NUMBER 59

SUMMER 2008

# THE BULLETIN

# JUDGE GEORGE W. GREER RECEIVES *first* SANDRA DAY O'CONNOR JURIST AWARD

*George W. Greer*

## PRESIDED OVER THE TERRI SCHIAVO CASE

*"For his unswerving commitment to the rule of law and the independence of our judiciary and for reminding all of us what it means to be a good judge under difficult circumstances."*

With those words, the American College of Trial Lawyers awarded its inaugural Sandra Day O'Connor Jurist Award to **George W. Greer**, Judge of the Pinellas-Pasco County Sixth Judicial Circuit, Clearwater, Florida.

The College, recognizing the need to address the growing problem of unfair criticism of judges, particularly in high-profile cases, created this new award, named in honor of retired Associate Justice **Sandra Day O'Connor**. It recognizes judges who have shown particular courage in the performance of their judicial duties under difficult or dangerous circumstances.

In his introduction, O'Connor Award committee chair Michael A. Pope of Chicago recited the history that led the

**Con't on page 18**

# ROSTER UPDATE

Preparations for the 2009 edition of the ACTL Roster are underway. Address change notices were sent to all Fellows in early July. Please mail any changes to the National Office so that we can update your listing. If you have changed firms or moved, please be sure to include your new e-mail address, telephone and fax numbers.

# 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.*

American College of Trial Lawyers
**The Bulletin**



Marion A. Ellis, *Editor*
Telephone: 704.366.6599
Email: ellisellisinc@bellsouth.net

Liz Doten, *Art Direction and Design*
Email: lizdoten@mac.com

American College of Trial Lawyers
Dennis J. Maggi, CAE
*Executive Director*
19900 MacArthur Boulevard, Suite 610, Irvine, California 92612
Telephone: 949.752.1801 Facsimile: 949.752.1674
Email: nationaloffice@actl.com Website: www.actl.com


# FROM THE EDITORIAL BOARD

This issue features the highlights of the College's 58th Spring Meeting in Tucson. Highlight of that meeting was the presentation of the first Sandra Day O'Connor Jurist Award to Judge **George W. Greer**, who presided over the Terri Schiavo case. It was difficult to do justice in print to the warmth of the reception those in attendance accorded Judge Greer and his wife.

As is our custom, we have recounted in some detail those presentations at the Spring meeting that lend themselves to being communicated in print. We hope that those of you who cannot attend national meetings find these articles useful and informative and that they serve as a reminder to those who were present of what they heard.

Two of the articles deal with high-profile proceedings, the prosecution of two officers of Enron Corporation and the Duke Lacrosse Team saga, both of particular professional interest to trial lawyers.

Judicial independence was a thread that ran through several presentations.

Department of Defense General Counsel **William James Haynes, II** gave the Lewis F. Powell Lecture, and in it laid out a view of the appropriate legal response to terrorism that differs from those we have heard from other speakers at earlier meetings.

As usual, the meeting was replete with humor, some of which we have attempted to capture for our readers.

Please pay particular attention to the comments preceding the In Memoriam section of this issue, in which we address a problem we hope all of you will do your part in addressing.

In the last issue we asked for volunteers to take on the writing of articles for the Bulletin. The silence has been deafening. At present, the Bulletin "staff" is a two-horse shay, and the tardiness of this issue is attributable to temporary overload on one of those horses. We would be happy to spread the fun around to more of you.

# SPRING MEETING IN TUSCON *features* FIRST O'CONNOR AWARD PRESENTATION.

Highlighting the 58th Spring meeting of the College was the presentation of the first Sandra Day O'Connor Jurist Award to The Honorable **George W. Greer**, Judge of the Pinellas-Pasco County Sixth Judicial Circuit of Florida. Judge Greer had presided over the celebrated *Terri Schiavo* case.

The meeting, which ran from Thursday, March 6 through Saturday night, March 8, was set at the JW Marriott Starr Pass Resort and Spa, located high on a spectacular ridge overlooking the city of Tucson.

*JW Marriott Starr Pass Resort and Spa in Tuscon, Arizona*

Early arrivals attended a professional continuing education program entitled *Make Arbitration Work for You*. Moderated by ADR Committee Vice-Chair **Michael A. Williams**, Denver, Colorado, the panel was composed of **Richard Chernick** of JAMS Arbitration Practice, Los Angeles, California, **William B. Fitzgerald**, FACTL, Los Angeles, California, **James M. Gaitis**, an arbitrator/ADR neutral, and former Regent **James F. Stapleton**, New Haven, Connecticut.

Fellows and their guests gathered at a welcome reception in the Tucson ballroom. As has become a tradition at the welcoming reception, each region had a separate section of the reception area, marked with signs listing each state or province in the region, to enable Fellows to locate and identify both inductees and Fellows from their regions.

The Friday general session began with the presentation of the Sandra Day O'Connor Jurist Award to Judge Greer. The announcement of the award and the description of Judge Greer's handling of the *Schi-*

*avo* case prompted a prolonged standing ovation, as did Judge Greer's acceptance remarks.

*Editor's Note: O'Connor Committee Chair* ***Michael A. Pope's*** *presentation and Judge Greer's acceptance remarks appear elsewhere in this issue, as do the remarks of many other program speakers and presenters.*

*An Independent Judiciary*, the title of the address by **Thomas W. Thrash, Jr.,** United States Judge for the Northern District of Georgia, served to continue the theme of the Friday program.

That theme was continued by Arizona Governor **Janet Napolitano,** a lawyer, in her remarks welcoming the Fellows to Arizona for the second time in four years.

**Lord Alan Rodger**, the Right Honorable Lord Rodger of Earlsferry, was inducted as an Honorary Fellow. The presentation was made by Regent **Chilton Davis Varner**, Atlanta, Georgia, who, along with Lord Rodger, had been a delegate to the recent Anglo-American Legal Exchange. Lord Rodger responded with an amusing and erudite exploration of the historical propensity of lawyers and judges to seek knowledge through travel, using his own journey from the British Isles to Tucson as a case in point.

The Friday program ended with a panel discussion entitled, *Personal Fouls: Offense, Defense and Goalkeeping after Nifong v Duke Lacrosse.* Moderated by Regent **J. Donald Cowan, Jr.,** Greensboro, North Carolina, the presentation began with a spell-binding narrative of how the prosecution in that celebrated case had fallen apart. Using evidentiary slides, Fellow **James P. Cooney III,** Charlotte, North Carolina, who had represented one of the defendants, gave a step-by-step account of how the defense had been able through the use of electronic footprints to establish that the alleged crime could not have occurred. Cooney's co-counsel, Fellow **Wade M. Smith,** Raleigh, North Carolina, marooned in the Houston, Texas airport in the wake of a snowstorm, had not arrived, and Cooney was left to tell the whole story by himself.

The remaining panel participants were: Fellow **Marsha L. Goodenow**, Charlotte, North Carolina, an assistant District Attorney who had been called as an expert witness in the disbarment proceedings of the Duke case prosecutor; **Louise S. Sams**, Atlanta, Georgia, Executive Vice-President and General Counsel of Turner Broadcasting System, Inc., and Dr. **Veda Kowalski,** Tucson, Arizona, Associate Dean of Student Affairs at the University of Arizona. Each panelist addressed the issues raised by the case for lawyers in general, for prosecutors, for the media and for university administrators.

Friday evening was highlighted by a visit to the Old Tucson Studios, scene of many a western movie, and now a combination movie set and historical museum of characters from the Wild West and the movies that were made about them. The Fellows, inductees and their guests were watered from bars, complete with swinging doors, costumed barmaids and pistol-toting cowboys, and fed from chuck wagons.

Inductees were treated to a Saturday breakfast, at which they were introduced to the College, and to a midday reception and luncheon for them and their guests, where that introduction continued.

The Saturday morning program began with a presentation by **John C. Hueston**, Newport Beach, California, the lead prosecutor in the criminal trials of Kenneth Lay and Jeffrey Skilling, entitled *Behind the Scenes of the Enron Investigation and Trial.* His presentation, punctuated with slides of key evidentiary materials, was an informative exposition of successful and unsuccessful trial strategy, taken from one of the most celebrated trials of the last decade.

This year's Lewis F. Powell, Jr. Lecturer was **William J. Haynes, II**, General Counsel to the Department of Defense for the past seven years. Choosing to focus on the future, Haynes raised many of the troubling practical and legal issues that must be ad-

dressed in dealing with terrorists in the future.

Immediate Past President **David J. Beck** presided over a mock debate entitled *The Cooperstown Conundrum: His Numbers Are a One-Way Ticket to Induction, but He Carries Excess Baggage: Should "Enhanced" Roger Clemens be Barred from Baseball's Hall of Fame?* The panelists were **Charles P. Scheeler**, Baltimore, Maryland, one of the investigators into the use of performance-enhancing drugs in major league baseball, who laid out the facts, and Fellows **Richard H. Sinkfield**, Atlanta, Georgia, and **William J. Kayatta, Jr.**, Portland, Maine, the latter two arguing the pros and cons of the issue.

The Saturday program ended with a hilarious presentation by **Sean Carter**, Mesa, Arizona, "Humorist at Law," who bills himself as a "recovering attorney." Carter explored such topics as: the antiquity of cases used in law school to teach principles of law: the contrast between *L.A. Law* and the real world; the apparent ease with which people tell lawyer jokes

"

[L]et us remember our purpose here and ask for guidance in the days ahead. Help us to remain constantly aware of our deep obligation to the profession that challenges, nurtures and sustains us, and to which we owe so much, and let our work here be guided by that sense of obligation. Open our minds so that we will learn from one another, open our hearts so that we will embrace and deepen the spirit of collegiality that binds us. And in this time of war, let us join in the sincere prayer for peace, so that those who wear our country's uniform can be safely returned to our families and be out of harm's way. Let us also pray that one day the world will realize what we know to be true, that even after the last battle is waged, lasting peace will only be achieved when there is a worldwide belief in justice for all and universal respect for the rule of law to which we, in our profession, are dedicated.

**Lauren E. Handler**, Morristown, New Jersey, at the opening session

* * * * * * * * * *

Our Father, we are gathered to recognize and celebrate the accomplishments of women and men who are here because of their integrity and their considerable talent. They are joining the Fellows of the American College of Trial Lawyers, themselves persons of considerable talents.

But Father, we recognize that all these talents are nothing unless we use them to make our land what it can be for the benefit of all.

Heavenly Father, grant us a vision of an America as you would make it, a vision of an America where all cultures, religions and races live in tolerance and mutual respect, a vision of an America where the weak are protected and none go hungry, a vision of an America where the benefits of life are shared by all, a vision of an America built on justice and the rule of law and is guided by truth and equality.

Then, Father, give us the inspiration and the courage to build that America of your vision.

Amen.

**Regent John H. Tucker**, Invocation at the induction ceremony

when they would not dream of telling such jokes about other beleaguered minorities; the temptations that accompany being a successful speaker; dealing with stress, and how to deal with the success of one's law school classmates.

*Editor's note: We chose not to make Carter's presentation the subject of an article full of quotations as we do with most national program presentations out of deference to his last assertion to his audience: "The one thing I want you take away from this conference . . . is simply this:* ***I am available to do other events****."*

The Spring meeting ended with the traditional banquet, at which ninety new Fellows were inducted into the College. Past President **Michael E. Mone**, Boston, Massachusetts, delivered the induction charge and inductee **Timothy F. Maloney**, Greenbelt, Maryland responded for the inductees.

Conventional wisdom and the usual protocol for introducing a speaker dictate that one steer a course between the Charybdis of saying too little and the Scylla of saying so much that the speaker is intimidated by the prospect of having to live up to his advance billing. Conventional wisdom and the usual protocol also dictate that one inject at least a bit of humor into the introduction to guard against the possibility that the speaker might prove to be humorless. Our next speaker is, however, neither conventional, nor usual, nor humorless.

Sean Carter is a lawyer. Indeed, he is a graduate of Brown and of the (pron. "thuh") Harvard Law School, though in his curriculum vitae, unlike many of his fellow Harvard Law graduates, he modestly leaves off the "thuh." He began his legal career as a corporate securities lawyer, in what the trial lawyers in my firm refer to as the pre-litigation department. He then became General Counsel of NC Capital Corporation, a leading supplier of mortgage products to Wall Street, a credential he probably now wishes he had omitted from his résumé.

After ten years of law practice, he became, by his own description, a standup comedian, a humor writer, a public speaker and an author. . . . He is the author of a book entitled *If It Does Not Fit, Must You Acquit?: Your Humorous Guide to the Law.* It features chapters such as "Contracts—Like Bondage, Just Not as Fun," "Torts—When Saying You're Sorry Isn't Enough" and "Constitutional Law—Can We Really Trust a Document Written by Men Wearing Tights, Wigs and Makeup?"

He lives in Mesa, Arizona with his wife and four sons, ages one to thirteen. Unfortunately, his wife could not be with us today. Their housekeeper resigned yesterday, one of them had to stay at home with the children and she doesn't do stand-up comedy.

Sean Carter, will you please come up and explain yourself?

Past President **Ozzie Ayscue**, introducing "recovering lawyer," and humorist **Sean Carter**

* * * * * * * * * *

Well, that was an introduction. I will take you on the road with me if you will come.

**Sean Carter**, responding

# FORMER GATES AWARD WINNER DEAD AT 73

## United States District Judge Sam C. Pointer, Jr.

Judge Sam C. Pointer, Jr., 1990 winner of the College's Samuel E. Gates Award for his significant contribution to the litigation process, died March 15, 2008 at age 73.

A Birmingham native and a graduate of Vanderbilt and of the University of Alabama Law School, Pointer was appointed to the bench by President Richard Nixon in 1970 after only twelve years of law practice. At the age of 35, he was then the youngest Federal District Judge in the nation.

As did many judges of his era, he played a major role in the implementation of appellate court decisions and congressional legislation in the turbulent civil right era. He quickly established himself as a judge who could handle tough, highly complex litigation. In the early Seventies he tried the first class action damages suit ever tried in the United States.

Other major complex cases followed, culminated by the Silicone-Gel Breast Implant cases, in which he pioneered the use of court-appointed experts and the use of the Internet for case management.

He was the principal author of the *Manual for Complex Litigation, Second,* the Board of Editors of which he chaired. He had also chaired the Advisory Committee on Civil Rules of the Judicial Conference of the United States. After his retirement from the bench, he practiced with Lightfoot, Franklin & White in Birmingham.

Pointer had participated in a number of College programs, and he was a member of the United States delegation to the College-sponsored 1999-2000 Anglo-American Legal Exchange.

His survivors include his wife, a daughter and a son.

# CHICAGO TRIAL LAWYERS CONTRIBUTE TO NEW BOOK

The highly acclaimed new book, *Your Witness: Lessons on Cross Examination and Life from Great Chicago Trial Lawyers,* includes articles by twenty-six Fellows of the College, over half its entire contents. The Fellows, including two former Regents, who contributed to the book are, in order of appearance: **Robert Tarun, Chas. Sklarsky, Gordon Nash, George Leighton, Peter John, Walter Jones, Jr., James Figliulo, Donald Kempf, Dan Webb, Thomas M. Durkin, Robert Clifford, William Kunkle, Edward Foote, Michael Hannafan, Steven Handler, Thomas Crisham, Michael Monico, Jeffrey Stone, Robert Byman, Philip Beck, Anton Valukas, Patricia Bobb, Thomas Breen, Vincent Connelly, William J. Martin** and **Thomas Demetrio.**

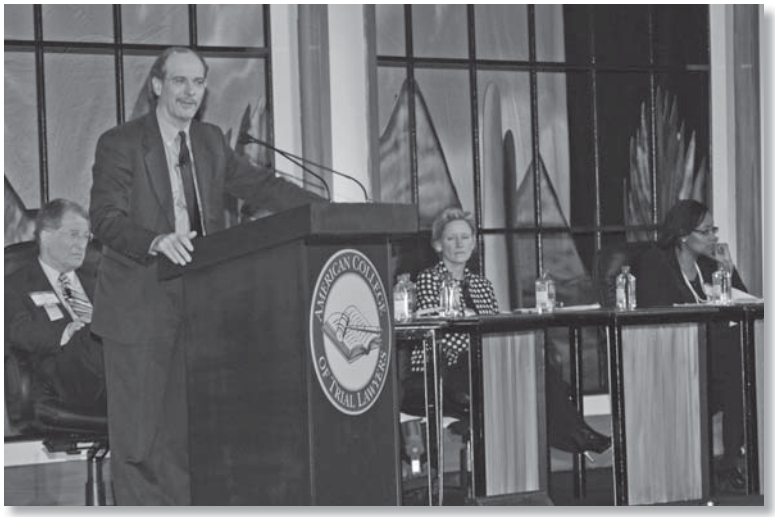
Novelist **Scott Turow** wrote the introduction. At 334 pages, $29.50, the book is published by Law Bulletin Publishing Co. of Chicago, LawBulletin.com.

## ELECTRONIC FOOTPRINTS *and* DNA:

# PANEL DISCUSSES DUKE LACROSSE CASE

"We are going to talk about lacrosse. We are going to talk about race, strippers, criminal indictments in the South at an internationally recognized university, known for its excellence in academics and its undergraduate school, its law school, medical school and business school, known also for athletic excellence, NCAA championships, led simply by a coach known by the first letter of his last name."

