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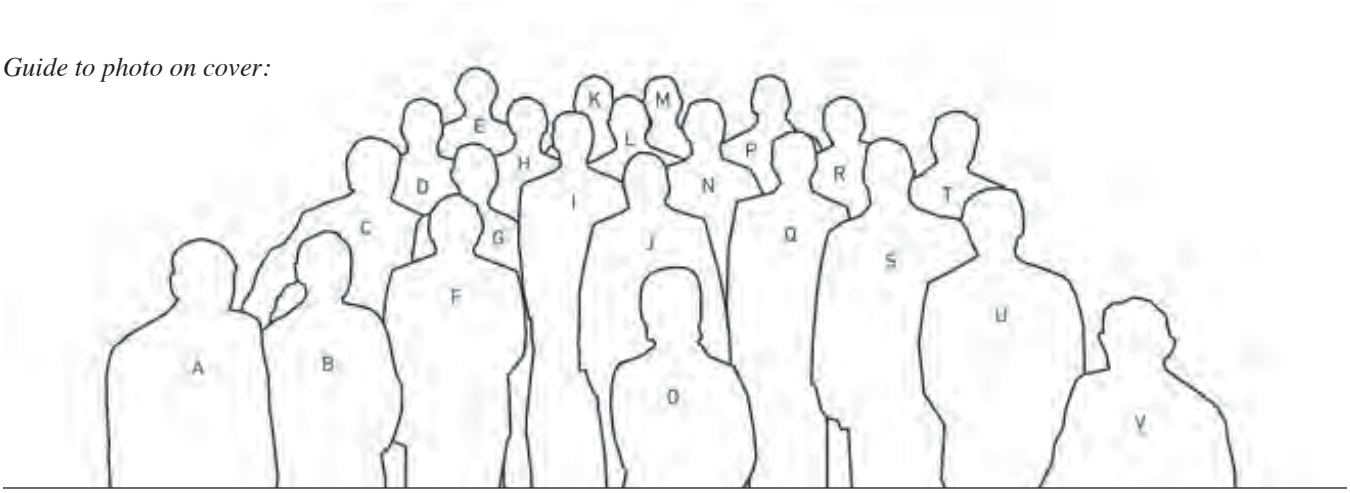
THE BULLETIN

PRESIDENT JOAN A. LUKEY *and all* LIVING PAST PRESIDENTS *at* 60TH ANNUAL MEETING

A reader's guide is on the overleaf.

THIS ISSUE: 104 PAGES

Guide to photo on cover:



A. Thomas E. Deacy, Jr. 1975-76
B. R. Harvey Chappell, Jr. 1986-87
C. Michael E. Mone 1999-2000
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E. John J. (Jack) Dalton 2008-09
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FROM THE EDITORIAL BOARD

Following our custom, we have dealt in separate articles in this issue with the substance of each presentation at the 60th Annual Meeting of the College in Washington, DC.

The College's national programs are designed to be both informative and thought-provoking for both Fellows and their non-lawyer guests. Those who have followed these programs over the years have come to realize that they embody in two days a combination of renowned speakers and challenging subjects that would be almost impossible to duplicate by any other organization or in any other venue.

We hope that our editorial approach serves as a record and a reminder for those who attend each meeting and enables those who were unable to attend to share in the rich and thought-provoking programs that successive presidents-elect have created.

Over the past ten years, the use of the Internet and the College website have become a routine means of timely, informative communication to the Fellows of the College. The Bulletin has thus been progressively transformed from a periodic bulletin board into something that more closely resembles a journal. In the process, we began to utilize a transcription of the proceedings at the annual meetings to transform them into a sort of permanent record. We also solicit informative articles and op-ed contributions from Fellows. We post the publication on the public segment of the College's website, where it is available to the general public as well as to Fellows of the College.

With this transformation has come the need to spread the task of doing the initial writing that goes into each article by offering to Fellows who have the time, the writing talent and the willingness an opportunity to participate in the publication. Although our Editor, Marion Ellis, does a lion's share of the work of producing the publication, many of the substantive articles require the knowledge and insight of a practicing lawyer to produce a first draft.

We will be happy to give a willing writer an assignment, the material you will need to carry it out, an informative template we use to produce a consistent approach in each article, the comfort of knowing that you will have the assistance of experienced editors and the College staff to review your contribution and a reasonable deadline. We will give you byline credit for any articles on which you choose to do the original writing.

For any of you who have a repressed desire to try your hand at footnote-free writing, Marion Ellis' contact information can be found at the bottom of the masthead that accompanies this issue.

American College of Trial Lawyers
The Bulletin

Marion A. Ellis, *Editor*
Telephone: 919.383.3737
Email: ellisellisinc@frontier.com
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 530, Irvine, California 92612
Telephone: 949.752.1801 Facsimile: 949.752.1674
Email: nationaloffice@actl.com Website: www.actl.com

IN THIS ISSUE

A current calendar of College events is posted on the College website at ***www.actl.com****.*

60TH ANNUAL MEETING
A TRIUMPHAL SUCCESS

The American College of Trial Lawyers returned to the nation's capital for the fifth time in its history, this time to celebrate a landmark occasion, the 60th anniversary of its founding. The College's 10th and 50th anniversaries had also drawn it to Washington.

Fellows gather on Thursday evening in National Building Museum for banquet honoring U.S. Supreme Court

****** NOTICE OF CHANGE OF MEETING SITE ******

The College's 2011 Annual Meeting will be held at La Quinta Resort and Club, La Quinta, California, rather than in San Diego. The dates of the meeting, October 20-23, 2011, remain unchanged.

Appropriate to the occasion, the meeting functions and programs centered around an array of honored guests. The presence of United States Supreme Court Chief Justice **John G. Roberts, Jr**. graced the opening banquet. Canadian Supreme Court Justice **Thomas A. Cromwell** and United States Associate Justice **Sonia Sotomayor** were inducted as Honorary Fellows of the College.

Other speakers included Honorary Fellow **Lord Phillips of Worth Matravers**, President of the recently established Supreme Court of the United Kingdom, retired Australian High Court Justice **Michael Kirby, AC, CMG,** Acting United States Solicitor General **Neal Katyal** and Senior Counselor for Access to Justice at the United States Department of Justice Professor **Laurence H. Tribe**. The second Sandra Day O'Connor Jurist Award was given to United States District Judge for Western District of Texas **Sam Sparks**.

Two recurring themes throughout the meeting were access to justice, fundamental to a democratic society, and the recent economic crisis, whose effects are still being felt throughout the world.

A highlight of the meeting was the honoring of the over forty Fellows of the College who had represented, pro bono, detainees at the United States Naval Base at Guantánamo, Cuba in habeas corpus and other proceedings. Those present were arrayed before the dais while Past President **Michael A. Cooper** related the origin of this effort and the College's role in coordinating the recruiting of volunteers for this arduous representation. He was followed by a moving account by Past President **Michael E. Mone** of his and his son's representation of an Uzbek detainee, his relocation to Ireland and ultimate reunion with his wife and children. The detainee had been cleared for release after almost eight years' detention, but could not safely return to his native country.

PRELIMINARIES

Before the conference participants had begun to arrive, the Board of Regents had met for two days, considering one hundred eight nominees and conducting the regular business of the College. The trustees of the College Foundation Board had met on Thursday morning to receive a report from its investment advisors, consider proposed grant applications and conduct its other regular business.

The Fellows' meeting was preceded on Thursday afternoon by a three-hour professional program entitled *International Commercial Arbitration: What You Need to Know* that drew upwards of two hundred fifty Fellows. The fourteen speakers, seven of whom were Fellows or Judicial Fellows, included leading scholars and practitioners in international arbitration from the United States and Canada, counsel to international corporations and jurists from both the United States and Canada.

On Thursday evening, the meeting of the Fellows commenced with a black-tie dinner in the Great Hall of the historic National Building Museum, honoring the Supreme Court of the United States.

The General Committees of the College held breakfast meetings on both Friday and Saturday mornings, and the new inductees attended a breakfast at which they were introduced to the workings of the College and their prospective role as Fellows.

The meeting programs and the annual induction banquet were held at the JW Marriott Hotel. The backdrop behind the dais at that venue (see photo at pages 40-41) featured reminders of the College's history, including: an iconic photo of the participants in the formal dinner that marked the 1951 Annual Meeting at the Waldorf Astoria in New York City; a photograph of the combined delegations at a Canada-United States Legal Exchange; portraits or photographs of Founder-Chancellor Emil Gumpert, Past President and Courageous Advocacy Award honoree Griffin B. Bell, Honorary Fellow and Jurist Award honoree Sandra Day O'Connor, David W. Scott. Q.C., the College's first Canadian president and Joan A. Lukey, the College's first woman president.

FRIDAY

President **Joan A. Lukey** presided over the Friday morning general session, which commenced with a traditional moment of silence as the names of the eighty-five Fellows who had died since the Spring Meeting were scrolled across the screens at the front of the ballroom.

