operatic Proportions*, 38(2) Colum. J. of L. & the Arts 239 (2015). The libretto was updated after Justice Scalia's death, and the revised version's publication is forthcoming.

Federal Voter ID Lawsuits in North Dakota: A Victory for American Indian Voters

By Timothy Q. Purdon

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In fall 2012, Heidi Heitkamp defeated Congressman Rick Berg in the race for one of North Dakota's U.S. Senate seats. Heitkamp won the race by less than 2,900 votes. Heitkamp's campaign, North Dakota media, and pundits across the country credited her narrow victory to the massive support Heitkamp received from voters on the American Indian reservations in North Dakota. North Dakota's Republican-dominated state legislature was quick to respond. In the wake of Senator Heitkamp's election, the legislature enacted new voter ID requirements for North Dakota voters that made it more difficult for American Indians living on reservations in North Dakota to vote.

North Dakota is the only state that does not require voters to register in order to cast a ballot. North Dakota had allowed a voter without an ID to cast a ballot if (1) a poll worker could vouch for the voter's identity, or (2) the voter signed an affidavit stating that the voter was qualified to vote. In 2013, shortly after Senator Heitkamp's election, this changed radically as the North Dakota legislature replaced these fail-safes with new voter ID requirements. This new legislation mandated that a voter produce an ID that listed a residential street address in order to cast a ballot.[1] In practice, the North Dakota secretary of state and some county auditors required not only a residential street address but also that the residential street address match a "valid" address according to state records. The state's justification for requiring the residential street address was twofold: to prevent voter fraud and to verify that the voter was voting in the correct precinct. (It must be noted that the author served as U.S. attorney for the District of North Dakota from 2010 to 2015. During this time, the U.S. Attorney's Office for the District of North Dakota was not presented with a single instance of alleged voter fraud for prosecution under federal law in North Dakota.)

These new requirements made it more difficult for American Indians in North Dakota to vote. Many American Indians living on reservations in North Dakota lack state-issued IDs that list a residential street address. While the North Dakota Department of Transportation (DOT) provides IDs with residential street addresses, there is a not-insignificant cost payable to the DOT to obtain them. Further, in North Dakota, the American Indian reservations are often located a great distance from the nearest DOT facility that issues these IDs. These problems of cost and distance create particular challenges for American Indian voters in North Dakota. As such, many rely on an ID card issued by their tribal government. These tribal IDs frequently list only a P.O. box rather than a residential street address. This is, in part, because homes on many parts of the extremely rural and isolated portions of reservations in North Dakota simply do not have street addresses.

The disproportionate negative impact on American Indians' right to vote led a federal district judge in North Dakota to not once, but twice, enjoin enforcement of the residential street address requirement. Prior to the 2016 general election and again in early 2018 in advance of the 2018 general election, Judge Daniel L. Hovland found that the North Dakota voter ID laws, on their face, violated the U.S. Constitution and enjoined their enforcement. These rulings were made in a suit titled *Brakebill v. Jaeger* brought by the Native American Rights Fund and others on behalf of several members of the Turtle Mountain Band of Chippewa Indians.

The state appealed the 2018 *Brakebill* injunction and, in the summer of 2018, the Eighth Circuit Court of Appeals granted the Secretary of State's motion to stay the injunction pending appeal.[2] In October, 2018, the Supreme Court of the United States declined to intervene, over dissent by Justices Ginsburg and Kagan.[3] American Indian voters in North Dakota faced the prospect of attempting to vote in the 2018 general election under North Dakota's restrictive voter ID laws for the first time.

In the weeks leading up to the 2018 general elec-

tion, problems with the new voter ID requirements begin to arise. For example:

- Dion Jackson is an enrolled member of the Spirit Lake Nation who lives on the tribe's reservation. He submitted an absentee ballot application and included a state-issued ID with his residential street address. The county auditor rejected the application because this address "did not match the address in the ND DOT database or is an invalid address."
- Kara Longie is an enrolled member of the Spirit Lake Nation and lives on the tribe's reservation. When Ms. Longie entered her ID number and birthdate into the North Dakota "My Voting Information" online tool, the address she was given did not match the address on her state-issued ID.
- Leslie and Clark Peltier are a married couple, enrolled members of the Turtle Mountain Band of Chippewa Indians, and live on the tribe's reservation. The Peltiers live in Belcourt, N.D., and had been assigned an address by a poll worker when they voted in the 2012 election. This address matched their state-issued driver's licenses issued in 2013. However, when the Peltier's driver's license numbers and birthdates were entered into the North Dakota "My Voting Information" online tool, they too received an address different than that on their state-issued driver's license.
- Terry Yellow Fat is an enrolled member of the Standing Rock Sioux Tribe and lives on the tribe's reservation. Mr. Yellow Fat was assigned an address by the county 911 coordinator. This address does not match any street sign near his home, and packages shipped to this address never arrived. Mr. Yellow Fat had a tribal ID that only listed a P.O. box. He had no state-issued ID.

On Oct. 30, 2018, the author, lawyers from the Campaign Legal Center and the Native American Rights Fund, and others filed *Spirit Lake Nation v. Jaeger* on behalf of the Spirit Lake Nation and additional individual American Indian voters, including Mr. Jackson, Ms. Longie, Mr. and Mrs. Peltier, and Mr. Yellow Fat. The plaintiffs sought a third injunction from Judge Hovland preventing implementation of the North Dakota voter ID residential street address requirement. This effort was unsuccessful. In a ruling on Nov. 1, 2018, the court found that "the litany of problems identified in this new lawsuit were clearly predicable and certain to occur as the Court noted in its previous orders in *Brakebill v. Jaeger.*"[4] However "[b]ecause the election scheduled for November 6, 2018 is imminent," the court held that no injunction could be issued.[5]

What followed this ruling in North Dakota was a massive, costly effort by the Spirit Lake Nation; the Standing Rock Sioux Tribe; the Turtle Mountain Band of Chippewa Indians; and the Mandan, Hidatsa, and Arikara Nation to assign and certify residential street addresses and issue tribal ID cards listing these addresses to thousands of enrolled members. The cost of these efforts meant that scarce tribal resources that could have been used to pay for tribal elder nutrition programs, Head Start programs, law enforcement services, or other critical tribal needs were diverted to ensure that tribal citizens could vote. The state of North Dakota bore none of these costs. As a result of these efforts and the additional efforts of many tribal voting rights nonprofit organizations, and because of the massive local and national coverage of the negative impact of the North Dakota voter ID requirement on American Indian voters, voter turnout on reservations in North Dakota shattered records in 2018.

The *Spirit Lake Nation v. Jaeger* litigation continued. In late 2018, the Standing Rock Sioux Tribe joined the suit as a named plaintiff. In 2019, the tribal plaintiffs pushed to begin discovery in anticipation of the upcoming 2020 primary and general election. The court agreed and set a May 2020 trial date. In the wake of these rulings and the now impending trial date, the state agreed to settlement discussions. In February 2020, the secretary of state, individual *Brakebill* plaintiffs, the chair of the Spirit Lake Nation, and other members of the Spirit Lake Nation Council engaged in a 14-hour settlement conference mediated by former U.S. Magistrate Judge Karen Klein. As a result of these efforts, the parties agreed in principle to settle both *Brakebill v. Jaeger* and *Spirit Lake Nation v. Jaeger.*

On April 27, 2020, pursuant to this agreement, Judge Hovland entered a consent decree ending both suits. The consent decree orders sweeping reforms on how the secretary of state implements the residential street address requirements in North Dakota voter ID statutes. Specifically, the consent decree:

- Allows American Indian voters who do not have or do not know their residential street address to locate their residence on a map at the polls or when applying for an absentee ballot, and then be assigned an address by county officials so that their ballots will be counted.
- Ensures that tribal IDs and tribally-designated street addresses are accepted as valid for voting under the statute.
- Cements commitments made by state officials to seek reimbursement of the tribes' expenses in producing voter IDs.
- Requires state officials to coordinate with DOT to visit reservations prior to each election to provide access to state-issued IDs at no cost.

These are important reforms. They remove hurdles constructed to reduce the voting power of American Indians in North Dakota. As we look forward to the 2020 elections, the result of the North Dakota tribal voter ID litigation is an important reminder of the role of the federal courts in protecting the right of all Americans to vote. ⊙

Endnotes

[1]N.D.C.C. § 16.1-01-04.2.
[2]*Brakebill v. Jaeger,* 905 F.3d 553 (8th Cir. 2018).
[3]*Brakebill v. Jaeger*, 139 S. Ct. 10, 202 L. Ed. 2d 212 (2018).
[4]*Spirit Lake Tribe v. Jaeger*, No. 1:18-cv-222, 2018 U.S. Dist. LEXIS 186993, at *3 (D.N.D. Nov. 1, 2018).
[5]*Id*. at *1-*2.

Editorial Policy

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Voting Rights of Individuals With Disabilities

By Irina L. Vaynerman and Chelsea A. Walcker

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[Disclaimer: The views expressed in this article are the personal views of the authors and do not reflect the views of the authors' employers.]

Even in the midst of the COVID-19 pandemic, Americans across the country are preparing to vote in local, state, and national elections in November. In Minnesota, a group of lawyers, judges, and advocates have organized to ensure that the public understands that eligible voters include individuals with disabilities. These efforts have resulted in two significant national outreach initiatives—a free online resource repository and a free annual seminar available to lawyers and the public at large.

The Disability Justice Resource Center

The Disability Justice Resource Center (https://disabilityjustice.org/) is an online resource launched in 2014 from a *cy pres* fund to help the legal community better understand the unique and complex issues related to justice for individuals with disabilities, particularly those with developmental disabilities. It also is designed to help the legal community identify and eliminate biases against individuals with disabilities. The site offers resources on a range of disability justice topics—including voting rights, historical information, demographic data, continuing issues regarding segregation and discrimination, and courtroom access and accommodations. The themes of equal justice and civil rights are interwoven throughout the site and reflect the personal experiences of self-advocates—individuals with developmental disabilities speaking for themselves—as well as members of the legal profession.

The resource includes a compilation of video interviews of leading legal scholars, federal judges, elected officials, and disability rights self-advocates discussing the right to vote. Most recently, Minnesota Secretary of State Steve Simon was interviewed about this topic, and emphasized that, "[i]n Minnesota and everywhere else, our vote is our voice, and we need to make sure that everyone in Minnesota is given voice regardless of disability status." Self-advocate Karen Loven discussed what the right to vote meant to her in an interview with friend Judge Donovan W. Frank, U.S. district court judge for the District of Minnesota.* The videos of these interviews serve as a helpful resource for attorneys and members of the public who are searching for accessible tutorials on frequently raised issues in voting rights law.

The Disability Justice Seminar

For 10 years, the Minnesota Chapter of the FBA has partnered with the law firm Robins Kaplan LLP and the Minnesota Governor's Council on Developmental Disabilities to host an annual Disability Justice Seminar. The seminar educates the legal community about challenges facing people with disabilities and highlights the perspectives of self-advocates in the disability community. During the annual seminar, self-advocates share their experiences navigating the complex systems that create barriers for individuals with disabilities. By amplifying these stories, the seminar shifts the narrative and combats false assumptions about individuals with disabilities that permeate society.

Past seminars have addressed wide-ranging topics, such as "Access to Justice for Individuals with Disabilities," "Employment Barriers and Opportunities for Individuals with Disabilities," and "Who is Left Behind in the #MeToo Movement?" The seminars have regularly attracted over 150 attorneys and community members from across the country.

This year, the committee will be hosting an event about voting rights of individuals with disabilities. Although the event was scheduled for April 2020, it was postponed because of the pandemic and the related stay-at-home orders issued by Minnesota Governor Tim Walz. The group is looking forward to rescheduling the event in an online forum this fall. The seminar panelists will include:

- **Hon. Donovan W. Frank,** U.S. District Court Judge for the District of Minnesota
- **Kellianne Blood,** Self-Advocate, White Bear Lake, Minnesota
- **Steve Simon,** Secretary of State, State of Minnesota

- **Gregory G. Brooker,** Assistant United States Attorney, District of Minnesota
- **Irina L. Vaynerman,** Deputy Commissioner, Minnesota Department of Human Rights
- **Elizabeth R. Schiltz,** Herrick Professor of Law, University of St. Thomas School of Law
- **Tara C. Norgard,** Partner, Carlson Caspers, P.A.

In addition to discussing voting rights of individuals with disabilities, the panelists will discuss ways in which attorneys and advocates can become involved in the electoral process. If you are interested in attending, please visit https://www.fedbar.org/events/category/minnesota-chapter/list/ to receive event updates and register for the seminar.

Other Resources and Volunteer Opportunities

The Disability Justice Resource Center offers resources for those interested in becoming involved in disability justice initiatives and opportunities. As the pandemic exacerbates disparities across the country, the need for pro bono representation for individuals with disabilities has never been greater. As attorneys and members of the legal community, we have the privilege of being able to offer our services to a community that's been particularly affected by the pandemic. Please visit https://disabilityjustice.org/ensuring-adequate-legal-representation/ to learn more about pro bono and other volunteer opportunities available.

Although we do not know what the precise contours of going to the voting booth may look like this fall, election judges will continue to play a critical role on election day—ensuring that all eligible voters can place their ballots, including individuals with disabilities. As Secretary Simon explained, election judges serve a "vital function in our democracy." If you are interested in serving as an election judge, visit your secretary of state's website or workelections.com. ☉

**The full interviews are available at https://disabilityjustice.org/right-to-vote/minnesotas-voting-process/.*

Hon. Patrick J. Walsh (Ret.)

Former United States Magistrate Judge for the Central District of California, Judge Walsh is now available for mediations and arbitrations.

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Speak Up, Lawyers

By Alfred F. Belcuore

Alfred F. Belcuore, a member of the District of Columbia and Maryland Bars, is a past national president of the FBA, current president of the D.C. Chapter of the American Board of Trial Advocates, and an adjunct professor of Trial Practice at Georgetown University Law Center. He was a member of the District of Columbia Bar's committee that drafted the Voluntary Standards for Civility in Professional Conduct. The views presented in this column are those of the author. © 2020 Alfred F. Belcuore. All rights reserved.

Thirty years ago, analysts of the savings and loan scandals asked, "Where were the auditors?" Then came Enron, and we heard the same question. Now Trumpism demands, "Where are the lawyers?"[1]

In one sense, they are ubiquitous. Lawyers host their own public affairs talk shows. They are "talking heads" commenting on the day's news. They are members of Congress. And, of course, they are advisors on the air waves publicly advocating for their clients, including the president of the United States. Do the usual rules of "professional responsibility" govern these attorneys? Or, because they engage in the public arena, are they free to say whatever they wish, subject only to the constraints of libel law? Perhaps most importantly, if there are ethical foul lines for these public attorneys, and they cross them, must bystanders who are themselves lawyers do anything about it? Can remaining silent ever be unethical?

The Bounds of Good Behavior

Justice Benjamin Cardozo put it simply: "Membership in the bar is a privilege burdened with conditions."[2] The "conditions" are ethical codes, court rules, and laws regulating attorney behavior. Lawyers are licensees, and each state (and the District of Columbia) has its own licensing board responsible for disciplining its lawyers, always with the goal of maintaining the public's interest in honesty and integrity, respect for the rule of law, and zealous but fair advocacy. To help, since 1908 the ABA has been suggesting model ethical codes for regulatory bodies to adapt as their own mandates. Typical among these are the disciplinary rules for the District of Columbia, a jurisdiction issuing licenses to many of the lawyers now in the public eye.

The overriding grand command for all lawyers is to do nothing to cast doubt on their fitness to serve as lawyers. Not only does this cover serious criminal offenses reflecting adversely on trustworthiness—crimes like perjury—but it also reaches conduct that may not be subject to criminal prosecution. For example, the District of Columbia's Rule 8.4 broadly brands as "professional misconduct" behavior "involving dishonesty, fraud, deceit or misrepresentation," or conduct that "seriously interferes with the administration of justice." The conduct must rise to a level challenging a person's fitness to serve. Thus, the Comments to Rule 8.4 explain that, while personal instances of moral failure, such as adultery, may not qualify as professional misconduct, repeated personal failings, like frequently flouting the truth, may "indicate indifference to legal obligation" and so subject a lawyer to discipline.

More specific rules direct behavior in specific forums. As courtroom advocates, lawyers may not ignore binding authority, but may argue in good faith for its reversal; they may not falsify evidence but may apply it in ways most helpful to their clients. As advisors, lawyers must render candid advice, founded upon their independent judgment, even if honest advice may be "unpalatable" to the client. Always, as spokespersons for their clients, lawyers may not knowingly make false statements of material fact or law to the public.

Each jurisdiction's disciplinary rules are requirements, not aspirational goals. But, hoping for less hostility in discourse, judges and bar leaders also have published guides for fostering civility in the practice of law. These "Civility Codes" began to appear with increasing frequency in the 1990s. Once again, the District of Columbia is typical, and its Code admonishes that civility in professional conduct "is the responsibility of every lawyer," and that failure to exercise self-control when participating in the legal process "demeans the legal profession, undermines the administration of justice, and diminishes respect" for the rule of law. Lawyers may not "knowingly misrepresent, mischaracterize, misquote, or miscite facts or authorities." They must avoid conduct undermining our system of justice and "the public's confidence" in it, and to this end, must advise their clients "to act civilly and respectfully toward" judicial authority. Even in the heat of litigation, lawyers may not "degrade the intelligence, ethics, morals, integrity or personal behavior of others"—unless such attributes "are legitimately at issue in the proceeding." In short, cheap shots demean the profession and are not acceptable.[3]

Everywhere the Lawyer Goes, the Rules Are Sure to Follow

Lawyers appearing on television or in other public but "non-legal" forums enjoy no blanket immunity from rules governing good behavior. Even when not representing a client, a lawyer must honor the obligation to

avoid fraudulent, deceitful, or other conduct reflecting adversely on the lawyer's integrity or fitness as a lawyer. As the D.C. Court of Appeals has admonished, "Lawyers have a greater duty than ordinary citizens to be scrupulously honest at all times ...."[4]

There may be a rare exception when a lawyer, acting pursuant to lawful authority, must deceive to serve the lawyer's official governmental duties; the D.C. Bar offers the example of a CIA lawyer whose work requires concealment of the lawyer's clandestine work, or falsification of identity, employment status, or fidelity to the United States. But, the D.C. Bar notes, even in such an extreme circumstance, if there is a competing obligation—like the duty to testify truthfully before Congress—the lawyer may not misrepresent the truth.[5]

Enforcing this principle is not an academic exercise. In the 1980s, Elliott Abrams, a member of the D.C. Bar, was assistant secretary of state for Inter-American Affairs. In 1991, he pleaded guilty to misleading Congress in unsworn testimony, given in his official capacity, in connection with the Iran-Contra matter. He was convicted based on his plea, but thereafter received a full and unconditional pardon from President George H.W. Bush. Notwithstanding that pardon, the District of Columbia Court of Appeals imposed discipline (public censure) for his misconduct. The act of dishonesty, not the conviction, was the predicate for the discipline, the court ruled, and "No moral character qualification for Bar membership is more important than truthfulness and candor."

Mr. Abrams is not the only lawyer whose public statements, though not made while representing a client or appearing in court, earned professional discipline. A generation earlier, former Attorney General Richard Kleindienst was disciplined for misleading Congress during his confirmation hearings. The subject, once again, was a highly charged, politically volatile matter, a Watergate-related allegation of presidential intrusion into the Justice Department's conduct of pending antitrust litigation.

That it was Congress these lawyers misled did not drive their discipline; it was their dishonesty. Similarly, President Bill Clinton was suspended from the Arkansas Bar, not for his misbehavior with Monica Lewinsky, but for giving deceptive testimony about it at a deposition. Lawyers have been disciplined for making false statements on a resume, lying on an application for a bank loan, and even plagiarism. In all cases, the paramount concern is the public's perception of the profession and assuring the integrity of those who serve in it.[6]

The Greater the Visibility, the Greater the Need for Vigilance

Because these rules are intended principally to preserve public trust in lawyers and respect for the rule of law, special responsibility attaches to those acting on the public stage. Like it or not, legal media stars carve an image for all lawyers.

In 2017, lamenting about his pick for attorney general of the United States, President Trump famously asked, "Where's my Roy Cohn?" The president's plea summons the model of a notorious lawyer disbarred in the 1980s for multiple acts of fraud and deceit. Mr. Cohn's adversarial style was that of Rambo overdosing on steroids, not marked by fidelity to law or order.[7]

When Senator Lindsey Graham, a lawyer, former Air Force attorney, and current chair of the Senate Judiciary Committee, proclaims before President Trump's impeachment trial that "I am trying to give a pretty clear signal I have made up my mind[;] I'm not trying to pretend to be a fair juror here," and then on national television solemnly swears "[s]o help me God," that he "will do impartial justice," one wonders what the lesson is for citizens taking similar oaths before serving as jurors in the courts of this nation.[8]

As a lawyer's conduct becomes more public and provocative, scrutiny becomes more likely, as these contemporary examples illustrate.

Presidential advisor Kellyanne Conway is a member of the District of Columbia Bar, though the bar's website shows her status (listed under her maiden name, Fitzpatrick) as administratively suspended for nonpayment of dues. According to published reports, in 2017, Abbe Smith, professor of Lawyers' Ethics at Georgetown Law, with law professors from 11 other law schools, filed a disciplinary complaint against Ms. Conway. Their complaint alleged that Ms. Conway knowingly had made false public statements, including those proffering a nonexistent "Bowling Green Massacre" to justify President Trump's ban on immigrants from certain countries; had touted the force of "alternative facts" when discussing other events; and had violated government ethics rules by endorsing Ivanka Trump products from the White House briefing room.

U.S. Attorney General William P. Barr is also a member of the D.C. Bar. According to published reports, in 2019, New Jersey Congressman Bill Pascrell Jr. filed a complaint suggesting that Mr. Barr be disciplined for professional misconduct. The complaint alleged, among other things, that Mr. Barr had deliberately misrepresented, to the public and to Congress, Special Counsel Mueller's findings relating to the investigation about Russian interference in the 2016 presidential election.

Rudy Giuliani, perhaps the most media-friendly lawyer in recent times, has been a member of the New York and District of Columbia Bars (though until recently, the D.C. Bar listed his membership type as "inactive," which the bar applies to those who "are eligible for active membership but do not practice, or in any way hold themselves out as licensed to practice, in the District of Columbia"). According to published reports, in 2019, Representative Kathleen Rice, from New York, filed a complaint with the New York authorities and asked that a disciplinary proceeding be initiated. Her complaint alleged misconduct by Mr. Giuliani, acting as President Trump's personal attorney, in connection with matters involving Vice President Biden and Ukraine.[9]

Of course, the complaints against Ms. Conway, Attorney General Barr, and Mr. Giuliani contain unproved allegations, not findings of fact or conclusions of law. The complaints have either been dismissed or remain pending. There are no published reports that any of these three lawyers have been disciplined; and unless there has been an informal admonition or the start of formal disciplinary proceedings, the D.C. Bar's Disciplinary Counsel will neither confirm nor deny even the filing of a disciplinary complaint. Similar confidentiality rules apply to disciplinary proceedings in New York. But it is not surprising that such highly visible behavior has generated review against the standards governing behavior of all lawyers.[10]

A Duty to Stand Up for the Profession

Complaints about a lawyer's conduct usually come from a client. They may come from a judge or member of the public, or arise from an investigation conducted by a licensing authority on its own initiative. But they must also come from other lawyers.

All lawyers share an obligation to enforce their profession's ethical

standards. The ABA's earliest Model Code, published in 1908, contained a model rule, titled "Upholding the Honor of the Profession," that exhorted lawyers to "expose without fear or favor ... corrupt or dishonest conduct in the profession" and to "strive at all times to uphold the honor and to maintain the dignity of the profession ...." A classic text from the early 1950s, Henry S. Drinker's "Legal Ethics," emphasized the lawyer's obligation to the public "always" "to uphold and maintain" the "honor and dignity" of the bar and listed among a lawyer's "cardinal loyalties" the "constant obligation to see to it that no unfit person" continues to serve as a member of the bar. Indeed, in his seminal essay on "The Five Functions of the Lawyer," former law school dean, ABA president, and chief justice of the state of New Jersey Arthur T. Vanderbilt wrote, "The third task of the great lawyer is to do his part individually and as a member of the organized Bar to improve his profession, the courts and the law."[11]

In the District of Columbia, Disciplinary Rule 8.3 requires a lawyer to report another's violation to "the appropriate professional authority" in certain circumstances. Informing on a lawyer is necessary if the reporting lawyer "knows" a violation has occurred and if the violation, if proved, would be serious enough to raise a "substantial question" about the misbehaving lawyer's "honesty, trustworthiness, or fitness as a lawyer in other respects."

The system thus contemplates responsible self-regulation, with those prompting investigation of a lawyer's professional conduct, at least in the first instance, themselves serving the public's interest. Ultimately, the "appropriate professional authority" comprises a Disciplinary Bar Counsel and a disciplinary committee, with authority for final decisions on discipline residing with judges, and occurring only after appropriate protection afforded by due process of law.

To be sure, there are exceptions to this rule. A lawyer need not report if the basis is only a suspicion that another lawyer has committed a serious violation; there must be knowledge that the act occurred. Nor does a merely negligent act require reporting; the conduct must rise to the level of a violation of a disciplinary rule. And there need not be a report if doing so would violate the reporting attorney's duty of confidentiality to his or her own client. But when reporting is required, failing to inform the "appropriate professional authority" is as much a violation of the disciplinary rules as the conduct prompting the duty to report.

It may be distasteful, or otherwise unpleasant, to report a colleague. And indeed, the rule imposing this duty has not received rigorous enforcement; the nation's published cases are few and far between. But in 2005, when disciplining a lawyer for knowing of but failing to report another's misconduct, the Supreme Court of Louisiana emphasized that the duty to report "is the foundation for the claim that we can be trusted to regulate ourselves as a profession." "If we fail in our duty," the court added, "we forfeit that trust and have no right to enjoy the privilege of self-regulation or the confidence and respect of the public."[12]

Debates Can Continue

That special rules apply to lawyers should not inhibit the robust exchange of ideas the First Amendment intends. Lawyers who are commentators and talk show hosts—and there are several, all along the political spectrum—are free to share their opinions, argue in good faith for changes in the law, and urge whatever public policies they wish. But their positions must be informed by facts grounded in truth, not "alternative" reality. And, mindful of their oaths upon admission to the bar, lawyers must honor the Rule of Law, and should debate their views vigorously but civilly within its bounds. These are the obligations of a law license.

The consequences for ignoring the rules are steep, with loss of public trust in law the most severe among them. Today, for example, when the attorney general of the United States takes a controversial position, whether it be regarding the prosecutions of Roger Stone or Michael Flynn, or the investigation of alleged insider trading by public officials who have oversight responsibility over the executive branch, commentators question whether the motives are political, at war with the attorney general's mission to represent the United States, not a particular office holder. This cynicism ill serves the administration of justice.

There are times of national political and legal crisis, such as the "Watergate" period nearly 50 years ago, when lawyers, and particularly D.C. lawyers, are called to action. Speaking up may be following the moral imperative of a personal sense of right and wrong, or the ethical rules binding all lawyers, or both. But silence is far from golden. ⊙

Endnotes

[1]For the questions about professionals in the savings and loan and Enron matters, see Leslie Wayne, *Where Were the Accountants?,* N.Y. Times, Mar. 12, 1989, at A.1; *Lincoln Savings & Loan Ass'n v. Wall*, 743 F. Supp. 901, 919-921 (D.D.C. 1990); Reps. John D. Dingell, Edward J. Markey, & Ron Wyden, *Where Were the Auditors?*, The Washington Post, Dec. 25, 1992, at A19; Reed Abelson & Jonathan D. Glater, E*nron's Collapse: The Auditors; Who's Keeping the Accountants Accountable?*, N.Y. Times, Jan. 15, 2002, at C.1.

[2]Justice Cardozo wrote these words as a Judge on the New York State Court of Appeals. *See In re Rouss*, 221 N.Y. 81, 84, 116 N.E. 782, 783 (1917), *cert. denied*, 246 U.S. 661 (1918).

[3]The District of Columbia Rules of Professional Conduct appear at https://www.dcbar.org/bar-resources/legal-ethics/amended-rules/index.cfm. The District's Voluntary Standards for Civility appear at https://www.dcbar.org/bar-resources/legal-ethics/voluntary-standards-for-civility/index.cfm. The text refers to Rules 2.1, 4.1, and 8.4 of the Rules of Professional Conduct and to the Preamble and Principles 25-28 of the Standards for Civility.

[4]The quotation from the D.C. Court of Appeals is from *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc). The same principle is discussed in *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc), and *In re Kennedy*, 542 A.2d 1225, 1228 (D.C. 1988).

[5]The exception allowing deceit is discussed in D.C. Ethics Opinion No. 323 (2004) (Misrepresentation by an Attorney Employed by a Government Agency as Part of Official Duties).

[6]For the disciplinary actions involving Messrs. Abrams and Kleindienst, *see In re Abrams*, 689 A.2d 6 (D.C. 1997) (en banc); and *District of Columbia Bar v. Kleindienst*, 345 A.2d 146 (D.C. 1975). An account of President Clinton's suspension appears at https://www.nysun.com/national/clinton-eligible-once-again-to-practice-law/25965/. The other examples of discipline for false statements are noted in *In re Hadzi-Antich*, 497 A.2d 1062, 1063 (D.C. 1985); *In re Kennedy*, 542 A.2d 1225, 1227-1228 (D.C. 1988).

[7]For President Trump's question about "my Roy Cohn," *see* Michael S. Schmidt, *Obstruction Inquiry Shows Trump's Struggle to Keep Grip on Russia Investigation,* N.Y. Times, Jan. 4, 2018, https://www.nytimes.com/2018/01/04/us/politics/trump-sessions-russia-

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mcgahn.html?searchResultPosition=1. Mr. Cohn's disbarment is reported at *In re Cohn*, 118 A.D.2d 15, 503 N.Y.S.2d 759 (1986). *See also* Marie Brenner, *Deal With The Devil,* VANITY FAIR, August 2017.

[8]For Senator Graham's statement, see https://www.cnn.com/2019/12/14/politics/lindsey-graham-trump-impeachment-trial/index.html; and https://www.washingtonpost.com/politics/lindsey-graham-not-trying-to-pretend-to-be-a-fair-juror-here/2019/12/14/dcaad02c-1ea8-11ea-b4c1-fd0d91b60d9e_story.html. The oath Senator Graham and every other Senator took before the impeachment trial is set out in Rule XXIV of the Senate Rules.

[9]The D.C. Bar reports membership status and type in the "Find a Member" section on its website. *See* https://www.dcbar.org/index.cfm. "Inactive" membership is defined at https://www.dcbar.org/membership/classes-of-membership.cfm. The law professors' complaint against Ms. Conway is available at https://assets.documentcloud.org/documents/3474086/Read-the-misconduct-complaint-sent-by-law.pdf. Rep. Pascrell's complaint against Attorney General Barr is available at https://pascrell.house.gov/uploadedfiles/pascrell_dc_bar_letter.pdf. An account of Rep. Rice's complaint against Mr. Giuliani appears, among other places, in the *Wall Street Journal* at https://www.wsj.com/articles/new-york-congresswoman-seeks-disbarment-of-giuliani-11571430630.

[10]In response to a question on the status of the complaints in the District of Columbia against Ms. Conway and Attorney General Barr, D.C.'s Disciplinary Counsel informed that, under the D.C. Bar Rules, "until we either file a petition initiating formal proceedings or issue an informal admonition, a form of discipline ... we neither confirm nor deny that we have received disciplinary complaints." D.C.'s confidentiality provision appears within Rule XI of the D.C. Bar Rules. New York's Rules also provide for the confidentiality of "disciplinary proceedings and investigations," 22 NY-CRR § 1240.18, and no response was received to a request to the New York Attorney Grievance Committee about the status of Rep. Rice's complaint against Mr. Giuliani.

[11]*See* Canon 29 from the ABA's 1908 Code, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/1908_code.pdf. The quote from Drinker's text appears at H. DRINKER, LEGAL ETHICS 6, 59 (1953). Chief Justice Vanderbilt's article, *The Five Functions of the Lawyer,* appeared in the American Bar Association Journal, 40 Am. Bar. Assoc. J. 31 (Jan. 1954), and is reproduced in THE LAWYER'S TREASURY 211-222 (E. Gerhart ed. 1956).

[12]The quotation from the Supreme Court of Louisiana appears in *In re Riehlmann*, 891 So. 2d 1239, 1249 (La. 2005).

The Unstable Constitutional Ground of the Religious Freedom Restoration Act of 1993

By Armen Kharazian

Armen Kharazian is a member of the District of Columbia Bar and the owner of the Law Offices of Armen Kharazian PLLC. His practice includes matters related to the Foreign Corrupt Practices Act and anti-money laundering statutes; the Foreign Agents Registration Act and Lobbying Disclosure Act; 18 U.S.C. § 207 (Restrictions on former officers, employees, and elected officials of the executive and legislative branches); and corporate formation in D.C. He received his J.D. from the University of the District of Columbia David A. Clarke School of Law, an M.A. in security studies from Georgetown University, and a B.A. in Middle Eastern studies from Yerevan State University in Armenia. He is on the board of the DC Chapter of the FBA.

This commentary addresses the constitutional implications of the Religious Freedom Restoration Act of 1993 (RFRA).[1] Congress enacted RFRA to protect and enforce the constitutional right of the free exercise of religion against federal and state regulation. RFRA's authority derived from the Necessary and Proper Clause of the U.S. Constitution, as applied to the federal government, and the Fourteenth Amendment of the U.S. Constitution, as applied to the states.[2] In *City of Boerne v. Flores,*[3] the U.S. Supreme Court held RFRA unconstitutional as applied to the states because it violated the principles of separation of power and federal-state balance. RFRA's applicability to federal law, however, was never directly challenged.

This commentary argues that RFRA can also be held unconstitutional with respect to federal law, on the grounds that the reliance by Congress on the Necessary and Proper Clause was flawed, because that clause was designed to expand government powers, not restrict them.[4]

Background

Congress passed RFRA in response to the U.S. Supreme Court's decision in *Employment Div., Dep't of Human Res. of Oregon v. Smith.*[5] That decision held that the Free Exercise Clause did not relieve an individual of an obligation to comply with a law of general applicability, which only incidentally forbade or mandated an act against that person's religious prescriptions. The Court also held that the First Amendment would bar the application of a neutral law of general applicability over a free exercise claim, only if such claim were accompanied by a claim of another violation of a constitutional protection. The stated purpose of RFRA was "to restore the compelling interest test as set forth in *Sherbert v. Verner*[6] and *Wisconsin v. Yoder*[7] and to guarantee its application in all cases where free exercise of religion is substantially burdened ...."[8]

Analysis of RFRA'S Applicability to Federal Law

Historically, courts have neither directly addressed nor properly analyzed the constitutionality of RFRA as applied to federal law. Although the Court in *Burwell v. Hobby Lobby Stores, Inc.*[9] discussed the effect of RFRA on federal legislation, it did so in the context of issues involving statutory interpretation and the level of scrutiny. The court never reached the more profound issue of constitutionality of RFRA, as applied to federal law.

The problem with RFRA, however, is the integrity of the constitutional basis from which it draws authority to prevent or preempt federal law—the Necessary and Proper Clause.

The clause states that Congress shall have the power "[t]o make all Laws ... necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[10] These powers are specific and limited.[11] The federal government may claim no other powers than those specifically reserved for it in the Constitution because it is a government of limited powers.[12] These powers do not include the power to enforce the free exercise of religion, with the exception of the power to enforce the Fourteenth Amendment protections on the states, which, however, the court in *Boerne* held unconstitutional.

Free exercise of religion is a First Amendment freedom—a category entirely different from the powers of the government. Whereas the Necessary and Proper Clause is designed to enforce federal powers, the Free Exercise Clause is designed to limit them.[13] Therefore, RFRA's constitutional authority to preempt or prevent federal law is lacking, if based solely on the Necessary and Proper Clause.

For comparison, Congress derived its authority to enact the Civil Rights Act of 1964[14] from (1) the Commerce Clause,[15] enforced through the Necessary and Proper Clause; (2) the Fourteenth Amendment

Equal Protection Clause and the power under its § 5,[16] enforcing the amendment's protections in the states; and (3) the Fifteenth Amendment, protecting voting rights, and its enforcement clause in § 2.[17] All these sources of authority relied on enforcement powers specifically afforded in the Constitution. Congress, however, has no such power to enforce the Free Exercise Clause over the federal government by invoking the Necessary and Proper Clause without first invoking another underlying constitutional power.

The plain language and statutory construction all but preclude support for the proposition that RFRA's protections, as applied to federal law, are proper under art. I, sec. 8, cl. 18. Therefore, a review of congressional intent may help.

The pertinent Senate Report[18] makes no reference to the Necessary and Proper Clause. Rather, it limits the authority of Congress to enact the statute to § 5 of the Fourteenth Amendment. In fact, chapter V(h) of the report, titled *Constitutional Authority to Enact the Act,* focuses exclusively on § 5 of the Fourteenth Amendment, discussing the power of Congress "to enforce by appropriate legislation" the provisions of the [Fourteenth] amendment "with respect to State governments . . . ."[19]

In contrast, the corresponding House Report[20] declares both art. I, sec. 8, cl. 18, and sec. 5 of the Fourteenth Amendment sources of authority for Congress's enactment of RFRA.[21] The report states that: "The Supreme Court has repeatedly upheld such congressional action after declining to find constitutional protection itself,"[22] citing *South Carolina v. Katzenbach*, [23] *Oregon v. Mitchell*,[24] *City of Rome v. United States*,[25] and *Thornburg v. Gingles*.[26]

However, *Katzenbach* and *Mitchell* concerned the Voting Rights Act of 1965,[27] which Congress enacted by properly drawing authority from the enforcement clauses of the Fourteenth and Fifteenth Amendments. *City of Rome* and *Thornburg*, too, concerned the Voting Rights Act and the power of Congress to enact legislation under the Fifteenth Amendment. None of the cases referred to in the House Report involved Congress's invocation of the Necessary and Proper Clause to enact a statute that enforces a First Amendment freedom. Therefore, all the cases above must be distinguished from RFRA.

Within the CRS Report[28] on draft bills H.R. 1308 and S. 578[29] there is a section titled "Congressional Power to Enact."[30] Here, the report states that § 5 of the Fourteenth Amendment is the proper authority for Congress to enact a law that would incorporate and apply to states the due process clause of the Fourteenth Amendment, "the "liberty" portion of which applies the religious freedom protections of the First Amendment"; and that art. I, sec. 8, cl. 18 is the proper constitutional authority for Congress to enact RFRA with respect to the federal government. The CRS Report, however, cites to the same case law as H.R. Rep. 103-88 did (*Mitchell, City of Rome,* and *Thornburg, as well as Katzenbach v. Morgan*[31]), and only in connection with RFRA's effect on the states. H.R. Rep. 103-88, on the other hand, claims that these cases offer direct support for Congress's authority to enact laws in connection with both the states and the federal government—an assertion this commentary contests and disproves.