With that introduction, Regent **J. Donald Cowan, Jr.** launched a panel discussion of the notorious Duke Lacrosse Case, in which three college athletes had been falsely accused of a gang-rape. The case had garnered national attention. It was pictured in the media as an encounter between an African-American college student working as an exotic dancer for an escort service to pay her way through college and three wealthy white athletes at a prestigious private national university. Scores of Duke faculty members, blindly accepting the facts alleged by the prosecuting witness, had published a statement in the school newspaper. The Duke lacrosse season was terminated, the coach discharged.



*James P. Cooney, III and panel.*

The defendants were represented by three Fellows of the College. The accusation was ultimately revealed to have been fabricated. The prosecutor, Mike Nifong, who was running for reelection when this incident took place, was disbarred for his conduct. Duke University subsequently entered into civil settlements with the

accused players and their coach.

## PANEL PARTICIPANTS

The panel consisted of: **James P. Cooney, III**, FACTL, Charlotte, North Carolina, who represented defendant Reade Seligman; **Marsha L. Goodenow**, FACTL, Assistant District Attorney in Charlotte, who appeared as an expert witness for the North Carolina State Bar in Nifong's disbarment proceedings; **Louise S. Sams**, Executive Vice President and General Counsel of Turner Broadcasting System, Inc., and **Dr. Veda Kowalski,** Associate Dean of Student Affairs at the University of Arizona.

Fellow Wade M. Smith, who had represented one of the defendants, was caught in a snowstorm in Houston, Texas (!) and was unable to participate in the program.

## QUESTIONS RAISED

Cowan posed these preliminary questions to the panel:

"How did this happen, how could a publicly elected official, with all of the facts in his possession as we now know them, do what he did?"

"What have we learned from what happened with Mike Nifong and the Duke lacrosse team, not only what has the legal profession learned, but what has the media and what have colleges and universities learned?"

"The media–some of the media–blindly took the press releases of Mike Nifong and publicized them either on the evening news or in the newspaper. Some of the media, talking heads, every night flamed the fire of what was going on with Mike Nifong and the Duke lacrosse players. What is the responsibility of the media when a criminal matter that becomes this newsworthy has the facts change on them?"

"When we send our children off to colleges and universities, we turn over the responsibility and hopefully the supervision of our children to those universities. But what happens in a case like the Duke lacrosse matter when you've got students charged with crimes and you may also have students . . . victims of those crimes? What is the role of the university to those students and what is the role of universities when their faculty members speak out about what is going on on the campus?"

## THE FACTS

First, Cooney set the scene by describing the alleged victim's story, which turned out to be fabricated, and then laid out the spellbinding account of how the defense attorneys used "electronic footprints" to demonstrate that their clients did not have the opportunity to commit the alleged crime.

"Now," he explained, "you need to understand something that I've come to, because I've got children who are in this generation. This generation . . . moves through time and space differently than any other generation in the history of the world. They are text-messaging each other. They are on their cell phones. Their cell phones have cameras. They carry digital cameras with them. They have Treos just like we carry. And every time they do something, they leave an electronic footprint behind. You cannot move in modern society today, and certainly not in that generation, without leaving footprints."

"So that's the first thing we did." he continued. "We looked for the electronic footprints. You don't go to the people who may be biased. You don't rely on your buddies for an alibi. You go to the objective evidence."

Through retrieval of the cell phone records of the three defendants and two of their girlfriends, of the alleged victim and of a cab driver, an ATM camera picture, a dorm room electronic card reader, the credit card record of the alleged victim's driver, a videotape of the alleged victim and her companion and numerous digital camera photographs and the accompanying metadata, defendants' counsel were able to establish that the defendants had no opportunity to have committed the alleged crime. The crucial timeframe was later corroborated by an adult next-door neighbor, who wrote to defendants' counsel after the police had failed to in-

terview him to find out what he had heard that night.

The Durham Police had dredged up a three-year-old misdemeanor charge against the cab driver when he refused to change his testimony, testimony the electronic footprints and ATM camera photo, evidence the police had not bothered to look at, corroborated.

Indeed, Cooney asserted, every piece of the recited evidence was available to Nifong and the Durham Police Department before any indictments were issued.

What broke the case wide open, however, was DNA evidence. The defendants offered to give DNA. They offered to take polygraph tests. They submitted to prolonged interrogation. They told the police about the photographs, which the police never examined.

Nifong disclosed to the defendants' attorneys that the Police found none of the defendants' DNA on the alleged victim, but argued the time-honored cliché that the absence of evidence is not the evidence of absence. What he represented, however, was that no other DNA was found on her when, in fact, testing had found DNA of multiple males, none of it from any of the Duke lacrosse players. When finally required to do so by the court, he turned over 1,800 pages of laboratory reports, leaving the defense attorneys to comb through them to find the evidence that conclusively exonerated their clients.

## DEFENSE COUNSEL'S VIEW

"Now, let me say this," Cooney remarked of the defendants, "These young men exercised lousy judgment that night. In fact, I like to use this case as an example to my girls and their friends about the saying we have all told our kids, 'Nothing good happens after midnight.' This case exemplifies this. They made a lousy decision. I don't know in what parallel universe it is ever a good idea to have a party where you hire escorts from that escort service. They have apologized repeatedly for that, and Lord knows every person on this team has been punished for that and then some."

Cooney ended his presentation with a slide depicting a large group of people, including some Duke faculty members, marching down the street in Durham, banging on drums and pots, carrying signs demanding that the defendants be castrated.

"[T]his took place in the United States of America in the 21st century," Cooney observed. "When you roll a case out to the mob, when you let the public decide based on what one advocate says, whether people are guilty or not, that is what you get. An independent judiciary does us no good unless we have the rule of law to go with it. And ultimately, that's what was vindicated in this case, the rule of law, not the rule of the mob."

## CAREER PROSECUTOR'S ANALYSIS

Turning to Ms. Goodenow, the moderator noted that the lacrosse players had the resources to hire top-flight counsel. He asked, "Do resources make a difference in who is prosecuted and who prevails?

Her response was that the quality of counsel possibly affected the case coming to a conclusion as early as it did, though in her opinion, the lack of DNA made acquittal inevitable. "I hope any qualified defense attorney would have discovered that," she said, "whether or not they would have discovered it as early on as it was in this case."

Cowan, the moderator, then asked, in light of the fact that Nifong was running for election, "What part does politics play in who we prosecute, when we prosecute and what we do with them?"

Goodenow's answer was illuminating: "I think that the fact that he was in the middle of a campaign created this monster. I think this monster was fed by the media. I think it was fed by the public's presuming that they had a right to try people in a public forum as opposed to a courtroom, and that they have some right to all the information before it comes out in a courtroom. I think that some of

the evidence that unfolded that I heard, was that Mike Nifong even made comments before giving press conferences about how much . . . free publicity he was getting out of this case for his campaign. I think that it is obvious that he used this case to propel his campaign, and unfortunately, successfully: he was elected."

"I have to praise the North Carolina State Bar for taking an unusual action . . . . [T]hey basically filed their complaint against him while the case was still pending, which was unusual, but I think had they not done that, this case would not have been derailed and stopped when it was."

## THE ROLE OF THE MEDIA

As for the media's role in this saga, Goodenow observed, "The biggest lesson that I think was not learned, and I don't know that it will ever be learned, . . . is the media's responsibility for this. They did not learn a thing. They tried these young men in the media and then promptly turned around, and when the evidence was unfolding to show that Mr. Nifong was apparently the person who was misrepresenting facts, they immediately tried him in the media before he had his disciplinary hearing."

"The one thing that I would like everyone to remember," she concluded, "is that every criminal defendant in this country is somebody's son, daughter, mother, father, brother, sister, and they all have a right to a fair trial. None of us have a right to have them tried in the media as a form of our entertainment on the evening news. And I would hope at some point we would learn that lesson and be a little more responsible about what we put out in the public before the trial happens."

Turning to Sams, Cowan asked, "What is the responsibility of media to simply report exactly what an elected public official said? What is the responsibility of the media to independently investigate and verify?

Sams began by stating that she was not there either to issue a *mea culpa* for the media nor to defend what she termed a rush to judgment. "I think we hope that in reporting the news," she continued, "we are reporting the truth . . . think the media believes their job . . . is to report what is happening accurately. And so, as a consequence in this case, when Mike Nifong was making statements, the press was reporting those statements accurately. And so, when Mike Nifong was not telling the truth, when he was making misstatements about the facts, the press was, in fact, reporting that."

"[T]he idea is," she continued, "that the press is supposed to tell you what is happening and then the public is to make their own judgment about those facts, as opposed to the media trying to tell the public what they should think. There was initially no reason for the media not to believe the prosecutor. I think that perhaps in the future there will be a bit more skepticism of prosecutors, although I am not sure that's the right result here. I think that there is an ethical framework that leads the press to believe that a prosecutor is not going to make statements that are false and is not going to make the kind of bold statements that Mike Nifong was making. I think it was very difficult for anyone to even dream that he would make the kind of statements that he would make about those young men in the face of some of the evidence that wasn't there."

"I think that where the media was most at fault," she conceded, "was in its willingness to believe the worst, and to embrace this story set in the South with all of the stereotypes that they could really play up and embellish. It was in the South. It was white versus black. It was rich versus poor. It was a set where this was just such the story to embrace."

"I think where the media also was more at fault," she continued, "was in editorial pieces, opinion pieces, and as you've mentioned on some of the talk shows that are on at night, where I think the media went very astray from reporting things accurately. They were allowing people to come on and just talk about things that weren't in evidence at all, make up stories, because it did fuel the fire. I think that the media here did not have its best day at all."

Noting that the press was unaccustomed to seeing a case played out in the media by both prosecution and defense, she speculated that perhaps the media was left wondering who to believe. She also noted that the media's job was not helped by the university making statements that led the press to believe that perhaps it knew things about the case that had not been revealed and its failure to take the position that its students were innocent until proven guilty.

## UNIVERSITY ADMINISTRATOR'S ROLE

Moving to Dr. Kowalski, Cowan asked how a university can properly wear all the hats it has to wear in a situation such as this. She responded that this case has provoked national conversation among university officials about the obligation of the institution to balance student safety with the rights of individual students.

She noted that it is difficult to say to a faculty member that he or she cannot make individual statements about a public matter. On the other hand, they are not free to represent the university in making such statements.

## THE ROLE OF THE COURT

In response to a question from the audience about the role of the court, Cooney pointed out that under North Carolina procedure, the court does not get involved in a prosecution until trial unless an issue is brought before it by motion. He remarked that the judge assigned to this case made it clear from the beginning that he was going to enforce the law and that he would require Nifong to produce every bit of evidence he was required to produce. That instruction resulted in the production of the 1,800 pages of DNA backup data that ultimately torpedoed the case.

# OFFICER NOMINATIONS SET

At the Annual Meeting in September, the officers' nominating committee will nominate the following Fellows to serve as officers of the College for the year 2008-09:

PRESIDENT: **John J. (Jack) Dalton,** *Atlanta, Georgia*

PRESIDENT-ELECT: **Joan A. Lukey,** *Boston, Massachusetts*

SECRETARY: **Thomas H. Tongue,** *Portland, Oregon*

TREASURER: **Gregory P. Joseph,** *New York, New York*

These four and Immediate Past President Mikel L. Stout will constitute the Executive Committee for the coming year.

Under the College Bylaws the Board elects its officers upon nomination by the past presidents at a reorganizational meeting immediately following the annual business meeting. Only a Fellow who has previously served as a Regent is eligible to serve as an officer.

# LESSONS FROM ENRON– LEAD PROSECUTOR *describes* TRIAL

*" 'Enron.' The word still galvanizes the legal community. It was the most important battle for the Justice Department in the last decade, and the most public. It's a case that the government absolutely needed to win, for this was a bet-the-company case for the entire Department of Justice."*

*John C. Hueston*

With that prelude, Regent **Paul S. Meyer** introduced **John C. Hueston**, lead prosecutor in the criminal trial of Jeffrey Skilling and Kenneth Lay, the top executives of now-defunct Enron Corporation, on notorious fraud charges.

As Dartmouth undergraduate, Hueston had organized protests about South African apartheid and led the call for that college to divest itself of supporting funds. Along with his future wife, Maybelle, daughter of a Navajo tribal leader, he had co-chaired the Interracial Concerns Committee. After Dartmouth, for two years he worked on a United Nations project, educating students about human rights violations in Africa. This, in turn, led him to Yale Law School.

Currently a partner in Irell & Manella LLP, before the Enron trial Hueston was chief of U. S. Attorney's office for the Southern Division of the Central District of California. The recipient of distinguished awards from three separate U. S. Attorneys for his trial work, Hueston is known as a lawyer who "thinks outside the box." He has been decorated by the U.S. Army for his prosecution of international defense contracting fraud, commended by the National Law Enforcement Association, the FBI and the IRS, and named one of the "Fab 50" in the United States by *The American Lawyer.*

In his presentation, entitled, *Behind the Scenes of the Enron Investigation and Trial*, Hueston undertook to walk his audience through some of what he felt were the turning points in the trial of Lay and Skilling, some of the obstacles the prosecutors had to

overcome and some of the lessons they learned.

## THE CHALLENGE

The issues the prosecution had faced were not simple. The Department of Justice had just suffered a public defeat in the prosecution of Richard Scrushy in the HealthSouth case. The Enron task force had been formed out of public outrage and the prosecutors came in from different parts of the country to put the evidence together and to see if there was a criminal case.

"We decided there was one," Hueston said, "but it didn't have smoking gun documents, which is what . . . federal agents and others look for to justify the investment of time. The closest that we had to a smoking gun document was something called the "Global Galactic Agreement" . . . a handwritten document between Andrew Fastow , the chief financial officer of Enron, and Richard Causey, the chief accounting officer. In that handwritten document, there were certain accounting side deals that they had documented that clearly violated the law."

The prosecutors' problem was that, though Fastow and others involved in that arrangement had pled guilty, the document did not contain the initials of Skilling or Lay. The defense characterized the prosecution as nothing more than an attempt to criminalize in hindsight good aggressive American business practices.

Skilling and Lay had both sold Enron stock before the company imploded, but each had an apparently plausible explanation, Skilling in that he had offered to return to Enron as it neared the bottom of its slide and in fact had taken steps toward a private buyout, Lay in that he claimed to be insulated from day-to-day operations and claimed to have sold to respond to margin calls.

It had been the disclosure of Lay's sales that had prompted public outcries and had put the Department of Justice under pressure to do something about what appeared on its face to be a case of insider trading.

Without smoking gun documents, the government had to rely on building its case with witnesses, and great witnesses were not readily available. The highest officer to plead had been Andrew Fastow, the Chief Financial Officer, but he was so heavily involved in self-dealing and side deals that lined his pockets that he could not have carried a nuanced prosecution of Skilling and Lay for earnings manipulation.

## A GAMBLE THAT PAID OFF

With no witness who could tell the whole story, the prosecution took a gamble and called before the grand jury Ben Glisan, the Treasurer of Enron, who was serving a sentence arising out of Fastow's side deal and who had no plea agreement with the Government. Hueston related that Glisan was called without preparation and asked, "Do you recall at all any evidence of earnings manipulation by mid-2001?"

"He sat back, " Hueston continued, "and said, 'Yes, and in the following five ways, one, two, three . . . .' and the grand jury sat back as well. It was one of those shocking turning points in the evidence ...."

At trial, Hueston put on Andy Fastow, who was not a likeable fellow, as a witness. He used Glisan as the closing witness, and, he related, "[T]hat smiling Boy Scout demeanor was the perfect antidote to the Fastow demeanor. We thought about that, the way one presents to balance, not only strengthen testimony, but demeanor. Glisan was a person who came across as earnest, as not having something to hide, somebody who just wants to set things straight. And that demeanor had a large part of I think our success in having him as a closing witness for us in the case-in-chief.

Hueston shared a number of insights with the audience, illustrating them with vignettes from the Enron trial.

## CREDIBILITY OF COUNSEL

"[A]lthough the old adage is that cases are often won or lost in the opening statement, I really don't believe that,' he said. "I think juries are more sophisticated than that and you can clearly make a decisive moment in the closing argument. I think when attorneys, trial attorneys, get in trouble in the opening and lose cases is when they lose their credibility, fatally, with the jury."

"My firm view is that jurors in a case look at the two sets of lawyers at the beginning of a trial, particularly a complicated trial like the Enron trial, and at bottom, they're believing, 'You know what, one of these sets of lawyers is here to tell me the truth, and the other set of lawyers is here to obscure that and to confuse us.' And they're trying to figure out by the end of the case, 'Which set of lawyers can I really believe here?' And what I have found through my experience is that the jurors generally vote for the set of lawyers that they like and trust, not always, but that's generally what they try and do. If they trust you and like you, they're motivated in going back to the jury room to bring back the verdict in your favor as the truth-teller in the courtroom."

As an illustration he pointed out that in opening, Skilling's attorney asserted that Fastow and the people working with him were their own special set of crooks, but promised that the defense would show that the eight or nine witnesses who has pled and were cooperating with the government did not in fact commit crimes and were simply submitting to the pressure of the Enron task force, saying what the government wanted them to say so that they could reduce their sentences and get back to their families.