The opening prayer, delivered by Past President **Andrew M. Coats,** was followed by the induction of

United States Supreme Court Associate Justice **Sonia Sotomayor** as an Honorary Fellow. Justice Sotomayor and her long-time friend, Regent **John S. Siffert,** then engaged in an informal on-stage chat, laced with warmth, humor and insight, billed as *The Journey from Judge to Justice, The First Year.*

[Editor's note: an account of all the presentations at the Annual Meeting may be found in separate articles in this edition of *The Bulletin.*]

Acting United States Solicitor General **Neal K. Katyal**, introduced by Past President **Earl J. Silbert**, next addressed the organization, role and history of his singular office, including some of its darker historical moments in which we wrestled with the role of race.

The presentation honoring the Fellows of the College who had represented Guantánamo detainees followed. Past President **Michael A. Cooper'**s introduction of those participants who were present drew a standing ovation, and Past President **Michael E. Mone's** account of the story of his and his son's client, Oybek Jabborov, an Uzbek refugee caught up in the armed conflict in Afghanistan and falsely accused of being a terrorist, brought both a standing ovation and more than a few tears.

Regent **Robert L. Byman** next introduced **Anton R. Valukas,** who had been appointed by the court as examiner in the bankruptcy of Lehman Brothers, the largest bankruptcy in history. His presentation, entitled *Lehman Brothers' Bankruptcy: The First Domino in the Financial Crisis*, was a riveting reminder of the financial disaster that continues to hang over the world economy.

The Friday program ended with a presentation by artist **Henry Casselli**, a former Marine combat artist, whose works range from the world around his home in the flood-ravaged Ninth Ward of New Orleans, through the battlefields of Vietnam, the preparations for the launch of both the flight of John Glenn and that of our first space station, to portraits of Muhammad Ali and President Ronald Reagan. Many of his works hang in the Marine Corps Museum at Quantico, Virginia, and the portraits of Ali and President Reagan hang in the National Portrait Gallery, where the Fellows and their guests were to gather that evening.

A luncheon for the Judicial Fellows attending the meeting and their spouses followed the Friday program. On Friday evening, the Fellows and their guests enjoyed a reception, dinner and dancing in the Smithsonian American Art Museum and the National Portrait Gallery.

SATURDAY

The Saturday morning program began with a presentation of the New Supreme Court of the United Kingdom by its first President, Honorary Fellow The Right Honourable the **Lord Phillips of Matravers**. Introduced by College Secretary **Chilton Davis Varner,** Lord Phillips described the history of the traditional Law Lords, who had long constituted the final appellate judicial body in the United Kingdom, and the transition in the last few years from that institution to an independent Supreme Court.

The Honourable Mr. Justice **Thomas A Cromwell**, Justice of the Supreme Court of Canada, was then inducted as an Honorary Fellow by Past President **David W. Scott, Q.C.** In his acceptance remarks, Justice Cromwell chose to address the growing problem of access to justice that afflicts both Canada and the United States.

Picking up on our ongoing economic difficulties, Columbia Law School Professor **John Coffee,** a noted legal authority in the financial regulation arena, spoke next on the questionable adequacy of the reforms theretofore adopted in the wake of the 2008 financial crisis. Introduced by Past President **Robert B. Fiske**, Professor Coffee's address was entitled *The Next Big Financial Crisis—Where Are We?*

Emil Gumpert Award Committee Chair and Regent designee **William J. Kayatta, Jr**. presented the 2010 Gumpert Award to the Older & Wiser Program of the Neighborhood Legal Services Association of Pittsburgh, Pennsylvania. In his acceptance remarks, Managing Attorney **Joseph Olimpi** described his organization's program to assist older citizens in navigating the maze of legal and regulatory problems with which they are faced.

The Honourable **Michael Kirby AC CMG,** Retired Justice of the High Court of Australia, introduced by President-Elect **Gregory P. Joseph**, next delivered an address entitled *Use of Foreign Precedents: Time for American Trial*

Lawyers to Rejoin the World. In his remarks, he forthrightly addressed a subject that has been the source of ongoing controversy in courts of the United States.

President **Joan A. Lukey** then introduced Harvard Law Professor **Laurence H. Tribe**, then the Senior Counselor of Access to Justice in the United States Department of Justice. Professor Tribe, who has since returned to Cambridge, described the Obama Administration's Access to Justice Initiative, giving a graphic account of the problems with which it was designed to deal.

The Saturday morning program reached a climactic end with the presentation of the second Sandra Day O'Connor Jurist Award to United States District Judge for the Western District of Texas **Sam Sparks,** JFACTL. In presenting the award, O'Connor Award Committee Chair and Regent-designate **Trudie Ross Hamilton** described Judge Sparks' courageous handling of the trial of the members of the feared Mexican drug cartel known as The Syndicate.

The Annual Business Meeting of the Fellows, at which five new Regents were elected, and the reorganization meeting of the Board of Regents, at which the officers for the coming year were elected, followed. The results of those elections are separately reported elsewhere in this issue.

Following the morning meeting, the new inductees and their spouses and guests were entertained at a reception and luncheon, at which Past President **James W. Morris, III** described the process by which the inductees had been selected and shared some of his reflections on the College.

ANNUAL BANQUET

The annual banquet began with an invocation by Past President **Frank C. Jones.** A past president of the College traditionally delivers the induction charge to new Fellows of the College at the black-tie reception and banquet given in their honor. On the occasion of the 60th Annual Meeting, however, the inductees, standing before a portrait of the late Emil Gumpert, the Founder-Chancellor of the College, heard a recording of Gumpert himself delivering the charge he had authored and had delivered to each new group of inductees until his death in 1982.

Inductee **Michael N. Herring**, Commonwealth Attorney for the City of Richmond, Virginia, delivered a response on behalf of the new inductees.

Following dinner, President **Joan A. Lukey** handed over the historic maul that is the symbol of the presidency of the College to her successor, **Gregory P. Joseph,** after which the Fellows and their spouses and guests chose between dancing the night away and participating in a traditional sing-along to end what had been a notably successful annual meeting.

The 2011 Spring Meeting was to be held in San Antonio, Texas and the 2011 Annual Meeting will take place in La Quinta, California.

As we enjoy the fellowship of great lawyers and judges during this special time, help us remember our responsibilities and our obligations to our system of justice. Give us the courage to stand with those who stand alone, to speak for those whose voices can't be heard, and not to turn away from the causes of the poor or the unpopular. In this time of foreign wars and domestic dangers, help us as we strive to protect the rights and individual liberties of our citizens which fear threatens to erode. When our deliberations are concluded and we leave this special place, help us take with us a renewed sense of camaraderie with those with whom we contest in Court, holding always to the courtesy, civility and collegiality which are the hallmarks of the Fellows of the College . . . . Amen.

Opening invocation
Past President Andrew M. Coats

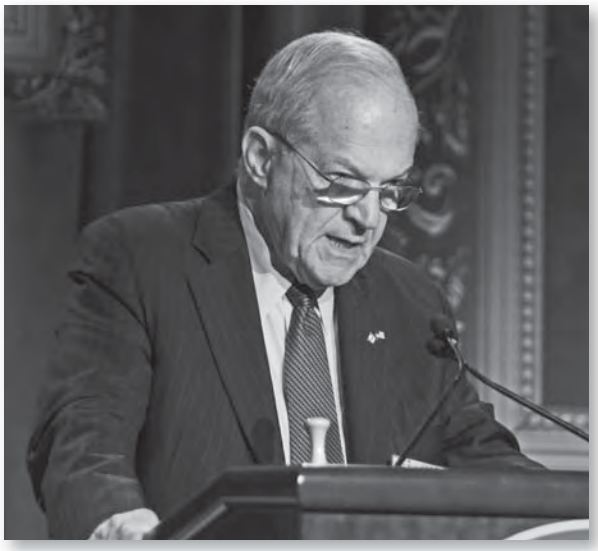
DEFENDERS *of the* GREAT WRIT HONORED

At its 60th annual meeting, the College honored those Fellows who had undertaken the pro bono representation of detainees at the United States Naval Base at Guantánamo Bay, Cuba in habeas corpus proceedings testing the validity of their confinement.

*Past President **Michael A. Cooper**, New York, New York, himself one of those volunteers, made the presentation to all the honorees who were present, and Past President **Michael E. Mone**, Boston, Massachusetts, responded.*

*As President **Joan A. Lukey** observed, "The core mission of this College is the administration of justice, including defense of the rule of law. The folks who undertook this task were from all parts of the political spectrum. This didn't have to do with being on one end or the other of 'liberal' or 'conservative.' It had to do with the recognition by Fellows of this College that the rule of law must be preserved and protected."*

Cooper's presentation and Mone's response, reflecting the best of what the profession and the College are all about, follow. The editors have thus chosen to print them in their entirety.



Michael A. Cooper

Michael A. Cooper

"Turn your mind back five years to the year 2005. There were about 700 individuals detained at the Guantánamo Naval Station. They came from many different countries. They had been apprehended in many different circumstances, very few in the field of battle. The Supreme Court had held that the United States District Courts had jurisdiction over claims asserted by the detainees, but there had been no adjudication as to what rights, if any, the detainees could assert.

"Fast-forward now to the present. Forty-three Fellows have represented detainees in habeas corpus proceedings and other proceedings. That is the largest cohort of law-

yers to have stepped forward for this arduous representation. How did that come about?