The CRS Report mentions *Morgan* one more time, where it admits that *Morgan* concerns § 5 of the Fourteenth Amendment, but draws a parallel between that authority and art. I, sec. 8, cl. 18. The parallel, also cited in *Morgan*, may be misleading, if not properly construed. In the relevant part, *Morgan* states: "By including s 5 [of the Fourteenth Amendment] the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, s 8, cl. 18." [32] *Morgan* then explains "the reach of those powers" by referring to the "classic formulation" articulated by Chief Justice Marshall in *McCulloch v. Maryand*.[33]

Evidently, the court in *Morgan* simply compares the scope of powers afforded Congress under § 5 of the Fourteenth Amendment, and art. I, sec. 8, cl. 18, as they apply, respectively, to the states and the federal government. It is true that in *McCulloch*, Chief Justice Marshall discussed the constitutionality of powers under art. I, sec. 8, cl. 18, but to suggest that he equated these powers with those under § 5 of the Fourteenth Amendment is misleading. In fact, in the same opinion, Chief Justice Marshall affirmed the purpose of the Necessary and Proper Clause as an instrument to enforce government powers, not to restrict them.[34]

RFRA's principal operational paragraph, § 3 (a) states: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability ..." By limiting the powers of the government, Congress contradicts the purpose of the constitutional provision, from which it claims to derive its authority.

Conclusion

RFRA's constitutional authority to prevent or preempt federal law is flawed because the Necessary and Proper Clause of article I, section 8 of the Constitution, from which it claims to derive such authority, applies to the powers of the government, not to the Bill of Rights. The Necessary and Proper Clause is construed as designed to expand these powers, not to contract them. Similar statutes enforcing and expanding constitutional protections, such as the Civil Rights Act of 1964, have relied on properly drawn constitutional authority, which, unlike RFRA, have included specific enumerated powers of § 8 when seeking enforcement under its Necessary and Proper Clause, and protections under the Fourteenth and Fifteenth Amendments, which are specifically endowed with respective enforcement clauses. For the foregoing reasons, RFRA's claim of constitutional authority under the Necessary and Proper Clause of article I, section 8 of the Constitution is invalid, and may be held unconstitutional, if properly challenged in the courts. ⊙

Endnotes

[1]Religious Freedom Restoration Act of 1993, Pub.L. 103–141, 107 Stat. 1488.
[2]*See*, *e.g.*, H.R. REP. No. 103-88, at 9 (1993).
[3]*City of Boerne v. Flores*, 521 U.S. 507 (1997).
[4]*See McCulloch v. Maryland*, 17 U.S. 316, 419-21 (1819).
[5]*Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).
[6]*Sherbert v. Verner*, 374 U.S. 398 (1963).
[7]*Wisconsin v. Yoder*, 406 U.S. 205 (1972).
[8]Religious Freedom Restoration Act, § 2(b)(1).
[9]*Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).
[10]U.S. Const. art. I, § 8, cl. 18.
[11]The "foregoing and all other Powers" involve the powers enumerated in article I, section 8; powers reserved for the Executive (Article II) and the Judiciary (Article III); powers outlined in Articles IV, V and VI; and those in the Amendments to the Constitution concerning Congress's power to enforce certain

fundamental and civil rights under respective Amendments, where such power is specifically reserved.

[12]*See* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[13]*See* U.S. Const. amend. I.

[14]*Civil Rights Act of 1964*, Pub.L. 88-352, 78 Stat. 241.

[15]U.S. Const. art. I, § 8, cl. 4.

[16]U.S. Const. amend. XIV, § 5.

[17]U.S. Const. amend. XV, § 2.

[18]S. REP. No. 103-111 (1993), U.S.C.C.A.N. 1892.

[19]*See id.*, at 13-14, U.S.C.C.A.N. 1892, at 1903.

[20]H.R. REP. No. 103-88.

[21]The report states: "[T]he Committee believes that Congress has the constitutional authority to enact H.R. 1308. Pursuant to Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause embodied in Article I, Section 8 of the Constitution, the legislative branch has been given the authority to provide statutory protection for a constitutional value when the Supreme Court has been unwilling to assert its authority. The Supreme Court has repeatedly upheld such congressional action after declining to find a constitutional protection itself. However, limits to congressional authority do exist. Congress may not (1) create a statutory right prohibited by some other provision of the Constitution, (2) remove rights granted by the Constitution, or (3) create a right inconsistent with an objective of a constitutional provision. Because H.R. 1308 is well within these limits, the Committee believes that in passing the Religious Freedom Restoration Act, Congress appropriately creates a statutory right within the perimeter of its power." *Id.*, at 9.

[22]*Id.*

[23]*South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

[24]*Oregon v. Mitchell*, 400 U.S. 112 (1970).

[25]*City of Rome v. United States*, 446 U.S. 156 (1980).

[26]*Thornburg v. Gingles*, 478 U.S. 30 (1986).

[27]Voting Rights Act of 1965, Pub.L. 89–110, 79 Stat. 437.

[28]David M. Ackerman, *CRS Report for Congress: The Religious Freedom Restoration Act and The Religious Freedom Act: A Legal Analysis* (Cong. Research Serv. Doc. 92-366A) (1992).

[29]House and Senate versions of the bill subsequently enacted into law as P.L. 103-141, Religious Freedom Restoration Act of 1993.

[30]*See* Ackerman, *supra* note xxviii, at 30.

[31]*Katzenbach v. Morgan*, 384 U.S. 641 (1966).

[32]*Id.* at 650-51.

[33]*McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

[34]Chief Justice Marshall wrote: "We think so for the following reasons: 1st. The clause is placed among the powers of congress, not among the limitations on those powers. 2d. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been, or can be assigned, for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. . . . If . . . their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these. 'In carrying into execution the foregoing powers, and all others,' &c., 'no laws shall be passed but such as are necessary and proper.' Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect." *Id.* at 419-20.

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Hon. Alan D Albright

District Judge, Western District of Texas

by David R. Schleicher

David R. Schleicher, of the Schleicher Law Firm, PLLC, is licensed in Washington, D.C., Texas, and Washington State. His practice typically is split evenly between representing business and nonprofits in Texas and then, in job-related disputes, federal employees around the world. His legal work has been covered in the *Washington Post, Washington Times,* and *Federal Times,* among others. He previously authored judicial profiles of Judges Walter Smith and Fred Biery for *The Federal Lawyer.* He may be reached at david@gov.law or david@corplawfirm.com.

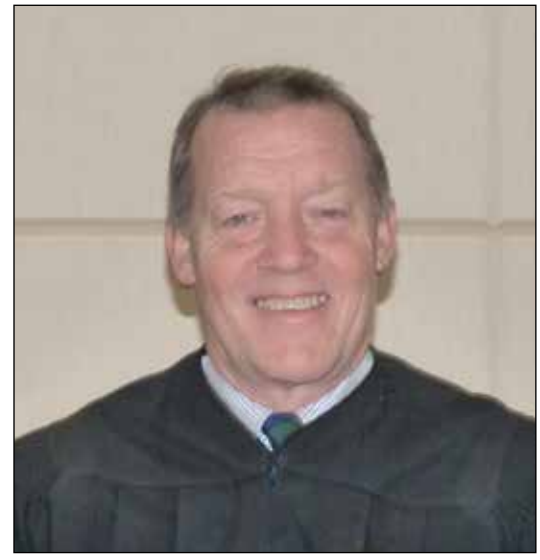
With a father who was a Marine and a mother who was a nurse, it is no shock that the arc of Alan D Albright's career has bent toward public service. What is surprising is that as many new patent suits are now being filed in the Western District of Texas as in Delaware federal courts, with some 95 percent of those on Judge Albright's docket as the sole district judge for the Waco Division.

A review of parties to new patent case filings assigned to Judge Albright in February 2020 reveals a who's who of modern commerce: Amazon, Apple, Best Buy, Google/YouTube, Intel, Microsoft, Samsung, Sony, Uber and, yes, even Victoria's Secret. In his short time on the bench since September 2018, Judge Albright's court has seen more new patent cases than are known to have been heard in the entire prior history of the Waco Division.

Waco, with a Metropolitan Service Area of about 275,000, is best known in recent years for its residents Chip and Joanna Gaines. While their *Fixer Upper* show and Magnolia™ brand bring about 2.7 million visitors a year to town, the increase in patent filings means that law firms are also visiting and setting up shop in Waco. Among these are Carstens & Cahoon, LLP; Gray Reed & McGraw, LLP; and Patterson + Sheridan, LLP, all due to Judge Albright's willingness—really, eagerness—to take on patent and other intellectual property litigation.

Other firms, such as Tindel and Thompson, LLP—with headquarters in the historic patent haven of the Eastern District of Texas—are joining with local firms (in this case, Haley & Olson) to operate Waco-based patent litigation offices. Existing Waco firms, such as Naman Howell Smith & Lee, have added patent lawyers. Given that Dallas is 100 miles to the north on Interstate 35 and Austin the same distance in the other direction, many patent firms in those cities are handling the Waco cases from their existing offices.

With Austin also part of the Western District of Texas, Judge Albright has been holding *Markman* (patent claim construction) hearings in that city for the convenience of counsel who are flying in from out of state. He uses the hour-and-a-half Waco to Austin drive to listen to audio of briefs in his cases—welcoming but not requiring such submissions from counsel appearing before him. This reflects his overall



approach to his docket: innovate where appropriate and give each case the attention it deserves. (Beyond supplementing briefs with audio versions, he also prefers additional copies of briefs and motions to be emailed in Word to the law clerk.)

What else should a lawyer trying a patent case before Judge Albright expect? (1) Discovery will be limited until the *Markman* hearing. (2) The *Markman* hearing typically will occur within six months from the filing of the suit. (3) Judge Albright will be readily available by phone to resolve discovery disputes and other pre-trial matters. (4) Settings will tend not to get bumped, and rulings on intermediate matters will be issued promptly. (5) A jury trial will be held within about 18 months from the case filing, as compared to a national average of around 2-1/2 years.

Judge Albright prefers cases to be focused on the lawyers rather than the judge. He wants the parties to know that his decisions will be made without regard to whether one is plaintiff or defendant, David or Goliath. His ability to achieve this is in no small part attributable to his own experience trying cases, where he ended up in roughly even proportions representing plaintiffs versus defendants.

Some judges begrudge lawyers bringing disputes to them that they feel should be resolvable by agree-

ment, such as how many lines of code to produce during discovery in a software patent case. Judge Albright takes a more tolerant view, accepting that lawyers sometimes simply need a decision to be made so that they and their clients can move on to the next issue in the case. Clients, he realizes, sometimes are more willing to accept a ruling from an independent third party than they are to allow their lawyers to agree to a compromise.

Having spent seven years as a magistrate judge in Austin (and years after that litigating intellectual property cases for firms such as Bracewell, LLP), Judge Albright is no stranger to the courtroom. He has found, however, that service as a district judge can be a very different experience than as a magistrate judge—in the best of ways. The lifetime appointment frees him to innovate and handle his docket in the most efficient manner possible without having to fear he will be second-guessed or overruled as to matters of process. He has assembled an ad hoc patent lawyer group to ensure this results in improvements, not merely change for change's sake.

Another area in which he experiences the benefits (and gravity) of a lifetime appointment is in sentencing criminal defendants. Judge Albright appreciates the ability to tailor prison terms to the facts of each case and the potential for rehabilitation. He wants no one to walk into a sentencing hearing assuming they are certain of the outcome before the facts are reviewed and the defendant and the government have both had an opportunity to speak to the court.

Attorney Jim Dunnam, of Waco's Dunnam & Dunnam law firm, has tried two civil bench trials before Judge Albright, one of them involving complex intellectual property issues that resulted in a judgment for over $3.5 million. He advises attorneys considering filing in the Waco Division that their experience will be that Judge Albright does his homework and comes to trial fully knowing the details of the case; he gives lawyers latitude to try their cases as they see fit but also flags issues of particular interest to his decision during questioning; and he conducts court cordially and with humility.

But, adds Dunnam, don't mistake his amiability for a willingness to tolerate violations of the rules and his orders. Dunnam says that the bottom line is that practice in the Waco Division is a refreshing experience for trial attorneys and a place you want to be for complex litigation.

Austin-based John J. "Mike" McKetta III (Graves Dougherty Hearon & Moody) had a similar experience in two trials (one bench; one jury) before Judge Albright. McKetta describes Albright as a very experienced patent lawyer who is cordial but always in good control of his courtroom, giving the lawyers lots of latitude to try their cases. He says counsel will find Judge Albright "smart, very quick, and always very gracious."

Coming to the Waco bench from out of town, Judge Albright was not certain what to expect from the Waco community. It turns out, he says, that people who don't know who he is are very nice to him and "those who do know who I am are even nicer." Albright has turned to Waco's Baylor School of Law for interns, giving them meaningful work to do under the supervision of his law clerks. He recounted how some lawyers around the state had wondered aloud how happy he would be serving in Waco after having practiced in Austin his entire career, but he believes that his appointment to the bench as the only federal district judge in Waco has allowed him to create an environment in the entire courthouse that is reflective of his personality and philosophy with respect to how justice should be administered.

He clearly considers himself unbelievably lucky. He loves Waco and enjoys serving as its sole district court judge. He declares that he is in Waco for the long haul and looks forward to seeing attorneys from around the country in his courtroom. On a given weekend he can be found taking a run along the Brazos River from Baylor to downtown or on a weeknight at a reception for the opening of the Waco offices for a patent law firm. Last fall he participated in the Waco Half-Ironman and hopes to do it again in the future. For attorneys who have not yet made the journey to Waco, he explains that he has observed the jury pool to be unlikely to award enormous damages on a whim but still quite willing to punish a wrongdoer when the facts and law justify it.

Some lawyers may wonder how one ends up filing a patent case in the Waco Division of the Western District of Texas. The city has major operations for Space X, defense contractor L3 Harris Technologies, M&M Mars, and Coca-Cola, among others. But how do Google or Uber end up before Judge Albright? The answer lies in the Supreme Court's *TC Heartland LLC v. Kraft Foods Group Brands, LLC*[1] decision.

The decision limited venue for most patent cases to the location where the defendant was incorporated or had a place of business. Numerous tech companies have operations in the Western District of Texas, which includes not only Waco to the north but also Austin in the middle, San Antonio to the south, and even El Paso to the west. For a patent defendant located anywhere in those cities, suit can be filed in the Waco Division and Alan Albright will be the judge assigned.

In a 2019 case, Judge Albright found that the law justified denial of a motion to transfer a patent case from the Western District of Texas to the Northern District of California. As attorneys become more familiar with the Waco venue and how Judge Albright manages his docket, one can predict that such motions to have intellectual property cases heard elsewhere will decline.

Judge Albright is doing his part to see that patent litigants know they will receive justice if their cases happen to be heard in the Waco Division of the Western District of Texas and receive it promptly. Few could have predicted Waco could be as well-known for patent lawsuits as Chip and Joanna Gaines or its Balcones Whisky, but that day has arrived, thanks to Judge Albright. ⊙

Endnote

[1] ––– U.S. ––––, 137 S. Ct. 1514, 197 L.Ed.2d 816 (2017).

Hon. Meredith Grabill

Bankruptcy Judge, Eastern District of Louisiana

by Cherie Dessauer Nobles, Benjamin W. Kadden, and Coleman L. Torrans

Cherie Dessauer Nobles is a member of Heller, Draper, Patrick, Horn & Manthey, L.L.C. She works in the bankruptcy practice group of the firm and concentrates on debtor and creditor rights. Benjamin Kadden is a shareholder with the firm of Lugenbuhl, Wheaton, Peck, Rankin & Hubbard. He is the current chair of the Bankruptcy Section of the Louisiana State Bar Association. Coleman L. Torrans is an associate of Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, working chiefly in the firm's bankruptcy practice. He previously served as a law clerk to the Honorable Carl J. Barbier of the U.S. District Court for the Eastern District of Louisiana.

It is no easy task to write a brief profile of Meredith Grabill, who recently became Hon. Meredith Grabill when she was sworn in as the new bankruptcy judge for the Eastern District of Louisiana on Sept. 9, 2019, joining Judge Jerry Brown on the bench. There is too much to say and too little space in which to say it.

After all, Judge Grabill's professional life spans two careers and stretches coast to coast. She is well known to the bankruptcy bar over which she now presides because of her extensive experience as a commercial bankruptcy practitioner, but her reputation extends well beyond this domain because of her active engagement with various charities and nonprofits. Indeed, while Judge Grabill worked as a full-time bankruptcy attorney before donning the robe, she also taught (and continues to teach) a chapter 11 corporate bankruptcy class as an adjunct professor of law at Tulane University Law School. She served for years as treasurer of the vestry at St. George's Episcopal Church and is a founding member of the *Tulane Law Review's* alumni association. Meanwhile, those duties did not prevent her from donating hundreds of hours of her time to various pro bono causes and mentoring young lawyers. She did all this while raising two young boys with her husband, Jeremy Grabill, himself an accomplished attorney.

The most obvious conclusion one draws from a review of Judge Grabill's career is that she must enjoy a 30-hour day to everyone else's measly 24. The truth is less fantastical but no less awing: Judge Grabill has the same small amount of spare time as the rest of us; she simply chooses to donate hers, driven by a strong sense of duty to help the less fortunate. Judge Grabill's legal experience undoubtedly qualifies her for the position of bankruptcy judge, but her experiences outside the practice of law may help her to become a great judge for our district.

To the uninitiated layman (and perhaps even some attorneys), bankruptcy is a mysterious procedural world where a judge applies an assemblage of arcane rules to divide up a debtor's property in accordance with mathematical formulae. Under that oversimplification, a bankruptcy judge is an accountant with an imposing rulebook, the Bankruptcy Code, and

she needs nothing more than a good head for figures and a copy of the book to do the job. But in actuality, efficiently distributing assets is just one component of the job. Bankruptcy courts are often called "courts of equity," and bankruptcy judges are granted broad and substantial powers to ensure justice is done for the sake of honest but unfortunate debtors, their creditors, and other stakeholders, such as employees and shareholders.

Bankruptcy judges are called upon to hear the competing claims of a diverse collection of parties and resolve them fairly. Inherent to the setting, there are not enough resources to go around. And many of those involved, both creditors and debtors, will be utterly unfamiliar with the process and risk being outmatched by more seasoned or more aggressive participants. Indeed, the average American is more likely to find themselves before a bankruptcy judge than in any other federal court. Furthermore, in chapter 11 business cases, which are generally the most complicated bankruptcy matters, the bankruptcy judge must manage the parties and assist in consensus-building as a plan for payment of the debtor's debts is developed, voted on, and ultimately put into practice. In those moments, a bankruptcy judge must be more than a mere umpire and must act as a facilitator of the pro-

cess. Fortunately for stakeholders in the Eastern District, Judge Grabill's personal history makes her incredibly well suited for the job.

Judge Grabill has always worked hard. The oldest of five children, she worked through high school as a lifeguard, waterski instructor, and camp counselor. She paid for her higher education herself through working a variety of jobs. At one point, she worked as a counselor at a medium-security wilderness program where she lived outdoors with delinquent and emotionally disturbed teenagers. The program was an alternative to detention at a state facility. Judge Grabill's job was to act as part-counselor, part-warden for these boys and young men, most of whom had been adjudicated for violent offenses and nearly all of whom came to the program lacking any sort of survival skills. More than that, after years of neglect, abuse, or both, some lacked even basic social and self-care abilities—Judge Grabill recalls having to teach one boy how to brush his teeth.

The program divided the boys into groups of about 10. The boys shared one large tent, where at least one other counselor slept. Judge Grabill's living quarters were equally spartan; she had her own small tent a few feet away. The driving idea of the program was that the residents could learn how to engage in healthy group dynamics by learning to survive as a group in a wilderness setting. Contrary to typical delinquency reform, the boys were invested with autonomy through participation in group decision-making, with the intent that program participants would learn to self-manage and be forced to face consequences of their decisions, good or bad.

Everything was done as a group. There were no individual (or ex parte) counseling sessions. Collectively, the boys decided their own schedule, assigned tasks, and set goals. But once the group made a decision, it was enforced. Because the boys also had to make their own meals on a campfire, the menu remained basic. The go-to: grilled cheese sandwiches and tomato soup, which remains one of Judge Grabill's favorite meals. In her role as a counselor, Judge Grabill was required to handle many different personalities, resolve conflicts among the boys, understand each child's motivation, and ensure that each child was protected.

After obtaining her undergraduate degree at The Evergreen State College, Judge Grabill continued to work with youth for years, including in maximum-security settings. Later, she served as an executive-level administrator of a juvenile justice agency for the State of Washington. While there, she worked with clinicians from the University of Washington to develop and implement behavioral treatment programs for adjudicated youth residing in institutions or in the community on parole.

Her experiences in instilling cooperation among groups with disparate interests and clashing personalities should prove useful in Judge Grabill's position as a bankruptcy judge, where she is helping debtors and creditors work together to develop repayment plans—although one hopes Judge Grabill's experience in federal bankruptcy court will be a *little* easier than her time in the wilderness.

Judge Grabill later enrolled at Tulane University Law School, where she became a member of the *Tulane Law Review*. Her peers on the *Review* (her future husband among them), impressed with her intelligence and leadership abilities, elected her editor-in-chief of the journal. The wisdom of that choice was quickly demonstrated. Judge Grabill would become, in effect, the *Review's* first editor-in-exile after Hurricane Katrina pummeled and then flooded New Orleans in 2005.

After the levees broke, then-Dean Lawrence Ponoroff informed the law students that the school would not reopen during the fall semester; however, he encouraged students to enroll in other law schools and to take classes on a pass/fail basis for the semester. As a result, students frantically enrolled at universities across the United States. With the *Review's* offices inaccessible and its student editors now a diaspora, most unpaid student editors would be willing to write off a fall publication at this point, with publication to resume in the spring, if it all. But because it was Judge Grabill's name at the top of the masthead, the *Review* did not take a hiatus. Judge Grabill explains in her excellent recounting of her experience—published in the *Review* 10 years later—that she felt she could not suspend publication because the *Review's* institutional knowledge is only one year, and even a brief disruption of operations would disrupt the passing of the torch from one student class to the next. Additionally, the *Review* had signed contracts with authors to publish their works exclusively. It was unacceptable to Judge Grabill that the journal's misfortune would be also be borne by the authors who had trusted the *Review* with publication of their works. Finally, Judge Grabill recognized that it meant something to her fellow members to have the *Tulane Law Review* listed on their résumés, and she did not want "our Volume to be that Volume with an asterisk beside it."[1]

Committed as she was, Judge Grabill scrambled to coordinate enough journal members to enroll at one university where a skeleton crew of student editors could ensure the *Review* was published as scheduled. She chose the University of Texas School of Law as the rally point for the student editors because it was the home of one of the authors being published in the *Review*. That author was gracious enough to intervene on the *Review's* behalf, and 12 student-editors enrolled at the university, where the *Texas Law Review* gave them the resources they needed to continue their work. Ultimately, with tremendous effort from its members located in Austin and abroad—and with Judge Grabill at the helm—the *Review* published the 2,043-page Volume 80, in the form of 40 articles and essays, five comments, five case notes, four book reviews, and memorials.

After Tulane reopened, Judge Grabill returned to New Orleans to finish her tenure as editor-in-chief, complete her education, and graduate. While still in school, she and Jeremy began planning their lives together. At

one point they took out a cocktail napkin, daydreamed a bit, and jotted down the cities where they could build their careers and their family. On this list: New York, New Orleans, Seattle, Madison, Portland (Maine and Oregon), and a few others. They decided on New York initially, but Jeremy kept the napkin in case they needed it.

Immediately upon graduating, Judge Grabill clerked for U.S. District Judge Martin Feldman, who had served as the chairman of the *Review's* board of advisory editors while Judge Grabill was the editor-in-chief. Judge Feldman, remarking on his former clerk, said recently:

> Meredith is one of the most gallant, brilliant, committed people I've ever known. The only reason there is still a *Tulane Law Review* is because as student chair during Katrina, while displaced, she kept the *Law Review* going. I've had the honor of very special young people who have clerked for me and made me look smart ... Meredith is at the top of that list.

Upon completing her district court clerkship, Judge Grabill went on to clerk for Judge Edith Brown Clement of the U.S. Court of Appeals for the Fifth Circuit. She then entered private practice in New York at a prestigious Manhattan law firm. After a few years in practice, although already a veteran of federal court chambers, Judge Grabill was eager to clerk for a bankruptcy judge to obtain an insider's perspective of the high-profile, large-debt cases that populate Manhattan's federal bankruptcy docket. She applied for a third clerkship with Bankruptcy Judge Martin Glenn of the Southern District of New York. Judge Glenn was thrilled. In explaining why Meredith was an "ideal" bankruptcy clerk, Judge Glenn recently recalled:

> Meredith got along well with everyone, but she didn't take gruff from anyone .... She had such good judgment as well as legal acumen. Anyone would love to have a law clerk like that.

Upon finishing her clerkship with Judge Glenn, Judge Grabill had worked inside chambers as a clerk at three different federal courts and as a litigator on some of the highest profile bankruptcy cases in the nation as a private practitioner. She and Jeremy also had two children. They looked for a place to raise their boys outside the bustle of New York City. Jeremy found the napkin on which they had scrawled their daydreams years ago. Two words caught their eye: "New Orleans." Neither had family in the city and neither had grown up there. But both had been charmed by New Orleans during their time as students there, cataclysmic flood notwithstanding, and felt the city's pull.

Judge Grabill and Jeremy moved back to New Orleans and quickly integrated themselves into the community. Each joined law firms. Jeremy became a partner with the firm of Phelps Dunbar. Judge Grabill became a shareholder with the firm of Lugenbuhl, Wheaton, Peck, Rankin & Hubbard and, in addition to maintaining a busy chapter 11 practice, found time to donate her time to pro bono clients in the areas of consumer bankruptcy, successions, interdiction, and intrafamilial child custody. When asked about his time working with his former colleague, Benjamin Kadden lamented:

> While her adversaries and allies are keenly aware that Judge Grabill is a talented and persuasive writer, Judge Grabill's most admirable trait—and that which is most likely to directly translate to her forthcoming experiences on the bench—may be her unwavering commitment to helping her colleagues, her students, and so many others become better people (and often, attorneys). Her tireless pursuit of constant and consistent improvement in everything and everyone that she encounters will be a tremendous benefit to the bankruptcy bar in New Orleans and beyond. While we will miss her as a shareholder at Lugenbuhl, we are proud and excited that she will serve as the bankruptcy judge in the Eastern District of Louisiana for the next 14 years.

While practicing law, Judge Grabill also found time to help establish the *Tulane Law Review's* alumni association. Judge Grabill returns to the classroom each spring at Tulane Law to teach upper level bankruptcy courses to law students. The boys are enrolled at Lycée Français de la Nouvelle Orleans, a French immersion public charter school. And the Grabills are parishioners at St. George's Episcopal Church, where Judge Grabill served on the vestry for years.

The above experiences, briefly and incompletely recounted, demonstrate Judge Grabill's tenacity, her thoroughness, and her grit, and an eagerness to do what is right. The bankruptcy bar of the Eastern District is fortunate to have a bankruptcy judge so committed to her craft and her adopted community. Judge Grabill, though, is the one who feels lucky: "We have been incredibly blessed since we have been back." ⊙

Endnote

[1]*See* Meredith Byars Grabill, *Deluge: The Tulane Law Review in the Aftermath of Hurricane Katrina*, 90 Tul. L. Rev. 1 (2015).

Hon. Michelle Whetsel

Administrative Law Judge, U.S. Social Security Administration

by Hon. Alisa M. Zuniga

Hon. Alisa M. Zuniga is a freelance writer and an administrative law judge for the U.S. Social Security Administration (SSA) in Tallahassee, Fla. Prior to working for SSA, Judge Zuniga worked as an administrative judge for the U.S. Department of Agriculture, National Appeals Division, adjudicating exclusively all Spanish-speaking appeals in South Florida and Puerto Rico. Judge Zuniga's decisions were published both in English and Spanish. © 2020 Alisa M. Zuniga. All rights reserved.

Hon. Michelle Whetsel firmly believes in the concept of fairness. With an unwavering dedication and lifetime commitment, she ensures that the rights of litigants are not forgotten. After 25 years of government service, Judge Whetsel shows no signs of slowing down.

Judge Whetsel was born in Dunkirk, Ind.—the "Glass Capitol" of the state—a quaint, small town north of Indianapolis. She was raised by hard-working parents, Gail and Grace Whetsel. Her father was an industrial engineer and then a Midwestern region area consultant for the parent company, Lancaster Colony. Her mother is an Indiana University graduate and worked as an executive assistant to the chief executive officer at 3M Corporation. In 1973, her parents divorced, and her mother became a high school English teacher to devote more time to raising young Michelle.

As a child, Judge Whetsel had a passion for playing the trumpet and participating in outdoor sports. She deeply loved and admired her maternal grandmother, who was strong-willed and wore many hats during her life, including being a Red Cross nurse. During World War II, Judge Whetsel's grandmother supported the soldiers in disaster relief. Inspired, young Michelle envisioned a career in medicine, and at her first opportunity, she enrolled in advanced science classes and volunteered at the local Red Cross blood drive. After seeing the needles and blood bags, however, Judge Whetsel became dizzy and fainted. This experience abruptly ended her dream of becoming a doctor. She immediately dropped her science courses and signed up for the only course left with open enrollment—a business law class. During that class, her instructor commented that she would be a great lawyer and—as fate would have it—the seed had been planted. With her instructor's encouragement, she began her journey to what would later become a successful and distinguished career in law.

The Air National Guard

From 1980 to 1984, Judge Whetsel attended Ball State University in Muncie, Ind. She graduated with a bachelor's degree in political science, *magna cum laude*. Upon graduation, Judge Whetsel attended the University of Wyoming Law School in Laramie, Wyo. With a determination to obtain a law degree and, at the same time, expand her opportunities, Judge Whetsel had the foresight to find a viable resource to accomplish those two goals—military service.

In 1985, Judge Whetsel enlisted in the Air National Guard. Airman First Class Whetsel worked as an administrative assistant committed to service on weekends and full-time obligations during the summer months. Her role was to comply with Air Force standards and to serve as a role model for subordinates. She eventually was promoted to senior airman first class, and ultimately staff sergeant. In describing her experience at the Air National Guard, Judge Whetsel stated, "I fell in love with service and the ability to give back to the community."

With a beautiful backdrop of historical landmarks and stunning architecture, Judge Whetsel delved into her law studies in law school. In her second year, she worked for the University of Wyoming Legal Services Project, where she was assigned to the indigent civil and criminal dockets and fought for civil rights and the protection of the rights of the poor and disabled. Judge Whetsel assisted in representing criminal defendants charged with theft, simple assault, and other misdemeanors. During her law school years, Judge

Whetsel also interned at the City of Laramie's Prosecutor's Office.

In her third year of law school, Judge Whetsel had the honor to extern as a judicial law clerk to Chief Justice Charles Brown (ret.) at the Wyoming State Supreme Court. Her experience exposed her to murder appeals, water-rights matters, and constitutional interpretation arguments. Judge Whetsel shares, "The exposure helped me understand how judges process the cases appealed, and it gave me some insight into the deliberation process of appellate panels." Upon graduating from law school in 1987, Judge Whetsel sat for the Washington State Bar and began taking steps to further her legal and military career.

The U.S. Army

In May 1988, Judge Whetsel was commissioned into the U.S. Army. First Lieutenant Whetsel attended the Judge Advocate General's Corps Legal Center (JAG Corps.) in Charlottesville, Va., where she studied military law and the application of the Uniform Code of Military Justice. As a JAG officer, First Lieutenant Whetsel served as a courts-martial prosecutor and a trial defense counsel and represented soldiers facing nonjudicial punishments. Judge Whetsel shares that the most challenging aspect of her military experience was being female. She states that "the military was still very much a male-dominated and male-focused environment. Female officers were seen as too weak and frail to serve in many combat deployable units." Although her options for tours of duty were limited, in January 1991, Judge Whetsel was an active participant in supporting her fellow soldiers in the First Gulf War during Operation Desert Shield and Operation Desert Storm—a military operation to expel occupying Iraqi forces from Kuwait.

Judge Whetsel explains that, overall, her military service taught her to be strong and resilient and to understand what it is like to be a cog in a giant machine. She adds, "It also taught me to consider how my actions affect others and to think about the larger picture as opposed to my individual needs." Judge Whetsel expressed that, despite some challenges, she is appreciative. Her fondest memories of her military experience are the feelings of trust, camaraderie, friendship, and a sense of belonging. The military also gave her valuable legal skills as an attorney and later a judge.

Judge Whetsel obtained solid litigation skills that benefited her career as a trial attorney. She shares that she received more trial experience in the military than she would have received as a new attorney practicing in a private or public sector law firm. For that, she is forever grateful. In 1993, Captain Whetsel returned to the Air National Guard and was eventually promoted to major and lieutenant colonel. After 20 years of military service, Lieutenant Colonel Whetsel retired in June 2005.

With her decades of military and legal experience, Judge Whetsel explains what equal justice under the law means to her. "It means every participant who tries to access the legal system has a fair and equal opportunity to be heard and to have their facts considered. It also means that those who seek assistance or relief from the law will receive the same level and quality of representation and consideration regardless of race, culture, sexual preference, and socioeconomic status." After retiring from the military, Judge Whetsel continued to strive to apply the law and regulations fairly and impartially in her quest for equal justice.

Equal Justice Under the Law

From 1993 to 1996, Judge Whetsel, worked for Spokane/Columbia Legal Services. Her caseload focused on family law as well as landlord and tenant discrimination matters. In one memorable case, Judge Whetsel assisted in shutting down a family-housing rental property that discriminated against families with children. In that case, the U.S. Department of Justice stepped in and applied federal pressure to reach that goal. Judge Whetsel was also instrumental in creating a law that allowed for civil damages to victims of domestic violence.

From 1996 to 2003, Judge Whetsel served as a state administrative law judge for the State of Washington. She presided over licensing issues and public assistance benefit programs. In 2003, the State of Washington assigned Judge Whetsel to work for Governor Gary Locke as a torts risk manager. She ran the day-to-day operations and negotiated tort claims that involved the state agencies and the public. In 2006, Judge Whetsel left the government and became an Allstate Insurance Agency owner. Two years later, however, her desire to return to public service peaked.

In 2008, Judge Whetsel served as an assistant city attorney for the city of Fort Wayne, Ind. In that capacity, she handled all cases that involved the city or its employees arising from civil lawsuits and city ordinance violations. Her duties also included representing the city mayor in union actions and government employee disputes. After years of state service, Judge Whetsel transferred her legal talents to the federal level.

In 2009, Judge Whetsel was appointed as an administrative judge for the U.S. Department of Agriculture, National Appeals Division (NAD) in Fargo, N.D. She presided over agricultural appeals, which included housing and farm loan disputes, crop insurance contract disputes, and farm operation and feasibility issues. In 2013, Judge Whetsel was promoted to deputy assistant director in NAD's Eastern Region in Indianapolis. Two years later, Judge Whetsel was further promoted to a detail interim position as supervisory appeals officer at the NAD Headquarters Office in Alexandria, Va.

In the span of six years at NAD, Judge Whetsel quickly climbed the ladder from an administrative judge to deputy assistant director, to acting supervisory appeals officer. Her fast rise evinces her capability, understanding, and respect for the regulatory process and equal justice under the law.

Administrative Law Judge and Advice to Lawyers

In June 2016, Judge Whetsel accepted a lifetime appointment as an administrative law judge for the U.S. Social Security Administration. In this capacity, she presides over formal, quasi-judicial, nonadversarial administrative disability hearings. She analyzes medical records and expert opinions to determine whether a claimant qualifies for benefits under the Social Security Act. Judge Whetsel handles a high-volume case docket of 50 cases per month, or 600 per year. Nevertheless, she strives not to treat litigants as mere numbers. Instead, she allows the parties a full opportunity to be heard, and she treats litigants appearing before her with respect. She states, "It is my belief that I am impartially applying the law, and as a result, helping people maneuver through difficult times in their lives while making sure that each participant's rights are not forgotten or abused."

When asked what guidance she would give to lawyers that appear before her, Judge Whetsel's advice is simple. Attorneys must take their obligation of representing their clients zealously. This means they must be prepared, know the facts, and understand the strengths and weaknesses of their client's case. In addition, lawyers must know what they want the judge to take away from the evidence. Equally important, Judge Whetsel expects attorneys to be kind and respectful to everyone who participates in the proceedings.

For lawyers who want to pursue a career as an administrative law judge, Judge Whetsel counsels that the attorney must love the law and must be willing to spend long hours reviewing evidence. The attorney must not only be a well-qualified lawyer but also ready and willing to put in the time and effort it takes to preside over cases meaningfully.

Family Matters

Judge Whetsel's passion for the law also extends to her family. Her family plays a big part in her life, bringing her great joy and happiness. She shares that the benefit of growing up as an only child means that family encompasses not only blood relatives but also close friends. Family to her is a safe haven, no matter what the situation. She states, "Family means a forever bond—an unconditional love and acceptance of others even in light of different opinions, beliefs, and life choices." In 2013, Judge Whetsel legally married her long-time girlfriend of eight years, Beverly, who is a realtor. Judge Whetsel and Beverly have a 19-year-old son who attended classes at the University of Southern Indiana and now works at Home Depot in Indianapolis.

When she is not presiding over cases, Judge Whetsel enjoys traveling, playing tennis, watching football, and taking in a good movie at the theater. She also enjoys cooking and revamping tasty meals from leftovers. Judge Whetsel amusingly shares that she is known at home as "the master meal-creator with leftovers."

Upon retirement, Judge Whetsel wants to leave good memories. She wants others to remember her as being kind, a hard worker, and a well-liked colleague among her fellow judges. As demonstrated throughout her distinguished career, Judge Whetsel has left a lasting impression on those who know her and on those she has mentored.

Judge Whetsel leaves us with one of her favorite quotes by Ralph Waldo Emerson—a quote she has indeed followed: "Do not go where the path may lead, go instead where there is no path and leave a trail." ⊙

Judicial Profile Writers Wanted

The Federal Lawyer is looking to recruit current law clerks, former law clerks, and other attorneys who would be interested in writing a judicial profile of a federal judicial officer in your jurisdiction. A judicial profile is approximately 1,500-2,000 words and is usually accompanied by a formal portrait and, when possible, personal photographs of the judge. Judicial profiles do not follow a standard formula, but each profile usually addresses personal topics such as the judge's reasons for becoming a lawyer, his/her commitment to justice, how he/she has mentored lawyers and law clerks, etc. If you are interested in writing a judicial profile, we would like to hear from you. Please send an email to Lynne Agoston, managing editor, at TFL@FBA.org.

A Lawyer's Deployment to the Front Lines of the U.S.-Mexico Border

MAJOR MIGUEL R. ACOSTA

Illegal immigration has been a popular yet controversial topic in the news for several years, and it is often difficult to know the true facts regarding what takes place on our southern border when viewed through the lens of potential media bias. One way to know for sure, however, is through firsthand experience. In the latter half of 2018, I was fortunate enough to obtain some of that firsthand experience through a military tour.

Traditionally, the military has played little to no role in the general day-to-day enforcement of immigration laws along the U.S. southern border, but that changed a few years ago. For the typical American, "military deployment to the desert" likely conjures up the image of a combat tour in the Middle East. For example, I deployed to Iraq in 2009 while on active duty in the Air Force. In any event, "military deployment to the desert" probably does not bring to mind an image of the city of El Paso, Texas, but that is where I "deployed" to in the summer of 2018 for a unique six-month tour related to immigration enforcement.

