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Chancellor-Founder
Hon. Emil Gumpert
(1895-1982)

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Andy Coats and Stephen Grant

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The Vanishing Justice System?

Amid the long and ongoing lament for the vanishing trial, President **Robert L. Byman** is not so certain it is necessarily a bad thing. To be sure, it is bad for trial lawyers that there are fewer trials–just as it is bad for generals that there are fewer wars. But is it bad for society? If we can resolve our disputes without war or trials, isn't this a good thing?

Au contraire, says past President **David J. Beck**. In "A Civil Justice System with No Trials" (Texas Bar Journal, December 2013), Beck observes that "the steady erosion of the American trial is our dirty little secret." He adds that "while jury trials in federal court obviously have declined, the decline in bench trials has been steadier and steeper." This is so, despite the fact that not only is the number of lawyers increasing but also the number of case filings and depositions, at least in federal courts.

Is this simply a matter of perspective?

Despite high costs of litigation, cases still wend their way to trial. But there must be many factors reducing that number. Cost is obviously first and foremost. Alternate dispute resolution—whether mediation and/or arbitration—clearly accounts for part of the decline. Indeed, in Delaware, until the Supreme Court refused to hear the appeal from a decision striking down the legislation, the Court of Chancery had been empowered to offer private, adjudicative services, for a fee. (See, Judith Resnick, "Renting Judges for Secret Rulings, *New York Times*, February 28, 2014.)

Summary judgment hearings might be another reason, while constant judicial pressure to settle cases clearly plays a role. Finally, litigation fatigue as a result of procedural wrangling may well cause cases to screech to a halt before trial.

Beck sees several profound, and in many ways, troubling consequences of this development, particularly that lack of jury participation enables the average citizen to abnegate his or her civic responsibility. Other commentators, particularly jurists and academics, suggest that this decline bodes ill for the development and evolution of the common law, thus decreasing legal certainty and predictability of outcome of a civil dispute. Still, it is hard, if not impossible, to justify the encouragement (as opposed to, say, facilitation) of trials simply to reverse this, seemingly inexorable trend.

And Byman's rosy view about fewer trials is a bit tongue in cheek. It is good, he thinks, that disputes be settled fairly and efficiently – but if the cost of litigation is driving dispute resolution to *inferior* forms of resolution, that is not a good thing. We need to find a way to make trials an effective and efficient mechanism.

Whether good or bad, and whether Beck or Byman is right, we are witnessing a sea change of historic proportion, and if events continue along this track, our justice system (and its underpinnings) will look vastly different even in a few years from what we have today. Like the doomed Easter Islanders, we may be on the verge of cutting down our last tree.

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This is the 75th issue of the ACTL *Journal* (née *The Bulletin*) and we are more than proud of it. What clearly made the *Journal* what it is now, however, are the efforts of all of our forebears, most notably our Editor Emeritus, **E. Osborne "Ozzie" Ayscue, Jr.**, a College Past President to boot. Ozzie's stewardship over the last ten years is legendary and we are merely standing on his broad shoulders. Much of the work we now divide among many of us, Ozzie (with Marion Ellis) did almost single-handedly, showing both a consistency of vision and execution. It is to him we are most grateful and tip our hats in tribute.

Finally, as you will note, we are expanding each issue to include articles and commentary of note along with our meeting coverage. We welcome all contributions.

Tally-ho, see you in London.
Andy Coats/Stephen Grant

COLLEGE PUBLICATION MARKS 75TH EDITION

FROM A BULLETIN BOARD TO A JOURNAL OF SUBSTANCE

Thirty years ago, the American College of Trial Lawyers' publication, *The Bulletin*, was created as a twice-a-year periodical to inform Fellows about College activities and to encourage them to speak to issues affecting the bar. Recently re-named the *Journal* to reflect its evolving nature, its growth has paralleled that of the College itself.

Before 1984, the President's Annual Report was the College's only established way to communicate with Fellows. The first issue of *The Bulletin*, a mere eight pages long, contained an update on College committee activities, selected news involving Fellows, the President's Annual Report, brief excerpts from two presentations at the Spring 1984 national meeting and two substantive articles (one on the impact of the widening gap between judicial compensation and the income of lawyers in private practice, the other on a pending proposed amendment to the Federal Rules of Civil Procedure).

The next thirty issues were consistently similar in content and appearance. Only six were as much as twenty pages long, the longest two reaching twenty-eight pages. Early in its existence, Fellow **Edward J. (Eddie) Rice, Jr.** of New Orleans, Louisiana, assumed responsibility for its publication. A Communications Committee chaired by **L. F. (Sandy) Sams, Jr.**, of Tupelo, Mississippi, the predecessor of the current Editorial Board, made its first masthead appearance in 1995.

EVOLUTION TO AN EXPANDED PUBLICATION

As the College's activity increased, so too did the number of issues published each year. Volunteer participation began to prove difficult, and in 1997 the College retained a former state bar staff member as Managing Editor. The Fall1998 issue noted the creation of a College website that, as electronic communication came of age, would eventually lead to a transformation of *The Bulletin.*

Issue 32, the Fall 1998 issue, covered the College's annual meeting in London and its ancillary meeting in Rome. Realizing that the first draft failed to report the substance of the speakers' presentations, then College President **E. Osborne (Ozzie) Ayscue, Jr.** (who as President-Elect had planned the meetings) rewrote the issue to ensure that the several thousand Fellows unable to attend would nevertheless have the benefit of those presentations.

The revised issue related the substance of the fourteen principal addresses and the presentations of the recipients of two Honorary Fellowships. Among those whose remarks were thus preserved were three Supreme Court Justices (two from the United States and one from Canada), two of the three top officials of the British judiciary, the United States Ambassador to the Court of St. James's, Italy and the Vatican, the retired Director General of the United States Foreign Service, and a former White House Chief of Staff.

Recognizing the positive reaction to the expanded approach, Ayscue, humorously reflecting that "no good deed goes unpunished," undertook to provide substantive coverage of the next four national meeting programs. Then in 2001, the College retained experienced journalist and writer, Marion A. Ellis as Editor of *The Bulletin.* A year earlier, Ellis had been the co-author of *Sages of Their Craft*, an in-depth history of the first fifty years of the American College of Trial Lawyers.

Beginning with Issue 38, former Past President Ayscue and author Ellis produced the next thirty issues of *The Bulletin*, with Ellis handling the production side and writing the articles and features that did not require the training and insight of a lawyer. Ayscue wrote the lawyer-centric articles, and the two complemented one another, each by editing the other's articles. An Editorial Board established policy decisions and reviewed the proposed contents of each issue, but its members were not directly involved in writing articles for the publication.

The College's national meeting programs, traditionally designed to send the attendees home with far more to think about than the issues of their everyday lives, remained the central feature of two issues each year. These programs had been filmed for many years, and at the Fall 2003 meeting, the proceedings were also recorded by a court reporter. With both of these supplementary resources available, the Winter 2004 issue began meeting coverage that moved from cursory "Notable Quotes" taken from each speaker's presentation to separate articles that better preserved the substance of those presentations. The practice of preserving the substance of the rich, thought-provoking programs — >>

a hallmark of the College — that had begun with the Fall 1998 issue has continued in this expanded form to the present.

The "new" *Bulletin* began to introduce the Fellows to their leaders by profiling incoming presidents, officers, and members of the Board of Regents. It expanded coverage of the national, state and province committees' activities and profiled regional meetings to inform, educate, and encourage attendance. Of paramount importance, the publication sought Fellows' involvement by soliciting and publishing their articles and opinion pieces on current issues facing the profession.

From time to time, articles explained the College's inner workings, notably including how the College selects its members and leaders. Recognizing that all the Fellows are outstanding members of the bench and bar, *The Bulletin* steered clear of singling out the professional achievements of any one Fellow. It chose instead to profile the achievements of Fellows beyond their professional lives and to highlight significant group efforts and pro bono successes.

As the publication continued to grow, members of the College's National Office assumed additional responsibilities to help broaden its breadth and reach. *The Bulletin* employed a professional graphic designer to upgrade its layout; it established a heightened relationship with its existing printing company, and it increased the responsibilities of its professional photographer, who expanded the publication's visual appeal with color photography in each issue.

COLLEGE WEBSITE ALLOWS TRANSITION

With growing acceptance and use of the internet and the continued development of the College's website, the time was ripe to utilize its burgeoning technology for timely and periodic reports to the Fellows. *The Bulletin* could then become even more substantive in its content. In addition to the print copy mailed to each Fellow, it "went live" on the College website at www.actl.com. Earlier editions, beginning with Issue 40, Winter 2001, were also archived and made available on the website. On the website, the publication was accessible for the first time to those outside the organization's membership. In keeping with its expanded role and its newly increased exposure, modernized graphics and expanded photographic coverage created a professional appearance commensurate with the substantive content of the publication.

The rise of the internet provided material for a new feature of each issue. Online research about the lives of Fellows who had recently died, research that often went beyond their published obituaries, allowed *The Bulletin*, and by extension, the Fellows, to recognize and honor the lives of Fellows whose stories might otherwise have been lost to all but those who had been close to them. The passing notices of loss transitioned from a simple list of those who had died to a description of the life of each in a section entitled "In Memoriam." Over time, "In Memoriam" has become not only a growing repository of the College's history, exemplified in the lives of departed members, but the single highest-read and most frequently requested repeat section of *The Bulletin*.

EVOLUTION FROM *BULLETIN* TO *JOURNAL*

Between 2007 and the end of 2011, the publication had grown to an average of seventy pages per issue. In 2012, beginning with Issue 68, the principal responsibility for the publication's production passed to the College staff and a newly reorganized Editorial Board, co-chaired by Past President **Andrew M. Coats** and Canadian Fellow **Stephen M. Grant,** LSM. The new Editorial Board assumed direct responsibility for the publication's content and for the first time, each member of the new board personally contributed articles for publication. Managing Editors on the National Office staff coordinated, edited, and produced the finished product with the able assistance of the off-site graphic designer and photographer.

A survey of the Fellows taken as this transition was taking place revealed a high regard for the content and character of the publication. The new Editorial Board has renewed the effort to recruit Fellows to contribute by writing articles and to continue to update the publication's appearance.

The thirty-year evolution of the official College publication has taken it from an eight-page Fellows-only bulletin board to a polished publication that can be accessed online by anyone who visits the College website. While responding to Fellows' demands, the publication has responded to the times, the technology, and the profession it serves. Entering a new era with content that approaches one hundred pages per issue and an ever-growing readership, it has transitioned to a new name that is more descriptive of its present content and role: *The Journal of the American College of Trial Lawyers.*

It remains the mission of editors and the staff of the *Journal* to continue to serve the College by producing a publication that reflects the high professional standards to which the College has traditionally held itself.

Communication is vital to an organization such as ours, whose members are scattered across the continent. For those Fellows who can't attend the general meetings, our written communications provide the only continuous link among us. It's vital that it be a strong one.

Past President President Gael Mahony in The Bulletin, number 1

2014 SPRING MEETING HELD IN LA QUINTA, CALIFORNIA

The College's sixtieth Spring Meeting was held in La Quinta, California, from March 6 through March 9, 2014, at the La Quinta Resort & Club. Nearly 600 Fellows, spouses, and guests gathered, and fifty-four new Fellows were inducted.

Thursday evening's President's Welcome Reception at the resort's main lawn offered Fellows, spouses, and guests the chance to kick off the three-day event with cocktails and hors d'oeuvres under the desert sky and with the Santa Rosa Mountains in the background. An outing to the BNP Paribas Open Tennis Tournament at neighboring Indian Wells Tennis Garden earlier in the day allowed tennis fans an up-close view of the tour's top players.

The general session on Friday morning commenced with an invocation by Past President **Thomas H. Tongue**, of Portland, Oregon.

Regent **David J. Hensler** of Washington, D.C., introduced the meeting's first speaker, Representative **Raul Ruiz** (D-CA) of Palm Desert, California. Ruiz's speech included the story of his journey from growing up in the Coachella Valley to attending Harvard Medical School and then returning to the area of his youth where he ran for public office.

Former Regent **Charles H. Dick, Jr.**, of San Diego, California, introduced **Navroj (Nuvi) Mehta**, maestro of the San Diego Symphony. Mehta brought his musical styling to the speech, opening it by playing the violin cadenza from the opening credits of the movie version of *Fiddler on the Roof*.

Immediate Past President **Chilton Davis Varner** of Atlanta, Georgia, introduced the next co-speakers, who are also father and son: The Honorable **James F. Holderman** of Chicago, Illinois, and **Bill Holderman** of Santa Monica, California. The pair worked together on the acclaimed film *The Conspirator*, which told the story of Mary Surratt, who was on trial for her part in the conspiracy to assassinate President Abraham Lincoln. Bill worked as a film producer while father James served as a consultant.

Past President **John J. (Jack) Dalton** of Atlanta, Georgia introduced **Mary Walshok**, Ph.D, Dean of Extension at the University of California San Diego and Associate Vice Chancellor for Public Programs. An author and industrial social scientist, Walshok spoke about innovation and invention in San Diego and in the state of California.

Introduced by Regent **Douglas R. Young** of San Francisco, California, Brigadier General **Mark S. Martins** of Annandale, Virginia, Chief Prosecutor of the Military Commissions spoke on reformed military commissions and the importance of trial advocacy.

The Fellows and their spouses, along with other guests, took advantage of the area's outdoor activities. A full roster competed in Friday's golf and tennis tournaments before the night's reception at the Empire Polo Club. Guests watched a practice polo match and were invited on field to interact with the players, pet the horses and take part in the traditional divot stomp.

Early risers participated in a 5K Fun Run before the General Session started on Saturday morning.

Secretary **Bartholomew J. Dalton** of Wilmington, Delaware introduced the morning's first speaker. The Honorable **Joseph R. (Beau) Biden, III**, Attorney General of Delaware, spoke on child sexual abuse, a cause he has passionately pursued to raise awareness and bring justice to those affected by it.

> With every event we are given the opportunity to make new friends and to converse with talented colleagues. The camaraderie, the fellowship, the interaction...make this legal group worthwhile and rewarding. As always, a very rewarding conference.
>
> *Fellow comment*

Committee Chair **Nanci L. Clarence** of San Francisco, California introduced **Park Dietz**, M.D., Ph.D. of Newport Beach, California. Dietz, founder of forensic consulting firm Park Dietz & Associates, Inc., and founder of Threat Assessment Group, a company devoted to workplace violence prevention, spoke on his experiences as an expert in forensic psychiatry.

Past President **Joan A. Lukey** of Boston, Massachusetts introduced the final speaker, **David Spence**, Ph.D., J.D. of Austin, Texas. Spence, a professor of law, politics, and regulation at University of Texas at Austin's McCombs School of Business spoke on fracking and the question of who should regulate the activity.

The General Session ended with a reenactment >>

I enjoyed the speaker lineup. It is rare that I go to a meeting and want the programs to last longer, but the speakers were so good that I was disappointed when the program ended each day and I had to go out and relax!

Fellow comment

of the trial of Socrates where the audience was asked to cast their vote of guilt or innocence. Past President **Gregory P. Joseph** of New York, New York, introduced the all-Chicago lineup of participants: **Robert A. Clifford**; **Patrick M. Collins**; **Patrick J. Fitzgerald**; Honorable **Terrence J. Lavin;** and **Dan K. Webb**. The result was 120 votes to convict and 113 votes to acquit.

A luncheon program for inductees and their spouses or guests followed Saturday's General Session. President **Robert L. Byman** presided while Past President **David J. Beck** explained the selection process to inductees, their invitation to become part of the fellowship, and the College's history and traditions.

Two tours allowed attendees to soak in the desert scenery either through a nature walk at Joshua Tree National Park or a bike tour of the valley.

Saturday night's grand finale to the Spring Meeting began with the traditional induction ceremony followed by a banquet, dancing, and the customary sing-along. **Renée E. Rothauge** of Portland, Oregon, provided the response on behalf of the fifty-four new Fellows. After remarks from Byman, Fellows, spouses, and guests enjoyed the live band and desert evening as they reflected on another cherished gathering.


A


B


C


D


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F

A | *Dinner awaits.*

B | *Fellow Pat and Sarah Vance, New Orleans, LA; President Bob and Jane Byman, Chicago, IL*

C | *Linda and Fellow Newal Squyres, Boise, ID*

D | *Fellow Lamont Jefferson; Faye Kuo; Canda Arneson and Fellow Lewin Plunkett, San Antonio, TX*

E | *Philippe Roy and Inductee Chantal Chatelain, Montreal, QC; Candy and National Moot Court Competition Vice Chair David Weinstein, Houston, TX*

F | *Away!*

G | *President-Elect Fran Wikstrom, Salt Lake City, UT; Past President Gene Lafitte, New Orleans, LA*

H | *Fellow Tim Parker; Inductee Nick Scarpelli, Jr., Seattle, WA; Fellow Wayne Leslie, Winnipeg, MB*

I | *Past Presidents face the inductees as Gene Lafitte reads the Charge*

J | *Former Regent Chuck Dick, Anne Dick, speaker Nuvi Mehta, San Diego, CA*

K | *Andee and Inductee Tom Rein, Chicago, IL*

L | *Game, set, and match!*

SERVING COMMUNITY AND COUNTRY

For Representative **Raul Ruiz** (D-CA), a promise is always meant to be fulfilled, no matter when it was made.

Ruiz was the opening speaker at the College's 2014 Spring Meeting in La Quinta, California. Ruiz shared how at age seventeen, in the 115 degree summer heat of the Coachella Valley, he walked up and down the streets in an oversized, itchy navy blue suit with a typewritten contract in hand.

"I would speak to whoever would listen in the small businesses. I would offer my contract, and I would say, "I'm offering you an opportunity to invest in your community by investing in my education. Because I promise you I will be a physician and I will come home and serve the community.'"

QUIPS & QUOTES

This is our moment to tell of our American story, fuelled by the American dream held up by two very strong pillars: personal responsibility and service with social responsibility.

Raul Ruiz

Ruiz grew up in the low-income desert community knowing hardships. His parents worked in the fields, and a trailer park was his home until the family moved into the house where his mother still lives. The youngest of two, he and his brother shared a kitchen table as a bed while they lived in the trailer. But these circumstances didn't stop his parents from envisioning a life that would allow their son to leave the valley and become something great.

"My mother was the go-to person in the community, an angel who would give the shirt off her back to anyone who needed one. And I admired that. When I was about four or five years old, she asked me, "Son, what do you want to be when you grow up?" And I looked at her and said, "Mom, what do you call those people that help others like you?" She was very smart, and she looked at me and said, "A doctor, son. A doctor."

Ruiz was able to raise $2,000 the summer he donned that itchy, blue suit, which paid for two years of books at UCLA where he graduated magna cum laude. He went on to attend Harvard Medical School and completed a joint degree with the Harvard Kennedy School of Government, earning a master's degree in public policy. He finished his emergency medicine training at the University of Pittsburgh before returning to Harvard to do a fellowship in international emergency medicine focusing on humanitarian and disaster aid. He also received a master's in public health from Harvard School of Public Health.

"I remember those nights when I used to call home and my mother and father would talk to me about how proud they were or how amazing it was that I was doing something that they did not have the op-

portunity to do, to go to higher education. And they reminded me every day of the responsibility to use my education to serve others."

Ruiz's journey of professional development took him to distant countries, from serving the extreme poor in Mexico to providing relief to earthquake victims in Haiti. A career he dedicated to helping others finally brought him home to serve the community he left many years before.

Because, according to Ruiz, "a promise is a promise."

He returned to Coachella Valley where he opened a free clinic with a group called Volunteers in Medicine, started a pre-med mentorship program for the underserved communities in the area and went to work as an emergency room physician at Eisenhower Medical Center in Rancho Mirage, California.

His ground-level view allowed him first-person access to "the human faces of failed policies." Ruiz talked about the area's limited access to healthcare.

"Fifty percent of our farm workers have never seen a dentist in their lives, and eighty percent haven't seen a physician in over four years. In my research here locally with my pre-med students, we counted physicians in our entire community in the region. We found that we only had one per 9,000 residents in the Eastern Coachella Valley and Desert Hot Springs, and the medically appropriate number in the United States is one to 2,000."

COMMUNITY AND HEALTH ISSUES THAT AFFECT BOTH YOUNG AND OLD

"I've had seniors tell me that they went days without eating in order to save money to pay for their medicine. I saw a senior woman in one of my healthcare forums later picking through the trash. She was collecting aluminum cans so that she could get money to pay for her medicine."

Ruiz shared about a healing ceremony he organized after a local shooting to help reaffirm the community's belief in nonviolence. "My niece was a student in one of those elementary schools, and they had to put the school on lockdown. She was so afraid that she wet her pants that night with nightmares. So we had to talk to her about these things."

THE ROAD TO CONGRESS

Running for Congress in 2012 seemed like the next step for Ruiz in his efforts address the issues he had been witnessing his entire life. And just like those business owners who came together many years ago to help him invest in their community, Ruiz believes that Americans have a social responsibility to each other and to serve their country. The country faces problems that require action and involvement from all professionals. If doctors and lawyers, engineers and teachers work together and focus on outcomes and put solutions above ideology and put people above partisanship "that truly will be the inoculation of the illness that is plaguing Congress right now."

I've been to several natural disasters, earthquakes, floodings, and with my training, I feel well suited to be in the largest manmade disaster in our country's history, called Congress.

Raul Ruiz

Ruiz called on the Fellows of the College to act, stating that just as doctors who are trained and have dedicated their lives to heal people, "you and your colleagues are trained to uphold the very fabric of our nation, the rule of law."

Armed with tools that have been polished and sharpened by education and experience, the Fellows of the College cannot merely sit on the sidelines. Such action can involve being engaged with elected officials or providing pro bono work to those who have suffered economic hardship and are in need of justice.

Hard work with personal responsibility and service with social responsibility are the two pillars that have shaped the country, said Ruiz, and he implored the College that now "is our moment to tell of our American story, fuelled by the American dream.

"Through the grit of determined intentions coupled with the desire to be part of the solution, "that is what brings us together, that is what fuels our passion to serve in our professional development with our social responsibility."

INTERSECTION OF ART AND JUSTICE

Music resonates very deeply in one's mind and soul, sometimes deeper than spoken word. At the College's 2014 Spring Meeting in La Quinta, **Navroj (Nuvi) Mehta** emphasized this point when he started his speech by playing the violin cadenza from the opening credits of the movie version of *Fiddler on the Roof.*

He asked the Fellows and their guests to get past their initial surprise and become immersed in the story of music.

"If you do that, you will recognize that you engaged with that music in a way very different from the way you engage in any verbal story, any literal subject whatsoever. Music has a power to reach us, reach our emotions, in ways that nothing else can. Music alone interfaces directly with the seat of our emotions, our subconscious, making no pit stop whatsoever in our conscious minds."

As described by Former Regent **Charles H. Dick, Jr.**, who introduced him, Mehta "puts a human face on music."

A MUSICAL WAY OF SPEAKING

The son of musicians, Mehta attended Indiana University and then The Julliard School, where he studied alongside other greats in the fields of violin and conducting. Today, he serves the San Diego Symphony as the Director of Special Projects, which includes being a pre-concert lecturer, "in-concert" speaker, community outreach resource, and host of the Symphony's "Classical Edge" concert series. For the past ten years he has been the artistic director of the Ventura Music Festival.

Mehta pointed out that people who work in other art forms, whether plays or productions on the big and small screens, know the eyes cannot trump the ears because the ears always take precedence.

"Nothing representational can affect our hearts, our souls the way music can. Not abstract art. It tries, but unfortunately for abstract visual arts, our eyes, being our primary sense for cognition and defining where we are in the world, will not give up easily their desire to interpret into the literal with our brains. I promise you, stand next to abstract painting or an abstract sculpture in any museum in world and you undoubtedly will hear someone say, "But what's it supposed to be?" We don't ask that question in music. It's a non sequitur. We know we are there to feel something special."

Mehta explained that even with the spoken word in a speech, no matter how compelling the subject, the construction, or the speaker's delivery, what rouses the audience is the tempo, crescendo, rhythm, poetry.

> If I say nothing else, I include other art forms in that because music alone interfaces directly with the seat of our emotions, our subconscious, making no pit stop whatsoever in our conscious minds.
>
> *Nuvi Mehta*

This rhythm is what Aristotle identified as "the only rhythm in poetry that is useful in great oratory because it alone moves the heart and the mind without being detectable. It is a musical way of speaking." To emphasize his point, Mehta played the first four notes of Beethoven's *Fifth Symphony.*

A SENSE OF UNIVERSALITY

From the early days of Gregorian chant to the time of Johann Sebastian Bach during the Baroque period, music has served as a connection to something universal, something larger, a universal truth.

"When you sense that larger universality, when you sense something in beauty that makes you realize that something ideal, in that split second when you are actually sensing that you're in the presence of the ideal, you are put into a purely observational state. And in that moment, in that purely observational state, we are freed from our striving ego, from that striving will. Music gives us that sense of universality."

Mehta referred to *On Beauty and Being Just*, a book written by Harvard professor and linguist Dr. Elaine Scarry, where she makes the argument that a connection exists between beauty and justice in discerning

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if something is ideal, real and true. He cited several examples of linguistic connections.

"When we come to the end of a paragraph and decide we have agreed that something is truth, we use words like 'wonderful' or 'beautiful' to say 'okay, that's good, that's done, that's true.' We use words like 'fine' and 'fair.' 'A beautiful woman is fair.' 'Justice is fair.' All of these connections between beauty and justice are what Scarry suggested is true in the world."

However, in this present day, a dichotomy exists between the study of the sciences and math and aesthetics, where the aesthetics and art have become marginalized, thus resulting in music programs to be the first programs that are cut from schools. Mehta presented the case that through scientific and empirical investigation, there is now evidence that proves what has always been assumed about the arts and music.

"Music is interpreted in a deeper part of the brain than language, cognition, a much older center of the brain. Music is now being brought to bear to cure people who have cognitive dysfunction because of trauma or disease. Alzheimer's patients or accident victims who have lost use of their frontal cortex, lost the ability of speech, lost the ability to recognize anything and anyone, will nevertheless finish a melody you start because that's processed in another part of the brain. And not only will they finish the tune that you start, they'll finish it with the words."

Music therapy is now used more frequently to heal people where science could not. In the arena of education, the benefits of music are paramount. Mehta reminded the audience that information is processed in two parallel neuro pathways: one for computation, math, science and investigation, the other for emotions and aesthetics. These pathways cannot function concurrently.

"But the way we learn is through a continual feedback loop, and we know this. We know that what we really know, we know emotionally. There is an emotional tag to those things that we believe are true."

Mehta agreed with the cellist Yo-Yo Ma who suggested that reading, writing, and arithmetic should not be the sole basis for schooling but that the arts should be present throughout the curriculum.

"We have so many stories of people whose lives are turned around because of the arts, because of the aesthetics. Kids who have had no opportunities, few chances, have found that music got them in tune with an inner truth, what they felt was a profound truth, and got them out of their circumstances."

He talked of George Gershwin, the great composer and pianist responsible for bringing American jazz to a worldwide audience through his classical music. He started out as the kid who skipped school and got into fights. After hearing a violin student play *Humoresque* by the Czech composer Antonin Dvorak during a school assembly, Gershwin began teaching himself songs and dove into his creative outlet. "Of course, the rest is history."

For Mehta, cutting out the study of aesthetics inflicts more damage on how students learn and their ability to sense larger truths that are felt in the deeper parts of each person.

"If you don't like Keats and you don't believe that truth is beauty and beauty truth, and if you don't believe that Plato said that balance and proportion are equally to be found in what is good and just and what is beautiful, if you don't believe Elaine Scarry that a pursuit of beauty and a study of aesthetics in school will rise in every student a concern for justice, that is the message that I am trying to convey. That we pull arts away from our young people at the peril of our sense of truth and at the peril of justice in this country."