ORIGIN OF THE PROGRAM

"Well, it happened that there was a member of the [College's] Access to Justice Committee named Mike Griffinger from New Jersey, and his firm had a public interest internship that they sponsor. The intern that year was a young woman lawyer named Rita Gutierrez, who was working with the Center for Constitutional Rights. That was the first organization in this country I believe, to have become aware of and decided to do something about the plight of the detainees.

"Mike Griffinger, spurred on by Rita Gutierrez, brought this need for representation to the attention to the Access for Justice Committee. That committee brought the need to the attention of the then-leadership of the College, and the need for representation became known to the fellowship at large.

"I remember at the time that I anticipated that five, perhaps ten, Fellows would volunteer to represent detainees. In fact, as I mentioned, forty-three did so. They came from all corners of the country. Sylvia Walbolt and Rufus Pennington from Florida, Ed Burke from Hawaii, Harry Schneider from Washington state, from Boston to Austin, Mike Mone and Dicky Grigg.

THOSE IN ATTENDANCE

"Sixteen of them are registered as attending this meeting, and I'm going to read their names, and I would ask them to come forward and stand in front of the podium here and face your colleagues in the College: Elizabeth Ainslie from Philadelphia, Scott Barker from Denver, Ed Burke from Honolulu, John Chandler from Atlanta, myself, Richard Siss from Washington, Paul Fortino from Portland, Dicky Grigg from Austin, Bill Hangley from Philadelphia, Clark Hartson from Philadelphia, John Lundquist from Indianapolis, Mike Mone from Boston, William Murphy from Baltimore, Rufus Pennington from Jacksonville Beach, Louis Ruphrecht from Millborn, New Jersey, Sylvia Walbort from Tampa, Florida. If there are any others here, please come forward and stand side by side with your colleagues.

OBSTACLES FACED

"These lawyers and the others who have represented detainees have faced formidable obstacles, unlike, at least in my case, any that I have encountered in my life as a lawyer. The first obstacle was a very simple logistical one. How do you get to Guantánamo to meet with your client? It's not a matter of purchasing an airline ticket. You have to be cleared; you have to get security clearance. You then have to go to Fort Lauderdale, and from Fort Lauderdale you take a prop plane, not a very new prop plane, on a three- to three-and-half-hour flight to the Guantánamo Bay Naval Station. There are no bathroom facilities on that plane, and I can tell you that when I took my first trip, that aspect of the trip kept me up at night. I won't tell you how I solved the problem.

"There was a language barrier. Most of the detainees do not speak English. They may have learned during the period of detention some phrases or words, but they couldn't converse with you. My client, who is Tunisian, speaks no English at all. I think he understands more than he lets on, but that is a barrier, again, that most of us don't face in our daily client representations.

"There's the cultural barrier. Most, if not all, of the detainees are Muslim. I brought with me on my first visit there a colleague who was a woman. I knew a little bit, only a little bit, about the attitude of Muslims toward women, particularly in the Sunni sects. My client could shake my hand. His culture did not permit him to touch my colleague.

"I happen to be Jewish. I didn't know how I should broach that subject. It was clear to me that I had to broach the subject, because if that made my representation unwelcome to him, I wasn't about to force it upon him by subterfuge. Fortunately, he told me that most of the 'brothers,' as he referred to them down there, were represented by Jewish lawyers, and they seemed to be pretty able.

"The last obstacle I mention is getting access to evidence. The government is rather liberal in classifying evidence as 'secret,' as

'classified.' If you want to view any of that evidence, you've got to go to a facility in Arlington, Virginia. You have to look at it there. You can't take copies of anything.

"All in all, it has been a very arduous representation. But the Fellows, those standing here, and others, have persisted, and I think that they have, they're a wonderful example of what courageous lawyers, dedicated lawyers, do.

MONE INTRODUCED

"Now, Joan Lukey, our president, chose wisely when she asked Mike Mone to speak for the Fellows who have volunteered to represent detainees. You would think at first blush that Mike is not a very likely volunteer for that representation. After all, he's made his name and mark in personal injury litigation and representing lawyers. But if you know Mike, if you know him, it seems quite natural that he would have stepped forward to represent detainees, for he has a genuine passion, a true passion for justice and for righting injustice. And the treatment by our government of detainees was a paradigm of injustice, at least until the Supreme Court and the District Court in some of the habeas cases restored the rule of law to this arena.

"Mike's client in Guantánamo was an Uzbek. I wonder if he has any idea how fortunate he was to have Mike and his son Michael, who is seated in the first row, represent him. He's left Guantánamo and with the assistance with Mike and his son has found a home in Europe. My client is still languishing there, hoping to be relocated to some country. There is no one I would rather have speak for me in the capacity of a volunteer lawyer representing a detainee than the College's 50th president, Mike Mone."

Michael E. Mone

"You cannot possibly understand how proud I am to speak for these men and women who just stood before you. I want to thank the College for honoring these Fellows who represented Guantánamo detainees. And in particular, I want to thank Mike Cooper, who encouraged the Access to Justice Committee to become involved in securing detainee representation.

" I want to thank Joan Lukey and the Regents of the College for the encouragement and the moral support provided to those Fellows who undertook to uphold a core value of the American College of Trial Lawyers, the right to counsel, a fair and independent trial, to challenge their detention and ultimately the rule of law.

"I want to make it clear, though, that I stand here only in a representative capacity in that I am speaking for the Fellows you have just met, for the Fellows who can't be here today who undertook this representation, and hopefully to represent lawyers all over the country in small and large firms, Republicans and Democrats, who answered the call to provide representation in this very unpopular cause.

Michael E. Mone

"I'm also here in a representative capacity, because much of the real work on our client's behalf was done by our son Michael, my law partner. So in these remarks, when I say that 'we' did something, in all probability it means that Michael did something.

OYBEK JABBAROV

"Too often we think of detainees the way we think of illegal immigrants. They're just a group. We mass them together. They're not. They're individuals, and every detainee had an individual story. Some, like my client, were confined simply because he was in the wrong place at the wrong time. And others were undoubtedly waging war against the United States Government. But each detainee has a separate story. All are entitled to the benefits of our constitutional protections.

"I want to tell you our client's story. I want to tell you about Oybek Jabbarov. In 2001, Oybek was

then in his early twenties. He was a refugee from Uzbekistan living in Afghanistan, along with his expectant wife and his one-year-old son. After being discharged from compulsory service in the Uzbek army, Oybek could not find a job, and like so many in his country, he left to seek work elsewhere and ended up in northern Afghanistan, living among an Uzbek community, supporting himself and his family by selling chickens, when the United States invaded to bring down the Taliban government and to capture the leaders of Al Qaeda following the unspeakable September 11th attacks on this country.

"In the chaos of war that followed, Oybek was separated from his family and, while attempting to rejoin them, was offered transportation by soldiers of the Northern Alliance who were our allies in the fight against the Taliban. You must understand that under the Taliban, Afghanistan, in essence, had no government. It had no borders. It had no checkpoints, and no one was ever asked for a passport. And thus, it became a refuge for people from all over central Asia, such as Oybek.

OYBEK DETAINED

"As we now know, Afghanistan is a tribal society. The only protection an individual has there is the protection of his family, his tribe, and without that protection, one is extremely vulnerable. In addition, when Oybek was picked up by the Northern Alliance, the US was offering a bounty for foreign fighters who were supporting the Taliban. Brochures in their native language were dropped all over Afghanistan. Let me read to you from one brochure:

" 'Get wealth and power beyond your dreams. Rid Afghanistan of murdering terrorists . . . . You can receive millions of dollars by helping to catch Al Qaeda and Taliban murderers. This is enough money to take care of your family, your village and your tribe for the rest of your life.'

"The Northern Alliance soldiers who offered Oybek a ride thus had a powerful incentive to consider him to be a foreign fighter to collect the bounty. And for that reason, Oybek was turned over to US forces at Bagram Air Force Base in December 2001. He was held in US custody at Bagram and then at a facility at Kandahar, until he was transferred to Guantánamo in the spring of 2002, despite the fact that US civilian interrogators in Afghanistan had determined that he was not a foreign fighter. They had already made that determination.

"During his time in US custody, Oybek, like many of the others, underwent 'enhanced interrogation.' Now, I'm not going to debate the definition of 'torture' with you here today, but I will say to you if it was done to you, you would know it was torture.

OYBEK AT GUANTÁNAMO

"Following transfer to Guantánamo, Oybek was held for more than seven years, where most of his time was spent in virtual solitary confinement. The Center for Constitutional Rights paired us with Oybek in 2006. It took us some time, because of various US Court cases and congressional actions involving and restricting the writ of habeas corpus, for us to obtain the classified documents which purportedly laid out the basis for Oybek's capture and continued detention.

"Before we ever had a chance to meet Oybek, having reviewed that material, it was apparent to us that the case against Oybek was thin or nonexistent. And Michael was armed with that information when we were finally allowed to visit Oybek in August of 2007. Now, when I came back from the Access to Justice Committee and suggested to Michael that we were going to take a Guantánamo detainee, he said to me, 'Okay, Dad, so everyone else is going to get a goat farmer, but what if we happen to end up with a real terrorist?'

