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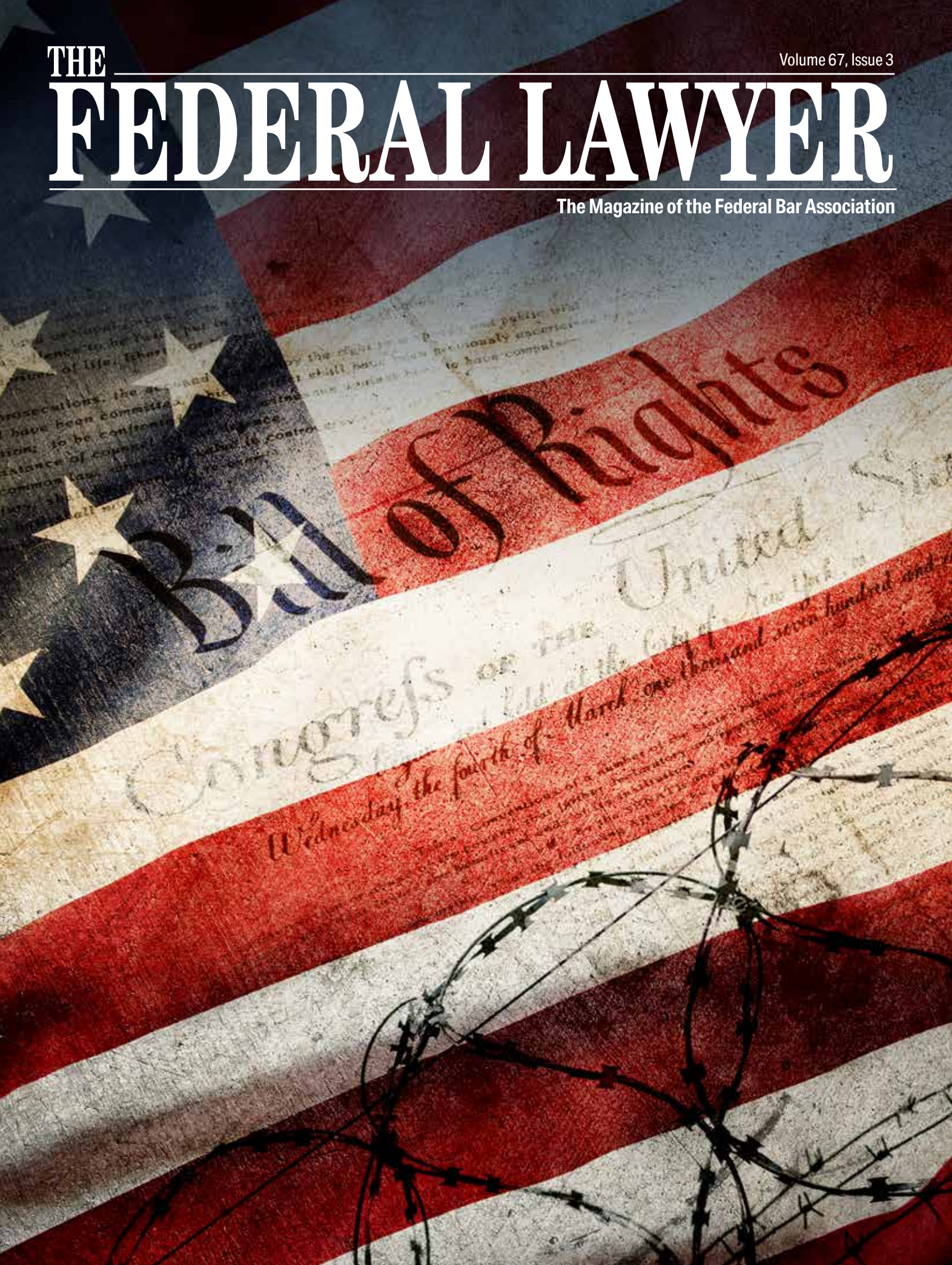

UPDATE:
FBA Membership Renewal Process

All FBA memberships will run October 1st to September 30th, with a single dues season at the same time every year.

To better serve our members the Federal Bar Association has converted its membership period from anniversary date to a set calendar year. This change will allow chapters, sections, and divisions to focus on renewals at a single time of year, and then concentrate on enhancing membership value for the remainder. It is our goal to have all current members on the same membership cycle starting October 1, 2021.

What This Means for Members

- ✓ Easy to remember universal dues deadline
- ✓ Firm/Organization billing option for employers
- ✓ Upcoming auto-renew and auto-pay features will make renewals even easier

What You Can Expect Now

- ✓ Your next renewal notice will be delivered as usual
- ✓ Renewal invoice amounts will be adjusted to get all members to a 9/30/2021 expiration date
- ✓ Uninterrupted service from your local chapter, your sections and divisions, and the national office

Please visit www.fedbar.org/membership for full details.

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Building Resilience (and Membership) in a Time of Uncertainty

by Christian K. Adams

Christian K. Adams is the founder and managing partner at Adams Krek LLP, headquartered in Honolulu, where he concentrates his practice on complex civil and appellate litigation.

This unprecedented time is difficult for us all. We are used to having the capacity to plan well in advance with a level of certainty and relative ease. It is difficult to accept, even after months of quarantine and restriction, that we cannot say for sure what the conditions will be in the coming months. The difficulty this presents for near-term planning is universal and common to us all—families, businesses, governments, courts, and schools are laboring together under the same burden of uncertainty.

In 2018, the FBA saw the effects of declining membership, a trend that has been impacting most bar and professional societies since 2015. Industry trends show that support of membership dues is in decline and, because of the increased movement of attorneys from firm to firm, membership retention is becoming more difficult. The board recognizes that the organization is in transition and must evolve to meet the needs of its national membership. Now more than ever, it is critical to build resilience by focusing on a sustainable financial model that will support the FBA's future relevance.

Because membership dues are a key component of our financial model, making up more than half of the organization's revenue, our strategic plan includes action items aimed at increasing retention, such as implementing fiscal calendar renewal and auto-renewal functions. On March 21, the National Council amended the FBA bylaws to allow the organization to convert its membership structure from the current anniversary model to a calendar model. In doing so, all memberships—national, chapter, section, and division—will have an October 1 effective date and expire on September 30. This change will allow our volunteers and national staff to focus on renewals at a single time of year, which will free up resources for volunteers and staff to concentrate efforts on enhancing membership programming and benefits for the remainder of the year. It is our goal to have all current members on the same membership cycle starting Oct. 1, 2021.

Even in today's COVID world, we live busy lives. Universal membership dates make it easier for everyone to remember when it is time to renew. Whether it is you, your colleague social distancing down the hall, or your fellow chapter members, all members will have the same renewal deadline. Employers will also enjoy the benefit of paying FBA membership renewal with a single payment as we recognized that the anniversary cycle can be burdensome if a firm's accounting department is managing multiple memberships throughout the year.

The universal membership renewal cycle will not only allow the bar to budget and plan for the coming year but it will also provide members with the assurance that the FBA will be here to provide the quality education, networking, and advocacy that led us all here in the first place, regardless of the circumstances in which we are required to operate.

To transition to the universal calendar renewal cycle, all members who have expiration dates of Oct. 30, 2020, or later will receive renewal invoices for a prorated amount corresponding to the number of months of membership through Sept. 30, 2021. Effective this May, all individuals who join the association will pay a prorated amount and receive a membership effective through this September. I encourage you to reach out to your network and share the benefits of membership with your colleagues, even if it is for a "trial" or prorated term. Individuals who join for a prorated term will receive all the benefits of membership, such as access to free webinars and programming, for a smaller dues investment.

We recognize that some in our community are experiencing financial hardship, and the national staff is able to assist our members with payment alternatives as needed. If you are currently in the renewal cycle and prefer to renew today and move to the new calendar date cycle, our member services team can assist with accepting payment for a prorated amount for a shortened membership term as well.

I encourage all members to remember that even in this trying time, some things are still certain. First among these, we remain committed to the FBA's core mission: to strengthen the federal legal system and administration of justice by serving the interests and needs of the federal practitioner (both public and private), the federal judiciary, and the public they serve. Our dedication to this mission calls us to continue to operate in the face of the unknown in the immediate future for the sake of our long-term success as an organization. ☉

When Will the Federal Courts Reopen?

By Bruce Moyer

Bruce Moyer is government relations counsel for the FBA.

The resiliency of the federal courts system has been tested by the COVID-19 pandemic, revealing positively the federal judiciary's capacity to adapt and innovate. This is a good sign. By nature, judicial institutions are averse to abrupt changes in their traditions and rules. But the lethal power of COVID-19 has afforded little room for the status quo when administering justice.

While civil litigation in federal courthouses has slowed and jury trials have been suspended in some locations, hearings in civil and criminal proceedings have continued, where practicable, through phone and videoconference arrangements, with many judges, court personnel, and attorneys working from home. These developments have swiftly involved the exponential adoption of videoconferencing, generating what may become the "new normal" for the foreseeable future.

As part of the CARES relief legislation, Congress provided $2.5 million to the federal courts in late March to strengthen their videoconferencing muscle. As the pandemic broke, it became obvious that the courts would need to shift from onsite to remote operations, requiring greater bandwidth and more secure electronic platforms for federal judges and staff to work remotely. The results have been relatively positive according to litigants and judges alike. The situation also has spotlighted the federal courts' electronic case management and case files system (CM/ECF).

Changes in the use of technology also were adopted at the U.S. Supreme Court on May 4, 2020, when the Court began to permit the live broadcast of teleconferenced oral arguments. It remains to be seen whether audio broadcasting continues after the pandemic and ultimately becomes a stepping-stone to the video broadcast of oral arguments.

AO Guidance on Reopening the Federal Courts

Just like the rest of the country, attorneys and judges wonder when the federal courts will reopen and what federal legal practice will look like. On April 24, 2020, the Administrative Office of the U.S. Courts issued guidance to all federal circuit and district judges and personnel to use in making locally based decisions on reopening courthouses, based on local COVID-19 case trends and stay-at-home and quarantine orders as well as CDC guidance. The AO guidelines reflect the decentralized management approach of the federal court system, permitting each circuit and district to make appropriate reopening decisions through the four phases of reopening.

Phase One under the AO guidance—where many courts are now—involves postponing all but necessary proceedings, with most court personnel working remotely. In Phase Two, courts will consider resuming grand jury and petit jury proceedings and allowing the return of nonvulnerable judges, court employees, attorneys, and litigants to the federal courthouse, but video and audio-teleconferencing will continue to the greatest extent possible. Court filings likely will increase, the AO guidance notes, but clerk acceptance of filings will continue remotely and on site in some locations. In Phase Two, courtrooms, jury rooms, and cafeterias could reopen, but 6-foot physical-distancing restrictions will need to be in place as well as enhanced screening such as monitoring employee temperatures.

Courthouse access restrictions will ease further under Phase Three, with continued use of precautionary measures, but also with the relaxation of enhanced screening measures and other protocols as the CDC rescinds guidance and new governmentwide mitigation measures are adopted. Phase Four—the return to normal—will not be attained until COVID-19 has been suppressed throughout the country, permitting full, unrestricted operations and activities within federal courthouses and facilities. Court officials "will need to tailor the application of these criteria to local circumstances," the guidelines say, and "should work with local public health and public safety agencies to ensure when these criteria are satisfied and minimize employee risk as they progress through the phases."

James Duff, director of the Administrative Office of the U.S. Courts, said in a statement that "Some courts are beginning to consider preparations for onsite operations. Many courts, however, are not close to this process yet as the pandemic continues to have severe impact in their communities." Duff said that more guidance will be coming from the AO, including guidance on testing potential jurors, social distancing considerations during jury assembly, *voir dire*, jury deliberations, and other matters. ☉

Where Texas Property Owners Hit a Wall: A Push to Relax the Unity of Title Factor in Eminent Domain Actions

By Soledad Valenciano

Soledad Valenciano is an attorney in San Antonio, Texas, where she practices eminent domain litigation. Her firm exclusively represents property owners. Valenciano is the president of the San Antonio Chapter of the FBA and is a frequent speaker on eminent domain issues. She co-authors the "Federal Court Update" published in the *San Antonio Lawyer Magazine.*

The Fifth Amendment to the U.S. Constitution provides, in relevant part, that no "private property be taken for public use, without just compensation."[1] Many states, including Texas, have similar provisions in their state constitutions.[2]

In Texas, like most states, the majority of eminent domain cases are filed in state court. And, generally speaking, state court is favored over the "quick take" power exercised by governmental entities in federal court, a forum that often leaves property owners addressing just compensation long after their property has been taken. For example, in 2009, in an effort to construct the current border fencing existing in the Texas Rio Grande Valley, the Department of Homeland Security filed over 360 eminent domain actions.[3] Some of those actions remained open for over 10 years.[4]

In most cases, "just compensation" is "the fair market value of the property on the date it is taken."[5] If an easement is taken on a property instead of its fee ownership, then just compensation is "the difference between the market value of that tract before and after the taking."[6] Thus, property owners facing eminent domain actions, whether in state or federal court, are entitled to the legal protection of the payment of just compensation; however, the complexities of this area of law, the expense of securing required land valuation evidence, and as discussed below, how it has been titled, can cause this constitutional protection to feel quite elusive.

Just compensation can prove even more elusive in states that follow the federal "quick take" model.[7] For example, the federal Declaration of Taking Act, 40 U.S.C. § § 3111-18, which Congress passed during the Great Depression to help stimulate the economy, allows the federal government to swiftly seize land to build projects. After a 30-day response period, the government can immediately deposit a payment with the court, subject to a possible deficiency judgment later, to compensate the property owner for the fair market value of the property. The property owner can choose to accept the payment as a settlement or continue to litigate. This one-sided determination of just compensation that can take years to resolve hardly feels "just." Indeed, much of the delay in the federal forum stems from post-filing allowances to determine title.[8]

For example, the border town of Eagle Pass, Texas, had litigation spanning years, given the complex ownership of land and limitations inherent in documenting ownership of land held in families for centuries.[9] According to the *Texas Tribune*, the government's lawyers located over 20 heirs to a half-acre tract overlooking the Rio Grande, leading to "a plot worthy of a Gabriel García Márquez novel," as the lawsuit involved the Roman Catholic Church, a competing land claim from another family, and a handwritten deed from 1894 that referred to the property line as "beginning at a mesquite tree eight inches in diameter on the east bank of the Rio Grande."[10]

Fortunately, in states like Texas, property owners facing eminent domain in state court can secure payment of an administrative award, decided by a neutral body, if early negotiations fail, and can then use this award to fund their litigation efforts if any party objects to the award.[11] In Texas state court, condemning authorities must follow a prescribed pre-suit *bona fide* offer process before filing suit, a process that can help alleviate title issues up front—as condemning authorities are loath to face later-raised challenges from overlooked property owners.

Therefore, at least in Texas, the federal forum for eminent domain actions is widely criticized as being slow and rife with title issues, especially in the border wall context that captures most of the current interest in federal eminent domain actions.

However, despite these criticisms, including in the area of title determinations, there is at least one area of federal eminent domain law that states like Texas should consider adopting: relaxing the interpretation of unity of title. This change could greatly benefit property owners who face eminent domain actions after having separated larger holdings in order to limit

exposure to liability or due to considerations such as succession planning, taxes, marriage, or financing.

Understanding that over 95 percent of Texas is privately owned, the Texas legislature passed various statutes to protect property owners, including statutes related to recreation, agritourism, and farm animals.[12] Still, many property owners in Texas further limit their possible exposure to liability for these types of activities or others by disaggregating property ownership and placing the ownership of the family's "headquarters" in one entity, operations in another, and equipment in yet another.[13] Farmers and ranchers face decisions related to collateralizing parts of property to fund the next year's crops and related obligations. "Postage-stamp" cut-outs are often seen in appraisal district records, divisions designed to recognize community property interests, afford bankruptcy protection, and facilitate certain property tax exemptions.

Yet, if a family's otherwise unified holding is suddenly targeted for a state taking, then, at least in Texas state court, only the parcel affected, and those similarly titled (as well as other factors not discussed here), will be appraised, despite any otherwise common ownership and control by the family.

In the case of the Granny Smith Ranch, unity of title was a multi-million-dollar issue. Granny Smith Ranch spanned 500 acres, had been owned by the Smith family for over 125 years, and was recognized as a Texas Family Land Heritage property due to over 100 years of continuous agricultural operation under the same family ownership. The property enjoyed nearly 2000 feet of frontage along the north side of a well-traveled highway near a rapidly growing city. A local utility proposed an unsightly combination of takings totaling over 15 acres that would have devastated the aesthetics of the property and severely limited access into the property from the highway. Both the condemning authority and Granny Smith Ranch engaged appraisers, and both appraisers determined that the Granny Smith Ranch was owned by a family limited partnership (FLP). Granny Smith, the family matriarch, died shortly before her property was condemned.

An administrative hearing was held where the principal issue was the two appraisers' determinations of economic units and the highest and best use of the Granny Smith Ranch. The condemning authority objected to the award, and thus, the case continued. As trial neared, it was discovered that perhaps certain portions of the Granny Smith Ranch were not "technically" owned by the FLP, but instead were owned by Granny Smith herself and held in several out parcels and likely part of a forgotten transaction. Indeed, up until that discovery, the parties, including Granny's children, their appraisers, and even the tax appraisal office and the condemning authority's title insurance company, believed that the Granny Smith Ranch was owned by the FLP.[14] At her death, Granny Smith's interest in the FLP was transferred to a trust. The ownership of the outparcels were also transferred to this trust and to her four children. Granny's four children were the only limited partners of the FLP and the only beneficiaries of the trust. Clearly, the same people owned the 500 acres, albeit in different capacities, and they were all aligned in the ongoing plans for the Granny Smith Ranch, which was to develop a scenic master-planned development made up of commercial and residential uses.

After learning of this issue, the condemning authority threatened to sever the case into two lawsuits, increasing litigation expenses for the property owners, and limiting the ultimate recovery to the property owners because of the dramatic change in the property's size, and by extension, its "remainder." In Texas, when a property owner seeks remainder damages, the issue becomes whether the part taken is part of a larger tract, and if so, what the boundaries of that larger tract are. Three unities aid courts in determining whether the part taken is part of a larger tract: unity of title, physical contiguity, and unity of use.[15] Indeed, the overwhelming breadth of case law across Texas and other jurisdictions focuses on unity of use.[16]

In Granny's case, physical contiguity and unity of use were not in dispute. And a review of relevant Texas case law indicates that unity of title is not critical, much less strictly required. Yet, there are problematic appellate court cases that create risk for both sides of state court eminent domain litigation, thus thwarting the constitutional aims of "just compensation."

Property owners will argue that this issue has already been decided in Texas, albeit with less clarity than desired. In the case of *In re State,* a Texas trial court allowed a family who intentionally severed its property pre-condemnation (thus destroying unity of title in order to make sure that their frontage property wasn't undervalued, thereby creating eight distinct owners, one for each tract) to proceed with a severed case. The trial court granted the family's motion to sever the case into eight separate lawsuits, and the state sought mandamus to vacate that order.[17] Notably, unity of title was raised by the new ownership groups who intervened. In their motion to sever, the intervenors argued that there was no unity of title amongst the eight tracts, and therefore, severance was proper. While the trial court agreed, prompting the mandamus action, the Texas Supreme Court disagreed and directed the trial court to vacate its order granting the motion to sever. Significantly, the Supreme Court said that the state had the right to present its appraisal theory that the entire condemned tract (with its *different* ownership groups) should be treated as one tract as "the State ... has the right to offer evidence that the entire property being taken should be valued as a single economic unit".[18] Therefore, the case would proceed at the trial level as one condemnation action whereby the diversely owned 185 acres would be considered a single economic unit.

Clearly, unity of ownership was not a controlling factor for the court. However, condemning authorities in the Granny Smith case argued that the cases were procedurally and factually dissimilar. Moreover, Texas has competing appellate court decisions brought after *In re State* that touch on unity of title to the property owner's detriment.[19]

For example, in 2014, the Amarillo Court of Appeals decided *Oncor Electric Delivery Co. LLC v. Brown.* There, relying on appellate caselaw and a dated version of the treatise Nichols on Eminent Domain, and ignoring *In re State* and a decision by a sister court, the court refused to expand the property description pled by the Condemnor (i.e., 159 acres) to 160 acres. The 159 acres were owned by the Brown Trust, and the additional 1 acre was owned by a trust beneficiary. The 1 acre was not included in the Condemnor's pleadings, but it was contiguous to and used with the 159 acres, and importantly, contained improvements whose market value would be damaged by the planned electric transmission line. In reaching its decision, the court relied on a case that discussed whether the party that sold off a property was entitled to claim eminent domain damages (he wasn't, as he no longer owned the property). The court also relied on a 1967 case that addressed the other unities—use and contiguity. And, in addition to not relying on Texas Supreme Court precedent,

the court ignored a more similar case, *Presswood*. In *Presswood*, the court allowed the two Condemnees to seek remainder damages on both a 30-acre tract (owned by both Condemnees) and on a 10-acre tract (owned by only one of them).[20] Notably, the 10-acre tract satisfied the other unities (contiguity and use). The second Condemnee explained that while the deed to the 10-acre tract did not include the second Condemnee's name on it, it was held in trust for the second Condemnee, and a provision was included in a will for her benefit. The court held that the undisputed testimony "does clearly establish a unity of use and ownership of the two tracts of land in question."[21]

The leading treatise in the field, Nichols on Eminent Domain, discusses at great length the split of authority on this issue, which extends beyond Texas appellate courts, and the rationales invoked for both views and concludes that, "the current trend seems to allow severance damages even if the tract is owned by different persons, so long as there is a sufficiently close relationship between the owners."[22] *Nichols* offers these policy reasons to support the more flexible view:

> The thrust of the argument favoring a finding of unity of ownership is that the parcels are being used in unity, both as to operation and control thereof. In short, the buyer in the marketplace could readily acquire both parcels from the same operative vendors, exercising the same business judgment in the transaction. The individual owners would be highly unlikely to be willing to sell their individually owned property at a lower price, because they had exercised their powers to control the acts of a corporate vendor in refusing to sell the corporate property and thus, driving down the individually owned value of the personally owned parcel. The economic realities of the marketplace simply do not produce those kinds of results.
>
> Just compensation has historically been measured by the equivalent in dollars of what the condemnee could attain in the marketplace, offering the property for sale with the ability to convey title. Clearly, two individuals owning Parcel A who own 100 percent of the stock of Parcel B owned in corporate form, are perfectly capable of conveying title to both parcels by the exercise of their business judgment and any buyer negotiating with them to purchase that property would be well aware of that fact. To urge corporate law principles which negate the piercing of a corporate veil, to deny the working affects [sic] of the marketplace, does not stand in the face of the mandate of just compensation.[23]

This is exactly the position that the U.S. District Court for the Southern District of Texas took in 2002.[24] There, the court was persuaded that this flexible view was more consistent with the constitutional mandate of just compensation in the context of what was in all other respects a unified tract of land. One parcel was owned by Dale and Abbe Crenwelge, and an adjacent one was owned by a corporation of which Dale Crenwelge was the sole shareholder. Relying on Supreme Court precedent, the court concluded that a parcel of land "used and treated as an entity shall be so considered in assessing compensation for the taking of part or all of it," and the fact that the land is "owned by different entities does not destroy the unity concept."[25] Therefore, the court considered both tracts as a unified tract. These divisions—the 1-acre cut out to recognize a spouse's community property interest—are common in Texas.

Therefore, *United States v. 14.36 Acres of Land*, while not controlling on Texas state courts, is relevant and highly persuasive on the issue of whether strict reliance on an inflexible view of "ownership" is justified. Indeed, the trend appears to be toward a flexible, factor-based approach.[26] Thus, at least in federal court, the "larger parcel or tract" is applied flexibly and holistically and is not a threshold question of law for a judge. "It is important to note that the presence or absence of any or all of these factors is not absolutely determinative. They are merely working rules adopted to do justice to the owner(s) of the remainder."[27]

Granny Smith's case ultimately settled. But before that, her children faced the "gotcha" moment where Granny Smith's innocent mistake jeopardized her family's most significant asset. Given the constitutional aim in an eminent domain case to achieve just compensation, it would have been desirable to have a factor-based analysis apply rather than a rigid one. Indeed, if "the buyer in the marketplace could readily acquire the parcels from the same operative vendors, exercising the same business judgment in the transaction" by simply transacting with the various owners (in this case, Granny Smith's four children in their varying capacities), then that should be enough to satisfy the unity of title factor.[28] ⊙

Endnotes

[1]U.S. Const. amend. V. (acknowledging the ability of the U.S. government to seize private property for public use).
[2]Tex. Const. art. I, § 17 ("Taking, Damaging, or Destroying Property for Public Use."). The takings clause of the Federal Constitution's Fifth Amendment is made applicable to the states by the Constitution's Fourteenth Amendment. *See* Tex. Const. art. I, § 17 interp. commentary (West 2007) (asserting a compensation requirement under the eminent domain power dates all the way back to the Magna Carta). The original Texas Constitution of 1845 contained the requirement in Article I Section 14. See John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood,* 26 Tex. Tech L. Rev. 1089, 1198 (1995) ("No person's property shall be taken or applied to public use, without adequate compensation being made, unless by the consent of such person.").
[3]*How the government abused eminent domain the last time it built a border fence in Texas,* Texas Tribune, Feb. 18, 2019.
[4]*Id.*; National Public Radio looked at over 300 cases. Two-thirds of them have been resolved. Most of them took about 3 1/2 years, and most were under an acre. The median settlement works out to $12,600. John Burnett, *Landowners Likely to Bring More Lawsuits as Trump Moves on Border Wall,* (Feb. 23, 2017), https://www.npr.org/2017/02/23/516895052/landowners-likely-to-bring-more-lawsuits-as-trump-moves-on-border-wall.
[5]*Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10, 104 S. Ct. 2187, 2194, 81 L. Ed. 2d 1 (1984).
[6]*United States v. 8.41 Acres of Land, More or Less, Situated in Orange Cty., State of Tex.*, 680 F.2d 388, 391 (5th Cir. 1982).
[7]*See* Declaration of Taking Act, 40 U.S.C. § § 3111-18.
[8]*See supra* Note 3. "The Rio Grande Valley was famous in Texas for murky land claims — the river shifted constantly, changing property lines. Records were missing. Families often had multiple members claiming ownership. But nobody at Homeland Security or the Justice Department appeared to have prepared for the complexity involved.

Years would pass before the government would even know who it was suing."

[9]The author is from Eagle Pass.

[10]*See supra* Note 3.

[11]Tex. Prop. Code §§ 21.014-21.018 (Acts 2011, 82nd Leg., R.S., Ch. 81 (S.B. 18 Sec. 19, eff. September 1, 2011)).

[12]*See Univ. of Tex. at Arlington v. Williams*, 459 S.W.3d 48, 51 (Tex. 2015)("The recreational use statute protects landowners who open property for recreational purposes, limiting their liability to the recreational user.") (citing *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006)).

[13]*See How Landowners Can Protect Themselves from Liability,* Texas A&M AgriLife Extension, Tiffany Dowell Lashmet.

[14]To complicate matters further, there were a few dozen "floating acres" not captured by the surveys performed in 1907, surveys which used mules and chains.

[15]*Enbridge G & P (East Tex.) L.P. v. Samford*, 470 S.W.3d 848, 858 (Tex. App.—Tyler 2015)(citing *United States v. 8.41 Acres of Land*, 680 F.2d 388, 393 (5th Cir. 1982); Nichols, 4A Eminent Domain at 14-393, 14-416, 14-424 (1981 Supp.)).

[16]*But see S. Pipe Line Corp. v. Deitch*, 451 S.W.2d 814, 819 (Tex. Civ. App.—Corpus Christi 1970), relaxing the unity of use factor ("value may reflect not only the use to which the property is presently devoted but also to that use to which it may readily be converted.").

[17]*In re State,* 355 S.W.3d 611 (Tex. 2011).

[18]*Id.*

[19]*See Oncor Elec. Delivery Co., LLC v. Brown*, 451 S.W.3d 128 (Tex. App.-Amarillo 2014, no pet.); *Southwestern Elec. Power Co. v. Presswood*, 420 S.W.2d 182 (Tex.App.-Tyler 1967, no pet.); *Gossett v. State*, 417 S.W.2d 730 (Tex.App.-Eastland 1967, n.r.e.).

[20]*See Presswood*, 420 S.W.2d 182.

[21]*Id*. at 186.

[22]Nichols on Eminent Domain § 12.02[1] (rev. 3d ed. 2001).

[23]Nichols on Eminent Domain § 14B.06[2](2001).

[24]*United States v. 14.36 Acres of Land*, 252 F. Supp. 2d 361, 362 (S.D. Tex. 2002).

[25]*Id.* at 463-64 (citing *United States v. Miller,* 317 U.S. 369, 63 S. Ct. 276, 283 (1943) and *United States v. 429.59 Acres of Land*, 612 F.2d 459 (9th Cir. 1980)).

[26]Several states and circuits view the three unities as "factors" including North Carolina, Hawaii, Delaware, Nevada, New Jersey, North Dakota, California, and the First, Fifth and Ninth Circuits (citations omitted).

[27]*See* Nichols on Eminent Domain §g16.02(2)(A)(2015).

[28]*See e.g., Union Cty. Improvement Auth. v. Artaki, LLC*, 392 N.J. Super. 141, 920 A.2d 125 (App. Div. 2007). When valuing adjacent properties, the condemning authority must consider the possibility of "unity of ownership" in a flexible way, using the "substantially identical ownership" test. In contrast, in *Southeastern Supply Header LLC v. 110 Acres,* 2008 U.S. Dist. LEXIS 4945, at *4-8 (S.D. Miss. 2008), the U.S. District Court for the Southern District of Mississippi declined to follow *United States v. 14.36 Acres of Land in McMullen County, Texas*, stating, "Although the unity of title principal is no longer absolute, its application here does not permit the Karolyis to consider the two contiguous tracts a single parcel for severance valuation. A buyer attempting to acquire both the 170-acre tract and the 10-acre tract would have to make separate arrangements with parties that have potential conflicts of interest. Because these entities could have plainly different interests compared to an individual who also maintains the alter ego of the corporate form, there exists no justification for overlooking the lack of a unified title in awarding severance damages."

The Federal Lawyer strives for diverse coverage of the federal legal profession, and your contribution is encouraged to maintain this diversity. Writer's guidelines are available online at www.fedbar.org/tflwritersguidelines. Contact Lynne Agoston, Editorial and Production Specialist, at tfl@fedbar.org or (240) 404-6488 with topic suggestions or questions.

The Canadian Indian Free Passage Right: An Anomaly in U.S. Immigration Law

By Paul Spruhan

Paul Spruhan is assistant attorney general of the Litigation Unit at the Navajo Nation Department of Justice in Window Rock, Ariz. He received his A.B. in 1995 and his A.M. in 1996 from the University of Chicago. He received his J.D. in 2000 from the University of New Mexico. He and his wife have two children and live in Fort Defiance on the Navajo Nation.

A little-known provision in the Immigration and Nationality Act recognizes a limited right for Canadian Indians to cross the border free of visa requirements. Such free passage right also allows Canadian Indians to become lawful permanent residents of the United States. However, these rights are conditioned upon proof that the person has "at least 50 per centum of blood of the American Indian race."[1]

The statute arises out of international treaties between the United States and Great Britain. The Jay Treaty of 1794 recognizes the right of Indians to cross the border freely. After the War of 1812, the Treaty of Ghent between the two nations affirmed free passage by recognizing Indian rights existing prior to the war. There is much debate whether the War of 1812 abrogated the Jay Treaty, and whether the Treaty of Ghent, absent implementing legislation, by itself reinstated the free passage right. Regardless of whether the treaty right remains independently viable, since 1928, American statutory law has allowed Canadian Indians to pass freely over the border.

The statute became necessary because of racial exclusions in American immigration law. Prior to 1924, Canadian Indians passed back and forth over the border with no trouble. Canadian Indians visited relatives in American tribes, worked as construction workers and seasonal agricultural workers, and otherwise crossed back and forth without incident.

All this changed in 1924, as an act of Congress tied the right to enter the United States to the right to naturalize as a citizen, declaring that a person ineligible for naturalization could not immigrate. This rule had a transparently racial intent, as only whites and "persons of African descent" (i.e., blacks) could be naturalized. The purpose of the restriction was to bar Japanese immigration. Prior laws barred other Asians from immigrating to the United States, and the 1924 provision intended to extend this prohibition to Japanese immigrants as well. Though targeting Asian immigration, immigration officials also applied the restriction to Canadian Indians. As neither white nor black, they were ineligible for naturalization and therefore ineligible for immigration under the 1924 act. Based on the act, immigration officials attempted to exclude or deport Canadian Indians.

Attempts to clarify Canadian Indian free passage came through both litigation and legislation.

Paul Diabo, an iron worker in Philadelphia and a Mohawk Indian from Quebec, challenged the exclusion policy, arguing for his right to remain in the United States. The district court concluded that Diabo could not be deported, ruling that the aboriginal right, irrespective of whether the Jay Treaty survived the War of 1812, allowed his free passage. The Third Circuit affirmed the district court's judgment but relied on the Jay Treaty and the Treaty of Ghent to justify Diabo's free passage.

Aware of the Diabo litigation, Congress exempted Canadian Indians from the bar on immigration:

> [T]he Immigration Act of 1924 shall not be construed to apply to the right of American Indians born in Canada to pass the borders of the United States: *Provided*, That this right shall not extend to persons whose membership in Indian tribes or families is created by adoption.[2]

Legislative history of the act shows that members of Congress believed that the racial bar on immigration was never intended to apply to the traditional crossing of Canadian Indians. They then clarified that Indians remained able to pass freely into the United States.

In its haste to protect Canadian Indians from deportation and exclusion, Congress neglected to include a clear definition of "Indian." To fill the gap, federal policy flip-flopped between applying a "political" definition based on Canadian law, and a "racial" definition that consciously rejected Canadian law.

At first, the Board of Immigration Appeals and the Immigration and Nationality Service concluded that Indian was a political status defined by Canada's Indian Act. Unlike American law, which defined "Indian" in different ways in specific legislation, Canada defined "Indian" in one general statute, the Indian Act. "Indian" was defined at the time by race and gender, as an

Indian woman who married a non-Indian man lost her Indian status. Their child also was not an Indian. However, a non-Indian woman *gained* Indian status through her marriage to an Indian man, and their child was also an Indian. Further, the Indian Act included the concept of "enfranchisement," in which certain Indians voluntarily or involuntarily became Canadian citizens and ceased to be recognized as Indian under Canadian law. American law had no analogous definition, and federal officials struggled with accepting Canada's construction of Indian status, which required exclusion of Indian women and others deemed "non-Indian" by Canadian law.

After several inconsistent policy decisions by federal officials, the Board of Immigration Appeals adopted the Indian Act's definition in 1942, allowing several white women married to Indian men to cross freely as "Indians." The administrative definition changed, however, after the federal district court for the Western District of New York ruled in *United States ex rel. Goodwin v. Karnuth* that the term "Indian" in the 1928 act had a "racial connotation."[3] More importantly, that case concerned a woman who had lost her Indian status by her marriage to a non-Indian. After that case, the Board of Immigration Appeals changed its view, concluding that Indian was a racial status under the 1928 act, and therefore, anyone who was racially Indian was allowed free passage regardless of Indian status under Canadian law.

By requiring 50 percent or more blood of the "American Indian race," the 1952 revision to the free passage statute completed the shift from a political definition of Indian to a racial one. The revision was part of a comprehensive overhaul of immigration and naturalization law through the McCarran-Walter Act, also known as the Immigration and Naturalization Act of 1952.[4] The most important overall changes were the elimination of racial barriers to naturalization and the lifting of the bar on Asian immigration. Though the act was touted as an elimination of racial distinctions in immigration and naturalization, the addition of a blood-quantum requirement for Canadian Indians actually adopted an explicitly racial limit to the free passage right.

The inclusion of the blood-quantum requirement has created practical implementation issues. Both courts and the U.S. Citizenship and Immigration Services struggle with accommodating Canadian Indians while enforcing the half-blood restriction. Unlike American Indians, who are issued a Certificate of Degree of Indian Blood by the Bureau of Indian Affairs that lists their blood quantum, the Canadian government issues no such document to Canadian Indians. The U.S. Citizenship and Immigration Services accepts "blood quantum letters" from Indian band officials that state the amount of Indian blood. Under current Canadian law, however, Indian status and band membership are separate concepts, and people recognized as Indian under the Indian Act might not be members of an Indian band. Additionally, some people may be of Indian descent but not be recognized by either the Canadian government or an Indian band. Such individuals have to produce other documents showing that they have at least one-half Indian blood.

One other issue, though not yet litigated in a published case, is whether other aboriginal people in Canada, though not technically "Indian," can cross the border freely. Canada recognizes three categories of aboriginal people in its 1982 constitution: (1) Indians, (2) Inuit, and (3) Métis. Though not "Indians," Inuit and Métis are nonetheless recognized as aboriginal people for certain purposes. It is unclear whether such other aboriginal people have the same right to cross freely as "Indians."

The racial definition of Indian status for free passage remains to this day. All other overtly racial definitions in immigration law have been eliminated. Further, Canada has since revised its own Indian law to eliminate the gender distinctions for Indian status.[5]

As a direct invocation of race, there is a serious question as to whether the statute is constitutional. Both immigration and Indian law is subject to the "plenary power" of Congress, but that power is not unlimited. Federal Indian law is currently under attack through challenges to the Indian Child Welfare Act (ICWA). In that litigation, opponents of ICWA allege its definition of "Indian child" is racial, and therefore subject to strict scrutiny because Congress defers to the membership definitions of tribal nations.[6] The U.S. Supreme Court has never applied strict scrutiny to an Indian statute, as since the 1974 opinion *Morton v. Mancari*, the Court has classified such statutes as "political," based on definitions that require membership in a federally recognized tribe.[7] For immigration law, the Court has been similarly deferential to the authority of Congress, authorizing overt racial limitations. If ever challenged, it is an interesting question whether that will change, and whether the Court will revise its immigration and Indian law accordingly.

Perhaps anticipating this possibility, members of Congress have recently sponsored bills to revise the statute. A pending bill titled the "Tribal Border Crossing Parity Act" would expand the scope of the definition by authorizing any individual who is a member, or is eligible to a member, of a federally recognized tribe in the United States or Canada to pass freely.[8] Interestingly, the proposed definition, which includes not only membership but also eligibility, is clearly based on ICWA's definition of "Indian child" currently being challenged.[9]

It remains to be seen whether the current statute will survive a direct attack, or whether Congress will amend the statute to eliminate or revise the blood-quantum requirement. Elimination of the requirement, or at least the addition of a non-blood definition as proposed by the current bill, at the very least would help insulate the treaty-based rights of Canadian aboriginal peoples to cross a border not of their own making. Regardless, as the current definition was created to combat a peculiarity in Canadian law that no longer exists, there is no real reason to keep the blood-quantum requirement in place.[10] ⊙

Endnotes

[1]8 U.S.C. § 1359.

[2]Act of April 2, 1928, ch. 308, 45 Stat. 401, 401 (codified as amended at 8 U.S.C. § 1359).

[3]74 F. Supp. 660 (W.D.N.Y. 1947).

[4]Act of June 27, 1952, ch. 477, 66 Stat. 234

[5]An Act to Amend the Indian Act, S.C. 1985, c. 27 (Bill C-31).

[6]*See Brackeen v. Bernhardt*, No. 18-11479 (5th Cir.). At the time of the writing of this article, the case was pending *en banc* before the Fifth Circuit Court of Appeals. 942 F.3d. 287 (5th Cir. 2019)

[7]417 U.S. 535 (1974).

[8]H.R. 2496, 116th Cong. (2019).

[9]*Compare id. with* 25 U.S.C. § 1903(4).

[10]For a more detailed discussion of the history of the free passage statute and its constitutionality, see Paul Spruhan, *The Canadian Indian Free Passage Right: The Last Stronghold of Explicit Race Restriction in United States Immigration Law,* 85 N.D. L. Rev. 301 (2009).

Transforming the Future of the Legal Profession Through Gender Equality: FBA Takes Global Leadership Role in Raising Awareness

By Emma Tsankov[1]

Emma Tsankov is a European law student at the University of Amsterdam. She has been serving as an intern with the International Bar Association supporting the FBA's International Women's Day programming. She is a member of the FBA International Law Section and an SDNY Chapter member.