UPHOLDING HISTORICAL ACCURACY

The father-and-son duo of the Honorable **James F. Holderman** and **Bill Holderman** spoke to Fellows gathered at the 2014 Spring Meeting in La Quinta about collaborating on the 2010 film, *The Conspirator*. The film is a historical drama that tells the story of Mary Surratt, the only female conspirator charged in the assassination of Abraham Lincoln and the first woman to be executed by the United States federal government.

"To be able to tell this part of history, sort of shed light on a story that I think slipped through the cracks of education, was something that we were really excited about," Bill said.

Judge Holderman has served as a United States District Judge beginning in 1985. He was chief judge of the Northern District of Illinois from 2006 to 2013. Before taking the bench, he was a veteran of a private litigation practice and served as Assistant U.S. Attorney in Chicago for six years. He is Chair of the ABA's Commission on the American Jury Project and sits on the seven-member board of the Federal Judicial Center, chaired by U.S. Supreme Court Chief Justice **John G. Roberts, Jr.**, an Honorary Fellow of the College.

Bill, the film's producer, worked with his father to ensure the legal accuracy of the film. Bill talked of Joe Ricketts, TD Ameritrade founder, who was frustrated by watching movies that claimed to be "based on a true story," and then finding out that key "facts" in the movie were not based on what actually happened. Rickets started The American Film Company, which was responsible for *The Conspirator*, with the sole mandate to "create American history projects that were historically accurate."

Brigadier General **Mark S. Martins**, who spoke to the Fellows after the Holdermans, referenced the film throughout his own presentation and commended the work. "The film, really, really strove to be historically accurate. When you read the record of the trial, you certainly come to the conclusion that the other conspirators were deeply involved consciously. But you come away with some doubts about Mary Surratt."

Bill explained that, contrary to what is taught in school, Lincoln's assassination was part of a larger conspiracy to overthrow the government. Secretary of State William H. Seward was also attacked the night of Lincoln's shooting, and Vice President Andrew Johnson was supposed to be assassinated as well.

He explained that the original plan was to kidnap Lincoln as a way to secure the release of Southern soldiers from prison. However, when Robert E. Lee surrendered on April 9, 1865, the plot shifted

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to murder. John Wilkes Booth and his co-conspirators, civilians who were Confederate sympathizers, not soldiers, were working to accomplish what they could not on the battlefield: topple an entire government by killing the President, Vice President and Secretary of State in one campaign.

"Robert E. Lee surrendered on April 9th; Lincoln was assassinated on April 14th; Mary Surratt was arrested April 17th; John Wilkes Booth was killed trying to escape from a burning barn on April 26th; the military-commissioned trial started on May 10th. It ended in July," said Judge Holderman, emphasizing the rapidity of the events.

Mary Surratt's son, John Surratt, was part of the conspiracy to kidnap Lincoln but was not arrested and charged because he had left town before the murder took place. All the men who were part of the conspiracy, including John Surratt, were friends and met at Mary Surratt's boarding house.

Senator Reverdy Johnson, Attorney General under President Zachary Taylor, defended Mary Surratt and started his defense before the trial began by attacking the jurisdiction of the military commissioner. Bill Holderman explained that the courtroom scenes in the movie were reenactments based on actual court transcripts.

The Holdermans showed a clip of the movie where Johnson asked the tribunal to allow him the same amount of time that the prosecuting attorney, Judge Advocate General Joseph Holt, had to prepare. Johnson told the tribunal: "Indeed, we all mourn the loss of our leader. But in our grief let us not betray our better judgments and partake in an inquisition."

Johnson withdrew from the case after upsetting the military tribunal with his remarks, and 27-year-old neophyte attorney Fred Aiken stepped in. It was his first trial case.

All eight of the conspirators, including Mary Surratt, were found guilty. Initially, Surratt was found guilty on July 5 but was not sentenced to death by hanging. However, Secretary of War Edwin Stanton who made appointments to the military commission that tried Surratt, spoke to Holt, prosecutor and legal advisor to the council, and told him "'we need these people dead and buried and they went back and the vote changed to unanimous for her hanging,'" Bill said. On July 6, Surratt was informed she would be hanged the next day.

A clip following the verdict to hang Mary Surratt showed when Aiken traveled in the middle of the night to Justice Andrew Wylie's home in order secure a writ of habeas corpus. The writ was issued at 3 a.m., July 7. The scene between Aiken and Justice Wiley in the Justice's home was not in the original screenplay; however, it was one that Bill fought to shoot.

It was "a scene that my dad and I talked a lot about, about how did Aiken convince a federal judge or why did Wylie turn and actually give him the writ of habeas corpus. It was a great pleasure to work with my dad to figure out how he turned the federal judge and convince him that this was something that he needed to do," Bill said.

The appeal went to President Andrew Johnson, one of the targets of the conspiracy, who overturned the writ and the execution took place the same day.

A clip of Aiken's closing arguments deeply resonated with the audience and displayed what it meant to be a courageous advocate.

"For the lawyer as well as the soldier there is an equally imperative command, that duty is to shelter from injustice the innocent, protect the weak from oppression, and when necessity commands to rally to the defense of those being wronged. There can be no doubt to the principal and real reason that Mary Surratt is here today. It's because of her son John Surratt. He invited Booth into her home, she did not. And he hid rifles and ammunition in Woods Tavern, she did not. If John Surratt is part of this conspiracy I pray to God that he receives every punishment known to man but if his mother can be convicted on such insufficient evidence I tell you, none of you are safe. Members of the commission, do not permit this injustice to Mary Surratt by sacrificing our sacred rights out of revenge. Too many of us have laid down our lives to preserve that."

AWARDS & HONORS

Alan W. Duncan of Greensboro, North Carolina, will complete his year as President of the North Carolina Bar Association in June. His replacement will be **Catharine Biggs Arrowood** of Raleigh, North Carolina. Twenty-two Fellows of the College have held the presidency of the North Carolina Bar Association, including twenty-one of the last forty-six.

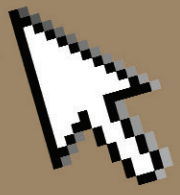
Christian D. Searcy of West Palm Beach, Florida, was honored with the American Bar Association's Pursuit of Justice Award. Given by the Tort, Trial and Insurance Practice Section of the ABA, the award recognizes lawyers and judges who have shown outstanding merit and who excel in providing access to justice for all Americans.

OVERSEAS OPPORTUNITIES FOR FELLOWS

The International Committee is working with five organizations that use trained lawyers to develop foreign lawyers in advancing the rule of law in their country. The International Committee page offers direct links to these organizations and lists any immediate opportunities.

Visit the page to learn more about how to have a powerful impact on another country's judicial system.

http://www.actl.com/Content/NavigationMenu/StateProvince/InternationalCommittee/default.htm



INNOVATION AND INVENTION IN SAN DIEGO

In 1969, when Dr. **Mary Walshok** found out her husband, Marco Walshok, had been offered a teaching position at San Diego State University, she cried. She cried because, as a Southern California native who grew up in Palm Springs in the 1950s, she knew employment opportunities in the Navy town were slim to none.

Today, she is the Dean of Extension at the University of California San Diego and Associate Vice Chancellor for Public Programs, as well as an author and industrial social scientist who is a tireless contributor to her city and the community of San Diego. She is committed to studying and promoting the ecosystem of reinvention and innovation.

Walshok spoke to the Fellows and guests of the College gathered at the 2014 Spring Meeting about her latest book *Invention and Reinvention*, which seeks to understand California's, and in particular, San Diego's, innovation environment.

"I'm fascinated by these cycles, these rises and falls in industrial wealth and creation and the people that stand behind them: the entrepreneurs and the innovators."

Walshok stated that there are key characteristics in an innovation economy that explain why the Golden State, California, is able to continuously reinvent itself.

"Innovation is a process … it is a process by which creative ideas and new inventions are translated into solutions to products, to processes, to artistic outputs that are extremely valuable in large markets, and they create new wealth and they create new jobs."

Walshok illustrated this process by sharing an example from her childhood when her mother wanted to call her sisters in Stockholm, Sweden. Her mother had to make an appointment with the telephone operator in order to call at the correct time. Now, Walshok's mother can watch her daughter walk around the house using her cell phone to talk to cousins in Stockholm about how to make tacos.

CULTIVATING AN INNOVATIVE ENVIRONMENT

In order for these innovative products to become an everyday norm, Walshok said an ecosystem must be present that is also "a regional culture and a commitment to place."

Development varies from place to place but, "innovation transforms existing industries, and those industries that survive are the ones that recognize and early on adopt new innovations." While the rational, organized human being may think innovation is about research and development, capacity, venture capital and industrial legacies, Walshok found that nuanced characteristics of place and people have a greater impact.

Her case in point is San Diego, a city where a new high-tech company is created every eighteen hours. What was once a predominantly military economy transformed into one that is seen as a leader in wireless technology, life sciences, software and higher education. Post-Cold War era, "there were a lot of underpinnings to the ability of San Diego to transform in ways that cities with many more assets in terms of great companies, old family wealth and large foundations, cities like Cleveland, St. Louis, Rochester or New York, have not."

> Often what unleashes what is best in this country are these indirect, these not always assumed characteristics of people and of place.
>
> *Mary Walshok*

According to Walshok, every great city was enabled by specific natural advantages of place, such as harbors, sunlight, or natural resources, which allowed for the rise of massive migration and exploitation of the natural environment. Land use, a "very sexy topic" for her, and the availability of public lands of entrepreneurial real estate was just as important as the entrepreneurs.

"In two regions in particular, the Silicon Valley and San Diego, there were many high-risk real estate developers developing laboratories and office space with their own cash, betting on the success of companies that would come in and pay them rents or leases or purchase property based on future revenues, not on existing assets."

A second characteristic is the culture of the place,often shaped by the early settlers of the area. When doing work for the Department of Labor in Michigan, Walshok realized that Detroit and Grand Rapids, cities less than two and a half hours away from each other, felt more like two different countries.

Detroit, known for its long association with the automobile industry, depended on assembly-line workers, which led to recruiting thousands of non-English speaking, uneducated workers from Eastern Europe. It was an industry that was innovative at one point, but it did not place an emphasis on education, talent, or skills. In Grand Rapids, by contrast, skilled Dutch Reformer furniture makers settled, creating furniture for emerging wealthy households in the 19th century. When the area was deforested, companies such as Steelcase and Herman Miller began to create metal furniture. The reinvention process in Grand Rapids has been "based on a culture that values talent, education, retraining, and developing people."

Affluent Midwesterners with health issues such as asthma were drawn to sunny San Diego and brought different values. "One was an anti-industrial culture that has served the growth of technology. The talents a community cultivates and values can be affected by what kind of emphasis the residents put on education and talent."

The last characteristic is how citizens define and promote their place, which in turn establishes the area's identity. California's history has included opportunists, innovators and small business people seeking fortunes in the Gold Rush, building the film industry, and growing the U.S. military presence in the Pacific region.

CAPITALIZING ON ASSETS

However, "everything that San Diego has going for it today was a liability in previous eras of industrial growth." The agricultural revolution passed the area because of its topography of canyons, hills, deserts, mountains, and little water. Even though San Diego is one of the oldest cities in America, it was just a small settlement until the 20th century.

"Something happened with the Spanish American War and the acquisition of Guam and Hawaii and the Philippines and the Declaration by Teddy Roosevelt of the dawn of the Pacific century. It mobilized the local citizens to go after turning San Diego into the Navy's Pacific-facing presence."

Local citizens and small business owners worked to create an economy based on the military, which eventually developed into an economy based on technology. "An underdeveloped harbor was developed into an advantage and the clean industry that local citizens were seeking was enabled by bringing the military." Unlike cities such as Cleveland, St. Louis, and Indianapolis, the reinvention and growth of high-tech sectors in San Diego occurred because "the civic culture of San Diego understood early on that you could create wealth, jobs, and prosperity through science and technology. And that, in part, was because of our relationship to the military."

FOUNDATION TO THRIVE

During the 1950s, the city zoned vast tracks of land for research and development and light industry, while other cities were increasing traditional assembly line technologies and large-scale manufacturing. By the 1980s when the nation began to focus on innovation and entrepreneurship, the San Diego community already had infrastructure in place that made it easy for innovation to flourish.

"You can have great research institutions in medical schools, like Philadelphia and St. Louis do, you can have a history of great industries, but innovation and entrepreneurship are small-scale, nimble activities that require this ecosystem, and you need mechanisms that pull people together. I'm a big believer in, 'You don't want the usual suspects.'"

The communities that engage the edgy, the ones who do not represent the establishment, have tended to have a record of innovation and growth.

"It turns out this quality of civic life, the ability, the willingness, the eagerness to integrate across generations, across disciplines, across class, across race has enormous effects on creativity…often what unleashes what is best in this country are these indirect, these not-always-assumed characteristics of people and of place."

For Walshok, states like California and cities such as San Diego continue to forge the path of innovation and entrepreneurship because they are able to shed the baggage of the old corporate America. "It may be better to include with our corporate history and our old patterns of leading and decision-making the new, the edgy, and the young. And that means collaboration across multiple boundaries."

FELLOWS TO THE BENCH

The following Fellows have been elevated to the bench in their respective jurisdictions:

Marie-Claude Armstrong
Montreal, Quebec
Effective April 2014
Judge, Quebec Superior Court

Michael H. Berger
Denver, Colorado
Effective January 2014
Judge, Colorado Court of Appeals

Andre G. Bouchard
Wilmington, Delaware
Effective May 2014
Chancellor, Delaware Court of Chancery

Daniel G. Lamborn
San Diego, California
Appointed December 2013
Judge, Superior Court of San Diego County

George K. Macintosh, Q.C.
Vancouver, British Columbia
Appointed December 18, 2013
Judge, Supreme Court of British Columbia

Gerald Austin McHugh
Philadelphia, Pennsylvania
Effective March 2014
Judge, United States District Court for the Eastern District of Pennsylvania

The College extends congratulations to these newly designated Judicial Fellows.

COLLEGE ROSTER UPDATE

Preparations for the 2015 edition of the College's *Roster*, commonly known as the "Blue Book," are under way. Requests for updates were mailed to all Fellows in June. Please advise the National Office by July 31, 2014 if your contact information needs changes or corrections. We will gladly update your listing.

THE SIX UN'S OF MILITARY COMMISSIONS

As the sixth chief prosecutor of the Military Commissions at Guantánamo Bay, Brigadier General **Mark S. Martins** knows his position is a difficult one that presents challenge and controversy for the United States. Martins shared with the College at the 2014 Spring Meeting in La Quinta that the six main criticisms of military commissions are what he called the 'six *un*'s'. "Military commissions are *un*fair, *un*settled, *un*known, *un*necessary and even *un*-American."

General Martins' impressive background includes roles on both the operational and institutional sides of the military. He served as an infantry platoon leader for almost five years in combat zones in Iraq and Afghanistan. He is a decorated officer who has earned an array of recognitions, including the Legion of Merit, two Bronze Stars, multiple Meritorious Service Medals, an Air Assault Badge, and a Master Parachutist Badge.

He graduated first in his class from West Point and then earned a Rhodes scholarship to the University of Oxford. However, the road to Oxford included a slight detour to U.S. Army Ranger School, where he graduated with distinction and earned his Ranger Tab. When he returned from Oxford and continued his military career, he attended Harvard Law School where he served on the *Harvard Law Review* with the man who would later become the President of the United States, Barack Obama. After law school, Martins obtained two additional degrees, a master of laws and a master's in military arts and sciences.

Referencing the presentation on the film, *The Conspirator*, given by the Honorable James F. Holderman and his son Bill Holderman earlier in the program, Martins went through the six areas of controversy regarding a process he knows intimately and offered his response. The system he operates in is one that has been established and reconfirmed by Congress multiple times. In the Military Commissions Act of 2009, a comprehensive, statutory framework was given. All three branches of government have acknowledged hostilities with Al-Qaeda and its associated forces. "Powers that are in our Constitution for the branches of government can be activated and used, which creates an imperative for accountability."

MILITARY COMMISSIONS ARE UNFAIR

Martins talked of the uphill battle Fred Aiken faced in defending Mary Surratt, who was being tried in her role of conspiracy to assassinate President Abraham Lincoln. Aiken was brought in on a short amount of time, the jury was handpicked to convict, and his client was being tried for guilt by association.

Based on the Military Commissions Act of 2009, Martins presented the rights of those who are being tried by a military commission.

"The accused is presumed innocent, the prosecution must prove guilt beyond a reasonable doubt, the accused has a right to notice of individual specific charges associated with the individual accused in a language he or she understands. Further, the accused has the right to counsel, choice of counsel, and, if facing the death penalty, learned counsel under the statute at government expense, a right service members don't have."

Other rights include: the right to presence; the right against self-incrimination, protection against the use of statements attained as a result of torture or cruel, inhumane or degrading treatment; the standard for admissibility of a statement where it be voluntary under the totality of the circumstances; the right to cross-examination of government witnesses; the right to exculpatory evidence; and the right to an impartial decision-maker.

"The judge is not an Article 3, lifetime-tenured, independent judge. He or she is an Article 1 judge, typically an Army Colonel, Navy Captain, or Air Force Colonel, experienced in military law, a judge advocate, and someone who is trying cases in the military justice system with our own troops…I ask you to look at their decisions and tell me if you think they're not independent.

"One judge was presiding over the case of Sergeant Graner, one of the Abu Ghraib perpetrators who was convicted. The Staff Sergeant was told the President wanted to raze Abu Ghraib prison. The judge concluded that it was a crime scene and still needed to be investigated and stated that if the destruction happened, the case would be gone. The judge brought the executive branch around on that issue and the prison stayed as a crime scene."

The jury in a military commission is "not a Sixth Amendment jury of one's peers chosen randomly in the district wherein the crime committed. It is a military board of officers chosen from a convening authority. The convening authority for military commissions is a senior officer in the Department of Defense. Right now it is the General Counsel of the Department of the Navy." A jury pool is selected based >>

on the same criteria used in courts martial: age, education, training, experience, length of service, judicial temperament.

The pool is subjected to examination and challenge by prosecution and defense and preemptory challenge to get an impartial jury. Confronted with "the stereotype that military courts are organized to convict, I ask you to consider that stereotype in light of the fact that the conviction rate of military courts is lower than jury trials and federal jury cases. If you compare international terrorism cases since 9/11 with military courts, the conviction rates is eighty-three percent in jury trials. In the judge-alone cases in federal civilian courts, it's about ninety-one percent."

QUIPS & QUOTES

One of his critics in his current role at the Military Commission, a lawyer at Human Rights Watch, has been quoted this way: "General Martins not only took my views seriously, but he actively sought them out and was always incredibly considerate and respectful. If the goal is to make the prosecution as fair and transparent and consistent with the rule of law as humanly possible, Mark Martins is the man for the job."

Regent Douglas R. Young, in his introduction of General Martins

The convening authority is able to select from a pool that includes 200,000 military officers worldwide. From those serving in the Korean Demilitarized Zone to those serving in Afghanistan to those stationed around the United States, the pool is diverse. Congress does not want it to be "unrepresentative of the American people. These are people who often have deployed, may have had to release detainees in a combat zone when their troops suspected them of doing something but they didn't have the proof…So these people will acquit if they don't see proof beyond a reasonable doubt."

Evidence must be probative, reliable, and relevant. Evidence can be excluded because of the prejudicial effects of outweighing the probative value and other rules of evidence and privilege. An accused will not be forced to take the lawyer provided, and a rigorous examination of the individual is performed to ensure the choice to waive the right to counsel is known and voluntary.

"Congress has said that we have a civilian/military combined court of military commission review with a scope of review that is both factual and legal. They can go back into the record, re-judge various things that come out of the record, or send it back to the Commission. And then it goes straight to the United States Court of Appeals, which is to the District of Columbia Circuit, direct appeal. And then thereafter by petition of writ of certiorari to the Supreme Court."

MILITARY COMMISSIONS ARE UNSETTLED

"Unsettled" is the notion that military commissions have new procedures, and that inherent with the notions of justice and fairness is that the rules must be set in advance.

Martins responded by pointing out the Body of Military Justice Law that was developed in 1950, a process by which he has been prosecuting and practicing throughout his military career. "In 1950 Congress gave us a comprehensive body of law with lots of case precedence built up on most of the important issues… You have to test to see if you have a methodical process for raising and resolving those issues in a sharply adversarial process, with both sides bringing forth the best law and the best argument. I believe this "unsettled" notion is way, way over-exaggerated by critics of commissions. What we have now fully complies with our Geneva Convention obligation in Common Article 3, that we try individuals who are irregular combatants through a regularly constituted court, affording all of the judicial guarantees recognized as indispensable."

MILITARY COMMISSIONS ARE UNKNOWN

"Unknown" pertains to the idea that commissions take place in secret. General Martins referred to the Mary Surratt trial, a case that was held in public even though proponents sought to have it take place in secret.

"You can read the same-day transcripts of our proceedings…and you don't have to pay for them. You can read them, as you can read all of the pleadings of the parties on pretrial motions, to get a sense of what the action's about, what the advocacy is about. We do have, as federal international terrorism trials have, an ability to close proceedings where genuine sources and methods, and genuine national security information can be put at risk. But this cannot occur because it is embarrassing to the government or because a law may have been broken. That is not a justification for doing it. And it has to be argued in advance, the judge has to put it on the record, preserved for appeal, all the way

up to the Supreme Court if necessary.…And by the way, the prosecution is not going to present any secret evidence. The accused may have a reason to go into something secret and may wish to tug the proceeding into a closed session if he wants to use that. But basically, you are using Classified Information Procedures Act of 1980 with subsequent case law in federal court. I have been in court about 200 hours since I got back from Afghanistan, and less than one percent of that has been in closed session."

MILITARY COMMISSIONS ARE UNFOUNDED

"Unfounded" stems from the concern that, like the Mary Surratt trial, the military jurisdiction is encroaching on civilian institutions.

Martins framed his response in that the concern "is a narrow jurisdiction. It has very, very significant hurdles to even getting into this process. We have to be dealing with hostilities. And that is not just a word. It is not just a sporadic attack or occasional violence, but is protracted armed violence of a nature, scope, intensity such that a state employs its armed forces to respond to respond to it. There's a legal definition of hostility.

"Our jurisdiction is very narrow; Congress has said a "non-citizen," "unprivileged belligerence." These are people who do not wear uniforms or carry arms openly, who wage armed conflict of a requisite intensity, and then they have to have committed a longstanding war violation. There are thirty-two offenses in our Code in the Military Commissions Act of 2009. Attacking civilians, attacking protected persons or places, engaging in treacherous or perfidious warfare at poisonous weapons calculated to create extra suffering; these are longstanding law of war violations. There are high hurdles to get into the system."

MILITARY COMMISSIONS ARE UNNECESSARY

"Unnecessary" is based on questions of why: why even have military commissions if they threaten to undermine civilian courts? Why have them when they can take place in secret, be unfair or cause people to believe the process is not fair?

Martins explained, "There is this category of cases that is best tried by Military Commission, where professionals, such as the eight Department of Justice prosecutors on my staff, look at a case with counterterrorism professionals, law enforcement agents, the best FBI agents in government, great professionals from across our government. There are not many. There has to be hostility involved, and we are only in hostility right now with Al-Qaeda and associated forces. Sometimes the best evidence you can get in front of a finder-of-fact is gathered overseas, either in a genuine combat zone or in an area that is ungoverned. With uneven police forces and security forces to collect the evidence, that is hearsay. Probative, reliable, lawfully attained evidence without a hint of unlawfulness has to be established by the judge in an adversarial proceeding beforehand, but you don't have *Crawford v. Washington* confrontation here."

MILITARY COMMISSIONS ARE UN-AMERICAN

Martins described another military commission trial, that of John Yates Beall, a Confederate officer operating out of uniform. In 1864, Beall attempted to derail a civilian train in upstate New York. He was tried for the basic war crime of attacking civilians and "ignoring that distinction between military and civilian, combatant and noncombatant." He was convicted. The conviction went to Lincoln for appeal, who at that same time was drafting the 13th Amendment to end slavery, deliberating over the military commission, and entering his second term as president. Lincoln ended up approving the military commission, conviction and sentence of Beall.

"It does not settle a lot of things. I think it does call into question that Military Commissions are somehow inherently un-American. And we have used military tribunals in law of armed conflict situations."

General Martins ended his presentation with a quotation from Robert Jackson when he spoke before the International Military Tribunal at Nuremberg.

"'That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that power has ever paid to reason.' That's what we've got to be about in this process, with a process that Congress has given us that will give us the only trial we're going to get in Guantánamo. As long as the bar to bringing them to United States is present, we've got to ensure that we're not doing vengeance, and the power is paying tribute to reason."

SAFE FROM EVIL

Park Dietz has traveled a career path he knows is unconventional.

At the 30th anniversary of his medical school graduation from Johns Hopkins University, Dietz and his wife Annie listened as one after another of his classmates told stories of devotion to the eradication of disease in third-world countries or the development of new treatments for cancer. Annie turned and whispered in his ear, since his topic was serial killers in healthcare, "You're in trouble."

A renowned forensic psychiatrist, Dietz has spent most of his career probing the dark depths of the mind. He has consulted or testified in many of the highest profile criminal cases in the U.S., including those of Jeffrey Dahmer, the Unabomber, and John Hinckley, the would-be assassin of President Ronald Reagan. He is also founder and head of Park Dietz & Associates, a forensic consulting firm, and Threat Assessment Group, a company devoted to workplace violence prevention. Also a clinical professor of psychiatry and biobehavioral sciences at the UCLA School of Medicine, Dietz spoke to the Fellows and guests gathered in La Quinta for the 2014 Spring Meeting.

Dietz's father was a general practice physician, whose interaction with his son at the dinner table included showing photos of "ugly medical lesions and conditions and surgical photographs." This strange ritual fostered in young Dietz a reverence for medicine and a sense of duty to follow in his father's footsteps.

Something happened when Dietz was 16. "A girl I knew confided in me that she had been raped by a local hoodlum. It was very impactful to me that she was so confused and had experienced such pain. And from that point on, I needed to understand the extremes of human behavior, especially crime and the human responses to trauma. And I had more of a sense that understanding crime was a first step toward being able to control crime and reduce the number of people victimized."

PATH TO PREVENTING CRIME

Dietz was drawn to forensic psychiatry because it offered him the opportunity to delve deeper into criminal behavior and study its effect on victims and their families. "It struck me that forensic psychiatrists were better situated to figure out how and why crimes occurred and how and why lives were shattered."

Dietz credited Susan Baker, noted public health professor at Johns Hopkins, for having a profound impact on his thinking. She encouraged him to devote himself to understanding how to prevent intentional injury through homicide, assault, and rape.

"This early focus on prevention conditioned me to notice details in the crime or trauma that gave me a better understanding of what led up to the incident and highlighted missed opportunities for prevention. To me, that has always been the point. How did we fail to prevent this trauma?"

After finishing his residency at Johns Hopkins, Dietz began teaching at Harvard Medical School at the age of twenty-nine. He was also director of forensic psychiatry at Bridgewater State Hospital, a facility for the criminally insane in Bridgewater, Massachusetts. Dietz talked about a private assignment when he was contacted by a defense attorney in New York who represented a man dubbed by the media as the Times Square Slasher. The attorney wanted to know about the prevalence of the use of adhesive tape and handcuffs in sexual acts between adults in Manhattan and Burgman County, New Jersey. Dietz and a research assistant compiled the offbeat data and submitted the quantitative part for publication. This "little study of sex shops in Times Square led to unexpected opportunities" after its publication in the *American Journal of Psychiatry*. He was later appointed to President Ronald Reagan's Attorney General's Commission on Pornography.