"Well, before we ever visited Guantánamo, we knew that that was very unlikely based upon the information we had. But when Michael came back from Guantánamo, I said, 'So what's he like?' And he looked at me, and he says, 'Dad, he's more Borat than he is Khalid Sheikh Mohammed.'

"During the first of eight trips to Cuba, he met Oybek. Oybek presented as a gentle young man with no apparent bitterness towards the United States government that was detaining him,

but he was desperate for freedom. But, however, unlike almost all of the other detainees, Oybek had taught himself to speak English, and he could speak English with us, which he had learned from the guards. As I say, he spoke English with a slight southern accent. His English greatly enhanced our ability to eventually relocate him. Shortly after we began representing him, the Bush administration cleared him for release or cleared him for transfer, recognizing what we believe to have been what had always been the fact, that he was not a threat to the United States.

SEEKING ASYLUM FOR OYBEK

"Following the administration's determination that he could be released, however, he was stateless. He could not go back to Uzbekistan, because our State Department recognized that Uzbekistan's record of human rights would make it very dangerous for someone like Oybek to return to his country. If you want to know anything about how the Uzbeks treat dissidents -- and they would have considered Oybek to be a dissident -- go to Google. Put in 'Uzbekistan,' put in the word 'dissident,' and put in the word 'boil,' as in 'cook,' and you will understand what Oybek would have faced had he returned to Tashkent.

"As Michael said, 'We don't have a legal problem anymore. We have a diplomatic and political problem of convincing a third country that they will give asylum to someone who the United States Government had defined as a member of the worst of the worst and who the United States Government wouldn't grant asylum to.'

"And we didn't get any help from the United States government in finding a place for him to go. Michael went to Europe, flew to Europe, and met with human rights groups in Germany and Denmark and Ireland, hoping to identify a country where we had some hope that Oybek would be accepted. Following meetings in Dublin with Amnesty International and representatives of Human Rights Watch, we focused on Ireland.

LONG ROAD TO IRELAND

"Why Ireland? Well, we had four reasons. First, Oybek spoke English, which gave him a real head start for building his life in another country. Secondly, Ireland remains in part an agricultural country, which was Oybek's background. Thirdly, Ireland has an established tradition of human rights. And most importantly, through long and trying experience, Ireland knows a terrorist when it sees one, and they would realize that Oybek wasn't.

"In the spring of 2008, Michael and I went down to Guantánamo to talk to Oybek about going to Ireland. He wanted to go to a free democratic country, and Ireland certainly qualified. But he didn't even know where Ireland was, and questioned us about that. So I took out a lawyer's yellow pad, and I drew a freehand map of Western Europe, and located where off the coast of England Ireland was. Now, as Mike said, every time you left Guantánamo, you had to put all your papers, your notes and your papers in an envelope and give them to the security teams. We are still waiting for them to clear my map of Western Europe.

"Michael will tell you that one of the most interesting moments in our representation was when Oybek asked what language is spoken in Ireland. And we assured him that it was English. He said, 'Well, do they speak English like you and Michael?' Michael then had to listen to me talking in what he described as 'vaudevillian Irish' to demonstrate to Oybek that he would be able to understand the natives of Ireland.

"On our return from Guantánamo, Michael went back to Ireland and single-handedly started a human rights campaign on behalf of Oybek. He talked to ministers in the Irish government, who expressed an interest in helping us but had great concerns about the political ramifications of taking a detainee. He had members of the Dail, Ireland's Parliament, raise questions of the government in debate and made Oybek's case a prominent public issue.

"Past-president Ralph Lancaster kindly put me in touch with his friend, Senator George Mitchell, whom the Irish revere for his work in bringing peace to Northern Ireland. Senator

Mitchell hand-delivered a letter to the Irish Foreign Minister from Michael, asking him to consider accepting Oybek. One of our Honorary Fellows, former president [of Ireland] Mary Robinson, spoke to Ireland in favor of Oybek's case. Senator Kennedy, Senator Kerry and Congressman Bill Delahunt directly contacted the Irish government on Oybek's behalf.

"Now, as you might imagine, many people from Boston travel to Ireland. And Michael had established such a presence there that people would come back and they would tell me that they had heard Michael on Irish radio discussing Ireland's role in helping to close Guantánamo.

A SETBACK

"Now, by the end of 2008, with the change in administration, we had made a lot of progress. And then came the spring of our despair, the spring of the despair for the men at Guantánamo, because the new administration came into office, but Congress passed a law prohibiting any US detainee from being brought to this country. That made it an awful lot harder to convince a third party to grant asylum to people who the United States would not take.

"In the spring of 2009, with no progress, despair set in at Guantánamo, and many of the detainees, including Oybek, began a hunger strike, and they had to be force-fed. I was very concerned about that. I was very concerned that that would affect Ireland's interest in Oybek. But, as my son pointed out, if anyone understands that the despair of confinement can lead to a hunger strike, it's the Irish.

"By the late summer of 2009, it was clear that the Irish had not given up on Oybek, and they were prepared to grant asylum not only to him but to one of the other Uzbek detainees. So Oybek and another Uzbek–try that a lot of times–Oybek and another Uzbek, who we referred to in our office as 'the Uzbek-to-be-named-later,' were eventually put on a US military plane at Guantánamo and flown into Dublin, where they arrived a year ago tomorrow.

IRELAND AND FREEDOM

"When the plane with Oybek and Shakhrukh, the other Uzbek, landed in Ireland, they were shackled hand and foot. That's the way Guantánamo detainees were moved. When a representative of the Irish government got on the plane, he was told by the officer in charge of the guards that they were ready to escort Oybek off the plane. The Irishman said, 'No, these men are not going anywhere until you take off the shackles and the handcuffs, because when these two men step off this plane onto Irish soil, they will do so as free men.'

"There was one last item undone. During the course of our representation, Michael had tried, without success, to locate Oybek's wife and two children. But without legal travel documents and afraid to return to Uzbekistan, they had lived in refugee camps throughout Central Asia since Oybek's disappearance. One day, Oybek's family was listening to the Uzbek service of radio-free Europe, Radio Liberty, and they heard Michael being interviewed. And they understood that there was a lawyer, and that Oybek was in Guantánamo, and they got in touch with us.

"Michael then worked with the Irish government to bring his two children, one of whom he'd never seen, to Ireland. Just before Christmas of last year, Michael sent out an email to all of the lawyers on the Guantánamo listserv. The listserv had been an invaluable tool to all of us detainee lawyers in sharing information, discussing strategy and providing representation to their clients. This email that went out just before Christmas is captioned 'Home for the Holidays.' Let me read to you very briefly:

A FAMILY REUNITED

"'Yesterday evening in Dublin, a plane touched down, carrying a young woman and her two sons. After they were met by the officer of the Irish government [who] helped them collect their belongings, they were ushered through Customs and out the door for international arrivals. Waiting for them on the other side of the door was their husband and father, Oybek Jabbarov. After eight years of separation and unimaginable

anguish, the Jabbarov family is finally reunited. They spent today getting settled in their new home on the west coast of Ireland. Mrs. Jabbarov loves her new home, but worries how she will ever keep the place clean. The boys were out in the neighborhood riding the new bicycles that their father had promised them.'

"Michael's email continued, and I address this to all of the lawyers who represented detainees: 'I write to tell you this because it is through our collective efforts that this reunion, eight years in the making came about, and you all deserve to share in this joyous moment.'

"Ladies and gentlemen, the Talmud teaches us that to save one life is to save the whole of humanity. At Joan Lukey's kind invitation, Oybek's lawyer is here. And I'd like to introduce you to our son Michael. Michael, stand up.

PRO BONO TRADITION RECOGNIZED

"Now, I've never had to explain to lawyers why the Guantánamo lawyers did this. But let me just tell you why, to those people who may not be lawyers who are here, why they did it, why lawyers, including Fellows of this College, undertook this representation . . . of this very unpopular cause. They did it because it's part of their DNA. It is a reason many of them went to law school. Who amongst you has not imagined yourself as Atticus Finch standing in that hot Alabama courtroom defending an innocent man?

"Every state in this country has a long tradition of lawyers providing pro bono representation. When Michael and I passed the bar in Massachusetts, thirty years apart, we signed a book that has the name of every lawyer who has ever practiced in our state. That book includes the names of the lawyers who defended Sacco and Vanzetti. It includes the name of Benjamin Curtis, who was on the United States Supreme Court, dissented in the Dred Scott case and resigned as a matter of principle, returned to Massachusetts and only came back to Washington to defend Andrew Johnson in a very unpopular impeachment trial.

"That book also has the names of the Adamses. Not just John Adams for what he did with the British soldiers, but his son, John Quincy Adams, who, after he was President, defended the Spanish slaves, African slaves on the slave ship Amistad. This is not just a Massachusetts tradition. This is the fabric of what it means to be an American lawyer. All of you will at some time have an opportunity to undertake an unpopular representation. I would urge all of you to seize that opportunity, because you will never forget it.