For the past decade, the legal profession has gone through a period of transition, with marked increased emphasis on diversity and inclusion within the field.[2] As a result, many courts, law firms, and corporations have enacted policies aimed at creating and supporting a professional legal workforce that more accurately reflects the population diversity.[3] Yet, despite that effort and a focus on diversifying the law firm ranks, the law profession as a whole remains one of the least diverse, especially with regard to the gender dimension.[4] The American Bar Association has been measuring diversity in the lawyer population in the United States for more than a decade, and its most recent study reflects that gender diversity in the profession is rising but apparently at a marginal pace. During the 10-year period from 2007 to 2017, the number of women in the profession increased by only 5 percent, which reflects a narrow increase to 35 percent in 2017, from a figure of 30 percent in 2007.[5] These statistics are even more troubling in the context of law firm private practice. There, women comprise nearly half of the law firm summer associates and associate classes. Yet, when we examine the level of gender diversity at the partnership level, women account for only 20 percent of law firm partners and a mere 18 percent of equity partners.[6]

Without a doubt, the profession has experienced several decades of diversity hiring and retention efforts, likely fueled in part by the acknowledgement that diversity is good for business.[7] And yet, gender and other diversity at the partnership level is sluggish,[8] especially taking into consideration that law schools are graduating, on average, classes comprising gender-equal components.[9]

It is not clear what the precise impact on our society is from the lack of diversity at the higher echelons of the professions, but the data seems to suggest that the loss could be profound.[10] As a result, professional associations and a range of organizations are taking a more active role in drawing attention to gender disparity and are offering a multitude of solutions about ways to raise awareness and thereby improve gender diversity ratios.

The FBA is taking an international leadership role in this effort. Beginning with the creation of a Task Force on Diversity & Inclusion, the FBA has actively developed partnerships with national and international "affinity" organizations to help support these initiatives. Through developing its annual national celebration of International Women's Day, the FBA has provided a hub for national partners to engage in discussion about gender and the profession. Its successful programming is fast becoming a hub within the United States for partnership organizations to help raise awareness about the problems and offer solutions. The programs make clear that, to better meet this challenge, the profession needs to implement educational programs that ensure that members of the legal profession have greater awareness of issues like bias—explicit and implicit—and offer strategies for eliminating it. It's also clear that states see a leadership opportunity, and some, such as New York, are now requiring its lawyers to complete continuing legal education (CLE) programs that address these types of issues.[11]

In this column, we will identify the FBA's diversity and inclusion efforts over the past three years, focusing on its International Women's Day programming component. We'll consider the FBA's anticipated 2020 programming and explore its goals and impact on a global level.[12] With high-profile programs on two continents, a documentary in the pipeline, and a focus on building awareness at the law student level, we'll examine how the FBA is taking a leadership role in this area and providing invaluable resources for lawyers around the world to help close the gender gap at the higher levels within the profession. The column will offer best practices advocated in leading studies to

help address these challenges and some conclusions about how we can best move forward at this stage.

The FBA Takes the Lead in Building Diversity and Inclusion

Over the past three years, the FBA has focused considerable national resources around the promotion of diversity and inclusion within the federal legal community. Beginning in 2017, under the leadership of former FBA Minnesota Chapter president Tara Norgard, the FBA has convened a national Task Force on Diversity & Inclusion, which has the primary objective of promoting and advancing diversity and inclusion in the federal legal community. The task force works to examine candidly where the FBA is today with regard to cultivating a diverse and inclusive federal legal community and to develop a concrete plan of action for where the organization aims to be. To that end, the task force has developed a national strategic plan to ensure that a diverse and inclusive federal legal community continues to be an organizational priority in the years to come.[13] In undertaking this work, it has convened a range of FBA leaders, including judicial and corporate counsel as well as leaders in the private sector, to provide insight and guidance for its work. It has built and strengthened the FBA's relationship with other national partner organizations through the creation of affinity bar liaisons that engage in joint programming initiatives. Partner organization relationships with groups such as the National Association of Women Judges (NAWJ) and academic institutions such as Fordham Law School, as well as international groups, including the International Bar Association and the Law Society of England and Wales, offer opportunities to leverage these relationships in support of common goals. To that end, these organizations have already established annual collaborative programs built around supporting women in the legal profession.

The FBA Builds Coalitions in Support of International Women's Day

For the past three years, the FBA has created national programming initiatives in support of International Women's Day. For the first time, in March 2018, the FBA convened a group of distinguished professionals to engage on women's human rights in the context of migration specifically in connection with International Women's Day. With a diverse group of academics from Harvard Law School, Fordham Law School, and the Leitner Center for Human Rights, these professors and graduate law students examined current events in human rights law impacting the ability of migrant women to seek international protection from persecution in the context of U.S. law and international human rights law. With support from the FBA International Law Section, the FBA Judicial Division, and the FBA Southern District of New York Chapter, that successful program was reprised at the FBA National Convention in New York in September 2018 and was expanded to include an additional speaker from the University of Amsterdam School of Law who appeared via Skype and offered the European perspective on the issues. These programs garnered national recognition.

About a year later, on March 11, 2019, the FBA Southern District of New York Chapter, the FBA International Law Section, and the FBA Judicial Division co-sponsored Fordham University's Second Annual International Women's Day event.[14] This program expanded on the student focus and was billed as a "Student-Moderated Evening of Discussion" hosted by the Fordham School of Law in New York City. With two tightly packed hours of presentations by eight distinguished speakers and FBA leaders, members from the legal community were treated to diverse perspectives as told from judges, practitioners, and prosecutors. The NAWJ and the Women's Bar Association of the State of New York co-sponsored the program.

FBA Southern District of New York Chapter president-elect and adjunct professor Mimi Tsankov kicked off the event with a welcome in her capacity as both Fordham School of Law adjunct professor and chair of the National Association of Immigration Judges, Gender and Equality Committee.[15] She announced the evening's theme as "Balance for Better"—in accordance with the United Nations 2019 International Women's Day guidance. Framing the evening's anticipated discourse, she posited three questions: "To what extent do the laws that we have in place support gender balance?" "Where do we need to improve?" and "What have we succeeded in doing so far?" Tsankov challenged the presenters to consider how they see gender equality in terms of the stated theme and invited their personal remarks in light of their positions of leadership within the various state, federal, and international governmental bodies in which they work.

Fordham LL.M. student Lucila Casado Ardizzi introduced then-FBA President Maria Vathis, who provided a detailed presentation about how gender balance is better for business, as it offers diversification of talent. She pointed out how multiple studies suggest that the inclusion of women increases the global gross domestic product. In fact, a 2015 report by the McKinsey Global Institute has found that if women could reach their greater economic potential through increasing involvement in the workforce, global GDP would increase as much as $12 trillion, and could reach $28 trillion if the gender gap was completely closed.[16]

As to the role of women in the law in the United States, Vathis pointed out a number of firsts, including the first gender discrimination case dating back to 1872 and the fact that the right of women to practice law in all 50 states only became a reality in the 1950s.[17] She noted that the confirmation of the first woman to the U.S. Supreme Court occurred only as recently as 1981. Vathis explained that, although the law profession has achieved some successes, including the fact that women represent the majority of law school graduates, women still represent a minority within the FBA.[18] By way of illustration, Vathis explained that some industries are particularly affected by underrepresentation. She said that in the science, technology, engineering, and math (STEM) fields, only one in four women hold positions, and to address this, she called on women to work together to fight stereotypes and encourage young girls to pursue careers in these fields. She identified how this impacts attorneys who practice patent law specifically. Since the patent bar requires the completion of an undergraduate degree in a science field, this disproportionately affects women, who make up only 25 percent of STEM university graduates. This program garnered much attention and received national recognition for its insights.

International Women's Day 2020 Programming

In 2020, the FBA organized a greatly expanded gender-focused programming initiative, which has increased its impact on a global level. The FBA organized two months of high-profile events scheduled to coincide and complement the key global events of International Women's Day, which occurs annually on March 8, as well as the 64th meeting of the U.N. Commission on the Status of Women (CSW).

By way of background, the CSW is an annual two-week U.N. session to which representatives of U.N. Members States, U.N. enti-

ties, and U.N. Economic and Social Council (ECOSOC) accredited nongovernmental organizations (NGOs) from all regions of the world are invited to attend.[19] The 64th Session of the CSW was itself a milestone event on women's issues, as it is the 25th anniversary of the 23rd Special Session of the UN General Assembly, known as the "Fourth World Conference on Women."[20] Held in 1995 in Beijing, this special session was a turning point for the global women's movement. With more than 17,000 attendees comprising government delegates, representatives from accredited NGOs, many international civil servants, and members of the media, that event resulted in the creation of the "Beijing Declaration and the Platform for Action" (BPfA), which was later adopted unanimously by 189 countries.[21] As a foundational document, the BPfA supports gender equity initiatives, and, in particular, BPfA Resolution 24 directs signatories to

> Take all necessary measures to eliminate all forms of discrimination against women and the girl child and remove all obstacles to gender equality and the advancement and empowerment of women.

Moreover, BPfA Resolution 32 sets forth that signatories must

> Intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion, or disability, or because they are indigenous people.

In 1995, while the "Fourth World Conference on Women" was ongoing, the interest in the initiative was tremendous, and while the 17,000+ official meeting was convened, a fully parallel event was taking place in nearby Huairou, China.[22] This parallel event, the "NGO Forum," served as the gathering place for over 30,000 people ready to help implement at a grassroots level what UN Women has since called "the most progressive blueprint ever for advancing women's rights" and "the key global policy document on gender equality."[23]

This year, during the 64th session of the CSW, dubbed "Beijing+25," UN Women and the CSW undertook a review and analysis of the implementation of the BPfA and its outcomes at the global, national, and regional level.[24] During the 64th CSW, the United Nations recognized that a five-year milestone had been reached toward achieving the Sustainable Development Goals of the 2030 Agenda for Sustainable Development, including the accelerated realization of gender equality and the empowerment of all women and girls everywhere.[25]

The FBA organized a four-hour CLE program to be followed by a networking reception hosted by FBA affinity partner Fordham Law School. The CLE program is co-sponsored by a host of organizations, including multiple FBA components and the International Bar Association, the Law Society of England and Wales, the National Association of Women Judges, and the Women's Bar Association of the State of New York. The program comprises two panels of distinguished speakers who evaluated recent studies aimed at promoting gender diversity in the legal profession. The panelists are to consider the findings contained in two reports: (a) the June 2019 report issued by the Law Society of England and Wales, titled "Advocating for Change: Transforming the Future of the Legal Profession Through Greater Gender Equality"; and (b) the November 2017 report issued by the New York State Bar Association, titled "If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR." In doing so, they will be raising awareness about how to improve gender equity in the legal profession across borders.

The next phase of the programming shifts to the CSW, where, on March 17, 2020, the FBA was scheduled to co-sponsor an official parallel event during the 64th Session of the CSW, which was curtailed significantly due to COVID-19 health and safety concerns. The event was to feature a 90-minute program titled "Transforming the Future of the Legal Profession through Gender Equality." The goal of the program was to engage the legal community in the context of CSW64 and Beijing Declaration Numbers 24 and 33 around advancing the stature of women legal professionals worldwide, and included speakers representing different regions around the world discussing this topic from their unique perspectives. With a major emphasis on training the next generation on diversity awareness, the program was organized and the speakers were to be introduced by the Fordham Law School's International Law and Justice LL.M. students. The key involvement of LL.M. advanced law students has been critical to the program's success in prior years, as doing so trains the next generation of legal professionals who are from countries around the world where gender equity is succeeding and where we continue to see gaps.

With the goal of expanding the International Women's Day focus beyond just March, the FBA has been working with multiple British organizations to recreate the programs in London. Chaired by former FBA SDNY Chapter president Donna Frosco, the FBA has sought to strengthen its relationship with the Law Society of England and Wales by holding a program within the U.K. and, in doing so, expanded the outreach to the Society of English and American Lawyers. The proposed April 2020 program was to welcome a broad coalition of British and American lawyers, and further cemented FBA's leadership beyond the confines of the United States. This program was postponed due to COVID-19 health and safety concerns.

To build lasting success in countries within the developing world, the FBA welcomed the International Federal for Peace and Sustainable Development and the International Bar Association as new distinguished partners to build a stronger international focus beyond Europe. With high-profile programs planned on two continents and a focus on building awareness at the international law student level, the FBA has embarked on producing a documentary film to capture the truly unique nature of this endeavor. With international LL.M. students at the helm and a film capable of expanding the awareness opportunities beyond traditional programming venues, the FBA is enabling students to share the fruits of these programs within their diverse communities in countries around the world. By doing so, the FBA is building its role as an international leader in providing invaluable resources for lawyers around the world to help close the gender gap at the higher levels within the profession.

Best Practices Advocated in Leading Studies

In June 2019, the Law Society of England and Wales issued a report titled "Advocating for Change: Transforming the Future of the Legal Profession through Greater Gender Equality" ("Law Society Report").[26] The Law Society Report reflects that, to overcome the barriers that prevent women from entering and progressing in law, the movement needs quantitative and qualitative research, and it has fulfilled that void by conducting the most comprehensive global survey on women in the law between November 2017 and January 2018, and through multiple international roundtable discussions held

in 21 cities, across 18 jurisdictions, and with the participation of 712 female lawyers.[27]

The Law Society Report demonstrates that many of the challenges female lawyers face are similar across jurisdictions and are a function of the application of traditional gender role expectations and stereotyping.[28] For example, many women reported that, as working mothers, they were penalized due to the societal expectations about their anticipated caregiving responsibilities. A universally recognized gender pay gap was reportedly a function of societal acceptability for men to request greater financial recognition for their work, and to perceive women as more aggressive when they do the same. Finally, flexible working, despite technological advancements, was not culturally acceptable in many countries, and those who did were viewed less favorably.[29]

The Law Society Report, which offered solutions for addressing these challenges, advocates for a multi-pronged approach.[30] The report suggests that providing training on these issues and engaging in public awareness campaigns is a critical first component. Similarly foundational is the need to engage male champions in the quest for change at all levels of the law profession to ensure policy as well as legislative reform.[31] By bringing women together to network and share practical solutions, such as through bar associations and law societies, the Law Society Report argues that leaders in the legal profession will be more likely to adopt and implement policies that "tackle gender inequality, address unconscious and conscious bias, promote flexible working, and improve work-life balance that benefits all."[32] It's clear that the association role as an agent of change offers a tremendous opportunity to both train and raise awareness, and to level gender inequality throughout the profession.

In November 2017, the New York State Bar Association released its seminal report, titled "If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR" ("NY State Bar Association Report").[33] After completing a comprehensive review that established how gender bias directly impacts the ability of women in the law profession to achieve gender parity in the courtroom and in the alternative dispute resolution context, it offered a variety of best practice solutions.[34] The NY State Bar Association Report encourages law firms to create institutional reforms that address women's initiatives, including the following:

- Convincing law firm partners to provide speaking opportunities in court and at depositions for junior attorneys, and institutionalizing top-down initiatives that support these objectives.
- Providing training and education on courtroom skills.
- Offering leadership training, including guest speaker opportunities and mentorship in gaining such opportunities.[35]

The NY State Bar Association Report identifies a partnership role for the practitioners with the court administration and judicial leaders in ways that encourage and facilitate closing the gender gap, including the following:

- Encouraging junior attorneys to argue discrete issues in court proceedings.
- Favoring granting oral argument when a junior attorney is scheduled to argue a matter.
- Encouraging the appointment of qualified women as lead counsel.[36]

The NY State Bar Association Report notes that clients play an important role in the process as well because they have the ability to insist on diversity in litigation teams and in selecting arbitrators and mediators.[37]

Conclusion

The legal profession needs to enter a new phase in its drive for diversity and inclusion if it is to accelerate the pace of change in bringing about gender equality in the legal profession. While much of the groundwork has been done, there is a clear opportunity for law profession associations to take a leadership role in reigniting and accelerating the stubborn pace toward equality. Superficial initiatives are being replaced by quantitative and qualitative studies that document prescriptions for how to close the gap. Every corner of the law profession is taking notice. And that's fortunate, because reaching our goals will require a multi-dimensional approach and a change in mentality. That the FBA is leading this initiative, and in doing so is folding in affinity partners, is important for the law profession as a whole. The FBA has the platform to develop programs that can train its members and help ensure that we are able to meet this challenge. By raising the profile of diversity and inclusion, and gender diversity in particular, the FBA and its partners can be leaders in implementing the solutions that close the gaps that exist. ☉

Endnotes

[1]Emma Tsankov is a European Law Student at the University of Amsterdam and writes this article in her capacity as an International Bar Association Law Intern supporting this program.

[2]Institute for Inclusion in the Legal Profession, http://www.theiilp.com/StateofDiversity.

[3]*See generally IILP Review 2019-2020, The State of Diversity and Inclusion in the Legal Profession,* Institute for Inclusion in the Legal Profession *(Jan. 2019)*, (hereinafter "IILP Review"), http://www.theiilp.com/resources/Documents/IILP_2019_FINAL_web.pdf.

[4]Allison E. Laffey and Allison Ng, *Diversity and Inclusion in the Law: Challenges and Initiatives,* American Bar Association (May 2, 2018), https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/

[5]*Id*.

[6]*Id*.

[7]IILP Review, *supra* note 3, at 45.

[8]*Id*. at 101.

[9]*Id*. at 108.

[10]*Id*.

[11]Angelica Cesario, *New York to Implement New Diversity CLE Requirement* in 2018, Above the Law (Sept. 25, 2017), https://abovethelaw.com/lawline-cle/2017/09/25/new-york-to-implement-new-diversity-cle-requirement-in-2018/.

[12]Due to the effects of the COVID-19 pandemic, scheduled programming has been modified from its original planned format.

[13]*See generally,* FBA Task Force on Diversity & Inclusion, https://www.fedbar.org/about-us/diversity-and-inclusion/.

[14]Fordham School of Law International Law and Justice Practicum LL.M. Students, *The Federal Bar Association Celebrates International Women's Day at Fordham*, The Federal Lawyer (Sept./Oct. 2019).

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The Return of Asylum Seekers to Unsafe Third Countries in Contravention of the Principle of Non-refoulement

By Beth Persky and Federica Dell'Orto

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Europe and North America are refugee-receiving regions under the international framework that has been in effect since World War II. In Europe, Italy has recently sent asylum seekers to other European countries. The United States, which entered into agreements with Guatemala, Honduras, and El Salvador in 2019, has begun to return asylum seekers from other Central American countries to Guatemala, and has recently proposed returning asylum seekers from Mexico to Guatemala. This article will address the frameworks in the United States and in Italy for sending asylum seekers to third countries.

The United States

An earlier article addressed whether the safe third country agreement signed by the United States and Guatemala conflicts with the non-refoulement provision of the United Nations Convention Relating to the Status of Refugees (the "Refugee Convention").[1] The United States adopted the concept of a safe third country in § 208(a)(2)(A) of the Immigration and Nationality Act, 8 U.S. Code 1158(a)(2)(A).

The United States has begun returning asylum seekers to Guatemala under the U.S.-Guatemala Agreement, which violates the non-refoulement provision if Guatemala is not a safe country.[2] On Nov. 19, 2019, the Department of Justice and the Department of Homeland Security adopted an interim final rule to modify existing regulations to provide for the implementation of Asylum Cooperative Agreements (ACAs) pursuant to INA § 208(a)(2)(A), with the purpose of providing asylum seekers with access to only one of the ACA signatory countries' protection systems.[3] Since the time that our prior column on this topic was written, the U.S. government has begun returning asylum seekers from El Salvador and Honduras to Guatemala. On Jan. 6, 2020, a spokesperson from the Department of Homeland Security announced that Mexicans seeking asylum who have not passed through Guatemala on their way to the United States could be sent to seek asylum in Guatemala under the U.S.-Guatemala Agreement.[4]

Under the U.S.-Guatemala Agreement, "Protection Applicant" refers to any person who submits a request for protection in the territory of one of the parties, and "Request for Protection" refers to the request of a person of any nationality to the government of one of the Parties to receive protection in accordance with obligations stemming from the 1951 Refugee Convention, the 1967 Protocol, or the Convention Against Torture. The United States retains responsibility for unaccompanied minors,[5] individuals who arrive with a validly issued visa or other valid admission document issued by the United States, or individuals who are not required to obtain a visa. Based on this language alone, an individual from any country who seeks asylum in the United States and does not have a proper entry document, or is not an unaccompanied minor, could be sent to Guatemala, whether the individual has passed through Guatemala or not.

The United States and Guatemala are both parties to the Refugee Convention. The preamble of the U.S.-Guatemala Agreement provides that the violations of the basic principle of non-refoulement be avoided, but the provisions appear to contradict reality. Article 3 of the agreement provides for the transfer of asylum seekers to Guatemala by the United States. Article 4 of the agreement provides that the Parties shall have procedures in place to ensure that the transfers from the United States to Guatemala of the persons covered by the Agreement are compatible with their respective obligations, domestic and international laws, and migration policies. Mexico's foreign ministry has condemned the plan to send asylum seekers from Mexico to Guatemala, and has indicated that the Mexican government would closely monitor human rights set out in the international agreements signed and ratified by both the United States and Mexico.[6]

In January of this year, incoming Guatemalan President Alejandro Giammattei said that he would review the U.S.-Guatemala Agreement.[7] In addition to El Salvador and Honduras, Guatemala is one of the

main countries from which refugees flee to seek asylum in the United States.[8] Nevertheless, in December 2019, the United States began returning migrants to Guatemala under the Agreement, including Hondurans and Salvadorans. The migrants included children as well as adults. The first Honduran and Salvadoran families returned to Guatemala under the agreement decided not to apply for asylum in Guatemala and accepted relocation to their home countries. As of Jan. 7, 2020, 52 migrants have been sent to Guatemala under the U.S.-Guatemala Agreement, and only six migrants returned to Guatemala have applied for asylum.[9] Guatemala does not provide housing, work, or other support to asylum seekers, though this assistance may be provided by non-governmental organizations.[10] In conclusion, Guatemala does not appear to meet the requirements of a safe third country, and the enforcement of the Agreement violates the provisions of the Refugee Convention.

Europe

The Italian legal system has recently adopted numerous provisions that have affected the reception and examination of requests for international protection from migrants and asylum seekers. The right of asylum is recognized as a fundamental human right and is protected by article 10, paragraph 3 of the Italian Constitution.[11]

The right to apply for asylum and the recognition of refugee status are not the same. In order to be recognized as a refugee, the individual applicant must have undergone specific acts of persecution. The recognition of refugee status entered the Italian legal system through the 1951 Geneva Convention.[12] The European Union (EU) establishes that an individual will be given refugee status as a result of and based on the outcome of an investigation run by the "territorial commissions for the recognition of international protection," as established through the so-called Dublin II Regulation.[13] According to the regulation, the alien can apply for international protection in the state of first entry, which becomes responsible for examining and adjudicating the application.

The Dublin regulation 604/2013, mostly referred to simply as Dublin or the "Dublin system," is the European regulation governing the request for asylum in EU countries. The current text updates a previous regulation, 343 of 2003, which was intended to absorb the so-called Dublin Convention—an international treaty signed in 1990 in Dublin but entered into force only in 1997 and known for having defined the first framework of European rules on the request for and right to asylum. The regulation was signed by all 28 EU countries at the time with the later addition of Iceland, Liechtenstein, Norway, and Sweden. It is mostly known—and controversial—for establishing the rule that makes the country of first entry responsible for processing the asylum application. This concept had already been introduced by the 1990 Convention and the 2003 regulation, and it had the purpose of preventing the same person from applying in multiple different countries.

The practical consequences concern both the states and the migrants. On the one hand, the first-entry member state is required to examine the request, taking on itself the whole process; on the other hand, the migrant has no right to choose where to start the asylum request. The regulation has raised criticism from both EU member countries and international bodies. In the first case, the states most exposed to the migratory routes of the Mediterranean (such as Italy, Spain, and Greece) contest the principle of the first port of entry because it ends up overloading some member states with the bulk of the protection requests. In the second case, many nongovernmental organizations have argued that the Dublin system is ineffective and unfair for both member countries and migrants, precluding asylum seekers from having the right to a transparent examination of their application for protection.

The controversy intensified on the occasion of the migration crisis of 2015, when the impressive growth in the number of migrants and asylum seekers highlighted pressure on Southern European countries as well as on the coordination problems between EU states in the management of the entrances. In 2016, the European Commission proposed a reform (renamed "Dublin IV") to overcome the 2013 version. The principle of the country of first arrival was replaced by an automatic redistribution system based on quotas allocated proportionally to individual countries. The proposal was definitively abandoned during the meeting of EU ministers of interiors, which took place on June 5, 2018, in Luxembourg.

As a result of internal conflicts and the growing migrant crisis, the EU—similar to the United States—entered into several agreements with neighboring countries in order to prevent migrants from reaching the EU. One such agreement was that signed with Turkey in 2016. According to this agreement, migrants and refugees on the Balkan route, including Syrians, are sent back to Turkey if they do not apply for asylum with the Greek authorities. The UN refugee agency (UNHCR) assists the rejected migrants in the process on the basis of a treaty clause. All costs are covered by the EU. The EU also accepts Turkey's commitment that migrants returned to Turkey will be protected according to international standards. For every Syrian refugee who is sent back to Turkey from the Greek islands, another Syrian is transferred from Turkey to the EU through humanitarian channels.

To manage the migrants, Turkey has closed its borders to Syrian refugees. In 2015, Syrian citizens did not need a visa to enter Turkey; now this is no longer the case. Furthermore, the border between Syria and Turkey is more controlled, making it virtually impossible for migrants to pass through Turkey. In exchange, the EU has promised to give Turkey 6 billion euros and to reopen the screening process on Turkey's accession to the EU—a process that has been stalling for a while.

A similar agreement was entered into between Italy and Libya in 2017. The Memorandum of Understanding—by which this agreement is known—is intended to limit the arrival of migrants from Africa to the Italian coast. To do this, Italy has made a commitment to allocate funds for the training of Libyan authorities and to provide the necessary means to the Libyan Coast Guard. The eight articles of the memorandum include, among other things, Italian funding for Libyan "reception centers." Said centers, meant to host migrants and process their applications, are in fact prisons, since illegal immigration in Libya is punished with imprisonment. Italy also provides health care, medicine, and training to Libyan staff working in the centers. From 2017 to today, Italy has given the Libyan government over 150 million euros by financing the training of the staff engaged in official detention centers and by supplying land and sea vehicles for the Libyan police authorities and the Coast Guard.

This year, Spain entered into a similar agreement with Morocco. The agreement, signed by the interior minister of Spain, Fernando Grande-Marlaska, and his Moroccan counterpart, Abdelouafi Laftit, regulates the joint work to deepen and develop the cooperation in the fight against illegal immigration. The document was signed in

Rabat on Feb. 13, 2019, in the presence of the kings of both countries and lists 18 crimes, including "human trafficking and irregular immigration." This agreement is based on the Treaty of Friendship, Goodwill and Cooperation[14] between the two countries, created in Rabat in 1991 with the purpose of contributing to the development of bilateral relations. It is an indefinite agreement and will remain in force as long as one of the parties does not withdraw through diplomatic channels. Since then, the Moroccans have deployed agents to reinforce the fight against illegal departures from its shores and have been actively involved in the prevention of departures from the African coasts.

Conclusion

Agreements to send asylum seekers to other countries raise the question of what it takes to be considered a "safe third country" for purposes of repatriation of asylum applicants. It would be possible to point to plenty of documentation of human rights abuses in Turkey, Libya, Morocco, Guatemala, and other countries that both the EU and the United States are sending migrants to. In recent times, more and more agreements of this kind have been entered into, in an attempt to block migratory flows. While currently in place and enforced, both the legal and ethical question on the suitability and appropriateness of these agreements will certainly be discussed in the months to come. ☉

Endnotes

[1]Please refer to citation information for our column in the January/February issue of *The Federal Lawyer.* Article 33 of the Convention states that "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Under U.S. law, a refugee is an individual who seeks resettlement from a location outside the United States, and an asylum seeker requests asylum inside the United States or at the U.S. border.

[2]U.S. Dep't of Homeland Sec., Agreement Between the Government of the United States of America and the Government of the Republic of Guatemala on Cooperation Regarding the Examination of Protection Claims (2019), https://www.justsecurity.org/wp-content/uploads/2019/07/Guatemala-Cooperative-Agreement-with-Signature-Blocks-ENG.pdf. ("U.S.-Guatemala Agreement").

[3]84 Federal Register 63994 (Nov. 19, 2019). The rule applies to all ACAs in force between the United States and countries other than Canada, including the recent ACAs with El Salvador, Guatemala, and Honduras.

[4]*US immigration: Mexican asylum seekers could be deported to Guatemala,* BBC News, Jan. 7, 2020.

[5]Under the Agreement, an "unaccompanied minor" is an applicant for protection who has not reached the age of eighteen (18) and whose parent or legal guardian is not present or available to provide care and physical custody in the United States, or in Guatemala, where the unaccompanied minor is located.

[6]Supra., note 4. The agreement was signed by former Guatemalan President Jimmy Morales after the U.S. government threatened to impose tariffs on Guatemala.

[7]*Supra* note 4.

[8]2018 statistics as reported, https://www.worlddata.info/refugees-by-country.php based on data collected from UNHCR.

[9]*Supra* note 4.

[10]*US sends first non-Guatemalan migrant families to Guatemala,* Associated Press, Dec. 12, 2019.

[11]https://www.senato.it/1025?sezione=118&articolo_numero_articolo=10

[12]https://www.unhcr.org/3b66c2aa10

[13]Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, https://eur-lex.europa.eu/eli/reg/2013/604/oj.

[14]https://treaties.un.org/doc/Publication/UNTS/Volume%201717/volume-1717-I-29862-English.pdf

Eisner v. Macomber Turns 100[1]

By Catherine Moore

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This issue's Tax Law Section column reflects on a seminal Supreme Court ruling from 1920. For a bit of context, 1920 gave us the hair dryer, jungle gym, Eskimo Pie, and Band Aids®. It was also the year of *Eisner v. Macomber,* one of the Court's important rulings on the definition of "income" for the purposes of imposing a federal income tax.[2] In summary, this case stands for the proposition that a stock dividend does not create taxable income because no property has been separated from the corporation in favor of the shareholder.

The facts of *Eisner v. Macomber* are straightforward. In 1916, Standard Oil issued a stock dividend of 50 percent to reflect its surplus undivided profits. The company made a transfer from its surplus account to capital stock. Mrs. Macomber, the taxpayer at issue, received an additional 1,100 shares as a dividend to her pre-existing ownership of 2,220 shares. She neither received a cash dividend nor sold any part of the shares in Standard Oil.

Under protest, Mrs. Macomber paid income tax on the stock dividend pursuant to the Revenue Act of 1916. She contended that (i) the tax violated article 1, § 2, cl. 3,[3] and article 1, § 9, cl. 4,[4] of the Constitution (requiring direct taxes be apportioned according to population), and (ii) the stock dividend was not "income" within the meaning of the Sixteenth Amendment. Accordingly, the issue taken up by the Court was whether—by virtue of the Sixteenth Amendment—Congress has the power to tax, as income of the stockholder and without apportionment, a stock dividend made against accumulated profits.

The Court's opinion begins by establishing that the Sixteenth Amendment must be interpreted in connection with the taxing provisions of the original Constitution. Before the Sixteenth Amendment, the Court had upheld the apportionment required by article 1, § 2, cl. 3 and article 1, § 9, cl. 4.[5] In *Pollack v. Farmers' Loan & Trust Co.*, the Court held that taxes on rents and profits as well as investment returns were direct taxes imposed by reason of ownership. Such direct taxes required apportionment. The Court continued to conclude that the passage of the Sixteenth Amendment is to be narrowly interpreted to modify only the Constitution with respect to direct taxes on income and the apportionment of such taxes.

To give effect to Article 1 and the narrow modification provided by the Sixteenth Amendment, the Court then turned its attention to determining what does and does not qualify as "income." In defining income, the Court relied on its previous holding in *Doyle v. Mitchell Bros. Co.*[6] The Court quoted *Doyle* and held "'Income may be defined as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets." The Court continued, "Here we have the essential matter: *not* a gain in *accruing to* capital; not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value, *proceeding from* the property, *severed from* the capital, however invested or employed, and *coming in*, being *'derived'*—that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal – *that* is income derived from property. Nothing else answers the description." In short, the Court believed that the definition set forth in *Doyle* matched the fundamental principle in the Sixteenth Amendment in that *Doyle* contemplates income as being indifferent to source but requiring receipt of separate property.

Having defined "income," the Court then analyzed the taxpayer's relation to a corporation in the instance of a stock dividend. The Court said that this relationship is the key to determining whether a stock dividend can fit within the constitutional parameters of "income." The Court began its analysis by noting that a shareholder has a capital interest in the corporation as evidenced by his stock certificates. This capital interest gives the stockholder various benefits, including the ability to vote at shareholder meetings and liquidation rights; the interest does not entitle the shareholder to withdraw a part of the corporate capital, assets, or profits for his own enjoyment. Only when a dividend, normally paid in cash, is made does the shareholder realize a profit or gain that is his separate property. This event satisfies the Court's definition of "income."

The Court proceeds to determine that the stock dividend in *Macomber* is merely a book adjustment because the aggregate assets and liabilities of the corporation remained unchanged after the dividend. The Court also noted the dividend did not alter any shareholder's preexisting proportionate interest or increase the intrinsic value of her holding. Moreover,

the Court held that the stock dividend cannot create income because the conversion of the surplus into stock prevents those profits from being distributed to shareholders, including Mrs. Macomber.

Ultimately, a significant fact to the Court was that none of Standard Oil's assets were separated for Mrs. Macomber's personal benefit or use. Because the stock dividend did not enrich Mrs. Macomber at the expense of removing assets from the company, there was no income event.

Though the Court's discussion of constitutional issues is certainly interesting, the modern practitioner will most likely be familiar with *Macomber*'s contribution to the definition of income. Much like the inventions mentioned above have become part of everyday life, in the last 100 years, the rules of *Eisner v. Macomber* have become engrained in modern tax doctrine. ⊙

Endnotes

[1]Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as "Deloitte Global") does not provide services to clients. In the United States, Deloitte refers to one or more of the US member firms of DTTL, their related entities that operate using the "Deloitte" name in the United States and their respective affiliates. Certain services may not be available to attest clients under the rules and regulations of public accounting. *See* www.deloitte.com/about to learn more about our global network of member firms.

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[2]*Eisner v. Macomber*, 252 U.S. 189 (1920).

[3]U.S. Const. art. I, § 2, cl. 3 provides:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[4]U.S. Const. art. I, § 9, cl. 4 provides that "No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." This clause was superseded by the Sixteenth Amendment.

[5]*Pollack v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895).

[6]*Doyle v. Mitchell Bros. Co.*, 247 U.S. 179 (1918).

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[15]*Id.*

[16]*The Power of Parity: How Advancing Women's Equality Can Add $12 Trillion to Global Growth,* McKinsey Global Institute (September 2015), https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Employment%20and%20Growth/How%20advancing%20womens%20equality%20can%20add%2012%20trillion%20to%20global%20growth/MGI%20Power%20of%20parity_Full%20report_September%202015.ashx.

[17]The Federal Lawyer Article, *supra* note 13.

[18]*Id.*

[19]Commission on the Status of Women, UN Women, https://www.unwomen.org/en/csw.

[20]Commission on the Status of Women, https://www.unwomen.org/en/csw/csw64-2020.

[21]UN Beijing Declaration and Platform for Action, https://www.unwomen.org/-/media/headquarters/attachments/sections/csw/pfa_e_final_web.pdf?la=en&vs=800.

[22]Ruth P. Dawson, *When Women Gather: The NGO Forum of the Fourth World Conference on Women*, Beijing 1995, International Journal of Politics, Culture, and Society, 10, 7-27 (Fall 1996),https://www.jstor.org/stable/20019871.

[23]UN Women, *The Beijing Platform for Action: Inspiration Then and Now,* https://beijing20.unwomen.org/en/about.

[24]CSW64/Beijing+25 (2020), https://www.unwomen.org/en/csw/csw64-2020.

[25]*Id.*

[26]*Advocating for Change: Transforming the Future of the Legal Profession through Greater Gender Equality,* The Law Society of England and Wales (June 2019), https://www.law.ox.ac.uk/sites/files/oxlaw/advocating_for_change_-_international_women_in_law_report.pdf.

[27]*Id.* at 6.

[28]*Id.*

[29]*Id.* at 15.

[30]*Id.* at 14.

[31]*Id.* at 29.

[32]*Id.* at 7.

[33]*If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR,* New York Bar Association (November 2017), https://www.nysba.org/WomensTaskForceReport/.

[34]*Id.* at 18.

[35]*Id.* at 34.

[36]*Id.* at 35.

[37]*Id.* at 34-35.

Hon. Stacie F. Beckerman

Magistrate Judge, U.S. District Court for the District of Oregon

by Christine E. Sargent

Christine E. Sargent is an associate at Littler Mendelson P.C. in Portland, Ore., and focuses her practice on defending employers in all aspects of employment law. Sargent currently serves as one of the editors of the Oregon Association of Defense Counsel's publication, *The Verdict.* She also externed for Hon. Stacie Beckerman while studying at Lewis & Clark Law School.

Judge Stacie Beckerman was destined for success as a legal practitioner from the start. As the daughter of an esteemed general practice attorney in the Midwest, Judge Beckerman's career track was greatly influenced by her father's upstanding pursuit of justice for the citizens of his small-town community. Judge Beckerman is an undeniably diligent, learned, and skilled judge, but her poise and benevolent nature is what sets her apart. As a magistrate judge for the District of Oregon, Judge Beckerman demonstrates these same qualities in her judicial position every day.

A Humble Upbringing and Impressive Education

The youngest of four sisters, Judge Beckerman was raised in a traditional household in the small town of Cedar Rapids, Iowa. Judge Beckerman's mother, Carol, stayed at home until Judge Beckerman reached high school, while Judge Beckerman's father, Jerry, maintained a general legal practice in Cedar Rapids. There, her father took on "a little bit of everything," from trusts and estates to various civil and criminal defense matters. In one of his most noteworthy cases, Jerry represented a local church in a pro bono matter, which ultimately reached the Iowa Supreme Court. Judge Beckerman, only a teenager at the time, had the opportunity to observe her father argue the case. Ironically, Judge Beckerman's initial reaction to watching her father argue in front of the Iowa Supreme Court was that she did not want to become a lawyer. She believed that her shyness and fear of public speaking (at the time) would not be conducive to the profession. Regardless, the experience of watching her father argue only bolstered the admiration she felt toward him. Perhaps more significantly, despite his burgeoning legal practice helping members in his local community seek justice and resolve their legal problems, Judge Beckerman's father always maintained a balanced family life, something Judge Beckerman clearly values in her own career today.

After graduating from Kennedy High School, Judge Beckerman recognized that attending a private or out-of-state university was cost-prohibitive. Thus,

as a lifelong Iowa Hawkeye fan, she was happy to attend the University of Iowa in Iowa City. Judge Beckerman entered college planning to attend medical school. During her sophomore year, however, she worked as a nursing assistant at one of the university's hospitals and determined a medical career would not be the right fit. She paused to reconsider her career track. In deciding on a new career pathway, Judge Beckerman says, "The fact that I had admired my dad for so many years had significant influence over my ultimate career." In 1995, Judge Beckerman earned the highest distinction in her class at the University of Iowa, graduating with a Bachelor of Arts degree in political science.

Once Judge Beckerman knew she wanted to pursue a legal career, she applied to a number of top-rated law schools, including Harvard Law School. As soon as she received the acceptance letter from Harvard, Judge Beckerman was confident that was where she wanted to be. She immediately called her father to report the news. Though her financial circumstances did not allow for a visit to her future law school, she got into her car and drove to Boston in the fall of 1995. Boston—and specifically, Harvard—was a culture shock at first. She recalls the first orientation activity being a Boston Red Sox game. "I had never been to a

Major League Baseball game. It was overwhelming and incredible, and I fell in love with Boston and Cambridge (and the Red Sox)," she says.

Multifaceted Attorney Experience

Between her first and second year at Harvard, Judge Beckerman clerked in Washington, D.C., at Crowell & Moring LLP. She enjoyed D.C. so much that the next summer, she returned to the area and worked for Verner, Liipfert, Bernhard, McPherson & Hand ("Verner Liipfert") in the Government Relations group, where she ultimately worked as an associate after graduating from law school. The practice was a perfect fit. "I had been a political junkie growing up in Iowa because so many presidential candidates would visit and spend time in the local parks nearby," she says. "Working in the Government Relations group was a nice intersection between law and politics." While at Verner Liipfert, Judge Beckerman worked closely with a number of prominent political leaders, including former Senate Majority Leaders Bob Dole and George Mitchell as well as late former Texas governor Ann Richards. "They were my idols at that time, so I felt very lucky."

