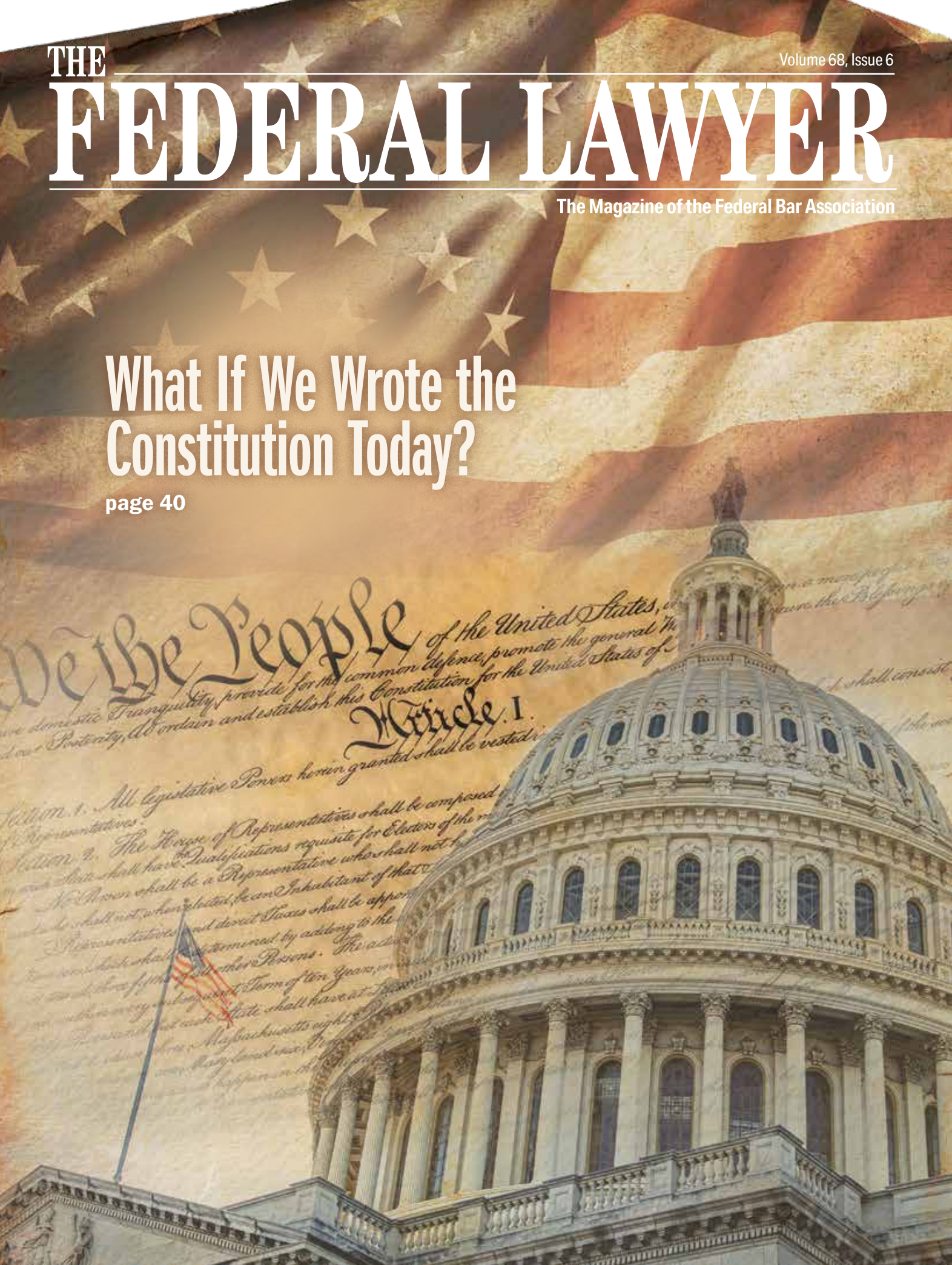
THE FEDERAL LAWYER

Volume 68, Issue 6

The Magazine of the Federal Bar Association

What If We Wrote the Constitution Today?

page 40



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Volume 68, Issue 6

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The Federal Lawyer (ISSN: 1080-675X) is published bimonthly six times per year by the Federal Bar Association, 1220 N. Fillmore St., Ste. 444, Arlington, VA, 22201 Tel, (571) 481-9126, Fax (571) 481-9090, Email: social@fedbar.org. Subscription Rates: $14 of each member's dues is applied toward a subscription. Nonmember domestic subscriptions are $50 each per year; foreign subscriptions are $60 each per year. All subscription prices include postage. Single copies are $5. **"Periodical postage paid at Arlington, VA., and at additional mailing offices." "POSTMASTER**, send address changes to: The Federal Lawyer, The Federal Bar Association, 1220 N. Fillmore St., Ste. 444, Arlington, VA 22201."

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The Constitution and Me

By Anh Le Kremer

Anh Le Kremer is a former business litigator at Stinson, LLP. She is currently the chief operating officer and general counsel for Nystrom & Associates, a behavioral health organization headquartered in Minnesota.

This year, National Past President W. West Allen wrote a five-part series on the U.S. Constitution focused on the principles of Popular Sovereignty, Federalism, Separation of Powers, the Bill of Rights, and the Rule of Law as part of his presidential messages. They are well written and comprehensive, and I would encourage you to read them if you haven't had the chance. I'm taking a bit of a different approach with my presidential message and wanted to share a personal story about what the U.S. Constitution means me.

Most of us are familiar with the U.S. Constitution, having learned about the Bill of Rights in grade school. And for us lawyers, we learned about the Fourteenth Amendment, the due process clause, in con law class. But there is a section of the Fourteenth Amendment that holds a personal meaning to me—the citizenship clause—which states that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

This clause is significant to me because I was born in Vietnam, and my family immigrated to the United States in 1985, a month shy of my 9th birthday. I'm an American today, with all the rights and privileges that come with citizenship, thanks to my mother, who became a naturalized citizen in 1990.

This clause is significant to me because I was born in Vietnam, and my family immigrated to the United States in 1985, a month shy of my ninth birthday. I'm an American today, with all the rights and privileges that come with citizenship, thanks to my mother, who became a naturalized citizen in 1990. My mother applied to become a U.S. citizen exactly five years (to the month) after our family first arrived in the United States, which was the earliest that she could submit such an application and meet the residency requirement. My mother will tell you that becoming a U.S. citizen was very important to her because, among other things, she wanted her children to grow up as Americans in full pursuit of the American dream.

The road to citizenship was not easy for my mother, who is not fluent in English. In addition to meeting the residency requirements, she had to show that she was able to read, write, and speak basic English and demonstrate a knowledge and understanding of U.S. history and government. I remember helping her study for the civics exam and thinking that most kids in my class would be unable to answer the questions about our branches of government or name all of the congressional delegates from their state. My mother spent hours studying and passed the civics exam—she was so happy! In addition to demonstrating knowledge of U.S. history and government, she had to exhibit good moral character, express a loyalty to the principles of the U.S. Constitution, and be willing to take the Oath of Allegiance.

I was with my mother during her citizenship interview and sat there proudly as she answered questions about her willingness to agree to live by, defend, and support the principles stated in the Constitution, including her willingness to dig trenches in a time of war. (Yes, that's one of the things she was asked.) I was by her side when she took the Oath of Allegiance, which was such a proud and emotional moment for me. Not everyone has an opportunity to remember the moment they became an American. I was there to witness my mother's moment, and my moment. ⊙

Aspiring Judges—Should You Update Your Resumes This Year?

The Prospects for Pending Judgeships Legislation

By Dan Renberg and Cissy Jackson

A former senior Senate staff member and presidential appointee, Dan Renberg has helped numerous clients since joining Arent Fox as a partner in 2003. Recognized as a top federal lobbyist, one of Renberg's advocacy efforts was included as one of the "Top 10 Lobbying Triumphs of 2009" by *The Hill*, and he has been listed annually since 2014 in *The Best Lawyers in America*. Before joining Arent Fox, Cissy Jackson served as counsel and national security adviser to Sen. Doug Jones, D-Ala. Jackson also has extensive experience in the private practice of law, handling white collar, False Claims Act, grand jury investigation, and commercial property tax appeal matters. She has represented multinational corporations, small businesses, and individuals in high-stakes civil and criminal litigation.

FBA members know all too well that our federal courts are severely overburdened, and many of you frequently face the consequences first hand.

Article I, section 1 of the Constitution vests the judicial power in the Supreme Court and "such inferior courts as the Congress may from time to time ordain and establish." Thus, the courts must rely on the kindness of Congress to help manage their workloads. To facilitate this process, Congress created the Judicial Conference of the United States ("JC"), tasked with making a comprehensive survey of the condition of business in the federal courts, studying the operation and effect of the general rules of practice and procedure in use in the federal courts, and providing an annual report to Congress on its proceedings and its recommendations for legislation.

According to the JC, a manageable district court caseload is 430 weighted filings per year. For the year ending Sept. 30, 2020, the average weighted filings per district court judgeship was 681, with some courts facing as many as 903 weighted filings per year. After assessing the caseloads of all district and circuit courts in granular detail, in March of this year, the JC recommended that Congress create 79 new judgeships across the country: 77 new district court judges and two new circuit court judges. In September, the JC supplemented its recommendation and requested five additional judgeships in Oklahoma, required to handle the significant increase in federal criminal prosecutions resulting from the Supreme Court's 2020 decision in *McGirt v. Oklahoma*.

In response to the JC's March report, bipartisan sponsors in the House and Senate introduced identical versions of The JUDGES Act (S. 2535/H.R. 4885) that would increase the number of district and circuit court judges in accordance with the JC's specific recommendations. Lead Senate sponsors of The JUDGES Act are Todd Young, R-Ind., and Chris Coons, D-Del.; House sponsors include Reps. Darrell Issa, R-Calif., Juan Vargas, D-Calif., Victoria Spartz, R-Ind., and Scott Peters, D-Calif. Rep. Issa, ranking member of the House Judiciary Subcommittee on Courts, provided videotaped remarks (https://youtu.be/P9gjPcRB_aE) for the FBA's Annual Meeting. He explained that partisan politics has prevented the passage of judgeships legislation in the past and that the JUDGES Act seeks to avoid concerns about partisan court-packing by creating the new seats in two batches, half on Jan. 21, 2025, and half on Jan. 21, 2029.

Not satisfied with the JUDGES Act, House Courts Subcommittee chairman Rep. Hank Johnson, along with the House Judiciary Committee chairman and other subcommittee chairs, introduced the District Court Judgeships Act of 2021 (H.R. 4886), which would establish over 200 new judgeships. The number of new judges is based on Rep. Johnson's projections of federal court caseloads over the next few years. Rep. Johnson also provided videotaped remarks for the FBA's Annual Meeting (https://youtu.be/0G0uUoPqzWI), arguing that judicial delay undermines public confidence in the rule of law and that his proposed increases are necessary to provide the system of justice envisioned by the framers of our Constitution.

Multiple bills aimed at solving this problem are a good start, but with such a disparity in the total judgeships created, negotiations will be necessary to reconcile differences and develop a consensus that can pass in both the House and Senate. As of the date of this writing, neither the House nor the Senate Judiciary Committee, to which the bills have been referred, has taken any action. The FBA has sent letters to the sponsors of all the bills expressing general support for addressing the national judgeships issue, but successful passage of judgeships legislation depends on additional grassroots efforts from federal court practitioners and personnel who can speak from experience about the urgent need to prioritize this legislation among the many pressing issues on Congress's agenda. As Rep. Issa emphasized in his concluding remarks at the FBA's Annual Meeting, the FBA's input is important—your efforts do make a difference. ⊙

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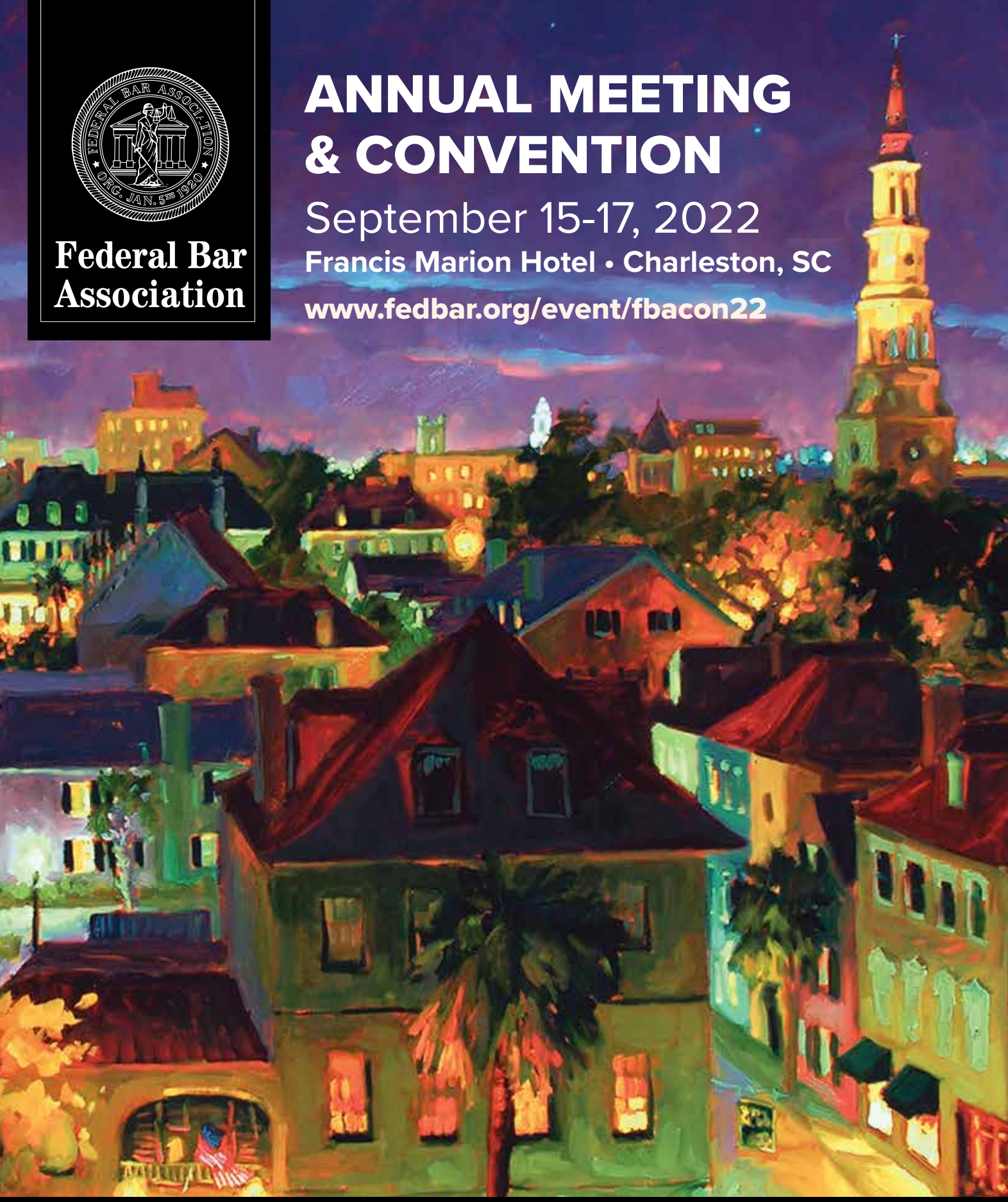

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Biodiversity Revisited: A World on the Brink of Change for the Better?

By Bruce A. McKenna

Bruce A. McKenna is admitted to practice in Oklahoma, New York, various federal district courts and circuit courts, and the U.S. Supreme Court. His practice consists primarily of professional negligence defense.

In July 2012, my At Sidebar contribution to *The Federal Lawyer* was titled "Biodiversity: It Is the Law of Nature and We'd Better Take Heed!"[1] Climate change was only one of the five categories of concern addressed at that time, but it was an essential contributing factor to the following conclusion:

> [T]he trends from available indicators suggest that the state of biodiversity is declining, the pressures upon it are increasing, and the benefits derived by humans from biodiversity are diminishing. The overall message from these indicators is that, despite the many efforts taken around the world to conserve biodiversity and use it sustainably, the efforts to date have been inadequate to address the scale of biodiversity loss or to reduce the pressure on affected ecosystems.[2]

Science and technology continue to provide us with warnings from Mother Nature that our planet is suffering from the abuse inflicted by humanity in failing to take good care of its only home. We do not seem to have taken heed in the nine years since my previous At Sidebar. So, as I did before, I will attempt to summarize what I have heard and read—not intending to be "gloom and doom" but, rather, as a reminder that we, as a society, can do more to fend off the effects of climate change and the predicted ramifications of either continuing to do too little to bring about change or striving to achieve change and ensure that our legacies are not legacies of gloom and doom.[3]

The Predominant Causes of Climate Change

Global warming is an ever-present term in today's vernacular. According to the U.S. Environmental Protection Agency, global greenhouse gas emissions attributed to human activities increased 26 percent from 1990 to 2005. By 2014, the United States accounted for approximately 15 percent of global greenhouse gas emissions. In 2019, the annual EPA *Inventory of U.S. Greenhouse Emissions and Sinks* showed that U.S. greenhouse gas emissions had dropped by 13 percent from the 2005 levels. But, as good as that sounds, it requires some context to appreciate that the level of greenhouse gases emitted into the atmosphere by U.S. economic activity was 6,558 million metric tons of carbon dioxide equivalents.[4] Maybe the reduction was false hope, because in 2020, the National Oceanic and Atmospheric Administration testing found that both carbon dioxide and methane gas levels were at their all-time highest.

Although it is the subject of much debate, the effects of global warming on the planet and the human population are frightening and appear to be mostly self-inflicted. The EPA estimates that, in 2019, the broadly defined sources of greenhouse gas emissions were transportation (accounting for 29 percent of emissions), coal-fired electric power plants (25 percent), industrial activities (23 percent), commercial and residential activities (13 percent), and agriculture (10 percent).

Effects of Climate Change on the Environment

It is entirely understandable to draw a direct correlation between increases in global temperature and climate change. It is widely recognized (again, but not without some debate) that human-induced climate change is a process that is being felt throughout the world. For example, in the United States, Glacier National Park is losing its glaciers; in 1910 it had more than 100, but now, fewer than two dozen remain. The Everglades National Park (a World Heritage site) is experiencing saltwater intrusion resulting from sea level rise and a corresponding loss of marine habitat and species. Other World Heritage sites endangered by the effects of climate change and man-made activities include the following:

- Egypt's Christian city of Abu Mena (significant rise in the surrounding water table).
- Four national parks and wildlife reserves in the Democratic Republic of Congo.
  - Garamba National Park (poaching and the absence of a national plan for corrective measures).
  - Kahuzi-Biega National Park (deforestation and civil strife).

- The Okapi Wildlife Reserve (poaching and localized armed conflicts).
- Virunfga National Park (deforestation related, in part, to the Rwandan Civil War).

- The 2.6-million-acre Tropical Rainforest of Sumatra in Indonesia (illegal logging activities and agricultural encroachments).
- The Old City of Jerusalem and its walls (uncontrolled urban development and general deterioration based on lack of maintenance).
- Coro, state of Falcón, Venezuela (heavy rains and various construction projects).
- Fortifications at Portobelo-San Lorenzo, Panama (environmental factors and lack of associated maintenance).
- Baja California Sur (imminent extinction of the vaquita, an endemic porpoise).[5]

Other more well-known ecosystems are being adversely affected on a larger scale by global warming impacts. The Amazon Rainforest is threatened by logging and fires. The Arctic regions are thawing. The snows of Kilimanjaro are melting. The Great Barrier Reef's corals are bleaching. Unfortunately, to continue identifying the catastrophic consequences of climate change would present a parade of horribles that would fill volumes!

Take Heed!

Take heed of what is going on around us. Simply by watching the network evening news programs, it should be apparent that the climate crisis is upon us. Extreme weather events fueled by climate change are becoming increasingly more frequent, more destructive, and more costly. Wildfires are burning millions of acres annually. Frequent back-to-back hurricanes, coupled with increased flooding, are causing devastating damage to already-climate-vulnerable communities unable to recover fully before the next disaster strikes. Extreme flooding is being experienced where never previously seen, while flooding in areas prone to flood has been exacerbated by recent changes in the climate. Droughts run rampant in arid areas like never seen before.

A 4,000-page *Sixth Assessment Report from the U.N. Intergovernmental Panel on Climate Change*, released on Aug. 9, 2021, paints a dire picture of climate change as "a code red for humanity." The report, which was written by 234 scientists and reviewed thousands of existing scientific studies on climate change, states that (a) it is clear that humans are responsible for climate change, and (b) the increasing frequency and severity of extreme weather events can be attributed to climate change with a high degree of certainty.

The findings from this most recent Intergovernmental Panel on Climate Change report are also particularly alarming, in part because they prove what reports from prior decades predicted: Climate change is happening now, and its impacts—especially in the form of extreme weather—are already having devastating effects on humans. The report concludes that many of these changes are now "locked in," meaning that communities are likely to continue experiencing extreme events for decades into the future.[6]

In 2021 alone, from the heaviest snow fall in Madrid in the last 50 years, to Cyclone Ana in Fiji, to the devastating winter storms in Texas, to dust storms in China, to record high temperatures in Moscow, to record wildfires in the western United States, to the ongoing disaster following Hurricane Ida in the United States, it should be apparent that Mother Nature is behaving differently now from how she behaved just a few short years ago.[7]

The Effects of Climate Change on a Personal Level

Undoubtedly, climate change will affect different geographical areas in different ways. But, because climate change appears to be the result of human activities, its effects on each of us include some, if not all, of the following:

- Damage to real and personal property from hurricanes, tornadoes, fires, and extreme weather.
- Damage to property resulting in higher insurance premiums and potentially reduced benefits.
- Reduced enjoyment of outdoor activities such as yard work, hiking, and sports participation and viewing.
- Higher electric bills, restricted usage levels, and more and more extended blackouts/brownouts.
- Higher taxes due to increased costs associated with providing public services and infrastructure.
- Increased health risks following weather events due to smoke from fires and mold from floods.
- Increased cost of groceries following crop loss during drought and after extreme weather events.
- Reduced water quality following intrusions into freshwater supplies from sewage and sea water.
- Travel restrictions and interruptions.

Global Perceptions of Climate Change and Its Effects

A 2019 YouGov study in the form of an online poll of 30,000 participants living in 28 nations[8] set forth a widely divergent set of perspectives related to climate change. The comprehensive statistical analyses reflected in the poll results are too numerous to list here, but a few observations are apt. A majority of poll participants in all countries believe that international bodies, governments of both wealthy and developing countries, businesses and industry, and individuals are all "very" or "fairly" responsible for climate change. Most respondents expect that climate change will have a moderate to large impact on their lives. But when presented with potential worst-case scenarios, the majority of respondents in all nations expressed their beliefs that climate change will result in serious damage to the global economy, cities being lost to rising sea levels, mass displacement of people from some parts of the world to others, and small wars. A majority or plurality in many countries expressed the belief that climate change might result in a new world war or even human extinction. In 25 of the 28 nations, people were more likely to say that their country "could be doing more" to tackle climate change than they were likely to say their nation was "doing as much as it reasonably can." In spite of the pessimistic views currently identified by poll respondents, there is, nevertheless, a strong sense among poll respondents that international organizations, national governments, business and industry, and individuals have the power to combat climate change.

So What Can We Do?

Possibly the most effective way to contribute to the effort to combat, stall, and halt climate change is to participate in the democratic process. Other suggestions I have heard about include the following:

- Reduce food waste by not allowing spoilage and donating perishable food that you will not use to food banks. It is estimated that curbing food waste could avoid a whopping 70.5 gigatons of

CO_2—estimated to be a larger impact than restoring 435 million acres of tropical forest.[9]

- If 50 percent of the world's population reduced meat consumption and avoided the associated deforestation caused by agriculture, we could decrease carbon emissions by 66 gigatons.
- Use clean, renewable energy. Congressional efforts have been taken to offer Treasury bonds as low as $25 to finance government clean energy programs. Replace existing heating systems with solar panels and hot water heaters with tankless systems. Replace old windows and doors. Tax credits may apply.
- Add insulation to homes and commercial buildings. It is estimated that if 50 percent of existing buildings installed thicker insulation, 8.3 gigatons of emissions could be avoided—estimated to have a larger impact than overhauling efficiency for the entire international shipping industry.
- Switch to LED bulbs, which use 90 percent less energy than incandescent bulbs and half as much as compact fluorescents bulbs.
- Use public transportation where possible, reduce miles driven, and make your next vehicle purchase a hybrid or electric vehicle.
- Recycle. Despite recent reports that recycling is not good for the environment, it has been estimated that approximately 50 percent of recycled materials come from households; if that number were to increase to 65 percent, at-home recycling could prevent 2.8 gigatons of carbon emissions.[10]
- Reduce water usage—the planet cannot replenish fresh water as quickly as it is being used.

How Might the Law and the Legal Profession Respond?

In 2015, the Paris Agreement was adopted by nearly every nation to address climate change and its negative impacts. The United States withdrew from the agreement but rejoined in February 2021. The nations joining the agreement were responsible for more than 90 percent of global greenhouse gas emissions—significantly, China (which, since 2006, has been the largest greenhouse gas emitter at 10.6 billion metric tons per year) and India (the third largest greenhouse gas emitter at 2.7 billion metric tons per year).[11] The major nations that have not formally joined the agreement are Iran, Turkey, and Iraq.

According to the Natural Resources Defense Council, the goals of the agreement are to (a) reduce global greenhouse gas emissions in an effort to limit the global temperature increase in the 21st century to 2 degrees Celsius above preindustrial levels; (b) attempt to limit the increase to 1.5 degrees; (c) identify how developed nations may assist developing nations in their climate mitigation efforts; and (d) create a system of transparent monitoring, reporting, and increasing the signatory nations' individual and collective climate goals. To accomplish those goals, the agreement includes certain mandatory measures for monitoring, verification, and public reporting of progress toward a country's emissions-reduction targets. The signatory nations must (a) report their greenhouse gas inventories and progress made toward reaching their goals and (b) allow outside experts to evaluate their success. Increased target goals are to be developed every five years, but there are no monetary penalties associated with failure to achieve goals. Finally, the agreement includes a plan for developed countries to continue to provide financial resources to help developing countries mitigate and increase resilience to climate change. Those financial commitments relate to and build on the 2009 Copenhagen Accord, which called for an increase in public and private climate finance for developing nations to $100 billion a year by 2020.

Yet, more is needed than the Paris Agreement. In 2020, global greenhouse gas emissions declined by 5.8 percent—the largest decline ever and almost five times greater than the 2009 decline that followed the global financial crisis. Yet, in 2021, emissions are projected to grow by 4.8 percent due to increased fossil fuel consumption as the world economy recovers. That would be the largest single increase since the economic recovery following the global financial crisis.[12]

The Green New Deal has been proposed as a means by which the United States can strive to (a) meet 100 percent of its energy demands by implementing clean, renewable, and zero-emission energy sources while, at the same time (b) grow the U.S. economy. Opponents claim that (a) the science behind the project is not sound, (b) the federal government will become even more involved in the energy sector of the nation's economy, and (c) the Green New Deal will actually increase the U.S. deficit and result in cuts to other federally funded programs.[13]

In addition to the general suggestions made above, various suggestions have been posited (many of which apply best to large firms at which the greatest impact can be identified) that can assist law firms in reducing their carbon footprints. A partial list of suggestions includes the following:

- Reducing the size of the office footprint.
- Moving forward with a staffing model that reduces travel through using more at-home workers, teleconferencing, and video depositions.
- Going "paperless," uniform use of digital document signatures, and uploading court filings through the digital dockets available (but not mandated) in various states.
- Recycle the paper that is necessary to your practice.
- Dispense with updating the library with pocket parts and move to online research services, and if you eliminate the books, donate them to a book finder.
- Using cloud-based storage and fiber optic broadband connections instead of physical cabling.
- Purchasing "carbon credits" by which firms can invest in carbon reduction programs.
- Minimize single-use products such as bottled water and pens that simply get thrown away when the ink runs out and purchase pens that work with reusable ink refills.
- When replacing office equipment, purchase energy efficient products and recycle the old equipment.
- Encourage and incentivize employees, when purchasing personal vehicles and appliances, etc., to purchase energy-efficient products, including roof solar panels and tankless hot water heaters.
- Turn off your computer and the lights when you leave your office and when you are the last person to leave a specific area.
- Adjust thermostat settings to be more energy-use efficient.

Closing Thoughts

As this At Sidebar evolved, it seems that there was more "gloom and doom" than I originally anticipated when writing the opening paragraphs. But, we are not without hope that private and public sectors alike will rise to the challenge.

It is my sincere hope that in another nine years, I will still have the privilege of being a member of *The Federal Lawyer* editorial

board and that I will be able (both mentally and based on changes in technology, perceptions, and actions occurring between now and then) to write a more positive update on the state of our world. It can be a wonderful place, so let's do what we can. As the old saying goes, "every little bit helps"—and we need to ask ourselves, do we really want to mess with Mother Nature? ⊙

Endnotes

[1]Bruce McKenna, *Biodiversity: It Is the Law of Nature and We'd Better Take Heed!*, 59-6 The Federal Lawyer 4 (July 2012).
[2]*Id.* at 72.
[3]It seems appropriate to reiterate a comment contained in my prior At Sidebar: "[P]lease accept my apologies in advance, because there is no doubt in my mind that a great deal of what is written in this short space in an effort to provide some insight into 'biodiversity' will offend some readers and be inaccurate in the minds of others." *Id.* at 4.
[4]In the United States, one metric ton is 2,000 pounds. By contrast, in the United Kingdom, a metric ton is equivalent to 2,240 pounds.
[5]*List of World Heritage in Danger*, Wikipedia, https://en.wikipedia.org/wiki/List_of_World_Heritage_in_Danger#Currently_listed_sites (last visited Sept. 25, 2021).
[6]Kat So & Sally Hardin, *Extreme Weather Cost U.S. Taxpayers $99 Billion Last Year, and It Is Getting Worse*, Cent. For Am. Progress, https://www.americanprogress.org/issues/green/reports/2021/09/01/503251/extreme-weather-cost-u-s-taxpayers-99-billion-last-year-getting-worse/ (last visited Sept. 25, 2021).
[7]I am dating myself here but, why not? Television commercials that ran in the 1970s talked about the consequences of fooling Mother Nature.

> Dressed in a gown of white and adorned with a crown of daisies, Mother Nature is seen sampling what she believes is butter, straight from nature. An unseen narrator ... informs her "[t]hat's Chiffon Margarine, not butter." A perplexed Mother Nature replies that it would be impossible for it to be margarine because it tastes too much like real butter; the narrator responds in delight that the margarine is indeed so close to real butter that it could fool even Mother Nature [who] angrily responds 'It's not nice to fool Mother Nature!' and commands nature to attack, such as through thunder and lightning or commanding an elephant to charge the camera.

Editorial Policy

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The Federal Lawyer *is edited by members of its Editorial Board, who are all members of the Federal Bar Association. Editorial and publication decisions are based on the board's judgment.*

The views expressed in The Federal Lawyer *are those of the authors and do not necessarily reflect the views of the association or of the Editorial Board. Articles and letters to the editor in response are welcome.*

[8]Matthew Smith, *Most People Expect to Feel the Effects of Climate Change, and Many Think It Will Make Us Extinct*, YouGov (Sept. 16, 2019), https://today.yougov.com/topics/science/articles-reports/2019/09/16/global-climate-change-poll.
[9]In the United States, a gigaton is equivalent to 1 billion metric tons, or 2 trillion pounds. In the U.K., that would be 2.2 trillion pounds. *See supra* note 4. Putting that into context, the weight of 10,000 fully-loaded U.S. aircraft carriers would weigh approximately 2.2 trillion pounds.
[10]Be aware that, done improperly, recycling can slow the system and create more waste, thus making it imperative that recyclables be rinsed. In addition, keep apprised of local regulations to make sure that what is being recycled is not causing contamination.
[11]There is plenty of blame to go around for the condition of our planet's climate. The top 10 contributors in 2020 were China, the United States, the European Union, India, the Russian Federation, Japan, Brazil, Indonesia, Iran, and Canada. Consisting of 27 different nations, the European Union appears to be the bright spot in all of this. In 2017, the combined greenhouse gas contribution from the EU was 3.2 million metric tons. In 2020, the combined greenhouse gas emissions from the EU was 2.5 million metric tons. *Carbon Dioxide (CO2) Emissions in the European Union from 1965 to 2020*, Statista, https://www.statista.com/statistics/450017/co2-emissions-europe-eurasia/ (last visited Sept. 25, 2021).
[12]Instit. Energy Agency, Global Energy Review 2021 (2021), https://www.iea.org/reports/global-energy-review-2021/co2-emissions.
[13]*What Are the Pros and Cons of The Green New Deal?*, Parlia (Nov. 15, 2020), https://www.parlia.com/c/what-are-positions-on-green-new-deal.

Efforts Toward Improved Diversity and Inclusion Through the Anti-Bias Rule

By Nellie Q. Barnard and Christopher Heredia

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Model Rule 8.4(g) of the Model Rules of Professional Conduct is the American Bar Association's (ABA's) long-awaited answer, at least in part, to curbing bias, discrimination, and harassment in the practice of law. There is no serious question that bias, discrimination, and harassment are present in the practice of law, and that, despite advances, the profession continues to struggle with its diversity efforts.[1] For example, a national survey on Model Rule 8.4(g) asked female lawyers whether they had ever experienced discrimination, harassment, or sexual harassment and revealed that more than one out of every two women had.[2] Seventy-five percent of women reported that they experienced a demeaning comment, story, or joke on account of their gender.[3] On the fifth anniversary of the Model Rule 8.4(g) adoption, we look back at its implementation and recent challenges and the road ahead.

Model Rule 8.4(g)

Model Rule 8.4(g), prohibits, in part, "conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."[4]

Comment [3] to the rule provides that "discrimination" includes harmful verbal or physical conduct that manifests bias or prejudice towards others," whereas "harassment" is intended to encompass "sexual harassment and derogatory or demeaning verbal or physical conduct ... unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature."[5] Similarly, Comment [4] provides context for specific conduct "related to the practice of law," such as "representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association business or social activities in connection with the practice of law."[6]

The Goals and Scope of Model Rule 8.4(g)

The ABA has recognized the unique role that attorneys play in society.[7] We act as ambassadors to our legal system and guide the administration of justice. As a self-regulating profession, we hold lawyers to higher standards than the general public to maintain confidence in the integrity of both our profession and our legal system, and in recognition of the profound privilege conveyed by a license to practice law. Model Rule 8.4(g) prohibits discriminatory conduct that harms the legal profession and those involved in our justice system, a principle long recognized by courts.[8] Model Rule 8.4(g) also goes further in prohibiting discriminatory conduct than do courts and other Model Rules by proscribing conduct within the many other practice-related settings, such as nonlitigation matters, matters occurring outside the courtroom, or office social functions.[9]

Prior to the adoption of Rule 8.4(g), 24 states and Washington, D.C., already had some form of anti-bias regulations on their books.[10] Such rules typically regulated conduct in three general contexts: before a tribunal, in the course of representing a client, or conduct which was prejudicial to the administration of justice.[11] Some states tied the scope of their anti-discrimination rules to conduct that also fell under the purview of other federal, state, or local anti-discrimination laws.[12] For example, Illinois maintains Rule 8.4(j), which prohibits violating a "federal, state, or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflect adversely on a lawyer's fitness as a lawyer."[13] However, similar to several other jurisdictions' rules, this first requires findings from another court before any misconduct charges can be raised.[14] These requirements have presented a challenge to meaningfully addressing discriminatory conduct in the practice of law.