THE TASK THAT REMAINS

"This work is not over. Detainees remain at Guantánamo, despite the fact that where the government has had to present evidence before a federal judge, seventy-five percent of the cases have been granted the writ. There are Fellows down there now, including Chuck Patterson from Los Angeles, who are representing a man before a military commission. Michael and I have filed an appearance in another detainee's case and look forward to the eventual release.

"In closing, I want to again thank the College for its support of our efforts. I want to thank all of my fellow detainee lawyers who are here today and all the lawyers in all of the firms all over the United States who worked on these cases in the proud tradition of this College.

"John Adams said that of all the things he did, which included not only the presidency but being the driving force behind the Declaration of Independence, that the representation of Captain Preston and the British soldiers in the Boston Massacre was the finest service that he had ever done for his country. Each of us standing here today and those who couldn't get here today will tell you that this is the best thing we have ever done.

"Thank you, and God bless the Constitution of the United States."

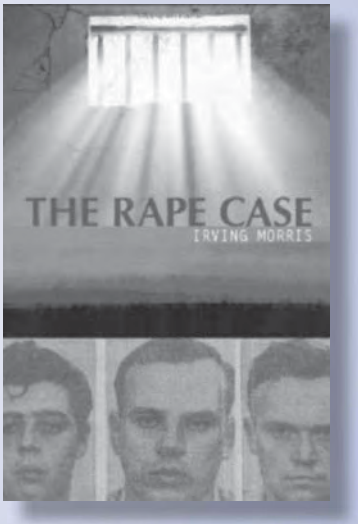
When Mike Mone finished his inspiring talk yesterday, my wife, Anne, had tears in her eyes. And I can say for certain she was not the only one who was so moved by that talk. As so often happens at these meetings when we gather together, I was reminded that this College of Fellows is not a mere trade association. Excellent at our craft, convivial in our gatherings, we also work together through the College, particularly through our committees, to meet the challenge that was so gently set forth in the invocations we heard [yesterday] . . . to recognize our responsibility to our system of justice and to speak for those whose voices might not be heard, whether in our cities, our countryside, or even in Guantánamo.

Regent designate William J. Kayatta, Jr.

FELLOWS IN PRINT

The Rape Case: A Young Lawyer's Struggle for Justice in the 1950's

Fellow Emeritus, **Irving Morris**, retired to Palm Beach, Florida after a fifty-year career at the Delaware bar, recounts his first case, in which he successfully undertook to represent three young men, indigent and unrepresented on their initial appeal, who had been sentenced to life imprisonment for rape. Morris candidly concedes that the issue that finally won their release by a federal court after eleven years in prison was not their guilt or innocence, on which he expresses no opinion, but whether they had been afforded a fair trial in a case that turned on the credibility of witnesses and in which the police had withheld evidence that bore on that issue.



In his foreword, Frederick A. O. Schwartz, Jr., Chief Counsel for the Brennan Center for Justice at the New York University School of Law, reflects: "One creative lawyer's perseverance against a system that failed miserably in its duty to do justice is particularly vital today when courts and legislatures seem more and more inclined to support finality rather than fairness, and toughness more than truth. Thus, the book teaches lessons for today's lawyers and citizens. . . . It was luck that led to Morris' involvement. But luck is the residue of desire. Thus, the lesson is always to be looking for opportunities to serve the public interest. Certainly the story also teaches the importance of perseverance. . . . Finally, perhaps the most important lesson of Morris' book is what our constitutional protections mean for each one of us as a citizen and what it takes to insure them."

TEXAS JUDGE RECEIVES O'CONNOR JURIST AWARD

United States Senior District Judge Sam Sparks, JFACTL, *Western District of Texas, Austin, Texas, was honored at the 60th annual meeting of the American College of Trial Lawyers as the second recipient of the Sandra Day O'Connor Jurist Award. Created in 2007, the award is given to a jurist who has been obligated to perform his or her judicial duties under unusually difficult or dangerous circumstances.*

Judge Sam Sparks

A native of Austin, Judge Sparks received both his undergraduate and law degrees from the University of Texas. Licensed to practice law in 1963 at age twenty-four, he clerked for Federal District Judge Homer Thornberry, then entered private practice. He was inducted as Fellow of the College in 1983. Nominated by President George H. W. Bush, he was confirmed to the federal bench in 1991.

A colorful judge with a robust sense of humor, he once chastised bickering lawyers in his court by observing in an order, "When the undersigned accepted the appointment from the President of the United States . . . he was ready to face the daily practice of law in federal courts with presumably competent lawyers. No one warned the undersigned that in many instances his responsibility would be the same as a person who supervised kindergarten."

In his career he has tried many high-profile cases, culminating in the case which brought him one of the College's most prestigious awards.

In presenting the award, O'Connor Award Committee chair and Regent-elect **Trudie Ross Hamilton FACTL**, Waterbury, Connecticut described as follows the circum-

stances that gave rise to the College's selection of Judge Sparks to receive the award.

THE TRIAL OF "THE SYNDICATE"

"Over the past twenty years," Hamilton began, "the United States has struggled to deal with the growing menace of Mexican drug cartels. Our border states face a rising tide of drug trafficking, extortion and murder carried out by prison gangs operating, with apparent impunity, in our cities.

"The Texas Syndicate was Texas's first prison gang. Syndicate membership spread through Texas prisons and on to Texas city streets. The Syndicate is known as the most brutal of the Mexican drug cartels. Membership is for life and violation of the Syndicate strict code is punishable by death.

"In May 2003, twenty key members of the Syndicate, including its leader, were indicted in Austin, Texas on drug trafficking and racketeering and conspiracy charges. These included multiple brutal murders. It was clear from the outset that the trial of this case would present an unprecedented degree of difficulty and danger.

"As the senior judge in the jurisdiction, Judge Samuel Sparks could have assigned this case to another judge, but it was not in Judge Sparks' character to shrink from a task, however daunting. Judge Sparks had a reputation of trying the most dangerous cases himself. He had received death threats before in other drug-trafficking trials. He took on this case with full knowledge of the substantial risk to himself and his family. The word on the street was that there would be retribution against cooperating defendants, against witnesses and against the trial judge.

"The level of security taken reflected the degree of the danger. Defendants and witnesses were transported to court by armed convoy. An armed helicopter flew overhead. Streets adjacent to the courthouse were blocked off, and US Marshal snipers were positioned on the rooftops. Death threats against the witnesses and Judge Sparks began shortly after the arrests and increased as some defendants entered pleas and agreed to testify against the remaining defendants. Tension and fear pervaded the courtroom. The threat of witness intimidation was ever present.

"Under Syndicate rules, a glare from the accused was a signal to other gang members in the courtroom to kill a family member of a testifying witness. Throughout the trial, US Marshals lined the walls of the courtroom, watching for such code signals.

"The toll on the personal life of Judge Sparks and his family was enormous. . . . Death threats continued for over a year through the trial, convictions and sentencing hearings. Judge Sparks and Melinda [his wife] were offered 24-hour-a-day protection and–this is Texas–were issued revolvers that they carried with them throughout the trial and its aftermath. Even today, Judge Sparks' schedule is known only to a few court personnel.

"The immediate impact of the trial and convictions was that it took some of the Syndicate's most brutal operators out of commission. But the greatest and most lasting achievement of the Texas Syndicate case is that it demonstrated that, despite the degree of terror and intimidation that the Syndicate exerts, these cases can be tried in open court under the Federal Rules of Evidence to a jury verdict."

A VICTORY FOR THE RULE OF LAW

"It was a victory for the rule of law," Hamilton continued, "a victory that was owed in large part to the courage and commitment of one man, Judge Samuel Sparks.

"We here today to honor you, Judge Sparks, a Judicial Fellow of this College, with one of the most important awards of the College. In recognition, Judge Sparks, of your courage and of your lifetime commitment to the rule of law and the right of trial by jury, the Regents and Fellows of the American College of Trial Lawyers here in Washington, on this our 60th anniversary, proudly confer upon you, Judge Samuel Sparks, the Sandra Day O'Connor Jurist Award."

JUDGE SPARKS' RESPONSE

"My first purpose," Judge Sparks began, "is to simply remind each of us of the privilege that we share and why we are here. My family has a long line of public service. My great-grandfather was a rather famous sheriff. My grandfather was a sheriff and elected Treasurer of the State of Texas. My father was a trial lawyer who was still trying cases when he was seventy-eight

years old. He retired from private practice and then went back to work for the Attorney General to help assist minority lawyers learn to try cases. So it was very easy for me to decide at an early age what I wanted to do with my life.

A CAREER IN THE LAW

"At nineteen, I was in law school and following graduation was appointed a law clerk to the Honorable Homer Thornberry, . . . [and to] show you how times have changed, in 1963 he had dockets at El Paso, Waco, Del Rio and Austin. We now have thirteen judges handling those divisions. I never left the courtroom–twenty-seven years of trying lawsuits, and this will be my nineteenth year as a judge.