Not only did Judge Beckerman find success in her career at Harvard, she also met her now-husband, Jamie. Jamie was studying at Harvard Medical School while Judge Beckerman was studying at the law school. In 1998, Judge Beckerman graduated from Harvard Law School *cum laude*. She continued working at Verner Liipfert. In 1999, Jamie matched in a residency program in Boston. Judge Beckerman happily moved back to Boston and began working as an associate at the well-respected Skadden Arps firm. She transferred to Skadden's Palo Alto, Calif., firm in 2003 after her husband matched in a fellowship program for cardiology at Stanford Medical School.

Judge Beckerman enjoyed the slightly less combative practice of litigation on the West Coast as opposed to her practice in Boston. However, the birth of her first son put her priorities into perspective. In 2006, Judge Beckerman left Skadden. "I left the firm on my son's first birthday as his birthday gift. I was having trouble balancing motherhood with 100-hour billable weeks. I didn't know anyone at the time who was successfully balancing being a law firm partner and a mom." Judge Beckerman's growing family toured several cities to identify where they wanted to live permanently. They loved California, but the cost of living was overwhelming. It did not take long for them to decide on Portland, Ore., a city chock full of outdoor enthusiasts with close proximity to both the mountains and ocean.

Upon their arrival in Portland, Judge Beckerman knew she wanted to move on to a legal career in public service. She began working for the Appellate Division of the Oregon Department of Justice in late 2006 and had a second son shortly thereafter. Two years later, she saw a job posting for a half-time assistant U.S. attorney position in the Criminal Division. Judge Beckerman always had an interest in being a prosecutor, and because the position was half-time and she was a mom of two boys, it seemed like the right fit. Then U.S. Attorney Karin Immergut, who was recently appointed to the bench as a U.S. district court judge for the District of Oregon, hired Judge Beckerman. Judge Beckerman "absolutely loved every day of [her] job." She started in the white collar and environmental crimes unit and then transferred to the violent crime unit. Eventually, she led the sex trafficking crimes unit.

Judicial Excellence

In 2013, U.S. Magistrate Judge Dennis Hubel announced his retirement. Judge Beckerman applied, not expecting to receive the appointment but hopeful that applying would pave the way for a future appointment. On Jan. 5, 2015, Judge Beckerman was appointed as a magistrate judge for the U.S. District Court for the District of Oregon.

Judge Beckerman appreciates that she is in a unique position to help people who are struggling. Accordingly, she finds that to be her primary motivation. Not only does she make efforts to further this objective on her docket, but she has led and been involved in a number of different court initiatives during her five-year tenure on the bench. As one of the judges assigned to the CAPS (Court Assisted Pretrial Supervision) docket, Judge Beckerman has been afforded the opportunity to provide extra support and structure to high-risk individuals who are released pending trial. Judge Beckerman also serves as one of the judges presiding over the District of Oregon's Reentry Court Program, a structured program for high-risk individuals who have been released from custody and are struggling with reentry into the community. Without a doubt, Judge Beckerman's efforts in both of these noble endeavors have positively affected both individuals and the community at large.

Judge Beckerman's service to the community does not end there. She has also been heavily involved in volunteering for the SMART (Start Making a Reader Today) program. She served as a volunteer site coordinator at a local elementary school located in a gang-impacted neighborhood—one in which she had prosecuted various gang-related crimes during her time at the U.S. Attorney's Office. SMART places volunteers in public schools facing such hardships as poverty, injustice, and gangs, and sets up volunteer readers with elementary-age students on a weekly basis. Judge Beckerman singlehandedly enlisted a number of prosecutors, defense attorneys, and courthouse personnel to volunteer. Doing so, Judge Beckerman says, "brought them together and gave them an opportunity to get to know each other outside the courthouse and join in a mission that gives back to the community."

Judge Beckerman strives to improve judicial administration as well. She is the chair of the Ninth Circuit Pro Se Litigation Committee and vice chair of the Ninth Circuit's Magistrate Judge Executive Board. She serves

Left: Judge Beckerman and her family recently spent two weeks in Peru, which included a hike to Machu Picchu. Bottom: As an avid Comic Con fan, Judge Beckerman makes annual trips to San Diego's Comic Con convention. Recently, she participated on a "Judges on Star Wars" panel.

on the board of the U.S. District Court's Historical Society and is the former president of the Queen's Bench, the local chapter of Oregon Women Lawyers. Last year, she traveled to Sri Lanka to speak at a judicial symposium on asset forfeiture and money laundering. To be sure, Judge Beckerman is a force to be reckoned with as a judge in the Ninth Circuit.

Judge Beckerman also greatly values and enjoys mentoring law students and young lawyers. Her goal in hiring legal externs is to allow them to be a part of chambers and expose them to a wide range of experiences that show them what being a lawyer is all about. Judge Beckerman seeks to make them better writers but also believes that through experiential learning in the courthouse, her clerks and externs can make an informed decision about where they fit best in the legal community. Perhaps most importantly, Judge Beckerman also tries to teach her externs that balance in life is important. "If I leave early to go to my son's basketball game, I make sure to let them know that is what I am doing and why it is important," she says.

Mohammed Workicho, one of Judge Beckerman's former clerks who is now an associate at Lane Powell PC, says, "Although she has a very demanding job, she gives her time freely to those who need it, from law students seeking sage advice to community organizations in need of steady leadership. She is a great mentor for law students and young lawyers because she exemplifies all of the qualities every legal professional, and really every person, should strive toward." Laney Ellisor, another former clerk who now practices criminal defense at Boise Matthews Ewing, says, "When my externship with Judge Beckerman ended, I feared we would lose touch. I soon learned that membership on Team Beckerman never expires. Judge Beckerman continues to mentor and inspire me regularly. I owe her an enormous debt of gratitude for where I am in my career, as I'm sure is true for many other lawyers and students, especially women."

Balance

Though it may seem that Judge Beckerman's docket, involvement in the community, and efforts to improve the judicial system would limit her time spent with the family, that could not be further from the truth. In her words, "My goal is to be the hardest worker in the courthouse, to write meticulous opinions, to be a good role model for young lawyers, and to do all of this while being home for dinner every night."

Judge Beckerman's family travels as much as possible. Most recently, her family spent two weeks in Peru and hiked the Inca trail together. In the summer of 2018, they spent two weeks on a driving trip throughout eight countries in Europe. They make a point of leaving the country every year for at least two weeks, something that is necessary "to detach [herself] from [her] tendencies to be a workaholic." She and her husband also recently completed a 50K trail race together on Mount Hood. This year, she is training to compete in sprint triathlons.

Judge Beckerman makes sure she does not take herself too seriously. Among other speaking engagements, she travels to San Diego Comic Con every year to speak on a "Judges on Star Wars" panel and preside over pop culture mock trials. One of her favorite parts of the job is inviting school groups to her courtroom, and she hosts a one-week criminal justice program for high school students every summer.

During her first five years on the bench, Judge Beckerman has continued to be a leader in the legal community through her mentorship of young lawyers, community service efforts, and active participation in a long list of initiatives and organizations. Her direct influence on former externs and clerks can be seen in their successes and the way they practice law. As Workicho puts it, "I will always remember how warmly people speak of her when she is not present and how quickly people's faces light up when she is." Judge Beckerman is a dedicated mother possessing a brilliant mind and hard-working attitude, and Portland is lucky to have her on the bench. ☉

Hon. Lisa Raleigh

Administrative Law Judge, U.S. Social Security Administration

by Hon. Alisa Tapia-Zuniga

Hon. Alisa Tapia-Zuniga is a freelance writer and an administrative law judge for the U.S. Social Security Administration in Tallahassee, Fla. Prior to working for Social Security, Judge Tapia-Zuniga worked as an administrative judge for the U.S. Department of Agriculture, National Appeals Division, adjudicating all Spanish-speaking appeals in South Florida and Puerto Rico.

Judge Raleigh was born in the Live Music Capital of the World—Austin, Texas—to Canadian parents, James and Doris Raleigh. Her mother worked as a secretary in the oil industry, where she met and eventually married Judge Raleigh's father. Her father, a civil engineer with a master's degree in petroleum engineering, was studying toward his Ph.D. at the University of Texas and, after Judge Raleigh's birth, the family moved to Canada. Her father had accepted a position with a Canadian subsidiary of a U.S. gas exploration company. He would eventually rise to the ranks of chief executive officer and chairman of the board.

With her slight Canadian accent, Judge Raleigh describes her childhood as happy. She recalls having a desire to one day become the prime minister of Canada. Judge Raleigh had a passion for reading, outdoor sports, and talking to new people. She explains that her talkative nature became useful later in her career when she took depositions, elicited testimony, and conducted trial examinations.

Nonetheless, Judge Raleigh's childhood did come with loss. When she was 12, her beloved father was diagnosed with metastatic melanoma. At age 14, she herself was diagnosed with early-stage melanoma because her father recognized the signs of the disease. Fortunately, she survived cancer due to early detection. A year later, however, her father succumbed to the disease. Judge Raleigh shares that her experience of this loss was emotionally stressful for years after her father's death and that she experienced a form of survivor's guilt—a condition that was not well-known at that time. In her despair—and with no clear plan—at age 18, Judge Raleigh left Canada and joined the U.S. Navy.

The U.S. Navy

From 1982 to 1986, Judge Raleigh served our country in the U.S. Navy. Her military experience, however, was not what she had envisioned. "I had a sheltered childhood in that old-fashioned European sense. I was still in the school system, where women delivered the vast majority of the instruction. I did not have a good perspective on the status of women in the larger world."

In 1985, Judge Raleigh was one of the first women stationed to an active duty patrol squadron in Jacksonville, Fla. At that time, the military was beginning to increase the types of jobs available to women; however, the inclusion practice came with vigorous resistance. The school of thought was that the military was not an appropriate place for women. Specific institutional regulations restricting the activities of women were entirely novel to Judge Raleigh. She explained that the most challenging aspect of her military experience was the disparate treatment of women.

In 1986, Judge Raleigh was deployed to Sicily, Italy, with a land-based anti-submarine warfare patrol squadron VP-56 at a NATO base (North Atlantic Treaty Organization). The squadron's purpose was to sanitize the Mediterranean by keeping Soviet submarines at bay. As an E-3 aviation electronics technician, Judge Raleigh maintained the anti-submarine cryptographic electronics and other duties as assigned.

Despite military challenges, Judge Raleigh pushed forward toward the future. During her military service, she attained college credit for her military training and her professional experience, and through her participation in the U.S. Navy Campus for Achievement Program. After successfully passing

various comprehensive subject exams, she graduated with a bachelor's degree in general studies and received a Good Conduct Award for her military service. After her enlistment ended in September 1986, Judge Raleigh was ready to pursue her next goal—law school.

Florida State University Law School

From 1987 to 1990, the Florida Bar awarded Judge Raleigh a three-year Public Service Fellowship to attend Florida State University Law School. In her first year, she joined the Law Review. In her second year, Judge Raleigh was awarded a semester abroad scholarship to study European Community Law in Brussels, Belgium. In her third year, Judge Raleigh was awarded a Rotary Ambassadorial Scholarship to study international law in Barbados upon graduation.

Between her scholarships, part-time work, and the Veteran's Education Assistance Program, Judge Raleigh's legal education was paid in full by graduation day in April 1990. Three months later, she sat for and passed the Florida Bar exam.

International Study

In September 1990, Judge Raleigh embarked to Barbados to attend the University of West Indies Master's Program. She humorously shares that she was intellectually exhausted and "primarily majored in open water swimming." In reality, she studied amongst the "Commonwealth Scholars." Specifically, her colleagues included government lawyers from other Caribbean nations as well as from India, Guyana, Malaysia, and Pakistan. The commonwealth scholars focused on self-executing legislative drafting.

Studying abroad was a great experience for her. Judge Raleigh states, "I left Barbados so impressed with these lawyers, who strove to build legal governance in their home countries." Although she planned to pursue a career in private practice tax law, she left Barbados with a new goal of government practice. Upon her return to the United States, Judge Raleigh joined the Florida Office of the Attorney General.

The Practice of Law

In 1991, Judge Raleigh began her career in the Tax Division at the Florida Attorney General's Office. She handled administrative and circuit court cases from the answer to the final judgment. After four years of public service, Judge Raleigh worked for Holland & Knight for a year but realized that big firm life was not ideal for her. She felt the pull of public service, so she returned to the attorney general's office.

Judge Raleigh worked closely with investigators and lawyers throughout the 50 states to investigate consumer fraud and unfair and deceptive trade practices. Her duties included traveling to local civic clubs and educating the people of Florida about consumer fraud. She found the experience working with Rotary Clubs so fulfilling that she ended up joining one in her location.

As an experienced assistant attorney general, Judge Raleigh handled federal civil rights inmate cases in the Corrections Unit for one year. She then moved to the Economic Crimes Unit for six years. At the Economic Crimes Unit, she handled high-profile cases.

For instance, Judge Raleigh led the settlement committee for the 53-jurisdiction Firestone and Ford tire rollover investigation (tire failures linked to over 200 fatalities and over 800 injuries in the United States). She investigated the Rite Aid Corporation on a prescription pricing scam (a computer program designed to raise prices depending on the desperation of the customer). Judge Raleigh also worked on a civil RICO warranty fraud investigation of the world's largest battery manufacturer.

Bureau Chief of the Economic Crimes Unit

Judge Raleigh spent her last year as bureau chief of the Economic Crimes Unit. During her tenure, she recalls that there were four direct strike hurricanes in a single season. The unit was running the state Price Gouging Hotline, and her family time, including time with her preschool-aged child, was limited. She recalls not having a single day off for 100 days. After the hurricane season was over in late 2004, Judge Raleigh transferred to the Complex Litigation Unit.

The Complex Litigation Unit

From 2005 to 2015, Judge Raleigh was assigned to the Complex Litigation Unit handling all trial set cases. She handed RICO, inverse condemnation, constitutional challenges, and first impression statutory interpretation cases. She also guided young lawyers to grow in the legal profession, which she found extremely satisfying. She states, "Some of my most treasured documents are letters and notes to me by young lawyers."

Candidacy for Judicial Election

In 2006, Judge Raleigh took a leave of absence from the attorney general's office and ran for Leon County court judge. With no prior political experience, and her campaign members consisting of mostly family and friends, she came in third in a three-way race with a 28% vote.

In 2007, Judge Raleigh took a second leave of absence, and with her 16-year-old stepdaughter and 8-year-old son in tow, she left for China to teach English to engineering students. She explains that it was a great sharing and learning experience for her and the kids.

In 2008, Judge Raleigh ran for another open judicial seat on the circuit court. She made it through the primary but lost in the general election. Judge Raleigh explains that she learned a great deal from the experience. While running for office, she spent considerable time thinking and talking to others about the judgeship seat. In turn, she developed a greater appreciation for judges. To her surprise, she had more respect in the field after she ran and lost for office. After elections, Judge Raleigh was assigned to better cases. "I was considered to be a very

good lawyer when it was over even though I did not practice law much while I was running for judge." Her advice to young people is to consider the electoral process, or even participate in any small way in any election. It will make you a better voter.

Judge Raleigh worked for the Complex Litigation Unit for over 10 years. In one memorable case, she recalls completing a 70-hour workweek handling an emergency hearing for a temporary injunction to close an assisted living facility for persons with mental illness. The hearing was estimated to last three hours. Instead, it lasted three days. Nevertheless, Judge Raleigh recalls, "we did excellent work during those ten years."

In total, Judge Raleigh worked as a public servant for the Florida Attorney General's Office for over 20 years. In reflecting on her career, she shares that her time with the attorney general's office led to a lifetime of valuable legal experience. For instance, she drafted her first brief for the Florida Supreme Court. She also presented an oral argument before the Eleventh Circuit. Judge Raleigh explains that her broad background offered her an interesting perspective later as an administrative law judge (ALJ).

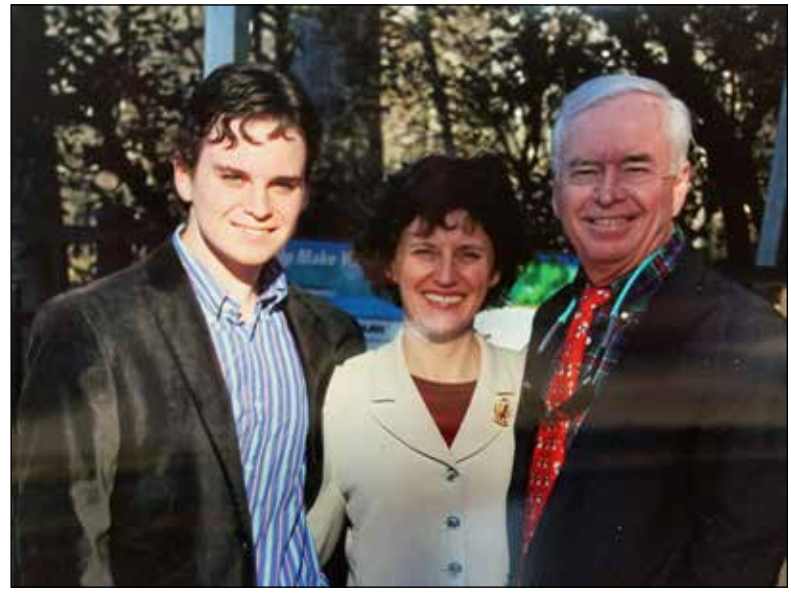
Administrative Law Judge for the Social Security Administration

In 2015, Judge Raleigh accepted a lifetime appointment as an ALJ for the Social Security Administration. She presides over cases in Tallahassee and Panama City, Fla., and Thomasville, Ga. Judge Raleigh's experience as an ALJ has been eye-opening. She explains, "It is surprising to me the economic disparities among the three areas we serve."

When asked what justice in the law means to her, Judge Raleigh states, "Our goal to achieve equal justice is to have all parties be heard, and the law fairly applied. On the bench, I make a point to often ask myself—*Would I do the same thing if the claimant were of another background*? I find the question to be remarkably effective in addressing biases of the subconscious, those which are societally ingrained. While it serves as an imperfect system in an imperfect world, it is a step I feel appropriate in ensuring the equal and fair treatment of all claimants, regardless of background." Judge Raleigh further explains that in every hearing she holds is a personal commitment to equal justice under the law.

For lawyers seeking a career as an ALJ, Judge Raleigh advises, "Do not pursue it as your end goal. Timing is everything. Do not count on having a mix of experience, location, and contacts needed to be appointed in a post-OPM era. Today, if you want to be a federal ALJ, I would suggest five to seven years of litigation or appellate work, followed by two to three years in-house at the agency you would like to work for as an ALJ."

In explaining what brings significant meaning to her career, Judge Raleigh states, "I have been part of an enormous societal change that now permits women largely equal access to education and increasing opportunities in the workplace. In retrospect, I find meaning and comfort in that."



Judge Raleigh with her family.

Family Life

Judge Raleigh's greatest joys come from spending time with her family, which has always been a top priority. As the eldest of her siblings, Judge Raleigh has a sister, Barbara, who is a physics teacher; a brother, John, who is a journeyman in autobody and automobile mechanics; and a half-sibling, Michael, who is a lawyer in Northern Alberta, Canada.

Judge Raleigh and her husband, Jim, have been married for 23 beautiful years. She jokingly states, "and they said we wouldn't last six months." Jim currently works as a tax lawyer with a boutique firm in Florida. Their son, James Thomas, is an undergraduate student at Florida State University.

Despite working full-time and meeting family commitments, Judge Raleigh makes time to sustain a healthy lifestyle. She exercises and eats a healthy diet to maintain her stamina presiding over a high-volume case docket—another essential element of her life in her chosen profession.

When asked how she would like to be remembered after retirement, Judge Raleigh said, "Less than remembering me, remember the generation of women who were the first to enter college by the millions and persevered in the profession decade after decade." In response, we say kudos to you, Judge Raleigh, for being a great inspiration for the next generation of women leaders. ⊙

Hon. Wendy Vitter

U.S. District Judge for the Eastern District of Louisiana

by Larry Centola

Larry Centola is a 2001 graduate of the LSU Law Center and is a partner at Martzell, Bickford & Centola. He is currently on the Plaintiff Steering Committee for the Taxotere MDL and the Bayou Corne Sinkhole litigation. In 2016, Centola was named one of the top 50 lawyers in the state of Louisiana by *Super Lawyers*. He is the 2008 recipient of the Sandra Day O'Conner Award for Professional Service, awarded by the national American Inns of Court to one young lawyer each year for excellence in pro bono activities. Centola is a life-long resident of New Orleans, where he raises three daughters with his wife, Amy. He is a member of the New Orleans Chapter of the FBA board of directors.

Judge Vitter May Be the Only Federal Judge Who Worked at McDonald's While Practicing Law

In advance of a recent presentation at the New Orleans Chapter of the FBA's Bench Bar Conference, Judge Wendy Vitter's law clerks were asked for a unique fact about the judge. The law clerks informed us that Judge Wendy Vitter is likely the only federal judge who worked at McDonald's while practicing law.

Judge Vitter earned her B.A. from Sam Houston State University and her J.D. from Tulane University Law School. Judge Vitter's father started practicing law as an assistant U.S. attorney and then practiced insurance defense. Judge Vitter was inspired by her father to become a lawyer. Also, a particular high school guest lecturer in New Orleans inspired a young Wendy Vitter to be an assistant district attorney. When the then-Orleans Parish District Attorney Harry Connick Sr. spoke to Judge Vitter's high school class, he encouraged all the students to become lawyers. During that visit, Judge Vitter matter-of-factly told the district attorney that she would one day work for him at the Orleans Parish District Attorney's office. Less than 10 years later, she would find herself seated next to him, prosecuting one of the most significant cases in her career.

As an undergraduate, Judge Vitter worked at the Texas Department of Corrections and helped inmates with habeas appeals. Upon graduating from law school and, after serving as a law clerk in the Orleans Parish District Attorney's office during her entire time in law school, Judge Vitter was hired as an assistant district attorney. Soon after being hired, the Orleans Parish District Attorney's office suffered budget cuts, a routine occurrence during that time. To comply with the budget cuts, some lawyers had to be let go. The rule was that the last one hired was the first one let go. Since Judge Vitter was a brand-new hire, she found herself without a paying attorney position. Instead of attempting to find another legal job, Judge Vitter decided to continue her passion and commitment to the Orleans Parish District Attorney's office by working without pay until the office's funding was restored. During the time, Judge

Vitter worked as an unpaid assistant district attorney each day and worked the nightshift at a McDonald's to makes ends meet. Judge Vitter would spend her days in the historic neoclassical criminal court house completed in 1931 and her evenings next to the fryer at McDonalds.

Judge Vitter Prosecuted the First Louisiana Criminal Trial Using DNA Evidence

Eventually, the budget was restored, and Judge Vitter was again a paid assistant district attorney in New Orleans. She eventually rose to chief of the felony trials division at the district attorney's office. There, she prosecuted over 100 jury trials, primarily homicide cases, as well as trying the first capital case in Louisiana that used DNA evidence.

In that groundbreaking case, the victim was a developmentally challenged granddaughter of a couple who managed an apartment complex. The grandparents, who had custody of their granddaughter, left the granddaughter at their apartment alone, when the maintenance man of the complex knocked on the door. The granddaughter knew the maintenance man and allowed him into the apartment.

The grandparents returned home to find their granddaughter's strangled and assaulted body. Al-

though the maintenance man admitted to knocking on the door, he claimed that he never entered the apartment and that the victim was alive and well when he left the apartment. There were no witnesses and little direct evidence besides the DNA evidence. While prosecutions with DNA evidence are now commonplace, at the time, DNA evidence was not an established theory of science to link a victim to an assailant. Judge Vitter and her team had to educate themselves, learn from the scientists, and then educate the judge and jury. Judge Vitter and her team successfully used the DNA evidence and secured a conviction.

At the conclusion of that case, Judge Vitter was happy to see that justice was served. "We worked especially hard during that case, because of the newness of the scientific evidence, but our goal remained the same—justice for the victim and her family," Judge Vitter stated. During her time as a prosecutor, that was always her goal: to make sure that justice was served. Regardless of the mechanics, whether justice was served through a conviction, a not-guilty verdict, a plea, or a *nolle prossed* or dismissed case, her mission then (and now) was to ensure that justice was served.

Former New Orleans District Attorney Harry Connick Sr. described Judge Vitter as "honest, impartial and an outstanding legal scholar ." The Honorable Camille Buras, judge of Orleans Criminal District Court, had this to say about Judge Vitter:

"I had the pleasure of working with Wendy over thirty years ago when we were Orleans Parish Assistant District Attorneys working for Harry Connick. The terrific work ethic and enthusiasm for her profession she had then are just as evident today. Wendy is a tremendous asset to the federal bench and I really look forward to seeing her quick-thinking, logical mind and her personal skills put to use managing a large, complicated docket."

Judge Vitter Was the First General Counsel of the Archdiocese of New Orleans

After leaving the district attorney's office, Judge Vitter practiced admiralty defense at a prominent New Orleans law firm. Judge Vitter sought to work a flexible schedule when her oldest daughter turned one. At the time, that type of scheduling did not work for that firm. Judge Vitter made the decision to take a break from the formal practice of law and focus her attention on community activities, local politics, and raising a family. About two years later, the managing partner of her former firm contacted her and asked her to return to the law firm, offering to work out a flexible schedule. At the time, Judge Vitter was pregnant with twins and was enjoying the time spent raising her family. She declined to enter back into the formal practice of law and chose to concentrate on raising her family. She thinks about that decision often and strives to find creative ways to allow good people to work in the legal field. Judge Vitter has said "I don't regret for one moment putting my family first. But I also want to be someone who can help a talented attorney find a way to raise a family and be a successful attorney on terms that benefit everyone. That is important to me."

In 2009, Archbishop Gregory M. Aymond became the 14th Archbishop of the Roman Catholic Archdiocese of New Orleans. Prior to being named archbishop in New Orleans, Archbishop Aymond was the Bishop of Austin. Once in New Orleans, Archbishop Aymond would often see Judge Vitter when she performed community service for various Catholic services and projects. While he was Bishop of Austin, Aymond had a person serving in the role of general counsel for that diocese. Although there was no general counsel position at the Archdiocese of New Orleans, given the archbishop's experience in Austin and given Judge Vitter's work, ethics, and commitment to Catholic causes and to the rule of law, Archbishop Aymond made her the first general counsel of the Archdiocese of New Orleans. Judge Vitter served as general counsel from 2012 to 2019, representing the body and its various entities in all legal matters involving Catholic charities, Catholic churches, and the Catholic school system. She handled matters ranging from employment-related issues (including Title VII) to property issues, and from individual student discipline issues to broad business issues facing one of the business entities. While working as the general counsel of the Archdiocese of New Orleans, Judge Vitter learned lessons that strengthened her commitment to service and helped her to see her job as a ministry.

Most Reverend Gregory M. Aymond, Archbishop of New Orleans, had the following to say about Judge Vitter:

> It has been a privilege to work with Judge Wendy Vitter when she served as General Counsel for the Archdiocese of New Orleans for seven years. She not only performed her work in a very effective way but also showed pastoral concern for all those with whom she worked. She is truly a woman of deep faith and integrity. She brings those gifts with her as she enters into this new responsibility as a judge. Our government will be blessed by her dedication.

Judge Vitter Lives a Life of Service to Others

On Jan. 23, 2018, President Donald Trump nominated Judge Vitter to the seat on the U.S. District Court for the Eastern District of Louisiana. Judge Vitter was confirmed by the Senate on May 16, 2019.

Since taking the bench, Judge Vitter has been impressed with the level of preparedness and professionalism from the practitioners in the Eastern District of Louisiana. Although some of the general public like to make lawyers the butt of jokes, Judge Vitter has found quite the opposite. She has found that the practitioners in the Eastern District of Louisiana are great advocates for their clients, while treating each other and the law with the appropriate amount of respect. "I have always held my head up high when saying that I am an attorney.

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The Round Table of Former Immigration Judges

by Dr. Alicia Triche

Dr. Alicia Triche is an appellate immigration lawyer in private practice in Memphis, Tenn. In 2013, she received a DPhil in international refugee law from Oxford University, under advisement of Prof. Guy S. Goodwin-Gill. Dr. Triche is publications chair of the FBA's Immigration Law Section, of which she is also a long-time governing board member. Dr. Triche wishes to especially thank Judges Dorothy Harbeck, Jeffrey Chase (ret.), Susan Roy (ret.), and Paul Schmidt (ret.) for their generous contributions to this article.

This judicial profile is unique because it features not just one judge, but a very special group of judges. The "Round Table of Former Immigration Judges" ("Round Table") consists of (at last count) 46 former immigration judges and members of the Board of Immigration Appeals (BIA). Originally referred to as the "Gang of Fourteen," this constantly evolving group first came together to file an amicus brief. Since that time, the Gang has grown in both number and strength. Its purpose and mandate is to assure due process for all. For its efforts, the Round Table was awarded AILA's 2019 Advocacy Award.

The Round Table was formed in June 2017, when seven former immigration judges and BIA members[1] united for an amicus brief with the BIA in *Matter of Negusie*, 27 I. & N. Dec. 481 (A.G. 2018). *Negusie* was a case that had been remanded from the U.S. Supreme Court and raised serious questions as to the legal and moral limits of humanitarian protection. In the two years since, the group has grown to its present size while continuing its dedication to the principle of due process for all. The Round Table has filed 36 amici briefs, including two with the Supreme Court (in the pending matters of *Barton v. Barr,* 904 F.3d 1294 (11th Cir. 2018), *cert. granted,* 139 S. Ct. 1615 (2019), and *Nasrallah v. Barr,* 762 F. App'x 638 (11th Cir. 2019), *cert. granted,* 140 S. Ct. 428 (2019)), 28 briefs in eight circuit courts, one in U.S. district court, and others with the attorney general and the BIA.

The Round Table has made its voice heard repeatedly in support of the rights of victims of domestic violence to asylum protection. The group has also lent its arguments to the issue of children's need for counsel in removal proceedings, remote detention's impact in limiting access to counsel, and the case against indefinite detention of immigrants. Speaking to these issues, founding member and former immigration judge Jeffrey Chase stated in his acceptance remarks at the AILA award ceremony that the Round Table aims to "speak for those who have no voice and must serve as the conscience in a time of amoral government actions. Those whom we advocate for had the courage and strength to not only escape tragedy and make their way to this country, but once here, to continue to fight for their legal rights against a government that makes no secret of its disdain for their existence. We owe it to them to use our knowledge and skills to aid them in this fight."[2]

DUE PROCESS FOR ALL

ROUND TABLE
of Former Immigration Judges

In addition, the Round Table has submitted written testimony to Congress and has released numerous press statements and letters to EOIR's director in response to agency actions. Its individual members regularly participate in teaching, training, and press events.[3]

One of the current presidential administration's main policies has been to prohibit current immigration judges from speaking publicly in spite of the fact that immigration judges (in their personal capacities, with use of a disclaimer) have vigorously been involved in bench bar educational activities for more than 30 years. With these restrictions in place, the Round Table's extensive participation in continuing legal education conferences has become especially important to immigration practitioners.

Round Table members also contribute significantly to arts and culture. Retired immigration judge Polly Webber of San Francisco has become a notable textile artist. Her weavings, and particularly her triptych "Refugee Dilemma" fiber artwork, have received national acclaim and recognition.[4] She spoke at the 2019

FBA-ILS New York Asylum Law Conference at New York Law School on a panel with poet and Wellesley College professor Marjorie Agosin, a noted scholar on the protest tapestry arpilleras of Chile.[5]

In addition, three Round Table members, all retired immigration judges of the New York Court, have acted along with stars of Broadway, TV, and film in Waterwell's wonderful play *The Courtroom*. While the play uses the actual transcript of an immigration court hearing and of circuit court oral arguments for its first and second acts, Betty Lamb, Terry Bain, and Jeff Chase wrote and delivered their own original remarks in conducting the final act's naturalization ceremony, in which the entire audience experiences being sworn in as U.S. citizens by an actual sitting of a former judge. The *New York Times* named this play to its "Best Theater of 2019" list![6] Finally, three members of the group—retired Assistant Chief Immigration Judge Robert Weisel, Betty Lamb, and Jeff Chase—recently joined actors, artists, politicians, lawyers, activists, and other public figures in recording videos reading affidavits taken from children detained at the border as part of the powerful video project *The Flores Exhibits*.[7]

With all the activity they have so far undertaken, it is hard to imagine that the Round Table is under three years old. It remains to be seen what further adventures this worthy, ever-growing band of knights will undertake in the future. ⊙

Endnotes

[1]Noting the group's founders, former BIA Chair and Immigration Judge Paul Schmidt wrote, "I'm proud to be a member of the Round Table and am deeply grateful for the efforts of Judges Jeffrey Chase, Lory Rosenberg, John Gossart, Carol King, and others who got this group organized and 'up and running,' and who keep track of all the (almost daily) requests for our assistance." Paul Schmit, *Roundtable of Former Immigration Judges Continues to Help New Due Process Army Succeed* (Dec. 12, 2019), https://tinyurl.com/wwqfmsj (last visited Jan. 14, 2020).

[2]*Round Table of Former Immigration Judges Receive AILA Advocacy Award*, https://www.jeffreyschase.com/blog/2019/7/2/round-table-of-former-immigration-judges-receive-aila-advocacy-award (last visited Jan. 14, 2020).

[3]*See supra* note 1.

[4]https://wp.me/p8eeJm-48d (last visited Jan. 14, 2020).

[5]https://www.wellesley.edu/spanish/faculty/marjorie_agosin (last visited Jan. 14, 2020).

[6]New York Times, *Best Theatre of 2019,* https://www.nytimes.com/2019/12/03/arts/best-broadway-theater-show.html?smid=nytcore-ios-share (accessed Jan. 14, 2020). In Waterwell's "The Courtroom," the accused is an immigrant in danger of deportation, her unassuming American life at risk of being torn apart over a mistake she insists was innocent. The sneaky thing about this riveting re-enactment, though, is that in watching it, we citizens are on trial, too. What kind of a nation are we? How cruel have we permitted ourselves to be? That work, recently returned for monthly site-specific performances around New York, is part of 2019's thrillingly vital bumper crop of political theater—shows that implicate the audience with bracing artistry.

[7]*The Flores Exhibits,* https://flores-exhibits.org (last visited Jan. 14, 2020).

Judge Vitter *continued from page 27*

I wish the general public would see the professionalism and hard work that I see every day from the members of the bar."

Judge Vitter's advice to young lawyers, and to all lawyers, is to make sure that you have something outside the law that keeps you grounded. For Judge Vitter, her faith keeps her grounded. For others, it may be family, exercise, volunteerism, or a host of other positive life influences.

Judge Vitter believes that this life is about how we help others. She saw Archbishop Aymond's commitment to serve and to help others. Judge Vitter sees her time on the bench as a continuation of her own commitment to serve and to help others—a commitment that started in the district attorney's office, was furthered and confirmed by raising children, and continues today while ensuring that justice is served, no matter the specific form, for all that come before her court.

Judicial Profile Writers Wanted

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


Bill of Right
Congress of the
begun and held at the City of
Wednesday the fourth of March one thousand
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Procedural Due Process in Removal Proceedings: History, Overview, and Recent Developments

COLTON SPENCER BANE

"The bosom of America is open to receive not only the Opulent and respectable Stranger, but the oppressed and persecuted of all Nations and Religions; whom we shall welcome to a participation of all our rights and privileges, if by decency and propriety of conduct they appear to merit the enjoyment." These are the words of our nation's first president, George Washington. Immigration has been a cornerstone of the foundation of the United States, and welcoming immigrants—especially the downtrodden or persecuted—has been a national ideal since our nation's beginning. However, national views on immigration have shifted significantly since that time. Throughout American history, there has been a constantly oscillating balance struck between humanitarian immigration policies and other national concerns, such as national security and societal cohesion. At this time in U.S. history, there is a strong swing of the pendulum toward the latter ideal. Now, competing ideals of "national security" and, at worst, exclusion, have come to dominate the stage of U.S. immigration law and policy.

The question of whether "due process" applies to immigrants has, throughout U.S. history, occurred against that background. Under the due process clause of the Fifth Amendment, "no person shall be deprived of life, liberty, or property, without due process of law."[1] This article, after setting out history and context, will address how the right to procedural due process applies to modern removal hearings. More specifically, the scope of this article includes only what are known as § 240 removal proceedings, rather than other, more limited hearings.[2]

Under the Immigration and Nationality Act (INA),[3] hearings to determine the inadmissibility or deportability of an alien are conducted by an immigration judge in what is referred to as § 240 proceedings.[4] There are three types of aliens in these proceedings: (1) arriving aliens who have not been physically present in the United States; (2) aliens present in the United States but who have not been admitted or paroled into the country; and (3) aliens who are admitted to the United States but are later found inadmissible or removable.[5] When immigration officials provide an alien with a Notice to Appear (NTA), it must allege which of these three categories properly represents the alien.[6] The alien's categorization from that point has a substantial effect on the remainder of the immigration court process.

Does the Fifth Amendment Right to Procedural Due Process Apply to All Aliens in Removal Proceedings, Even Arriving Aliens?

Historic jurisprudence held, somewhat infamously, that for an alien seeking entry to the country, "due process" was whatever Congress had provided.[7] Today, the question arises of whether, and to what extent, that doctrine should apply to § 240 proceedings. This article argues that even arriving aliens should be afforded Fifth Amendment due process protections (although potentially diminished) to ensure a "fundamentally fair hearing." Any power or authority that any branch of the federal government exercises is derived from the Constitution of the United States.[8] Furthermore, the Supreme Court has provided a tripartite test for constitutional sufficiency that not

only should but *must* be utilized when assessing what procedural due process protections are owed to any individual having power exercised over them by the U.S. government.[9]

The Evolution From the Entry Fiction to Modern Removal Proceedings

Historically, a highly fact-based analysis was required to determine whether an alien was present in the United States for purposes of determining which type of immigration proceedings the alien was subject to. Until 1996, prior to the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA), there were two separate types of immigration proceedings: exclusion proceedings and deportation proceedings. Exclusion proceedings dealt with aliens who had not affected an entry into the United States, including aliens who were paroled into the United States pending exclusion proceedings. The second type of proceedings, deportation proceedings, dealt with aliens who had affected an entry into the United States but were later determined to be deportable.[10]

The determinative fact of which type of proceeding an alien was placed into was whether the alien had affected an entry.[11] To determine this, immigration courts utilized a fact-intensive, case-by-case analysis often referred to the as the "Entry Fiction." Under this Entry Fiction, even an alien present in the United States could be subjected to exclusion proceedings. An example would be an alien paroled into the country, who would be placed in exclusion proceedings just as an arriving alien would. By contrast, post-IIRIRA, an "arriving alien is defined by statute and no longer requires the application of the Entry Fiction"

> The term *arriving alien* means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains an arriving alien even if paroled ... and even after any such parole is terminated or revoked ... .[12]

The Department of Homeland Security has adopted a similar definition.[13] In contrast to the old Entry Fiction's fact specific analysis, these definitions provide a bright line legal rule for whether an alien is an arriving alien or an alien present in the United States who has not been admitted or paroled. Though legally distinct, both categories are considered to be seeking admission.

There are two types of aliens that seek admission: arriving aliens and aliens present in the United States without admission or parole.[14] These are the first and second categories (of three categories) of aliens on a modern NTA. The third category of aliens, those who have been admitted into the United States, are *not* considered applicants seeking admission. An alien is an applicant for admission only when they are arriving aliens (first category) *or* present in the United States without being admitted (second category).[15] Here is where the IIRIRA made the distinction that the Entry Fiction did not. Formerly with the Entry Fiction, the alien either affected an entry or did not. If the alien was considered to have entered, then they would have been placed in deportation proceedings. If the alien was *not* considered to have entered, exclusion proceedings would be utilized. Currently though, post-IIRIRA, both would be put into the same type of court proceedings called a "removal proceeding." The former "deportation" and "exclusion" proceedings were combined into the single "removal proceeding" with the enactment of IIRIRA.