While no longer on active duty, I am an attorney (commonly referred to as a JAG) in the Florida Air National Guard. Typically, performing duty involves serving one weekend a month at the Air National Guard base in Jacksonville, Fla. From June to December of 2018, however, I went on extended leave from my full-time civilian employment at a law firm in Orlando, Fla., and was activated, along with about 20 other reserve or National Guard JAGs, for a one-time military mission as part of the federal government's enhanced efforts to enforce U.S. immigration laws.

El Paso is bisected by a large mountain range called the Franklin Mountains. These mountains are located within the city, cutting between it in such a way that the city has developed around the mountains in a "U" shape. While barren of any significant foliage, these desert mountains are a beautiful addition to the city and a great place for a challenging hike. Visible from the top of these mountains (and many other elevated spots in the city) is Ciudad Juarez ("Juarez") directly across the border in Mexico.

El Paso and Juarez make up one large metropolitan area divided only by a small stream of water (the Rio Grande is not so "grande" as it flows though the city) and a large metal wall (more about walls later). As a result, crossing from the United States into Mexico is as simple as paying 50 cents to use the walking bridge to stroll through the nonexistent Mexican customs booth into Juarez. The return trip to the United States is almost as simple, except that on the U.S. side, there is, of course, your typical customs screening, comparable to what you would see at an airport. The trip between Mexico and the United States at any of the several ports of entry in or near El Paso is made legally by thousands of pedestrians and vehicles each day, whether to go to work, visit family, transport goods or food to distribute throughout the United States, or just to go shopping for the day. Unfortunately, the border is also a large source of illegal immigration and drugs into the United States, and that is the reason why JAGs were sent to help the overworked prosecutors in the U.S. attorneys' offices along the border.

More specifically, the mission involved prosecuting immigration related crimes in federal district court in cities along the southwest border of the United States. In order to prosecute in federal court,

the JAGs who deployed to the various border towns for the assignment were appointed as special assistant U.S. attorneys for the duration of our tours. Shortly after arriving in El Paso, I received training from the full-time assistant U.S. attorneys in the office regarding immigration-related federal crimes (such as illegal reentry into the United States, alien smuggling, and visa fraud) as well as some on-the-job training in federal criminal procedure. After that, I was assigned my own case load that I was expected to litigate from the initial probable cause and detention hearing through sentencing.

The most significant takeaway from my tour in El Paso was perspective. First and foremost, large-scale illegal immigration on our southern border is real. As part of my prosecutorial responsibilities, I saw hundreds of illegal aliens in court from many different countries. Multiply my six-month experience in one federal district along the border by the experiences of dozens of other federal prosecutors in the six different districts along the border, and the result is an incredibly large number of aliens entering the country illegally each year.

While many Americans assume that the illegals are from Mexico or Central America, I also saw defendants who were from the Middle East, Asia, South America, and Cuba. As a result, I heard languages spoken in court, through interpreters, that I never knew existed, like K'iche', an indigenous language from Guatemala. I cannot begin to convey the difficulty in conducting a hearing when the defendant is speaking in K'iche', an interpreter then translates from K'iche' to Spanish, and then a second interpreter translates from Spanish to English for the record. It becomes particularly challenging when one or both of the interpreters attend the hearing by cell phone from Central America. There is nothing more valuable for a smooth hearing than a K'iche' interpreter who also speaks English (and is physically present). Unfortunately, they are few and far between.

While in court during hearings, I heard all different types of explanations as to why the defendants entered or attempted to enter the United States illegally. Some stories were sad. Some were funny. Others were dubious. Some were apologetic. Others were not. The motivations ran the gamut from pure to criminal. Some of the illegal aliens had no criminal records and had never previously been to the United States. Others had extensive, violent criminal records and had been deported multiple times. Some came with only the clothes on their backs. Others came with large packs of drugs on their backs. Some of the illegals had a college education, while others had not even completed the first grade.

Those individuals who had never previously been deported and were caught entering the United States illegally were prosecuted under 8 U.S.C. § 1325 for illegal entry (we will call these defendants "1325s"). This crime is a misdemeanor that carries with it a punishment of zero to six months in prison. To provide context, in the six months that I was in El Paso, the Navy Reserve JAG who was with me and I prosecuted about 2,600 of the 1325s. The average sentence each of these individuals received was about two to three days confinement because many were given the opportunity to conduct their initial appearance, plea, and sentence all in the same day.

This leads to the question of the sufficiency of due process when defendants have their initial appearance and are sentenced in one day. At least in the Western District of Texas (the district where El Paso is located), the due process for these misdemeanor offenses is robust. The 1325s are usually assigned a private attorney under the Criminal Justice Act at no expense to the defendants, and that attorney is provided all the discovery in the government's possession

before the initial appearance. This way, when the attorney meets with his or her client, that attorney is able to evaluate whether the defendant has any viable defenses or if it would be in the alien's best interest to accept responsibility by pleading guilty and being sentenced right away. Almost without fail, a quick guilty plea and a "time served" sentence is in the defendant's best interest. However, I saw a few 1325s contest the charge against them, demand a trial, and ultimately be found not guilty. So, while the initial appearance, guilty plea, and sentencings are oftentimes held in mass, from a few defendants at a time to up to about 70, each 1325 has an attorney, is addressed individually by the judge, and has as much time as he or she needs to decide on whether to plead guilty or to demand a trial. From what I observed, it is a fair, efficient system and all individuals involved (prosecutor, defense counsel, and judge) take their respective roles seriously. Whether they serve only a few days in confinement or obtain a not guilty verdict at trial, after the 1325s complete their time in the criminal justice system, they are then transferred to the Department of Homeland Security for immigration proceedings. There, they can potentially receive an expedited deportation to their country of citizenship or request asylum or some other form of relief depending on their circumstances.

The procedure for defendants charged with illegal reentry into the United States under 8 U.S.C. § 1326 (the "1326s") is similar to the 1325s but takes longer because the crime is a felony. These are the aliens who have been to the United States before and have been officially deported at least once. The 1326s usually are appointed an as-

sistant federal public defender to represent them. In my experience, these attorneys are zealous, effective advocates for their clients. The 1326s proceed under the typical federal criminal procedure process, which can take from a few months to up to a year depending on the facts, defenses, and criminal histories of the defendants. The 1326s with no prior felony criminal histories (along with defendants who commit visa fraud that does not involve identity theft) and who have been deported only once or twice typically enter a fast-track program where, if convicted, they will spend approximately two months in prison from start to finish. Then, like the 1325s, the 1326s move into the immigration system where they can request an expedited deportation or some other form of relief (though, by the time they are a 1326, the defendants typically, but not always, have exhausted most options to stay in the United States). Of course, the 1326s with multiple deportations or felony convictions will spend more time in confinement (just like an American citizen who has been convicted of a crime and has an extensive criminal history).

So, what is the utility of prosecuting the 1325s and first time 1326s? The case has been made by some that federal resources would be better spent by simply deporting these individuals rather than spending the time and money to prosecute them in federal court. Without delving into the politics, the rationale for prosecuting the 1325s and first time 1326s is one of both specific and general deterrence. There was a time when these defendants were not prosecuted at all and were simply deported. Under this procedure, there were basically no negative consequences for the illegal alien. If he (at that time the illegals were mostly "he") was detained and deported, he could try and try again until he managed to not get caught. Now, in 2018 and beyond, with many illegal border crossings being prosecuted, a message is sent to the alien that there are consequences for his or her actions (female illegal aliens are now commonplace). As for general deterrence, this same message of consequences spreads to others who are considering attempting to enter into the United States illegally via word of mouth or social media.

While this latter point regarding general deterrence may be hard to believe given some of the impoverished countries in Central America where many of these defendants live, I have seen definitive proof that word does, in fact, spread. The "zero tolerance" policy is a good example of this phenomenon. The zero tolerance policy was the federal government's stated goal announced in April 2018 of prosecuting 100 percent of the adults who entered the United States illegally. This policy ultimately was ended due to political pressure because some immigrant parents who entered the United States illegally accompanied by a minor child were held separately from the child while awaiting prosecution, resulting in a number of different legal issues.

When the zero tolerance policy ended and the Department of Justice generally stopped prosecuting adults who entered illegally into the United States if they had a child with them, word of this spread throughout Mexico and Central America. The message was clear: show up alone and do jail time or show up with a child and avoid prosecution. Once the word got out, it encouraged some illegal aliens to bring juveniles (sometimes related and sometimes not) with them to avoid prosecution. This meant that parents would bring their children; aunts and uncles would bring nieces and nephews; or sometimes adults would bring children of friends, neighbors, or total strangers and then pretend as if they were related. I saw this with my own eyes in court and read a number of arrest reports where immigration officials would struggle to determine the relationship between juvenile and adult. I watched the number of adults traveling with children rise exponentially from when I started my tour in June to when I ended in December. The point is that the United States can send a message (intentionally or not) through its actions because word does spread.

While in El Paso, I took three separate tours of the border: one in and around the city, one in the desert, and one at a port of entry. There are different challenges associated with enforcing the integrity of the border depending on the terrain. Customs and Border Protection (CBP) officers— the immigration officials who wear dark blue uniforms—are responsible for the ports of entry (the entry points into the United States where people legally enter and exit). In contrast, the Border Patrol (BP) officers, who wear dark green, are responsible for the portions of the border in between ports of entry.

In the city, the challenge in enforcing the border comes from the proximity to civilization. There are large numbers of CBP and BP agents in El Paso, but if an immigrant is able to cross the border illegally within the city limits, there are many places to hide or blend in with other pedestrians. Americans usually think of illegal aliens "sneaking" into the country at points along the border that are not ports of entry. However, I prosecuted several defendants who tried to run through a port of entry without being checked, tried to low crawl at night through the port of entry hoping they would not be spotted by CBP, were caught hiding in the back of trucks or in secret vehicle compartments, or even rappelling into the United

States from the bridges over the Rio Grande that make up the ports of entry. The various ways that aliens attempt to enter the United States illegally are creative and are only limited by their imaginations. I recall vividly one defendant who put on a neon vest and tried to blend in (unsuccessfully) with some construction workers who were building a raised highway along the border and another defendant who pretended (unconvincingly) to be a Mexican water purification official when he was caught by CBP ambling into the United States near the river.

In the desert, the challenge in enforcing the border is based on the vast amount of terrain that BP agents are responsible for monitoring. According to the agents to whom I spoke, walls and fencing work, and they want more of them in strategic locations. However, on the day I toured the border in and around Sierra Blanca, Texas (population just over 500), we spent all day driving in a BP truck in the desert, and we still did not cover all of the territory that the local BP station is responsible for patrolling. There are miles and miles of uninhabited desert with large mountain ranges, no paved roads, and no cell phone service. As a result, given the small number of BP agents responsible for that large amount of land, it is hard to imagine how they ever catch anyone, especially when the illegal aliens usually only travel at night, and some are wearing camouflage. In the desert, where there is no wall or fencing marking the border (just the Rio Grande), the BP relies heavily on technology, the natural barriers created by the mountains, and the BP agents' knowledge of the land.

For example, the BP agents know from experience that an alien smuggler leading a group of illegal aliens into the United States through the desert to a highway about 20 or 30 miles away will take the path of least resistance. So, rather than going up and over the peak of a mountain, the smuggler will lead his group through the valleys. It is in these valleys that the BP has sensors and cameras. Something will trip a sensor and a camera will then take a picture of it. The BP agents showed me some of these photos. I saw a very clear photo of three illegal aliens with backpacks wearing all camouflage. I also saw a photo of a mountain lion that had set off a sensor. Once the BP agents verify that it is a human that has tripped a sensor, based on the direction of travel, BP agents can go to the point where they know the illegals will emerge. Other times, the BP agents will spot footprints or other signs of illegal aliens and track them for miles and miles on horseback or in their four-wheelers.

Alien smuggling is prosecuted under 8 U.S.C. § 1324. The crime of alien smuggling encompasses the leaders of the smuggling organization, the guides who lead illegal aliens through the desert, the drivers who transport illegal aliens into and throughout the United States, the individuals who harbor the illegal aliens in homes or motels or other buildings, and generally anyone else who facilitates alien smuggling. Alien smuggling is a business, and the leaders of the smuggling organizations treat it as such. Aliens certainly do not require the services of a smuggler to attempt to enter the United States illegally, but those that choose to hire one have many options. Some alien smugglers are employed by the drug cartels (and use the same routes through the desert that they use to import drugs), while other smugglers are freelance operators.

The cost of being smuggled can vary significantly. An illegal alien may pay anywhere from a $1,000 to over $10,000 for the service of being smuggled. Some of the alien smuggling organizations have even made themselves more marketable by offering "all-inclusive, lifetime packages" to their potential illegal alien customers. An all-inclusive lifetime package might typically include a guide, the food and water required for a trip through the desert, a backpack for carrying the supplies, camouflage clothing, special shoes designed to minimize or eliminate leaving footprints, a ride to the alien's final destination after the trek through the desert, and a "lifetime guarantee." This lifetime guarantee ensures that, if the illegal alien is caught by the BP and eventually deported, he or she can try again with a new guide and supplies for no extra charge. Of course, in true business fashion, this makes an alien smuggling organization more competitive in the marketplace to potential illegal alien customers.

These facts about alien smuggling and all the other stories above are just a small handful of the memories, knowledge, and perspective that I gained from my desert deployment to El Paso. It is empowering in a sense to have had that first-hand experience and know what it is really like along our southwest border (again, with the lens of any media bias removed). What is easy to forget though, is that for me, it was a six-month military tour. For the attorneys and immigration agents with whom I worked, those stories are their lives every day, all the time. Illegal immigration did not stop when my tour in El Paso ended.

Since leaving, I have been back to see friends (and hike in the mountains I mentioned), and I can report that there are immigrants still attempting to enter into the United States illegally. Anecdotally, the numbers are lower in El Paso, but that can be based on a number of different factors—from weather (if it is too hot or too cold, the numbers decrease) to the enhanced enforcement measures to fewer referrals to the DOJ from DHS. Nevertheless, in my new full-time job as an assistant U.S. attorney in Atlanta (I moved from Orlando), I have handled illegal reentry and alien smuggling cases, although in much lower volumes.

In the meantime, the DOJ has hired many more assistant U.S. attorneys along the border, so they no longer need JAGs to help with the overflow of cases. Still, my deployment to El Paso was memorable for many reasons (the cases, the border tours, the friendly coworkers, the tacos, etc.). So, while I have tried hard to keep this article to just the facts, I hope that any legal professional who has taken the time to read the entire piece will ideally have gained some perspective on the reality of the immigration situation along the southern border of the United States and the challenges surrounding it. ⊙

The views expressed in this column are those of the author and do not necessarily reflect the official policy or position of the U.S. Air Force, the Florida Air National Guard, the Department of Defense, the Department of Justice, or the U.S. government.

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Agricultural Migrant Workers in Today's America: A Parallel to Modern Slavery

FEDERICA DELL'ORTO AND JUDITH L. WOOD

The organization of labor in the English colonies that would later become the United States was complex; it included free persons, slaves, and indentured servants. The first slaves arrived as indentured servants on the coast of Virginia and, over a period of a few decades, slavery spread throughout all the English colonies of North America. The economy of the southern colonies of Virginia, Maryland, Georgia, and Carolina heavily relied on plantations, where tobacco and cotton farming was common; the slaves imported from Africa quickly became the main workforce of these large plantations, thus making slavery the foundation of the whole economic system of those territories, until the Civil War.

During the colonial era, farming tobacco and cotton was common in the southern colonies; and it was done mainly through the use of slave labor until the Civil War. In the Northeast, slaves were used in agriculture until the early 19th century.[1]

During and after the Civil War, the Thirteenth, Fourteenth, and Fifteenth amendment of the U.S. Constitution prohibited slavery and involuntary servitude and gave former slaves citizenship rights and African American men the right to vote, respectively, but many were forced back into low-wage sharecropping and segregation under the Jim Crow Laws.[2] Immediately following the ratification of the Thirteen Amendment, these laws began to develop; they were meant to marginalize African Americans and deprive them of their rights. Those who attempted to protest these laws or sue for equal rights under the Constitution faced arrest, fines, jail sentences, violence, and death.[3]

Additionally, during the late 1800s, large-scale farming brought numerous Asian workers to supplement local laborers. As reported by the National Farmworkers Ministry, by 1886, seven out of every eight farmworkers in California were Chinese. But in 1882 the Chinese Exclusion Act banned the employment of Chinese workers.[4] Around this time, Europeans started coming to the United States to perform agricultural work, but with the beginning of WWI, the number of European farmers decreased drastically and were replaced by Mexican workers.[5]

In the 1930s, as farm workers went on strike for higher wages, national labor laws were passed that excluded farm workers from many benefits, including overtime pay. The National Labor Relations Act[6] and the Fair Labor Standards Act[7] are two such laws that granted rights to many workers but specifically excluded farm workers from their provisions. Additionally, when the Great Depression hit in 1929, more than 500,000 Mexican Americans were deported in what became known as "the Mexican Repatriation."[8]

Presently, the conditions of submission and need of farm workers—willing out of necessity to work in difficult circumstances—are absolutely evident and so severe that a parallel can be drawn between the condition of historical slavery and modern day agricultural workers. The people working on American farms feed the nation and are the backbone of a multi-billion dollar agricultural industry. Yet,

across the country, these same farm workers—on whom our food industry relies entirely—are living in precariousness and fear. The workers, forced by the need to survive as well as to keep their families alive, accept to work in poor conditions, with exhausting and tiring shifts, without rest, and for a pay that is both below that of regular farm workers, but also far too low for the duties they perform.[9] It is estimated that there are approximately around 3 million agricultural workers today in the United States, of whom 16 percent have been identified as migrating while 84 percent are seasonal agricultural workers.[10] Sixty-nine percent of hired farm workers were born in Mexico, 24 percent were born in the United States, and a small portion (1 percent) originated from various other regions, including South America, the Caribbean, Asia, and the Pacific Islands. Eighty-three percent of all farm workers are Hispanic. Among U.S.-born workers, 35 percent are Hispanic.[11]

Of concern is the fact that just more than half (51 percent) of all farm workers in the National Farm Worker Ministry's study have work authorization: 29 percent were U.S. citizens, 21 percent were legal permanent residents, and 1 percent had work authorization through some other visa program.

As outlined, almost half of all U.S. farm workers are undocumented and without a work permit; and their employers rely on new immigrants who have no other option but to work for extremely low wages and under unsafe conditions. The legal status of the worker has been shown to impact the wage received for a job. An agricultural worker with no documentation earns an average of 15 percent less than one with amnesty or green card.[12] What emerges from the studies conducted on farm workers is an alarming picture of exploitation.

Significant Recent Legislative History

Bracero Program

The Bracero program of 1942 was the beginning of a large-scale legal and illegal Mexico-U.S. migration. Under the Bracero "Strong Arm" program, Mexican farmworkers were imported by the federal government for work on farms and railroads to supplement wartime labor shortages.

The United States and Mexico signed a bilateral agreement in 1942 that allowed the entry of "native-born residents of North America, South America, and Central America, and the islands adjacent thereto, desiring to perform agricultural labor in the United States."[13] The United States' purpose for signing this agreement was that of obtaining cheap labor to support its agriculture during the World War, while Mexico was hoping to leverage on the workers' acquired know-how to industrialize the country and grow its economy. It is estimated that almost 2 million Mexicans participated in the program, but tensions between Mexico and the United States over the real objectives of the program, as well as its failure to limit illegal immigration into the United States, led to Operation Wetback in 1954.[14]

When the Bracero program started, illegal Mexican farm workers found on U.S. farms were legalized through a fairly simple process that was referred to as "drying out the wetbacks." Illegal Mexicans were taken to the border and issued documents and brought back to the farm where they were found. But the number of illegals soon exceeded the number of legal Braceros.

Operation Wetback was an immigration enforcement initiative that used military-style tactics to remove Mexicans from the United States. Under Operation Wetback, the U.S. government removed 1.1 million Mexicans in 1954. Nevertheless, the availability of Braceros allowed an expansion of labor-intensive agriculture and created a higher demand for farm workers.[15]

A U.S. government commission in 1951 aimed to sanction employers who hired illegal immigrants. Both the U.S. president and the Mexican government endorsed this proposal, but Congress did not. As a result, the 1952 Immigration and Nationality Act[16] made harboring illegal aliens a felony, but it also included a provision that specified that employing an illegal alien was not harboring.[17] Criticism of the Bracero program by unions, churches, and study groups persuaded the U.S. Department of Labor to tighten wage and housing standards.

During the summer of 1963, there was a debate in Congress over the Bracero program. Farmers—who were supporters of the program—argued that without Braceros, the agricultural production would shrink and food prices would rise. On Sept. 17, 1963, the Chualar bus accident took place; 32 Braceros were killed and 27 injured when the bus that was taking them from their houses to the fields crashed with a train in Chualar. The fact that their bodies were not claimed immediately heightened the criticisms over the Bracero program and its lack of accountability.

The Bracero program was terminated amidst controversy in 1964. The program had offered employment contracts to 5 million Braceros and was the largest foreign worker program in U.S. history.

Saw and Raw Program

In 1986, Congress passed the Immigration Reform and Control Act (IRCA),[18] which provided amnesty to a group of agricultural workers who met certain requirements. These workers were needed to perform labor related to perishable fruit and vegetables.

This amnesty granted undocumented immigrants—who had been working on farms and who were willing to keep working in farms—the opportunity to remain in the United States temporarily with the status of lawfully temporary resident farmworkers. This amnesty program then allowed the farmworkers who had obtained temporary status to apply for lawful permanent resident status if they could meet specific criteria set forth in the Act. These farmworkers were called special agricultural workers (SAW).

The SAW program delineated two groups of farmworkers to obtain legal status in the United States. The first group had to prove that they had worked at least 90 days as farmworkers in each of three years from May 1, 1983, to May 1, 1986. The farmworkers who belonged to this group were allowed to obtain temporary residency and thereafter to adjust status to that of a lawful permanent resident on Dec. 1, 1989, absent other grounds of deportability. The second group was that of "special agricultural workers who, during the 12-month period ending May 1, 1986, performed at least 90 man-days in the aggregate of qualifying agricultural employment in the United States."[19] This second group was allowed to obtain lawful permanent residency—if not deemed deportable—on Dec. 1, 1990.

This program became known as the "super-amnesty" for agriculture. More than 600,000 applicants were admitted to the United States for processing under the special agricultural workers program.[20] Applicants had to prove they met the requirements set forth in the Act through all possible available evidence, including pay stubs or letters from the employer.

Section 210A[21] of the INA, the Replenishment Agricultural Worker (RAW) Program, was added by the 1986 IRCA. The RAW Program had been created to give immigration status to those farm

workers who came to the United States after a shortage of agricultural workers and thus, during a need for workforce for perishable crops. The provision established that if the secretaries of Agriculture and Labor determined that a shortage existed, the government was allowed to overcome such shortage by providing workers with immigration status.

Under this program, RAW workers were going to receive work authorizations, and while required to work in a seasonal agricultural field for three years, they could choose which kind of crop and at which location to work. Additionally, once given RAW status, the workers would have also been allowed to receive public assistance and to live inside or outside the United States. Similarly to SAW workers, their status could be terminated in the presence of grounds of deportability. According to the RAW program, the workers—after working the requisite amount of time for three years in seasonal agricultural services—were eligible to adjust status to that of permanent residents. Unfortunately, the employers of RAW workers were allowed to discriminate toward these immigrants by paying them less than the market average salary, since there was no wage protection provision in place at the time. In the three years the program was in place, though, a shortage of workers never occurred. As a result, the INS removed the regulations on RAW.

H2A Visa

The H2 category was first created in 1952 by the INA. H2 was introduced as a temporary unskilled worker category. Later, in 1986, the IRCA divided the H2 category into two further subcategories: the H-2A for temporary agricultural workers and the H-2B for temporary workers in other fields.

The H-2A program allows employers to temporarily hire foreign farm workers for agricultural jobs that last a maximum of 10 months. For an H2A visa to be granted to a proposed foreign worker, the Department of Labor must make sure that there are not enough U.S. workers "able, willing, qualified, and available"[22] to perform the offered job, and that U.S. workers will not be "adversely affected"[23] by the import of guest workers on the U.S. market. To prove these points, the employers have to recruit and hire U.S. workers and abide by certain labor protection requirements, such as free housing and minimum wage. The employer must submit all necessary documents and evidence to the Department of Labor (DOL), which, if satisfied with the submission, will issue a labor certification. This labor certification is then submitted with a petition for nonimmigrant worker to U.S. Citizenship and Immigration services (USCIS).

The criticisms of the H2A programs are numerous, including the little oversight exercised by DOL, which is said to approve most applications without any in depth analysis. Other criticisms of the program include abuses of farmers' rights, wage theft, and discrimination. Most of the workers who are employed through the H2A visa are escaping conditions of extreme poverty from countries with little or no social protection. Desperate to support their families, these workers are willing to accept working conditions unfathomable to Americans. H2A workers can only work for the employer who brought them to the United States and cannot stay in the country for longer than the duration of their contracted job. It is obvious that these workers are reticent to report abuses, as the balance of power tips sharply in favor of their employers, who can terminate noncompliant workers and have them deported at any time. As a result, the very requirements designed by the DOL to serve as a set of minimum labor conditions, have effectively become the best—as in the only—deal these workers can aspire to. Additionally, the H2A program has been reprimanded, as its critics claim that it is structured in a way that creates incentives for employers to hire foreign workers over Americans. By way of example, a foreign worker is cheaper in terms of taxes because an employer will not have to pay Social Security or unemployment taxes on an H2A worker. As a result, the initial legislative objective of not disrupting the American market is clearly not met. Further, the shadow of human trafficking and exploitation has also been cast upon the H2A visa program, as most recruitments happen through private third-party agencies that connect the employers with the workers.[24] Said agencies often charge workers an unreasonable fee in order for them to be given a chance to come work in the United States, *de facto* creating a system of forced labor. Workers leave their home countries with substantial debt, often with their valuables as collaterals, to then come to the United States with very few rights and work for an employer who can fire and deport them as he pleases.

Exploitation and human trafficking are inevitable byproducts of a poorly regulated employment visa program, where cheap foreign labor is imported into the United States with utter disregard to workers' rights, human rights, and the damages caused to the U.S. labor market for American citizens.

Considerations and Proposal

Facing the coronavirus emergency, millions of U.S. workers are staying at home in compliance with state orders issued in an attempt to control the pandemic. During this national emergency, America's food security and its supply chains are a burden placed on the shoulders of the many low-wage agricultural workers who work tirelessly in the fields to guarantee food supply to the American people. In the face of this pandemic, agricultural workers have been deemed essential by the U.S. government. The paradox is that at least half of the farm workers busy feeding America are in fact illegal. Essential, yet illegal.

The United States, in its history, has often times rewarded immigrants who made a contribution to the country by offering, for example, a path to citizenship to the soldiers who served in the U.S. military.[25] The frontlines in today's pandemic are the farms, where these workers serve every day in order to guarantee that Americans have food on their tables. To make sure that the food supply is maintained, farm workers are not sheltering at home, putting their health and life in danger for the American people. It's time to offer these workers a path to legal status in a way that is rewarding of their efforts and does not violate basic human rights.

Other countries around the world have faced a similar issue. Many Western European countries rely on foreign workers for their harvest season. In Italy, for example, many seasonal farm workers live in Eastern Europe and go to work in Italy for the harvest season. Italy was about to face a serious shortage in food supply, as its usual seasonal workers can't leave their home countries because of COVID-19 travel restrictions. As a result, the Italian government has decided to address the issue of its approximately 600,000 irregular migrants working in the Italian agricultural sector. They have approved a bill that allows these workers to legalize their status and get a residency valid for six months.[26] The United States should face the issue of its farm workers as well, and craft a legal instrument that would legalize and secure these workers and their families. There

is currently a bill proposal that should be endorsed and furthered, which would, among other things, create a new certified agricultural worker (CAW) status.

On Dec. 11, 2019, the House passed H.R. 5038, the Farm Workforce Modernization Act of 2019, by a vote of 260 to 165.[27] If passed into law, this bill would create a new CAW status providing temporary work authorization for individuals who are not work authorized, are not lawfully present, are under deferred enforce departure, or who have temporary protected status. These individuals must be currently present in the United States and must have previously performed a certain amount of agricultural work. Relevantly, in the study by the National Farm Worker Ministry, it was reported that in the 12 months prior to being interviewed, respondents spent an average of 33 weeks employed in farm work and performed an average of 192 days of farm work. According to the bill, CAW status would be valid for five and a half years and may thereafter be extended. Applicants would need to show prior agricultural work, proving that they have performed agricultural labor in the United States for at least 180 work days during the two years preceding the introduction of the Act. CAWs and their certified dependents would be eligible for certain benefits, including old age, survivors, and disability insurance, and they would be issued a Social Security number. If passed, this bill would also allow individuals who don't meet the prior working requirements to be eligible for H2A status. Under existing law, the employer must sponsor H2A applicants while they are outside of the country, while this bill would allow employers to sponsor workers that are in the country without requiring them to depart. This would be particularly beneficial, as it is a way to legalize existing illegally present individuals as opposed to bringing more foreigners from abroad, while those currently present remain without papers. Finally, CAWs would be allowed to adjust status to that of legal permanent residents once all federal income tax liabilities have been paid.

Passing this bill would not only correct a wrong from a human rights perspective but it would also bring tax revenue to the federal government and extend its purview over previously unmonitored aliens—undoubtedly a bipartisan win and a win for the United States and Americans at large. ⊙

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Endnotes

[1]*See* Rosemarie Zagarri, *Slavery in Colonial British North America*, TeachingHistory.org, https://teachinghistory.org/history-content/ask-a-historian/25577 (last visited July 7, 2020).

[2]The term "Jim Crow Laws" refers to a series of state and local statutes passed in the 1870s and 1880s that coded and legalized racial segregation in the states of the former Confederate States of America.

[3]*See* Cibonay Dames, *Jim Crow: Now and Then,* Github, https://cibonayrae.github.io/jimcrow/ (last visited July 7, 2020).

[4]National Farm Worker Ministry, http://nfwm.org/ (last visited July 7, 2020).

[5]*Immigration and the Great War*, Nat. Park Serv. (Oct. 30, 2018), https://www.nps.gov/articles/immigration-and-the-great-war.htm.

[6]29 U.S.C. §§ 151-169.

[7]*See* Dep't of Labor Emp't & Training Admin., Findings from the National Agricultural Workers Survey (NAWS) 2015-2016: A Demographic and Employment Profile of United States Farmworkers (2018), https://wdr.doleta.gov/research/FullText_Documents/ETAOP_2019-01_NAWS_Research_Report_13.pdf

[8]*See Mexican Repatriation (1929-1936)*, ImmigrationHistory.org, https://immigrationhistory.org/item/%E2%80%8Bmexican-repatriation/ (last visited July 7, 2020).

[9]The Human Cost of Food (Charles D. Thompson & Melinda F. Wiggins eds., 2002).

[10]*Id.*

[11]*Id.*

[12]Sabrina Isé & Jeffrey M. Perloff, *Legal Status and Earnings of Agricultural Workers*, 77 Am. J. of Agric. Econ. 375 (1995).

[13] Farm Labor Supply Appropriation Act, 50 App. U.S.C. § 1355(g) (Supp. V 1944).

[14]Kelly Lytle Hernandez, *UCLA faculty voice: Largest deportation campaign in U.S. history is no match for Trump's plan*, UCLA Newsroom (Mar. 23, 2017), https://newsroom.ucla.edu/stories/ucla-faculty-voice:-largest-deportation-campaign-in-u-s-history-is-no-match-for-trumps-plan.

[15]*Id.*

[16]Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952), *codified at* 8 U.S.C. §§ 1101-1537.

[17]8 U.S.C. §§ 1324-24(a) (2005).

[18]Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3445 (1986).

[19] *See* 8 C.F.R. §§ 210a. (2017).

[20]The Associated Press, *U.S. Amnesty Ends for Farm Workers*, N.Y. Times (Dec. 1, 1988), https://www.nytimes.com/1988/12/01/us/us-amnesty-ends-for-farm-workers.html.

[21]8 C.F.R. § 210a (1992).

[22]8 U.S.C. § 1188 (2000).

[23]*Id.*

[24]*Human Trafficking on Temporary Work Visas: A Data Analysis 2015-2017*, Polaris (Apr. 2018), https://polarisproject.org/wp-content/uploads/2019/01/Human-Trafficking-on-Temporary-Work-Visas.pdf.

[25]8 U.S.C. §§ 1439-40 (1990).

[26]Decreto Legge 23 febbraio 2020, n.6, http://www.governo.it/sites/new.governo.it/files/DL_20200520.pdf

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BANK

Supreme Court Nixes Another FDIC-Friendly Federal Common-Law Rule: Only Agency Restraint Has Saved the *D'Oench* Doctrine From *"Duhme"*

JEROME A. MADDEN

Since the S&L crisis of the late 1980s and early 1990s and the more recent Great Recession that began in earnest in September 2008, the Federal Deposit Insurance Corporation (FDIC), acting in its receivership capacity or as corporate liquidator, has resolved the affairs of thousands of insured depository institutions. Thanks to the FDIC's resolution process in which a failing bank typically is closed on a Friday afternoon and reopens the next day under new ownership, the country has weathered both crises quite well, despite the too-big-to-fail moral hazard made glaringly obvious in the Great Recession. All one needs to do is look at what happened to banks during the Great Depression before the creation of the FDIC and federal deposit insurance to understand the critical role the FDIC plays in maintaining confidence in the nation's financial system.

Prior to the 1990s, the courts were accommodative to the FDIC's efforts to develop federal common law to fill in the gaps of underdeveloped statutory bank receivership law. The FDIC's ability to liquidate the assets of failed banks and thrifts (collectively, banks) is vitally important to the replenishment of the Bank Insurance Fund. Over the last quarter of a century, however, as the S&L crisis began to crest in the early 1990s, the federal courts in general, and the Supreme Court in particular, began pushing back on federal common law favorable to the FDIC's resolution efforts. The Court's recent decision in *Rodriquez v. FDIC*[1] completes a sweep of federal common law favorable to the FDIC to the dust bin of history—with one important wrinkle. We explore here the extinction of these federal court-made rules and the potential impact on the FDIC's resolution and liquidation efforts in a future financial crisis.

The *D'Oench* Doctrine

In 1942, the Supreme Court in *D'Oench, Duhme & Co. v. FDIC*[2] created a federal common-law rule in favor of the FDIC in its efforts to liquidate the affairs of failed banks. As the insurer of deposits, the FDIC requires banks to periodically file financial reports detailing their assets and liabilities. All too often, although a bank loan was reported to the FDIC as an asset, the loan (asset) was illusory because of a written or oral secret side agreement between a borrower and a bank insider stating that the note would never be called for payment. In the event the bank failed, the FDIC would seek to collect on the loan only to have the secret agreement raised as a defense. Although the Federal Reserve Act made it a crime for any person to mislead the FDIC about the value of a security, nothing in federal law rendered such agreements unenforceable in suits by the FDIC. In

D'Oench the Supreme Court created a federal common-law rule that rendered such secret agreements unenforceable based on the policy in the Federal Reserve Act.

Eight years later, in 1950, Congress amended the Federal Deposit Insurance Act (FDI Act) to codify the rule enunciated in *D'Oench*. But, 12 U.S.C. § 1823(e) applied only to the specific capacity in which the FDIC sought payment. In the facts of *D'Oench*, the FDIC in its capacity as the receiver (FDIC-Receiver) for the failed bank assigned the loan to the FDIC in its capacity as insurer of deposits (FDIC-Corporate) so that FDIC-Corporate could liquidate the loan and replenish funds used from its Bank Insurance Fund to resolve the affairs of the bank. Section 1823(e), therefore, applied only to cases where FDIC-Corporate was seeking to collect and did not apply when FDIC-Receiver itself sought to liquidate the asset. Section 1823(e) provided that no agreement which tends to diminish or defeat the interest of FDIC-Corporate in any asset obtained by assignment from FDIC-Receiver was valid unless it was in writing, executed by the bank, approved by the bank's board of directors, and held continuously in the bank's official record. From 1950 onward, FDIC-Corporate relied on § 1823(e) to defeat secret side agreements that fit the fact pattern in *D'Oench* and relied on *D'Oench* when the facts did not mimic the fact pattern in § 1823(e), but the policy identified in *D'Oench* was implicated. FDIC-Receiver relied on *D'Oench* to defeat side agreements. Therefore, § 1823(e) and *D'Oench* were applied in tandem to achieve the same federal policy objective.

The timing of the Supreme Court's decision in *D'Oench* is important because just four years earlier, the Supreme Court had held in *Erie Railroad Co. v. Tompkins,*[3] that there was no federal common law and that Congress has no power to declare rules of common law applicable in a state. The *Erie* Doctrine abrogated *Swift v. Tyson*,[4] which held that "federal courts ... need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the state is—or should be ...." Nevertheless, in *D'Oench,* the Supreme Court held that federal policy dictated the need to create a specific federal common-law rule to protect the FDIC. The Supreme Court did not articulate until sometime later that it would create similar special federal rules only in "few and restricted" circumstances where state law interfered with important federal policies.[5] The FDIC continued to advocate for a federal common-law rule whenever state law would interfere with its view of federal policy. Because the Court in *Erie* did not specifically address the fate of preexisting federal common law, the FDIC also continued to rely on a pre-*Erie* Supreme Court case from the 19th century holding that directors and officers of federally chartered financial institutions were subject to a simple negligence standard of care.[6]

O'Melveny & Myers v. FDIC (1994)

the federal courts' receptiveness to the creation of federal common-law rules to protect the interests of the FDIC began to wane after Congress enacted the Financial Institution Reform, Recovery and Enforcement Act of 1989 (FIRREA). FIRREA represented a comprehensive overhaul of the nation's banking laws, with emphasis on the resolution of insured depository institutions placed into FDIC receiverships. Once FIRREA was enacted, and especially from 1993 onward when the S&L crisis began to subside, the golden era of federal common-law rules favoring the FDIC as receiver or liquidator was over.

