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THE BULLETIN

Speaker Decries Attacks on Judicial Independence

FEDERAL JUDICIAL CENTER DIRECTOR

BARBARA J. ROTHSTEIN

"The tone of hostility toward the Third Branch in the current discourse has reached a level of hostility not often seen before in our history," noted United States Judge Barbara J. Rothstein, addressing the annual meeting of the College in Chicago.

Judge Rothstein, the first woman to win the Ames Moot Court Competition at the Harvard Law School, a highly regarded twenty-eight year trial judge and the former Chief Judge of the Western District of Washington, is currently Director of the Federal Judicial Center, the education and research arm of the Federal judicial system.

Remarking that the subject of judicial independence has been around for over 200 years, nevertheless, she observed, the tension that currently exists between the judiciary and the other branches of government has prompted "just about every judge and justice called on to speak recently," including Associate Justice Sandra Day O'Connor, to choose this subject as his or her topic.

To illustrate her concern, she called attention to:

- the virtually unprecedented derogatory remarks made recently by certain members of Congress about the Federal judiciary, collectively and individually
- proposed "jurisdiction-stripping" legislation that would take areas selected by Congress out of the federal courts' jurisdiction
- talk of the appointment of an Inspector General to monitor the affairs of the judiciary
- discussion of the use of impeachment of judges who are, in Congress' opinion, making unwise or arbitrary decisions
- proposals to take away life tenure, "one of the gems of our constitutional system."

"When the Founders created our government, they created three equal branches," she continued. "They deliberately built in–and even expected–a certain amount of hostility between the branches. Indeed, they believed the hostility and the tension would be a good thing, and it would be a healthy one, because it would insure that there were checks and balances that would keep one branch from dominating and becoming all too powerful, thereby threatening the survival of our democracy."

Noting that the executive and legislative have from time to time fought for power, she described the role of the judiciary in this struggle: "Always, in the beginning guided by the original paths carved

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HENRY G. MILLER STORY... - SEE PAGE 25

American College Hosts Eighth Anglo-American Legal Exchange

SUPREME COURT JUSTICES SANDRA DAY O'CONNOR, ANTONIN SCALIA AND STEPHEN BREYER PARTICIPATE

The 2004-05 Anglo-American Legal Exchange, sponsored by the College, took place in late September 2005. The Exchange, which hosted high court justices and legal professionals from the United States and the United Kingdom, debated topics of interest for both countries, and discussed the similarities and differences between their respective judicial systems. The sessions commenced at Harvard Law School, and the week-long event came to a close in Washington, D.C., where the delegation witnessed the opening session of the U.S. Supreme Court and the swearing in ceremony of Chief Justice John G. Roberts, Jr.

Anglo-American Exchange Delegates

According to College President **Michael A. Cooper**, "In an increasingly interconnected world, it is of great importance to understand the judicial systems of other countries, especially those that share our common law heritage. The Exchange provides a forum for our eminent judges and leaders in the legal profession to become aware of and review legal challenges confronting the courts of other nations, address critical legal issues pertinent to our global society, and discuss the perceptions abroad of the U.S. judicial system."

This year's Exchange focused on five timely legal issues:

- Trends in Legal Education - Bridging the Gap Between Academia and the Legal Profession
- Counterterrorism and the Law
- Separation of Powers and Judicial Independence
- Punitive Damages
- Alternative Dispute Resolution

The Delegations were comprised of high court justices and leading lawyers from both countries The American judicial delegation consisted of United States Supreme Court Justices **Sandra Day O'Connor**, **Antonin Scalia**

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In This Issue

*A current calendar of College events is posted on the college website at **www.actl.com**, as are a current compendium of the ongoing projects of the College's National Committees.*

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FROM THE

Editorial Board

In this issue, we feature separate articles on each presentation at the Annual Meeting in Chicago. We hope that this will enable those of you who could not attend to get the benefit of some of the meeting program. It may also encourage you to attend future meetings.

We continue the experiment we began in the last issue of profiling interesting Fellows. In this issue we profile trial lawyer, author, playwright, former Regent and actor Henry Miller of White Plains, New York.

We continue to solicit articles expressing the writer's opinion on current issues and letters to the editor. We also appreciate any suggestions you may have for making the Bulletin more relevant, informative and useful.

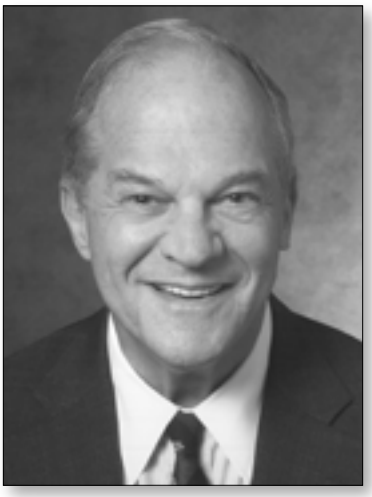
We remind you to send the obituaries of any Fellows in your locality who pass from among us to the College office.

We renew our request that you identify to us all the fellows who are veterans of World War II in your state or province. We want to feature them in a future article.

AS ALWAYS, WE APPRECIATE YOUR CONSTRUCTIVE COMMENTS AND SUGGESTIONS, EITHER BY EMAIL OR "SNAIL MAIL."

PRESIDENT'S REPORT:

Explaining the Process of Electing Nominees to Fellowship



Michael A. Cooper

Since I succeeded Jimmy Morris as President last October, I have been the guest of Fellows and their spouses and guests at seven dinners in six states, and on each occasion I have been welcomed as warmly as anyone could have wished and have been reminded of the special bond of fellowship in the College. Time and again, watching Fellows who practice on different sides of the aisle engaged in cordial conversation, I have been reminded of Shakespeare's admonition in *Taming of the Shrew*: "And do as adversaries do in law–Strive mightily, but eat and drink as friends."

It was particularly heartwarming in Louisiana and Mississippi to observe the resilience of spirit and lack of self-pity of Fellows who have lost so much and who are so grateful for the grants that have generously been made to the Bar Foundations in both states by the Foundation of the College. The Fellows in the Pacific Northwest and in New Jersey and Pennsylvania have been equally generous to me, and to Nan when she has been able to join me, as those in the Gulf Coast. If the welcome we have received is a harbinger of the remainder of my term, Nan and I will be lucky indeed, fully recompensed for the burdens of almost constant travel.

The two workshops for state, province and general committee chairs we attended in November at Reynolds Plantation, Georgia, and Dana Point, California, have also been enjoyable, but more importantly reassuring because of the commitment to the College's mission displayed by all the chairs present and their willingness to work to further that mission. I have attended countless workshops over the years as a committee chair, regent and officer, and the insightful comments and novel suggestions made by committee chairs at workshops never cease to surprise me. The questions they ask are as instructive as their suggestions, and it is to some of those questions that I would like to devote the remainder of this letter.

A number of committee chairs have raised questions concerning the procedures by which nominees are elected to fellowship. If committee chairs ask those questions, they must also be harbored by Fellows who do not hold office. I will try to shed at least some light on what is not inherently a transparent process.

The basic steps in the process of election to fellowship are well-known. A trial lawyer is nominated by a Fellow and the nomination seconded by two others, or a candidate is brought forward for consideration by the state or province committee itself. In either case, an investigation is conducted for the committee by one of its members, who obtains a case list and then calls both judges before whom the candidate has appeared and lawyers who have been the candidate's adversaries or co-counsel. If the nominee meets the College's high standards,

that is, if the nominee is a preeminent advocate in the jurisdiction in which he or she practices and has exemplified the collegiality and dedication to ethical behavior demanded by our creed, the state or province committee recommends to the Board of Regents that the candidate be elected to fellowship.

A poll is then taken of all Fellows in that state or province, and with the poll results in hand, the Regent assigned to that jurisdiction conducts an independent investigation and reports on its results to the Board of Regents at one of its semi-annual meetings. After as much discussion as any Regent considers necessary, the Board votes to approve or disapprove the candidate or to continue the candidacy for further investigation. A candidate who has been approved is asked to fill out a questionnaire, and if the answers prove satisfactory, the candidate is elected to fellowship by the Board at its next meeting.

The procedure seems straightforward. Why then is a candidate recommended by a state/province committee disapproved by the Board, as happens roughly 30% of the time? And why is the Board's negative determination not explained more clearly to the state/province chair and committee or the nominating Fellow?

A partial answer to the first question is that the poll sometimes yields surprising results. It is not uncommon, for example, for a state/province committee member who voted affirmatively in committee to express doubts or reservations in the poll response when not under the scrutiny of other committee members. Or a responding Fellow may raise a question about a candidate's ethical conduct or civility that may not have previously surfaced. Occasionally the poll results themselves are ambiguous. A "favorable" vote may mean that the voter knows nothing unfavorable about a candidate (hardly a ringing endorsement), or it may mean that the voter considers the candidate a highly qualified trial lawyer, but not among the few very best known to the voter. Those views as to a candidate's qualification for fellowship, both expressed in the same "favorable" vote, are very different. It is the Regent's responsibility to pursue these questions and ambiguities until satisfactory answers are received.

A poll response may also suggest an altogether new line of inquiry not revealed during the state/province committee's investigation, or it may lead the Regent to conclude that political considerations, such as a bias in favor of, or against, certain firms, may have influenced the poll results.

When reporting on the candidates to whom he or she has been assigned, each Regent is subjected to questioning by the Board as probing as any the Regent has faced in court.

The extent of a Regent's investigation is not known to, and therefore cannot be appreciated by, most Fellows. A Regent may have to make dozens of calls before being satisfied that he or she has all the information the Board will want before reaching a decision.

When reporting on the candidates to whom he or she has been assigned, each Regent is subjected to questioning by the Board as probing as any the Regent has faced in court. The members of the Board feel deeply a responsibility to the College, whose affairs have been placed in their trust, and they discharge that responsibility with the utmost conscientiousness when considering candidates. The discussion of a candidate may take from five minutes (in the case of a "slam dunk") to an hour. And, in the end, the Board may send the Regent back to conduct further inquiries.

When the Board has reached its decision as to a candidate, the Regent conveys that decision to the chair of the state/province committee that recommended the candidate. That decision is normally conveyed without explanation. Why isn't the com-

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out by John Marshall, stood the judicial branch with its mandate to keep both branches within the boundaries marked by the Constitution."

Recalling instances in our early history when those two branches turned on the judiciary, she noted that after the failed attempt to impeach Justice Samuel Chase, the notion that Congress could impeach a sitting judge on account of his decisions was essentially abandoned. Likewise, President Franklin Delano Roosevelt's failed attempt to pack the Court with new members served to reinforce the principle of judicial independence.

Noting how few countries have what we would describe as an independent judiciary and how many there are for whom that is "an unreachable dream," she observed, "Our country was blessed in its origins. We inherited a culture of obedience to a Rule of Law from the British, and throughout the existence of our country, men and women on the bench have, for the most part, pursued their positions of power honestly and conscientiously and courageously."

BARBARA J. ROTHSTEIN AT THE ANNUAL MEETING IN CHICAGO

"Our Constitution," she continued, "was part of what made this all possible. . . . Somehow, through the years, we have managed to keep a judiciary that has won the trust and respect of the public, and that is something that, if ever lost, [would be] very hard to regain...[W]e have no way of enforcing our decisions. It is the faith of the public and the acquiescence of the other branches that make this possible. Maybe it's luck, maybe it's history, maybe it's culture, but we are lucky to have them and to have individual judges believe they have the freedom to make decisions based on their interpretation of the law, and only that, without any influence or threats coming from the other branches."

Pointing out that an independent bar is the necessary corollary to an independent judiciary, she said, "Our cases are brought to us by trial lawyers like yourselves. . . . Without a trained and competent and independent bar, there could be no such thing as an independent judiciary." To illustrate her point, she related that on her first visit to the Holocaust Museum, she discovered from reading old newspaper accounts that some of the earliest legislation enacted by the Nazi regime after Adolph Hitler came to power first abolished the independent bar and then the independent judiciary.

"The sad fact is that undermining the faith of the public in the impartiality and fairness of their judges is detrimental not only to the bar, but to all of society."

Quoting Sir Thomas More's famous answer that he would give the Devil the benefit of the law for his own sake, she noted, "What the most virulent critics of the courts seem to miss is that if they were to be successful in their attacks on the institution and the individual judges, where would they go when *they* need the protection of the law?"

Asserting that judges generally cannot, and should not, defend themselves and that they are really in a poor position to defend their own independence, she observed, "Instead, we rely on lawyers like you to present the case for judicial independence to the public and to Congress."

Thanking the College for undertaking, through a recently appointed special committee, to prepare a white paper that will establish its official position on judicial independence and the separation of powers, she concluded, "One of the purposes of our Constitution's creating the third branch was to insulate the country from the passing tempers of the times, things that could happen now that we would be sorry for later on. And some of our best decisions have done exactly that, have stood up to public opinion, knowing that that public opinion was against the basic rules of the Constitution, and saying, 'Stop, wait. This will pass.' It always does. And what was assured by the Constitution is that . . . those are the rules we should play by."

"We judges, you lawyers, and the public, the public you represent, all of you, need to insure that the process and the institution that has evolved over 200 years, imperfect though it may be, does not fall victim to the tempers of our times." ♦

Chicago Meeting A Resounding Success

For the second time in as many years, a baseball team in the city hosting the College's annual meeting won its league playoffs during the meeting and headed for the World Series. In 2004, it was the St. Louis Cardinals, in 2005, the Chicago White Sox.

The meeting began with a Thursday night reception for the Fellows. The Board of Regents had been hard at work since the preceding Sunday.

Most of the program events listed below are the subject of separate articles in this issue.