The Evolving Legal Right to Due Process for All Aliens Facing U.S. Proceedings

Even before either the INA or IIRIRA was enacted, certain due process protections were provided to aliens. Some of the protections were dependent on the Entry Fiction—whether the alien had affected an entry or not. Other protections were universal and applied to both classes of aliens. As early as 1886, the Supreme Court asserted "[t]he [F]ourteenth [A]mendment to the [C]onstitution is not confined to the protection of citizens." The Court went on to state that the provisions of the Fourteenth Amendment[16] "are universal in their application, to all persons within the *territorial jurisdiction*, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge to the protection of equal laws."[17]

The Court again reiterated the universal application of due process when it stated that even an alien who was prevented from entering the United States "is doubtless[ly] entitled to a Writ of *Habeas Corpus* to ascertain whether the restraint is lawful." The Court continued on to clarify that it was not the role of the courts to permit aliens to enter the United States if the alien never naturalized, acquired domicile or residence within the United States, or was admitted.[18]

In 1903, the Supreme Court recognized that an alien facing *deportation* must receive an opportunity to be heard to comply with the Fifth Amendment's due process clause.[19] The Court reiterated it was settled law that the political department of the government has the sole authority to exclude or remove aliens. The Court refused to hold, and never held before, that administrative officers could disregard the "fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution."[20]

Shortly after World War II, and in the early years of the Cold War, the Court leaned on national security and national emergencies as grounds for allowing the legislative branch to delegate powers of exclusion without a hearing to the executive branch.[21]

In *Knauff*, the Court dealt with an individual excluded based on the national emergency declared by President Franklin Roosevelt on May 27, 1941, in response to the war raging in Europe that would become World War II.[22] The alien petitioner, Knauff, was born in Germany but had moved to Czechoslovakia when Hitler was controlling Germany. She became a refugee in England by 1939, where she eventually served the Royal Air Force and was honorably discharged in early 1943. In February 1948, she married a naturalized U.S. citizen, Kurt Knauff, who was honorably discharged from the U.S. Army following World War II. He was a civilian employee for the U.S. Army in Frankfurt, Germany, at the time of the marriage. In August of the same year, she traveled to the United States in hopes of naturalizing. But instead, she was temporarily excluded and detained on Ellis Island. The attorney general, based on the recommendation by the assistant commissioner of immigration and naturalization, had her permanently excluded without a hearing because "her admission would be prejudicial to the interests of the United States." She then filed a writ of *habeas corpus* in the Southern District of New York.[23]

The Court in *Mezei* dealt with a similar exclusion, but instead relied on the "emergency regulations promulgated pursuant to the Passport Act." The alien in *Mezei* had "a certain vagueness about (his) history." He seemed to have been born of Hungarian and Romanian

parents in Gibraltar. He had also apparently lived within the United States between the years 1923 and 1948. In May 1948, the alien left the United States to visit his mother in Romania who was said to have been dying. The country of Romania did not allow the alien to enter, so he remained in Hungary for roughly 19 months. He eventually obtained an "exit permit" as well as a "quota immigration visa" that he obtained from the American Consul in Budapest. Leaving from France, the alien sailed to New York, where he was temporarily excluded upon his arrival pursuant to the Passport Act. The attorney general reviewed the facts and determined that the alien be permanently excluded without a hearing based on national security reasons. Additionally, the government refused to disclose the reasoning because its disclosure would allegedly be "prejudicial to public interest."[24]

In both *Knauff* and *Mezei*, the Court held that the permanent exclusion of these aliens without a hearing did not violate or deprive them of any statutory or constitutional right.[25] But both cases arose during distinct and extreme circumstances that are not present today, namely following World War II and the beginning years of the Cold War. Practical considerations have been, historically and in modern times, factored into what process is due to aliens.[26]

In February 2019, President Donald Trump declared a National Emergency Concerning the Southern Border.[27] In his declaration, President Trump asserted that there was a "border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency."[28] This proclamation is not determinative in the analysis of what process is due to aliens, but it is weighed and factored into the test of constitutional sufficiency.[29] But it can be said that these circumstances do not quite rise to the level of World War II or the Cold War.

With the more recent concerns regarding COVID-19, however, there is an understandable impact on the nation's immigration courts, including their closing. The health of individuals in proceedings, as well as the judges and court staff, is of immediate importance. Drastic but necessary steps have been taken to protect the health of those in the courts. The steps being taken in detention centers for aliens may not necessarily be as effective, though. The question of which Fifth Amendment due process protections apply to aliens is dependent on these practical considerations just as much as the notion of *de jure* sovereignty.[30]

A more modern consideration of the scope of aliens' due process protections has occurred in the realm of indefinite detention.[31] The *Zadvydas* Court dealt specifically with the indefinite detention of an alien who was unlawfully present in the United States. In holding that indefinite detention was improper, the Court reasoned doing so would violate the Due Process Clause of the Fifth Amendment. Any detention by the government would violate that protection unless the detention was a result of "a *criminal* proceeding with adequate procedural protections." As is the case with § 240 proceedings, the proceedings reviewed by the *Zadvydas* Court were civil rather than criminal. Because these proceedings were civil, the Court additionally assumed that the procedures were "nonpunitive in purpose and effect."[32] The Court later extended these due process protections to arriving aliens. Both categories of aliens can be detained only for a reasonable period of time, which is presumptively six months, to comport with standards of procedural due process.[33]

Even the Board of Immigration Appeals (BIA), the appellate administrative immigration court, has recognized the due process protections of the Fifth Amendment applying to aliens. In *Toro*, the BIA recognized that "evidence must be probative and its use fundamentally fair so as to not deprive respondents of due process of law as mandated by the [*F*]*ifth* [*A*]*mendment*." The board explained that evidence obtained as a result of a *Fourth Amendment* violation is not necessarily determinative of whether the evidence is excluded from deportation proceedings. Evidence is not "fundamentally unfair" merely because the Fourth Amendment was violated, but in some cases, the seizing of evidence is so egregious that it encroaches upon the Fifth Amendment.[34]

Now that we have examined the developments and evolution of procedural due process, another question remains: geographically speaking, how far does the Constitution reach, particularly in regard to the procedural due process protections it affords? This issue is of particular importance when it comes to the arriving aliens impacted by the Migrant Protection Protocol (MPP) because these aliens are physically outside of the United States while awaiting their asylum hearing.

The application of the U.S. Constitution goes beyond mere territorial limits of the nation, or in other words, beyond *de jure* sovereignty. The Supreme Court has recognized this, and the government has asserted this on numerous occasions. The Court in *Boumediene* begins its discussion of the extraterritorial application of the U.S. Constitution with a history lesson. Two significant events in U.S. history are addressed by the Court where the Constitution reached beyond *de jure* sovereignty: admission of new states and the territories ceded to the United States following the Spanish-American War. The application of the Constitution outside of the contiguous United States (at the time) was allowed under both these circumstances. The Court notes that at the dawn of the 20th century, when Puerto Rico, Guam, the Philippines, and Hawaii were annexed, Congress chose to end its usual practice of using statutes to extend constitutional rights.[35]

The *Boumediene* Court also references the "Insular Cases." The issue addressed by the Insular Cases was not whether the Constitution applied in foreign territories when the United States had a presence in the territory. Rather, the issue was which provisions of the Constitution applied, by way of limitation, when the executive and legislative branches exercise their power in those territories. The doctrine of territorial incorporation resulted from the Insular Cases, which states that the Constitution is fully incorporated in territories that are "surely destined for statehood," but the Constitution is only incorporated in part within "unincorporated territories."[36] For the purposes of this article, this analysis is necessary for arriving aliens being held in Mexico awaiting their asylum hearing per the MPP. Although it should be obvious Mexico is neither destined for statehood nor an unincorporated territory, the power that the United States exercises over those aliens in their removal proceedings is still constrained by the Constitution's due process protections in the Fifth and Fourteenth Amendments.[37]

The *Dorr* Court, in one of the Insular Cases referenced in *Boumediene*, considered it settled law that "the Constitution of the United States is the only source of power authorizing action *by any branch of the federal government*."[38] This statement is followed by a quote from a prior case in the series of Insular Cases: "The government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument."[39] This should include even the exercise of authority over arriving aliens affected by the MPP. The *Boumediene* Court reiterated this principle in explaining, "even when

the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'"[40]

What Due Process Rights Apply to Aliens in Removal Proceedings?

Statutory Rights

With the enactment of the INA, Congress provided all aliens in § 240 proceedings three enumerated statutory rights.

> In proceedings under this section, under regulations of the Attorney General—
> (A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,
> (B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and
> (C) a complete record shall be kept of all testimony and evidence produced at the proceeding.[41]

First, aliens have the *privilege* of effective representation. Unlike criminal defendants in our legal system, aliens have the privilege of (rather than right to) effective representation at their proceedings at no expense to the government.[42] Unless the alien expressly waives this privilege, an immigration judge must "grant a reasonable and realistic period of time to provide a fair opportunity for a respondent to seek, speak with, and retain counsel." Additionally, the waiver of such privilege must be knowing and voluntary.[43] It is important to note that in order for waiver to be effective, the alien's right to adequate interpretation should be complied with so that the alien is acting with knowledge of the right and the consequences of waiving it.

Secondly, the alien has the *right* to examine evidence that the government is using against him or her, as well as present his or her own evidence, in removal proceedings. Arguably, the right of an alien to present evidence should include both lay and expert witnesses. It is often necessary to have the testimony of others to corroborate the alien's claims, and the testimony of experts to effectively explain country conditions. The ability to present witnesses, lay and expert, is thus fundamental to a fair hearing. Furthermore, it is often necessary for a successful claim to relief from removal. Subject to a national security exception, the alien also has the right to cross-examine any witnesses that the government presents in its case to have the alien removed.[44]

And lastly, the alien has the right to have a complete record of testimony and evidence from his or her removal proceedings.[45] Meaningful judicial review of an agency decision requires such. Now, for context, we will momentarily delve into some fundamental administrative law, as it involves this third right and, more precisely, judicial reviewability of an order of removal from an agency's informal adjudication.

APA and Judicial Review of § 240 Removal Proceedings

When dealing with judicial review of an agency, one must first determine whether its actions are adjudicatory or rulemaking. The agency here is the Executive Office of Immigration Review (EOIR), which is a component of the Department of Justice. The removal procedures that EOIR conducts are the agency action we are addressing.

Agency action is considered to be adjudication if there is individualized finding of fact, such as in removal proceedings for aliens.[46] Adjudication is defined by the Administrative Procedure Act (APA) as an "agency process for the formulation of an *order*" (i.e., an "order of removal"). Rulemaking, on the other hand, is generally policy determination through "formulating, amending, or repealing a rule" without individualized fact finding.[47]

After making the determination that removal proceedings are in fact adjudications, the next determinative issue is whether the adjudications are considered formal or informal. Formal adjudication is only triggered where the "organic statute," or statute that Congress enacted to create the agency and its purpose, requires "a hearing" that is "on the record."[48] In the case of § 240 removal proceedings before a Department of Justice EOIR court, this is informal adjudication because Congress did not give express language that requires formal adjudication.[49] Furthermore, informal adjudication tends to be the "default" and most common agency procedure.[50]

Because removal proceedings are informal adjudication and APA protections do not apply, the only protections available to aliens arise through due process.[51] This only emphasizes the importance of due process protections for aliens in § 240 removal proceedings, as it is their only protection. A complete record of evidence and testimony from the removal proceeding ensures the judicial review necessary to satisfy the most fundamental of due process rights as well as satisfying the third and final enumerated right for aliens in § 240 removal proceedings.

The question then arises: are the three statutory protections (and their fundamental interpretations) under § 240(b)(4) of the INA (8 U.S.C. § 1229a(b)(4)) the *only* due process protections for aliens? It would seem a "fundamentally fair hearing" would require more.

Other Procedural Due Process Rights

In addition to the statutory rights of all aliens in § 240 removal proceedings under § 240(b)(4), there are a number of rights provided by common law that are often penumbras of the understanding of "fundamentally fair hearing."

Notice and Hearing

Notice and hearing are considered the most basic of procedural rights.[52] The entirety of INA § 240 (8 U.S.C. § 1229a) is devoted to creating the § 240 proceedings as a hearing. As previously discussed in *Yamataya*, the Supreme Court determined the right to be heard is protected by the Fifth Amendment.[53] Notice has been the subject of recent cases concerning what is considered *sufficient* notice, but that is not the purpose of this article.[54] Nonetheless, notice is recognized a basic procedural right by the Supreme Court.[55]

Neutral Finder of Fact (Immigration Judge)

Another basic due process protection is an alien's right to a neutral finder of fact.[56] Whenever Congress instructs an agency to create a hearing, like removal proceedings, "it can be assumed that Congress intends that procedure to be a fair procedure."[57]

Adequate Translation

Aliens in removal proceedings have the right to an adequate interpre-

tation to ensure a fundamentally fair hearing. The BIA has recognized more than once that "a competent translation is fundamental to a full and fair hearing."[58] More often than not, respondents in immigration proceedings have little to no knowledge of the English language. The courts generally provide an interpreter of the immigrant's primary language. Languages such as Spanish, Mandarin Chinese, and Arabic are common enough, and interpreters of these languages are not usually difficult to obtain. But there is a higher level of concern when it comes to lesser known languages, such as indigenous languages of Central America and regional minority dialects. Many immigrants who speak these lesser known languages are provided telephonic interpretations rather than in-person interpreters. An adequate interpretation is necessary for the alien to be able to present his or her case, understand the necessary advisals regarding asylum, and understand the consequences of failing to comply with the court's orders and procedures.

Advisal of Rights

An alien has a somewhat limited right to advisal of their rights. If an alien does wish to waive one of his or her rights, the alien's advisal of their rights is necessary because whatever rights the alien may have must be waived voluntarily and with knowledge. But an alien must show actual prejudice due to the failure of the immigration judge to advise the alien of their rights.[59]

How to Test for Constitutional Sufficiency of Aliens' Due Process Rights in § 240 Proceedings

The final question involves the methodology for determining what due process protections are constitutionally satisfactory for a "fundamentally fair hearing." The Supreme Court has provided a tripartite balancing test to assess constitutional sufficiency.[60] Additionally, this is the test suggested by Justice O'Connor in *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). Taking into consideration the scope and reach of due process, as well as practical consideration, this test is the proper analysis regarding whether aliens are given constitutionally sufficient due process rights in § 240 proceedings.

The first factor to consider is the interest of the individual that the government's actions would affect. The second factor consists of two components: "the risk of an erroneous deprivation of such interest through the procedures used" and "the probable value, if any, of additional or substitute procedural safeguards." In other words, the second factor looks at the probability of a wrongful deprivation of the individual's interest by the procedures being used as well as the cost of adding more or different safeguards. The final factor is the interest of the government. This includes the purpose of the procedures the government is using in addition to the "fiscal and administrative burdens" of providing more or different safeguards.[61]

The results of this analysis would differ greatly depending on whether the alien is an arriving alien (NTA category 1), an alien present in the United States without admission or parole (NTA category 2), or an alien who has been lawfully admitted to the United States (NTA category 3). All have distinctly different interests at stake. The closer the relationship the alien has with the United States, the more potent his or her procedural due process rights are. For example, an arriving alien who has not stepped foot onto U.S. soil does not have as high an interest at stake as an alien who has been living in the United States, although unlawfully, and has a substantial relationship with the United States.[62] This diminishing interest (from category 3 to category 1 aliens) should influence the *Mathews* test for constitutional sufficiency of the procedures used to provide a fundamentally fair removal proceeding.

Conclusion

The right to procedural due process is fundamental to the integrity of the rule of law, and, as a nation of immigrants, we should apply it to all those who are subject to our Constitution. The above delineated protections must apply to *all* aliens in § 240 proceedings—with enough rigor and substance to make their removal hearings fundamentally fair, and regardless of which box is checked on the NTA. ⊙

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Endnotes

[1]U.S. Const. amend. V.
[2]8 U.S.C. §§ 1225, 1228, 1229a, 1534-37 (1952) (as amended).
[3]8 U.S.C. § 1101.
[4]I.N.A. § 240; 8 U.S.C. § 1229a.
[5]8 U.S.C. §§ 1182, 1225, 1227.
[6]8 U.S.C. § 1229(a)(1).
[7]*United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)
[8]*Dorr v. United States*, 195 U.S. 138, 140 (1904).
[9]*Landon v. Plasencia*, 459 U.S. 21 (1982); *Mathews v. Eldridge*, 424 U.S. 319 (1976).
[10]*Landon*, 459 U.S. at 28-29.
[11]*Id.*
[12]8 C.F.R. § 1001.1(q) (emphasis in original).
[13]8 C.F.R. § 1.2.
[14]I.N.A. § 235(a)(1), 8 U.S.C. § 1225(a)(1)
[15]*Id.*
[16]"Nor shall any state deprive any person life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.
[17]*Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (emphasis added); *see also Wong Wing v. United States*, 163 U.S. 228 (1896).
[18]*Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892).
[19]*Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903).
[20]*Id.* at 100.
[21]*Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Knauff*, 338 U.S. 537 (1950).
[22]*Knauff*, 338 U.S. at 539-40.
[23]*Id.*
[24]*Mezei*, 345 U.S. at 208, 214-15.
[25]*Knauff*, 338 U.S. at 544-46; *Mezei,* 345 U.S. at 215.
[26]*Boumediene v. Bush*, 553 U.S. 723, 759-60 (2008).
[27]Proclamation No. 9844, 84 Fed. Reg. 4949-4950 (Feb. 20, 2019).
[28]*Id.*
[29]*Mathews*, 424 U.S. 319 (1976).

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The Global Migration Crisis—The Cases of the United States and Myanmar

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Beyond the Migration: A *Quid Pluris* or an Issue?

Migration has become a key issue for countries all over the world. Voluntary migration is based on free will and initiative and typically occurs when people try to join their families, find new jobs or business opportunities, or pursue a better education. Environmental or climatic factors are also playing an increasingly central role in incrementing migration flows, and these people could qualify as migrants. Furthermore, through perilous journey, people are forced to flee from armed conflict, persecution, discrimination, and gross violation of human rights and crimes, mainly because they no longer feel safe and have been targeted just because of who they are or what they do or believe.[1] These people try to seek safety and could qualify as refugees.

The modern definition of refugees was drafted in 1951 through the Convention Relating to the Status of Refugees (1951 Refugee Convention)[2] in response to mass persecutions and displacements of World War II. The 1951 Refugee Convention defines a refugee as "someone who is outside their country of nationality and unable to return." It gives protection to people fleeing persecution based on their race, religion, nationality, political opinion, or membership in a particular social group.[3]

While countries by and large agree on one definition of refugee, every host country is responsible for examining all requests for asylum and deciding whether applicants can be granted the status of refugee. Countries have the sovereign right to determine and enforce conditions of entry and stay in their territories.[4] In doing so, they must respect and protect the human rights of the migrants under their jurisdiction or control and must defer to refugee laws.[5]

United States Migrant Crisis: What's Next?

Even if every nation has the sovereign right to control its border, the United States hosts more immigrants than any other country, with more than 1 million people arriving every year as permanent legal residents, asylum-seekers, and refugees, and in other immigration categories.[6]

These days, many people decide to cross the southern U.S.-Mexico border for several reasons, including to escape insecurity or violence, to seek economic opportunity, and to avoid extreme poverty. Most of the migrants come from the Northern Triangle: El Salvador, Guatemala, and Honduras.

Statistics show that the number of migrants crossing into the United States through the southern border has declined over the last few decades, but the demographics of people making the dangerous journey has changed.[7] Before 2009, most migrants were single men and boys looking for jobs or educational opportunities.[8] Since 2014, most of these border crossers are seeking asylum to escape poverty and uncontrolled criminal violence in their homelands.[9] Indeed, many of the migrants go so far as to risk their lives by carrying children on their backs and crossing two or three borders illegally in an attempt to reach the United States.[10] People who are arriving at the U.S. border have the right to request asylum, not only under the 1951

Refugee Convention but also under the Refugee Act of 1980, and specifically the U.S. Refugee Admissions Program. However, even those who would be recognized as refugees under the international definition may not necessarily receive asylum in the United States[11] because in past years, the asylum law has changed to avoid "abuse and fraud."

In April 2018, U.S. Attorney General Jeff Sessions announced the "zero tolerance" immigration policy for people seeking refugee status and asylum. The new policy is intended to ramp up criminal prosecution of people caught entering the United States illegally. News reported that unauthorized immigrant parents traveling with their children were being criminally prosecuted and separated from their children.[12] The primary purpose of the separations was to deter people from coming to the United States. Nevertheless, a June 2018 executive order ended family separation, with some exceptions.[13]

In July 2019, the Trump administration announced a change to asylum rules: to be eligible for asylum, migrants must have made an asylum claim at a previous country while en route to the United States before arriving at the southern border; anyone who had not done so was ineligible for asylum in the United States.[14]

In September 2019, the U.S. Supreme Court ruled to allow the Trump administration to enforce nationwide restrictions that would prevent most Central American immigrants from seeking asylum in the United States.[15] Regarding this decision, U.S. Supreme Court Justice Sonia Sotomayor wrote in her dissent, "Once again, the Executive Branch has issued a rule that seeks to upend longstanding practices regarding refugees who seek shelter from persecution."

Myanmar: Is the Rohingya Refugee Crisis Still Ongoing?

Myanmar (also called Burma) is the most religious Buddhist country, and it recognizes 135 ethnic minorities.[16] In Myanmar, there is ongoing persecution of the ethnic Muslim minority group, the Rohingya, because of the group's religion and ethnicity. The Citizenship Act of Myanmar, enacted in 1982, formally denied the group citizenship rights. Indeed, the Rohingya are the single largest "stateless" community in the world. This stateless condition, or lack of citizenship, increases their vulnerability because they are not entitled to any legal protection from the government of Myanmar. The Myanmar government has effectively institutionalized discrimination against the ethnic group through restrictions on marriage, family planning, employment, education, religious choice, and freedom of movement.[17] The exodus began on Aug. 25, 2017, after the Arakan Rohingya Salvation Army launched a brutal campaign that destroyed hundreds of Rohingya villages and forced nearly 100,000 Rohingya to leave Myanmar and find refuge in temporary shelters in refugee camps in Cox's Bazar, Bangladesh.[18] Here, the Rohingya people are not only stateless but also considered illegal migrants because Bangladesh is not a state party to the 1951 Refugee Convention or its 1967 Protocol.[19] Furthermore, there is no provision for refugees in national legislation, although a number of national laws and stipulations in the Bangladesh Constitution cover all people in the territory. Additionally, Bangladesh is not a state party to either of the international Statelessness Conventions—the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. Therefore, no national legislation exists to help prevent and reduce statelessness or to protect stateless persons. Bangladesh respects the principle of non-refoulement,[20] however, which recognizes the responsibility of a state to not expel or return refugees to the frontiers of territories where they might face persecution related to race, religion, nationality, membership in a particular social group, or political opinion. This principle is also legally binding on Bangladesh as a matter of customary international law.[21]

What Can Be Done?

To address the migration crisis on a global level, the Global Compact for Safe, Orderly and Regular Migration (GCM) was developed, the result of a two-year negotiation process. In July 2018, the 193 United Nations (UN) member states, except for the United States, finalized the GCM. Only 164 countries formally adopted it, however. It is the first-ever UN global, non-legally binding agreement, and it covers all dimensions of international migration in a holistic and comprehensive manner.[22] It was a great landmark step and underscores that the phenomenon of migration must be managed at local, regional, and global levels in the future. It is important to have full international cooperation between UN Member States, the UN, civil society, and other relevant actors.

Conclusion

In both the United States and Myanmar, thousands of people are suffering due to their conditions. They are victims of several abuses as well as discrimination and persecution, not only in their countries of origin but also in the countries to which they have fled while trying to search for a better future. The result is that they are stigmatized several times over because of their race, sex, and gender. Moreover, the COVID-19 pandemic could aggravate the existing vulnerabilities of the world's refugees and migrants.

It is important to look at the immigration crisis from different perspectives and consider the bigger picture. This problem cannot be solved through new rules, policies, and international agreements alone. It is necessary to create a pool of judges, prosecutors, and lawyers who are specialized in immigration law and international law. It is essential to respect migrants and refugees because, after all, each is a human being. The UN Member States must address the push factors, period. ⊙

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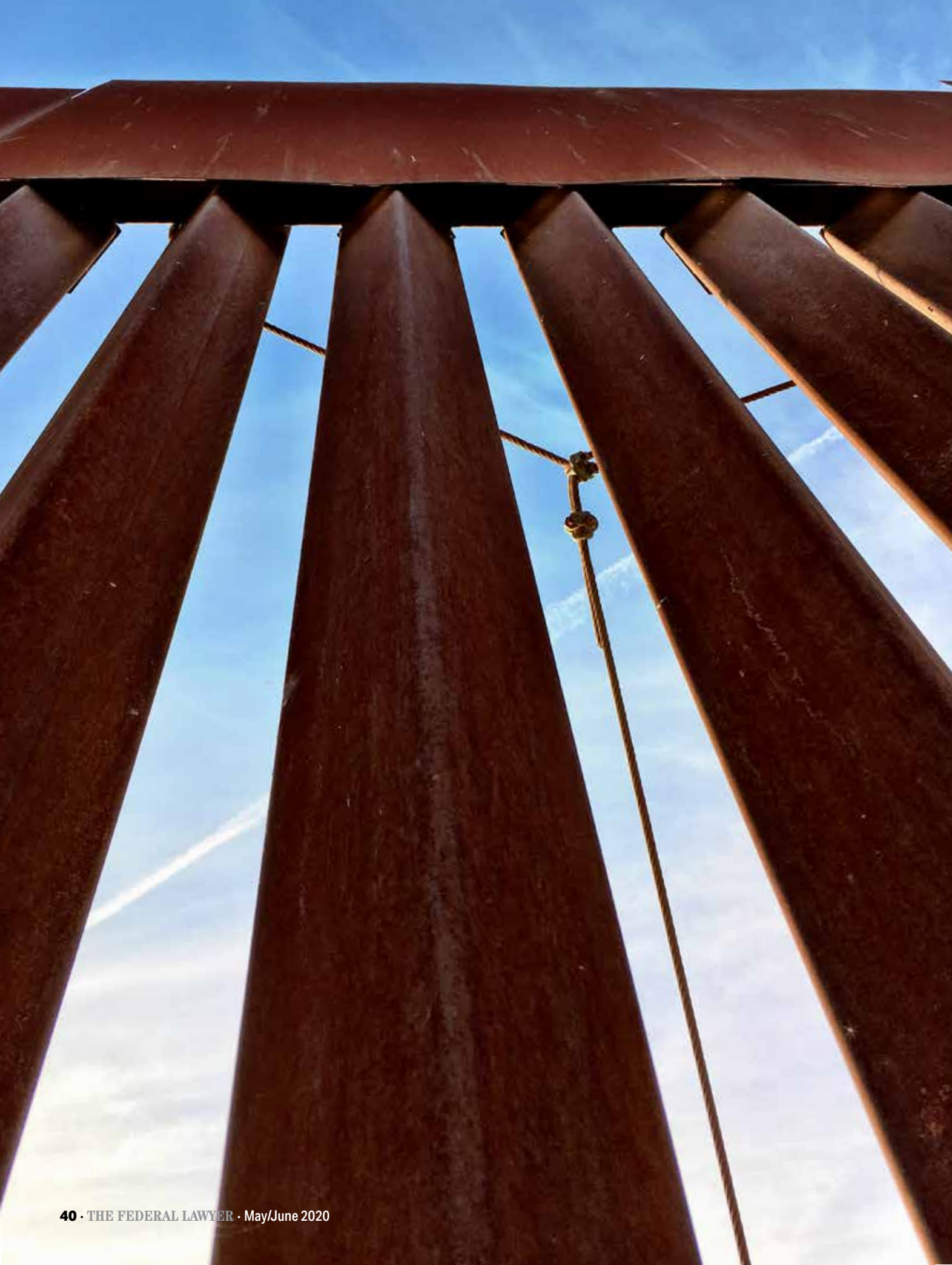

Changes to the U.S. Asylum Process at Our Southern Border Under the Current Administration

H. RAYMOND FASANO

In the aftermath of World War II, millions of people were displaced. Thereafter, the United States has welcomed those who were oppressed by war or genocide. From the acceptance of European refugees after World War II to the rise of the Iron Curtain and the oppression of communism, to the post-Vietnam war airlifts and the resettlement of Albanians in the 1990s, the United States has set the example for how people who are fleeing from persecution should be treated.

Pursuant to its international treaty obligations, the United States has offered a procedure for allowing non-U.S. citizens who fled persecution to apply for asylum and to remain in the country while their cases are under consideration. In fact, until recently, the United States seemed to have led the world in offering a system to process refugees in general.

This has all changed under the current administration's restrictive asylum policies. It seems that the administration is on a path of isolationism—making it harder and, in some cases, impossible to apply for asylum, even when a non-U.S. citizen has been persecuted or tortured in their home country. This article will briefly give an overview of asylum procedure in the United States and touch upon the new restrictions that the current administration has placed on asylum eligibility.

Asylum Overview

Asylum in the United States is based on the Refugee Act of 1980.[1] The purpose of the Act was to bring the United States in conformity "with the 1967 United Nations Protocol Relating to the Status of Refugees,[2] [('1967 Protocol')], to which the United States agreed to accede in 1968."[3] The 1967 Protocol incorporated the United Nations Convention relating to the Status of Refugees[4] as well as other multilateral international instruments that had been negotiated to deal with the world refugee crises in the first half of the 20th century. Under the Refugee Act, the attorney general now has the discretion to grant asylum, even in cases where an asylum seeker entered the United States illegally.[5] The courts of appeals have jurisdiction to review the attorney general's decision.[6]

Border Processing of Asylum Applicants Before the Migrant Protection Protocols

Before the current administration changed the asylum process at the southern border, asylum procedure was solely governed by the Immigration and Nationality Act (INA). The INA is codified in chapter 8 of the United States Code. The general rule regarding asylum eligibility is found in 8 U.S.C. §1158(a)(1):

> Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

Asylum applicants who entered without inspection were processed for "expedited removal" by immigration officers. If the applicant expressed a fear of persecution, they were afforded a credible fear interview (CFI) to establish whether there was a "significant possibility" that the applicant would be persecuted if she were returned to her home country.

If the applicant passed a CFI, the Department of Homeland Security (DHS) would either detain or parole the individual until her asylum claim could be heard before an immigration judge. DHS would parole applicants out of custody on a regular basis or the individual would be afforded a bond hearing before an immigration judge. If the individual were released through parole or bond, immigration judges regularly granted motions to change venue to the locale where the individual would stay in the United States during the pendency of her proceedings. This has all changed for applicants who now enter through our southern border.

The Migrant Protection Protocols

On Jan. 24, 2019, DHS issued the Migrant Protection Protocols (MPP), which changed the manner in which asylum cases were processed at our southern border.[7] Under the MPP, asylum applicants who arrive at our southern border after having passed through Mexico must wait in Mexico for their asylum hearing, in contrast to the traditional parole, supervision, bond, or detention that existed prior to MPP. Expedited removal has now been supplanted by standard removal proceedings. Families, unaccompanied children, Mexican nationals, applicants who are processed for expedited removal, and any applicant "who is more likely than not to face persecution or torture in Mexico"[8] are exempt from the MPP.

The Inspection Process of Non-U.S. Citizens at a U.S. Port of Entry

If a Customs and Border Protection (CBP) officer concludes that a non-U.S. citizen is inadmissible to the United States, the individual is processed through expedited or regular removal proceedings.[9] Ordinarily, a non-U.S. citizen who attempts to enter without inspection is found to be inadmissible based on fraud or misrepresentation[10] or lack of documentation.[11]

The following is the screening process and procedure for expedited removal followed by a CBP officer at the U.S. port of entry:[12]

> If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

All applicants for admission who are not processed for expedited removal are placed in removal proceedings,[13] where they are afforded an opportunity to present their asylum case before an immigration judge.[14] Some asylum applicants are granted an Employment Authorization Document during the pendency of the asylum case.[15]

The MPP differs from regular removal proceedings in that asylum applicants are made to return to the contiguous territory from which they arrived, in this case Mexico, for the duration of their removal proceedings.[16]

The MPP finds support in the U.S.C. as follows:[17]

> **(A) In general**
> Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.
> **(B) Exception**
> Subparagraph (A) shall not apply to an alien—
> **(i)** who is a crewman,
> **(ii)** to whom paragraph (1) applies, or
> **iii)** who is a stowaway.
> **(C) Treatment of aliens arriving from contiguous territory**
> In the case of an alien described in subparagraph (A) 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 1229a of this title.

There is ongoing litigation regarding the validity of the MPP.[18] In *Innovation Law Lab v. McAleenan,* the Ninth Circuit granted the government's motion to lift a stay that was placed on the MPP by the district court. The court reasoned that the "treatment of aliens arriving from contiguous territory" supported the MPP. At the time of this writing, the validity of the MPP is in flux, as there is pending litigation on the administration's authority to invoke the MPP.[19]

Bars to Asylum

Existing statutory bars to asylum eligibility apply to noncitizens who (1) may be removed to a safe third country with which the United States has a qualifying agreement, (2) did not apply within one year of arriving in the United States, or (3) have previously been denied asylum.[20]

In addition to other bars to asylum, a non-U.S. citizen is ineligible for asylum if she "was firmly resettled in another country prior to arriving in the United States."[21] The attorney general may also set additional limits and conditions under which a non-U.S. citizen is not eligible for asylum.[22]

Safe Third Country Bar to Asylum

On July 16, 2019, the Department of Justice (DOJ) and DHS published a joint interim final rule that creates "a new mandatory bar for asylum eligibility for aliens who enter or attempt to enter the United States across the southern border after failing to apply for protection from persecution or torture in at least one third country through which they transited en route to the United States."[23] The new rule bars non-U.S. citizens from applying for asylum in the United States if they passed through at least one country that is not their country of citizenship or their country of habitual residence.[24]

The rule does not apply to non-U.S. citizens who applied for asylum in another country and were denied.[25] The rule also does not apply to "victim[s] of a severe form of trafficking in persons."[26] Finally, the rule does not apply if "[t]he only countries through which the alien transited en route to the United States were, at the time of the

transit, not parties to [the 1951 Convention, the 1967 Protocol, or the UN Torture Convention.[27]]"[28] This new "safe third country" rule makes it impossible for any noncitizen to be eligible for asylum in the United States if she did not first apply for asylum in another country and was denied. The rule does not take into consideration whether the non-U.S. citizen had access to the asylum procedure in the third country through which she passed before arriving at the U.S./Mexico border.

A non-U.S. citizen who did not apply for asylum en route to the United States is considered de facto not credible for credible fear purposes.[29] However, the non-U.S. citizen may forego the pursuit of asylum and in its stead apply for relief under withholding of removal and/or relief under the Convention Against Torture. In that case, the asylum officer must then consider whether the alien demonstrates a reasonable fear of persecution or torture.[30] The non-U.S. citizen is afforded the right have an immigration judge review the mandatory bar to asylum and the finding that the non-U.S. citizen lacks a reasonable fear of persecution or torture.[31]

Conclusion

The MPP is known as "the wait in Mexico" policy. There are credible first-hand reports of the dangers that asylum applicants face while waiting in Mexico.[32] One asylum applicant related that, "We are alone and only God's hand has kept us safe from the constant danger that surges in this country . . . We don't intend to cause any harm to the United States. We would just like a safe place [to wait] for a response from the government."[33]

I have met with over a dozen individuals who illegally re-entered the U.S. after being processed for MPP but could not wait for their hearing while in Mexico because it was too dangerous. I have met with women who have been raped and individuals who have been beaten and robbed while waiting for their asylum hearing in Mexico. After these individuals illegally re-enter, they have essentially foregone their ability to pursue asylum, as many are prosecuted for illegal re-entry,[34] and others are placed in "re-instated" removal proceedings in which asylum is no longer available.

Acting under duress is a traditional defense in both civil and criminal law. As early as 1868, the Supreme Court defined it as "that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient, in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness."[35] There is no guidance from DHS or DOJ on how or whether the duress exception applies to illegal re-entry after being placed in the MPP. ⊙

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[11]8 U.S.C. §1182(a)(7).
[12]8 U.S.C. §1225(b)(1)(A)(i).
[13]8 U.S.C. §1225(b)(2)(A).
[14]8 U.S.C. §1229a.
[15]8 C.F.R. §274a.12(c)(8); https://www.uscis.gov/i-765. Under highly complex procedural policies, in some courts, defensive asylum applicants who refuse the option an "expedited" decision in their case are not eligible to receive employment authorization.
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A Challenge to the Status Quo? *Shields v. Illinois Department of Corrections* and § 1983 Liability for Private Companies

STEPHEN J. HAEDICKE

If you you represent plaintiffs in civil rights litigation, *Monell v. Department of Social Services* is probably not your favorite case. In general terms, *Monell* holds that a municipality may be liable for its employees' civil rights violations under 42 U.S.C. § 1983 *only* if the municipality contributed to the violation either through an official policy or a custom and practice. In plain Latin, that means there is no *respondeat superior* liability against a municipality simply because it employs someone (a police officer, for example) who, acting under color of law, violates a plaintiff's constitutional rights. Instead, to recover against a municipality, a plaintiff must prove that either (1) an official policy is unconstitutional or (2) official policymakers were aware of but failed to prevent a pattern or practice of unconstitutional behavior.[1]

Monell poses a high bar for any civil rights plaintiff. Cases challenging an official policy are the exception rather than the rule. Most of the time, a plaintiff must attempt to prove a pattern or practice to satisfy *Monell*. That can be expensive and time-consuming, and, although the need to prove a pattern justifies expansive discovery requests, it is often difficult to find the evidence needed to prove it. If the plaintiff fails to prove up the *Monell* claim, he or she is left with only a claim against a municipal employee unlikely to have the money to satisfy a large judgment. And although many municipalities will pay judgments on behalf of employees, others will not, especially if the judgments are exceptionally large. You do not have to practice plaintiff-side civil rights law long before you hear horror stories of multi-million-dollar verdicts made uncollectible by the failure to prove *Monell* and a recalcitrant municipality. Hence the paradox of plaintiffs' civil rights cases: do too well in the wrong jurisdiction and you might get nothing.

But perhaps blinded by modern-day frustrations with the case, many often forget that *Monell* actually expanded the reach of § 1983. *Monell* overruled *Monroe v. Pape*, which was itself a mixed bag. *Monroe* had held that § 1983 could be used to sue individual municipal employees, effectively throwing the doors of the courthouse open to § 1983 plaintiffs to bring suits against individuals.[2] But when one door opens another closes, and *Monroe* had also held that municipalities were totally immune from any § 1983 action. The logic was that a municipality was not a "person" within the meaning of § 1983.

Monell overruled that total bar on § 1983 suits against municipalities. So it, too, opened a door, but only a crack. And there things stand in terms of municipal liability under § 1983.

But what about private companies performing state functions, like a private prison or a private medical company providing health care to prisoners? Are they subject to *respondeat superior* for the constitutional torts of their employees, acting in the course and scope of their employment, like other private companies would be for the torts of their employees? Or does the *Monell* standard protect them too? If it does, should it? The growing number of private companies providing traditional state services, especially in the criminal justice arena, makes this a timely question. It is one that Judge David Hamilton of the Seventh Circuit Court of Appeals tackled in fine style in his 2014 opinion, *Shields v. Illinois Department of Corrections.*[3] And though *stare decisis* ultimately prevented the *Shields* court from following through on Judge Hamilton's analysis, the case raises challenging questions about the application of the *Monell* standard to private companies. Analysis of how the case played out provides some helpful tips for anyone looking to push the boundaries of current law in this area.

Shields—The Facts

On June 16, 2008, Ernest D. Shields was serving time at Hill Correctional Center in Illinois for illegal weapon possession. Evidently, he spent a lot of time lifting weights while in prison—on this occasion, he was attempting to bench press 345 pounds. Unfortunately, the attempt did not end well, and Shields ruptured a pectoralis tendon muscle in his left chest, according to his complaint in federal court.

Shields then embarked on a peripatetic journey through the medical system of the Illinois Department of Corrections (DOC). Wexford Health Sources Inc., a private company, contracted with the Illinois DOC to provide medical care in the state prison system. The Wexford-DOC contract was reportedly worth between $1.3 and $1.5 billion over 10 years.

Shields was seen by the Wexford doctor at Hill Correctional, who recommended he see an orthopedist. The Wexford regional medical director concurred, and a local orthopedist evaluated Shields and recommended shoulder surgery. Importantly, the orthopedist recommended that a "shoulder specialist" perform the surgery and, lacking such expertise, he declined to do the surgery himself. A number of shoulder specialists also declined, so many that eventually Wexford had to search for an "out-of-area" orthopedist, meaning one that was not on a preapproved Wexford list.

It was here that a "critical error" occurred, according to the *Shields* opinion. Staff at Hill Correctional contacted Wexford to obtain the name of an "out-of-area" doctor to perform the recommended surgery. But instead of providing the name of a shoulder specialist, Wexford staff selected a doctor who lacked such expertise. This doctor, employed by Southern Illinois University, evaluated Shields and, contrary to every other doctor who had seen him, recommended only a course of physical therapy as treatment for his injury. The Wexford doctor at Hill and the regional medical director concurred with this nonsurgical recommendation.

Shields promptly filed a grievance when he learned he would not receive the surgery numerous doctors had prescribed. The grievance was rejected by prison staff, who failed to review any documents. Shields started his physical therapy but was unable to complete it because of pain. His physical therapist recommended that he be seen by an orthopedist, if that had not already happened. There was no evidence anyone ever read the physical therapist's note.