In the early 1990s, FDIC-Receiver brought a professional malpractice case against O'Melveny & Myers in connection with two real estate syndications it handled for a bank at a time when its management was involved in fraudulently overvaluing the assets that were the subject of the transactions. The FDIC sued O'Melveny under California law for not conducting due diligence about the financial condition of the bank. O'Melveny moved for summary judgment arguing as a complete defense that the wrongdoing of the institution's insiders must be imputed to the FDIC because, as receiver, the FDIC stood in the shoes of the failed bank. The Ninth Circuit reversed summary judgment for O'Melveny. In rejecting O'Melveny's argument that any equitable defense under California law—including imputation—that could have been raised against the bank could be raised against the FDIC as the bank's receiver, the Ninth Circuit stated that "[t]he flaw in this argument is the law O'Melveny assumes applies."[7] The court continued: "It is beyond doubt that federal, not state, law governs the application of defenses against FDIC. While we may incorporate state law to provide the federal rule of decision, we are not bound to do so ... Thus, contrary to O'Melveny's argument, we are not bound by state law, but must instead establish federal law."[8]

The Supreme Court granted O'Melveny's petition for certiorari. The FDIC argued that federal common law—not California law—controlled whether the wrongdoing of the institution's insiders could be imputed to the bank and, even if California law applied to that issue, then federal common law controlled whether insider wrongdoing could be imputed to the FDIC as receiver representing the interests of innocent creditors—not the bank's shareholders. The Supreme Court would have none of it. An opinion written by Justice Scalia rejected both of the FDIC's arguments, stating flatly that "[t]here is no federal common law," citing *Erie R. v. Tompkins*.[9] The Court noted that the mere fact that an insured depository might go into federal receivership was not a "conceivable basis for adopting a special federal common-law rule divesting States of authority over the entire law of imputation."[10] The Court acknowledged that post-*Erie,* it had recognized federal common-law rules in "few and restricted" circumstances but there was no need for federal common law in this circumstance: The Court observed that the rules of decision at issue in the case "affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that has already occurred."[11] The Court continued stating that uniformity of a rule of law on this issue might be desirable by the FDIC, but if that were the standard for a special common-law rule "we would be awash in 'federal common-law' rules."[12] The Court did not address how the issue on remand would be resolved under California law.[13]

In the concurring opinion, however, Justice Stevens, joined by Justices Blackmun, O'Connor, and Souter, observed that "[i]t would be entirely proper for a state court of general jurisdiction to fashion a rule of agency law that would protect creditors of an insolvent corporation from the consequences of wrongdoing by corporate officers even if the corporation itself ... would be bound by the acts of the agent."[14] It was not surprising, therefore, that on remand, the Ninth Circuit held that under California equitable principles the wrongdoing of the bank's insiders could not be imputed to the FDIC as receiver: "While a party may itself be denied a right or defense on account

of its misdeeds, there is little reason to impose the same punishment on a trustee, receiver or similar innocent entity that steps into the party's shoes pursuant to court order or operation of law."[15]

The Circuit's Split Over Whether FIRREA Displaced *D'Oench*

Before the ink was dry on the *O'Melveny* opinion, several federal circuit courts of appeals began an assault on the federal common-law rule announced in *D'Oench*. In 1989, as part of FIRREA, Congress enacted 12 U.S.C. § 1821(d)(9)(A) and amended § 1823(e) to accomplish what the 1950 amendment to the FDI Act did not. As originally enacted, § 1823(e) was defensive in nature, i.e., it was raised to defeat unrecorded side agreements raised as a defense to liquidation of a failed bank asset. In contrast, § 1821(d)(9)(A) rendered unenforceable secret side agreements that formed the basis of a claim against the FDIC in either its receivership or corporate capacities. It provided that "any agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the [FDIC as] receiver or the [FDIC operating in its corporate capacity to liquidate an asset transferred from FDIC-Receiver to FDIC-Corporate]." In turn, § 1823(e) was amended to include FDIC-Receiver. After FIRREA enacted § 1821(d)(9), failed bank claimants began asserting that FIRREA had displaced the *D'Oench* doctrine. A split in the circuit courts of appeals developed.[16]

Atherton v. FDIC (1997)

While the battle over the survival of the *D'Oench* doctrine was ongoing in the circuit courts of appeals—as discussed later, this split would eventually work its way to the Supreme Court—the Supreme Court granted certiorari in another FDIC federal common-law case. For the first time, Congress in FIRREA addressed the standard of liability to be applied in suits by FDIC against the directors and officers of a failed bank alleging a breach of duty to the bank:

> A director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action by, on behalf of, or at the request or direction of the Corporation ... acting as ... receiver ... for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law.[17]

This new section caused much confusion over the fate of *Briggs v. Spaulding* that held, pre-*Erie*, that directors and officers of federally chartered banks were governed by a simple negligence standard of care. It also caused confusion about whether state laws also imposing a simple negligence standard of care had been preempted in favor of a national gross-negligence standard applicable to all banks—state and federal. Relying on the last sentence of § 1821(k), FDIC argued that the simple negligence standard enunciated in the Supreme Court's 1897 decision in *Briggs* still applied to federally chartered banks and, further, that where a state's law imposed a simple negligence standard nothing in § 1821(k) precluded imposing that standard in liability suits by FDIC against the insiders of state-chartered institutions. In FDIC's view, § 1821(k) displaced state-law liability standards only to the extent that state law imposed a standard of care more lenient than gross negligence, *e.g.*, where a state's standard of care was intentional misconduct.

The meaning of § 1821 (k) came to a head in *Resolution Trust Corporation v. CityFed Financial Corp.*[18] FDIC as receiver for City Federal Savings Bank, a federally chartered thrift, sued the bank's directors and officers asserting that the simple negligence standard set out in *Briggs* applied. The officers and directors argued that § 1821(k) established a uniform federal standard of gross negligence for all depository institutions regardless of whether their charter was state or federal. On interlocutory review, the Third Circuit agreed with the FDIC. "We hold that Congress did not preempt existing state law or supplant federal common law."[19]

The Supreme Court granted certiorari and in *Atherton v. FDIC,*[20] disagreed with the FDIC as it had done in *O'Melveny*. The Court stated that the corporate governance standard enunciated in *Briggs* for federally chartered financial institutions did not survive the Court's decision in *Erie*. The Court noted that, after *Erie,* cases in which a special federal rule would be justified are "few and restricted."[21] To justify such a special federal rule, the Court explained, "'the guiding principle is that a significant conflict between some federal policy or interest and the use of state law ... must first be specifically shown.'"[22] The Court rejected the FDIC's arguments that federal common law (1) was needed for purposes of uniformity, (2) would be consistent with the "internal affairs doctrine," and (3) would be consistent with the federal regulator's use of the *Briggs* simple-negligence standard in cease-and-desist administrative enforcement actions brought against directors and officers of operating insured depository institutions.[23] The Court found that these policy reasons were far weaker than what was presented in those "few and restricted" circumstances where the Supreme Court has created a federal common-law rule.[24]

The Court agreed with the FDIC, however, that those circuit cases holding that § 1821(k) imposed a uniform federal gross-negligence standard for all state and federal banks were incorrect.[25] Justice Breyer, writing for the Court, concluded that regardless of whether the bank was state or federally chartered, the relevant state law provided the standard of care so long as the applicable state's standard of care was not more lenient than gross negligence, *e.g.*, a state law could not impose liability only for intentional misconduct.[26]

The Supreme Court Vacates and Remands the Eleventh Circuit's *Motorcity* Decision

At the time the Supreme Court decided *Atherton*, the split in the circuit courts regarding *D'Oench* made its way to the Supreme Court. After the Court decided *Atherton*, it granted Motorcity's petition for certiorari, vacated the Eleventh Circuit's en banc decision holding that Congress did not intend to displace *D'Oench* in enacting FIRREA, and remanded the case for reconsideration in light of its decision in *Atherton*. Upon reconsideration, the Eleventh Circuit—once again—held that Congress, in enacting FIRREA, did not intend to displace the *D'Oench* doctrine: "We continue to believe that the analysis set forth in our prior en banc opinion reflects the most reasonable reading of Congress's intent, *i.e.*, that Congress did not intend FIRREA to displace the *D'Oench* doctrine, but rather intended to continue the harmonious forty-year existence of the statute and the *D'Oench* doctrine."[27] The court of appeals relied on *United States v. Texas*,[28] where the Supreme Court held that there is a presumption that when Congress legislates in an area where federal common law

exists, it does not intend to displace federal common law "unless a statutory purpose to the contrary is evident."[29]

The Eleventh Circuit found that *Atherton* was inapposite. The court explained that the issue in its en banc decision in *Motorcity* was whether Congress intended FIRREA to supplant a previously established and long-standing federal common law *D'Oench* doctrine.[30] "*Atherton* does not address the question of whether a federal statute abrogates a previously established and long-standing federal common law doctrine."[31] In contrast, the court noted that the issue before the Supreme Court in *Atherton* was whether "the use of state law constitutes a significant conflict with federal policy or interest such that the creation of a federal common law would be appropriate."[32]

FDIC's Policy Statement Restraining Its Reliance on the *D'Oench* Doctrine

The Eleventh Circuit noted that, between its en banc decision in *Motorcity* and the Supreme Court's grant-vacate-and-remand order in *Motorcity*, the FDIC issued a statement of policy explaining that §§ 1821(d)(9)(A) and 1823(e) "should be interpreted in a manner consistent with the policy concerns underlying the *D'Oench* doctrine" and "[a]ccordingly ... these sections bar claims that do not meet the enumerated recording requirements set forth in section 1823(e), regardless of whether a specific asset is involved, to the same extent as such claims would be barred by the *D'Oench* doctrine."[33]

The Policy Statement explained that § 1823(e) applies only with respect to agreements that pertain to assets held by the FDIC "because the function of that section is to bar certain defenses to FDIC's collection of such assets. Section 1821(d)(9)(A)'s function, in contrast, is to bar certain affirmative claims against the FDIC" based on alleged agreements that do not meet the recording requirements of § 1823(e).[34] The Policy Statement noted that, prior to the enactment of FIRREA in 1989, "the Supreme Court in *Langley v. FDIC*[35] held that it would disserve the policy recognized in *D'Oench* to interpret § 1823(e) in a more restricted manner than *D'Oench* itself: 'We can safely assume that Congress did not mean 'agreement' in section 1823(e) to be interpreted so much more narrowly than its permissible meaning so as to disserve the principle of the leading cases applying that term to FDIC-acquired notes.'"[36] The Policy Statement continued: "In the same way, it would disserve the policies recognized in *D'Oench* and *Langley* to interpret section 1821(d)(A) more narrowly than *D'Oench* has been applied in so-called no-asset cases."[37]

Despite the Policy Statement's affirmation of the FDIC's belief that *D'Oench* can be interpreted more broadly than its statutory corollaries, FDIC stated that "as reflected in the [attached] Guidelines, the FDIC, as a matter of policy, will not seek to bar claims which by their very nature do not lend themselves to the enumerated requirements of section 1823(e). To that end, the FDIC will continue to assert the protections of the *D'Oench* doctrine and FIRREA (sections 1821(d)(9)(A), 1821(e)) only in accordance with the Guidelines."[38] In short, the Policy Statement agreed with the reasoning of the Eleventh Circuit's en banc decision in *Motorcity* but announced as a matter of policy that the FDIC would carefully monitor those circumstances in which *D'Oench* would be asserted. Thereafter, FDIC relied predominantly on the statutory corollaries to *D'Oench,* arguing that they should not be interpreted more narrowly than *D'Oench* jurisprudence. Although after the issuance of the Policy Statement, the FDIC restrained its reliance on the *D'Oench* doctrine, nowhere in the statement did the FDIC state that it agreed with those circuit court cases holding that FIRREA displaced the *D'Oench* doctrine. Nor did anything in the Policy Statement address what the FDIC's position would be in the future if the circuit courts failed to interpret *D'Oench*'s statutory corollaries as expansively as *D'Oench* jurisprudence. Although there is no way to know whether the Policy Statement had an impact, the Supreme Court denied the second *Motorcity* petition for certiorari after the Policy Statement was issued.[39]

Rodriguez v. FDIC (2020)

On Feb. 25, 2020, the Supreme Court in *Rodriguez v. FDIC*[40] kayoed another federal common-law rule favorable to the FDIC. Most banks today are owned by bank-holding companies whose profit center(s) are one or more banks they own as subsidiaries. These holding companies file consolidated tax returns with the IRS. The IRS in turn requires the bank-holding company to designate itself or one of its entities as the agent to receive any tax benefits that might be forthcoming. Once the IRS delivers the tax refund, it has no interest in how the refund is distributed among the holding company and its subsidiaries. There is nothing in the tax code or its regulations that compels the conclusion that a tax savings inure to a bank subsidiary whose activities generated the refund or the losses leading to a tax savings. Because subsidiary banks typically are the profit center for holding companies, when those banks fail, the holding company in many cases ends up in bankruptcy. And, when there is no tax-sharing agreement between the holding company and its subsidiaries, the matter often ends up as an adversary proceeding in bankruptcy court.

That is what happened in *In re Bob Richards Chrysler-Plymouth Corp*.[41] A consolidated tax return was filed by Wester Dealer Management (WDM) and its wholly owned subsidiary, Bob Richards Chrysler Plymouth (Bob Richards). The tax return showed that the consolidated group was entitled to a refund resulting from a net operating loss which could be carried back for a refund of taxes paid by members of the group in prior years.[42] Bob Richards was placed into involuntary bankruptcy and the refund to the consolidated group, WMD and Bob Richards, was due entirely to the earnings history of Bob Richards. There was no tax sharing agreement and the IRS sent the refund to the accountant for both entities. The Ninth Circuit found that "[a]bsent any differing agreement we feel that a tax refund resulting solely from offsetting the losses of one member of a consolidated filing group against the income of that same member in a prior or subsequent year should inure to the benefit of that member."[43] The court of appeals continued stating that "[a]llowing the parent to keep any refunds arising solely from the subsidiary's losses simply because the parent and subsidiary chose a procedural device to facilitate their income tax reporting unjustly enriches the parent."[44] The court stated that WDM received the tax refund solely as the agent of Bob Richards, its subsidiary.[45]

In its two-page opinion, the Ninth Circuit reached its holding without conducting the analysis required by the Supreme Court to limit federal common-law rules to "few and restricted" circumstances where the application of state law would frustrate federal policy. Nor did the court of appeals cite any state law in support of its holding. Despite the absence of analysis, the decision of the Ninth Circuit was accepted by several other federal circuit courts of appeals.

In *Rodriguez*, the Supreme Court ended its reign. United Western Bank was placed into FDIC receivership and soon thereafter, as is often the case, its parent, United Western Bancorp. Inc., filed for bank-

ruptcy. When the IRS issued a $4 million refund, both FDIC-Receiver and the holding company's trustee, Simon Rodriguez, laid claim to the refund. After litigation through the bankruptcy court and the district court, the Tenth Circuit ruled in favor of FDIC-Receiver, relying on *Bob Richards*.[46] The Supreme Court reversed. The Court observed that, although there are often onerous tax rules governing consolidated tax returns, nothing in tax law governs how a refund is to be divided among members of the consolidated group. It also noted that many corporate groups enter into tax-allocation agreements that specify which entity or entities will benefit from any tax return and that where there is no agreement or if there is a dispute about its meaning, the courts typically turn to state contract law. The Supreme Court stated that some federal courts "have chartered a different course" and "have crafted their own federal common law rule—one known to those who practice in the area as the *Bob Richards* rule ...."[47] The Court continued:

> [T]he *Bob Richards* rule provided that, in the absence of a tax allocation agreement, a refund belongs to the group member responsible for the losses that led to it ... With the passage of time, though, *Bob Richards* evolved. Now, in some jurisdictions, *Bob Richards* doesn't just supply a stopgap rule for situations when group members lack an allocation agreement. It represents a general rule always to be followed unless the parties' tax allocation agreement unambiguously specifies a different result.[48]

The Supreme Court remarked that, at the urging of the FDIC and consistent with circuit precedent, the Tenth Circuit employed the expansive *Bob Richards* rule. Because the parties had a tax-sharing agreement, the Tenth Circuit stated that "the question was whether the agreement unambiguously deviated from the *Bob Richards* Rule."[49] The Tenth Circuit concluded that the FDIC owned the tax refund.[50]

The Supreme Court disagreed, noting that not all circuits accepted the *Bob Richard's* rule, including the Sixth Circuit in *FDIC v. AmFin Financial Corp*.[51] The Sixth Circuit concluded that nothing in the Ninth Circuit's opinion in *Bob Richards* identified a conflict between state law and federal policy that would justify a federal common-law rule.[52] The Supreme Court agreed, explaining that under *Erie,* there was no general federal common law and that only limited areas exist in which federal judges may appropriately craft a federal rule of decision.[53] The Court continued that a federal rule was not necessary to protect uniquely federal interests.[54] The Court asked rhetorically: "what unique interest could the federal government have in determining how a consolidated corporate tax refund ... is distributed ...."[55] Finding none, the Supreme Court jettisoned the *Bob Richards* rule. The Court declined the FDIC's invitation to address the issue under state law, stating only that it "is a matter the court of appeals may consider on remand."[56]

Does the Virtual Extinction of the FDIC's Reliance on Federal Common Law Matter?

Between 1994 and 2020, either directly—*O'Melveny* (1994), *Atherton* (1997), and *Rodriguez* (2020)—or indirectly—FDIC *D'Oench* Policy Statement 1997—the Supreme Court weaned the FDIC from its reliance on federal common-law rules in favor of the application of state law. But, how much does it matter? Not as much as one might think. For example, on remand in *O'Melveny* the Ninth Circuit held that California law precluded imputation and, therefore, the FDIC achieved the rule against imputation it had sought under federal common law. And there is no reason to think that other state courts would not come to the same conclusion under each state's equitable powers.

The Supreme Court's refusal in *Atherton* to recognize a federal common-law rule that the standard of liability for officers and directors of banks is simple negligence is a bit more nuanced. Under *Atherton,* if the standard of liability in the relevant state is simple negligence, then that standard applies to both state and federally chartered banks, and if the standard of liability in the relevant state is gross negligence then that standard applies. But if the relevant state's standard is more lenient than gross negligence, then § 1821(k) displaces that state standard and imposes a gross negligence standard as a matter of federal statutory law. The FDIC lost the ability to apply a simple negligence standard of care under *Briggs* but can use a relevant state's simple negligence standard in suits against the directors and officers of failed federally chartered institutions; yet, it is relegated to a gross negligence standard where state law provides for gross negligence or a more lenient standard. However, the Court in *Atherton* explained that nothing precludes the Office of the Comptroller of the Currency—the charterer and primary federal regulator of federally chartered depository institutions—from displacing state gross negligence standards with a regulation imposing a simple negligence standard against officers and directors of federally chartered banks.[57] The OCC has not promulgated such a regulation.

The demise of the *Bob Richards* Rule in *Rodriguez v. FDIC* should not significantly hinder FDIC-Receiver in its efforts to corral tax benefits generated by a failed insured depository institution. State law in most cases should lead to the same result. As the Court in *Rodriguez* noted, "[t]he FDIC points out that the court of appeals proceeded to consult applicable state law—and the FDIC assures us—its result follows naturally from state law ...."[58]

That leaves for consideration the fate of the *D'Oench* doctrine. The FDIC Policy Statement set significant limits—but does not preclude entirely—the use of the *D'Oench* doctrine to the extent its statutory corollaries do not protect the interests of the FDIC. Even if in some future case, however, the Supreme Court were to hold that the *D'Oench* doctrine had been displaced by FIRREA, FDIC should be able to achieve the same result under state law. After all, in *D'Oench* itself, Justice Frankfurter, joined by Chief Justice Harlan Stone, concurred on the result but concluded that a federal common-law rule was unnecessary because the result would be the same under state law. "If Illinois law governs, respondent [FDIC] is admittedly entitled to recover as a holder in due course. If Missouri law governs, petitioner is estopped to assert the defenses on which it now relies. Whether the case is governed by the law of one state or the other, or by 'federal common law' drawn here from one state or the other, the result is the same."[59] There is no reason to think that Justice Frankfurter was incorrect and that federal courts applying state law would fail to protect FDIC's ability to rely on a failed bank's books and records in resolving the affairs of a failed bank.

In the final analysis, because the states are the successors to the common law of England, including the law of equity, state law is well suited to fill-in the interstices of federal statutory law, as occurred in *O'Melveny* on remand and is likely to occur on remand in *Rodriguez*. As for the fate of the *D'Oench* doctrine, even if the Supreme Court

were to hold in some distance case that *D'Oench* was displaced by FIRREA, there is no reason to think that state law—as noted by Justice Frankfurter in his concurring opinion, joined by Chief Justice Stone—would not protect FDIC's interests. And, if state law were applied adversely to the interest of the FDIC, Congress would be free to establish a statutory rule displacing state law. ⊙

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Endnotes

[1]140 S. Ct. 713 (2020).
[2]315 US 447 (1942) .
[3]304 U.S. 64 (1938).
[4]41 U.S. (16 Pet.) 1 (1842).
[5]*See Texas Indust., Inc. v. Radcliff Materials, Inc*., 451 U.S. 630, 640 (1981) (stating that although the Court held in *Erie* that there is "no federal general common law," "the Court has recognized the need and authority in some limited areas to formulate what has become known as 'federal common law'" and explaining that "[t]hese instances are 'few and restricted' ... and fall into essentially two categories: those in which a federal rule of decision is 'necessary to protect uniquely federal interests' ... and those in which Congress has given the courts the power to develop substantive law") (citations omitted).
[6]*Briggs v. Spaulding*, 141 U.S. 132 (1891).
[7]*FDIC v. O'Melveny & Meyers*, 969 F.3d 744, 751 (9th Cir. 1992).
[8]*Id.* (citations omitted).
[9]*O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83 (1994).
[10]*Id.*
[11]*Id.* at 88.
[12]*Id.* (citation omitted).
[13]*Id.* at 89.
[14]*Id.* at 90.
[15]*FDIC v. O'Melveny & Myers*, 61 F.3d 17, 19 (9th Cir. 1995).
[16]*Compare Murphy v. FDIC*, 61 F.3d 34, 40 (D.C. Cir. 1995) (holding that § 1821(d) and the amendment of § 1823(e) displaced the *D'Oench* doctrine); *DiVall Insured Income Fund Ltd. P'ship v. Boatmen's First Nat'l Bank*, 69 F.3d 1398, 1402 (8th Cir. 1995) (following D.C. Circuit's decision in *Murphy*) and *Motorcity of Jacksonville, LTD v. Southeast Bank, N.A*., 83 F.3d 1317 (11th Cir. 1996) (en banc) (holding the *D'Oench* doctrine was not displaced by FIRREA); *Young v. FDIC*, 103 F.3d 1180, 1187 (4th Cir. 1997) (holding that FIRREA did not displace the *D'Oench* doctrine).
[17]12 U.S.C. § 1821(k).
[18]57 F.3d 1231 (3d Cir. 1995).
[19]*Id.* at 1249.
[20]519 U.S. 213 (1997).
[21]*Id.* at 218.
[22]*Id.* at 218 (quoting *O'Melveny*, 384 U.S. at 68).
[23]*Id.* at 219-25.
[24]*Id.* at 225.
[25]*Id.* at 231.
[26]*Id.*
[27]*Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 120 F.3d 1140, 1144 (11th Cir. 1997).
[28]507 U.S. 529 (1993).
[29]*Motorcity,* 120 F3d. 1143.
[30]*Id.* at 1143.
[31]*Id.*
[32]*Id*. at 1142.
[33]*Id.* at 1144 n.6 (quoting *FDIC Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, against Unrecorded Agreements of Arrangements of a Depository Institution Prior to Receivership*, 62 Fed. Reg. 5984, 5984 (1997)).
[34]*FDIC Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, against Unrecorded Agreements of Arrangements of a Depository Institution Prior to Receivership*, 62 Fed. Reg. 5984, 5984 (1997)) at 5984.
[35]484 U.S. 86, 92-93 (1987).
[36]FDIC Policy Statement, supra note 34, at 5984-85 (quoting *Langley*, 484 U.S. at 92-93).
[37]*Id.* at 5985.
[38]*Id.*
[39]*Hess v. FDIC*, 118 S. Ct. 1559 (1998).
[40]140 S. Ct. 713 (2020).
[41]473 F.2d 262 (9th Cir. 1973).
[42]*Id.* at 263.
[43]*Id.* at 264.
[44]*Id.*
[45]*Id.*
[46]914 F.3d 1262, 1264 (10th Cir. 2019).
[47]140 S. Ct. 713, 716-17.
[48]*Id.*
[49]914 F.3d at ___
[50]*Id.*
[51]140 S.Ct. at 717 (citing 757 F.3d 530, 535 (6th Cir. 2014)).
[52]*Id.*
[53]*Id.*
[54]*Id.* (quoting *Texas Indus., Inc. v. Radcliffe Materials, Inc*., 451 U.S. 630, 640 (1981)).
[55]*Id.* at 717-18.
[56]*Id.*
[57]*Atherton*, 519 U.S. at 219, 221, 225 (noting OCC authorization to promulgate a simple negligence standard for national banks if it found state law too lenient).
[58]*Rodriguez v. FDIC*, 140 S. Ct. at 718.
[59]*D'Oench*, 315 U.S. at 462.

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The Need for Speed in International Child Abduction Cases

ROBERT E. RAINS

On Feb. 25, 2020, the Supreme Court decided *Monasky v. Taglieri,*[1] addressing the difficult and recurring issue of how to determine the state (country) of "habitual residence" of a child, as well as the standard of review for circuit courts on the issue of habitual residence. Under Article 1 of the Hague Convention on the Civil Aspects of International Child Abduction, a signatory country such as the United States has a duty to effect the "prompt return" to another signatory country of a child who has been wrongfully removed from her country of habitual residence or wrongfully retained in another signatory country.[2] The United States implements its treaty obligation through the International Child Abduction Remedies Act (ICARA).[3]

Consistent with decisions from other signatory countries, the Court unanimously ruled that the determination of "habitual residence" depends on the totality of circumstances specific to the case and does not require an actual agreement between the parties. The Court also unanimously ruled that the habitual-residence determination is a task for the factfinding (district) court and "should be judged by a clear-error review standard deferential to the factfinding court."

Finally—and contrary to the suggestion of the United States as *amicus curiae*—the Court ruled that there should be no remand and that the judgment of the circuit court should simply be affirmed, given "the protraction of the proceeding thus far." That issue—the protraction of proceedings in U.S. courts in international child abduction cases—is the focus of this article and cries out for corrective action.

The facts in *Monasky*—although some are in dispute—are undeniably tragic. Michelle Monasky, an American, met Italian Domenico Taglieri, both highly educated, in Illinois, and they married there in 2011. In 2013, they moved to Italy to pursue their careers, although Monasky did not speak Italian. The marriage was troubled almost from the start, with allegations by Monasky that Taglieri physically abused her and forced her to have sex. (He has consistently denied all such allegations beyond having "smacked her.") Monasky became pregnant in May 2014, allegedly after an instance of forced sex. Monasky gave birth to a daughter, identified in court as A.M.T., by emergency cesarean section on Feb. 13, 2015. After yet another violent argument, Monasky took A.M.T. to the police, who placed them both in a social-services safe house for domestic-violence victims. Two weeks later, on April 15, 2015, the day she received A.M.T.'s U.S. passport, and without informing Taglieri, Monasky flew with A.M.T. to the United States. A.M.T. was a mere eight weeks old.

Taglieri promptly took legal action in both Italy and the United States. On April 29, 2015, he sought a judicial determination of his parental rights in an Italian court. Monasky apparently had no actual notice of this action and did not participate in the Italian proceedings. The Italian court ruled in Taglieri's favor, and, by order dated June 16, 2015, terminated Monasky's parental rights *ex parte* and granted Taglieri sole custodial rights. On May 14, 2015, Taglieri filed for the return of A.M.T. in the U.S. District Court for the Northern District of Ohio. That case was ultimately decided by the Supreme

Court in February 2020. At this writing, A.M.T.'s legal status remains unresolved. The baby who was eight weeks old when her mother removed her to the United States is now five years old. No matter which parent ultimately prevails, both have remained in legal limbo for years regarding a matter that is surely of the utmost concern to virtually every separated parent: who will care for their child and with what rights granted to the other parent?

In addition to the parental rights termination and sole custody action in Italy and the international child abduction action in Ohio, Taglieri also sued Monasky in federal court in Ohio claiming that she had converted marital funds to her exclusive use. She counterclaimed for assault and battery. The court dismissed his conversion claims, and a jury awarded her $100,000 in damages for assault and battery. The Sixth Circuit has upheld that judgment.[4] According to Monasky's Ohio attorney, Christopher Reynolds, Taglieri has not paid that judgment.[5]

Of course, only a miniscule portion of ICARA cases are litigated all the way to the Supreme Court. But consider the timeline in *Monasky*. Monasky removed A.M.T. from Italy to the United States on April 15, 2015. Taglieri filed for her return in federal court on May 14, 2015. The district court entered an order in Taglieri's favor on Sept. 14, 2016, a full 16 months later. Surely, by then, a pre-verbal infant born in Italy had become a toddler beginning to understand and speak English and not Italian. The district court's order required Monasky to return A.M.T. to Italy within another forty-five days. Monasky appealed and sought a stay, which was denied by the Sixth Circuit and, on Dec. 6, 2016, by Justice Kagan. Finally, in December 2016, A.M.T. was returned to Italy where, per the Italian court's prior order, she was placed with Taglieri "as sole custodian with full legal rights." The Sixth Circuit Court of Appeals affirmed the district court *en banc* on October 17, 2018, more than two years after the district court's decision. Over a year later, the Supreme Court heard argument and, after another two and a half months, issued its ruling.

Several provisions in the Child Abduction Convention ("Convention") are intended to reinforce the Article 1 mandate of prompt action. Article 2 requires that "Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use *the most expeditious procedures available*."[6] Article 7 mandates that, "Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities of their respective States *to secure the prompt return of children*...."[7] [NB: The Department of State is our Central Authority.[8]] Article 11 provides that "The judicial or administrative authorities of Contracting States *shall act expeditiously* in proceedings for the return of children."[9] Moreover, under Article 11, "If the judicial or administrative authority concerned has not reached a decision within *six weeks* from the date of commencement of the proceedings," the applicant can request a statement of the reasons for the delay.[10]

ICARA, our implementing statute, reiterates the Convention's mandate for prompt return of abducted children, subject to "narrow exceptions."[11] ICARA grants state courts and federal district courts concurrent original jurisdiction to hear Convention applications.[12] Unfortunately, neither the statute nor the federal rules of civil procedure specify exactly what is meant by "prompt" or how that mandate is to be effectuated.

Implementation of the mandate for prompt return has been an ongoing problem, not just in the United States, but in most other contracting countries. There have been a series of statistical surveys of contracting countries conducted by Nigel Lowe and Victoria Stephens in consultation with the Permanent Bureau of the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children. The findings of the most recent survey are reported in the 2018 *Family Law Quarterly*.[13] As the survey's authors note, "Timing is vital to the successful operation of the Convention."[14] Six weeks is the accepted yardstick of promptness, but it is at best aspirational. In 2015, the average number of days to arrive at a final settlement was 164 days from the date the application was received (i.e., almost four times longer than the aspirational period).[15] Still, this was an improvement over the 188-day average reported in the 2008 survey.[16] As noted, in the *Monasky* case, 16 months elapsed between the father's federal court filing and issuance of that court's return order. It took another three months before A.M.T. was actually returned to Italy.

Under the Convention, an aggrieved parent may file an application for return (or, in a minority of cases, access) in a court of competent jurisdiction or with the Central Authority of either country. When cases were filed with a Central Authority, there was even more delay. In 2015, "Central Authorities took an average of 93 days to send applications to court, and the courts took a further 125 days on average to reach a final order."[17] In the United States, the average time for the State Department to send Convention cases to court was 142 days.[18] Only then was litigation even commenced.

In the words of the survey authors, "We hold to the view that it is basically wrong for children to be uprooted from *their* home by the unilateral act of either parent and taken to a foreign jurisdiction and thus separated from the other parent and their friends and familiar surroundings. Furthermore, research has shown that even abduction by primary caring mothers has significant detrimental effects."[19]

Unfortunately, several provisions in the Convention actually encourage delay on the part of the abducting parent. Article 4 provides, "The Convention shall cease to apply when the child attains the age of 16 years."[20] This can enable an abducting parent to "run out the clock" in the case of a teenage child. One prominent example of this phenomenon occurred in the case of *Abbott v. Abbott*, decided by the Supreme Court in 2010.[21] In *Abbott*, the mother had removed the child from Chile, his state of habitual residence, in August 2005. The father filed his Child Abduction Convention application in federal district court in Texas in May 2006. That court denied his claim on the basis that his Chilean right of *ne exeat* did not constitute a right of custody. That decision was affirmed by the court of appeals. But in May 2010, four years after the father's initial filing, the Supreme Court reversed, ruling that the father's *ne exeat* right was a right of custody under the Convention. For the father, this constituted a pyrrhic victory. In June 2011, while the case was on remand to the district court, the child turned 16, leading the district court to dismiss the action.[22]

Article 12 encourages concealment of the abducting parent and child to prevent prompt filing of a Convention application in a court of competent jurisdiction. Under that article, "The judicial or administrative authority, ... where the proceedings have been commenced after the expiration of the period of one year ... shall ... order the return of the child, unless it is shown that the child is now settled in its new environment."[23] In *Lozano v. Alvarez*, in 2014, the Supreme Court unanimously ruled that this one-year period is not equitably tolled by the abducting parent's concealment of the child's location.[24]

[Query: After *Lozano*, does an attorney have an ethical obligation to inform an abducting parent of the legal advantages of hiding the child from the other parent?]

Article 13 provides that return of an abducted child is not mandated where "the child objects and has attained an age and degree of maturity at which it is appropriate to take account of his views."[25] The longer the delay, the more likely it is that the child will be acclimated in "its" new environment and will have reached an age and level of maturity at which a court will deem it proper to take account of "its" views.

Delay harms both parents and the child. In *Monasky*, the father (who certainly does not appear to be a sympathetic figure) was deprived of access to his newborn baby for 19 months. A.M.T. was deprived of her father's parental consortium for that same period of time. According to Attorney Reynolds, Monasky moved back to Italy when she returned A.M.T. in December 2016. She has been trying to undo the *ex parte* order terminating her parental rights, thus far without success. Unless and until she can reopen that order, her ability to see A.M.T. is constricted and may end. She has been able to obtain only limited, sporadic visits with A.M.T. in the intervening three years, sometimes under the watchful eye of Taglieri, who has been found by a U.S. court to have seriously abused her. Since Monasky knows very limited Italian and it appears that no one is teaching A.M.T. English, their ability to communicate, even when they see each other, is quite constricted.

It should be noted that Hague Convention cases do not determine custody; they only determine where the child should reside, which will normally be the jurisdiction where custody is to be decided. Thus, delay in adjudicating Child Abduction Convention cases typically leads to delay in finalizing a child's custody arrangements.

Of course, one might argue that it was Monasky who, first, created her unfortunate position and, then, prolonged it for years. If medically feasible, she might have departed Italy and a bad marriage while she was still pregnant, and the Convention would not have applied to her fetus. (Whether it might arguably apply after the birth of a child who was removed from her country of residence while in utero is far from clear.) No doubt, Monasky had her reasons for remaining in Italy to give birth. Nevertheless, it was she who removed A.M.T. from Italy without notice to the father, she who defended the return petition, she who sought stays of the return order from both the Sixth Circuit and the Supreme Court, she who appealed to a panel of the Sixth Circuit, she who sought and obtained *en banc* review from the circuit, and she who sought and obtained certiorari in the Supreme Court. This is not to criticize her or her counsel. She certainly had strong motivations, and the courts in Italy have thus far not been responsive to her attempts to reestablish her parental rights and have reasonable contact with her daughter. Moreover, the issue of determination of "habitual residence" has been vexing for courts both here and overseas, and the Supreme Court had never addressed that issue directly.

In addition to the emotional toll of delay on each party separately and on the child, there is the harm to what would normally be ongoing family relations. It certainly does not appear that Monasky and Taglieri are likely candidates for a reconciliation, but they will likely need to deal with each other at least until A.M.T. reaches the age of majority. Years of adversarial litigation are unlikely to help smooth ongoing interactions. Additionally, there is, of course, the financial cost incurred on both sides. The *Monasky-Taglieri* litigation has been ongoing on two continents for half a decade and shows no signs of ending in Italy anytime soon. The expenses incurred by both parties on both sides of the Atlantic must be staggering. To the extent that the financial resources of parents are expended on litigation in any child abduction case, they will not be available for the support and benefit of the child.

The *Monasky* decision is not the first time that the Supreme Court has noted "the protraction of proceedings" in a Child Abduction Convention case. Seven years earlier, in *Chafin v. Chafin*, the Court unanimously ruled that the court-ordered return of a child to its original country did not moot the abducting parent's appeal of that order.[26] The *Chafin* case began when the mother filed a return petition in federal district court in Alabama in May 2011. The Supreme Court issued its ruling in February 2013, and that ruling sent the case back for further proceedings. Writing for the Court, Chief Justice Roberts noted that Child Abduction Convention "Cases in American courts often take two years from filing to resolution."[27] He quite properly asserted, "Importantly, whether at the district or appellate court level, courts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation."[28] He optimistically added that many courts already do so, but the very study he relied on for that appraisal, *Federal Judicial Center, J. Garbolino, The 1980 Hague Convention of the Civil Aspects of International Child Abduction: A Guide for Judges,* hardly supported such a rosy view.[29] Among the cases cited by Judge Garbolino for promptness were one that took four years from filing to resolution, one that took four and a half years, and one (*Gaudin v. Remis*[30]) that took an astonishing nine years.[31]

Justice Ginsburg, joined by Justices Scalia and Breyer, filed a concurring opinion in *Chafin*.[32] Her concurrence focused on delay in these cases and the absence of rules to expedite them. She suggested, "For the federal courts, the Advisory Committee on Federal Rules of Civil and Appellate Procedures might consider whether uniform rules for expediting Convention Proceedings are in order."[33] She noted with apparent approval procedural limitations imposed in England and Wales on filing appeals in these cases. She concluded that, "For future cases, rulemakers and legislators might pay sustained attention to the means by which the United States can best serve the Convention's aims: 'to secure the prompt return of children wrongfully removed to or retained in' this Nation; and to 'ensure that rights of custody... under the law of one Contracting State are effectively respected in the other Contracting States.'"[34]

Sadly, Justice Ginsburg's suggestions have been not simply ignored but outright rejected. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States sent Ginsburg a letter in response setting forth opposition to any such rules. "The Judicial Committee has a long-established policy of opposing statutes or court rules that mandate docket priority and timelines for categories of cases."[35]

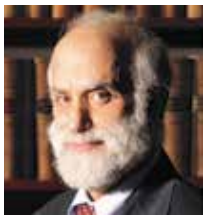
So, here we are, seven years after the *Chafin* decision in which all the justices agreed on the need to act expeditiously in Child Abduction Convention cases, with no concrete action and, not surprisingly, an ongoing pattern of delay. I have elsewhere suggested concrete statutory and regulatory changes that hold the promise of improving this situation,[36] and I will not repeat all the details here. But, first and foremost, at the statutory level, Congress needs to amend ICARA to specify that Convention cases shall be given priority by the federal

courts, as is recommended by the Hague Conference Guide to Good Practice.[37] Such an amendment would trigger Rule 40 of the Federal Rules of Civil Procedure: "The court must give priority to actions entitled to priority by a federal statute."

In turn, the Federal Rules of Civil Procedure should be amended to address Convention cases with specificity and require the sort of expeditious handling with which family lawyers in many jurisdictions will be familiar for custody matters. For example, in Pennsylvania, where I supervised students in a Family Law Clinic for three decades, state court rules mandate that parties to a custody proceeding have in-person contact with the court within 45 days of the commencement of proceedings, that no answer is required to be filed, that there is no discovery without special order of court, and that the judge's decision must ordinarily be entered within 15 days of the conclusion of trial.[38]

Similarly, the Federal Rules of Appellate Procedure should be amended to provide for "fast-track" appeals for Convention cases, patterned on fast-track rules in custody cases in various state courts.[39] Such rules would limit the time for filing appeals, shorten briefing schedules, and severely restrict extensions of time. Such limitations could also be fashioned at the Supreme Court level.