The Friday program began with an account by **Mikel L Stout** of Wichita, Kansas, Secretary of the College, of the College's response to Hurricane Katrina, which had seriously impacted many Fellows in Louisiana and Mississippi. That report and the subsequent history of this effort are the subject of a separate article on page 9 of this issue.

A representative of the first recipient of the newly revised Emil Gumpert Award, Dakota Plains Legal Services, described the recipient and the Native American client population it serves and outlined how the accompanying grant would be used. Page 17.

Justice **Richard J. Goldstone**, one of the original members of the Supreme Constitutional Court of South Africa, described how that country had gone about creating this new court after the three hundred-plus years of apartheid ended and was replaced by a democratic government. Page 19.

The winners of the national trial competitions in both Canada and the United States were honored, and the best oralists from each competition were called on to address the Fellows and their guests. Page 33.

Madam Justice **Marie Deschamps** of the Supreme Court of Canada was inducted as an Honorary Fellow of the College. Page 18.

To end the Friday program, four Fellows, a moderator, Regent **Robert W. Tarun**, a Federal prosecutor, **Sally Quillian Yates**, and two criminal defense attorneys, **Robert G. Morvillo** and **Reid H. Weingarten**, discussed their experiences in handling high-profile white collar criminal trials. Page 26.

Reflecting the College's recent efforts to give its Judicial Fellows a larger role, the Judicial Fellows attending the meeting enjoyed a luncheon at the Chicago Club.

Friday evening featured an ACTL Speakeasy, complete with Twenties' costumes and Charleston lessons, at Chicago's Museum of Science and Industry.

Saturday's program began with a riveting account by **Joseph Margulies** of his representation of a Guantanamo detainee and his explanation of the issues raised by the Guantanamo detensions. Page 28.

The winning teams from both the Canadian and United States moot court competitions were honored, and the outstanding oralists were invited to speak. Page 33.

Harvard Professor **Robert H. Mnookin**, a negotiation analyst, laid out his assessment of the many steps necessary to bring about a resolution of the Israeli-Palestinian conflict. Page 36.

He was followed to the podium by Federal District Judge **Barbara J. Rothstein**, the Director of the Federal Judicial Center, who spoke on the current threats to judicial independence in their historical context. Page 1.

Retiring ACTL Foundation President Lively M. Wilson was honored for his nine years of service,

CHICAGO MEETING, con't on page 8

that had begun with the creation of the Foundation. Page 12.

The final professional program, moderated by Regent **Gregory P. Joseph**, dealt with the handling of discovery of electronically generated documents and electronically stored information and the proposed rules for dealing with such discovery. Page 35.

Constance M. Alt, Cedar Rapids, Iowa, gave the response for the inductees. Page 15.

The new inductees met for an orientation breakfast and they and their spouses and guests were honored at a reception and luncheon after the Annual Meeting of the Fellows.

Following recent custom, the inductees were arrayed on a stage facing the past presidents and the rest of the audience at the annual banquet, while they were given the traditional induction charge by Past President **Warren B. Lightfoot**. Page 14.

It did not escape notice that all four of the winners of the best oralist awards in the Canadian and United States student competitions were women and that four of the major program participants, including the newest Honorary Fellow were, likewise, women.

In introducing incoming College President Michael Cooper, outgoing President Jimmy Morris commented: "[I]f I were picking a President and first lady of the American College of Trial Lawyers, . . I would have said, "I want people who are intelligent, even brilliant, who have style, who have grace, and who care about this College and what it is about. For you Fellows from Quebec, they would have savoir fare. And I must tell you that our friends Mike and Nan have all of those. I hope that you will join me in welcoming the next great President of the American College of Trial Lawyers."

Cooper, in accepting the presidency, remarked, "[I]f I could have bottled Jimmy's brilliance and energy and affection, I could be a very rich man. He has been a wonderful leader of the College, . . . and he will have left, will leave, an enduing imprint on the College for which we all owe him great thanks. . . .

"Lord Elgin's phrase, "the hermit and the horse," it just resonated within me because it expresses, at least for me–this is what the imagery means to me–two of the qualities of a trial lawyer. The hermit: complete dedication, commitment. The horse: energy, giving every ounce of strength that you have, mental and physical. And those are qualities of great trial lawyers.

"But great trial lawyers require something more to achieve their status, and that is support of their family, their parents, their spouse, their children. We talk about the price that we pay as trial lawyers, the things we have had to forego, but our family has had to forego much more than we have had to, and we should recognize that."

Following the installation of Cooper as president of the College, the Fellows and their guests danced the night away. ♦

Humor From the Annual Meeting

AS USUAL, THE FALL MEETING OF THE COLLEGE WAS LACED WITH GOOD HUMOR.

***Justice Goldstone**, describing the creation of a new Supreme Court in South Africa*

We had to agree on our [the South African Supreme Constitutional Court's] relationship with the media. We set up a media committee, and . . . the two members of the media committee, Justice Saxe and I, eventually convinced our colleagues to allow television cameras into our courts . . . And I need hardly tell you, the minute the doors were opened, they found the meetings were boring. They didn't pay much attention to them.

LOOK FOR BON MOTS THROUGHOUT THIS ISSUE OF *The Bulletin.*

College Responds to Katrina

As the scope of the tragedy of Hurricane Katrina began to emerge, then president **James W. Morris III** asked College Secretary **Mikel L. Stout** of Wichita, Kansas and Regent **Ed W. Mullins** of Columbia, South Carolina to evaluate what response would be appropriate for the College. Stout reported on the College's response at the annual meeting in Chicago.

After making contact with state chairs from Florida to Texas, they determined that there were 12 Fellows on the Gulf Coast in Mississippi and approximately 60 in Louisiana who suffered substantial, in some cases total, loss of their homes and offices.

The College website was modified to enable the national office to receive both requests for temporary assistance and offers of assistance with temporary housing, office space and the like for the affected Fellows. In addition, Executive Director **Dennis Maggi** created a location on the College website where we could report as Fellows and their families were located and their status determined.

Finally, the website listed some appropriate recipients of charitable gifts to general relief, and a general announcement of these opportunities was sent to the Fellows on September 1. The following day, **Stuart D. Shanor**, of Roswell, New Mexico the president of the ACTL Foundation, notified all Fellows by e-mail that the Foundation would receive funds to be used in re-establishing basic legal and judicial services in the affected areas, and that notice was added to the College website.

Updating Foundation president Shanor's recent report, in response to this request, Fellows have as of press time donated a total of $118,526.22 to the Foundation's Katrina Disaster Relief Fund. After careful investigation, the Foundation Board distributed $60,000 from that Fund to the Louisiana State Bar Foundation Disaster Relief Fund, which is jointly managed by the Louisiana State Bar and the State Bar Foundation. In addition, it donated $20,000 to the Mississippi State Bar Foundation Disaster Relief Fund, which is jointly managed by its State Bar and State Bar Foundation.

In each of these states, the funds will be used to aid lawyers whose practices were destroyed and who are the primary providers of legal services to disadvantaged segments of those communities that desperately need legal services.

The joint bar committees of those two states will report to our Foundation Board on the use of its contributions, so that it can be satisfied that the funds have been distributed in an organized way to assist lawyers on the front lines, particularly public interest lawyers, public defenders and, more broadly, lawyers serving the needs of clients in lower income brackets.

Fellows have as of press time donated a total of $118,526.22 to the Foundation's Katrina Disaster Relief Fund

At the College's annual banquet in Chicago, Regent **Raymond L. Brown**, of Pascagoula, Mississippi, one of those affected by Katrina, included in his invocation: "We have seen and we are thankful for your angels of mercy. They are the volunteers, the faith-based groups, Red Cross and Salvation Army, the military and public safety personnel and the donors of funds, food, clothing and shelter who step up to help others when disaster strikes. We have seen them recently, those angels of mercy and they inspire us."

The Foundation Board has reserved the remaining approximately $33,500 contributed by Fellows for later distribution. It has sent a direct solicitation to all the Fellows to give them a further opportunity to contribute before the Fund is closed and the remaining funds distributed.

In sending this solicitation, Foundation President Shanor said, in part, "[W]e are extremely proud of the Fellows of the College for the manner in which they have responded to this frightening tragedy. You can all take pride in the commitment of your colleagues. . . . [I]t is not without good reason that the College enjoys such an enviable reputation . . . ." ♦

mittee chair—and the nominator, if the candidate was nominated by a Fellow—told the basis of the Board's decision? There are at least three answers.

The first is that an investigating Regent gives an assurance to each lawyer or judge who is called that the name of the lawyer or judge will not be disclosed—even to the Board. Even if the name of an individual were not disclosed, it might be possible to identify the individual from the content of his or her remarks.

A second reason is that there may be no single basis for the collective Board decision. Some Board members may think that a candidate has simply not demonstrated the degree of excellence in advocacy that the College demands of candidates. Others may believe that a sufficient question has been raised about a candidate's professionalism or commitment to ethical behavior to deny admission to fellowship. Still others may think the candidate has exhibited all the requisite qualities but needs further seasoning. These considerations and others are not evident when a Regent casts a "yea" or "nay" vote.

Finally, even if there is unanimity as to the reason for disapproving a candidacy, there is a strong reason to keep the Board's evaluation of candidates in confidence. The Board is sensitive to, and does not wish to injure, a candidate's reputation. There are many estimable trial lawyers who are not Fellows of the College. Their professional reputations should not be sullied simply because they were not admitted to fellowship.

In a perfect world, the process by which candidates are evaluated and found either qualified or unqualified would be more transparent. But the world in which we live is imperfect, and in the end Fellows must rely on the dedication, commitment and fair-mindedness of the members of the Board of Regents. After observing Board deliberations for five years, I can and do assure you that your reliance is not misplaced and give you the further assurance that the nomination and election process, which is designed to identify and admit to fellowship the very best of the trial bar, achieves that lofty goal. ♦

Fellows to the Bench

The College is pleased to announce the following judicial appointments of Fellows:

Douglas C. Shaw
Ontario Superior Court of Justice,
Thunder Bay, Canada

John Richard Smoak
United States Northern District of Florida,
Panama City, Florida

Alan D. MacLeod
Court of Queen's Bench of Alberta,
Calgary, Canada

Neil G. Gabrielson
Court of Queen's Bench of Saskatchewan,
Sasaktoon, Canada

College Regions Realigned

The Board of Regents has approved the realignment of two regions along the northeastern tier of the United States and the adjacent Canadian provinces. Acting on the recommendation of an ad hoc committee chaired by Past President **Ralph I. Lancaster, Jr.** the Regents moved the Province of Quebec from its former region and paired it with Upstate New York and the Province of Ontario. The committee had conducted a poll of the Fellows in the affected states and provinces before making its recommendation. **Brian P. Crosby**, Buffalo, New York, is the current Regent for the newly realigned region

The region to which Quebec was formerly attached now consists of the Atlantic Provinces, Maine, Massachusetts, New Hampshire, Puerto Rico and Rhode Island. Its current regent is **Joan A. Lukey** of Boston, Massachusetts.

and **Stephen Breyer**, Delaware Supreme Court Justice **Randy J. Holland**, Chief Judge **Deanelle Reece Tacha** of the United States Court of Appeals for the Tenth Circuit and United States District Judge **Martin L.C. Feldman** of the Eastern District of Louisiana.

The Fellows in the delegation were delegation co-chair and then President-elect **Michael A. Cooper**, New York, Past President **Charles B. Renfrew**, San Francisco, **Alan L. Sullivan**, Salt Lake City, Utah, recently elected Regent **Chilton Davis Varner**, Atlanta, Georgia, former Solicitor General **Seth P. Waxman**, Washington, DC and **Fletcher L. Yarbrough**, Dallas, Texas.

The British delegation consisted of The Right Honourable The **Lord Scott of Foscote**, House of Lords, The Right Honourable The **Lord Rodger of Earlsferry**, House of Lords, The Right Honourable **Lady Justice Arden**, Royal Courts of Justice, The Right Honourable **Lord Justice Dyson**, Royal Courts of Justice, The Honourable **Mr. Justice Stephen Richards**, Royals Courts of Justice, The Honourable **Mrs. Justice Heather Hallet**, Royal Courts of Justice, Professor **Jeffrey Jowell**, Q.C., The Faculty of Laws, University College London, **Joanna Korner**, Q.C., barrister and **Charles Plant**, Esq., Herbert Smith Solicitors.

The Anglo-American Exchange began in the 1970's and is held every four to five years. A rotating group of Supreme Court Justices and legal professionals meet with their counterparts in England and Scotland to address legal issues of global concern. Similar periodic Exchanges are held with Canadian judges and lawyers. The first phase of the most recent Exchange took place in London in 2004. ♦

PARTICIPANTS IN THE EXCHANGE HAVE SINCE COMMENTED AS FOLLOWS;

"In my view, the Exchange is one of the most powerful ways of cementing relationships with our colleagues in the United Kingdom and of challenging us to think more deeply about issues of mutual concern."

Letter dated October 13, 2005 from Hon. Deanelle Reece Tacha, Chief Judge of the United States Court of Appeals for the Tenth Circuit, to Michael A. Cooper

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"On behalf of the Court, I thank the American College of Trial Lawyers for their support of this enterprise over the years."

Letter dated October 21, 2005, from Justice Antonin Scalia to Michael A. Cooper

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"I have never been on a better judicial/legal exchange....l want to send you my personal thanks--lots and lots of thanks--and to the College (and to Nan) too."

Letter dated October 5, 2005, from Justice Stephen Breyer, to Michael A. Cooper

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"I thought that the discussions were stimulating and very valuable. We share many problems and it helpful to note the similarities as well as the differences between our solutions. We covered a remarkably wide range of topics, all of them very interesting, and our discussions were always thought-provoking."