Several months later, Shields was transferred to a different prison facility. He was seen by the prison doctor there, complaining of severe pain in his left shoulder. He was seen by another shoulder specialist, who diagnosed a ruptured pectoralis tendon, which surgery could have repaired. But too much time had passed and the injury was irreparable. Shields' left shoulder was permanently atrophied, and it was unlikely he would ever gain full use of his left arm. "Surgery is the standard treatment for a pectoralis tear and typically results in a favorable outcome—but only if done promptly."[4]

Shields—The Law

Shields filed suit under 42 U.S.C. § 1983 against Wexford, its physician administrators, and some of the various doctors who had examined him. Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

Vis-à-vis the individual defendants, Shields' task under § 1983 was to show that some individual had treated him with "deliberate indifference." "Deliberate indifference" is a term of art in § 1983 practice and, somewhat confusingly, it has different meanings depending on the context. Here, because Shields was a convicted prisoner serving time in a state prison, his claim was that the defendants deprived him of the right against cruel and unusual punishment secured by the 8th Amendment. The Supreme Court's analysis of 8th Amendment claims required that Shields prove *subjective* deliberate indifference, meaning that he had to show that an individual defendant subjectively appreciated the risk that the failure to provide the shoulder surgery created, but consciously disregarded that risk.[5] Some courts compare subjective deliberate indifference to a criminal recklessness standard.[6]

Shields had been unable to proffer evidence at summary judgment to meet that high standard. As the *Shields* opinion notes, this was apparently not because of any lack of diligence on Shields' part. Instead, Wexford and the other organizational defendants had "diffused responsibility for Shields' medical care so widely" that he had been unable to identify a particular person who was responsible for ensuring that he received the care he needed. No one person "both appreciated and consciously disregarded Shields' need for prompt surgery."[7]

In other words, rather than being the victim of an individual tortfeasor, Shields was the victim of institutional neglect. Assuming Shields' claims were accurate, the processes that Wexford and the other defendants put in place to ensure that inmates in their care received appropriate treatment had broken down. The constitutional violation in the case lay with the organization, not its individual employees.

If Shields had not been a § 1983 case, the failure to identify an individual wrongdoer would have been no problem at all. The general tort principal of *respondeat superior* would have filled the void, effectively shifting the risk of bureaucratic error onto the entity that created it, in other words, Wexford.

But § 1983 has been interpreted differently. With its origins as

part of the Civil Rights Act of 1871, § 1983 has been interpreted to be directed mainly at individual rather than organizational liability. The judicial reluctance to interpret § 1983 to provide a remedy against organizations culminated with *Monell*. The textual footing for this reluctance is § 1983's requirement that the defendant "subjects, or causes to be subjected" the deprivation of the plaintiff's rights.

There are powerful reasons to question whether *Monell's* rejection of *respondeat superior* for municipalities should be extended to private corporations like Wexford. As described by Judge Hamilton in *Shields*, those countervailing reasons are both doctrinal and practical.

First, on the doctrinal side, the *Monell* decision itself has been the subject of persuasive criticism. Commentators have noted that it completely ignored that *respondeat superior* was an accepted part of American law at the time § 1983 was enacted. Nothing in the text of § 1983 suggests that Congress intended the law to be an exception to that basic tort principle, and courts have otherwise interpreted § 1983 to incorporate other basic tort principles. For example, the statute of limitations for a § 1983 cause of action is governed by the general statute of limitations for a personal injury tort in the state where the act occurred.[8]

Also suspect is the *Monell* court's reliance on the legislative history of § 1983. To buttress the rule it propounded, *Monell* pointed to congressional rejection of the so-called Sherman amendment to the Civil Rights Act, which would have made municipalities liable under § 1983 for the constitutional torts of the municipality's citizens, who were not under the municipality's control. In essence, the Sherman amendment would have imposed on municipalities a general duty to keep the peace. Even for the Reconstruction-era Congress, that provision was a bridge too far, and the proposal was soundly rejected.

It is difficult to see what the defeat of the Sherman amendment has to do with *respondeat superior* liability under § 1983. The Sherman amendment would have radically expanded municipal liability beyond accepted historical norms, while the application of *respondeat superior* would have represented no such departure. The *Monell* court's interpretative leap in this regard suggests that the decision was less about intellectual purity and more of a compromise driven by reluctance to subject public coffers to exposure for the constitutional torts of municipal employees.[9]

Monell itself is, therefore, on shaky ground. Are there other Supreme Court cases counseling extension of its rule to private corporations? The answer is a definitive "no." In fact, as Judge Hamilton notes, the Supreme Court in *Adickes v. S. H. Kress & Co*.[10] took for granted that a private company would be liable for the constitutional torts of its employees committed in the course and scope of their employment. *Adickes* involved a white school teacher who, in 1964, was arrested after she went to a restaurant with her black students in Mississippi. Among other things, *Adickes* established that a private person could be liable under § 1983 where he or she conspired with state officials to violate the plaintiff's constitutional rights. The *Adickes* opinion went on to hold that the plaintiff could recover against the restaurant if she proved "that a Kress employee, in the course of employment, and a Hattiesburg policeman somehow reached an understanding to deny Miss Adickes service in the Kress store, or to cause her subsequent arrest because she was a white person in the company of Negroes."[11]

Adickes remains good law and is a powerful reason to think that *respondeat superior* should apply to private companies sued under § 1983. But there are other reasons as well. It has long been the law that private individuals performing state functions (for example, private prison guards) can be sued for constitutional violations under § 1983. In *Richardson v. McKnight*,[12] the Supreme Court faced the question whether such private individuals could, like public employees, assert the defense of qualified immunity when sued under § 1983. The Court said no. There was no history of private individuals being granted limited immunity when they were performing state functions, and there were also no policy reasons to extend immunity to such individuals. *Richardson*, in other words, rejected any equivalence between § 1983 exposure, which private individuals can share with government actors, and the defenses available to § 1983 defendants. In other words, just because private individuals can be sued like they are governmental actors does not mean they enjoy the same protections.[13]

The Supreme Court has thus explicitly rejected the idea that all defenses that governmental entities may have to § 1983 liability are also automatically available to private companies. *Richardson* denied qualified immunity to private individuals, and *Adickes* applied *respondeat superior* to private companies sued under § 1983. Moreover, as the Supreme Court explored in *Richardson*, there are sound practical reasons for rejecting the false equivalency between § 1983 exposure and the availability of defenses. Most notably, private companies can generally obtain insurance to protect themselves and their employees from substantial money judgments. Public employers often lack that ability, so a certain amount of judicial protection is necessary both to protect the public coffers and to ensure that qualified people are not overly deterred by the threat of lawsuits from working in the public sector.

But despite all these considerations, Judge Hamilton's opinion in *Shields* notes that the Seventh Circuit and a number of other circuits have concluded that *Monell* applies to private companies. In a bit of legal scholarship that should remind us that sometimes the most accepted legal principles have foundations of sand, Judge Hamilton traces the history of decisions extending *Monell* to private companies back to a single Fourth Circuit decision from 1982, *Powell v. Shopco Laurel Co.* Without really engaging in any reasoning of its own, the *Powell* court held simply that *Monell's* reasoning applied with equal force to private companies ("No element of the Court's *ratio decidendi* lends support for distinguishing the case of a private corporation.").[14] As Judge Hamilton notes, *Powell* failed to engage in any meaningful way with the underlying weaknesses in the *Monell* decision, and it did not critically examine, as the Supreme Court did in *Richardson*, whether there are good reasons to extend certain § 1983 protections to private individuals or companies.[15]

Shields—The Conclusion

Despite *Powell's ipse dixit* reasoning, the Seventh Circuit and other circuits have followed it. Under general appellate rules of orderliness, one panel cannot overrule a decision from a prior panel, so Judge Hamilton was forced to pen a decision affirming the district court's holding that neither Wexford nor any individual defendant was liable for Shields' injury.

Judge Hamilton did, however, note the possibility that the court's precedent could be overruled if a petition for *en banc* review were granted. Shields followed Judge Hamilton's advice and sought *en banc* review, but his request was denied. He then filed a petition for certiorari with the Supreme Court, which was also denied.

Thoughts and Observations From Shields

Although decided in 2014, the questions raised in *Shields* regarding *Monell* protections for private companies have become more, rather than less, timely since then. One of the Trump administration's first criminal justice decisions was to roll back the Obama administration's decision to limit the use of private prison companies in housing federal prisons, and the number of prisoners housed in private prisons has been on the rise. Similarly, the number of prisoners receiving medical care from private companies has continued to increase.

A few important observations can be made about *Shields*. First, at least one circuit has not followed *Powell*'s reasoning. In *Smith v. Brookshire Brothers, Inc*.,[16] the Fifth Circuit instead followed *Adickes* in holding that a private company can be liable under *respondeat superior* for the constitutional torts of its employees. Although *Smith* is an old case, it remains good law in the Fifth Circuit, and it has the distinction of being consistent with Supreme Court precedent.

Furthermore, at least some of the circuits to have followed *Powell* on this question seem to have relied on the false equivalency between public and private § 1983 defendants that the Supreme Court rejected in both *Richardson* and *Wyatt v. Cole*.[17] That is, simply because private individuals may share § 1983 exposure with a public employee does not mean they have the same defenses available to them. Although both *Richardson* and *Wyatt* involved qualified immunity, it does not take much imagination to see the Supreme Court rejecting the same type of equivalency between public and private employers when it comes to *Monell*.

Which leads to the second observation: the issue of waiver. Litigants who wish to preserve this issue need to specifically raise it in both their complaints and their arguments in the district court. Indeed, in a concurrence in *Shields*, Judge Tinder opined that Mr. Shields had probably waived the issue regarding whether Wexler should receive *Monell* protections not just by failing to argue that *Monell* did not apply, but also by trying to plead a *Monell*-style pattern-and-practice claim in the district court. Shields had continued to argue that he had satisfied *Monell* in his appellate papers. In Judge Tinder's mind, those actions resulted in appellate waiver of the issue. In at least one post-*Shields* case, another panel of the Seventh Circuit explicitly ruled that a plaintiff had waived this issue by failing to plead and argue it in the district court.[18]

Another practical observation on this question involves insurance. Many municipalities and government agencies (for example, sheriff's offices) do not have a private insurance carrier, but private companies almost always do. If a § 1983 judgment is obtained against an individual employee, it may be possible to require the insurance company to pay that judgment based on the doctrine of *respondeat superior*, regardless of whether the employer is legally required to pay. Of course, this question will turn on the coverage and exclusions of the particular insurance policy at issue, and also perhaps whether the state permits a direct action against the insurer. Relatedly, there should also generally not be a problem enforcing any judgments on the pendent state law claims that are often filed in federal civil rights actions. For such claims, *respondeat superior* should apply.

There are also ethical issues to consider in these situations. If a private company's litigation strategy is to deny an obligation to pay a judgment against an employee based on *Monell*, situations may arise in which the employer's attorney cannot ethically represent the employee in the matter because the two parties' interests are not aligned. If the company attorney continues to do so and there is a judgment against the employee, the employee may well have a malpractice claim against the attorney. In the right circumstance, one can envision a civil rights plaintiff becoming aligned with the civil rights tortfeasor in a joint effort to obtain funds to satisfy a civil rights judgment from a defense attorney's malpractice carrier.

Final Thoughts

If the right litigant in the right case preserves the issue, it may be that the Supreme Court will have to decide whether private companies enjoy *Monell* protections. Although there is substantial circuit precedent on the issue, that does not make the Supreme Court's answer on this question preordained. For example, in *Kingsley v. Hendrickson*,[19] another case involving the rights of incarcerated individuals, the Court showed itself willing to pass quickly over a voluminous amount of circuit precedent holding that pretrial detainees are subject to the same heightened requirements for proving excessive force as convicted prisoners. The *Kingsley* Court rejected the nearly unanimous views of the circuits on that point, relying instead on language from *Bell v. Wolfish*[20] to hold that pretrial detainees must prove only objective, as opposed to subjective—deliberate indifference to establish an excessive force claim. Interestingly, Judge Hamilton also wrote the dissenting opinion below in *Kingsley*, and his view ultimately prevailed in the Supreme Court. Time will tell whether he proves to be equally prescient with respect to *Monell* protections for private companies sued for constitutional violations under § 1983. ⊙

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Endnotes

[1]*Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 690-92 (1978).
[2]*Monroe v. Pape*, 365 U.S. 167 (1961).
[3]746 F.3d 782 (7th Cir. 2014).
[4]*Id.* at 786-88.
[5]*Farmer v. Brennan*, 511 U.S. 825 (1994).
[6]*See, e.g., Darnell v. Pineiro*, 849 F.3d 17, 32 (2d Cir. 2017).
[7]*Shields*, 746 F.3d at 786.
[8]*Owens v. Okure*, 488 U.S. 235, 239-40 (1989).
[9]*Shields*, 746 F.3d at 789.
[10]*Adickes,* 398 U.S. 144 (1970).
[11]*Adickes*, 398 U.S. at 152 (1970).
[12]*Richardson*, 521 U.S. 399 (1997).
[13]*Id.* at 412-14
[14]*Powell v. Shopco Laurel Co.*, 678 F.2d 504, 506 (4th Cir. 1982).
[15]*Shields*, 746 F.3d at 794-95.
[16]*Smith*, 519 F.2d 93 (5th Cir. 1975).
[17]*Wyatt v. Cole,* 504 U.S. 158. (1992); *see also Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992).
[18]*Hahn v. Walsh*, 762 F.3d 617, 639 (7th Cir. 2014).
[19]*Kingsley v. Hendrickson,* 576 U.S. 389 (2015).
[20]*Bell v. Wolfish*, 441 U.S. 520 (1979).

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Arbitrary H-1B Nonimmigrant Visa Denials Have Employers Thinking Federal Litigation Rather Than Administrative Review

RAYMOND LAHOUD

U.S. Citizenship and Immigration Services (USCIS) data between 2015 and 2019 show that denials of the H-1B Specialty Occupation Nonimmigrant Visa Petitions have quadrupled for both initial H-1B petitions and those seeking the continuation of employment with the same employer.[1]

According to immigration policy analysts, including the National Foundation for American Policy (NFAP), this is a result of more restrictive Trump administration policies, specifically the 2017 "Buy American and Hire American" executive order.[2] The "Buy American and Hire American" executive order provided for executive agency regulatory and adjudicatory reforms to the employment-based immigration system, including the H-1B nonimmigrant visa, to "create higher wages and employment rates for workers in the United States."[3]

In the pre-"Buy American and Hire American" H-1B processing times, there was clarity in adjudication. What has transpired since the 2017 executive order has created confusion and concern for employers, foreign employees, and immigration agents alike. What used to be an easily approvable H-1B petition has now become easily deniable. Thousands now in the United States under the H-1B visa face possible denials of requests for H-1B visa extensions for their same positions with the same employers, despite having applied many, many times in the past without issue.

Faced with inconsistent initial agency decisions and "rubber-stamp" agency appeals that can take years and leave employers and foreign employees in limbo, many immigration practitioners are turning to federal district courts for review— bypassing the typical agency review process.

About the H-1B Temporary Specialty Worker Program

The H-1B nonimmigrant visa program allows U.S. employers to sponsor foreign nationals who temporarily relocate to the United States to work in positions deemed "specialty occupations." Broadly defined, these are positions that normally require a minimum of a bachelor's degree or higher in a specialty field.[4] Created in 1990, the H-1B program permits temporary employment for initial durations of up to three years, with extensions available that allow the foreign national to hold H-1B status for no more than six years.[5]

Before the employer can file a petition with USCIS, it must take steps to ensure that hiring the foreign worker will not harm U.S. workers. Employers must attest on a Labor Condition Application (LCA) certified by the U.S. Department of Labor (DOL) that:

1. The employment of the H-1B worker will not adversely affect the wages and working conditions of similarly employed U.S. workers;
2. The wage offered to the H-1B worker is the higher of the actual wage paid to similarly employed U.S. workers, or a DOL determined prevailing wage for the area of intended employment;
3. Existing U.S. employees in the same occupation are not on strike or in a lockout;
4. Existing U.S. employees were provided with notice of the employer's intention to hire an H-1B worker; and
5. The employer will provide a copy of the DOL certified LCA to the foreign-born employee prior to commencement of the specialty employment.[6]

Since the creation of the H-1B program in 1990, Congress has limited the number of H-1B visas made available each fiscal year.[7] From 1991 through 1998,[8] Congress set the annual statutory cap at 65,000 H-1B nonimmigrant visas, with an increase in 1999 and 2000 to 115,000 H-1B nonimmigrant visas.[9] The cap reached an ultimate high of 195,000 from 2001 to 2003.[10] In 2004, the annual statutory cap was reduced to 65,000.[11] To adjust to a need for H-1B nonimmigrant visa employees with advanced degrees, an additional 20,000 H-1B visas were added in 2007 for foreign professionals who graduated with a master's degree or doctorate from a U.S. institution of higher learning.[12] Today, the cap remains at 65,000 per year, plus the additional 20,000 for foreign professionals with a master's degree or doctorate from a United States institution of higher learning.[13]

In recent years, the Congressionally imposed cap has been reached within days of when employers are permitted to begin submitting H-1B petitions.[14] In the 2010, 2011, and 2012 fiscal years, the annual cap was reached an average of 183 days from the opening of the petition filing period, which typically begins on April 1.[15] In each year between 2014 and 2020, the annual cap was reached within five days of the opening of the petition filing period.[16]

Qualifying for an H-1B

To qualify for the H-1B temporary nonimmigrant specialty worker program, there must exist an employer-employee relationship, or the intent to enter into one if the H-1B petition is approved. The employer must pay at least the actual wage or the DOL prevailing wage, whichever is higher, and must seek certification of the job from the DOL by filing a labor condition application.

Moreover, the job must qualify as a "specialty occupation." The Code of Federal Regulations broadly defines a "specialty occupation" as an:

> occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.[17]

This broad definition is followed by a rather narrow "standard" that lists four alternatives, one of which the position "must" meet:

1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
3. The employer normally requires a degree or its equivalent for the position; or
4. The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.[18]

Review of Positions Certified FY 2019 YTD (% of total certified FY 2019 YTD)			
Top 10 Occupations (based on SOC Codes)	Software Developers, Applications	333,507	33.2%
	Computer System Analysts	88,274	8.8%
	Computer Occupations, All Other	84,556	8.4%
	Software Developers, Systems Software	82,851	8.2%
	Electronic Engineers, Except Computers	41,298	4.1%
	Operation Research Analysts	29,351	2.9%
	Computer Programmers	24,551	2.4%
	Management Analysts	21,517	2.1%
	Mechanical Engineers	16,458	1.6%
	Computer and Information Systems Managers	15,546	1.5%
Top 10 States	California	274,618	27.3%
	Texas	101,402	10.1%
	New York	71,999	7.2%
	Washington	47,056	4.7%
	New Jersey	46,927	4.7%
	Illinois	43,886	4.4%
	Florida	37,517	3.7%
	Massachusetts	35,485	3.5%
	Pennsylvania	35,271	3.5%
	Georgia	30,843	3.1%
Top 10 Employers	Deloitte Consulting, LLP	84,649	8.4%
	Cognizant Technology Solutions, US Corp	28,229	2.8%
	Apple, Inc.	26,236	2.6%
	Infosys Limited	21,434	2.1%
	Qualcomm Technologies	21,238	2.1%
	Tata Consultancy Services Limited	15,794	1.6%
	KForce, Inc.	15,225	1.5%
	Cisco Systems, Inc.	14,130	1.4%
	Amazon.com Services	12,695	1.3%
	Wipro Limited	12,687	1.3%

Chart Source: United States Department of Labor

With a certified LCA from the DOL and a position that qualifies as a "specialty occupation," the inquiry shifts to the prospective foreign employee to establish eligibility premised on one or more of the following: (1) holding a U.S. bachelor's or higher degree, as required by the specialty occupation, from an accredited college or university or its foreign equivalent; (2) possessing the required license or other official permission to practice the occupation (such as those required by attorneys, physicians, architects, surveyors, or physical therapists) in the state of proposed employment; or (3) having education, specialized training, or progressively responsible experience, or a combination of the three, which are the equivalent to a U.S. bachelor's degree or higher in the specialty occupation, with recognition of

expertise through progressively responsible positions directly related to the specialty occupation.[19]

Impact

H-1B nonimmigrant visa occupations have typically encompassed a wide array of positions in a multitude of industries.

In the most recent fiscal year, 2018–2019, 62,556 U.S. employers submitted a total of 664,616 LCAs to the DOL.[20] Six of the top 10 occupations were Computer and Software related occupations, accounting for 63%, or 629,285 of the total LCAs submitted to the DOL.[21]

The top 10 employers submitted LCAs to the DOL requesting an aggregate of 252,320 H-1B nonimmigrant visa workers. These employers, including Amazon, Apple, Cisco, and Deloitte, are America's most trusted and cross the political divide with their products and services.

In the same period, U.S. colleges and universities sought over 5,800 foreign-born professors and assistant professors, with other employers requesting physicians, attorneys, accountants, architects, therapists, management consultants, teachers, researchers, pharmacists, nonprofit administrators, and advanced industrial technicians. Employers from every state requested H-1B nonimmigrant visa workers, with New Jersey, New York, and Pennsylvania among the top 10 states seeking H-1B nonimmigrant visa workers.

The demand for H-1B employees by U.S. employers is clearly obvious, and the need is significant. The impact of those employees on each employer and the overall American economy is critical. According to the American Immigration Council (AIC):

> In today's labor market, foreign workers fill a critical need—particularly in the Science, Technology, Engineering, and Math (STEM) fields. Many opponents of the H-1B visa seek to pit native-born workers against their foreign-born colleagues. In reality, workers do not necessarily compete against each other for a fixed number of jobs.
>
> The United States has created a dynamic and powerful economy. Foreign-born workers of all types and skills, from every corner of the globe, have joined with native-born workers to build it. Skilled immigrants' contributions to the U.S. economy help create new jobs and new opportunities for economic expansion. Indeed, H-1B workers positively impact our economy and the employment opportunities of native-born workers.[22]

Moreover, the H-1B nonimmigrant visa program has a net positive impact on the wages of native U.S. employees.[23] Again, according to AIC:

- From the creation of the H-1B program in 1990 up until to 2010, H-1B-driven increases in STEM workers were associated with a significant increase in wages for college-educated, U.S.-native-born workers in 219 U.S. cities. An increase of 1 percent in foreign STEM workers' share of a U.S. city's total employment correlated with an increase of wages from 7 to 8 percent paid to both U.S.-native-born non-STEM degree college graduates and U.S-native-born STEM degree college graduates, and a 3 to 4 percent increase in pay for non-college-educated U.S. native-born workers.
- In the three years between 2009 and 2011, wage growth for U.S-born workers with at least a bachelor's degree was nominal, but wage growth for workers in occupations with large numbers of H-1B petitions was substantially higher.
- On average, H-1B workers earn higher wages than employed U.S.-born workers with bachelor's degrees— $76,356 compared to $67,301—including in areas like computer and information technology, engineering, healthcare, and post-secondary education. When comparing workers of the same age cohort and occupation, H-1B workers earn higher wages than their native-born counterparts. Specifically, in 17 of 20 age cohort and occupation groups, wages for H-1B workers are higher than non-H-1B workers.
- The median salary of H-1B workers rose from $69,455 in FY 2007 to $80,000 in FY 2016, with the median salary of all computer and mathematical workers in the United States increasing from $73,979 to $75,036.[24]

Further, H-1B nonimmigrant visa workers complement U.S. workers and fill employment gaps in many STEM occupations. With the "United States fac[ing] challenges in meeting the growing needs of an expanding knowledge-based innovation economy, [a]rguments that highly skilled, temporary foreign workers are freezing out native-born workers are rebutted by the best available empirical evidence."[25] A review of unemployment rates in the United States from 2004 to 2018 in occupations for which H-1B nonimmigrant visas were granted found low unemployment levels for those occupations, which, consequently, indicates a workforce supply shortage in those occupations.[26]

If operated without political influence and at optimum efficiency, the H-1B nonimmigrant visa program would result in a growth of job opportunities for all U.S. workers and the overall economy. In a statement submitted to the U.S. Senate Committee on the Judiciary for the March 2015 Hearing on Immigration Reforms Needed to Protect Skilled American Workers, the U.S. Chamber of Commerce noted that economists estimate that if the H-1B program was expanded, employment will increase by 227,000 jobs in the first year after such expansion and will continue to expand with a net increase of 1.3 million jobs over the first 30 years after H-1B program expansion. Using the same modeling, the Gross Domestic Product is estimated to expand by $22 billion if the H-1B program is expanded, with more than $158 billion expansion over 30 years. Employment and gross state product is estimated to increase for all states and in each of the first 30 years as a result of H-1B program expansion.[27]

What Has Happened?

While H-1B nonimmigrant visa holders are critical to the U.S. economy and thousands of employers across the United States, from New Jersey, New York, and Pennsylvania to California, analysis of USCIS data between 2015 and 2019 related to H-1B visa petitions shows that denials have quadrupled for both initial H-1B petitions and those seeking continuation of employment with the same employer.[28]

In practice, the current H-1B nonimmigrant visa adjudication process is itself internally inconsistent, with the following main issues: a lack of deference to, or understanding of, the doctrine of *res judicata*; unsupported denials; unnecessary and duplicative requests for additional evidence; and frequent administrative appeals. Due to the lack of a meaningful administrative appeals process, what is likely to start

occurring is a slew of federal lawsuits challenging H-1B visa denials. This is a procedural step that petitioning employers rarely took in the past, but it is now becoming the only avenue of due process for actual and reasonable review of an H-1B nonimmigrant visa petition.

Denial rates for H-1B petitions have increased significantly during President Trump's first term, "rising from 6% in FY 2015 to 24% through the third quarter of FY 2019 for new H-1B petitions for initial employment ... . In the first three quarters of FY 2019, USCIS adjudicators denied ... 12% of H-1B petitions for continuing employment.[29] The 12% denial rate for continuing employment is historically high—4 times higher than the denial rate of only 3% for H-1B petitions for continuing employment as recently as FY 2015."[30]

H-1B petitions for initial employment include those "primarily for new employment, typically a case that would count against the H-1B annual limit."[31] H-1B petitions for continuing employment include "extensions for existing employees at the same company or an H-1B visa holder changing to a new employer."[32] Of those H-1B petitions approved, no data exists on the number of employers served with Requests for Evidence (RFEs), which require the petitioning employer to respond to specific requests from USCIS for documents and information and to provide additional supporting evidence and legal arguments in support of the qualifications of the job offered and the employee for the H-1B program.[33]

The increase in rates of denial is "a result of more restrictive Trump administration policies," specifically the administration's 2017 "Buy American and Hire American" executive order, which ordered executive agency regulatory and adjudicatory reforms to the employment-based immigration system, including the H-1B nonimmigrant visa, to "create higher wages and employment rates for workers in the United States."[34]

No Deference

Year after year, U.S. employers seek extensions without any material changes of H-1B nonimmigrant visas for foreign-born employees who already work for the employer, are already under H-1B nonimmigrant visa status, and have previously been granted H-1B nonimmigrant visa status multiple times by USCIS. Extension requests mean there has been no interruption in employment and that this is an identical submission to those previously submitted and previously approved, often multiple times. Deference, one would assume, would be given to the prior approvals? No.

Prior to October 2017, deference, or the doctrine of *res judicata*, was indeed applicable to some extent.[35] In April 2004, the Department of Homeland Security (DHS) published a memorandum providing "that in matters relating to an extension of nonimmigrant petition validity involving the same parties (petitioner and beneficiary) and the same underlying facts, a prior determination by an adjudicator that the alien is eligible for the particular nonimmigrant classification sought should be given deference."[36]

On October 23, 2017, DHS rid itself of deference by rescinding the April 23, 2004, memorandum:

> USCIS is rescinding the policy of requiring officers to defer to prior determinations in petitions for extension of nonimmigrant status as articulated in the [April 23, 2004] memoranda. USCIS is also providing updated guidance that is both more consistent with the agency's current priorities and also advances policies that protect the interests of U.S. workers.[37]

Since then, no consistent guidance has been provided. According to immigration practitioners, USCIS sends out template denial letters and

Employer	State	Initial Approvals	Initial Denials	Continuing Approvals	Continuing Denials
GOOGLE LLC	CA	2,111	56	2,570	37
AMAZON.COM SERVICES INC.	WA	1,612	97	3,059	89
TATA CONSULTANCY SVCS LTD	MD	1,367	720	4,050	1,144
FACEBOOK INC.	CA	1,132	27	1,459	22
APPLE INC.	CA	991	21	1,717	13
COGNIZANT TECH SOLNS US CORP.	TX	920	1,360	8,767	2,696
MICROSOFT CORPORATION	WA	917	81	2,333	43
IBM CORPORATION	NC	749	384	473	86
TECH MAHINDRA AMERICAS INC.	NJ	559	505	1,192	259
CAPGEMINI AMERICA INC.	IL	466	579	1,948	521
DELOITTE CONSULTING LLP	PA	455	156	3,175	1,170
LARSEN AND TOUBRO INFOTECH LTD	NJ	437	105	1,310	139
WIPRO LIMITED	NJ	429	489	1,828	426
CISCO SYSTEMS INC.	CA	428	38	1,078	24
INTEL CORPORATION	AZ	388	28	1,507	46
QUALCOMM TECHNOLOGIES INC.	CA	376	19	582	22
ORACLE AMERICA INC.	CA	375	46	1,034	20
DELOITTE CONSULTING LLP	MA	356	597	455	538
ACCENTURE LLP	IL	356	395	1,680	298

Source: United States Citizenship and Immigration Services.

template requests for evidence in nearly all matters, even those that are clearly approvable and supported with significant evidence. Adjudicators are simply told to treat every H-1B nonimmigrant visa petition as if it were the first, and to deny petitions for whatever reason.

Adjudicators are doing just that, and the increase in denials for H-1B nonimmigrant visas for continuing employment is clearly apparent. As noted, during the "first three quarters of FY 2019, USCIS adjudicators denied ... 12% of H-1B petitions for 'continuing' employment."[38] This denial rate is at a historical high, and employers should expect these rates to continue to increase through 2020 and into a possible second term for the Trump administration.

Among those U.S. companies that lost continuing H-1B employees were Google, Amazon, Facebook, IBM, and Cisco.[39]

Cognizant Technical Solutions US Corporation of Texas received 2,696 H-1B nonimmigrant visa denials for continuing employees, with Deloitte losing nearly 1,600 H-1B nonimmigrant visa workers who were already employed.[40]

Immigration practitioners report that denials come in the form of template letters that are often inconsistent with the evidence that was submitted, the responses to requests for additional evidence, and the existence of prior adjudications of the very same occupation; petitioning employer; and foreign-born, long-term H-1B nonimmigrant visa employee.

With an agency appellate process that can take over a year, employers and their foreign employees are left frustrated. The agency appeals, however, are often "rubberstamps" of the underlying decision, as evidenced by the 3 percent Administrative Appeal Office (AAO) reversal rate between fiscal years 2014 and 2017.[41]

Employers Using Federal Courts to Bypass Administrative Appeals

Left with little hope by USCIS or the AAO, more employers are considering or seeking relief from federal district courts, pursuant to the Administrative Procedures Act (APA)[42] and the Mandamus and Venue Act of 1962.[43]

When weighing the costs of litigation and the unreasonability of underlying USCIS decisions and the lengthy time and lack of substance of the AAO appellate process against the real possibility of quick resolution before a fair adjudicator with opposing counsel that actually reviews the entirety of the record, employers are more inclined to seek federal district court action and bypass the AAO. In federal court, there is a stronger likelihood of fulfilling the need for a consistent, nonarbitrary, foreseeable adjudicatory process for essential employees and occupations.

In typical APA agency matters, a plaintiff must exhaust all administrative remedies before seeking judicial review. This is not necessarily the case in employment immigration matters, however. In *Darby v. Cisneros*, 509 U.S. 137, 153-54 (1993), the U.S. Supreme Court mandated exhaustion of administrative remedies prior to judicial review *only* when the underlying statute or regulation requires exhaustion of administrative remedies.[44]

It is fortunate but not widely known that *no* existing statute or regulation mandates an administrative appeal before the AAO as a prerequisite to judicial review. As employers seek other paths of relief, federal judicial intervention is quickly becoming an employer's course of direct appellate review of the arbitrary, inconsistent, and unknowable USCIS adjudication processes.

Given their strict adherence to procedure, practice, and timeliness, together with their ability to facilitate amicable settlements and agreements that are otherwise unavailable in immigration matters, federal district courts provide an opportune venue for immigration practitioners who have become accustomed to long agency delays and federal immigration courts and review boards, such as the BIA, that retain little, if any political independence. ☉

Endnotes

[1]*H-1B Denial Rates: Analysis of H-1B Data for First Three Quarters of FY 2019*, Policy Brief, National Foundation on American Policy (October 2019).

[2]*See id.*; *see also* Executive Order signed by President Trump on 4/18/17, titled "Buy American and Hire American." (82 Fed. Reg. 18837, 4/21/17).

[3]*See supra note* 1.

[4]*See* 8 C.F.R. § 214.2(h)(4)(iii)(A).

[5]American Competitiveness in the 21st century Act, Pub. L. No. 106-311, 114 Stat. 1251, 2000 S. 2045; Pub. L. No. 1-6-311. 114 Stat 1247 (Oct. 17, 2000), 2000 HR5362; 146 Cong. Rec. H 9004-06 (Oct. 5, 2000); 8 U.S.C. § 1184(h).

[6]20 C.F.R. § 655.73(d)(1) – (6).

[7]*See supra* note 5.

[8]*See* 8 U.S.C. § 1184(g)(1)(A)(i).

[9]*Id.* §§ (A)(ii)-(iii).

[10]*Id.* § (A)(iv)-(vi).

[11]*Id.* §(A)(vii).

[12]*See* 8 U.S.C. § 1184(g)(5)(c).

[13]*Id.*

[14]*See* Sarah Pierce and Julia Gelatt, *Evolution of the H-1B: Latest Trends in a Program on a Brink of Reform,* Migration Policy Institute (March 2018).

[15]*Id.*

[16]*Id.*

[17]8 C.F.R. § 214.2(h)(4)(ii).

[18]*Id.* § (h)(4)(iii)(A)(1)-(4).

[19]*See* 8 C.F.R. § 214.2(h)(4)(iii)(C).

[20]H-1B Temporary Specialty Occupations Labor Condition Program–Selected Statistics, FY 2019, United States Department of Labor, https://www.foreignlaborcert.doleta.gov/pd/PerformanceData/2019/H-1B_Selected_Statistics_FY2019_Q4.pdf (last visited Jan. 13, 2020).

[21]*Id.*

[22]*The H-1B Visa Program: A Primer on the Program and Its Impact on Jobs, Wages, and the Economy, American Immigration Council.* American Immigration Council Fact Sheet, 3 (April 2018).

[23]*Id.* at 1.

[24]*Id.* at 4.

[25]*Id.* at 4.

[26]*See* Statement for the Hearing Record before United States Senate Committee on the Judiciary Tuesday, March 17, 2015 Hearing on Immigration Reforms Needed to Protect Skilled American Workers Statement of U.S. Chamber of Commerce, stating that, "Naturally, there is wide agreement that the first focus should be on developing a pipeline of American workers qualified to fill such STEM jobs. But leaving jobs unfilled doesn't help businesses trying to create and retain jobs in the U.S. economy. Labor market experts interpret a job opening of longer than a month as an indicator that

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Immigration Cases Before the U.S. Supreme Court in the October 2019 Term

NICHOLAS J. PERRY

Immigration is a major theme of the U.S. Supreme Court term that began in October 2019 and is scheduled to end in June 2020. While the case related to the Deferred Action for Childhood Arrivals (DACA) program is the most prominent, there are several other immigration law cases that the Court will be considering this term. As of this writing, the Court has accepted certiorari in seven different cases related to immigration law, which is significantly more than in a typical Supreme Court term.

Some of the cases address broad issues, including the relationship between immigration law and the Constitution and other laws (*Kansas v. Garcia*, *United States v. Sineneng-Smith*, *Nasrallah v. Barr*) and whether the decision to terminate the DACA program is legally permissible (*Department of Homeland Security v. Regents of the University of California*). Others relate to nuances of immigration law, such as the "stop time rule" (*Barton v. Barr)*. Five of the seven cases arise from circuit splits between the Ninth Circuit and other courts of appeal. Another theme common to several cases is the availability of judicial review to challenge immigration decisions. The cases are discussed in the order of the Supreme Court oral arguments.

There are two other cases before the Supreme Court—*Hernandez v. Mesa* (No. 17-1678 (U.S.)) and *Liu v. Securities and Exchange Commission* (No. 18-1501 (U.S.))—where the factual backgrounds relate to immigration, but the issues before the Court are not immigration-related. *Hernandez* examines whether the remedies established in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[1] apply when a person in Mexico is shot by a U.S. Border Patrol agent in the United States, allegedly in violation of the Fourth and Fifth Amendments. *Liu* relates to the scope of the SEC's ability to impose equitable remedies for a securities law violation. The violation in *Liu* arose from efforts to fund a project under the "EB-5" Investor Visa Program pursuant to 8 U.S.C. § 1153(b)(5), but the question before the Court is unrelated to the EB-5 program. These two cases are not further discussed here.

Kansas v. Garcia—Does immigration law preempt states from prosecuting persons who use someone else's identity in obtaining work?

Kansas v. Garcia (No. 17-834 (U.S.)) is the only immigration case before the Supreme Court this term that originated in state rather than federal court. This case from the Kansas Supreme Court raises important questions regarding whether federal immigration law restricts a state's ability to prosecute identity theft, even under state criminal statutes.

Three aliens (i.e., as defined in immigration law, individuals who are not citizens or nationals of the United States[2]) were prosecuted in Kansas for using other people's social security numbers in violation of the Kansas identity theft and making-a-false-information statutes.[3] They were initially charged with using the social security numbers on the federal I-9 Form, which all new employees in the United States are required to complete. The form requires employees to indicate whether they are U.S. citizens, noncitizen nationals, lawful permanent resident aliens (LPRs, commonly referred to as having "green cards"), or aliens otherwise eligible to work (e.g., individuals on H-1B visas). Additionally, the I-9 requires employees to provide their social security number. The employer is required to examine documents demonstrating that the employee is eligible to work in the United States.

The criminal charges related to the I-9 Form were dismissed, and the three aliens were ultimately convicted of using the false social security numbers on the K-4 form, a Kansas tax withholding form similar to the federal W-4. The Kansas Supreme Court reversed the convictions for using a false social security number on the Kansas

tax form, holding that the prosecutions were preempted by federal immigration law, specifically 8 U.S.C. § 1324a(b)(5).[4]

Section 1324a of Title 8 of the United States Code was enacted in 1986 as part of the Immigration Reform and Control Act of 1986 (IRCA).[5] IRCA is the law that, among other things, requires all employees in the United States to fill out the I-9 Form. The Kansas Supreme Court's decisions were based on 8 U.S.C. § 1324a(b)(5), which provides that the I-9 Form and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of" immigration law and various federal fraud offenses. The Kansas Supreme Court concluded that this provision expressly prohibits using information from the I-9 Form in these cases, even when the convictions were not based on the I-9 Form itself.[6] Other state appellate courts have rejected similar arguments that § 1324a(b)(5) preempts prosecutions when defendants present false information that also appears on the I-9 Form.[7]

Before the U.S. Supreme Court, the state of Kansas argued that the text of § 1324a(b)(5) does not explicitly or implicitly restrict the prosecutions because the prosecutions were based on forms other than the I-9 Form. Specifically, in its opening merits brief to the Court, the state asserted that "The plain text of 8 U.S.C. § 1324a(b)(5) does not preempt [the] prosecutions [of the defendant's] for using someone else's social security number on forms other than the I-9."[8] The federal government supported Kansas in an amicus brief and at oral argument. The federal government emphasized that the IRCA provision is limited to immigration issues, stating in the oral argument that "nothing in IRCA diminished the states' long-standing power to prosecute crimes like this one, non-immigration offenses on non-immigration forms submitted for non-immigration purposes."[9] The defendants, in contrast, argued that 1324a prohibited their prosecution because the prosecutions were based on "information contained in" the I-9 Form. Additionally, the defendants argued that the federal law implicitly preempted their prosecutions by establishing a comprehensive framework for the employment of aliens, which the prosecutions here would make irrelevant because the states could rely on tax documents, rather than the I-9 Form, to prosecute every alien who is illegally employed. At the oral argument, some of the Supreme Court justices focused on whether the prosecutions would defeat the purpose of the restrictions in 8 U.S.C. § 1324a(b)(5). Specifically, some justices emphasized that both the I-9 and tax forms were required for employment and, in Justice Ruth Bader Ginsberg's words, were submitted as "one package" for the purpose of obtaining employment, rather than in "discrete episodes."[10] Other justices, however, expressed doubt as to whether there is express or implied preemption in this case. For example, Justice Samuel Alito specifically stated that he did not "see how you get express preemption out of [§ 1324a](b)(5). And I don't know what the conflict is."[11]

(Note: The Supreme Court issued an opinion on March 3, 2020, in favor of the State of Kansas.)