All of these suggestions are bound to be met with resistance. They will undoubtedly burden the litigants, their counsel, and the courts. But the current situation where Convention cases frequently drag on for two years or more is harmful to children who have already undergone a wrenching dislocation, as well as to their parents, and is quite simply unconscionable and indefensible. ⊙



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Endnotes

[1]*Monasky v. Taglieri*, 140 S. Ct. 719 (2020).
[2]Convention on the Civil Aspects of International Child Abduction, Art. 1, Sec.a. (Oct. 25, 1980), https://www.hcch.net/en/instruments/conventions/full-text/?cid=24 (hereinafter "Convention").
[3]22 U.S.C. §§ 9001-11.
[4]*Taglieri v. Monasky*, 767 F. App'x 597 (6th Cir. 2019).
[5]E-mail from Christopher Reynolds, Attorney at Law, Cleveland, OH (Sept. 21, 2020, 1:14 PM EDST) (on file with author).
[6]Convention, *supra*, note 2, Article 2.
[7]*Id*., Article 7.
[8]Exec. Order No. 12648, 53 Fed. Reg. 30637 (Aug. 11, 1988).
[9]Convention, *supra,* note 2, Article 11.
[10]*Id.*
[11]22 USC § 9001(a)(4).
[12]22 U.S.C. § 9003(a).
[13]Nigel V. Lowe & Victoria Stephens, *Global Trends in the Operation of the 1980 Hague Abduction Convention: The 2015 Statistics*, 52 Fam. L.Q. 349 (2018).
[14]*Id*. at 373.
[15]*Id.* at 374.
[16]*Id.*
[17]*Id*. at 376.
[18]*Id*. at 377.
[19]*Id*. at 354.
[20]Convention, *supra*, note 2, Article 4.
[21]*Abbott v. Abbott,* 560 U.S. 1 (2010).
[22]*Abbott v. Abbott*, CAUSE No. A-06-CV-359-LY, Final Order of Dismissal (W.D.Tex., Feb. 10, 2012).
[23]Convention, *supra*, note 2, Article 12.
[24]*Lozano v. Alavarez*, 572 U.S. 1 (2014).
[25]Convention, *supra*, note 2, Article 13.
[26]*Chafin v. Chafin*, 568 U.S. 165 (2013).
[27]*Id.* at 179.
[28]*Id*.
[29]J. Garbolino, The 1980 Hague Convention of the Civil Aspects of International Child Abduction: A Guide for Judges 116 n. 435 Fed. Judicial Ctr. (2012).
[30]*Gaudin v. Remis*, 282 F.3d 1178 (9th Cir. 2002); 379 F.3d 631 (9th Cir. 2004); 415 F.3d 1028 (9th Cir. 2005); 334 F. App'x 133 (9th Cir. 2009).
[31]*See* Robert E. Rains, *Possession Is 9/10 of the Law: The Need for Strict Procedural Rules in Hague Abduction Convention Cases*, J. Comparative L., (UK), Vol. IX, No. 1, 253 (2014), *reprinted* in Robert E. Rains ed., The 1980 Hague Abduction Convention: Comparative Aspects (Wildy, Simmonds & Hill Publishing) (London 2014).
[32]Chafin, *supra*, n. 26, at 180. (Ginsburg, J. concurring).
[33]*Id*. at 183, n. 3.
[34]*Id*. at 185.
[35]https://www.uscourts.gov/sites/default/files/fr_import/2014-04-Appeals-Agenda-Book.pdf.
[36]Rains, *supra* note 31.
[37]Hague Conference Guide to Good Practice Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II–Implementing Measures, 6. Summary: Legal Procedural Matters, ¶6.3, available for purchase at https://www.hcch.net/en/publications-and-studies/details4/?pid=2781.
[38]*See generally* PA. R. Civ. P. 1915.4.
[39]*See, e.g.*, PA. R. A. P. 2185(2), Children's fast track appeals.

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The Coming Wave of Trade Secret Litigation and the Implications for the Future of Trade Secret Law

MICHAEL T. RENAUD AND NICHOLAS W. ARMINGTON

Trade secret litigation has been on the rise ever since the passage of the Defend Trade Secrets Act (DTSA) in 2016, which allows a direct route to federal court for litigants to address trade secret misappropriation. Now, the pandemic and its effects on the economy and the manner in which Americans work are likely to create an even larger spike in the volume of trade secret litigation in federal courts over the coming years. In light of the busy times ahead in trade secret litigation, it's a prudent time to take stock of what protections are provided in the DTSA and related state trade secret law regimes and of the proactive and responsive actions trade secret owners can take to prevent trade secret theft or address it if misappropriation has already occurred.

This article discusses how the DTSA and the pandemic have and will change the landscape of trade secret litigation in federal court. First, the article provides an overview of trade secret litigation, the DTSA, and the effect that the federal statute has had on the volume of trade secret litigation in federal court since its passage about four years ago. Next, the article examines how the pandemic and its effects on the economy and creation of a work-from-home culture will lead to a spike in the volume of trade secret litigation in the coming years. The article then provides guidance as to what employers can do now to address the increased threat of trade secret misappropriation amid the continuing pandemic. Lastly, given the wave of federal trade secret litigation on the horizon, the article examines some of the important issues that have arisen from trade secret litigation under the DTSA in the last four years and provides insight as to how these issues will further develop in the future.

A Trade Secret Primer

A trade secret can be any type of valuable confidential business information that derives its value from not being generally known or easily ascertainable outside of your company. Think the Coca-Cola formula or Google source code. But business information does not have to be of a highly complex technical nature to garner trade secret protection. A trade secret can hypothetically comprise any type of valuable business information as long as it derives economic value from not being generally known or ascertainable by proper means, and where the trade secret owner has undertaken reasonable efforts to keep it secret. Thus, a wide range of types of business information, including customer lists, manufacturing processes or techniques, marketing strategies, pricing information, source code, chemical formulae, business strategies, and design concepts can potentially be trade secret information.

Trade secret litigation generally involves allegations of misappropriation, which means acquiring a trade secret by improper means, e.g., taking and using the information without permission. The vast majority of trade secret cases involve allegations that a former employee or business partner took confidential information without permission to compete with his or her former employer or business partner.

Statutory Protections for Trade Secrets

The first nationwide effort to unify statutory trade secret protection came in the form of the Uniform Trade Secrets Act (UTSA), a proposed act published by the Uniform Law Commission in 1979 (and amended in 1985) for adoption by individual states. The UTSA

provided definitions for key aspects of trade secret protection, including "trade secret," "improper means," and "misappropriation," and proposed remedies for trade secret misappropriation, including injunctive relief, damages, and attorneys' fees, among other things. The UTSA has been adopted in modified form by all states, except for New York, which still relies on common-law trade secret protection. The form of the UTSA adopted by the states differs from state to state, however, and, over time, those differences have led to differences in the protection afforded trade secret owners across the United States, despite the fact that the trade secret laws of each state were based on the same model statute.

The DTSA, signed into law by President Obama on May 11, 2016, after enjoying wide bipartisan support leading up to its enactment (passing in the House by a vote of 410-2 and passing unanimously in the Senate), was devised to allow a direct route to federal court to combat trade secret misappropriation, and also to provide some measure of nationwide uniformity to trade secret protection. The DTSA does not preempt state trade secret law,[1] which practically means that a plaintiff alleging trade secret misappropriation can bring co-pending state and federal claims for trade secret misappropriation—and indeed, this has been the general practice since the passage of the DTSA. Definitions for key terms related to trade secret litigation in the DTSA, such as "trade secret" and "misappropriation," are not significantly different from the definitions for those terms in the UTSA, and the DTSA provides for many of the same remedies as the UTSA, including injunctive relief, damages for actual loss or unjust enrichment, and attorneys' fees, among others.[2]

The DTSA Increased the Volume of Trade Secret Litigation in Federal Courts

The passage of the DTSA alone led to a notable increase in the volume of trade secret litigation in federal courts. From 2015 to 2017 there was an approximately 30 percent increase in the number of trade secret cases filed in federal court nationwide. This increase was likely due at least in large part to the DTSA becoming available to litigants in the middle of 2016, as no other major event affecting the ability to litigate trade secret disputes in federal court occurred during that time period. Following this initial increase in trade secret litigation in 2017, the volume of trade secret litigation in federal court has largely leveled off and has remained constant since.[3]

The Pandemic and Its Effects on the Economy and a Work-From-Home Culture Will Engender a Second Wave of Increased Trade Secret Litigation

The financial crisis of 2007-2009 caused a marked increase in the volume of trade secret litigation in the recovery years following that recession, and given that the market indicators now are similar to those during the recession of 2007-2009, we expect a similar spike in trade secret litigation during the recovery from the present economic downturn brought on by the COVID-19 pandemic. We expect that the increase in trade secret litigation in the recovery from the present downturn will be more pronounced, however, due to the combination of increased employee mobility driven by the downturn with the ubiquity of work-from-home arrangements that have characterized the present crisis.

The financial crisis of 2007-2009, driven by the subprime mortgage crisis and associated recession, precipitated a drop in the Dow Jones Industrial Average of approximately 50 percent and led to 37 million new unemployment claims over the course of the downturn. These two historical trends are set forth in the Charts 1 and 2.

The economic and social upheaval of a massive loss in financial market value and widespread layoffs coincided with a spike in the filing of new trade secret cases during the economic recovery in the years following the downturn of 2007-2009. Chart 3 shows the aggregated numbers of new trade secret case filings in the years leading up to, during, and after the "Great Recession," and shows a marked increase in the number of new cases filed during the recovery years.

The information in Chart 3 was collected using a research tool provided by Bloomberg Law that identified new complaints that included trade-secret-related allegations and shows a marked increase in these types of cases during the years of the recovery. Increased employee mobility during and after the 2007-2009 downturn was likely the driving factor behind this trend. Employees who left companies during the downturn got jobs with competitors or started their own companies and, in some cases, allegedly used information from their former employers to aid their new employer or startup, which led to the former employers filing lawsuits to address this alleged misappropriation. This is a common theme among trade secret cases, and where the downturn caused a multitude of employees to be laid off and seek work elsewhere, this fact pattern played out more frequently, increasing the volume of cases filed to address it.

Chart 1

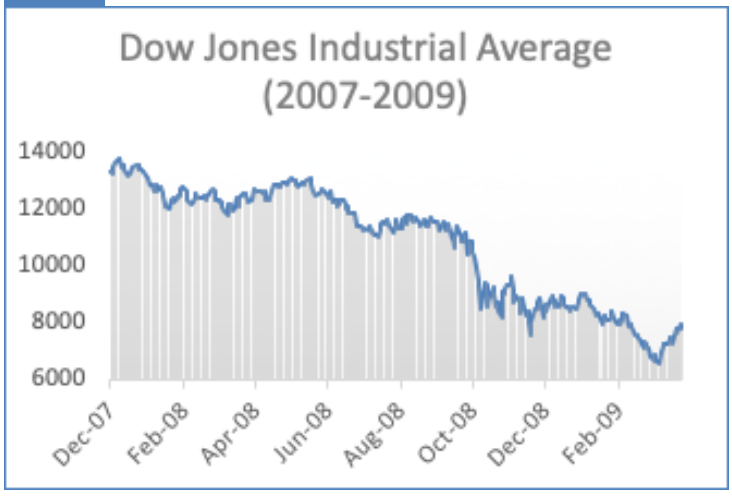
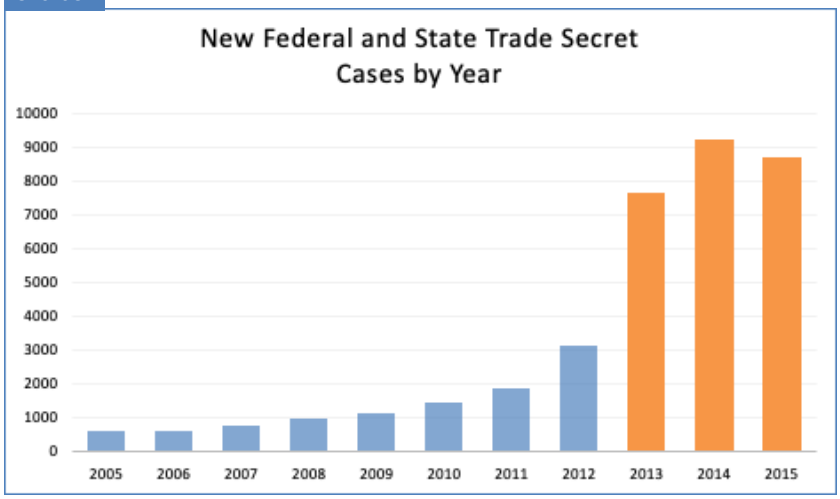


Chart 2

Data: U.S. Employment and Training Administration via FRED, St. Louis Fed

Chart 3



Data: Bloomberg Law

The current trends of the Dow Jones and initial unemployment claims look much the same as they did during the financial crisis of 2007-2009. A snapshot of these indicators from February to April 2020 is set forth in Charts 4 and 5.

Because the market factors we see now closely resemble those in 2007-2009, we expect that the result in the context of trade secret litigation will be the same (i.e., a marked increase in the volume of new complaints containing allegations related to trade secret misappropriation in the coming years). But the falling financial markets and jump in initial unemployment claims leading to increased employee mobility in the coming years are not the only factors likely to engender this increase in trade secret litigation. We expect that the DTSA will play a role, as it provides litigants a more direct route to federal court that was not available during the recovery from the economic downturn of 2007-2009. We also expect the current ubiquity of work-from-home arrangements to have an outsized effect. That is because with many of America's knowledge workers working from home, those workers now, in many cases, have access to their respective company's confidential trade secret information from their homes, and with that type of remote access becoming commonplace, a company's information may not be subject to the same security measures as if it were accessed from the company's offices. With the prospect that certain of these employees may be laid off in the future due to the financial downturn, the potential for theft of trade secret information multiplies because laid off employees who are inclined to take a company's confidential information with them when they go now have the information conveniently at their fingertips on their devices at home.

Actions to Protect Trade Secrets During the COVID-19 Pandemic

In light of threats to the security of important confidential information now increasingly accessible remotely, companies should consider some or all of the following actions to shore up protection of valuable confidential information:

- Identify and label trade secret information as "Confidential" to remove any doubt from your employees of the sensitive nature of information they are accessing.
- Take steps to ensure that when your employees are remotely accessing data, they use industry standard security tools, including VPN, two-factor authentication, and password protection, and prohibit use of unsecured Wi-Fi.
- Allow discussion of trade secret information only through secure video-conferencing services.
- Implement security protocols that allow you to remotely wipe company data from employee devices being used remotely.
- Establish expectations concerning use of any hard copy papers or physical property (e.g., prototypes or product samples) that this material is to be stored in a secure environment and that it is only to be accessed by authorized individuals.
- Train employees regarding companywide policies for handing confidential information, including use of confidentiality agreements when sensitive information is shared with third parties, and of obligations in employee confidentiality agreements.
- Monitor network access to detect irregularities in traffic or access to sensitive material and whether such information is sent to personal email accounts.
- Train employees concerning the threats posed by malware, phishing, and other common techniques used by hackers to infiltrate secured networks.

Chart 4

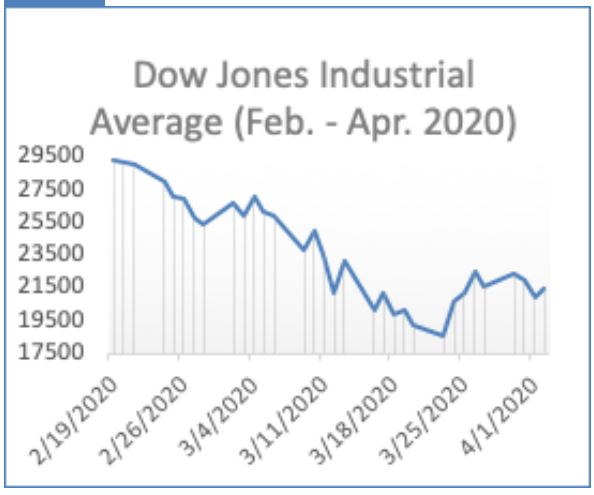


Chart 5

Data: U.S. Employment and Training Administration via FRED, St. Louis Fed

- Ensure that all business partners with which sensitive information is shared are under confidentiality agreements and are employing the same protective measures against disclosure of information as your company.
- Take immediate steps to address any potential improper disclosure of trade secret information.

The above are just some of the myriad ways a company can increase the protection of its trade secrets amid the pandemic and the likelihood that some or all of a company's employees have been working remotely for several months.

Additional Considerations and Emerging Issues for Trade Secret Litigants in Federal Court in View of the Coming Wave of Trade Secret Litigation

With four years of trade secret litigation under the DTSA behind us, certain trends and emerging issues concerning litigation under that statute have emerged. Next, we discuss some of those trends and how we expect them to evolve in the future.

A Lack of Uniformity

While one of the main goals of the DTSA was to provide some measure of uniformity among trade secret jurisprudence across the country in federal court, the first four years of DTSA litigation has shown that, rather than create uniformity, the DTSA has instead continued the trend of varying application of trade secret law across jurisdictions. This varying application flows from the fact that the DTSA does not preempt state trade secret law regimes and thus, the default practice for litigators has been to bring co-pending state and federal trade secret claims. However, when presented with co-pending state and federal trade secret claims that often make identical allegations of trade secret misappropriation under the state and federal laws, federal courts typically look to the state-specific trade secret jurisprudence in the jurisdiction in which they sit to make substantive determinations concerning the trade secret claims. This makes sense in a way, because in most cases, the text of the state trade secret law tracks very closely to the language of the DTSA and, given the identity of many aspects of the parallel trade secret laws, courts have interpreted them together. But, this practice has run counter to one purpose of the DTSA, which was to provide uniformity to trade secret protection, and led not to a uniformity of federal trade secret jurisprudence but to a practice by which the idiosyncrasies of state trade secret law seep into federal trade secret jurisprudence under the DTSA for each state in which it is applied.

One example of this phenomenon is the application of the inevitable disclosure doctrine in the context of trade secret misappropriation allegations under the DTSA. The inevitable disclosure doctrine is a common law doctrine by which a court can prevent a former employee from working for a competitor, where doing so would necessarily require the employee to depend on the former employer's trade secret information during the course of his work in his new position.[4] While some have suggested that the inevitable disclosure doctrine is not available under the DTSA because of certain language within the statute, including that an injunction may not "prevent a person from entering into an employment relationship,"[5] and that any conditions placed on employment must be based on "evidence of threatened misappropriation and not merely on the information the person knows,"[6] the application of this common law doctrine across the states in DTSA actions has been disparate and has tracked the relevant state trade secret law precedent on the issue. Compare, for instance, the treatment of the inevitable disclosure doctrine in Illinois and California.

In Illinois, the inevitable disclosure doctrine appears to be recognized in the context of DTSA allegations. One example of such recognition is *Molon Motor and Coil Corp. v. Nidec Motor Corp.*, in which the plaintiff's former head of quality control was accused of trade secret misappropriation after going to work for the defendant and allegedly bringing with him dozens of copied technical files. The defendant moved to dismiss, arguing that there was no evidence that it accessed or used any of the information the employee took, but the plaintiff argued in response that it did not need to give specifics regarding the defendant's access or use of misappropriated information because the disclosure and use could be inferred under the inevitable disclosure doctrine. In conducting an analysis as to whether inevitable disclosure applied, the court considered three factors: (1) the level of competition between the former employer and the new employer; (2) whether the employee's position with the new employer is comparable to the position he held with the former employer; and (3) the actions the new employer has taken to prevent the former employee from using or disclosing trade secrets of the former employer. The court found that the plaintiff satisfied each of these factors, explaining that:

> [Plaintiff]'s allegations on the direct competition between the parties, as well as the allegations on the employment breadth and similarity of the employee's quality control work at the two companies, are enough to trigger the circumstantial inference that the trade secrets inevitably would be disclosed by the employee.[7]

While it's important to remember that this case came on a motion to dismiss and not a motion for preliminary injunction or motion for summary judgment, the case suggests that inevitable disclosure is available in Illinois under the DTSA. And, importantly, *Molon Motor and Coil Corp.*, is not the only example of Illinois courts applying the inevitable disclosure doctrine under the DTSA.[8]

But, it's a different story in California. For example, in *UCAR Tech. (USA) Inc. v. Li*, the plaintiff brought claims for trade secret misappropriation under the DTSA alleging that former employees took proprietary information relating to autonomous vehicle technology upon leaving the company and would inevitably use that information when starting a competing company. The California federal court, in line with established practice in California trade secret actions, rejected the plaintiff's "inevitable disclosure" allegations under the DTSA out of hand, explaining that:

> To the extent the complaint relies on these types of "inevitable disclosure" allegations, those allegations are ordered stricken from the complaint. California courts have resoundingly rejected claims based on the "inevitable disclosure" theory.[9]

This rejection of the inevitable disclosure doctrine under the DTSA, mirroring historical trade secret jurisprudence under California state law, has been followed by at least one other California federal court.[10] Thus, the uniformity sought by Congress in passing the DTSA has not been entirely realized, as of yet, and given the trend of federal courts applying state specific trade secret jurisprudence to DTSA actions pending before them, this disparate interpretation

of the DTSA will likely continue—not only in the context of the inevitable disclosure doctrine, but with respect to other substantive interpretations of the DTSA as well.

DTSA *Ex Parte* Civil Seizure and Seizure Orders Under Rule 65

The DTSA provides a brand new, powerful form of injunctive relief not available under any state trade secret law in its *ex parte* civil seizure mechanism, which allows victims of trade secret misappropriation to quickly prevent further dissemination of confidential information by asking a court to direct federal marshals to seize stolen trade secret material and secure that material during the pendency of a formal DTSA case. As the volume of trade secret litigation increases in the coming years, we expect that requests for use of this mechanism will also increase. However, because civil seizure under the DTSA can only be utilized in "extraordinary circumstances," we expect that issuance of such orders will continue to be few and far between.[11] To be awarded an *ex parte* civil seizure order, the plaintiff must show the following:

- An order pursuant to Fed. R. Civ. P. 65 or other equitable relief would be inadequate.
- An immediate and irreparable injury will occur if seizure is not ordered.
- Harm to the applicant from denial of a seizure order: (1) outweighs the harm to the person against whom seizure is ordered; and (2) substantially outweighs the harm to any third parties by such seizure.
- The applicant is likely to succeed in showing that the person against whom the order is issued misappropriated or conspired to misappropriate a trade secret through improper means.
- The person against whom the order will be issued has possession of the trade secret and any property to be seized.
- The application describes with reasonable particularity the property to be seized and, to the extent reasonable under the circumstances, the property's location.
- The person against whom seizure is ordered would destroy, move, hide, or otherwise make such property inaccessible to the court if put on notice.
- The applicant has not publicized the requested seizure.

Once a seizure order has been issued, the court must hold a seizure hearing, where the party requesting the order has the burden to prove the facts underlying the order.[12]

The first civil seizure order granted under the DTSA provides some guidance as to the circumstances in which federal courts will grant such extraordinary relief. In *Mission Capital Advisors LLC v. Romaka*, the U.S. District Court for the Southern District of New York ordered federal marshals to seize contact lists and other electronically stored information that was allegedly misappropriated by the defendant, a former employee of the plaintiff, but only after the plaintiff explained that the former employee downloaded the plaintiff's entire 65,000 person client and contact list, that the plaintiff's computer forensic expert found the files on the defendant's computer after he claimed he had deleted them, and that the defendant has since cut off contact with the plaintiff entirely. In its order granting the plaintiff's seizure request, the court found that an order under Rule 65 would be inadequate because it was likely that the defendant would evade, avoid, or otherwise not comply with the order. The court highlighted as persuasive the additional circumstances that the defendant failed to appear for a hearing after being ordered to do so to show cause why a preliminary injunction should not be entered, and also repeatedly failed to acknowledge receipt of court orders and evaded service of process.[13] As was the case in this first issuance of a civil seizure order under the DTSA, mere assertions that a defendant will evade a court directive will likely continue to be insufficient for an order to be issued, and plaintiffs will continue to be required to show that a defendant's past actions demonstrate a propensity to disobey a future court order, as has been the case in civil seizure orders granted since.[14]

The ability to seize information in relation to an alleged theft of trade secrets does not end with the DTSA's civil seizure mechanism, however, as Federal Rule of Civil Procedure 65 also allows a judge to direct seizure of property as part of a temporary restraining order (TRO) or preliminary injunction related to allegations of trade secret theft under the DTSA. While this route does not involve an *ex parte* request, and thus a covert seizure action against the defendant, it does avoid the "extraordinary circumstances" requirement in the DTSA civil seizure provision. This strategy has already been employed successfully. In *Magnesita Refractories Co. v. Surendra Mishra*, the court granted a temporary restraining order directing the seizure of the defendant's personal laptop, which the court found was necessary because there was "a strong likelihood that [the employee] was conspiring to steal [the employer's] trade secrets contained on the laptop, and the seizure needed to be taken forthwith to prevent the impending harm."[15] Thus, where the extraordinary measure of calling on federal marshals to seize property is not appropriate or where the necessary "extraordinary circumstances" are not present, plaintiffs still have a tool in Rule 65 to seize property necessary to prevent dissemination of allegedly misappropriated trade secrets.

DTSA and Actions Under the Racketeer Influence and Corrupt Organizations Act

The DTSA also allows trade secret owners for the first time to leverage the Racketeer Influence and Corrupt Organizations Act (RICO)—a statute passed to address organized crime— to combat trade secret misappropriation. The DTSA does this by making trade secret theft a predicate act sufficient to show racketeering activity under RICO.[16] This as of yet seldom employed new tool under the DTSA allows victims of misappropriation another potent option when confronting trade secret theft.

RICO provides a civil remedy for violations of the statute's substantive provisions, which prohibit acts performed as part of a continuing criminal organization. To state a civil RICO claim, a plaintiff must allege:

> (1) the existence of an enterprise affecting interstate commerce; (2) that the defendant was employed by or associated with the enterprise; (3) that the defendant participated, either directly or indirectly, in the conduct or the affairs of the enterprise; and (4) that the defendant participated through a pattern of racketeering activity that included at least two racketeering acts.[17]

One question that hasn't yet been answered definitively concerning the use of the DTSA to predicate RICO allegations is how the actions of a defendant underlying the alleged trade secret misappropriation are appropriately partitioned into separate "acts" for purposes of showing a pattern of racketeering activity. While the DTSA clearly names the separate acts related to trade secret theft that can be con-

sidered predicates for purposes of RICO—stealing and copying trade secret information without authorization, and receiving, buying, or possessing such information knowing it to have been obtained without authorization—what remains unclear is how courts will draw the line separating these acts into specific instances of conduct as opposed to their each being considered part of a single scheme to misappropriate a trade secret. No set rule has yet been established regarding how to make this demarcation, and courts differ in opinion in how to make the distinction.[18]

For example, in *Magnesita Refractories Co. v. Tianjin New Century Refractories Co.*, the defendants moved to dismiss RICO claims predicated on alleged trade secret theft, arguing that the plaintiff failed to plead more than one predicate "racketeering" act, and instead that the amended complaint set forth a single scheme to misappropriate trade secrets constituting only one predicate act. The court was not persuaded that each use—i.e., copying, downloading, uploading, sending, communicating, conveying, and possessing—constitutes a separate predicate act. But the court did not ultimately decide the issue because it relied on a different pleading deficiency to dismiss the RICO claim (that the plaintiff only identified one predicate act that post-dated the enactment of the DTSA).[19]

The federal courts' treatment of this issue is far from uniform, however, as in *Brand Energy & Infrastructure Services v. Irex Construction Group*, the court suggested that each individual use of a trade secret may be a separate RICO predicate. In that case, the plaintiff, a provider of construction services, alleged that current and former employees siphoned its trade secret information concerning revenues, customers, drawings, and business plans to a competitor who was allegedly using the information to the plaintiff's detriment. The defendant competitor moved to dismiss the complaint in its entirety, including the RICO claims predicated on allegations of trade secret misappropriation, but the judge allowed these claims to survive, recognizing a sufficiently pleaded "pattern of racketeering activity":

> [Plaintiff]'s amended complaint alleges a series of alleged "predicate acts." As already discussed, [plaintiff] alleges that the defendants stole [its] trade secrets in violation of the DTSA [and] alleges dozens of DTSA violations. There is also a threat that the DTSA violations will continue because, allegedly, the defendants continue to use [plaintiff]'s trade secrets in their business affairs at [their new employer]. These allegations alone are sufficient to constitute a "pattern of racketeering activity" under RICO.[20]

With the practice of pleading RICO claims predicated on violations of the DTSA still in its relative infancy, it is difficult to say with certainty how courts will parse the actions constituting trade secret theft into discrete acts for purposes of pleading RICO violations in the future. Given the fact-specific nature of trade secret actions generally, this analysis will be conducted and determined on a case-by-case basis. In any event, the prospect of treble damages and attorneys' fees make RICO a potent tool and will continue to make it an attractive option for litigants as the volume of trade secret litigation increases in the coming years and where the facts support pleading a claim.

Extraterritorial Application of the DTSA

Another novel aspect of the DTSA that sets it apart from state trade secret law regimes is its applicability to misappropriation occurring overseas. The language of the statute states that:

> This chapter also applies to conduct occurring outside the United States if –
>
> 1. the offender is a natural person who is a citizen or permanent resident alien of the United States, or an organization organized under the laws of the United States or a State or political subdivision thereof; or
> 2. an act in furtherance of the offense was committed in the United States.[21]

However, it was only recently that a federal court analyzed whether this language rebuts the presumption against extraterritorial application of laws of the United States. In *Motorola Solutions v. Hytera Communications Corp.*, the plaintiffs brought claims for trade secret misappropriation under the DTSA alleging that the defendants hired engineers away from the plaintiffs' Malaysian office and that those engineers stole thousands of technical documents containing the plaintiffs' trade secrets and used them to develop a digital radio that was indistinguishable from the plaintiffs' product, later selling the radio around the world in competition with the plaintiffs. In a motion to preclude reliance on extraterritorial damages, the defendants argued that the DTSA did not have extraterritorial effect and thus, that damages should be limited to domestic application of the DTSA. The court disagreed and, in a thorough analysis, found that the DTSA overcomes the presumption against extraterritoriality through the language in § 1837 of the statute, and further that extraterritorial application was appropriate in that case because the defendants had committed an act in furtherance of the alleged offense in the United States.[22]

With extraterritorial application confirmed, litigants should consider how to best utilize the reach of the DTSA beyond U.S. borders. While there are multiplicitous circumstances in which the DTSA might apply extraterritorially, some potential examples include the following:

- Trade secret shared with foreign office of an American corporation under NDA then used improperly.
- United States citizen residing overseas misappropriates trade secret of American company.
- Employee of foreign company misappropriates trade secret while in the United States.

Another venue that litigants may consider employing to combat the theft of trade secrets overseas is the International Trade Commission (ITC), a federal agency with broad investigative responsibilities on matters of trade. An entity suspecting that trade secret theft has led to the importation into the United States of an article using that misappropriated trade secret can file a complaint asking the ITC to open an investigation under § 337. If such an investigation is open, the ensuing proceeding is a trade secret litigation before an ITC administrative law judge. If the ITC finds that an article imported into the United States does indeed use the misappropriated trade secret, it can direct U.S. Customs and Border Protection to block the importation of that article. The Federal Circuit recently confirmed that the ITC may address acts of trade secret misappropriation occurring overseas, and the DTSA's overseas applicability makes it an obvious choice of trade secret law to

be employed in these contexts.[23] The ITC has been made even more of a dynamic venue in the trade secret context based on another recent decision finding that determinations regarding trade secret misappropriation at the ITC can have preclusive effect in federal court.[24]

Conclusion

In light of the increase in federal trade secret litigation on the horizon, it behooves companies who have had an increase in the number of employees working remotely due to the pandemic to ensure that additional security measures are in place to protect confidential and trade secret information being widely accessed from employees' homes, and to also audit such access to identify any patterns that may indicate misappropriation. The plethora of new trade secret actions will also advance DTSA jurisprudence in the areas of novel protection provided by the DTSA, discussed above. While we expect that an increase in cases across the country will likely lead to a further lack of uniformity in the application of certain aspects of the statute as federal courts across the country continue to apply the precedent from state-specific trade secret regimes of the jurisdictions in which they sit, we also expect that *ex parte* seizure requests and use of RICO under the DTSA will increase and potentially create a federal jurisprudence in those areas where there is no state law analog. Further, as the world's economies continue to open, we also expect extraterritorial application of the DTSA to increase as international business travel and relations reinvigorate. While the precise outcomes of a marked increase in trade secret litigation cannot be perfectly predicted, one thing we are sure of is that it will be an exciting decade for trade secret litigation. ⊙

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Endnotes

[1]18 U.S.C. § 1838.

[2]18 U.S.C. § 1839.

[3]Rachel Bailey and Jason Maples, *Lex Machina Trade Secret Litigation Report* (2020), https://pages.lexmachina.com/Trade-Secret-Report-2020_LP.html.

[4]*See generally PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995).

[5]18 U.S.C. § 1836(b)(3).

[6]*Id.*

[7]*Molon Motor and Coil Corp. v. Nidec Motor Corp.*, No. 16 C 03545, 2017 U.S. Dist. LEXIS 71700, at *5 (N.D. Ill. May 11, 2017).

[8]*See Gen. Elec. Co. v. Update Techs., Inc.*, 394 F. Supp. 3d 815 (N.D. Ill. Jun. 25, 2019) (denying motion to dismiss DTSA allegations arguing that inevitable disclosure doctrine is not recognized by the DTSA); *Indus. Packaging Supplies v. Channell*, No. 18 CV 165, 2018 U.S. Dist. LEXIS 93598, at *3 (N.D. Ill. Jun. 4, 2018) (analyzing DTSA claim under inevitable disclosure doctrine).

[9]*UCAR Tech. (USA) Inc. v. Li*, No. 5:17-cv-01704, 2017 U.S. Dist. LEXIS 206816, at *3-4, *8-9 (N.D. Ill. Dec. 15, 2017) (citing *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1463 (2002) ("Lest there by any doubt about our holding, our rejection of the inevitable disclosure doctrine is complete.")).

[10]*See, e.g., Human Longevity, Inc. v. Craig Venter Inst., Inc.*, No. 18-cv-1656, 2018 U.S. Dist. LEXIS 213912, at *6 (S.D. Cal. Dec. 18, 2018) (finding that plaintiff "fail[ed] to allege facts giving rise to a plausible inference of misappropriation within the meaning of the DTSA," and noting that the inevitable disclosure doctrine is not recognized in California.).

[11]*See, e.g., OOO Brunswick Rail Mgt. v. Sultanov*, Case No. 5:17-cv-00017, Dkt. 15 (N.D. Cal. Jan. 6, 2017) (denying request for civil seizure and instead ordering preservation of devices at issue pursuant to Rule 65); *Magnesita Refractories Co. v. Mishra*, No. 2:16-cv-524, Dkt. 37 (N.D. Ind. Jan. 25, 2017) (same); *Dazzle Software II, LLC v. Kinney*, No. 2:16-cv-12191, Dkt. 20 (E.D. Mich. July 18, 2016) (denying request for civil seizure where court not convinced that defendant would not comply with order under Rule 65); *Balearia Caribbean Ltd. Corp. v. Calvo*, No. 1:16-cv-23300, Dkt. 10 (S.D. Fla. Aug 5, 2016) ("a plaintiff may not rely on bare assertions that the defendant, if given notice, would destroy relevant evidence").

[12]18 U.S.C. § 1836(b)(2).

[13]*Mission Capital Advisors LLC v. Romaka*, No. 16-cv-5878, Dkt. 7 (S.D.N.Y. July 29, 2016)

[14]*See Axis Steel Detailing, Inc. v. Prilex Detailing LLC*, No. 17-CV-00428, 2017 U.S. Dist. LEXIS 221339, at *1 (D. Utah Jun. 29, 2017) (granting civil seizure order); *Blue Star Land Servs., LLC v. Coleman*, No. 17-cv-931, Dkt. 10 (W.D. Okla. Aug. 31, 2017) (same).

[15]*Magnesita Refractories Co. v. Surendra Mishra*, 2:16-CV-524, Dkt. 37 (N.D. Ind. Jan. 25, 2017).

[16]18 U.S.C. § 1961(1) (citing 18 U.S.C. § 1832).

[17]*Magnesita Refractories Co. v. Tianjin New Century Refractories Co.*, No. 1:17-CV-1587, 2019 U.S. Dist. LEXIS 32559, at *28 (E.D. Pa. Feb 28, 2019).

[18]*See* 18 U.S.C. § 1832.

[19]*Magnesita Refractories Co. v. Tianjin New Century Refractories Co.*, U.S. Dist. LEXIS 32559, at *28-33, 48-50.

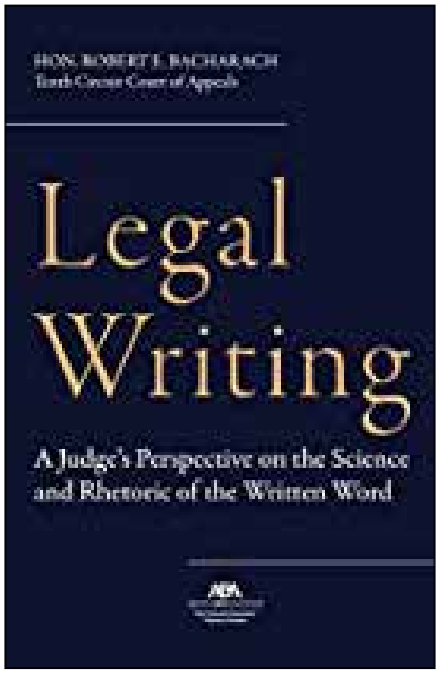
[20]*Brand Energy & Infrastructure Servs. v. Irex Contr. Grp.*, No. 16-2499, 2017 U.S. Dist. LEXIS 43497, at *27-28 (E.D. Pa. Mar. 23, 2017).

[21]18 U.S.C. § 1837.

[22]*Motorola Solutions v. Hytera Communs. Corp.*, No. 1:17-cv-1973, 2020 U.S. Dist. LEXIS 35942, at *5, 27-28, 36 (N.D. Ill. Jan. 31, 2020).

[23]*TianRui Grp. Co. Ltd. v. ITC*, 661 F.3d 1322, 1327-28, 1332 (Fed. Cir. 2011).

[24]*Manitowoc Cranes LLC v. Sany America Inc. and Sany Heavy Industry Co., Ltd.*, No. 1:13-cv-00677, 2017 U.S. Dist. LEXIS 202860, at *8-9 (E.D. Wisc. Dec. 11, 2017).



Legal Writing: A Judge's Perspective on the Science and Rhetoric of the Written Word

By Hon. Robert E. Bacharach (Tenth Circuit Court of Appeals)

ABA Publishing, 2020

184 pages, $ 89.95

Reviewed by Matthew C. Kane

Writing a book review on a book about writing is a daunting task—there is no doubt that (1) you will violate a plethora of the principles set out by the author and (2) the audience for both the book and the review will inherently be more attentive and critical of the reviewer's word choices, punctuation, and literary devices. Regardless, it is a task that must be undertaken, particularly when a new book is published that is wholly deserving of such attention.

Of course, the reviewer's challenge is nothing compared to that of the author, who faces the same questions under even greater scrutiny but nonetheless has the wherewithal to write an entire book on the subject. In my first year of law school, we were required to purchase a text on legal writing by a member of the faculty. I found myself ever amused identifying various instances within the text that would violate the very principles the author was trying to convey. A sentence on concise stylistic choices would run over 50 words. A paragraph advocating for plain language would quote Latin. Judge Bacharach's text stands in sharp juxtaposition to that early law school assignment.

While providing a host of extremely useful and easily applicable principles of legal writing, the unifying theme of the text is how to utilize such techniques to make legal writing memorable. How will a judge ever decide in a client's favor if she cannot recall the arguments made by the attorney? Can a judge adequately fulfill his duty to render the correct decision if everyone immediately forgets what the decision was? Our arguments are only as good as the recall of the judge, the opinion as effective as what the attorney ascertains and applies as the salient legal principle. Each chapter provides means to achieve such an effect.