Letter dated October 6, 2005, from Lord Justice Dyson, Deputy Head of Civil Justice, to Michael A. Cooper

Lively Wilson

HONORED AS FOUNDATION PRESIDENT

Lively Wilson of Louisville, Kentucky was honored by the College at the annual Meeting as the retiring president of the ACTL Foundation. Wilson, president of the College in 1994-95, was the first president of the Foundation, serving from 1996 to 2005.

He was presented with a charcoal portrait for his years of service to the Foundation, which now has assets of $1.7 million.

"It has been a great privilege for me to be associated with the Foundation," Wilson said. "It got its genesis from a number of years ago when judges and government officials, academics challenged this organization to use its considerable talents to try to address some of the problems of our judicial system and the Foundation was seen as a method for funding that effort. We have made a modest beginning I think."

Past President (2001-02) Stuart Shanor of Roswell, New Mexico has been elected new president of the Foundation.

The Foundation has made grants to the National College of District Attorneys, National Criminal Defense College, the National Children's Law Network, the National Constitution Center in Philadelphia, the National Mock Trial and Moot Court Competitions and the International Judicial Academy. It also funded projects at the School of Law at the University of Missouri at Columbia and at Mercer University Law School. It also helped to fund the College's Mass Tort Manual projects, which has produced a manual that will be published soon. ♦

BON MOT: *ACTL Foundation President* ***Stuart D. Shanor****, presenting a portrait to* ***Lively M. Wilson****, his predecessor in that office and Wilson accepting the recognition*

STUART D. SHANOR: Lively, . . .in recognition of your long and valuable service, we wish to present to you a token of our appreciation in the form of a charcoal portrait. The portrait bears the legend, "In grateful appreciation for your leadership and devoted service to the Foundation of the American College of Trial Lawyers, Lively M. Wilson, President 1996 to 2005." We hope that this will be a continual reminder of our appreciation and gratitude for your years of faithful service to the Foundation.

MR. WILSON: I wish you had used my high school picture to copy that. I asked Jimmy Morris how much time I had to respond this morning, and he said, "If you ask that question Saturday morning, you've already used half of it." . . .My thanks also to Mr. Shanor who will now have the gratifying experience of having his e-mails ignored and his voicemails not returned, who will on entering a room see the Fellows leave like a flushed covey of quail.

Awards, Honors and Elections

Immediate Past President **James W. Morris, III**, of Richmond, Virginia has received the Hunter W. Martin Professionalism Award from The Bar Association of the City of Richmond. The award recognizes adherence to the highest standards of professional conduct. It was established in 1993 to honor its first recipient, who served as secretary-treasurer of the Richmond Bar from 1963 to 1987. Morris was president of the Richmond Bar in 1998-99.

Robert F. Hill of Denver has received the William Lee Knous Award, the highest alumni honor, from the University of Colorado School of Law. Conferred annually by the Law Alumni Board, the award recognizes outstanding achievement and sustained service to the law school. Hill is a 1970 graduate.

Clark Hodgson of Philadelphia has received the St. Thomas More Award from the Philadelphia Chapter of the St. Thomas More Society.

H. Talbot (Sandy) D'Alemberte of Tallahassee, Florida has been elected chair of the Board of Directors of the American Judicature Society. He served as AJS president form 1982 to 1984 and received its Justice Award in 1996.

Past President (1999-2000) **Mike Mone** of Boston was cited in a November 14, 2005 *New Yorker* magazine article entitled, "The Malpractice Mess." The article stated that Mone was responsible for a change in Massachusetts law when the state Supreme Court ruled in the case of Franklin v. Massachusetts General Hospital et al that time limits must start with discovery of harm, not the actual date of such harm.

James E. Ferguson II of Charlotte, North Carolina, a past chair of NITA, was recently honored by the South African Ambassador to the United States for his twenty years of work training lawyers or color in South Africa in courtroom skills, under the auspices of South Africa's Black Lawyers Association. For over twenty years, while apartheid kept black lawyers from formal legal education, this trial advocacy program educated hundreds of them who went on to become leaders in South Africa. They include former Chief Justice Ismail Mahomed and President Mbeki's current top legal advisor, Ms. Mojanku Gumbi. Of Ferguson and the others who participated in this project, Nelson Mandella has been quoted as saying, "These men and women are the heroes of yesterday and the hope of tomorrow. I salute them,"

David Stockwood, Q.C. of Toronto has received the Law Society Medal from the Law Society of Upper Canada for his work as a respected arbitrator, mediator and author in the legal profession.

Marc H. Alcott of New York, New York has been installed as president of the New York State Bar Association.

Fellow Emeritus **Julian C. "Pete" Dewell** of Everett, Washington has been awarded a Lifetime Service Award by the Washington State Bar Association.

Judicial Fellow **William W. Schwarzer**, San Francisco, California has received the American Judicature Society's Edward J. Devitt Distinguished Service to Justice Award. This award honors an Article III judge for significant contributions to the administration of justice and the rule of law. The presentation was made by Honorary Fellow Anthony Kennedy. Schwarzer, Senior United States Judge for the Northern District of California, is a former director of the Federal Judicial Center.

Jerome J. Braun of San Francisco has received the John P. Frank Award, established by the Judicial Council of the Ninth Circuit, presented annually to a lawyer who has "demonstrated outstanding character and integrity; dedication to the rule of law; proficiency as a trial and appellate lawyer; success in promoting collegiality among members of the bench and bar; and a lifetime of service to the federal courts of the Ninth circuit."

Jack H. Olender, Washington, D.C. was inducted into the National Bar Association Hall of Fame, which honors outstanding lawyers who have made significant contributions to the cause of justice. ♦

Ninety-Seven Fellows Inducted at Chicago Meeting

ALABAMA:
Allan R. Chason, Bay Minette
Ralph D. Cook, Birmingham

ARIZONA:
Jill A. Herman, Phoenix

CONNECTICUT:
Michael C. Jainchill, Hartford

DISTRICT OF COLUMBIA:
Gregory B. Craig, Washington
Ford F. Farabow, Jr., Washington
Mark C. Hansen, Washington
Michael D. Jones, Washington
Anthony J. Trenga, Washington

FLORIDA:
John W. Kozyak, Miami

GEORGIA:
Anthony L. Cochran, Atlanta
L. Joseph Loveland, Jr., Atlanta
William N. Withrow, Jr., Atlanta

IDAHO:
David E. Comstock, Boise

ILLINOIS:
Terry A. Ekl, Clarendon Hills
David P. Faulkner, Rockford
Michael D. Monico, Chicago
Douglas J. Pomatto, Rockford

INDIANA:
Jessie A. Cook, Terre Haute
Kevin P. McGoff, Indianapolis

IOWA:
Constance M. Alt, Cedar Rapids
William F. Fanter, Des Moines
Gregory M. Lederer, Cedar Rapids
Bruce L. Walker, Iowa City
Chester C. Woodburn, III, Des Moines

KANSAS:
Joseph D. Johnson, Topeka
Craig Shultz, Wichita

LOUISIANA:
M. Taylor Darden, New Orleans
Irving J. Warshauer, New Orleans

MARYLAND:
M. Hamilton Whitman, Jr., Baltimore

MASSACHUSETTS:
J. Michael Conley, Braintree
Thomas R. Kiley, Boston
L. Jeffrey Meehan, Springfield

MICHIGAN:
Steven L. Barney, Petoskey
Vincent R. Petrucelli, Iron River
Walter J. Piszczatowski, Bloomfield Hills
Clarence L. Pozza, Jr., Detroit
Jeffrey A. Sadowski, Bloomfield Hills
Douglas E. Wagner, Grand Rapids

MINNESOTA:
Robert Bennett, Minneapolis
Terrence J. Fleming, Minneapolis
Thomas S. Fraser, Minneapolis
Daniel A. Gislason, New Ulm
Douglas A. Kelley, Minneapolis
George W. Soule, Minneapolis
Terry L. Wade, Minneapolis

MISSISSIPPI:
David L. Ayers, Jackson
Roy D. Campbell, III, Jackson
Robert L. Gibbs, Jackson

NEW MEXICO:
Patrick A. Casey, Santa Fe
Gregory W. Chase, Albuquerque

DOWNSTATE NEW YORK:
William H. Bave, Jr., White Plains
Martin Flumenbaum, New York
T. Barry Kingham, New York

UPSTATE NEW YORK:
Thomas D. Keleher, Syracuse
Stephen G. Schwarz, Rochester
James T. Scime, Buffalo

NORTH CAROLINA:
W. Andrew Copenhaver, Winston-Salem
Alan W. Duncan, Greensboro
Douglas W. Ey, Jr., Charlotte

NORTH DAKOTA:
Joanne Hager Ottmar, Jamestown
Steven A. Storslee, Bismarck

OHIO:
James E. Arnold, Columbus
Julia R. Bates, Toledo
John D. Holschuh, Jr., Cincinnati
Damond R. Mace, Cleveland
Kevin R. McDermott, Columbus
Craig S. Morford, Cleveland

OKLAHOMA:
Alan R. Carlson, Bartlesville
Mack K. Martin, Oklahoma City
Eugene Robinson, Tulsa
Reggie N. Whitten, Oklahoma City

OREGON:
Peter H. Glade, Portland
Timothy J. Helfrich, Ontario
Steven P. Jones, Portland

PENNSYLVANIA:
James M. Brogan, Philadelphia
Bruce W. Ficken, Philadelphia
Fred T. Magaziner, Philadelphia
Caroline M. Roberto, Pittsburgh

SOUTH CAROLINA:
Capers G. Barr, III, Charleston
Moffatt G. McDonald, Greenville
Joel H. Smith, Columbia
John Hamilton Smith, Charleston
Mark C. Tanenbaum, Charleston

TENNESSEE:
Jerry O. Potter, Memphis

TEXAS:
James (Jim) E. Hund, Lubbock
Robert M. Schick, Houston

UTAH:
Walter F. Bugden, Jr., Salt Lake City

VIRGINIA:
Gerald T. Zerkin, Richmond

WEST VIRGINIA:
Elisabeth H. Rose, Fairmont
Boyd L. Warner, Clarksburg

WISCONSIN:
James W. Gardner, Madison

WYOMING:
Paul J. Hickey, Cheyenne

ALBERTA:
Alain Hepner, Q.C., Calgary

MANITOBA/SASKATCHEWAN:
Michael T. Green, Winnipeg
D. Wayne Leslie, Winnipeg

ONTARIO:
Allan R. O'Brien, Ottawa

Constance M. Alt *of Cedar Rapids, Iowa gave the response for the inductees. A portion of her remarks follow on page 15.*

New Fellow Responds For Inductees

***Constance M. Alt**, Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, Iowa, the widowed mother of two daughters, responded on behalf of the inductees at the Chicago meeting. A portion of her remarks follows:*

"You, the American College teachers have taught us how to be trial lawyers. You have taught us how to work hard, how to manage our clients, how to manage the cases and to command the courtroom. You have also taught us how to balance zealous representation and professionalism. You have taught us how important it is to respect one another and the absolute importance of collegiality. You taught us that we must actively advance collegiality by example . . . . You've taught us the importance of service to the profession and to the legal system. You taught us to stick up for what we know is right in the legal system, however unpopular it is, to speak up and take action, to protect the profession, including the judiciary, when it is unfairly criticized and to step up and take the lead in aiding and preserving and bettering our system of justice, the independent judiciary and the Bar and the right to trial by jury. . . .

"I have always thought that my teachers from the ranks of the American College are the best lawyers on the planet, and we are honored and humbled to be asked to join your ranks. As new members of the College we acknowledge our responsibilities to carry on with all that you have taught us, to work together to bolster the image of the profession, to mentor and to teach the next generation of trial lawyers, to maintain the ideals of the College and foster its growth and the pursuit of excellence." ♦

BON MOT:
Inductee responder ***Constance M. Alt**, Cedar Rapids, Iowa*

My Mom has raised eight children, and my parents taught us to be very self-sufficient. We all graduated from college and went on to professional careers. Four of my siblings chose medicine, and you would think that with four doctors in the family, I would be the black sheep. But that's not true, because I have one brother who is an IRS Agent.

A banquet scene in Chicago

2005-06 College Leaders Elected

At its reorganizational meeting on October 22, 2005, following the annual meeting of the Fellows, the Board of Regents elected the following to serve as officers for the coming year:

President	**Michael A. Cooper** New York, New York
President-Elect	**David J. Beck** Houston, Texas
Secretary	**John J. "Jack" Dalton** Atlanta, Georgia
Treasurer	**Mikel L. Stout** Wichita, Kansas

AT THE ANNUAL MEETING OF THE FELLOWS, THE FOLLOWING WERE ELECTED TO FOUR-YEAR TERMS ON THE BOARD OF REGENTS:

J. Donald Cowan, Jr., Greensboro, North Carolina, representing Virginia, West Virginia, North Carolina and South Carolina.
Francis X. Dee, Newark, New Jersey, representing Delaware, New Jersey and Pennsylvania.
Philip J. Kessler, Detroit, Michigan, representing Kentucky, Michigan, Ohio and Tennessee.
Chilton Davis Varner, Atlanta, Georgia, representing Alabama, Florida and Georgia.

Under the College bylaws, Regents are nominated by a committee composed of three Regents, one of whom acts as chair, two past presidents and two Fellows-at-large and are elected by the Fellows at the annual meeting. The officers are nominated by the past presidents, sitting as a nominating committee, and are elected by the Board of Regents.