QUIPS & QUOTES

Forensic psychiatry isn't just about opinions, it's about trying to find, analyze, and prevent – present the evidence as clearly as possible. When things go well, I find the fact-finder hearing the evidence, when presented clearly, reaches the correct conclusion before the expert needs to reveal an opinion at all.

Park Dietz

USING EVALUATIVE TECHNIQUES

Dietz recalled a conversation with Fellow **Roger M. Adelman**, the federal prosecutor assigned to the John Hinckley case, when he was asked to lead the evaluation of Hinckley.

"He encouraged me to form a team of experts and supported our review of every scrap of paper, visiting the >>

crime scene and the places Hinckley had stayed over the course of his life, examining the physical evidence, and interviewing both the witnesses who knew him well and also all the proximal witnesses. This was a new approach to evaluating criminal responsibility, and the only case in which, to our knowledge, anyone had ever done anything half as thorough."

The thorough data collection "made it possible to apply the pre-incident, incident, and post-incident analysis common to injury control research." The findings pointed toward the multiple opportunities to prevent the crime and had implications beyond the Hinckley case.

Dietz tried to apply the evaluative techniques he used in the Hinckley case to every case, where appropriate, and to train his colleagues and trainees to do the same. The preventive ideas that sprang from Dietz's technique led to many critical actions: it was the basis of a grant proposal to the National Institute of Justice that supported years of research on threats and attacks against public figures, which in turn led to training of the intelligence division of the Secret Service, the U.S. Capitol Police, the Los Angeles Police Department Threat Management Unit, and to the Threat Management Unit for the Central Intelligence Agency.

It also resulted in Dietz establishing the Threat Assessment Group, to use prevention training and behavioral consultation to help large organizations prevent violence and misconduct in the workplace, in colleges, in schools, and in other organizations that serve youths.

QUIPS & QUOTES

...this early focus on prevention conditioned me to notice details in the crime or trauma that gave me a better understanding of what led up to the incident and highlighted missed opportunities for prevention. To me, that has always been the point. How did we fail to prevent this crime? This trauma?

Park Dietz

In Dietz's opinion, forensic psychiatrists should suggest avenues of investigation, review all records of a person's life history, visit the scenes or at least inspect videos and photos, and interview victims and witnesses. "Examinations need to use specific, proven techniques and assure that any necessary testing gets done. Our goal is to reach as an objective an understanding of what actually happened as possible."

HUMAN DECENCY CAN SAVE

Dietz's work has sometimes brought him to conclusions that challenge the status quo. One discovery was the importance of videotaping forensic evaluations and the process of not asking suggestive and leading questions during those evaluations. Also, he found that three tools commonly used by employment lawyers to help clients avoid violence make the situation worse: restraining orders, calling the police about threatened violence, and walking threatened people out to make an example of them.

Dietz reminded the audience that violence never erupts without warning. He used the shootings at Columbine High School as an example. The most telling warning signs of Eric Harris and Dylan Klebold, the two high school seniors who committed the murders, were found in their personal writings and their videotapes, which could have been discovered by attentive family members willing to search the rooms of young people in trouble. "That was one of the best ideas we had for parents."

Even if a case has progressed along the path toward violence, Dietz believed it is possible to interrupt the forward trajectory. He recalled a case where managers from a small company sought help on what to do about an employee who had threatened mass murder in the workplace after his wife had left him, taking the house and their children. The man complained about his job to everyone who would listen. The only thing he owned was a gun collection that he kept in his truck which he parked in the company parking lot at night.

"This looked like a more-difficult-than-average case to fix since the man had threatened to do it the next day. And I asked a question I have learned to ask every time, "Do you happen to know his hopes and dreams?" And they did. They told me he hoped to save enough money to move to the next county because he had heard that in the next county, the women don't leave you and the jobs don't suck. So we helped him. We figured out a way to give him a check for two weeks' pay without having to work for it, and he felt as though he had won the lottery.

"Remarkably, sometimes all that is required to stay safe from evil is an awareness of how important it is to behave like a decent human being. That may be all that is needed to avoid sparking bad behavior in others."

WHOSE IS IT?

There is a beautifully maintained house somewhere in the Midwest, cherished and preserved by a former State Chair. The house belonged to an American painter whose singular and iconic work graces the walls of a well-known art museum, also located in the Midwest. Who was the artist and who is the former State Chair?

Contest is not open to Fellows from west of the Mississippi River.

This beautifully maintained Midwest house was preserved by a former State Chair and once belonged to an iconic American painter.

SHADES OF GRAY IN FRACKING

Some people may take a black-and-white approach to how they perceive different topics, but **David B. Spence**'s particular area of interest is one "where there are shades of gray."

Spence is Co-Director of Energy Management and Innovation at the Innovation Center at the University of Texas at Austin, and is a professor of law, politics, and regulation at in the McCombs School of Business. Also a leading national expert on fracking, Spence spoke to the Fellows and guests gathered at the College's 2014 Spring Meeting in La Quinta.

Hydraulic fracturing, or fracking, is the process by which oil and gas are produced by drilling into a layer of shale rock that contains the oil and gas. Thanks to technological innovation, the drill is able to take a right-hand turn and move laterally along the shale layer for thousands of feet. Once a well has been drilled, water, sand, and chemicals are forced down the hole to fracture the shale, producing more openings and allowing the gas or oil to float to the surface for production.

Shale rock formations are found throughout the United States, in states such as Arkansas, Louisiana, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, and West Virginia. Despite its widespread use, fracking is a controversial process with high stakes.

Fracking has seen its share of exposure in the media, including in films such as *Gasland* and *Promised Land* and in books such as *The Frackers: The Outrageous Inside Story of the New Billionaire Wildcatters* and *Under the Surface: Fracking, Fortunes, and the Fate of Marcellus Shale.* Spence said proponents and opponents of fracking "treat it either as a godsend…or a scourge."

Fracking produces shale gas, an energy source seen as a cleaner fuel than coal. The benefits of fracking include millions of dollars in royalty income for ranchers, farmers, landowners, and other owners of mineral rights. Producing regions have low unemployment rates and show an increased investment in manufacturing. Students in those areas are able to forgo college and make $80,000 per year driving a truck.

THREATS AND COMPLICATIONS

According to Spence, the worries and fears about the impacts of fracking fall into four categories: threats to water, groundwater, and surface water; air pollution and other threats to the air; seismic effects and micro tremors within producing regions; and changes to the quality of life in the area where the fracking is taking place.

Industrial activity brings with it loud drilling and pungent odors, truck traffic from 18-wheelers, and sizable equipment coming in and out of areas that were previously quiet and rural. The downsides are "the kinds of impacts most people would not want in their backyard if they had a choice," Spence said.

Other impacts are more speculative, requiring further study to draw any solid conclusions. However, Spence pointed out that "what we are learning is probably not well understood by the people who are involved in the popular debates," leading to two sets of ongoing debates.

QUIPS & QUOTES

> There are something like 450 anti-fracking ordinances that have been enacted at the local level, Los Angeles just being the latest. Even the city of Dallas, which you may think of as a pro-energy industry kind of place, has enacted ordinances, effectively anti-fracking ordinances.
>
> *David Spence*

CONFLICTING INTERESTS

One debate involves the interest groups and public over whether fracking can be done in certain areas or whether it should be banned. The second debate involves scientists and researchers who are studying fracking in a more focused way.

Referring to interest groups and the public, Spence said, "if you are getting your information from either of these groups, you are not getting a complete picture of what the risks are associated with fracking" and there is "a certain reflexive discounting of studies and new information" that runs counter to each point of view, regardless of side. However, he said there are moderate groups, such as the Environmental Defense Fund and other state regulators, who have taken a more cautious approach in identifying the specific risks and the best ways to deal with them.

Concurrently, researchers at various academic and government institutions are working to quantify and measure the actual risks to groundwater, surface water, air quality and the seismic impact. The scientists conducting these studies approach their work by >>

QUIPS & QUOTES

The idea here is that once we've developed a position on something, especially if it's a position that we think is important and we invest emotionally in it, then we are not going to be dislodged from that position, at least not in the near term, by new scientific information that points in the opposite direction.

David Spence

looking at narrow questions, and "they are not giving us a thumbs up or a thumbs down on fracking."

SHAPING ONE'S PERCEPTION

Spence posited that new information is assimilated in biased ways where it is discounted because it challenges a point of view. Spence called it "confirmation basis," something he has observed taking place in the fracking debate. Once someone's position on the issue has been developed, especially in a situation where there is an emotional investment, that person will not be likely to change her position, even if new scientific information proves the opposite of the held belief.

"So if you learned about fracking because you've been involved in the oil and gas industry, you're not going to be very receptive to studies showing that perhaps too much methane is leaking from natural gas production...You may be tempted to discount that study, discredit the people who undertook the study."

Or, if someone watched the movie *Gasland* and was inspired to join the local anti-fracking organization to stop groundwater contamination, that same person may not want to hear studies on how the risk to groundwater from fracking is minimal.

Another reason people discount information is the connection to their social identities. Spence noted, "We are each psychologically committed to our own social identity through group memberships and ideology," preventing the rational processing of information on public policy matters.

There is also a fear component at place in the anti-fracking movement, which Spence said was illustrated in the movie *Gasland*. "The fear circuitry of the brain can sometimes dominate the parts of the brain that incorporate rational parts of the brain." This fear has led to extreme conflicts and divisions in towns where fracking is taking place.

DEEP DIVISIONS

These divisions often lead to litigation. "In almost every state where fracking happens, and in every state where local anti-fracking ordinances are being passed, there is a state oil and gas law that establishes a permitting regime for allowing companies to produce oil and gas" with the permitting regime possibly preempting the local ordinance. Cases in Pennsylvania, New York, West Virginia and Ohio are working their way through the court system. "It is not unlike federal preemption jurisprudence; it has the same sorts of standards and the same sorts of language. But the case law is embryonic at this point and there is not really much we can say to generalize about it."

At the local level, approximately 450 anti-fracking ordinances have been enacted around the country. The city of Los Angeles started drafting an anti-fracking ordinance because California is situated over an oil shale formation. Dallas, Texas, a place perceived by many as pro-energy, has enacted ordinances effectively regulating anti-fracking ordinances. Spence predicted another kind of litigation will take place, based on "the argument that the local ban has taken my land…that my land has been taken by this regulation" and a person is entitled to compensation under the Fifth and Fourteenth Amendments of the Constitution.

I think in the long run, the gap between the scientific debate and the popular debate will close, but it's going to be in the long run. It's going to take a long time.

David Spence

QUIPS & QUOTES

The scientific community is coalescing around the conclusion that "frack fluids," the chemicals and water that are injected into the ground, pose minimal risk to groundwater. However, the problems of methane leakage, air pollution, and seismicity still need to be figured out.

"In the long run, the gap between the scientific debate and the popular debate will close, but it is going to be in the long run. It is going to take a long time."

DELAWARE ATTORNEY GENERAL BEAU BIDEN: DEDICATED TO PROTECTING KIDS

Delaware Attorney General **Joseph R. (Beau) Biden, III** has accomplished much throughout his career, but when it comes to the cause he is most passionate about, he will resoundingly say "we have a lot to do."

Biden, who is serving his second term as attorney general, is a crusader in protecting children from sexual abuse. He first served as attorney general in 2007, an office he held for only one year before his thirteen-month deployment to Iraq. Upon his return to Delaware in 2009, he had the opportunity to run for, and most likely win, a Senate seat vacated by his father, Vice President of the United States Joseph R. Biden, Jr.

Instead, he made the kind of choice rarely seen from political leaders: he turned it down. Biden had goals he wanted to accomplish for the citizens of Delaware and another term as attorney general would allow him to fulfill them.

Biden's front line experience in protecting kids resulted in the creation of the Child Predator Unit, a unit combining the work of both state and federal law enforcement, state and federal prosecutors, psychologists, psychiatrists, and other experts in the field. The unit's goal is to detect, investigate, arrest, and prosecute predators.

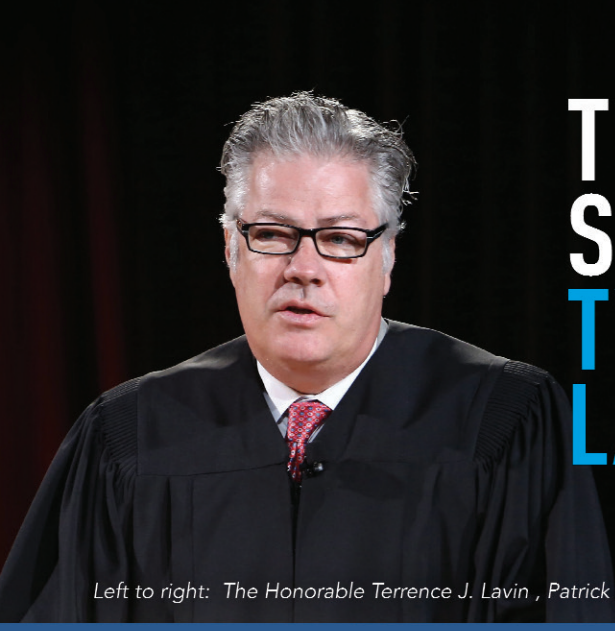
When introducing Biden at the College's 2014 Spring Meeting in La Quinta, Secretary **Bartholomew J. Dalton** said, "the Delaware model is the model for the rest of the country."

Seeking justice for victims is one facet to the issue. Another is education. The topic of sexual abuse of children may sometimes provoke only awkward and hushed discussion, but it is one that cannot be ignored. Biden shared with the College a video from a group called *Darkness To Light*. It included the latest research and statistics: one in ten children is sexually abused. Most never report the abuse, and there are 39 million survivors of child sexual abuse in America.

Despite the good work he has already accomplished, Biden told the College, "I know I could do more."

President **Robert L. Byman** later shared that while listening to Biden he was reminded of a journal entry French historian and political thinker Alexis de Tocqueville made when he visited the United States almost 200 years ago. De Tocqueville was in awe of the breadth of the government's ability contrasted with the seeming lack of depth in those who governed.

"That's not true of you, General Biden," Byman said. "If we had more people like you in public office, de Tocqueville would come back and write a more glowing account of this country."



THE TRIAL OF SOCRATES: TWO CENTURIES LATER

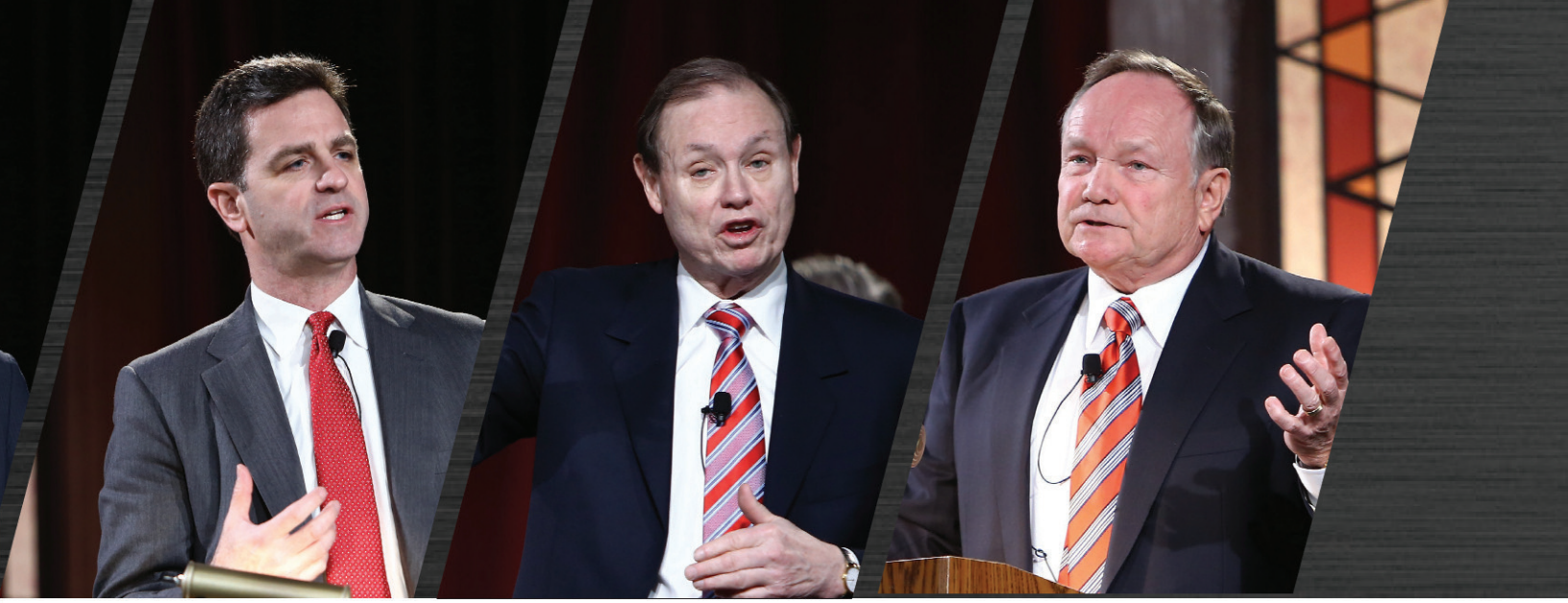
Left to right: The Honorable Terrence J. Lavin , Patrick J. Fitzgerald, Patrick M. Collins, Dan K. Webb, Robert A. Clifford

A CLE panel at the College's 2014 Spring Meeting in La Quinta reenacted the trial of Socrates, which occurred in the year 399 B.C.. Following the original trial, Socrates was sentenced to death by poison, but the vote was close. Many people expected him to flee because he was given the opportunity. However, Socrates considered it his solemn duty as a citizen to face his punishment and drink the hemlock poison.

In the reenactment, four lawyers and a judge, all from Chicago, composed the panel.

Fellows **Robert A. Clifford** and **Dan K. Webb** served as the defense team for Socrates, while Fellows **Patrick J. Fitzgerald** and **Patrick Collins** prosecuted. Judicial Fellow **Terrence J. Lavin** presided.

The audience was asked to cast a vote of guilt or innocence.



THE BACKGROUND

Socrates, a 70-year-old war veteran who had fought three times to defend Athens, had a decades-long history as a provocative thinker who asked questions about virtue and the good life, and openly criticized the convictions of like-minded men who were logically unsound and morally muddled. The citizens of ancient Greece loved and admired Socrates, but his eccentric methods roused the youth and earned him many enemies. One way to apply the meaning of this trial today is to see that all the various parties, prosecutor, defendant, and jurors, and the citizens at large, wrestled with a very modern dilemma, that of the relationship between the dissent and disloyalty of a democratic state going through very turbulent times.

In the Athenian courts, it was a one-day, one-trial system. The jury of 500 men was randomly selected. Because the proceedings had to be finished in one day, the Athenians had to be vigilant of the time, which was shown by a water clock.

Socrates was charged with a two-count complaint by three citizens: Meletus, Anytus, and Lycon. The first charge read: "Defendant Socrates undertook a course of conduct that exhibited impiety by refusing to acknowledge the gods recognized by the state and by introducing new and different gods." The second charge was corruption of the youth: "Defendant Socrates corrupted the youth of Athens by teaching them to despise democracy and remain idle, philosophizing rather than becoming productive members of society."

The prosecution, seeking death, had hired speech writers. Socrates, seeking acquittal, had presented and delivered his own apologia, an account of himself in defense of the charges.

QUIPS & QUOTES

> They had an obligation to act. Under the circumstances of the time where the belief system says 'You can't disrespect the gods or we all suffer,' in the state Athens was in, Athens has the right and obligation to protect its existence.
>
> *Patrick J. Fitzgerald, speaking on behalf of the prosecution*

"It bears repeating that the charges against Socrates were brought by private citizens, and that was the typical procedure. The citizen would make a charge and the government would summon the jury. If they did not persuade more than a quarter of the jurors, a hefty fine would be owed for wasting everybody's time. If they did pursue or persuade the majority, it would then proceed to the penalty phase," said Judge Lavin. The jury voted to convict 280/220; however, during the penalty phase Socrates did himself no favors. He openly mocked those who brought the charges against him and said that he was not somebody who should be punished but instead, he should be treated like an Olympic athlete and be given free food for life. Socrates' words angered the jurors and resulted in a vote of 360/140 to kill.

MR. FITZGERALD, PROSECUTION

"Socrates is guilty of endangering not Athens, but the very existence of Athens by two crimes that could have brought Athens to its knees." Fitzgerald pointed out there was only one written account of the trial. Plato, philosopher and Socrates' friend, only wrote down the defense's side and left out the government's case. The Athenian justice system, unlike the American fundamental rights, did not have burden of proof, proof beyond a reasonable doubt, presumption of innocence, or the right to remain silent. The crimes Socrates was charged with were "not only crimes, but they had to

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QUIPS & QUOTES

The city's grand experiment of democracy in Athens was at risk. . . The law was clear, the belief system was clear, the harm was real. Socrates committed the defense. There was uncontroverted evidence that he did it. He did not deny it.

Patrick M. Collins, speaking on behalf of the prosecution

be crimes." Fitzgerald explained: "The first charge of impiety, failing to acknowledge the gods was a crime because in Athens at the time, if someone disrespected the gods, their city was hit by a plague."

In the thirty years leading up to the trial, the gods had not been kind to Athens. A plague wiped out one third of the population. At the same time, they were engaged in the Peloponnesian War for thirty years, which they lost. The plague was seen as a probable cause for losing the war. The city's formidable navy was crushed and the walls of Athens crumbled. Socrates' disrespect of the gods could bring further ruin and suffering to Athens, so the citizens had an obligation to act. "Athens has the right to protect its existence." Fitzgerald said that under Athenian law, the government proposed a penalty and the defendant proposed a penalty, and the jury had to vote for one of them. The government sought death as a way to appease the gods. Socrates proposed penalties that were a joke.

MR. COLLINS, PROSECUTION

The fledgling democracy of Athens survived two shocks to its system. The first was when 400 tyrants went through a murderous revolt in Athens. Seven years later, thirty murderous tyrants again tried to change the democracy. In that instance, more than 1,500 were killed, close to ten percent of the city's population. "What was Athens' response to these murderous regimes? Amnesty. If you conform to the democracy of Athens, there are no penalties, and, therefore, nothing that Socrates did before the amnesty can he be convicted of.…There was amnesty as long as you conformed to the democratic principles of Athens." Athens believed in a participatory democracy where citizens came to speak at the town square and everyone had a vote. Athens had faced two uprisings to the government and it could not survive a third. But Socrates thought people were sheep and needed to be led.

Athenian society had a polytheistic view of the gods. All the gods had to be honored and there was no separation of church and state. "When you combine the Athenian view of democracy, the shocks that the system had taken, and its view of religion and the combination thereof, that is the overlay of the evidence against Socrates." In the trial record from Plato, Socrates mocked the gods, calling the sun a stone and the moon dirt. He acknowledged a new god he called Demonio and vowed to "do what that god orders me to do." Instead of simply saying he believed in the Athenian gods, he proudly embraced his own. Socrates, being a teacher, corrupted the youth by ordering "the future of Athens to disrespect the gods of Athens because they were not gods." The young people Socrates preached to later grew up to be leaders of the tyranny: Alcibiades, who was the leader of the 400 and Theramenes and Critias who led the thirty. "When you're a teacher and three of your pupils become tyrants and murderers, it's time to change the syllabus," Collins advised.

MR. CLIFFORD, DEFENSE

Socrates defended Athens' democracy with "great fervor" for its citizens. Plato's apologia of the trial was written after that fact. However, the motives of the three accusers were questionable. Anytus' son was a pupil of Socrates; Anytus was a powerful man in Athens at the time and he did not approve of Socrates because of what his son was being taught. Meletus and Socrates knew each other well. In an exchange where Meletus claimed to be an expert on poetry, he was embarrassed by Socrates when Socrates questioned him. The Socratic method was "a derivative of Socrates having met the oracle and the oracle telling him that it was his charge to go out and find someone wiser than he." The accusers had plenty of motive to speak of Socrates in ways that were not accurate and less than truthful.

Here in Athens, we have ropes that are used by our Navy, and there's the factory down by the dock. Above the factory door it says, 'He who weaves this rope weaves his conscience into every rope twine because so many lives depend thereon.' Your verdict has your conscience woven into it. Please weave a rope that exonerates Socrates.

Robert A. Clifford, speaking on behalf of the defense

QUIPS & QUOTES

At the time of trial, Socrates was seventy years old, the son of a stone mason, a craftsman, and a war hero. He participated in three campaigns of the Peloponnesian Wars as a heavy infantry man, the first time at Potidaea in 432 BC at age thirty-seven, the second time at Delium at age forty-five in 424, and the third

campaign was at Amphipolis in 422 BC at age forty-seven. Those who fought "did an enormous service to the community and Athens" because they supplied their own weaponry and paid their own way. Part of the Socratic method was a direct result of his exposure to General Pericles, who told his troops that friends are made by conferring with one another. In regard to Socrates' relationship with Alchibiades, Critias, and Theramanes, because of his position as a citizen, Socrates knew all kinds of people on both sides of the disputes. "If he's going to be guilty by association with these people, how about freedom by association? General Pericles praised him as a citizen soldier."

Socrates spoke about the demon, Demonio, who was giving him direction. But is it right to execute someone who appeared to have a mental health issue? Socrates did not deserve that fate. The charge Meletus brought against Socrates was that he did not acknowledge any gods at all. There was no evidence that Socrates did not acknowledge the gods at all. If Socrates did not acknowledge the gods at all, he would not have survived the three tours of war because the soldiers he stood next to with General Pericles subscribed to the views of their leader.

MR. WEBB, DEFENSE

Socrates was the very first person in the history of the Athenian democracy to be accused of a crime only because of something he said, because of something he believed in. Meletus, the primary accuser, actually had no evidence of Socrates corrupting the youth. Webb asserted that what Socrates actually did was meet people at a marketplace over the course of fifty years. He spoke with young and old, asked them questions, wanted them to think and use logic, and "rise above themselves." Sometimes, the questions he asked would plant seeds that would be considered a criticism of the democracy of Athens. The answers people arrived to on their own showed there were inefficiencies and improvements that needed to be made. The main issue that caused Socrates to believe the democracy was inefficient and ineffective was because those who served in public office were chosen by lot, not by qualifications, background, and experience. Supporters of the democracy in Athens believed discrimination should not be allowed, even to those people who were unqualified.

Because of the fear surrounding the state of Athens, the reign of tyranny, and the Peloponnesian War, an irrational fear existed toward anyone who challenged the democracy. The view was that, despite centuries of democracy, any dissent at all must be met with death. This fear is what motivated Socrates' three accusers. Socrates, Webb argued, should not be held accountable for having a conversation with someone thirty years earlier, nor for any acts a person committed thirty years later. "If there is some reason to hold Socrates accountable for the acts these people committed, why weren't they called as witnesses?"

Religious freedom was also an important tenet of the great democracy. Socrates had different religious views. He taught the youth to "be good, do good deeds, and the gods will judge by that," not by whether one attended a public festival to honor them. Socrates did not flee or stop speaking in the marketplace. He continued to do what he had always done: express his beliefs and trust that the citizens of Athens will "see through this irrational overreaction to where we are today in Athens with our democracy."

CLOSING ARGUMENT FROM MR. CLIFFORD

Socrates did not deny any of his actions, even though he could have done so. The question posed was whether he committed the crime as charged in the indictment of disrespecting the gods and acknowledging another god. He honored a new god, Demonio and injected a new god into the system with potentially cataclysmic consequences. "He admitted the crime, he was proud of the crime charged." The evidence presented that three of his disciples later becoming murderous tyrants was not proof of guilt by association; it was evidence that there were consequences for his teachings, real consequences that came upon Athens. The fact he served the country should be honored, but being a good soldier did not allow immunity from prosecution. The Athenian culture and democracy, with the struggles it faced, also had the right to prosecute and uphold the laws that Socrates proudly ignored and proudly taught others to ignore.