To combat this, "to try to snap the credibility of the defense right out of the box," the prosecution put up as its first witness the head of investor relations, Mark Koenig, who had entered into a plea agreement. Koenig was not a key witness on the substantive facts and indeed was cross-examined very effectively until the defense reached its culminating point: why Mark Koenig had pled guilty.

"And on that point," Hueston related, "Koenig stepped up in the following way, unrehearsed, nothing we went over with him. . . . There were questions being asked of him after they went through the fact that he pled guilty and cooperated with the government along the following lines: 'Sir, at the time that you pled guilty, how old were your children?'"

"And at that point, Mark Koenig paused, tears began welling up in his eyes. I remember the court clerk pushing over a box of tissue, the judge . . . began to call a time out. And at that point, Koenig pushed away the box of tissue. He had been stumbling a bit in his answers and questions. He said, 'Counsel, you know, I don't need a break, I would like to go on. Counsel, you asked me how old my children were at the time I pled guilty. Well, they were 10 and 14 years of age. And by the way, earlier you asked me how much money I had when I pled guilty. I had five million dollars in my bank account at the time I pled guilty, which was plenty of money to fund a defense. And I will tell you that that would have been a waste of money for me to go forward and to be sitting here with these two men. I can tell you that today I leave this courtroom with my head held up high that I stopped telling the lies and I'm trying to set things straight.'"

"And as he said that," Hueston related, "he looked over at the jury and I thought I could see a couple jurors locking eyes and nodding their heads, and I thought in that moment, the Skilling camp had broken on the key point of credibility with one of the promises they had made in the opening."

## OVER-PROMISING

The Lay defense in opening statement asserted that, "[T]his case will rise or fall on whether Mr. Lay had to sell each and every share of Enron stock in 2001." This, Hueston observed was unnecessary because the prosecution had chosen not to charge Lay with insider trading, selling Enron stock when he knew the company was in trouble. It did, however, give Hueston the opportunity to go back to that assertion to reinforce the government's theme that the case was about "lies and choices."

Near the end of cross-examination of Lay, going back to this theme, the prosecution was able to show that Lay did have choices of what to sell when he was hit with margin calls he met by selling Enron stock. In one instance he sold $4 million in Enron stock to meet a $500,000 margin call at a time when he had $11 million in lines of credit and $7 million in non-Enron stock available.

"When he had to admit yes, that's what he chose to do," Hueston asserted, "he conceded his case."

Other Hueston observations:

## KEEP IT SIMPLE

• "[T]ry to keep it simple and keep the experts out of the trial. My firm view is that experts cancel each other out, and particularly in a criminal case. If the government has to resort to calling experts, it's just too easy for the defense to answer that, by definition, the government can't prove its case beyond a reasonable doubt."

To emphasize this, Hueston pointed out that the prosecution's simple theme was "lies and choices."

## CONNECTING

• "[I]t's not enough to make a clear roadmap in opening. . . . . You need a way to connect to those jurors on a visceral level. You have to anticipate the other side's going to do it and you have to get to the hearts as well as the minds of this jury."

To accomplish this, to create a sense of human connection, the prosecution brought in two former Enron employees who had relied on defendants' reassurances to keep all their retirement funds in Enron stock.

## ENGAGING THE JURY

• Create "a sense of excitement with the trial and a sense of mystery so that the jurors want to come into the trial with you and take the journey with you into the evidence."

To do this, the prosecution displayed a slide of the empty twin Enron Towers in Houston and, in opening, told the jury, "Ladies and gentlemen, the United States in this case will take you inside the doors of what was once the seventh biggest company in this country, Enron. And let me take you to a key turning point in time. It's August 15th, 2001. To the outside world, Enron was a picture of corporate success, 28,000 employees and growing. It had a seemingly magical ability to meet and just beat its profit, quarter after quarter, year after year, and it was named the most innovative company by *Fortune* magazine year after year. And yet, inside the doors of Enron, something was terribly wrong." It then proceeded to walk through the lies and choices that had taken place behind those doors.

## WITNESS SELECTION

• "I'm a firm believer in calling as few witnesses as possible to put on your case at trial. A talented adversary is looking for the trial lawyer who calls that one too many witnesses who provides the adversary with a great moment to make his or her case, within your case, breaking up your trial narrative, bringing over the attention of the jury. That third corroborating witness, the jury's beginning to not pay attention to what they've heard before. They're waiting for the cross that's the new and different, and when they see that, they begin to lose faith in you. You're the person who's bringing on the case, and they're wondering why you had to call that third corroborating witness in your trial."

## OTHER LESSONS

• Avoid the witness who wants to make everyone happy by agreeing with every examiner.

• In a criminal case, jurors are looking for three, four or five "conviction moments." Get three, four or five of those moments, they have already clicked off and they decide the case.

• If you have a terrible vehicle for evidence, don't bother risking it unless you're really behind in the cards.

• Regardless of instructions to weigh all the evidence in the case, in a criminal case, the jurors really don't pay attention to that, and at the end of the testimony of the defendant, if they don't believe him, they often reject the defense case.

• You don't need to answer everything the other side brings up. The jury never remembers it all, and you may create unnecessary credibility issues

• Prepare your witnesses not only to meet the substance of the issues, but also to deal with outside issues where an inconsequential lie may kill the witness' credibility. In Lay's case , that involved his denying having contacted potential collateral witnesses during the trial.

• And finally, make sure that the jury remains connected with your theme during a long trial.

College to select Judge Greer, who for seven years presided over the celebrated Terry Schiavo case, for this singular honor.

A Brooklyn native who moved to Florida as a child, Greer graduated from Florida State University and, in 1966, from the University of Florida Law School. After eighteen years in private practice in Clearwater and after serving two terms as a county commissioner, he was elected a circuit court judge in 1992 and began serving as probate and guardianship judge.

Terri Schiavo, who had collapsed with some kind of chemical imbalance that stopped her heart and cut off oxygen from her lungs, had already been in a coma for over two years. A petition by her husband and the executor of her estate for permission to terminate the artificial life support made its way to Judge Greer's docket.

After evidentiary hearings, in February of 2000 Greer found that Ms. Schiavo was in a vegetative state from which she would not recover and that she had previously expressed the desire not to be kept alive by artificial means. On the basis of that evidence, following a Florida statute, he ordered her life support to be ended.

Ms. Schiavo's parents' appeals to the Florida appellate courts and the Supreme Court of the United States were unsuccessful. Thereafter, presented with claims of a potential new medical technique which might revive Ms. Schiavo, Judge Greer ruled in 2001 that five new doctors could examine her and determine whether those treatments might be beneficial. Following those examinations and after further evidentiary hearings, he reaffirmed his original finding and ordered life support terminated. That decision was also affirmed on appeal.

Six days after her nutrition and hydration tubes were removed, the Florida Legislature passed, and Governor Jeb Bush signed, a law known as Terri's Law, allowing the government a one-time stay to prohibit withholding nutrition from a patient such as Terri Schiavo. Under the Governor's order, the tubes were then re-inserted.

In September of 2004 the Florida Supreme Court struck down that law as improper encroachment on the separation of powers and as an unconstitutional delegation of legislative powers to the executive branch.

"By this time," Pope related, "the case had become a national tabloid story. With each succeeding loss, the parents and their allies, a loose coalition of disabled rights activists, right-to-life zealots and religious fanatics, became more angry and more desperate. Their public relations machine was generating plenty of attention and their anger was directed at one man, Judge George Greer. Hate mail and telephone threats attacked his family. He was called a murderer by religious leaders and by members of Congress."

"A practicing Christian his whole life," Pope continued, "he was even asked to leave his church by his pastor. But while Congressman DeLay and Senator Frist were publicly lambasting the judge, he maintained his poise and his resolve and continued to rule on the case as the law and the facts required."

Then, the United States Congress passed its own law, entitled An Act for the Relief of Theresa Marie Schiavo and President Bush signed it in the middle of the night, March 21, 2005. The bill gave the federal courts jurisdiction to hear claims that Ms. Schiavo's civil rights had been violated.

"But," Pope continued, "when the federal courts looked at the record in this case, they concluded that the quiet, unassuming probate judge from Clearwater, Florida had correctly interpreted the law and applied the facts appropriately. They refused the invitation to intervene and denied the parents' motion for an injunction. The 11th Circuit affirmed and the United States Supreme Court once again denied cert. Following several more desperate procedural attempts to get around Judge Greer's ruling, Terri Schiavo was finally allowed to die peacefully on March 31, 2005, more than 15 years after her cardiac arrest first befell her."

Through this incredibly emotional experience, Judge Greer made only one public statement . . . . [H]e said, "My oath is to follow the law and if I can't follow the law, I would need to step down."

Judge Greer's acceptance remarks, delivered after a prolonged standing ovation from those attending the opening session of the College's 58th Spring meeting in Tucson, can be found on page 32 of this issue.

# bon mot

[T]his (the call to ask him to take the lead in the Enron case) was not the last call that John received from D.C. Thirty minutes before his now-famous cross examination, Washington called again reminding him, and I quote, that, "The future of corporate crime prosecution rests on your cross examination," just in case John forgot that he was in the middle of the biggest case in memory.

. . . .

I know that I stand alone in this room when I say this, but I want to note something deeply personal: I have, in fact, lost a case–or two.

. . . .

Judges before whom John has appeared told me -- one judge said, "I was presiding over a trial and a thought crossed my mind as we were in the middle of this case that I was very relieved not to be opposing John Hueston, and then I looked over at the face of his adversary and I could read the same thing."

**Regent Paul S. Meyer**, introducing Enron prosecutor **John C. Hueston**

* * * * * * * * * * *

[T]hat introduction's very flattering, far different from what my wife has done with me. When I got back from the Enron trial, which was about eight months of being away from home, I came in the door and she said, "You know, with all the attention you guys received, thank goodness you didn't suck."

Enron Prosecutor **John C. Hueston**, Responding to his introduction

* * * * * * * * * * *

As we watched for the result of the jury, we couldn't forget that moment [in the trial of Richard Scrushy of HealthSouth, which resulted in an acquittal] where this one older woman came out and said. "We didn't find fingerprints on the documents. We knew then that if we had a jury like that in this case, all hope was going to be lost.

**John C. Hueston**

I would like to thank, in his absence, Judge Griffin Bell, not only for helping me out for twenty years, but more importantly, for his long and great service to our country, and to this legal profession. He's in a tough fight, and I wish him all that man can give and that God will give. Bob Gates [Secretary of Defense Robert Gates], my boss, asked me to give you all his regards, but asked me to pay a special tribute to Judge Bell as well. In Secretary Gates' typically understated way, he told me, "Griffin Bell is an adult and I, Bob Gates, owe him quite a bit." So from the Department of Defense, thank you, Judge Bell."

Department of Defense General Counsel **William James Haynes, II**

# POWELL LECTURER EXPLORES TENSION *between* FREEDOM AND SECURITY

*Speakers at recent national meetings of the College have suggested different paradigms for analyzing and dealing with the threat of terrorism, each calling for a different remedy. Our British hosts in London in 2006 described how they have treated terrorism as crimes to be dealt with in their courts. At the College's 2007 Annual Meeting ,former U.N. Commissioner for Human Rights* ***Mary Robinson*** *described terrorist acts as crimes against humanity, to be dealt with accordingly. At the Spring meeting in Tucson, the Lewis F. Powell lecturer,* ***William James Haynes, II****, General Counsel to the Department of Defense, articulated yet another paradigm, that of war, a new and unconventional form of war. His address looks to the future and outlines the difficulty of resolving this modern phenomenon on any of these theories while preserving the rule of law.*

*William James Haynes, II*

The distinguished career of **William James Haynes, II**, this year's Lewis F. Powell lecturer, has combined partnership in a major law firm with a general counsel position with a Fortune 500 corporation and three separate periods of public service.

A Phi Beta Kappa graduate of Davidson College and of the Harvard Law School, after a judicial clerkship, Haynes served five years in the United States Army JAG Honors Program. After a year in private practice, he joined the Department of the Army, where he served for three years as General Counsel. In 1993 he became a partner in the Washington office of Jenner & Block. Three years later, he joined General Dynamics, where he was General Counsel to several of its major military-oriented subsidiaries. He then returned to Jenner & Block, where, with a brief leave to serve with an international relief agency in Kazakhstan, he practiced until 2001, when he was tapped to become General Counsel to the Department of Defense.

Haynes address, edited for publication, follows. As are all Powell Lectures, it will be posted on the College website in its entirety at a future date.

We were attacked by a non-state organization known as Al Qaeda, and the President decided that we would fight this enemy with all national

power, including our armed forces. We were at war. . . . [T]he United Nations and NATO concluded that we had suffered an armed attack, thereby invoking the UN Charter, and the NATO Charter provisions for collective military action. The Congress . . . passed a breathtakingly broad authorization for the use of military force. . . .

I would like to invite you to look with me to the future as this national global dialogue continues, as you all, who are incredibly important opinion leaders, and as our democracy considers these things, these new legal policies.

I ask you to consider three questions, important to all Americans, and maybe especially important to those of us in the legal profession. One, with law as it is developing, can we fight and win wars? Number two, can we preserve the systems that we hold most dear? And number three, when the next big attack comes, will we be able to live within the law in responding to it?

## IMPACT OF LAW ON FIGHTING TERRORISM

First, how does the law affect how we fight and win wars? An obvious approach to this question is to think about the rules we place on government. In the aftermath of 9/11, we have seen reforms . . . . We removed the walls between law enforcement and intelligence. We created a Department of Homeland Security. We created the office of the Director of National Intelligence. These legal reforms have been aimed at restructuring government to be more effective . . . .

What incentives does the law set for our enemies? In a way, the threat that Al Qaeda poses makes the application of the law of war to this conflict unprecedented. On the other hand, the bedrock documents underlying the law, the Geneva Convention had this kind of conflict squarely in mind in some sense. They were consciously written for the purpose of encouraging combatants to follow certain basic rules, to place bounds on an inherently violent and barbaric conduct–war.

The heart of this effort is to separate fighters from civilians. If the two are separated, civilian populations will be spared killing and destruction. So the law of war requires combatants to distinguish themselves from civilians and distinguish those whom they target, usually by wearing a uniform and carrying their arms openly. So the law of war attempts to encourage everyone to follow these rules through incentives. People who follow the rules receive a privileged status. Lawful fighters get combatant immunity. Although they may kill and be killed on the battlefield, once removed from the fight, they may not be prosecuted for lawfully fighting. Lawful fighters when captured also get a special status called "prisoner of war." This status comes with many privileges . . . .

Al Qaeda's reason for being, its method of operation, strikes at the core of the law of war. Al Qaeda does not want to be distinguished from civilians that surround them. The September 11th highjackers did not want to carry their arms openly. They posed as businessmen and students. They did not distinguish their victims. They attacked civilian aircraft and used those aircraft to attack civilian targets. Should we afford prisoner of war status to Al Qaeda fighters notwithstanding their conduct? Amplifying that, should they get more procedural rights than even prisoners of war?

Here, I invite you to think about the incentives going forward. If one gives more protections and privileges to these unlawful combatants, then we may be stripping away any legal incentives for people to fight according to the rules. Countries and groups will have strategic incentives to enjoy the benefits of clandestine warfare without bearing any of the consequences for doing so. . . .

Now, this new series of rights affects the incentives of those on the front line, combating terrorist organizations too. In fighting, our military personnel may be buying a long series of judicial proceedings, trials and accusations and the prospect that our opponents will be released before the end of the war. These were never prospects that military personnel faced in prior conflicts. One must ask, "What will the effect of this new web of legal requirements have on battlefield decision-making in the future?

## THE DETAINEES

And consider this: We have hundreds of habeas corpus cases from persons the United States holds in Guantanamo Bay, Cuba, and I'm concerned about the impact these cases might have on the incentives provided by the law of war. During World War II, the United States detained more than 400,000 German and Italian prisoners of war in camps sprinkled around the United States. Many of them were American citizens. Zero had successful habeas corpus prosecutions. There are literally less than a handful of reported decisions. Now, today, we have fewer than three hundred people that we consider to be unlawful enemy combatants outside the United States in Cuba. Two hundred forty-six habeas corpus

cases go with them. These cases are in addition to the administrative processes that the executive branch has developed on its own to review the detention of them, and those administrative processes have been endorsed by the Congress. The legal process afforded to these detainees far exceeds anything that German or Italian soldiers enjoyed in their captivity within our borders, and more than any prisoners of war are entitled to in a conventional war.

But consider the states beyond Cuba. Coalition forces hold tens of thousands of detainees in Iraq and over a thousand Afghanistanis. If the detainees in Cuba receive these rights, should those detainees in Iraq and Afghanistan also receive them? Instead of hundreds, why not tens of thousands of cases in our courts about those detained in combat with the United States? I would say that this is an incentive to violate the law of war. As some have said, "What's in it for any foe of the United States to abide by those rules if one gets better treatment when captured by violating them?"

. . . .