Average Age, Level Of Experience Of Nominees Increases

PRESIDENT COOPER URGES BETTER EFFORT

Only 92 nominees were submitted to the Board of Regents at its Fall meeting in Chicago in October 2005. Eight of these were candidates whose consideration had been continued from the Spring 2005 meeting. This compares with 132 nominees submitted by the same states and provinces at the Fall 2004 meeting. Sixty-nine of the nominees considered at the Fall 2005 meeting were approved, 15 were declined, six were continued for further investigation and two were withdrawn.

In spite of the College's fifteen-year threshold eligibility level, the average age of the Fall 2005 nominees was 55 years and the average nominee had been practicing law 29 years. The Fall 2004 nominees had averaged slightly in excess of 54 years of age and had been in practice an average of slightly more than 27 years. Since roughly half the states and provinces send forth nominees to the Spring meeting and the other half to the Fall meeting, these are the most relevant comparisons.

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Dakota Plains Legal Services Receives First New Gumpert Award

Dakota Plains Legal Services, the oldest Native American legal services program in the nation, was honored at the College's Annual Meeting with a $50,000 grant as the first winner of the newly constituted Emil Gumpert Award.

DPLS, which serves Native Americans on nine Indian Reservations in the Dakotas, will use the grant to create a website with content that is largely unavailable today, even in paper form, and to train pro bono lawyers.

In accepting the grant, DPLS former executive director **Ronald D. Hutchinson** of Mission, South Dakota, said, "Native Americans are often forgotten. They're uniformly misunderstood, and I can't tell you the impact you have had on the local Dakota people in terms of the recognition that they have received from this Emil Gumpert Award. . . .

"[O]n another level, the impact you all have had on the morale of the people that work in my program is tremendous. So often they labor in obscurity. They work hard. They don't get paid much, and this really meant a lot to everybody to be able to be recognized and receive this award.

"Finally, . . we have never received so much publicity and awareness in . . . the local newspapers, the regional media and the national media, in terms of what Indian Legal Services is all about . . . .

"I really can't overstate the impact that you are having with this project and that you will have."

The Board of Regents approved the award from among 46 nominations upon the recommendation of the new Emil Gumpert Committee, chaired by **Joseph D. Steinfield** of Boston.

Dakota Plains Legal Services began in 1967, the first such program in South Dakota. It has seven branch offices whose 31 employees serve the legal needs of 55,000 low-income Native Americans. Headquartered in Mission, South Dakota, the agency has six branch offices providing development support and assistance to the Tribal Court systems in its service area, including training to Tribal Court staff and lay advocates. It has also assisted in the development of Tribal Court bar associations.

Any Fellow may nominate a program for the award, or programs may apply directly. All details, including application and nomination forms, can be found in the awards section of the College's website, www.actl.com. ♦

BON MOT:

*President **James W. Morris, III**, recounting his visit to the Dakota Plains Reservation*

Among the benefits the College received from this wonderful project [the Emil Gumpert Award to Dakota Plains Legal Services] . . . I got a great story. It seems that in a tribal court, one of the defendants was . . . charged with being a horse thief. The judge instructed the jury, and the jury went out and came back shortly and said, "We, the jury, on the issue joined, find the defendant not guilty, but he has to give back the horse."

The judge found that inconsistent and sent them back with instructions to make it consistent, and they came back again and said, "We, the jury, on the issue joined, find the defendant not guilty and he can keep the horse."

Justice Marie Deschamps

INDUCTED AS HONORARY FELLOW

Canadian Supreme Court Justice Marie Deschamps was inducted as an Honorary Fellow of the College at the annual meeting in Chicago. Appointed to the Canadian Supreme Court in 2002 and sworn in two days before her fiftieth birthday, she remains the youngest member of that court. She had previously served on the Quebec Superior Court two years and then for ten years on the Quebec Court of Appeal. Before taking the bench she had practiced law with the Montreal firm of Byers, Casgrain, specializing in civil and commercial litigation and administrative law. She earned her law degree at the University of Montreal in 1974 and was called to the bar in 1975.

In introducing Justice Deschamps, Quebec province chair Michel Decary noted that as a practicing lawyer, in addition to earning her masters degree in law from McGill University in 1983, she had sat on the Federal Government's Advisory Committee on the Reform of the Bankruptcy Act and on the Canadian Competition Tribunal's Advisory Committee.

Decary noted that Justice Deschamps was known both for the volume of work she turns out and for her courage in confronting controversial issues. In her acceptance remarks, she noted the progress of women in the legal profession since she entered it. She also pointed out instances in which the perspective of women had clearly influenced opinions rendered by the courts of Canada. Listing the progression of women onto the Supreme Court of Canada, she paid particular tribute to her Chief Justice, Beverly Mclachlin, who is also an Honorary Fellow of the College.

She also noted the predominance of women among this year's winners of the College's student competitions and expressed confidence that the number of women in the College will grow exponentially.

"The more that women enter into the labor market," she said, "the more visible they become, and the more the imbalance between men and women can be addressed. There is no justification for a ceiling, glass or otherwise. Promoting women within firms, universities and the judiciary is no longer a political statement."

The College's honorary fellowships honor individuals whose accomplishments in the law have earned them a high degree of respect and eminence in the legal profession. Justice Deschamps is the fourth female Justice of the Canadian Supreme Court to be inducted as an Honorary Fellow. ♦

Former South African Justice

Describes Peaceful Transition to Democracy

At the College's Annual meeting in Chicago, Justice **Richard J. Goldstone**, currently a visiting professor at the University of San Diego School of Law, gave a riveting account of the South African experience in the 1990's in creating from the whole cloth a new Supreme Constitutional Court after the dismantling of apartheid and the replacement of the all-white minority government with a democratically elected one.

In introducing Goldstone, Fellow **Philip A. Robbins** of Phoenix, Arizona, the immediate past chair of the College's International Committee, related how Goldstone, then a Justice of the Appellate Division of the Transvaal Supreme Court who was publicly opposed to apartheid, had been asked by then South African President de Klerk to conduct an inquiry into the hanging death in the Johannesburg Central Police Station of the boyfriend of the daughter of Nelson and Winnie Mandela.

Goldstone Commission

At the time, South Africa was involved in negotiations between the existing government and the black majority that would ultimately lead to the creation of a new democratic state with a new Constitution. Goldstone's skillful handling of that inquiry led to his appointment as head of the newly-created Standing Committee of Inquiry Regarding the Prevention of Public Violence and Intimidation, which came to be known as "the Goldstone Commission."

In her foreword to Richard Goldstone's book, *For Humanity*, Justice Sandra Day O'Connor reflected, "Justice Richard Goldstone of South Africa has been at the forefront of one of the biggest challenges facing emerging democracies today, how to address grave, systematic human rights abuses committed by leaders of the previous regime."

The groundwork laid by the Goldstone Commission in bringing to justice perpetrators of racial and political crimes made possible the creation of South Africa's Truth and Reconciliation Commission.

In July 1994, he was appointed to the newly created Supreme Constitutional Court of South Africa, an institution that then set about literally to invent itself. His address focused on the creation of that Court.

In his address, Goldstone described the *ad hoc* arrangement that led to the new South African Constitution. The elected white government and unelected black leaders negotiated an interim Constitution. It was agreed that this would be the skeleton of the final Constitution. A schedule to that first draft listed thirty-four provisions which had to be reflected in the final Constitution. In fact, as Goldstone pointed out, there were in reality over a hundred principles covered by those provisions.

The interim Constitution created a Supreme Constitutional Court, whose first task was to certify whether those principles had been complied with. That Court originally consisted of eleven justices, seven white and four black. Two of the eleven were women.

That Court immediately met for a week in Germany to learn how that country had gone about creating its highest court after the fall of Nazi Germany after World War II. They then returned to South Africa and set about creating their own court. They studied and borrowed freely from the courts of many other countries. To distinguish themselves from the old all-white Court, they agreed on green robes bearing on their sleeves the

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colors of the country's flag. They decided that their bench would be at eye-level with counsel appearing before them. They adopted the United States Supreme Court's custom of being addressed as "Justice" and "Chief Justice," as opposed to "My Lord," and its use of green, yellow and red lights to enforce time limits on arguments. They agreed to allow television cameras in the Court.

The Constitution drafted by the newly created Parliament over a period of two years was submitted to the Court for certification. After two weeks of public hearings and two months of deliberations, the Court, in a detailed 200-page opinion, set out the respects in which that document failed to comply with the 34 principles that were a part of the interim Constitution and returned it to the Parliament.

In February 1997 the Court, in a unanimous opinion, certified the resulting redraft of the Constitution submitted by the Parliament, and the Constitution came into operation.

By consensus, the initial and the final Constitutions contained a detailed Bill of Rights. The blacks, who had been the victims of the prior regime's trampling on human rights would have no less. The white minority, seeing the handwriting on the wall, had overnight become great supporters of human rights.

The Constitutional Court was inaugurated by President Mandela on the 15th of February of 1995, and its first case the next day, involved the constitutionality of the death penalty. Hundreds of people were then waiting on death row. "President Mandela inaugurated the Court," he recalled. "The eleven of us sat on each side of him, and his opening words none of us will forget. His opening words were . . . , 'The last time I was in a South African court was when I waited to hear that I was to be sentenced to death.' You can imagine what went through our minds, and I have no doubt that that was exactly what he intended should go through our minds.

"The Court held unanimously that the death penalty was inconsistent with the principles to which I referred [preservation of human dignity, banning of cruel and unusual punishment], and especially the right to life, and the death penalty was held to be unconstitutional and, therefore, it was set aside."

That Court has gone on to hear many such issues in its first ten plus years: gay and lesbian rights, gender equality, corporal punishment, freedom of religion, social and economic rights. The Constitution, in creating a new court with no precedents to rely on, provided that all courts in South Africa are obliged to have due regard for international law.

> "THE HAVOC AND MISERY THAT HUMANS ARE CAPABLE OF INFLICTING ON OTHERS CONTINUES UNABATED FROM CENTURY TO CENTURY."

"I would like," Goldstone interjected in his presentation, "to pay a tribute, a very sincere tribute, to the role the American legal fraternity played during the last couple of decades of apartheid. It was the United States legal community that came to South Africa and literally helped keep the flame of justice alive. It was the United States legal community that helped set up, with American foundation money, . . . pro bono legal defenses for many thousands of black South Africans who were hauled before our courts under the draconian apartheid laws. It was the United States that helped us set up the Legal Resources Center, a public interest law firm modeled on the Legal Defense Fund that does such wonderful work in this country.

"It was those efforts that, in the minds of the vast black community and particularly the black legal fraternity, that kept some respect, as little as it was, during those very dark years of apartheid. And it was those organizations and [their] work that made it possible for a number of us who were anti-apartheid activists to become actively involved in helping to keep the flame of justice alive during the last couple of decades of apartheid and in enabling a

number of white South African lawyers who were anti-apartheid activists to become actively involved on the South African judiciary."

A quiet, unassuming man, Justice Goldstone has been called on for many critical international assignments. He was the chief prosecutor for war crimes tribunals for the former Yugoslavia and Rwanda. He chaired the international independent inquiry into alleged war crimes in Kosovo. More recently, he was one of the three members of the committee that investigated evidence of corruption in the United Nations Oil for Food Program in Iraq.

In his introduction of Goldstone, Robbins quoted from Goldstone's Book, *For Humanity*. After describing a low-level helicoper flight into Sarajevo sitting on his flack jacket to be protected from gunfire from below and observing mile after mile of burned-out homes, he wrote this, "The havoc and misery that humans are capable of inflicting on others continues unabated from century to century. Most of us lament this fact, but we have little opportunity to change it. A few step up to meet the challenge and make a difference."

As Robbins observed, Richard Goldstone is clearly one of those a persons. ♦

BON MOT:
***Justice Goldstone**, describing the reaction to the ruling that the death penalty was unconstitutional.*

The next day [after the Court found the death penalty unconstitutional] . . . the former President de Klerk, [who] was now a deputy president to Mandela. . . said publicly on television. . . , "I'm disappointed at the decision of the Constitutional Court. I understand it. I don't suggest it's wrong, but I would suggest we have a referendum. . . . I'm convinced that the majority of our people, black and white, want the death penalty, and if we had a referendum and I'm proved correct, we should amend the Constitution and allow for the death penalty."

President Mandella . . . a couple of hours later, said, "I'm surprised to hear one of my deputy presidents suggest that we rule by referendum. . . . I thought we had agreed on constitutional democracy, with a Bill of Rights that all laws were tested, against. But if we're going to rule by referendum . . . , let's have a majority out there. . . . Let's have two questions in the first referendum, not one.

Question one: By all means, the death penalty. If the majority of our people want it, we'll amend the Constitution and allow the death penalty.

"Question two," he said, "We should ask the majority of our people whether white South Africans should be allowed to keep the property they have acquired in the last 350 years."

Well, there has never been another suggestion of a referendum in South Africa.

College Creates Ad Hoc Committee On Judicial Independence

Responding to the rising level of attacks on judicial independence and the accompanying impact on the principle of separation of powers, the College has created an ad hoc committee to produce a "white paper" for presentation to the Regents, setting out the College's position on this fundamental issue.

It is intended that this position statement will enable the College leadership to take timely positions at the national level in both the United States and Canada and provide a basis for authorizing state and province committees to do likewise whenever a threat to the independence of the judiciary surfaces at any level.

The Committee, appointed by outgoing President **James W. Morris, III** with the approval of the Executive Committee is chaired by **Robert L. Byman**, Chicago, Illinois. Its members are: **Terry O. Tottenham**, Austin, Texas: **Michael A. Pope**, Chicago, Illinois; **William T. Hangley**, Philadelphia, Pennsylvania; Regent **Philip J. Kessler**, Detroit, Michigan; **Edward W. Madeira, Jr.**, Philadelphia, Pennsylvania; Judicial Fellow and United States District Judge **Barbara M. G. Lynn**, Dallas, Texas; and Past President **E. Osborne Ayscue, Jr.**, Charlotte, North Carolina.