> You are the barrier between justice and injustice. You are the ones that have to say to these accusers, you are overreacting. You're letting your concerns about the weakness of Athens' democracy today cause you to do something that we will deeply regret in this democracy.
>
> *Dan K. Webb, speaking on behalf of the defense*

THE VERDICT

The result in La Quinta was 120 votes to convict and 113 votes to acquit.

QUIPS & QUOTES

FIFTY-FOUR INDUCTED AT SPRING MEETING IN LA QUINTA

ALASKA
Anchorage
Laura L. Farley

ARKANSAS
Little Rock
David D. Wilson

BRITISH COLUMBIA
Vancouver
Ian Donaldson, Q.C.

CALIFORNIA – SOUTHERN
Claremont
Ricardo Echeverria
Glendale
Stephen C. Pasarow
Long Beach
William C. Haggerty
Los Angeles
Scott A. Edelman
Irvine
James M. Baratta
Christopher P. Wesierski
Manhattan Beach
James J. Kjar
Pasedena
Robert Garrett
San Diego
William M. Low

COLORADO
Denver
John M. Palmeri
Patrick L. Ridley
Greenwood Village
Christopher H. Toll

CONNECTICUT
Bridgeport
James T. Shearin
Middletown
Peter A. McShane
New Haven
Paul F. Thomas

FLORIDA
Tallahassee
S. William Fuller, Jr.
Tampa
William F. Jung
John F. Lauro
Winter Park
Dennis R. O'Connor

GEORGIA
Savannah
James D. Durham

IDAHO
Twin Falls
Thomas B. High

ILLINOIS
Chicago
Thomas D. Rein

INDIANA
Indianapolis
David K. Herzog
J. Richard Kiefer

KENTUCKY
Hartford
Abram V. Conway, II

MAINE
Lewiston
Jodi L. Nofsinger

Portland
James F. Martemucci

MARYLAND
Baltimore
John A. Bourgeois
Towson
Scott D. Shellenberger

MASSACHUESETTS
Boston
Jonathan Shapiro

MINNESOTA
Minneapolis
Paul C. Peterson

MISSOURI
Kansas City
James C. Morrow
John H. Norton
Dawn M. Parsons

NEW JERSEY
Newark
Henry E. Klingeman

NEW YORK
Syracuse
Kevin T. Hunt

OKLAHOMA
Sallisaw
Daniel George

ONTARIO
Barrie
James L. Vigmond
Ottawa
Michael Edelson

OREGON
Portland
Karen O'Kasey
Renée E. Rothauge

QUEBEC
Montreal
Chantal Chatelain

TEXAS
Austin
D. Douglas Brothers
Jay Harvey
Scott R. Kidd
Houston
Jean C. Frizzell
Dallas
Barry Barnett
Rockwall
Joel J. Steed

VIRGINIA
Charlottesville
William H. Archambault
Middleburg
Edward B. MacMahon, Jr.

WASHINGTON
Seattle
Nicholas P. Scarpelli, Jr.

****

Marie-Claude Armstrong of Verdun, Quebec, was inducted by President Robert L. Byman on April 22, 2014 in Montreal, Quebec.

INDUCTEE RESPONDER SEEKS TO CARRY ON TRADITION

Following the induction of new Fellows, **Renée E. Rothauge** of Portland, Oregon responded on their behalf. In her speech, Rothauge recognized the many Fellows who encouraged her and made her fellowship in the College possible. Equally important was Fellow **Stephen F. English** who taught her to be a trial lawyer, "a person without whom I would never have been given the incredible opportunity of ACTL fellowship."

Her remarks follow:

Perhaps you have heard about "the call" that changes your life. This call, bearing glad or bad tidings, leaves you in shocked stupor and makes you wonder if there has been a mistake. You never know when you will get "the call," or what you will be doing, but I always hoped that, should I receive such a call, I would know the right thing to say. Being a trial lawyer, I felt the odds were in my favor.

Unfortunately, I was wrong. However, by way of my defense, nothing, I mean nothing, can prepare you for a call from the President of the American College of Trial Lawyers "asking" if you would give the response speech for your inducted class.

NO BULL ABOUT LANDMARK CASE

To prepare for tonight, I studied past responses and learned that past speakers often spoke about their landmark cases, such as ones involving human rights at Guantánamo Bay, organized crime in Philadelphia, or appearances before the Supreme Court. So I am obliged to share a bit from my landmark case, a case that, despite the years since the trial, lives on in the lore of Lane County, Oregon. It involved bull semen, and I believe it is the only bull semen case tried to verdict in the Pacific Northwest and perhaps the country. The semen at issue died a slow, tragic death in the plaintiff's barn when my client accidentally forgot to deliver the liquid nitrogen required to keep said semen in cryogenic suspension. This was no ordinary semen, as most of it had come from the United States' first million dollar Polled Hereford bull that was dead.

According to Plaintiff, this sperm was irreplaceable and priceless; however, two million dollars would go a long way to ease the pain. This jury heard things that no jury had heard before. They heard how difficult it was to collect sperm from a million dollar bull unless you used what was called a "trick cow."

I spoke words I never thought I would say in public, much less in a court of law. I had to convince the jury that the blame for the death was with plaintiff and not my client. Finally, the big showdown, the battle of the experts, the ones who knew what bull semen was really worth. In Oregon state courts we have no expert discovery, so you hear the other side's expert opinions for the first time at trial, just like the jury. And sometimes you get unexpected testimony from your own expert. I asked my expert to explain how you can rate bull semen using the surprisingly intricate numerical system used by semen brokers. He said, "You look at the offspring born from the semen. I said, "What do you mean you look at the offspring?" He said, "Well, for example, in the case of the cows, 'The bigger the udders, the better the semen.'" The jury laughed. I had won that battle.

Fortunately, the jury found that plaintiff's claim was bull and we won.

CARRYING ON TRADITION

Finally, I turn to my true purpose here tonight: to thank the American College Fellows, on behalf of all the inductees, for your mentorship, your good example and the honor you have bestowed upon us tonight. Each one of us has a story about what the trial lawyers of this most esteemed organization have meant to each of us. In my case, I would not be here but for your members' mentorship so generously and freely given over decades.

I recall the first time I turned to the College for help. I was thirteen and I had what Congressman Ruiz so eloquently described yesterday as my "Ah ha!" moment. I decided I wanted to be a trial lawyer, but I had a concern. The only woman I had ever seen in court was Perry Mason's secretary, Della Street. I was not sure what she did, but I was more interested in being Mr. Mason than Della. I sought out the only lawyer I knew at the time to ask him if he thought it possible that I could be a trial lawyer. If he said no, I would give up on the idea and become a veterinarian (probably collecting bull semen samples). But if he said yes, then I would do everything I could to go to law school.

Fortunately, this lawyer was **Douglas G. Houser**, a Fellow of the College. My presence here tonight reveals what his answer was; he said simply, and I remember it like it was yesterday, "Renée, you would make a fine trial lawyer." And there are so many stories I and others could tell about what you have done for each of us as we pursued our professional dreams. We have stood on your mighty shoulders, we have eaten from the food you harvested, and drunk from the wells you have dug. You are the trial titans that inspired us, coached us, and we have but one wish: to carry on your rich tradition of mentorship and fellowship in your honor.

FELLOW CONTRIBUTIONS MAKE FOUNDATION'S WORK POSSIBLE

Generating both project ideas and the funds to support them, Fellows drive the Foundation and its work to promote the College's mission.

Immediately prior to the College's 2014 Spring Meeting in La Quinta, the Trustees of the Foundation met to discuss the Foundation's ongoing fiscal health and make decisions on grant awards.

RECENT FOUNDATION GRANTS MADE POSSIBLE BY FELLOW CONTRIBUTIONS:

$100,000 Emil Gumpert Award to the Human Trafficking Courts Project of the Sex Workers Project at the Urban Justice Center. Based in New York City, the Project aims to train defenders, law enforcement, and court personnel, and coordinate alternatives to incarceration for individuals arrested for prostitution-related offenses. This will ensure that sex workers and survivors of human trafficking receive due process and legal representation.

$25,000 to the Veterans Legal Support Center and Clinic run by the National Access for Veteran Justice. Sponsored by the John Marshall Law School in Chicago, the program will train volunteer lawyers and law students to provide veteran advocacy and to provide a pool of pro bono representatives with knowledge of veteran law.

$25,000 to the Medical Legal Partnership of the Legal Aid Society – Employment Law Center in San Francisco. The Partnership will establish material resources and on-site education programs for medical practitioners to provide low-income pregnant women and new parents with information about their legal rights in the workplace.

$10,000 to the National College of District Attorneys

$10,000 to the National Criminal Defense College

$2,000 for the Advanced Trial Advocacy Program at the University of Montana School of Law and sponsored by Montana Fellows

$2,000 for the Advanced Trial Advocacy Institute at Seattle University Law School and sponsored by Washington Fellows

$1,000 for the Negotiation Symposium for Public Interest Lawyers organized by Pennsylvania Fellows

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THE "ALABAMA PLAN"

Setting a standard for others to follow, Fellows in Alabama have developed the "Alabama Plan," whereby every Fellow in the state is encouraged to annually contribute a sum equal to one billable hour. During the 2013-2014 fiscal year, the effort has resulted in donations from more than fifty Alabama Fellows, or nearly eighty percent of all practicing Fellows in the state. At $20,000, that represents more than ten percent of the Foundation's total donations.

FOREIGN AFFAIRS EXPERT EXAMINES U.S. INFLUENCE

At the College's 2013 Annual Meeting in San Francisco, California, Fellows and their guests were treated to a speech by a highly accomplished individual whose global perspective on the role of the United States in world affairs is refreshingly original.

Michael Moran, Vice President of Global Risk Analysis for a company called Control Risks, is qualified to talk about many things—foreign policy, journalism, documentary-filmmaking, and the risks and benefits of choosing to operate businesses in foreign countries. However, he chose to talk to the Fellows about his perception that the United States is experiencing greatly diminished influence on the world stage, and that the diminution should prompt a re-examination of some of the old promises and old rules that he believes have become "brittle."

Moran attributed the country's diminution on the world stage primarily to two events: first, instigating the war with Iraq on what Moran called "rather shaky evidence," and second, having embraced "a particular…approach to regulation in our financial sector" that "practically led the whole world economy off the cliff."

At the same time that the United States is experiencing diminished influence, however, it is coming up against old but significant promises it made, promises which it is now finding difficult to keep. For example, immediately after World War II, the country was relatively much stronger than any other developed country, most of which had sustained serious damage to their cities and manufacturing bases, both from bombing and from the financial burdens of war. Being so much stronger it seemed both honorable and relatively easy for the United States to take on extra responsibilities, such as paying a bulk of the costs of NATO. And in adopting the notion of the Great Society, the U.S. made a lot of promises to its citizens that it may no longer be able to afford.

Moran said the U.S. is currently experiencing a gap between what has been promised and what can be delivered. But he also pointed out that many old promises have already helped to deliver benefits to U.S. citizens and the world. The world countries "fought" for during the Cold War for has largely come into being—"we won." Present day concerns are not about Russia and China developing nuclear warheads and aiming missiles at Europe and America; concerns these days are about the capitalist dislocations in those countries, and their international economic impact.

Moran showed the Fellows a graph projecting the percentages of the overall world economy held by the major international powers in 2030. The United States' share of the world's economy in terms of Gross Domestic Product is nowhere near as dominant as it was after World War II, but the nation is still a significant player. And Moran exhorted the College not to panic over this diminished influence because, after all, the other rising economies are "potential markets for American goods."

Moran gave four examples of products or technology that Americans have invented that can change the shape of global society: Twitter, which can shape the course of revolutions; the iPad; the 3D printer; and fracking.

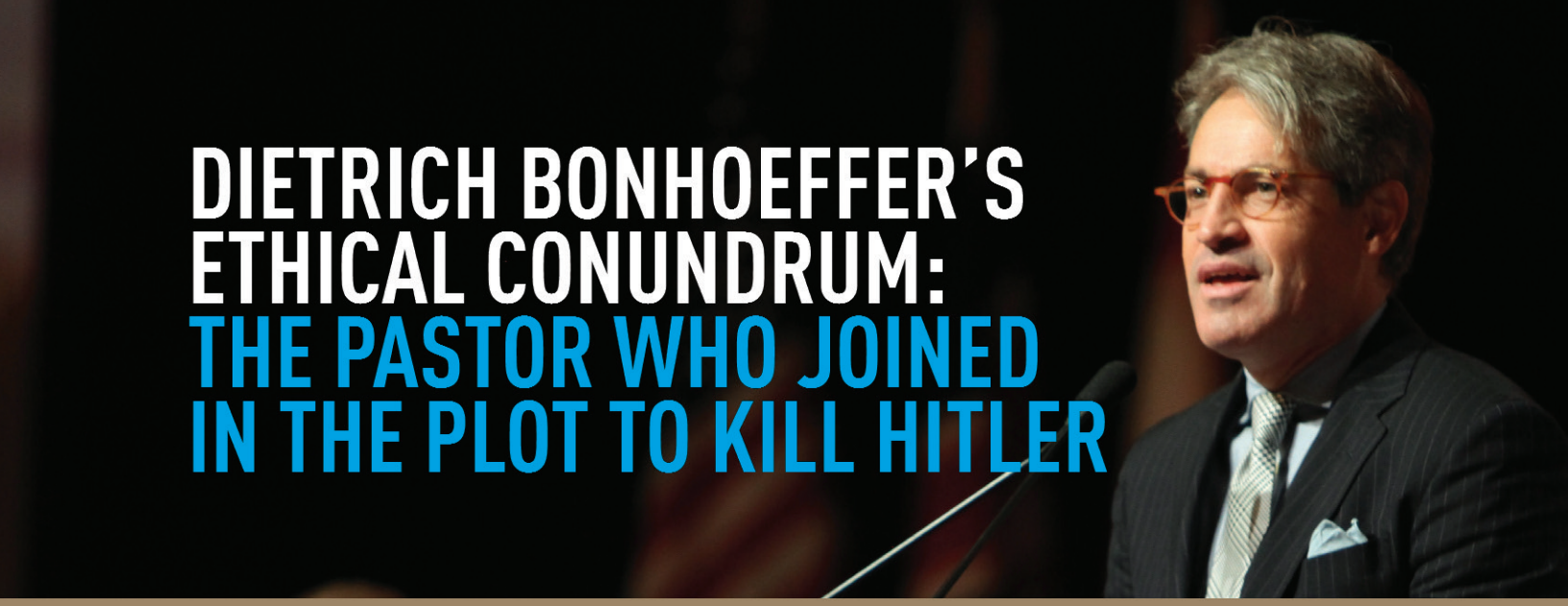
Fracking in particular has the potential to change global politics. "It means, for instance, that the United States no longer cares as much about the Persian Gulf." Moran believed that the United States has been "playing the role of public utility provider. We're essentially defending the Europeans; we should stop doing that. We've been playing nanny in the Middle East to a lot of regimes we don't need to play nanny to. We're helping keep the energy flowing to Asian countries that include our most important economic competitors. We're subsidizing all this. We should demand that they help, at the very least."

In addition, Moran suggested removing the veto from the rules of the United Nations Security Council. "It would remake that institution," and he posited that the United States is in a particularly good position to initiate that change.

> The U.S. is still the most influential player. It would still be able to build the coalitions, if it will, but no one is going to ditch that veto unless the United States takes the first step and suggests it. It would remake that institution. It would be an amazing thing.
>
> *Michael Moran*

Concluding his survey of how the nation and the world might benefit from re-examining some of the promises made and the rules adopted, Moran turned his attention to the domestic political scene in the United States. He described the current system as "brittle" and suggested a few things he thought should be changed. Attributing some ideas to Nick Cantor, a former congressman, he suggested changing the way voting districts are apportioned, the way seniority and seats on congressional committees are apportioned, and many other parliamentary rules of Congress. "I'd love to see us remove the midterm election… It creates all the wrong incentives in our politics. It creates a permanent campaign and it perverts everything from the budget process in those years to the ability of the Chief Executive to run the country."

Elizabeth K. Ainslie
Philadelphia, Pennsylvania



DIETRICH BONHOEFFER'S ETHICAL CONUNDRUM: THE PASTOR WHO JOINED IN THE PLOT TO KILL HITLER

Author **Eric Metaxas** told an engaged audience at the 2013 Annual Meeting of the College in San Francisco the story of German theologian and Lutheran minister Dietrich Bonhoeffer, who participated in spiriting a group of Jews out of Nazi Germany to escape the Holocaust and then in the unsuccessful internal plot to kill Adolf Hitler, for which he lost his own life.

Yale graduate Metaxas' published works range from religion to humor to celebrated books for children. They include two acclaimed biographies, *Amazing Grace: William Wilberforce and the Heroic Campaign to End Slavery* and *Bonhoeffer: Pastor, Martyr, Prophet, Spy*, the latter of which provided the material for his presentation to the College Fellows. His radio and television appearances range from CNN, MSNBC and FOX News to National Public Radio's *Morning Edition*, *Talk of the Nation* and *On Being*. He was the keynote speaker at the 2012 National Prayer Breakfast.

Metaxas related his interest in telling the Bonhoeffer story to his own family heritage. The son of a German immigrant mother, Metaxas grew up hearing stories of how his grandfather had listened to the BBC with his ear pressed to the radio speaker, knowing that anyone caught by the Nazis listening to the BBC could be sent to a concentration camp. An unwilling conscript, he died in World War II, leaving a nine year-old daughter, Metaxas' mother. "The horror of that time, the tragedy, the pain, has hung over our family and lives with us to this day. The emotional scars are yet with my mother and have affected me."

A friend had given Metaxas a copy of *The Cost of Discipleship*. Here was the story of a German pastor and theologian, a devout Christian who felt compelled by his faith to speak out for the Jews, to speak against the Nazis and ultimately to become involved in a plot to assassinate Adolf Hitler. Bonhoeffer was himself put to death by the Nazis three weeks before the end of World War II.

"And so," Metaxas related, "when I heard this story..., I thought,...here was a German who did the right thing, who in a sense was a voice for the voiceless Germans like my grandfather, but obviously much more so for the Jews of Europe. I was so intrigued, I've always puzzled over this period in history. My story is...relevant to how I came to write the Bonhoeffer book.

"There is something about the story that particularly strikes a chord with people today....Many people have come up to me and said that there are odd parallels in this story with regard to where we are today. It is extraordinary how many times I have heard that."

Metaxas told the audience that Bonhoeffer was born in 1906 into a family of geniuses. He was the youngest of four brothers, and had four sisters. His father was the most famous psychiatrist in Germany in the first half of the 20th century. His father was so well known that the Nazis did not come after him, even after his family members, his children, were implicated in the plot to kill Hitler.

QUIPS & QUOTES

I must risk everything, knowing that even if I get it wrong, God is a merciful God. He looks on my heart and he judges me for what I am trying to do, rather than trying to trip me up and catch me in a sin.

Eric Metaxas

"The father trained these kids to think like a scientist, with rigor....He said, 'I want my children to know the difference between what is true and what is not true, and I want them to follow the logic of an argument ruthlessly to the end, not to be moved to the left or the right by any kind of emotion, but to follow the logic, to understand what is true and what you believe, because you may have to die for what you believe.'"

Bonhoeffer at age thirteen decided that he wanted to be an academic theologian. "He wanted to be a superstar at Berlin University, which was the place on the planet to study theology in those days." He brought his father's scientist's sense of thinking and logical rigor into the world of theology, earning his doctorate at age twenty-one.

A LIFE-CHANGING VISIT

After he wrote his dissertation on the subject, "What is the Church?" Bonhoeffer decided that he wanted not just to be an academic theologian of the highest order, but also to be ordained as a Lutheran minister. Since he could not be ordained until he was twenty-five, he spent one year as an assistant vicar at a German-speaking congregation in Barcelona, Spain, then came to America at age twenty-four to study for a year at Union Theological Seminary in Manhattan, New York.

In September 1930, an African-American student from Alabama invited him to visit the Abyssinian Baptist Church, an African-American church in Harlem. What he saw there simply changed his life; he saw a group of people who were no strangers to suffering. For them, going to church was not just something they did, not just a cultural experience. "It was," Metaxas related, "something that was real. It was palpable, and Bonhoeffer was deeply moved by this. He said, 'This is real. These people are not ever playing church; this is the church. These people somehow make it clear in the way that they are going into what they are doing on Sunday morning that this is real for them, that God is real to them, and that it means everything to them. This is not just something they do in a building on Sunday morning.' "

Bonhoeffer was so moved that he decided to return to that church every Sunday that he could while he was in New York. "It was," Metaxas observed, "an extraordinary thing for a tow-headed, respectable Berlin academic to go to this Harlem church every week....He got very involved with the congregation. He actually taught Sunday school there."

When he went back to Germany in the summer of 1931, his friends could see that he was different. He had always been serious about theology, but they noticed that he had somehow really encountered God, that this was real for him, and that he was behaving differently.

When Bonhoeffer left Germany in September 1930, the Nazis were the ninth largest political party in the Reichstag, but when he came back they were the second largest. Seeing Germany beginning to turn towards the Nazis, he began to speak out against them. He had connected his faith with what was happening in Germany. Under the Kaisers, there had been a historically close relationship between the Crown and the Lutheran Church, but Bonhoeffer could see that the church would be challenged by a Nazi state.

VOICING BOLD BELIEFS

In 1933, Hitler became Chancellor. Two days later, Bonhoeffer went on the radio and spoke out boldly against the "Fuhrer" principle, the idea that was so popular in Germany between the wars, that Germany needed a strong leader. He talked about what true leadership is, >>

how true leadership, true authority, must somehow submit to a higher authority.

Bonhoeffer also asserted that real leadership was, by definition, servant leadership. He continued speaking publicly against Hitler, and he began to try to awaken the church to what was happening in Germany. Metaxas explained that the title of his book included the word "prophet" because Bonhoeffer had a "prophet voice," like an Old Testament prophet trying to wake up the people of God to be the people of God, to stand up against what was happening.

Only months after Hitler took power, Bonhoeffer saw that the Nazi government was trying to take over every aspect of German society, including the church. For the Nazis, even those Jews who had converted to the Christian faith and who had for generations been part of the German church could not belong to any German church, because the Nazis saw everything along racial lines. To articulate the pastors' and theologians' position, Bonhoeffer wrote a famous essay, *The Church and the Jewish Question*.

QUIPS & QUOTES

...as brilliant as Bonhoeffer was, as rigorously intellectual and as rigorously logical as he was, a point at which...one's ability to make a decision goes beyond even principles where there's no precedent. You're in terra incognita. And at this point, one has to have a relationship with God.

Eric Metaxas

In his essay he said some extraordinary things. He said first of all that it is the role of the church to be the conscience of the State, to hold the State accountable to be what it ought to be and, when necessary, to speak out against the State. He further asserted that it was the role of the church to bandage up the wounds of victims of the State. Bonhoeffer was very careful to include in this assertion those who were outside of the church, the Jews of Europe.

That was a radical thought for many in the German Lutheran Church at that time. Finally, most radically and most presciently, Bonhoeffer said that it is the role of the church, if necessary, to "put a stick in the spokes of the wheel of government" if the government is proceeding in a way that is bringing harm to its citizens. By the church he did not necessarily mean the organization, but rather those who call themselves Christians.

Bonhoeffer was not very successful, as most prophets tend not to be, and so he was frustrated. He saw that what the Nazis were doing to Germany was not going to end, that they were taking more and more power to themselves and that unless the church stood up as one against this, the window would close. Germany did not have a tradition of religious liberty, and Bonhoeffer could see where this was leading. He could see that there would be a time when the church could not stand up, and that was precisely what did happen.

About 6,000 pastors had signed something called the Barmen Declaration in 1934, a document that rejected the subordination of the church to the state, articulating how the official German church, had been taken over ideologically by the National Socialists. The pastors who signed it were saying, "We are separating from this heretical Nazified state church and forming something called the Confessing Church." The pastors who signed the Declaration in 1934 were marked men from that day forward.

For a time, Bonhoeffer led an illegal seminary for the Confessing Church, but, as he had predicted, the Nazis were increasing their control, making it even harder for any German Christian to be a Christian in any public way. The seminary was shut down and Bonhoeffer took his teaching underground.

"Bonhoeffer was forbidden from speaking publicly and then, finally, from publishing because he had the temerity...to publish a book, an exegesis on the Psalms, which... are in the Old Testament....It is hilarious and profoundly tragic that the German state church was trying to create a church of Christianity... that was utterly devoid...of all Jewish elements. So the Old Testament was considered too Jewish....They were quite seriously trying to create this bogus religion which would claim to be Christianity, but...could never be anything near Christianity. Their values were National Socialist values, values that are more Nietzschean than Christian."

At this point, the war was coming. Bonhoeffer knew that he could not fight in Hitler's war. He was not a pacifist, but he knew that he could not support a war of chest-thumping nationalism, exactly what Hitler was bringing to Europe. He knew it was a war of aggression, that Hitler was a monster and a tyrant. He decided at that point to go back to America, to escape, so that when the war hit he would be stuck over there and could ride it out and return when it was over.

All kinds of people, especially theologian Karl Paul Reinhold Niebuhr, had pulled strings so that this young genius could come to America. But when he got off the boat in June of 1939, Bonhoeffer knew that he had made a mistake. He had a keen sense that God was calling him to go back to Germany. "As brilliant as Bonhoef-

fer was, as rigorously intellectual and as rigorously logical as he was, there was a point at which...one's ability to make a decision goes beyond even principles, where there is no precedent. You are in terra incognita, and at this point, one has to have a direct relationship with God. This was very important to him."

CONCEALED DISSIDENCE

Sensing that God was calling him back to Germany, he decided to go back to an uncertain and very dangerous future. He was not going to announce himself as a conscientious objector. On the contrary, he did something that was unthinkable for most pastors. He decided that he was going to pretend to be a good German and a good National Socialist and to join the German military intelligence, Abwehr, in which his brother-in-law was a leader. Abwehr was in fact at the center of a conspiracy to assassinate Hitler and his top lieutenants.

Joining Abwehr, Bonhoeffer was able to travel, as other Germans could not, to neutral countries. He went to Sweden and Switzerland specifically to meet with members of the allied governments. In Sweden, he was able to meet with George Bell, the Bishop of Chichester, whom he had known for years and who had a close relationship with Foreign Secretary of the United Kingdom Anthony Eden and the Churchill government, to let him know that there were Germans inside of Germany working to end Nazi rule and to assassinate Hitler.

By 1943, Bonhoeffer had been imprisoned by the Nazis for his role in Operation 7, which had created a subterfuge to get seven Jews out of Germany and into neutral Switzerland to save their lives. Then, in 1944, Operation Valkyrie, the code name for the plot to kill Hitler, went awry. The bomb went off, but it did not kill Hitler. Thousands were arrested and tortured. Names came up; one was that of Bonhoeffer. At that point he was transferred to a Gestapo prison and then to Buchenwald, where on April 9, 1945 he was hung at dawn for his role in the plot to kill Hitler.

ACTING ON REAL FAITH

In closing, Metaxas reflected, "The idea of this pastor getting involved in a plot to kill someone is theologically rather complicated....The fact is that Bonhoeffer had a very clear idea of what it was to follow God.... To me this is the ultimate difference between real faith and the counterfeit, which is, ultimately, dead religion... fear-based....It says, 'God is a harsh judge, he is unpleasant and mean, and he is trying to find my mistake. He wants to punish me. He is looking hard to see where I make a mistake, to see where I sin.' If you have that view of God, your whole view of how to behave is to avoid sin. It is negative and it is fear-based.