Logically, the book begins with a discussion of introductions. Importantly, legal writing does not require the author to catch the reader's interest—those both writing and reading pleadings and orders do so out of obligation. It is a hazard of the job. But that does not mean the introduction should be ignored; rather, it is an opportunity to inform readers of not only the key issues in the case but the context in which they are situated. It outlines, or more properly, condenses the argument to follow and provides a concise conclusion; there is no benefit in hiding the outcome or desired result in a legal brief or order.

Judge Bacharach continues by exploring topics such as organization, headings, sentences, paragraphs, diction, and grammar. In each chapter, he approaches the given subject with a straightforward, clear presentation of salient issues. The chapters appropriately vary in length, with some comprising only a few pages while others occupying significant portions of the text. Each subject gets what it deserves on its own merits. This methodology avoids unnecessary filler and redundancy while keeping the reader safe from monotony.

Perhaps the most fascinating portion of the text is the author's dedicated use of dynamic examples to illustrate key points. While the majority are drawn from Supreme Court opinions, old and new, others quote famous speeches, literary texts, and skillful oral advocates. To explain the concept of "epistrophe," the use of repetitive phrases at the end of a segment or sentence, Judge Bacharach provides the following excerpt by Winston Churchill:

> We strove long, too long, for peace, and suffered thereby; but from the moment when we gave our guarantee that we would not stand by idly and see Poland trampled down by Nazi violence, we have never looked back, never flagged, never doubted, never flinched.

The sentence is remarkable. Just by reading those words, vivid images of World War II spring to mind. The atrocities committed by Nazi Germany, the suffering of those persecuted, the bravery of soldiers in the field, and the tenacity and doggedness of each Briton and the collective free world. This visual palate is enhanced by application of epistrophe, as Churchill repeats the term "never," thus emphasizing not only specific instances of resolve but the strength and continuity of that resolve. The quote, thus, not only helps define epistrophe but extolls its virtues and serves as a mnemonic aid; while we might forget the term, we are much more likely to recognize repeated language as a specific writing technique because we have seen it effectively practiced by Winston Churchill in a truly profound setting.

This brings us back to the heart of the text and how words can be used to make our writing indelible. As Benjamin Dreyer, copy chief of Random House, wrote in his recent *Dreyer's English*:

> We're all of us writers: We write term papers and office memos, letters

to teachers and product reviews, journals and blog entries, appeals to politicians. Some of us write books. All of us write emails. And, at least as I've observed it, we all want to do it better: We want to make our points more clearly, more elegantly; we want our writing to be appreciated, to be more effective; we want—to be quite honest—to make fewer mistakes.

The writer must write for her audience. A lawyer is an advocate: she cannot sacrifice effective writing in favor of any explicit rule or principle of grammar. Many state court judges have very limited time to delve into the nuances of an obscure statute. The motion will be won or lost on what the judge draws from what may amount to nothing more than a cursory glance at the first page or two of text. Conversely, a brief for a circuit court requires deep exposition of particularly relevant issues and questions. Similarly, the individual judge may be more interested in overarching principles of law than seldom utilized principles of contract interpretation. Regardless, the lawyer wants the judge to remember her argument.

The writer must also write for himself. He must retain his own voice and remain, at least to some degree, in a familiar zone. Coloring within the lines will lead to a very tidy but often uninspiring result. An author writing with his own style, within reason, can convey a story with more conviction, and in a more convincing fashion, than he can with rigid application of various stylistic rules and principles. Such a personal approach to writing should lead to a product that is more likely to be remembered by the reader.

We can all still learn and improve, no matter how many briefs filed or orders entered. Judge Bacharach has provided just such an opportunity. With a clear and concise approach, Judge Bacharach presents his audience with a thoughtful and accessible analysis of good writing. Implementing such strategies will assist writers of all skill levels and experience in producing memorable briefs and, consequently, superior advocacy for their clients. To borrow again from Dreyer, applying the lessons found in Judge Bacharach's book to one's own writing will "burnish and polish it and make it the best possible version of itself that it can be—to make it read even more like itself than it did..."

T*hrough Dec. 31, 2020, receive a 20 percent discount on Judge Bacharach's book at http://www.americanbar.org/products/inv/book/39886415/ (use discount code LGBR7B).* ⊙

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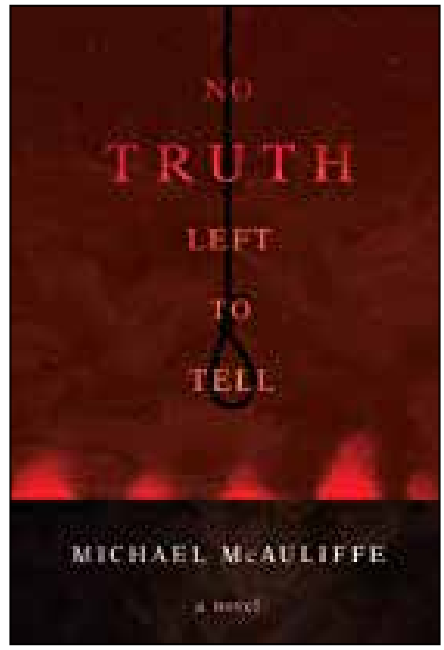

No Truth Left to Tell

by Michael McAuliffe

Greenleaf Press, Austin, Texas 2020

Reviewed by Kenneth D. Stern

Lawyers and non-lawyers alike will find themselves engrossed in this tale about the federal prosecution of a local "Grand Dragon," a leader of the local chapter of the Ku Klux Klan, for his having instigated and led a night of cross burnings in the fictional Louisiana town of Lynwood in 1994. The investigation and prosecution involve both local police and FBI agents and prosecutors from the Department of Justice's Civil Rights Division. The author skillfully portrays the murky area between the practical realities of law enforcement and the overriding principles that restrict the options available to police and other law enforcement officials.

Author Michael McAuliffe, a former elected state attorney in Florida, inserts the reader into the world of the Ku Klux Klan and its intended victims, as well as into the worlds of local police and federal law enforcement officials. The characters are real, not dissected with psychological analysis, but concisely portrayed through their actions and statements. For example, the pathetic need for racists to look down on others in order to avoid seeing themselves as they are, on the lowest rungs of the economic and social ladders, is tersely exposed, as when the local Klan leader, seeking to incite the members of his klavem to burn crosses to intimidate minority members of the community, says "Nobody's our equal. That's the whole thing."

The writing style is compelling, each chapter coaxing the reader to continue. Unlike the equally compelling format of each chapter ending like a cliff-hanger, this smooth and easy read pulls the reader along, the captivating story giving no hint of the moral dilemmas being created both for local police and for federal agents and prosecutors. Infused into the plot are both the real and perceived differences in the separate worlds in which the local and federal agencies live, and the complex relationships between them and within them. The plot invokes the familiar criminal concepts of the exclusionary rule and the fine line between permissible and impermissible police tactics, and the moral imperatives that underlie our most basic constitutional safeguards designed to protect us all.

Having been both a Department of Justice trial attorney and an assistant U.S. attorney, I can attest to the genuineness of the people, issues, and events portrayed and discussed in this highly engaging book. That the story is as true-to-life as life itself is no surprise, as it is told by someone who's been there. Mr. McAuliffe successfully prosecuted Klan leaders as a trial attorney with the Civil Rights Division of the U.S. Department of Justice, and this book about the prosecution of a local Klan chapter leader is imbued with authenticity in every regard, from the make-up and conduct of a grand jury investigation, to the friction between state and federal law enforcement personnel, to the subtle but crucial constitutional principles that make our country so unique in the world.

Nonetheless, there is a categorical disclaimer of any relationship to actual events and people, and there is no reason to believe otherwise. Although the author's personal experiences and insights unquestionably permit him to understand the motives and behavior of white racists and their intended victims, and the workings of both federal and state law enforcement agencies and per-

sonnel, it is hardly uncommon for the best of fictional authors either to write of what they know through personal experience, or to spend years researching the subject on which they write.

No Truth Left to Tell, while fictional, has the ring of truth in its portrayal of people and events and is both entertaining and thought-provoking. It is well worth reading and is highly recommended. ⊙

Kenneth D. Stern is a retired state circuit judge in Palm Beach County, Fla. Prior to his taking the bench, he was a trial attorney with the Antitrust Division of the U.S. Dept. of Justice and an assistant U.S. attorney in the Southern District of Florida; he was a litigator in both federal and state courts, doing commercial, tort, and criminal defense litigation. Since his retirement, Judge Stern has been active as an arbitrator, mediator, and special master conducting hearings on motions in state court. He is active in local bar associations and has been a frequent presenter at seminars involving alternative dispute resolution. Judge Stern is a graduate of Cleveland State University School of Law, where he served as editor-in-chief of the Law Review.

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The previews are contributed by the Legal Information Institute, a nonprofit activity of Cornell Law School. The previews include an in-depth look at two cases plus executive summaries of other cases before the Supreme Court. The executive summaries include a link to the full text of the preview.

Our Lady of Guadalupe School v. Morrissey-Berru (No. 19-267)

Oral argument: May 11, 2020

Court below: *U.S. Court of Appeals for the Ninth Circuit*

Question as Framed for the Court by the Parties

Whether the First Amendment's religion clauses prevent civil courts from adjudicating employment-discrimination claims brought by an employee against her religious employer, when the employee carried out important religious functions.

Facts

This case consolidates two cases, the first brought by Kristen Biel and the second brought by Agnes Deirdre Morrissey-Berru.

In *Biel v. St. James Sch.*, Kristen Biel (Biel) was initially employed by St. James Catholic School (St. James) as a first-grade substitute teacher. Later, in June 2013, St. James hired Biel as a full-time, fifth-grade teacher for one year. As a condition of her new full-time employment, Biel signed an employment contract with St. James that affirmed St. James's religious mission, and that further obligated Biel to adhere to that religious mission in her professional capacity as a full-time teacher. Specifically, Biel delivered four, thirty-minute class sessions per week on religious topics. Additionally, Biel instructed her students on traditional catechisms, and Biel herself attended a four-hour conference in Los Angeles on Catholic pedagogy. Unfortunately, Biel was diagnosed with cancer less than a year after gaining full-time employment with St. James. After Biel informed a colleague of her diagnosis St. James subsequently informed Biel that it would not be renewing Biel's teaching contract based on her allegedly loose "classroom management."

Biel sued St. James in the U.S. District Court for the Central District of California (the District Court), arguing that in terminating her, St. James violated the Americans with Disabilities Act (ADA). St. James moved for summary judgment on Biel's claim, arguing that because Biel's ADA claim falls under Title VII of the Civil Rights Act of 1964 and she was considered a "religious minister," her claim is barred by the ministerial exception. The ministerial exception bars employees from bringing employment-discrimination claims against a religious employer where the employee serves religious functions. The District Court granted St. James's summary-judgment motion. Biel then appealed her case to the U.S. Court of Appeals for the Ninth Circuit (the Ninth Circuit). On appeal, the Ninth Circuit reversed and remanded the case under the *Hosanna-Tabor* analysis. Under *Hosanna-Tabor,* the Ninth Circuit found that Biel was not a "minister" based on her duties in the classroom; therefore, the ministerial exception did not apply. After the Ninth Circuit denied an *en banc* hearing, St. James petitioned the U.S. Supreme Court, asking for a writ of certiorari.

In the second consolidated case, *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, respondent Agnes Deirdre Morrissey-Berru (Morrissey-Berru) filed an employment-discrimination claim against her employer, Our Lady of Guadalupe School (Our Lady). In 1998, the California-based Catholic parish school first hired Morrissey-Berru as a substitute teacher. The following year, Our Lady hired Morrissey-Berru as a full-time, sixth-grade teacher. Morrissey-Berru taught sixth grade for 10 years and then taught fifth grade for six years. During this time, Morrissey-Berru received her California teaching credential from Chapman University.

Every year, Morrissey-Berru had to sign a "Faculty Employment Agreement" which referred to her only as a "teacher" and not a "minister." As part of this agreement, the teachers must agree to comport with Catholic doctrine by aligning their classes with "the values of Christian charity, temperance, and tolerance," and by "model[ing] and promot[ing] behavior in conformity to the teaching of the Roman Catholic Church in matters of faith and morals." To follow this commitment, Morrissey-Berru taught religious classes every day, introduced students to Catholicism, and provided a framework for their religious doctrine. Morrissey-Berru, however, did not only teach religion; she also taught reading, writing, math, grammar, vocabulary, science, and social studies.

In 2012, Our Lady's principal, April Beuder, directed Morrissey-Berru to implement a new reading program "to address concerns about academic rigor" at the school. In 2014, Principal Beuder expressed disappointment at how Morrissey-Berru implemented the program, and so, she removed Morrissey-Berru to a part-time position that involved teaching fifth-grade religion and fifth-through-seventh-grade social studies. After one year, Principal Beuder was still dissatisfied with Morrissey's performance in the part-time role, and she did not renew Morrissey-Berru's employment contract for the following year. At the time, Morrissey-Berru was in her sixties.

On June 2, 2015, Morrissey-Berru filed an employment-discrimination claim with the Equal Employment Opportunity Commission (EEOC), alleging that Our Lady violated the Age Discrimination in Employment Act of 1967 (ADEA). The EEOC issued Morrissey-Berru a right-to-sue letter on September 19, 2016, and on December 19, 2016, she filed suit in the U.S. District Court for the Central District of California (the District Court). The District Court granted Our Lady's summary-judgment motion, finding that the First Amendment's

ministerial exception barred Morrissey-Berru's claim. The court explained that Morrissey-Berru had a ministerial role because she "expressly admitted that her job duties involved conveying the Church's message" and she "integrat[ed] Catholic values and teachings into all of her lessons."

In October 2017, Morrissey-Berru appealed the decision to the U.S. Court of Appeals for the Ninth Circuit (the Ninth Circuit). The Ninth Circuit, following its decision in *Biel*, reversed and remanded the case back to the District Court. The Ninth Circuit determined that Morrissey-Berru was not a minister because she did not hold an ecclesiastical title, she did not have any significant "religious credential, training, or ministerial background," and she "did not hold herself out to the public as a religious leader or minister."

On December 18, 2019, the U.S. Supreme Court granted certiorari.

Legal Analysis

THE FUNCTIONAL APPROACH VS. THE FOUR-FACTOR TEST

Petitioners, St. James and Our Lady (the Schools), contend that the Court should adopt the functional approach to determine when an employee is a minister. The Schools refer to a prior Supreme Court decision, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, to argue that the ministerial exception applies when an employee's job involves important religious functions. The Schools then define what qualifies as an important religious function under the ministerial exception. Looking to the minister-teacher in *Hosanna-Tabor*, the Schools assert that, at a minimum, important religious functions include teaching religion, leading students in prayer or devotional exercises, accompanying students to worship services, and occasionally leading those services. Moreover, they argue that important religious functions can involve leading a religious organization; conducting worship services, ceremonies, or rituals; or serving as the faith's messenger. The Schools add that this list is not exhaustive; any function that is "important for the autonomy of the religious group" could be included. The Schools maintain, however, that for an employee to be considered a minister, she need not have the formal title of "minister" nor have received ministerial training.

Contrary to the Schools' interpretation, Respondent Morrissey-Berru contends that the Court should use a four-part test to identify when an employee is a minister. The four factors, she explains, are whether the employee has (1) the title of minister; (2) received ministerial substance and training; (3) "held herself out as a minister;" and (4) carried out "important religious functions." Morrissey-Berru contends that, given the ministerial exception's precedent, history, and purpose, it is flawed to merely focus on the "important religious functions" factor. First, looking to the precedent, Morrissey-Berru notes that the courts have rejected this single-factor approach. She points to a case, *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, where a Christian elementary school fired a pregnant teacher stating that "mothers should stay home with their preschool aged children." Although the ministerial exception was not explicitly involved, Morrissey-Berru contends that the Court allowed the teacher's EEOC complaint to proceed, despite the school's objection that the teacher carried out "important religious functions." Morrissey-Berru also looks to the ministerial exception's history, as mapped out in *Hosanna-Tabor*, finding that it generally involved "a religious organization's freedom to select its *titled* clergy or other expressly designated leaders," not a lay teacher in a religious school.

Discussion

EMPLOYERS' RELIGIOUS FREEDOMS VS. EMPLOYEES' CIVIL-RIGHTS PROTECTIONS

The Christian Legal Society (CLS), in support of the Schools, argues that broadly interpreting the ministerial exception is imperative to ensure both religious equality and freedom from government interference. First, CLS maintains that a narrow definition favors some religions as the term "minister" has "strong Protestant associations." The National Catholic Educational Association (NCEA) agrees, explaining that some faiths, such as Islam or Hinduism, do not use the term "minister," while others, such as Sunni Islam or Sikh, reject classes of ordained clergy altogether. Therefore, CLS contends that because the United States is home to "virtually every religion in the world," it is important to interpret the exception broadly to encompass all religions. The National Right to Work Legal Defense Foundation (the Foundation) also argues that a broad interpretation ensures that religious groups retain their constitutional right to self-governance. The Foundation explains that a religious organization's right to hire staff is "at the heart of [their] freedom" because such employees shape the faith and carry out its mission. CLS adds that denying religious organizations the ability to hire and terminate their own staff could create a chilling effect. CLS explains that uncertainty about who the organization may hire, and fear of liability, would cause such groups to "conform [their] beliefs and practices regarding 'ministers' to the prevailing secular understanding."

In support of Morrissey-Berru, the National Women's Law Center (NWLC) counters the Schools' concerns for religious liberty by arguing that primarily basing the ministerial exception on the "important religious functions" factor erodes civil-rights protections for religious organizations' employees. NWLC explains that adopting this "functions-only test" will encourage sex, race, disability, and age discrimination within religious workplaces. Moreover, NWLC contends that employees would be unable to assert retaliation claims which is important since, each year, the EEOC receives tens of thousands of these complaints—more than any other kind of employment-discrimination claim. The State of Virginia agrees, adding that overturning the Ninth Circuit's opinion would likely deny over 100,000 lay teachers employed by Catholic elementary and secondary schools the federal and state-law employment protections to which they would otherwise be entitled. Specifically, the Freedom from Religion Foundation (FFRF) asserts that this "functions-only test" would jeopardize the civil rights of millions of healthcare workers. FFRF explains that religious hospitals employ a significant number of workers—upwards of 750,000 people—and applying the ministerial exception broadly would deprive these individuals of their civil-rights protections, despite their highly secular job.

ADMINISTRATION OF THE EXCEPTION

The Independent Women's Law Center (IWLC), in support of the Schools, argues that adopting the Ninth Circuit's four-factor test will bog down the civil courts in matters involving religious doctrine and practice. The IWLC maintains that courts will become entangled in questions involving the degree of religious training or time spent on a "religious" activity. Moreover, the IWLC notes that this test would allow a secular judge to definitively determine when

a religious employee's job is sufficiently important to qualify as a minister. The Foundation agrees, explaining that courts would have to delve into religious organizations and determine which employees and what roles are fundamental to the organization's mission. The Foundation asserts that the First Amendment's religion clauses bar this inquiry into religious matters.

Morrissey-Berru counters by arguing that the Schools' proposed test for the ministerial exception would be very difficult to properly administer in practice. Morrissey-Berru explains that there is no bright-line rule that can distinguish between religious and secular duties. For example, she points to secretariat schools that provide integrated secular education with religious mission, making it difficult to untwine the two. The NWLC agrees, explaining that the four-factor test provides the courts with an objective set of criteria to use when determining whether an employee is a minister. NWLC further asserts that some religious organizations could take advantage of the Schools' proposed test by assigning ministerial duties to lay employees merely to ensure that they fall within the exception. ⊙

Full text available at https://www.law.cornell.edu/supct/cert/19-267.

Written by Kathryn Adamson, Jingyi Alice Yao, and David Relihan. Edited by Isaac Syed.

Carney v. Adams (No. 19-309)

Oral argument: TBD
Court below: *U.S. Court of Appeals for the Third Circuit*

Questions as Framed for the Court by the Parties

(1) Whether the First Amendment invalidates a longstanding state constitutional provision that limits judges affiliated with any one political party to no more than a "bare majority" on the state's three highest courts, with the other seats reserved for judges affiliated with the "other major political party"; (2) whether the U.S. Court of Appeals for the Third Circuit erred in holding that a provision of the Delaware Constitution requiring that no more than a "bare majority" of three of the state courts may be made up of judges affiliated with any one political party is not severable from a provision that judges who are not members of the majority party on those courts must be members of the other "major political party," when the former requirement existed for more than 50 years without the latter, and the former requirement, without the latter, continues to govern appointments to two other courts; and (3) whether the respondent, James Adams, has demonstrated Article III standing.

Facts

James R. Adams is a resident of Delaware and a member of the Delaware State Bar. For years, Adams desired a position as a Delaware state judge. In 2009, he applied to be a Family Court Commissioner, but was not selected. In 2014, Adams contemplated applying to serve on the Delaware Supreme Court or Superior Court, but he did not apply because he was registered as a Democrat, and the positions were open only to Republicans. Adams retired in 2015, but in 2017 he reactivated his Delaware State Bar status to continue searching for potential judgeships. In 2017, Adams also changed his party affiliation to Independent, to express, in his mind, his disdain toward the moderate-leaning Democratic Party.

Delaware's state constitution contains a provision that effectively requires Democrats or Republicans to fill most state judiciary positions—the Delaware Constitution places a cap on the number of judges who can be affiliated with the majority political party (the bare majority provision) and requires that members of the other major political party fill the other judgeships (the major party provision). Thus, Adams' change in party affiliation also led him to believe that he would not qualify for a judgeship due to his political affiliation. Therefore, despite his longstanding interest, Adams did not apply for a vacant judicial position, at least two of which called for Republican candidates.

In February 2017, Adams brought suit against Delaware Governor John Carney in the U.S. District Court for the District of Delaware (the District Court) to challenge the bare majority and major party provisions of the Delaware Constitution. The District Court concluded that Adams did not have standing to challenge the bare majority provision but did have standing to challenge the major party provision of the Delaware Constitution: the court determined that, despite Adams' failure to actually apply for a judicial position, doing so would have been futile. Furthermore, the District Court sided with Adams on the merits, determining that Article IV, Section 3 of the state constitution, containing the two challenged provisions, restricted candidates' access to a government position based on their political affiliation and was therefore unconstitutional. The District Court granted summary judgment in Adams' favor.

Governor Carney appealed this decision to the U.S. Court of Appeals for the Third Circuit (the Third Circuit). There, Adams again argued that Article IV, Section 3 of the Delaware Constitution limits service on state courts to members of the two main political parties. The Third Circuit, after affirming the District Court's standing decision, held that the section of the Delaware Constitution that restricts candidates' ability to apply for judicial positions based on political affiliation constitutes a First Amendment violation and is thus unconstitutional. Additionally, the Third Circuit determined that state judges are not policymakers, and, therefore, the policymaker exception does not apply.

On December 6, 2019, the U.S. Supreme Court granted certiorari. The Supreme Court directed that, in addition to preparing arguments on the constitutional questions raised on freedom of association, the parties should also prepare arguments on whether Adams has Article III standing to raise his claim.

Legal Analysis

ADAMS' ARTICLE III STANDING AS AN INDEPENDENT

Petitioner, Governor Carney, argues that Adams does not have standing under Article III of the U.S. Constitution to assert a challenge to the Delaware Constitution because Adams has failed to establish an "injury-in-fact" that is "concrete and particularized" for each challenged provision. First, Governor Carney notes that the bare majority provision could injure only members of major political parties by creating a supermajority in the state courts, and because Adams does not belong to either major party, that provision cannot injure him. Next, Governor Carney asserts that to demonstrate that the major party provision injured him, Adams must establish (1) he had genuine, active plans to apply for judgeships, (2) the constitutional provision prevented him from equal evaluation for these positions, and (3) without the provision, he had a reasonable probability of securing a judgeship. Governor Carney contends that Adams failed to establish all three of these criteria: first, Governor Carney states that Adams' general interest in one day applying to the courts is too hypothetical to

sustain an actual injury. Second, contrary to Adams' position in the lower courts, Governor Carney continues, positions were open to Democrats in 2014 for which Adams could have applied, and therefore, the major party provision never cost him an opportunity for a judgeship. Governor Carney posits, moreover, that because Adams' status as an Independent would not bar him from serving on, for example, the Family Court, Adams could fulfill his general interest in serving as a judge notwithstanding the major party provision. Finally, Governor Carney emphasizes that Adams does not have a reasonable probability of becoming a judge because, at most, the record reflects that he "meets the minimum qualifications" of judgeships.

Respondent, Adams, counters that he has Article III standing to challenge both provisions of the Delaware Constitution because he has experienced injury sufficient to satisfy the requirements of Article III standing. Adams argues that the major party provision injures him by categorically preventing him from ever serving as a judge and the bare majority provision injures him by limiting his potential judgeships whenever a bare majority exists in a court. Consequently, Adams asserts, the constitutional provisions cause him to experience a chilling effect on his political association; an injury that he believes gives rise to standing. Responding to Governor Carney, Adams contends that judgeships available to him in 2014 do not undermine his alleged injury because past opportunities are irrelevant to the obstacles that he currently faces. Adams further maintains that his current interest in judgeships renders his injury imminent, rather than hypothetical. Although he has not yet applied for a judgeship, Adams explains, Article III standing doctrine does not require him to make a futile attempt. Moreover, Adams argues that he meets the "reasonable possibility" test because Delaware law requires only that judgeship candidates be legally trained and are Delaware citizens. For standing, Adams continues, he does not need to assert that he realistically could have achieved a judgeship absent the constitutional provisions, but rather showing that the government has rendered it more difficult to obtain a benefit for members of one group than for members of another is sufficient.

THE MAJOR PARTY PROVISION'S CONSTITUTIONALITY UNDER THE FIRST AMENDMENT

Governor Carney maintains that the major party provision is constitutional because it is consistent with precedent in *Elrod v. Burns* and *Branti v. Finkel*, which staked out an exception to the First Amendment's prohibition on political affiliation considerations when the position at issue is one of policymaking. State judges, he argues, fall under this exception because they exercise discretion in performing public functions and are not akin to the low-level government positions for which political affiliation is irrelevant and the First Amendment protects. The Third Circuit's determination that judges are not policymakers, he continues, subverts *Elrod*'s rationale of political neutrality in staffing government positions because the provision that the Third Circuit struck down is designed to insulate the judiciary from partisan influence.

Adams replies that the major party provision is unconstitutional because the First Amendment prohibits selecting judges based on political affiliation, since such a scheme restricts freedom of association in a way that does not bear a rational relationship to a judge's performance. He further maintains that *Elrod's* and *Branti's* First Amendment protections do not apply only to low-level government employees but extend to anyone—including judges—who are politically independent from the party in power. Under these cases, Adams argues, judges do not fall within the policymaker exception to First Amendment protections, which applies only to government positions whose functions can only be performed effectively if the appointee shares the appointing power's political ideology. To the contrary, Adams contends, judges are supposed to be politically independent and politicized appointments could sow corruption in the judiciary.

Discussion

DO THE DELAWARE CONSTITUTIONAL PROVISIONS HELP OR HINDER STATE INTERESTS?

The Brennan Center for Justice at NYU School of Law (Brennan Center), in support of Governor Carney, argues that the Delaware Constitution furthers important state interests beyond even what the Third Circuit considered. The Brennan Center contends that Delaware's provisions demonstrate that a state's way of structuring its judiciary is particular and unique. State and Local Government Associations, in support of Governor Carney, assert that a state government's determination that party balancing is useful in a particular context reflects a sovereign's determination that deserves respect from the federal government. The Court, the Brennan Center maintains, should consider this important state interest that the Delaware Constitution advances, along with Delaware's significant interests in increasing public confidence in the judicial system's fairness and preventing one political party from gaining full control of the judiciary.

In contrast, the Cato Institute, in support of Adams, argues that the Delaware Constitution may actually undermine the state interest of creating a politically balanced judiciary in which the public can be confident. The Cato Institute contends that explicitly labeling judicial positions as having to be filled by either Democrats or Republicans indicates to the public that the Delaware government considers judicial decisions to be inherently tied to party affiliation, thus undermining public perception of a neutral judiciary. Additionally, the Cato Institute asserts that party restriction may influence judicial decision-making, by compelling judges to represent the political party to which they belong rather than impartially make decisions. The Cato Institute further maintains that excluding Independents, who are less ideologically extreme, from state judge positions contradicts the state goal of judicial political neutrality.

THE BENEFITS AND BURDENS OF REQUIRING MAJOR PARTY AFFILIATION AMONG JUDGES

The Delaware State Bar Association (the Association), in support of Governor Carney, argues that the government should consider judicial candidates' political affiliations when filling judicial vacancies because judges make policy that aligns with their political perspectives. Additionally, Professors Brian D. Feinstein and Daniel J. Hemel, in support of Governor Carney, emphasize that diverse political viewpoints, such as those created by Delaware's two-party requirement, prevent extreme judicial decisions and promote reasonableness. The Former Chief Justices of the Delaware Supreme Court (the Former Chief Justices), in support of Governor Carney, agree and assert that the Delaware Constitution's two-party requirement guarantees that no one political party overtakes the judiciary.

Conversely, the Cato Institute, in support of Adams, believes that Delaware's

two-party requirement imposes a burden upon Independent judicial candidates, as well as judicial candidates who are affiliated with other third-party political groups. For example, the Libertarian National Committee, in support of Adams, argues that Delaware's two-party requirement categorically excludes Libertarians from state judicial positions solely due to their political ideology. To that end, the Cato Institute asserts, the requirement may compel Independents and members of other third parties to betray their political beliefs for an opportunity to serve as a Delaware judge. Further, the Cato Institute argues that Delaware's two-party provisions discourage judges from leaving their political parties while they are still serving out their judicial terms, even if their political ideologies change while they are serving. ⊙

Full text available at https://www.law.cornell.edu/supct/cert/19-309.

Written by Julia Canzoneri and Grant Shillington. Edited by Cecilia Bruni.

Google LLC v. Oracle America, Inc. (No. 18-956)

Oral argument: TBD
Court below: *U.S. Court of Appeals for the Federal Circuit*

Questions as Framed for the Court by the Parties

(1) Whether copyright protection extends to a software interface; and (2) whether, as the jury found, the petitioner's use of a software interface in the context of creating a new computer program constitutes fair use.

Facts

In 2010, Respondent Oracle America, Inc. (Oracle) purchased Sun Microsystems, Inc. (Sun), transferring ownership of the Java programming language to Oracle. Java 2 Standard Edition (Java SE) is an open-source software platform that allows programmers to write programs using the Java programming language that run on different types of computers without having to rewrite the program for each type of hardware. The Java SE platform incudes the Java Application Programming Interface (API), which consists of prewritten code designed to provide programmers with predetermined functions.

Programmers must use a set of API packages to enable the Java language to function. Oracle created a library of over 166 API packages that enable programmers to "write once, run anywhere." Oracle licenses its API packages to programmers for a fee. Oracle does, however, provide access to a free version of the API packages through OpenJDK, but it requires companies that improve any API packages to give away the improvements to the Java community for free.

In 2005, Petitioner Google LLC (Google) started negotiating with Sun to use and adapt the Java SE platform for its Android mobile device software platform; however, talks fell apart due to Google's desire to use the Java APIs for free and without limits on modification. After failing to reach an agreement, Google software developers unsuccessfully attempted to create their own APIs. At that point, Google elected to copy verbatim 37 Java APIs for use in the Android platform and write its own implementing code. In 2007, Google released the Android platform for free under an open source license. As a result, many of Oracle's clients that were licensing APIs left in favor of the Android platform, and the clients that remained with Oracle demanded that Oracle provide the licenses at a "steep discount."

In response, Oracle sued Google in the U.S. District Court for the Northern District of California (the District Court) for copyright infringement. The jury found that Google infringed on Oracle's copyright but failed to determine whether using the Java APIs constituted fair use. Despite the jury verdict, the District Court held that the APIs were not copyrightable as a matter of law and entered judgment for Google on May 31, 2012. On appeal, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) reversed the District Court's judgment, holding that the declaring code and structure, sequence, and organization (SSO) of the APIs were entitled to copyright protection under the Copyright Act, thus requiring programmers to purchase the license to avoid infringement. The Federal Circuit then remanded the case to the District Court to determine the fair-use question.

When evaluating fair use, courts look at: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used, and (4) the effect of the use on the potential market. After a second trial, a jury found in favor of Google. Oracle moved for both judgment as a matter of law and for a new trial, but the District Court denied both motions and entered judgment for Google on June 8, 2016.

Oracle appealed once again to the Federal Circuit to redetermine the fair-use question, or alternatively, to seek relief from the District Court's denial of a new trial. Google likewise filed a cross-appeal against all adverse orders and rulings under the final judgment. On March 27, 2018, the Federal Circuit reversed the District Court's judgment, determining that Google did not meet the four fair-use requirements. As such, the Federal Circuit denied Google's cross-appeal and remanded the case to the District Court to determine damages.

Google filed a petition for a writ of certiorari, which the U.S. Supreme Court granted on November 15, 2019.

Legal Analysis

APPLICABILITY OF THE MERGER DOCTRINE

Google argues that no copyrightable interest existed in Oracle's Java SE due to copyright law's "merger doctrine." According to Google, the merger doctrine dictates that no copyright can vest to an expression if that expression is one of only a few ways to access a system or method of operation. Vesting copyright, Google asserts, would effectively allow the copyright holder to circumvent Section 102(b) of the Copyright Act of 1976, which bars copyrighting ideas. In the present case, Google contends that the merger doctrine applies because the declaring codes it borrowed from Oracle were the only declaring codes that could perform programming functions in the way that experienced Java developers would expect.

Moreover, Google states that, when possible, its Android developers only borrowed Oracle's declaring codes to the extent they absolutely needed to, and even then, Google's developers input their own implementing code. Additionally, Google argues that the merger doctrine applies even if assessed at the time a work is created. If applied at the time Java SE was created, Google argues that merger still applies because outside of choosing the names of methods (which are not copyrightable), Sun only made conceptual choices about the way a method should perform, and concepts cannot be copyrighted.

Oracle counters that the merger doctrine does not apply here because there were "countless ways" for the authors of Java

SE to express their ideas embodied in the platform, none of which was necessary. Oracle insists that the Court must look to the options available to the original author at the time of conception; otherwise a work could be copyrighted only to later be deregistered based on what was available at the time of reuse. In fact, according to Oracle, no circuit court has ever analyzed merger from the time of reuse.

Oracle also rebuts Google's assertion that Google had no choice but to copy the Java SE declaring codes by pointing out that Oracle had offered Google three available licensing agreements. Furthermore, Oracle argues that Google could have used its abundant resources to write its own programming platform for app developers from scratch, as other companies such as Microsoft and Apple have done. Oracle also asserts that simply because the Java language is well-known and pervasive, Google is not allowed to just copy it without permission.

THE PROPER FAIR USE BALANCING

Google contends that, even if the Court were to find a copyrightable interest in the Java SE APIs, Google's use still constitutes fair use under the four-factor balancing test of § 107 of the Copyright Act of 1976. First, Google argues that the purpose and character of its secondary use of the Java SE APIs in creating the Android platform added new methods, classes, and packages that gave new meaning and expression to the borrowed code. Therefore, Google contends, its use was transformative. Second, Google asserts that, although the declaring codes are "minimally expressive," they are functional—not creative—in nature, which weighs in favor of a finding of fair use. Third, Google argues that the amount and substantiality of the original APIs borrowed was fair because Google only borrowed as much as was necessary—less than 0.5% of the Java SE code—to allow Google to fulfill its purpose of having Java function on Android. And fourth, Google contends that Android did not negatively impact Oracle's market for Java SE because, unlike Android, Java SE was not designed for modern smartphone technology; therefore, Android could not have supplanted Java SE's market.

Oracle counters that Google's use of the Java SE APIs does not constitute fair use because Android superseded the concept behind Java SE entirely. First, Oracle asserts that the commercial purpose and nature of Google's Android platform weighs against fair use. Indeed, Oracle argues, Google has made $42 billion from Android—a direct result of copying the Java SE APIs. Further, Oracle asserts that Android is not transformative because the function of the borrowed code remained the same once implemented into Android. Second, Oracle contends that the Java SE code was undeniably creative in nature because the choices that went in to making the code arose out of a desire to make a memorable and appealing code. Third, Oracle contends that because Google admitted to copying the most valuable lines of the Java SE code, the amount and substantiality factor weighs against fair use. Thus, Oracle maintains that Google's argument that only a small percentage of code was copied from Java SE fails because "statistics cannot trump quality." Fourth, Oracle reasons that Google did negatively impact Oracle's market for Java SE because Google marketed Android to Oracle's otherwise loyal clients based on Android's use of Java. In fact, Oracle states, many of Oracle's commercial customers switched to Android entirely and others used Android as a bargaining chip to receive discounts on Java SE.

Discussion

UPENDING THE PURPOSE OF COPYRIGHT LAW?

Professors Peter Menell, David Nimmer, and Shyamkrishna Balganesh (the Law Professors), in support of Google, argue that the Federal Circuit's decision runs contrary to copyright law because API packages possess a functional element. The Law Professors contend that extending copyright protection to protect functional elements would upend Congress's intentional dichotomy between patent law's time-limited monopoly—which is designed to protect functions—and copyright law's lengthy protection. Furthermore, the Developers Alliance, also in support of Google, argues that rigid application of the fair-use doctrine creates an unworkable framework for software because the nature of software is critically different than the nature of literature or other types of work generally protected with copyrights.

The United States, in support of Oracle, argues conversely that the API packages falls within the range of copyrightable material that Congress intended to protect. According to the United States, the API packages are not merely functional implementations, but rather embody expressive choices made by Sun in order to make them appealing to developers. Similarly, the Copyright Alliance contends, in support of Oracle, that a finding of fair use would diminish the balance between copyright protection and fair use because putative infringers could couch a mere adaptation to a different hardware as an innovation.

CREATING BARRIERS TO ENTRY AND HARMING CONSUMERS

The Developers Alliance, supporting Google, contend that the Federal Circuit's decision frustrates "copyright law's stated intent" because granting copyright protection for functional API packages stifles innovation. A group of Copyright Scholars, also in support of Google, likewise argue that granting copyright protection to declaring codes gives the creator undue control over the use of the platform, allowing the creator "to leverage its rights over copyrightable aspects . . . to forbid legitimate uses of the uncopyrightable aspects." Microsoft, also supporting Google, furthers the concerns of the Copyright Scholars by asserting that centralizing control in the code originator stifles the creation of new technology by creating barriers to seamless interoperability.

The SAS Institute (SAS), in support of Oracle, argues conversely that failing to extend copyright protection in this situation would actually inhibit innovation because proprietary-software companies, like Oracle and SAS, would have no incentive to invest in researching and creating software if they were not able to monetize it. Furthermore, SAS claims that failing to apply copyright protection would allow competitors to undercut software development firms by appropriating software interfaces under the guise of interoperability. SAS warns that such a result would lead to greater secrecy and less collaboration between companies, ultimately hurting consumers. ☉

Full text available at https://www.law.cornell.edu/supct/cert/18-956.

Written by Thomas Shannan and Andrew Kingsbury. Edited by Tyler Schmitt.