Where Has Model Rule 8.4(g) Been Adopted?

Seven states and/or territories, including Vermont, Pennsylvania, Connecticut, Maine, the U.S. Virgin

Islands, American Samoa, and the Northern Mariana Islands, have adopted a version of the Model Rule. Certain federal district courts, including the Northern District of Illinois, have also adopted Rule 8.4(g) by way of adopting the Model Rules in their entirety, and have since entered formal discipline for violations of Rule 8.4(g).[15] Several other states, including New York and New Jersey, are still considering adopting a version of the rule. More than 13 states have rejected adopting Rule 8.4(g), including Illinois, Texas, Arizona, South Dakota, Montana, Nevada, and Tennessee.

Model Rule 8.4(g)'s Constitutionality Debate

Early challenges to Model Rule 8.4(g) indicate that constitutional concerns regarding its scope may have some traction. Arguments against the rule raise the prospect that it runs afoul of First Amendment free speech protections, primarily on two grounds: overbreadth and vagueness. These concerns focus on the rule's open-ended provisions, which could result in regulation far beyond the traditional "bounds" of the legal practice. The clause "conduct related to the practice of law" is often flagged as a particular concern because it does not identify how and when an attorney would or could violate the rule.

The test for vagueness is whether the restriction "is set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest."[16] The Model Rules do not define "related to the practice of law." Thus, there is a risk that bar regulators and courts will consider any conduct, however remote, to nonetheless be "related" to "the practice of law." That apparent vagueness, therefore, puts attorneys at risk of violating the rule just by virtue of being an attorney, regardless of the context of the conduct. Further, that language has been criticized for giving too much discretion, and too little interpretive support, to bar regulators, thus leaving attorneys and the public to simply "trust" that regulators will properly enforce the rule in the absence of narrowly tailored language.[17]

On the issue of overbreadth, the debate centers on the rule's potential to chill a lawyer's protected speech and association, particularly related to teaching or legal social events based on the fear of a bar complaint for statements made during the event. The overbreadth doctrine requires regulations to be sufficiently precise to avoid sweeping protected speech under their prohibitions, or even deterring protected speech or association.[18] However, regulating lawyers' conduct has been held to be a compelling interest justifying other rules proscribing lawyer speech and conduct, even when beyond the courtroom or office. For example, Model Rules 7.1, 7.2, and 7.3, which regulate attorney advertisements and solicitation, restrict the First Amendment commercial speech of lawyers in ways that non-lawyers are not limited. Similarly, by regulating fee sharing and legal entities operations, Model Rule 5.4(b) limits a lawyer's right of association.

The underlying principles of the Rules of Professional Conduct may address these concerns. Courts have consistently reaffirmed that the Rules of Professional Conduct are "rules of reason" that should be "interpreted with reference to the purposes of the of legal representation and of the law itself."[19] Thus, the rules do not define or instruct attorneys in every conceivable situation. An inherent level of vagueness is present in a number of the rules, including Rule 8.4(b),[20] Rule 8.4(c),[21] and Rule 8.4(d)[22]. Courts have consistently upheld these rules in the face of vagueness claims.[23] And courts have cautioned that broad standards should not be used as "loopholes" to evade discipline.[24]

In addition, Model Rule 8.4(g) itself addresses vagueness and overbreadth concerns. The plain language of the rule cannot be read to apply to *any* conduct of a lawyer.[25] Instead, an ordinary lawyer exercising common sense could sufficiently understand and comply with its terms. In short, the rule provides that a violation may only occur (1) when conduct is taken against one of the delineated categories of victims, (2) when the lawyer knows or reasonably should know that it constitutes harassment or discrimination, and (3) when it is related to the practice of law. When the rule is read in light of its official comments, which further narrow its scope, the rule provides a reasonable roadmap of potentially triggering scenarios. Of significance is the fact that the rule explicitly does not regulate nor attempt to regulate conduct wholly unconnected to the practice of law, despite several other long-upheld Rules of Professional Conduct doing so.[26]

Recent Impact of Challenges to 8.4(g)

Five years after its adoption, the real-world implications of the rule, including its additional adoptions, rejections, and challenges, are taking shape. In July 2020, the ABA released Formal Opinion 493, which offers guidance on the purpose, scope, and, importantly, the much-questioned applicability of Rule 8.4(g).[27] Formal Opinion 493 addresses concerns regarding the rule's constitutionality and offers hypotheticals to guide its practical applications.

Further illustration of the current state of the rule is Pennsylvania's version. Pennsylvania's first Model Rule 8.4(g), arguably broader than ABA's version, prohibited knowingly manifesting "by words or conduct ... bias or prejudice" in the practice of law.[28] Prior to its December 2020 effective date, the rule was challenged on First Amendment grounds.[29] The court hearing the challenge was persuaded. In issuing an injunction the day the rule was set to take effect, the court stated that it was "swayed by the chilling effect" that the rule would have on attorneys licensed in the state, and found the "fatal language" to be the provision "by words ... manifest bias or prejudice".[30] The court found that provision to be an improper attempt to prohibit "professional speech" as well as an extension to words or conduct that are beyond the traditional legal practice.[31] In addressing these issues, in July 2021, the Pennsylvania Supreme Court approved revisions to the rule, which now prohibits knowingly engaging in "conduct constituting harassment or discrimination."[32] It remains to be seen whether these revisions will be challenged.

Mindful of the First Amendment concerns addressed above, and particularly the challenge to Pennsylvania's rule, other jurisdictions have taken note. Some states, such as Connecticut, have explicitly included provisions addressing the First Amendment concerns.[33] Others, like Colorado, have upheld discipline under a narrower scope of the rule, including a recent disciplinary action against an attorney for addressing a judge using a homophobic slur.[34] Still others continue to assess the implications of such challenges as they consider the rule's adoption.[35]

Pennsylvania's 8.4 revision highlights the delicate balance we must strike in working to create a more diverse and inclusive profession. While many of us agree that our profession will benefit from a legal system that promotes and increases diversity, equity, and inclusion, one question that remains is how to appropriately tailor our self-imposed regulations to both improve the profession

from within while ensuring its continued integrity and accountability to the public. What is clear, however, is the need for well-written and thoughtfully enforced regulations that adequately address the challenges posed by systemic bias, discrimination, and harassment—all present and damaging within our profession. As with any goal to improve our profession, the best way to achieve those results will remain a work in progress for the foreseeable future, as we continue developing our goals and the professional regulations designed to achieve them. ⊙

Endnotes

[1]*See generally* 2020 ABA Model Diversity Survey (2021), https://www.americanbar.org/content/dam/aba/administrative/racial_ethnic_diversity/aba/credp_2020_mds_report.pdf; *see also* Debra Cassens Weiss, *Diversity 'Bottleneck' and Minority Attrition Keep Firm Leadership Ranks White and Male, New ABA Survey Says*, ABAJournal (Feb. 17, 2021), https://www.abajournal.com/news/article/diversity-bottleneck-and-minority-attrition-keep-law-firm-leadership-ranks-white-and-male-aba-survey-says.

[2]*See* Women Lawyers on Guard, Still Broken: Sexual Harassment and Misconduct in the Legal Profession—A National Study 23-24 (2020), https://womenlawyersonguard.org/wp-content/uploads/2020/07/Still-Broken-Full-Report.pdf.

[3]Roberta D. Liebenberg and Stephanie A. Scharf, Walking Out The Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice 7 (2019), https://www.americanbar.org/content/dam/aba/administrative/women/walkoutdoor_online_042320.pdf.

[4]Model Rule of Pro. Conduct 8.4(g) (Am. Bar Ass'n 2020).

[5] Model Rule of Pro. Conduct 8.4, cmt. 3 (Am. Bar Ass'n 2020).

[6]*Id.* at cmt. 4.

[7]*See Mission Statement and Goals*, American Bar Ass'n, https://www.americanbar.org/about_the_aba/aba-mission-goals/ (last visited Sept. 30, 2021).

[8]*See, e.g.*, *Mullaney v. Aude*, 730 A.2d 759, 767 (Md. Ct. Spec. App. 1999) ("[W]hen the ill feeling that may exist between litigants carries over into the conduct and demeanor demonstrated by one lawyer toward another, the legal profession is diminished."); *In re Charges of Unprofessional Conduct*, 597 N.W.2d 563, 568 (Minn. 1999) (observing that racially-biased conduct by counsel is "especially troubling" because it can "undermine confidence in our system of justice" and "erode the very foundation upon which justice is based.").

[9]ABA Comm. On Ethics & Pro. Resp., Formal Op. 493 (2020).

[10]Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 Geo. J. Legal Ethics 195, 208 (2017).

[11]*Id.*

[12]*Id.*

[13]Ill. Rule of Pro. Conduct 8.4(j) (2010).

[14]*Id.*

[15]*See, e.g.*, *In the Matter of the Discipline of Jason R. Craddock, Sr.,* No. 17 MC 27 (N.D. Ill Jan. 18, 2017) (suspending attorney from practicing in federal court for using gender-based, vulgar terms to insult defense counsel).

[16]*Howell v. State Bar of Texas*, 843 F.2d 205, 208 (5th Cir. 1988).

[17]Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 Geo. J. Legal Ethics 241, 261-62 (2017).

[18]*See* Rebecca Aviel, *Rule 8.5(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 Geo. J. Legal Ethics 31, 41-45 (2018) (exploring the overbreadth doctrine in the context of Rule 8.4(b)).

[19]Model Rule of Pro. Conduct, Preamble, cmt.14 (2020); *see also In re Gerard*, 548 N.E.2d 1051, 1064 (Ill. 1989) (observing that the purposes of the attorney disciplinary process is to maintain the integrity of the legal profession, protect the administration of justice from reproach, and safeguard the public); *Burke v. Lewis*, 122 P.3d 533, 540 (Utah 2005) (holding that the purposes of Utah's Rules of Professional Conduct are "to provide a framework for the ethical practice of law" and should be applied reasonably under the circumstances); *Landino v. Black Tie Limousine, Inc.*, No. CV 980408538S, 1999 WL 53279, at *2 (Conn. Super. Ct. Jan. 26, 1999) (noting that "[t]he Rules of Professional Conduct are rules of reasons" and should be interpreted with reference to the purposes of legal representation and of the law itself); *ABS MB Inv. Ltd. P'ship v. Ivax Corp.*, No. CIV. AMD 94-1923, 1996 WL 173131, at *3 (D. Md. Apr. 10, 1996) (holding that Maryland's Rules of Professional Conduct should not be subject to a "strict construction" approach).

[20]Prohibiting criminal acts reflecting adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

[21]Prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation.

[22]Prohibiting conduct prejudicial to the administration of justice.

[23]*See In re Snyder*, 472 U.S. 634, 644-45 (1985) (upholding discipline for "conduct unbecoming"); *Ky. Bar Ass'n v. Blum*, 404 S.W.3d 841, 855 (Ky. 2013) (analyzing First Amendment claims and upholding the propriety of a the rule prohibiting lawyers from making false or reckless statements regarding a member of the judiciary); *Howell*, State Ban of texas, 843 F.2d 205, 208 (5th Cir. 1988) (providing that lawyer regulations are not required to meet the same level of clarity as required for laypersons in analyzing the prohibition against conduct prejudicial to the administration of justice).

[24]*In re Gerard*, 548 N.E.2d at 1064; *see also* In re *Holtzman*, 577 N.E.2d 30, 33 (N.Y. 1991) (holding that rules of professional conduct are necessarily broad and that "the guiding principle must be whether a reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct is proscribed.").

[25]ABA Formal Ethics Op. 493 (2020)

[26]*See* Model Rule. of Pro. Conduct 8.4(b)

[27]ABA Comm. On Ethics & Pro. Resp., Formal Op. 493 (2020).

[28]Pa. Rule of Pro. Conduct 8.4(g) (2020).

[29]*Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 16 (E.D. Pa. 2020)

[30]*Id.* at 30.

[31]*Id.* at 28-30.

[32]Pa. Rule of Pro. Conduct 8.4(g) (2021).

[33]Conn. Rule of Pro. Conduct 8.4(7) (2021).

[34]*In the Matter of Robert E. Abrams,* 488 P.3d 1043 (Colo. 2021).

[35]New York Unified Court System, Memorandum (Mar. 19, 2021), https://nclalegal.org/wp-content/uploads/2021/06/Request-for-Public-Comment-Rule-8.4-March-2021-v3.pdf (requesting public comment on adoption of Model Rule 8.4(g)).

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Stuck in the Middle: The Case for a National Innocent Seller Defense to Protect Retailers and Distributors

By Michael J. Cahalane, Hayley Kornachuk, and Erica A. Dumore

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If there was an unsung hero of the last two years, it was America's retailers and their nearly 5 million employees,[1] whose work throughout the pandemic has allowed consumers to obtain daily necessities and the nation's economy to continue to hum along. Without retailers, suppliers, wholesalers, and distributors (hereafter collectively referred to as "retailers"), such as grocery stores, Americans would have been without food and other essentials. Had construction material suppliers, lumber yards, and supply houses been shuttered, the nation's tradespeople would have sat idle as construction grinded to a halt. If retail stores remained closed, manufacturing would have slowed and unemployment would have been far worse. The country has survived the pandemic, due in large part to retailers that allowed Americans to continue to live their lives.

Retailers stepped up during the pandemic, despite the inherently unfair product liability law in much of the country that holds innocent sellers—merely distributors in the chain of commerce—liable for products they never manufactured, designed, or installed. The American tort system blames retailers and distributors for the acts or omissions of manufacturers. Many of these retail defendants have no control over the manufacture of the products they sell, putting them in a precarious position to effectively defend a product liability case. Depending on the applicable state law, some defenses and other relief are available to innocent sellers, whether in the form of statutes or common laws. The protections vary by jurisdiction, however, and many states provide no safeguards at all. In the wake of the pandemic, which irrefutably illustrated the value of retailers and suppliers to our economy, it is time for Congress to enact a federal statute to immunize innocent sellers.

Inherent Unfairness

"Sellers are often brought into litigation despite the fact that their conduct had nothing to do with the accident or transaction giving rise to the lawsuit."[2] Retailers are frequently held liable for damages caused by a defective product they merely sold but did not manufacture. In most cases, the retailer had no reason to believe the product was defective. There are many reasons why this is inherently unfair.

Retailers are not the designers or manufacturers of the injury-producing product, and therefore, are "ill-equipped to defend the product."[3] They likely lack essential product information available to manufacturers, such as ingredients or composition, testing data, warnings, labels and instructions, and research regarding alternative designs. The lack of such basic information can make defending a product liability action exceedingly difficult for a seller who took no part in the manufacturing, design, or installation of a product.

Similarly, it is unreasonable to require a retailer to litigate lawsuits on multiple fronts to resolve allegations regarding a product it distributed, as is often the case in litigation against sellers.[4] In a typical products liability case, the retailer is first required to defend a claim by the injured plaintiff.[5] Assuming the first lawsuit prevails against the retailer, in many states, a second lawsuit is necessary for retailers to seek indemnity from the manufacturer if the retailer does not want to be ultimately responsible for the damages to the consumer.[6] As articulated in proposed legislation designed to address such inequities, multiple lawsuits needlessly expose retailers to "unfair and disproportionate damage awards," "high liability cost," "unwarranted litigation costs," and "high costs in purchasing insurance."[7] All of these create undue expenses, which are likely passed to consumers in the form of increased prices.

Notwithstanding these considerations, not every retailer is "innocent," and, in some cases, there are legitimate public policy reasons for product liability cases to apply to certain sellers. For example, holding some retailers liable may promote "the public policy that an injured party not have to bear the cost of his in-

juries simply because the product manufacturer is out of reach."[8] This argument holds the most weight when the product manufacturer is bankrupt, cannot be identified, or is not subject to the court's jurisdiction or service of process.[9] The argument loses strength, however, when the plaintiff has an adequate remedy against the manufacturer[10] and the plaintiff is allowed to proceed against both the manufacturer and supplier. In this circumstance, the retailer is unfairly forced to defend the case.

Without an innocent seller defense, retailers are not only footing the bill for unavailable or insolvent manufacturers, but they are further disadvantaged because they are left bearing the costs of defending a product about which they know very little. A federal statute that provides a truly innocent seller with a pathway out of litigation while still acknowledging public policy concerns is imperative. A federal innocent seller statute should be enacted to ensure that all parties are protected and fairness is upheld.

Current State Law Protections Available to Innocent Sellers

Approximately 28 states have adopted some version of an innocent seller statute that offers various levels of protection for retailers. While some innocent seller statutes provide remedies for retailers to navigate their way out of product liability actions, some only offer retailers protection against strict liability claims. Moreover, some state statutes shift the burden onto retailers to prove certain facts in order to avail themselves of the protections of the statute. Finally, some states only provide avenues for retailers to seek indemnification from the manufacturer, leaving retailers stuck defending product liability actions and forced to seek relief at the conclusion of the case.

Arguably, the most comprehensive innocent seller statute is Colorado's, which provides that "[n]o product liability action shall be commenced or maintained against any seller of a product unless said seller is also the manufacturer of said product or the manufacturer of the part thereof giving rise to the product liability action."[11] However, the Colorado statute also includes a carve-out to address public policy concerns regarding an injured party having no recourse:

> [i]f jurisdiction cannot be obtained over a particular manufacturer of a product or a part of a product alleged to be defective, then that manufacturer's principal distributor or seller over whom jurisdiction can be obtained shall be deemed, for the purposes of this section, the manufacturer of the product.[12]

As such, the retailer does not escape liability when jurisdiction cannot be established over the manufacturer itself.

Another example, although less comprehensive as it only relates to strict liability causes of action, is Indiana's innocent seller statute, which provides:

> [a] product liability action based on the doctrine of strict liability in tort may not be commenced or maintained against a seller of a product that is alleged to contain or possess a defective condition unreasonably dangerous to the user or consumer unless the seller is a manufacturer of the product or of the part of the product alleged to be defective.[13]

But similar to Colorado, "[i]f a court is unable to hold jurisdiction over a particular manufacturer of a product or part of a product alleged to be defective, then that manufacturer's principal distributor or seller over whom a court may hold jurisdiction shall be considered, for the purposes of this chapter, the manufacturer of the product."[14]

Unlike the previous examples, some states, such as New Jersey, place the burden on the defendant seller to identify the product manufacturer in order to establish that it is solvent and subject to the court's jurisdiction. Under the New Jersey Product Liability Act (NJPLA), a product seller seeking immunity bears the burden of demonstrating that it is not subject to liability under any statutory exceptions.[15] A product seller is relieved from liability only if it is truly innocent of responsibility for the alleged defective product and the injured party retains a viable claim against the manufacturer.[16] The statute states, in pertinent part:

> (a) In any product liability action against a product seller, the product seller may file an affidavit certifying the correct identity of the manufacturer of the product which allegedly caused the injury, death or damage.
>
> (b) Upon filing the affidavit pursuant to subsection (a) of this section, the product seller shall be relieved of all strict liability claims, subject to the provisions set forth in subsection (d) of this section. Due diligence shall be exercised in providing the plaintiff with the correct identity of the manufacturer or manufacturers.[17]

There are exceptions to the NJPLA under section (d) of the act when (1) the retailer has exercised some significant control over the design, manufacture, packaging, or labeling of the product; (2) the retailer knew, should have known, or was in possession of facts from which a reasonable person would conclude that the product was defective; or (3) the retailer created the defect in the product, and any of the three caused the injury, death, or damage.[18] In any of these circumstances, the seller cannot claim to be "innocent."

Arizona has adopted an indemnity statute that offers some protection to innocent sellers.[19] In pertinent part, the statute states:

> A. In any product liability action where the manufacturer refuses to accept a tender of defense from the seller, the manufacturer shall indemnify the seller for any judgment rendered against the seller and shall also reimburse the seller for reasonable attorneys' fees and costs incurred by the seller in defending such action, unless either paragraph 1 or 2 applies:
>
> 1. The seller had knowledge of the defect in the product.
>
> 2. The seller altered, modified, or installed the product, and such alteration, modification, or installation was a substantial cause of the incident giving rise to the action, was not authorized or requested by the manufacturer, and was not performed in compliance with the directions or specifications of the manufacturer.[20]

In Arizona and other states with similar statutes, the innocent seller is afforded a right of indemnification from the manufacturer and the right to fees associated with defending the product liability action if the manufacturer fails to accept tender of the defense. Like

New Jersey, Arizona expressly excludes sellers who possess knowledge of, or caused, the defects.

Although the innocent seller and indemnity statutes differ, all offer some form of protection for retailers to allow them to avoid liability for products they did not make. However, these protections are not absolute. The patchwork of varying state laws governing seller liability also creates uncertainty for retailers who operate in multiple jurisdictions.

History of Proposed Innocent Sellers Fairness Act

Although many states have implemented seller protection statutes, a federal statute has still not been enacted despite repeated efforts.[21] The Innocent Sellers Fairness Act has been introduced in the House of Representatives on six separate occasions from 2006 to 2017. All six times, the act failed to receive a vote by the House. The Innocent Sellers Fairness Act was first introduced to Congress in 2006.[22] The identical act was reintroduced in 2007 and 2009.[23] The original proposed act read as follows:

> (a) In General – No seller of any product shall be liable for personal injury, monetary loss, or damage to property arising out of an accident or transaction involving such product, unless the claimant proves one or more of the following non-sale activities by the seller:
>
> 1. The seller was the manufacturer of the product.
> 2. The seller participated in the design of the product.
> 3. The seller participated in the installation of the product.
> 4. The seller altered, modified, or expressly warranted the product in a manner not authorized by the manufacturer.
>
> (b) Liability for Non-Sale Activities – If the claimant proves one or more of the non-sale activities described under subsection (a) and such non-sale activity was negligent, the seller's liability shall be limited to the personal injury, monetary loss, or damage to property directly caused by such non-sale activity.[24]

In 2013, the Innocent Sellers Fairness Act was modified prior to being reintroduced to the House.[25] The modified version was reintroduced in 2015 and 2017.[26] The modification stripped the proposal of the term "non-sale" in reference to activities and included four additional ways a claimant could prove and hold a seller liable.[27] The additional activities were:

5. The seller had actual knowledge of the defect in the product as a result of a recall from the manufacturer or governmental entity authorized to make such recall or actual inspection at the time the seller sold the product to the claimant.
6. The seller had actual knowledge of the defect in the product at the time the seller supplied the product.
7. The seller intentionally altered or modified a product warranty, warning, or instruction from the manufacturer in a way not authorized by the manufacturer.
8. The seller knowingly made a false representation about an aspect of the product not authorized by the manufacturer. [28]

Each time it was introduced, the Innocent Sellers Fairness Act went through the House Judiciary and was sent to the House Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection, where it consistently stalled. Since the act was first proposed to Congress in 2006, the number of co-sponsors has significantly decreased. When the act was last introduced before Congress in 2017, it only had six co-sponsors, whereas the act proposed in 2006 and in 2007 had 23 and 63 co-sponsors, respectively.[29] While momentum for the Innocent Sellers Fairness Act gradually waned from 2006 to 2017, the events of 2020 and 2021 should justify another close look at providing innocent retailers with federal liability protection.

The Time Has Come for Federal Protections for Innocent Sellers

Retailers met the challenge presented by the pandemic by keeping their doors open and allowing the rest of society to function. Without retailers and their employees, the American economy would have screeched to a halt, and families would have struggled to buy food and other necessities. Notwithstanding the sacrifices made by retailers and their employees and the resulting benefits to society, the tort system continues to unjustly punish innocent sellers for products over which they yield little, if any, control. Is it reasonable to hold a grocery store liable for injuries caused by cleaning products it sells or a hardware store for damages caused by defective nails that it carries? When the retailer is acting as a mere distributor in the chain of commerce, without involvement in manufacture, design, or installation, certainly not. Such liabilities unfairly burden sellers and require them to defend lawsuits regarding unfamiliar products, hire lawyers, and buy insurance, all of which impose high economic costs.

While some states have enacted protections for innocent sellers, many states offer no such safeguards, and others shift the burden to the retailer to demonstrate its innocence and prove that the statute applies. Even then, an innocent seller in some states can still be stuck bearing liability if the manufacturer is not subject to the jurisdiction of the court. The resultant patchwork of statutes yields vastly different results among jurisdictions and can be confusing and cumbersome for retailers operating in multiple states.

The solution is one easily understandable, nationally applicable protection for retailers. Until a Federal Innocent Sellers Fairness Act is enacted, retailers will continue to face inherently unfair litigation, and the future of their business will always be in jeopardy. It is time for Congress to finally acknowledge the service that the retail sector has done for the country and to enact a federal innocent seller defense. ⊙

Endnotes

[1]Bureau of Labor Statistics, Occupational Outlook Handbook, Retail Sales Workers (Sept. 8, 2021), https://www.bls.gov/ooh/sales/retail-sales-workers.htm.

[2]Innocent Sellers Fairness Act, H.R. 989, 110th Cong. (2007).

[3]*See* Frank J. Cavico, Jr., *The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products,* 12 Nova. L. Rev. 213, 227-28 (1987).

[4]*See* Adam Feeney, Note, *In Search of a remedy: Do State Laws Exempting Sellers from Strict Product Liability Adequately Protect Consumers Harmed by Defective Chinese Manufactured Products?* 34 J. Corp. L. 567, 571 (2009); *See also* Frank J. Cavico Jr., *The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective*

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Serving the Holy See Through Letters Rogatory: Pray for a Miracle to Effectuate?

By Andrew Brendon Ojeda

Andrew Brendon Ojeda is a licensed attorney in the Commonwealth of the Northern Mariana Islands. He attended UCLA as an undergraduate and USC Gould School of Law. He was born and raised in Los Angeles and is of Puerto Rican and Mexican descent.

Under Federal Rules of Civil Procedure 4(j)(1),[1] a plaintiff may serve a foreign state like the Holy See with a complaint. First, the plaintiff prepares a summons and presents it to the clerk of court to seal and sign.[2] Then, the summons, complaint, notice of suit,[3] and letters rogatory must be prepared in the official language of the country—Italian in the Holy See.[4] The plaintiff must also submit to the federal court copies of the translated complaint, summons, notice of suit, and letters rogatory with a prepaid, preaddressed envelope for the clerk of court to dispatch the documents under 28 U.S.C. § 1608(a)(3). Then, the court executes the Request for International Judicial Assistance (letters rogatory).[5]

Unfortunately, as litigants seek redress for sexual abuse from the Catholic Church, the occurrence of rejecting service of process through letters rogatory is not uncommon.

Practitioners who have represented survivors of sexual abuse have commented on the difficulty of effectuating service of process on the Holy See through letters rogatory. "The Holy See avoids service like the plague," said Marci Hamilton, founder and CEO at CHILD USA, a nonprofit academic think tank dedicated to ending child abuse. She continued,

> It pulls out every stop possible to avoid service. It avoids direct service by arguing that whoever tries to serve it is not the proper person. Serving the Holy See usually takes one to two years. The Holy See also requires that briefs be translated into an arcane version of Latin. And these cases are few and far between because it is often better for litigants to pursue a live claim under state law.

"Before getting to discovery, the Holy See resisted service (the complaint had to be translated into Latin)," said William Barton, counsel in a suit filed against the Holy See in the U.S. District Court in Oregon.[6]

Litigants are first required to serve the Holy See through letters rogatory, but when this process fails, the next method of service allowed is through diplomatic channels under the Foreign Sovereign Immunities Act.[7] First, counsel representing survivors must draft a letter to the clerk of court requesting service of process on the Holy See through diplomatic channels (i.e., through the U.S. Department of State).[8] Second, counsel must file the request with the federal court as an Affidavit of Foreign Mailing. Third, counsel must provide the clerk of court with the following:

1. One copy of the letter requesting service.
2. One copy of the notice of electronic filing, confirming filing of the letter.
3. Proof that service via letters rogatory under 28 U.S.C. § 1608(a)(3) was unsuccessful.[9]
4. Two copies of the summons, complaint, and notice of suit, and translations of all documents in Italian.[10]

In addition, counsel must include a check to cover the $2,275 fee required by the U.S. Department of State for service through diplomatic channels.[11]

Once diplomatic channels prove successful, the federal court will receive a diplomatic note from the Embassy of the United States to the Holy See, stating that it transmitted the above documents to the Secretariat of State to the Holy See.[12]

Following receipt of this diplomatic note, litigants are generally met with a motion to dismiss for, among other reasons, lack of subject matter jurisdiction.

Survivors of sexual abuse face many hurdles in trying to serve the Holy See. Expense and the long and complicated process of having to first move for letters rogatory, which often proves unsuccessful, represents one of the main hurdles. Then, the only true way to serve the Holy See is through diplomatic channels, adding more expense and complication. On top of this, survivors must pay thousands of dollars to translate documents into Italian and Latin. As long as the Holy See continues to reject service through letters rogatory, survivors of sexual abuse will continue to face hurdles in serving the Holy See and finally healing from the trauma they have had to endure from childhood to adulthood. ☉

Endnotes

[1]Codified in 28 U.S.C. § 1608(a)(3), Rule 4(j)(1) allows for service of process on a foreign state. In addition, § 1608(a)(3) states that service of process be made "by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail required a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3).

[2]*See* Fed. R. Civ. P. 4(b).

[3]A Notice of Suit is prepared in accordance with 22 C.F.R. § 93.2.

[4]Since 2014, Italian has been the official language of the State of the Vatican City. *See Pope ditches Latin as official language of Vatican synod,* Reuters (Oct. 6, 2014), https://www.reuters.com/article/us-pope-latin/pope-ditches-latin-as-official-language-of-vatican-synod-idUSKCN0HV1O220141006. Before this move by the Pope, Latin had been the official language of the State of the Vatican City.

[5]In other words, the court sends the package directly to the Holy See, asking the judicial entity there to help in serving the country itself.

[6]William A. Barton, Recovering for Psychological Injuries 525 (3rd ed. 2010).

[7]When serving the Holy See through letters rogatory fails, the FSIA provides for service of process via diplomatic channels. *See* 28 U.S.C. § 1608(a)(4). A litigant may serve the Holy See under § 1608(a)(4): "[I]f service cannot be made within 30 days under [§ 1608(a)(3)], by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted."

[8]This letter must specify that that request is under 28 U.S.C. § 1608(a)(4), and include any other details, exhibits, or explanations as a basis for the request.

[9]In this case, proof that the Holy See rejected a DHL package with the documents mentioned would suffice.

[10]*See* U.S. District Court for the District of Columbia, Attorney Manual for Service of Process on a Foreign Defendant (July 2018), https://www.dcd.uscourts.gov/sites/dcd/files/AttyForeignMlg2018wAttach.pdf.

[11]*See id.*

[12]*See*, *e.g.*, U.S. Department of State Letter of Transmittal, *D.M. v. Holy See, et al.,* No. 1:19-cv-0030 (District of Guam).

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Products, 12 Nova. L. Rev. 213, 229 (1987).

[5]*See id.*

[6]*See id.*

[7]H.R. 989, 110th Cong. (2007).

[8]*Dunn v. Kanawha City. Bd. Of Educ.,* 459 S.E.2d 151, 157 (W. Va. 1995).

[9]Robert A. Sachs, *Product Liability Reform and Seller Liability: A Proposal for Change*, 55 Baylor L. Rev. 1031, 1037 (2003).

[10]*See id.*

[11]Colo. Rev. Stat. Ann. § 13-21-402(1).

[12]Colo. Rev. Stat. Ann. § 13-21-402(2).

[13]Ind. Code Ann. § 34-20-2-3.

[14]Ind. Code Ann. § 34-20-2-4.

[15]*See* N.J. Stat. Ann. 2A:58C-9; s*ee also Fidelity and Guar. Ins. Underwriters, Inc. v. Omega Flex, Inc.*, 936 F. Supp. 2d 441 (D.N.J. 2013).

[16]*See Fidelity and Guar. Ins. Underwriters, Inc. v. Omega Flex, Inc.*, 936 F. Supp. 2d 441 (D.N.J. 2013).

[17]N.J. Stat. Ann. 2A:58C-9

[18]N.J. Stat. Ann. § 2A:58C-9(d).

[19]Similarly, in New York, manufacturers and retailers have some indemnity protections through common law. "New York courts have consistently held that common-law indemnification lies only against those who are actually at fault." *Nourse v. Fulton Cnty. Cmty. Heritage Corp.*, 2 A.D.3d 1121, 1122 (2003); *see Colyer v. K Mart Corp.*, 273 A.D.2d 809, 810 (2000), *Trustees of Columbia Univ. v. Mitchell/Giurgola Assoc.*, 109 A.D.2d 449, 451 (1985). In the products liability context, a manufacturer is held accountable as a "wrongdoer" when it releases a defective product into the stream of commerce, *see Rosado v. Proctor & Schwartz,* 66 N.Y.2d 21, 25-26 (1985), and "innocent" sellers who merely distribute the defective product are entitled to indemnification from the at-fault manufacturer. *See Godoy v. Abamaster of Miami,* 302 A.D.2d 57, 62 (2001).

[20]Ariz. Rev. Stat. Ann. § 12-684.

[21]Rachel S. Nevarez, *How to Take Advantage of "Seller's Exception" Statutes*, American Bar Association (2016), https://www.americanbar.org/groups/litigation/committees/products-liability/practice/2016/how-to-take-advantage-sellers-exception-statutes/.

[22]Innocent Sellers Fairness Act, H.R. 5500, 109th Cong. (2006).

[23]Innocent Sellers Fairness Act, *supra* note 7; H.R. 2518, 111th Cong. (2009).

[24]Innocent Sellers Fairness Act, *supra* note 22.

[25]Innocent Sellers Fairness Act, H.R. 2746, 113th Cong. (2013).

[26]Innocent Sellers Fairness Act, H.R. 1199, 114th Cong. (2015); H.R. 1118, 115th Cong. (2017).

[27]*See* H.R. 1118, 115th Cong. (2017).

[28]Innocent Sellers Fairness Act, *supra* note 25.

[29]*See* Innocent Sellers Fairness Act, H.R. 5500, 109th Cong. (2006); H.R. 989, 110th Cong. (2007); H.R. 1118, 115th Cong. (2017).

Unprecedented Times Call for Quick Precedent From the Supreme Court's "Shadow Docket"

By Steven E. Kish, Howard & Howard Attorneys PLLC

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As the old adage goes, "the wheels of justice grind slowly, but they grind exceedingly fine." Civil cases resolve after a little more than two years—a median of 27 months—from when they are filed in U.S. district courts. The appellate process takes months or years thereafter.[1] Meanwhile, COVID-19 has killed over 650,000 people in the United States.[2] The slow-moving judicial system, deliberative as it is, seemed ill-equipped to face the pandemic's dynamic regulatory and legal landscape. The "shadow docket" has provided litigants with a more expedient path to Supreme Court review during the COVID-19 pandemic. But now we are left with the question of the precedential weight that these shadow docket cases and opinions should be afforded.