The prospect of litigation against individuals, our troops and government officials, also affects the decisions that we make. When it comes to foreign lawsuits, the prospect of an adverse reaction, not by our executive branch, by our Congress or by our courts, but by a foreign tribunal, is affecting military personnel and civilian leaders. . . . [L]tigation and changing laws are dramatically affecting warfare. . . .

## PRESERVING OUR LEGAL SYSTEM

Now, the second question I posed is, can we preserve the American legal system? We have a remarkable criminal justice system. It's adversarial. It seeks to restrain government power and to preserve space for individual freedoms, and it's the most solicitous of individual rights of any in the world. Our criminal law system is remarkable in many ways, but one of them is because of how much it is not focused on putting criminals behind bars. It's a system where it's more important that innocents be found innocent than that the guilty be punished. Therefore, the standard of proof is very high, beyond a reasonable doubt. . . .

Now, how would we adapt this gold standard of criminal law to deal with Al Qaeda and its like? Is it better that ten Al Qaeda operatives escape than that one be wrongly detained? Should Al Qaeda members go free if the government blunders? And even if the government doesn't blunder, if the elements of proof are different in a combat situation, should that result in freedom for the Al Qaeda? Many might answer "Yes," and there are good reasons to do so. Frankly, I think that any criminal process has got to have that set of procedural protections, because that's what we Americans prize most.

But I invite you to remember what only nineteen people were able to do nearly seven years ago. Some believe that doctrinaire logic of this type, applied without reflection, may be unwise in the future. . . . Indeed, nearly all who seriously considered the decision, view criminal prosecution in the U.S. federal courts under rules currently in place as a viable option for only a handful of the Al Qaeda members that we have detained.

Now, adopting or adapting our criminal justice system to a 9/11-type terrorist threat could entail compromise between our long tradition of individual rights and the new public need for thwarting mass murder and destruction. Academics and pundits have proposed such a compromise, special terrorism courts. These courts, for example, might detain individuals for long periods of time in spite of reasonable doubts. They might overlook blunders by constables even, if those blunders found credible evidence. And they might consider secret evidence. But I ask, do we want to introduce those qualifications into our gold standard criminal justice system? . . .

I pose the question merely: Should we be so fast to merge the two systems, the law of war and the criminal justice system of the United States? If we choose to do that, we must take care that we do not endanger our long-held principles and values. Once we add special relaxed procedures in the criminal justice system, can we keep those procedures defined to the hardest cases? How will we prevent those who follow from using those as convenient ways to bypass the rigors of the system at large?

## ADHERENCE TO THE RULE OF LAW

The third question I pose is, can we preserve our adherence to the rule of law today? The threat of terrorism seems distant to many Americans. Polls show that people are more concerned with the economy and health care than with terrorism. And for many of the military and civilian personnel in government, this is our proudest achievement. By preventing attacks, the government

has returned to the people a sense of safety.

But as we continue to refine the laws, we should not just assume today's sense of security and safety. We should also ask ourselves how people will think and feel and act when the next attack comes. And it *will* come. We can be sure that when the next attack comes, the American people will rally to the government and demand that it take action to protect the nation.

Writing the laws today, how do we write them so that the government has enough flexibility to deal with tomorrow's crises? And what if we err? What if a future government is put into a position where he or she must choose between following the law and doing what he or she believes is necessary to protect the nation? This is an awful choice. . . . We must be careful that the country can act lawfully in self-defense.

In closing, I've shared with you some of my perspective on law and national security. In a word, my perspective is conservative. I mean that literally. There is so much in our country worth preserving, worth conserving, worth protecting: the lives of our citizens, the liberties we enjoy, our legal traditions, our belief in government under law. As enemies threaten us, as the world is changing, how do we best preserve all of that?

My first job out of law school was as a law clerk to Judge James B. McMillan in the Western District of North Carolina. I learned a lot from Judge McMillan, including some favorite phrases . . . . [I]mportant for this talk today, he said, "Government has no rights, only responsibility." And I've always carried this lesson with me whenever I've been in government. The awesome powers of the government exist only to fulfill its responsibilities to the people. Throughout my time as General Counsel to the Department, I have viewed the actions, not so much as exercises of lawful executive power or governmental rights, but as an appropriate discharge of the difficult executive responsibility.

The Constitution confers upon the President the ultimate responsibility of ensuring that the American people are safe and secure, especially in wartime. And the Constitution gives the President the power to fulfill that responsibility. Exercising this responsibility is discharging the most basic of all presidential duties. Now of course, other branches have constitutional duties as well. And we've seen the dialogue between the Congress and the courts and the President on these national security issues. This dialogue is how our Constitution is supposed to work.

Without presuming to speak for anyone other than myself, let me speculate a bit in my closing. I think and hope that history will be kinder to the decisions this administration has made than many current accounts might indicate. This country has not, and I knock on wood as I say this, suffered another devastating domestic attack from Al Qaeda since 9/11. And most of the stories told thus far have been by outside critics, people who do not know the whole story. . . .

## OUR CHALLENGE

I believe our challenge as citizens now is to find ways to deal with this deadly and likely enduring threat, that we can agree to sustain over time and across party lines ways that protect the ability of our country to win wars, to protect our systems, and to abide by the law. . . .

Justice Jackson speaking in 1951 at the beginning of the Cold War, offered his thoughts on wartime security and liberty under law. After discussing our constitutional history, . . . Justice Jackson concluded with the following: "The problem of liberty and authority ahead are slight in comparison with those of the 1770s and 1860s. We shall blunder and dispute and decide and overrule decisions and the common sense of the American people will preserve us from all extremes which would destroy our heritage.". . .

I think what Justice Jackson meant was this: The logic of liberty and the logic of security, if blindly followed without the other, each leads to the impracticable regimes. Carried to its extreme, the logic of liberty is a suicide pact. Carried to the other extreme, the logic of security is a government which can bend every law with a claim of urgent necessity, a government by fiat, not by law. Between those two extremes, we must chart a middle course since ideology and dogmatic logic lead us to crash at either end. And I suppose we must rely on common sense to point the way.

As I leave government, as you all take up these challenges, may it guide you as well.

Thanks very much.

# COLLEGE CONFERS HONORARY FELLOWSHIP ON LORD RODGER *of* EARLSFERRY

*At the Spring meeting in Tucson,* ***Alan Ferguson Rodger,*** *Lord Rodger of Earlsferry, was inducted as an Honorary Fellow of the College.*


*Alan Ferguson Rodger and Chilton Davis Varner*

The College from time to time invites to honorary fellowship persons "who, by reason of contributions to, and accomplishments in, the profession, have attained a high degree of respect and eminence in judicial or other roles in the profession or public service."

Twice a participant in Anglo-American Exchanges sponsored by the College, Lord Rodger has been since 2001 Lord of Appeal in Ordinary, the formal title of those who are more familiarly known as the British Law Lords.

A Scot by birth, Lord Rodger was educated at Kelvinside Academy, Glasgow, the University of Glasgow and New College, Oxford. He was a Junior Research Fellow at Balliol College, Oxford and then a Fellow of New College. He became an advocate in 1974 and was Clerk of the Faculty of Advocates from 1976 to 1979. Appointed Queen's Counsel in 1985, he became Solicitor General of Scotland in 1989 and Lord Advocate in 1992. In that position, he was the chief legal advisor to the Crown in both civil and criminal matters in Scotland. That same year he was made a Life Peer as Baron Rodger of Earlsferry and a Privy Counselor.

In 1995 he was appointed a Senator of the College of Justice (the Scottish equivalent of a High Court Judge in England and Wales), and was rapidly promoted to become Lord President of the Court of Session and Lord Justice General of Scotland (in essence, the Chief Justice of Scotland) the

following year. He served in that capacity until his elevation to his current position.

A published author in several fields, particularly well-versed in Roman Law, he is a Fellow of the Royal Society of Edinburgh and a Fellow of the British Academy.

In her introduction, Regent **Chilton Davis Varner**, who had been a fellow participant in the most recent Anglo-American Exchange, described him as one with "a penetrating mind, a keen intelligence, and most of all, a penchant for asking the pivotal question, . . . the most charming of companions."

Eschewing more serious topics, and taking his lead from his own journey from the British Isles to Tucson, Lord Rodger gave a scholarly, but tongue-in-cheek (he described it as "random, and perhaps not too serious"), survey of the historical propensity of lawyers to broaden their horizons, legal and otherwise, by seizing on even the most remote professional reason for travel to distant places.

He speculated that the legal officer who accompanied Julius Caesar to France missed the opportunity to be the first traveling lawyer to visit Britain when Caesar crossed the Channel without him in 55 B.C. He speculated that the honor of being the first probably then went to a Roman centurion named Salvius, known to have visited in 81 A.D. The first famous Roman legal visitor did not come to Britain and Scotland until 205 A.D.

In a segué to American colonial times, he observed, "So far as I have been able to determine, lawyers did not feature prominently or enjoy a great reputation among the early settlers in this country from England. Indeed, while there were, of course, systems of law in New England, early colonists seem to have prided themselves on doing, so far as possible, without lawyers."

"A principal motive, or is it perhaps an excuse," he speculated, "for lawyers' travels is to acquire knowledge—or legal knowledge. Travels for the ostensible purpose of learning the law have a long pedigree. In the 17th and 18th centuries, young Scotsmen training as lawyers would go off for a year to . . . the universities in the Netherlands, nominally at least to learn the law. But James Boswell has left us an account which shows they got up to very many other things besides learning the law, and not all of them were things suitable for mention in their letters home."

After an account of the well-chronicled and prolonged post-graduation trip to Britain of future Supreme Court Chief Justice Oliver Wendell Holmes, Lord Rodger moved to the more challenging task of justifying the travels of practicing lawyers abroad: "Students or those who have just been students can usually conjure up an excuse that they must go somewhere to learn something. It is unfortunately, a little harder, for qualified lawyers or judges to put forward a plausible case, and that is, of course, where skill comes in. You must find something which you can claim it is essential to study in another country."

Expanding on his theme, he moved to the side-trip from the expenses-paid study trip: "[T]he side-trip has been lovingly developed by skilled practitioners of the art of legal travel." He noted that in 1883, Lord Coleridge became the first Lord Chief Justice of England to visit the United States at the invitation of the New York Bar, a trip that somehow included a visit to Mount Vernon.

Lord Rodger noted that during the 19th Century national and international conferences first came into existence, facilitated by the advent of rail systems in Europe that could move a large number of people conveniently. Since World War II, air travel has, he observed, put the whole world within range. A researcher had earlier discovered a modern epidemic he called "congressitis," particularly likely to attack diplomats and those whom he called "perpetual friends of peace."

The American Bar Association traveled to London for the first time in 1924. In return, in 1930, a large contingent of British lawyers set sail for Canada and the United States, only to find themselves deprived of drink by Prohibition.

Commenting on the recent travels of members of the United States Supreme Court, Lord Rodger observed that in two hours of live presentation, Justice Antonin Scalia got his message across to a group of

lawyers in Britain "more effectively than any number of books or articles or Internet presentations."

Moving to his own experiences in the Anglo-American Exchanges in which he had participated, Lord Rodger continued, "I have, ladies and gentlemen, the privilege, as you've been told, of being a member of two of the Anglo-American Judicial Exchanges organized by the College and the United Kingdom authorities. These exchanges take place over two years, one in Britain and the other here in the States. I count them easily as two of the highlights of my time as a lawyer. They enabled the British members not only to meet and to get to know Supreme Court Justices, but also in the second occasion, to be present at the installation of Chief Justice Roberts. At least as important is the opportunity of meeting lawyers and judges from all over the country and of hearing from the real experts about such things as the handling of vast class actions, different approaches to oral hearings."

"'[O]ne does not find a practical application for everything in one's work, but my abiding impression . . . is that of the sheer intelligence, professionalism, wisdom, practical good sense and indeed, good sense of humor of the American lawyers and judges whom we met. And again, that's something you learn only by personal contact . . . ."

"Finally . . . ," he observed, "most busy lawyers are almost completely taken up with the problems of their clients, or, at most, of their own legal system. A chance to meet lawyers from other systems may help us to realize that our problems are not unique, that, worse, this may suggest that there are no simple answers to those problems, since if there were, they would have been found already. More encouragingly perhaps, we are reminded that when we practice law, we are not simply engaged in a round of mundane and humdrum tasks. We are exercising an ancient and noble profession whose existence and independence are among the achievements, not simply of Western civilization, but in an especially high degree of the English-speaking peoples on both sides of the Atlantic."

"The College," he reminded the audience, "exists to carry forward these achievements and it does so in that particular form of trial which sets English-speaking lawyers apart from others, with cross examination, submission by both sides of fact and law. Today, that model is under pressure, at least in Britain, where even some senior judges, who I think should know better, turn to mediation as the solution for everything."

Concluding, he remarked, "It therefore gives me the very greatest pleasure to travel here to Tucson to accept your honorary fellowship and so to pledge my faith in the values which the College has proclaimed, proclaims and will undoubtedly continue to proclaim. Thank you."

## FELLOWS *to the* BENCH

THE COLLEGE IS PLEASED TO ANNOUNCE THE FOLLOWING NEW JUDICIAL FELLOWS:

**John T. Cook,** Twenty-fourth Judicial Circuit of Rustburg, Virginia

**Michael K. Davis,** First Judicial District in Cheyenne, Wyoming

**Jeffrey J. Keyes,** United States Magistrate Judge, Minneapolis, Minnesota

**Paul J. Pearlman,** Justice of the Supreme Court of British Columbia

## Corrections:

Christine Donohue was elected to the Superior Court of Pennsylvania, not appointed as reported in the Winter 2008 issue of The Bulletin.

Also in that issue, through a typographical error Gerald Tremblay, Q. C., of Montreal was incorrectly identified as Sharon Tremblay (page 60.)

# bon mots

I had a most inauspicious start at the Bar. On February 25, 1986 I was driving to the Timonium Fairgrounds, right outside of Baltimore, to sit for the February Maryland Bar exam. I was about half hour away from Timonium when smoke started coming out of my engine, and then my car just died right there on the Baltimore Beltway. But I did what any self-respecting bar applicant would do. I got out of the car with my trusty IBM Selectric II typewriter that I had planned to use on the examination, and I started hitchhiking on the expressway. I looked like I had just broken into an office supply store and was trying to get out of town in a hurry. Finally, a pickup truck pulled over and I hopped in and I told the driver, and I will never forget this, I said, "If you get me to the Timonium Fairgrounds by 9:00 a.m., you will have a lawyer for life, for free!" Well, he did, and that Friday he called the firm where I was clerking. It seems that he was getting divorced, and his wife had just sworn out assault charges against him. And by the way, he needed to file for bankruptcy. It was my very first experience in the fine art of fee-setting.

Later that year I had my first jury trial. It was a very simple auto tort case against a State Farm insured. And my client, she was having marital problems, but she didn't seem to know about it, and neither did I. And in fact, her husband seemed most anxious to testify. So when I put him on the witness stand in support of the claim for loss of marital consortium, he looked at me and he looked at the jury, and then he got this big smile on his face and he said, "To tell you the truth, Mr. Maloney, it wasn't all that great before the accident." When the jury stopped laughing, they gave us our medical bills and sent us on our way.