"Bonhoeffer had a different view of God....If you think of God, on the contrary, as someone who is on our side and who loves us, your desire to please him will be stronger than your desire to avoid sin. This was key for Bonhoeffer, because Bonhoeffer said, 'Faced with what I know'–and he was one of few Germans who knew everything that the Nazis were doing, especially toward the Jews –'I know I must act.' But he says, 'I am not one hundred percent sure that getting involved in the plot to kill Hitler is the right thing to do.' Let's be clear: the Bible is not against killing. It is against murder. We cheer when David kills Goliath. We have to be real. It is much more complicated than people sometimes make it out to be.

"Bonhoeffer said, 'In this case I think that the right thing to do is to get involved in this plot to assassinate this madman, because what he is doing, what his people are doing every single day, is a horror, and to stand by and to try to be pious and to try to say, "I don't want to do anything wrong, I want to be justified before God, I don't want to do anything wrong, I don't want to lie, I don't want to kill, I'm just going to stay here and I'm going to pray." He says. 'No, that is fear-based. I must risk everything, knowing that even if I get it wrong, God is a merciful God. He looks in my heart and he judges me for what I am trying to do, rather than trying to trip me up and catch me in a sin, in a mistake.'

"And so, Bonhoeffer did some things, specifically this thing, which baffled many of the religious people of his time. Many of his colleagues could not follow him out onto this thin limb where he was going theologically. 'But,' he said, 'ultimately I answer to an audience of one, which is to say, 'God is my judge.'"

While many people in the church could not fathom Germans plotting again their own government, Bonhoeffer knew he had to take greats risks in order to serve God and his fellow man. Bonhoeffer's story challenges one to think about God, evil, and how to act in accordance with one's beliefs.

"All of these things come together somehow in the story of Bonhoeffer.... I had no idea that it would strike the kind of chord it has, but I see that it is helping people to think through some of the things that are ethical conundrums for us. It is not easy, but Bonhoeffer challenges us to try nonetheless....It is one of the stories of the ages."

E. Osbourne Ayscue, Jr.
Charlotte, North Carolina

AN EXXON INSIDER

S. Jack Balagia, Jr. may work for an extensive and complex company, but the law department he oversees does "just about anything that a major law firm would do." Balagia is General Counsel of Exxon Mobil Corporation. He joined Exxon's litigation section in 1998. As General Counsel, a position he has held since March 2010, he heads a law practice which includes 221 lawyers in the United States and 207 lawyers in thirty-one countries outside the United States.

Exxon's litigation runs the gamut, including spills, releases, explosions, antitrust, class actions, punitive damages, naturalization of assets, and regulatory regimes, and some specific to the oil industry.

Exxon is also committed to the vigorous defense of its rights and beliefs. In fact, in a July 6, 2013, *Wall Street Journal* op-ed piece in which competitor BP was described as a serial capitulator, it was suggested that a company in crisis might look to Exxon as inspiration.

An experienced trial lawyer, Balagia brought to the Fellows and guests gathered at the 2013 Annual Meeting in San Francisco his knowledge, experience and touch that has been shaped by his time in court.

COMPANY SNAPSHOT

Exxon was established in 1882 as the Standard Oil Company, part of the Standard Oil Trust. In 1911, the U.S. Supreme Court, under the Sherman Act, dissolved the trust. Standard Oil New Jersey and Standard Oil of New York became separate companies. Standard of New York eventually changed its name to Mobil, while Standard of New Jersey changed its name to Exxon. The two merged in 1999 to create ExxonMobil Corporation.

ExxonMobil, known simply as Exxon, is the world's largest publicly traded oil and gas company, owning acreage in thirty-eight countries and running operations in twenty-three. With 77,000 employees, it is the world's largest oil refiner and the largest supplier of petroleum products.

As big as Exxon may appear to be, based on the amount of oil and gas reserves controlled by a company, Exxon is number seventeen. The rest are national oil companies run by countries.

According to the *Wall Street Journal*, Chinese oil companies bought 44 billion dollars' worth of U.S. oil and gas companies and fields in 2013. While Exxon is the biggest publicly traded oil and gas company, Balagia noted "we are a very small player. We control less than two percent of the world's oil and gas reserves."

Profits in 2012 totaled around $45 billion, but the company paid $102 billion in taxes all across the world. Its large stature means it is the subject of public discussion and debate.

"You can go to YouTube and type in Exxon, you will pull up the most amazing stuff. Some of it is pretty vitriolic." A website called ExxonHatesYourChildren.com talks about climate change, how Exxon is responsible for it, and how the company is going to kill the world's children.

OUTLOOK ON ENERGY

Surveying the energy landscape and trying to predict what energy consumption is going to look like in the future is a yearly process. "We have to because we invest in projects that take 10 or 20 years to build or bring to production. The future is very important to us, as we have to consider how much oil, how much gas, how much nuclear, how much solar, and how much wind are people going to be using 30 years from now."

Exxon's predictions run through 2040. "I think one of the learnings is that population growth is going to drive energy demand. There will be, in 2040, nine billion people in the world." China and other undeveloped countries will see economic standards of living increase, spurred on by energy, with a majority of the energy being consumed for electricity generation.

By 2040, oil, natural gas and coal will still be the predominant sources of energy, but the largest growth among all of these sources will be in solar and wind. However, even in 2040, with that growing six percent

> We are a target company. Because we are a target, we are a much more careful company than we were fifty years ago. We are very safety conscious. We have a very significant compliance tone at the top. We try to do the right thing all the time, and so being a target is not all bad. It also keeps the lawyers in business.
>
> *S. Jack Balagia, Jr.*

QUIPS & QUOTES

per year, only four percent of the world's energy will be supplied from solar, wind and bio fuels.

EXXON'S LAW DEPARTMENT

One reason Exxon has a law department "is to make sure that our lawyers help the business units protect themselves and enable them to do the work that they need to do. We are a target company. Because we are a target, we are a much more careful company than we were fifty years ago. We are very safety conscious. We have a very significant compliance tone at the top. We try to do the right thing all the time, and so being a target is not all bad. It also keeps the lawyers in business."

QUIPS & QUOTES

As big as it is perceived that we are, if you measure oil companies in the world based on the amount of oil and gas reserves that they control, Exxon is number seventeen. All the others are national oil companies run by countries.

S. Jack Balagia, Jr.

Exxon has lawyers all over the world in thirty-one offices. Some of the largest offices are in Calgary, Weatherhead, Brussels, Singapore, Lagos, and Melbourne. The company will soon consolidate all of its U.S. operations into a single location in Houston, Texas.

Balagia emphasized that Exxon is not just "an old oil and gas company." It's also a technology company that spends about one billion dollars a year in research. Annually, it files 450 patents, with 19,000 patents that are either granted or pending. The company brings in about $150 million per year in patent licensing.

Exxon uses over 300 law firms in the U.S., around 1,800 lawyers, with several hundred more lawyers outside the U.S. "We have a very strong internal culture for participation by the in-house lawyers for all matters involving our outside counsel. There's been a lot of talk in the press and elsewhere about the use of alternate fees. My experience is that hourly fees are still the predominant basis for outside counsel engagement. I expect that to continue."

STATE OF THE JUDICIAL SYSTEM

Balagia referenced *a Business Week Magazine* cover from May 2013.

"What do you call 176,000 lawyers lying at the bottom of the ocean? Well, the answer in the old joke was 'a start.' What they say now is 'the future.'" According to the U.S. Department of Commerce, by 2020 there will be 176,000 more law graduates than there will be law jobs. The projected figure does not take into account the fact that law school admission classes have already been declining very dramatically. Admission was down thirty percent in 2012. "So the question we've got to answer is: in 2020, will this actually be what our profession looks like?"

The number of new U.S. law jobs has been flat since 2000. In 2012, fifty percent of law grads could not find law jobs. Major law firms have been closing offices. "It is now a buyers' market for those of us in the in-house business."

However, with fewer lawsuits, there are fewer trials, and fewer opportunities to train trial lawyers. "The irony of the situation to me is that, despite all this increase in supply, this oversupply of lawyers, three out of four poor Texans still cannot get legal representation. So that's a landscape that is still with us."

Balagia suggested the decrease in trials and in the demand for lawyers is due to costs and shared findings from a conference on civil litigation held by the Duke University School of Law:

- Outside litigation costs, from major companies, averaged $115 million in 2008, up seventy-three percent from 2000
- Average litigation costs as a percentage of revenues increased seventy-eight percent
- Hourly rates remained relatively flat
- Electronic discovery in the typical case costs about three-and-a-half-million dollars, and increased discovery costs account for most of the increase in litigation costs.
- The demands for high-end corporate legal services will continue.

Balagia ended on a positive note. He foresees a balance occurring between law school enrollments and demand. Whether the cycle continues, or steps to changing the legal profession take place, remains to be seen. "But I think the need for experienced trial lawyers will never change."

David N. Kitner
Dallas, Texas

OUTREACH UPDATES

ALABAMA STATE COMMITTEE OFFERS LEGAL PROGRAMS

Under the leadership of Fellow **Robert P. MacKenzie**, during the past year the Alabama State Committee has presented fourteen continuing legal education programs to a variety of groups, including the DRI Medical Liability and Health Care Law Seminar, the Eleventh Circuit Judicial Conference, the Alabama Defense Lawyers Annual Meeting, legal aid personnel and staff, a local chapter of the American Inns of Court, the Cumberland School of Law Labor and Employment Law Ethics Program, and the Mobile and Baldwin County Bar Association's Annual Bench and Bar Conference.

New admittees to the Alabama State Bar are also required to complete a three-hour course in professionalism within one year of admission. Those courses are offered in alternating years by the University of Alabama and Cumberland Schools of Law, and the law schools have invited the Alabama State Committee to present a panel discussion at each of their programs. The presentations are based on the College's *Code of Pretrial and Trial Conduct* and each new bar admittee is given a copy of the *Code*. Several additional programs based on the *Code* were offered by the committee to members of the general bar. Most of these programs used as discussion items the ethics vignettes included with the *Code*.

In furtherance of the outreach efforts of the committee, state and federal judges have participated with Fellows in the presentation of most of these programs. In all, forty-three different Alabama Fellows participated in one or more of these programs - more than half of the total number of Fellows in the state.

In alternating years, the Alabama State Committee presents a special program entitled the "Jere White Trial Advocacy Institute." The purpose of this program is to honor deceased Alabama Fellow, **Jere F. White, Jr.**, and to publicize the Jere F. White, Jr. Fellows Program, a scholarship fund established by Jere and his wife, Lyda, at the Cumberland School of Law. All speakers at the Institute are Fellows and all of the event proceeds go to the scholarship fund. The inaugural program in 2012 raised around $140,000 for the fund.

Finally, the Alabama State Committee is presently considering a request by the Alabama Circuit Judges Association to offer to its 225 members (Alabama general jurisdiction trial judges) a one-day Judicial Education Program.

Allan R. Chason
Bay Minette, Alabama

MONTANA JUDICIAL INSTITUTE REACHES HIGH SCHOOL EDUCATORS

It began with a routine voir dire.

Senior U.S. District Judge and Judicial Fellow **Donald W. Molloy** was perplexed by the number >>

of potential jurors who had little knowledge of how the courts function. While he could educate the twelve jurors selected for the final panel during the course of a trial, he though a better way of reaching and educating citizens about the third branch of government should be available. And so began the Montana Judicial Institute in 2008, a two-and-a-half-day course for high school government and civics teachers, designed to provide them with information they could take back to their classrooms about the judicial system and the Rule of Law. It has continued nearly annually since it began.

About thirty participants are hand selected by Montana's federal court staff from a plethora of applications that are received each year. Participants travel from all across Montana for the experience, some as far as 560 miles each way. Accommodations and meals are provided, and teachers participate in ten-hour days of intellectually rigorous instruction and courtroom observations. A constant refrain among the participants is "I didn't know that!"

The educational experience does not end when the daily classroom and court presentations are complete. Two working dinners are included that feature additional lectures and speakers. A critical component of the Institute's success is the commitment by the faculty to fully participate for the duration of the course, so judges and instructors also attend the working dinners to engage one-on-one with participants. Funding is provided through the federal court's Attorney Admission Fund, and participants are eligible for one graduate credit for the course.

Presenters include: Judge Molloy, U.S. District Court Judge and Judicial Fellow **Dana L. Christensen**, and U.S. Magistrate Judge Jeremiah C. Lynch; Montana's current and former federal clerks of court; University of Montana Philosophy Professor Emeritus Thomas P. Huff, who provides a historical and practical background to the Rule of Law; Montana's three lawyer representatives to the Ninth Circuit; and a cadre of volunteer lawyers who present information and demonstrations on selected topics. Participants are compensated only by the satisfaction of seeing the law come alive for a group of teachers who will take the experience back to their students.

The course begins with a lecture by Professor Huff, a law and philosophy educator for more than thirty-five years, who describes the history and structure of the Rule of Law and why it is important. The anatomies of both civil and criminal trials are explained, complete with a panel presentation of jurors who have served in the federal system and who provide candid insights into their experiences. Participants later have the opportunity to observe real arraignment and sentencing hearings at the federal courthouse.

Other lectures about the state court system, appellate court jurisdiction (usually from a Montana Supreme Court justice), and tribal court jurisdiction are included. Sometimes a working voir dire is demonstrated, with the participants assuming the roles of prospective jurors. One former speaker shared his personal experience in the federal corrections system.

Judge Molloy has described the experience as akin to "drinking from a fire hose." While the experience is intense, it has been well received, and evaluations from each year's participants are mostly glowing. The teachers who attend describe being "blown away" by the courtroom observations. One year, the courtroom observation included testimony by the United States Secretary of the Interior, and the teachers incredulously noted that "everyone" is subject to the Rule of Law, including high government officials. Participants have expressed surprise by the thorough preparation and cooperation among the lawyers and judges.

Why has the Institute been so successful? Professor Huff believes it is partly because teacher-students are treated like they are sharing in the enterprise of figuring out the Rule of Law. But second, although the Rule of Law is one of the crown jewels of modern democratic states, it is little understood by the public and by these teachers. This is unexplored and fertile ground for government teachers in their

quest to prepare good citizens.

The program could be adopted in nearly any state with sufficient federal or state judicial and attorney volunteers for instruction. Past observers in the court have included federal clerks of court from other states interested in creating a similar program on their home turf, and all would be welcomed at future institutes. The hands-on judicial component is key to the success of the course. Participants leave with the firm knowledge that this is a real-life experience, which can affect each and every one of them in their daily lives.

Carey E. Matovich
Billings, Montana

PHILADELPHIA FELLOWS PROVIDE CONTINUING LEGAL EDUCATION TO PUBLIC INTEREST LAWYERS

Dedicated public interest lawyers providing free legal services to the indigent population in Philadelphia often find themselves negotiating on behalf of their clients from a position of vulnerability and power imbalance. This vulnerability stems from many factors, including lack of experience, gender, law firm size, and lack of prestige. Focusing on ways to overcome these common obstacles, Fellows **Roberta D. Pichini**, **Eric Kraeutler**, and **Catherine M. Recker**, together with the Honorable Abraham J. Gafni, presented a three-hour program to forty lawyers from Community Legal Services, Inc. (CLS) and Philadelphia Legal Assistance (PLA), two organizations annually serving tens of thousands of low income clients free of charge.

Launching the program with a short clip from the movie *The Verdict*, the Fellows presented strategies that addressed where negotiation should take place, who might appear and participate, and how to build relationships and trust. The Fellows also described how to control elements of timing and pace, express a bottom line, make opening offers, and disclose fallback positions. A final segment looked at the unique imbalance of negotiating with monolith adversaries such as the federal government.

After the prepared remarks, the participants split into teams to engage in a negotiation exercise. One side represented a struggling art student who had inherited several paintings of unknown worth, while the other side represented a gallery owner who recognized the value of the paintings and who represented a wealthy collector with a personal connection to the paintings. The participants were given ten minutes to study the fact pattern and thirty minutes to negotiate the sale of the paintings. When the time was up, the results of the negotiations were revealed and participants discussed their observations about what worked and what did not, and what other options might have been considered.

The response was enthusiastic, with Catherine Carr, the Executive Director of CLS reporting that the program offered the lawyers the opportunity to gain new skills and to think deeply and in new ways about their advocacy styles and roles. She said enthusiasm was so great that the exercise "could have could have gone on for many more hours!" Carr noted that the training will be put to good use on behalf of the thousands of clients who seek assistance from legal aid attorneys each year.

Financial support was provided by the Foundation of the American College of Trial Lawyers and the law firm of Morgan, Lewis & Bockius LLP. In a wonderful coincidence, Rob Ballenger, one of the CLS participants, is the grandson of the late Past President **Lively M. Wilson**, who had also served as President of the Foundation.

Catherine M. Recker
Philadelphia, Pennsylvania

KENT WALKER: HISTORIAN AND VISIONARY

In remarks described by then-President **Chilton Davis Varner** as "provocative, challenging and dazzling," Fellows and guests in attendance at the 2013 Annual Meeting in San Francisco, California, were treated to an erudite history lesson and look into the future from Google's General Counsel, **Kent Walker, Jr**.

Walker told the audience that up to the year 1500 AD, families made no more than $1,000 per year, year after year. From that point on, however, family incomes started growing and did not stop. Starting with the Industrial Revolution in the 1700s, family incomes began growing exponentially. This increase in income seemed to reduce violence, war, and sickness, leading to an unprecedented increase in human lifespan.

The cause for this, according to Walker, was nothing other than the growth in trade, an activity that appeared to have always been present in civilization. It could easily be seen that commerce worked, certainly more productively than warfare. Groups found they were better off trading than fighting. When people trade, they exchange not only goods but ideas as well, said Walker.

This exchange in ideas afforded civilization the benefits of both pluralism and universalism. "We benefit from diversity but we converge in prosperity." These ideas now are both political and technological. The clipper ships of their day, used for trading physical goods, have become the internet of today, the current mode for trade in digital goods.

TECHNOLOGY TRANSFORMS THE WORLD

In Silicon Valley, where Walker's family has lived for generations, Walker noted that the "magicians of technology"—the engineers and inventors—have transformed today's culture and economy. Case in point: six billion out of the seven billion in the world's population have cell phones, more than many people have to decent sanitation. Now, 2.4 billion people can access the internet; in 2016, that number will double. These advances in communication, transportation, and information technology have brought over one billion people out of poverty.

> The arc of history bends toward progress, and it's that progress that raises living standards, reducing warfare and disease, promotes mature democracy and the rule of law and, yes, permits societies to enjoy rising standards of justice.
>
> *Kent Walker*

Paraphrasing Dr. Martin Luther King, Jr., Walker said that the arc of history bends towards progress and it is this progress that raises standards of living, reduces warfare, and promotes democracy. It promotes the rule of law and, as King put it, promotes the standards of justice.

Walker addressed how the world arrived at this particular point, and described one of history's "hinges." Walker mentioned Moore's Law, which posits that a computer chip's processing power will double every eighteen to twenty-four months, while Metcalfe's Law provides that networking power is directly related to the square of the number of users on the network. With the Cloud, the results of these laws are evident, such that the cost of processing, memory and transmission are approaching zero. Collectively stored information, doubling each year, is still speeding ahead.

PROMOTING AN OPEN INTERNET

The internet's rise and a new era of creative tools has lowered the barrier to creation and distribution of information, resulting in the availability of open source software, crowd sourcing, citizen journalism, online education, and the like. And today's information consumers are also creators, eroding the difference between consumers and producers as seen through the explosion in online news sites and blogs.

Far from characterizing this as a technological utopia, however, Walker recognized the need to be comfortable with the notion of failure, especially as the future can be disconcerting because most people even though most people prefer the status quo. Companies such as Uber, a car sharing service, are forging new ways to do business, but may need to challenge existing regulations in doing so. In addition to economic disruption and regulatory resistance, Walker noted that technology also challenges cultural norms and creates new ones. Technology is often unpredictable but by and large, it is "transformative, uplifting and even revolutionary." It exists to solve problems, some of which may not yet be identified. Yet, the advances in technology have laid the foundation for economic, political, and civil empowerment along with social engagement and global ties.

Though much of the law is based on maximizing social benefit, Walker talked of the need to re-examine these constructs in favor of creation and innovation. All of this forms part of a balancing act. Technological advancement, Walker said, will only yield improved growth and standards of living when coupled with sound public policy. The free flow of goods, services, labor and capital but, most of all, ideas must be embraced, and innovation must be a priority. An open internet as a human rights priority must promoted, which is a key aspect of promoting the rule of law around the world, according to Walker.

To Walker, any government control of the internet, as witnessed in more repressive countries, is a pernicious development, the Edward Snowdens of the world notwithstanding.

That concern aside, in order to keep growing technologically, information should spread and laws should be in place to facilitate it, said Walker. He concluded, "The future doesn't have a lobbyist but we can all, and must all, shape our laws and our policies with one eye on the future."

Stephen Grant, LSM
Toronto, Ontario

BALANCING INTELLIGENCE, SURVEILLANCE AND ADVOCACY

The Honorable **James Robertson** served on the federal bench in the District of Columbia for more than fifteen years. As a judge, he granted the first writ of habeas corpus to a Guantánamo Bay detainee. Prior to his jurist position, Robertson served as a litigator in Mississippi for the Lawyers Committee for Civil Rights Under Law, followed by a quarter century as a trial lawyer with the Wilmer, Cutler and Pickering firm now known as WilmerHale. Currently, Robertson serves as a private mediator and arbitrator, where his experience and skill set helped him reach a $3.4 billion settlement in a Native American trust fund class action that lasted fourteen years and included nine separate trips to the Court of Appeals.

But it was Robertson's tenure as a Foreign Intelligence Surveillance Act (FISA) Court judge that provoked and seeded his remarks on October 26, 2013, at the College's Annual Meeting in San Francisco. Appointed in 2002 by then Chief Justice William Rehnquist to the FISA Court, he served for three years before *New York Times* reporters "blew the cover on the NSA," reporting that the National Security Agency (NSA) eavesdropped on Americans to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying. While silent at the time as to the reason for his resignation, Robertson argued the court was being used improperly: "The FISA Court was being used like the fake village that Marshal Potemkin built on the banks of the Nipa River to convince or fool Catherine the Great into believing that the peasantry was well-off and satisfied." Robertson, who had served for a time in the Office of Naval Intelligence when he was going to night law school, followed his conscience by resigning.

FISA Court proceedings were held at the Department of Justice (DOJ) in what is called an SCIF, or, Sensitive Compartmentalized Information Facility. A lead-lined cargo container on rubber feet, it is where the judges met with the FBI agents and DOJ lawyers who presented the warrants. The documents reviewed by the Court were classified as secret, top secret, and sometimes even higher.

I wish the norms of these proceedings would permit the speaker to turn-around and reintroduce the introducer because it's a real honor to be introduced by Earl Silbert, who anybody from Washington D. C. will tell you is an icon of legal practice in Washington and has a resume that is more a dream than anybody I know.

Honorable James Roberston (Ret.)

Robertson explained the history and purpose of the Federal Intelligence Surveillance Act enacted in 1978. It came about after Senators Frank Church and Sam Ervin "exposed the Nixon administration's use of federal resource to spy on political and activist groups." The idea, according to Robertson, was to provide judicial and congressional oversight of the government's covert intelligence surveillance while maintaining the secrecy that is needed to protect national security. However, the 2008 FISA Amendments Act, according to Robertson, vastly increased the government's power to conduct surveillance of international communications without individualized judicial review. At the same time, it severely limited the scope of the FISA Court's review and permitted the Attorney General and Director of National Intelligence jointly to authorize surveillance programs that gather intelligence by targeting international communications of foreign persons located abroad.

Since leaving the bench, Robertson has become vocal in his dissatisfaction about the jurisdiction and judicial review available to the FISA Court. The central tenet of his criticism of the format of the FISA Court is that it lacks advocacy balance. Only the government presents. There is no public citizenry response. He noted that Amnesty International's effort to do just that was stopped in its judicial tracks by the U.S. Supreme Court in the *Clapper v. Amnesty International* decision. "This is where I get on my hobby horse....I don't have any problem with ex parte proceedings to approve individual warrants…Where I draw the line is where the notion that precedents are being set and followed ex parte, or that ex parte proceedings are being conducted for the approval of programs."

Some might question how traditional advocacy could ever work in something as sensitive as national security, especially in the wake of the Al-Qaeda-sponsored 9/11 attacks and the loss of thousands of American lives. But Robertson suggested an independent advocate could argue cases before the FISA Court, new and shorter sunsets on "controversial surveillance authorities" could be imposed. Robertson thought it important not to involve the "public advocate" in issuing warrants, but rather to have an adversary involved in the process whenever the FISA court is making law or whenever it is reviewing a program that is not an individual warrant.

And in an outspoken summary of the problem as he sees it, Robertson lambasted the NSA calling it the "No Such Agency" (because no one knows anything about it), and that it is "out of control and the FISA Court does not have the ability to control it." Robertson does not believe the *Wall Street Journal's* "solution" will happen: that the Chief Justice of the U.S. Supreme Court tells Congress that the judiciary will not support rewriting FISA and end its current participation. The problem, according to Robertson, is back on Congress' back.

The FISA Court was being used like the fake village that Marshal Potemkin built on the banks of the Nipa River to convince or fool Catherine the Great into believing that the peasantry was well-off and satisfied.

Judge Robertson

In Orwellian terms, Robertson closed his remarks by noting that maybe Americans do not care about privacy, and that "we may be indeed heading inexorably toward a world in which everything is known about everyone."

Kevin J. Kuhn
Denver, Colorado

QUIPS & QUOTES

Region 7 Regional Meeting | *Alabama-Florida-Georgia* | *February 6-8, 2014 Amelia Island, Florida*

TRI-STATE REGIONAL MEETING CONVENES IN AMELIA ISLAND

More than 175 Fellows and guests attended the Tri-State regional meeting at the Ritz-Carlton in Amelia Island, Florida, February 6-8, 2014. Held every other year, the joint meeting of Fellows from Alabama, Florida and Georgia continued its long tradition of substantive and enlightening programs, along with a focus on fellowship and camaraderie.

Honorary Chair **Roy B. (Skip) Dalton, Jr.**, United States District Judge for the Middle District of Florida, introduced the opening speaker, Dr. **Neil Hammerschlag** of the University of Miami Dunlap Marine Conservation Program, who presented "Sharks: Exploring the World's Most Feared and Mysterious Predators." Past President **John J. (Jack) Dalton** introduced **Kenneth S. Broun**, Professor Emeritus at the University of North Carolina School of Law and the author of "Saving Nelson Mandela: The Rivonia Trial and the Fate of South Africa," who gave a fascinating historical account of the criminal trial of Mandela.

Immediate Past President **Chilton Davis Varner** introduced **Frank Cerabino**, humor columnist for the *Palm Beach Post*, to provide his observations of humor in the news and law. The day concluded with a discussion led by **Bob Graham**, former governor of Florida and former United States Senator, on the current state of American politics and its effect on the federal and state judiciary.

On Friday evening the Fellows and their guests enjoyed a lovely reception at a historic home in the quaint downtown of Fernandina Beach followed by a dine-around at local restaurants, all arranged by Fellow **Charles P. Pillans, III**, and his wife, Judy.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The second day began with an insightful presentation on the Trayvon Martin trial, the legal and ethical issues it raised, and the lessons learned by Florida lawyer **Mark O'Mara**, lead defense attorney for George Zimmerman.

The highlight of the weekend was a powerful and moving talk by **Morris Dees**, co-founder and chief trial counsel of the Southern Poverty Law Center, on the tradition of American lawyers representing the underprivileged and unpopular clients and causes.

In the final presentation, Florida Supreme Court Justice **Barbara J. Pariente** was interviewed by Fellow **Patricia E. Lowry** regarding Pariente's career path, special interest attacks on the judiciary, and issues facing women in the practice of law and in the judiciary.

Regent **C. Rufus Pennington, III**, presented gifts of appreciation and thanks to his predecessor, incoming College Secretary **Samuel H. Franklin**, and to Immediate Past President Varner.