The juxtaposition of the ever-changing regulatory landscape in response to the COVID-19 pandemic vis-à-vis Supreme Court review is underscored by Justice Kavanaugh's concurrence in *Alabama Association of Realtors, et al. v. Department of Health and Human Services, et al.* In his one-paragraph opinion, Justice Kavanaugh joined Chief Justice Roberts and Justices Kagan, Sotomayor, and Breyer to uphold the eviction moratorium. The reason? "[T]he CDC plans to end the moratorium in only a few weeks." Thus, Justice Kavanaugh's opinion demonstrates the importance of timing when challenging and seeking review of these policies. Although his was the deciding vote to keep the eviction moratorium in place, Justice Kavanaugh went a step further: He "agree[d] with the District Court and the applicants that the Centers for Disease Control and Prevention exceeded its existing statutory authority by issuing a nationwide eviction moratorium."[3] Accordingly, Justice Kavanaugh's concurrence evinces a willingness to address the merits of an underlying action, particularly in response to the COVID-19 pandemic.

But there is an even more expeditious path to Supreme Court review. Injunctive relief has offered litigants a fast pass to the High Court by way of the so-called "shadow docket." The shadow docket is the part of the Supreme Court's docket in which the Court issues orders without argument and often truncated briefing.[4] For instance, *Alabama Association of Realtors* was submitted to the Court at the beginning of June; a decision followed within the month. While the one-month turnaround is notable, the COVID-19-related cases decided on the shadow docket were even more swiftly decided. The shadow docket allowed California litigants to quickly bludgeon COVID-19 restrictions on religious gatherings, as the Supreme Court sided against Governor Newsom on five separate occasions over only three months.

Although orders from the shadow docket ordinarily involve only procedural matters, emergency injunctive relief is handled on the shadow docket, where litigants have increasingly used expeditious review to their advantage. Interestingly, shadow docket orders—usually devoid of in-depth reasoning and analysis—have increasingly gone beyond the mere grant or denial of injunctive relief. Instead, the Court has grappled with the substance and merits of the underlying action.[5]

COVID-19-related cases challenged restrictions on religious gatherings, issues of prisoner safety, business closures, and the election.[6] In November 2020, litigants successfully enjoined then-Governor Cuomo's restrictions on religious gatherings.[7] The five successful challenges to Governor Newsom's COVID-19 policies built on *Roman Catholic Diocese*, beginning with the Court's Feb. 5, 2021, decisions in *Harvest Rock Church v. Newsom* and *South Bay Pentecostal Church v. Newsom*.[8] The plaintiffs' success before the High Court continued on with *Gish v. Newsom* on Feb. 8 and *Gateway City v. Newsom* on Feb. 26.[9] The Court's repudiation of Newsom's COVID-19 policies vis-à-vis religious gatherings culminated in the April 9, 2021, opinion in *Tandon v. Newsom*.[10]

Of the two Feb. 5 decisions, *South Bay* was the more substantive. Indeed, the justices' positions in *Harvest Rock* were based on their respective decisions in *South Bay*.[11] In *South Bay*, the Court enjoined a prohibition against indoor worship—while denying the application as to a 25 percent capacity limit and a

prohibition against singing and chanting—holding that "California has openly imposed more stringent regulations on religious institutions than on many businesses." Although the Court allowed the 25 percent capacity limit and prohibition against singing and chanting to stand, the justices did so "without prejudice to the applicants presenting new evidence to the District Court that the State is not applying the percentage capacity limitations or the prohibition on singing and chanting in a generally applicable manner." Justices Barrett and Kavanaugh gave the litigants a blueprint to follow on remand: "if a chorister can sing in a Hollywood studio but not in her church, California's regulations cannot be viewed as neutral." Thus, the *South Bay* decision struck at the merits of the underlying action.[12]

The Supreme Court then summarily granted the applications in *Gish* and *Gateway City,* as their outcomes were "clearly dictated by [the] Court's decision in *South Bay*." The Court did so with virtually no substantive discussion—bringing it more in line with an ordinary shadow docket opinion.

In *Tandon*, the Ninth Circuit believed "it was essential in the recent Supreme Court decisions that the regulations in question implicated religious activity in houses of worship." Thus, by the circuit court's estimation, neither *South Bay* nor *Gateway City* compelled injunctive relief because, "[w]hen compared to analogous secular in-home private gatherings, the State's restrictions on in-home private religious gatherings are neutral and generally applicable and, thus, subject to rational basis review."[13]

The Supreme Court disagreed. In its six-page opinion, the Court held precisely the contrary, reasoning that "precautions that suffice for other activities suffice for religious exercise too," which was fatal to California's COVID-19 response that "contain[ed] myriad exceptions and accommodations for comparable activities, thus requiring the application of strict scrutiny." Therefore, principles of strict scrutiny "dictated the outcome in [*Tandon*], as they did in *Gateway City Church v. Newsom*." Thus, the Court ultimately held as follows:

> Applicants are likely to succeed on the merits of their free exercise claim; they are irreparably harmed by the loss of free exercise rights "for even minimal periods of time"; and the State has not shown that "public health would be imperiled" by employing less restrictive measures.[14]

Now, the question remains: What precedential value is to be afforded to these decisions? Given the Supreme Court's willingness to unambiguously address the merits of an underlying action, the opinions coming from the shadow docket have been increasingly substantive. Arguably, a lot of that substance constitutes nonbinding *dicta*, but the Court itself has been willing to apply its reasoning from prior shadow docket opinions to decide the outcome of other challenges. The outcome of *Harvest Rock* was predicated on *South Bay*, both of which dictated the results in *Gish*, *Gateway City*, and *Tandon*.

Accordingly, while the wheels of justice have historically turned slowly, it seems the shadow docket has the capacity to kick the Court into overdrive. While it is unclear just how much these shadow docket opinions will drive future precedent, they have already had an impact on the Court's reasoning. In recent months, that impact has extended beyond the context of COVID-19-related capacity restrictions. Two cases are of particular note: *Alabama Association of Realtors v. Dep't of Health and Human Services*[15] and *Whole Woman's Health v. Austin Reeve Jackson, Judge*.[16]

After Congress failed to extend the federal eviction moratorium, the CDC took it upon itself to do so.[17] *Alabama Association of Realtors* was the second shadow-docket challenge to the CDC's eviction moratorium. This time, the Court allowed the CDC's federal eviction moratorium to expire. Importantly, the district court below that struck down the eviction moratorium reasoned that, this time around, a stay pending appeal was not warranted because "the Government was unlikely to succeed on the merits, given the four votes to vacate the stay in this Court and Justice Kavanaugh's concurring opinion."[18]

In *Whole Woman's Health*, a majority of the Court denied injunctive relief to litigants challenging Texas's controversial law, S.B. 8, which went into effect on Sept. 1, 2021. Chief Justice Roberts noted that, as a result of shadow-docket procedure, the Court was asked to resolve "novel questions—at least preliminarily—in the first instance, in the course of two days, without the benefit of consideration by the District Court or Court of Appeals" and "to do so without ordinary merits briefing and without oral argument." Justice Kagan lambasted the majority's decision, saying that it "illustrates just how far the Court's 'shadow-docket' decisions may depart from the usual principles of appellate process." [19]

The Supreme Court has embraced several substantive, controversial, and timely issues on its shadow docket. It appears that district courts have taken note. Thus, it behooves savvy litigants and Supreme Court advocates to review shadow docket opinions and, where such opinions are substantive, invoke them to their advantage. The challenge will be in delineating where substantive authority ends and dicta begins. ⊙

Endnotes

[1]Joanna R. Lampe, *Lawsuits Against the Federal Government: Basic Federal Court Procedure and Timelines*, Congressional Research Service (Dec. 22, 2020) https://fas.org/sgp/crs/misc/IF11349.pdf.
[2]The first few thousand COVID-19-related deaths were reported in March 2020; over 500,000 deaths were reported by February 2021, and that number has continued to climb. Centers for Disease Control and Prevention, Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory (Sept. 9, 2021), https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases.
[3]*Alabama Assoc. of Realtors, et al. v. Dep't of Health and Human Servs., et al.*, 594 U. S. ____ (2021) (Kavanaugh, J., concurring).
[4]William Baude, *The Supreme Court's Secret Decisions*, New York Times (Feb. 3, 2015), https://www.nytimes.com/2015/02/03/opinion/the-supreme-courts-secret-decisions.html; Samantha O'Connell, *Supreme Court "Shadow Docket" Under Review by U.S. House of Representatives*, American Bar Association (April 15, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/scotus-shadow-docket-under-review-by-house-reps/.
[5]O'Connell, *supra* note 4; *see also* Stephen Wermiel, *Symposium: Coronavirus Litigation Lurks in the Shadows*, SCOTUSblog (Oct. 26, 2020, 5:18 PM), https://www.scotusblog.com/2020/10/symposium-coronavirus-litigation-lurks-in-the-shadows/.
[6]*Id.*; *see also* Stephen Wermiel, On the Supreme Court's Shadow Docket, the Steady Volume of Pandemic Cases Continues, SCOTUSblog (Dec. 23, 2020, 3:16 PM), https://www.scotusblog.com/2020/12/on-the-supreme-courts-shadow-docket-the-steady-

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[7]*Roman Catholic Diocese of Brooklyn, N.Y. v. Andrew M. Cuomo, Gov. of N.Y.*, 141 S. Ct. 63 (2020).
[8]*Harvest Rock Church* v. *Newsom,* 141 S. Ct. 1289 (2021); *South Bay Pentecostal Church, et al. v. Newsom, et al.*, 141 S. Ct. 716 (2021).
[9]*Gish* v. *Newsom*, 141 S. Ct. 1460 (2021); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021).
[10]*Tandon v. Newsom,* 141 S. Ct. 1294 (2021).
[11]*Harvest Rock*, *supra* note 8.
[12]*South Bay*, *supra* note 8.
[13]*Tandon v. Newsom*, 992 F.3d. 916 (9th Cir. 2021).
[14]*Tandon*, *supra* note 10.
[15]*Ala. Assoc. of Realtors v. Dep't of Health and Human Servs.*, 141 S. Ct. 2485 (2021).
[16]*Whole Woman's Health v. Austin Reeve Jackson, Judge*, 141 S. Ct. 2494 (2021).
[17]Temporary Halt in Residential Evictions in Communities With Substantial or High Transmission of COVID-19 To Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43244 (Aug. 6, 2021).
[18]*Ala. Assoc. of Realtors, supra* note 15 (citing *Ala. Ass'n of Realtors v. United States Dep't of Health & Human Servs.*, No. 20-CV-3377 (DLF), 2021 WL 3577367 (D.D.C. Aug. 13, 2021)).
[19]*Whole Woman's Health*, *supra* note 16.

No Plans to End 30 Years of Service

By Michael Bartish, Springstead Bartish Borgula & Lynch, PLLC

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In May 1991, I was an 18-year-old senior at St. Xavier High School in Cincinnati. Earlier that spring, I had been accepted to the University of Notre Dame—my "dream school." We had just received Notre Dame's financial aid package in the mail. Notre Dame's package was significantly less than what was offered to me by other comparable universities—but those schools were not Notre Dame. Even as an 18-year-old, it was hard for me to justify the additional cost that my parents would incur because of my choice to attend Notre Dame. So, I made the decision to enroll in the Army ROTC program at Notre Dame.

I do not come from a military family. Military service was not even on my or my family's radar back in 1991. I was doing this strictly for the scholarship money. I figured I would join ROTC for the scholarship, complete my four years of mandatory military service, and move on to a regular life as soon as I fulfilled my military commitment. Somewhere along the way, however, I stumbled across the U.S. Army Judge Advocate General's Corps (JAG Corps). Now, 30 years later, I am still serving in the Army JAG Corps Reserves and loving every minute of it.

The First Four Years

When I tell people that I am a JAG officer, or Judge Advocate (JA), in the U.S. Army Reserves, it naturally elicits a number of questions:

- What exactly does a JAG do?
- How do you do all those things while still maintaining a civilian practice?
- Didn't that show get canceled years ago?
- Have you ever screamed "did you order the CODE RED?" at some colonel?

Each branch of the U.S. military has a legal component led by a senior legal advisor, designated as The Judge Advocate General (TJAG). The U.S. Army was the first military branch to designate such an office. JAs are tasked with providing an entire array of legal services necessary for a fully functioning legal system. JAs must, of course, be versed in all aspects of military law, including military justice, national security law, administrative and civil law, and contract and fiscal law. However, JAs must also be versed in civilian law such as real estate, procurement, estate planning, and really any other specialty in the civilian sector. In fact, you could think of the most obscure area of the law, and I promise you there is some JA out there who specializes in it.

During a military career, a JA should expect to serve in a myriad of different positions. Most Army JAs begin their military legal careers as a legal assistance or client services attorney. This position is most akin to a civilian legal aid attorney. Believe it or not, young soldiers will occasionally get themselves embroiled in legal issues such as vehicle purchase from less than reputable auto dealerships, magazine subscription contracts, and debt collection issues, among others. The legal assistance attorney assists soldiers with these issues and will sometimes negotiate on the soldier's behalf with these companies. As a JA gains more experience, they will typically move on to a trial counsel position. A trial counsel typically serves as a prosecutor for a particular Army unit to which he or she is assigned. A trial counsel advises the various commanders who serve within his or her unit, makes charging recommendations to the commanders for violations of the Uniform Code of Military Justice (UCMJ), and ushers those cases to court-martials (trials) once they are referred. Often, following a stint as a trial counsel, a JA will move on to serving as a Trial Defense Services (TDS) counsel, which is akin to a public defender. Every member of the military charged with a violation of the UCMJ is assigned a TDS counsel to represent them at courts-martial. TDS attorneys have one job within the military, to protect and defend the rights of the soldier (client). While not every JA ends up serving in these positions during their first tour, this is generally the most common career progression.

Immediate Trial Experience at Fort Hood, Texas

I spent my four first years in the military as an attorney in JAG Corps serving at Fort Hood, Texas. I spent one year as a legal assistance attorney, two years as a trial counsel, and my final year as a TDS attorney. During that brief four-year period (from the ages of 26-30), I tried, as lead counsel, six attempted murder contested jury trials, three first-degree murder contested jury trials, and four other miscellaneous felony contested

jury trials. I obtained more trial experience before the age of 30 than any of my law school counterparts. Rather than carrying a partner's briefcase, I was managing my own criminal case load and putting together trial strategies. As an individual who always wanted to be a criminal defense trial attorney, the experience was invaluable. Even in the busiest prosecutor and public defender's office, an attorney normally has to wait years before getting the opportunity to try the most serious criminal offenses. Thanks to the JAG Corps, I got that opportunity at age 28.

Continued Service in the Army Reserves

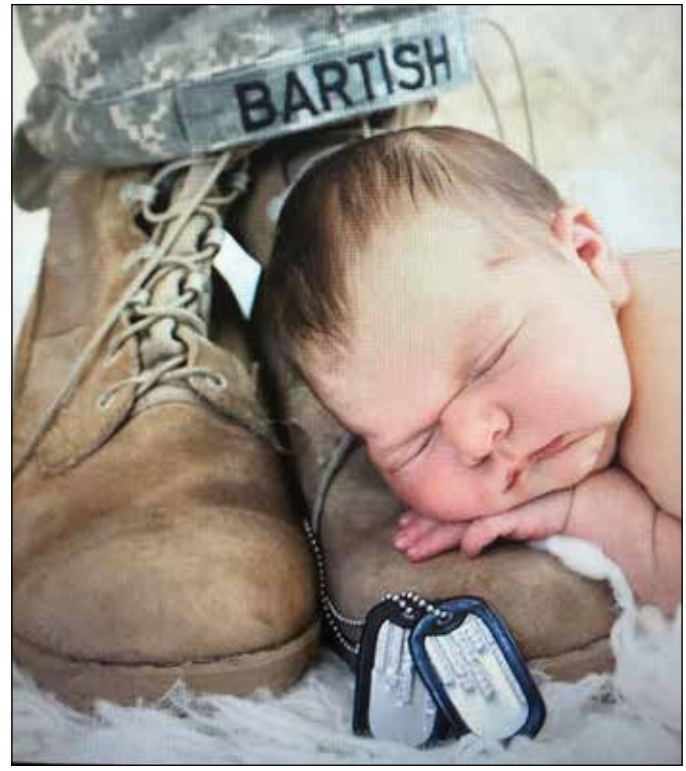
The question I most often receive after I try to explain what exactly a JA does is why I have continued to serve as a Reserve Officer in the JAG Corps after my initial four-year commitment ended. Why do I spend one weekend a month and two weeks a year traveling to another city to deal with subject matter that often has little to do with my civilian practice? For me, the short answer is because it is fun and incredibly rewarding.

The JAG Corps Is a Family

Even more important than the trial experience I received were the people I met while serving. The JAG Corps is truly a family. During my initial four-year active-duty assignment, I lived with two fellow single male JA officers in a rented home. The then 4th Infantry Division Staff Judge Advocate (SJA) (who later became the Army TJAG) lived two streets over from our rented house. Skeptical of the ability of three single 20-something males to take care of themselves and eat properly, she watched over us like we were her sons, sometimes bringing us portions of her family's meals. Conversations with fellow JAs throughout my Army career indicate that ours was not a unique experience. Almost all JAs have stories of how our commanding officers and leaders were much more than just our supervisors. I went to countless barbecues and picnics at our SJA's home, took numerous staff rides to interesting locations, and competed on many football and soccer fields in interoffice scrimmages where I found the 50-something SJA as fierce of a competitor as the 19-year-old enlisted soldier. The leadership of our commanders made us much more than co-workers; we were family. To this day, I try to emulate these former supervisors' leadership styles, not only in my leadership positions within the various Army Reserve units in which I have served, but also in the manner in which I supervise and lead the associates and staff in my civilian practice.

Diverse Experience and Diverse Job Assignments in the Reserves

Leaving active duty was one of the hardest decisions I made. Fortunately, the JAG Corps Reserves allowed me to continue to serve after entering the civilian work force. I have served in the JAG Corps Reserves since leaving active duty in 2002. The Reserve experience, although different, has been equally rewarding. The quality of people and sense of family remain the same. The only difference is the sheer variety of attorneys with different expertise with whom we get to serve. For example, in my current Reserve unit, I serve alongside a former U.S. attorney, an FBI agent, a federal public defender, numerous state prosecutors, a senior partner in a major New York City law firm, an e-gaming sports agent, and numerous solo practitioners. Many of the JAG units in which I have served were full of very powerful and brilliant attorneys who have every right to have enormous egos. Yet when we get together during military drill weekends, no egos exist. We are that family, uniformly committed to fulfilling our mission and our roles within the U.S. JAG Corps. During my last drill period, I spent four hours in the Arizona desert trying to complete a land navigation course alongside a U.S. district court judge and the chief legal officer of a major international corporation. Yet all we cared about was locating our last point on the land navigation course.



Boots and dog tags provide the best accessories for a newborn photo of LTC Bartish's youngest daughter in 2015.

The experiences available to Reserve JAs are equally diverse. For example, during my Reserve career, I have served as a TDS attorney, a Military Defense Appellate Division attorney, and a civil affairs attorney. In the Michigan National Guard, I served as the chief legal advisor for a National Guard unit responsible for responding and coordinating the federal government's relief efforts in the event of an attack in the United States. JA Reservists also have opportunities to volunteer for one-year temporary tours of active duty where they can often pick assignments that appeal to them and serve in that assignment for six months to one year. I served with Reserve JAs who deployed to Guantanamo Bay Detention Camp to serve as the camp's legal officer. I served with other Reserve JAs who volunteered for active-duty assignments representing the detainees at Guantanamo Bay. Some of these officers represented the most infamous detainees at the camp and were featured in GQ for their work. While serving in the Michigan National Guard, I worked with officers who were tasked with overhauling the military justice system for the Liberian Army. The opportunities available to Reserve JAs are almost unlimited and allow the Reservist to essentially try out an assignment for a year and then go back to their regular life.

The Sacrifice and Benefits of Service

Serving in the JAG Corps Reserves does require some sacrifice. It helps to have understanding co-workers and an understanding local

Top left: Tackling the land navigation course with members of the 117th LOD at the Arizona National Guard Florence Military Reservation. Top right: LTC Bartish and his family enjoying a Disney Cruise aboard the *Disney Fantasy* in September 2014. Bottom: LTC Bartish with three of his four children following his promotion to Lieutenant Colonel while serving in the Michigan National Guard 46th Military Police Command.

bar. While my Reserve service has on occasion disrupted my civilian criminal defense practice, I have yet to run into a prosecutor or judge who was not willing to accommodate my military schedule. My law partners are equally accommodating. You absolutely need an understanding spouse. I could not continue to serve as long as I have without the support of my wife, who has been required to be both mom and dad on a number of occasions when my service has taken me away from my family.

There are other measurable perks besides the additional pay that service in the Reserve JAG Corps provides. My Reserve service provides health care for me and my family. One of the major costs of going off on your own and starting your own law firm is health care. Because of my Reserve service in the JAG Corps, I did not have to worry about health care costs when I made the leap to start a criminal defense firm with my current law partners. I have been able to call upon the expertise of my fellow Reservists numerous times for assistance in my civilian practice and have received numerous client referrals from Reserve JAs throughout the country. Finally, and most important to my kids, our family of six has gone to Walt Disney World every year for the last 10 years, thanks to being able to stay at the military property Shades of Green located right on the grounds.

Steward of the Profession

I assure you that I am not a professional recruiter for the JAG Corps. However, anytime anybody asks me to describe the JAG Corps, I unintentionally turn into a cheerleader. During my time in the Reserves, I have recruited six civilian attorneys into the JAG Corps simply by explaining to them what I do one weekend a month, two weeks a year. Some of these people were dissatisfied with their current jobs and looking for a change. Some just wanted to serve their country. One was not even considering military service and was just curious as to where I went once a month. All of them are still serving in the Reserve JAG Corps to this day. I run into all of them occasionally. Like me, they are all still having fun.. ☉

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Hon. David L. Russell

Senior U.S. District Judge, Western District of Oklahoma

by Gerard Michael D'Emilio

Gerard Michael D'Emilio is an attorney with GableGotwals in Oklahoma City. He previously served as Judge Russell's law clerk. He also recently clerked for Judge Jerome Holmes, U.S. Court of Appeals for the Tenth Circuit. D'Emilio graduated with highest honors from the University of Oklahoma College of Law in 2018. He thanks those who contributed to this profile, especially Judge Russell and his judicial colleagues, staff, and former clerks.

If you are looking for someone who has done it all, Judge David Russell may be your man. Now entering his 40th year on the bench, hardly a legal position exists that Judge Russell has not performed in his decades-long career of public service. Through it all, the native Oklahoman has been led by the principles of fairness, open-mindedness, selflessness, and humility—and his sterling reputation in the Oklahoma legal community reflects this.

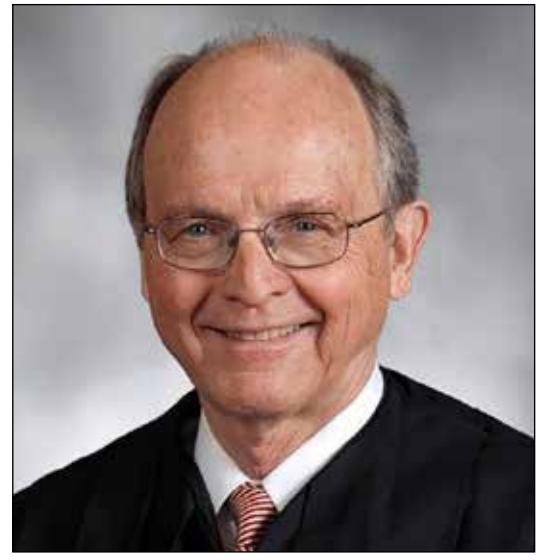
Judge Russell was born in Sapulpa, Okla., in 1942, the younger of Lynn and Elizabeth Russell's two children. Owing to his father's career, Judge Russell led an itinerant childhood, attending at least nine different schools across two states. Eventually, his family settled in McLoud, Okla.—on the homestead Judge Russell's grandfather claimed during Oklahoma's Kickapoo Land Run in 1893. Auguring an exceptional future, Judge Russell skipped the last year of high school and graduated early in 1959.

After high school Judge Russell attended Oklahoma Baptist University (OBU) in Shawnee, graduating with a bachelor's degree in just three years. It was at OBU that the future judge first developed an interest in politics:

> OBU was just perfect. I had some wonderful professors there. I had three or four professors that literally affected my life. They had that kind of influence on me, history and politics and philosophy and literature. Believe it or not, I picked up a book at OBU by William Buckley called "Up from Liberalism"—and my family had no political background at all—and reading it, again, affected my life. I was kind of fascinated by politics and by his slant on it.

Motivated by his new interests, Judge Russell started at the University of Oklahoma College of Law in 1962, graduating in 1965 at the age of 22—the youngest-ever graduate of OU Law at the time.

After graduation, Judge Russell rose to the rank of lieutenant commander, including three years of active-duty service in the Navy's Judge Advocate General's Corps, traveling as far as the Philippines and Hong Kong to try cases—ideal for the man who would



one day visit every continent on Earth. Returning to Oklahoma City in 1968 and looking for work, he walked into the Oklahoma attorney general's office and, on a whim, asked to speak with G.T. Blankenship, the man who held the position. Blankenship hired Judge Russell on the spot.

After two years, Blankenship informed 28-year-old Judge Russell that Oklahoma's governor, Dewey Bartlett, wanted him as his legal counsel. A late-night interview at the Governor's Mansion began Judge Russell's long and career-shaping association with Bartlett. Judge Russell would eventually serve as Bartlett's chief legislative assistant when the former governor became Oklahoma's senator.

In 1975, Senator Bartlett submitted 33-year-old Judge Russell's name for U.S. attorney for the Western District of Oklahoma—the "best job in the world," says Judge Russell. His tenure did not start quietly:

> The first case I handled when I was the U.S. Attorney was for the attempted bombing of the Western District courthouse. A woman had left a bomb at the west side of the courthouse on a Sunday night. She allegedly had been a part of the Symbionese Liberation Army. Fortunately, the bomb didn't go off. The jury convicted.

Judge Russell left the U.S. attorney's office in 1977, but following the elections of President Ronald Reagan and Senator Don Nickles, R-Okla., in 1980, he again became the Western District's U.S. attorney—the only person to hold that office twice. His term was again eventful, as Judge Russell handled a massive public corruption case that led to the prosecution of over 200 Oklahoma county commissioners for illegal kickback schemes.

Judge Russell's second stint as U.S. attorney was even briefer than his first—as he was quickly nominated for the position he holds today. Judge Russell remembers the call informing him of his nomination:

> I knew I was under consideration to be a federal judge, but it was not set in stone. I was sitting at my desk in the U.S. Attorney's office one day and my secretary came in and said, "Mr. Russell, there's a call for you from the White House, from the President." And I kind of rolled my eyes and thought, "which of my friends is doing this to me?" I said, "Okay, put him through," kind of laughing. I answered the phone and this voice says, "Mr. Russell, can you hold for the President?" I still thought one of my pals is pulling my leg here. And then this voice came on, and President Reagan has a rather inimitable voice, and he could not have been more gracious. He said, "David, I'd like to nominate you to be a federal judge, if you'd consider that." And of course I said yes.

Nominated on Dec. 4, 1981, Judge Russell was confirmed by the Senate on Dec. 16, received his commission on Dec. 17, and was sworn in on Jan. 12, 1982. He originally served in a joint seat for the Eastern, Western, and Northern Districts of Oklahoma, but he was reassigned only to the Western District in 1990. The thought of becoming a federal judge having never crossed his mind, Judge Russell was 39 years old when he assumed the bench.

Like his time as U.S. attorney, Judge Russell's judicial tenure started off with a bang. Within months of his swearing-in, Oklahoma's Penn Square Bank failed, and with the failure came a glut of civil cases: the Western District wound up with the highest case load per judge in the nation, and Judge Russell went from 180 pending civil cases when he started to over 600 cases by the mid-1980s. He oversaw scores of trials arising out of the bank failure, affording him critical courtroom experience from virtually his first day as a judge.

Judge Russell's early years on the bench also reaffirmed his conviction that the life tenure enjoyed by federal judges is a critical component of the measured decision-making and evenhandedness typifying the federal judiciary. In 1983, Judge Russell issued an order in *Norma Kristie, Inc. v. City of Oklahoma City*, which involved the plaintiff's permit request to rent Oklahoma City's Myriad Convention Center for a national female impersonator contest, the "Miss Gay America Contest."

Judge Russell in Antarctica, 2001.

The city, without explanation, denied the request; the city manager later testified that he denied the permit because "he thought the event to be an open expression of homosexuality which ... violated prevailing community standards" and, therefore, was "obscene."[1]

Judge Russell ruled for the plaintiff, finding the Convention Center to be a public forum and noting that "[p]rior restraints on expression," like the city's permit denial, "come before the courts bearing a heavy presumption against their constitutional validity."[2] He wrote further,

> Whether the pageant is an open expression of homosexuality is irrelevant. In view of acclaimed performances by Dustin Hoffman, Julie Andrews, Flip Wilson, Harvey Korman, Tony Curtis and Milton Berle in the roles of female impersonators, such impersonations may not be necessarily equated with homosexuality. In any event, homosexual expression is protected. The First Amendment values free and open expression, even if distasteful to the majority ... As Voltaire said, "I disapprove of what you say, but I will defend to the death your right to say it." Particularly disturbing to this Court is Defendant['s] conduct in dealing with Plaintiff's application. Defendants made no effort to follow the clear dictates of the U.S. Supreme Court .... Instead, in the face of clear-cut mandates, Defendant ... unilaterally rejected the application without investigation and based only on his own opinion. Providing wholesome entertainment is an admirable motive, but government officials at all levels must shoulder the responsibility of following the law and upholding the Constitution, even when to do so is unpopular.[3]

Applying straightforward First Amendment principles, Judge Russell ordered the city to rent the Convention Center for the pageant and awarded fees and costs to the plaintiff. The pushback was swift: Judge Russell was denounced by courthouse picketers and castigated

Left: Judge Russell with a Kangaroo in Sydney, Australia, 2008. Below: Judge Russell by direction signs in Antarctica, 2001.

in newspaper op-eds. But the reaction only satisfied him that his decision was right. It also made him recall how he sometimes felt in private practice, when he would appear before elected state court judges whose campaigns might have been managed by opposing counsel. Even if those judges' rulings were fair and impartial, such familiarity between the bench and certain attorneys gave a distasteful impression. So critical to the mission of the federal judiciary is its insulation from the vicissitudes of public opinion. "The idea that a judge and his interpretations of the law should be subject to the public whim and to editorials and to the threat of being defeated in the next election because he may rule some way that's unpopular—it just goes against the whole grain of what the judiciary is supposed to be about," says Judge Russell. "The independence of the federal judiciary is the hallmark of the federal system." That commitment to following the law, without fear or favor, continues to guide him.

Perhaps the most consequential—and trying—time in Judge Russell's tenure was during his seven-year term, from 1994 to 2001, as chief judge of the Western District. At 9:01 a.m. on April 19, 1995, Judge Russell boarded a plane in Oklahoma City bound for Washington, D.C., with a changeover in Dallas. When he stepped off the plane in Texas, an American Airlines employee met him and said, "You need to call Washington." Judge Russell would soon learn that one minute after his departure, Timothy McVeigh detonated a bomb in front of the Alfred P. Murrah Federal Building across the street from the Western District courthouse, killing 168 people and injuring over 680 more in one of America's most devastating domestic terror attacks. The blast damaged the courthouse so extensively that many, including Judge Russell, initially believed it was the target.

Judge Russell, as the court's leader, took action. That evening, he raced to the court to protect its computers from the rain falling through broken windows. The next day, he assembled the Western District's judges at his home; settling on a course of action, they went so far as extending statutes of limitations until the court reopened—which it did by the following Monday. As chief judge, Judge Russell also handled all preliminary matters before the indictment of McVeigh and his accomplice, Terry Nichols, including securing counsel for both. In one of Oklahoma City's darkest hours, Judge Russell offered calm, clear-eyed leadership for the continued administration of justice.

Judge Russell held his judicial seat for another 12 years after serving as chief. While he took senior status in July 2013, he continues to keep a full docket. Never lacking for energy, Judge Russell is, as a former law clerk puts it, "Senior in Name Only."

About a life so significant, there is plenty more on which to comment. There is the judge's beloved wife of 50 years, Dana; their daughters, Lisa and Sarah; and their three grandchildren. There are the myriad awards he has won—among them the Rogers State University Constitution Day Award, the Oklahoma Baptist University Profile in Excellence Award, the Journal Record Award for Outstanding Judge, the Oklahoma Board of Trial Advocates Judge of the Year Award, and the Oklahoma Bar Association Award for Judicial Excellence. There are the administrative positions he has held on the District Judges Association of the Tenth Circuit and the Judicial Conference of the United States—even being appointed by Chief Justice Rehnquist to the Conference's Executive Committee. And there are his more than 20 years of service on the Oklahoma Methodist Foundation's Board of Directors.

But what stands out most is his reputation. One lawyer praised Judge Russell's courage, judgment, integrity, and dedication. His judicial peers lauded his loyalty, generosity, graciousness, and approachability. His friend, the late Judge Lee R. West, admired the quality of his trial work, noted that he had the lowest reversal rate of his colleagues, and opined that he was likely "the

Top: Judge Russell with the African gentlemen in Kenya, 1999. Right: Judge Russell in the well-appointed cabin in the Orient Express, 1996.

best-read member" of the Western District—no surprise, given Judge Russell's well-known reputation as an avid reader. A second colleague admired Judge Russell's job-like patience, rock-steady countenance, work ethic, and effectiveness as a mentor. Another fellow judge said,

> Judge Russell speaks often of others' kindness and humility, but never about his own. Yet he is one of the kindest and most humble individuals that I've ever met. Having known Judge Russell for many years, I have never heard him speak ill about anyone; he instead relishes the opportunity to speak of others' accomplishments. Judge Russell is one of God's finest creations.

With qualities like these, it should be obvious why Judge Russell is regarded as a superlative trial judge—he was even named Outstanding Federal Judge by the Oklahoma Trial Lawyer Association in 1988. And one need only attend Judge Russell's *voir dire*—where he recounts the history of the common law and the jury system to potential jurors—to know that trials are his favorite part of the job. While he would not change a thing about his career, Judge Russell does regret the diminishing opportunities for civil trials in federal court.

Having served 40 years as a federal judge, Judge Russell shows no signs of slowing down. He remains an exemplar for young lawyers, both those who clerk for him and those who appear in his courtroom. A faithful devotee to fairness, to calling "balls and strikes," Judge Russell's tenure on the Western District reminds practitioners why America's federal judiciary is the envy of so many nations. ⊙

Endnotes

[1]*Norma Kristie, Inc. v. City of Oklahoma City,* 572 F. Supp. 88, 90 (W.D. Okla. 1983).
[2]*Id.* at 91.
[3]*Id.* at 92 (citation and paragraph breaks omitted).