Inductee **Timothy F. Maloney**, Greenbelt, Maryland responding for the inductees

bon mots

# COLLEGE INDUCTS 90 AT TUCSON MEETING

**UNITED STATES**

ALABAMA:
**James E. Williams,**
*Montgomery*

ARKANSAS:
**Walker Dale Garrett,**
**Don A. Taylor,**
*Fayetteville*

NORTHERN CALIFORNIA:
**Melinda Haag,**
*San Francisco*
**Kirk W. McAllister,**
*Modesto*
**Joseph P. McMonigle,**
*San Francisco*
**William H. Parish,**
*Stockton*
**Donn P. Pickett,**
*San Francisco*

SOUTHERN CALIFORNIA:
**William G. Baumgaertner,**
*Los Angeles*
**Thomas Patrick Beck,**
*Pasadena*
**Denise M. Gragg,**
*Santa Ana*
**Brian J. Hennigan,**
*Los Angeles*
**J. Michael Hennigan,**
*Los Angeles*
**Peter H. Klee,**
*San Diego*
**Joel Levine,**
**William S. O'Hare, Jr.,**
*Costa Mesa*
**Brian J. Panish,**
*Los Angeles*
**Robert C. Reback,**
*Manhattan Beach*
**Reg A. Vitek,**
*San Diego*
**Michael G. Yoder,**
*Newport Beach*

COLORADO:
**Michael H. Berger,**
**James E. Hartley,**
**Saskia A. Jordan,**
**Mary A. Wells,**
*Denver*

CONNECTICUT:
**Joseph D. Garrison,**
*New Haven*
**Stephen E. Goldman,**
*Hartford*

DELAWARE:
**Kenneth J. Nachbar,**
**James Brendan O'Neill,**
*Wilmington*

DISTRICT OF COLUMBIA:
**Wallace A. Christensen,**
*Washington*

FLORIDA:
**A. Graham Allen,**
**Jeptha F. Barbour,**
*Jacksonville*
**Rodney S. Margol,**
*Jacksonville Beach*
**Francis M. McDonald, Jr.,**
*Orlando*

GEORGIA:
**Dwight J. Davis,**
*Atlanta*

ILLINOIS:
**Joseph P. Switzer,**
*Chicago*

IOWA:
**Kristopher K. Madsen,**
*Council Bluffs*

KENTUCKY:
**Steve Downey,**
*Bowling Green,*
**John W. Phillips,**
*Louisville*

MAINE:
**Melissa A. Hewey,**
*Portland*

MARYLAND:
**Glenn M. Cooper,**
*Bethesda*
**Timothy F. Maloney,**
*Greenbelt*
**Craig B. Merkle,**
*Baltimore*

MASSACHUSETTS:
**Beverly Cannone,**
*Dedham*

MINNESOTA:
**Joseph S. Friedberg,**
*Minneapolis*

MISSOURI:
**John C. Aisenbrey,**
*Kansas City*

NEBRASKA:
**Daniel P. Chesire,**
*Omaha*

NEW HAMPSHIRE:
**R. Peter Taylor,**
*Dover*

NEW JERSEY:
**Carol L. Forte,**
*Chatham*
**Neil M. Mullin,**
*Montclair*
**Brian J. Neary,**
*Hackensack*
**Judith A. Wahrenberger,**
*Springfield*
**David Parker Weeks,**
*Millburn*

DOWNSTATE NEW YORK:
**Stuart E. Abrams,**
*New York*

OHIO:
**S. Michael Miller,**
*Columbus*

OREGON:
**James P. Martin,**
*Portland*

PENNSYLVANIA:
**Michael F. Barrett,**
**Thomas J. Duffy,**
*Philadelphia*
**David B. Fawcett,**
*Pittsburgh*

RHODE ISLAND:
**Jerry Petros,**
*Providence*

TENNESSEE:
**William W. Dunlap, Jr.,**
*Memphis*

TEXAS:
**Tom Harkness,**
*Austin,*
**Mike Mills,**
*McAllen*
**Donato D. Ramos,**
*Laredo*
**D. Gibson Walton,**
*Houston*

UTAH:
**Stephen J. Trayner,**
*Salt Lake City*

VIRGINIA:
**Thomas J. Bondurant, Jr.,**
*Roanoke*

WASHINGTON:
**David J. Burman,**
**Spencer Hall,**
**Ralph H. Palumbo,**
**Timothy J. Parker,**
**Louis D. Peterson,**
*Seattle*

WISCONSIN:
**Michael J. Fitzgerald,**
**William J. Katt,**
*Milwaukee*

**CANADA**

ALBERTA:
**James W. Rose, Q.C.,**
*Calgary*

ATLANTIC PROVINCES:
**Philippe J. Eddie, Q.C.,**
*Moncton*
**Charles D. Whelly, Q.C.,**
*Saint John*

BRITISH COLUMBIA:
**Mark D. Andrews, Q.C.,**
**E. David Crossin, Q.C.,**
**David C. Harris, Q.C.,**
*Vancouver*

MANITOBA/ SASKATCHEWAN:
**Christine J. Glazer, Q.C.,**
*Saskatoon*

ONTARIO:
**J. Thomas Curry,**
**Brian J. Gover,**
*Toronto*
**Peter W. Kryworuk,**
*London*
**J. Gregory Richards,**
**Gerald P. Sadvari,**
**Paul Steep,**
**David Stratas,**
**Kent E. Thomson,**
*Toronto*

QUEBEC:
**Jean G. Bertrand,**
**Andre J. Payeur,**
*Montreal*

THE INDUCTEE RESPONSE WAS GIVEN BY
TIMOTHY J. MALONEY OF GREENBELT, MARYLAND

# MARYLAND INDUCTEE RESPONDS *for* GROUP

The following are the edited remarks of inductee Timothy J. Maloney, Greenbelt, Maryland, who responded on behalf of the College inductees at the Spring meeting in Tucson.

*Timothy J. Maloney*

I come from a long family of lawyers, so it might have been inevitable that I would become one as well. Both my father and my grandfather were lawyers, but they were crusaders as well, in the very best sense of that word. My grandfather . . .graduated from the University of Michigan Law School in 1907 at the age of twenty-two, and later that same year, he became a member of the Missouri Bar. In 1922 he helped a friend of his get elected to the position of Jackson County Judge, which in Missouri is the equivalent of a county commissioner. In 1935 that very same friend, Harry Truman, by then a United States Senator, asked my grandfather to come to Washington to serve as a member of the United States Bituminous Coal Commission, the agency that was the forerunner to FERC.

When his second term expired, instead of becoming an energy lobbyist, which is what most people today would do, he spent the next twenty-seven years of his life representing Potawatomi Indians as well as Indians from the Miami and Hannahville tribes in their claims against the United States government for misappropriation of tribal lands in the Nineteenth Century. . . . I remember as a child going into his basement, filled with treaties and deeds and land records which just overflowed. These cases took decades to prosecute. My grandfather didn't live to see all the fruits of his labor, but after his death thousands of American Indians received awards from the federal government for what had been taken from

their tribal ancestors a century before. . . .

[M]y father . . . was a JAG lawyer, a lawyer, an NLRB administrative judge, a county attorney and a county councilman. He excelled at all those things. He wrote our county charter and he was acknowledged even by his fiercest opponents to be the conscience of the county. . . .

Last year marked one hundred consecutive years in which a member of my family has been a member of the Bar. I was lucky to have such great role models. I was lucky that they took me to court a lot . . . .

There has been much discussion at this conference about the vanishing trial and, with it, the diminishing role of the trial lawyer. And indeed, some have gone so far as to suggest that one day the concept of the trial lawyer itself will be an anachronism. But we here tonight know differently. There will always be a need for trial lawyers as long as the facts will be in dispute, as long as civil rights will be at stake, or as long as liberty is at risk, in short, as long as there are people living in a free society.

We saw that here this weekend. No one in Durham, North Carolina could have known that allegations made two years ago just next week, later proven to be false, would shake the foundations of that great city, a great university and indeed the legal profession itself. And in the days that followed those allegations, parents across the country made frantic calls to find the answer to a really simple question, which was, "Who are the best trial lawyers who practice in Durham County, North Carolina?" Fortunately they found them in three members of this College, and that made all the difference.

Every day in this country similar calls go out on matters less publicized, but no less important, asking simply for the best trial lawyers. And invariably they are found in the membership of this College. And we all saw that so evidently this weekend in the Fellows who spoke to us, lawyers who are so skilled at their work and who so evidently love their profession that they give life to the words of Ruskin, that, "When love and skill come together, expect a masterpiece."

We inductees are humbled to join such masters in the craft in fellowship and to share the very highest aspirations of our profession. But along with this humility, and yes, pride, we also as inductees feel one other overwhelming emotion tonight, and that is one of profound gratitude, first, to our families to our colleagues and our firms, to our mentors and to the clients we are privileged to serve. Every Fellow in this room is here tonight because of their own commitment, persistence and accomplishments, but we are also here, every one of us, because of the love of others, the grace of God and no small amounts of serendipity. Finally, we are here tonight because we are privileged to live and practice law in two of the greatest democracies in the world.

So for all those things, for your kind invitation to become Fellows of the College, we inductees say simply and with a grateful heart, "Thank you very much."

[T]he truth is that my Dad's real passion in public life was to raise Hell wherever and whenever it was needed, an attitude that he instilled in us at an early age. He used to take me to the courthouse regularly. And I remember him when I was twelve years old, encouraging me as I walked around the courthouse, putting signs on the hot-air hand driers in the men's room of the county courthouse. Those signs read, "Press Here for a message from the County Commissioners".

Inductee **Timothy F. Maloney,** Greenbelt, Maryland, responding for the inductees

# O'CONNOR AWARD RECIPIENT *addresses* JUDICIAL INDEPENDENCE

*The following are the edited acceptance remarks of Florida Circuit Court Judge George W. Greer, whose role in the celebrated Terri Schiavo case gives him a very personal view of judicial independence.*

*Mikel L. Stout, Hon. George W. Greer and Michael A. Pope*

I'm so honored to accept this award for two reasons. First, it comes from the American College of Trial Lawyers, the top of what I consider to be an incredibly noble profession. I am not sure why trial lawyers seem to rise to the top of this profession, but you do. You do great things for very unpopular causes in many cases. You come together as groups to assist the courts and you just do great work, and I'm very proud of what you do, your commitment to the legal profession. You're here and you're not making any money, and that speaks volumes.

The second reason is the likeness of Justice Sandra Day O'Connor, who this award is named for. Justice is always pictured as a woman, and it is fitting that Sandra Day O'Connor was the first woman on the United States Supreme Court. She is an embodiment in the flesh of Dame Justice, that great statue with the sword and the blindfold. She is not only a role model for women; she also serves as a role model to each and every one of us. She is a great lady and she has done incredible work. Since she left the Court, all the facts that have come to light, she even stands taller today than she did when she was on the Supreme Court.

## OUR LEGACY

Civics 101 tells us that when our forefathers established this Republic, they created it with three separate and equal branches of its government, the executive, the legislative and the judicial. They set this forth in the first three articles of the United States Constitution. This same model has been followed by the fifty state constitutions enacted since that time. . . .

Our country was the first nation to formalize separation of powers in a written constitution. However, of the doctrine of the separation of powers, so familiar to readers of the United States Supreme Court opinions, the United States Constitution says not a word. Yet the framework of government outlined in the Constitution of 1787 presupposes a separation of powers, gives expression to it, and in so doing, further refines the meaning of the doctrine.

A brief definition of separation of powers is that government functions best when its powers are not centralized in a single authority, but are blended among different branches of that government, the idea of separation of powers and branches of governments whose respective powers are the legislative branch, which has the power to enact the law, the executive branch, which has the power to enforce the law, and the judicial branch, which has the power to interpret the law.

The Founders created a system which both separated and blended powers so that each branch served as a check and balance on the powers of the others. This was largely due to their experience with the King of England, who possessed all powers. They knew intuitively that an all-powerful executive would become a monarchy and that an all powerful legislative branch would become anarchy. They knew a strong judicial branch would prevent this from happening, but it too would need to be checked and balanced.

In *The Federalist Papers*, Alexander Hamilton declared that the judicial branch is the least powerful branch. This is indeed true because we have neither the purse nor the sword. The judicial branch in the federal system is prevented from interference from political pressures from the Congress or the executive branch because it provides that federal judges during terms of good behavior have life tenure and a guaranteed salary. There are no such protections for state court judges.

## JUDICIAL INDEPENDENCE DEFINED

But what *is* judicial independence? No branch of our government can be truly independent, and we judges realize that we operate under constitutional, statutory and ethical restraints. A really good and comprehensive definition of judicial independence was given by Chief Judge Robert M. Bell of the Court of Appeals of Maryland. Judge Bell opined that a truly independent judiciary has three characteristics.

First, the decisions issued by the judiciary are impartial. The personal interest of the judge has no basis in the outcome of the case. Judges determine cases based upon the facts and the law.

Second, judicial decisions are respected. Then he quotes *Estrada v. U.S.*, a 1989 U.S. Supreme Court case, with the following: "The legitimacy of the judicial branch ultimately depends upon its reputation for impartiality and non-partisanship."

And third, Judge Bell says, the judiciary is free from interference such that those with an interest in the outcome of the cause do not have an ability to influence the decision.

When we look closely at Judge Bell's analysis, we find that one of these characteristics lies solely within the judicial branch, one lies within the branch and with others, most notably the organized bar, and the third characteristic is one over which we have little or no control.

Only we judges can determine whether or not our decisions are, in fact, impartial. No one, including us, wakes up in the morning free from bias or with a notion about all kinds of things. Yet we must put those aside and make decisions based upon the facts and the law. There are many times when I have an initial impression of a lawyer or a litigant that is negative, but I would be violating my oath as a jurist if I permitted that first impression to carry the day.

Respect for judicial decisions is a product of many things. First and foremost, judges must perform

and discharge their duties in a manner which engenders respect for those decisions. Then, others associated with the branch, most notably again the bar, must support those decisions if they are worthy of support. And that's not to say that some criticism of judges is not legitimate. There is legitimate criticism, and I am not suggesting that we be supported across the board, only when we are deserving of such support. It is too much to hope for that media and others will champion respect for the judiciary. They have other things to do, and quite frankly, they generally do not have a full appreciation and understanding of the legal process.

## JUDICIAL ELECTIONS A THREAT

In my humble opinion though, the 800-pound gorilla in this discussion is that of judicial elections. They rattle to the core public respect for the judiciary and its ability to make fair and impartial decisions. Let us look at what is happening. In America we have a patchwork quilt on how state court judges get on the bench and remain on the bench. Some are elected and re-elected. Some are appointed and meritly retained. And other states use a blend of these. These elections are becoming more and more hostile and more and more partisan, which again leads to the inevitable result of undermining public respect for what judges do.

In judicial elections starting in 2000 and ending in 2006, the number of TV ads rose a startling 600 percent to a total in 2006 of 121,000-plus TV commercials for judicial candidates. As you can well imagine, this caused a dramatic increase in campaign funding in order to pay for these ads and other expenses of running for office.

And how does the American public view all this? According to a poll commissioned by Justice at Stake, seventy-six percent of Americans think that campaign cash affects the outcome of cases in the courtroom. And perhaps even more startling, in a similar poll of American state court judges, twenty-six percent agreed. In 2007, a Wisconsin Supreme Court race set a new record for fundraising for a judicial race in that state. Since 2000, candidates for state supreme court races across the nation have raised over $156 million.

And is there really cause for concern? We are really talking about perception. And I would call your attention–I'm sure you saw this–in *Parade Magazine* February 24th, almost two weeks ago now, a pretty gray-haired lady wrote about how to save our courts, Justice Sandra Day O'Connor. And the subtitle of this said, "Politics Are Threatening The Rule of Law in the U.S. Today."

Now, Justice O'Connor was writing this article basically for the lay people who were reading it. I have no idea what the circulation of *Parade* is, but my guess is it is probably in the tens of millions of households across this country. She wrote well; she wrote for them. She concluded that education is what the public needs to do to become familiar with judicial candidates. She spent some time writing about the most expensive judicial campaign in American history, which was a 2004 Supreme Court race in the state of Illinois, Mike Pope's state. She wrote about the Judge who won, Justice who won. . . . [S]he quoted him in his election night speech, accepting victory, which was quite unusual . . . : "That's obscene for a judicial race. What does it gain people, how can anyone have faith in the system?"

This justice was elected in 2004. In October 1, 2006, a story appeared in *The New York Times* about this particular Justice, and it noted that he had raised 4.8 million of the total of 9.3 million raised in that campaign for his judicial race, much of it coming from two companies. More than $350,000 came from employees and lawyers of a large insurance company, and those who had filed briefs in support of it in a pending class action suit. Even more came from people and groups supporting a large tobacco company that likewise was involved in a class action suit.

In August of 2005, he cast the deciding vote to reverse a $456 million breach of contract suit against the insurance company, and later that year, in December, he cast the deciding vote in a tobacco case, reversing a $10 billion judgment against the company.

Again, we are talking about perception. And to quote, that Justice, "How can anyone have

faith in the system?"

Unfortunately, there are other examples, and the bottom line is that we judges who are elected must strive to keep that sort of thing from occurring. We must step down when requested, if the request is reasonable. The test is not whether or not we think we can be fair. At least in Florida the test is whether or not the verified motion sets forth a reasonable basis for the litigants to *believe* we are not fair.

I spoke to the director of Justice at Stake this week, and he told me that for ten years whenever the subject of maybe creating a litmus test for campaign contributions and automatic recusals for judges and justices came up, it received little or no attention. He did tell me however now people are talking about it, and that that may be one of the ways we address that sort of thing. . . .

## JUDGE GREER'S EXPERIENCE

Judge Bell's final characteristic was that the judicial branch is free from interference in its decision-making. Obviously we have no control over this. As you know, I'm here today because of a prolonged guardianship case, into which my Governor, my Legislature, my President, my Congress, and my church tried to interfere and influence my decision. It is a bit disconcerting to see a legislature in a blink of an eye pass a clearly unconstitutional law empowering a Governor to reverse a final judicial order. And it's interesting to note the Florida Supreme Court, in striking down that law, did it unanimously, with three of the six justices having been appointed by Governor Bush. It is downright frightening to watch on TV the Congress and the President scramble on a Palm Sunday to enact a law empowering the federal courts to get involved in a final state court order.

And it is depressing to receive a two-page letter from your pastor suggesting you withdraw your membership in a church you attended for over 35 years because of something you did in your job. At 5' 7" and 170 pounds, it's good I am of Scottish descent.

Judge Bell did not tell us how to handle this, and I certainly have no good answers for that. In my case, I do have proof of my life-long belief that my law enforcement people in my part of the world are top-notch. They screen my mail, they view my e-mail, they protected my wife and me 24/7 for the better part of the first half of 2005. To this day, they still have their antenna up, advising me as late as August of last year when I went to the ABA convention in San Francisco to register under an alias at the hotel.

To me, this case came with the job, certainly not the best part of my job but part of it nonetheless. The tragedy is my wife didn't sign on for that nor did my kids . . . .

Whenever I think about judicial independence and this sort of thing, I recall a speech given by Arthur Miller at the Law Day Luncheon in Tampa in 2005. . . . His topic was the American jury system. . . .