In order to insure that in framing this position paper the committee takes into account all the potential manifestations of threats to judicial independence at any level of the judiciary, Fellows who become aware relevant incidents in their states or provinces are being encouraged to bring them to the attention of the committee Chair. ♦

BON MOT:
Federal Judicial Center Director
Barbara J. Rothstein

The first [Federalist] target that was picked for impeachment [by the Jeffersonians] was an easy one. In fact, it was almost a comical one. It was a judge . . . on the Supreme Court. He had been on the Supreme Court of New Hampshire before. There was no question in anybody's mind that he was mentally ill. This man really had serious mental problems, and it was all compounded by the fact he was also an alcoholic. He had, indeed, been moved from the New Hampshire Supreme Court to be a Federal court judge because they figured he would do less harm there, and they needed to get him out of harm's way.

Oh, we have had our share of arrogant judges, and we have had judges who have ruled arbitrarily, and we have had judges who didn't keep up on the law and didn't get properly prepared. Every trial lawyer has horror stories, or just amusing ones, of judges who have done silly things from the bench. And actually we feel that's part of our mission, because if we didn't, what would trial lawyers talk about?

In Memoriam

THE COLLEGE HAS RECEIVED NOTICE OF THE DEATHS OF THE FOLLOWING FELLOWS:

Ralph C. Dell, Tampa, Florida, inducted in 1968, died November 19, 2005 at the age of 82. He received his undergraduate and law degrees from the University of Florida. He had served as a member of the Board of Governors of the Florida Bar. He had also served on numerous corporate boards and was involved in a variety of civic activities, as well as serving as an elder and clerk of the session of the First Presbyterian Church of Tampa. A widower who had remarried, he is survived by his second wife and several children and step-children.

Edward Digardi, Oakland, California, 1969, died in October 2005 at the age of 86 after a twenty-two year battle with cancer. A decorated naval officer in World War II, he had survived the sinking of his destroyer, spending three days in shark-infested waters before being rescued. Many of the men he served with perished, his son related, and, "That day, he thought he was a dead man. From that day on, he figured it was free time." A graduate of the University of California at Berkeley, and of the Hastings Law School, he was a plaintiff's lawyer who in a fifty-year career tried approximately four hundred cases. A former partner described his battle with cancer thus, "He would just not give up. He treated his disease like he did his trials." He is survived by a wife and three children.

John A. Donovan, Jr., Boston, Massachusetts, 1992, died November 21, 2005. A graduate of Williams College, he received his law degree from Boston College Law School and his master's degree in law from Georgetown Law School. An avid golfer, skier and hiker, he was a founding partner of Donovan and Hatem. He is survived by his wife, five children and two step-children.

Richard Alfred Foxx, Rancho Mirage, California, 1986, an Emeritus Fellow, died in November 2005 at the age of 87. Graduating from UCLA in 1940, he entered the Navy V-12 program at Northwestern and served on the aircraft carrier USS Saratoga in World War II, leaving the Navy in 1946 as a lieutenant commander. He then attended law school at the University of Southern California, graduating in 1950. Practicing in Los Angeles, he was a founding member of the Los Angeles chapter of ABOTA. He is survived by his wife of 54 years and two children.

Maurice J. Garvey, Chicago, Illinois, 1985, died in May 2005 of lymphoma at the age of 71. A former Marine lieutenant, and a college baseball player, he was a graduate of St. Joseph's College of Indiana and of Marquette University Law School, graduating second in his class. An Irish tenor noted for his sense of humor, he specialized in medical malpractice defense. The headline in his obituary in the Chicago Daily Law Bulletin referred to him as the "Dean of the Defense Bar." He is survived by his wife and six children.

Louis F. Racine, Jr., Pocatello, Idaho, 1962, died August 17, 2005. Born in 1917, he received his undergraduate and law degrees from the University of Utah. Valedictorian of his 1940 law school class, he attained the rank of captain in the United States Navy. He served as president of the Idaho State Bar and in 1985 received its Distinguished Lawyer of the Year Award. He is survived by his wife and one daughter.

Chief Justice William B. Rehnquist, Washington, D.C., 1989, an Honorary Fellow of the College, died September 3, 2005 of thyroid cancer at the age of 80. He was appointed an Associate Justice by Richard M. Nixon in 1972 and as Chief Justice by Ronald Reagan in 1986. The second oldest Justice to preside over the Court, he was the second to preside over a presidential impeachment proceeding. He emerged from the hospital after his cancer was diagnosed and went to work the next day, and he continued to perform his duties on the

IN MEMORIAM, con't on page 24

Court to within a few days of his death. He had last appeared on a College program at the 50th Anniversary Meeting in Washington, DC in 2000, when he participated in a panel discussion with his counterparts from Canada and England.

Jimmie B. Reynolds, Jr., Jackson, Mississippi, 1991, died January 6, 2006 after a lengthy illness. Born in 1944, he was a graduate of Mississippi College and the University of Mississippi Law School, where he was editor-in-chief of the law journal. He had served as president of the Mississippi Defense Lawyers Association and was an original member of the Supreme Court of Mississippi Committee on Rules. He is survived by his wife, two children and two stepsons.

Henry Day Salassi, Jr., Baton Rouge, Louisiana, 1986, died October 1, 2005 at the age of 69. A 1959 graduate of Louisiana State University, he served on active duty for three years as an officer in the United States Air Force. Returning to law school, he graduated from LSU Law School in 1967, serving as associate editor and managing editor of the law review. He was an adjunct professor of law at LSU, teaching trial advocacy and pre-trial litigation and in the school's litigation clinic. He is survived by his wife and several children and stepchildren.

Lester Furr Summers, New Albany, Mississippi, 1981, died December 16, 2005 at the age of 79. He earned his undergraduate and law degrees from the University of Mississippi, where he was associate editor of the law journal. He served in the United States Army and was an officer in the Army Reserves. A former president of both the Mississippi State Bar and the Mississippi Bar Foundation, he had received the Bar Foundation's Professionalism Award in 2001 and the Mississippi Bar's Lifetime Achievement Award in 2002. An avid reader, a sailing enthusiast and an Eagle Scout, he was for many years a Scoutmaster and a church school teacher. He is survived by his wife of almost fifty years and three children.

The College has also received word of the deaths in 2005 of two Emeritus Fellows, **William B. Lee**, 1974, Pittsford, New York and **Robert T. Skipworth**, 1972, who practiced in Rochester, New York. No obituary information was available for either as of press time. ♦

Recent College Publications

AMONG THE RECENT PUBLICATIONS APPROVED BY THE BOARD OF REGENTS ARE:

Annotated Code of Trial Conduct, A Manual for Trial Practitioners and for Use as a Teaching Aid. These materials were prepared by the Legal Ethics Committee of the College. They include a teaching supplement. In addition to the current Legal Ethics Committee members, the following former committee members authored the original draft of this manual; John Gianoulakis, R. Joseph Parker, Alan T. Radnor, Thomas L. Shriner, Jr. The publication is designed to provide Fellows with prepared materials for conducting interactive programs on the Code of Trial Conduct.

Supplemental Report on Military Commissions for the Trial of Terrorists. This report is a follow-up to the original report published in 2003 by the International Committee. Since the original report there has been a raft of federal court litigation challenging the Commissions and the detention of the alleged terrorists. However, no Commission trials have occurred. This report summarizes the principal events that have occurred with respect to the Commissions and the detention of terrorists. The supplemental report is authored by **Richard T. Franch** a member of the International Committee.

Trial Ethics Teaching Program Manual Canadian and U.S.. A template has been developed by the Legal Ethics Committee and Canada – U.S. Committee for use by Fellows of the College in presenting litigation ethics issues to law students in the U.S. and Canada. These materials were initially prepared by a subcommittee of the Legal Ethics Committee composed of John Gianoulakis, Michael Loprete, Daniel Land, John McElhaney and Alan Radnor. The Canadian manual was developed by a sub-committee of the Canada – U.S. Committee led by Earl Cherniak.

COPIES OF THESE PUBLICATIONS ARE AVAILABLE FROM THE COLLEGE OFFICE OR FROM THE COLLEGE WEBSITE.

Profile: Henry G. Miller

ACTOR, PLAYWRIGHT, AUTHOR, TRIAL LAWYER

Most people would be satisfied with mastering just one, but Henry G. Miller is successful at all four.

Outside of the courtroom, Miller of White Plains, New York is best known for his one-man portrayal of Clarence Darrow, a role he created six years ago and one he performed for the College in 2002 at the Annual Meeting in New York City.

A Fellow of the College since 1975 and a Regent (1988-92), Miller had been an actor as an undergraduate at St. John's University. He graduated in 1952, went on to Columbia University and New York University before returning to St. John's Law School for his L.L.B. in 1959.

Through the years, he never lost the acting bug and after being president of the New York State Bar in 1984-85 he started appearing in White Plains productions. "I studied with Stella Adler and I was in a few shows, including one of my own called 'Lawyers,' which entitled me to join Actors Equity," Miller said.

He has appeared Off Broadway in a Harold Pinter play and a Clifford Odets play and has performed monlogues that he wrote. He also has written a one-act play called 'James Joyce Comes Home.'

Through it all, he has continued his one-man Clarence Darrow show, which he created for a meeting of The Association of the Bar of the City of New York to accompany a showing of the movie, 'Inherit the Wind.'

He started off with a half-hour recitation there and repeated it at several other venues, but in November 2005 he expanded it to an hour and a half for six performances in White Plains and now has plans to take it Off Broadway. He also has other projects underway, including a play he wrote on Stella Adler.

His book, "On Trial—Lessons from Lifetime in the Courtroom," was published in 2001. In addition to his membership in Actors Equity, he belongs to the Dramatists Guild.

"I have done plenty of research on Darrow," Miller said. "I have heard (recordings of) his voice and I would describe it as flat Midwestern."

He has twenty-five books on the Chicago lawyer and read most of his writings "He is amazingly relevant today," Miller said. "On creationism (as in 'Inherit the Wind'), the audience can't get enough of that; with the Leopold and Loeb and the fight against the death penalty; the fight against big business and the excesses there. The fight for the working man remains very current."

Asked how he finds the time to act, write and practice law, he says, "I don't play golf. It's a matter of apportioning your time. If I'm not on trial or I don't have a meeting, I can usually steal a few hours to work on these things, particularly early in the morning before I have to come to the office."

In the courtroom, Miller is passionate, but not flamboyant, says Lucille Fontana, a partner who has worked with Miller 24 years at Clark, Gagliardi and Miller in White Plains.

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FELLOWS OFFER ADVICE ON HANDLING

High-Profile White Collar Criminal Cases

Moderator Robert W. Tarun

A panel moderated by Regent **Robert W. Tarun** of Chicago presented a professional program entitled High-Profile White Collar Criminal Trials in the 21st Century at the College's annual meeting in Chicago.

The participants were: **Robert G. Morvillo**, New York, New York, who had represented Martha Stewart in her recent trial; **Reid H. Weingarten** of Washington, D.C., who had defended Bernie Ebbers, chairman and CEO of WorldCom, and **Sally Quillian Yates**, First Assistant United States Attorney in Atlanta, Georgia, who is currently prosecuting the former mayor of her city..

The panel explored a number of areas that typify the high-profile criminal trial. The subjects, and some of the panel's observations were::

- **Grand jury leaks.** The sources are most often witnesses who are not bound by grand jury secrecy rules. The participants agreed that government attorneys are rarely the source of leaks because of potential contempt proceedings. Defense counsel suggested that, on the other hand, FBI personnel are "masters" in poisoning the atmosphere in high-visibility cases.

- **Client's public statements while grand jury is proceeding.** Defense counsel pointed out the danger of making admissions or false exculpatory statements and the possibility that the court might impose a gag order. From the prosecutor's point of view: "We seldom have the crime on videotape. The next best thing to the defendant committing the crime on tape is lying about it on tape, . . . because in white collar cases the issue most often comes down to the issue of intent. It's not so much, "Did he do it or not do it?" but "What was he thinking about at the time that he did it?" Intent is a very difficult thing to prove, but if the defendant is out lying about his conduct, particularly in a pre-indictment context, he can provide us with that . . . evidence of criminal intent that we may be lacking in otherwise or that we have a hard time finding something concrete to put in on trial otherwise." Defense counsel noted that a defendant who is a public figure may feel that protecting his public position is, nevertheless, more important than risking indictment.

- **Submitting to client interviews or appearing before the grand jury.** The consensus was that a defen-

dant should never appear before the grand jury. There are other ways to give the prosecutor a look at the potential defendant. This is where defense counsel's advocacy becomes important.

- **Jury consultants.** The government does focus groups and mock trials, but does not usually do polling. Defense counsel were divided on the value of consultants. One felt they help counsel to focus, the other felt that the effect of a mock trial or a focus group could be to distort reality. Both agreed that the defendant should not participate in a mock trial, since it is unclear whether what he or she says in that proceeding would be privileged.

- **Jury profiles.** There seemed to be an unspoken feeling that jury profiles are a guessing game, albeit a necessary one.

- **Dealing with the press.** The government's rules limit what it can do. Defense counsel see as important making sure media reporters understand what is going on. Nobody thinks that the jury is not influenced by news coverage; there is an assumption that they are exposed to it. Having a public relations person to handle the daily contacts with the press is helpful. It relieves counsel of an unneeded burden. Being helpful to reporters who have a job to do helps. There was general agreement that the new cable television "talking head" kibitzers distort reality. Intense media coverage is seen by defense lawyers as a negative for defendants. The public dotes on bad news. The prosecutor saw it differently: publicity builds up an expectation of blockbuster prosecution evidence, and not multiple small pieces of a puzzle.