Barton v. Barr—When can an LPR be "rendered inadmissible" under the stop-time rule?

Barton v. Barr (No. 18-725 (U.S.)) relates to the so-called "stop-time" rule for cancellation of removal. Cancellation of removal is a means whereby aliens subject to removal from the United States can lawfully remain in the country if they meet certain statutory requirements. There are two types of cancellation: 8 U.S.C. § 1229b(a) allows LPRs who are subject to removal for certain crimes or other actions (e.g., alien smuggling) to retain their LPR status; and 8 U.S.C. § 1229b(b) allows aliens who are not LPRs to become LPRs. The stop-time rule applies to aspects of both forms of cancellation of removal. The *Barton* case specifically relates to cancellation for those who are already LPRs. The Court decided a separate case, *Pereira v. Sessions*, two terms ago that addressed a different aspect of the stop-time rule for non-LPRs.[12]

The cancellation of removal statute for LPRs requires aliens to have "resided in the United States continuously for 7 years after having been admitted in any status."[13] However, under the stop-time rule set forth in this statute:

> any period of continuous residence or continuous physical presence in the United States shall be deemed to end ... when the alien has committed an offense referred to in section 1182(a)(2) of this title that **renders the alien inadmissible** to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title.[14]

Andre Martello Barton is a citizen of Haiti who was admitted to the United States as a visitor in 1989. He has been an LPR since 1992. He committed and was subsequently convicted of aggravated assault, criminal damage to property, and possession of a firearm during the commission of a felony. These offenses were committed within seven years of his admission to the United States. Later, he was convicted of various controlled substance offenses and placed in removal proceedings.

More than any immigration case before the Supreme Court this term, *Barton* gets into tricky nuances of immigration law. During the oral argument on Nov. 4, 2019, Justice Stephen Breyer said that "this statute is as obscure as any I've seen," and Justice Elena Kagan described it as "a puzzle."[15] Part of the complexity arises because the grounds upon which aliens are subject to removal from the United States are themselves divided into two categories: grounds of inadmissibility and grounds of deportability (sometimes confusingly referred to removability).[16] The inadmissibility grounds at § 1182(a) are used to place in removal proceedings individuals who either (1) are seeking to enter the United States but have not been admitted, or (2) entered the country illegally.[17] The deportability grounds at § 1227(a), in contrast, are the removal charges for aliens who (1) have already been admitted to the country after being inspected or (2) have obtained certain immigration statuses in the United States (e.g., LRP status, asylum), regardless of how they physically entered. Various immigration benefits also are barred to those who are subject to some grounds of inadmissibility, such as adjustment of status to LPR status in the United States and temporary protected status (TPS) for citizens of countries experiencing war and natural disasters.[18]

The issue before the Supreme Court is whether Barton can be "rendered inadmissible" based on the crimes and thus ineligible for cancellation of removal if he is not seeking admission. In other words, can he be "rendered inadmissible" if he is not subject to an admissibility determination outside of this statutory provision? The courts of appeal are divided on the issue, with the Second, Fifth, and, in the decision below in this case, Eleventh Circuits, holding that aliens are "rendered inadmissible" for purposes of the stop-time rule so long as they have committed one of the offenses listed in § 1182(a), regardless of whether they are seeking admission.[19] The Ninth Circuit, however, has taken a different view, holding that "a

lawful permanent resident cannot be 'rendered inadmissible' unless he is seeking admission."[20]

Barton argued before the Supreme Court that the plain meaning of the text is that an offense "renders the alien inadmissible" only if the offense actually triggers an adjudication of inadmissibility during the alien's removal proceeding. Under this reading, Barton's offense did not stop time for him because he was already admitted. On the other hand, the government argued in its merits brief to the Supreme Court that it was "immaterial that petitioner was not seeking admission to the United States when he was placed in removal proceedings," because neither the stop-time rule nor 8 U.S.C. § 1182(a) is limited to those seeking admission.[21] The government also pointed out the various other places where immigration law refers to someone being "admissible" or inadmissible outside of removal proceedings based on grounds of inadmissibility.[22] Barton asserted in the oral argument that these other instances where inadmissibility applies involve "constructive admission" and thus are distinguishable from the stop-time rule.[23] The government, however, countered that the "stop-time rule ties the operation of the rule to an alien's status as inadmissible, independent of whether he is seeking admission or not."[24]

(Note: The Supreme Court ruled in the government's behalf on April 23, 2020.)

Department of Homeland Security v. Regents of the University of California—Can the Trump administration lawfully terminate DACA?

Department of Homeland Security v. Regents of the University of California (No. 18-587 (U.S.)) involves challenges to the legality of the Trump administration's decision to rescind the Deferred Action for Childhood Arrivals (DACA) program. The *Regents* case, which is combined with two other appeals from lower court decisions—*Trump v. NAACP* (No. 18-588 (U.S.)) and *McAleenan v. Vidal* (No. 18-589 (U.S.))—is the most high-profile and potentially impactful immigration case before the Court, and among the most anticipated cases this term.

DACA was established in 2012 by a memorandum from then-Secretary of Homeland Security Janet Napolitano. (DACA is often incorrectly described as having been created by an executive order; however, while it involved an executive action and was announced by the White House, DACA did not involve an executive order.) Under DACA, the Department of Homeland Security provides "deferred action" to certain aliens who arrived in the United States as children. Deferred action is a practice whereby DHS notifies aliens that the agency is not presently seeking their removal from the United States. DACA recipients who met certain requirements and passed background checks were granted deferred action for two years and were also granted employment authorization. Nearly 700,000 aliens have been granted deferred action under DACA since 2012. DACA recipients are frequently referred to as "DREAMers" or "dreamers." This phrase was initially based on the Development, Relief, and Education for Alien Minors (DREAM) act, which would have provided lawful immigration status to a group of aliens like those covered by DACA. Versions of the DREAM Act have been introduced multiple times, but none has yet been enacted.[25]

In 2016, the Obama administration sought to expand DACA and create a similar program for parents whose children are U.S. citizens or LPRs, referred to as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). Texas and 25 other states sued to enjoin DAPA and the DACA expansion. As a result of that suit, the Southern District of Texas enjoined DAPA and the DACA expansion.[26] The Fifth Circuit Court of Appeals affirmed the injunction, and the Supreme Court affirmed by an equally divided vote.[27] Key to the Fifth Circuit's decision was its conclusion that DAPA was "manifestly contrary to the statute" since immigration law "does not grant the Secretary [of Homeland Security] discretion to grant deferred action and lawful presence on a class-wide basis to 4.3 million otherwise removable aliens."[28]

Texas and other states involved in the DAPA litigation announced in 2017 their intention to challenge DACA in court on similar grounds if the program was not rescinded. Subsequently, DHS announced on Sept. 5, 2017, that it was rescinding DACA. Its decision was based on a letter from then-Attorney General Jeff Sessions stating that DACA was initiated "without proper statutory authority" and was likely to be struck down because it "has the same legal and constitutional defects that the courts recognized as to DAPA."[29] Numerous lawsuits were filed seeking to enjoin the rescission of DACA, and several courts issued injunctions staying the DHS action, including the three before the Supreme Court.[30] The courts found that the DHS decision to rescind DACA was based on Attorney General Sessions' determination that the program was unlawful and that the legal reasoning was incorrect (i.e., DACA was lawful) or had not been sufficiently justified. Because the lower courts viewed this reasoning as incorrect or likely to be found incorrect, they concluded that the rescission decision was, or was likely to be found to be, arbitrary and capricious under the Administrative Procedure Act (APA). One of the courts, however, permitted DHS to "reissue a memorandum rescinding DACA, this time providing a fuller explanation."[31] In response to this invitation, then-Secretary of Homeland Security Kirstjen Nielsen issued a memorandum on June 22, 2018, further explaining the decision to rescind DACA, including a policy rationale for the decision, as well as offering a more detailed legal justification.[32]

DHS argued in its briefs to the Supreme Court in the combined cases that the decision to wind down DACA is not subject to judicial review and, even if it were, it was a lawful decision. Specifically, DHS argued that the decision to rescind DACA, both initially and as explained in Secretary Nielsen's 2018 memorandum, was a discretionary decision and, thus, immune from judicial review under the APA. Further, DHS argued that, even if the rescission decision were reviewable, the reasons the Department provided for the rescission are sufficient. Or, as DHS put it in its opening merits brief, "the APA does not require DHS to retain a discretionary policy that the [Immigration and Nationality Act] at most barely permits and likely forbids."[33]

The challengers to the DACA rescission, on the other hand, argued that the APA exception to reviewing discretionary determinations does not apply because the DHS decision to rescind was based on a legal conclusion, not an act of discretion. As one of the challengers, the Regents of the University of California maintained in its merits brief, "when an agency concludes that an action is prohibited by law, it is not exercising discretion." The challengers also asserted that the Nielsen memorandum explicitly providing a policy basis for the rescission was an "impermissibly post hoc" justification that does not make the determination discretionary. Further, the challengers maintained that the rescission decision was arbitrary and capricious under the APA because it was based on incorrect legal reasoning

and "failed to demonstrate that it gave adequate consideration to the welfare of the individuals affected by the decision or the reliance of DACA participants on the policy."[34]

The government was pressed at oral argument on Nov. 12, 2019, on whether DHS had properly considered the reliance interests of DACA recipients. In response, the government maintained that any reliance interest was "extremely limited" in light of the announced stop-gap nature of DACA, and that DHS did consider these limited reliance interests. Some justices, nonetheless, questioned whether sufficient consideration was given to the reliance interests, with Justice Sonia Sotomayor expressly stating that "there's a whole lot of reliance interests that weren't looked at." On the other hand, the justices' questions for the challengers focused more on the reviewability of the rescission decision than on its legality. Specifically, the challengers were pressed on how courts are to determine which prosecutorial discretion decisions are judicially reviewable, with Justice Neil Gorsuch telling counsel for the individual challengers that he was "still struggling with this line that you're asking us to draw."[35]

Throughout the oral arguments, the justices displayed an awareness that the Court's decision would affect hundreds of thousands of DACA recipients. For example, Justice Gorsuch noted "I hear a lot of facts, sympathetic facts, you put out there, and – and they speak to all of us," while Justice Sotomayor emphasized "That this is not about the law; this is about our choice to destroy lives."[36]

Guerrero-Lasprilla v. Barr—Is a lack of due diligence subject to judicial review as a question of law?

Guerrero-Lasprilla v. Barr (No. 18-776 (U.S.)), which is combined with *Ovalles v. Barr* (No. 18-1015 (U.S.)), concerns whether the limitation on judicial review of removal orders involving criminal aliens extends to findings that aliens failed to exercise due diligence in pursuing reopening of their removal orders. Congress has restricted judicial review of removal orders against aliens convicted of certain criminal offenses, but nonetheless permits "review of constitutional claims or questions of law" filed with the courts of appeal in challenges to removal orders.[37] The courts of appeal have reached conflicting conclusions as to whether a finding that an alien failed to exercise due diligence in seeking to reopen can be considered in light of this restriction on judicial review. *Guerrero-Lasprilla* is one of two cases this term concerning the judicial review provision at 8 U.S.C. § 1252(a)(2)(C).

Both Pedro Pablo Guerrero-Lasprilla and Reuben Ovalles had been LPRs who were ordered removed due to criminal convictions. They both filed untimely motions to reopen based on changes in law. Motions to reopen removal proceedings generally must be filed within 90 days after the order is entered (with certain exceptions), but that time period can be equitably tolled.[38]

The Board of Immigration Appeals (BIA), the administrative appellate body over removal hearings, denied the Guerrero-Lasprilla and Ovalles motions as untimely and found that equitable tolling did not apply because the aliens failed to display due diligence in pursuing reopening. The aliens sought review of the BIA's conclusions before the Fifth Circuit. The Fifth Circuit held that it lacked jurisdiction to review the BIA's determination due to the restriction on judicial review of removal orders of aliens convicted of certain crimes. The Fifth Circuit further concluded that it lacked jurisdiction to review the BIA's determination that due diligence was lacking because "[w]hether an alien acted diligently in attempting to reopen removal proceedings for purposes of equitable tolling is a factual question" and, thus, outside of the exception permitting review of questions of law pursuant to 8 U.S.C. § 1252(a)(2)(D).[39] The Fifth Circuit's conclusion that whether an alien exercised due diligence in pursuing reopening is not a question of law for purposes of 1252(a)(2)(D) conflicts with the Ninth Circuit, which has permitted review of this question as a mixed matter of law and fact.[40]

In their opening merits brief to the Supreme Court, Guerrero-Lasprilla and Ovalles argued that the statute permits review in their cases because "The phrase 'questions of law' encompasses the application of law to fact."[41] In their view, allowing judicial review would also be consistent with the "strong presumption that Congress intends judicial review of administrative action," as well as with Congress's intent to expand judicial review when it enacted the exception permitting review of legal and constitutional questions.[42] The government, in contrast, argued in its brief that the "phrase 'questions of law' in Section 1252(a)(2)(D) encompasses questions of law only," and "not questions of fact or mixed questions of law and fact."[43] According to the government, "Congress enacted Section 1252(a)(2)(D) against the background of a well-established understanding that questions of law are distinct from those other two types of questions."[44]

(Note: The Supreme Court issued an opinion on March 23, 2020, in favor of Guerrero-Lasprilla.)

United States v. Sineneng-Smith—When is encouraging an alien to illegally remain in the United States protected speech?

United States v. Sineneng-Smith (No. 19-67 (U.S.)) involves the intersection of immigration law and the First Amendment, specifically whether the federal criminal prohibition upon encouraging or inducing illegal immigration for commercial advantage impermissibly restricts freedom of speech.[45]

Evelyn Sineneng-Smith, a U.S. citizen, operated an immigration consulting business. She was criminally convicted of encouraging or inducing illegal immigration. According to the Ninth Circuit's opinion in the case, she assisted aliens unlawfully in the United States to obtain a "labor certification" under a program that expired in 2001, namely the 245(i) program codified at the former 8 U.S.C. § 1255(i). At the time she did so, she knew the program had expired, but she nonetheless accepted fees to assist clients. Among other things, she was convicted of two counts of encouraging or inducing illegal immigration for financial gain in violation of 8 U.S.C. § 1324(a)(1)(A)(iv) and (a)(1)(B)(i). Section 1324(a)(1)(A)(iv) makes it criminal for a person to "encourage[] or induce[] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." Section 1324(a)(1)(B)(i) prescribes the penalty when such action is "done for the purpose of commercial advantage or private financial gain."

The Ninth Circuit reversed, holding that 8 U.S.C. § 1324(a)(1)(A)(iv) is facially invalid under the First Amendment because it "restricts a substantial amount of protected speech in relation to the narrow band of conduct and unprotected expression that the statute legitimately prohibits." Specifically, the Ninth Circuit concluded that, "[a]lthough the 'encourage or induce' prong in Subsection (iv) may capture some conduct, there is no way to get around the fact that the terms also plainly refer to First Amendment-protected expression." In so holding, the Ninth Circuit is in conflict with the Third Circuit,

which had previously ruled in a different context that § 1324(a)(1)(A)(iv) does not apply to "general advice," but instead requires "some affirmative assistance that makes an alien lacking lawful immigration status more likely to enter or remain in the United States than she otherwise might have been."[46]

The U.S. government sought certiorari, arguing, among other points, that "Section 1324(a)(1)(A)(iv)—and in particular the financial-gain offense with higher penalties—is an important tool for combating alien smuggling and other similar conduct that knowingly causes or significantly contributes to individual aliens violating the immigration laws."[47] In contrast, Sineneng-Smith argued in opposition, "The government has many statutory tools to combat illegal immigration," and the Ninth Circuit's decision is correct.[48] The Supreme Court granted certiorari on Oct. 4, 2019. The decision could be especially important to attorneys because it relates to giving advice on a legal matter. Some commentators have expressed concern that a broad reading of the provision could result in attorneys being afraid to give legal advice.[49]

(Note: The Supreme Court remanded the case on May 7, 2020.)

Nasrallah v. Barr—Is likelihood of torture subject to judicial review as a question of law?

Nasrallah v. Barr (No. 18-1432 (U.S.)), like *Guerrero-Lasprilla v. Barr*, relates to the limitation on judicial review of removal orders entered against aliens convicted of certain crimes codified in 8 U.S.C. § 1252(a)(2)(C). Unlike *Guerrero-Lasprilla*, however, *Nasrallah* concerns the relationship between that section and the federal government's obligation not to remove aliens to a country where they are likely to be tortured pursuant to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (commonly referred to as the Convention Against Torture or CAT).[50]

Nadal Nasrallah is a citizen of Lebanon who entered the United States in 2006 and became a lawful permanent resident in 2007. He was convicted of two counts of receiving stolen merchandise, which subjected him to removal as an alien convicted of a crime involving moral turpitude. In removal proceedings, Nasrallah sought, among other things, deferral of removal pursuant to CAT. Deferral of removal protects aliens from being removed to a country where they are likely to be tortured, but this finding of likelihood of torture can be reconsidered if country conditions change. The immigration judge (IJ, the trial-level adjudicator) granted deferral of removal, but the BIA reversed, finding that Nasrallah had not shown that it was likely that he would be tortured.

Nasrallah appealed to the Eleventh Circuit Court of Appeals, which held that it could not review the BIA's conclusion that he was not likely to be tortured.[51] As explained above in the discussion of *Guerrero-Lasprilla*, Congress limited judicial review of removal orders against aliens convicted of certain crimes but created an exception for "review of constitutional claims or questions of law." The Eleventh Circuit concluded that the bar for aliens convicted of crimes at 8 U.S.C. § 1252(a)(2)(C) applied to Nasrallah's convictions because a "determination about the likelihood of future harm ... is a finding of fact, not a question of law," and therefore the exception for review of legal and constitutional questions at 8 U.S.C. § 1252(a)(2)(D) does not apply.

Other courts of appeal have ruled, as the Eleventh Circuit did here, that § 1252(a)(2)(D) bars judicial review of the agency's findings regarding the likelihood of torture.[52] However, the Ninth Circuit has found that, because CAT deferral is available to all aliens, regardless of whether they have a criminal history, the denial of CAT deferral is a decision "on the merits" of the CAT claim, and not a decision "on the basis of [a criminal] conviction" as specified in Section 1252(a)(2)(C).[53] The Seventh Circuit has reached a conclusion consistent with the Ninth Circuit, but on different grounds. According to the Seventh Circuit, deferral of removal should not be considered a final order of removal because "it can be revisited if circumstances change," and, thus, the limitations on judicial review of final order of removal at 1152(a)(2)(C) and (D) do not apply.[54]

In seeking certiorari, Nasrallah argued that the approach taken by the Ninth Circuit is correct and, alternatively, that the Seventh Circuit's holding is correct. The government, in contrast, argued in opposition to certiorari that the correct interpretation is that taken by the majority of circuit courts. Much of the government's brief, however, was devoted to why this was an inappropriate case for the Supreme Court to take to resolve the circuit split.

(Note: As of the time of the original writing of this article, the parties had not filed their merits briefs giving a fuller explanation of their views. Since that time, the Supreme Court issued an opinion on June 1, 2020, in favor of Nasrallah.)

Department of Homeland Security v. Thuraissigiam—Are the jurisdictional review limitations on expedited removal permitted by the Suspension Clause?

In *Department of Homeland Security v. Thuraissigiam* (No. 19-161 (U.S.)), the Supreme Court will review whether the statutory limitations on judicial review of expedited removal orders are unconstitutional under the Constitution's Suspension Clause. The Suspension Clause provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[55] In 1996, Congress created the expedited removal (ER) process at 8 U.S.C. § 1225(b)(1). Under ER, an alien who entered the country illegally and is stopped near the border, or who is found to lack appropriate documents (such as a valid visa) or to be engaged in fraud while seeking entry, can be ordered removed without a hearing in front of an IJ. Rather, a DHS officer with either U.S. Immigration and Customs Enforcement (ICE) or U.S. Customs and Border Protection (CBP) issues the order, which is to be reviewed by a supervisor. If the alien expresses a fear of persecution or torture if removed, or expresses an intention to apply for asylum, the alien is interviewed by an asylum officer with U.S. Citizenship and Immigration Services (USCIS). The asylum officer determines whether the alien has a "credible fear" of persecution or torture. Credible fear is defined as "a significant possibility ... that the alien could establish eligibility for asylum."[56] If the asylum officer finds there is a credible fear, then the alien is placed in removal proceedings before an IJ. If, however, the alien is found not to have a credible fear, and a supervisory asylum officer concurs, then the alien can seek a *de novo* review of that determination by an IJ. If the IJ also finds there is not a credible fear, then DHS can remove the alien. Congress has expressly limited judicial review of ER determinations, including by prescribing, "There shall be no review of whether the alien is ... entitled to any relief from removal."[57]

Vijayakumar Thuraissigiam is a citizen of Sri Lanka. He was arrested just inside the United States border with Mexico and was placed in ER proceedings. After he indicated a fear of persecution,

he was interviewed by an asylum officer who determined he had not established that he had a credible fear, and an IJ concurred in this assessment. Thuraissigiam then sought judicial review in habeas corpus proceedings. The district court dismissed his petition, finding that it lacked jurisdiction pursuant to § 1252(e)(5).[58]

The Ninth Circuit reversed, holding that the limitations on review of habeas proceedings in 8 U.S.C. § 1252(e) were unconstitutional as applied to Thuraissigiam under the Constitution's Suspension Clause.[59] In reaching its conclusion, the Ninth Circuit relied upon *Boumediene v. Bush*, the Supreme Court case that recognized that those subject to law-of-war detention by the U.S. military at Guantanamo Bay are entitled to habeas proceeding.[60] Specifically, the Ninth Circuit applied what it described as the "analytical template" from *Boumediene* to determine whether the Suspension Clause applies and, if so, whether the procedure provided to the detainee afforded meaningful procedure. Based on its application of this template, the Ninth Circuit concluded that the Suspension Clause applied, and the ER procedures were insufficient. The Ninth Circuit's decision conflicts with a decision of the Third Circuit, which rejected a similar argument.[61]

In its petition for certiorari, the government asserted that the Ninth Circuit decision is incorrect. Among other things, the government claimed that the Suspension Clause does not apply to Thuraissigiam because as "'an alien seeking initial admission to the United States' [he] has 'no constitutional rights regarding his application.'" Additionally, DHS argued that the process provided was sufficient. DHS also sought to distinguish *Boumediene* on the grounds that "[T]he challengers [in *Boumediene*] sought to be released from the government's custody so they could return home or to another country .... By contrast, [Thuraissigiam] is free to be returned to his home country: He would be removed to and released in Sri Lanka forthwith absent his habeas petition here."[62]

Thuraissigiam, in contrast, asserted that the cases upon which the government relies relate to due process rather than the Suspension Clause. Additionally, Thuraissigiam maintained that since he had physically entered the country, even if unlawfully and briefly, before being placed in ER proceedings, he obtained constitutional protections pursuant to, among other cases, *Mathews v. Diaz*.[63] Thuraissigiam further argued that the process provided in ER cases is insufficient.[64] ⊙

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Endnotes

[1]403 U.S. 388 (1971).
[2]8 U.S.C. § 1001(a)(3).
[3]Kan. Stat. Ann. §§ 21-6107; 21-3711.
[4]*State v. Garcia*, 401 P.3d 588 (Kan. 2017); *accord State v. Morales*, 401 P.3d 155 (Kan. 2017); *State v. Ochoa-Lara*, 401 P.3d 159 (Kan. 2017).
[5]Pub. L. No. 99-603, § 101, 100 Stat. 3359, 3360 (1986).
[6]*Garcia*, 401 P.3d 588.
[7]*See State v. Diaz-Rey*, 397 S.W.3d 5 (Mo. App. 2013); *State v. Reynua*, 807 N.W.2d 473 (Minn. App. 2011).
[8]Brief for the Petitioner at 22, *Kansas v. Garcia,* No. 17-834 (U.S. May 24, 2019), 2019 WL 2296765, *22, https://www.supremecourt.gov/DocketPDF/17/17-834/100945/20190524121326560_17-834%20ts--PDFA.pdf.
[9]Transcript of Oral Argument at 22, *Kansas v. Garcia,* No. 17-834 (U.S. Oct. 16, 2019), 2019 WL 5212703, *22-*23, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/17-834_jifl.pdf.
[10]*Id.* at 7.
[11]*Id.* at 52.
[12]138 S. Ct. 2105 (2018).
[13]8 U.S.C. § 1229b(a)(2).
[14]8 U.S.C. § 1229b(d)(1) (emphasis added).
[15]Transcript of Oral Argument at 38 & 28, *Barton v. Barr,* 140 S. Ct. 1442 (Apr. 23, 2020), 2019 WL 5696911, *28 & *38, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-725_g314.pdf.
[16]*See* 8 U.S.C. §§ 1182(a) (inadmissibility); 1227(a) (deportability).
[17]*See generally Matter of D-K-*, 25 I. & N. Dec. 761 (BIA 2012).
[18]*See* 8 U.S.C. §§ 1255(a)(2) (adjustment of status); 1254a(c)(1)(A)(iii) (TPS).
[19]*See, e.g., Heredia v. Sessions*, 865 F.3d 60, 68 (2d Cir. 2017); *Calix v. Lynch*, 784 F.3d 1000, 1012 (5th Cir. 2015); *Barton v. U.S. Attorney General*, 904 F.3d 1294 (11th Cir. 2018).
[20]*Nguyen v. Sessions*, 901 F.3d 1093, 1100 (9th Cir. 2018).
[21]Brief for the Respondent at 11, *Barton v. Barr*, No. 18-75, 2020 WL 1941965 (U.S. Apr. 23, 2020), 2019 WL 3987631, https://www.supremecourt.gov/DocketPDF/18/18-725/112547/20190815200606622_18-725bsUnitedStates.pdf.
[22]*Id.* at 17-19.
[23]Transcript of Oral Argument at 11, *Barton v. Barr*, No. 18-75, 2020 WL 1941965 (U.S. Apr. 23, 2020), 2019 WL 5696911, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-725_g314.pdf.
[24]*Id.* at 35.
[25]*See, e.g.,* S. 3827, 111th Cong., 2d Sess. (2010).
[26]*Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015).
[27]*Texas v. United States*, 809 F.3d 134 (5th Cir. 2015); *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016) (per curiam).
[28]809 F.3d at 186 & n.202.
[29]https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf.
[30]*Regents of the Univ. of Cal. v. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018); *NAACP v. Trump*, 315 F. Supp. 3d 457 (D.D.C. 2018).
[31]*NAACP v. Trump*, 298 F. Supp. 3d 209 (D.D.C. 2018).
[32]After consideration of the Nielsen memorandum, the D.C. District still found that the DACA rescission was arbitrary and capricious. *NAACP v. Trump*, 315 F. Supp. 3d 457 (D.D.C. 2018).
[33]Brief for the Petitioners at 16, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.,* Nos. 18-587, 18-588, and 18-589, 2019 WL 394 2900 (U.S. Aug. 19, 2019), https://www.supremecourt.gov/DocketPDF/18/18-587/112855/20190819213105900_18-587tsUnitedStates.pdf.
[34]Brief for the Respondents Regents of Univ. of Cal. at 14-16, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.,* Nos. 18-587, 18-588, and 18-589, 2019 WL 4858288 (U.S. Sept. 27, 2019), https://www.supremecourt.gov/DocketPDF/18/18-587/117328/20190927151220415_18-587%20Regents%20Brief%20for%20Respondents.pdf.

[35]Transcript of Oral Argument at 23, 30, & 77, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.,* Nos. 18-587, 18-588, and 18-589 (U.S. Nov. 12, 2019), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-587_1bn2.pdf.
[36]*Id.* 31 & 51.
[37]8 U.S.C. §§ 1252(a)(2)(C) & (D).
[38]8 U.S.C. § 1229a(c)(7)(C)(i); *see, e.g., Lugo-Resendez v. Lynch,* 831 F.3d 337, 343-44 (5th Cir. 2016).
[39]*Ovalles v. Sessions,* 741 Fed. App'x 259 (5th Cir. 2018); a*ccord Guerrero-Lasprilla v. Sessions,* 737 App'x 230 (5th Cir. 2018).
[40]*See Ghahremani v. Gonzales,* 498 F. 3d 993, 999 (9th Cir. 2007).
[41]Brief for the Petitioners at 16, *Guerrero-Lasprilla v. Barr,* 140 S. CR. 1062 (2020) (Nos. 18-776 & 18-1015), 2019 WL 4192300, at *16, https://www.supremecourt.gov/DocketPDF/18/18-776/114174/20190829181408049_18-776.18-1015.ts.brief.pdf.
[42]*Id.* at 44 & 32 (internal quotation and citation omitted).
[43]Brief for the Respondent at 15, *Guerrero-Lasprilla v. Barr,* 140 S. CR. 1062 (2020) (Nos. 18-776 & 18-1015), 2019 WL 5420122, at *15, https://www.supremecourt.gov/DocketPDF/18/18-776/119722/20191021192731736_18-77618-1015bsUnitedStates.pdf.
[44]*Id.*
[45]*See* 8 U.S.C. § 1324(a)(1)(A)(iv) and (B)(i).
[46]*DelRioMocci v. Connolly Props. Inc.,* 672 F.3d 241 (3d Cir. 2012).
[47]Petition for Certiorari at 25, *United States v. Sineneng-Smith,* No. 19-67, 2019 WL 3074568, at *25 (U.S. July 12, 2019), https://www.supremecourt.gov/DocketPDF/19/19-67/107895/20190712102938819_United%20States%20v.%20Sineneng-Smith%20-%20Pet.pdf.
[48]Brief in Opposition to Petition for Certiorari at 1, *United States v. Sineneng-Smith,* No. 19-67, 2019 WL 4131228 (U.S. Aug. 28, 2019), https://www.supremecourt.gov/DocketPDF/19/19-67/113992/20190828161419073_19-67%20brief%20in%20opposition.pdf.
[49]*See* Lorelei Laird, *The Supreme Court May Criminalize Immigrant Advocacy,* Slate.com (Nov. 18, 2019), https://slate.com/news-and-politics/2019/11/supreme-court-criminalize-immigration-advocacy-sineneng-smith.html.
[50]*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment,* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.
[51]762 App'x 638 (11th Cir. 2019).
[52]*See, e.g., Ventura-Reyes v. Lynch,* 797 F.3d 348, 356-58 (6th Cir. 2015); *Ortiz-Franco v. Holder,* 782 F.3d 81, 88-91 (2d Cir. 2015).
[53]*Lemus-Galvan v. Mukasey,* 518 F.3d 1081, 1083 (9th Cir. 2008).
[54]*Wanjiru v. Holder,* 705 F.3d 258, 264 (7th Cir. 2013).
[55]U.S. Const. art. I, § 9, cl. 2.
[56]8 U.S.C. § 1225(b)(1)(B)(v).
[57]8 U.S.C. § 1252(e)(5).
[58]287 F. Supp. 3d 1077 (S.D. Cal. 2018).
[59]*Thuraissigiam v. U.S. Dep't of Homeland Sec.,* 917 F.3d 1097 (9th Cir. 2019).
[60]553 U.S. 723 (2008).
[61]*See Castro v. U.S. Dep't of Homeland Sec.,* 835 F.3d 422 (2016).
[62]Petition for Certiorari at 25-26, *Dep't of Homeland Security v. Thursaissigiam,* No. 19-161, 2019 WL 35456 at 26 (U.S. Aug. 5, 2019), https://www.supremecourt.gov/DocketPDF/19/19-161/111120/20190802171149570_DHS%20v.%20Thuraissigiam%20-%20Pet.pdf, 25 Id. at 26.
[63]426 U.S. 67, 77 (1976).
[64]Brief in Opposition to Petition for Certiorari, *Dep't of Homeland Security v. Thursaissigiam,* No. 19-161, 2019 WL 4273840 (U.S. Sept. 4, 2019), https://www.supremecourt.gov/DocketPDF/19/19-161/111120/20190802171149570_DHS%20v.%20Thuraissigiam%20-%20Pet.pdf.

Arbitrary H-1B Nonimmigrant Visa Denials *continued from page 55*

qualified candidates are hard to find. Such an interpretation of vacancy survey data is empirically grounded in both historical and many contemporary labor market surveys from private firms and state governments. In fact, in 2013 researchers found that H-1B occupations in STEM fields are particularly difficult to fill: 43 percent of new vacancies for STEM occupations with H-1B requests go unfilled after a month."
[27]*Id.* (*citing* Frederick R. Treyz, Corey Stottlemyer, and Rod Motamedi, *Key Components of Immigration Reform: An Analysis of the Economic Effects*, Regional Economic Models, Inc. (July 2013)).
[28]*See supra* note 1 .
[29]*Id.*
[30]*Id.*
[31]*Id.*
[32]*Id.*
[33]*Id.*
[34]*Id.*
[35]PM-602-0151: *Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status, rescinding memorandum titled, The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity,* DHS issued on Apr. 23, 2004.
[36]*The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity,* DHS, HQOPRD 72/11.3 (Apr. 23, 2004).
[37]*See supra* note 40
[38]*See supra* note 1.
[39]USCIS H-1B Employer Data Hub, https://www.uscis.gov/h-1b-data-hub (last accessed January 12, 2020).
[40]*Id.*
[41]AAO Appeal Adjudications FY 2014 – FY 2018, Administrative Appeals Office, https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Directorates%20and%20Program%20Offices/AAO/USCIS_and_AAO_Data_for_Publishing_Thru_FY18.pdf (last accessed January 13, 2020).
[42]5 U.S.C. § 702.
[43]28 U.S.C. § 1361
[44]*Darby v. Cisneros*, 509 U.S. 137, 153-54 (1993).

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Romag Fasteners Inc. v. Fossil Inc. (No. 18-1233)

Oral argument: Jan. 14, 2020
Court below: *U.S. Court of Appeals for the Federal Circuit*

Question as Framed for the Court by the Parties

Whether, under Section 35 of the Lanham Act, 15 U.S.C. § 1117(a), willful infringement is a prerequisite for an award of an infringer's profits for a violation of Section 43(a), 15 U.S.C. § 1125(a).

Facts

In 2002, Fossil, Inc., a company that designs and sells handbags, entered into a trade agreement with Romag, a company that has trademarked and patented magnetic snap fasteners used in handbags. As part of the trade agreement, Fossil agreed to exclusively use ROMAG fasteners in Fossil products. To make its products, Fossil contracts with manufacturers and it instructs them to purchase ROMAG fasteners from a Romag manufacturer when necessary. Between November 2008 and November 2010, one Fossil manufacturer purchased significantly fewer fasteners than it had in prior years. In May 2010, Romag's president and founder first suspected that this Fossil manufacturer was using counterfeit ROMAG fasteners. This allegation was not fully investigated and confirmed until November 2010.

After this discovery in 2010, Romag sued Fossil in the United States District Court for the District of Connecticut (the District Court) under § 1117(a) of the Lanham Act. Romag alleged that Fossil and multiple retailers who sold Fossil products used counterfeit ROMAG fasteners and thus violated Romag's patent and committed trademark infringement. Romag also asked for a temporary restraining order (TRO) and a preliminary injunction to stop the Fossil manufacturer from using the counterfeit fasteners. The District Court granted the TRO, and Fossil removed the affected products from inventory and kept them from being sold to customers.

In April 2014, the jury found Fossil liable for patent and trademark infringement. It determined that, although Fossil had acted with "callous disregard," it did not willfully infringe on the trademark. The jury then awarded Romag $51,052.14 for the patent infringement claim. For the trademark infringement claim, the jury suggested awarding Fossil's profits to Romag under two theories: first, the jury suggested $90,759.36 in damages under an unjust enrichment theory which intended to take away any gain Fossil had unfairly obtained, and second, it advised an award of $6,704,046.00 under a deterrence theory intending to prevent Fossil from engaging in similar behavior in the future.

The District Court then held a bench trial regarding defenses and adjustments to the jury's award. During this trial, it was determined that Romag had delayed in bringing their suit for months—waiting to bring it just before Black Friday—thereby hoping to obtain a higher award. Therefore, the District Court reduced Romag's award by 18% under an equitable doctrine known as laches, where a party who waits too long to bring a lawsuit will be barred from recovery. The District Court also determined that the jury's finding that the trademark infringement was not willful meant Romag could not be awarded Fossil's profits.

Romag appealed the District Court's rejection of the jury's profit award to the U.S. Court of Appeals for the Federal Circuit (the Federal Circuit). In 2016, the Federal Circuit upheld the District Court's ruling. Romag petitioned the Supreme Court for a *writ of certiorari* which the Court granted. The Court then vacated the lower court's judgment and remanded it back to the Federal Circuit for reconsideration in light of a recently decided case—*SCA Hygiene Products Aktiebolag v. First Quality Baby Products*. On remand, the Federal Circuit upheld most of its previous decision but it reversed on the issue of the profit award, stating that because the infringement was not willful, Romag would not receive a profit award. Romag then petitioned for certiorari again in March 2019, which the Court granted in June 2019.

Legal Analysis

Statutory Analysis of Section 1117(A)

Romag argues that the plain text of Section 1117(a) does not require willfulness to receive monetary relief under § 1125(a). Romag explains that § 1117(a)'s plain language only requires a plaintiff to establish "a violation under § 1125(a) or (d)," neither of which require a showing of willfulness to establish a violation. Romag then points to the remainder of § 1117(a) which explicitly requires willfulness by stating "or a *willful violation* under § 1125(c) of this title." He explains that because the second part of § 1117(a) refers to a willful violation, the first clause of § 1117(a), requiring a violation of § 1125(a) or (d), does not require willfulness. Romag also refers to other sections of the Lanham Act, such as § 1118, which differentiate between a "mere violation" and "a willful violation under section 1125(c)."

Fossil counters that the textual analysis of § 1117(a) should incorporate traditional principles of equity that limit monetary relief. Fossil explains that the phrase "principles of equity" in § 1117(a) refers to the established rules of equity jurisprudence. Initially, Fossil asserts, trademark infringement law limited the situations in which a plaintiff could receive monetary relief for a trademark violation by requiring the defendant to willfully infringe on the trademark. Therefore, Fossil contends that the requirement of willfulness

is incorporated into § 1117(a) through its plain text which mandates that the relief be "subject to the principles of equity." Furthermore, Fossil notes that the words "subject to" indicate a limitation, and here relief is limited by the mental state.

Does The Phrase "Principles of Equity" Justify a Willfulness Requirement?

Romag argues that the phrase "principles of equity" does not justify a requirement of willfulness. Romag contends that a willfulness requirement is incompatible with basic equitable principles. Considering the flexibility of equitable principles, Romag argues that § 1117(a)'s "principles of equity" supports a court's discretionary authority to administer monetary awards depending on each case. Romag points out that this Court has recently ruled, in intellectual property cases, that equity is a flexible principle; it rejected any bright-line rules that would restrict courts' discretion. Romag argues that the same principle should be applied to this case by acknowledging courts' equitable discretion to grant awards.

Furthermore, Romag contends that § 1117(a) is not ambiguous and thus the Court should not rely on equitable principles, otherwise it would make the Lanham Act unpredictable. Romag explains that since "principles of equity" does not have an established common-law interpretation, this Court cannot assume that Congress intended for it to apply throughout the Act. Romag continues, arguing that courts declined to make willfulness a prerequisite to a profit award. Even though courts required an establishment of willfulness in cases containing "unfair competition" and "trademark infringement," Romag contends that courts did not consistently make this a requirement. Therefore, Romag asserts that the Court should decline to imply this requirement to § 1117(a).

Fossil counters that traditional principles of equity have established a willfulness requirement for a profits award. Fossil explains that courts have historically required a showing of willful or fraudulent intent, although such a requirement was not always explicitly stated. Fossil contends that other "general principles of equity" have also influenced courts. Fossil explains that courts considered the 1905 Act, a basis for the 1946 Lanham Act, to have integrated the willfulness requirement, and continuously applied the same requirement to the 1946 Lanham Act. Fossil argues that governing treaties of the era also required willfulness. Therefore, Fossil asserts that Congress likely legislated against this backdrop and intended to include principles of equity, such as willfulness, into § 1117(a).

Further, Fossil counters Romag's two premises: (1) that equitable principles grant discretion to courts, and (2) that discretion indicates an absence of clear rules. Fossil argues that although the text refers to a court's discretion to grant monetary relief "subject to the principles of equity," this does not authorize "broad discretion to tailor an award of monetary relief." Fossil acknowledges that § 1117(a)'s reference to equitable principles may involve remedial discretion, but this is balanced against equitable *principles* which are clear standards. For instance, Fossil points to the requirement of willfulness, which under equity, would limit a court's discretion to grant monetary relief.