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The Bell Tolls for the Migrant Protection Protocols

CARLOS CASTAÑEDA

The death knell of the Migrant Protection Protocols (MPP), more commonly known as the "Remain in Mexico Policy," has been a milestone closely awaited by many, as well as dreaded by supporters of the controversial policy. The Biden administration surprised some by taking a gradual approach to ending this policy, but the June announcement by the Department of Homeland Security (DHS) constituted (what would have been) a de facto termination since it signifies the end of this policy's continued hampering of asylum seekers' ability to have their day in court.[1] Though a final end remains out of reach for now due to an August injunction by a federal district court, the future appears clear: the MPP is on its way out.

The rise and fall of the MPP occurred over the course of under three years, a relatively short lifespan for such an impactful immigration policy. Indeed, many had long thought it to be a dead letter of law. While the statute authorizing it has existed since 1996, no American president had used it. Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act appeared too controversial, too impractical, or too harmful to others to actually become a reality.[2] This, however, did not prevent the conjuring of the MPP into existence in late 2018.

The MPP proceeded to haunt the sociopolitical enemies (mostly asylum seekers) of those who brought it to life for that purpose. The MPP seemed to only gain strength over time, not unchallenged but still undaunted. The Ninth Circuit Court of Appeals stayed a district court's April 2019 preliminary injunction, which prevented the named defendants from continuing to implement or expand the MPP.[3] When the circuit court ultimately affirmed that preliminary injunction in February 2020, the U.S. Supreme Court quickly issued its own stay a month later.

Not until 2021 did the tide turn. The MPP suffered repeated blows, as described below, with its applicability progressively curtailed by the Biden administration every couple of months. Then, just as the moribund MPP seemed poised to meet its end, it was resurrected once more this past August.

The undead character in this legal-political narrative has thus proven surprisingly resilient. The actions that would have finished it off have occurred in three phases, in January, February, and June of 2021. If the controversial MPP was a physical wound, then these three phases, respectively, can be summarized as follows: stopping the bleeding, stitching up the cut, and then healing the wound.

The first phase came about as a partial fulfillment of a campaign promise by President Biden, who vowed to end the MPP. On the day

of his inauguration, President Biden announced that no *new persons* would be enrolled in the MPP program starting on Jan. 21, 2021. That he did not go further surprised many who had hoped for a more aggressive roll back. Yet, this stopped further bleeding and prevented the MPP from affecting even more people.

The second phase began on Feb. 2, when the president issued an executive order that, among several other directives, ordered that the "Secretary of Homeland Security shall promptly review and determine whether to terminate or modify the program known as the Migrant Protection Protocols (MPP)[.]"[4] This raised hopes for those individuals still subject to the MPP but still left much uncertainty since it gave no timeline as to when such individuals could expect to leave Mexico. On Feb. 19, with some fanfare by DHS, the first group of those with active MPP cases entered the United States with the intent to remain there while their removal cases continue, per usual.[5] Another 10,000 people did the same by the end of May, creating excitement among many, though disappointment in others who had hoped for faster processing.[6] Until all those individuals with active cases are allowed to enter the United States, the stitching of the wound will continue.

The third phase began with the June 1 memorandum by the DHS secretary, formally terminating the MPP given his "conclu[sion] that, on balance, MPP is no longer a necessary or viable tool for the Department."[7] Of course, these policy changes did not remedy the harms already inflicted by the MPP. The suturing of the metaphorical wound only went so far. Healing its worst effects remained elusive. For that reason, the announcement by DHS on June 23, 2021, constituted perhaps the best news. It announced an actual remedy—one neither specified nor even alluded to in the notable June 1 memorandum.

That announcement (but for judicial developments in August, as discussed subsequently, would have) meant that individuals issued in absentia removal orders or whose cases were terminated while subject to the MPP will be able to reopen their cases and have their day in court. Because tens of thousands of in absentia removal orders were issued, the June 23 announcement remedies one of the biggest criticisms of the MPP: how it disadvantaged asylum seekers.[8]

All told, approximately 71,002 individuals were subjected to the MPP as of June 2021. Of these, slightly over half (32,510) were issued a removal order by the presiding immigration judges and less than 1 percent (685) were granted relief other than voluntary departure. Equally notably, the great majority of those removal orders (27,842) were issued in absentia.

These incredible statistics do not show a lack of viable cases, however. While many, if not most, cases will admittedly result in a denial of relief, these statistics are more so a consequence of the MPP's detrimental impact on the right to obtain counsel and present one's case. Consider how of those ordered removed, nearly all (97.3 percent, or 31,635 people) lacked legal counsel. By contrast, of the over 1.3 million cases now pending in immigration courts across the country, only 41.1 percent lack an attorney.

The statistics provided in this article all come from published government data compiled by the Syracuse University's Transactional Records Access Clearinghouse (TRAC) as of the end of May.[9] Without the work by this organization, quantitative proof of the gravity of the MPP would remain elusive.

Almost equally elusive is the conclusion of this story, since the zombie-like MPP refuses to go quietly into the night. On Aug. 13, a federal district court issued a preliminary injunction that vacated the DHS secretary's June 1 memorandum in its entirety and ordered the Biden administration to continue implementing the "MPP in good faith until ... it has been lawfully rescinded in compliance with the APA [Administrative Procedures Act] and ... [there exists] sufficient detention capacity to detain all aliens subject to mandatory detention[.]"

Less than a week after this ruling, the Fifth Circuit Court of Appeals declined an emergency appeal to stay that injunction. It agreed with the lower court, among other holdings, that the Biden administration had likely violated the APA because of how it had terminated the MPP. Additionally, while not explicitly agreeing with the district court's ruling that the administration also violated Section 235, the appellate court did say the administration's chosen arguments to the contrary were unlikely to succeed and thus did not meet the requirements for a stay.

The U.S. Supreme Court, on August 24, likewise declined to stay the injunction. Yet, the high court's short ruling did not reference the alleged Section 235 violations; it only mentioned the APA deficiencies.

This means that the MPP's tortured history is still drawing to a close. Just as it was conjured into existence through regulations pursuant to the APA, a (more careful) adherence of the APA's holy text will vanquish it finally.

The bell tolls. It tolls for the MPP. It has rung many times throughout this year, each time with increasing sonorousness. Though the August injunction has delayed its demise, the language in the appellate courts' decisions do indicate that its demise remains foreseeable.

Soon, immigration attorneys throughout the United States will have the opportunity to assist those who have predominantly gone without legal representation for several months. Thousands of these will have a realistic chance to fight for asylum.

A new era emerges. The MPP's end draws near. ⊙

Born and raised in San Antonio, Carlos Castañeda is the first-generation son of physicians who immigrated from Mexico. He is a specialist in immigration law as certified by the Texas Board of Legal Specialization and is fluent in Spanish. Castañeda has a wide range of experience with other immigration firms. After graduating from the University of Texas at Austin School of Law with a J.D. and an LL.M., Castañeda also worked in the Texas Legislature and at the Refugee and Immigrant Center for Education and Legal Services, the largest nonprofit organization focused on immigration law in Texas.

Endnotes

[1]Dep't of Homeland Security: DHS Announces Expanded Criteria for MPP Enrolled Individuals Who are Eligible for Processing into the United States (2021), www.dhs.gov/news/2021/06/23/dhs-announces-expanded-criteria-mpp-enrolled-individuals-who-are-eligible-processing.

[2]"In the case of an alien [who is an applicant for admission and determined to be not clearly and beyond a doubt entitled to be admitted] who is *arriving on land* (whether or not at a designated port of arrival) *from a foreign territory contiguous* to the United States, the Attorney General may *return the alien to that territory*

pending a proceeding under section [240] of this title." 8 U.S.C. § 1225(b)(2)(C) (emphasis added). Of the many reasons for not using this statutory power, a key one was the practicality, or rather the impracticality, of obliging a country (Mexico or Canada) to tolerate the indefinite presence of persons not its nationals while they await and finalize removal proceedings with American administrative courts, a months-long process at best.

[3] The named defendants in that case were the trifecta of American immigration agencies and some of their officials: the United States Citizenship and Immigration Services (USCIS), Customs and Border Protection (CBP), and Immigration and Customs Enforcement (ICE). *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1110 n.1, (N.D. Cal. 2019).

[4]Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, 86 Fed. Reg. 8267 (Feb. 22, 2001).

[5]Mayra Srikrishnan, *Border Report: The End of 'Remain in Mexico' Has Begun*, Voice of San Diego (Feb. 22, 2021), www.voiceofsandiego.org/topics/news/border-report-the-end-of-remain-in-mexico-has-begun/.

[6]The numbers regarding cases transferred from the MPP to ordinary Section 240 removal proceedings were calculated by comparing MPP court records at the end of January 2021 matched with those from the end of May 2021. *MPP Transfers Into United States Slow and Nationality Inequities Emerge*, TRAC Immigration (June 17, 2021), https://trac.syr.edu/immigration/reports/650/.

[7]U.S. Department Of Homeland Security, Termination of the Migrant Protection Protocols Program (June 1, 2021), https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf.

[8]The announcement became especially important following the decision of the Board of Immigration Appeals (BIA) in *Matter of J.J. Rodriguez*, 27 I&N Dec. 762, 766 (BIA 2020), where the board held that when "DHS returns an alien to Mexico to await an immigration hearing pursuant to the Migrant Protection Protocols and provides the alien with sufficient notice of that hearing, an Immigration Judge should enter an *in absentia* order of removal if the alien fails to appear for the hearing."

[9] *Details on MPP (Remain in Mexico) Deportation Proceedings*, TRAC Immigration (Aug. 2021), https://trac.syr.edu/phptools/immigration/mpp/; TRAC Immigration, *Immigration Court Backlog Tool*, TRAC Immigration (June 24, 2021), https://trac.syr.edu/phptools/immigration/court_backlog/; *State and County Details on Deportation Proceedings in Immigration Court,* TRAC Immigration (June 24, 2021), https://trac.syr.edu/phptools/immigration/nta/.

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A First Amendment Challenge to the Forced Labor Act (18 U.S.C. § 1589) and the Need for Reform

NILES STEFAN ILLICH, PH.D.[1]

Section two of the Thirteenth Amendment began the long struggle to criminalize slavery in the United States.[2] This struggle culminated with 18 U.S.C. § 1589, which currently criminalizes slavery. Section 1589 defines "forced labor" (through the definition of "serious harm") so broadly that it infringes on the First Amendment right to association and criminalizes routine relationships—such as an employer and employee, a parent and a child, or a teacher and a student.[3] The breadth of § 1589's definition of "serious harm" creates a vagueness and overbreadth conflict with the First Amendment's Freedom of Association.[4] But § 1589's twin problems of vagueness and overbreadth are readily resolvable with the addition of an affirmative defense. This proposed affirmative defense would recognize that routine and socially accepted pressures, such as those exerted by a parent to a child or a teacher to a student or an employer to an employee, are not criminal acts. But without the addition of such an affirmative defense, 18 U.S.C. § 1589's definition of "forced labor" is an unconstitutional violation of the First Amendment right to Freedom of Association.

The Trafficking Victims Protection Act of 2000

The Trafficking Victims Protection Act of 2000 created the offense of "forced labor." This section most directly repudiated earlier and considerably narrower definitions of "involuntary servitude."[5] Section 1589 undid this prior and narrow definition of "involuntary servitude" by criminalizing labor or services secured by "serious harm" or threats of "serious harm." It is the statutory definition of "serious harm" that infringes on the First Amendment right to Freedom of Association.

The definition of "serious harm," while addressing the problems from the earlier and narrow definition, is overly broad and vague and infringes on the First Amendment right to the Freedom of Association.

The Problem With the Definition of "Serious Harm" Under the First Amendment Freedom of Association

The forced labor statute makes an act criminal when a person knowingly "provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—"

...

(2) by means of serious harm or threats of *serious harm* to that person or another person; ...

or

(4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer *serious harm* or physical restraint, shall be punished as provided under subsection (d)....

(c) In this section: ... (2) The term "*serious harm*" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same

> circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.[6]

Sections 1589(a)(2), (a)(4), and (c)(2) are unconstitutional violations of the First Amendment right to Freedom of Association because the definition of the term "serious harm" is so broad and thus so vague that it encompasses many of most fundamental of human relationships.

"A 'facial challenge' to a statute considers only the text of the statute itself, not its application to the particular circumstances of an individual."[7] The Constitution protects choices to enter into and maintain certain intimate human relationships against undue intrusion by the state and as a fundamental element of personal liberty included in the First Amendment.[8] It is this freedom that § 1589's definition of "serious harm" intrudes upon.

Section 1589(c)(2) defines "serious harm" as:

> any harm;
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> whether physical or nonphysical, including psychological, financial, or reputational harm;
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> that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.[9]

This definition stems from the Supreme Court's opinion in *Kozminski*. In *Kozminski*, the government argued that the phrase "involuntary servitude" should be interpreted broadly.[10] The Supreme Court rejected this argument and explained:

> The Government has argued that we should adopt a broad construction of 'involuntary servitude,' which would prohibit the compulsion of services by any means that, from the victim's point of view, either leaves the victim with no tolerable alternative but to serve the defendant or deprives the victim of the power of choice. Under this interpretation, involuntary servitude would include ... almost any other type of speech or conduct intentionally employed to persuade a reluctant person to work.[11]

In rejecting the government's argument, the Court explained that the government's interpretation would "criminalize a broad range of day-to-day activity" and "[i]t would also subject individuals to the risk of arbitrary or discriminatory prosecution and conviction."[12]

The Supreme Court's reasoning from *Kozminski* applies to the definition of "serious harm" because the definition is so uncertain that it "would include ... almost any other type of speech or conduct intentionally employed to persuade a reluctant person to work" and because the definition "delegate[s] to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes. [This definition] also subject[s] individuals to the risk of arbitrary or discriminatory prosecution and conviction."[13]

Hypothetical situations illustrate the problems with § 1589's definition of "serious harm." Under this definition, a person would commit the offense of forced labor if a parent *knowingly* requires their five-year-old child to clean up Legos that the child has been playing with or risk having the parent pick up the Legos and then "put them away" and not allow the child to play with the Legos for three days, if this coercive act was sufficient to compel a reasonable person of the same background and in the same circumstances as the five-year-old to clean up the Legos to avoid the penalty of losing the Legos for three days. Because the Forced Labor statue permits the prosecution of a parent who knowingly secures the labor of their five-year-old child by means of "threats of serious harm," and because the definition of "serious harm" is so vague, the statute impinges on the hypothetical parents' rights, in the most intimate of associations, to First Amendment association. And because no parent could raise a child without such coercive efforts, and because as society we encourage such coercive efforts, the parents would have no reason to believe that their conduct violated the statute.

Under this hypothetical, when all of the surrounding circumstances are considered, any reasonable child would be compelled to perform the labor or service to avoid incurring the resulting "harm," whether it is "psychological, financial, or reputational."[14] But the actors who are knowingly using the "threat of serious harm" or actual "serious harm" to secure the labor would not have fair notice that their conduct was criminal because the statute "is plagued with such 'hopeless indeterminacy' that it precludes 'fair notice of the conduct it punishes'" and it "invites arbitrary enforcement."[15]

Further, the hypothetical is but one example of the day-to-day activities that are the essence of decisions to be made and to maintain certain intimate human relationships (in this hypothetical case, to have a child) that are secured against intrusion by the state and receive protection as a fundamental element of personal liberty under the First Amendment's protection for Freedom of Association.[16]

Moreover, § 1589(a)(4) dilutes the definition of "serious harm" further because, in § 1589(a)(4), a person can be convicted if he knowingly secures the labor or service of another by "means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer *serious harm* ... , shall be punished as provided under subsection (d)."[17]

Such a "pattern" might include an agreement between parents to support each other when one parent disciplines a child appropriately—such as taking away Legos for three days after a child refused to clean them up.[18] But such a "pattern" or "plan" could easily be constructed to apply in a workplace or a school.

Under the statutory definition of "serious harm," the forced labor statute intrudes on this First Amendment right to association and specifically the choice to enter into and maintain intimate human relationships.[19] In particular, the definition of "serious harm" is so vague that no reasonable person who decided to bring a young person into their home (whether through birth, adoption, or even for a temporary stay) would be on notice that their conduct in correcting the young person or in raising that young person violated the forced labor statute. In its current form, the statute requires parents to decide whether to not have a child or young person in their home and be safe from violating this statute or to have a child or young person, raise that child or young person in a responsible way, and likely violate the Forced Labor Act.[20] For this reason, 18 U.S.C. §§ 1589(a)(2), (a)(4), and (c)(2) are unconstitutionally vague.

Invitation for Arbitrary Enforcement

The statutory definition of "serious harm" also necessitates arbitrary enforcement—as the Supreme Court anticipated in *Kozminski*.[21] In *Kozminski,* the Court hypothesized that the government's broad interpretation of the statute would criminalize "a broad range of day-to-day activity."[22] The Court continued and argued that under the government's theory, "§ 1584 could be used to punish a parent who coerced an adult son or daughter into working in the family business by threatening withdrawal of affection."[23] And the Court concluded, "[a]s these hypotheticals suggest, the Government's interpretation would delegate to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes. It would also subject individuals to the risk of arbitrary or discriminatory prosecution and conviction."[24]

Under the forced labor statute, "serious harm" is "any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm."[25]

Under this definition, any parent who knowingly conditioned a teenaged child's ability to participate in some important or significant social activity (such as a homecoming dance or a prom) on mowing the grass, helping around the home, assisting with siblings, or even requiring the child to clean his or her own room would likely violate the statute.[26] The parent's conduct would violate the statute if the requirement that the teenaged child do the "labor" or "service" was "sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm."[27] Yet, such parental direction is routine and even encouraged and arguably essential.

There is no case in which a parent was charged with forced labor for conditioning participation in a significant social event on such a "labor" or "service." But, as the Supreme Court explained in *Stevens*, "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."[28] Thus, 18 U.S.C. §§ 1589(a)(2), (a)(4), and (c)(2) are unconstitutionally vague because they invite arbitrary enforcement.

Overbroad

In the First Amendment context, the Supreme Court recognizes "a second type of facial challenge," whereby a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[29]

Here, the forced labor statute relies on a definition of "serious harm" that means "any harm; whether physical or nonphysical, including psychological, financial, or reputational harm; and, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm."[30] The statute includes a scienter requirement, but as in *Stevens*, the requirement that the act occur "knowingly" does not change the overbreadth analysis.

Instead, here, the forced labor statute create[s] a criminal prohibition of alarming breadth. Under this statute, a huge variety of constitutionally protected conduct associated with the raising of children, the supervision of employees, the education of children or adults, the rehabilitation of prisoners, the training of aspiring soldiers, and other activities all fall within the purview of the criminal aspects of this statute. For these reasons, 18 U.S.C. §§ 1589(a)(2), (a)(4), and (c)(2) are overbroad and unconstitutional.

Challenges to the Definition of "Serious Harm"

The constitutionality of § 1589's definition of "serious harm" has been unsuccessfully challenged in the courts; however, with only one exception, the definition has not been challenged as a violation of the First Amendment right to Freedom of Association.[31]

United States v. Toviave

In *Toviave*, the Sixth Circuit faced a challenge to the sufficiency of the evidence to support a conviction for "forced labor" under § 1589. The court found the evidence insufficient due to the problems with the definition of "serious harm" and wrote:

> Defendant Toviave brought four young relatives from Togo to live with him in Michigan. After they arrived, Toviave made the children cook, clean, and do the laundry. He also occasionally made the children babysit for his girlfriend and relatives. Toviave would beat the children if they misbehaved or failed to follow one of Toviave's many rules. While his actions were deplorable, Toviave did not subject the children to Forced Labor. The mere fact that Toviave made the children complete chores does not convert Toviave's conduct—what essentially amounts to child abuse—into a federal crime. Toviave's federal Forced Labor conviction must accordingly be reversed.
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> Toviave immigrated to the United States from Togo in 2001 and eventually settled in Michigan. In 2006, he contacted Helene Adoboe, a girlfriend (sometimes referred to as his wife) from Togo, and asked that she and four children—Gaelle, Rene, Kwami, and Kossiwa—come and live with him in the United States. Kossiwa is Toviave's younger sister, Gaelle and Rene are Toviave's cousins (although their degree of consanguinity is unclear), and Kwami is Adoboe's nephew. Adoboe and the children managed to enter the United States with false immigration documents. Adoboe initially lived with Toviave, but their relationship quickly soured, and the two separated in 2008.
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> Toviave apparently demanded absolute obedience from the children and was quick to beat them. Toviave hit the children with his hands, and with plunger sticks, ice scrapers, and broomsticks, often for minor oversights or violations of seemingly arbitrary rules. For example, Gaele testified that Toviave hit her in the face for using loose-leaf paper rather than a notebook to do her homework, and Kossiwa recounted an incident where Toviave hit her with a broomstick for throwing a utensil in the sink.
>
> The children were responsible for different household chores. Toviave made the children cook, clean, and do the laundry. He also made the children pack up the house when the

family moved to a new apartment, serve food to Toviave's guests, iron Toviave's clothes, and clean his van. Toviave also occasionally made the children babysit for the women he was dating, or for his relatives.[32]

Toviave concerned a challenge to the sufficiency of the evidence and did not include a challenge to the constitutionality of the forced labor statute.[33] Nevertheless, the Sixth Circuit wrote:

> Although Toviave's treatment of the children was reprehensible, it was not forced labor. Three points compel this conclusion. First, forcing children to do household chores cannot be forced labor without reading the statute as making most responsible American parents and guardians into federal criminals. Second, requiring a child to perform those same chores by means of child abuse does not change the nature of the work. And third, if it did, the forced labor statute would federalize the traditionally state-regulated area of child abuse. In short, treating household chores and required homework as forced labor because that conduct was enforced by abuse either turns the Forced Labor statute into a federal child abuse statute, or renders the requirement of household chores a federal crime.[34]

And the court provided a hypothetical situation to explain the problem with the government's theory of the case. The court wrote:

> The government's interpretation of 18 U.S.C. § 1589 would make a federal crime of the exercise of these innocuous, widely accepted parental rights. Take a hypothetical parent who requires his child to take out the garbage, make his bed, and mow the lawn. The child is quarrelsome and occasionally refuses to do his chores. In response, the child's parent sternly warns the child, and if the child still refuses, spanks him. The child then goes about doing his chores. There is no principled way to distinguish between that sort of hypothetical labor and what Toviave made the children do in this case. Both the tasks assigned to the child by the hypothetical parent and the duties assigned by Toviave are "labor" in the economic sense of the word: one could, and people often do, pay employees to perform these types of domestic tasks.[35]

Ultimately, the court found the evidence insufficient to support a conviction for forced labor and wrote "[t]he line between required chores and forced labor may be a fine one in some circumstances, but that cannot mean that all household chores are forced labor, with only the discretion of prosecutors protecting thoughtful parents from federal prosecution. The facts of this case fall on the chores side of the line."[36]

Thus, although *Toviave* did not address constitutional arguments, the reasoning illustrates the constitutional infirmity of § 1589.

United States v. Calimlim

Calimlim is one of the very few cases to address the constitutionality of the forced labor statute.[37] In *Calimlim*, two physicians brought an adolescent, Irma Martinez, from the Philippines to work for the family in the United States.[38] When Martinez arrived, the family confiscated her passport and told her that she would have to reimburse them for the cost of her plane ticket.[39] Martinez did not speak English for almost six years after arriving in the United States.[40] The family told Martinez that she was in the country illegally, and the Calimlims rarely allowed Martinez to leave the home. Over 19 years, "[t]he Calimlims allowed Martinez to speak with her family four or five times."[41] The Calimlims repeatedly told Martinez that if law enforcement agents discovered her, she could be arrested, imprisoned, and deported.

"On September 29, 2004, federal agents, acting on an anonymous tip, executed a search warrant and found a trembling Martinez huddled in the closet of her bedroom." The government charged the Calimlims with forced labor, and a jury convicted them.[42] The Calimlims challenged their convictions on the basis that the forced labor statute was unconstitutional as applied to them—and not facially. And, importantly, the Calimlims did not argue that the forced labor statute infringed on their First Amendment right to Freedom of Association.[43] The Seventh Circuit rejected the as-applied challenge.

Remedy

The importance of criminalizing forced labor is undisputed, but § 1589 prohibits far more than the unconscionable and the abhorrent and incorporates nearly all human relationships—whether professional, educational, clerical, familial, social, romantic, or platonic. Congress could readily remedy the constitutional deficiencies by creating an affirmative defense for "the procurement of labor through everyday pressures and demands." But without the protection of such an affirmative defense, § 1589 is unconstitutionally vague and overbroad.

Conclusion

The current definition of "serious harm" is likely overbroad and vague and infringes on the First Amendment right to the Freedom of Association. In its current form, the definition of "serious harm" goes to many of the fundamental (but unequal) relationships that define human existence and culture. The definition of "serious harm" need not revert to the narrow definition from *Kozminski* but should instead include an affirmative defense that permits a defendant to show that the pressure or harm that resulted in the charge for forced labor is the type of pressure that is widely accepted and even valued. With this addition, the forced labor statute would expand the offense from the narrow definition in *Kozminski* but remain constitutionally sound. ⊙

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Endnotes

[1]A prior version of this article was presented in San Juan, Puerto Rico, at the 2020 Annual Meeting of the First Amendment Lawyers Association, and a different iteration of this argument was presented

in the *St. Mary's Law Journal* in Volume 52, Number 3. A much earlier version was presented during oral argument to a panel of three appellate judges on the U.S. Court of Appeals for the Fifth Circuit. The comments from both oral presentations sharpened the argument, as did the thoughts from the student editors on the *St. Mary's Law Journal*. The author extends thanks to his employer, Scott H. Palmer, P.C., who created time for him to prepare this article.

[2]U.S. Const. amend. XIII, § 2.

[3]18 U.S.C. § 1589(c); *United States v. Toviave*, 761 F.3d 623, 624-626 (6th Cir. 2014) (holding that contrary to the Government's interpretation of 18 U.S.C. § 1589, that while "Toviave's treatment of the children was reprehensible, it was not forced labor. Three points compel this conclusion. First, forcing children to do household chores cannot be forced labor without reading the statute as making most responsible American parents and guardians into federal criminals. Second, requiring a child to perform those same chores by means of child abuse does not change the nature of the work. And third, if it did, the Forced Labor statute would federalize the traditionally state-regulated area of child abuse. In short, treating household chores and required homework as forced labor because that conduct was enforced by abuse either turns the Forced Labor statute into a federal child abuse statute, or renders the requirement of household chores a federal crime.").

[4]*IDK, Inc. v. Cnty. of Clark*, 836 F.2d 1185, 1199 (9th Cir. 1988) ("It is well established that Freedom of Association is an 'inseparable aspect' of the freedom of speech protected by the First Amendment and the liberty protected by the due process clause of the fourteenth amendment. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). Moreover, 'it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters.' *Id*. The protection of the Constitution extends to association for social as well as political ends.").

[5]Richard Carelli, *Court Rules for Michigan Farm Family Accused of Enslaving Retarded Men*, AP (June 29, 1988), https://apnews.com/article/68953e7579aedc3c64b3c2217ced7d43 ("The Supreme Court, ruling for a Michigan farm family accused of enslaving two retarded men for more than 10 years, said today that illegal involuntary servitude cannot be imposed through psychological coercion alone. By a 9-0 vote, the justices rejected Reagan administration arguments that the legal definition of involuntary servitude should be broad enough to include psychological coercion. If the court had agreed with federal prosecutors, the broader definition of involuntary servitude - outlawed by the Constitution's 13th Amendment, which abolished slavery and by federal law - could have jeopardized certain cult groups or religious orders that use psychological persuasion to enlist and retain members."); H.R. Rep. No. 106-939, at 100-01 (2000); William Wilber Force Trafficking Victims Protection Reauthorization Act of 2008, 154 Cong. Rec. H 10888, 10904; Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1467 (2000) ("Involuntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion. In *United States v. Kozminski*, 487 U.S. 931 (1988), the Supreme Court found that section 1584 of title 18, United States Code, should be narrowly interpreted, absent a definition of involuntary servitude by Congress. As a result, that section was interpreted to criminalize only servitude that is brought about through use or threatened use of physical or legal coercion, and to exclude other conduct that can have the same purpose and effect."); *Joseph v. Signal Int'l*, No. 1:13-CV-324, 2015 U.S. Dist. LEXIS 33870, at *45 (E.D. Tex. March 17, 2015) ("Congress, however, expressly repudiated Kozminsk's narrow definition of involuntary servitude with the passage of the Victims of Trafficking and Violence Protection Act of 2000"); *Kiwanuka v. Bakilana*, 844 F. Supp. 2d 107, 115-16 (D.D.C. 2012) ("*Kozminski* is not controlling, as Congress has specifically addressed the *Kozminski* decision and rejected it as too narrow."). This Act broadened the definition of involuntary servitude to "include cases in which persons are held in a condition of servitude through nonviolent coercion." *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1467 (2000) (codified at 22 U.S.C. § 7101); *see also United States v. Bradley*, 390 F.3d 145, 150 (1st Cir. 2004) ("Adopted in 2000 as part of a broader set of provisions--the Victims of Trafficking and Violence Protection Act of 2000, 114 Stat. 1464—section 1589 was intended expressly to counter *United States v. Kozminski*, 487 U.S. 931, 101 L. Ed. 2d 788, 108 S. Ct. 2751 (1988).").

[6]18 U.S.C. § 1589 (emphasis added).

[7]*Field Day, LLC v. Cnty. of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006).

[8] *City of Dallas v. Stanglin*, 490 U.S. 19, 23 (1989).

[9]18 U.S.C. § 1589(c)(2).

[10]*Kozminski*, 487 U.S. at 940.

[11]*Id.* at 949.

[12]*Id*.

[13]*Id*.; 18 U.S.C. § 1589(c)(2).

[14]18 U.S.C. § 1589(c)(2).

[15]*City of El Cenizo, Texas v. Texas*, 890 F.3d 164, 190 (5th Cir. 2018).

[16]*City of Dallas v. Stanglin*, 490 U.S. 19, 23 (1989).

[17]18 U.S.C. § 1589(a)(4).

[18]*Id.*

[19]*Id.*

[20]*Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006) (holding that to mount a facial attack "in the First Amendment context, the challenger need only show that a statute or regulation might operate unconstitutionally under some conceivable set of circumstances.") (internal quotation marks omitted).

[21]*United States v. Kozminski*, 487 U.S. 931, 949 (1988).

[22]*Id.*

[23]*Id.*

[24]*Id.*

[25]18 U.S.C. § 1589(c)(2).

[26]*Id.*

[27]*Id.*

[28]*United States v. Stevens*, 559 U.S. 460, 480 (2010).

[29]*Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n.6 (2008); *United States v. Williams*, 553 U.S. 285, 292-93 (2008).

[30]18 U.S.C. § 1589(c)(2).

[31]The exception is *United States v. Toure*, 965 F.3d 393, 400 (5th Cir. 2020). In *Toure* the constitutional challenge was brought under the rubric of the First Amendment but was unsuccessful because it was raised for the first time on appeal and did not clear the bar for "plain error." *Id*. at 400.

[32]*United States v. Toviave*, 761 F.3d 623, 624 (6th Cir. 2014).

[33]*Id.*

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What If We Wrote the Constitution Today?

JEFFREY ROSEN

As the world's oldest written constitution, the U.S. Constitution has been remarkably resilient. For more than 230 years, it has provided the foundation for America's economic prosperity, political stability, and democratic debate. But during the past two centuries, changes in politics, technology, and values have led many to assume that if Americans set out to write a new Constitution today, the document would be quite different. To find out what a new Constitution might look like, my colleagues and I at the National Constitution Center recently asked three teams of scholars—conservative, progressive, and libertarian—to draft new Constitutions for the United States of America in 2020 from scratch.

The results surprised us. As expected, each of the three teams highlights different values: the team of conservatives emphasizes Madisonian deliberation; the progressives, democracy and equality; and the libertarians, unsurprisingly, liberty. But when the groups delivered their Constitutions, all three proposed to reform the current Constitution rather than abolish it.

Even more unexpectedly, they converge in several of their proposed reforms, focusing on structural limitations on executive power rather than on creating new rights. All three teams agree on the need to limit presidential power, explicitly allow presidential impeachments for non-criminal behavior, and strengthen Congress's oversight powers of the president. And, more specifically, the progressive and conservative teams converge on the need to elect the president by a national popular vote (the libertarians keep the Electoral College); to resurrect Congress's ability to veto executive actions by majority vote; and to adopt 18-year term limits for Supreme Court justices. The unexpected areas of agreement suggest that, underneath the country's current political polarization, there may be deep, unappreciated consensus about constitutional principles and needed reforms.

The conservative team, composed of Robert P. George of Princeton, Michael W. McConnell of Stanford, Colleen A. Sheehan of Arizona State, and Ilan Wurman of Arizona State, focuses on structural reforms designed to improve the country's political discourse. Many of their proposed changes, they write, "are designed to enable elected officials to break free of the grip of faction and once again to deliberate, with the aim of listening attentively to, as well as educating, public opinion, and promoting justice and the public good." The changes they describe as most "radical" are reducing the size of the Senate to 50 members to encourage genuine deliberation, increasing senatorial terms to nine years and the presidential term to six years—both with no possibility of reelection—and (in a proposal the libertarian team also put forward) reintroducing senatorial appointment by state legislatures. In their view, these reforms would encourage elected officials to vote their conscience and focus on the common good rather than partisan interests.

The progressive team, composed of Caroline Frederickson of Georgetown University, Jamal Greene of Columbia, and Melissa

Murray of New York University, also finds much to admire and preserve in the original constitutional structure. "We wanted to make clear our own view that the Constitution, as drafted in 1787, is not completely incompatible with progressive constitutionalism," they write. "Indeed, in our view, the original Constitution establishes a structure of divided government that is a necessary precondition for a constitutional democracy with robust protections for individual rights." The goal, in their proposed changes, is to secure the blessings of liberty and equality promised by the Declaration of Independence, by doing more to strengthen the "structural protections for democratic government." Rather than abolish the Senate, the progressive team would make it more representative, with one senator for each state and "one additional senator [for] every one-hundredth of the national population." For example, California would have 13 senators, Texas would have seven, Florida nine, and 22 states (including Washington, D.C.) one. Senators would serve for one six-year term. The progressives would also decrease fundraising pressure on representatives by extending the House term from two to four years, and by making clear that the government has the power to set both spending and contribution limits in political campaigns. Their proposed Progressive Constitution would also codify judicial and legislative protections for reproductive rights and against discrimination based on gender, sexual orientation, gender identity, pregnancy, and childbirth.

The authors of the proposed Libertarian Constitution—Ilya Shapiro of the Cato Institute, Timothy Sandefur of the Goldwater Institute, and Christina Mulligan of Brooklyn Law School—emphasize their intent to clarify the original Constitution, not replace it. "At the outset," they write, "we joked that all we needed to do was to add 'and we mean it' at the end of every clause." Their particular focus is resurrecting limitations on the commerce clause. Since the New Deal era, the Supreme Court has interpreted the commerce clause to grant Congress essentially unlimited power to regulate anything that might have a tangential effect on interstate commerce. The libertarians would allow regulation only of actual interstate commerce, not of noncommercial activity that takes place within one state. They would also limit federal power in other ways, requiring all federal regulations to be related to powers enumerated in the Constitution and prohibiting the federal government from using its powers of the purse to influence state policies. Like the conservative team, the libertarians would return the selection of senators to the states, in the hope of promoting federalism. The libertarians also include a series of other restrictions on state and federal power to protect economic liberty, such as limiting the states from passing rent-control or price-control laws, prohibiting the states and the federal government from subsidizing corporations, providing for a rescission of national laws by a two-thirds vote of the states, and requiring a balanced federal budget.