- **Putting the defendant on the stand.** The jury expects it in a high-profile case, but you have to evaluate what you have to gain or lose. This is a decision to be made at the last minute, based on preparation from day one. The sentencing guidelines, with their enhancement if a defendant's testimony is inconsistent with the jury verdict, is a major deterrent. The media may spot inconsistencies between testimony and matters not in evidence, and their accounts may poison the jury.

- **Difference from the ordinary criminal case.** There was general agreement that the high-profile white collar case is vastly different from the ordinary criminal case. Judges behave differently; witnesses behave differently; the media behave differently; parties behave differently; counsel behave differently. ♦

Robert G. Morvillo

Reid H. Weingarten

Sally Quillian Yates

Counsel For Guantanamo Detainee Recounts His Experience

[Editors' note: The College has a long history of not flinching from airing controversial issues so that its members can be better positioned to make informed judgments about them. Recent examples are national programs that included presentations on the debate over the United States' withdrawal from participation in the proposed International Criminal Court, the litigation over the 2000 presidential election and the attempted impeachment of President William Jefferson Clinton. The Chicago address of Joseph Margulies, who represented a Guantanamo Bay detainee from February 2002 until his release from custody in January 2005, continues this tradition. As always, the Bulletin welcomes expressions of opinion on this issue, either in the form of letters to the Editor or op-ed type articles.]

Joseph Margulies

Joseph Margulies, currently Lecturer in Law at the McArthur Justice Center at the University of Chicago School of Law, who was lead trial counsel for Mamdouh Habib, one of the movants in *Rasul, et al v., Bush, et al*, addressed the annual meeting of the College in Chicago about his experience in representing this Guantanamo detainee.

On June 28, 2004, the United States Supreme Court had held in *Rasul* that United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay and it remanded the case to the trial court for further proceedings.

Margulies had undertaken to represent Habib, an Australian citizen captured in Pakistan, in February 2002, a few weeks after January 11, 2002, when the first detainees arrived at Guantanamo. At that time, 9-11 was so recent that highly respected firms that regularly took on death penalty cases without qualms wanted no part of this representation.

Indeed, Margulies' co-counsel in both the United States and in Australia received death threats because of their representation.

Margulies carefully framed the issue in *Rasul* as follows: "[W]hether, and to what extent, there is a role for the judiciary in policing the bounds of the Commander-in-Chief's power to detain people held in connection, or ostensible connection, with the War on Terror. . . . [T]he issue is not, and has never been, whether the Administration has the authority to detain people in connection with this conflict. The question is not whether you may detain them *vel non*. The question is, may you detain them beyond the role of the judiciary, that is whether, and to what extent, the judiciary has a role."

He outlined the Administration's position as follows: "[I]t has the power to seize any person from anywhere. . . . What 'any person' means is that in this context, where typical and conventional notions of 'enemy' and 'ally' break down, you cannot define a person's hostility by his nationality. And so, therefore, you may seize any person of any nationality wherever they may be located. And the reason you can go wherever they may be located is

that . . . terrorism is a transnational phenomenon that knows no geographic or citizenship boundaries, and so, therefore, when you identifying a person you perceive to be evil, perceived to be somebody who's a threat to the United States, you must have a right to seize that person wherever they are and whoever they may be, even without the permission of the host government."

According to Margulies, it is the position of the Administration that the Guantanamo detainees, of forty different nationalities, seized from all over the world, who have been designated as "enemy combatants," a term generated for this purpose and not defined by treaty or international convention and having no fixed meaning in international law, "have no rights under domestic or international law, under the laws of war, international humanitarian law, international human rights law or domestic constitutional law." As a consequence, in the Administration's view, they may be held "for as long as the President sees fit, under any conditions the military may devise, without charge, without counsel, incommunicado if the military sees fit, for an indefinite period . . . as long as the War on Terror is deemed to persist."

It was therefore to test, not whether the Administration had the right to detain persons held in connection with the War on Terror, but, rather, whether the judiciary has any role in testing the allowable bounds of that right that Margulies brought the *habeas corpus* proceeding on behalf of Habib in the United States District Court in Washington, D.C. That petition ultimately found its way to the Supreme Court as a companion case in *Rasul*.

After laying out this background, Margulies focused on one issue raised by such detentions, one that has yet to be litigated, the idea that the detainees "may be held under uniquely severe conditions." He noted that "for the first time in modern U. S. history, an Administration has determined that it will not be constrained by the Geneva Conventions or the U.S. Army regulations governing the treatment of captured personnel."

In an aside, Margulies pointed out that this is not a political issue. He noted that once-secret documents relating to this issue had been placed in the Congressional Record by Senator Lindsay Graham, a former JAG officer, that the charge in Congress to rein in the Administration's policy was being led by Senators Warner and McCain and that former Secretary of State Colin Powell is known to have resisted the policy as well, all four of these being members of the President's own party.

MARGULIES FOCUSED ON ONE ISSUE RAISED BY SUCH DETENTIONS, ONE THAT HAS YET TO BE LITIGATED, THE IDEA THAT THE DETAINEES "MAY BE HELD UNDER UNIQUELY SEVERE CONDITIONS."

He opined that the heroes in this conflict are not the lawyers who brought the litigation, but "the people working on the inside, struggling to prevent this from happening, and mostly those people are the Judge Advocate Generals of the different branches of service . . . ."

Listing the detention centers known to exist, only one of which, Guantanamo Bay, is accessible to lawyers, he described them as attempts to create the "ideal interrogation chambers[s]." Looking back, he noted that although "the history of noncompliance with the Geneva Conventions is, unfortunately internationally rather robust," the United States had resisted the public outcry to suspend the Conventions in retaliation for atrocities committed on captured United States servicemen by North Korea in the 1950s and Japan during World War II, saying, in effect, "This is not about who *they* are; it is about who *we* are."

Describing some of the methods that have been utilized in the existing interrogation centers, all of which have been described in detail in recent news

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accounts, he referred in passing to the issue of the enforceability of minimum restraints, such as the Conventions, on the treatment of prisoners and the role, if any, of the judiciary in that enforcement as a separate legal question, which he would not undertake to address.

Instead, he addressed two issues: 1. whether, regardless of how we treat them, the detainees are indeed who we believe them to be and how we go about determining that and 2. why we lawyers should care.

He noted that the hypothesis of Guantanamo, the reason it exists, is that, lacking reliable intelligence, we created it and other detention centers to allow us to interrogate, at a place outside the United States, detainees captured not only in Iraq and Afghanistan, but also in other parts of the world. Thus, he noted, it is not surprising that many people familiar with the situation, "including former interrogators, former military police, former leadership at Guantanamo Bay, the current Deputy Commander at Guantanamo Bay, have all said that the majority of the people there are either innocent or harmless."

"Why Should We Care?"

He addressed this issue, saying, "[M]y view . . . a view that we have pressed since the litigation in *Rasul* began, . . . can be stated very simply: that liberty is, and should always be, a judicial question, that the government alone, that the Administration alone, the Executive, cannot be permitted to imprison people and hold them under these conditions unless it first demonstrates by a fair process, by a process that comports with the core irreducible minimum of due process of law, that the prisoner is the person you believe him to be, that he belongs in custody.

"If you are going to create these uniquely severe conditions, you must come into, before, a neutral court, and for us that means a Federal court, and demonstrate that this person is who you believe him to be. . . ."

"Our litigation," he remarked, "has not focused on the Administration's authority to seize. It is our judgment that that gets into, - that's a step the judiciary is not likely to go. Now there is an exception to this, and that is the very controversial practice known as 'extraordinary rendition,' the idea, you know, people call a 'snatch-and-grab' operation. You pluck a person from one place and you send them to another country, a third country, for interrogation. In fact, Habib was picked up in Pakistan and transported by a U.S. transport to Egypt where he was tortured for six months."

He observed that: "[R]egardless of how many, what fraction, of the people are the ones that the Administration describes as the 'worst of the worst,' regardless of whether there are some, whether there are a number, whether there are many, or whether there are only a handful, the fact is none of them, and now after three and one-half, nearly four years of the prison's existence, none of them have been shown to be deserving of this treatment by a fair process. The Government has yet to defend a single post-9/11 detention in Federal court. . . . Instead, we are told that we must take the Administration's word for it, . . . that the unilateral judgment of the President alone is sufficient to justify both the continuation of the detention and the conditions of under which it operates."

Moving to his second question, "Why should we care?" a question to which he gave a two-part answer: "I would suggest that . . . this group . . . has to care on at least two levels. And the first

level is the level that speaks to us, as lawyers, as trial lawyers, and as officers of the court. It is captured by the words of Thomas Jefferson . . . in the Kentucky Resolution . . ., 'Let no more be said than of confidence in man, but bind him down from mischief by the chains of the Constitution.' . . . That was what was said in response to the Sedition Acts, which were so horribly misused by the Federalists. And the point then was that you should trust the Administration, you should trust the President, to exercise the power given to him, to exercise it wisely. And Jefferson's point was–and the point doesn't go away–that we do not simply trust in them, notwithstanding whatever amount of good faith they may bring to the table. The point is, we 'bind him down from mischief by the chains of the Constitution.' That replaces the need to simply take faith in what the President says. The question is not whether the President believes that people at Guantanamo are the folks he says they are. That is not his role. That is the judiciary's role.

"The second level at which this speaks to us . . . is the level that speaks to us as human beings, is the level that reminds us, and reminds me, why we became lawyers."

"As I got up to leave," Margulies continued, " . . . he put his hand on my forearm like this, and he said, 'I'm dying here, Joe. I'm going to die.'"

To bring home his point, he described his representation of Mamdouh Habib. He first met him in November 2004, two years and nine months after he had been retained by Habib's relatives to appear on his behalf and five months after the Supreme Court affirmed his right of access to the United States court system. He found him in a state of apathy, having given up hope of ever going home. Margulies was the first person other than an interrogator or a guard to whom he had spoken in over three years. After satisfying Habib that he was who he was and showing him the petitions he had filed on his behalf, Habib authorized him to continue to act on his behalf. "As I got up to leave," Margulies continued, " . . . he put his hand on my forearm like this, and he said, 'I'm dying here, Joe. I'm going to die. They're never going to let me go home.' And I sat back down, and I didn't know what to say. I hadn't prepared myself for this, and he had fallen into what Camus called the 'pit of despond.' He had given himself up to this dark and foreboding fear that he would live out his days there."

Skipping over the proceedings that led to Habib's release two months later, on January 28, 2005, he continued, "I had the privilege of boarding a plane at Guantanamo, a private jet chartered by the Australian government, and picking up Mamdouh and flying home with him to Sydney, Australia. . . . And we walked down the stairs of this plane, and across the tarmac, and up the steps of another very small prop plane that my local counsel in Australia . . . had chartered to take Mamdouh . . . to a small little neighborhood field to avoid the scrum of media that was there. . . . And as Mamdouh walked up the steps of the plane, he looked in the back of this little five-seater and he saw his wife, who he hadn't seen for over three and one-half years. . . .

"I've been a death penalty lawyer for many years. I've been a civil rights lawyer for many years. I have had a number of proud moments as a lawyer, and I've seen a number of disaster moments as a lawyer. That was the most gratifying experience that I have ever had in my professional career. It was not the moment that I got a call from the Australian embassy saying, 'Mamdouh is going to be back home.' It was the moment that I saw my client reunited with his wife, who he had been told was dead by American interrogators. It was that moment that I realized this is what we need to do."

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HENRY G. MILLER, con't from page 25

"He tends to be quite humble and occasionally passionate in his opening and summation, particularly in his summation," she said. "And on his cross he often does an exhilarating good job. He's known mainly for the plaintiff cases, but he's also known for some astonishing defense verdicts." Fontana said that in one such case, a jury found a person not liable who had actually pled guilty. A school bus driver had been accused of sexually molesting students, but Miller proved it could not have happened.

Miller has said there are many parallels between acting and being a trial lawyer. "But there is a danger in both disciplines—in the stage and in the trial. Theatricality is the danger because it's false. And as a trial lawyer you have to be real. There can't be anything phony because people will see right through you."

Miller also had lectured at St. John's law school and written extensively about legal matters. He still treasures his College membership."I have loved being in the College," he says. "It has been a good group and I have made really fine friends all over the country."

What lies ahead for him?

"I will continue to be a trial lawyer," he said. "The law has been good to me and I still enjoy trying cases, but I do hope to have more chance to expand and get a little more writing done and get a little more acting done before I pass on. That's my hope."

Miller has recently acquired one more thing to keep him occupied. A remarried widower, he and his wife, Dawn Baker Miller, recently became the parents of a daughter, Anna Marie Miller. ♦

Henry Miller Book Excerpts

ON TRIAL. LESSONS FROM A LIFETIME IN THE COURTROOM

(On Trial was published in 2001 by ALM Publishing, a division of American Lawyer Media, Inc. It is a 163-page compilation of columns that Miller wrote for the *New York Law Journal*.)

"Forget yourself. You're not important. Think of the case. The case is important."

"Any problems in your case? Talk about them in jury selection and opening. Don't be slick and hide. Any bad documents that you know are admissible? You'd better offer them. Be up front. Win the jurors' trust. They're looking to see if you are trustworthy. They want integrity. This approach will serve you well all your career."

"Talk as if you are a human being. Remember life before law school, We said 'loss of money,' not 'pecuniary detriment.' The jury will not thank you for saying 'testamentary capacity' when you might have said 'sound mind and memory.' . . . Remember: Before we were lawyers, we were human beings."