Discussion

Flexibility For Courts vs. Avenues for Abusive Litigation

The American Bar Association (ABA), in support of Romag, argues that creating a prerequisite of willfulness would artificially constrain courts from exercising their full authority and disallow them from considering other relevant factors when granting awards to plaintiffs. According to the ABA, awarding profits to plaintiffs can serve at least three purposes, and only the third requires willful infringement: (1) an award of profits can be a measure of the plaintiff's damages, (2) it can prevent unjust enrichment of infringers, and (3) it can deter willful infringement. The ABA does not deny that willfulness could be an important factor, only that it should not be a "bright-line" rule. Finally, the ABA argues that this flexibility and discretion allows courts to ensure that no "draconian impacts" are placed on defendants, and that the flexibility allows for fairness to be maintained. The ABA explains that courts are allowed to adjust awards they find excessive and consider numerous factors when they enter a final judgment for damages—the same discretion available to them in determining awards to be excessive should be available to them in determining whether a profits award is appropriate.

A group of intellectual property law professors (law professors), in support of Fossil, argue that, far from giving courts flexibility, not requiring a showing of willfulness would afford plaintiffs a variety of abusive litigation tactics. Because profits awards can be substantial and even exceed their actual damages, the law professors argue, plaintiffs may leverage such risks against defendants and coerce them into costly settlements. According to the law professors, plaintiffs may intentionally wait until just before periods of high-sales volume so to maximize the potential damage on defendants and improve the plaintiffs' own bargaining power. Thus, the law professors contend that the Court should include a willfulness requirement in § 1117(a).

Fair Compensation or Overcompensation?

The ABA, in support of Romag, argues that limiting profits awards to willful infringement may prevent trademark owners from receiving fair compensation. According to the American Intellectual Property Law Association (AIPLA), in support of neither party, where actual damages are too speculative to support an award, an award of the infringer's profits may be the only substantive monetary relief that is available to the trademark owner. AIPLA claims that a rigid willfulness requirement may prevent trademark owners from receiving any recourse for their losses, and therefore the Court should not imply such a requirement into § 1117(a).

Conversely, the law professors, in support of Fossil, argue that limiting profits awards to willful infringement still leaves injunctions and compensatory damages available for plaintiffs who fail to show the infringers' willfulness. Not only that, the law professors continue, a willfulness requirement for profits awards would actually deter infringing activity while avoiding chilling legitimate competition. Furthermore, according to the law professors, without any willfulness requirement, plaintiffs may recover far in excess of their actual damages where, as here, Romag's magnetic snap fasteners are only one part of Fossil's larger products from which the profit calculations are derived. A requirement of willfulness for profit awards will balance deterring bad conduct with allowing necessary trademark competition.

Full text available at https://www.law.cornell.edu/supct/cert/18-1233. ⊙

Written by Soo Min Ko and Kaitlyn Marasi. Edited by Ushin Hong.

Babb v. Wilkie (No. 18-882)

Oral argument: Jan. 15, 2020
Court below: *U.S. Court of Appeals for the Eleventh Circuit*

Question as Framed for the Court by the Parties

Whether the federal-sector provision of the Age Discrimination in Employment Act of 1967, which provides that personnel actions affecting agency employees aged 40 years or older shall be made free from any "discrimination based on age," 29 U.S.C. § 633a(a), requires a plaintiff to prove that age was a but-for cause of the challenged personnel action.

Facts

In 2004, Noris Babb joined the C.W. "Bill" Young Veterans Affairs (VA) Medical Center's Pharmacy Services division in Bay Pines, Florida as a clinical pharmacist. Two years later, Babb began working as a geriatrics pharmacist in the Medical Center's Geriatric Clinic, a position governed by a service agreement between the Pharmacy Services division and the Geriatric Clinic. As a member of an interdisciplinary team within the Geriatric Clinic, in 2009, Babb acquired an "advanced scope of practice" that allowed her to practice "disease state management" (DSM). In 2010, Babb pursued a promotion under a new nationwide VA initiative called the "Patient Aligned Care Team" (PACT) initiative, which enabled pharmacists spending a minimum of 25% of their time practicing DSM to seek a promotion to GS-13 on the federal pay scale.

In 2011, two of Babb's colleagues, both female and over the age of 40, filed Equal Employment Opportunity complaints with the Equal Employment Opportunity Commission (EEOC) against the VA, alleging that the Medical Center's Pharmacy Services division implemented the new PACT initiative promotion standards in a way that discriminated on the basis of gender and age. Then, in 2012, the Pharmacy Services division and the Geriatric Clinic issued a new service agreement governing Babb's responsibilities. Under the new agreement, Babb could only spend at most 18.75% of her time practicing DSM. Because Babb could no longer meet the DSM practice requirement necessary for promotion under the PACT initiative, the Pharmacy Services division and the Geriatric Clinic agreed that Babb would not practice DSM at all. Pharmacy Services management then also removed Babb's "advanced scope of practice" designation.

Babb complained to a Pharmacy Services administrator in February 2013 about the decision to no longer have her practice DSM. Around the same time, the Pharmacy Services division rejected two requests by Babb for anticoagulation training. Later, in April 2013, Babb applied for two open anticoagulation-clinic positions; however, two younger female pharmacists received the positions instead. Upon finding out that she had not been selected for either anticoagulation-clinic position, Babb filed her own EEOC complaint in May 2013 alleging age and gender discrimination.

In July 2014, Babb sued Secretary of the Department of Veteran Affairs Robert Wilkie in federal district court, claiming that the Pharmacy Services managers violated Title VII of the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act of 1967 (ADEA) by subjecting her to age and gender discrimination, among other claims. The U.S. District Court for the Middle District of Florida (the District Court) analyzed Babb's age and gender-discrimination under the *McDonnell Douglas* burden-shifting framework. Under this framework, a plaintiff must first establish a prima facie case of discrimination, after which the burden shifts to the defendant-employer to articulate a "legitimate, nondiscriminatory" reason for its action. The plaintiff must then prove that the employer's articulated nondiscriminatory reason is pretextual by showing that discrimination was the actual reason for, or "but-for" cause of, the adverse employment action. Applying this framework, the District Court granted summary judgment in Wilkie's favor.

Babb appealed the District Court's ruling to the U.S. Court of Appeals for the Eleventh Circuit (the Eleventh Circuit), contending that the District Court should have applied a less-stringent motivating-factor test to her claims. Under this test, a plaintiff must simply demonstrate that that age or gender was a "motivating factor" of an adverse employment action he or she suffered. While the Eleventh Circuit agreed with Babb that the motivating-factor test should have been used for her Title VII claim, the court affirmed the use of the *McDonnell Douglas* framework for her federal-sector ADEA claim.

On June 28, 2019, the U.S. Supreme Court granted Babb's petition for a writ of certiorari to determine the proper causation standard under the federal-sector provision of the ADEA.

Legal Analysis

The Proper Reading of the Statute's Plain Language

Babb argues that the Supreme Court should reverse the Eleventh Circuit's decision because, according to her, the plain language of the federal-sector provision of the ADEA, § 633a(a), fully prohibits the government from unequally considering age in employment decisions. As such, Babb asserts that the statute only requires a federal-sector plaintiff to show that the government's decision-making process involved age discrimination—not that age discrimination was the but-for cause of an adverse employment decision. Babb notes that the statute requires the government to make employment decisions "'free from any' age discrimination." Babb contends that the words "free from" and "any" in § 633a(a) make unlawful even the most minimal amount of age discrimination in the federal decision-making process. Babb also maintains that the word "discrimination" broadly refers to the failure to provide equal treatment, regardless of whether the unequal treatment is the cause of a negative outcome. Furthermore, Babb posits that the phrase "discrimination based on age" merely expresses the type of discrimination barred under the statute, and that the phrase is synonymous with "age discrimination."

Moreover, Babb contends that former Supreme Court cases support her argument regarding the plain meaning of § 633a(a). Babb emphasizes that the Court has held that "discrimination" encompasses a broad range of deliberate unequal treatment that includes not only losing a benefit, but also being denied fair and equal consideration for that benefit because of a protected status. Thus, Babb asserts that the Court has recognized that unlawful discrimination can occur even where it does not cause the rejection of a particular benefit. Finally, Babb maintains that the Court has applied this definition of discrimination in numerous cases spanning decades of precedent.

Wilkie counters that the Court should uphold the Eleventh Circuit's decision because, according to him, § 633a(a)'s plain language forbidding discrimination "based on age" clearly requires but-for causation. Wilkie argues that the Court has repeatedly held that the phrase "based on" means "because of," which in turn implies but-

for causation. Thus, Wilkie asserts that § 633a(a)'s ban on "discrimination based on age" is only applicable in federal-sector cases where age is the reason for the adverse employment decision. Wilkie further emphasizes that the standard definition of discrimination is different treatment of employees who are similar except for a particular status. Wilkie concludes, therefore, that an employer must do more than simply consider age in an employment decision to unlawfully discriminate based on age; rather, age must cause the employer to treat an employee less favorably than a younger, similarly-situated employee.

Wilkie further asserts that the Supreme Court's prior cases clarify that the ADEA's ban on discrimination based on age requires that age be the but-for cause of an adverse employment outcome. In *Safeco Insurance Co. v. Barr*, Wilkie notes, the Court held that the phrase "based on" implies but-for causation because that is the most common understanding of the phrase. Thus, Wilkie posits that if Congress wanted to bar federal employers from considering age at all in employment decisions, it would have said so explicitly. Wilkie also emphasizes that the Court held in *Gross v. FBL Financial Services* that the private-sector provision of the ADEA, which uses the phrase "because of," requires but-for causation. Wilkie argues that both the private-sector and federal-sector provisions require but-for causation because both contain language—either "because of" or "based on"—that indicates a but-for causation standard.

Comparing the ADEA's Federal-Sector Provision to Title VII's

Babb argues that § 633a(a) of the ADEA uses language practically identical to that of the federal-sector provision of Title VII. Accordingly, Babb contends that the Supreme Court should conclude that Congress intended the text of the federal-sector provisions of the two statutes to mean the same thing. Babb asserts that Title VII's federal-sector provision was partially intended to enforce the Constitution's equal-protection guarantee for federal employees. Babb emphasizes that a plaintiff does not need to prove but-for causation to demonstrate a violation of the Constitution's Equal Protection Clause; instead, a plaintiff just needs to prove that they were denied "equal footing" in the government's decision-making process based on a protected status. Accordingly, Babb concludes that § 633a(a) also incorporates the "equal footing" standard.

Wilkie counters that the causation standard of § 633a(a) is governed by the text of the ADEA, not the Constitution's Equal Protection Clause. Nonetheless, Wilkie asserts that even if equal protection principles provide the causation standard, the Equal Protection Clause still mandates a but-for causation standard in the relevant circumstances. As Wilkie notes, the private-sector provision of the ADEA governs state and local governments, which undoubtedly requires but-for causation, as the Court established in *Gross*. Wilkie contends that even if Babb is correct about Congress' equal protection concerns, Babb has failed to provide a reason to assume that Congress sought to apply a different causation standard to the federal government.

Whether Chevron Deference Applies to EEOC Interpretations

Babb argues that, if the Supreme Court finds the ADEA's federal-sector provision ambiguous as to its causation standard, the Court should defer to the EEOC's interpretation that but-for causation is not required to prove a violation of § 633a(a). Babb notes that the ADEA gives the EEOC the authority to enforce § 633a(a) and to issue rules and regulations to carry out that enforcement. Therefore, Babb contends, the EEOC's interpretation is entitled to *Chevron* deference, a legal principle under which courts defer to an agency's interpretation of an ambiguous statutory provision if the agency's interpretation is reasonable. Babb asserts that the EEOC has reasonably interpreted § 633a(a) not to require but-for causation to demonstrate unlawful age discrimination under the provision. Thus, Babb concludes that, at minimum, the Court must apply *Chevron* deference to the EEOC's reasonable interpretation that but-for causation is not required to prove a violation of ADEA's § 633a(a).

Wilkie disputes that the Court should defer to the EEOC's interpretation because § 633a(a)'s text clearly invokes a but-for causation standard, thus making the EEOC's regulations irrelevant, even if they purport to define the federal-sector causation standard. Even if § 633a(a) was ambiguous as to the causation standard, Wilkie argues that the EEOC regulations Babb relies on address relief, not the determination of liability. Wilkie further emphasizes that the EEOC removed any direct relief for individual plaintiffs in cases where age discrimination was not the but-for cause of an adverse federal employment decision, thus suggesting that a plaintiff could not prevail under the ADEA without proof of but-for causation. Finally, Wilkie asserts that even if the regulations are relevant to the determination of liability under § 633a(a), they are inconsistent with the standard Babb proposes. According to Wilkie, the regulations impose a burden-shifting scheme that requires the government to rebut but-for causation under a clear-and-convincing evidence standard, actually making it harder for federal-sector plaintiffs to obtain relief than under Babb's suggested standard.

Discussion

The Ability of Federal-Sector Employees to Prove Age Discrimination

The National Treasury Employees Union (NTEU), in support of Babb, alleges that applying a but-for causation standard to federal-sector ADEA claims would lead to age-discrimination by the federal government going unremedied. The NTEU asserts that this is because a but-for causation standard will create a harsh evidentiary hurdle for federal employees, requiring plaintiffs to produce a "smoking gun" or admission by their federal employer to show that age discrimination was a but-for cause of an adverse employment action. Further, the NTEU predicts that applying a but-for causation standard to federal-sector ADEA claims will embolden agencies to resist age discrimination allegations, knowing full well that federal employees will have a hard time meeting the standard.

Wilkie counters that failing to apply a but-for causation standard under § 633a(a) would create inconsistencies between the ADEA and other federal anti-discrimination laws. Specifically, Wilkie notes that Babb proposes a causation standard possibly lower than a traditional motivating-factor standard based on Babb's insistence that § 633a(a) of the ADEA prohibits the federal government from even considering a worker's age when making employment decisions. Lastly, Wilkie asserts that applying a but-for causation standard to federal-sector ADEA claims would equalize the protection of federal employees with state, local, and private employees in the absence of express statutory language to the contrary.

Full text available at https://www.law.cornell.edu/supct/cert/18-882. ⊙

Written by Lachanda Reid and Gabriela Markolovic. Edited by Tyler Schmitt. The authors would like to thank Professor Angela B. Cornell for her guidance and insights into this case.

GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC (No. 18-1048)

Oral argument: Jan. 21, 2020
Court below: *U.S. Court of Appeals for the Eleventh Circuit*

Question as Framed for the Court by the Parties

Whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards permits a non-signatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel.

Facts

On Nov. 25, 2007, Thyssenkrupp Stainless USA LLC (now Outokumpu Stainless, USA LLC (Outokumpu)), a U.S. corporation, entered into three contracts with F.L. Industries Inc. (now Fives St Corp. (Fives)), also a U.S. corporation, for the purchase of cold rolling mills. These contracts identify Fives as the "Seller," Outokumpu as the "Buyer," and jointly as "Parties," and provides that "Seller" includes subcontractors that Fives employ for the supply of parts of the mills unless otherwise stated. These contracts require the parties to resolve disputes arising out of or relating to the contracts through consultation, failing which they should be resolved through arbitration in Germany, applying German substantive law and the International Chamber of Commerce's Rules of Arbitration (ICC Rules). Fives then entered into a subcontractor agreement with Converteam SAS (now GE Energy Power Conversion France (GE)), a French corporation, which manufactured in France motors required for the mills and installed them in Outokumpu's manufacturing plant in Alabama by 2012. By August 2015, all the motors that GE supplied had failed.

Subsequently, Fives, GE, and a third company, DMS SA, entered into a consortium agreement, providing that all stipulations contained in the Outokumpu-Fives contracts would bind each party. This agreement required the parties to resolve amicably the disputes arising out of or relating to this agreement, or relating to the Outokumpu-Fives contracts, failing which they should be settled through arbitration in France, applying the ICC Rules.

On June 10, 2016, Outokumpu et al. sued GE before the Circuit Court of Mobile County in Alabama (the state court), alleging negligence, breach of professional design and construction warranties, breach of implied warranties, and products liability. On July 18, 2016, GE removed the suit to the U.S. District Court for the Southern District of Alabama Southern Division (the District Court) based on (i) federal subject matter jurisdiction, which allows for the removal of suits involving subject matter that "relates to" an arbitration agreement "falling under" the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the NY Convention), and (ii) diversity jurisdiction based on Outokumpu's joinder of foreign insurers as plaintiffs. Outokumpu and its insurers moved to remand; GE moved to dismiss and to compel arbitration. The District Court denied the motion to remand, finding removal warranted under federal subject matter jurisdiction. It granted the motion to dismiss and to compel arbitration, finding, among other things, that there was an arbitration agreement between Outokumpu and GE under *Bautista v. Star Cruises*. The District Court determined that the arbitration clause contained in the Outokumpu-Fives contracts binds GE as a subcontractor because GE was not expressly excluded.

On appeal, the U.S. Court of Appeals for the Eleventh Circuit (the Eleventh Circuit) affirmed the District Court's denial of the motion to remand. The Eleventh Circuit reversed and remanded the District Court's decision to dismiss the suit and to compel arbitration, holding that there was no arbitration agreement "signed by the parties" within the meaning of the NY Convention because GE did not sign the arbitration agreement between Outokumpu and Fives. Accordingly, GE had no right to compel arbitration. The Eleventh Circuit rejected GE's argument that an arbitration agreement may be implied by conduct under the equitable estoppel doctrine, holding that estoppel cannot be invoked to compel arbitration of an international dispute under chapter 2 of the Federal Arbitration Act (FAA), different from a case of a domestic dispute. GE appealed and the Supreme Court granted certiorari on June 28, 2019.

Legal Analysis

Does the FAA's Chapter 1 Incorporate Equitable Estoppel into Chapter 2?

GE Energy notes that in 2009, the Supreme Court in *Arthur Anderson LLP v. Carlisle* interpreted chapter 1, section 2 of the FAA to allow a party seeking to enforce an arbitration agreement to invoke common-law contract principles––such as equitable estoppel––to construe the scope of the agreement. GE Energy contends that Chapter 2 must permit equitable estoppel because it would further the NY Convention's purpose of promoting arbitration by making arbitration agreements more effective. GE Energy asserts that the NY Convention's drafters assumed that member states would use their domestic laws to fill in the gaps in the NY Convention's undetailed provisions. This is why, GE Energy argues, the domestic law from section 2 of the FAA should apply to this case. Finally, GE Energy rejects Outokumpu's argument that the law governing the arbitration agreement is German law, arguing that Outokumpu forfeited this argument and, if not, the question of applicable law should not be considered by the Supreme Court, but should be considered by a lower court on remand.

Outokumpu counters by reading *Arthur Anderson* more narrowly for the proposition that Chapter 1 conditionally permits a party to invoke "estoppel [only] if the underlying state law governing the arbitration agreement allows it." Outokumpu notes that the Supreme Court in *Arthur Anderson* remanded the case to a lower court to find whether state contract law––the law governing the arbitration agreement in that case––would permit estoppel, not whether federal common law or general contract law would. Outokumpu therefore urges the court to examine whether German law authorizes GE Energy to invoke equitable estoppel to compel Outokumpu to arbitrate. Finally, Outokumpu contends, in any case, that the agreement here requires the arbitration to take place in Germany, and Chapter 1 does not authorize a party to compel arbitration abroad.

The NY Convention Article II's Writing Requirement

GE Energy contends that the NY Convention should be understood as imposing minimum requirements when enforcing arbitration agreements while allowing countries to

apply their own domestic laws where such laws would further encourage arbitration. For support, GE Energy points to the NY Convention's Article VII, which entitles a party seeking to enforce an arbitral award to employ a country's more favorable enforcement regime. For example, GE Energy asserts that a party may apply another country's laws where those laws contain fewer grounds for refusing to enforce an award than the NY Convention. GE Energy cites the United Nations' UNCITRAL Commission's 2006 Recommendation, the U.S.-based Restatement of the Law of International Commercial and Investor-State Arbitration, and two treatises in favor of applying Article VII's principle to Article II's writing requirement. In particular, GE Energy notes that Article II(1) provides only that member states "shall recognize an agreement in writing," not that they must *only* recognize a written agreement. GE Energy also cites Article III of the NY Convention, which prohibits states from imposing "more onerous conditions or higher fees" on arbitral awards. GE Energy argues that, just as it would not make sense to infer that the NY Convention prohibited countries from making awards *easier* to enforce, one should not read Article II as limiting a country's ability to increase the efficacy of arbitration agreements. Finally, GE Energy contends that Article II(2) is particularly inviting of an expansive reading, since it uses the phrase "shall *include*" and would accept even an unsigned arbitration agreement if it was "contained in an exchange of letters or telegrams." Therefore, GE Energy argues that Article II's writing requirement should be read expansively to bind Outokumpu and employ doctrines of equitable estoppel.

Outokumpu counters that GE Energy's contention that countries are free to apply their own more pro-arbitration laws does not apply to Article II's writing requirement. Outokumpu contends that Article VII in fact goes against GE Energy's position because the NY Convention restricts Article VII's applicability to arbitral awards and Article II does not contain such a clause. Outokumpu turns to the text of Article II(3), which authorizes a court to compel arbitration in "a matter in respect of which the parties have made an agreement within the meaning of this article." Outokumpu observes that Article II(3)'s "parties" refers, as it does in Articles II(1) and (2), to the parties to the agreement, as opposed to the litigation, and that the "agreement" refers to Article II(2)'s writing requirement. Outokumpu therefore concludes that, under the NY Convention, a party may compel arbitration only when that party was itself "one of the parties to the written agreement." Outokumpu also contends that Article II(2)'s use of "includes" in specifying the writing requirement is not, as GE Energy contends, open-ended, but rather is a result of a confusing English translation, and that "includes" should instead be read as "means," as the Convention's official French and Spanish versions state. But even if "includes" is flexible, and encompasses e-mail, for example, Outokumpu contends it must still require at least some form of writing for a party to compel arbitration.

Discussion

Certainty and Predictability

The Miami International Arbitration Society (MIAS), in support of GE, argues that precluding non-signatories to an arbitration agreement from compelling arbitration in the United States would create uncertainty about their ability to access arbitration as a means to resolve international commercial disputes, thus making it riskier for foreign companies to conduct businesses in the United States. Similarly, the National Association of Manufacturers (NAM), in support of GE, contends that allowing non-signatories to compel arbitration would assure companies involved in international trade that they can resolve potential disputes through arbitration, thereby adding predictability in international commerce. Without such stability, NAM points out that international commercial transactions and contracting would be significantly hampered.

Professors Benjamin G. Davis and Nader M. Ibrahim (Professor Davis), in support of Outokumpu, assert that prohibiting non-signatories from relying on the equitable estoppel doctrine to compel companies similarly situated as Outokumpu to arbitrate would encourage business entities to contract carefully using clear and intentional language. Public Citizen, also in support of Outokumpu, adds that expanding arbitration agreements to include non-signatories would create uncertainty as which parties are bound by the agreement. According to Public Citizen, this uncertainty would not only affect companies involved in a transaction, but also the individual consumers who increasingly transact with those companies given today's e-commerce era.

Fairness

NAM, in support of GE, contends that allowing non-signatories to compel arbitration would assure foreign companies that they can resolve disputes in a neutral forum with the help of arbitrators whose expertise in specific industries would ensure a fair outcome. NAM points out that the ability to access arbitration allows non-signatories to avoid the need to seek resolution through domestic court systems, where foreign companies may be disadvantaged due to bias in favor of domestic companies. MIAS, in support of GE, argues that without the ability to enforce foreign arbitral awards in the United States, non-signatories would essentially be deprived of meaningful relief from their adversaries whose assets are in U.S. territory. According to MIAS, this is because non-signatories would be forced to litigate their disputes before domestic courts without an effective mechanism that ensures favorable rulings would be enforced when there is no ratified, multinational treaty similar to the NY Convention that enforces local court judgments.

Professor Davis, in support of Outokumpu, contends that forcing companies to arbitrate commercial disputes without their consent would seriously disadvantage them. In particular, according to Professor Davis, these companies would be barred from resolving their disputes through U.S. courts, and thus could not benefit from the United States' expansive discovery procedures. Professor Davis points out that companies forced to arbitrate would be unfairly subjected to a restrictive discovery process because prevailing international rules impose greater restrictions on document production and e-discovery in arbitration proceedings. Professor Davis adds that forcing companies to arbitrate without consent would subject them to an arbitration governed by foreign substantive laws to which they never agreed to be bound. Moreover, Professor Davis contends that precluding arbitration in this case would not be unfair to GE because GE should reasonably expect that it may be sued before U.S. courts by engaging in a transaction that has many connections to the United States.

Full text available at https://www.law.cornell.edu/supct/cert/18-1048. ⊙

Written by Connor Grant-Knight and Angela Shin Wei Ting. Edited by Lauren Devendorf. *The authors would like to thank Professor John J. Barceló III for his insights.*

Espinoza v. Montana Department of Revenue (No. 18-1195)

Oral argument: Jan. 22, 2020
Court below: *Montana Supreme Court*

Question as Framed for the Court by the Parties

Whether it violates the religion clauses or the equal protection clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools.

Facts

In 2015, the Montana State Legislature (the Legislature) established a Tax Credit Program wherein a taxpayer could receive dollar-for-dollar tax credit up to $150 for the taxpayer's donations to a Student Scholarship Organization (SSO) in Montana. An SSO is a charitable organization that uses the bulk of its revenue (largely from donations) to fund tuitions for students attending a Qualified Education Provider (QEP). A QEP is any school that meets the requirements laid out in § 15-30-3102(7) of the Montana Code; essentially, any private school.

Article X, Section 6(1) of the Montana Constitution prohibits the State from directly or indirectly providing financial aid to sectarian schools, which are schools "controlled in whole or in part by any church, sect, or denomination." The Montana Department of Revenue (the Department), which is responsible for implementing the Tax Credit Program, determined that the program violated Article X, Section 6(1) of the Montana Consititution by indirectly aiding sectarian schools because the definition of QEP included most religiously-affiliated schools. Accordingly, the Department enacted Rule 1, which narrowed the definition of QEP by excluding any religiously-affiliated private schools.

On December 24, 2015, the Petitioners, Kendra Espinoza, Jeri Ellen Anderson, and Jaime Schaefer (collectively, Espinoza), sued the Department in the District Court of the Eleventh Judicial District of Montana (the District Court) challenging the constitutionality of Rule 1. After the Department enacted Rule 1, Espinoza's children, who attended a religiously-affiliated school, were barred from receiving scholarships under the Tax Credit Program. Espinoza argued that Rule 1 violated the free exercise clauses of the Montana Constitution and the U.S. Constitution because it indirectly penalized parents for sending their children to religiously-affiliated schools. The Department countered that the Tax Credit Program would be unconstitutional without Rule 1 because the former broad definition of QEP allowed the State to indirectly fund religiously-affiliated schools in violation of Article X, Section 6(1) of the Montana Constitution. The District Court determined that the Tax Credit Program was constitutional as originally enacted in 2015 because the program was not an expenditure of state funds and therefore did not trigger Article X, Section 6(1). The District Court struck down Rule 1 and granted summary judgment in favor of Espinoza.

The Department appealed the District Court's decision to the Montana Supreme Court. The Montana Supreme Court reversed the District Court's decision, holding that the Tax Credit Program itself violated Article X, Section 6(1) of the Montana Constitution. In reaching its decision, the Montana Supreme Court explained that legislators intended for Article X, Section 6(1) to broadly prohibit any use of state funds to aid sectarian schools. The Montana Supreme Court found that not only did the Department exceed its authority when it enacted Rule 1, but also that Rule 1 was superfluous because the underlying Tax Credit Program unconstitutionally used public funds to aid sectarian schools. Accordingly, on December 18, 2018, the Montana Supreme Court struck down the Tax Credit Program.

Espinoza filed a petition for a writ of certiorari with the U.S. Supreme Court on March 12, 2019. The Court granted certiorari on June 28, 2019.

Legal Analysis

Free Exercise Clause

Espinoza argues that the application of Article X, Section 6(1) of the Montana Constitution violates the First Amendment Free Exercise Clause rights of parents who wish to send their children to religiously-affiliated schools. As Espinoza explains, the Free Exercise Clause prohibits the government from discriminating against particular religions and religion in general. Espinoza relies primarily on the U.S. Supreme Court's decision in *Trinity Lutheran Church v. Comer*, which invalidated a generally applicable grant program because the program conditioned grant eligibility on a church's religious "status," "belief," and "conduct." Article X, Section 6(1), according to Espinoza, similarly conditions eligibility of a generally applicable government benefit on parents' religious beliefs, conduct, and status, because some parents send their children to religious schools to align their children's education with their religious beliefs, practices, and identity. Espinoza further asserts that Article X, Section 6(1) discriminates against religious schools because of their religious "character" and "identity." Therefore, Espinoza argues, because Article X, Section 6(1), as applied, discriminates against religious beliefs, conduct, and status, it must survive strict scrutiny. Espinoza contends, however, that it cannot withstand strict scrutiny because the Court in *Trinity Lutheran* already rejected the Department's rationale—that a state has a compelling interest in creating greater separation of church and state than what already exists under the U.S. Constitution's Establishment Clause.

The Department counters that Article X, Section 6(1) of the Montana Constitution neither directly nor indirectly prohibits the free exercise of religion in violation of the Free Exercise Clause. According to the Department, different from the church's choice in *Trinity Lutheran*, Article X, Section 6(1) does not prohibit any school or student from exercising their religion, even if the lack of scholarship funds is financially burdensome. Similarly, the Department argues that because the Montana Supreme Court struck down the entire Tax Credit Program, there is no benefit available to anyone, religious or non-religious. Thus, the Department continues, families cannot be coerced into abandoning their religious practices because even if they "abandoned their faith, they still would not get scholarships." In support of the Department, Religion Law Scholars add that Espinoza's claim does not fall within the type of government action that the constitutional safeguards in the Religion Clauses were meant to protect because Espinoza fails to identify "any actual discrimination" violating constitutional principles that prevent the government from favoring or disfavoring religion. The Religion Law Scholars maintain that, historically, the Religion Clauses were intended to prevent the government from singling out religion by favoring or disfavoring it; here, however, Article X, Section 6(1) equally applies to religious and nonreligious parents.

Equal Protection Clause

Espinoza argues that Article X, Section 6(1) violates the Equal Protection Clause of the

Fourteenth Amendment because, historically, it was "born of bigotry" and it continues to perpetuate discriminatory animus. Espinoza explains that the Equal Protection Clause prohibits drawing classifications based on "inherently suspect" protected groups, like religion. Espinoza points out that Article X, Section 6(1) is a "Blaine Amendment"—an amendment many states adopted in the Nineteenth Century to prevent public funding of Catholic schools while preserving "Protestant-oriented public schools." Therefore, Espinoza argues, because religious discriminatory animus was a "motivating factor" in the adoption of Article X, Section 6(1) and because the provision has a discriminatory effect on all types of religious schooling today, the provision violates the Equal Protection Clause.

The Department counters that there is no unequal treatment between religion and nonreligion in Montana because when the Montana Supreme Court applied Article X, Section 6(1) to the Tax Credit Program, it denied aid to all private schools, whether sectarian or secular, impacting both religion and nonreligion in the same way. In addition, the Department argues, Espinoza's historical argument overlooks analogous "no-aid provisions" that trace back to the Founding that were not motivated by anti-Catholic bigotry. Indeed, the Department maintains that Montana's no-aid provision is actually a means of promoting religious liberty by erecting a greater barrier between the government and religious schools. Finally, the Department asserts that even if Montana's original "Blaine Amendment" was discriminatory when it was first adopted, that animus was purged when Montana adopted a new constitution in 1972, more than 100 years after the provision was originally passed.

Establishment Clause

Espinoza argues that Article X, Section 6(1) of the Montana Constitution violates the U.S. Consitution's Establishment Clause because it expresses a hostility to religion by excluding religious entities from a generally applicable funding program. As Espinoza explains, the Establishment Clause requires that the government remain neutral between different religions and between religion and nonreligion. Espinoza asserts that Article X, Section 6(1) is a form of "passive hostility" because it fosters a bias against religion by leaving in place the discriminatory animus created by the Blaine Amendments. Article X, Section 6(1) is also a form of "active hostility," according to Espinoza, because the government continues to use it as an "engine of discrimination" to exclude all religious entities from participating in the Tax Credit Program. Therefore, Espinoza concludes, analyzed under any of the tests applied in Establishment Clause cases, Article X, Section 6(1) creates hostility towards religion while also depriving families of educational choice.

The Department counters that Article X, Section 6(1) does not violate the Establishment Clause because it is not hostile to religion. Instead, the Department maintains, Article X, Section 6(1) advances Establishment Clause principles by creating a greater barrier between church and state; here, by ensuring that religious schools do not become dependent on state funding. The Department argues that the Establishment Clause allows states to decide whether and how to fund religious entities. Thus, the Department continues, because Montana had the ability to prohibit funding to religious entities in the first place, expressing this same policy determination in Montana's Constitution does not create hostility toward religion over nonreligion in violation of the Establishment Clause.

Discussion

Effect on Other Government Benefits to Religiously-Affiliated Entities

The American Center for Law and Justice (ACLJ) argues in support of Espinoza that the Montana Supreme Court's holding—that a state may exclude religiously-affiliated entities from participating in generally applicable funding programs—will set a dangerous precedent for all other states. The ACLJ asserts that upholding the Montana Supreme Court's decision might signal to other states that they may exclude religiously-affiliated entities from participating in any kind of public benefit program, which would amount to "gratuitous hostility" against persons interacting with such entities.

Various religious and civil rights organizations (Organizations) contend in support of the Department that upholding the Montana Supreme Court's decision will not affect religiously-affiliated entities in other benefit programs. The Organizations explain that property-tax exemptions for churches and tax deductions for charitable donations have a "long historical pedigree" in America. The Organizations contend that, in such contexts, the public funding is aimed at promoting community well-being rather than at promoting religion. Meanwhile, tuition-tax-credit programs, the Organizations continue, are relatively new and directly promote religious education, thereby raising Establishment Clause concerns.

School Choice

A group of state legislative leaders (Leaders) in support of Espinoza argue that the Montana Supreme Court's decision threatens benefits that school choice programs bring to low-income families. School choice programs, the Leaders explain, enable parents to select a school that best fits their child's educational needs by providing parents with public education funding, irrespective of whether the selected school is sectarian or secular. The Leaders posit that, without such public funding, low-income families are often forced to send their children to "one-size-fits-all" public schools that may not address a child's unique educational needs. School choice programs, Leaders continue, have worked efficiently and effectively across states by increasing students' attendance rates, improving students' passage rates, and making schooling more affordable for low-income families. Eighteen states (States) in support of Espinoza explain that upholding the Montana Supreme Court's decision would encourage other state courts to interpret their states' Blaine Amendments to eliminate all public benefits, even incidental, to religiously-affiliated schools.

Public Funds Public Schools (PFPS) in support of the Department argues that school choice programs cause more harm than benefit to students. PFPS asserts that the data relied on by Espinoza's amici are based on cherry-picked, outdated, and non-peer-reviewed research. Instead, PFPS continues, large-scale peer-reviewed research proves that school choice programs cause harm by diverting funds from public schools to private religiously-affiliated schools. Indeed, National School Boards Association (NSBA) in support of the Department explains that, in reality, school choice programs mostly benefit students from wealthy backgrounds because, even with school choice funding, low-income families often cannot afford the unfunded portion of private school tuition. Therefore, the NSBA contends, wealthy families take advantage of school choice funding to reduce private school costs while their poorer counterparts have no choice but to attend public schools.

Additionally, PFPS asserts that students who attend private schools through school choice programs perform worse academically, scoring lower on reading and math tests, than their peers in public schools.

Written by Gabrielle Kanter and Prachee Sawant. Edited by Matt Farnum.

Full text available at https://www.law.cornell.edu/supct/cert/18-1195. ⊙

New York State Rifle & Pistol Association Inc. v. City of New York, New York (No. 18-280)

Oral argument: Dec. 2, 2019
Court below: *U.S. Court of Appeals for the Second Circuit*

This case asks the Supreme Court to decide whether New York City's (City) restrictions on the transportation of handguns is unconstitutional pursuant to the Second Amendment, the Commerce Clause, or the fundamental right to travel. Under a former rule, the City issued premises licenses to qualified individuals. Such licenses permitted a licensee to possess a handgun at the licensee's City residence but placed restrictions upon the transportation of the handgun to locations outside of the City. Romolo Colantone, Efrain Alvarez, and Tony Irizarry (collectively, Colantone) were issued premises licenses and wanted to use their handguns at shooting ranges and competitions located outside of the City, and Colantone wanted to transport his handgun to and from his second home in upstate New York. Colantone joined by the New York State Rifle and Pistol Association, argues that the City's transportation restrictions violate the Second Amendment, the Commerce Clause, and the fundamental right to travel. The City, joined by the New York City Police Department-License Division, counters that its former rule is a constitutional exercise of its regulatory power and protects public safety. The City recently amended the rule at issue, so the City also argues that this case is moot. The Court's decision will have implications for public safety concerns of vulnerable populations and populations living within major urban areas.

Full text available at https://www.law.cornell.edu/supct/cert/18-280. ⊙

State of Georgia v. Public.Resource.Org Inc. (No. 18-1150)

Oral argument: Dec. 2, 2019
Court below: *U.S. Court of Appeals for the Eleventh Circuit*

The Supreme Court will determine whether the government edicts doctrine renders uncopyrightable the annotations in the Official Code of Georgia Annotated (OCGA). The government edicts doctrine prevents individuals from copyrighting government edicts—such as judicial decisions and statutes. The State of Georgia and the Georgia Code Revision Committee (Georgia) argue that the annotations—which were primarily written by private actors and do not carry the force of law—are beyond the scope of the government edicts doctrine. PublicResource.Org disagrees, arguing that because the annotations are published under a state authority, and because Georgia's Supreme Court treats the OCGA annotations as authentic sources of legal meaning, the annotations carry the force of law and are thus uncopyrightable under the government edicts doctrine. From a policy perspective, this case is important because it may have implications for organizations' abilities to provide cheap public access to state laws as well as access to non-legal codes and standards (e.g. construction codes and standards).

Full text available at https://www.law.cornell.edu/supct/cert/18-1150. ⊙

Atlantic Richfield Co. v. Christian (No. 17-1498)

Oral argument: Dec. 3, 2019
Court below: *Montana Supreme Court*

This case asks the Supreme Court to consider whether private citizens can fashion their own cleanup remedies at federal "Superfund" sites. The Comprehensive Environmental Response, Compensation and Liability Act, commonly known as "Superfund," allows the Environmental Protection Agency to create cleanup plans for polluted sites across the nation. Gregory Christian and other resident landowners (Landowners) near the Superfund site of Anaconda, Montana, sued the owner of the site, Atlantic Richfield, alleging that the company owed them damages to restore their properties to pre-pollution status. Atlantic Richfield argues that the Superfund Act preempts any party from seeking state-law restoration damages. The Landowners counter that the Superfund Act leaves room for additional damages beyond what the Environmental Protection Agency has already deemed appropriate. The Supreme Court's decision will impact the certainty and finality of Superfund cleanups, private-property rights in the environmental setting, and the balance of state and federal power.

Full text available at https://www.law.cornell.edu/supct/cert/17-1498.

Rodriguez v. Federal Deposit Insurance Corp. (No. 18-1269)

Oral argument: Dec. 3, 2019
Court below: *U.S. Court of Appeals for the Tenth Circuit*

This case asks the Supreme Court to determine whether federal common law or state law principles govern the ownership of a tax refund solely attributable to a single corporate subsidiary but received from the IRS by that subsidiary's corporate parent as part of a consolidated tax return. Petitioner Simon E. Rodriguez, Chapter 7 Trustee for the bankruptcy estate of United Western Bancorp. Inc., contends that this area of law is not open to federal common lawmaking and thus should be governed by state agency law. Respondent Federal Deposit Insurance Corporation, Receiver for United Western Bank, counters that the issue here is not governed by federal common law in the strict sense, but rather by interpretations of Internal Revenue Service regulations that inform private party contract interpretation. The outcome of this case will have implications on the equitable ownership interests of tax refunds issued to corporate parents on behalf of their subsidiaries as part of consolidated tax returns.