After speaking about the American jury system, he noted that those who drafted the 1787 Constitution of this great country would, by today's standards, be a politically incorrect group. They were all white males engaged in business or a profession. He noted that notwithstanding that, when it came to the 6th and 7th Amendments, "They got it right." And he repeated that phrase several times for emphasis.

I would submit to you today that when that politically incorrect group embodied into that wonderful document the concept of an independent judiciary, they too got it right.

Let me conclude with a quote from Chief Justice John Marshall. During the 1829 debate over the Virginia State Constitution, Justice Marshall said, and I quote, "The greatest scourge an angry heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt or a dependent judiciary."

Thank you again. My wife and I are truly enjoying ourselves being with you at this conference. I wish you great success, not only in this Spring conference, but in all of your future endeavors. And please rest assured that she and I . . . will cherish this award forever.

Thank you.

# MEET *your* OFFICERS

*We profile the officers of the College from time to time. The profiles of the two current officers of the College we have not previously published follow.*

*Joan A. Lukey*

**Joan A. Lukey**

A Fellow since 1991, Joan Lukey is the current Treasurer of the College. She has chaired the Emil Gumpert Award Committee and the Massachusetts State Committee. Elected Secretary of the College in 2006, she was the first woman to become an officer. She received her B.A. from Smith College *magna cum laude* in 1971 and her J.D. *cum laude* in 1974 from Boston College Law School. A member of the winning National Moot Court team, she was the first woman ever selected as Best Oral Advocate in the national finals. President of the Boston Bar Association in 2000-2001, Lukey received the St. Thomas More Award in 2002 and the Founders' Medal in 2004 from Boston College Law School.

"Because of our mission and the extraordinary composition of our Fellowship, the College is uniquely situated to celebrate and protect the rule of law," Lukey said. "Doing so includes such related efforts as defending the independence of the judiciary and educating the public with regard to the importance of preserving the institution of jury trials. No organization or institution is better suited than we are to be the standard bearer in these efforts."

*Gregory P. Joseph*

**Gregory P. Joseph**

Inducted in 1993, Greg Joseph is Secretary of the College. He has served as chair of the Downstate New York Committee as well as a member of nine other College committees. An honors graduate of the University of Minnesota Law School in 1975, he is the former chair of the litigation department at the New York firm, Fried, Frank, Harris, Shriver & Jacobson. He now heads his own firm in New York City. A former chair of the 60,000-member litigation section of the ABA, he has served in a number of other positions, including the Advisory Committee on the Federal Rules of Evidence. A former Assistant U.S. Special Prosecutor in the early 1980s, Joseph is the author of several books, including *Modern Visual Evidence*, *Sanctions: The Federal Law of Litigation Abuse* and *Civil Rico: A Definitive Guide* (2d ed. 2000).

At the Annual Meeting in Toronto, Lukey's name will be placed in nomination as the president-elect of the College and Joseph will be nominated as Treasurer.

He's also an avid sportsman I am told. Supposedly his interest in tennis developed during the long winter of his 14-month nomination process. He was nominated by President Clinton in May of 1996, and finally confirmed in July 1997. He has a lasting passion for the game and Thursday evenings are reserved for doubles matches with his law clerks and a guest, usually a lawyer or a federal judge. The clerks reported [in an article written by his former law clerks] that Judge Thrash always seems to win when playing against the lawyers. Now, I want to tell you lawyers he will participate in the tennis tournament this afternoon.

. . . .

Another hallmark of clerkship with Judge Thrash, according to the article, is that he entertains his clerks on Fridays at a rotating roster of greasy spoons in Atlanta. Reportedly he is skeptical of any place that takes reservations and uses cloth napkins.

. . . .

One of the anonymous lawyers who commented for the Almanac of the Federal Judiciary was not quite as effusive in his praise of Judge Thrash, simply stating, "He gets it right quite a bit."

. . . .

Several years ago their daughter Maggie was in a school classroom in which the teacher asked that any student having a father who wears a uniform should raise his or her hand. Maggie promptly raised her hand. The teacher asked what kind of uniform her daddy wears. She responded, "He wears a blue suit, a white shirt, and a red tie every day."

Past President **Frank C. Jones** introducing U.S. District Judge Thomas W. Thrash, Jr.

# bon mots

* * * * * *

I know that Frank and his Georgia colleagues are also happy to be here. When we left Atlanta this week, the Georgia General Assembly, our state legislature, was in session. It may be of some interest to a group of attorneys that during this session of the Georgia General Assembly, a bill has been introduced that would allow any person in possession of a valid Georgia hunting license to "hunt or trap attorneys for recreational, non-commercial purposes only." There are limitations placed on the sport. For instance, the bill states that, "The taking of attorneys by deadfall is permitted, provided, however that the use of currency as bait is tantamount to shooting on a baited field and is prohibited. In addition, it shall be unlawful to attract attorneys for hunting purposes with calls of 'whiplash' or 'free scotch' or the use of any device mimicking the sight or sound of an ambulance." And, "It shall be unlawful to hunt attorneys within 100 yards of a BMW or Mercedes dealership." Furthermore, "Attorneys cannot be hunted within 200 yards of courtrooms, law libraries, health spas, golf courses, hospitals or any accident involving a municipal bus." The bill did establish bag limits. During the season, a hunter could take two ambulance-chasing pettifoggers, three back-stabbing divorce lawyers, and four paper-shuffling corporate lawyers. No limit was set on insurance defense lawyers. Finally, and again, I'm quoting from the bill, "Notwithstanding any other provisions of the bill, honest attorneys shall be protected as an endangered species."

I'm told that the bill is expected to pass with large majorities in both houses of the General Assembly.

. . . .

I will close with a story that I heard Frank Jones tell of a farmer who entered his mule in the Kentucky Derby. One of his friends commented, "Your mule doesn't have a snowball's chance in Hell of winning that race with all of those thoroughbreds. "The farmer replied, "I don't expect him to win, but I believe he will benefit from being in their company."

Thank you for inviting me to attend your meeting. I will benefit greatly from just being in your company.

Federal District Judge **Thomas W. Thrash, Jr.**

# FEDERAL JUDGE ADDRESSES JUDICIAL INDEPENDENCE *from* A HISTORICAL PERSPECTIVE

*"No President of the United States shall ever say to an Article III judge those words of King James: 'For certain causes now moving us, we will that you shall be no longer our judge to hold pleas before us, and we command that you no longer interfere in that office, and we at once remove and exonerate you from the same.'"*

*Thomas W. Thrash, Jr.*

Echoing a theme that pervaded the Spring meeting of the College, The Honorable **Thomas W. Thrash, Jr**., United States District Judge for the Northern District of Georgia, chose to address his subject, *An Independent Judiciary*, from a historical perspective that reached back to the experience of our English forbears.

Judge Thrash, a native of Alabama, a graduate of the University of Virginia with high distinction and a cum laude graduate of the Harvard Law School, practiced in Atlanta for twenty years, first as an assistant district attorney and then as a small firm practitioner representing individuals, before becoming a federal judge in 1997.

A member of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Thrash is known for opinions that exhibit clear prose as well as sound law. He is also manifestly a scholar of history.

## OUR HISTORICAL ANTECEDENTS

"When," he began, "Jack Dalton asked me to speak at

this meeting on the importance of an independent judiciary, I immediately thought of telling a story, the story of the life and career of one of the great figures of the English common law tradition, Sir Edward Coke. . . . The philosopher, George Santayana said, 'Those that cannot remember the past are condemned to repeat it.' I believe that that admonition is especially true for us today."

Thrash then proceeded to remind his audience of the story of Coke's confrontations with King James, which, he asserted "are relevant to issues facing us today, particularly as they relate to the importance of an independent judiciary."

Born in 1552, Coke was a scholar whose lectures on real property became the treatise *Coke Upon Littleton,* a work known to every colonial American lawyer and judge as the foundation of law and jurisprudence, as were his reports of cases decided in the English courts. Speaker of the House of Commons when he was only 41 years old, a year later Queen Elizabeth I appointed him as her Attorney General. During her reign and that of King James I, he was a ferocious prosecutor of Papists and others suspected of treason.

After Elizabeth's death, Thrash related, King James made Coke Chief Judge of Common Pleas. As a trial jurist, Coke, the grim prosecutor, became a great defender of freedom of speech, the privileges of Parliament, the right of an accused to a public trial, the right against forced self incrimination, and the writ of habeas corpus, the Great Writ, the ultimate safeguard against arbitrary and unlawful detention.

Coke believed profoundly in the rule of law. King James believed just as profoundly in the divine right of kings. Conflict between them was, as Judge Thrash pointed out, perhaps inevitable. That conflict began with Coke defending the jurisdiction of the common law courts against the ecclesiastical courts. The latter, compliant to the will of the Sovereign, were steadily encroaching upon the traditional jurisdiction of common law courts. The Archbishop of Canterbury, appointed by the King, had proclaimed, "The King is the law speaking. It is clear by the word of God in the Scriptures that judges are but delegates under the King."

The King himself decided to intervene in the conflict. Summoning the judges and the churchmen to his palace one Sunday morning in 1608, an extraordinary confrontation between the Stuart King and the Chief Judge ensued. That encounter is, Judge Thrash noted, memorialized in bronze in one of eight panels on the doors to the west entrance to the Supreme Court of the United States, each of which illustrates a significant event in the evolution of justice in the Western tradition.

Thinking then that Coke would cause less trouble as an appellate judge, the King elevated him to the Court of King's Bench, making him Chief Justice of England. He was mistaken. The conflict came to a head in a lawsuit concerning the King's appointment of a bishop. The plaintiff's lawyer had challenged the King's right to make the appointment. Outraged, the King ordered Coke to halt proceedings in the case. Coke refused, and the Attorney General and the other judges joined him. King James summoned all of the judges to Whitehall Palace. Coke alone refused to bow to the King's will, asserting that he would "do that which be fit for a judge to do."

Determined to break Coke and affirm the divine right of kings over the judges, James signed an order that was delivered to the Chief Justice in his chambers. It read, "For certain causes now moving us, we will that you shall be no longer our Chief Justice to hold pleas before us. And we command you that you no longer interfere in that office, and by virtue of this present we at once remove and exonerate you from the same."

It is said that after he read the paper, Coke bowed his head and wept. At age 65, he was thrown out of office,

disgraced and humiliated. The conflict, however, was not over. James had also asserted that the divine right of kings extended also to Parliament. Again elected to Parliament, Coke's protests against the arrest on the King's orders of members of the House of Commons resulted in his own arrest and confinement in the Tower of London. In 1628, however, his last Parliament forced James' successor, King Charles I, to accept the great Petition of Right, which denied the right of Kings to throw Englishmen into prison without cause shown.

Coke then retired from Parliament and spent the rest of his life working on the *Reports* and *Institutes* for which he is still known. Even on Coke's deathbed, King Charles considered him a dangerous man. As Coke lay dying, a warrant to search his chambers and his library was issued by the Privy Council, and the manuscripts of his *Reports* and *Institutes* were confiscated. Two days later, on September 3, 1634, he died.

This conflict between the divine right of kings and the rule of law, Judge Thrash recalled, ultimately led to the English Civil War and triumph of Parliament, the loss by Charles of his throne and then his head, the Restoration and the Glorious Revolution that ended forever the Stuart dynasty, and with it, at least in the British Isles, the notion of the divine right of kings.

## IMPACT ON THE AMERICAN EXPERIENCE

"Our forefathers," Judge Thrash recounted, "knew well the story of Sir Edward Coke and the treason trials of the 16th and 17th Century. They knew about secret trials before *ad hoc* tribunals, with no right of counsel, trial on affidavit with no right to confront one's accuser, trials based upon forced confessions, arrest and indefinite detention for reasons of state. And they knew the importance of an independent judiciary to preserve their liberties."

"In the Declaration of Independence," he continued, "they included in the list of King George's 'injuries and usurpations' that: 'He has obstructed the Administration of Justice by refusing his Assent to Laws for establishing Judicial Powers. He has made judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.'"

"So," Thrash related, "when it came time to form a Constitution, the wise men of the Constitutional Convention established the judiciary as an independent third branch of government with life tenure for judges. In defense of the Constitution, Alexander Hamilton wrote, 'According to the plan of the convention, all the judges who may be appointed by the United States are to hold their offices during good behavior, which is conformable to the most approved of the state constitutions.'"

"The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government," he asserted. "In a monarchy, it is an excellent barrier to the despotism of the prince. In a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright and impartial administration of the laws."

"Oh," Thrash exclaimed, "how I love the powerful words of Article III, Section 1 of the Constitution: 'The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall at stated times, receive for their services a Compensation, which shall not be diminished during their Continuance in Office.'"

"No President of the United States," Thrash asserted, "shall ever say to an Article III judge those words of King James:

'For certain causes now moving us, we will that you shall be no longer our Judge to hold pleas before us, and we command that you no longer interfere in that office, and . . . we at once remove and exonerate you from the same.'"

"As an institution," he continued, "I submit that an independent federal judiciary has served us well, but we have had attacks upon the federal judiciary and threats to judicial independence throughout our history. Why is it that recently attacks upon the judiciary seem to have increased both in frequency and intensity? Well, over the last fifty years, the courts have been involved in many of the most important, and controversial, issues of the day: civil rights for blacks, women and the disabled, school prayer and the role of religion in government, criminal procedure and the rights of those accused of crime, the death penalty, homosexuality, abortion. On all of those issues, the federal courts have taken positions that are, or were, opposed to by popular opinion."

## ATTACKS ON THE JUDICIARY

"When I was growing up in Birmingham, Alabama in the 1950s and '60s," he recalled, "the two most hated men in the state were Hugo Black and Frank Johnson. Justice Black's first public appearance in the State of Alabama after *Brown v. Board of Education* was in 1970 at the annual meeting of the Alabama Bar Association. He began his remarks by saying, 'I recall very vividly a few years ago, our state legislature, that I love very much, passed a resolution suggesting that they would probably purchase a cemetery plot for me--in some *other* state.' It is ironic now that the federal courthouse in Montgomery is named for Judge Frank Johnson, and federal courthouse in Birmingham is now named for Justice Hugo Black."

"Attacking the courts," Thrash continued, "has become a form of popular entertainment. Talk radio, cable television and the Internet mean that opinions and information are not always filtered through responsible journalistic channels. Much of the information that circulates in talk radio or on the Internet is demonstrably false, or at the least distorted. The furor over the Supreme Court's recent condemnation decision is an example of that that comes to mind."

"Finally," he observed, "attacking the courts is good politics for some. In politics, a good slogan is worth more than hours of reasoned dialogue and discussion of the type that we will have here in the next two days. In this context, the slogan of the day is 'judicial activism'. Of course, the epithet has been so misused that it now just means that a judge has done something that the accuser disagrees with. In saying this, however, I do not mean to make light of the problem. The danger is that if irresponsible attacks on the judiciary continue without response, the result over time will be the public's loss of respect for and sense of legitimacy for what we do."

"Serving as a judge," he asserted, "sometimes requires the exercise of moral courage. Many of the great constitutional principles that we hold dear in the abstract are restraints upon the majority, to protect the rights of unpopular individuals and minorities. In upholding those great constitutional principles, we are bound to be unpopular. So if the judiciary is under attack, that probably means that we are doing our job."

## A CHALLENGE TO THE BAR

Judge Thrash concluded with a plea support of the judiciary: "We cannot respond to those attacks on us. We depend on leaders in the community such as you to respond for us, and in doing so, to defend the great principles and institutions that guarantee our liberty."

# ARIZONA GOVERNOR JANET NAPOLITANO *welcomes* COLLEGE TO TUCSON

For the second time in four years, Arizona Governor **Janet Napolitano** welcomed the College to Arizona, the fastest growing state in the United States.

*Janet Napolitano*

For the second time in four years, Arizona Governor **Janet Napolitano** welcomed the College to Arizona, the fastest growing state in the United States.

Named by *Time* magazine one of the five best governors in the United States, Napolitano is a graduate of Santa Clara University and of the University of Virginia Law School. An accomplished lawyer, she clerked for a judge of the Ninth Circuit Court of Appeals and practiced as a commercial appellate lawyer with a Phoenix law firm before being appointed U. S. Attorney for Arizona. Elected first as Arizona Attorney General in 1998, she is serving her second term as Governor of the State.

In introducing her, Arizona State Chair **Michael L. Piccarreta** lauded Napolitano for her "integrity, honesty, intelligence and ability" and for having devoted those qualities to a life of public service.

Napolitano chose to address subjects she knew to be of interest to the College. Referring to the speaker who preceded her, she agreed that the independence of the judiciary is continually and consistently un-

der attack. "[W]e see this every election year kind of bubbling up to the surface."

She pointed out that the two urban counties in Arizona, which have almost seventy percent of the state's population, have merit selection of trial court judges and that Arizona has merit selection for its Court of Appeals and Supreme Court. "[T]hat, she asserted, "has given rise to a bench that is highly professional and highly meritorious. . . . [B]y way of example, we have five Justices on the Arizona Supreme Court, three of whom were law clerks on the United States Supreme Court, and the other two are very distinguished jurists in their own right."