Pereida v. Barr (No. 19-438)

Oral argument: TBD
Court below: *U.S. Court of Appeals for the Eighth Circuit*

Question as Framed for the Court by the Parties

Whether a criminal conviction bars a noncitizen from applying for relief from removal when the record of conviction is merely ambiguous as to whether it corresponds to an offense listed in the Immigration and Nationality Act.

Facts

Clemente Avelino Pereida (Pereida), a Mexican citizen, entered the United States in 1995 without authorization. Pereida has remained in the United States since then, and he has been steadily employed, paid his taxes, and raised a family.

In July 2009, Nebraska authorities arrested Pereida and charged him with "criminal attempt" in connection with his use of a fraudulent social security card to gain employment, violating Nebraska Revised Statute § 28-608 (which has since been amended and moved to § 28-638). Pereida pleaded no contest. Subsequently, on August 3, 2009, the Department of Homeland Security (DHS) issued Pereida a Notice to Appear, which charged him with removability because he is an unauthorized immigrant. Pereida conceded that he is an unauthorized immigrant, but, in March 2011, he filed an application for cancellation of removal pursuant to 8 U.S.C. § 1229b(b)(1), stating that his removal would impose extreme hardship on his lawfully admitted family.

In August 2014, DHS moved to pretermit Pereida's cancellation application, arguing that Pereida's criminal attempt conviction constituted a crime involving moral turpitude (CIMT), which automatically made Pereida ineligible for cancellation of removal. The Immigration Judge (IJ) acknowledged that, categorically, a violation of § 28-608 is not a CIMT because the statute is divisible into four subsections, and it is possible to violate one of the subsections without committing a CIMT. However, the IJ concluded that Pereida was convicted under a subsection that necessarily constituted a CIMT because it contained as an element the "intent to defraud or deceive." Accordingly, the IJ granted DHS's motion.

Pereida appealed the IJ's decision to the Board of Immigration Appeals (BIA). The BIA used a "modified" categorical approach to analyze § 28-608, which permitted the BIA to use certain court documents to ascertain which subsection of the statute Pereida violated. Using this approach, the BIA was unable to determine the subsection. The BIA commented that Pereida had the burden of proving that his conviction was not a CIMT and that, because he failed to carry his burden of proof, he was ineligible for cancellation of removal. Consequently, the BIA affirmed the IJ's decision.

Pereida petitioned the U.S. Court of Appeals for the Eighth Circuit to review the BIA's decision, arguing that his conviction was not a CIMT. Like the IJ, the Eighth Circuit determined that § 28-608 was not categorically a CIMT and that the statute was divisible. The Eighth Circuit then turned to the modified categorical approach, and, like the BIA, was unable to discern "the subsection . . . under which Pereida was convicted." The Eighth Circuit acknowledged that although "Pereida is not to blame for the ambiguity surrounding his criminal conviction," he still has the burden of proof, which he failed to meet. Because the Eighth Circuit could not ascertain which subsection applied, it did not delve into Pereida's substantive legal arguments and, ultimately, it denied Pereida's petition for review.

Pereida filed a petition for a writ of certiorari with the U.S. Supreme Court on September 30, 2019, which the Court granted on December 18, 2019.

Legal Analysis

HOW SHOULD COURTS INTERPRET DIVISIBLE STATUTES?

Petitioner Clemente Avelino Pereida (Pereida) claims that he is eligible for cancellation of removal because his state-level criminal conviction does not necessarily constitute a crime involving moral turpitude under the Immigration and Nationality Act of 1940 (INA). Pereida maintains that, under the categorical approach to interpreting divisible statutes, the Court must focus on "the legal question of what a conviction *necessarily* established." Accordingly, Pereida asserts that the Court should presume he committed only the least of the acts that could have led to his conviction under Nebraska Revised Statute § 28-608 to determine if he committed a CIMT. Here, Pereida argues that his conviction is ambiguous, so it cannot "necessarily" constitute a CIMT. While CIMTs require a culpable mental state, Pereida points out that not all the crimes in § 28-608 include a mental state and that the Nebraska state court did not specify whether he was convicted of a crime with a mental state element. Further, Pereida notes that he was charged with all the crimes listed within § 28-608 and pleaded no contest, so he was not convicted of a specific crime.

Pereida acknowledges that the "least-acts-criminalized" presumption is rebutted if the record of conviction conclusively establishes that he was convicted of a crime listed within § 28-608 that constitutes a CIMT. Pereida claims, however, that this "modified" categorical approach to analyzing a noncitizen's conviction under a divisible statute is not meaningfully different from the traditional categorical approach. Pereida argues that the modified approach can only rebut the least-acts presumption if "the record of conviction of the predicate offense *necessarily* establishes" the noncitizen's conviction of a CIMT, so even under the modified approach, an ambiguous conviction still only *necessarily* establishes the least of the crimes under the state statute.

Respondent Attorney General William P. Barr (Barr) argues that Pereida incorrectly applied the categorical approach. Barr explains that an indivisible statute "sets out a single . . . set of elements to define a single crime," whereas a divisible statute defines multiple crimes with multiple elements. The "least-acts" presumption, Barr continues, only applies when courts analyze the specific crime within the divisible statute, not the whole of the divisible statute as the Court must do here. Barr maintains that the least-acts presumption applies only after the court has identified the relevant crime within the divisible statute. Here, Barr agrees that Pereida's conviction is ambiguous because it is unclear which crime Pereida was convicted of committing. Therefore, Barr argues that the Court cannot apply the least-acts presumption to determine whether Pereida's conviction is a CIMT because it has not yet been determined which crime he was convicted of committing.

Accordingly, Barr contends that if Pereida cannot prove which part of a divisible statute he was convicted of committing, then the court cannot determine the noncitizen's eligibility for cancellation of removal by the normal operation of the categorical approach. In situations like this, Barr claims that the "modified" categorical approach is necessary because it allows a court to examine the record of conviction to determine which crime the noncitizen

was actually convicted of committing. Barr maintains that, if a noncitizen is unable to prove they were not convicted of a disqualifying offense, the noncitizen is ineligible for cancellation of removal.

BURDEN OF PROOF

Pereida argues that he does not have the burden of proving his crime of conviction under § 28-608 because a burden of proof resolves questions of fact and not questions of law. Pereida argues that he met this burden in his cancellation of removal application because, among other things, he submitted "hundreds of pages of evidence" showing that he qualified for cancellation of removal. On the other hand, Pereida argues that when courts apply the categorical approach, they seek to resolve only questions of law, so there are no uncertain facts for Pereida to prove. Pereida continues that in this case the categorical approach requires the Court to resolve the "binary" legal question of whether his past conviction "*necessarily* established a disqualifying offense" (internal quotations omitted). Pereida contends that this is true under the modified-categorical approach as well. This approach, Pereida maintains, is a tool that helps courts to apply the categorical approach. Crucially, Pereida asserts that this is still a binary legal question that does not involve any factual question triggering Pereida's burden of proof.

Barr counters that, to be eligible for cancellation of removal, Pereida has the burden of proving that he did not commit a CIMT. Barr claims that the INA places an affirmative obligation on a noncitizen to "prove by a preponderance of the evidence" that the noncitizen is eligible for cancellation of removal. Where multiple grounds exist for denying a cancellation request, Barr notes that the noncitizen must prove that "such grounds do *not* apply." Additionally, Barr points to the cancellation of removal application, which requires an applicant to provide conviction information such as the name of the underlying offense. Taken together, Barr claims, the INA and relevant regulations demonstrate that Pereida bears the burden of proving he was not convicted of a disqualifying offense. Further, Barr explains that when a statute is divisible, a court may use the modified categorical approach, which requires a noncitizen to supply court documents to prove that the noncitizen's crime of conviction is not disqualifying. Ultimately, Barr concludes that Pereida failed to carry his burden of proof.

Discussion

FAIRNESS, CONSISTENCY, AND UNIFORMITY

The National Association of Criminal Defense Lawyers (NACDL), in support of Pereida, argues that adopting the lower court's decision will result in unfair and inconsistent outcomes. NACDL explains that state conviction records are "often incomplete, destroyed, or never created," making it difficult for noncitizens to provide documents to show which specific crime underlies their convictions. NACDL further contends that this rule harms noncitizens by basing immigration outcomes on the "bureaucratic decisions of county clerks' offices and the idiosyncrasies of courts' guilty plea processes." A group of former Immigration Judges and members of the Board of Immigration Appeals (IJs) agrees, adding that Pereida's categorical approach is more straightforward and generates more uniform outcomes because the judge only needs to compare a statute's elements. The IJs note that this also saves the court significant time and resources as the judges no longer need to make individualized factual decisions nor hear witness testimony.

Barr counters that the Court should adopt the "modified categorial approach" because it is the more simple, fair, and workable alternative. Barr explains that if the necessary documents are lost or never created in the first place, then no matter who carries the burden of proof, the problem of lack of evidence will still exist. Barr notes that Congress drafted the INA with careful, detailed wording, intending to place the burden of proof on the noncitizen. Switching the burden of proof onto the government, Barr argues, would essentially nullify Congressional intent. Barr asserts that Pereida has "no valid basis for such overriding of Congress's considered judgment." Finally, Barr points to the limited records that a noncitizen may use to identify the underlying conviction, including indictments and jury instructions. Barr contends that the use of only these documents avoids "practical difficulties" as it limits the number of records that the noncitizen must produce.

WHO IS BETTER POSITIONED TO CARRY THE BURDEN OF PROOF?

The Immigrant Defense Project (IDP), in support of Pereida, argues that the government should have the burden of proof because it is better positioned to produce evidence to determine the crime of conviction. The IDP explains that most noncitizens are unrepresented by counsel, which makes it difficult for these individuals to obtain criminal records. Additionally, the IDP notes that because approximately 89 percent of noncitizens' immigration court cases proceed in a language other than English, a significant number of noncitizens may have even greater difficulty in requesting records in their non-native language. The IDP adds that noncitizens with mental illnesses or other disabilities may also have trouble requesting documents, creating a major problem because each year tens of thousands of noncitizens with mental disabilities face removal. The IDP continues that Immigration Customs and Enforcement (ICE) detains many noncitizens in prison-like conditions where they have limited access to phone, internet, and mail services, which makes it difficult to request prior criminal records.

Barr counters that noncitizens, instead of the government, are better positioned to meet the burden of proving their crimes of conviction. Barr explains that, generally, noncitizens will receive the necessary documents after a conviction in a criminal case. Barr asserts that keeping the burden of proof on noncitizens will incentivize them to produce the necessary documents. Furthermore, in cases where noncitizens know their conviction may have immigration consequences, Barr contends that noncitizens will be even further incentivized to ensure that the relevant records, such as a plea-colloquy transcript, are generated and retained. Switching the burden of proof onto the government, Barr notes, would encourage noncitizens to "withhold and conceal evidence." Although Barr concedes that sometimes underlying conviction records are lost at no fault of noncitizens, Barr asserts that noncitizens should bear the burden in such cases because they are seeking discretionary relief from removal and already have a criminal conviction, so the lack of evidence should not automatically benefit them. ⊙

Full text available at https://www.law.cornell.edu/supct/cert/19-438.

Written by Brandon Slotkin, Kathryn Adamson, and Matt Farnum. Edited by Matt Farnum.

United States v. Briggs (No. 19-108)

Oral argument: TBD

Court below: *U.S. Court of Appeals for the Armed Forces*

Question as Framed for the Court by the Parties

Whether the U.S. Court of Appeals for the Armed Forces erred in concluding—contrary to its own longstanding precedent—that the Uniform Code of Military Justice allows prosecution of a rape that occurred between 1986 and 2006 only if it was discovered and charged within five years.

Facts

In May 2005, respondent Michael Briggs (Briggs) was serving as a Captain and an F-16 instructor pilot in the United States Air Force. One evening in 2005, an intoxicated Briggs visited the room of Airman First Class DK, who worked in Briggs' squadron, and had sex with DK over her protests and without her consent. DK disclosed the incident to others but made no official report at the time.

In July 2013, DK telephoned Briggs to discuss the 2005 incident and recorded the call without Briggs' knowledge. Briggs admitted his wrongdoing during the conversation, telling DK, "I will always be sorry for raping you." As a result of the recorded phone call, Briggs was court-martialed for rape in February 2014, over eight years after the 2005 incident.

At trial, the military judge found Briggs guilty of rape and sentenced him to dismissal from the Air Force, five months' confinement, and a reprimand. Briggs appealed to the Air Force Court of Criminal Appeals (AFCCA) where he attempted to raise a statute of limitations defense for the first time. The AFCCA refused to entertain the limitations argument, reasoning that Briggs waived his right to that defense by not raising it at trial. Briggs next appealed to the Court of Appeals for the Armed Forces (CAAF), which also affirmed his conviction. Briggs then appealed to the U.S. Supreme Court, which vacated the judgment and remanded the case for reconsideration in light of the CAAF's intervening decision in *United States v. Mangahas*.

On remand, the CAAF reversed the AFCCA and set aside Briggs' conviction and sentence. In so ruling, the CAAF explained how its 2018 *Mangahas* decision altered its interpretation of the Uniform Code of Military Justice (UCMJ) Article 43 (10 U.S.C. § 843). Prior to *Mangahas*, the CAAF explained, military courts had interpreted a former version of Article 43(a) to have no limitations period for rape offenses. The CAAF explained that, with its decision in *Mangahas*, it concluded that military rape was no longer punishable by death. As such, reiterated the CAAF, Article 43(b)'s general 5-year statute of limitations applies to rape offenses that occurred between 1986 and 2006, when former Article 43(a) was in force.

In 2006, however, Article 43(a) was amended to expressly provide that there is no limitations period for rape offenses. The CAAF determined that this unlimited prosecution period could not apply retroactively to prosecute Briggs. As such, the CAAF reversed Briggs' conviction, set aside his sentence, and dismissed the charge.

The U.S. Supreme Court granted certiorari on November 15, 2019.

Legal Analysis

DOES THE FIVE-YEAR STATUTE OF LIMITATIONS APPLY?

Petitioner the United States argues that because rape was a crime punishable by death under the UCMJ at the time of Briggs' offense, and because the UCMJ did not then impose a statute of limitations on crimes punishable by death, Briggs may be tried for rape at any time. The United States asserts that the plain language of former Article 43(a) of the UCMJ, which stated that a person charged "with any offense punishable by death, may be tried and punished at any time without limitation," and former Article 120(a), which provided that "rape . . . shall be punished by death or such other punishment as a court-martial may direct," reflected a clear congressional intent that certain crimes, such as rape, are serious enough to be prosecuted without any time limitation. According to the United States, the enactment of a statute of limitations period for certain crimes is "an exclusively legislative judgment" that is not open to judicial interpretation when the legislative intent is clear, as it is here. The United States furthermore argues that the applicability of former Article 43(a) did not depend on the constitutionality of capital punishment, as Congress merely referred to crimes "punishable by death" as a way of identifying crimes sufficiently serious to be tried at any time without having to maintain a specific list of such offenses.

Respondent Briggs counters that former Article 43(a) authorized an unlimited prosecution period only for offenses that were "punishable by death." Because the Eighth Amendment bars the use of capital punishment for rape, continues Briggs, the general five-year statute of limitations must apply to cases of military rape. Briggs asserts that the language "punishable by death" refers to offenses that can actually be punished by death and not offenses for which Congress "has merely authorized a particular penalty." Briggs concludes that interpreting "punishable by death" to include offenses which can never be punished by death, such as rape, is illogical. Briggs also contends that the United States' argument that "punishable by death" includes offenses for which Congress has merely authorized the death penalty is unsupported by case law, as the United States fails to cite a single case where the death penalty was not actually at least a potential punishment for the underlying offense. Briggs additionally claims that even if former Article 43(a) is ambiguous, the rule of lenity holds that ambiguous statutory language should be interpreted in favor of Briggs, the defendant.

DOES THE EIGHTH AMENDMENT PROHIBIT CAPITAL PUNISHMENT FOR MILITARY RAPE?

The United States argues that even if the statute of limitations for military rape depends on a constitutional analysis, capital punishment for military rape is constitutional. The United States further argues that punishing military rape with the death penalty, which has been military practice for over one hundred and fifty years, reflects the unique harms that military rape presents for the armed services' reputation, morale, and combat effectiveness. The differences between military rape and civilian rape, the United States goes on, justify the legality of capital punishment for military rape.

Briggs responds that the Eighth Amendment prohibits punishment of military rape with the death penalty. While recognizing that "many constitutional rights apply differently" in a military context, Briggs claims that a defendant's Eighth Amendment rights do not. Briggs further argues that the Eighth Amendment jurisprudence now applies to military courts by default unless there is a sufficient "military necessity" to justify not applying an Eighth Amendment protection. That military courts have consistently

incorporated the Eighth Amendment into Article 55, claims Briggs, is reason enough to dispose of the case because of the principle of constitutional avoidance.

RETROACTIVE APPLICATION OF CURRENT ARTICLE 43

The United States argues that, regardless of whether Briggs can be prosecuted under former Article 43(a), he can be prosecuted under current version of Article 43(a). As the United States explains, Congress amended Article 43(a) in 2006, one year after the rape at issue here, such that Article 43(a) now expressly provides that there is no limitations period for prosecuting rape. While recognizing that there is generally a presumption against applying legislation retroactively, the United States argues that that presumption does not apply in Briggs' case. According to the United States, the presumption against retroactive legislation is principled on the idea that individuals should have "fair notice" of what the law is. The United States contends that Briggs had such notice here, because even at the time of the rape in 2005 the UCMJ did not contain a limitations period for rape.

In response, Briggs asserts that the 2006 amendment to Article 43(a) does not apply retroactively. Briggs argues that, unless there is clear evidence that Congress intended otherwise, legislation applies only prospectively. According to Briggs, there is no indication here that Congress intended for the 2006 amendment to Article 43(a) to apply retroactively. For one, explains Briggs, the amendment did not specify an effective date, which at the most indicates that Congress was silent regarding when the amendment would apply. Briggs furthermore claims that applying the 2006 amendment retroactively would produce an intolerable "retroactive effect," meaning that the difference between applying the amendment retroactively and applying it prospectively is the difference between whether Briggs could be prosecuted at all. Such an application, Briggs argues, would impermissibly impact his "substantive rights" connected to conduct before the amendment was enacted.

Discussion

DOES THE MILITARY SETTING JUSTIFY A DIFFERENT STANDARD?

Members of Congress, in support of the United States, assert that rape in the military implicates unique problems that justify there being no limitations period. The Members of Congress argue that sexual assault is especially destructive in the military because the military environment exacerbates the individualized trauma of sexual assault. For one, the Members of Congress explain, victims of military rape are generally unable to avoid future contact with their assailants due to the inherently intimate nature of military life where servicemembers live and work together in close quarters. The Members of Congress also argue that military rape presents unique problems that go beyond the individual victim. For example, the Members of Congress contend, military rape harms morale, discipline, and unit cohesion—all of which affect the military's ability to carry out missions.

The National Association of Criminal Defense Lawyers (NACDL), in support of Briggs, responds that such policy considerations cannot take precedence over a servicemember's Eighth Amendment right to be free from cruel and unusual punishment. The NACDL argues that even if a servicemember's offense is "service-connected," that alone does not justify disparate Eighth Amendment treatment between civilian and military defendants. The U.S. Army Defense Appellate Division (Appellate Division), also arguing in support of Briggs, agrees that the Eighth Amendment applies to servicemembers in the same way that it applies to civilians. According to the Appellate Division, servicemembers are entitled to the same constitutional protections as civilians absent a "military specific reason," and there is no "military exigency" that warrants subjecting servicemembers to cruel and unusual punishment.

UNDERREPORTING SEXUAL ASSAULT IN THE MILITARY

Members of Congress, in support of the United States, assert that interpreting former Article 43(a) to allow for the unlimited prosecution of rape will encourage rape victims to come forward. The Members of Congress contend that failure to report rape is especially acute in the military due to the military's hierarchical structure. For example, the Members of Congress explain, servicemembers are trained to be completely obedient and subservient in pursuit of a larger goal, and "while this structure may be crucial to military success, it exacerbates the problem of underreporting." The Members of Congress furthermore argue that rape victims may be particularly reluctant to come forward when the perpetrator is a superior officer. According to the Members of Congress, many rape victims fear that reporting will cause them to be "labeled as a troublemaker" or lead to some form of retaliation, such as negative performance reviews. This pervasive underreporting, the Members of Congress warn, erodes trust among servicemembers and disrupts commanders' ability to maintain order.

The NACDL, in support of Briggs, counters that the problem of underreporting is not unique to the military. The NACDL argues that the #MeToo movement underscores the extent to which civilian rapes also go unreported, claiming that "reports of sex crimes increased 7%" within the first few months of the start of the #MeToo movement. Within the following year, the NACDL continues, reporting of sexual assaults "more than doubled in the general population." The NACDL implies that the Me Too movement will also empower victims of military rape to come forward, regardless of whether rape prosecutions are subject to a 5-year statute of limitations. The NACDL also points out that sexual assault is pervasive in hierarchical institutions other than the military, such as schools, churches, and civilian workplaces. Because rape is not a "military-specific offense," the NACDL explains, there is no justification for authorizing a military-specific exception to the Eighth Amendment's prohibition on punishing rape with death. ⊙

Full text available at https://www.law.cornell.edu/supct/cert/19-108.

Written by Eric Cummings and Allison Franz. Edited by Brady Plastaras.

United States Patent and Trademark Office v. Booking.com B.V. (No. 19-46)

Oral argument: May 4, 2020

Court below: *U.S. Court of Appeals for the Fourth Circuit*

This case asks the Supreme Court to determine whether the addition of a domain suffix such as ".com" to a generic term like "booking" can create a protectable trademark. The Petitioners, United States Patent and Trademark Office and the Department of Justice, contend that the Court's decision in *Goodyear's India Rubber Glove Manufacturing Co.*

v. Goodyear Rubber Co. that the addition of a corporate designation such as "Company" or "Inc." to a generic word does not render the combination protectable, extends to adding a ".com" suffix. The Respondent, Booking.com, counters that the Lanham Act repudiated *Goodyear*, and advocates for the application of the "primary significance" test which focuses the genericness inquiry on whether the consuming public views the term as signifying the producer rather than the product. The Court's decision will have implications for online companies that have invested resources in developing their brand recognition for generic terms. ☉

Full text available at https://www.law.cornell.edu/supct/cert/19-46.

United States Agency for International Development v. Alliance for Open Society International, Inc. (No. 19-177)

Oral argument: May 5, 2020
Court below: U.S. Court of Appeals for the Second Circuit

This case asks the Supreme Court to determine whether the government violates the First Amendment when it requires the foreign affiliates of U.S.-based nongovernmental organizations to adopt policies explicitly opposing prostitution and sex trafficking in order to receive federal funding. The U.S. Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the Leadership Act) authorizes federal funding for nongovernmental organizations to assist their worldwide campaigns against HIV/AIDS and other diseases. But the Act requires fund recipients to adopt a policy that explicitly opposes prostitution and sex trafficking (the Policy Requirement). The U.S. Agency for International Development administers the Leadership Act and contends that requiring foreign affiliates to comply with the Policy Requirement does not violate the First Amendment rights of these domestic organizations nor the Alliance for Open Society International, Inc. (AOSI). It explains that First Amendment rights do not extend to the foreign affiliates because foreign entities are not entitled to any First Amendment rights and are legally distinct from their domestic counterparts. AOSI counters that the Policy Requirement infringes on its First Amendment rights because it compels speech that is likely to be attributed to AOSI. The outcome of this case has heavy implications for the international network of welfare workers as well as the government's control on federal funding. ☉

Full text available at https://www.law.cornell.edu/supct/cert/19-177.

Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania (No. 19-431)

Oral argument: May 6, 2020
Court below: *U.S. Court of Appeals Third Circuit*

The Supreme Court consolidated *Trump v. Pennsylvania* and *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, two cases challenging the Trump Administration rules allowing employers to opt out of contraceptive-care coverage for their employees. Petitioners Donald J. Trump, President of the United States, et al. (Government) and Little Sisters of the Poor Saints Peter and Paul Home (Little Sisters) assert that the final rules are procedurally and substantively valid because the Departments of Health and Human Services, Labor, and the Treasury (the Agencies) can circumvent the notice-and-comment requirements under the Administrative Procedure Act (APA) when, as here, they have "good cause." Furthermore, the Government and Little Sisters assert that the Agencies were authorized to make such exemptions under the Patient Protection and Affordable Care Act (ACA) and the Religious Freedom Restoration Act (RFRA). Respondents, the States of Pennsylvania and New Jersey (collectively, Pennsylvania), counter that the final rules are procedurally and substantively invalid because the Agencies violated the APA's notice-and-comment requirement. Furthermore, Pennsylvania argues that the power to make such exemptions lies solely with Congress and the Court, and that the Agencies had no authority under the ACA or RFRA. On the second issue in front of the Court, Little Sisters asserts that it has standing in this appeal because it is at risk of harm under the preliminary injunction in question, irrespective of an injunction from the District Court of Colorado. Pennsylvania counters that Little Sisters does not have standing in this appeal because the Colorado District Court's injunction protects Little Sisters from any harm caused by the preliminary injunction in question. The outcome of this case has heavy implications for the separation of powers, religious freedom, and individual rights. ☉

Full text available at https://www.law.cornell.edu/supct/cert/19-431.

Barr v. American Association of Political Consultants, Inc. (No. 19-631)

Oral argument: May 6, 2020
Court below: *U.S. Court of Appeals for the Fourth Circuit*

This case asks the Supreme Court to decide whether the Telephone Consumer Protection Act's unsolicited-cellphone-call ban and its government-debt exception are valid under the First Amendment. Attorney General William P. Barr and the Federal Communications Commission (FCC) (collectively, the Government) argue that the government-debt exception is content-neutral because the exception distinguishes permitted and prohibited conduct solely based on economic activity. They also contend that the exception satisfies intermediate scrutiny because the exception strikes the appropriate balance between Congress's legitimate interests in protecting consumer privacy and preserving public funds. The Government argues that the exception, if invalid, is severable from the cellphone-call ban because the ban stood for 24 years before the exception was enacted, and because this history suggests that Congress would prefer to leave the ban in place. The American Association of Political Correspondents, Inc., et al. (collectively, AAPC) respond that the ban and the exception are content-based because they restrict permitted call topics and that neither the ban nor the exception survive either strict or intermediate scrutiny because there is no privacy interest to which the cellphone-call ban and the government-debt exception are closely tailored. AAPC refutes that severability is the appropriate remedy because the whole ban is an unconstitutional restriction on speech. The Court's decision raises concerns about consumers' privacy interests, the government's ability to collect debt, and increasing litigation costs. ☉

Full text available at https://www.law.cornell.edu/supct/cert/19-631.

McGirt v. Oklahoma (No. 18-9526)

Oral argument: May 11, 2020
Court below: *Court of Criminal Appeals of the State of Oklahoma*

This case asks the Supreme Court to determine whether the State of Oklahoma has, for decades, been improperly exercising criminal jurisdiction over land within the historical boundaries of the Muscogee (Creek) Native American tribe in Eastern Oklahoma. The Oklahoma Court of Criminal Appeals held that Oklahoma had jurisdiction to prosecute a Native American defendant, Jimcy McGirt, for crimes that he committed within Oklahoma's borders but entirely on the Muscogee (Creek) Nation's historically tribal lands. McGirt, as the Petitioner, argues that because his crime took place on the Muscogee (Creek) reservation and he is an enrolled Seminole-tribe member, only the federal government has jurisdiction to prosecute him in this case. Oklahoma, as the Respondent, counters that the land on which McGirt committed his crimes was never an Indian reservation—instead, Congress classified the land as a dependent Indian community until Congress removed this classification and gave Oklahoma criminal jurisdiction over the community's land. The outcome of this case will likely determine whether a substantial portion of Oklahoma is exclusively controlled by the Muscogee (Creek) Nation and the federal government, which in turn would have enormous legal, economic, and social implications. ☉

Full text available at https://www.law.cornell.edu/supct/cert/18-9526.

Trump v. Mazars USA, LLP (No. 19-715)

Oral argument: May 12, 2020
Court below: *U.S. Court of Appeals for the District of Columbia*

The Supreme Court will determine whether a congressional committee may subpoena a third-party for the financial records of the President of the United States. The U.S. Courts of Appeals for the District of Columbia and the Second Circuit have both held that congressional committees did not exceed their constitutional authority when they issued subpoenas to President Donald Trump's accountant and several banks for his personal financial records, because those subpoenas were related to legitimate legislative purposes. Petitioner President Trump argues that Congress may not issue subpoenas for the documents of a sitting President under the constitutional doctrine of separation of powers. Respondents, three Committees of the House of Representatives, argue that Congress has long exercised investigative power over the President as part of its legislative function. This case will likely affect the number and scope of future congressional subpoenas for a President's personal records. ☉

Full text available at https://www.law.cornell.edu/supct/cert/19-715.

Trump v. Vance (No. 19-635)

Oral argument: May 12, 2020
Court below: *U.S. Court of Appeals for the Second Circuit*

This case asks the Supreme Court to decide whether a grand jury subpoena served on the president's accounting firm that demands 10 years' worth of the president's financial records comports with the U.S. Constitution. President Trump argues that Article II renders the president categorically immune from any criminal process while in office. This is especially so here, President Trump argues, where the Supremacy Clause asserts the primacy of federal interests over those of state courts, and where the criminal nature of the subpoena imposes a stigma. District Attorney Cyrus R. Vance counters that Article II and the Supremacy Clause do not apply where the particular legal process does not implicate or impinge on the president's official conduct. District Attorney Vance points to the Court's centuries-long practice of enforcing presidential subpoenas. The outcome of this case will significantly affect local officials' ability to launch investigations into matters concerning sitting presidents, as well as presidents' immunity from grand jury investigations while in office. ☉

Full text available at https://www.law.cornell.edu/supct/cert/19-635.

Chiafalo v. Washington (No. 19-465)

Oral argument: May 13, 2020
Court below: *Washington Supreme Court*

This case asks the Supreme Court to decide whether a state may sanction a presidential elector who does not vote according to the state's legislatively mandated procedures for how presidential electors must vote. The Electoral College is comprised of each state's electors based on its number of U.S. senators and representatives. Under Article II of the U.S. Constitution, each state selects the presidential electors who will cast the state's allotted votes for the President and Vice President. In Washington State, each political party selects a group of electors who will represent the State if their candidate receives the most votes on Election Day in November. Washington law requires that each of its appointed electors pledge that they will vote for the candidate nominated by their party. Anyone who does not fulfill this pledge and becomes a "faithless elector" is subject to a civil penalty of up to $1,000. Petitioners Chiafalo, Guerra, and John were fined after violating their pledge. They argue that Washington law sanctioning faithless electors is unconstitutional because the U.S. Constitution forbids the states from controlling or imposing any conditions on its state's presidential electors. Respondent Washington State counters that the U.S. Constitution does not impose any conditions on the methods that states use to select their electors and therefore, states can choose whether or not to impose any restrictions on their presidential electors. The outcome of this case has implications on the 2020 presidential election, the institutional legitimacy of the Electoral College, and state involvement with presidential electors. ☉

Full text available at https://www.law.cornell.edu/supct/cert/19-465.

Colorado Department of State v. Baca (No. 19-518)

Oral argument: May 13, 2020
Court below: *U.S. Court of Appeals for the Tenth Circuit*

This case asks the Supreme Court to decide whether presidential electors can discretionarily cast their electoral votes for the President and Vice President, even if such votes are inconsistent with the appointing state's popular vote and violate that state's law binding electors to the state's popular vote. For the 2016 general election, the Colorado Democratic Party appointed Michael Baca as one of its nine presidential electors. And when Hillary Clinton won the popular vote in Colorado, state law required Michael Baca to cast his electoral vote for her. Michael Baca, however, voted for John Kasich. Petitioner, the Colorado Department of State (Colorado), subsequently removed Michael Baca from office and cancelled his

electoral vote. Colorado first argues that Michael Baca lacks standing to sue because he was not personally injured by his removal from office. And second, Colorado maintains that Article II of the U.S. Constitution and the Twelfth Amendment empower states to control their electors. Respondents, Michael Baca and two other electors (the Electors), counter that they do have standing to sue because their removal from office and cancellation of their vote constitute a concrete, personal injury. Further, the Electors assert that under the text and history of Article II and the Twelfth Amendment, they have discretion when casting their electoral vote. The outcome of this case has implications for the future of the electoral system, the meaning of the popular vote, and the likelihood of fraud and corruption. ☉

Full text available at https://www.law.cornell.edu/supct/cert/19-518.

City of Chicago, Illinois v. Fulton (No. 19-357)

Oral argument: TBD
Court below: *U.S. Court of Appeals for the Seventh Circuit*

This case asks the Supreme Court to determine whether an entity that passively possesses a debtor's property must turn over that property to the bankruptcy estate under the Bankruptcy Code's automatic stay provision. Petitioner City of Chicago argues that the automatic stay provision requires debtors and creditors to maintain the status quo as of the petition date, which, among other things, means that creditors cannot take actions to control property of the estate. Chicago maintains that passive possession does not constitute action. Further, Chicago asserts that because the automatic stay freezes the status quo, debtors must seek a court order to compel the turnover of property lawfully repossessed pre-petition. Respondents Robbin L. Fulton and others counter that the automatic stay language plainly requires that all the debtor's property be transferred to the trustee or debtor and that passive retention is an act of restraint in violation of the automatic stay. Additionally, Fulton and others contend that the turnover duty is mandatory and does not require a court order. The outcome of this case has important implications on debtors' and creditors' bankruptcy rights, public safety, and the financial well-being of debtors and local governments.

Full text available at https://www.law.cornell.edu/supct/cert/19-357.

Ford Motor Company v. Montana Eighth Judicial District Court (No. 19-368)

Oral argument: TBD
Court below: *Supreme Court of the State of Montana*

This case asks the Supreme Court to reconsider the extent to which a defendant's contacts with a forum state must be related to the claim at issue in order to establish specific jurisdiction over the defendant. Petitioner Ford argues that there must be a causal relationship between the defendant's in-state contacts and the plaintiff's injury because the court in *Bristol-Meyers Squibb Co. v. Superior Court of California* disregarded the existence of similar causal relationships between the defendant's in-state contacts and the injuries of third parties. Respondent Charles Lucero counters that a causal connection is not necessary to support specific jurisdiction in cases such as this where the defendant has marketed its products in the forum state and a person suffers an injury from one of those products within that state. The outcome of this case will clarify where manufacturers may expect to be subject to suit and will impact litigants' ability to engage in forum shopping. ☉

Full text available at https://www.law.cornell.edu/supct/cert/19-368.

Rutledge v. Pharmaceutical Care Management Association (No. 18-540)

Oral argument: TBD
Court below: *U.S. Court of Appeals for the Eighth Circuit*

This case asks the Supreme Court to decide whether an Arkansas state law regulating pharmacy benefit managers' drug reimbursement rates is preempted by the Employee Retirement Income Security Act of 1974 (ERISA). Whether ERISA preempts the state law, Act 900, depends on whether Act 900 has an impermissible connection to ERISA or refers to ERISA. Arkansas Attorney General, Leslie Rutledge, argues that ERISA does not preempt Act 900 because Act 900 is simply a basic rate regulation that does not have an impermissible connection to ERISA or refer to ERISA. The Pharmaceutical Care Management Association counters that ERISA, in fact, preempts Act 900, because Act 900 regulates a central part of ERISA plan administration, making it impermissibly connected to ERISA, and refers to ERISA. The Court's decision in this case will influence the ability of states to regulate pharmacy benefit managers and, by extension, could impact the costs of prescription drugs and the access patients have to pharmacies. ☉

Full text available at https://www.law.cornell.edu/supct/cert/18-540.

Tanzin v. Tanvir (No. 19-71)

Oral argument: TBD
Court below: *U.S. Court of Appeals for the Second Circuit*

This case asks the Supreme Court to decide whether, under the Religious Freedom Restoration Act (RFRA), individual federal employees can be sued for money damages. Petitioners Tanzin and other government agents argue that money damages against individuals in their personal capacities are unavailable unless Congress clearly indicates otherwise, which Congress has not done in RFRA. Tanzin also argues that RFRA authorizes relief "against a government," which does not include individual officials. Tanzin further claims that money damages fall beyond RFRA's authorization of "appropriate" relief. Respondents Tanvir and others counter that Congress need not expressly authorize money damages, but that rather, money damages are available unless Congress clearly says otherwise. Additionally, Tanvir claims that RFRA authorizes suits against officials, even separate from their official capacity, and that money damages are "appropriate" and even necessary to enforce RFRA. The outcome of this case could affect the separation of powers between the judicial and the executive branches, the financial and operational burdens on the federal government, and the interests of third parties, including religious minority groups. ☉

Full text available at https://www.law.cornell.edu/supct/cert/19-71.

Texas v. New Mexico (No. 22065)

Oral argument: TBD
Court below: *original jurisdiction*

The waters of the Pecos River are allocated to Texas and New Mexico in accordance with the terms of the Pecos River Compact. When disputes arose between the states regarding each state's duties under the Compact, the Supreme Court issued an

amended decree to regulate such duties and appointed a River Master to calculate and oversee the parties' obligations. Texas now challenges the River Master's determination that Texas, rather than New Mexico, should bear the burden of evaporative losses caused as a result of Tropical Storm Odile. Texas argues that the River Master erred in retroactively awarding evaporative loss credits to New Mexico because the River Master lacks authority to do so and New Mexico's motion for such credits was untimely. Texas further contends that Article XII of the Compact is inapplicable because the Bureau impounded flood water for public safety reasons, not for use in Texas. New Mexico counters that the River Master correctly granted a one-time retroactive credit for evaporative losses to New Mexico because New Mexico's motion was timely, and the River Master was permitted to adopt procedures necessary to address novel accounting issues. New Mexico further asserts that Article XII is applicable because the Bureau impounded flood water primarily for Texas's later use. The outcome of this case has implications for the role of the River Master and the procedures to be followed in future disputes under the Compact. In addition, the outcome of this case will affect the authority granted to court-appointed officers overseeing other interstate contracts, as well as the tolling procedures that other states should look to in resolving disputes arising from such contracts. ☉

Full text available at https://www.law.cornell.edu/supct/cert/22O65.

Torres v. Madrid (No. 19-292)

Oral argument: TBD
Court below: *U.S. Court of Appeals for the Tenth Circuit*

This case asks whether an officer's intentional use of physical force to apprehend an individual constitutes a seizure for Fourth Amendment purposes, even if the officer does not successfully detain the individual or limit her freedom of movement. Officers Janice Madrid and Richard Williamson temporarily paralyzed Roxanne Torres's arm after striking it with two bullets as Torres drove at them. Torres argues that based on the common law meaning of the Fourth Amendment and on the Supreme Court's Fourth Amendment precedents, a person is seized where the officer intentionally applies physical force. Torres contends that although she drove over an hour away from the scene of where she was shot, the officers' bullets striking her arm constituted a Fourth Amendment seizure. Officers Madrid and Williamson counter that a Fourth Amendment physical-force seizure requires more. The officers maintain that to successfully complete a Fourth Amendment seizure, they would have had to intentionally acquire physical control, which did not occur because Torres fled from the scene. The outcome of this case has important implications for the balancing of interests respecting police conduct and public safety. ☉

Full text available at https://www.law.cornell.edu/supct/cert/19-292.

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Mississippi Chapter: (left to right) Alysha Carter, president; Dean Emeritus Jim Rosenblatt, faculty advisor; Chief Judge Tacha; Sarah Barber, vice-president.