Jeptha F. Barbour
Jacksonville, Florida

I am concerned that across the nation we are seeing a politicalization and a greater reverence to campaign money in the selection of judicial candidates than we have seen in our lifetime.

Bob Graham

A great lawyer must maintain active creativity.

Mark O'Mara

Unless we are able to find justice and fairness in these places, we as a nation will look in vain for progress in a larger world. Lawyers, trial lawyers especially, have a great and important responsibility to make sure that happens.

Morris Dees

The wave of media coverage is coming to a neighborhood near you because of 24-hour media and everybody having a video camera in their pocket.

Mark O'Mara

QUIPS & QUOTES

A. Alabama State Chair Allan Chason (left) and wife Susan with Florida Fellow David Ackerman (right) and wife Kim

B. Cris Johannpeter and Regent Rufus Pennington

C. Mark O'Mara, lead defense counsel for George Zimmerman

FELLOWS PROVIDE ACCESS TO JUSTICE

The College's commitment to pro bono service may not be highly publicized, but Fellows in both Canada and the United States are active in serving their communities.

The Access to Justice and Legal Services Committee, co-chaired by **John P. Gilligan** of Columbus, Ohio and **Ian Francis Kelly**, Q.C. of St. John's, Newfoundland, serves as a clearinghouse for pro bono opportunities by publicizing needs and collecting stories from Fellows. Two stories follow:

PROTECTING THE RIGHTS OF IMMIGRANT CHILDREN

Not long ago, **Wallace A. Christensen**, a College Fellow in the Washington, D.C., office of Troutman Sanders LLP, was given the opportunity to represent a young Mexican child, Diego, who had been taken into custody for entering the United States illegally. Kids In Need of Defense, or KIND, is an organization founded in 2008 by Microsoft Corporation and Angelina Jolie. KIND works to find, develop, and train pro bono attorneys to represent children facing deportation so they have a fair chance of making their claims for U.S. protection. It is a daunting task, but KIND has been successful in fulfilling its mission: since 2009, KIND has recruited over 190 law firm, corporate, and law school partners, trained more than 6,100 lawyers, matched seventy percent of the children under its purview with pro bono attorneys, and received more than fifty million dollars in pro bono services.

DIEGO'S PATH TO THE U.S.

Diego [name changed to protect his identity] was born in 1992 in a small, poor village 300 miles south of Mexico City. His parents were sixteen and twenty years old at the time. Diego's mother abandoned him three weeks after he was born, leaving him to be raised in extreme poverty by his father and his father's family.

Opportunities for labor in Diego's village were extremely limited. Diego's father sometimes found work in the cornfields, earning $10 a day for a twelve-hour shift. It simply was not enough. Shortly after Diego turned sixteen, his father decided things were so difficult in the village that they should both go to the United States to seek work to support the rest of the family.

Diego was taken out of school, and in June 2008, using the services of a human smuggler known as a *coyote*, Diego and his father surreptitiously entered the United States. They were driven to Atlanta, Georgia,

and from there traveled throughout the Southeast, occasionally finding jobs at construction sites. After six months on the road, they settled on Florida's east coast. Diego's father worked as a day laborer doing construction jobs, and Diego got a full-time job cutting vegetables in a restaurant. Each week, Diego and his father would send as much money as possible to their family in Mexico, while at the same time saving what they could in order to pay off their debt to the *coyote.* This brief respite of stability was shattered, though, when they were stopped and questioned by a police officer outside a 7-Eleven near Daytona Beach, Florida. Out of panic, Diego tried to run away. As a result, he and his father were taken into custody.

IN U.S. CUSTODY

Diego was immediately separated from his father and detained in Daytona Beach. His father was deported to Mexico, despite his frantic assertions that he would be murdered by his ex-wife's boyfriend if he was returned to his village. Those concerns sadly proved to be well-founded; Diego's father was shot and killed less than ten days after being sent back to Mexico.

After three weeks in the local jail, Diego was transferred to a juvenile facility in Miami, Florida. It was there that he learned his father had been killed. Diego – who spoke no English – was told by other residents of the facility that he, too, would soon be deported back to Mexico. Diego was terrified that he would meet the same fate as his father.

The good news for Diego was that he would be given a hearing before he was deported. In addition, a special provision in the *Immigration and Nationality Act* might afford him the opportunity to remain in the United States, provided he could prove to a court that he satisfied the requirements of the statute.

The bad news, though, was that the government does not appoint or otherwise provide counsel to represent children appearing in deportation proceedings. As a result, unless Diego had the knowledge, connections, and financial resources to locate and hire a lawyer himself, he would be forced to face the government's charges entirely on his own, without counsel.

ALONE IN A CROWD

Diego's case was not unusual. In fact, in 2008, the same year Diego was taken into custody, more than 6,000 unaccompanied immigrant and refugee children, upon arriving the U.S., were placed in deportation proceedings. Last year, the number almost quadrupled, with even greater increases predicted for 2014 and beyond. These children, many of whom have fled violence, abuse, abandonment or persecution in their homelands, arrive in the country struggling to understand a system they know nothing about, in a language they do not speak, and without the assistance of a parent or guardian to help protect and guide them. If taken into custody, they are placed into deportation proceedings regardless of why they came or what they were fleeing. They are scared, confused, and – without legal counsel – virtually unable to present their claim for U.S. protection to an immigration judge. As a result, many are deported and returned to their country, where their well-being or even their lives may be at serious risk.

Diego faced the same plight. He would find himself in a courtroom, alone. His adversary – the U.S. government – would be represented by a skilled attorney advocating for his deportation. He faced the prospect of trying to defend himself in a proceeding that, in his

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case, literally had life or death consequences.

Fortunately for Diego, and thousands of other immigrant children, two great benefactors in Microsoft and Angeline Jolie joined forces to create KIND to remedy the injustices they faced.

A FELLOW STEPS IN

Christensen is one of those lawyers who was trained by KIND. He was having lunch with a colleague who had signed up for training, and the colleague invited Christensen to come along. Christensen had no background in immigration law and little interest in taking on any work in that area – until he learned about the problems of the young children, and the role he could play in helping them. Christensen was stunned when he learned that the children were subjected to an adversary system that effectively deprived most of them of any meaningful way to seek and obtain lawful rights provided by immigration laws. As a father of two boys, he knew the sense of outrage he would feel if his child was detained by a foreign government and forced to defend himself, without the benefit of counsel, in a language he neither spoke nor understood. As a lawyer, Christensen was shocked that anyone could possibly consider this the due process, or fundamental fairness, upon which the entire U.S. legal system is based. "And, as an American, I was embarrassed that this was how our legal system was experienced by so many from around the world." Christensen signed up to take Diego's case a few days after the training.

The training he received from KIND was substantial – a clear and concise manual explaining the immigration process, the rights provided to immigrant children under a variety of statutes, and the procedures necessary to protect and enforce those rights. He was assigned a mentor by KIND's Washington, D.C., office who walked him through the proceedings, introduced him to Diego, and gave invaluable guidance and advice every step of the way.

Christensen was provided with a detailed dossier on Diego prepared by a social worker in conjunction with KIND, which provided the raw material he would need to analyze and prepare his case. Soon thereafter, he met Diego for the first time. Diego was confused, scared, and spoke almost no English. Christensen watched as the interpreter explained to Diego that Christensen would be his attorney, that he would do everything in his power to help him, and that he was donating his services to Diego, free of charge. Given Diego's initial experiences with the immigration laws, he was skeptical of Christensen's role. As Christensen began to prepare for their initial appearance in court, Diego asked why he would take on the government, free of charge, for someone who had entered the country illegally. It gave Christensen the chance to explain to Diego everything good about the U.S. legal system and the role of a trial lawyer in protecting his rights.

In consultation with his mentor at KIND, Christensen decided that Diego might qualify for Special Immigrant Juvenile Status under the *Immigration and Nationality Act*. To obtain this status, Christensen would need to establish, in a state juvenile court, that reunification with one or both of Diego's parents was not viable due to abuse, neglect or abandonment, and that it would not be in his best interests to be returned to Mexico. With KIND's help, Christensen obtained Diego's father's death certificate and an affidavit from his maternal grandmother in Mexico, documenting his birth mother's abandonment of him three weeks after his birth. He persuaded a state court in Richmond, Virginia (Diego had been transferred from Florida to a foster care facility in Virginia) to make the necessary findings, after a hearing in which Diego testified. He then had to obtain the consent and approval of the U.S. Citizenship and Immigration Service (USICIS), which required the submission of additional documentation, and an interview of Diego by the agency.

A LIFE CHANGED

Diego's application to remain in the U.S. was granted. His status was changed from an "undocumented alien" minor to that of an alien lawfully admitted to the U.S. for permanent residence. Once permanent residence is established, Diego eventually will be able to apply for U.S. citizenship. Christensen described the phone call in which he conveyed the good news to Diego as "one of the most emotional calls of his career." Diego repeatedly expressed his gratitude, and his amazement that someone was willing to dedicate his time and effort towards securing his rights under our laws.

Interestingly, but not surprisingly, immigration judges and government counsel have welcomed the participation of KIND's pro bono lawyers in these proceedings. No one feels good about seeing children having to fend for themselves.

Diego has since graduated from school, is now fairly fluent in English and lives and works in a major city in the Southeast. Yet, as Christensen pointed out,

there are so many more children in desperate need of our services. "Our country is facing a child migration crisis." He noted that it is estimated that as many as 74,000 unaccompanied children will be apprehended as they enter the United States in 2014. KIND continues to strive to achieve its goal of providing free legal counsel to each and every one of these children.

Christensen was proud to give Diego an introduction to the ideals of the profession, and to show him the way the U.S. legal system was meant to operate. He said that representing Diego "turned out to be one of the most gratifying experiences of my career. I urge other Fellows to consider taking one of these cases. It will be an experience you will never forget."

PRO BONO LITIGATION PROVIDES LONG-TERM ACCESS TO JUSTICE

In May 1981, the inmates at the Idaho State Correctional Institution (ISCI) had serious complaints about unconstitutional living conditions. After trying unsuccessfully to obtain attorney representation to address their claims, they proceeded with litigation pro se. Inmate Walter Balla undertook representing their cause, filing a class action lawsuit commonly referred to as the Balla Class Action (*Balla*). The lead defendant was the Idaho Board of Corrections (IBOC). The inmates requested injunctive relief to address their lack of adequate medical treatment, overcrowding, inadequate diets, inadequate clothing, and lack of protection from predatory practices.

The matter ultimately went to trial in November of 1984 where the Inmates won their case in the U.S. District Court for the District of Idaho (Court). In its *Balla I* ruling, the Court found that because of the ISCI's deliberate indifference, without any connection to a legitimate penalogical purpose, the inmates were subjected to needless pain and suffering on account of inadequate medical and psychiatric care. That, plus overcrowding and inadequate attention to housing and security, contributed to stabbings, assaults, gang rape, and sexual slavery. Close custody (the classification for especially dangerous or vulnerable prisoners) was so badly managed that "virtually every young man assigned to that custody level was brutally raped." The Court issued an injunction to remedy the constitutional violations.

Subsequently, in July 1985, the Court approved Compliance Plans submitted in response to the *Balla I* order on the following topics: adopt a special dietary program for medically infirm inmates; provide adequate clothing for inmates in protective custody; create a 24-hour emergency medical system for inmates and hire a full-time physician; provide a properly-staffed medical delivery system; establish a program for psychiatric treatment; implement adequate security staffing for double-celled units; establish a plan to reduce predatory attacks in protective custody units; and implement a disciplinary offense procedure in compliance with the U.S. Constitution's due process standards. The Idaho Department of Corrections (IDOC) officials were ordered to fully implement the Compliance Plans by October 1, 1985. The Court conducted a hearing on the overcrowding issue on October 31 and November 1, 1985. By this time, the ACLU had appeared to represent the *Balla* inmates. At the close of the hearing on overcrowding, both parties agreed to the appointment of a court-appointed expert.

In August 1986, the Court clarified the issue that still needed to be addressed in the action:

"The plaintiffs have not challenged...the implementation of any programs or policies ordered and adopted in the July 11, 1985 order, except the psychiatric care program. Therefore, the court will herein order that all issues except the overcrowding issue have been raised, decided, ordered remedied and the remedial measures completed, and therefore, closed in this action. The only issue which remains to be decided and will hereafter be litigated in this action is the issue of overcrowding. It is further ordered that all issues which have been heretofore raised in this action, except the issue of overcrowding, should be, and are hereby, closed and will not be re-litigated in this action."

After some delay, the appointed expert toured the ISCI in January 1987, as did the Court and counsel, and the expert submitted a report to the Court in February 1987.

Subsequently, the Court held additional hearings on compliance. In March 1987, the Court ruled in its *Balla II* ruling that overcrowding had worsened, to the point where it amounted to "the unnecessary and wanton infliction of pain." The Court made the injunction more precise and specific to each housing unit of the prison. The Court specifically limited double-celling—that is, two inmates in one cell—for some classifications, and also limited the number of >>

prisoners housed in some units. Additionally, the Court expressed particular concern about housing "close custody inmates," who "are often volatile, violent and predatory," with others upon whom these prisoners preyed.

Following the compliance proceedings, the ACLU withdrew from representing the inmates, primarily due to the amount of time their representation required. Subsequently, in February 2004, the Court appointed Stoel Rives LLP, and resultantly Fellow **J. Walter Sinclair**, for the limited purpose of monitoring matters for the inmates.

The initial efforts of Sinclair and his team were to try to determine the scope and status of the injunctive relief previously granted the inmates, which was problematic in that neither the Court nor the State had preserved the Compliance Plans approved years earlier. Then, in June 2005, the State filed a Motion to Terminate Injunctive Relief, pursuant to the Prison Litigation Reform Act (PLRA), 18 U.S.C.A. § 3626, under the proposition that the IDOC had complied with all of the Compliance Plans and that further injunctive relief was unnecessary and inappropriate.

The parties provided briefing and oral argument to the Court, which ultimately denied the State's Motion to Terminate Injunctive Relief and entered a Memorandum Decision and Order in Plaintiffs' favor in September 2005. In the Court's Memorandum Decision and Order, which is known as *Balla III*, the Court specifically addressed the overcrowding issues of the *Balla II* injunction, finding that the conditions at the ISCI had actually worsened during the years after the Court's entry of the injunction. Following entry of the judgment on December 13, 2005, the Court withdrew Sinclair's firm's appointment as counsel for Plaintiffs.

Accordingly, the injunctions of *Balla I* and *Balla II* remained in effect in 2008 and after. At that time, the *Balla II* injunction prohibited, among other things: putting "close custody" prisoners two in a cell instead of one in a cell, or housing more than 78 inmates in Unit 9; housing more than 108 inmates in Units 10 or 11; and housing more than 144 inmates in Unit 13. The State was further enjoined from using "any other vehicle, scheme or mechanism designed to undermine the spirit and letter" of the injunction. As of that time, no question had been raised regarding the continuing validity of the *Balla I* injunction.

In 2007, the IDOC moved, again, to terminate the then twenty-year-old *Balla II* injunction, again asserting that they were in compliance and the injunction should terminate under the terms of the PLRA, which outlines the method for terminating prospective relief that was ordered prior to its enactment. The IDOC could move for termination of injunctive orders two years after they were entered, which then requires a finding of the Court that the relief remains necessary, or the injunction is terminated.

Because of the State's motion, the Court determined that counsel for the *Balla* inmates was again necessary. After considering the firm's history, experience, and prior service in representing the inmates previously, the Court reappointed Stoel Rives to represent the inmates, along with appointing five Class Representatives to work with the firm. Following the appointment of Counsel, the IDOC withdrew its request to terminate the injunction.

However, by the end of 2008 and the beginning of 2009, the IDOC had been housing 650 of its prisoners in private prisons in Texas and Oklahoma. Idaho decided to terminate contracts with the private prison operators in those states, both out of a desire to save money and because of concerns about staff shortages at the private prisons. By late November, with the return date less than two months away, the IDOC decided that it would convert a warehouse on the prison grounds, formerly used as an upholstery shop, into a new housing unit, to be called Unit 24.

Sinclair and his associates learned of the upholstery warehouse plan from the newspapers. On December 11, 2008, they wrote to the Deputy Attorney General handling the case that the plan appeared to violate the prohibition in the injunction against double-celling and against housing inmates in "nondesigned cell areas;" that is, areas not originally intended to be used as cells. They asked the State for an explanation in hopes of avoiding litigation and met with the State's project manager on December 22, 2008. However, a number of issues remained unresolved. In a January 2, 2009 email, the State advised Sinclair's team that 200 inmates would live in the converted warehouse, construction of which was in progress but incomplete, and that the two planned outbuildings for bathroom facilities to service the warehouse facility were not yet ready.

The State's plan failed immediately. Even before the prisoners returning from Texas arrived, on January 2, 2009, after the lights were turned down for the night and within a few hours of being moved to the ware-

house, the 200 inmates rioted, resulting in the effective destruction of the warehouse.

The State now had an already overcrowded prison and a destroyed warehouse it had intended to use to accommodate the 300 prisoners returning from Texas. Despite the now unusable converted warehouse facility, the State went ahead with flying 300 inmates back from Texas.

Because the warehouse did not house inmates at the time of the *Balla II* decision, it had not been a subject of the injunction. So while the housing conditions might have violated the "spirit and letter" catch-all clause of the injunction, it was not technically in violation of the injunction. However, because the riot made the warehouse unusable, and the State had brought back the Texas inmates anyway, the State then was in violation of the letter of the injunction by double-celling inmates in the preexisting units. The State acknowledged that it had violated the population limits but stated that it intended to end prohibited double-celling by March 1, 2009.

On January 16, 2009, Sinclair and his team moved for an order to show cause why the Defendants should not be held in contempt, for an order requiring the State to quit violating the double-celling prohibition in the injunction by February 4, 2009, to pay $5,000 per day for each day of violation of the injunction, and to remove by March 1, 2009 one of the two beds and one of the two lockers from each cell where double celling was prohibited. By the time the contempt motion was heard on February 18, the State had regained compliance.

In 2009, the State took the position that the only issue left for it to comply with was the overcrowding issue, and that all other issues addressed in the prior Compliance Plans were moot. The inmates did not agree and requested the Court to issue an order addressing whether or not the *Balla I* Compliance Plans, as best they could be reconstructed, remained in force. The Court issued a Memorandum Decision and Order in May 2009 ruling that *Balla I* and the *Balla I* Compliance Plans entered in 1985 remained in force and that they were enforceable through contempt proceedings.

In 2010, the team at Stoel Rives remained concerned that the IDOC was not complying with its obligations under *Balla I*; thus, they moved the Court to appoint a special master. Accordingly, in January 2011, the Court issued an order finding that the appointment of a special master was appropriate to address the remedial phase of the *Balla I* Compliance Plans. On July 20, 2011, the Court appointed Dr. Marc F. Stern as a special master to render an opinion as to whether Defendants were presently in compliance with the Compliance Plans. Stern issued his report on February 2, 2012, determining that the Defendants were not in compliance in various respects, which the Defendants disputed strenuously.

The parties agreed to engage in mediation to address the *Balla I* Orders on: the special dietary program; 24-hour emergency medical care; a properly staffed medical delivery system; and the establishment of a psychiatric care program. Following mediation, the parties entered into a Memorandum of Understanding (MOU) dated April 6, 2012, followed up with a Stipulated Motion to Modify Injunctive Relief entered on May 15, 2012 (the Stipulation). The Stipulation set forth what actions Defendants needed to take and provided for a two-year monitoring period to determine compliance. The primary concerns for the Plaintiffs were medical diets, medical care, and mental health care at the ISCI. The parties failed to agree to a resolution of various issues, but they established a process for monthly monitoring meetings attended by the Class Representatives, their counsel, and representatives of the IDOC and their counsel.

As part of the provisions of the Stipulation, the remaining issues which could not be agreed upon were submitted to the Court for resolution in October 2013. The Court issued a sealed Memorandum Decision and Order which addressed all but a couple of the remaining issues. The Inmates moved for partial relief from the October Order in December 2013. A settlement conference was held on April 1, 2014, with a Sealed Order being entered on April 7, 2014.

It appears, at this time, that the remaining issues continuing from this now thirty-three year old class action may be resolved in the near future. However, the history of this case demonstrates that some problems resolve neither quickly nor easily. Time will tell whether the process has provided the inmates with more tenable living conditions which will continue in the future.

J. Walter Sinclair
Boise, Idaho

FAIRNESS AND RESPECT FOR THE LAW RULE IN TEXAS TRIAL

Marlise Muñoz was only thirty-three and fourteen weeks pregnant when she suffered cardiac arrest on November 26, 2013. Married for less than a year, Marlise and her husband, Erick Muñoz, worked as paramedics. She was taken to John Peter Smith Hospital in Fort Worth, Texas, the largest hospital in the city and also the county hospital.

According to the hospital's records Marlise had an "anoxic brain injury" (lack of oxygen to the brain) resulting in brain death. This determination was made on November 28, 2013. Despite the diagnosis that Marlise was "brain dead," the hospital kept her on life support in response to a Texas statute that prohibits withdrawing or withholding life sustaining treatment from a pregnant patient. For the next two months, Marlise's parents and Erick tried to get the hospital to remove Marlise from life support while the hospital refused, believing it could not take that action without a judicial interpretation of the Texas statute.

On January 14, 2014, Erick filed suit in the district court of Tarrant County, Texas, seeking a declaration that the statute did not apply to Marlise or, in the alternative, that the statute was unconstitutional. The case was randomly assigned to one of the ten district court judges in Tarrant County. The judge to whom the case was initially assigned recused herself. The task of reassigning the case went to the temporary acting administrative judge, who happened to be **R.H. Wallace, Jr.**, a Fellow of the American College of Trial Lawyers.

In December 2010, Wallace was appointed to fill an unexpired state court vacancy before being elected in January 2012 to a full four-year term. Texas state court judges are elected by popular vote. Texas is one of only six states, not counting retention states, which elect their judges. He is the only state district court judge in Texas who is a Fellow of the American College of Trial Lawyers.

As the acting administrative judge, Wallace could have assigned the case to any of the other district court judges in Tarrant County. Even before the filing of the lawsuit, Muñoz's situation had generated immense state, local, and even international attention. Public opinion was divided, though it is likely that most of the people following the case could not have fully appreciated the legal issues. Instead of sending the case to one of his colleagues and perhaps running the risk of additional recusals, Wallace assigned the case to himself, on Friday, January 17, 2014. He then granted the parties an expedited hearing for the following Friday, January 24, 2014.

The courtroom was packed with media and observers, yet the hearing itself was relatively short. The parties, in the true spirit of the College's *Code of Pretrial and Trial Conduct* and despite having very opposing views, recognized that the issue was a question of law. The parties stipulated to the relevant facts, including that Marlise Muñoz met the clinical criteria for brain death, that the fetus was twenty-two weeks at the time of the hearing and that it was not yet viable. Hospital records indicated that even if life support were maintained, the likelihood of a successful pregnancy was questionable. From all accounts, including Wallace's, the lawyers were respectful of each other and their legal positions.

Erick Muñoz's lawyers argued that Marlise was not a pregnant patient as contemplated by the statute because she was dead; that life sustaining measures could not be applied to a dead person; and that the statute did not apply to a fetus. In response, the hospital, represented by the district attorneys' office, argued that the statute was enacted to protect the unborn child and that the statute reflected the legislature's intent to do just this.

During the week leading up to the hearing Judge Wallace reviewed the pleadings and briefs and conducted his own legal research because Texas state district court judges do not have law clerks. At the conclusion of the hearing, and after further review of pleadings and legal authorities, Wallace determined that the statute did not apply to Marlise Muñoz because "applying the standards used in determining death…Mrs. Muñoz is dead." He ordered that the hospital pronounce her dead and remove any life sustaining treatment by Monday, January 27, 2014, providing enough time to give the hospital the opportunity to appeal. The hospital did not appeal and the court's order was followed. Marlise Muñoz was pronounced dead and her body released to her husband on Sunday, January 26.

Wallace received universal praise for his handling of this case. He ruled clearly and promptly, yet respected the hospital's right to seek appellate relief. That there was not an appeal may have been simply that the hospital did not believe it would be successful. It may also have been recognition that the issue was fully briefed and argued and resulted in a decision made by a judge whose fairness and respect for the law were, and remain, unquestioned.

While it is certain that many disagreed with his decision, there were few who voiced any criticism of Wallace or the judicial process. In fact, newspaper editorials praised the process, if not the outcome. There is no doubt that Wallace's many years of experience on the other side of the bench as a trial lawyer served him well. All Fellows should take pride in the manner in which Wallace handled this very difficult case.

David N. Kitner
Dallas, Texas

TO BE OR NOT TO BE
A JUSTICE OF THE SUPREME COURT OF CANADA

In the matter of a Reference by the Governor in Council concerning Sections 5 and 6 of the Supreme Court Act, R.S.C. 1985, c. S.-26, as set out in Order in Council P.C. 2013-1105 dated October 22, 2013 (Reference re: Supreme Court Act, ss. 5 and 6) seven judges of the Supreme Court of Canada held that Marc Nadon, a semiretired Judge of the Federal Court, was not eligible to be appointed to the Supreme Court of Canada.

This reference to the Supreme Court was an extraordinary event in Canadian judicial history and the first time an appointment to the Supreme Court was rejected.

The Supreme Court of Canada is composed of nine judges who are officially appointed by the Governor General but are, in reality, chosen by the Prime Minister. The Supreme Court was constituted in 1875 and became the "court of last resort" in 1949 when appeals from Canada to the Privy Council of England were terminated. The composition of the Court is a historical compromise that reflects the unique bi-juridical nature of Canada's judicial system. While nine provinces are "common law" provinces whose lawyers and judges are trained in the common law, Quebec's legal system is founded in civil law and has a unique set of legal traditions.

For this reason, the Supreme Court Act, as subsequently amended, provides for the appointment of Supreme Court Justices in Section 5 and Section 6 as set out as follows:

> 5. [Who may be appointed judges] Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.
>
> 6. [Three judges from Quebec] At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.

Thus there has been a "historical bargain" ensuring that at least three judges of the Supreme Court must be "from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from the advocates of that province" in order to ensure that at least three members of the Supreme Court have been trained in civil law and are imbued in that tradition.

The aforementioned issue arose when, on September 30, 2013, Canadian Prime Minister Stephen Harper announced the nomination of Marc Nadon, a supernumerary judge of the Federal Court of Appeal, to the Supreme Court of Canada. On October 3, 2013, Nadon was appointed to the Supreme Court, replacing the Honourable Mr. Justice Morris Fish, who was obliged to retire because he had reached the august age of 75, the mandatory retirement age. Nadon was sworn in on October 7, 2013, and that same day the appointment was challenged by an application before the Federal Court of Canada, the principal challengers being the Attorney General of Quebec and Rocco Galati, an Ontario lawyer. On October 22, 2013, the Governor in Council referred two questions for hearing and consideration by the Supreme Court. The two questions referred were:

> 1. Can a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Quebec be appointed to the Supreme Court of Canada as a member of the Supreme Court from Quebec pursuant to sections 5 and 6 of the *Supreme Court Act?*
>
> 2. Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled *Economic Action Plan 2013 Act, No. 2?*

The appointment of Nadon was challenged on the basis that he was not currently from "among the judges of the Superior Court or Court of Appeal of Quebec nor among advocates of the Province." Rather, Nadon, who had been a member of the Bar of Quebec from 1974 to 1993, principally specializing in maritime and transportation law, was appointed to the Federal Court in 1993 and subsequently to the Federal Court of Appeal in 2001. Consequently, Nadon was not a member of the Bar of Quebec at the time of his appointment nor was he a judge of a "Quebec Court of Appeal or Superior Court." (It is interesting to note that there are a requisite number of judges appointed to the Federal Court which also must be from the Province of Quebec and thus trained in Quebec Civil Law, of which Nadon was one).