"Like you, I believe in our judicial system, and I believe in trial by jury. On reflection, when I was thinking about the words I was going to say, I realized how privileged I was to try lawsuits at the best of times against extraordinarily talented and competitive and skilled lawyers. In the 1960s in the Texas state courts, trying lawsuits was very different from the way it is today. For example, a defense lawyer's fee for answering, preparing and trying a case in District Court with general jurisdiction was less than one hour's of your charging today, $400. You could defend the railroad for $250, but you got a pass that would allow you a discounted fee. I never met a lawyer who used it.

"The work product objection meant that you had to guess who the witnesses would be, and you could not depose any retained expert without a court order. Therefore, there was little discovery. The rules required the trial lawyer to think quickly and to prepare thoroughly for trial and yet be flexible and imaginative in an effort to persuade the jurors.

"You went to trial with two or maybe three depositions, your preparatory notes, the motions that you had prepared and filed during trial and your requested instructions. You cross-examined witnesses who you never heard of before their name was called, and the information you had was their direct testimony. As a result, trials were short, two or three days, and your file was usually less than three inches thick.

"You learned quickly how to ask your questions, or, more important, how not to ask them, when and when not to object, when to stop your cross-examination and what to say to the jurors at the end of the evidence. You tried as many cases as opportunity provided, simply to cover your salary, your expenses and hopefully give a profit to your firm.

"But thinking back, I realized we tried as many cases as possible because we wanted to try the cases. We wanted to be in the courthouse performing in front of the judges, the juries and the lawyers and the lawyers who would come to watch you and the attending public. Even though Texas is a big state, there were not many courthouses in Texas in small or large cities that they did not have an opponent who was experienced, competitive and ready to go to trial. A few lawyers in Texas had national or state reputations, but most of the lawyers that you saw across the state were competitive as well. I really believe that most of these trial lawyers would have tried these cases even if they were not paid, and of course sometimes they weren't. . . .

"Trial lawyers in those days had great respect for the judges. I don't know about the rest of you, but in Texas the district judges had to be at least 100 years old, mean and would pounce on any lawyer, young or old, experienced or not, when they made a mistake. They considered themselves the teachers of the trial law and in many ways they truly were.

"Trial lawyers were professional and respectful for each other. Anybody that was at the courthouse saw how much they believed in the system. And the golden rule was you were only as good as your last case, so you stood thoroughly prepared for each trial. If you were fortunate, like I was, and had a role model who assisted you in learning how to try lawsuits who was a Fellow of this College, it was easier. But if not, your classroom was the courtroom, and you observed lawyers and you learn the hard way.

"So in preparing these remarks . . . the first point I wanted to make [was] how privileged I was to watch and compete over the years with these trial lawyers. I know I selected the best of all professions and have been privileged to be a trial lawyer, and my point to you is that you should feel privileged, too."

THE LIFE OF A FEDERAL JUDGE

"When you become a federal judge," Sparks continued, "your expectations are that you're going to sit in a beautiful courtroom, a lovely chambers and you're going to have important cases, and Fellows of the College will be on either side,

and they will entertain you with their competence and wit. Nobody tells you about the cases involving *pro se* litigants, tax protesters, the mentally ill, the state and federal prisoner lawsuits. Nor do they tell you about the dangerous criminal defendants you may be sentencing, or the threats that you and your family members will get.

"And they don't tell you how rich people think you are because of all the lands people file against you in the county and state land department. And I think most are like myself. We're not prepared when you open a letter one day and it's written in the blood of someone that you've sentenced who tells you how he's going to kill your children and your grandchildren with the address and telephone number of everyone in that letter. And when the marshal and FBI come in and say that there may be a contract out on your life and that a deputy marshal should stay with you twenty-four hours a day, you think, Well, you know, I don't know that they pay you enough for this job.

A TRIBUTE TO HIS WIFE

"It certainly doesn't take long to learn how to live a little bit more carefully. And yet, to be honest, I would have never continued with these responsibilities had it not been for my incredible partner. She manages our security. She protects my backside and she has stood with me through all of the trouble. I had a serious accident right after we married. She pushed me in a wheelchair for eighteen months to try lawsuits all over the state, and she has no fear. Without her strength and commitment, I would have returned to trying cases a long time ago as a lawyer. So thanks.

"In 1983, I was honored . . . to be a member of this College, and now you present me with this special award, and I am and will be forever grateful. But I do wish all of you to know and realize that you've given me this award simply for doing my job. In my part of the country, every federal judge and state judge has the same duties with the same risks and problems that I've faced and continue to face. So in part, I accept this award for all of those judges who go to work every day and to do their jobs, notwithstanding the risk and perils that they never imagined or dreamed they would have when they became a judge, to protect the Constitution and our way of life, including trial by juries.

"Thank you very much."

COLLEGE ELECTS NEW OFFICERS AT 60TH ANNUAL MEETING IN WASHINGTON

Gregory P. Joseph of New York, New York was installed as the College's new President, succeeding **Joan A. Lukey** of Boston, Massachusetts.

Thomas H. Tongue of Portland, Oregon was chosen as President-Elect.

Chilton Davis Varner of Atlanta, Georgia will serve as Treasurer.

J. Donald Cowan, Jr. of Raleigh, North Carolina will serve as Secretary.

SOTOMAYOR INDUCTED AS HONORARY FELLOW

*A highlight of the 60th Annual Meeting of the College was the induction of United States Supreme Court Associate Justice **Sonia Sotomayor** as an Honorary Fellow. Rather than giving a traditional response, Justice Sotomayor chose to engage her longtime friend, College Regent **John S. Siffert**, in an informal on-stage conversation.*

John S. Stiffert and Sonia Sotomayor

Sifford introduced Associate Justice Sotomayor in the following words:

"In 1957, a three-year-old girl moved into a housing project in the South Bronx. Her seventh-floor apartment overlooked the Bruckner Expressway. Today, she is an Associate Justice of the Supreme Court, and that housing project is named after her. Justice Sotomayor's story is well known. Still, it is a story worth retelling; all inspirational stories are worth retelling. Like many of them, hers is a story that involves a journey and a transformation.

"After graduating from Cardinal Spellman High School, Justice Sotomayor crossed the bridge that separated the South Bronx from the rest of America. The gateway to that bridge for her was Princeton University, but the journey was not easy. English was her second language. Every day she committed to memory twenty new vocabulary words while reading the classics to give context to them. She graduated from Princeton University . . . [summa cum laude]. At Yale Law School, she took a trial advocacy class and discovered that she had the flair for trial work.

"Her first job was as an assistant district attorney in [Manhattan District Attorney] Bob Morganthau's office . . . , where she prosecuted hardened criminals and established new precedents. Justice Sotomayor also achieved success in the private practice of civil law. She became a partner at a prestigious international law firm, where she tried trademark cases on behalf of European designers. The girl from the . . . projects in the South Bronx was able to distinguish the difference between an authentic Fendi handbag and a fake from twenty yards away.

"Justice Sotomayor's journey took a turn when Senator Moynihan recommended that President Bush nominate her to the bench of the Southern District of New York, where she served from 1992 to 1998. She probably was best known as the trial judge who saved baseball by ending the players' strike in 1995. Senator D'Amato recommended that President Clinton elevate her to the Second Circuit.

"In her eleven years as a circuit judge, she wrote opinions on a staggering variety of cases. Her legal insight can be seen from one of those cases, where she held that the federal securities laws, which prescribe fraud in connection with the purchase and sale of securities, do not preempt state securities laws, which forbid deceit on holders of securities.

"In the past year on the Supreme Court, Justice Sotomayor demonstrated her discipline and rigor, authoring eight opinions, one concurrence and three dissents. In her very first opinion, she held that a lower court finding that the attorney-client privilege had been waived was not immediately appealable, although there was existing authority to suggest otherwise. She explained that preventing piecemeal appeals from the trial court would ensure . . . "that the district judges who are playing a special role in managing ongoing litigation are not undermined or distracted by interlocutory orders or challenges." This opinion illustrates how Justice Sotomayor remembers the lessons that she learned as a district judge as she now sits on the nation's highest court.

"Those of us who have known her are not surprised that she has drawn lessons from her past. We have been witness to how Justice Sotomayor has woven the threads of her past into the vibrant fabric of her life. To this day, she continues to give countless hours, traveling to the South Bronx and to Puerto Rico to inspire young people to believe that, whatever their current circumstances, they can achieve their dreams. She keeps her old friends close and is loyal to a fault.

"Justice Sotomayor comes to people with a rare humanity. She comes to judging with immense integrity, and she comes to her job as Associate Justice with selfless dedication. Justice Sotomayor, we are delighted that you have agreed to accept our invitation to become an Honorary Fellow of the American College of the Trial Lawyers."

Throughout the informal conversation that followed, covering a wide range of subjects, Justice Sotomayor exhibited both the openness that had characterized her confirmation proceedings and a lively sense of humor. The conclusion of this singular introduction of this new Honorary Fellow to the College brought a standing ovation from the audience.