Full text available at https://www.law.cornell.edu/supct/cert/18-1269. ⊙

Banister v. Davis (No. 18-6943)

Oral argument: Dec. 4, 2019
Court below: *U.S. Court of Appeals for the Fifth Circuit*

This case asks the Supreme Court to decide whether and under what circumstances a timely Rule 59(e) motion should be recharacterized as a second or successive habeas petition under *Gonzalez v. Crosby*. Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a petitioner may not obtain habeas relief for a state court's decision on a

claim unless the decision clearly runs counter to the Constitution or is based on an unreasonable determination of the facts. Section 2244(b) of AEDPA requires a court to dismiss a claim if it presents a second or successive habeas corpus application that was presented in a prior application. Banister argues that a Rule 59(e) motion, which mandates that a motion to alter or amend a judgment be filed within 28 days of the judgment, does not constitute a "second or successive habeas application" under Section 2244(b) because it is part of a habeas applicant's first habeas proceeding. Although *Gonzalez* held that a Rule 60(b) motion, which asks a court to relieve the movant from a final judgment, can constitute a second or successive habeas application, Banister contends that a Rule 59(e) motion does not similarly apply to Section 2244(b)'s restrictions because it is distinct from a Rule 60(b) motion. In response, Davis argues that so long as a Rule 59(e) motion is made after a final adjudicated judgment, it constitutes a second or successive habeas application subject to Section 2244(b)'s restrictions. Davis further asserts that Rule 59(e) and Rule 60(b) motions are similar enough to warrant the same treatment under Section 2244(b)'s restrictions. The outcome of this case will affect the timing for filing Rule 59(e) motions. This case will also have important implications for the limitations placed on federal habeas corpus review and on courts' ability to correct or clarify previous rulings.

Full text available at https://www.law.cornell.edu/supct/cert/18-6943. ☉

Intel Corp. Investment Policy Committee v. Sulyma (No. 18-1116)

Oral argument: Dec. 4, 2019

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

The Supreme Court will decide when Section 1113(2) of the Employee Retirement Income Security Act's statute of limitations begins to run. Both parties agree that the text of Section 1113(2) establishes that the three-year statute of limitations runs from the date on which the plaintiff had actual knowledge of a violation, but dispute what actual knowledge means. Petitioner Intel Corp. Investment Policy Committee argues that actual knowledge means being in possession of proof of the violation, whether a plaintiff is aware of the violation or not. Respondent Christopher M. Sulyma argues that actual knowledge means when the plaintiff is fully aware and understands that a violation took place. The Court's decision will affect employers' incentives to offer retirement plans and employees who cannot comprehend the complex and lengthy plan documents provided to them by their employers.

Full text available at https://www.law.cornell.edu/supct/cert/18-1116. ☉

Guerrero-Lasprilla v. Barr, Att'y Gen. (No. 18-776)

Oral argument: Dec. 9, 2019

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

This case asks the Supreme Court to determine whether the issue of a petitioner's request for equitable tolling in filing motions to reopen his deportation proceedings is a purely legal question or a mixed question of law and fact. Petitioners Pedro Pablo Guerrero-Lasprilla and Ruben Ovalles contend that the term "question of law" in 8 U.S.C. § 1252(a)(D) encompasses mixed questions of law and fact, thereby permitting appellate courts to review whether immigration judges or the Board of Immigration Appeals correctly applied the law to settled historical facts. They contend that even if the Court finds that "question of law" does not encompass mixed questions of law and fact, Guerrero and Ovalles assert that the issue of equitable tolling is closer to a legal rather than factual inquiry, therefore also allowing the appellate courts to review the decision. Attorney General William P. Barr counters that "question of law" does not extend to mixed questions of law and fact, and that even if it did, equitable tolling is a primarily factual determination that cannot be subject to judicial review. This case will affect whether courts experience an increase in the amount of litigation and expended resources, and the effectiveness and meaningfulness of judicial review of immigration proceedings.

Full text available at https://www.law.cornell.edu/supct/cert/18-776.

Thryv Inc. v. Click-To-Call Technologies LP (No. 18-916)

Oral argument: Dec. 9, 2019

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

In this case, the Supreme Court will decide whether 35 U.S.C. § 314(d) precludes judicial review of the Patent Trial and Appeal Board's ("the Board") decision to grant an inter partes review after determining that an effective statute of limitations under § 315(b) does not apply. Thryv, Inc., contends that the plain language of § § 314(d) and 315(b) and relevant Supreme Court precedent renders such decisions nonappealable. Click-To-Call Technologies counters that the plain language of § 314(d) contains nothing to indicate that judicial review of the Board's interpretation of § 315(b) is prohibited, and that Supreme Court precedent has confirmed this understanding. The outcome of this case will have important implications on the scope of administrative power, incentives for product innovation, and the integrity of the patent system.

Full text available at https://www.law.cornell.edu/supct/cert/18-916. ☉

Holguin-Hernandez v. United States (No. 18-7739)

Oral argument: Dec. 10, 2019

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

This case asks the Supreme Court to consider whether a formal objection at sentencing is necessary for criminal defendants to receive reasonableness review of the length of their sentence upon appeal. Gonzalo Holguin-Hernandez argues that Federal Rule of Criminal Procedure 51 (Rule 51) only requires defense counsel to argue prior to sentencing that a certain sentence would be unreasonable, thereby rendering a formal post-sentencing objection unnecessary. The United States agrees and also argues against the Fifth Circuit's requirement of a formal post-sentence objection. The Court appointed an Amicus to brief the opposing side of the issue. Amicus argues that both Petitioner and Respondent misinterpret Rule 51, and that defendants must clearly state their objection and its grounds to preserve an argument for reasonableness review on appeal. The outcome of this case has implications for how clearly defendants need to articulate their objections to a court's sentence and for the consistency of court procedure across criminal and civil cases.

Full text available at https://www.law.cornell.edu/supct/cert/18-7739.

Maine Community Health Options v. United States (No. 18-1023)

Oral argument: Dec. 10, 2019
Court below: *U.S. Court of Appeals for the Federal Circuit*

This case consolidates four lawsuits, together asking the Court to determine if § 1342 of the Affordable Care Act statutorily obliges Congress to fulfill outstanding payments to insurance companies after Congress failed to appropriate funds for these payments. § 1342 established a "risk-corridors program," whereby health insurers and the United States government would share unforeseen costs associated with providing universal healthcare on "health benefit exchanges." Petitioners argue that § 1342 statutorily requires the government to make full "payments out" to insurance companies who have suffered a loss—regardless of whether Congress appropriated enough money to cover these losses. Respondent, the United States, counters that § 1342 merely created a program to oversee "payments out" to health insurers, and even if it does oblige the government to make payments, Congress's appropriations riders repealed that obligation. The outcome of this case has implications for the separation of powers principles and the future of public-private partnerships.

Full text available at https://www.law.cornell.edu/supct/cert/18-1023. ⊙

McKinney v. Arizona (No. 18-1109)

Oral argument: Dec. 11, 2019
Court below: *Arizona Supreme Court*

In this case, the Supreme Court will decide whether the Supreme Court of Arizona correctly weighed mitigating and aggravating factors when conducting an independent review of James Erin McKinney's capital sentence, and whether the correction of the original sentencing error required resentencing by a jury at the trial level. McKinney argues that, by conducting a sentencing review, the state court reopened his finalized case, thus allowing the application of modern constitutional protections in his sentencing, which require resentencing by a jury. Arizona counters that the independent review conducted by the state court did not constitute direct review that reopened McKinney's case and that McKinney's sentence does not require review at the trial level. The outcome of this case will impact the retroactive application of newly established constitutional rights in capital sentencing and could afford a new opportunity for capital defendants for whom a judge conducted sentencing to be resentenced by a jury.

Full text available at https://www.law.cornell.edu/supct/cert/18-1109. ⊙

Monasky v. Taglieri (No. 18-935)

Oral argument: Dec. 11, 2019
Court below: *U.S. Court of Appeals for the Sixth Circuit*

This case arises out of a custody dispute between an Italian father, Domenico Taglieri, and an American mother, Michelle Monasky, whose marriage had deteriorated, and where the mother had removed the child to the United States before a court could determine the parents' custody rights. To determine whether the child must be returned to Italy, the Supreme Court must decide whether to uphold the Sixth Circuit's order to return the child based on its affirmation of the district court's determination that the child habitually resided in Italy. Monasky argues that the Hague Convention's text supports an actual-agreement standard for habitual residence, and that the Hague Convention does not contemplate courts imposing habitual residence on a child when the child's situation in the state would be precarious and the child lacks meaningful connections with the state. She further argues that the statute, appellate history, and the mixed legal and factual nature of habitual residence support de novo review. Taglieri responds that the lower courts properly applied a fact-sensitive analysis of the child's situation in Italy and, furthermore, that if "actual agreement" were required, the Hague Convention would under-protect children in hotly disputed custody cases who most need protection. He also contends that clear-error review should apply because habitual residence issues are more factual than legal, and because such review is more expedient, consistent with the Hague Convention's aims. The outcome of this case will have implications for international child abduction and custody cases involving claims of domestic violence.

Full text available at https://www.law.cornell.edu/supct/cert/18-935. ⊙

Lucky Brands Dungarees Inc. v. Marcel Fashions Group Inc. (No. 18-1086)

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

This case asks the Supreme Court to consider whether courts can prevent a defendant from raising a defense if the defendant failed to assert that defense against the same plaintiff in a prior, similar lawsuit. The Second Circuit recognized "defense preclusion" as a valid civil procedure concept to bar Lucky Brands Dungarees from raising a new defense in a trademark infringement lawsuit against Marcel Fashions Group where Lucky Brands Dungarees could have raised this defense in a previous lawsuit over the same alleged infringement. Lucky Brands Dungarees contends that applying defense preclusion against a defendant conflicts with fundamental principles of *res judicata* and is a novel invention by the Second Circuit that is harmful to defendants whose interests change over time. Marcel Fashions Group counters that defense preclusion is a logical feature of *res judicata* and argues that this doctrine clearly applies to defendants who, after losing a lawsuit, do not change their conduct. The Supreme Court's decision in this case will impact when and how defendants strategically raise defenses in civil litigation.

Full text available at https://www.law.cornell.edu/supct/cert/18-1086. ⊙

Thole v. U.S. Bank N.A. (No. 17-1712)

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

In this case, the Supreme Court will decide whether ERISA plan participants have standing to sue for breaches of fiduciary duty where the underlying employee benefit plan is overfunded. Thole and Smith argue that they have standing under 29 U.S.C. § 1132(a)(2)–(3) and the common law of trusts because neither conditions standing on a showing of individual financial loss. U.S. Bank counters that Thole and Smith have not suffered an injury sufficient to support standing because their retirement benefits were never actually at risk and they have no interest in a plan's overfunded surplus. The outcome of this case will determine the circumstances in which certain plan participants may enforce ERISA violations.

Full text available at https://www.law.cornell.edu/supct/cert/17-1712. ⊙

Kelly v. United States (No. 18-1059)

Oral argument: Jan. 14, 2020
Court below: *U.S. Court of Appeals for the Third Circuit*

In 2010, two public officials, Bridget Anne Kelly and William E. Baroni, Jr., reallocated two toll lanes on the George Washington Bridge's upper level to punish Fort Lee's mayor for refusing to endorse then-New Jersey governor Chris Christie's re-election campaign. Despite disguising this corrupt act as a traffic study, Kelly and Baroni were indicted for and convicted of wire fraud, defrauding a federally funded entity, and conspiracy to defraud. Petitioner Kelly and Respondent Baroni now argue that the Port Authority was never deprived of a legally-protected property right and that fraud cannot have occurred because the alleged victim received exactly what was bargained for, even though the public officials lied about their true intentions. Respondent United States contends that the Port Authority was deprived of a property right because Kelly and Baroni's traffic-study lie encumbered the Port Authority's exclusive free use of the George Washington Bridge and because neither Kelly nor Baroni had the authority to make such drastic changes. The outcome of this case has implications on future politics and whether political corruption should be prosecuted as a federal crime.

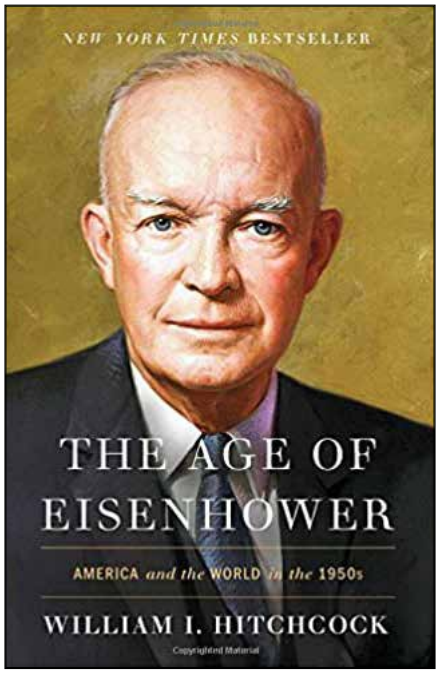
Full text available at https://www.law.cornell.edu/supct/cert/18-1059. ☉

Shular v. United States (No. 18-6662)

Oral argument: Jan. 21, 2020
Court below: *U.S. Court of Appeals for the Eleventh Circuit*

This case asks the Supreme Court to determine whether the categorical approach under the Armed Career Criminal Act (ACCA) should apply to "serious drug offense" determinations. Petitioner Eddie Lee Shular argues that under the ACCA, a "serious drug offense" must be considered under the same offense-matching categorical approach that is applied to a "violent felony" under the Act. Shular further argues that the "serious drug offense" provision of the statute requires a *mens rea* element in the prior state offense in order to qualify under the ACCA. Respondent United States counters that the categorical approach is not applicable to the "serious drug offense" provision of the ACCA, and that a *mens rea* element is not a requirement under the Act. The outcome of this case will affect uniformity in the criminal justice system, constitutional avoidance, and the ability of courts to limit detrimental effects and disparate impacts.

Full text available at https://www.law.cornell.edu/supct/cert/18-6662. ☉



The Age of Eisenhower: America and the World in the 1950s

By William I. Hitchcock

Simon & Schuster, New York, NY (2018)

672 pages, $35.00

Reviewed by John C. Holmes

This book is not a biography of General Dwight D. Eisenhower's entire life, but rather a comprehensive examination of his presidency, along with some attention to the years immediately surrounding his presidency. Eisenhower's life experiences and his character and personality are explored mainly as they relate to his performance as president. The author discusses Eisenhower's elections and his dealings with Russia; scientific and space challenges resulting from Sputnik; civil rights; the national highway system; the Suez Canal crisis; national healthcare; and Eisenhower's own personal health.

In the hard fought political scrum of today, where few politicians are widely admired, it is hard to imagine the immense popularity of the man everyone called "Ike." During World War II, Eisenhower was viewed as a heroic commanding general who subsequently represented America in securing peace. After the war, Eisenhower became the president of Columbia University, which was an engagement of celebrity status rather than full-time participation. Leading up to the 1952 presidential election, both Democrats and Republicans courted him to run as their candidate, even though he had never previously run for political office. He selected the Republican party, where he faced off against Senator Robert Taft of Ohio, who was an unassuming, conservative stalwart who had engaged in many years of political service and believed that he deserved the nomination. With the assistance of Congressman Richard Nixon and Governor Earl Warren, however, Eisenhower prevailed in a close primary race.

In both his election and reelection, Eisenhower's opponent was Adlai Stevenson, former governor of Illinois, who, because of his highly intellectual approach to issues and his general demeanor, was referred to by some as an "egghead." Stevenson earned high approval from academicians and Democratic activists. However, he was overwhelmed by Ike's idealism, charisma, and sincerity and the voter's admiration of Ike's past achievements. In his campaign and in many public speeches beforehand, Eisenhower usually espoused fairly standard conservative, pro-business Republican policy positions. Privately, he preferred a more moderate view on most issues, contending that if both sides of an argument were against you, your position must be correct.

Concerning the U.S.S.R. (Russia), an ally during World War II and a chief adversary afterwards, Eisenhower engaged in firm opposition to the U.S.S.R.'s governmental system, which he called "ungodly" communism. Ike's policy positions against the U.S.S.R. were labeled "Mutual Assured Destruction." He declared that any attack on the United States or an ally would be met by equal force, including nuclear bombing. The very concept of mutual destruction was believed to prevent any enemy consideration of pursuing such an ill-conceived attack, yet Eisenhower hid his extreme personal reluctance to consider such action. Because he was a former military commander of the United States, which had used the atomic bomb against Japan to accelerate the end of the War, Russia was fearful of testing Ike's resolve.

Ike's Russian counterpart was Nikita Khrushchev, a squat, rotund, unattractive, emotionally mercurial and sometimes insecure bullying man of whom Eisenhower was not fond. Nevertheless, after some confrontational maneuvering, Ike invited him for a tour of the United States, which temporarily unfroze the "Cold War." Eisenhower's hopes were realized when Khrushchev became very impressed by America's prosperity and the population's peaceful intentions. Their relationship was never warm, however, and it subsequently ended on a sour note.

Known publicly for his rectitude and honor, privately, Ike helped to create and subsequently used information gathering through covert operations by the Central Intelligence Agency. Eisenhower was also happy to initiate the risky practice of high flying U2 planes to spy over Russian territory. Nevertheless, he publicly denied its use while unaware that the Russians had already shot down Gary Power's plane and captured him. Besides Ike being personally embarrassed by this episode, a chance to advance peaceful efforts was lost as Khrushchev angrily canceled a scheduled summit.

Eisenhower's method of collegial governing was emphasized through his dealings with civil rights matters. During Eisenhower's tenure, the United States was racially segregated between whites and blacks in the South by state law and policy. Even during World War II, most military units were segregated. Eisenhower's appointee as chief justice to the Supreme Court was the same Governor Earl Warren who had assisted him in obtaining the nomination as the Republican candidate for president. On May 17, 1954, Justice Warren wrote a unanimous decision in *Brown v. Board of Education*, calling for the end of segregation in public schools. Despite the Supreme Court's call for due haste in implementation, there was resistance in many southern states by methods such as the use of private schools to avoid desegregation. Eisenhower's desegregation

policy was enforced by Attorney General Herbert Brownell, who aggressively sought to enforce the Court's order. Eisenhower appeared to stay above the fray, however, not wishing to earn the anger of southern voters, of which he had earned growing support. In the emotionally charged issue of desegregation, Ike emphasized his role as the executive required to enforce the Supreme Court's order and urged calm acceptance rather than asserting a moral imperative. At various times, he was praised for his desegregation efforts and alternatively criticized both by black civil rights organizers and white southern officials. Ultimately, Eisenhower emerged relatively unblemished in popularity while substantially furthering civil rights for the disenfranchised.

A matter in which Eisenhower took special pride was his successful effort to obtain funding for a national highway system, which provided for the expanding population to travel more frequently and easily for both business and pleasure. He also initiated plans for the peaceful use of atomic energy, providing for the nuclear fueling of the destroyer *U.S.S. Savannah,* submarines, and its future use in utility energy.

Eisenhower's adept handling of Senator Joe McCarthy further demonstrated Ike's personality, character, and governing style. McCarthy was a self-styled communist-hater and publicity hound, and he grew increasingly outrageous in his pursuit of real and imagined communists and sympathizers. As chairman of the "Un-American Activities" Committee, he scheduled hearings where he subjected movie stars, business leaders, or other ordinary citizens to intense interrogation of activities allegedly related to communist activity, going well beyond the usual boundaries of propriety in investigating allegations of wrongdoing. Eisenhower's reaction was to completely ignore the senator's excesses, despite intense pressure by the press and his own party to oppose McCarthy. Eventually, McCarthy overestimated his appeal and support while attacking the military and even directly implicating Eisenhower himself. The author articulates at length the ensuing battle that, in a karmic rebound, resulted in the Senate investigating McCarthy and his destructive methods. Eisenhower played a minimal but crucial role in the demise of "McCarthyism." The Senate eventually censored McCarthy, who thereafter lost his Senate seat.

In addition to the numerous domestic and foreign matters facing "Ike," he also managed to engineer the conclusion of the fairly long-running Korean War. Additionally, he refused to engage in the Suez Canal uprising, thereby antagonizing allies England and France, while gaining admiration from free and soon-to-be-free Middle Eastern countries, such as Egypt.

Significantly, Eisenhower's many accomplishments and shortcomings occurred while experiencing personal health problems. For over six months, leading up to his reelection, he was severely limited in performing his usual routine due to a heart attack requiring frequent rest. His ability to run for reelection was subjected to many questions by an anxious public and curious press. Eisenhower's eventual decision to seek reelection was based largely on his increasing confidence in his own competency and his low opinion of Richard Nixon's abilities.

The author celebrates the public's elevated ranking of Eisenhower, often ranked as the fifth highest behind Washington, Jefferson, Lincoln, and Franklin Roosevelt, and asserts:

> From the start of his active pursuit of the presidency in 1951, right through eight years in office, and for a decade after he retired to his farm in Gettysburg, Pennsylvania, critics styled Eisenhower as a lightweight, an amateur, an orthodox pro-business do-nothing president, a lazy leader who, despite all his grinning was often callous and distant, more interested in golf than governing. The Washington D.C. press corps often depicted Ike as unimaginative, slow-witted, out of touch, and frankly uninterested in the daily affairs of the country. Even as the nation enjoyed a period of unprecedented prosperity at home and a stable if fragile peace abroad, and even as the people grew even more fond of Ike, his political rivals were scathing about his shortcomings as a leader. It is the central paradox: that a man so successful at the ballot box and so overwhelmingly popular among the voters, could have been given such poor marks by the political class. His critics never grasped the profound appeal of the man and never appreciated the depth of his political talent.

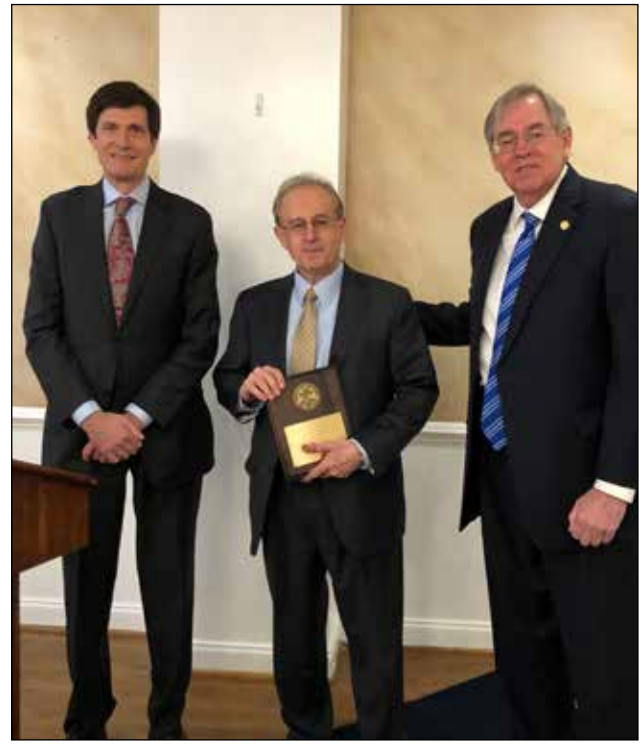
As Eisenhower neared the conclusion of his presidency, he was both disheartened and yet invigorated toward further action and speaking in defense of his performance by the vicious attacks of the Democratic challenger and future president, John F. Kennedy. Referring to Ike as detached and too elderly for the job, and emphasizing a "missile gap" with Russia, Kennedy was a young and attractive candidate and advanced a new generation of leadership. Eisenhower shunned direct confrontation with Kennedy or full-throated support of Nixon, who wished to continue Ike's policies, until nearly the conclusion of the presidential campaign. Nixon lost by a very narrow margin.

President Kennedy became quickly chastened and embarrassed by his failure to promulgate a voluntary uprising in Cuba that was actually planned by the CIA, and by the later Russian-created "Cuban missile crisis," and his leadership faltered early on in Vietnam. Somewhat vindicated, Eisenhower was subsequently often secretly consulted by Kennedy for advice, especially on foreign policy.

Ike's popular but seemingly placid presidency initially resulted in low political ratings versus the appeal of his successor; and it was further downgraded by Kennedy's tragic assassination. Harvard historian Arthur Schlesinger Jr., while praising Kennedy's short administration as "Camelot," published a poll that ranked Ike as 22nd of the 31 previous chief executives, nestled between the undistinguished Chester A. Arthur and the disgraced Andrew Johnson. Hitchcock has—through careful, exhaustive research and hard-hitting, honest reporting—demonstrated why these ratings have been reevaluated and reversed.

John C. Holmes served as a U.S. administrative law judge for 30 years, retiring in 2004 as chief administrative law judge at the Department of the Interior. He currently works part time as a legal and judicial consultant.

Roanoke Chapter: (Left) Board member Paul Beers presenting the plaque to Bob Ziogas. (Below) Left to right: Paul Beers; Bob Ziogas, Past President; and Bob Habermann, Chapter President.



FOURTH CIRCUIT

Roanoke Chapter

The Roanoke Chapter of the FBA hosted Laura Day Rottenborn, the executive assistant U.S. attorney for the Western District of Virginia, at our meeting held on Jan. 23, 2020, at the Shenandoah Club.

At the meeting, we presented a plaque to honor former president and long-time board member Robert Ziogas. ⊙

FIFTH CIRCUIT

Mississippi Chapter

The Mississippi Chapter of the FBA joined with the Harrison County Bar Association (HCBA) (Gulfport/Biloxi) to host Senior U.S. District Court Judge Louis Guirola Jr. for a talk about his experiences as a district court judge and his duties as a senior status

Mississippi Chapter: (Left to right) Taylor McNeel, HCBA Past President; Nick Morisani, FBA Secretary (Phelps Dunbar); Dean Jim Rosenblatt, FBA Executive Director (Mississippi College School of Law); Judge Guirola; Nita Kuhner, HCBA Vice-President.

Mississippi Chapter: (Left to right) Nick Morisani, FBA Treasurer (Phelps Dunbar); Dean Jim Rosenblatt, FBA Executive Director (Mississippi College School of Law); Patrick McDowell, Outgoing President (Brunini); Chief Judge Jordan; Blythe Lollar, Secretary (Baker Donelson); and Mary Helen Wall, President (Office of the Attorney General).

judge. The Great Southern Club offered a wonderful buffet for this yearly Gulf Coast meeting.

The Mississippi Chapter of the FBA was privileged to have U.S. District Court Chief Judge Dan Jordan of the Southern District speak to an overflow crowd at the Capitol Club on the accomplishments of the court in 2019 and the plans for 2020. Chief Judge Jordan praised the work of District Court Clerk Arthur Johnston III. The members elected a new slate of officers to serve for 2020. ⊙

SIXTH CIRCUIT

Northern District of Ohio Chapter

Bill of Rights Birthday Celebration

Members of the Northern District of Ohio Chapter of the FBA joined 86 students and six teachers at Campus International School in Cleveland to celebrate the 228th birthday of the Bill of Rights on Dec. 13, 2019. Attorneys Bill Beyer, Rob Chudakoff, Sarah Cleves, and Jim Satola passed out copies of the Bill of Rights to each student and talked with the students about the meaning and importance of the Bill of Rights. The students also asked questions about the role of the Bill of Rights in the attorneys' day-to-day law practices. Everyone then celebrated with birthday cupcakes. The FBA-NDOC looks forward to celebrating the event again next year!

The FBA Northern District of Ohio Chapter brought a birthday cake and cupcakes to share with the students in celebration of the Bill of Rights' 228th birthday. ⊙

Northern District of Ohio Chapter: (Top) FBA-NDOC members (and chapter board members) Rob Chudakoff and Jim Satola taking questions from students on how the Bill of Rights applies in everyday life. (Bottom) FBA-NDOC members (first row, center) Rob Chudakoff, Sara Cleves, and Bill Beyer and (second row, center) Jim Satola, with the students of Campus Elementary School in Cleveland.

Member Spotlight

*** Denotes Sustaining Member**

Joseph Falvey
Neil Gorsuch
Robert Sanger*

FIRST CIRCUIT

First Circuit at Large
B. Debrason
Adam Stone

Hon. Raymond L. Acosta Puerto Rico
Linette Figueroa Torres
Isabel Lecompte Shiba
Maria Bustelo-Garcia*

Massachusetts
Jennifer Boal
Allison Burroughs
Donald Cabell
Denise Casper
Judith Dein
David Hennessy
Mary Kelley
Pablo Man
Mark Mastroianni
Angela Munro
Michael Ponsor
Katherine Robertson
Sean Smith
Leo Sorokin
Indira Talwani

Rhode Island
Danilo Borgas
Kelsey Peck
Santiago Posas

SECOND CIRCUIT

Second Circuit at Large
Andrea Fischer*
Brendan Kalb*
Benjamin Margo
Christian Torres

Eastern District of New York
Keith Gutstein*

Southern District of New York
James Finkel*

Vermont
Angela Eastman

Western District of New York
Bernadette Gargano

THIRD CIRCUIT

Delaware
Joel Glazer
William Johnston*

Eastern District of Pennsylvania
James Fitzpatrick
David Freese*

Middle District of Pennsylvania
Katie Dixon

New Jersey
Kerry Hartington*

Western District of Pennsylvania
Kelvin Morris

FOURTH CIRCUIT

Fourth Circuit at Large
Janet Smith

Eastern District of North Carolina
Jamilah Espinosa
John Holton
Terence Steed

Hampton Roads
Daniel Salmon

Middle District of North Carolina
Jamieson Stone

Northern Virginia Chapter
Erin Alleman
Mark Lansing
Lynnette Rodgers

Roanoke
Nathan Schnetzler

South Carolina
Jonathan Drucker*
Mckinley Hyman

Western District of North Carolina
Jorge Pardo

FIFTH CIRCUIT

Fifth Circuit At Large
Pamela Buchmeyer
Franklin Rosenblatt

Austin
Christopher Camillone
Keith Henneke
Gabriel Soto
James Wiseman

Baton Rouge
Garrett Anderson
Ridge Miguez

Dallas
Cynthia McGeoch
Joshua Russ

Fort Worth
Pamela Fernandez

Jacksonville
Bradley Bodiford
Kelly Milliron

Lafayette/Acadiana
Jessica Allain

New Orleans
Rachel Anderson
Remington Angelle
Rebecca Areaux
Natalie Awad
James Barnett
Andrew Blasini
Patrick Bollman
Casey Bordelon
Matthew Braquet
Rachel Breaux
Marquita Cage
Maresh Campbell
Rebekah Capers
Ethan Caubarreaux
Alexandra Cello
Sarah Clevenger
Taylor Cooper
Samantha Coughlin
Zachary Daniels
Monette Davis
Farren Davis
Deandra De Napoli
Patrick Duncan
Victoria Fabre
Jeffery Gasser
Morgan Gonzales
Edmond Guidry
Maxwell Hadley
Roth Hainkel
Linly Hall
Grace Hancock
David Hanks
Michael Heaton
Lamant Hills
Amelia Hurt
Meagan Johnson
Alexander Johnson
David Kobetz
Katherine Kovach
Phillip LaBorde
Luke LaHaye
Christine Lama
Hayley Landry
Jonathan Lee
Sara Levy
Ashton Licciardi
Lance Licciardi Jr
Jordan Adam Lieberman
Olivia Mallary
Kolby Marchand
Bette Matheny
Allena Brooke McCain
Chandler McCoy
John-Michael Mcintire
Jamie Miller
Denman Mims
Darius Moore
Michael O'Brien
Casey O'Flynn
Gwyneth O'Neill
Samantha Oppenheim
Kristine Ortiz
Madison Pitre
Stephanie Poucher
Laura Pousson
Jacob Powell
Paul Pritchett
Jacob Pritt
Christopher Prudhomme
Myles Ranier
Anna Reed
Connor Reinoso
Kassie Richbourg
Brooke Roach
Henry Roth
Joelann Rousell
Benjamin Russell
Alexandra Saliba
Wishkaranjit Sarai
James Sheppard
Gabriel Silva
Courtney Smith
Mary Smith
Cristian Soler
Brett Sommer
Whitney Stewart
Eden Tesvich
Joseph Thigpen
Parish Tillman
Coleman Torrans
Kyle Townsley
Kyle Truxillo
Joseph Trytten
Ryan Tucker
Courtney Turkington
Kyle Usner
Stephanie Veech
Leah Voth
Garret Wick
Trey Williams
Marina Wilson
Taylor Katherine Wimberly
Kenneth Wink Jr
Gabriel Winsberg
Ryan Edward Womac
Michael Yenni, Jr
Claire Zeringue
Samantha Schott*

San Antonio
Rebecca Aduddell
Julie Bell
Bradley Bellows
Kimberly Boutte
William Broocks
Jonathan Chaires
Nicondra Chargois-Allen
James Dingivan
Nicole Edgeworth
Joseph Ellis
Courtney Gaines
Jonathan Garcia-Davalos
Manoj Govindaiah
Charles Hayes
Brennen Jenkins
Thomas Lillibridge
Jacob Litzenberger
Mathews Metyko
Eunice Moore
Priscila Mosqueda De La Garza
Edward Nealy
Edward Russell
Matthew Salazar
Sarah Smart
Kelli Vaughn
Karen Vowel Sales
Taylor Wood
Rodrigo Borja*

Southern District of Texas
Stephen Barnes
Florence Chen
E. R. Hamilton
Wesley Nash
Russell Stockman
Courtney Glaser*

SIXTH CIRCUIT

Sixth Circuit at Large
Erin Barnhart
Nathan Somogie

Chattanooga
Patrick Shockey

Cincinnati-Northern Kentucky, John W. Peck
Collin Ryan
Peter Snow
Robert Thompson

Columbus
Rachel Bloomekatz
Chris Brigdon
Brian Coulter*

Dayton
Adam Beiersdorfer
Masallay Komrabai-Kanu
Glen McMurry*
Morgan Napier

Memphis Mid-South
Madeline Holbert
Mary Morris
Jonathan Nelson
Jon York

Northeast Tennessee
Cynthia Wyrick
Karissa Range*

Northern District of Ohio
Amanda May
Vicki Werneke
Mengxue Xie

SEVENTH CIRCUIT

Seventh Circuit at Large
Hannah Henkel

Central District of Illinois
Marsha Combs-Skinner

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	❍ $180	❍ $160
Member Admitted to Practice 6-10 Years	❍ $250	❍ $225
Member Admitted to Practice 11+ Years	❍ $300	❍ $260
Retired (Fully Retired from the Practice of Law)	❍ $180	❍ $180

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	❍ $115	❍ $90
Member Admitted to Practice 6-10 Years	❍ $180	❍ $155
Member Admitted to Practice 11+ Years	❍ $225	❍ $185
Retired (Fully Retired from the Practice of Law)	❍ $115	❍ $115

**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. ..... ❍ $225

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 ..$25
- ❍ 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
- ❍ LGBT Law $15
- ❍ Qui Tam Section $15
- ❍ Securities Law Section $20
- ❍ 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 - $20

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 _____

FY20D

Chicago
M. Elysia Baker Analo
Jake Christensen
Garrett Fitzsimmons
Jordan Matthews
Richard Mrizek
Anna Perocchi
Alexandra Ruggie
Bill Whitner
Daniel-Charles ("DC") Wolf

P. Michael Mahoney (Rockford, Illinois)
Richard Dvorak

Southern District of Illinois
Michele Parrish
Brandon Wise

Wisconsin
Robert Lundberg

EIGHTH CIRCUIT

Eighth Circuit at Large
Alana Mosley

Minnesota
Eric Boettcher
Chelsea Bunge-Bollman
Erin Edgerton
David Hackworthy
Jacob Harris
Jennifer Hartjes
Christopher Haugen
Elle Lannon
Sarita Matheson
Bartley Messick
Molly Nephew
Christopher Nguyen
Daniel Ongaro
Christopher Pham
James Robbins
Carly Thelen
Veena Tripathi
Kyle Wislocky

Montana
Daniel Wenner

Nevada
Homero Gonzalez*

NINTH CIRCUIT

Ninth Circuit at Large
Patricia Deem
Sarah Farhat
Daniel Klopper
Michelle LaPena
Bethany Nolan
Joshua Schroeder
Jeffrey Stein
Jesse Taylor
Gregory Watts

Alaska
Patricia Wong

Hawaii
Jennifer Gitter
Sarah Love*
Harvey Lung*
Rachel Miyashiro
Andrea Miyashita
Ethan Murphy
Rae Shih

Idaho
Peter Wucetich

Los Angeles
Jan Aune
Paul Green
Berenika Palys
Jazmine Smalley

Northern District of California
Angi Cavaliere
John Hemann*
Juliana Yee

Oregon
Amy Bruning
Sangye Ince-Johannsen
Anit Jindal
Meredith Bateman*

Phoenix
Kathryn Almond
Jessica Gale
Meaghan Kramer
Molly Weinstein
Lorraine Morey*

Sacramento
Christopher Hales

San Diego
Michael Berg
Melissa Bobrow
Betsey Boutelle
Chloe Dillon
Jenn French
Oliver Kiefer
Alexi Pfeffer-Gillett
Eric Plourde
Allison Rego
Christopher Wooley

TENTH CIRCUIT

Colorado
Laura Jones
Steven Osit
Jennifer Weddle*

Kansas and Western District of Missouri
Nathan Kakazu
Bernardo Zito Porto

Northern/Eastern Oklahoma Chapter
Stephanie Duran

Oklahoma City
Lauren Kiefner
Aileen Novess
Gina Pointon
Shawnae Robey
Kari Hawkins*

Orange County
Amy Karlin

St. Louis
Grant Ford
Talmage Newton
Joseph Schlotzhauer

Utah
Rita Cornish*
Christina Isom
Brian Malone
Michael Reed
Cecilia Romero

ELEVENTH CIRCUIT

Eleventh Circuit At Large
Justin Bennett
Allyson duLac
Lindy Keown
Joshua Kersey
Dennis O'Hara*

Atlanta Chapter
Sharlz Webb

Broward County
Vanessa Tussey

North Central Florida
Natalie Maxwell

Orlando
Jacinda Bernard
Colby Ferris
Vaughn Glinton
Emily Martin
Cameron Parks

Palm Beach
Casey McGowan

South Florida
Kyle Ceuninck

Tallahassee
David Fulleborn

Tampa Bay
Jessica Alley*
Sarah Anderson
Amanda Biondolino
James Botkins
Ryan Corbett
William Jung
Michael Mariani
Robert McKinley
Lisa Scheibly
Robert Stines
Jessica Vander Velde
Morgan Vasigh
Christina Flatau*

D.C. CIRCUIT

District of Columbia Circuit at Large
Jonathan Gaffney

District of Columbia
Jessica Burt
Christopher Carlson
Mary Beth Hasty
Sheila Hollis
MacCary Laban
Janel Quinn
William Reese

Federal Bar Association Calendar of Events

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

MAY

MAY 1
Webinar: Fighting Fraud in a Pandemic: The False Claims Act's New $2 Trillion Battlefield – Part I

MAY 4
Webinar: Should a Business Take the Paycheck Protection Program Money? Key Factors for Companies to Consider When Certifying Their PPP Need

MAY 4 – 8
New Orleans Chapter: Justice Camp

MAY 6
Webinar: Implicit Bias in the Law, the Court System, the Legal Community, and your Legal Career

MAY 8
Webinar: Fighting Fraud in a Pandemic: The False Claims Act's New $2 Trillion Battlefield – Part II

MAY 1 – JUNE 4
2020 Virtual Leadership Training

MAY 15
Webinar: Judging in a Time of Crisis

MAY 19
New Orleans Chapter: FBA Law School Zoom Happy Hour

MAY 20
Webinar: USERRA: What Matters in Protecting our Service Members' Employment Rights

MAY 20
Webinar: Ethics in the Practice of Immigration Law

MAY 20
New Orleans Chapter: Virtual Lunch with the Court with the Hon. Nannette Jolivette Brown

MAY 21
Tax Section: Practice and Procedure Roundtable Call

MAY 21
Oklahoma City Chapter: Virtual CLE – COVID-19 Employment, Finance, and Regulatory Issues

MAY 21
New Orleans Chapter: FBA Law School Zoom Happy Hour

MAY 25
New Orleans Chapter: FBA Law School Zoom Happy Hour

MAY 27 – MAY 29
Virtual 2020 Insurance Tax Seminar

MAY 27
New Orleans Chapter: Town Hall Zoom With EDLA Chief Judge Nannette Jolivette Brown

MAY 27
New Orleans Chapter: FBA Law School Zoom Happy Hour

JUNE

JUNE 3
Webinar: Serving our Tribal Nations: Employment Law Issues

JUNE 3
Webinar: Visa Issuance and Expedite Requests for Foreign Medical Professionals During the COVID-19 Pandemic

JUNE 12
Webinar: COVID Coverage: A Counsel's Guide to Successful Insurance Claims and Recovery

JUNE 17
Webinar: Senior Lawyers: OK Boomers!

JUNE 26
Webinar: Labor and Employment Issues in the Healthcare Industry: The Impact of COVID-19

JULY

JULY 1
Webinar: Lessons from John Steinbeck's Grapes of Wrath: Copyright Terminations Under Section 203 and 304 of the Copyright Act

Happy 100th Birthday, FBA!

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Federal Bar Association

Save the Date

ANNUAL MEETING & CONVENTION

September 9–12, 2020

Francis Marion Hotel • Charleston, SC

www.fedbar.org/fbacon20