Describing the process, she continued, "As Governor, . . . I receive a list of names that are forwarded to me by a Commission on Appointments, who have already vetted and interviewed the applicants on the list. [It] has to be bipartisan; they can't send me all Republicans or all Democrats. . . . I must pick from that list. It is a process that has worked well for us and has given us, as the practicing lawyers in this state appreciate, a very, very high quality of judiciary."

Further describing the system, she continued, "[T]he judges stand for retention elections, but they're not running against anyone nor are they having to raise money. And that's the key issue with respect to merit selection. If you don't have to raise money in the sense that a true candidacy requires, there is not only an independence that goes with that, there is an appearance of independence that is so very, very important, because it is the independent judiciary that gives people faith in the justice system."

She then reminded the audience, "The one group that can really defend the judiciary are the attorneys who appear before it on a regular basis. And we can do it through a number of things. We can do it by educating the public. We can do it by responding to unfair attacks in the press. We can do it by how we comport ourselves with respect to judges with whom we disagree. . . . [I]f a judge has handed down an unfavorable ruling and the press is asking you about it, you don't blame the judge, you just say, "That's the process," and we move on. All of those things will help support the independence of the judiciary that we wish to maintain."

Moving to another subject, Napolitano continued, "I recognize the disappearance of the trial as a means in and of itself of resolving disputes. On the civil side, the cost of trial and preparing for trial has gotten beyond the reach of most litigants, and the time involved and the delay involved in getting into court has become a real deterrent to using the judicial trial process as a dispute resolution technique." Referring to the local situation in Arizona, she related that, "[I]n the Tucson area, if you're in federal court, you come behind all of the immigration and drug smuggling cases that must go into federal court, and these cases are not by the tens and they're not by the dozens, they are literally by the hundreds and thousands every year, and they are only growing. In the year 2006, the Border Patrol made almost 500,000 apprehensions in Arizona, over half of their apprehensions for the entire country. . . . So, if you are a non-immigration, non-drug-smuggling litigant, and you wish to get your commercial dispute resolved, your tort case heard, you have a hard process getting it resolved in a federal court."

"So," she concluded, "as we . . . talk about the importance of the independence of the judiciary, that also implies that you have the ability to get before an independent judge to have your dispute resolved, and those things need to be talked about together, and they tie into, as I just mentioned, some other national policies that really merit resolution, and can only be resolved at the national level. Those are things we all should be advocating for as well."

# COLLEGE AND SUPREME COURT HISTORICAL SOCIETY *enjoy* CLOSE RELATIONSHIP

At its annual meeting in early June, the United States Supreme Court Historical Society announced the inauguration of a series of reenactments of famous oral arguments before the Court, to be named in honor of outgoing Historical Society president and College past president Frank C. Jones. The Historical Society already sponsors a lecture series named in honor of Society past president and current board chair, College past president Leon Silverman. Recognizing the close ties between the Historical Society and the College, we asked Frank Jones to write the following article for the information of all the Fellows of the College.

*Frank C. Jones*

At the recent annual meeting of the Supreme Court Historical Society in Washington, D.C., **Ralph I. Lancaster, Jr.**, was elected president. **Frank C. Jones,** who had served for the previous six years as president, was elected president emeritus, and **Leon Silverman**, a former president, was elected to continue as chairman. All three are Fellows and past presidents of the American College of Trial Lawyers.

For many years there has been an extraordinarily close relationship between the College and the Society. For the benefit of those Fellows who may not be well acquainted with the Society, let me briefly outline its purposes and history.

The Society is a private non-profit organization dedicated to the collection and preservation of the history of the Supreme Court of the United States. It was founded in 1974 by Chief Warren E. Burger. The first Board of Trustees included Whitney North Seymour and Bernard G. Segal, both past presidents of the College, and Erwin N. Griswold, a Fellow, who later served as chairman of the Society.

The Society seeks to accomplish its mission by conducting educational programs, supporting historical research, publishing books, journals and other electronic materials, and by collecting antiques and artifacts related to the Court's history. These activities increase the public's awareness of the Court's contribution to our nation's constitutional heritage.

Among its programs, the Society co-sponsors a Summer Institute in Washington each year which trains secondary school teachers to educate their students about the Court and the Constitution. Additional teacher programs have been conducted recently in New York and St. Louis. It also sponsors an annual lecture series at the Supreme Court, named in honor of Leon Silverman, and occasional lectures around the country. The Society has on several occasions presented a reenactment of the oral argument in some noteworthy Supreme Court case. Beginning this coming year there will be a reenactment series to which my name has been attached (to my complete surprise)—an honor I greatly appreciate.

The Society distributes a quarterly newsletter to its members containing historical pieces on the Court and articles describing the Society's programs and activities. It also publishes three issues each year of the Journal of Supreme Court History, a scholarly collection of articles and book reviews. Cash prizes are awarded to students and established scholars to promote scholarship. An eight-volume Documentary History of the Supreme Court of the United States, 1789-1800, begun almost 30 years ago, was completed recently. The Society also publishes general interest books such as The Supreme Court Justices: Illustrated Biographies (1995); Supreme Court Decisions and Women's Rights: Milestone to Equality (2000); and Black, White and Brown: The Landmark School Desegregation Case in Retrospect (2004).

A very active acquisitions program regularly adds significant items to the permanent historical collection at the Court. This assists the Court Curator and her staff in mounting educational displays for the benefit of hundreds of thousands of annual visitors to the Supreme Court building.

The Society operates a gift shop that offers for sale a comprehensive variety of interesting and attractive gifts. A new shop is now under construction in the space that was formerly occupied by the Court's snack bar immediately across the hall from the Court cafeteria on the ground floor.

In addition to the three officers mentioned above, other College members who currently serve as active or emeritus trustees are: **J. Bruce Alverson; David J. Beck; Hugo L. Black, Jr.; Edmund N. Carpenter, II; Andrew N. Coats; William T. Coleman, Jr.; Michael A. Cooper; John J. (Jack) Dalton; William Edlund; Frank N. Gundlach; Frank G. Jones; Gregory P. Joseph; Philip J. Kessler; Phillip Allen Lacovara; Joan A. Lukey; Maureen E. Mahoney; Michael Mone; James W. Morris, III; Ted Olson; Carter G. Phillips; E. Barrett Prettyman, Jr. (also a vice president); Harry M. Reasoner; Charles B. Renfrew; Jerold S. Solovy; Mikel Stout; Dennis R. Suplee; Seth P. Waxman; Lively M. Wilson,** and **W. Foster Wollen.**

The Society reached a high of more than 6,300 members at the end of the 2007 fiscal year under the leadership of **Dennis Suplee.** The current membership chair, **James R. Wyrsch,** also a Fellow of the College, is optimistic that this record will be surpassed as of June 30, 2008. **Phil Kessler,** a College Regent, will head the membership effort next year.

Chief Justice **John G. Roberts, Jr**. is honorary chairman of the Society and Associate Justice **Sandra Day O'Connor** (Ret.) is an honorary trustee. The Chief Justice and Associate Justices **Scalia, Kennedy, Thomas, Ginsburg, Breyer** and **Alito**, attended the annual dinner of the Society on June 2 and Justice Alito delivered the annual lecture that afternoon. All nine members of the Court, including Justice Alito, who will be inducted in Toronto, are Honorary Fellows of the College. They have supported the College in many ways, including planning and leading the U.S. delegations in exchanges with other countries, hosting gatherings at the Court, and speaking at national meetings of the College.

Membership in the Society is a real bargain in my judgment. For an initial annual payment of $50 ($75 beginning the second year), a member receives the Journal and Quarterly, and other special publications on a complimentary basis from time to time. Members are eligible to attend the Society's programs and lectures and the annual dinner at the required fee; and are entitled to purchase items at the gift shop at a discount.

Since the relationship between the College and the Society is so close, and given the support and encouragement that both organizations receive from the justices of the Supreme Court, I encourage every member of the College to become a member of the Society. You can join by writing Orazio Miceli, Director of Membership, at the Society's headquarters, 224 East Capitol Street, Washington, DC 2003, or by email—micelischs@aol.com.

A substantial increase in membership would further enhance the existing close ties between the Society and the College.

By Frank C. Jones

# REGIONAL ROUNDUP

Texas Fellows donated their time and expertise to the 2008 Texas Trial Academy for legal aid attorneys last May in Austin. The academy host was the Texas Access to Justice Commission.

South Carolina Fellows recognized Lucas Asper of the University of South Carolina Law School in Columbia as the 2008 best trial advocate at the USC and Charleston schools of law. The South Carolina Fellows also each year give the USC Law School $5,000 to be used at the discretion of the dean.

More than 30 public defenders from Florida attended a Trial Skills Training Program for Florida Juvenile Defenders at Barry University Juvenile Justice Center in Miami Shores. It was organized by the College's Access to Justice and Legal Services Committee, chaired by Bob Parks of Coral Gables.

# OVER FOURTEEN HUNDRED FELLOWS RESPOND TO ONLINE SURVEY

Fourteen hundred and ninety-four Fellows of the College responded to a recent online survey authorized by the Executive Committee and conducted jointly by the College Task Force on Discovery and the Denver University-based Institute for the Advancement of the American Legal System (IAALS).

The Task Force, chaired by Fellow **Paul C. Saunders** of New York, and the Institute have undertaken a study to identify and quantify the problems associated with delay and disproportionate cost in the U.S. civil justice system. The survey is a key part of that study.

The results of the survey, whose 42% response rate was remarkably high for such a poll, are being currently being collated and incorporated into a report which will be used as an analytical tool by the Task Force.

IAALS has published a number of studies on matters of interest to trial lawyers, including judicial evaluation. Its newly released reports on the growing impact of electronic discovery, *Electronic Discovery: A View from the Front Lines* and *The Emerging Challenge of Electronic Discovery: Strategies for American Businesses*, conclude that the impact of e-discovery is so significant that "it represents the greatest sea change in the practice of law in recent memory."

These and other published works of IAALS are available for downloading from its website, www.du.edu/legalinstitute.

# AWARDS, HONORS *and* ELECTIONS

The College was very much in evidence at the annual meeting of the North Carolina Bar Association in June. Judicial Fellow and Senior Federal District Judge **William L. Osteen** of Greensboro, North Carolina received the John J. Parker Award, the highest award given by the North Carolina Bar Association. Created in memory of the late Chief Judge of the Fourth Circuit Court of Appeals, it recognizes conspicuous service by a member of the North Carolina Bar to the cause of jurisprudence in North Carolina.

At the same meeting, Fellow **Charles L. Becton** of Raleigh was elected president, succeeding Fellow **D. Clark Smith, Jr.** of Lexington, and Fellow and former State Chair **John Robbins Wester** of Charlotte was named president-elect.

The Criminal Justice Section of the North Carolina Bar Association has created the **Peter S. Gilchrist III** Award and the **Wade M. Smith** Award, given to honor, respectively, a prosecutor and a defense attorney whose careers exemplify the highest ideals of the profession. Gilchrist, a Fellow from Charlotte, is the long-time District Attorney for Mecklenburg County, North Carolina. Smith, a Fellow from Raleigh, recently represented one of the defendants in the celebrated Duke lacrosse case.

Smith was also awarded the Association's H. Brent McKnight Renaissance Lawyer Award, given to "an attorney whose trustworthiness, respectful and courteous treatment of all people, enthusiasm for intellectual achievement and commitment to excellence in work and service to the profession and community, inspires others." All three recipients of the award have been Fellows of the College.

Fellow **Charles E. Burgin,** Marion, North Carolina was inducted into the Bar Association's General Practice Hall of Fame.

And, Regent **J. Donald Cowan** of Greensboro, North Carolina has been honored by the Litigation Section of the North Carolina Bar Association with its Advocates Award, which recognizes overall excellence as a professional and as a citizen. He has also received the 2008 Pro Bono Award from the Greensboro Bar Association. That award was based on his pro bono representation of defendants in five separate capital cases, including his work in the highly publicized Willie Brown case, a nineteen-year marathon that included a challenge to lethal injection as a means of execution. Cowan, a civil trial lawyer, regularly takes assignments in both capital trials and appeals.

**Harry S. Hardin, III** of New Orleans has received the 2007 Louisiana Bar Foundation's Louisiana Distinguished Attorney Award, given to individuals who, by reason of their professional activities, have distinguished themselves and have brought credit and honor to the legal profession.

**W. A. Derry Millar** of Toronto, Ontario has been elected Treasurer of the Law Society of Upper Canada, the governing body of the practicing Bar. The Treasurer of the Society is its presiding officer.

**Tom Heintzman, O.C., Q.C.** of Toronto, Ontario has been named the recipient of the Ontario Bar Association's Award of Excellence in Civil Litigation, created to recognize outstanding contributions and achievements by a member of the Association.

**Gary M. Jackson** of Denver, Colorado has received the George Norlin Award, which honors alumni of the University of Colorado at Boulder for distinguished lifetime achievement.

**Edgar M. Elliott, III**, Birmingham, Alabama, has been awarded the Nina Migilionico "Paving the Way" Leadership Award by the women of the Birmingham Bar. The award recognizes individuals who have actively paved the way to success and advancement for women lawyers.

President-Elect **John J. (Jack) Dalton**, Atlanta, Georgia, has received the Atlanta Bar Association's Award for Outstanding Contributions to Professionalism. The award recognizes excellence, professionalism and public responsibility within the legal profession.

# IN MEMORIAM

*One of the most rewarding things we do in the Bulletin is to recognize the passing of Fellows of the College, undertaking from the information available to us to highlight those things that set them apart in life. In the notes that follow, you will find sixteen known veterans of World War II, two veterans of the Korean War and one of the Vietnam conflict, a former United States Ambassador, the former dean of two law schools, a retired judge who conducted a high-profile investigation of police wrongdoing, a judge who tried serial killer Ted Bundy, a Fellow who ran against Senator Joseph McCarthy at the height of his anti-Communist crusade, a lawyer who mentored a current Supreme Court Justice, a former shipmate who advised Richard Nixon in the early days of Watergate and a war hero who earned Britain's highest award for valor, the Victoria Cross.*

*Sadly, you will find only sketchy accounts of the deaths of several other Fellows, some of whom died as long ago as 1991, but whose passing has only now been reported to the College. All of these were Fellows Emeritus, long since retired, but each of them was surely known to some among you. We have no way of knowing what history has been lost to us through the passage of time. Newspapers keep obituaries online for only a short time, and only the largest maintain online archives, so that our ability to research outdated obituaries is limited.*

*We have a simple request: When a Fellow known to you dies, please get a copy of his or her obituary and send it to the national office. Do not assume that someone else will do this. We owe that to one another.*

**William R. Eckhardt, III,** (67) , a Fellow Emeritus from Houston, Texas, died January 7, 2008 at age 92. A graduate of Rice University and of the University of Texas Law School, where he was a member of the Order of the Coif, he began his career in the United States Attorney's Office for the Southern District of Texas. Joining the U.S. Navy in World War II, he was a disbursing officer, stationed on Guam. After the war he joined Vinson & Elkins, where he handled numerous high profile cases. His survivors include a son and a brother.

**Edward J. Egan,** (87), a Fellow Emeritus from Chicago, Illinois, and a retired appellate court judge, died March 26, 2008 at age 84 of cancer. One of seven children of a Chicago police officer, he had studied for the priesthood before World War II. He saw combat as a member of the 81st Field Artillery in the harshest fighting in the Battle of the Bulge. Attending college on the GI Bill, the first member of his family to do so, he graduated from DePaul University and from its law school and became a state court prosecutor, eventually recruiting many outstanding lawyers

to the state prosecutor's office. Elected to the circuit court in 1964 and appointed a justice of the appellate court in 1972, he had left the bench for an unsuccessful run for Cook County State's Attorney. Practicing in his own firm for a number of years, he was again appointed to the appellate court in 1988 and served until his retirement. In 2002, when he was 78, the presiding judge of the Cook County criminal court asked him to lead an investigation into allegations that members of the Chicago police department from the 1970s through the 1990s had mistreated, and in some cases tortured, suspects. His investigation concluded that these alleged offenses had taken place and that at least five police officers could once have been indicted had the statute of limitations not run. A widower who had remarried, he is survived by his wife, three sons, two daughters, three stepsons and two stepdaughters.

**George B. Finnegan, Jr.,** (75), a Fellow Emeritus from Yuba City, California, died September 30, 1998 at age 95. His maternal grandparents had crossed the plains to California in 1849. Educated at West Point, he had served in the U.S. Army in the 1920s. He had attended George Washington and Fordham law schools. During World War II, he served as Staff Judge Advocate at West Point under its then superintendent, Lt. General Maxwell D. Taylor. A noted inventor of a simulator for training and testing automobile drivers, he was a nationally known patent lawyer and a founder of the New York patent law firm, Morgan & Finnegan. A widower who had remarried, his survivors included his second wife, a daughter and a son.

**Charles S. Fisher, Jr., (67),** a Fellow Emeritus from Topeka, Kansas, died October 26, 2007 at age 79. He had served in the Navy in World War II and in the Air Force during the Korean War. A graduate of Washburn University Law School, where he was a member of the law review, he had been President of the Kansas Bar Association and a member of the American Bar Association Board of Governors. A plaintiff's personal injury attorney, he was an outdoorsman who raised Charlais cattle and for several years, raced his Porsche in competition. Divorced and remarried, his survivors include his second wife, three sons, four daughters and four stepdaughters.