Although all three Constitutions maintain a balance between state and federal power, the main differences among them concern how they strike that balance, with the libertarians imposing the greatest restrictions on federal power and the progressives the least. (In this respect, their debates resemble those of the original Framers in Philadelphia.) But, strikingly, all three Constitutions embrace structural reforms to ensure that the balance among presidential, congressional, and judicial power is closer to what the original Constitution envisioned, with all three branches checking each other, rather than an imperial president and judiciary checking a passive and polarized Congress.

Most notably, all three Constitutions seek significant limits on executive power. The three teams all clarify that the president's power to execute the law is not a freestanding power to make laws: The conservatives emphasize that executive orders don't have legal effect unless authorized by Congress; the libertarians underscore "that the power of the executive branch constitutes the power to 'execute the laws' and not some broader, freestanding power"; and the progressives propose that "Congress's oversight authority over the executive branch must be made more explicit to ensure it can effectively police wrongdoing in program administration or otherwise." To increase Congress's oversight powers over the president, both the Conservative and Progressive Constitutions would resurrect the so-called legislative veto, which the Supreme Court struck down in 1982, allowing Congress to repudiate presidential regulations and executive orders by majority vote. For both teams, the resurrection of the legislative veto would allow Congress to take the lead in lawmaking, as the Framers intended.

Along the same lines, all three Constitutions would relax the standards for impeachment, making explicit that the president can be impeached for non-criminal offenses. At the same time, both the Conservative and Progressive Constitutions would require a three-fifths vote in the House, to reduce the risk of partisan impeachments. The conservatives also note that "it is generally improper for the President personally to direct prosecutions" and that "the President may not pardon himself or the Vice President." The progressives include other reforms, such as requiring a two-thirds vote in the Senate for the confirmation of the attorney general, "to ensure that the law enforcement power of the federal government is not abused for partisan gain."

On the election of the president, the conservatives and progressives once again converge on nearly the same language, with both teams providing that the president shall "be elected by a national popular vote conducted using a ranked-choice voting method." While agreeing that the Electoral College system for choosing among candidates is not democratic enough, the conservatives believe that the system for selecting candidates undervalues experience and character; therefore, they would abandon the presidential primary system, allowing presidential candidates to be selected by elected representatives at the state level. Resurrecting a proposal that was nearly adopted at the original Constitutional Convention, the conservatives would also limit presidents to a single six-year term, to encourage them to focus not on reelection but on the common good.

Finally, there is the Supreme Court. Once again, the conservative and progressive teams agree, this time on the need for 18-year term limits for justices. And the libertarians leave the question of Court terms open (their team's leader, Ilya Shapiro, recently endorsed limits in his new book, *Supreme Disorder*), but they decide not to propose them, in the spirit of avoiding what they call purely "good government" reforms, without clear libertarian salience. This convergence suggests that if President-elect Joe Biden does, in fact, convene a commission to examine judicial reform, term limits for justices will be a proposal that has the potential for broad cross-partisan support.

It is on the subject of rights, rather than constitutional structures, that disagreements among the three teams really emerged. All three teams maintain and even strengthen most of the existing provisions of the Bill of Rights (the libertarians and progressives even update the Fourth Amendment's prohibition on unreasonable searches and

seizures for a digital age). However, each Constitution also adds provisions about rights that reflect the teams' unique concerns. For example, the progressives try to increase democracy and reduce judicial power by providing that all rights are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." By contrast, the libertarians create the opposite presumption for courts to apply in evaluating claims about rights, emphasizing that whenever government infringes on the presumption of liberty, "courts shall determine whether that government has constitutional authority for its action and a genuine justification for its restriction or regulation."

The three teams also strongly disagree about how to strike the balance between liberty and regulation when it comes to the First Amendment rights of speech and religion. All teams would include explicit protections for freedom of conscience, but they define it in different ways. The Conservative Constitution declares, "All persons have the inalienable right to the free exercise of religion in accordance with conscience," but, like the conservative justices on the Supreme Court, makes clear that the free exercise of religion cannot be impeded "except where necessary to secure public peace and order or comparably compelling public ends." The Libertarian Constitution emphasizes that "the freedoms of speech and conscience include the freedom to make contributions to political campaigns or candidates for public office." The Progressive Constitution, by contrast, provides that "everyone shall have the right to freedom of thought, conscience, and religion" but emphasizes that "Congress and the legislature of any State shall ... have the power to establish by law regulations of the financing of campaigns for elected office, provided that such regulations are reasonably aimed at ensuring that all citizens are able to participate in elections meaningfully and on equal terms." In the three Constitutions, as on the Court today, the progressives diverge from the conservatives and libertarians on campaign-finance restrictions and on religious exemptions from generally applicable laws.

Another divergence is on the topic of gun rights. Unsurprisingly, the conservative team proposes a Constitution that clearly recognizes an individual right to keep and bear arms "ordinarily used for self-defense or recreational purposes," but it does allow for the federal and state governments to pass "reasonable regulations on the bearing of arms, and the keeping of arms by persons determined, with due process, to be dangerous to themselves or others." The progressive proposal, by contrast, does not explicitly recognize an individual's right to bear arms for the purpose of self-defense, but emphasizes, like the conservatives, that gun ownership is "subject to reasonable regulation." The libertarian version alone contains no provisions for the regulation of gun rights, stating unequivocally, "The right of the people to keep and bear arms shall not be infringed."

I don't want to understate the philosophical and practical disagreements among the three Constitutions: The libertarians' emphasis on liberty leads to a much more constricted version of federal power to regulate the economy, for example, than either the progressives or the conservatives, who want to restore Congress's primary role in making laws and checking the president. But the areas of agreement—reining in presidential power and reducing partisanship in Congress—are far more surprising than the areas of disagreement.

The most striking similarity is that all three teams choose to reform the Constitution rather than replace it. And all three focus their reform efforts on structural and institutional protections for liberty and equality rather than creating a laundry list of new rights. As Shapiro put it in a recent interview about the project, "Why start from scratch when we can build on James Madison's genius?" ⊙

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[34] *Id*. at 625.
[35] *Id*. at 625-626.
[36] *Id*. at 630.
[37] *United States v. Calimlim*, 538 F.3d 706, 710 (7th Cir. 2008).
[38] *Id*. at 708.
[39] *Id*.
[40] *Id*.
[41] *Id*. at 709.
[42] *Id*. at 710.
[43] *Id.* at 708-11.


SARS-CoV-2
CORONAVIRUS
VACCINE
COVID-19

Dark Before the Dawn:

The Coming Constitutional Conflict Surrounding Mandatory COVID-19 Vaccination

BRAD TAYLOR

Readers require no history lesson regarding the COVID-19 pandemic. The effects of the outbreak are fresh and continuing—the affliction remains at the forefront of government efforts to stem the tide of infection, featured daily in news programs from every outlet, and prominent in the minds of most. Millions of Americans have been and continue to be tragically affected by the pandemic. Those spared the direct impact of the virus may have lost a friend or loved one. Those lucky enough to escape any direct effects of the disease were tangentially affected by the measures implemented to prevent the spread of the deadly virus and unforeseen consequences of the pandemic: mask mandates; work-from-home orders; employment furloughs and layoffs; brief but notable shortages of necessary household items; the inability to do many activities previously taken for granted, including visiting loved ones. It would be a huge understatement to call 2020 "a difficult year" for many Americans.

The end of 2020, however, introduced a light at the end of the tunnel. Three reportedly safe and effective vaccines were developed and offered to the American population in phases based on need and perceived vulnerability to the virus.[1] The combination of vaccination rollout, mask mandates, and social distancing staunched the spread of the infection. The ever-rising wave of COVID-19, which had threatened the lives and livelihoods of so many, had been halted or at least restrained.

As of today, the vaccine is available, free-of-charge, to every American.[2] Despite that availability, only 55.8 percent of Americans had been fully vaccinated as of Sept. 28, 2021.[3] However, 75 percent of American adults had received at least one dose of the vaccine at that point.[4] With the emergence of the Delta variant, which "is believed to be roughly twice as contagious as the original virus" and "likely more severe," a resurgence of the virus seemed likely, if not inevitable.[5] By the end of June 2021, the Delta variant accounted for over 80 percent of new infections in the United States.[6] As of July 30, 2021, "COVID-19 cases, hospitalizations, and deaths [were] once again increasing in nearly all states, fueled by the B.1.617.2 (Delta) variant, which is much more contagious than past versions of the virus."[7] The Centers for Disease Control and Prevention (CDC) also noted that "[t]he highest spread of cases and severe outcomes is happening in places with low vaccination rates."[8] Consequently, the CDC reinstated its recommendation that masks be worn "indoors in public places, to stop transmission and stop the pandemic."[9]

Despite the emergence of the Delta variant, communities within

the United States continue to transition back to normalcy (or whatever may emerge as the "new normal") by lifting or relaxing mask mandates, social distancing policies, and other restrictive measures meant to prevent the spread of infection. Private and public institutions, meanwhile, are duly concerned that the resumption of in-person, close-proximity interactions will lead to new infections. One potential means to re-open while mitigating that risk is to require employees and students to be fully vaccinated before resuming in-person activities. Mandatory vaccination would intuitively curb the spread of infection as "[t]he virus is infecting mostly unvaccinated people."[10] The Delta variant accounts for the majority of new infections, most of whom are unvaccinated.[11] The Biden administration unequivocally "threw its support behind the increasing number of employers and universities that, in recent days, have announced they will compel people to be vaccinated to return to work or school."[12] The administration has also tasked the Department of Labor with developing and implementing a rule "that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work."[13] Those who resist the call to vaccinate, however, have already sought protection by way of the First and Fourteenth Amendments to the U.S. Constitution. Yet, the U.S. Supreme Court has seemingly already settled the issue ... over 100 years ago.

The U.S. Supreme Court Upholds Criminal Law as Sanction for Refusal to Vaccinate

"[A] community has the right to protect itself against an epidemic of disease which threatens the safety of its members."[14]

—Justice John Marshall Harlan

At the outset of the 20th century, infectious diseases constituted the leading cause of death in the United States.[15] Against that backdrop, the Massachusetts legislature passed legislation permitting city boards of health to mandate vaccinations "when necessary for public health or safety."[16] In relevant part, the statute read:

> The board of health of a city or town if, in its opinion, it is necessary for the public health or safety shall require and enforce the vaccination and revaccination of all the inhabitants thereof and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit five dollars.[17]

In response to an outbreak of smallpox in 1902, Cambridge's board of health issued an order requiring all adults to be vaccinated against the disease.[18] The penalty for refusing the vaccine was a $5.00 monetary fine.[19] Henning Jacobson refused the vaccine, citing an adverse reaction to another vaccine he received as a child. He was subsequently fined and eventually appealed his case, first to the Massachusetts Supreme Court and then on to the U.S. Supreme Court.[20] Throughout the litigation, Jacobson argued:

> [H]is liberty is invaded when the State subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary and oppressive, and therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one objects to vaccination, no matter for what reason, is nothing short of an assault upon his person.[21]

At trial, Jacobson sought to introduce evidence to support several propositions, including "eleven propositions [that] all relate to alleged injurious or dangerous effects of vaccination."[22] The trial court did not allow Jacobson to introduce such evidence, and the Massachusetts Supreme Court affirmed that ruling by holding, in relevant part:

> [The jury] would have considered this testimony of experts in connection with the facts that for nearly a century most of the members of the medical profession have regarded vaccination, repeated after intervals, as a preventive of smallpox; that while they have recognized the possibility of injury to an individual from carelessness in the performance of it, or even in a conceivable case without carelessness, they generally have considered the risk of such an injury too small to be seriously weighed as against the benefits coming from the discreet and proper use of the preventive; and that not only the medical profession and the people generally have for a long time entertained these opinions, but legislatures and courts have acted upon them with general unanimity. If the defendant had been permitted to introduce such expert testimony as he had in support of these several propositions, it could not have changed the result. It would not have justified the court in holding that the legislature had transcended its power in enacting this statute on their judgment of what the welfare of the people demands.[23]

The Supreme Court also examined Jacobson's rejected evidence and noted "they are more formidable by their number than by their inherent value."[24] Moreover, the evidence "seem[s] to state the general theory of those of the medical profession who attach little to no value to vaccination as a means of preventing the spread of smallpox or who think that vaccination causes other diseases of the body."[25] The Court rejected Jacobson's offer of proof because "[w]hat everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief and is maintained by high medical authority."[26]

In applying what may be regarded as a precursor to rational basis review, the Court noted "[t]he state legislature proceeded upon the theory which recognized vaccination as at least effective if not the best known way in which to meet and suppress the evils of a smallpox epidemic that imperiled an entire population."[27] Massachusetts had the authority to pass such a law based on its inherent police power, which included "the authority of a State to enact quarantine laws and 'health laws of every description.'"[28] Without directly acknowledging that Jacobson had a liberty interest in making his own medical choices, the Court noted that "[e]ven liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law."[29]

As the Court found "strong support" that the vaccination was an effective means of combatting the spread of smallpox, "no

court, much less a jury, is justified in disregarding the action of the legislature simply because in its or their opinion that particular method was—perhaps or possibly—not the best either for children or adults."[30] Further, no individual or group of individuals could lawfully "defy the will of ... constituted authorities" by refusing a mandated vaccine thought to be reasonably effective in combatting the spread of disease, because doing so "would practically strip the legislative department of its function to care for the public health and the public safety when endangered by epidemics of disease."[31] In effect, the High Court was unwilling to "hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of any State."[32] The Court closed by noting that, although it sided with Massachusetts in that instance, "the police power of a State ... may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts."[33] The opposing positions in *Jacobson* bear a strong resemblance to the debate surrounding modern vaccination, acutely present in regard to the COVID-19 vaccine.

Modern Challenges to Mandatory Vaccination

"Those who cannot remember the past are condemned to repeat it."

—George Santayana

Jacobson concerned a criminal sanction for an adult's refusal to receive a vaccination. That law, on its face, offered no exemptions for medical or religious purposes, at least as they concerned adults.[34] Today, most legal battles concerning mandatory vaccinations occur under less stark conditions. More specifically, employees and students have challenged the policies of public institutions and private employers that mandate vaccination before returning to work or school—despite some of the policies allowing for certain exemptions.

A Private Employer Sued Under State and Federal Laws

In Texas, over 100 employees of the Houston Methodist Hospital (a private company) sued their employer after it announced a policy requiring all employees to be vaccinated against COVID-19 by June 7, 2021.[35] Plaintiffs in that case argued the vaccination requirement violated state law precluding wrongful termination, as well as federal law concerning testing and distribution of medication. In granting the defendant's motion to dismiss, the district court made quick work of the plaintiffs' arguments:

> [Plaintiff] dedicates the bulk of her pleadings to arguing that the currently-available COVID-19 vaccines are experimental and dangerous. This claim is false, and it is also irrelevant. [Plaintiff] argues that, if she is fired for refusing to be injected with a vaccine, she will be wrongfully terminated. Vaccine safety and efficacy are not considered in adjudicating this issue.

Texas law only protects employees from being terminated for refusing to commit an act carrying criminal penalties to the worker. To succeed on a wrongful termination claim, [Plaintiff] must show that (a) she was required to commit an illegal act—one carrying criminal penalties, (b) she refused to engage in the illegality, (c) she was discharged, and (d) the only reason for the discharge was the refusal to commit an unlawful act.

> [Plaintiff] does not specify what illegal act she has refused to perform, but in the press-release style of the complaint, she says that she refuses to be a "human guinea pig." Receiving a COVID-19 vaccination is not an illegal act, and it carries no criminal penalties. She is refusing to accept inoculation that, in the hospital's judgment, will make it safer for their workers and the patients in Methodist's care.[36]

The district court also sharply criticized plaintiffs for analogizing the vaccine requirement with war crimes committed by Nazi Germany:

> [Plaintiff] has again misconstrued this provision, and she has now also misrepresented the facts. The hospital's employees are not participants in a human trial. They are licensed doctors, nurses, medical technicians, and staff members. The hospital has not applied to test the COVID-19 vaccines on its employees, it has not been approved by an institutional review board, and it has not been certified to proceed with clinical trials. [Plaintiff's] claim that the injection requirement violates 45 C.F.R. § 46.116 also fails.

She also says that the injection requirement is invalid because it violates the Nuremberg Code, and she likens the threat of termination in this case to forced medical experimentation during the Holocaust. The Nuremberg Code does not apply because Methodist is a private employer, not a government. Equating the injection requirement to medical experimentation in concentration camps is reprehensible. Nazi doctors conducted medical experiments on victims that caused pain, mutilation, permanent disability, and in many cases, death.[37]

Bridges is an interesting case, but it does not address the constitutional implications of a mandatory COVID-19 vaccine. That case saw employees suing their private employer based on select state and federal statutes, not the Constitution. It is noteworthy, however, to see a court address some of the balder, unsupported assertions regarding the vaccine. To see how courts address the constitutional questions of compelled COVID-19 vaccinations, however, readers must look elsewhere.

A Constitutional Challenge to a Public University's Vaccination Policy

In Indiana, a situation closely analogous to *Jacobson* has arisen in the public-school context. In *Klaassen v. Trustees of Indiana University*, eight students sued the public university over a policy requiring that students either (1) receive a COVID-19 vaccination prior to attending in-person classes during the Fall 2021 semester; (2) receive an exemption from the requirement on religious or medical grounds and comport with additional masking and periodic testing requirement; or (3) attend classes remotely.[38] The students claim that the mandatory vaccination, or alternatively the mask and testing requirements, violated their substantive due process rights protected under the Fourteenth Amendment.[39]

As of this writing, the *Klaassen* case is ongoing. However, the district court issued an extensive opinion when denying plaintiffs'

motion for a preliminary injunction.[40] The court relied on the *Jacobson* decision in ruling that the liberty at issue, "the right to refuse a vaccine ... this interest in bodily autonomy, though protected by the Constitution, wasn't fundamental under the Constitution to require greater scrutiny than rational basis review."[41] Because the liberty interest was not "fundamental," the court applied rational basis review to determine whether the students were likely to prevail on their claims.[42] Under rational basis review, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[43] After examining the preliminary record before it, the Indiana district court found that the university "faces still an 'objectionable' and 'serious threat' to the 'academic community' that its vaccination policy seeks reasonably to address for campus health."[44] Consequently, the law was likely to survive rational basis review.

The students also challenged the vaccine requirement under the First Amendment. The district court noted, however, that the requirement was a "neutral rule of general applicability," which allowed for exemptions for religious reasons, and therefore likely did not infringe on the students' right to free exercise of religion.[45] After the district court denied their motion, the students appealed and sought another injunction, this time from the Seventh Circuit, during the pendency of their appeal.

In denying the students' motion for an injunction pending appeal, the Seventh Circuit noted, succinctly, that "[g]iven *Jacobson v. Massachusetts*, which holds that a state may require all members of the public to be vaccinated against smallpox, *there can't be a constitutional problem with vaccination against SARS-CoV-2*."[46] In fact, the Seventh Circuit noted that the university's policy was less problematic than the law at issue in *Jacobson* for two reasons. First, Indiana University's vaccine requirement allows for exemptions on medical and religious grounds—the vaccine requirement in *Jacobson* did not expressly allow for such exemptions in adults.[47] Rather, students who are exempted from the policy merely need to wear masks and be tested for the infection periodically—"requirements that are not constitutionally problematic."[48]

Secondly, Indiana did not mandate a COVID-19 vaccination for every adult residing in Indiana; rather, the vaccine was merely a condition precedent to attending Indiana University for the Fall 2021 semester.[49] Prospective students who did not wish to receive the vaccine, or comply with the additional requirements attendant to receiving exemption status, had the ability to attend school remotely or altogether elsewhere.[50] The Seventh Circuit, like the district court before it, also noted that required vaccinations are commonplace in schools. "Health exams and vaccinations against other diseases (measles, mumps, rubella, diphtheria, tetanus, pertussis, varicella, meningitis, influenza, and more) are common requirements of higher education."[51]

Both the District Court for the Northern District of Indiana and the U.S. Court of Appeals for the Seventh Circuit preliminarily addressed the issue of whether the Indiana University students were likely to prevail on their claims under the First and Fourteenth Amendments. Both found that outcome unlikely. Although neither ruling should be interpreted as a definitive answer on the claims presented in the *Klaassen* case, they are instructive in showing *how* such claims will be analyzed in the immediate future. As of now, Fourteenth Amendment claims related to mandatory COVID-19 vaccinations imposed by government entities will be analyzed under the rational basis test—a forgiving standard that favors the government. Further, future generally applicable vaccine requirements will likely not run afoul of the First Amendment, at least so long as reasonable exemptions exist.

Conclusion

"Vastly improved, yes; out of the woods we aren't, not on this preliminary record."[52]

—Judge Damon Ray Leichty

All things being equal, a competent adult has a protected liberty interest in selecting and refusing medical treatment.[53] The individual choice to vaccinate, however, has much broader repercussions than other health choices. Herd immunity, for example, is only possible when a majority of members of a population are either vaccinated or have developed protective antibodies in response to a previous infection.[54] Unvaccinated individuals are apparently more likely to become infected, and thereby more likely to spread the disease to others.[55]

Can a local or state government compel residents to receive a COVID-19 vaccine? *Jacobson* suggests that it can. That case, however, was decided before the Supreme Court had distinguished rational basis from strict scrutiny review, mere months before the dawn of the *Lochner* era of jurisprudence.[56] *Jacobson* also suggests that the right to medical autonomy, although a liberty interest protected by the Fourteenth Amendment, is not a fundamental right.[57] That, too, however, is a questionable proposition, as *Jacobson* was decided before rights were distinguished by fundamental or nonfundamental status. Regardless, *Jacobson* is a well-reasoned decision and remains good law insofar as it concerns mandatory vaccinations.

When considering future claims that a vaccine requirement unreasonably infringes on an individual's protected liberty interest, *Jacobson* controls. That is to say, unless and until the Supreme Court takes up the issue again. No local or state government has attempted to implement a sweeping vaccine requirement in modern times. If a government were to attempt compulsory COVID-19 vaccination of an entire adult population, *Jacobson* (and the reasoning underlying that decision) would truly be put to the test. Until that time, parties are left to debate the present meaning of *Jacobson* and the extent to which it still controls. ⊙

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Endnotes

[1]*See, e.g.,* Illinois Department of Public Health, *SARS-CoV-2/COVID-19 Mass Vaccination Planning Guide*, https://www.dph.illinois.gov/covid19/vaccination-plan (last visited Sept. 29, 2021).

[2]Centers for Disease Control and Prevention, https://www.vaccines.gov/ (last visited Sept. 29, 2021).

[3]Centers for Disease Control and Prevention, *COVID Data Tracker: COVID-19 Vaccinations in the United States,* https://covid.

cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total (last visited Sept. 29, 2021).

[4]*Id*.

[5]Emily Anthes, *The Delta Variant: What Scientists Know*, N.Y. Times, (June 22, 2021, updated Aug. 5, 2021), https://www.nytimes.com/2021/06/22/health/delta-variant-covid.html?.?mc=aud_dev&ad-keywords=auddevgate&gclid=Cj0KCQjwu7OIBhCsARIsALxCUaNTnUdnWb1sT9G-bx9tlX6cp1ocJpuPlxfMi3GQEnq6w7G0e9YmGlUaAmdREALw_wcB&gclsrc=aw.ds.

[6] *Id.*

[7]Centers for Disease Control and Prevention, *COVID Data Tracker Weekly Review* (July 30, 2021), https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/past-reports/07302021.html.

[8]*Id*.

[9]Centers for Disease Control and Prevention, *Delta Variant: What We Know About the Science* (Aug. 26, 2021), https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html?s_cid=11617:delta%20variant:sem.ga:p:RG:GM:gen:PTN.Grants:FY22.

[10]Adela Suliman, Bryan Pietsch, Brittany Shammas and Amy Goldstein, *U.S. hits Biden's vaccination goal a month late, with 70 percent of adults receiving at least one shot*, Wash. Post (Aug. 2, 2021, 9:43 PM), https://www.washingtonpost.com/nation/2021/08/02/coronavirus-covid-live-updates-us/.

[11]Anthes, *supra* note 5.

[12]Adela Suliman, Bryan Pietsch, Brittany Shammas and Amy Goldstein, *U.S. hits Biden's vaccination goal a month late, with 70 percent of adults receiving at least one shot*, Wash. Post (Aug. 2, 2021, 9:43 PM), https://www.washingtonpost.com/nation/2021/08/02/coronavirus-covid-live-updates-us/.

[13]The White House, *Path out of the Pandemic: President Biden's Covid-19 Action Plan*, https://www.whitehouse.gov/covidplan/ (last visited Sept. 29, 2021).

[14]*Jacobson v. Mass.*, 197 U.S. 11, 27 (1905).

[15]Wendy K. Mariner, George J. Annas, and Leonard H. Glantz, *Jacobson v Massachusetts: It's Not Your Great-Great-Grandfather's Public Health Law*, 95 Am. J. Pub. Health 581, 582 (2005).

[16]*Id*.

[17]*Commonwealth v. Pear*, 183 Mass. 242, 244 (1903).

[18]Mariner, Annas, and Glantz, *supra* note 15 (The issue read "Whereas, smallpox has been prevalent to some extent in the city of Cambridge and still continues to increase; and whereas, it is necessary for the speedy extermination of the disease, that all persons not protected by vaccination should be vaccinated; and whereas, in the opinion of the board, the public health and safety require the vaccination or revaccination of all inhabitants of Cambridge; be it ordered, that all the inhabitants of the city who have not been successfully vaccinated since March 1, 1897, be vaccinated or revaccinated.").

[19]*Id*.

[20]*Id*.

[21]*Jacobson*, 197 U.S. at 26.

[22]*Id*. at 23.

[23]*Id*. at 23-24 (quoting *Commonwealth v. Jacobson*, 183 Mass. 242 (1903).

[24]*Id*. at 30.

[25]*Id.*

[26]*Id*.

[27]*Id*. at 30-31.

[28]*Id*. at 25 (quoting *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824)).

[29]*Id*. at 26-27 (quoting *Crowley v. Christensen*, 137 U.S. 86, 89 (1890)).

[30]*Id*. at 35.

[31]*Id*.

[32]*Id*. at 38.

[33]*Id*.

[34]It should be noted, however, that neither the Massachusetts Supreme Court, nor the U.S. Supreme Court construed the statute to allow for an absolute rule that all adults receive a vaccine, regardless of known, serious harmful effects to a recipient. *Jacobson v. Mass.*, 197 U.S. 11, 39 (1905).

[35]*Bridges v. Houston Methodist Hosp.,* No. 21-1779, 2021 U.S. Dist. LEXIS 110382, at *3, -- F. Supp. 3d._-- (S.D. Tex. June 12, 2021).

[36]*Id*. at *3-4.

[37]*Id*. at *6-7.

[38]*Klaassen v. Trs. of Ind. Univ.,* No. 21-238, 2021 U.S. Dist. LEXIS 133300, at *15-17, -- F. Supp. 3d -- (N.D. Ind. July 18, 2021).

[39]*Id*. at *39-40.

[40]*Id*.

[41]*Id*. at *55, 57 (citing *Sweeney v. Pence*, 767 F.3d 654, 668 (7th Cir. 2014)).

[42]*Id*. at *57-58 ("Government action that infringes on the liberty interest here, as in *Jacobson*, is subject to rational basis review.").

[43]*City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

[44]*Klaassen* at *78.

[45]*Id*. at *66-67.

[46]*Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 592 (7th Cir. 2021) (citation omitted) (emphasis added).

[47]*Id*.

[48]*Id*.

[49]*Id*.

[50]*Id*.

[51]*Id*.

[52]*Klaassen v. Trs. of Ind. Univ.*, No. 21-238, 2021 U.S. Dist. LEXIS 133300, at *69 _F.Supp.3d (N.D. Ind. Jul. 18, 2021) (opining that evidence suggested the spread of COVID-19 had been reduced, but danger of a resurgence remained).

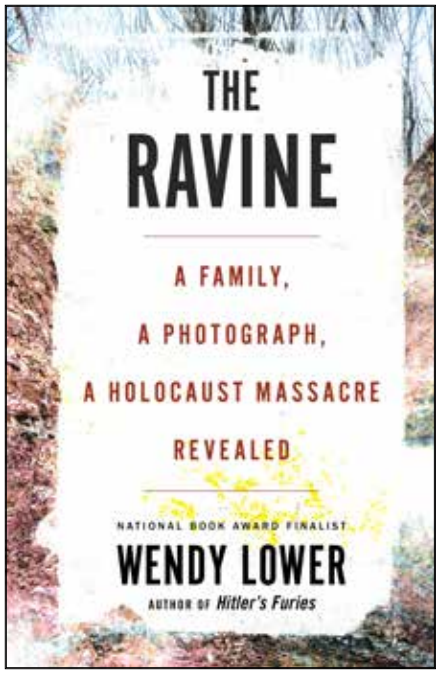
[53]*Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990) ("[F]or purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.").

[54]Mayo Clinic, *Herd Immunity and COVID-19 (Coronovirus): What you need to know* (Aug. 28, 2021), https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/herd-immunity-and-coronavirus/art-20486808.

[55]Katie Camero, *Unvaccinated people face more than double the risk of COVID reinfection, CDC says*, Miami Herald, (Aug. 6, 2021, 3:52 PM), https://www.miamiherald.com/news/coronavirus/article253313233.html.

[56]*See Lochner v. New York*, 198 U.S. 45 (1905).

[57]*See also Cruzan*, 497 U.S. at 279.



The Ravine: A Family, a Photograph, a Holocaust Massacre Revealed

By Wendy Lower

Houghton Mifflin Harcourt 2021

272 pages $28.00

Reviewed by Jon M. Sands and Nickolas Smith

The murders occurred 80 years ago. The Germans occupied a small Ukrainian town, identified who was Jewish, and systematically killed them over several months. It was an act repeated throughout Eastern Europe. Countless people perished. And we would not remember or even know of them, the town, or the murders. Except for a photograph. This photograph is the subject of Wendy Lower's book, *The Ravine: A Family, a Photograph, a Holocaust Massacre Revealed*.

It depicts a grisly scene at the edge of a ravine in a sun-dappled forest outside of Miropol. German officers and Ukrainian auxiliary police are executing a Jewish family. A woman, presumably the mother, buckles forward from a volley of shots at close range. She grasps the hand of a barefoot boy while she shields an infant in the cradle of her other arm—"another soul about to be extinguished," writes Lower.

The photograph is one of only a few in existence of a Nazi execution. Nazi protocol strictly forbid photographing executions—a seemingly strange prohibition in a regime obsessed with meticulous documentation. As Lower explains, though, this prohibition was designed to keep unseemly photographs out of the hands of Reich enemies, who might use them as propaganda.

The photograph came to Lower's attention by accident. A librarian approached her in the archives of the United States Holocaust Memorial Museum in Washington, D.C., and asked whether she could help identify the photograph for two journalists from Prague. This happenstance led Lower on a decade-long forensic investigation to restore forgotten lives.

The Ravine chronicles her quest. Piecing together evidence step-by-step, Lower uncovers the once-vibrant Jewish shtetl in Miropol, its rich history, and, ultimately, its obliteration. Central to this story is what historians have termed "the Holocaust by bullets." In June 1941, Einsatzgruppen (Nazi death squads) began a brutal sweep of Eastern Europe behind the advance of the Wehrmacht (the German army). Tasked with eliminating Jews in small towns and villages, these units often conscripted local people resentful of the Jewish community to aid in the massacres. Many know of the gas chambers at Auschwitz II-Birkenau—the universal symbol of economized genocide. Most are also familiar with the Belzec, Sobibor, and Treblinka killing centers; "deportations to the East"; ghettos; and death marches. But few are familiar with the horrors of the satellite massacres in places like Miropol. And they are even less familiar with local collaborators, their rape of Jewish women, and their plundering of Jewish homes and businesses. Over a million Jews perished during these "Aktions."

Building off Christopher Browning's work in *Ordinary Men*, Lower's research reveals just how voluntary collaborator participation was. In Miropol, for example, SS officers asked a unit of German custom guards for volunteers to participate in the mass shootings at the ravine. Two stepped forward. Lower names these volunteers and recounts how a conscience-stricken comrade reported them to authorities after the war. But, as was common, West Germany declined to pursue charges. The Ukrainian collaborators were not as lucky. A KGB investigator (with Jewish ancestry) made it his personal mission to bring them to justice. Two were tried, sentenced, and executed by firing squad in January 1987. One received 15 years in a Soviet prison. Lower's chronicling of their fates reflects the different imperatives nations had in reckoning with the horror of the Holocaust; the changing attitudes towards it; the defining of perpetrators, collaborators, and victims; how history can unearth the truth and confront the reality; and whether and how justice can ever be achieved.

In her quest to identify the victims, Lower interviewed local witnesses to the Miropol pogrom. Their testimony dispels the fatalistic sheep-to-the-slaughter myth. The Jews of Miropol did not march passively to the ravine—they actively resisted. Several families stowed their children with non-Jewish neighbors, ensuring the next generation's survival. Although many resisters were betrayed, some survived the Nazi occupation to see their murderers brought to justice. Others escaped the massacre and joined partisan resistance movements. In fact, Lower's best lead for identifying the victims in the photograph was the only survivor of the nearly 400 murdered at the ravine. She clawed out of the pit of corpses and fled into the forest. Unfortunately, this woman did not know about the photograph and died before Lower could interview her.

Lower also spends time investigating the photographer. Her inquiry falls within a larger debate about the value of atrocity photos and the culpability of those who took them. Some photographs were born of pure evil. SS men sought to create documentary proof of what they considered a holy crusade. Other photos, however, were clandestinely taken to bear witness to the Nazi genocide. Lower accordingly explores the photographer's role at the crime scene, traces his life thereafter, and interviews his children. Her findings aptly illustrate what Primo Levi termed the "gray zone"—a breakdown of the perpetrator-victim binary.

Any effort to shoehorn this photographer into a bright-line "good" or "bad" role is futile. He is both complicit and resistant, callous voyeur and daring partisan documentarian.

Lower labors for 171 pages to dissect every inch and angle of the photograph. And she succeeds in many ways. But her odyssey to identify the victims falls short. They remain nameless, just as many of Lower's other questions go unanswered. Perhaps that is the point. There will never be closure, and we need to stop searching for it. ⊙

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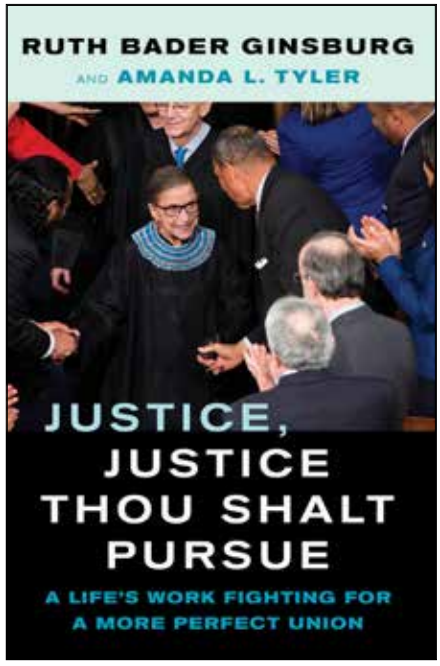

Justice, Justice Thou Shalt Pursue: A Life's Work Fighting for a More Perfect Union

By Ruth Bader Ginsburg and Amanda L. Tyler

University of California Press 2021

288 pp $26.95

Reviewed by Elizabeth Kelley

It has been over a year since Justice Ruth Bader Ginsburg died. Her passing has been mourned for a variety of reasons. Some mourn the passing of a towering figure in the world of sex discrimination law. Some mourn the passing of a historic figure—the second woman on the U.S. Supreme Court and the first Jewish woman. Some miss a reliable vote on what is called the Court's liberal block. And some simply miss the pop culture icon, fondly known as the Notorious RBG, who was the co-author of *The RBG Workout Book* and the subject of the hit movie *On the Basis of Sex*.