FIFTH CIRCUIT

Mississippi Chapter

Former Chief Judge Deanell Tacha of the 10th Circuit spoke to the student members of the FBA at Mississippi College School of Law in Jackson. Chief Judge Tacha shared with the law students her experiences as a chief judge, law school dean, and law professor and offered practical advice to the students. ⊙

U.S. Magistrate Judge Mike Parker returned to his alma mater, Mississippi College School of Law (MC Law), to speak to the Student Division of the FBA about the operation of his court. Judge Parker brought with him his two federal judicial clerks, who spoke about their roles in Judge Parker's chambers. ⊙

Mississippi Chapter: (left to right) Professor Martin Edwards; Dean Patricia Bennett; Alysha Carter, president; Dean Jim Rosenblatt, faculty advisor; Judge Parker; Eric Granberry, vice-president; and Justin Starling, judicial clerk.

The Mississippi Chapter held its Oxford luncheon meeting at the McCormick Café prior to the CLE sponsored by the Northern District of the U.S. District Court. Chief Judge Sharion Aycock addressed the members and guests of the chapter with news of the new federal courthouse for Greenville and the status of the courthouse renovations in Aberdeen. ☉

Mississippi Chapter: (left to right) Nick Morisani, secretary (Phelps Dunbar); Dean Jim Rosenblatt, executive director (Mississippi College School of Law); Chief Judge Aycock; Kristi Johnson, treasurer (AUSA); Mary Helen Wall, vice-president (AUSA); and Patrick McDowell, president (Brunini).

WESTERN DISTRICT OF NORTH CAROLINA

Judge David C. Keesler has been reappointed to a third eight-year term as a U.S. magistrate judge in the U.S. District Court for the Western District of North Carolina. A resident of Charlotte, Judge Keesler hears civil and criminal cases that arise in the 32 counties that comprise the Western District. By appointment of the chief justice, Judge Keesler currently serves on the Committee on Space and Facilities of the Judicial Conference of the United States. He is a past president of the Federal Magistrate Judges Association, a voluntary organization of active and retired magistrate judges nationwide. He is also a founding member of the FBA chapter for the Western District of North Carolina. ☉

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ALTERNATIVE DISPUTE RESOLUTION SECTION

Helping in the World's Recovery

The FBA Alternative Dispute Resolution Section has accomplished much over the past year and is geared to play a massive role as the world's economy recovers from the COVID-19 pandemic, one community and one jurisdiction at a time. The practice of alternative dispute resolution (ADR) includes and is not limited to the substantive fields of labor, employment, construction, commercial, international, family law, and more.

ADR practitioners serve alongside domestic and international judiciaries in both legally binding adjudicative forums, such as arbitration, and non-adjudicative forums through mediation, restorative justice, and ombuds. Our venues include court rooms, construction sites, hospitals, human resource offices, criminal justice systems, universities, community justice centers, corporations, and more.

Like the COVID-19 pandemic, the practice of ADR is present in every community throughout the world. Unlike the COVID-19 pandemic, the ADR profession is a force for good. As the global economy recovers from the COVID-19 pandemic, the practice and profession of ADR has a large role to play in helping the world's economy recover from some of the greatest devastation seen in modern times. No matter your industry, no matter your jurisdiction, no matter your location, join the FBA Alternative Dispute Resolution Section. Our work has just begun.

A Message From Outgoing ADR Section Chair Alexander J. Zimmer

When we left the Annual Meeting in Tampa last year, who could have anticipated the challenges we would be facing, and continue to face, this year. Our section's leadership team responded to the disruptions and obstacles presented by COVID-19 with creativity, resilience, and resolve. I want to thank each of this year's officers and board members for their dedication and hard work in keeping the Section active and functioning while managing obligations to their families, friends, communities, and professional practices.

By working together, we have achieved significant accomplishments that will leave the section stronger and will have contributed to the FBA's mission of education and professional excellence. Chief among these are:

- In March, we sponsored one of the first webinars designed to acquaint the ADR Section and the wider world with the promise and possibilities of video conferencing to keep us together and working while social distancing, even in our own varieties of lockdown.
- We addressed the challenges of the remote workplace, drawing on a cross-section of professionals familiar with the ins and outs of employment practices in regular and irregular times.
- Even as the entire country shut down in March, we published the spring issue of *The Resolver,* the section's platform for opinion, intellectual discourse, and shared learning.
- We looked inward and reflected on ways our section can improve itself, and as a result, we significantly broadened opportunities for participation in leadership by expanding our board by admitting four new members, laying the groundwork for a robust program cultivating new members and maintaining our existing cadre.

To all who contributed to this year's accomplishments, thank you for your work, your time, and your dedication. On behalf of the ADR Section, I also want to express our gratitude to Laura Mulhern and the entire FBA team for their support and assistance throughout this tumultuous year.

Finally, I want to introduce the incoming officers of the ADR Section for 2020–2021.

Chair: Bryan Branon
Chair-Elect: Angela Eastman
Secretary: James Downey
Treasurer: Gabriel Soto

These individuals bring enthusiasm, creativity, and dedication to the ADR Section. We can be certain that their energy will continue to move the section forward in fulfilling our mission of encouraging education, discussion, and the exchange of ideas relating to the field of alternative dispute resolution. I wish this talented group of ADR practitioners good fortune in their service to our section and to the FBA, and I encourage all of you to give them your support by being active members of the ADR Section.

I am grateful to have had the opportunity to be of service. ☉

CORPORATE AND ASSOCIATION COUNSEL DIVISION

The Corporate and Association Counsel Division has hosted several webinars recently. In March, we hosted a webinar titled "Be the One They Call First: Helping Your Clients Succeed in Business as In-House or Outside Counsel." This program included presentations by Bill McIntyre from Seager Tufte Wickhem LLP, Michaune Tillman from Worthington Armstrong Venture, and Shawnte Mitchell from Zogenix Inc. In June, CACD hosted "COVID Coverage: A Counsel's Guide to Successful Insurance Claims and Recovery," presented by Covington & Burling, LLP attorneys Gretchen Hoff Varner, Rukesh Korde, and Suzan Charlton. Finally, in August, Rena Lowenbraun from Prove and Odia Kagan from Fox Rothschild LLP presented "Your Privacy Roadmap." CACD continues its efforts to present diverse content that is of interest to in-house counsel and those attorneys and other professionals who work with them. If you are interested in joining the Corporate and Association Counsel Division or you're already a member and would like to get more involved, please reach out to David Greene at dgreene@foxrothschild.com.☉

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TAX LAW ESSAY WINNERS

Each year the FBA Section on Taxation sponsors the Donald C. Alexander Tax Law Writing Competition, named in honor of former IRS Commissioner Don Alexander. Mr. Alexander, who passed away in 2009, was an advocate for writing and rhetorical skill in tax law. To carry forward his advocacy, the Tax Section invites J.D. and LL.M. students to submit original papers concerning federal taxation. The first and second place winners each earn a cash prize and a trip to the annual FBA Tax Law Conference in Washington, D.C.

Elizabeth Burlington, Esq., is the recipient of the first place award for her paper titled "The Letter and the Spirit: The §501(c)(3) Religious Exemption and American Churches." Burlington is a 2012 graduate of the University of Baltimore School of Law and also received her LL.M. in taxation from the University of Baltimore in Spring 2020. She is an associate attorney at Frost Law, a tax, estate planning, and business litigation law firm.

Samantha Leigh Gozlan, second place award winner, wrote a paper titled "Tax-*on* Pollack: Deconstructing the Charitable Deduction for Fractional Gifts of Art." Gozlan graduated *cum laude* from Nova Southeastern University Shepard Broad College of Law and received her LL.M. in taxation from the University of Florida Levin College of Law. She is currently working at a boutique firm that specializes in tax controversy and white-collar criminal defense.

The Letter and the Spirit: The § 501(c)(3) Religious Exemption and American Churches

By Elizabeth Burlington

Introduction: Religious Organizations and the Internal Revenue Code

The current policy surrounding the tax treatment of churches in America under the provisions of both the Internal Revenue Code (hereinafter "IRC" or "the Code") and federal case law is a unique one. While churches enjoy tax-exempt status under the umbrella of the § 501(c)(3) charitable designation, they also enjoy more preferential treatment than other § 501(c)(3) organizations. Church tax policy is unusual for several reasons: the lack of clear guidance as to what constitutes a "church," the requirements necessary to support an examination of the church's tax-exempt status, and the lack of any specific or substantive criteria to "prove" an organization is a church and therefore entitled to the exemption.

Tax Treatment of Churches

Statutory Provisions and Guidance

Although religious organizations are already designated as tax-exempt entities under § 501(c)(3), churches—which are distinguished from the broader category of "religious" organizations enumerated in § 501(c)(3)—enjoy additional, specialized tax treatment.

The distinction of churches as a species of religious organization developed gradually over time. The task of identifying any turning points is frustrated in that the courts, Treasury, and Congress are reluctant to define what is (and what is not) a church in any meaningful and useful way.

Perhaps the most specialized definition of "church" is found in I.R.C. § 7611. This is the most notable because it is the Code provision that sets forth the rules by which the Service must comply in conducting inquiries or examinations into the tax status or dealings of churches. The Code section in relevant part states as follows:

> **(h) Definitions.**–For purposes of this section–
> **(1) Church.**–The term "church" includes–
> **(A)** any organization claiming to be a church, and
> **(B)** any convention or association of churches.[1]

The definition given in this section does not go into any further detail concerning how one might possibly verify whether an organization's claim to be a church is legitimate, nor does it impose any further requirements beyond taking an organization's word for it. The Treasury Regulations do not elucidate the issue:

> Solely for purposes of applying the procedures of section 7611, and as used in these questions and answers, the term "church" includes any organization claiming to be a church and any convention or association of churches. For purposes of the procedures of section 7611 and these questions and answers a church does not include separately incorporated church-supported schools or other organizations incorporated separately from the church.[2]

It is interesting to note that the Service's own website admits that there is no settled definition for the term "church" within the Code. The Service has published guidelines for determining whether an entity qualifies as a "church" for purposes of tax-exempt status and favorable treatment.[3] The guidelines consist of a 14-point, nonexclusive facts-and-circumstances test, with no one factor being dispositive.

Judicial Tax Treatment of Churches

Over the years, various federal courts have attempted develop a working definition of "church" to complement (or as an alternative to) the cumbersome 14-point test that had been used by the Service. In 1980, the U.S. District Court for the District of Columbia, in the case of *American Guidance Foundation, Inc. v. U.S.*, established the "assembly test" to satisfy the threshold requirements to be considered a church:

> At a minimum, a church includes a body of believers or communicants that assembles regularly in order to worship. Unless the organization is reasonably available to the public in its conduct of worship, its educational instruction, and its promulgation of doctrine, it cannot fulfill this associational role.

As the organization purporting to be a church in *American Guidance* ultimately did not meet the assembly requirements set forth by the U.S. District Court, the court declined to proceed further in establishing additional criteria that might have further clarified the meaning of the term "church."[4]

The principles espoused in *American Guidance* were applied in *Foundation of Human Understanding v. U.S.*[5] In that case, the U.S. Court of Appeals for the Federal Circuit acknowledged both the findings in *American Guidance* as well as the criteria set forth by the Service in 1978 via its 14-point test.[6] The Court of Appeals stated in its opinion:

> Thus, whether applying the associational test or the 14 criteria test, courts have held that in order to be considered a church under section 170, a religious organization must create, as part of its religious activities, the opportunity for members to develop a fellowship by worshipping together.[7]

In *Foundation*, as well as in *American Guidance*, and the other precedents and opinions cited in both of these cases, it appears that the dispositive factor in determining church status is whether an entity claiming church status assembles on a regular basis for fellowship.

Although the courts in determining church status have largely referred to the assembly test as first put forth in *American Guidance*, it is important to note that the original charitable intentions of § 501(c)(3) have not completely gone begging. In the case of *Church of Visible Intelligence That Governs The Universe v. United States,*[8] the U.S. Claims Court denied an organization a religious-based tax exemption based on the fact, among other reasons, that the organization had demonstrated no evidence that they had performed any charitable activities associated with their purported ministry.[9]

The definition of church has been examined and pieced together over a series of opinions in a number of different courts. In addition to the opinions cited above in *American Guidance* and *Foundation*, the U.S. Tax Court has also weighed in its opinion in *Spiritual Outreach Society v. Commissioner,*[10] where it reiterated its findings in *Foundation* with respect to the assembly requirement.

Although it is somewhat helpful to have a more coherent and judicially approved definition of "church," this working definition is problematic insofar as it arguably does not reach far enough to prevent individuals and organizations from abusing the tax-exempt status of a church. Nor does this definition do much to fine tune or expand the oversight into the status of entities proclaiming to be churches without having to prove such before the fact.

Analysis of judicial attitudes and opinions on the status and definition of the term "church" could be (and likely is) a treatise all its own. This is only further evidence that the working definition of church remains confusing and cumbersome despite attempts at judicial clarification. The IRC is notorious for its technicalities and statutory definitions of everything from related parties to taxable years; that in over a century of legislation the word "church" does not have a statutory definition under the Code is suspect and likely a product of deference to the personal nature of an individual's religious beliefs and hesitation to take up an issue that will likely cause massive political rifts in an already divided nation.

The U.S. Claims Court stated in *Church of Visible Intelligence*, "Exemption from taxation as a church is not a right, but a matter of legislative grace ... Plaintiff cannot merely declare it is a church; it must demonstrate that it is."[11] Based on the above-discussed issues with the current religious exemption and church status criteria, the American taxpayer and *bona fide* churches would benefit greatly from the establishment of a coherent, statutory, and—most importantly—constitutional definition of the term "church" under the Code.

Analysis: How the Current Tax Treatment of Churches Affects the Individual and the Country as a Whole

Introduction: Religion by the Numbers in America

Before one can truly understand the implications of the current tax status of the church and—to a lesser degree—religious organizations in general, one must understand how much is truly at stake. On a purely practical level, a church takes in revenue that might otherwise be taxed if the § 501(c)(3) religious exemption and § 170 deduction did not apply.

The very nature of the current tax-exempt status and flexible guidelines for the church make charting the exact numbers difficult. However, other statistics and information sources paint a pretty striking picture of the state of American churches today. Religious adherence is a fluid thing: people worship in different ways, in different places, and at varying frequencies. Some avow religious beliefs but are not members of a congregation, while many who do attend churches and financially support them are not necessarily true believers. In the midst of all this, it is still reasonable to conclude that organized religion is a formidable institution in America.

While this analysis acknowledges the diversity of religion in America in both the past and present, with nearly three-quarters of the American population identifying as Christian in 2015,[12] it only

makes sense that the majority of both the churches claiming religious exemption under § 501(c)(3) identify as some branch of Christianity, and that it is most likely that the majority of the money given to churches is donated to benefit Christian organizations.

Religious Jews in America represent only 1.8 percent of the adult population as of 2013,[13] and as of 2010, the Muslim faithful in this country were only 0.9 percent of the adult population.[14] The remaining percentages are accounted for by way of religious groups with marginal membership numbers and those who either do not affiliate with religion or who are simply undecided. There are the outliers of course: Scientology being the most high-profile, the Church of the Flying Spaghetti Monster being one of the most imaginative, and the Satanic Temple the most recent.[15]

While the percentage of church attendees remains high, it is on the decline in recent years.[16] The reduction in numbers of the faithful could well be a sign of the times and could possibly be a precursor to a change in tax treatment of churches.

The Financial Effect of the Religious Exemption on the American Tax System

With large flocks come large contributions, further adding to the unique nature of the religious exemption in general and the special treatment of churches specifically. Most, if not all, Christian denominations consider tithing—the giving of a certain percentage of one's income to the church—to be a tenet of its faith. Though the varied nature of denominations and their requirements do not give a hard and fast rule, anecdotal evidence and Christian teachings endorse the philosophy that one must give to the church on a regular and consistent basis. On a practical level this makes sense, as the church really has no other way of generating revenue (at least not tax-exempt revenue), and even churches need to keep the lights on.

Once again, accurate numbers are hard to come by given the current tax environment, but a 2015 report by the Giving Institute estimated that in 2014, Americans donated nearly $115 billion to religious organizations.[17] That amount is more than double the amount that was donated to educational causes (which came in second at $54 billion).[18] Because churches and other religious organizations are not subject to the same reporting and oversight requirements as a corporation or individual, it is difficult to determine how this revenue was allocated or even if the numbers are correct.

Given these rough numbers, it is difficult to determine if the process of taxing churches on revenue or subjecting them to additional reporting requirements would be "worth it" in a financial sense. $115 billion in income less operating expenses and other deductions would likely not produce an appreciable amount of tax revenue, and when one considers factors like the additional manpower that would be needed to analyze and examine the returns of American churches, mosques, and synagogues it could very well not be worth pursuing.

The financial information is further complicated by the fact that churches and religious organizations are often exempt from property taxes, are not subject to capital gains taxes on profits from sales or exchanges, and do not pay sales taxes. The reach of the § 501(c)(3) religious exemption extends to the personal income taxes of religious leaders who enjoy certain fringe benefits, such as the parsonage exemption, that are excluded from their personal taxable income.[19] Exact figures are unavailable, but it has been estimated that the American taxpayers provide roughly $71 billion per year in subsidies to religious organizations and churches.[20] It is also estimated that churches and religious organizations own over $600 billion in property, most or all of which is exempt from property taxes.[21]

It can be argued, however, that the entire *raison d'etre* of the IRC is not simply to generate tax revenue; rather, it is to generate tax revenue while also implicitly endorsing certain behaviors and principles in the American psyche. Once this is factored into the equation, the case for reform of the current church tax policy becomes more compelling.

Effectuating a Solution

In light of all the issues discussed above, the United States would do well to pursue a change to its § 501(c)(3) policies as they pertain to the taxation of churches. The question then becomes: what approach should Congress and the Service take with respect to modifying the current practices?

1. Establish a Consistent Definition of the Term "Church"

The issues associated with the current church tax climate can be addressed fairly and effectively through a series of different policy changes. These proposed changes will combat the instances of actual and potential abuse by increasing the level of accountability that churches must have to the state.

The first step is for the Service to implement a coherent and consistent definition of the term "Church" as it pertains to the Code by way of the Treasury Regulations. This is an opportunity for the Service to incorporate the judicial philosophies espoused by various courts as they related to the definition of "church" with the 14-point test the Service sometimes employs. Once an official definition has been established, then it would eliminate problems caused by competing (or at least differing) definitions in different jurisdictions and would provide more elucidation into the Code itself insofar as the different provisions related to churches would have a common definition and philosophy.

Consider a definition like the following:

For the purposes of the Code and Treasury Regulations, the term "church" shall be defined as:

1. A distinct legal entity;
2. Established for the purposes of worship and charity;
3. That provides regular occasions for members to congregate and worship together;
4. Which has no collateral or ancillary organizations or subsidiaries whose purpose is to generate revenue for the purposes of private gain.

This definition encompasses the letter and the spirit of both the underlying § 501(c)(3) philosophy of charity and the judicial guidance that was discussed previously in this analysis. It also establishes a prohibition against collateral business enterprises that might otherwise be shielded by the § 501(c)(3) umbrella of its parent church.

The other route would be for Congress themselves to create a viable definition for the term in the Code. At first glance this might seem untenable in the current political climate, but it may not be so difficult as one might think. The December 2017 passage of the Tax Cuts and Jobs Act of 2017[22] included some notable changes to the taxation of fringe benefits for church employees.[23] This has gone largely uncommented on, and the lack of outrage over this change

might be an indication that the American people are changing their attitudes toward the tax-exempt status of the church. It is also important to note that the Tax Cuts and Jobs Acts was passed by a Republican Congress under a Republican president.[24] This seems out of character from an administration whose candidate and eventual president courted and ultimately carried the evangelical vote.[25]

The natural outgrowth of such a codification or regulation would be to have the definition tested in a case before the U.S. Supreme Court. The constitutional challenge would likely not be long in coming, and considering how weighty the topics of both church and taxes are to the American public, the Supreme Court would almost certainly grant certiorari for the test case.

Whichever way the task is accomplished, a coherent and effective definition of the term "church" would go far in preventing exploitation. It will be more difficult for an individual or entity to include a water park or paramilitary naval organization under the umbrella of a church. It would also reduce the need for parties to seek judicial clarification when the issue of what constitutes a church arises in a tax context.

2. Institute Reporting Requirements for Entities Claiming Church Status

Once a verified and effective definition of church is established, entities that meet the necessary criteria should be subject to some form of reporting requirements in order to maintain their § 501(c)(3) tax-exempt status. These reports do not necessarily need to be subject to the same requirements as proper tax returns but they need to include enough information for the Service to be able to determine the amount of income a church is bringing in either through donations or through other means and the amount that is being expended on operating expenses, the amount of salaries and fringe benefits for employees, and the resources devoted to charitable work. These reports should be submitted periodically, and the reporting period would vary according to the size of the church and the amount of resources available to them.

The aim of this endeavor is not to punish a charitable organization by way of unnecessary paperwork or onerous reporting requirements. Rather, it is to instill in these institutions a philosophy of accountability and to facilitate transparency, which will in turn reduce the possibility of abuse. This would also necessitate a change to the § 7611 examination policies insofar as the church would no longer be shielded from audits or inquiries under the "reasonable cause" provision. The information in the self-submitted reports would provide the basis necessary to determine if the church should be subject to additional examination.

3. Impose Limitations on Individual Compensation for Church Officers and Employees

Greater scrutiny toward personal compensation and fringe benefits would also be an effective means of discouraging enterprising individuals who would otherwise use a church's coffers as personal slush funds. Limits on compensation for employees or officers of an organization purporting to be a church would also likely prevent or at least greatly reduce the aggressive fundraising techniques that have become part and parcel with celebrity pastors and televangelists.

This course of action would further endorse the § 501(c)(3) prohibition against using organizational funds inuring for the benefit of private individuals and would also prove compatible with the charitable principles upon which the church in America is supposedly based.

4. Impose Limitations on Expenditures Unrelated to Charitable or Missionary Purposes

This provision is proposed in the same spirit as the proposal discussed in the preceding section. Limitations on expenditures unrelated to the church's "mission" or charitable endeavors should be capped at a certain percentage to prevent an organization or individuals within that organization from diverting church funds for the benefit of small numbers of individuals.

Conclusion: The Future of the Religious Exemption in America

Tax policy is rarely an all or nothing situation; moderation and common sense can prevail to serve both the interests of the public and the private ministries of the church. Requiring churches to be accountable to their earthly masters is not unreasonable proposal, and the means by which this analysis suggests to accomplish this goal are not onerous. Oversight and accountability should not be barriers to the operation of an effective § 501(c)(3) organization, no matter what its purpose.☉

Elizabeth Burlington, Esq., is a 2012 graduate of the University of Baltimore School of Law. Burlington also received her LL.M. in taxation from the University of Baltimore in Spring 2020 and served as the assistant director of the school's Low-Income Taxpayer Clinic during the 2019-2020 school year. Burlington lives in Baltimore and is an associate attorney at Frost Law, a tax, estate planning, and business litigation law firm that serves the Washington, D.C. Metro region as well as Florida and Pennsylvania.

Endnotes

[1]I.R.C. § 7611(h)(1)(A)-(B).
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[3]https://www.irs.gov/charities-non-profits/churches-religious-organizations/churches-defined
[4]*Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304, 307 (D.D.C. 1980).
[5]614 F.3d 1383 (Fed. Cir. 2010); *See also Found. of Human Understanding v. Comm'r of Internal Revenue,* 88 T.C. 1341, 1356 (1987).
[6]*Id.* at 1389.
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[8]4 Cl. Ct. 55 (1983).
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[10]58 T.C.M. (CCH) 1284 (T.C. 1990), *aff'd,* 927 F.2d 335 (8th Cir. 1991)
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Tax-*on* Pollack: Deconstructing the Charitable Deduction for Fractional Gifts of Art

By Samantha Gozlan

Introduction

Some of the most important pieces in American museum collections have been donated via fractional gifts. By donating a work of art using the fractional gift method, donors are giving museums a route to collect works that are vastly out of their price range and simultaneously giving the community a new work of art to visit at their favorite museum. Before 2006, fractional gifts were a popular tax planning vehicle that provided art collector donors with the incentive and means to make large donations of art to museums. These donations were an advantageous method of getting a charitable deduction and ensuring that artwork ends up in the hands of the public by becoming part of a museum's permanent collection. The Walter H. Anneberg collection of Impressionist and Post-Impressionist paintings, drawings, and watercolors was donated to the Metropolitan Museum of Art using the fractional gift method. This collection was valued at $1 billion dollars at the time of announcement and continued to increase in value with subsequent donations.[1] Thanks to the fractional gift by Mr. Anneburg in the early 1990s, the Met now owns more than 50 works by Monet, Manet, Degas, Renoir, Van Gogh, Gaugin, Cezanne, Matisse, and Braque. The twin objectives of this paper are to examine the checkered history of tax consequences affiliated with fractional giving and to discuss the most effective methods of making gifts of art to museums in 2018 under the new tax plan.

Why Do We Give? Why Do We Deduct?

The benefits of making a charitable contribution are twofold. A charitable contribution can both create direct change within a community and, if correctly structured, decrease a taxpayer's tax liability. Museums and nonprofits rely on a variety of sources for funding, and a portion of that funding comes from private donors. Donor-art collectors who share their collections create legacies and can qualify for deductions to their tax liability.[2]

By making charitable donations, individuals support the public good by indirectly funding services that would generally be furthered by the public. Section 170 of the Internal Revenue Code was enacted in pursuit of this goal[3] by permitting an individual or corporate taxpayer to deduct charitable contributions from their gross adjusted income.[4] The amount deducted, however, is limited to 60 percent of the taxpayer's contribution base.[5] Though the tax code caps how much a taxpayer can deduct annually, a taxpayer may carry over the remainder of his donation for each or the succeeding five years when the charitable deduction exceeds the taxpayer's adjusted gross income.[6]

What Is Fractional Giving?

For many years, fractional giving was a practical recourse for a donor who wanted to donate a work of art while still retaining its possession for part of the year. Fractional giving occurs when a donor transfers an undivided fractional interest in a piece of property to a donee.[7] For example, a collector may make a gift to the Museum of Art of a ¼ interest in his Manet. For three months, the Manet belongs to the museum, and for nine months the Manet belongs to the donor. Our donor may not take back his ¼ interest the next year, although he may choose to give another piece of his ownership interest to the museum at a later date, increasing the museum's share. Under the old tax laws, the donor was entitled to a charitable deduction on his income taxes for each portion of ownership interest transferred to the museum.[8]

The Internal Revenue Code prohibits charitable deductions for certain types of gifts. Under I.R.C. § 170(a)(3) and § 170(f), trans-

fers of future interests in property are not entitled to a charitable deduction until they are actually made.[9] The practical effect of these provisions requires that no income, gift, or charitable deduction can be made until the property is transferred to the donee. Therefore, to qualify for a charitable deduction, the portion of the property being given to the donee must be a present, absolute right to use and possess, and cannot be a remainder interest in the property. At this time, the code did not account for fractional gifts because the donee immediately had a right to possess the property, even though the property was not in the donee's actual *physical* possession.[10]

When the donor of a fractional interest of a piece of property dies, the ownership interest that still belonged to him may be included in his estate.[11] Generally, before a museum accepts a fractional gift of art, it wants to make sure that upon the donor's death, the museum will be entitled to the remaining ownership interest in the artwork.[12] This contract is negotiated by lawyers and accountants on both the donor and the donee museum side. Generally, a binding agreement will be established, stating that the artwork will be donated to the donee museum in full (at some fixed point in time). Museums have always been hesitant to accept fractional gifts of art without some kind of guarantee that the donor will eventually transfer the entirety of his interest to the museum.

Under the previous tax laws, if a bequest was made to a museum that already had an ownership interest, the percentage of the interest owned would be deducted from the estate tax and subsequently multiplied by the fair market value of the art on the donor's date of death.[13] Without contractual assurance that the museum would gain control of the artwork at a later date, the museum would likely not pursue possession because of the high potential for litigation against the decedent's estate over the interest in the property.

In 1993, the IRS issued Private Letter Ruling 9303007, stating that when a promise to transfer property in the future is made, the gift tax consequences are judged at the time the transfer is actually made.[14] Because the '93 private letter ruling did not cap the deduction by limiting the artwork's fair market value at the time of the promise, donors could increase their deductions as the artwork increased in value over time.[15]

Background: Legislative History

The Winokur Case Creates a Tax Loophole

Fractional giving reached a peak in popularity after the landmark 1988 tax decision in *Winokur v. Commissioner*.[16] In 1977, James Winokur donated a 10 percent interest in 44 works of art to Pittsburgh's Carnegie Institute. Winokur took a charitable deduction for his contribution, and the Carnegie Institute did *not* take physical possession of the gifts of art that year.[17] The next year, Winokur did the same, taking a deduction despite the museum never gaining control over the artworks.[18] For every year that Winokur donated an interest, he took a deduction, but the Carnegie Institute didn't collect his artwork. Essentially, Winokur was receiving a charitable deduction for donating his art and hanging it in his own home.[19] The Internal Revenue Service soon took notice, eventually suing Winokur. The Internal Revenue Service claimed that because the Carnegie Institute never took possession of the artworks, the fractional interests had to be characterized as future interests and were therefore nondeductible.[20] The tax court ruled in favor of Winokur, agreeing with his argument that since the Carnegie Institute had the power to possess the artwork and a right to use the property, whether or not the Carnegie Institute exercised that right, it was immaterial to a determination of Winokur's possible deduction.[21] The tax court reasoned that because the tax code was absent any language *disallowing* a charitable deduction, the legislature did not intend to forbid a charitable deduction when a charity failed to take ownership of a piece of property.[22] Following the *Winokur* decision, a powerful estate planning tool came into the fore for many art collectors who desired to take advantage of the charitable deduction.

By making a fractional donation of a piece of work, a collector could retain part-time possession of his art and create custom donations to offset his tax liability under *Winokur*. By not giving the entire artwork as an outright gift, the collector was entitled to a deduction based on the artwork's fair market value and *not* his cost basis in the work.[23] Another benefit to the fractional giving method is that each time a donor contributes a portion of their artwork to an institution, the work gets reappraised.[24] If the artwork increases in value since its last donation, the donor is entitled to a larger deduction proportionate to the increase in value. Additionally, when the entire artwork is donated, the collector is able to avoid the tax on capital gains he otherwise would have owed.[25]

Museums were also excited by the prospects of fractional gifts after *Winokur*. Since institutions are hesitant to pay the costs and insurance affiliated with storing, transporting, and installing works yearly, *Winokur* meant that over a period of time, without actually having to take physical possession of works, museums could expand their collections without some of the affiliated costs. The fractional giving scheme under *Winokur* encouraged donors, who would otherwise bequeath such artworks to family, to give their artwork to the public to enjoy.

The *Winokur* decision quickly made fractional giving a popular tool proffered to collectors by tax advisors and planned giving directors from museums across the country. This did not result in large numbers of fractional gifts of art outright, but it did provide museums and donors with a new tool for contributing significant gifts. The Walker Art Center in Minneapolis houses a collection of almost 10,000 works of art, and according to museum officials, only 23 of these artworks were made through a fractional gift.[26] However, the artworks acquired by fractional gifts are some of the largest and most important at the museum.[27] Fractional giving under *Winokur* provided a mechanism by which donors were able to give away some of their most valuable artwork and take full advantage of the value of their charitable deductions. Additionally, museums were able to acquire pieces they never could have afforded to purchase on their own.

Tax Abuse and the Legislative Response

With *Winokur* providing the opportunity for donors to maximize their charitable deductions while still maintaining possession of their artwork, the potential for tax abuse ripened. Museums and tax planners began recommending fractional gifts as a way to avoid the capital gains tax associated with highly appreciated artwork while keeping the work in the possession of the donors. With its growing popularity, legislators began to consider the unfairness of fractional giving's tax consequences. While museums were collecting new works that would come into their possession in the coming years, *Winokur* essentially created a tax loophole that managed to give wealthy collectors the opportunity to slowly give away their art while both retaining its possession and reducing tax liability.

The system of fractional giving in the *Winokur* era created a tax loophole that benefitted the taxpayer donors, allowing them to take enormous charitable donations while retaining the artwork in their collections. In reaction to public criticism, Congress enacted the Pension Protection Act (PPA). The act's goal was to allow the public to view the artwork that it essentially paid for with tax deductions provided by making fractional gifts.[28]

Proposal and Conclusion: Alternatives to Making Fractional Gifts

Fractional giving in its pre-PPA form will likely never return. In examining the legislative history after the enactment of the PPA, it is clear that there will likely be no relief for donors who want very generous tax incentives for their fractional gifts. Rather than putting more effort into lobbying for the museum community and promoting more legislation that will likely never even be brought to the congressional floor, it is important that museums and donors together start to examine some potential alternatives to making fractional gifts of art. Donors are looking for giving systems that provide some kind of tax advantage and create a legacy in their name, while museums are looking for innovative methods of acquiring large works of art that they would be unable to purchase on their own. Some potential methods of acquiring gifts of art that can provide relief to donors missing the opportunity to make a fractional gift are joint purchase agreements and promised gifts. Though joint purchase agreements and promised gifts are not ideal replacements for fractional gifts, there are advantages that will appeal to the donor's desire to reduce their tax liability. By balancing donative intent with donee need, museums can work hand in hand with collectors and continue the tradition of making donations of artwork (and taking charitable deductions for them)! ⊙

The full text of this paper can be read at samanthagozlan.com.

Samantha Leigh Gozlan is an attorney admitted for practice in Florida, currently working at a boutique firm that specializes in tax controversy and white-collar criminal defense. She graduated cum laude from Nova Southeastern University Shepard Broad College of Law and received her LL.M. in taxation from the University of Florida Levin College of Law. She is an avid painter, reader, and writer. In her free time, Gozlan operates Laissez-Faire Press, a hand-printed publishing press, and is always looking to collaborate!

Endnotes

[1]John Russell, *Annenberg Picks Met for $1 Billion Gift* , NY Times, Jan. 26, 1991, https://www.nytimes.com/1991/03/12/arts/annenberg-picks-met-for-1-billion-gift.html.

[2]MFA Boston receives two collections of 17th century Dutch and Flemish art, including 2 Rembrandts! "Eijk and I couldn't be happier that our collection will find a home at the MFA, where it can be displayed, loaned and shared with the widest possible audiences," said Rose-Marie van Otterloo." Peter Libbey, *The Museum of Fine Arts, Boston to Receive Two Major Donations*, NY Times, Oct. 11, 2017, https://www.nytimes.com/2017/10/11/arts/the-museum-of-fine-arts-boston-to-receive-two-major-donations.html.

[3]In *Bob Jones University*, the Court articulated why the legislature permits charitable deductions stating, "The exemption from taxation of money and property devoted to charitable and other purposes is based on the theory that the Government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from other public funds, and by the benefits resulting from the promotion of the general welfare." Ipso facto—you give to the community, the government rewards you for doing its job. *Bob Jones University v. U.S.* 461 U.S. 574 (1983).

[4]Samuel G. Wieczorek, *Winkour, Lose, or Draw: Art Collectors Lose an Important Tax Break*, 8 Hous. Bus. & Tax L.J. 90, 97 (2007).

[5]A taxpayer's contribution base is defined by the tax code as the taxpayer's gross adjusted income, minus any net operating losses carryover for the year. I.R.C. § 170(b)(1)(H).

[6]Treas. Reg. §1.170A-10.

[7]Emily J. Follas, Note, *"It Belongs in a Museum": Appropriate Donor Incentives for Fractional Gifts of Art*, 83 Notre Dame L. Rev. 1779, 1781 (2008).

[8]*Id.* at 1782.

[9]I.R.C. §170(a)(3), (f).

[10]*Winkour v. Comm'r*, 90 T.C. 733 (1988).

[11]The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death. I.R.C. §2033.

[12]I.R.S. P.L.R. 9303007 (Jan. 22, 1993).

[13]I.R.S. P.L.R. 200223013 (June 7, 2002).

[14]I.R.S. P.L.R. 9303007 (Jan. 22, 1993).

[15]*Id.*

[16]*Winkour,* 90 T.C. at 733.

[17]*Id.*

[18]*Id.*

[19]*Id.*

[20]*Id.*

[21]*Id.*

[22]*Id.*

[23]An outright gift entitles a taxpayer to a charitable deduction equal to the taxpayer's full fair market value as determined by a qualified appraiser. Treas. Reg. §1.170A-13. The amount of the deduction that the taxpayer can take in the year of the gift is 30 percent of his adjusted gross income in the year that the gift is made. *Id.* The donor will then be able to deduct the residual deduction at a rate of 30 percent of his adjusted gross income for up to five years. *Id.*

[24]Wieczorek, *supra* note 1, at 97.

[25]*Id.*

[26]Stephanie Strom, *The Man Museums Love to Hate*, NY Times, Dec. 10, 2006, https://www.nytimes.com/2006/12/10/arts/design/10stro.html.

[27] Ellsworth Kelly's *Gate*, now wholly in the Walker's possession, was originally donated as a fractional gift by the collector Kate Butler Peterson. Gate is aluminum shaped into an "X" in orange with slight bend in center. It is one of Kelly's earliest sculptures and one of his first painted sculptures. Installed, it stands 63 x 63 x 17 inches and was completed in 1959. *Gate by Ellsworh Kelly*, Walker Art Museum, https://walkerart.org/collections/artworks/gate.

[28]Senator Grassley, the PPA's pioneering champion on fractional gifts of art: "[I]t isn't right for a donor to get a big tax break for supposedly donating a painting that hangs in his living room, not a museum, all year. A painting in a private living room doesn't benefit the public." Grassley has stated that the possibility of donating fractional interests in art can lead to significant tax abuse. Strom, *supra* note 26, at 2.

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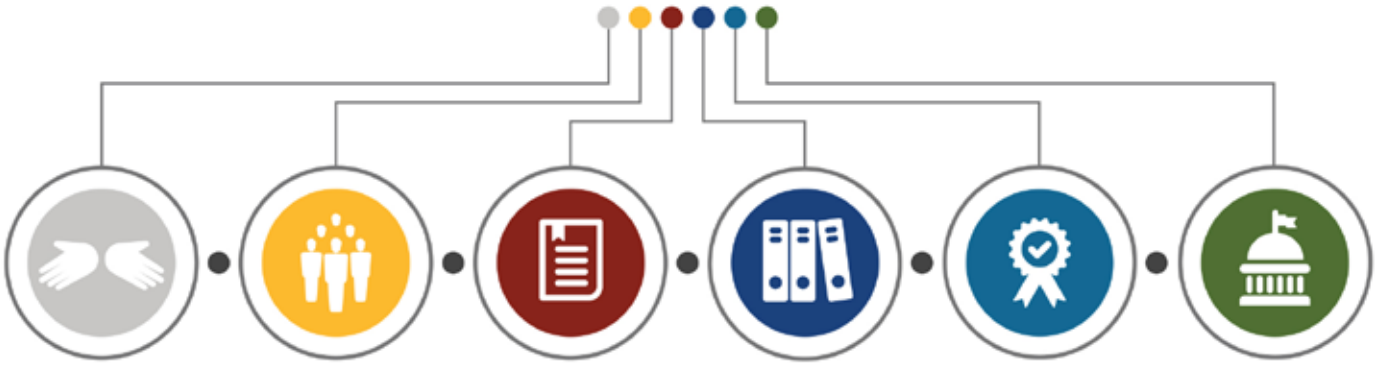

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