**Knox B. Foster, Q.C.,** (85), a Fellow Emeritus from Winnipeg, Manitoba, retired from Aikins, MacAulay & Thorvaldson, has died.

**William S. Gordon,** (70), a Fellow Emeritus from Vero Beach, Florida, died March 21, 2008 at age 94. A graduate of the University of Indiana and of the University of Michigan Law School, where he was editor of the law review, he had been a special agent for the FBI during World War II and was later a prosecuting attorney. He had practiced with Keaner, Gordon & Glenn in Huntington, Indiana before his retirement.

**Stewart M. "Nick" Hanson, Jr.,** (85), a Fellow Emeritus from Ivins, Utah, died March 30, 2008 at age 69 of lung cancer. A cum laude graduate of Westminster College, on whose Board of Trustees he had served, and of the University

of Utah Law School, over the years he had practiced with several law firms and had served as a state court judge four years. As a judge, he had presided over the aggravated kidnapping trial of serial killer Ted Bundy. He had ended his career as Assistant Attorney General of Utah and Chief of the Litigation Division. He was a Lieutenant Commander in the United States Coast Guard Reserves and later a Lieutenant Colonel in the Utah National Guard. His survivors include his wife and three daughters.

**Hon. Harrison R. Hollywood,** (84), a retired Judicial Fellow from La Mesa, California, died in May 2008 after a long battle with cancer. He had been a judge in San Diego, California.

**Marshall T. Hunt,** (80), a Fellow Emeritus, died March 29, 2008 at age 87. A graduate of the University of California at Berkeley, he served as a Captain in the Army in the European Theater in World War II. Graduating from USC Law School, he began his own law firm and later joined Cummins & White in Newport Beach, California. Known as "The Bear," for his tenacity and his love of a challenge, he retired in 2007 after 57 years of practice. His survivors include his wife and two daughters.

**H. William Irwin,** (71), a Fellow Emeritus from Indianapolis, Indiana, died January 15, 2008 at age 88. A graduate of the University of Michigan and of its law school, he was a Navy pilot in World War II, flying PBY seaplane bombers and winning a Distinguished Flying Cross, an Air Medal and a Presidential Unit Citation. His Flight Squadron 52 was a part of the famed "Black Cat" Squadron. After the war he joined Murray, Mannon, Fairchild and Stewart, now Stewart and Irwin. A judge for three years in the 1950s, he was legal counsel to his local school board for over 35 years, during which time it grew from a one-building trustee school to a large metropolitan school district. He had retired from the practice of law in 1988. A widower, his survivors include two sons.

**Rex A. Jemison,** (84), a Fellow Emeritus from Las Vegas, Nevada, died April 12, 2008 at age 79. A graduate of the University of Nevada, his law degree was from Georgetown, and he had done graduate work at Stanford. A widower, he is survived by five children.

**Justice Robert Francis Kane,** (81), Clovis, California, died December 22, 2007 of complications from heart surgery at age 81. The son of a seventh son, he was the youngest of eight children born to an Irish immigrant and his wife. After serving in the Navy in World War II, he attended Menlo College and USC and graduated from the University of San Francisco Law School. He practiced with Ropers, Majeski, Kohn, Bentley, Wagner & Kane in San Francisco and Redwood City. At various times in his career he was a trial court judge and a Judge on the Court of Appeal for the First Appellate District of California. In 1982 he was appointed as an arbitrator for the United States in a dispute with Poland at The Hague. In 1984 President Reagan appointed him U. S. Ambassador to Ireland. He had retired from practice in 1994 and had thereafter acted as a private mediator, arbitrator, special master and discovery referee. His survivors include his wife, three sons and two daughters.

**Jack L. Kennedy,** (75), Portland, Oregon, and a longtime member of Kennedy, King & Zimmer, died March 18, 2008 at age 84, following surgery for lung cancer. A graduate of the U.S. Maritime Commission Academy and of Lewis and Clark Law School, he had served on the Board of Governors of the Oregon State Bar.

**Herman C. Kimpel,** (86), a Fellow Emeritus from Pittsburgh, Pennsylvania, died February 6, 2008 at age 80. A graduate of Waynesburg College and Duquesne Law School, and a U.S. Navy veteran of World War II, he had practiced with Dickie, McCamie & Chilcote.

**Philip J. Kramer,** (82), Binghamton, New York, died March 4, 2008 at age 71. A graduate of Yale and of Cornell Law School, he had been a partner in Kramer, Wales & McAvoy and subsequently of counsel to Hinman Howard & Kattell. He had served as a Justice of the New York Supreme Court. He is survived by his wife and several children.

**Charles B. Larrabee,** (81), a Fellow Emeritus from Albuquerque, New Mexico, and a former New Mexico Supreme Court Justice, died March 29, 2008 at age 81. He had served on the battleship USS North Carolina in World War II. A graduate of the University of New Mexico School of Law, he had practiced in Albuquerque until his death.

**William Burns Lawless,** (74), a Fellow Emeritus from San Rafael, California, former Justice of the New York State Supreme Court and Dean of the University of Notre Dame Law School, died April 23, 2007 at age 84 of complications from diabetes. As a judge, he had ruled that the New York prison system had to recognize Black Muslims as members of a valid religion. Named Dean of the Notre Dame Law School in1968, he established one of the nation's first programs that allowed law students to spend a year abroad. After leaving Notre Dame in 1971, he joined the New York firm Mudge, Rose, Guthrie and Alexander. In 1982 he became president of Western State University College of Law in Fullerton, California. A graduate of the University of Buffalo, he held law degrees from Notre Dame and Harvard. Divorced from his first wife, with whom he had six daughters and six sons, his survivors include all twelve children and his second wife.

**James B. Moore,** (64), a Fellow Emeritus, retired to Pawley's Island, South Carolina, has died. Born in 1918, he was a graduate of The Citadel and of the University of South Carolina School of Law. He served as an Army officer in the European Theater in World War II. He had served in the South Carolina House of Representatives and chaired the South Carolina Ports Authority and had practiced with The McNair Law Firm in Georgetown, South Carolina.

**Sidney Neuman,** (59), a Fellow Emeritus from Chicago, Illinois, died June 10, 2000 in a nursing home in Santa Barbara, California at age 95. Starting work as an office boy at Jones, Addington, Ames and Seibold, he had worked his way through Chicago-Kent College of Law, taking evening classes, and was admitted to the bar in 1926. He ultimately became a partner in the firm for which he had first worked.

**M. James O'Grady, Q.C.,** (98), Ottawa, Ontario, died in May 2008 at age 71. A graduate of Queens University and of its law school, he also earned an LL.M. from Harvard Law School. After acting as Special Assistant to the Solicitor General of Canada, he practiced for forty-six years with Solway, Wright, Houston, Greenberg, O'Grady & Morin and later with O'Grady & Associates. He had served as president of the Consumer's Association of Canada and on the Executive Committee of the International Organization of Consumer's Unions. A legendary devotee of ice hockey, he was a member of the International Ice Hockey Federation Board of Arbitrators. His survivors include his wife and a son.

**Bernard Petrie,** (83), San Francisco, California, died August 26, 2007, just before his 82nd birthday. A graduate of West Point and of the University of Michigan Law School, where he was an editor of the law review, he began his practice in New York, then moved to San Francisco. After serving as an Assistant United States Attorney for the Northern District of California, he established his own law firm, where he practiced for over forty-five years. He had served in a number of civic and bar organizations and on the Boards of Visitors of Stanford Law School, the University of Michigan Law School and New York University Law School.

**Kenneth D. Renner,** (91), Portland, Oregon, a member of Miller & Wagner, died March 2, 2008 at age 68. A graduate of the University of Oregon and of its law school, he was a Navy reconnaissance pilot in Vietnam and the Pacific between undergraduate and law schools. A widower who had remarried, his survivors include his wife, a son, a daughter and a stepdaughter.

**Frank F. Roberson,** (60), a Fellow Emeritus from Potomac, Maryland, died August 25, 2006 at age 90. A graduate of the University of Virginia and of its law school, he had been associated with the Washington, D.C. firm of Hogan & Hartson.

**Leonard F. Schmitt,** (70), a Fellow Emeritus from Merrill, Wisconsin, died April 11, 1991 at the age of 88 of a heart attack. Born on a farm, he had worked his way through the University of Wisconsin. He had been a delegate to the Republican National Convention in 1936 and had served six years as District Attorney for Lincoln County, Wisconsin. He enlisted in the Army in 1942 and emerged from World War II a captain, serving at Camp Hood, Texas and in Italy. A partner in the law firm of Schmitt, Hartley, Arndorfer & Koppelman, he had also served as president of a local bank. He was best known for his challenge to Senator Joseph B. McCarthy in the 1952 Republican primary, at the height of McCarthy's anti-Communist campaign, a campaign Schmitt described as "a fight to retire from public office the most dangerous and irresponsible demagogue to despoil the political scene in many years." His unsuccessful candidacy had brought him nationwide attention and hundreds of pieces of hate mail, accusing him of being a Communist. His wife survived him.

**Harold Schmittinger,** (77), a Fellow Emeritus from Dover, Delaware, a founder of Schmittinger & Rodriguez, P.A., died March 22, 2008 at age 79. A graduate of the University

of Delaware and of the Washington College of Law at American University, he had served in the Criminal Investigative Division of the Army and while stationed in Washington, had earned his LL.M. from Georgetown. He had served as president of the Delaware State Bar Association. His survivors include five daughters.

**Winfield Turley "Teke" Shaffer,** (78), a Fellow Emeritus from Charleston, West Virginia, died May 30, 2008 at age 79. A graduate of West Virginia University, he served as an officer in the 7th Infantry Regiment, 3rd Infantry Division in the Korean War, after which he attended West Virginia Law School. Beginning his practice in the family firm of Shaffer, Shaffer & Shaffer in Madison, West Virginia, in 1959 he had joined the Charleston firm, Jackson, Kelly, Holt & O'Farrell, where he practiced until his retirement in 1996. His survivors include his wife, a son, a daughter, a sister and a brother, Harry G. Shaffer, who is also a Fellow of the College.

**George Ford Short,** (81), Oklahoma City, Oklahoma, founder of Short, Barnes, Wiggins & Margo, died April 7, 2008. Born in 1927, he was a graduate of the University of Oklahoma Law School. He had joined the Naval Aviation Cadet program just before World War II ended. A former Vice-President of the Oklahoma Bar Association and a member of its Board of Governors, at the time of his death he was a member of Hornbeck Krahl Vitali & Braun, PLLC. A noted lecturer in medico-legal subjects, he had been an adjunct professor at the OU College of Medicine and Dentistry. His survivors include his wife and three daughters.

**Robert M. Siefkin,** (77), a Fellow Emeritus from Oro Valley, Arizona, died March 5, 2008 at age 82. As an eighteen-year-old, he enlisted in the Army in World War II, became a radio operator and participated in landings in New Guinea and the Philippines and in the occupation of Japan. A graduate of Kansas State University, where he played football, and of the University of Kansas School of Law, he practiced with Foulston & Seifkin in Wichita, Kansas until his retirement. He had served as president of the Kansas Association of Defense Counsel. His survivors include his wife, three sons and a daughter.

**Ronald L. Snow,** (82), Concord, New Hampshire, former New Hampshire State Chair, died March 18, 2008 after a brief illness at age 72. A debater with national ranking as an undergraduate at Dartmouth College, he earned the Caskie Prize for trial competition at Yale Law School. A senior director and shareholder of Orr & Reno, he was a member of the Board of Directors of the New Hampshire Public Defender. A young lawyer who started with his firm and who regarded Snow as his mentor called him "the gold standard, as a lawyer, as a citizen and as a friend." That lawyer, who left Snow's firm to join the New Hampshire Attorney General's office, is now an Honorary Fellow of the College, Associate Justice David Souter. Snow's survivors include his wife, a daughter and two sons.

**George D. Solter,** (75), a Fellow Emeritus from Towson, Maryland, died October 14, 2007, one day short of his eighty-seventh birthday. A graduate of Johns Hopkins and the University of

Maryland Law School, he was retired from the Baltimore firm Whiteford, Taylor & Preston.

**Walter A. "Bill" Steele,** (65), a former Regent from Denver, Colorado, and a founder of White and Steele, died Memorial Day, May 27, 2008 at the age of 85. From a family described as the First Family of Colorado Law, the grandson of a Justice of the Colorado Supreme Court and the son of a long-time state court judge, he was a summa cum laude graduate of Princeton, where he was a member of Phi Beta Kappa. He served in the Air Force as a navigator and bombardier, stationed in the Aleutian Islands, in World War II. After the war, he attended law school at the University of Colorado, where he was a member of the Order of the Coif. He had been president of the Colorado Bar Association and of the International Association of Defense Counsel and had been honored by both his state bar association and his law school. His survivors include his wife, a daughter and a son.

**David Stockwood, Q.C.,** (95), Toronto, Ontario, died March 7, 2008 at age 66 after a long battle with prostate cancer. A graduate of Trinity College, University of Toronto, and of the University of Toronto School of Law, he founded his own litigation boutique, Stockwoods LLP. Appointed Queens Counsel in 1979, he was awarded the Law Society Medal in 2005. A prolific writer and lecturer, his book on civil procedure is in its fifth edition. He was for many years editor of the Advocates' Society Journal. He was also the founder of an early alternative dispute resolution group. His survivors include his wife, two daughters and a son.

**Philip H. Strubing, 2d,** (55), a Fellow Emeritus from Memphis, Tennessee, died in a nursing home January 2, 1994 at age 86 after a series of strokes. He had served in 1970-71 as president of the United States Golf Association. He had been chairman of Pepper Hamilton & Sheets in Philadelphia. He was survived by his wife, two daughters and a son.

**Hon. John J. Sullivan,** (62), a Judicial Fellow from Sarasota, Florida, a former Chicago lawyer and an Illinois appellate judge, died of a stroke on October 2, 2007 at age 94. A World War II shipmate of Richard M. Nixon, he had counseled Nixon in the early days of the Watergate scandal before being appointed to the bench. The son of Irish immigrants, he was known for representing the underdog. A graduate of DePaul, where he was captain of the football team and class valedictorian, he had practiced law for six years before enlisting in the Navy in World War II, where he rose to the rank of Lieutenant Commander and won a Bronze Star. He had served as president of the Chicago Bar and the Illinois Trial Lawyers Association. After mandatory retirement from the bench at age 75, he had practiced for six more years before retiring for good in 1994. His survivors include a daughter.

**Hon. Ford L. Thompson,** (77), a retired state court judge and Judicial Fellow from Tallahassee, Florida, died February 25, 2008. Born in 1920, he was a graduate of the University of Florida undergraduate and law schools.

**John E. Wall,** (96), Boston, Massachusetts, died November 20, 2007 at age 76 following a brief illness. A cum laude graduate of Boston College, he had served in the U.S. Army as a Ranger and a paratrooper. Remaining in the Army Reserves, he was a Lieutenant Colonel at the time of his discharge. A graduate of Columbia University Law School, he began his career in the Organized Crime Section of the Department of Justice while earning his Master of Laws degree from Georgetown. His career had included acting as special trial assistant to the U.S. Attorney for the District of Columbia, Assistant U.S. Attorney for the District of Massachusetts, Assistant Attorney General for the Commonwealth of Massachusetts and Chief of the Criminal Division and attorney in charge of a Department of Justice Organized Crime Strike Force for New Orleans. He had argued the first Criminal RICO case before the United States Supreme Court. For the final 35 years of his life he was a criminal defense lawyer. His survivors include his wife, three stepsons and three stepdaughters.

**Rt. Hon. Sir Tasker Watkins, VC GBE PC,** (85), an Honorary Fellow from Llandaff, Cardiff, Wales, died September 9, 2007 at age 87 as the result of a fall. Born exactly one week after the end of World War I, the son of a Welsh coal miner, educated on a scholarship, when World War II broke out, he joined The Welsh Regiment and was promoted from the ranks. On August 16, 1944 his company came under murderous machine-gun fire while advancing through a French cornfield set with booby traps. After all the other officers in his group had been killed or wounded, twenty-five year old Lieutenant Watkins continued to lead a bayonet charge with his thirty remaining men, practically wiping out the fifty enemy infantry opposing them. At dusk, separated from the rest of his battalion, he ordered his men to scatter, and he personally charged and silenced a German machine-gun post, regrouped his remaining men and led them to safety. His gallantry on that occasion earned him the Victoria Cross, Britain's highest award for valor.

After the war, he pursued his lifelong desire to take up legal studies. He was called to the Bar by the Middle Temple in 1948 and became Queens Counsel in 1965. By 1971 he was a Judge of the High Court of Justice. He became a Lord Justice of Appeal in 1980 and Deputy Chief Justice of England and Wales in 1988. He retired in 1993. The recipient of many honors in his lifetime, his love of rugby led him to the presidency of the Welsh Rugby Union for eleven years. His wife had predeceased him.

**Kenneth C. Weyl,** (63), a Fellow Emeritus from Naples, Florida, died April 2, 2008. A veteran of World War II, he had served on the battleship USS Iowa. He was a graduate of William Mitchell College of Law and had practiced in both Minnesota and Arizona. A widower, he is survived by two sons and two daughters.

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

*"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