"Only when we are at one with our clients can we truly represent them. We can then say for them what they cannot say for themselves. This is the very essence of being a lawyer. It is pure advocacy."

"The word 'I' should not precede every single sentence in a summation. It is not you but your client that counts. Humility is still the trial lawyer's best friend. We shouldn't take ourselves too seriously. A touch of modesty does wonders. It often melts resistance. It also makes defeat easier to bear."

"A little *pro bono* might enrich the spirit and result in your defending an indigent accused of crime. Variety might spice an otherwise dull trial term. Civil rights and environmental lawyers never seem to tire of their labor. The case that stretches us beyond our ordinary niche may be the only one that nourishes our deepest needs and rejuvenates our spirit."

"Conclusion: Keep fit, be ethical, take vacations, have many interests, laugh, do not take yourself too seriously, love your work, be creative, face up to hard problems. Not a bad prescription. Come to think of it, it is not a bad way to get through life for anyone—whether you are a trial lawyer or just a normal human being."

Students Competition Winners

HONORED AT CHICAGO MEETING

The College honored the winners of all four of the College-sponsored student competitions its 2005 Annual Meeting.

TRIAL COMPETITIONS

LAURA MARR

Laura Marr and **Krista Smith**, Dalhousie University, Halifax, Nova Scotia, were the winning team in the Sopinka Cup Competition, the Canadian Trial competition. Commenting on the role of Fellows in the competition, Marr, the best overall advocate in that competition, remarked:

"[I]t's one thing to read about great arguments in cases. It's entirely another to meet the people that make those arguments and to have the experience of shaking their hand while they welcome you into this great tradition of advocacy. That is what will stay with me for the rest of my career."

Melissa Lyons, **Kathryn McCann** and **Brian Ward**, Loyola Law School, Los Angeles won the Kraft W. Eidman Award as the winning team in the 30th National Trial Competition, co-sponsored with the Texas Young Lawyers, in which 135 law schools competed. This competition was the idea of College President-Elect David J. Beck when he was president of the Texas Young Lawyers.

Addressing the Fellows, Jamaican native Lyons, the winner of the George A. Spiegelburg Award as the best oral advocate, observed:

"Without . . . the American College, competitions like this would start to disappear, and without the competitions, the trial advocacy programs at schools would start to dwindle. And once those programs dwindle, then that experience is lost to those students. . . .

"It's important that the American College continues to support these competitions so that students will be able to see that there are attorneys out there that have achieved great levels of success without sacrificing their ethical character, their moral character. It's important for young aspiring attorneys to know that organizations committed to making sure and revamping the image of the legal community as one that is professional, one that is civil, and one that is full of passion and compassion. . . .

MELLISSA LYONS

"It's important that you, not the College in general, but you as also individuals, participate in this competition, whether it be as judges or as mentors, so that we can then, as young attorneys, take over the trial world and make the legal profession something that people can now be proud of . . . ."

STUDENTS HONORED, con't on page 34

STUDENTS HONORED, con't from page 33

MOOT COURT COMPETITIONS

Leah K. Bolstad, **Mark D'Argenio** and **Eliza Hoard**, University of California, Hastings College of the Law, San Francisco, were the winning team in the 55th National Moot Court Competition, jointly sponsored with the Association of the Bar of the City of New York. Indeed, the top two teams in their region were from Hastings, but only one was allowed to advance.

LEAH K. BOLSTAD

Bolstad, the winner of the Fulton W. Haight Award as the best oral advocate in the competition, commented,

"[T]he purpose of the National Moot Court Com[petition is to teach the art of appellate advocacy. Many other competitions purport to do the same, but this competition stands out. . . . [T]he quality of judging is superb . . , thanks to the participation of lawyers from among your ranks. . . . [S]tudent participants benefit immensely from receiving feedback from the nation's top attorneys. Another reason . . . [is] what this competition consistently does is pose questions that are the most intelligent and deliciously complex that the legal world has to offer, and we enjoy the challenge."

John Adair, **Yousuf Aftab**, **Mark Elton** and **Amy Salyzyn**, University of Toronto, were the winners of the Brian Dixon Medal in the Canadian Gale Cup Moot Competition. This team went on to defeat teams from 11 other countries in the Commonwealth Competition in London, defeating the team from England in the final round.

Pinta Maguire of York University Osgoode Hall Law School was the winner of the best oral advocate award in the Canadian Moot. In accepting, Maguire told the Fellows:

"I had wanted to be a lawyer since I was 6-years old when my mother, exasperated with my unwillingness to not take 'No' for an answer, decreed that such an argumentative child must have a future as an advocate. . . .

"I want to be a role model for young ethnic women, so that they too can know that all you need is a goal and a belief in yourself, even when others tell you it cannot be done. I'm proof positive that you can realize your dreams, no matter how big. I would like to conclude by thanking the College, yet again for their generosity inviting me to this wonderful event, and I would like to acknowledge my mother, because it was her unending strength and indomitable spirit that pushed me to succeed. Most of all, she taught me that with hard work and preparation you can do anything you set your mind to." ♦

PINTA MAGUIRE

PROGRAM ON ELECTRONIC SPOLIATION AND SANCTIONS

Provides Heads-Up For Commercial Trial Lawyers

Electronic Spoliation and Sanctions: Is the Sizzle Consuming the Steak? was the subject of a panel discussion at the Fall meeting in Chicago.

Regent **Gregory P. Joseph**, New York, New York moderated a discussion by a panel that included two Fellows who had recently dealt with this issue in high-profile litigation and a Federal judge who had authored a much-discussed ruling on discovery of electronically stored communications and records.

The were:
United States Judge **Shira A. Scheindlin** of the Southern District of New York, the author of an opinion popularly known as *Zubulake* and a member of the Advisory Committee on Federal Rules, whose rules governing electronic discovery have been promulgated and are scheduled to go into effect in late 2006.

Jerold S. Solovy, FACTL, Chicago, Illinois, counsel for the plaintiff in a recent case in which his client recovered $1.5 billion after the trial court entered a default against the defendant on the issue of liability for discovery misconduct based largely on electronic discovery.

Dan K. Webb, FACTL, Chicago, Illinois, whose client had been sanctioned when eleven of its employees failed to comply with document preservation instructions during the pendency of litigation.

Judge Scheindlin briefly outlined the subjects of the new rules, touching first on the requirement that counsel meet and confer at the beginning of a case to discuss preservation of evidence, how electronic evidence will be retrieved and produced and how privilege issues will be resolved.

She then moved quickly through the discovery of electronically stored information, the preservation of the privilege and the handling of waiver, the handling of "inaccessible" electronically stored information and the "safe harbor" provision for destroyed data.

Solovy described the history that led to the entry of default against his opponent on two issues of liability, leaving his client to prove only reliance and damages.

Webb described how the failure of employees of his client to take evidence preservation instructions seriously led to a sanction of $2.7 million against his client and the preclusion of the testimony of its offending employees.

Webb left the audience with a pointed message: "[A]s a trial lawyer, you have got to get your head into e-mail discovery issues. You have got to get down at 2,000 feet, not at 20,000 feet, and even if you think you have worked out a good procedure. . . . Things can go wrong, and you've simply got to take every precautionary measure you can, because the honest-to-God truth is in the judiciary . . . today, there's an attitude that, when big companies screw up and e-mails don't get produced, I don't care what the problem was, I don't care about the nature of e-mails and all these storage problems, if you don't produce what you should produce, there are going to be pretty serious consequences. And . . . as a commercial litigator representing companies with a great deal at stake, you simply can't afford to let happen what unfortunately happened to me and you have got to prevent it." ♦

Israel-Palestine Conflict Examined by Negotiation Analyst

[Editor's note: This presentation was made before both the disabling stroke suffered by Israeli Prime Minister Ariel Sharon and the recent Palestinian elections. Though some of the facts have since changed, Professor Mnookin's analysis of the forces at work in the Israeli-Palestinian conflict remains essentially valid.]

Robert M. Mnookin

In many ways today is both a time of hope and a time of some despair in the ongoing Israeli-Palestinian conflict , Professor **Robert M. Mnookin** told the Fellows at the Annual Meeting in Chicago.

Mnookin is Samuel Williston Professor of Law at Harvard Law School and director of the Harvard Negotiation Research Project. He has been studying the Israeli-Palestinian conflict for the past three years.

He observed that most observers feel it reasonably clear that a two-state solution would serve the interests of most Israelis and most Palestinians. In such a solution, East Jerusalem would be the Palestinian capital and the remainder of Jerusalem the Israeli capital. Israeli settlers would have to be evacuated from the West Bank, Palestinians would have to give up their claim to a right of return to the land they occupied before the creation of Israel, and some minor territorial adjustments would be required along the border between the two states.

In spite of this obvious solution, the often violent conflict continues. Mnookin finds the explanation of this apparent paradox in internal conflicts among both the Israelis and the Palestinians.

The internal conflict among the Israelis, which has been the subject of open political debate in that nation, centers on the settlement project. If the settlers remain, there can be no two-state solution. Among the Palestinians, the conflict centers on the right of return. If substantial numbers of Palestinians were to return to what is now Israeli territory, the demographic balance there would be upset.

The Israeli settlers fall into three groups. One half live on the West Bank because it offers cheap housing, commuting to work in Israel itself. One fourth are ultra-orthodox "Black Hats," who are generally poor, who live in closed communities and who are there because that is where their rabbi led them. The other fourth, the driving force behind the settlements, are the "national religious settlers," who see their reoccupying the West Bank as fulfilling the Biblical mandate of the Covenant between God and the Jewish people.

On the Palestinian side, the divisions are less obvious because they have not been publicly debated and because they relate more to class, clan and age. The Palestinian national movement defines itself as a refugee movement, centered on the collective right of the Palestinian people, not merely to compensation for the land seized from them when the state of Israel was established, but also the right to choose to return to what is now Israel. Some Palestinians have no interest in returning. Others insist it is their right.

"There's been a changing Palestinian leadership and Abu Mazen is obviously much more moderate and has consistently publicly denounced the use of violence," Mnookin said in his address. "Prime Minister Sharon achieved something quite remarkable when he unilaterally removed all the settlers from Gaza and in that process the Israeli democracy held. . . . Notwithstanding even the concerns that there could be civil war or much bloodshed, where Jews were fighting Jews, it was done in quite a remarkable way."

"The United States can play a very useful and constructive role here, but I don't think we should assume for a moment that we have got the capacity to impose solutions. I think that's a very dangerous illusion. . . ."

But Mnookin pointed out that the number of additional settlers in the West Bank during the last two years has been more than the number removed. "It took Sharon, the champion of the settlements project, to achieve an evacuation of Gaza, which has limited Biblical significance and religious significance," he said. "I think all of this suggests that much, much, much work remains to be done."

A final solution to the conflict will require sacrifices on both sides, Mnookin said. "For the settlers who are going to have to be evacuated, they are going to have to give up a dream, and that's not easy for people to do. And for the Palestinians, who for generations have suffered in refugee camps to sustain their identify as refugees, to give up the dream of going home for many will be extremely painful."

Both sides will have to make sacrifices for the benefit of the larger society, he said. "Within each community there is a desperate need for better dialogue," Mnookin said. He concluded by expressing the hope that additional unilateral initiatives on both sides of the conflict will lead to that dialogue.

"If, Sharon, during the next couple of years, can evacuate some of those [Jewish settlements beyond "Sharon's fence"], create more contiguous space, even if done unilaterally, I think would be a very good thing.

"If, unilaterally, the Palestinians can do more to restrain violence among their own people, and can have successful legislative elections, and avoid anarchy in Gaza, I think that's plenty to aspire to.

"But I think pressing the people to final status negotiations would be a big mistake."

In the course of his presentation, Mnookin also offered some "modest advice" for the United States. "If Iraq has taught us anything, it should be a certain modesty about our capacity, even with vast American resources, to intervene internally into conflicts to create resolution. . . . [T]he United States can play a very useful and constructive role here, but I don't think we should assume for a moment that we have got the capacity to impose solutions. I think that's a very dangerous illusion. . . ." ♦

Retiring Regents, Committee Chairs Saluted in Chicago

Edward M. Mullins, Jr. of Columbia, South Carolina,
Dennis R. Suplee of Philadelphia and
Sharon M. Woods of Detroit
were honored as retiring Regents at the Annual Meeting in Chicago.

THE FOLLOWING CHAIRS ALSO WERE HONORED WITH PLAQUES IN RECOGNITION OF THEIR SERVICES:

Standing Committees

Chilton Davis Varner of Atlanta, Attorney-Client Relationships
Trudie Ross Hamilton, Waterbury, Connecticut, Award for Courageous Advocacy
Stephen D. Marcus, Chicago, Canada-United States
Lawrence T. Hoyle, Jr., Philadelphia, Complex Litigation
Robert L. Byman, Chicago, Federal Civil Procedure
John J. Kenney, New York City, Federal Rules of Evidence
Philip A. Robbins, Phoenix, International
D. Dudley Oldham, Houston, Judiciary
Paul B. Ebert, Manassas, Virginia, National College of District Attorneys
Richard M. Zielinski, Boston, Teaching of Trial and Appellate Advocacy

State and Province Committees

James D. Gilmore, Alaska (Anchorage)
William H. Sandweg, III, Arizona (Phoenix)
Robert L. Jones, III, Arkansas (Fort Smith)
Thomas E. Holliday, Southern California (Los Angeles)
E. Norman Veasey, Delaware (Wilmington)
Benjamin H. Hill, III, Florida (Tampa)
Robert W. Neirynck, Downstate Illinois (Bloomington)
Thomas R. Mulroy, Jr., Upstate Illinois (Chicago)
Charles E. Moore, Kentucky (Owensboro)
Elizabeth N. Mulvey, Massachusetts (Boston)
Martin J. McGreevy, New Jersey (Oakhurst)
Robert E. Sabin, New Mexico (Roswell)
Charles J. Faruki, Ohio (Dayton)
Terry W. West, Oklahoma (Shawnee)
James J. McKenna, Rhode Island (Providence)
J. Rutledge Young, Jr., South Carolina (Charleston)
Glen Reid, Jr., (Tennessee (Memphis)
C. William Bailey, Washington (Seattle)
Gerald E. Mason, Wyoming (Pinedale)
John J. Hunter, Q.C., British Columbia (Vancouver)

Fellow Surveys Russia's Legal System

*Fellow **J. Dennis Marek** of Kankakee, Illinois spent ten days in Russia in the spring of 2005 as a member of a select committee of 20 lawyers and judges through People to People Ambassadors to interchange with members of the Russian judiciary. He contributed the following summary to **The Bulletin**:*

While scholars can debate the reasons for the collapse of the Soviet Union, it is clear that as Russia enters the 21st century, the legal system will require a modification unknown in previous centuries. With the influx of property rights, laws are needed to define and protect these new concepts. Real estate and mortgages, patents and infringements, major corporate giants and mergers, are but a few of the new legal entities facing Russia.