Justice, Justice Thou Shalt Pursue encompasses all that, plus a deep affection for a woman who was a friend and mentor to many. Amanda L. Tyler was a clerk to Justice Ginsburg during the October 1999 term and is now a professor at UC Berkeley School of Law. *Justice, Justice* was intended as a collaboration between Justice Ginsburg and Professor Tyler, but the Justice's death made it as much a tribute as a collaboration. As Tyler notes in the Preface, Justice Ginsburg died three weeks after they submitted the manuscript to the University of California Press.

The inspiration for the book was a memorial to Herma Kay Hill, the legendary dean of UC Berkeley Law School and a friend and colleague of Justice Ginsburg. The two co-authored the first casebook on gender-based discrimination law in 1974. As such, the book contains a tribute to Herma Kay Hill by Justice Ginsburg as well as a wide-ranging interview of the Justice by Tyler. Both of those took place on the occasion of the first Herma Kay Hill Memorial Lecture in October 2019. Aside from a touching Introduction and Afterward by Tyler, the book is a rare lens into the mind and preferences of Justice Ginsburg.

In a section titled "Ruth Bader Ginsburg the Advocate," Justice Ginsburg selects her three favorite cases when she appeared before the Supreme Court: *Moritz v. Commission of Internal Revenue*, *Frontiero v. Richardson*, and *Weinberger v. Wisenfeld*. In the following section, the Justice selects four opinions from her service on the High Court: *United States v. Virginia (VMI)*, *Ledbetter v. Goodyear Tire & Rubber Co.*, *Shelby County v. Holder*, and *Burwell v. Hobby Lobby Stores, Inc.* (Regarding the selection of these opinions, the Justice says it's like being asked which of her grandchildren is her favorite.) The book concludes with three of her speeches, including one helpful to appellate lawyers titled "Lessons Learned from Louis D. Brandeis." Also included are the remarks Dean Hill made in support of Ginsburg at her Senate confirmation hearings in 1993, wherein she stated that her friend and colleague would truly be worthy of the title "Justice."

The book's title derives from a verse from Deuteronomy—"Justice, Justice Thou Shalt Pursue"—which Ginsburg hung in her chambers. And, as Tyler notes in the Introduction, the subtitle ("A Life's Work Fighting for a More Perfect Union") derives from Ginsburg's *VMI* opinion, wherein she stated that the work to build "a more perfect Union" "remains ongoing." (p. 12).

By now, thanks to Justice Ginsburg's biography, it is well-known that she was the daughter of first-generation Jews in Brooklyn, that her mother died when she was a teenager, and that she attended Cornell, where she met her eventual husband Martin (Marty) Ginsburg. We know of her days at Harvard Law School, where she was one of nine woman. We know about the young couple's struggle as Marty battled cancer treatments while they were both in law school, her difficulty finding a job after graduation because of her gender, her ground-breaking work for the ACLU in the area of gender discrimination, her appointment to the DC Circuit Court, and her 27 terms on the Supreme Court bench.

What distinguishes *Justice, Justice* from other books about Ginsburg is, first, that it shows how the aspects of her personal life shaped her professional success, and, second, it reveals the abiding affection many like Tyler have for her.

The most significant force in Ginsburg's life was her husband, partner, and Rock of Gibraltar, Martin Ginsburg. Martin Ginsburg was himself a noted tax lawyer. As Justice Ginsburg notes in her interview with Tyler, "he was the first boy I ever dated who cared I had a brain." (p. 31). Indeed, Marty was the one who gave his young wife the advance sheets laying forth the problem with the IRS faced by Charles E. Moritz, and Marty was the unwavering advocate of all her professional endeavors. In her interview with Tyler, Justice Ginsburg states, "My number one advice is choose a partner in life who thinks that your work is as important as his." (p. 39). She also shares the advice her mother-in-law gave her: "It helps every now and then to be a little deaf." (p. 32).

Tyler's affection for Justice Ginsburg, her boss, and, later, her mentor and friend is palpable. She recounts Justice Ginsburg's

grit when, on her first day as a clerk, the Justice called shortly after a radiation session and instructed Tyler to let Chief Justice Rehnquist know that she would be attending arguments that day. She recounts how Justice Ginsburg checked in with her during the depth of the pandemic and inquired as to how her children were adjusting to the upset in the world. And Tyler recounts how, upon the death of the Justice, all of her former law clerks returned to the Capitol to serve as honorary pallbearers and keep vigil as her coffin lay in state.

A recent Gallup poll showed that only 40 percent of the public approved of the Supreme Court's work. Books like this should, in some way, help restore confidence in the Court. Indeed, whatever one's political or judicial philosophy, one cannot help but admire Justice Ginsburg's tenacity, scholarship, experience, integrity, and warmth. ☉

Elizabeth Kelley is a criminal defense lawyer based in Spokane, Wash., with a nationwide practice specializing in representing people with mental disabilities. She is the editor of three books published by the American Bar Association (ABA): Representing People with Mental Disabilities: A Practical Guide for Criminal Defense Lawyers; Representing People with Autism Spectrum Disorders: A Practical Guide for Criminal Defense Lawyers; *and* Suicide and Its Impact on the Criminal Justice System *(with Francesca Flood). She chairs The Arc's National Center for Criminal Justice and Disability Advisory Board and also serves on the ABA's Commission on Disability Rights and the Criminal Justice Council. She is a member of the FBA's Editorial Board.*

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

United States v. Tsarnaev (No. 20-443)

Oral argument: Oct. 13, 2021

Question as Framed for the Court by the Parties

1) Whether the U.S. Court of Appeals for the First Circuit erred in concluding that Dzhokhar Tsarnaev's capital sentences must be vacated on the ground that the district court, during its 21-day voir dire, did not ask each prospective juror for a specific accounting of the pretrial media coverage that he or she had read, heard or seen about Tsarnaev's case; and 2) whether the district court committed reversible error at the penalty phase of Tsarnaev's trial by excluding evidence that Tsarnaev's older brother was allegedly involved in different crimes two years before the offenses for which Tsarnaev was convicted.

Facts

In 2013, Respondent Dzhokhar Tsarnaev and his brother, Tamerlan Tsarnaev, set off two bombs at the Boston Marathon. The bombs killed three people and injured hundreds. After Tamerlan and Dzhokhar escaped, they drove Tamerlan's car past Massachusetts Institute of Technology. While passing, they noticed Sean Collier, a campus police officer. Tamerlan and Dzhokhar approached Collier from behind and shot him six times, killing him. The brothers fled when they saw an MIT student nearby.

Then, Tamerlan and Dzhokhar approached Dun Meng while he was sitting in his car. Tamerlan threatened Meng with a gun and forced Meng to drive him and Dzhokhar. Meng eventually escaped but Tamerlan and Dzhokhar continued driving his car. The police located the brothers using Meng's car's tracking system. Tamerlan was eventually shot, apprehended by the police, and died later that day. Dzhokhar escaped and hid for the night in a boat stored in a nearby backyard. The next day, Dzhokhar was found, arrested, and indicted for death penalty eligible charges.

Prior to trial, Dzhokhar, fearing a trial in Boston would result in a prejudiced jury, requested a venue change. The judge denied the request, assuring Dzhokhar that voir dire would protect against bias. However, the judge prohibited attorneys from asking specific questions like "[w]hat did you know about the facts of this case before you came to court today (if anything)?" At the trial, Dzhokhar admitted to his involvement but argued that Tamerlan manipulated him into the attack. The jury found him guilty on all charges.

During sentencing, Dzhokhar sought to present evidence on the Waltham murders. In 2011, an unknown person (or people) killed three drug dealers in Waltham, Massachusetts. While this crime remains unsolved, evidence suggests that Tamerlan committed the murders with the help of his friend, Ibragim Todashev. Todashev agreed to confess to the crimes but attacked a police officer during his testimony. Todashev died during this confrontation. The FBI refused Dzhokhar's requests to produce reports of Todashev's testimony or evidence of Dzhokhar's involvement in the Waltham murders.

Dzhokhar argued that Tamerlan's possible involvement with the Waltham murders would show a pattern of conduct by Tamerlan of recruiting others to commit terrible act, which could be a mitigating factor for Dzhokhar's behavior and weigh against a death sentence. The judge denied Dzohkhar's request. The jury recommended a death sentence and the judge agreed, sentencing Dzhokhar to death. Dzhokhar appealed, raising sixteen issues for review.

The United States Court of Appeals for the First Circuit reversed three of Dzhokhar's convictions and vacated the death sentences.

The United States Supreme Court granted the United States' petition for a writ of certiorari on March 22, 2021.

Legal Analysis

VOIR DIRE QUESTIONS ABOUT CONTENT OF MEDIA EXPOSURE

The United States contends the district court judge carefully determined the bias of prospective jurors and chose those who could put their exposure to pretrial media aside during voir dire. The United States argues deference is owed to the trial court to create an appropriate jury selection process, because trial court judges are uniquely situated in the locale where the publicity has had its effect.

The United States further asserts that the supervisory power of the court under *Patriarca v. United States* does not apply. The United States notes that while the appellate court held that *Patriarca* requires district courts to always grant a request of counsel to inquire about what potential jurors have read or heard about in a "high-profile case," this is not a constitutional prerequisite for jury selection. The United States cites *Mu'Min v. Virginia*, which found that there was no constitutional requirement to question all prospective jurors about the specific content of their pretrial exposure. Further, the United States argues that only specific types of cases, such as those that include racial bias, require a particular type of inquiry. The United States additionally claims jurors are not required to be completely ignorant to the facts of the case before the trial. According to the United States, the ultimate questions of voir dire do not focus on the content exposure, but rather the jurors' impartiality.

The United States concludes that the jury selection process successfully identified potential bases for bias and explored whether the juror could remain unbiased, following voir dire requirements. The United States

emphasizes that the content of news coverage from over two years ago is less important during voir dire than the impartiality of the potential jurors. Therefore, the United States concludes the Court of Appeals invalidated Dzhokhar's capital sentence without identifying any juror or trial decision that showed evidence of pretrial bias.

Dzhokhar Tsarnaev counters that the district court failed to determine whether prospective jurors were biased by the pretrial publicity. Dzhokhar notes that during voir dire, both sides requested asking questions about the content of the publicity seen by the potential juror, although the United States later changed position. Dzhokhar asserts that the district court refused to pose such questions and largely prevented him from asking them. According to Dzhokhar this is a violation of the *Patriarca* rule, which "holds that the district court must ask [potential] jurors what they have heard about a case if counsel requests it" and determine whether there is "a significant possibility that jurors have been exposed to potentially prejudicial material," particularly in high profile cases. Dzhokhar argues that this rule applies to this case because situations where pretrial publicity could threaten the jury's impartiality are present. Dzhokhar contends that the pretrial media coverage was "a deluge of highly prejudicial, inadmissible, and inflammatory reporting and commentary." According to Dzhokhar, no sufficient bias screening occurred during voir dire, and therefore the Court failed to ask a question required by the *Patriarca* supervisory authority.

Dzhokhar concludes that the *Patriarca* rule is a reasonable supervisory rule because the Court of Appeals can mandate procedure to lower courts. Dzhokhar contends that although *Mu'Min* established no constitutional right to content-based questions, all nine justices agreed such content questioning is helpful, and it left the door open for supervisory rules that govern voir dire questions. Dzhokhar concludes that *Patriarca* is a reasonable exercise in supervisory authority because asking potential jurors what publicity they remember from the pretrial media coverage is helpful in determining impartiality amongst the jury pool.

Dzhokhar explains that if the jurors were screened for *content* exposure to pretrial material, rather than the *amount* of exposure, the court could have ascertained if the prospective jurors were prejudiced. Dzhokhar asserts that the pervasive nature of the coverage made it impossible for prospective jurors to assess their own impartiality.

ADMISSION OF MITIGATING EVIDENCE IN THE PUNISHMENT PORTION OF A CAPITAL PUNISHMENT CASE

The United States argues that the District Court correctly excluded evidence of Tamerlan's alleged involvement in different unsolved crimes. The United States contends that while the Federal Death Penalty Act allows for evidence beyond the scope of Federal Rule of Evidence 403, the statute enables district courts to exclude evidence if the evidence may confuse the jury, is misleading, or its the probative value is outweighed by the possibility of prejudice. Further, the United States asserts that reversal is only warranted if the "judgment is plainly incorrect." The United States maintains that the judgment was correct because the evidence would have warranted a "complicated minitrial about that unsolved crime." Additionally, the United States argues that the previous crime's accomplices, manner, and motivation are different from the Boston Marathon bombing, and that it is as likely that Dzhokhar masterminded and committed the Waltham murders. According to the United States, the probative value was outweighed by the possible confusion and distraction.

Dzhokhar Tsarnaev counters that the Eighth Amendment entitles capital defendants to present for jury consideration any mitigating factors during the penalty phase of a capital punishment trial. Dzhokhar argues such mitigating factors encompass any aspect of the defendant's character or record, or any circumstances that would be a basis for a sentence less than death. Dzhokhar further contends that admittance of mitigating evidence has a low standard, meaning that as long as the evidence shows reliability it can be admitted over other substantive evidentiary rules of exclusion. Dzhokhar claims the Federal Death Penalty Act, which governs the penalty-phase presentation of evidence, requires juries to consider any mitigating factors, which includes relative culpability. Dzhokhar argues that under both the Eighth Amendment and the Federal Death Penalty Act, inclusion of mitigating evidence is admissible regardless of the Federal Rules of Evidence Rule 403. Dzhokhar contends that the Federal Death Penalty Act does not alter the constitutional right to present mitigation evidence, nor does it allow the court to decide on discretion to exclude evidence.

Discussion

COUNTERING POTENTIAL JURY BIAS

In support of the United States, the National Fraternal Order of Police contends that voir dire, and the type of questioning used, is best left to the discretion of trial court judges as they know the effect of publicity in the area. The National Fraternal Order of Police also argues that requiring a long and complex voir dire process may waste judicial resources, confuse the jury, and ultimately disrupt justice. Moreover, the National Fraternal Order of Police adds that certain procedures in the federal system, like the size of judicial districts and the right to counsel already protect against biased jurors. The Criminal Justice Legal Foundation argues that, because of the news and popular crimes shows, people are now frequently exposed to horrible violence and thus "public passion" prejudice may not lead to biased jurors and unfair trials. Finally, the Criminal Justice Legal Foundation adds that protecting against bias is not as important in cases in which the central question is about penalty and not guilt.

In response, a group of retired federal judges and former federal prosecutors (Judges and Prosecutors), in support of Dzhokhar, contend that specific questioning has led to more impartial trials in multiple high-profile cases over the last thirty years. Shirin Bakhshay and other psychologists (the Psychologists), in support of Dzhokhar, assert that specific questioning is especially important today, as social media has led to an increase in exposure to misinformation. Additionally, the Psychologists argue that specific questioning helps identify jurors who may be influenced by unconscious bias. Similarly, the American Bar Association, in support of neither party, warns that ineffective voir dire in high profile cases may result in an unfair trial as jurors will be influenced by media coverage. Rather than asking potential jurors general questions, such as "Can you be fair?", the ABA encourages asking jurors specific, individualized questions such as "What have you heard about this case?"

THE EFFECT OF EVIDENCE EXCLUSION ON SENTENCING PROCEDURE

The United States argues that admitting unnecessary, attenuated evidence complicates trials, distracts juries, and muddles the issues.

Allowing complicated and inconclusive evidence, they urge, may result in courts having to conduct "mini-trials" on this evidence. District courts, the United States argues, should be given discretion to make decisions about what evidence is admissible as they are most knowledgeable about the specific facts of the case and deal more frequently with evidence issues than appellate courts.

In support of the judgment below, a group of evidence and sentencing law professors (Professors), assert that excluding too much evidence at the penalty phase may create a crucial constitutional conflict. If evidence exclusion rules are read too literally, the Professors argue, defendants may not have the opportunity to present information that could affect the severity of their sentencing. The American Civil Liberties Union and others (ACLU), in support of Dzhokhar, explain that allowing more evidence ensures sentencing is more personal and less random. Permitting a broad array of evidence during sentencing, the ACLU says, can benefit the prosecution or the defense depending on the case.

Full text available at https://www.law.cornell.edu/supct/cert/20-443. ⊙

Written by Renee Olivett and Kate Sullivan.
Edited by Daniel Bialer

Wooden v. United States (No. 20-5279)

Oral argument: Oct. 4, 2021

Question as Framed for the Court by the Parties

Whether offenses that were committed as part of a single criminal spree, but sequentially in time, were "committed on occasions different from one another" for purposes of a sentencing enhancement under the Armed Career Criminal Act.

Facts

While searching for a wanted fugitive, police asked Wooden if they could enter his home. According to the police, Wooden gave them permission to enter. While in his home, police observed Wooden pick up a firearm. One of the officers was aware that Wooden was a convicted felon and that he could not legally possess a firearm. The police arrested Wooden and later discovered two additional guns after further searching his home and person. Wooden was subsequently charged with one count of being a felon in possession of a firearm and ammunition, violating 18 U.S.C. § 922(g)(1). A jury convicted Wooden of the felon-in-possession charge.

The United States Probation Office identified Wooden as subject to the Armed Career Criminal Act (ACCA). The ACCA enhances a sentence to a term of 15 years to life if the defendant has at least three prior convictions. Under the ACCA, qualifying convictions include violent felonies committed on different occasions. Wooden's criminal history included a 1989 Georgia aggravated assault conviction and ten 1997 burglary convictions. The ten burglary convictions were the result of Wooden entering ten different storage units.

Wooden objected to the sentence enhancement on two grounds. First, he argued that neither the aggravated assault nor the burglaries were violent felonies under the ACCA. Second, he contended that the ten 1997 burglary convictions all stemmed from a single criminal episode and therefore did not qualify as more than one "occasion." The district court rejected Wooden's claims and agreed to an enhanced sentence under the ACCA.

Reviewing the claims de novo, the United States Court of Appeals for the Sixth Circuit focused on how the "occasions" provision should be read. The Sixth Circuit noted that the text of the ACCA provided little guidance on how courts ought to interpret the relevant phrase. The Sixth Circuit next turned to its own prior decisions for direction. Using the three indicia described in *United States v. Hill*, the Sixth Circuit held that the ten 1997 burglaries constituted ten separate "occasions" because they occurred sequentially at different times and in different locations. Specifically, the Sixth Circuit determined that Wooden could not have been in multiple storage units at the same time. The Sixth Circuit also reasoned that it was possible for Wooden to have ended the night's criminal activity after the first of ten burglaries. Accordingly, the Sixth Circuit affirmed Wooden's enhanced sentence.

Wooden appealed, and on February 22, 2021, the United States Supreme Court granted certiorari to hear this case.

Legal Analysis

HOW EXPANSIVE A SCOPE SHOULD BE GIVEN TO THE PHRASE "OCCASIONS"?

Petitioner Wooden contends that under the ACCA's sentencing enhancement a defendant must commit felonies under different circumstances for courts to consider them unique. Wooden argues that this reading is consistent with the plain language of the statute, as well as the commonplace dictionary definition of the term "occasion." Wooden also asserts that other federal statutes do not conflate "occasion" with a single point in time, but rather use it to represent activities that arise from a common set of circumstances. For example, Wooden notes that the recidivism or repeat-offender enhancement under 18 U.S.C. §3559(c)(1)(A) contemplates all convictions made from a single indictment on the same day. Wooden claims that courts must weigh the totality of the circumstances in each case to determine whether an offender committed crimes on different occasions. Wooden urges against courts applying catch-all per se rules about what constitutes an "occasion." Hence, Wooden contends that because he burglarized one combined storage structure on one specific evening, he committed all the crimes on a single occasion.

Respondent United States counters that Wooden's definition of "occasion" is too broad, and that instead offenders commit crimes on different "occasions" if they commit their crimes in sequence at different times. In contrast with Wooden's fact-dependent approach, the United States urges that crimes occur on different occasions when the criminal conduct required to complete the listed elements of each crime occurs at different times. In support of its position, the United States cites case law (e.g., *United States v. Yashar*) suggesting that most courts find that offenders complete crimes when they satisfy the crime's elements. Consequently, the United States argues that once the perpetrator commits the crime's discrete elements, any subsequent criminal activity represents a distinct "occasion." The United States further argues that this more limited definition of "occasion" is consistent with the word's dictionary meaning of a "particular time," and consistent with the Supreme Court's "plain meaning" application of the term in *Coleman v. Tollefson*. Additionally, the United States posits that most lower courts have uniformly recognized the Coleman approach of distinguishing crimes by different occasions under the ACCA. Therefore, the United States maintains that because Wooden did not complete all ten burglaries simultaneously, he necessarily committed those crimes on different occasions.

DO THE HISTORY AND PURPOSE OF THE ARMED CAREER CRIMINAL ACT SUPPORT A SPECIFIC INTERPRETATION OF "OCCASIONS"?

Wooden contends that the ACCA's structure, history, and purpose illustrate Congressional intent to specifically target "career" criminals, therefore encouraging a less restrictive interpretation of "occasion." Wooden posits that the ACCA adopts the separate occasions language from the Organized Crime Control Act of 1970 (OCCA), which accords judges discretion to impose a more severe sentence for "dangerous special offenders" who have committed more than two offenses on separate occasions. Wooden argues that the American Bar Association (ABA), which influenced the OCCA, wanted to ensure that the penalty would only target habitual offenders, not just defendants prosecuted multiple times for the same temporally committed offense. Moreover, Wooden contends that Congress wanted the ACCA to target repeat, "career" criminals with enhanced sentences. Wooden identifies statements made by Congressional leaders arguing that most state laws did not sufficiently capture and prevent "career" criminals. Wooden also notes that in 1988 Congress specifically revised and added the "occasions" language to the ACCA, which at first did not differentiate between defendants who committed prior offenses separately and those who committed them simultaneously. Wooden elaborates that Congress amended the statute only after the Eighth Circuit in *United States v. Petty* applied the sentencing enhancement to a defendant who had a prior multi-count conviction for six robberies committed simultaneously. Consequently, Wooden articulates that because he committed all ten burglaries in one evening, he is the exact type of offender—like the defendant in Petty—who Congress meant to exclude from the sentencing enhancement by amending the ACCA. Additionally, Wooden expounds that the rule of lenity mandates resolving any ambiguities in the text or history of the ACCA in his favor.

The United States counters that the ACCA's goal to target "career" criminals does not offer definitive guidance on how to interpret whether criminals committed offenses on different occasions. The United States further argues that the 1988 amendments to the ACCA reveal a Congressional intent to distinguish occasions by temporal distance. The United States maintains that the 1988 amendment only aimed to prevent specific application of the sentencing enhancement to defendants who committed simultaneous crimes. As evidence, the United States refers first to the Solicitor General's confession of error in *Petty*, where he differentiated between simultaneous crimes, like the robberies at issue in that case, and non-simultaneous crimes. . Second, the United States notes that a Senate analysis of the amendment specifically mentioned that multi-count convictions could still constitute separate occasions. Therefore, the United States urges that Congress unambiguously declined to exclude defendants like Wooden, whose individual crimes can be more readily temporally distinguished than the simultaneous robberies in *Petty*. Finally, the United States explains that the rule of lenity cannot operate here because the text, structure, history, and purpose of the ACCA do not allow for any ambiguity about the meaning of "occasions."

Discussion

UNIFORMITY AND PROPORTIONALITY IN SENTENCING

The Roderick & Solange MacArthur Justice Center (MJC), in support of Wooden, asserts that a temporal-based interpretation of "occasion" conflicts with the ACCA's underlying goal of promoting uniformity in sentencing. MJC further argues that a temporal-based approach places too great of an emphasis on drawing distinctions between simultaneous and sequential offenses. MJC warns that drawing distinctions on this basis impedes sentence uniformity because it asks sentencing courts to rely on insignificant facts particular to each defendant's criminal history.

FAMM, also in support of Wooden, contends that in addition to undermining uniformity in sentencing, a temporal-based interpretation of "occasion" leads to disproportionate and significantly harsher sentences. FAMM argues that this danger is particularly relevant when mandatory minimums are in place because of their emphasis on deterrence and incapacitation of criminals.

The United States counters that decades of judicial experience in applying a temporal-based interpretation of "occasion" ensures uniformity in sentencing. Furthermore, the United States argues that Wooden's holistic and fact-dependent interpretation of "occasion" would lead to disproportionate sentences. The United States notes that, under a holistic and fact-dependent approach, factors such as the occurrence of an arrest and release between two offenses would render them different "occasions" under the ACCA. Accordingly, the United States posits that this approach would cause inequities in sentencing and potentially overlook more dangerous offenders who avoid apprehension.

RECIDIVISM AND "CAREER" CRIMINAL CONCERNS

Professors of Criminal Law (Professors), in support of Wooden, argue that a temporal-based interpretation of "occasion" impermissibly broadens the class of criminals identified as repeat offenders. Specifically, the Professors contend that individuals who commit multiple offenses as part of a single criminal episode are not necessarily "career" criminals. The Professors assert that a temporal-based interpretation unjustly places "one-day career" criminals on the same level as particularly dangerous repeat offenders that Congress intended to target.

Human Rights for Kids (HRFK), also in support of Wooden, argues that a temporal-based interpretation of "occasion" risks unjustifiably making juvenile offenders into "career" criminals. HRFK contends that because the ACCA includes juvenile convictions as qualifying offenses, a single night of juvenile criminal conduct can result in a mandatory 15-year sentence. HRFK posits that this harsh result ignores an adolescent offender's lack of maturity and forecloses any opportunity for juvenile rehabilitation.

The United States counters that a holistic and fact-dependent interpretation of "occasion" would encourage repeat criminal offenses, so long as the offenses occur as part of one criminal spree or episode. Specifically, the United States argues that a holistic and fact-dependent approach encourages habitual offenders to commit more crimes in the span of one day or night. Furthermore, the United States cautions that repeat offenders could rely on pure luck, such as the lack of some intervening event between offenses, to avoid facing an enhanced sentence.

Full text available at https://www.law.cornell.edu/supct/cert/20-5279. ⊙

Written by Parker Harris and Moataz Abdelrasoul. Edited by Paul Ingrassia.

Mississippi v. Tennessee (No. 22O143)

Oral argument: Oct. 4, 2021
Court below: Original Jurisdiction

This case asks the Supreme Court to determine if groundwater should be classified as an interstate resource and fall within federal common law equitable apportionment jurisprudence. The Special Master determined that the Middle Claiborne Aquifer is an interstate resource and that the Supreme Court should allow Mississippi to amend its complaint to include an equitable apportionment claim. Mississippi disputes the Special Master's conclusions and argues that groundwater naturally flows from its territorial boundaries. Mississippi asserts that Tennessee's underground pumping violates Mississippi's territorial sovereignty by disrupting the groundwater's natural flow within Mississippi's borders. Tennessee argues that the Special Master is correct in identifying the aquifer as an interstate resource, but that the Supreme Court should not allow Mississippi to amend its complaint because any amendment would create additional costly and time-consuming litigation. The outcome of this case has serious implications for interstate water rights and the apportionment of below-ground natural resources.

Full text available at https://www.law.cornell.edu/supct/cert/143,%20ORIG. ⊙

Hemphill v. New York (No. 20-637)

Oral argument: Oct. 5, 2021
Court below: *Court of Appeals of the State of New York*

This case asks the Supreme Court to balance state criminal evidence rules and Sixth Amendment rights. New York's opening-the-door rule allows the admission of otherwise inadmissible evidence if a party has given an incomplete and misleading impression of the issue. Under this rule, if a criminal defendant "opens the door" to responsive evidence, the defendant also forfeits their right to exclude that evidence on the grounds that it is barred by the Confrontation Clause. Darrell Hemphill contends that New York violated his Sixth Amendment right to confront his accuser by ruling that the state's opening-the-door rule superseded the Confrontation Clause. New York argues that the opening-the-door rule does not infringe on Hemphill's constitutional rights. The outcome of this case has heavy implications for a defendant's rights under the Sixth Amendment and the states' trial procedures.

Full text available at https://www.law.cornell.edu/supct/cert/20-637. ⊙

Brown v. Davenport (No. 20-826)

Oral argument: Oct. 5, 2021
Court below: *United States Court of Appeals for the Sixth Circuit*

This case asks the Supreme Court to resolve a difference in judicial opinion among several federal courts of appeal regarding which standard is appropriate for granting federal habeas relief. Petitioner Ervine Lee Davenport (Davenport) contends that the approach taken by the U.S. Court of Appeals for the 6th Circuit in *Brecht v. Abrahamson*, which requires that a defendant experience a "substantial and injurious effect" due to a trial error, is satisfactory. Respondent Mike Brown (Brown), Acting Warden, argues that the standard invoked by the U.S. Court of Appeals for the 2nd, 3rd, 7th, 9th, and 10th Circuits in *Chapman v. California* should instead apply. For a federal court to grant relief under *Chapman v. California*, a trial error must not be "harmless," and the state court's interpretation of *Chapman v. California* must be "unreasonable" under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The outcome of this case will affect how much deference federal courts give to state courts' interpretations of AEDPA, as well as the ability of defendants to successfully obtain relief in federal habeas proceedings.

Full text available at https://www.law.cornell.edu/supct/cert/20-826. ⊙

United States v. Zubaydah (No. 20-827)

Oral argument: Oct. 6, 2021
Court below: *United States Court of Appeals for the Ninth Circuit*

This case asks the Supreme Court to weigh national security concerns against the need for transparency and accountability when applying the state secrets privilege, a common-law privilege permitting classified information to be protected from discovery. Petitioner the United States argues that the utmost deference is owed to government officials in matters of national security. Respondent Zubaydah argues, however, that courts should review the evidence independently to separate state secrets from non-privileged information. The outcome of this case carries significant implications for judicial transparency, the separation of powers, and civil liberties.

Full text available at https://www.law.cornell.edu/supct/cert/20-827. ⊙

Cameron v. EMW Women's Surgical Center, P.S.C., et al. (No. 20-601)

Oral argument: Oct. 10, 2021
Court below: *United States Court of Appeals for the Sixth Circuit*

This case asks the Supreme Court to determine whether it is appropriate for an attorney general to intervene in a case when no other governmental representative will defend the state law, despite the attorney general's voluntary dismissal and contradictory stipulations in the case. After the Court of Appeals for the Sixth Circuit affirmed the district court's decision to prohibit the enforcement of a Kentucky law, the Secretary of Kentucky's Cabinet for Health and Family chose not to appeal the Sixth Circuit's decision and Attorney General Daniel Cameron (Cameron) moved to intervene as a third-party to continue defending the law. Cameron argues that the court should consider the importance of the state's legal interests, maintaining that states have the authority to decide who represents them in court, and that the Sixth Circuit abused its discretion by not permitting his intervention. EMW Women's Surgical Center (EMW) counters that Kentucky's interests were protected because the Attorney General's office left the initial suit voluntarily and agreed to be bound by the final judgment. EMW contends that the Attorney General's office should not receive unique exemptions from procedural rules, with intervention being appropriate at the appellate level in rare circumstances only. The outcome of this case has important implications for separation of power between the state and the federal government and for the court's application of procedural law to state-government litigants.

Full text available at https://www.law.cornell.edu/supct/cert/20-601. ⊙

Statement of Ownership, Management, and Circulation of *The Federal Lawyer*

This statement of ownership, management, and circulation as filed Oct. 1, 2021, is required by an act of August 12, 1970: Section 3685, Title 39, United States Code. *The Federal Lawyer* (ISSN: 1080-675X) is published by the Federal Bar Association (FBA); in calendar year 2021, The Federal Lawyer was published bi-monthly. The annual nonmember subscription price is $50 ($14 FBA member subscription included in member dues).

The publisher's general office is: 1220 North Fillmore Street, Suite 444, Arlington, VA 22201. The Federal Bar Association, Publisher; Andrew Doyle, Editor in Chief: 1220 North Fillmore Street, Suite 444, Arlington, VA 22201; Lynne Agoston, Managing Editor: 1220 North Fillmore Street, Suite 444, Arlington, VA 22201. Owned and managed by the Federal Bar Association, 1220 North Fillmore Street, Suite 444, Arlington, VA 22201. Stockholders owning or holding 1 percent or more of total amount of stock: none. Bondholders, mortgage, and other security holders owning or holding 1 percent or more of total amount of bonds, mortgages, or other securities: none. The purpose, function, and nonprofit status of the Federal Bar Association has not changed during the preceding 12 months.

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Issue Date for Circulation Below: July/August 2021

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1. Mailed Outside-County Paid Subscription State on PS Forum 3541	17,084	14,883
2. Mailed In-county Paid Subscriptions State on PS Form 3541	0	0
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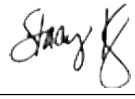
G. Copies Not Distributed	541	573
H. Total	18,274	16,001
I. Percent Paid	96%	96%

This publication is a general publication and publication of this statement is required. The statement will be printed in the November/December 2020 issue of this publication.

Signature and Title of Editor, Publisher, Business Manager, or Owner **Date**



Executive Director **10/1/21**

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Thompson v. Clark (No. 20-659)

Oral argument: Oct. 12, 2021
Court below: *United States Court of Appeals for the Second Circuit*

This case asks the Supreme Court to determine whether the "favorable termination" element of a Section 1983 claim alleging unreasonable seizure requires a petitioner to show that the criminal proceedings at issue terminated in a way that is consistent with his innocence. Petitioner Larry Thompson brought a Section 1983 claim against his arresting officers for violating his Fourth Amendment rights after his criminal charges were dismissed "in the interest of justice," with no further explanation regarding Thompson's innocence or guilt. Thompson claims that his criminal proceedings terminated favorably, but Respondent Paigel Clark—an arresting police officer— argues that Thompson failed to meet this requirement, asserting that charges must be dismissed in a way that affirmatively indicates innocence. This case has important implications for the future of Section 1983 claims, prosecutorial discretion, and police officer accountability.

Full text available at https://www.law.cornell.edu/supct/cert/20-659. ⊙

Babcock v. Kijakazi (No. 20-480)

Oral argument: Oct. 13, 2021
Court below: *United States Court of Appeals for the Sixth Circuit*

This case asks the Supreme Court to determine whether the uniformed services exemption under the Social Security Act applies to the Civil Service Retirement System pensions of dual-status technicians. Petitioner David Babcock argues that the entirety of his service as a dual-status technician was as a uniformed member of the National Guard and he thus should entirely fall under the exemption. The Social Security Administration, under Acting Commissioner Kilolo Kijakazi, argues that the portion of Babcock's service as a dual-status technician that was compensated by the Civil Service Retirement System pension was performed in his capacity as a civilian employee and therefore it should not fall under the exemption. The outcome of this case will impact the benefits available to dual-status technicians and clarify the distinction between dual-status technicians and other military personnel.