The seven-person bench (excluding Fish who had retired and Honourable Mr. Marshall Rothstein who did not sit in order to have an odd number >>

of judges sitting) held, with The Honourable Mr. Justice Michael J. Moldaver dissenting, that Nadon, a judge of the Federal Court of Appeal, was ineligible to be appointed to the Supreme Court because he was not "among" the judges and lawyers of Quebec at the time of his appointment. The court read into Section 6 a temporal element that an appointment required a current member of the bench or bar of Quebec notwithstanding Section 5's clear language that "any person may be appointed a judge who is or has been a judge of a Superior Court of a Province or a barrister or advocate of at least 10 years standing at the bar of a province."

QUIPS & QUOTES

That is a legal issue, not a political one. It is not the function of this Court to comment on the merits of an appointment or the selection process that led to it. Those are political matters that belong to the executive branch of government. They form no part of our mandate.

The Honourable Mr. Justice Michael J. Moldaver

The majority took great pains to read into the language of Section 6 two conditions as part of the "historical bargain;" not only that three judges must be from Quebec but also the requirement to be a currently practicing lawyer or active judge of the Superior Court or Court of Appeal of Quebec presumably so that these three judges are not only trained in the law of Quebec but also currently up-to-date in all of the legal and social values of Quebec law in order to preserve and protect its legal traditions. The majority best sums it up at Section 18 of their judgment as follows:

> [18] "We come to this conclusion for four main reasons. First, the plain meaning of s. 6 has remained consistent since the original version of that provision was enacted in 1875, and it has always excluded former advocates. Second, this interpretation gives effect to important differences in the wording of ss. 5 and 6. Third, this interpretation of s. 6 advances its dual purpose of ensuring that the Court has civil law expertise and that Quebec's legal traditions and social values are represented on the Court and that Quebec's confidence in the Court be maintained. Finally, this interpretation is consistent with the broader scheme of the Supreme Court Act for the appointment of ad hoc judges."

In October 2013, Parliament had also enacted an amendment to the *Supreme Court Act* for purposes of clarity, providing that Section 6 also referred to former judges and lawyers of Quebec. The majority struck down this amendment, holding that it amended the Constitution and therefore required the unanimity of Parliament and the ten provinces. Therefore, question 2 also received a negative response.

The lone dissenting voice was that of Justice Moldaver who did not opine on the second question regarding the constitutional amendment in that he vigorously maintained that Section 6 read with Section 5 clearly included both current and former judges of Quebec courts as well as current and former members of the Quebec bar.

Justice Moldaver's reasoning at paragraphs [110] and [111] of the Judgment as follows:

> [110] "The issue raised in Question 1 is whether former advocates of the Quebec bar of at least 10 years standing meet the eligibility requirements in the Supreme Court Act for appointment to the Quebec seats on this Court. That is a legal issue, not a political one. It is not the function of this Court to comment on the merits of an appointment or the selection process that led to it. Those are political matters that belong to the executive branch of government. They form no part of our mandate.
>
> [111] The answer to Question 1 lies in the correct interpretation of ss. 5 and 6 of the Act. For reasons that follow, I would answer Question 1 in the affirmative. Under ss. 5 and 6 of the Act, both current and past advocates of at least 10 years standing at the Quebec bar are eligible for appointment to this Court. In view of my answer to Question 1, the legislation to which Question 2 refers is redundant. It does nothing more than restate the law as it exists.

Accordingly, I find it unnecessary to answer Question 2."

Justice Moldaver readily agreed that "the coexistence of two distinct legal systems in Canada - the civil law system in Quebec and the common law system elsewhere - is a unique and defining characteristic of our country. It is critical to both Quebec and Canada as a whole that persons with training in civil law form an integral part of this country's highest court" (paragraph 113 of the Judgment).

However, Justice Moldaver, recognizing that both current and former members of a provincial bar of at least ten years standing and judges of the courts are eligible for appointment to the court, went on to reason at paragraph 117 of the Judgment that "the same eligibility criteria in Section 5 apply to all appointees including those chosen from Quebec institutions to fill a Quebec seat. The currency requirement is not supported by the text of Section 6, its context, its legislative history or its underlying object."

Clearly, the majority's reference to the "plain language" of Section 6 is not so plain to Justice Moldaver and indeed to the various constitutional experts and former Supreme Court judges who had reportedly given opinions to the Prime Minister's office that Nadon did indeed fulfill the criteria of Section 5 and 6 of the Supreme Court Act.

While this wise and well-reasoned decision was almost unanimously applauded by jurists and politicians in Quebec and indeed interpreted as an endorsement by the Supreme Court of Quebec's unique legal traditions as well as Canada's commitment to protecting those traditions, legal experts elsewhere have criticized the decision and rallied to Justice Moldaver's compelling dissent.

Nonetheless, the Prime Minister's office has accepted this judgment and the country awaits the announcement of a new appointment. One still has to ponder what would have occurred had

Nominee Marc Nadon

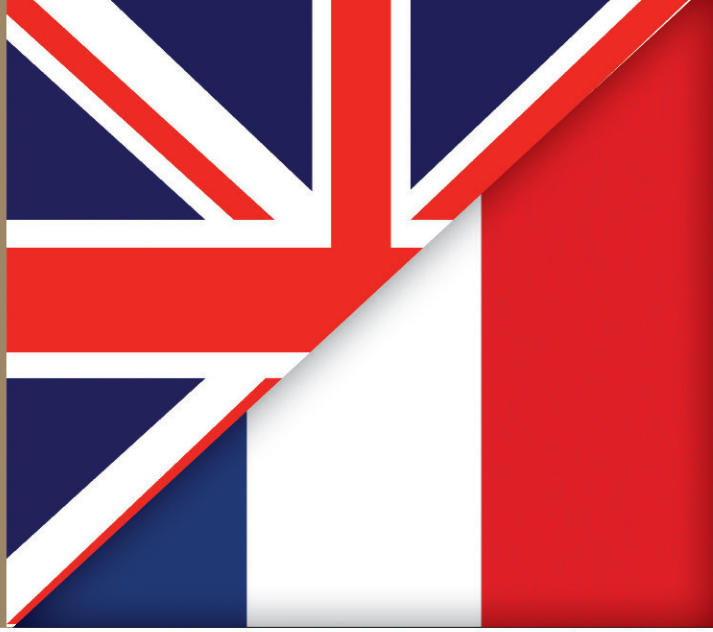
the government appointed Nadon to the Quebec Court of Appeal or Superior Court for a few days prior to announcing his appointment to the Supreme Court or had Nadon fully retired from the Federal Court and been admitted to the Bar of Quebec prior to his appointment. Would his then almost twenty years of practice as a Quebec lawyer been re-validated by a couple of days or weeks of re-admission to the Bar of Quebec or appointment to a Quebec Court? Unfortunately, this was not to be for Nadon. His appointment and the annulment thereof by the Supreme Court now goes down into the annals of Supreme Court of Canada judicial history.

Lynne Kassie, Ad. E.
Montreal, Quebec

Eds

Since this decision was rendered, controversy has arisen with Canadian Prime Minister Stephen Harper unwarrantedly attacking the Right Honourable **Beverley McLachlin**, *P.C. Chief Justice of Canada, prompting President* **Robert L. Byman** *and the College to write in support of the Chief Justice and the independence of the judiciary. President Byman's letter and the accompanying press release may be found on the College's website, www.actl.com*

LONDON & PARIS
2014 ANNUAL MEETING



President Bob Byman looks forward to welcoming College Fellows, their spouses, and guests to Europe for the 2014 Annual Meeting in London, England and Paris, France.

LONDON

September 11-14, 2014

The College's sixth meeting in London promises many firsts for Fellows and their guests.

General Sessions on Friday and Saturday will showcase exceptional speakers who will educate and entertain. Confirmed speakers include:

Honorable Stephen Breyer
Associate Justice of the Supreme Court
of the United States

Honorable Matthew Barzun
Ambassador of the United States
to the United Kingdom

Dame Carol Black
Principal, Newnham College, Cambridge, England

Lord Peter Goldsmith, QC, PC
Former United Kingdom
Attorney General, London, England

David Green, CB, QC
Director, United Kingdom
Serious Fraud Office, London, England

David J. Feldman, QC (Hon)
Professor of English Law
University of Cambridge, Cambridge, England

Martin J. Kemp
Professor, Art Historian, Oxford, England

Lord Neuberger of Abbotsbury
President of the Supreme Court
of the United Kingdom, London, England

Ronald K. Noble
Secretary General
Interpol General Secretariat, Lyon, France

Dale Templar
Managing Director, One Tribe TV, Bath, England

Lord Harry Woolf
Former Lord Chief Justice of England and Wales
Honorary Fellow of the College, London, England

A Continuing Legal Education panel will discuss the 800th anniversary of the Magna Carta. Participants include moderator Sir **Jeffrey Jowell**, KCMG QC, Director of the Bingham Centre for the Rule of Law; Sir **Robert Worcester**, KBE, DL, Chairman of the Magna Carta 800th Anniversary Committee; Lord **Tom McNally**, Chair of Youth Justice Board; and **Robin Griffith-Jones**, Master of the Temple.

PARIS

September 14-17, 2014

Tuesday's General Session will showcase notable speakers who will enlighten and energize.

Helena Kennedy QC, FRSA
Baroness Kennedy of The Shaws, Barrister

Jack Kagan
Holocaust survivor who escaped from a Nazi camp and fought with the Bielski partisans in World War II

Lord George Robertson
Former Secretary General of the North Atlantic Treaty Organization (NATO)

A Continuing Legal Education Panel will discuss the differences between U.S. and French criminal procedure using the Dominique Strauss-Kahn case as the focus. Participants will include Fellow **Frederick T. Davis**; Former Regent **John S. Siffert**, and **Daniel Soulez-Larivere**.

BARRISTERS VERSUS FELLOWS

MOCK TRIAL SLATED FOR COLLEGE'S MEETING IN LONDON

For those attending the College's 2014 Annual Meeting in London, an exciting mock trial and panel discussion will offer a unique opportunity to explore the differences in law and trial skills between the College's barrister friends in London and trial lawyers in the United States. The program will take place on Thursday, September 11, 2014 from 1:00 p.m. to 4:30 p.m.

A team of London barristers led by the distinguished Queen's Counsel Gavin Kealey will represent the plaintiff, Lynn Rogers, while Fellows **Paul D. Bekman**, **Christy D. Jones** and **Kathleen Flynn Peterson** will represent the defendant, Metal Fabricators, Inc. (MFI). The case will be judged by Honorary Fellow Judge **Marc T. Treadwell**, United States District Court for the Middle District of Georgia. A jury will render verdicts. Canada will be represented by Past President **David W. Scott**, O.C., Q.C., who will serve on the panel following the mock trial.

THE CASE

Rogers will claim that she was wrongfully discharged from employment for refusing the sexual advances of her boss, Alex Goodings. The defense will argue Rogers was terminated because of incompetency in the performance of her job. But what about the love letters left in her desk drawer? Does it matter that Goodings is now happily married, after having been engaged previously to the plaintiff?

The program will be fast-paced, and is designed to illustrate trial skills and techniques in the courtroom. Attendees will have ample opportunity to observe opening statements, examination of witnesses, and closing arguments. Do London barristers subscribe to the doctrine of primacy? The various styles and how the UK judge responds to objections will be interesting topics for review. For example, how will the Judge rule to an objection that the cross examination is beyond the scope of the direct?

The panel discussion will focus on differences between law and trial practice in the United States and the United Kingdom. Topics will include:

- Role and relationship of solicitors and barristers
- Salient differences between the English Civil Procedure Rules (CPR) and the Federal Rules of Civil Procedure (FRCP)
- Differences between pretrial discovery in the USA and the UK
- The role of experts, pretrial, and at trial
- Differences in working with witnesses to prepare for trial
- Legal fees of barristers: Why no contingency fees? Are there alternatives to contingency fees in UK?
- Does the "loser pays" rule have a chilling effect on access to the courts?
- The role of jury trials
- Differences in trial procedure: the scope of cross examination, examination of experts

The mock trial and panel will also discuss how, if at all, style and delivery differ in the various phases of trial, as well as the role played by visuals and electronic evidence, and how they are displayed. This program will be exciting, dynamic, and surely entertaining. Most importantly, it will be an opportunity for Fellows to sharpen their trial skills.

The program is being organized by the Teaching of Trial and Appellate Advocacy Committee Chair **John C. Aisenbrey**; Ex Officio **Sylvia H. Walbolt**; Vice Chair **Paul Mark Sandler**, and members **Barry Coburn** and **Paul G. Nittoly**.

CLIENT LOYALTY, CLIENT CONFLICTS

Conflict of interest is a subject that affects the everyday lives of every lawyer in America. At the College's 2013 Annual Meeting in San Francisco, **Lawrence C. Marshall** challenged Fellows to consider how they would approach notions of loyalty when faced with concurrent clients.

A former clerk for United States Supreme Court Justice **John Paul Stevens**, Marshall is a professor at Stanford Law School where he teaches appellate practice, professional responsibility, and criminal law.

Marshall presented two different examples of what the practice of law can look like and whether the same rules, applied exactly the same way, make sense in both scenarios.

THE SMALL FIRM

The first example Marshall asked the audience to picture was of a firm in a midsize town with twelve lawyers working in a single office. Alan and Susan Smith own a chain of grocery stores, and the firm represents the couple on tax issues and estate planning. The firm also represents the privately-held company that the Smiths own, the grocery stores. The Smiths use no other lawyers.

A litigator at the same firm receives a call from a prospective client asking for help in bringing suit against the Smiths' grocery store. The caller's store is located very close to one of the Smiths' stores. The Smiths are going to expand, but don't plan to put in more parking. The caller asks for assistance in deciphering the zoning laws and seeks to enjoin the Smiths from expanding their business without adding parking lots.

"Because it's a small firm of twelve lawyers, even though this litigator hasn't done work for the Smiths personally, he's heard about them for years," Marshall explained. "So he approaches the managing partner, and the managing partner calls the Smiths and says, 'We've been asked to take this case, is that okay with you? Will you waive the rule that says that we can't otherwise be adverse to a current client even if the matter is completely unrelated as this one is?'"

The Smiths' response is emotional. They feel betrayed, as they trusted the firm with everything and

believed they were a friend and advocate. The couple never imagined the firm would ever be adverse to them.

THE LARGE FIRM

Marshall's second model was of a firm with 424 lawyers, operating nine offices in six different states and three different countries. For the past two years, one of the lawyers at the firm's Hong Kong office has been giving tax advice to Northern Industries, a Fortune 500 company that trades on the New York Stock Exchange. The tax advice has been on a discrete issue around a particular investment in China. Northern Industries uses hundreds of different law firms for different kinds of subjects. The lawyer's point of contact with Northern is through someone in the general counsel's office, which has more than 100 lawyers.

An intellectual property lawyer from the firm's New York office receives a call from a prospective client, asking for representation on a patent infringement case that Northern Industries has brought against them. The IP lawyer has heard of Northern Industries, but was not aware that Northern Industries was a very minor client until a conflict check is run.

The conflict check shows the firm represents Northern from its Hong Kong office. The IP lawyer sees the lawyer's name in Hong Kong who is doing the work, but does not recognize the name, has never met the lawyer, and knows nothing about the tax issue.

The lawyer approaches the managing partner, who then requests the Hong Kong lawyer to call his contact at Northern and ask if the company would be willing to consent to the concurrent client conflict. Northern's general counsel's office says it needs time to respond, and after a few days calls the firm back and expresses its unwillingness to waive the conflict.

ARE THE RULES THE SAME?

"Two stories, same end. Do they feel the same to you?" Marshall asked. "Does the relationship of the Smiths to their firm, born of loyalty and closeness and the degree of trust for all purposes, does the fact that we're willing to respect that, does the fact that we wrote conflict of interest principles with that model tell you that we ought to be honoring Northern Industries' use of the rule of ethics to disqualify this law firm?"

For Marshall, the relationship between Northern Industries and its firm is a business relationship. Northern employs many lawyers throughout the world. "It is a 300-lawyer relation. It is an a la carte approach to legal representation."

> We're beginning to develop a common law, even if it's not the formal regulatory scheme that recognized this idea of two separate bars.
>
> *Lawrence C. Marshall*

When a company employs 300 law firms, those are 300 firms that are now precluded from being adverse to the company on any matter except in Texas. Texas is the lone state that does not have a rule against concurrent conflicts, although Marshall noted that the federal courts in Texas have not been so sympathetic to that exception from the rest of the norm across the country. How is it beneficial if those >>

QUIPS & QUOTES

hundreds of law firms are now off limits to be adverse to Northern unless the company is willing to waive the conflict?

I want to suggest that in some ways we have moved away from common sense in some of these areas, and our mission is to make common sense the law.

Lawrence C. Marshall

THREE SUGGESTED MODELS

Marshall suggested three different models of approach to his illustrations. The first model is "to regulate with the most vulnerable client in mind." In the Smith's scenario, "we are going to create rules that require waiver, informed consent in that situation, because the Smiths need it and, therefore, if there are other clients who maybe don't need it and end up being collateral beneficiaries of the entitlement and the power, so be it."

A second approach is "to set certain default rules." A certain rule is set around waiver, but it will allow sophisticated clients to contract around it.

However, Marshall pointed out two problems that may arise in that scenario. The first is the advanced waiver question, where an assignment is taken only if "that means I can never be adverse to you in ways that I can't even imagine. And by never, I mean as long as our current representation continues." The second is when work is performed for a client intermittently and formal severance has never taken place, but the client assumes a relationship is active even if no billing has occurred.

"The law treats that as a current client of yours and forecloses taking on a matter that is in conflict. The remedy to that is clearly what no lawyer wants to do, which is to send a termination letter, saying 'we are glad to have served you, at this point the matter is closed and you are not a current client. We very much hope you come back to us in the future.'"

The third model is an approach that recognizes two legal professions. "We have the folks who are representing the Northern Industries and we have the folks who are representing the Smiths, and the nature of the law firm and the nature of the client both can be very different."

Today the justice system is between model one and model two and Marshall said, "we are mightily resistant to model three."

According to Marshall, the current system is not entirely the second model because of advance waivers. Sophisticated clients can approach their law firms with a retention agreement where there is a waiver of concurrent client conflicts that do not deal with confidences and or with substantially related matters. The problem occurs when a client, like a Northern Industries "comes in to court and says, 'this waiver is invalid, this waiver is unenforceable, this waiver was not the product of informed consent.' Why? 'Because how can we consent in an informed manner if we didn't know what case may come down the road?'"

The concern for an unsophisticated client is the inability to get independent counsel, whereas a sophisticated client such as Northern Industries has an entire office to provide legal advice. A professional relationship and fiduciary duty is present, but when "dealing with sophisticated lawyers, is there really a concern?"

In 2011, a group of thirty-three in-house general counsels to law firms brought to the American Bar Association's Commission on Ethics 20/20 a formal proposal for a bifurcated system on some of these client issues. It included defining a sophisticated client similar to how the SEC defines sophisticated clients for the purposes of disclosure, and recognizing the extent to which they are different.

Bar authorities and regulators have shown resistance to these kinds of changes with good reason. "One wants these changes to be incremental. We want them to be thoughtful and deliberative."

The legal market continues to evolve and Marshall called on the College to recognize the realities of it. "We recognize that within a system we can be equitable and sensible, and that treating like things alike, and different things differently, is the essence."

David N. Kitner
Dallas, Texas

IN MEMORIAM

✦ Since the last issue of the *Journal* went to press, we have become aware of the passing of twenty-nine more Fellows of the College. ✦ Seventeen of them, four as teenagers, saw military service in World War II; two of them returned to service in the Korean Conflict. ✦ Seven others also saw Cold War service during the Korean Conflict. ✦ One was decorated for his role in the sinking of two German U-Boats. ✦ One was the top aide to the chief of security for the Manhattan Project, which produced the first atomic bomb. ✦ One was a helicopter pilot in Korea. ✦ One was the skipper of a landing craft that went ashore on Omaha Beach on June 6, 1944, D-Day. ✦ They came from varying backgrounds. ✦ Some came from humble beginnings, the sons of immigrant parents or the first in their families to attend college. ✦ More than a few had worked their way through college and law school. ✦ The lives they lived after returning to a peacetime world were profoundly influenced by their wartime experiences. ✦ All of them achieved the stature as trial lawyers that led to their invitation to become Fellows of the College. ✦ Four went on to serve the College as chairs of state or national committees; three were former Regents. ✦ National law firms of another era bore the names of several; the names of others are attached to landmark cases. ✦ One, a college drama student, was known for employing his theatrical talents in the courtroom. ✦ Another, whose criminal defense practice had ranged from defense of the wealthy local elite to a member of Hell's Angels accused of murder and a teacher forced from her job when she became pregnant, enthusiastically took on, in one of his last notable cases, the defense of a grown woman ticketed for rollerblading on a public street. ✦ The public service that accompanied their careers as trial lawyers spoke volumes. ✦ Two became justices of their states' highest court; another once served as an acting justice. ✦ Many led local and state legal organizations and several led national ones. ✦ Several had been law professors, others adjunct professors. ✦ One, a national leader in the profession's post-war sea change, including the genesis of bar-sponsored legal aid offices, client security funds, and enhanced continuing legal education programs, helped to rewrite his emerging state's constitution and served for twenty-five years in the American Bar Association House of Delegates. ✦ Another, a high-profile forty-one year criminal defense lawyer, changed careers at age sixty-four to take charge of his district's Federal Public Defender Of-

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fice. ✦ Another, a lawmaker in a state in the Deep South, was a leader in racial reconciliation in the Civil Rights era, enduring attacks from fellow representatives on the floor of his state legislature for resisting the extremes of the White Citizens' Council. ✦ Another was best known for successfully fending off a proposal to build a four-lane highway through a scenic mountain pass. ✦ Many were college and university trustees. ✦ Many became leaders in the civic and cultural lives of their communities—from campaigns to support the arts and chairing their local school boards to supporting the creation of public housing. ✦ One devoted his time to aiding in the recovery of victims of addiction. ✦ The list of local, state, and national awards they earned for the lives of service they lived, both within and outside the law, is virtually endless. ✦ One had the local Inn of Court named for him. ✦ The lawyers' gathering place in another's county courthouse bears his name. ✦ Several were honored with scholarship funds or awards that bear their names. ✦ Their published obituaries disclose wide-ranging interests, from collecting antiques to flying, motorcycling and farming. ✦ One traveled around the world, collecting native costumes which he then wore at the theme parties he threw upon his return. ✦ Another played bridge weekly until his death at age ninety-two. ✦ One was an author, one of whose books described the trials and tribulations of his favorite pastime, foxhunting. ✦ Another, an athlete, after being diagnosed with cancer, competed in a duathlon at age seventy-four, two years before his death. ✦ Another retired after his diagnosis with the cancer that ultimately took his life, became a world traveler, earned certification as a divemaster and, before his death, introduced his grandchildren to scuba diving. ✦ Their varied interests, both in and out of the profession served them well. ✦ Thirteen lived into their nineties, the oldest to ninety-nine; only two died in their seventies. ✦ Nineteen had been Fellows of the College for over thirty-five years, another six for over thirty. ✦ Several regularly went to their office into their nineties. ✦ Seventeen of those whose obituaries disclosed the information survived, or were survived by, wives to whom they had been married for over fifty years, nine of them for sixty or more.

Collectively, their histories are persuasive evidence of the impact of continued professional, personal, intellectual, and physical engagement on the length and lasting value of one's life.

E. OSBORNE AYSCUE, JR.
EDITOR EMERITUS

Dimitri Dennis Allegretti, '72, a Fellow Emeritus, Of Counsel to Duane Morris LLP, Boston, Massachusetts, died February 26, 2014 at age 85. A patent lawyer, the only son of immigrant parents, he earned undergraduate degrees in both chemical engineering and general engineering in four years at the Massachusetts Institute of Technology. He worked his way through the Georgetown School of Law as an examiner in the United States Patent Office, then served for two years during the Korean Conflict in the Office of the Chief of Ordinance of the United States Army. A native of Chicago, he first practiced law there in a firm that became Allegretti & Witcoff. Merging with a Washington firm which then became Banner & Allegretti, he later helped to open that firm's Boston office. At the time of his death, he was Of Counsel to Duane Morris. One of the College's early patent lawyers, he was involved in a number of landmark cases and was an author and a frequent speaker on intellectual property law and patent litigation. His obituary noted that he was an avid reader of "whodunits," a collector of antiques and a master of *The New York Times* crossword. His survivors include his wife and two sons.

William Joel Blass, '65, a Fellow Emeritus from Pass Christian, Mississippi, a former Justice of the Mississippi Supreme Court, died October 23, 2013, four days after turning 95. His great-grandfather was a Confederate soldier, both of his parents were teachers and his father was also a Baptist minister. He began his college education in the depths of the Great Depression at two successive junior colleges, completing his undergraduate degree at Louisiana State University, then working his way through Louisiana State University School of Law, where he served on the editorial board of the law review. Upon graduating from law school, he was for one year a Special Agent for the Louisiana State Police, assigned to the Louisiana Crime Commission. Commissioned through his university's ROTC program on the eve of World War II, he served for five years as an officer in the United States Third Army in the European Theater, earning a Bronze Star. He later returned to military service during the Korean Conflict. Entering private practice in Wiggins, Mississippi, early in his career he had prosecuted and won a high-profile voter fraud case. During the turbulent 1950s, he served for several years in the Mississippi House of Representatives. Widely known as a leader in racial reconciliation, he opposed the "red meat" legislative proposals of the White Citizens' Council, enduring vigorous, hostile attacks from private citizens and, on the floor of the legislature, from fellow representatives. After practicing for nineteen years in Wiggins, he was for six years a Professor of Law and Director of Research and Associate Dean at the Lamar Law Center of the University of Mississippi, where he taught its first African-American students, one of whom later became a justice of the Mississippi Supreme Court. He was awarded the school's Teaching Excellence Award. He then returned to private practice in Gulfport. Eighteen years later, he received a gubernatorial appointment as Associate Justice of the Mississippi Supreme Court, serving for two years before being defeated in the following election. After again teaching at the law school for a year, he returned to private practice in Gulfport and practiced there until his retirement. A Commissioner of the National Conference of Commissioners on Uniform State Laws, he received the Mississippi Bar Foundation's Professionalism Award and the Mississippi Bar Lifetime Achievement Award. He is one of three jurists for whom the Mississippi Gulf Coast Chapter of the American Inns of Court is named. He was the first President of Diocesan Council of the Natchez-Jackson Diocese of the Roman Catholic Church and was named a Knight of St. Gregory, Equestrian Order. A widower, his survivors include two daughters.

James Patrick (Pat) Brody, '68, a Fellow Emeritus, retired from Foley & Lardner LLP, Milwaukee, Wisconsin, died January 14, 2014 at age 93. Beginning his college education at La Crosse State College, he earned his undergraduate degree from the University of Wisconsin, Madison. After a year in law school, he served for four years during World War II as an officer in the United States Navy, seeing action in the Pacific Theater. He earned his law degree from the University of Wisconsin Law School, where he was an Assistant Editor of the law review and a member of the Order of the Coif and then spent his entire career until his retirement in the firm that became Foley & Lardner. A past Chairman of the Media Law Committee of the Wisconsin State Bar and for years a member of the Wisconsin Freedom of Information Council, he was honored by the National Society of Professional Journalists with its First Amendment Award. >>

He served as President of the Bar Association of the Seventh Federal Circuit, and his law school's alumni association honored him with its Distinguished Service Award. He served the College as its Wisconsin State Chair. A past Chairman of the Xaverian Missionary Fathers, he also chaired the Board of Trustees of Cardinal Strich University, which awarded him an honorary degree. His obituary noted that his spirit was reflected in his limericks and poems, which he shared with family and friends. A widower, his survivors include two daughters and two sons.