Russian law slowly ground its way through feudalism, czarism and communism into this century. There are those that believe the present system is little more than criminalism. The privatization that took place in the mid 1990s, where the state sold its industries to a variety of robber barons at rock bottom prices, produced a totally corrupt economy. These purchasers were placed correctly with the new government and to the chagrin of the government quickly transferred the profits of secondary sales out of Russia and reinvested those gains in western Europe. This divestiture of industry by the government left the Russian economic system in a mixture of barter and conspiratorial pricing. The hope of many outsiders of a western capitalism in Russia quickly tempered.

THE PRIVATIZATION THAT TOOK PLACE IN THE MID 1990S, WHERE THE STATE SOLD ITS INDUSTRIES TO A VARIETY OF ROBBER BARONS AT ROCK BOTTOM PRICES, PRODUCED A TOTALLY CORRUPT ECONOMY.

Historical Russia has demonstrated over and over that brute strength is an essential element of government as well as ownership. From the despotic powers of the czar answering only to God, to the amoral legacy of communism with the elimination of individual rights, religion and private ownership, the Rule of Law in Russia has always been one where the written law is only as important as its enforceability. Today, there is a level of criminality at almost every juncture of ownership and enforcement of rights.

In 1991 there were but 20 law schools. At latest count there are now 160. In 1991 there were virtually no laws involving real property, estates, probate, trusts, corporations, mergers, intellectual property, juries, or even the rules of legal representation. In less than 15 years, the need for more and more fully educated lawyers has become paramount in sustaining the legal system. With billions of dollars waiting outside Russia for investment, many international corporate giants are just watching. They won't commit until they are reasonably sure that there is not a reversal in private ownership and there is a protected process for investment such as mortgages with foreclosures and contract enforcement without governmental whim.

To be sure, communism extended the arbitrary character of Russian law and many do blame the amoral basis as a reason for this lawlessness, but this is too simple. The West seems to expect

RUSSIA, con't on page 40

instant progress in the market economy and the development of rights of individuals. This ignores the thousand years of culture our market-based economy has seen with its maturation from federalism to republican democracy. This process has no basis in modern Russia. There were no centuries spent in the development of the common law as seen in England and its progeny. Russia is Russian with all its idiosyncrasies and its "Russian logic."

As Russia approaches these massive changes in not only its economy but also its entire approach to the Rule of Law as a nation, one must remember the point central to any law based society is the revered concept of stare decisis and the entire history of the rule of the case. It took those hundreds of years to develop this common law and the history of development is ingrained in our western society. Yet these concepts we find so basic are still foreign to the Russian courts and lawyers. There is still the belief that each judge or magistrate should view a case within the four corners of the document and not be swayed by prior judges with even similar cases. When an American lawyer was helping with a Russian appeal and cited prior Russian decisions of which he knew, his suggestion was not only disregarded, "foreign" attorneys were not permitted in those courts for a period of time.

J. Dennis Marek

Coming from a litigious society, as we do, Americans find the Russian lack of interest in protecting one's rights in the private legal sector to be a curious attitude on their part. Our "Sue the Bastards," a phrase so familiar to us that it has been translated back into Latin and sold on plaques, does not register to a Russian, even under the most generous translation.

Russia is not alone in its infancy in individual rights. Many of the emerging nations from the Soviet Union and the Balkan States are struggling to find life under the Rule of Law. It is most important for these nations to be a member of the Council of Europe for many reasons, especially economic. Russia needed to abolish its death penalty to quality for admission, while Serbia is still not a member because of the way it has failed to deal with its issues of war crimes. The way Russia dealt with the "abolition" of its death penalty is so Russian. Rather than have its Duma (congress) repeal the death penalty, an act many Duma members were unwilling to do, the Constitutional Court has banned its imposition. Under their interpretation of the new constitution, such a sentence can only be given after a trial by jury and since not all political subdivisions have instituted the jury trial (notably Chechnya) none of the courts can impose the death penalty.

The recent conviction of billionaire Mikail Khordorkovsky for fraudulent commercial transactions, illustrates another totally Russian approach to human rights and the new constitution. While the new Russian constitution resembles those of Western Europe and has substantial similarity to ours, what follows in actual practice is often quite different. Pretrial detention, for the first time, was addressed constitutionally, and required a bond hearing within 48 hours. Yet Khordorkovsky, after his 2003 arrest, languished for 28 months before his trial without such a hearing, was never allowed to post a bond and was never allowed to speak with his attorneys privately. As the head of Yukos Oil and a number of other companies, this Russian Bill Gates was trading stock, switching investments and doing many of those acts we would recognize as mergers and acquisitions. While some of our CEOs have gone to jail for manipulation of stock, balance sheets and inter-company transactions, Russia had no

laws for Khordorkovsky to break. In spite of what is deemed internationally as a blatant violation of rights, this potential Putin rival is accorded no sympathy by the Russian Bar. Rather a great majority believes that anyone who could amass such a fortune is obviously a crook and really doesn't deserve those individual protections. The constitutional right against *ex post facto* laws is explicitly stated in American law, yet in Russia these violations were not of some newly adopted law but rather no law at all. The three-judge panel concluded that the acts were inherently unlawful and thus he was convicted and is serving a substantial sentence for something that wasn't a defined crime.

The retention of some of the remnants of the old systems has certainly not helped the new federal judicial system, at it is woefully inadequate to meet the needs of emerging Russia. The 1991 collapse of the Soviet Union originally unleashed a sense of optimism of reform with a reinvention of a country with notions of individual liberty, representative government and a free market economy. Those hopes have now had to accept pure Russian realism. The essential requirement from this point on is going to be the passage of time. To assist, foreign law makers, judges and individual lawyers have spent and are now spending substantial time in place in the new republics under the auspices of Department of State, the American Bar Association and similar organizations from Western European countries. But the Russians do not want to be told how to run their legal system. They listen to our "experts" on such diverse subjects as mortgage banking and jury selection, but they want to listen and then choose, not be told. So those that do visit must present alternative views carefully and persuasively but not as "the way we do it back home."

There are many Russians who yearn for a return to communism and the old way, while many of the younger generation look at the changes as a hope for a better life. One should, perhaps, bet on the young, as they will outlive the older stalwarts. There will be years of struggle, however, before the written word and actual implementation of these basic rights come together. One of the most popular Russian books among the law community recently is entitled "Striving for Law in a Lawless Land." So Russian and so true. ♦

BON MOT:
Committee chair ***Joseph Steinfield****, introducing the first winner of the new Emil Gumpert Award*

I recall a telephone call that I received two years ago from [then president] David Scott. As many of you know, getting a phone call from David Scott could be a daunting experience. I thought maybe I had done something wrong, but David actually was calling to ask if I would chair the Emil Gumpert Committee. . . .

I said to David, "Well, that would be just wonderful. I would love to go back to New Orleans, . . ."and, by the way, at the Windsor Court Hotel where we used to stay in rooms larger than my house." Well, David said, "No, the Board of Regents had made a few changes, and we would not be going back to New Orleans." "Well," I said, "That's okay, because the Emil Gumpert Committee does a very worthwhile thing. It gives an award to law schools for the teaching of trial advocacy. I'm interested in that." "Well, no," he said, "we are not going to do that any more either."

So I said, "Well, David what's left of this committee that you want me to chair?" And he said, "Well, we're keeping the name." And I said, "Is there anything in particular you would like us to do?" And David said, "Well, why don't you and your committee see if you can come up with something." And I'm here to report on what we did.

GITMO, con't from page 31

In response to questions from the floor, Margulies noted that there are substantial arguments both ways about the enforceability of the Geneva Conventions in United States courts, and that that issue is currently in litigation. He also discussed the tactical considerations involved in deciding whether to pursue that issue in international forums.

In answer to another question about the historical role of the courts in other conflicts, he pointed out that there were no questions about the identity of battlefield prisoners taken in World War II and confined in POW camps in the United States. Furthermore, we adhered to the Geneva Conventions in that conflict, so that the questions raised in the current conflict did not arise.

Another member of the audience then asked the question Margulies had avoided in his presentation, "How were you able to get Habib out?" Margulies knew that his client had been picked up in Pakistan and transported in a United States transport to Egypt, where he had been tortured for six months, before being taken to Guantanamo. One day when he was at Guantanamo, he checked his e-mails, and found a forwarded news report that Egypt had asked for return of Guantanamo detainees.

He then interviewed Habib at length about what had happened to him in Egypt. He found that he had been bundled up and his mouth sealed with duct tape before being put on the plane to Egypt. He had seen and could describe in detail the tattoos of those who were handling him, so that they would have been readily identifiable. Margulies had described them in detail in a court filing. As soon as it was declassified, he had given a copy to a newspaper reporter, and it was the subject of a front-page article the next day about Habib's "rendition" to Egypt.

Margulies related that by coincidence, Attorney-General designate Alberto Gonzales was testifying before the Senate Judiciary Committee that day, and he was asked, "So now you see in the front page in the paper that we're sending people to be tortured and we couldn't torture them ourselves. That's illegal, isn't it?" And General Gonzalez said, "Yes, that's illegal."

"That," continued Margulies, "was Thursday, January 6th. Tuesday, January 11th, the Defense Department announced that Habib was going to be released, and he was home three weeks later." ♦

BON MOT:
Regent ***Dennis R. Suplee****, Philadelphia, Pennslyvania*

About a year ago, Mike Griffinger from New Jersey suggested that the College should begin to try to place cases for the Guantanamo detainees. The Supreme Court had decided in *Rasul vs. Bush* that the detainees had a right to counsel in theory, but that didn't mean much unless they had counsel in practice.

At this point, more than 50 Fellows have responded to that call and have taken on cases for the Guantanamo detainees, including one who said to me, "Let me get this straight. You want me to take on a case in an area of the law in which I have no expertise? You want me to take on a case where I cannot get to see my client until I get a security clearance? You want me to take on a case where, when I do get to see my client, we can't converse directly because I don't speak Arabic? You want me to do this for free, and you want me to accept the fact that I will have expenses of ten thousand dollars or more that will never be reimbursed?"

And my response was, "You can see what a great opportunity this is."

STATS, con't from page 16

The Fall 2004 figures were, however, consistent with those from other recent Regents' meetings.

Only 10 of the nominees had practiced 20 or fewer years and only 11 were 45 years old or under. Only twenty-four had practiced 25 or fewer years and only 18 were 50 or under.

Of the 24 states and provinces that had nominees before the Board, eight sent forward new nominees whose average time in practice exceeded 30 years, and only four sent forward new nominees who averaged under 25 years of practice. Five states submitted no nominees.

"Every organization," commented College President Michael Cooper, "needs a constant infusion of new blood in order to remain vital. The College is no different. We must find a better way to identify qualified candidates before they become judges or enter government service and cease to be eligible for consideration by the College. This is a responsibility not only of the state and province committees, but of every Fellow. Each of us from time to time encounters an adversary or co-counsel who merits consideration for fellowship. When you next have this experience, commend that individual to your state or province committee." ♦

BON MOT:
*Outgoing President **James W. Morris III**, presiding over the annual banquet*

The president of the College, when he is given the responsibility of a meeting like this, is given a script, and the script is written basically by [Executive Director] Dennis Maggi. Right now it says, "Morris introduces his wife, Jane, and makes endearing remarks."

We are grateful to many, many people in this room and elsewhere. I must particularly mention my brother who is a Fellow of this College, who has been back home with his finger in the dike trying to keep the water from pouring through. . . . I froze when I walked in here, because Monday he's going to walk out the other door and say, "I'll see you next year.". . .

Now comes the time that I have been fearing for a considerable period of time. It says here, I didn't write this, "It is my pleasure to introduce and install as your new President." Does he look all right? Well I guess I've got to go ahead with this.

Michael would you kindly come forward to the podium. Having gone to a military school, I know that's the last military order he will ever obey that I give him.

BON MOT:
*President **Michael Cooper***

I expressed a little bit of concern to Richard Goldstone about the hour at which I would begin speaking, and he told me a story about Winston Churchill. He said that Churchill was once, when he was Prime Minister, at a banquet, and there was speech after speech. And finally, at about 11:30 the master of ceremonies said, "And now Mr. Prime Minister, your address," to which Churchill responded, "10 Downing Street."

The Bulletin

of the

American College of Trial Lawyers

19900 MacArthur Boulevard, Suite 610

Irvine, California 92612

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 invitatation 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.

"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, ACTL