Full text available at https://www.law.cornell.edu/supct/cert/20-480. ⊙

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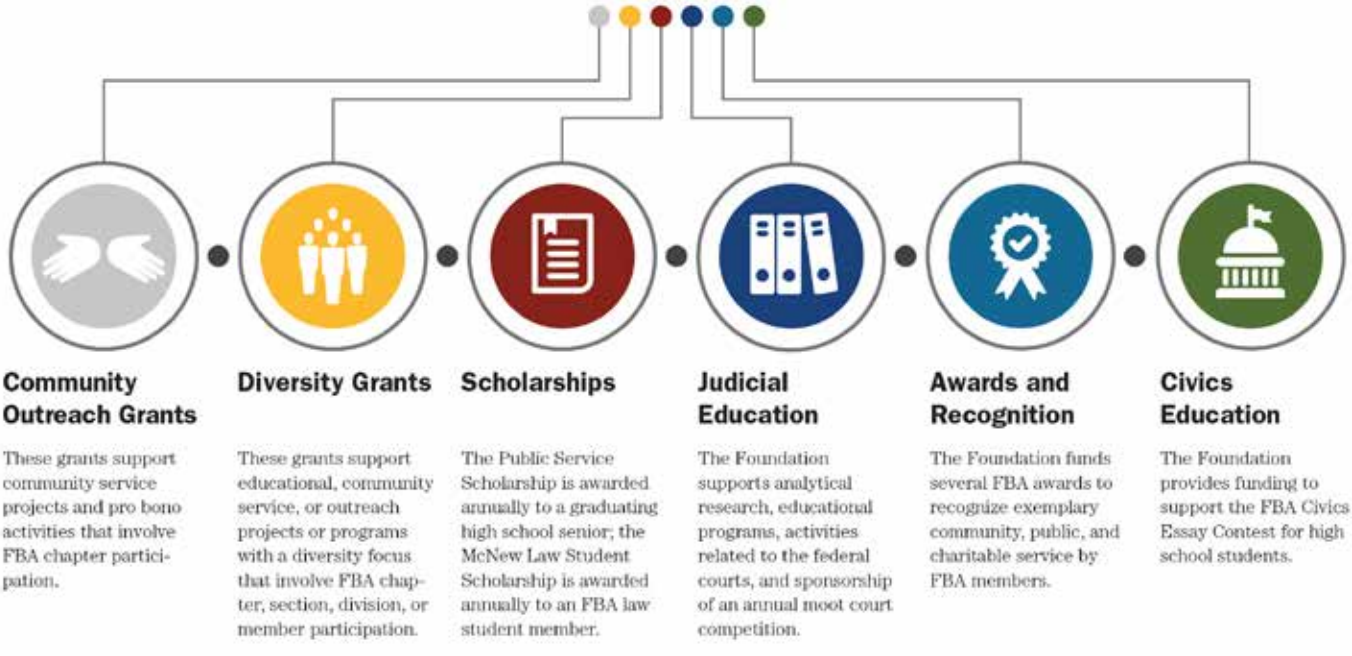

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MEET YOUR BOARD

Anh Le Kremer
National President

Anh Le Kremer is the chief operating officer and general counsel at Nystrom & Associates, Ltd. Kremer has been an active member of the FBA since the start of her legal career in 2001. Her involvement with the FBA began with the Minnesota Chapter, where she was a member of the Executive Committee and served in a number of leadership roles before serving as the circuit vice president for the Eighth Circuit for two terms, receiving the Outstanding Service Award in 2011 for her work. She served on the FBA Board of Directors from 2013 to 2016 and was appointed by then-president Judge Michael Newman in January 2017 to fill a vacancy on the board from January through September 2017. Kremer served on the Sections and Divisions Council. She is also a past chair of the Professional Ethics Committee, where she assisted with the development of a Standards of Professional Ethics and Conduct Policy, which was adopted by the board and sets the standards of conduct expected of our leadership. Kremer is a past chair of the Audit Committee (2015), past chair of the Shaw Younger Lawyers Public Service Award and Grant Committee (2017), and past chair of the Constitution, Bylaws, Rules and Resolutions Committee (2018), and she has served on other FBA committees, including the Nominations and Elections Committee, the Sarah T. Hughes Awards Committee, the Women and the Law Conference Planning Committee, and the Rising Professionals Symposium Planning Committee. Kremer also served as the general counsel for the FBA for FY 2019. Kremer was elected as the treasurer in FY 2020 and has progressed through the leadership ladder, recently installed as president for FY 2022. In addition to her work with the FBA, Kremer is also a frequent speaker at various bar association events, including the Third Annual Women of Color in the Law Forum (2018) and the Association of Corporate Counsel Women In the House: Bringing the Strength & Power of Women to the Workplace. ☉

Matthew C. Moschella
National President-Elect

Matthew C. Moschella is a partner at Sherin and Lodgen LLP in Boston, where he represents clients in all types of civil litigation. He is also a member of the firm's Employment Law and Professional Liability Groups. Moschella counsels clients in various industries on employment risk management issues, including preventing discrimination claims; hiring and termination issues; employment contracts; employee handbooks; and noncompete, nonsolicitation, and nondisclosure agreements.

Moschella graduated from Boston College, Boston College Graduate School of Social Work, and Northeastern University School of Law. After law school, he served as a law clerk to Hon. Judith Gail Dein, U.S. magistrate judge for the U.S. District Court for the District of Massachusetts. During law school, he interned with a district judge at the U.S. District Court for the District of Massachusetts, the Civil Division of the U.S. Attorney's Office for the District of Massachusetts, two Boston civil litigation firms, and the Massachusetts Department of Social Services' legal department.

Moschella has been active in the FBA since 2004. He has been a board member of the Younger Lawyers Division (YLD) for several years and has recently served as chair. He is also the co-chair of the FBA's Supreme Court Admissions Program, which is coordinated by the YLD. Moschella is also active in the Massachusetts Chapter of the FBA. He has been a member of its Executive Council and an officer for several years. ☉

Jonathan O. Hafen
National Treasurer

Jonathan O. Hafen is widely regarded as one of Utah's top lawyers. As a trial lawyer, Hafen handles a wide variety of litigation, including cases in the areas of securities and investment law, employment law, regulatory enforcement defense, ownership and control of businesses, class actions, and legal malpractice defense. Hafen also serves as legal counsel to numerous small, midsize, and multinational companies, utilizing the significant resources available at his law firm, Parr Brown Gee & Loveless, to address the broad spectrum of legal challenges routinely confronting business leaders. Most recently, he has devoted a significant portion of his time serving as the court-appointed receiver in a $200-million precious metals Ponzi scheme.

Following a nomination, research, and blue-ribbon review process, Hafen was named one of the "Top 10" lawyers in the Mountain States (Utah, Nevada, Idaho, Montana, and Wyoming) by *Super Lawyers*

Magazine. Hafen also has been repeatedly recognized as a top lawyer by *Best Lawyers in America*, *Chambers USA*, *Benchmark Litigation*, and *Utah Business* magazine. *Best Lawyers* named Hafen "Lawyer of the Year" in Employment Law for Individuals.

Prior to joining his current firm, Hafen graduated *summa cum laude* from BYU in 1988 and *magna cum laude* from BYU Law School in 1991. He clerked for Monroe McKay, chief judge of the U.S. Tenth Circuit Court of Appeals and worked at one of the nation's most prestigious law firms, Sidley & Austin in Chicago.

Hafen is heavily involved in work for charitable organizations. He has served for many years as board chair of Tuacahn Center for the Arts. Tuacahn typically hosts over 300,000 patrons each year and has a positive economic impact on Washington County, Utah, of over $100 million. He supports numerous professional organizations and has held leadership positions with the FBA, the Utah State Bar, the BYU Alumni Association, the BYU Law School Alumni Association, and the J. Reuben Clark Law Society.

Hafen supports his legal community through a wide variety of service, including serving for a number of years as chair of the Utah Supreme Court Advisory Committee on the Rules of Civil Procedure, as chair of the Utah State Bar CLE Advisory Committee, and as an organizer of dozens of CLE conferences and presentations. In recognizing his mentoring of many other lawyers, the Utah State Bar awarded Hafen the inaugural Charlotte Miller Mentoring Award. He recently completed a term serving as the FBA's general counsel (pro bono).

Hafen is also active in Utah's business community, having served for many years on the Salt Lake Chamber's Board of Governors, where he is currently the co-chair of the chamber's Public Policy Committee. He also serves on the board of Utah's Women's Leadership Institute and on the board of the Utah Center for Legal Inclusion.

Hafen has published and lectured widely on a variety of topics, including trial skills, investment fraud, antitrust law, professionalism and civility, legal ethics, employment law, securities law compliance, and litigation strategy. ⊙

Hon. Alison S. Bachus
Director

Hon. Alison S. Bachus has served FBA in a variety of capacities, including on the National Board of Directors from 2018 to 2020. She has also served on the National Constitution, Bylaws, Rules and Resolution Committee; Government Relations Committee; Budget and Finance Committee; Community Service and Outreach Committee; Membership Committee; Nominations and Elections Committee; Chapter Activity Awards Committee; and Special Committee on Women in the Law. In FY 2018, she chaired the Nominations and Elections Task Force, which examined the FBA's elections procedures. She then served on the National Governance Task Force in FY 2019. From 2012 to 2017, she served as vice president for the Ninth Circuit. Judge Bachus was chair of the circuit vice presidents for FY 2017. Prior to her election as a circuit vice president, she served as president of the Phoenix Chapter, where she was a member of the board from 2007 to 2020. She is also proud to be a Fellow of the FBA Foundation.

From 2011 to 2016, Judge Bachus presented at every FBA national leadership training program and co-chaired the program in 2016. She drafted the national sample membership plan, which is used as a model for chapters across the country for membership best practices, as well as the national governing document changes recently adopted by the National Council. At the section level, she has been a member of the Federal Litigation Section and has served on its board. She was a speaker at the FBA's national Women in the Law Conference in Washington, D.C., in 2015.

Prior to her appointment to the Arizona state bench in 2015, Judge Bachus served as an assistant U.S. attorney for many years and as in-house counsel for the Federal Bureau of Prisons in Arizona. She received various awards during her career as a federal litigator, including Cooperative Law Enforcement and Victims' Rights awards. Before joining the U.S. Attorney's Office, she served as a law clerk for then-Chief U.S. District Judge Stephen M. McNamee.

Judge Bachus currently serves on the board of the Law College Association of the University of Arizona's Rogers College of Law, and she was a faculty member of Arizona's Bar Leadership Institute, working on bench/bar relations between the federal and state bars, for many years. She is a member of the Arizona Women Lawyers Association. Prior to joining the bench, she served as a lawyer-representative for the Ninth Circuit Judicial Conference and on the Arizona State Bar's Committee on Minorities and Women in the Law. Outside of legal organizations, Judge Bachus volunteers with the Girl Scouts in Arizona. ⊙

Ernest T. Bartol
Director

Ernest T. Bartol received his J.D. from Villanova University School of Law in 1970. Admitted to the New York Bar in 1971, Bartol served the president of the FBA's Eastern District of New York Chapter from 2011 to 2013 and has served as a member of the Nassau County Bar Association, Estates and Trusts Law Committee from 1977 to date, the Professional Ethics Committee from 1979 to date, and the Tax Certiorari Committee from 1988 to date, and the New York State Bar Association Estates and Trusts Law Committee from 1973 to date.

Bartol, who has a B.S. in accounting from Fordham University, has concentrated in all phases of estates, wills, and trusts and commercial litigation since leaving the employ of a major accounting firm in 1971.

On the estate-planning side, he has been engaged in all phases of estate asset protection by drafting, inter alia, (1) Wills with Unified Credit Shelter Trusts and Provisions; (2) Irrevocable and Revocable Trusts, including Life Insurance Trusts; (3) Qualified Personal Residence Trusts; (4) Family Limited Partnerships and Limited Liability Companies; (5) Private Annuities; (6) GRATS, GRITS and GRUTS; and (7) other planning devices for use by individuals, shareholders of family and closely held businesses, and partners of family and closely held businesses.

On the estate litigation side, Bartol has been engaged in all types of proceedings

in the surrogates courts located in New York City and Nassau, Suffolk, and upstate counties, including contested probate proceedings, contested accounting proceedings, and discovery proceedings. His estate work also includes preparing and filing federal and New York State estate tax returns. He also has handled many commercial trials in the New York State Supreme Courts and the U.S. District Courts in the Eastern and Southern Districts.

A member of the New York State Bar Association Trusts and Estates Law Committee, wherein he frequently lectures on estate-related topics, Bartol also has recently been inducted as a member of the Federal Bar Council and has become a Fellow of the American Bar Foundation and the New York State Bar Association. He is a member of various Who's Who registers, including Who's Who in American Law.

In 2003, Bartol became a member of the Civil Rules Committee of the U.S. District Court for the Eastern District of New York, and in August 2008, he became a member of the Magistrate Selection Committee of the U.S. District Court for the Eastern District of New York. In March 2008, he became a member of the state of New York Committee on Character and Fitness for the Second, Tenth, and Eleventh Judicial Districts. In June 2008, he became a member of the Independent Judicial Election Qualification Commission for the Tenth Judicial District of the New York State Supreme Court. In 2004, he became the presiding trustee of the Board of Directors of United Cerebral Palsy of Nassau County, a charity for whom he has donated substantial time for 30 years.

Bartol is admitted to practice before all the courts of the state of New York, a number of U.S. district courts, the U.S. Court of Appeals for the Second Circuit, the U.S. Supreme Court, and the U.S. Tax Court. ⊙

Joey Bowers
Director

Joey Bowers, who serves the FBA in his personal capacity, is an assistant general counsel with the Justice Management Division for the Department of Justice (DOJ) in Washington, D.C. He joined the DOJ through the Attorney General's Honors Program, and prior to serving in his current position, he served as both a trial attorney and the in-house counsel for the Civil Division of DOJ. Before joining the DOJ, Bowers had the honor to serve as a law clerk for U.S. District Court Judge Patrick Michael Duffy and U.S. District Court Judge Joseph F. Anderson Jr., both in the U.S. District Court for the District of South Carolina. Bowers is the recipient of the DOJ Civil Division's John W. Douglas Award for Pro Bono Service and the Washington Council of Lawyers Government Pro Bono Award. He is a member of the Capitol Hill Chapter and is a former chair of the FBA's TLD Board of Directors. ⊙

Richard Dellinger
Director

Richard Dellinger is lead trial counsel with the Newlin Law Firm in Orlando, Fla. In that role, he is responsible for bringing cases before juries and securing a verdict. Dellinger regularly appears in state and federal court on behalf of parties who have been injured. His cases involve motor vehicle crashes, premises liability, and significant personal injury. He has practiced in Florida for more than 22 years and previously was a partner with an established Orlando law firm.

Dellinger is the past president of the Orange County Bar Association (with 3,500+ members) and is past president of the FBA's Orlando Chapter, the Orange County Bar Foundation, and the Orange County Bar Legal Aid Society. ⊙

Anna W. Howard
Director

Anna W. Howard is an instructor of law at the University of Georgia School of Law. In this role, she teaches legal writing courses and helps direct the school's advocacy program and the Appellate Litigation Clinic. In the clinic, Howard supervises students as they represent indigent clients before the federal circuit courts of appeal, the Supreme Court of Georgia, the Board of Immigration Appeals, and the U.S. Supreme Court.

Previously, she was an associate with Butler Wooten & Peak LLP, where she litigated False Claims Act qui tam, product liability, and catastrophic personal injury cases. She also served as a career law clerk for Hon. Leigh Martin May and a term law clerk for Hon. Richard W. Story, both of the U.S. District Court for the Northern District of Georgia.

Howard earned her bachelor's degree *cum laude* and her J.D. *magna cum laude* from the University of Georgia. As a law student, she was a member of the school's successful moot court team and was inducted into the Order of the Coif and the Order of the Barristers.

Outside of her position as director, Howard currently serves as immediate past chair and member for the Eleventh Circuit of the National Board of Directors for the FBA's YLD. She previously served as YLD chair, chair-elect, treasurer, and secretary, and for many years chaired the YLD Younger Federal Lawyer Awards and Membership Committees. She also currently serves as vice president of the Atlanta Chapter of the FBA and formerly served as the Atlanta Chapter's YLD chair. ⊙

Glen R. McMurry
Director

Glen R. McMurry is a partner at Taft Stettinius & Hollister LLP in its Dayton, Ohio, office and is a member of the firm's litigation practice group. He has over 14 years of experience serving diverse corporations and individuals across the country resolving a wide variety of issues, including complex dispute resolution and compliance with local, state, and federal laws. McMurry also focuses his practice on employment issues, construction claims, insurance claims/defense, and mergers and acquisitions.

McMurry is currently serving his second term as a member of the FBA Board of Directors, having been an active participant in the association for over a decade. He served as the Dayton, Ohio, Chapter president from 2010 to 2012. Since then, he has served in many capacities, including chairing the YLD in 2016, serving on Government Relations Committee and the editorial board, and

serving as one of the Sixth Circuit vice presidents. Most recently, McMurry was appointed to steer a national task force aimed at increasing courtroom advocacy opportunities for younger lawyers across the country. He was also recently appointed to chair the Law Student Division. ⊙

Adine S. Momoh
Director

Adine S. Momoh is an equity partner and trial attorney specializing in complex business and commercial litigation, securities litigation, estates and trusts litigation, and creditors' rights and bankruptcy in the Minneapolis office of the law firm of Stinson LLP. Momoh received her B.A. in business administration-legal studies in business, psychology, and pre-law, *summa cum laude,* from the University of St. Thomas Opus College of Business. She received her J.D., *magna cum laude*, from William Mitchell College of Law, and an LL.M., with highest distinction, from Georgetown University Law Center. After law school, she clerked for Hon. Jeanne J. Graham of the U.S. District Court for the District of Minnesota.

Momoh has been an active member of the FBA since 2011, after having joined the association as a law student member in 2007. She is a former Eighth Circuit vice president and served as chair of the FBA's YLD during the FBA's Centennial, where, under her leadership, the division initiated the annual StepUp Pro Bono Challenge, which encourages all FBA members to volunteer at least 50 hours of pro bono service each year for work addressing systemic racism, socio-economic injustice, and access to justice. Having been elected to the YLD Board of Directors in 2011, Momoh has served on practically all of the YLD's committees. For five years, she served as a director of the YLD's Thurgood Marshall Memorial Moot Court Competition in Washington, D.C., one of the most prestigious moot court competitions in the country. She served as the chair of the Robyn J. Spalter Outstanding Achievement Award Committee and was one of the award's founders. She also assisted the YLD with its Summer Law Clerk Program and U.S. Supreme Court Admissions Ceremony, among many other committees and FBA initiatives. A nationally recognized and award-winning attorney, Momoh has received national FBA awards for her work, including the FBA's Appreciation of Leadership Award in 2017.

With respect to her involvement with the FBA on the national level, in addition to chairing the YLD and serving as an Eighth Circuit vice president, Momoh previously served as chair of the FBA's Chapter Activity Fund Committee and has served as a member of various FBA committees and task forces, including the FBA's 100th Anniversary Planning Committee, Rising Professionals Symposium Planning Committee, Audit Committee, Membership Committee, Nominations and Elections Committee, Shaw Younger Lawyers Public Service Award and Grant Committee, and Diversity and Inclusion Committee. With respect to her involvement with the FBA on the local level, Momoh is a board member of the FBA Minnesota Chapter's Board of Directors and was previously vice president of membership, co-chair of the chapter's Law School Outreach Committee, and a member of the chapter's Communications Committee, for which she has written several articles for the chapter's nationally recognized and award-winning *Bar Talk* publication. She currently serves as the co-vice president of special events.

Aside from her work with the FBA, Momoh has been active with other bar associations and nonprofits, including serving on the boards of the Minnesota Association of Black Lawyers and the Saint Paul and Minnesota Foundation, and as vice chair of the American Bar Association's Bankruptcy Appeals Subcommittee of the Bankruptcy Committee. ⊙

Michelle M. Pettit
Director

Michelle M. Pettit is an assistant U.S. attorney in the Southern District of California, where she has worked in the Criminal Division since 2007, prosecuting a wide range of cases, such as drug trafficking, immigration offenses, human smuggling, child exploitation, sexual assaults, cybercrimes, domestic and international terrorism, and homicide. She is currently the deputy chief of intake, coordinating the initial processing of all new reactive cases and training new prosecutors in one of the nation's busiest border districts.

Pettit, who received a B.S. degree with distinction from the U.S. Naval Academy, began her career in 1994 as a surface warfare officer in the U.S. Navy. She held multiple leadership positions in the Engineering, Combat Systems, and Operational Departments and completed two Persian Gulf deployments on Navy destroyers. She was selected for the Law Education Program in 1998 and received her J.D. from Vanderbilt University Law School in 2001, where she was inducted into the Order of the Coif and served as a managing editor of the *Vanderbilt Law Review*. Subsequently, she entered the Judge Advocate General (JAG) Corps and served six additional years on active duty, advising Navy officials on personnel and military justice matters and serving as the senior supervising prosecutor for the entire Southwest region. In 2007, she transferred to the Navy Reserves when she joined the Department of Justice. As a Navy reservist, she has been assigned as a trial counsel, an appellate defense counsel, a Naval Justice School instructor, an executive officer, a preliminary hearing officer, an appellate judge on the Navy-Marine Corps Court of Criminal Appeals, and the chief reserve trial judge and commanding officer of the Navy Reserve Trial Judiciary.

Pettit has diligently served the San Diego Chapter of the FBA in a variety of capacities, including as a committee member, secretary, president, and, now, Advisory Board member. Before being elected to the FBA's Board of Directors, she was a member of the National Governance Task Force. In addition to her FBA service, she has been a member of the Ninth Circuit Conference Executive Committee and a lawyer representative for the Southern District of California, where she has coordinated and presented eight programs in support of the federal judiciary. She is currently the treasurer and an Executive Board member of the Enright Inn of Court, and she is an active member of the San Diego County Bar Association, the Lawyers Club of San Diego, the National Association of Women Judges, and the Association of Business Trial Lawyers. She spends countless hours volunteering for the District Court's outreach programs and is a committee member and judge for the annual Ninth Circuit Civics Contest. She frequently conducts law enforcement training and

provides lectures on national security and military justice topics. ⊙

Kelly T. Scalise
Director

Kelly T. Scalise has been a member of the FBA for over 18 years and has served in a leadership role for all of those years. After joining the FBA in November 2001, Scalise became a board member of the YLD of the New Orleans Chapter. She entered the leadership ladder and became chair of the YLD in 2005, overseeing the re-establishment of the YLD following Hurricane Katrina. While serving on the YLD board, she organized a CLE that brought in over 150 new members; participated in an event for high school students during which they visited oral arguments at the U.S. District Court for the Eastern District of Louisiana; organized a program for law school students at the Eastern District, which also increased membership by over 100 members; and participated in public service projects, including a refurbishment of a police station after Hurricane Katrina.

In 2006, Scalise became a board member of the New Orleans Chapter. As a board member, she served on multiple committees, including CLE committees, policy committees, and planning committees. She served as the national liaison for the New Orleans Chapter from 2009 to 2011. In 2011, she was selected to serve as membership chair, thus entering the leadership ladder. While president-elect in 2015–2016, the New Orleans Chapter was awarded Chapter of the Year. As chapter president, she established eight practice area committees, which provide substance and opportunities for engaging chapter members; conducted a gift card drive for the legal community affected by devastating floods in Louisiana; welcomed nearly 100 new lawyers as members; coordinated with national sections on CLE programming; and oversaw at least one CLE or special event per month.

In 2007, Scalise also became a member of the YLD National Board, joining the Thurgood Marshall Memorial Moot Court Competition Committee and advancing to co-director. She chaired a CLE committee that presented the first YLD CLE program at the Annual Convention in San Diego. From 2012 to 2013, she served as chair of the YLD and co-chaired the largest moot court completion. She received the 2013 Division Chair Award.

In 2013, Scalise co-founded the Admiralty Law Section with Howard McPherson and served as its chair for a two-year term. As chair, she established a quarterly newsletter, organized three seminars, and steadily recruited members. She was a member of the board of directors and *The Federal Lawyer* editorial board, past co-chair of the Law Student Division Task Force, and a past member of the Sections and Division Council. Scalise is a Fellow of the FBA Foundation.

Scalise is a shareholder at Liskow & Lewis, practicing in maritime, oilfield, and indemnity issues as well as environmental and tort litigation. She has represented clients both as plaintiffs and defendants and tried cases in federal and state court. She serves on her firm's Diversity Committee. She is a frequent presenter on admiralty and insurance issues. She was nominated to "Top Lawyers" by *New Orleans Magazine*, *Louisiana Super Lawyers*, and *Best Lawyers in America*. She also received the 2015 FBA President's Award.

Scalise is a member of the New Orleans Bar Association, having chaired several committees; the Judge John C. Boutall American Inn of Court; the Women's Energy Network; and the Women's International Shipping & Trading Association. She is a Fellow of Louisiana Law Foundation and American Bar Foundation and is a member of the ABA Admiralty and Maritime Law Committee. She also volunteers at her children's school, St. Catherine of Siena. ⊙

Hon. Mimi E. Tsankov
Director

Hon. Mimi E. Tsankov (personal capacity) has served as an immigration judge with the U.S. Department of Justice, Executive Office for Immigration Review, since 2006, where she has presided over detained and nondetained dockets at the Los Angeles Immigration Court, the Denver Immigration Court, and the New York Immigration Court. She has served as pro bono liaison judge at the Denver and Los Angeles Immigration Courts and has been a contributing editor of the U.S. Department of Justice *Immigration Judge Bench Book*. A frequent panelist at regional, national, and international law conferences, Judge Tsankov has presented on a wide variety of immigration law topics, ranging from mental competency and juvenile docket hearings, to ethics, professional responsibility, and "crimmigration" matters. She has published articles in the U.S. Department of Justice *Immigration Law Advisor*, *The Federal Lawyer*, and various academic law journals on topics ranging from 287(g) law enforcement to immigration benefits for victims of domestic violence in the United States and the European Union. Judge Tsankov established and chaired the Colorado Federal Attorney Pro Bono Program and served on the Colorado Chief Justice's Commission on the Legal Profession.

In her personal capacity, she has served as an officer with the FBA Colorado Chapter, the FBA Immigration Law Section, and the FBA International Law Section, having been recognized nationally in this regard. She is a member of the National Association of Women Judges, Human Rights Subcommittee, and the American Bar Association, National Conference of the Administrative Law Judiciary. She has taught immigration law as an adjunct professor at the University of Denver Sturm College of Law and the University of Colorado School of Law. She holds a J.D.-M.A. in foreign affairs from the University of Virginia. ⊙

Christie C. Varnado
Director

Christie C. Varnado is a partner at The Seibels Law Firm, P.A., a boutique litigation and captive insurance firm in Charleston, S.C. Over the past 25 years, her civil litigation practice in federal and state courts has involved a wide variety of matters and is currently focused on construction defect claims, product liability, personal injury, employment discrimination and compensation, and election challenges. She also provides counsel to private employers, local governmental entities, and individuals with

employment or contractual concerns. She is admitted to practice as a member of the South Carolina bar as well as in the U.S. District of South Carolina, the Fourth Circuit Court of Appeals, and the U.S. Supreme Court.

Varnado served as a law clerk to Hon. Wallace W. Dixon, U.S. magistrate judge, and as deputy county attorney for the County of Charleston. She has been awarded an AV Preeminent rating by Martindale-Hubbell, is a lead counsel rated attorney in civil litigation and consumer protection, and has been listed in *South Carolina Super Lawyers* in the field of construction litigation. Varnado received a B.A. in English from the South Carolina Honors College at the University of South Carolina, where she was a member of Phi Beta Kappa. She received a J.D. from the University of South Carolina School of Law, where she was a member of the Order of the Wig & Robe and the editorial staff of the *South Carolina Law Review*.

Varnado's active involvement with the FBA, both on the national and at the chapter level, has spanned the two decades since the South Carolina Chapter was reinstated in 2001. This is her second term on the national board of directors. Prior to that, she served several terms as a Fourth Circuit vice president, culminating as chair of the circuit vice presidents in 2014–2015. She has been inducted as a Life Fellow of the Foundation of the FBA. Varnado was president of the South Carolina Chapter and a member of its board of directors from 2003 to 2010. She is currently chairing the South Carolina Chapter's planning committee and preparing for the FBA's national annual meeting, to be held in Charleston in September 2022.

Varnado has also served on several committees for the South Carolina Bar and as a YLD delegate to the annual meeting of the American Bar Association. She has been appointed by South Carolina's governor to serve on the Charleston County Board of Elections and Voter Registration since 2003 and is currently serving in her second term as chair. Varnado has presented several lectures on various topics, including legal ethics, elections, local government, federal civil procedure, employment law, and the Freedom of Information Act, and her writing has been featured in *South Carolina Lawyer* magazine. ☉

Michael S. Vitale
Director

Michael S. Vitale is a partner at the law firm of Baker & Hostetler LLP, where he has practiced law since 2007. His practice includes civil, construction, and complex business litigation across the southeast United States, where he has trial experience at both the federal and state level. Vitale has been recognized for his accomplishments as an attorney by Martindale-Hubbell, *The Legal 500* (U.S.), *Florida Super Lawyers*, and *Florida Trend* magazine. He is admitted to practice as a member of the Florida bar as well as the Northern, Middle, and Southern Districts of Florida, the U.S. Court of Appeals for the Eleventh Circuit, and the U.S. Supreme Court.

A dedicated servant to the FBA, Vitale has been an FBA member for well over a decade and has held leadership roles both at the national level and locally. Last year, in addition to serving as a director, he was a member of the FBA's Governance Task Force and the FBA's Audit Committee.

Vitale previously served as a vice president for the Eleventh Circuit for six years, chairing the group during the 2019-2020 year. He received the award for Outstanding Circuit Leader in 2016-2017. During his time as a circuit vice president, Vitale assisted the 15 local chapters in the Eleventh Circuit with their professional development and helped to form the FBA's Southern District of Georgia Chapter.

Vitale has also served on the Membership Committee; the Chapter Activity Fund Committee; the Nominations and Elections Committee; the Constitution, Bylaws, Rules, & Resolutions Committee; and the FBA Mentorship Committee, among others. Locally, he previously served as the president of the Orlando Chapter during the 2012-2013 term and as the National Delegate for Orlando for the 2013-2014 term. He is also a proud Lifetime Fellow of the Foundation of the FBA and a member of the Federal Litigation Section.

Vitale has a B.A. from Florida State University and earned his law degree from Vanderbilt University Law School in 2005. Prior to entering private practice, he was a judicial law clerk for then-Chief Judge Patricia C. Fawsett of the Middle District of Florida. His complete biography can be viewed at https://www.bakerlaw.com/MichaelSVitale. ☉

Mississippi Chapter: Left to right: Dean Emeritus Jim Rosenblatt (FBA Executive Director), McKenna Stone Cloud (FBA President), Robert Gibbs (Mississippi Bar President), Gabrielle Wells (BLSA President), and Professor Frank Rosenblatt (Director, MC Law Litigation and Dispute Resolution Center)

FIFTH CIRCUIT

Mississippi Chapter

Mississippi Bar president Robert Gibbs spoke at Mississippi College School of Law (MC Law) on how mediation and arbitration can serve to settle litigation and disputes. The program was sponsored by MC Law's Student Division of the FBA, the Black Law Students Association (BLSA), and the Litigation and Dispute Resolution Center. President Gibbs is a former trial judge and an experienced litigator and has a robust national mediation practice.☉

SIXTH CIRCUIT

Eastern District of Michigan

The FBA and Honigman LLP hosted a virtual panel discussion, "Public Servant to Private Practitioner: A Roadmap for Transitioning Out," to explore a discrete segment of the legal market: former government lawyers who successfully transitioned to private practice. The panelists discussed their career paths, their journeys to private practice, and considerations for lawyers looking to transition their practice from public to private or private to public. The panel further explored how working on the "inside" can help shape your practice on the outside. ☉

Eastern District of Michigan: Panel discussion titled "Public Servant to Private Practitioner: A Roadmap for Transitioning Out."

Federal Bar Association Application for Membership

The Federal Bar Association offers unmatched opportunities and services to enhance your connections to the judiciary, the legal profession, and your local legal community. Our mission is to strengthen the federal legal system and administration of justice by serving the interests and the needs of public and private federal practitioners, the federal judiciary, and the public they serve.

Advocacy

The opportunity to make a change and improve the federal legal system through grassroots work in over 100 FBA chapters and a strong national advocacy.

Leadership

Help shape the FBA's future and make an impact on the growth of the federal legal community by serving in FBA governance positions.

Learning

Learn from the experts at our many Continuing Legal Education programs offered throughout the year - at both the national and chapter levels.

Networking

Connect with a vast network of federal practitioners and judges extending across all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands.

The FBA - for your career; for a lifetime

THREE WAYS TO APPLY TODAY: Online at www.fedbar.org; by fax (571) 481-9090; or by mail: FBA, PO Box 79395, Baltimore, MD 21279-0395. Questions? Contact the membership department at (571) 481-9100 or membership@fedbar.org.

Applicant Information ***(Please print legibly and complete both sides of the application)***

First Name M.I. Last Name Suffix (e.g. Jr.) Title (e.g. Attorney At Law, Partner, Assistant U.S. Attorney)

❍ Male ❍ Female Have you been an FBA member in the past? ❍ yes ❍ no Is this your business or home address? ❍ business ❍ home

Firm/Company/Agency Number of Attorneys

Address Suite/Floor

Phone Email Address

City State Zip Country

Bar Admission and Law School Information (required)

U.S.
*Court of Record: _____
State/District: _____ Original Admission: / /

Clerk
Court _____
State: _____

Tribal
*Court of Record: _____
State: _____ Original Admission: / /

Students
Law School: _____
State/District: _____ Expected Graduation: / /

Foreign
*Court/Tribunal of Record: _____
Country: _____ Original Admission: / /

Date of Birth (mm/dd/yyyy)
/ /

***Court of Record:** Name of **first court** in which you were admitted to practice.*

Authorization Statement

By signing this application, I hereby apply for membership in the Federal Bar Association and agree to conform to its Constitution and Bylaws and to the rules and regulations prescribed by its Board of Directors. I declare that the information contained herein is true and complete. I understand that any false statements made on this application will lead to rejection of my application or the immediate termination of my membership. I also understand that by providing my fax number and e-mail address, I hereby consent to receive faxes and e-mail messages sent by or on behalf of the Federal Bar Association, the Foundation of the Federal Bar Association, and the Federal Bar Building Corporation.

Signature of Applicant ***Date***

(Signature must be included for membership to be activated)

*Contributions and dues to the FBA may be deductible by members under provisions of the IRS Code, such as an ordinary and necessary business expense, except 4.5 percent which is used for congressional lobbying and is not deductible. Your FBA dues include $15 for a yearly subscription to the FBA's professional magazine.