CANADIAN JUSTICE *becomes* HONORARY FELLOW

*The Honorable **Thomas Albert Cromwell**, the newest Justice of the Supreme Court of Canada, was inducted as an Honorary Fellow of the College at its 60th Annual Meeting.*

Thomas Albert Cromwell

In his introduction of Justice Cromwell, Past President **David W. Scott**, QC, of Ottawa, Canada, remarked, "If experience at the bar, in academia and on the bench are important and desirable qualifications, Justice Cromwell was, at his appointment, the quintessentially perfect candidate for our highest court. Justice Cromwell has a degree in the discipline of the common law from Queens University in Kingston and in civil law from Oxford University. He practiced law in the City of Kingston, Ontario, and taught at Queens University Law School. He was a professor of law at Dalhousie University in Halifax, the oldest university law school in the British Commonwealth, for a period of ten years."

He had served as executive legal officer of the Supreme Court of Canada under the late Chief Justice Antonio Lamer, himself an Honorary Fellow. He had been appointed directly from the bar to the Nova Scotia Court of Appeal, where he served for eleven years. He was appointed to the Supreme Court on December 22, 2008.

A man of truly extraordinary achievements, Justice Cromwell is an accomplished musician, with a bachelor's degree in music, and he is an associate of the Royal Conservatory of Music at the University of Toronto.

Justice Cromwell's humor was on display in remarks that separately accompany this article. His remarks on a serious issue facing the bench and bar of both Canada and the United States follow.

Justice Cromwell

I am very honored to be inducted into the College and delighted to be part of this highly symbolic tradition, because I think this induction symbolizes the close relationship of mutual respect that exists, and must exist, between the bench and the bar. While we have our different roles to play, we share our commitment to the rule of law. The induction underlines the close and respectful relationship between our two countries.

While our shared belief in democracy, the rule of law and judicial independence sometimes leads us in different directions, no one, I am sure, could doubt our unity of purpose or the strength of our commitment to those ideals. And so your generous act to me today is not only a personal honor, but it is a symbolic act, symbolizing the relationship we wish to maintain and foster between the bench and the bar of our two countries and of the common fundamental tenets of our legal systems. I am very proud to be part of this tradition which serves those worthy purposes.

Allow me very briefly to say a word about a topic dear to my heart and I hope to yours, access to justice. I am not here to advocate particular courses of action, but simply to raise with you two questions.

First, does the legal profession recognize just how large a problem there is with access to justice? I cannot speak to the situation in the United States . . . but I can tell you that in Canada, the problem is very serious. Many lawyers and judges, let alone the average person in our country, could not afford to have a legal problem of any complexity. The number of persons who are representing themselves in our courts is large and growing. This not only puts in doubt whether their rights and interests are being protected. The presence of these self-represented litigants also adds to the legal cost and in some cases perhaps may even jeopardize the rights of other represented litigants.

I have serious concerns that we have hit the iceberg but are being too slow to recognize the seriousness of the damage or the threat to the integrity of the structure that the collision has caused. In the United States, the term "the justice gap" has become an apt description of the problem that I'm describing. Whether it is a gap or a chasm I will leave for you to judge. But I do suggest that the problem is real and growing.

The second question is related to the first: Is the legal profession sufficiently engaged in efforts to improve access to justice? The judiciary and the bar, of course, are trustees of our legal system. We not only function within it and know how it works in practice. We are also primarily responsible for its preservation. That sense of responsibility may make us reluctant to support change, lest we later be thought to have abused that trust. By training and practice, we learn about and revere the justice system that we have inherited. This may not always permit us to see its flaws as clearly as we should. Moreover, any profession tends to have a large investment in its past knowledge and present practice. The profession of law is no exception.

One Canadian academic, noted for making rather cheeky comments about our profession, put it this way, and I quote, "Anyone who believes that the legal establishment can easily or will quickly be persuaded to give up the habits of a lifetime surely requires treatment."

At many points in our history, the legal profession–and let me be clear, by this I mean the bench and the bar–has not only failed to be engaged by the problems of access to justice, but has been resolutely resistant to change. Writing at the turn of the 19th Century, Jeremy Bentham railed against the profession's resistance to all reform, which he attributed to self-interest. In 1850, a piece in the London Times had this to say, and I quote, "If the minds of legal men are to be forever perversely directed to the past, if they will not divest themselves of old prejudices and accept new views and ideas suited to the exigencies of the present time, the public must be content with the attempts made by a layman to improve a system which cannot longer be permitted to remain in its old and mischievous condition. The patience of society is at length exhausted."

At the turn of the 20th Century, the great American scholar, Roscoe Pound, wrote eloquently about the causes of the popular dissatisfaction of the administration of justice. As the 20th Century came to a close, the General Council of the Bar and the Law Society in the United Kingdom found professional attitudes and resistance to change to be significant stumbling blocks to reform.

I give you this whirlwind tour of 200 years of access to justice commentary simply to note that history is not on the side of real engagement upon the part of the legal profession with improving access to justice. What will be said about the legal profession of the early Twenty-First Century?

Of course I'm well aware of important contributions being made by members of the profession with a view to improving access to justice. In Canada, lawyers are helping in many ways, leading and supporting procedural reforms and promoting and undertaking pro bono work, to mention only two examples. I am less familiar with initiatives in the United States, but I am sure there are similarly many dedicated lawyers and judges working hard to improve the situation. We saw yesterday [in the tribute to those who had represented Guantánamo detainees] what dedicated Fellows of this College have done to ensure effective representation for people who badly needed it. But my question is posed at a more fundamental level. Is the profession as a profession deeply engaged and deeply committed to improving access to justice?

There is, after all, a limit to what individual lawyers or particular groups of them can accomplish, worthy and laudable as their efforts are. I suggest that the legal profession as a whole needs to be deeply engaged in addressing access to justice and mobilized to do so. I invite you to reflect on whether we have yet reached that point.

In 1940, the great American legal scholar, Roscoe Pound, was presented with the American Bar Association Medal for conspicuous service in the cause of American jurisprudence. He was a person whose commitment to the improvement of the administration of justice in the early 20th Century reverberated over the succeeding hundred years and more. He concluded his remarks on the acceptance of the award with these words: "So venerable, so majestic is this living temple of justice, this immemorial, yet ever freshly growing fabric of our common law, that the least of us is proud who may point to so much as one stone thereof and say the work of my hands is there."

I suggest that we face a serious problem with access to justice, and I wonder if we as a profession are yet fully engaged with that problem or mobilized to confront it. Will we be able to look back on the improvements to access to justice in the early 21st Century and say that the work of our hands is there?

Thank you very much for this honor, for your generous hospitality, and for the opportunity to say a few words.

bon mot

Justice Cromwell's wife, Dr. Della Stanley, is a distinguished Canadian historian and is currently a professor emeritus of Mount Saint Vincent's University in Halifax, Nova Scotia. For twenty-five years I have been telling my American friends that Canada won the War of 1812. As recently as this morning at breakfast, I learned that it was a tie.

Past President Canadian David W. Scott

bon mot

THE HUMOR OF A CANADIAN JUSTICE

Thank you very much, David [Scott, his introducer, who had quoted from the judgment in a small local case that Justice Cromwell had won as a fledgling trial lawyer in 1980]. You can see how far he had to go back in history to find a victory in my CV. David, of course, is a major leader in the field of pro bono work in our country, and, as you would expect, he has a very generous nature. I think we've just perhaps seen an example of his generosity overcoming his otherwise meticulous attention to the facts during that introduction.

It seemed that really from the moment of my initial appointment to the bench of the Court of Appeal in 1979, my friends and colleagues set out to ensure that I retained what one friend called my richly deserved humility.

Former Chief Justice Lamer, for whom I had worked, called me shortly after my appointment, and his first words to me were, "Tom, I'm so relieved." I asked what he meant. That was a mistake. He replied, "I'm so relieved you were appointed to the Court of Appeal. The thought of you doing anything by yourself scares me."

Then there was my son, who at about age ten, after I had been on the Court of Appeal for a couple of years, said to me, "Dad, why does it take three of you and your law clerks eight months to do what the trial judge had to do in twenty minutes all by herself?"

I never had a really good answer.

Then there was an academic colleague who, when told of my appointment from the law faculty of Dalhousie to the Court of Appeal, remarked, "Tom's appointment from the law school to the Court of Appeal will enrich the intellectual atmosphere of both places."

I started out my career as an adjudicator, as a labor arbitrator. My work was subject, of course, to judicial review. And the test applied in Canada at that time on judicial review was whether my decision was clearly irrational. This, of course, is a challenging standard to meet. [Laughter] Your reaction anticipates the sad truth that I managed to do it on a couple of occasions. How did you know?

You can perhaps imagine what relief I felt when I was appointed to the Court of Appeal, where the worst thing I could do was be wrong. Now, of course, on the Supreme Court all those days of being wrong are a thing of the past. Now, the only thing I have to worry about is being outnumbered, another challenge to which I have arisen already on several occasions.

I think our former Chief Justice, Antonio Lamer, summed up well when he once said to me, "Tom, remember, without four friends, it's just literature."

Now, in Canada, as you know, we wear the gowns and we address each other as "My Lord" and "Lady" and "My Learned Friend" and all that, so we have a fairly formal court style. But nonetheless, there can be some pretty good-natured ribbing going on between the bench and the bar. The story is told as a true story, that one day a judge with a well-earned reputation as a character went into court with his dog. He asked counsel on the first matter if counsel had met the dog. Counsel responded, "No, My Lord, but I think I may have read one or two of his judgments."