Edward D. Brown, Jr., '79, a Fellow Emeritus from Manlius, New York, died March 6, 2014 at age 85. A graduate of Niagara University and of the Syracuse University College of Law, his law school education was interrupted by two years of service as an officer in the United States Army during the Korean Conflict, in which he earned a Bronze Star. He practiced with the Syracuse firm Melvin & Melvin, PLLC and then with the Law Department of Niagara Mohawk Power Company, from which he retired. He was a member of the national panel of the American Arbitration Association. A widower who remarried, his survivors include his wife, five daughters and two sons.

Rodney Sawyer (Bud) Bryson, '79, a Fellow Emeritus, retired from Ware Bryson West & Kummer, Covington, Kentucky and living in Villa Hills, Kentucky, died August 21, 2013, four days short of his ninety-first birthday. His undergraduate education was interrupted by his four years' service in the United States Army Air Corps during World War II. After returning to graduate from the University of Cincinnati and the University of Cincinnati School of Law, where he was a member of the Order of the Coif, he practiced in the Solicitor's office in Covington, Kentucky before joining the law firm in which he practiced for the rest of his career. A Past President of his county Bar, he was honored with a Lifetime Achievement Award by the Northern Kentucky Bar Association. His survivors include a daughter, three stepdaughters and two stepsons.

Walter Ryland Byars, '82, Montgomery, Alabama, died January 21, 2014 at age 85. He was a graduate of the University of Alabama and of the University of Alabama School of Law. After serving as an officer in the United States Navy during the Korean Conflict, he began his practice in Troy, Alabama. He then joined the Legal Department of Southern Bell Telephone and Telegraph Company, working first in Atlanta, Georgia and then in Birmingham, where he was his employer's General Attorney for Alabama. After eleven years in the corporate legal world, he joined the Montgomery firm that would later become Steiner, Crum & Byars, P.C. For twelve years he also served the City of Montgomery, first as City Attorney and then as Chief Legal Advisor, playing a significant role in the city's real estate development. He was the first Chair of the Board of AlaTrust, Inc., a local credit union. President of two county Bars and then of the Alabama State Bar, during his tenure as President of the Montgomery County Bar Association, it received the American Bar Association's Award of Merit for overall excellence. He also served as President of the International Society of Barristers. Involved in his college fraternity, Sigma Chi, from his undergraduate years on, he was instrumental as an undergraduate in paying off its debt and later, as an alumnus, in the building of two new chapter houses. He was honored by the national fraternity as a Significant Sig and by his own chapter, which selected him the first recipient of its Lifetime Service Award. His survivors include his wife of sixty-three years, two daughters and two sons.

The Honorable Tom Chambers, '99, a Judicial Fellow from Olympia, Washington, retired from the Washington Supreme Court, died December 11, 2013 at age 70, of cancer. Beginning his undergraduate education at a community college, he earned his degree from Washington State University and his law degree from the University of Washington School of Law. Primarily a plaintiff's personal injury attorney with his own law firm, he was a founding member of both the Damage Attorney's Round Table and the Trial Lawyers for Public Justice and had authored a two-volume work on the trial of cases. He served as President of both the Washington State Bar Association and the Washington State Trial Lawyers Association (now the Washington State Association for Justice), the latter of which renamed its Trial Lawyer of the Year Award for him. He was honored by his law school with its Henry M. Jackson Distinguished Public Service Award and by the Seattle Housing Authority and Neighborhood House with its Good Neighbor Award for his twenty years of

commitment to residents of Seattle Public Housing. He and his wife created a trust to provide basic medical supplies to low-income Seattle families. Both the American Board of Trial Advocates and the Washington State Bar honored him with lifetime achievement awards. The son of a gas station owner who never forgot his roots, throughout his life he loved cars and his Harley Davidson motorcycle. An accomplished pilot, he chaired the Washington chapter of the Lawyer Pilots Bar Association. Treating his medical condition as he would a courtroom adversary, he continued to travel around the world, exploring oceans, as a scuba diver achieving the rank of Divemaster and leading his oldest grandchildren in their first foray beneath the sea. His survivors include his wife of forty-six years, two daughters and a son.

Charles Fenton Clarke, '70, retired from Squire, Sanders & Dempsey, Cleveland, Ohio, died January 17, 2014 at age 97. A *summa cum laude* graduate of Washington & Lee University, a member of Phi Beta Kappa, he earned his law degree from the University of Michigan Law School on the eve of World War II. As a counterintelligence officer in the United States Army, he served as the top aide to the chief of security for the Manhattan Project, the secret program that built the first atomic bomb. Returning to civilian life six years after he finished law school, he posted the second highest score on the Ohio Bar Examination and joined the firm in which his former superior at Los Alamos was a partner. He spent his entire career in that firm, for years leading its litigation department. He served as President of the National Association of Railroad Trial Counsel. The news article that accompanied his death described him as "an old-school lawyer who pursued noble causes while defending the rich, the powerless and the notorious." It noted that he unsuccessfully represented the local school board in resisting a desegregation lawsuit involving busing, then turned around and defended one of the lawsuit's proponents in an extortion case. His clients ranged from major corporations to a member of Hells Angels accused of murder to a teacher forced from her job when she became pregnant. In one of his last cases, he defended a woman ticketed for roller blading on a public street. Among his many contributions to his community, he served as President of the local Hearing and Speech Center, as a Trustee of the local Legal Aid Society and for twenty years as the leader of the Free Medical Clinic of Greater Cleveland. Ten years after his first wife died, he married United States District Judge Lesley Brooks Wells, who survives, along with his three daughters, a son, three step-daughters and one step-son.

William R. Cogar, '75, a Fellow Emeritus, retired from Mays & Valentine, LLP, Richmond, Virginia, died February 4, 2014 at age 84, of kidney and congestive heart failure. From a rural West Virginia childhood, he attended Washington and Lee University, where he was a member of Omicron Delta Kappa and Phi Beta Kappa. He served as an officer in the United States Marine Corps during the Korean Conflict before returning to the Washington and Lee School of Law where, as a member of the law review, he was inducted into the Order of the Coif. Early in his career, he appeared in many cases representing Virginia towns and cities seeking to annex adjoining suburbs as the state grew. Later, he represented A. H. Robins Company, the pharmaceutical firm and manufacturer of the Dalkon Shield, in coordinating the defense of over 300,000 lawsuits brought against his bankrupt client. He was the last surviving member of the original board of the Medical College of Virginia. Known for his sense of humor, a newspaper article at the time of his death recounted a trial in which he defended the manufacturer of a beauty product that the plaintiff claimed had caused her to lose her hair. In his opening statement, Cogar walked up to the jury box, leaned forward to give the jurors a close look at his bald scalp and said, "Gentlemen, I am not the plaintiff in this case." He is reported to have won the case. He retired to spend more time traveling with his wife and collecting oriental rugs and porcelains. His wife of sixty-two years preceded him in death by eight months. His survivors include a daughter and two sons.

Arthur Guild Connolly, Jr., '99, Connolly Gallagher LLP, Wilmington, Delaware, died March 25, 2014 at age 76 of a rare and aggressive form of lymphoma. He was a graduate of Georgetown University, where he was a pitcher on the school's baseball team, and of the Georgetown University Law Center. He began practice in a Wilmington firm founded by his father, practiced there for fifty years, then became Emeritus Counsel to a firm founded by his son. A Past President of the Dela-

ware State Bar Association and a past chair of the Delaware Board of Bar Examiners, he served on committees of the Delaware Supreme Court and the United States Court of Appeals for the Third Circuit and was also an Adjunct Professor of Trial Practice at the Widener University School of Law. He had been Chair of the State Public Integrity Commission, was a founding member of the Board and a past Chair of Cancer Care Connection, and had been a Director and, for sixteen years until his death, President of the Laffey-McHugh Foundation, a charitable organization directed to assisting economically disadvantaged and segregated citizens. Honored with the Delaware Service Award of United States District Court for the District of Delaware and the Delaware Bar Association's Distinguished Pro Bono Award, he and his wife had been jointly honored with the J. Thompson Brown Award of Children and Families First of Delaware for their longstanding dedication to helping Delaware children. A competitive runner and biker who completed hundreds of races up to 2013 in spite of three separate battles with cancer, two of which he survived, Connolly continued to compete, completing a duathlon two years before his death. His survivors include his wife of fifty-four years, a daughter and two sons.

William Beale Dean, '64, Brown, Dean, Wiseman, Proctor, Hart & Howell, LLP, Fort Worth, Texas, died September 29, 2013 at age 91. At age sixteen, he enrolled at the University of Texas, leaving to join the United States Army Air Corps in World War II, where he served in England, France and Germany. Returning to law school at the University of Texas, he finished first in his class and began his career as an Assistant District Attorney in Dallas before moving to Fort Worth to enter private practice. Later, he was appointed Special Assistant Attorney General of Texas to prosecute an antitrust suit against a major oil company. He served as President of his county Bar and had received its Blackstone award for exemplifying the highest attributes of the legal profession. A founding member of his local American Inns of Court and a Regent of the American College of District Attorneys for eighteen years, he had chaired two of the College's national committees, including the committee that is the College's liaison to the National College of District Attorneys. His law partners described Beale Dean as a playful prankster who had a nickname for everyone in the firm. His survivors include his wife of sixty-five years, a daughter and a son.

Thomas Henry DeChant, '84, a Fellow Emeritus from Rocky River, Ohio, retired from Stewart & DeChant Co, LPA, Cleveland Ohio, died December 8, 2013 at age 81. Working his way through high school, college and law school doing construction jobs, he was a graduate of the University of Detroit Mercy and of Case Western Reserve University School of Law. A Life Fellow of the Sixth Circuit Judicial Conference and a Master Bencher of his American Inns of Court, his practice was principally devoted to representing personal injury plaintiffs. An avid golfer, he had a hole in one to his credit. In retirement he spent a part of each year in Venice, Florida. His survivors include his wife of fifty-six years, two daughters and two sons.

Frederick N. Egler, '76, a Fellow Emeritus, retired in 2001 from Egler, Garrett & Egler, Pittsburgh, Pennsylvania, died February 28, 2004 at age 91 as the result of injuries that followed a broken leg. The son of a police officer, the first in his family to attend college, he was a graduate with honors of Duquesne University. He served as an officer in an artillery brigade in the United States Army in World War II, then worked his way through the University of Pittsburgh School of Law doing odd jobs. He helped to create and then served as President of the Academy of Trial Lawyers of Allegheny County, created to bridge the divisions between plaintiffs' and defense attorneys. He had been an Adjunct Professor at the Duquesne School of Law for many years. A scholarly lawyer who wore bow ties and had a full head of white hair, he disdained the use of notes in the courtroom so as to maintain constant eye contact with jurors. He and his wife helped to create a Catholic high school for girls after other schools in the diocese ran into financial difficulties. He was a local recipient of his church's St. Thomas More Award. He and his wife bought a 250-acre working farm, a part of whose farmhouse dated to before the Civil War, on which he planted hundreds of trees and a vast array of shrubs, bushes and flowers and raised horses and other animals. His survivors include his wife of sixty years, six daughters and five sons, six of whom became lawyers.

Robert Marvin Ervin, '73, retired Of Counsel to Ervin, Kitchen & Ervin, Tallahassee, Florida, a

former Florida State Committee Chair and Regent of the College, died February 5, 2014 at age 97 after a brief illness. The fifth of seven children of a farmer, country store proprietor and high school principal, he earned his undergraduate degree from the University of Florida. His law school education at the University of Florida Levin College of Law was interrupted by service as an officer in the United States Marine Corps in the Pacific Theater in World War II. Remaining in the Marine Corps Reserve after the war, he rose to the rank of Colonel. His office was closed each year on Veterans' Day. After finishing law school, he established his own firm in Tallahassee, where he practiced until his retirement at age ninety. For twenty years he served as a part-time Referee in Bankruptcy in the local federal court. One of the generation that came home from the war intent on making theirs a better world, he came along when the organized bar was beginning to undergo sea changes, and he became a lifelong leader in helping to bring about these changes. An early advocate of legal services for the poor, he was instrumental in establishing the Tallahassee Bar Association's Legal Aid Committee during his term as President of that Bar in the early 1950s. Years later, he led the effort to create a local Bar headquarters building. During his presidency of the Florida Bar in the middle 1960s, its continuing legal education program was greatly expanded, the Bar took over the disciplining of unauthorized practice and it created a statewide Client Security Fund to protect clients against lawyer malfeasance. He represented the Florida Bar in the drafting of a new state constitution. He was the first Fellow of the Florida Bar Foundation. He had been President of the Florida Supreme Court Historical Society, chaired the American Bar Association's Criminal Justice Section and served for twenty-five years in that organization's House of Delegates. In 2003, the Florida Bar Foundation honored him with its Medal of Honor. The Lawyers' Common in his local courthouse bears his name. His wife of sixty-five years preceded him in death, as did his brother Richard, former Florida Attorney General and Supreme Court Justice. His survivors include a daughter and a son.

David Lynn Freeman, '65, a Fellow Emeritus from Greenville, South Carolina, died January 24, 2014 at age 89. After graduating from the University of South Carolina, he served as an officer in the United States Navy in the Pacific Theater in World War II. After graduating from Harvard Law School, he began practice in Anderson, South Carolina, serving a term in the South Carolina House of Representatives before moving to Greenville, where he practiced for the rest of his career. He had a national reputation as a First Amendment lawyer. After retiring from a forty-seven year career at Wyche, Burgess, Freeman and Parham, P.A., in 2011, he and a friend established their own firm, Freeman & Moore, P.C. He had been President of the South Carolina Bar Association, President of the Greenville Symphony Association and a founder of the Peace Center for the Performing Arts. His survivors include his wife of nearly sixty years, two daughters and two sons.

Jerry Paul Jones, '93, a Fellow Emeritus, retired from Thompson & Knight P.C., Dallas, Texas, died March 4, 2014 at age 82. A graduate of West Texas State College, (now Texas A&M University), he served four years in the latter stages of the Korean Conflict as an intelligence officer on the heavy cruiser USS *Rochester* (CA-124). After graduating from the University of Texas School of Law, he joined the firm in which he practiced until his retirement in 1998. A Master Bencher in his local Inns of Court, he was a co-founder of Lawyers Concerned for Lawyers and the first President of statewide Texas Lawyers Concerned for Lawyers. Called an "Unsung Hero" in an article written by a Texas judge, he was widely sought as a speaker for groups involved in helping persons struggling with addiction to cope with their diseases. His survivors include his wife of almost sixty years, a daughter and a son.

Charles Watson Kenady, '79, a Fellow Emeritus, retired from Cooper, White & Cooper LLP, San Francisco, California, died September 20, 2013 at age 92 after a brief illness. After graduating from Yale University, he enlisted in the United States Navy. After World War II, he returned and earned his law degree from Yale Law School, then joined the law firm with which he practiced until his retirement. He was playing bridge weekly until his death. After the death of his first wife, he remarried. His second wife also preceded him in death. His survivors include two daughters.

Andrew Booth Kirkpatrick, Jr., '79, Of Counsel to Morris, Nichols, Arsht &Tunnell LLP, Wilm-

ington, Delaware, died January 18, 2014 at age 85. A graduate *cum laude* of Davidson College, he served as an officer in the United States Army's 31st Infantry Regiment during the Korean Conflict, earning a Combat Infantryman's Badge and the Army Commendation Medal. He then earned his law degree *magna cum laude* from Harvard Law School, where he was a member of the *Harvard Law Review* and the Lincoln's Inn Society. After clerking for the Chief Judge of the United States Court of Appeal for the Third Circuit, he joined the law firm in which he practiced for his entire career until his retirement. He served as President of the Delaware State Bar Association and for eight years chaired what is now the Supreme Court's Board on Professional Responsibility. He also chaired the Governor's Commission on Organized Crime. He was for twenty-one years a member of the Board of Trustees of the University of Delaware, serving for eleven years as its Chair. The university established the Andrew B. Kirkpatrick, Jr. Chair in Writing to promote good writing in every discipline across the campus and later awarded him an honorary degree. Upon his retirement as a Trustee, he was named Honorary Counselor of the university. He served the College as Delaware State Chair. His survivors include his wife of sixty years, two daughters and a son.

Norman Sidney London, '73, St. Louis, Missouri, died March 1, 2014 at age 83 in the aftermath of a fall. A graduate of Washington University, St. Louis, Missouri, where he was a member of Omicron Delta Kappa, he earned his law degree from its School of Law, and was an Editor of the *Washington University Law Quarterly* and a member of the Order of the Coif. After a clerkship with a federal district judge, he began a forty-one year practice in criminal defense in which his clientele ranged from the wealthy St. Louis elite to high-profile organized crime figures to ordinary citizens charged with crime. Then, in a surprise move, at age sixty-four, he left private practice and accepted an appointment as the head of the Federal Public Defender Office for the Eastern District of Missouri, retiring from that position after ten years. Although he routinely opposed police officers in court, he helped to organize the St. Louis Police Officers Association, which he represented for years. Six feet five inches tall, a drama student who had once played Cyrano de Bergerac, he was known for his courtroom drama. His survivors include his wife, two daughters and a son.

Burchard Villiger Martin, '76, Martin, Gunn & Martin P.A., Westmont, New Jersey, died April 5, 2014 at age 80 after a short illness. A graduate of Villanova University and of the Villanova University School of Law, he practiced for fifty-six years in the firm he helped to found. He served the College as New Jersey State Chair. His county Bar honored him with its Honorable Peter J. Devine Award, and he received the Trial Attorneys of New Jersey Award for Distinguished Service to the Cause of Justice. He was a lifetime member of the Board of Consultors of his law school. His survivors include his wife of fifty-nine years, a daughter and three sons, two of whom practiced law with him.

Mark O'Neill, '76, a Fellow Emeritus, retired from Weston Hurd LLP, Cleveland, Ohio, died February 18, 2014 at age 88 of multiple myeloma. Halfway through his junior year in high school he had applied for the United States Navy's pilot training program, was accepted and then allowed to finish his high school education. Fearing that World War II would be over before he finished his flight training, he transferred to the United States Marine Corps and was assigned to the light cruiser USS *Providence* (CL-82), on which he saw duty in the Caribbean and Mediterranean areas. He then entered Harvard College, which had earlier accepted him with a scholarship upon his graduation from high school. He went on to earn his law degree from Harvard Law School. He practiced with the same firm for fifty-eight years, retiring in 2009. He was perhaps best known for his representation as lead attorney for the Ohio Board of Education during twenty-three years of proceedings relating to public school desegregation in Columbus, Cincinnati and Cleveland. He served as President of the Cleveland Metropolitan Bar Association, was the first President of his Inns of Court, and in 2010, received the Lewis F. Powell, Jr. Award for Professionalism and Ethics for the Sixth Circuit from the American Inns of Court. He and his wife, a ballet dancer, travelled widely in their later years. His survivors include his wife of sixty years and three sons.

William Prickett, '86, a Fellow Emeritus, retired from Prickett, Jones & Elliott, P.A., Wilmington, Delaware, a firm established by his grandfather,

died January 30, 2014 at age 88 after a long illness. His education at Princeton University was interrupted by service in the United States Navy in World War II, and his legal education at Harvard Law School was interrupted by service as an officer in the United States Marine Corps in the Korean Conflict. He served as President of the Delaware State Bar Association and was the original Chair of the Delaware Interest on Lawyer Trust Accounts (IOLTA) Committee and Chair of the Governor of Delaware's Judicial Nominating Committee. Several of his representations of the State of Delaware included acting as Special Deputy Attorney in seeking recovery of overpayments for highway work and representation of the state in school desegregation litigation stemming from *Brown v Board of Education*. He was a founding member of the Brandywine River Museum, created to house works of the Wyeth family and other artists, and the first President of the Grand Opera House, an 1873 structure that was restored and made Delaware's Center for the Performing Arts. He was the recipient of a Special Merit Citation from the American Judicature Society, and his law firm had endowed two scholarship funds at the Widener University School of Law in his honor. Fluent in French, he traveled extensively around the world, collecting native costumes, which he then wore at parties to entertain his friends. A devoted foxhunter and a prolific author, one of the eight books listed in his obituary was entitled, *Risk in the Afternoon – Some of the Pleasures and Perils of Foxchasing*. His survivors include his wife, two daughters and a son.

James Carroll Ritchie,'78, a Fellow Emeritus, retired from the Rodey Law Firm, Albuquerque, New Mexico, died February 3, 2014 at age 86, following an illness. He served two years in the United States Navy at the end of World War II before entering college. A graduate of the University of New Mexico and of the University of New Mexico School of Law, he practiced over fifty years with the same law firm. He served the College as New Mexico State Chair. A widower whose wife of over fifty years preceded him in death, his survivors include two daughters and two sons.

Dennis L. Shackleford, '76, a Fellow Emeritus, retired from Shackleford, Phillips & Ratcliff, P.A., El Dorado, Arkansas, died February 6, 2014 at age 83. The son and grandson of lawyers, he served the College both as Arkansas State Chair and as a Regent. After undergraduate school at the University of Arkansas, he was a helicopter pilot for the Air Rescue Service in the United States Air Force during the Korean Conflict. He thereafter earned his law degree from the University of Arkansas School of Law, then joined the firm in which his father and brother practiced. He served as President of his county Bar and of the Arkansas Bar Association and was a past President of the Arkansas Institute for Continuing Legal Education, a former member of the Arkansas Supreme Court Board of Law Examiners, a former President of the Arkansas Association of Defense Counsel and a former State Chair of the American Board of Trial Advocates. He had on one occasion been appointed a Special Justice of the Arkansas Supreme Court. He was honored as an Outstanding Alumnus of the University of Arkansas School of Law, received the Arkansas State Bar's Golden Gavel Award for exemplary service to the legal profession and its James H. McKenzie Professionalism Award for sustained excellence and the Arkansas Bar Foundation's C. E. Ransick Award of Excellence. His survivors include his wife of sixty-one years and three daughters.

William Simon, '66, a Fellow Emeritus from Naples, Florida, retired in the mid-1980s from what was then Howrey & Simon, Washington, District of Columbia, died December 27, 2013 at age 99 of a heart ailment. Born in Chicago of Jewish immigrants, he attended Crane Junior College in Chicago from 1930 to 1932 and then earned his law degree from Chicago-Kent College of Law in 1935. He served in the United States Navy on the aircraft carrier USS *Essex* (CV-9) in the Pacific Theater in World War II. After the war, he came to Washington, where he was successively General Counsel to the Senate Interstate and Foreign Commerce Committee on Trade Practices, General Counsel to the Petroleum Administration for Defense and General Counsel to the Senate Banking & Currency Committee in the FHA Investigation. In 1956, he and three other antitrust lawyers formed the first national antitrust firm, then called Howrey, Simon, Baker & Murchison. In the 1970s he served the College as a member of the Board of Regents. A widower whose wife of sixty-one years preceded him in death, his survivors include a daughter and a son.

George Melvin Tunison, '75, a Fellow Emeritus, retired from Purcell, Tunison & Cline, P.C., Saginaw, Michigan, died December 16, 2013 at age 94. A graduate of the University of Michigan and of the University of Michigan Law School, he served in the United States Army Intelligence Corps in World War II. He served for two years as an attorney for the Veterans Administration in its regional office in Detroit and then as Chief Assistant Prosecutor of Saginaw County before entering private practice. He served as President of his local Bar Association. An outdoorsman, he was a hiker and a fly fisherman. Preceded in death by his wife of fifty years, his survivors include a daughter.

Frederic Kendall Upton, '70, a Fellow Emeritus, retired from Upton & Hatfield, LLP, Concord, Massachusetts and living in the nearby town of Exeter, died December 2, 2013, two weeks short of his 95th birthday after a long bout with cancer. Graduating from high school at sixteen, he earned his undergraduate degree from Dartmouth College, where he was a senior fellow for academic excellence, ran track and was captain of the cross-country team. He was not quite finished with his education at Harvard Law School when World War II broke out, and he joined the United States Navy, seeing duty in the Atlantic on destroyer escorts, winning two Bronze Stars for his role in sinking two German U-boats and emerging as a Lieutenant Commander. In 1943, while he was at home on leave, the New Hampshire Supreme Court waived the bar examination and he became a member of the Bar. After the war, he joined the law firm his father had created in 1908. His father later served one year as an interim appointee to the United States Senate, and his older brother, Richard, who as Speaker of the New Hampshire House of Representatives, is given credit for creating that state's first-in-the-nation presidential primary. Frederick Upton was the first President of the newly created unified New Hampshire Bar Association and the first Chair of the New Hampshire Supreme Court's Judicial Conduct Committee. He was perhaps best known for his representation of the Society for the Protection of New Hampshire Forests in successfully opposing the construction of a four-lane federal highway through Franconia Notch. Involved in public education, he once chaired his local school board. He served the College as New Hampshire State Chair. In 2007, he was honored with the New Hampshire Bar Foundation's Frank Rowe Denison Award. Twice a widower, his survivors include two daughters, three sons and a step-daughter.

Charles S. Wilcox, '68, a Fellow Emeritus retired from Wilcox & Hoots, St. Joseph, Missouri, died August 10, 2013 at age 95. A graduate of the University of Missouri and of its School of Law, he was the first St. Joseph attorney drafted into the United States Army in World War II. Assigned to the Allied Intelligence Bureau in Australia, providing support to Pacific Island Coast watchers, he was discharged as a Major. He served on a number of local civic and charitable boards and was a Life Elder in his Presbyterian Church. His survivors include his wife of sixty-five years, two daughters and a son.

James William Wray, Jr., '76, Chavez, Obregon & Percales, LLP, Corpus Christi, Texas, died February 13, 2014, at age 91, fifteen days short of his 92nd birthday. After graduating from Baylor University in 1943, he was commissioned an officer in the United States Navy. He was in command of a craft that landed on Omaha Beach on June 6, 1944, D-Day, and he later served in the Pacific Theater. Following his graduation from Baylor Law School, he was asked to stay and teach the first-year course in torts, which he did for a time before entering private practice with the firm of Lewright, Dyer, Redford, Burnett, Wray & Woolsey, where he practiced for over thirty years. He then practiced with Chavez, Obregon until he was ninety-one. He had been President of his local Bar and received an Outstanding Fifty-Year Lawyer Award from the State Bar of Texas. He served the College as Texas State Chair. A widower, his survivors include two daughters.

UPCOMING EVENTS

Mark your calendar now to attend one of the College's upcoming gatherings. More events can be viewed on the College website, www.actl.com.

NATIONAL MEETINGS

2015 Spring Meeting
Eden Roc Resort
Miami Beach, Florida
February 26 – March 1, 2015

2015 Annual Meeting
Fairmont Chicago
Millennium Park
Chicago, Illinois
October 1 – October 4, 2015

REGIONAL MEETINGS

Northwest
Alaska, Alberta, British Columbia, Idaho, Montana, Oregon, Washington
Suncadia Resort
Cle Elum, Washington
August 6 – 9, 2014

COMMITTEE CHAIR WORKSHOPS

Western Chairs Workshop
Hyatt Regency Huntington Beach Resort and Spa
Huntington Beach, California
October 9 – 12, 2014

Eastern Chairs Workshop
The Willard InterContinental Hotel
Washington, D.C.
October 30 – November 2, 2014

JOURNAL

American College of Trial Lawyers
19900 MacArthur Boulevard, Suite 530
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"In this select circle, we find pleasure and charm in the illustrious company of our contemporaries and take the keenest delight in exalting our friendships."

Hon. Emil Gumpert
Chancellor-Founder
American College of Trial Lawyers

Statement of Purpose

The American College of Trial Lawyers, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and those whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years' experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.