Federal Bar Association

Membership Categories / Professional Chapter Affiliations / Sections and Divisions

National Membership Levels

Sustaining Membership

Members of the association distinguish themselves when becoming sustaining members of the FBA. Sixty dollars of the sustaining dues are used to support educational programs and publications of the FBA. Sustaining members receive a 5 percent discount on the registration fees for all national meetings and national CLE events.

	Private Sector	Public Sector
Member Admitted to Practice 0-5 Years	❍ $170	❍ $150
Member Admitted to Practice 6-10 Years	❍ $235	❍ $215
Member Admitted to Practice 11+ Years	❍ $285	❍ $245
Retired (Fully Retired from the Practice of Law)	❍ $170	❍ $170

Active Membership

Open to any person admitted to the practice of law before a federal court or a court of record in any of the several states, commonwealths, territories, or possessions of the United States or in the District of Columbia.

	Private Sector	Public Sector
Member Admitted to Practice 0-5 Years	❍ $110	❍ $85
Member Admitted to Practice 6-10 Years	❍ $170	❍ $145
Member Admitted to Practice 11+ Years	❍ $215	❍ $175
Retired (Fully Retired from the Practice of Law)	❍ $110	❍ $110

**Clerk of Court of a Federal or tribal court who is admitted to the practice of law*

Associate Membership

Clerk of Court Associate

Clerk of a Federal or tribal court who is not admitted to the practice of law $0

Foreign Associate

Admitted to practice law outside the U.S. ..... ❍ $215

Law School Associate

Faculty Advisor of Law School Student Chapter ..... ❍ $0
First year student (includes four years of membership)* ..... ❍ $50
Second year student (includes three years of membership)* ..... ❍ $30
Third year student (includes two years of membership)* ..... ❍ $20
One year only option ..... ❍ $20

**These law student associate memberships include an additional year of FBA membership upon graduation.*

National Membership Dues Total: $ _____

Sections - *optional* communities by Practice Area

- ❍ Admiralty Law $25
- ❍ Alternative Dispute Resolution .. $15
- ❍ Antitrust and Trade Regulation... $15
- ❍ Banking Law $20
- ❍ Bankruptcy Law $25
- ❍ Civil Rights Law $15
- ❍ Criminal Law $10
- ❍ Environment, Energy, and Natural Resources $15
- ❍ Federal Litigation $20
- ❍ Government Contracts $20
- ❍ Health Law $15
- ❍ Immigration Law $10
- ❍ Indian Law $15
- ❍ Intellectual Property Law $15
- ❍ International Law $15
- ❍ Labor and Employment Law $15
- ❍ _____ $15
- ❍ Qui Tam Section $15
- ❍ Securities Law Section $0
- ❍ Social Security $10
- ❍ State and Local Government Relations $15
- ❍ Taxation $15
- ❍ Transportation and Transportation Security Law $20
- ❍ Veterans and Military Law $20

Divisions - *optional* communities by Career interest

- ❍ Corporate & Association Counsel (in-house counsel; corporate practice) $20
- ❍ Federal Career Service (past/present federal government employee ..... N/C
- ❍ Judiciary (past/present member or staff of a judiciary) ..... N/C
- ❍ Law Student Division ..... N/C
- ❍ Younger Lawyers* (age 40 or younger or admitted less than 10 years) ..... N/C
- ❍ Senior Lawyers* (age 55 or over) $10

***For eligibility, date of birth must be provided.**

Sections and Divisions Dues Total: $_____

Professional Chapter Affiliation

FBA membership includes one professional chapter membership. Any local chapter dues are indicated next to the chapter name. If no chapter is selected, you will be assigned a chapter based on geographic location. **No chapter currently located in this state or location.*

Alabama
- ❍ Birmingham
- ❍ Montgomery
- ❍ North Alabama

Alaska
- ❍ Alaska

Arizona
- ❍ Phoenix
- ❍ William D. Browning/ Tucson

Arkansas
- ❍ Arkansas

California
- ❍ Inland Empire
- ❍ Los Angeles
- ❍ Northern District of California
- ❍ Orange County
- ❍ Sacramento
- ❍ San Diego
- ❍ San Joaquin Valley

Colorado
- ❍ Colorado

Connecticut
- ❍ District of Connecticut

Delaware
- ❍ Delaware

District of Columbia
- ❍ Capitol Hill
- ❍ D.C.
- ❍ Pentagon

Florida
- ❍ Broward County
- ❍ Jacksonville
- ❍ North Central Florida–$25
- ❍ Orlando
- ❍ Palm Beach County
- ❍ South Florida
- ❍ Southwest Florida
- ❍ Tallahassee
- ❍ Tampa Bay

Georgia
- ❍ Atlanta–$10
- ❍ Southern District of Georgia Chapter

Hawaii
- ❍ Hawaii

Idaho
- ❍ Idaho

Illinois
- ❍ Central District of Illinois
- ❍ Chicago
- ❍ P. Michael Mahoney (Rockford, Illinois) Chapter
- ❍ Southern District of Illinois

Indiana
- ❍ Indianapolis
- ❍ Northern District of Indiana

Iowa
- ❍ Iowa–$10

Kansas
- ❍ Kansas and Western District of Missouri

Kentucky
- ❍ Kentucky

Louisiana
- ❍ Baton Rouge
- ❍ Central Louisiana
- ❍ Lafayette/ Acadiana
- ❍ New Orleans–$10
- ❍ North Louisiana

Maine
- ❍ Maine

Maryland
- ❍ Maryland

Massachusetts
- ❍ Massachusetts –$10

Michigan
- ❍ Eastern District of Michigan
- ❍ Western District of Michigan

Minnesota
- ❍ Minnesota

Mississippi
- ❍ Mississippi

Missouri
- ❍ St. Louis
- ❍ Kansas and Western District of Missouri

Montana
- ❍ Montana

Nebraska
- ❍ Nebraska

Nevada
- ❍ Nevada

New Hampshire
- ❍ New Hampshire–$10

New Jersey
- ❍ New Jersey

New Mexico
- ❍ New Mexico

New York
- ❍ Eastern District of New York
- ❍ Southern District of New York
- ❍ Western District of New York

North Carolina
- ❍ Eastern District of North Carolina
- ❍ Middle District of North Carolina
- ❍ Western District of North Carolina

North Dakota
- ❍ North Dakota

Ohio
- ❍ Cincinnati/ Northern Kentucky-John W. Peck
- ❍ Columbus
- ❍ Dayton
- ❍ Northern District of Ohio–$10

Oklahoma
- ❍ Oklahoma City
- ❍ Northern/ Eastern Oklahoma

Oregon
- ❍ Oregon

Pennsylvania
- ❍ Eastern District of Pennsylvania
- ❍ Middle District of Pennsylvania
- ❍ Western District of Pennsylvania

Puerto Rico
- ❍ Hon. Raymond L. Acosta/ Puerto Rico–$10

Rhode Island
- ❍ Rhode Island

South Carolina
- ❍ South Carolina

South Dakota
- ❍ South Dakota

Tennessee
- ❍ Chattanooga
- ❍ Knoxville Chapter
- ❍ Memphis Mid-South
- ❍ Nashville
- ❍ Northeast Tennessee

Texas
- ❍ Austin
- ❍ Dallas–$10
- ❍ El Paso
- ❍ Fort Worth
- ❍ San Antonio
- ❍ Southern District of Texas–$25
- ❍ Waco

Utah
- ❍ Utah

Vermont
- ❍ Vermont

Virgin Islands
- ❍ Virgin Islands

Virginia
- ❍ Northern Virginia
- ❍ Richmond
- ❍ Roanoke
- ❍ Hampton Roads Chapter

Washington
- ❍ At Large

West Virginia
- ❍ Northern District of West Virginia–$20

Wisconsin
- ❍ Wisconsin

Wyoming
- ❍ Wyoming

Professional Chapter Dues Total: $ ____

Payment Information

TOTAL DUES TO BE CHARGED
(Membership, Section/Division, and Chapter dues): $_____

❍ American Express ❍ MasterCard ❍ Visa
❍ Check made payable to Federal Bar Association - check no. _____

Name on card (*print*) _____

Card No. _____ Exp. _____

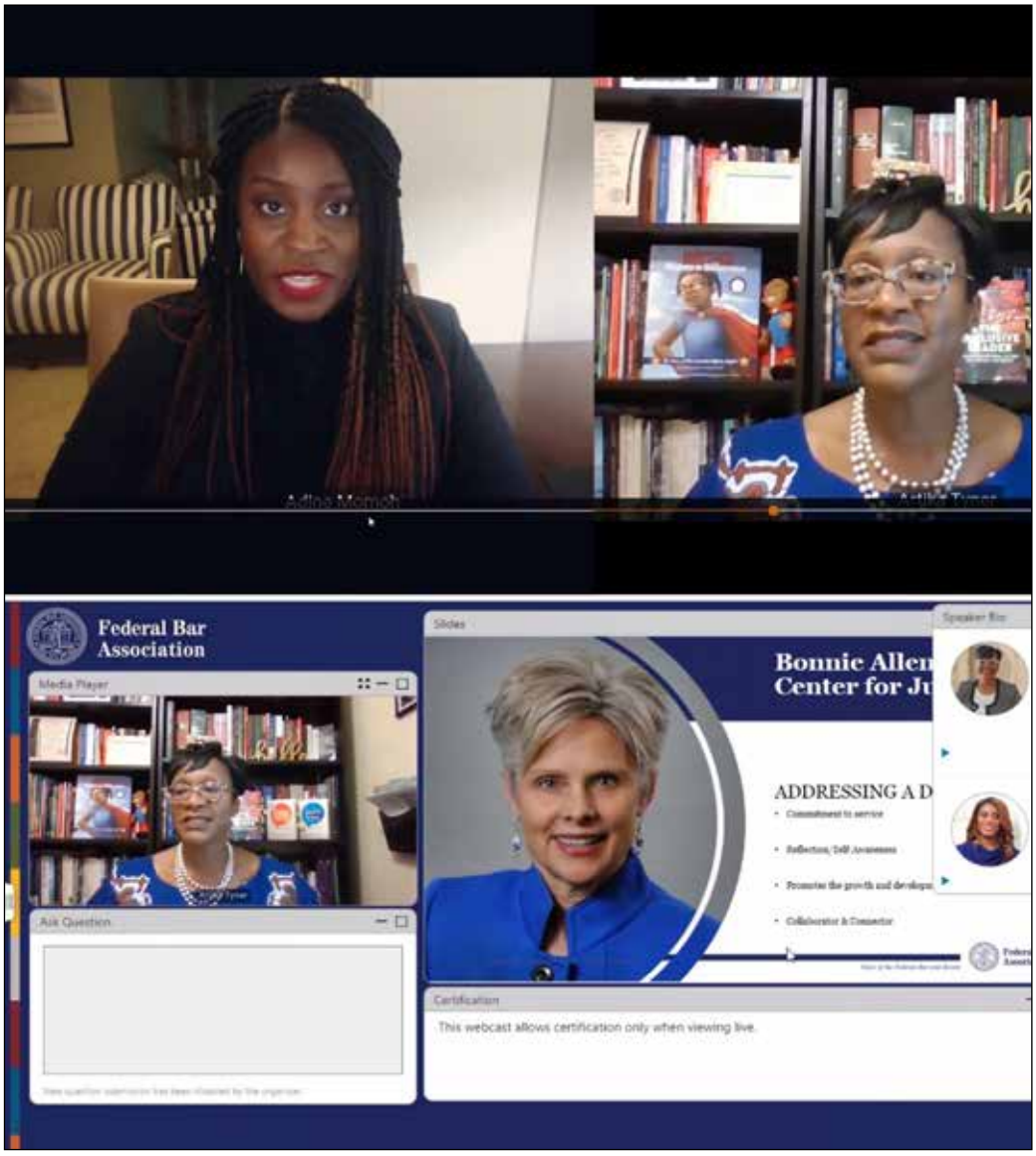
Signature _____ Date _____

Attendees of the Intellectual Property Law Section Business Meeting, held Sept. 24, 2021, at the Frost Science Museum in Miami.

INTELLECTUAL PROPERTY LAW SECTION

The Intellectual Property Law Section (IPLS) met on Sept. 24, 2021, during the FBA's Annual Meeting in Miami. The section business meeting was presided over by section chair Ira Cohen and occurred at the Frost Science Museum, allowing attendees to explore the museum before the meeting. The featured guest speaker was George C. Pologeorgis, administrative trademark judge of the U.S. Patent and Trademark Office's Trademark Trial and Appeal Board. In attendance were several law students who were sponsored by the FBA's IPLS. The IPLS is indebted to board member and officer Oliver Ruiz and to FBA staff for making the memorable event a reality. ⊙

Intellectual Property Law Section chair Ira Cohen leads the section's business meeting in Miami.



Adine S. Momoh (left) and Dr. Artika R. Tyner (right) presenting a CLE webinar on Oct. 6, 2021.

YOUNGER LAWYERS DIVISION

The Younger Lawyers Division (YLD), in cooperation with the FBA's Minnesota, Atlanta, and Utah Chapters and its Diversity, Equity and Inclusion Committee, sponsored a CLE webinar on Oct. 6, 2021, titled "A Call to Action: Stepping Up to Lead and Effectuate Change in a Time of Crisis."

The webinar presented a unique training opportunity led by Dr. Artika R. Tyner, director of the Center on Race, Leadership and Social Justice at the University of St. Thomas School of Law in Minneapolis and author of the award-winning book *The Lawyer as Leader: How to Plant People and Grow Justice*. In the training, Dr. Tyner explored her book and discussed tangible ways lawyers can use their legal skills to advocate for change in marginalized communities. Participants learned how they can use their skills, position, and authority to create equal access to justice, and they left the webinar motivated and with concrete action items for how they can assist in bringing about change in our communities.

The YLD applied for and received a Diversity Grant from the FBA Foundation to help offset the costs. As a result, they were able to provide a free copy of the author's book to the first 50 registrants.

In FY 2020, then-YLD chair Adine S. Momoh led a Call to Action in response to George Floyd's tragic death and the civil unrest across Minnesota, the country, and the world, along with the socio-economic disparities that were heightened by the pandemic (e.g., housing, education, access to food and medical care). The YLD issued a statement and provided resources to help younger attorneys respond. The YLD then initiated a national pro bono challenge, the StepUp Pro Bono Challenge, and encouraged younger attorneys to step up and perform pro bono work, specifically addressing issues of systemic racism, socio-economic injustice, and access to justice. The YLD board has since adopted it as an annual program.

We'd like to thank those who participated in the StepUp Pro Bono Challenge in the last year (2020-2021), completing a total of 745 hours of pro bono service!

Elizabeth Horn
Lisa Kpor
Erin McAdams Franzblau
Adine S. Momoh
Nico Ratkowski
Izak C. Rosenfeld
Rachel Ellen Simon ⊙

Notice of Elections for FY2023

The Nominations and Elections Committee (Committee) hereby gives notice that there will be an election for the following officers of the association for the fiscal year beginning October 1, 2022: President-elect; Treasurer; three Directors; and one Vice President for the following circuits: Second, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Please review specific qualifications for each position at Bylaw 6B. www.fedbar.org/about-us/governance-and-organizational-structure/fba-bylaws/#6

2022 Nominations and Elections Committee

Anh Le Kremer
President and Chair

Matthew C. Moschella
President-elect

W. West Allen
Immediate Past President

Donna Mikel
Circuit Vice President

Oliver Ruiz
Circuit Vice President

Hon. Robin Feder
Section or Division Chair

Daniel Hedlund
Chapter Representative

Pursuant to Bylaw 8, Sec. A1, the Nominations and Elections Committee is responsible for administering the procedures applicable to nomination and election of national officers of the Association during the annual election as prescribed in Article V, Section 3, of the Constitution and Bylaw 6. The Committee shall be composed of the President, who shall chair the Committee; President-elect; immediate past-President; two Vice Presidents for the Circuit designated by the President; a Section or Division chairperson designated by the President- elect; and one Professional Chapter representative designated by the President-elect.

All officers will assume their elected position on October 1, 2022, and serve the following terms: President-elect and Treasurer, one year; three Directors, two years; and Vice Presidents for the Circuits, two years. The incumbent President-elect will automatically succeed the incumbent President on October 1, 2022.

Under Article V, Section 3 of the FBA Constitution, there are two ways for members to be listed on the ballot:

- By nomination of the Nominations and Elections Committee; or
- By petition: (1) a candidate for national office must be endorsed by not less than fifty members in good standing; and (2) a candidate for Vice President for the Circuit must be endorsed by not less than twenty members in good standing of chapters and/or members at large in that particular circuit.

Under Article V, Section 2 of the FBA Constitution, all members of the association at the time of nomination, whose dues are paid for the current fiscal year and who otherwise are in good standing, and meet all other qualifications, as may be required by the Constitution, Bylaws, and policies of the Association, shall be eligible as candidates for any elective office. The FBA welcomes and encourages diverse individuals to apply for leadership positions.

Nominations

Members interested in being nominated for office by the Committee shall complete and submit the FBA Application for National Office along with an electronic resume and photo to Anh Le Kremer, Chair of the Nominations and Elections Committee, at elections@fedbar.org, to be received by February 1, 2022. The Committee shall require, at a minimum, that each candidate provide their name; place of professional practice (firm, office, court, agency or other); preferred mailing address; contact telephone number; facsimile number; e-mail address; date of FBA membership; and the title of the office sought. Also, the Application shall provide space for a candidate to provide a biographical sketch of their qualifications for the office that should include 1) why the candidate is seeking national office (2) a description of the candidate's FBA activities and leadership positions; (3) professional experience and awards received; (4) other volunteer activities; (5) what is one significant issue facing the FBA and, as a leader, how would you address the issue? The biographical statement is limited to one page electronic document no larger than 8.5"X11" using 12-point font.

By March 1, 2022, the Committee shall nominate one or more members in good standing for each of the elective offices becoming vacant for the coming term. By March 10, 2022, the Committee shall cause to be transmitted to each member in good standing notice of the upcoming annual election and of the offices to be filled therein; of the Committee's nominations for those offices; and the manner and time by which nominations of candidates may be made by petition as provided in Article V, Section 3.b. of the Constitution and Bylaw 6(C).

Petitions

Members who have not been nominated for office by the Committee, but who wish to be placed on the ballot for national office, may do so by delivering to Anh Le Kremer, Chair of the Nominations and Elections Committee, at elections@fedbar.org, a petition, including an Application, specifying the office being sought and bearing the required number of signatures indicated previously. Petitions must be received by May 15, 2022.

Election

In accordance with Bylaw 6(D), by June 1, 2022, the Committee shall cause a Notice of Election to be sent to each member of the Association in good standing. The notice shall list the names of all nominated candidates and candidates by petition in alphabetical order under each elective office. The notice also shall contain such instructions as necessary for members to cast their votes as prescribed by policy adopted by the Board of Directors.

Completed ballots shall be received by the Chair of the Committee or by such person as designated by the Chair no later than June 15, 2022. The Committee shall review and certify the tabulated votes and report as elected the candidate for each office who has received a plurality of the votes cast for that office by the next business day following June 15.

In the event that any deadline herein specified is a Saturday, Sunday, or legal federal holiday, the next succeeding business day shall substitute for that specific deadline.

Member Spotlight

*** Denotes Sustaining Member**

Amanda Kaiser
Amelia ONeil

FIRST CIRCUIT

First Circuit At Large
Marysol Lopez-Gonzalez
Andrew Sirulnik

Hon. Raymond L. Acosta Puerto Rico
Juan Alvarez-Valentin
Salvador Antonetti-Stutts
Mario Davila
Jose Gonzalez Nogueras*
José Oliveras-Cabrera*

Massachusetts
Ferruccio Romeo
Henry Rotchford

SECOND CIRCUIT

Second Circuit At Large
Christian Alvarez
Hamsa Mahendranathan
Veronica Mullally-Munoz*

Eastern District of New York
Kai Wang

Southern District of New York
José del Rosario
Remy Green
Alistair Joobeen
Tanya Kennedy
Kersuze Morancy
Thais Ridgeway
Sofia Rinvil

THIRD CIRCUIT

Third Circuit At Large
Michael Farmer

Delaware
Kelsey Bomar
Toyia Haines
Alexandra Joyce

Eastern District of Pennsylvania
Katlyn Patton

FOURTH CIRCUIT

Fourth Circuit At Large
Jordan Fanelli
Carina Federico
John Flores
Suzanne Katchmar*
Cate Malycke
Kelly Powers

Eastern District of North Carolina
Matt Sawchak

Hampton Roads
Ryan Dougherty
Brandan Goodwin
Jeffrey Wilson

Maryland
Honorable April T. Ademiluyi
Marcia Anderson
Stephanie Dalecki
Daniel Moore
Meriam Mossad

Middle District of North Carolina
Lisa Costner

Northern Virginia
Clint Brannon
Abigail Johansen
Meghan Loftus
Christopher Pickens
Jeri Somers
Madeline Taylor Diaz

Richmond
Benjamin Johnson
Loc Pfeiffer
Victoria Pretlow
Kelsey Rule

South Carolina
Julian Adams
Joseph Alvarez
Caroline Barker
James Barkley
Robert Byrd
Amanda Davinson
Thomas Hall
Lydia Hendrix
Alexandria Jones
Ryan Martin
Chandler Rowh
Lashania White

Western District of Virginia
Taylor Brewer
Monica Cliatt
Nancy Dickenson-Vicars
Whit Pierce*
Charles Smith
Gregory St. Ours

FIFTH CIRCUIT

Fifth Circuit At Large
Dominique Bernal
Luis Castillo
Jennifer Correro
David Curlin
Tom Dees
Deborah Fallis
Deborah Perry
Edward Sandoval
Robert Smith
Sahrish Soleja

Austin
William Stroud

Baton Rouge
Jared Blackburn
Keiara Fort
John Gaupp
Caleb Lewis
Catherine Rutherford
Kathryn Simon
Connor Thomas

Dallas
Peter Barrett
Joshua Greene
Jonathan Neerman
Dennis Roossien
Gino Rossini

El Paso
Dana Carmona*
Elizabeth Molina

Lafayette/Acadiana
Heather Arrington
Kathleen Kay*
Danielle Young

Mississippi
Molly McNair
Francis Springer*
J. Williams

New Orleans
Korby Kazyak
Caroline Lafourcade
Rebekka Veith

San Antonio
Michael Black
Paul Bowers
William Calve
Jenna Castleman
Kennedy Hatfield Asel
Justin Simmons
David Steyer
Janell Thompson

Southern District of Texas
Jeannie Andresen
Bilma Canales
Joanna Caytas
Danny David
Mauricio Garcia
Patrick Kelly
Dennis Robinson
Gregory Sapire
Marium Siddiqui
Alexandra Tijerina
Lisa Virgen

SIXTH CIRCUIT

Sixth Circuit At Large
Timothy Blackbern
James Genetin
Michael Hushion
Paul Kerridge
Meghan Savercool

Chattanooga
Cecilia Garrett
Kelly Walsh

Cincinnati-Northern Kentucky, John W. Peck
Jason Golden
Kristin Whiteker

Columbus
Hannah Harris
Stephanie Rawlings
Adam Rusnak
Kitty Sorah
Robert Yaptangco

Eastern District of Michigan
George Donnini
Noah Hurwitz
Andrew Lievense
Jennifer Newby
Charissa Potts

Kentucky Chapter
Jason Hollon*

Memphis Mid-South
Karen Moore
Naira Umarov

Nashville
Christopher Sabis

Northern District of Ohio
Andrea Arnold
Jenna Heaphy
Mariya Howykowycz
Lisa Johnson
McDaniel Kelly
Rebecca Lutzko
Ryan Palko
Cara Staley Rafferty
Talia Sukol Karas
Tracey Tangeman*

Western District of Michigan
James Fisher
William Hankins Jr
Kirsten Holz
Krista Jackson
Erin Lane

SEVENTH CIRCUIT

Seventh Circuit At Large
Lyndsey Franklin
Sarah Kimmer
Maria Ortega Castro
Judith Sherwin
Anshuman Vaidya
Amy Ziegler

Chicago
Sioban Albiol*
Karyn Bass Ehler
Daniel Cotter
Anthony Garcia*
Sarah Grady
Katie Hill
Matt Hiller
Matthew Lind
Mary Marcin
Michael McGivney
Nicholas Wasdin*
Sheri Wong

P. Michael Mahoney (Rockford, Illinois)
Jared Clay

Southern District of Illinois
Ferne Wolf Chapter

Wisconsin
Peter Smyczek

EIGHTH CIRCUIT

Eighth Circuit At Large
Frederic Bruno
Jacob Huju
Daniel Ritter
Reginald Snell

Iowa
Kate Goettel

Kansas and Western District of Missouri
Laine Cardarella
Branden Smith
John Weslander

Minnesota
Gregory Arenson
Alec Beck
Jean Binkovitz
Mathea Bulander
Martin Chester
Lauren D'Cruz
Jason Drefahl
Jordon Greenlee
Lori Johnson
Abraham Kaplan
Seung Sub Kim
William Manske
Alejandra Martinez
Inti Martìnez-Alem·n
Russell Spence
Joshua Taylor
Hillary Taylor
Lukas Toft
Elizabeth Wright
Henry Zurn

St. Louis
Kevin Curran

NINTH CIRCUIT

Ninth Circuit at Large
Anita Clarke
Sean Flynn
Josephine Gerrard
Jason Hartley
Savannah Jensen
Kate Kaso-Howard
Nedra-Su Kawasaki*
Tarina Mand
Benjamin Naylor
Raven Norris
Danicole Ramos
Jennifer Seraphine
Kirsten Shea
Stephen Zollman

Alaska
Amanda Kranz

You Belong at the FBA

We want to thank you for being a member of the Federal Bar Association and remind you to update your profile in our directory to ensure you keep getting the most value out of your membership. Looking for someone you met at an FBA function, a schoolmate, or a colleague with whom you lost touch? Expand your network with our online directory available only to members.

Did you know your membership also gives you access to:

- ✓ More than 700 credit hours of free and discounted continuing legal education (CLE) at both the national and local level throughout the year
- ✓ Local chapter membership that provides networking, programs, community outreach, and leadership opportunities
- ✓ Representation on Capitol Hill on behalf of federal practitioners, and so much more!

Login at fedbar.org and confirm your Member Profile today!

Connect with us here to ensure you get the latest news and updates from the FBA.

Hawaii
Michelle Comeau
Eric Nixdorf*

Inland Empire
Martin Santos

Los Angeles
Leonora Cohen
Marcia Guzman
Matthew Rosenbaum
Eric Sefton

Northern District of California
Eleonora Antonyan
James Dallal
Tyler Summers
Adam Zapala

Orange County
Lenore Albert
Robert Mitzel

Oregon
Megan Crowhurst
Peter Lacy
Shannon Pedersen
Shannon Vincent

Phoenix
Katie Bettini
Jean-Jacques Cabou
Gideon Cionelo
Kristian Garibay
John Gray
Ari Hoffman
Benjamin Phillips
Hilary Weaver
Molly Weinstein

Sacramento
McGregor Scott

San Diego
Stephen Anderson
Heather Beugen
Steven Coopersmith
Sean Flaherty
Jeffrey Krinsk
John Mears
Teresa Morin
Stacy Plotkin-Wolff
Bill Smelko
Martha Yancey

San Joaquin Valley
Marc Ament
Craig Houghton
Ben Nicholson
Kevin Rooney

William D. Browning Tucson
John Hinderaker
Kyle Lochner
Scott Rash
Pete Sabori

TENTH CIRCUIT

Tenth Circuit At Large
Taylor Crossley
Aila Hoss
TaChelle Jones

Colorado
Paul Cha
Joanne Curry
Marissa Garcia

New Mexico
Gary Lasky
Brenda Saiz

Northern/Eastern Oklahoma
Sara Hill
Samantha Oard

Oklahoma City
Christa Alderman
Alex Barnes
Brian Bond
Rebecca Braun-Harrison
Blaine Brewer
Camille Burge
Brooks Cain
Hannah Coker
Katherine Crowley
Connor Curtis
Maria Escobar
Kaleigh Ewing
Lindsey Gonzalez
Victoria Hardebeck
Shelby Mann
Jacob Patton
Jacob Patton
Christopher Punto
Nicolas Rhinehart
Jake Seidel
Alyssa Sloan
Mylon Smith
Sheldon Smith
Matthew Welborn
Lauren Wilmes
Riley Wren

Utah
Jonathan Collier
Esther Johnson
Brett Parkinson

Wyoming
Ronald Wirthwein

ELEVENTH CIRCUIT

Eleventh Circuit At Large
Charnia Brown
Alexis Buese
Susa Klock*
Yuna Scott*
Daniel Weigel

Atlanta
Aaron Block
James Brigman

Broward County
Sheri-Lynn Corey-Forte
Felipe Plechac-Diaz

Jacksonville
Mary Fackler

North Central Florida
Daniel Kersey

Orlando
Andrew Ballentine*
Jacinda Beraud
Meghan Boyle
Alyx Cassel
Cyrus Ellison
Timothy Frantz*
Michael Hristakopoulos
Michael Ihe
Steven Kronick
Eve Lumsden
Gisel Samantaria
Kara Wick

South Florida
Victor Bruzos
James Bryan
Goel Damkani
Emma Johnson
William O'Leary
Barbara Papademetriou
Oyeniyi Sodimu
Helena Tetzeli
Brooke Watson

Southern District of Georgia
Tara Lyons

Tampa Bay
Erik Banuchi
Cornelius Demps*
Chemere Ellis
Roscoe Green
Anne Hankins
Benjamin Laing
Michelle Lambo
Ernest Marquart
E. Williams

D.C. CIRCUIT

District of Columbia
Ubong Akpan
Linda Blauhut
Robert Caplen
Thomas Healy
Derek Ho
An Hoang*
Andrew Laing
William Marshall*
Cameron McBride
Abigail Neuviller
Diana Wielocha

District of Columbia Circuit At Large
Robert Russell

Federal Bar Association Calendar of Events

▸ Visit **Fedbar.org** for more information.

NOVEMBER 2021

NOVEMBER 3
Agility in the Face of Change/GDPR

NOVEMBER 3
Southern District of New York Chapter- Myth Busting the Trans Sports Panic: The Imagined Crisis at the Top and The Ignored Crisis at the Bottom

NOVEMBER 4
Qui Tam Section: False Claims Act Today – Middle District of Tennessee

NOVEMBER 10
Minnesota Chapter: November Monthly Luncheon

NOVEMBER 12
Practicing Immigration Law During the Pandemic and Beyond

NOVEMBER 17
The Quagmire of Qualified Immunity:
A Practical Guide for Law Clerks and Advocates

NOVEMBER 18-19
[VIRTUAL] 2021 DC Indian Law Conference

DECEMBER 2021

DECEMBER 1
The Evolution of Dispute Resolution from a Courtroom to a Computer Screen

DECEMBER 8
Minnesota Chapter: December Monthly Luncheon

DECEMBER 15
Pablo Picasso and the Art of Pleading, Proving and Arguing Foreign Law in U.S. Courts with Judge Loretta Preska

FEBRUARY 2022

FEBRUARY 23–25
[VIRTUAL] 2022 Qui Tam Conference

MARCH 2022

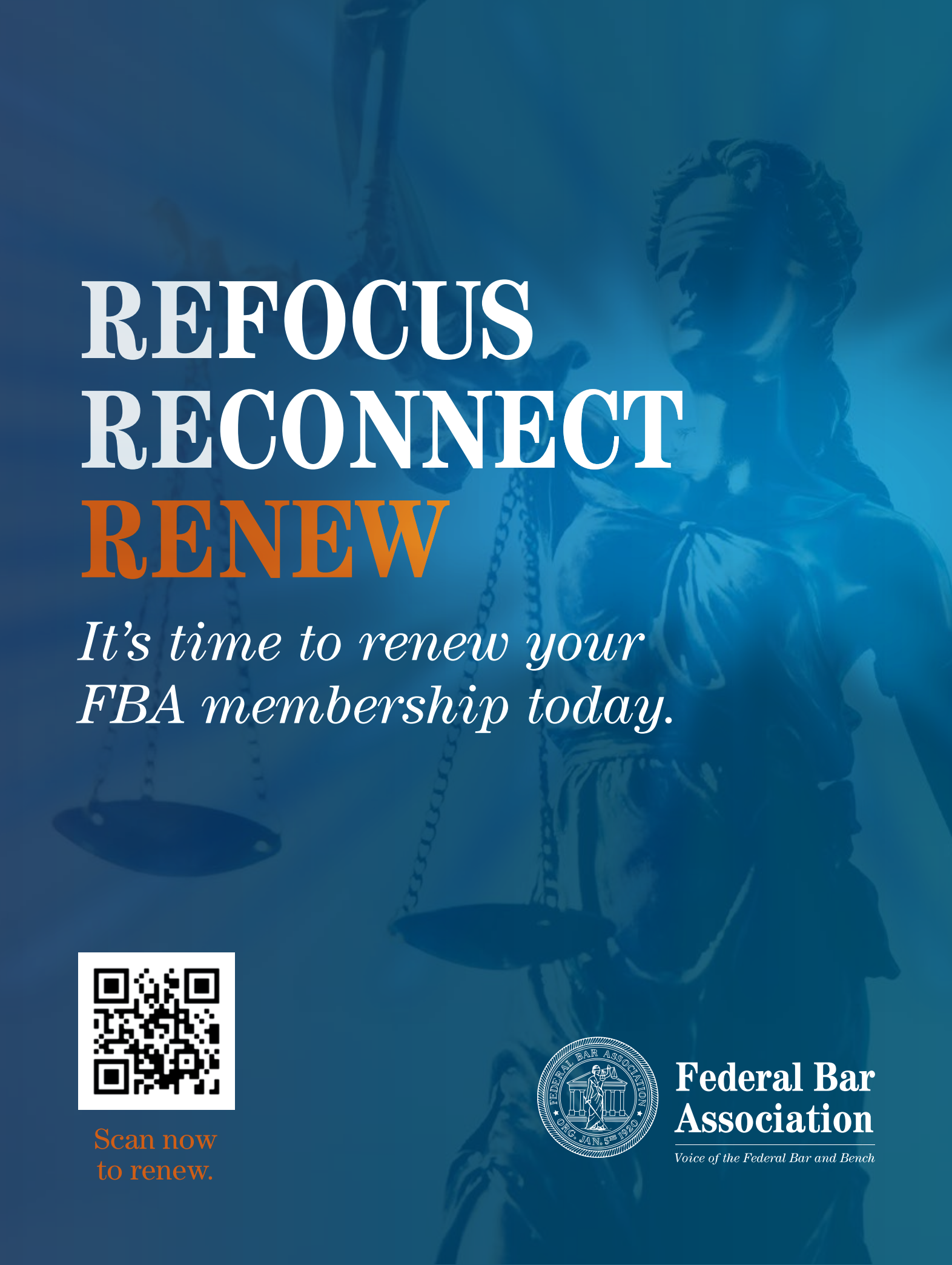
MARCH 14-18
2022 [Virtual] Thurgood Marshall Moot Court Competition

APRIL 2022

APRIL 28–30
2022 Leadership Summit

SEPTEMBER 2022

SEPTEMBER 15–17
2022 FBA Annual Meeting & Convention – Charleston, SC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