On another occasion, counsel was engaging in a lengthy and prolix, and largely pointless cross-examination that went on for many hours. The cross-examination had started with the question, "How old are you?" And after about seven or eight hours of this, the question was posed again. The trial judge snapped and said, "He was sixteen when you started."

THE NEW UNITED KINGDOM SUPREME COURT

In a presentation rich in history and laced with humor, ***The Right Honourable the Lord Phillips of Worth Matravers****, the first President of the recently established Supreme Court of the United Kingdom, introduced his American audience to a historic change in his country's appellate judiciary.*

Lord Phillips of Worth Matravers

Many Fellows of the College who have participated in its meetings in London and in College-sponsored Anglo-American Legal Exchanges have watched with interest the transition of the highest court in the United Kingdom from one comprised of Law Lords who were part of Parliament itself to a modern manifestation of the principle of separation of powers, an independent Supreme Court.

In her introduction, College Secretary **Chilton Davis Varner** of Atlanta, Georgia described Lord Phillips as "a gentleman of enormous energy and capacity" who has served in virtually every important post in the legal system of the United Kingdom. In 1999, he was made a Lord of Appeal in Ordinary, in common parlance, a Law Lord. In 2000, he succeeded Lord Woolf of Barnes as Master of the Rolls, the presiding officer of the civil appellate branch of the appellate judiciary. From 2005 through 2008, he served as Lord Chief Justice of England and Wales, the presiding officer of the criminal appellate branch. In October 2008, he became the Senior Law Lord, and a year later he assumed his office as President of Britain's new Supreme Court.

In his storied career, Lord Phillips has brought the benefit of his keen intellect to a wide assortment of matters, ranging from the Robert Maxwell Pension Fund fraud case to

an investigation into the outbreak of Mad Cow Disease in the United Kingdom. An Honorary Fellow of the College since his induction in New York in 2002, Lord Phillips has been a frequent visitor to its meetings since that time, including welcoming the College to its last London meeting in 2006.

Lord Phillips

Why in 2009 did the United Kingdom, one of the world's oldest democracies, create a Supreme Court? One answer is that it is because of the importance in our constitution of the separation of powers. That may provide a question, "what constitution?" for the United Kingdom is almost unique in the world in that it has no written constitution. We nonetheless have an unwritten constitution, and this today gives effect, in its own way, to the separation of powers.

This is the way that Lord Mustill, one of our greatest jurists, described that principle when giving judgment in *The Crown v. the Home Secretary, ex parte the Fire Brigades Union* in 1995: "It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries out the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed."

It would be quite wrong to conclude that the principle of the separation of powers has long been entrenched in our unwritten constitution. That principle has its origin in the writings of the 18th Century French philosopher Montesquieu. It inspired those who drafted the Constitution of the United States. That Constitution makes express provisions for the separation of powers. Those who drafted it . . . included many lawyers who had learned their law at the Inns of Court in England. In providing for the separation of powers, they were not, however, seeking to copy the English constitutional position; rather, they were reacting against it.

And the Supreme Court that was set up under the American Constitution proved to be rarely supreme. In the great case of *Marbury v. Madison*, the Court ruled that it had power to declare a congressional statute void on the ground that it conflicted with the Constitution.

In England, the position was very different. The transition from monarchy to democracy took place both in America and in France, and in a great many other countries, by revolution, but we also had a revolution when in 1649 we chopped off the head of Charles I. As a special concession, the head was restored to the body so that his family could pay their respects. But after only eleven years as a republic, the monarchy was restored in the form of the son, Charles II. Thereafter, the transition from monarchy to democracy took place gradually and peacefully.

Today, as Lord Mustill stated, we have three arms of state: the legislature, the executive and the judiciary. But each of these has inherited powers that used to be exercised by the Crown, that is the King or Queen, and each still exercises those powers in the name of the Queen.

TRADITION

The King used to live in the Palace of Westminster in London. He would summon to Westminster his advisors. Initially these were noblemen, the Lords created by the King. Once the King had made a man a Lord, the title passed on his death to his heir, so that there grew up a body of hereditary peers or Lords. Later, the King also took to summoning to advise him of the representatives of the different regions of the country who were not Lords, the commoners.

These two bodies of advisors developed into the two houses of Parliament, the House of Commons and the House of Lords. They still sit at Westminster, although this is no longer a royal palace. They are the first arm of state, the legislature.

In the Great Hall at Westminster, which survives to this day, the King's judges used to sit to administer the law on his behalf. He appointed them, and he could dismiss them. Their successors

are the independent judiciary, of whom I am one. They are the second arm of state, the judiciary.

The third arm of state, the executive, consists of the ministers and officials who control the ever more complex administration of the country. Once again, the power that they exercise was originally delegated to them by the King, who appointed them and who could dismiss them. They also are now independent of such control.

The Queen remains the constitutional head of state. She has to assent to Acts of Parliament before they can take effect as laws. She appoints the judges. The ministers are her ministers. But her powers are largely illusory. The way that she exercises them is the determined by others.

When I entered the profession as a barrister some fifty years ago, the separation of powers was well-established in the United Kingdom, but it is fair to say that it was more real than apparent. There were some startling anomalies.

Take the Lord Chancellor. His is one of the oldest offices of state, and it used to be the most important. He was the King's right-hand man and advisor. As such, he used to hear petitions and administer justice in his own court. In recent times, the Lord Chancellor retained both his administrative and his judicial duties. He was appointed by the Prime Minister, so that his office was a political office. He was the most important member of the Prime Minister's cabinet, so he was a leading member of the executive. He had particular responsibility for the administration of justice and for upholding the rule of law.

One of his most important duties was recommending who should be appointed as judges. But he was also an important member of the legislature, for he presided over the legislative business of the House of Lords. He was, in effect, the Speaker of the House of Lords. And nor was that the end of it. The Lord Chancellor retained his judicial functions. He sat as a judge, most senior judge in the land, and so he was head of the judiciary. He was the very antithesis of the separation of powers. He was the combination of powers.

In my time in the law, the Lord Chancellor always performed his judicial duties in a manner that was impartial and free from any political bias. When he sat as a judge, he was careful to see that it was in cases in which the government did not have an interest. When he made judicial appointments, he consulted widely, taking particular importance to the views of the senior judiciary, and the appointments were always made on merit.

I said that the Lord Chancellor sat as a judge. I did not say where he sat. Where he sat was the House of Lords, and the judges who sat with him under his presidency were also members of the House of Lords. This calls for a little explanation. From the time of its creation, Parliament would entertain petitions from citizens, sometimes brought directly and sometimes by way of appeal, from decisions of the courts. In the 18th and early 19th Century, the House of Lords would sit in the morning to do its judicial business, which consisted largely of appeals from the courts.

Those who had no judicial experience could debate and vote on the result of the appeals. In defiance of the doctrine of the separation of powers, legislators were acting as judges, and most of them were not competent to perform this role.

THE LAW LORDS

In the 19th Century, things changed. There were a number of members of the House of Lords who had judicial experience, and it was agreed that they only should hear and vote on appeals from the courts. And then in 1876, a statute was passed which provided for conferring peerages on senior judges so that they could conduct the judicial business of the House. These were known as the Law Lords. Their peerages were not hereditary. Their titles died with them. But only they and any other hereditary Lords who had the chance to have judicial office were entitled to sit to hear appeals from the courts. Those appeals could be brought from any court in the country, that is, any court of the United Kingdom, save that no appeal could be brought from Scotland in criminal matters. The Law Lords were in effect a supreme court to the United Kingdom, in effect, but not in appearance.

I was made a Law Lord some eleven years ago, and I found

myself in a very strange world. There were by this time twelve Law Lords. We were accommodated in little attics in the Palace of Westminster. Our law clerks–or judicial assistants, as we call them–were lodged in a garret in the roof space, and there was only room for four of these, so we had to share them between us.

We sat to hear appeals, usually in panels of five, in committee rooms at the House of Lords, just like any other Parliamentary committee. Technically, we were not judges, so we wore no judicial robes. So far as delivering judgments were concerned, the old formalities were observed. We moved to the floor of the House of Lords at 9:45 in the morning, before the hour at which its business usually began.

Proceedings had to be commenced in a normal way for the business of the House, with a huge mace being carried in, to which we all bowed. Then the duty Bishop would read prayers while we knelt on the benches. The Senior Law Lord would sit to preside on the woolsack, a large cushion stuffed with wool dating back to the 14th Century, although I daresay they changed the wool from time to time. The rest of the Law Lords who heard the appeal would sit on the Parliamentary benches. The Senior Law Lord would propose the motion that the appeal be allowed. Each Law Lord would then in order of seniority get to his feet to deliver his speech or his opinion in relation to that motion. This was in reality his judgment. Senior Law Lords would then put the matter to the vote and announce whether the appeal would be allowed or dismissed.

Although our functions as Law Lords were to transact the judicial business in the House, we were full members of the House. We could take part in the legislative business of the House, speaking in debates and voting on bills, though by convention we ceased to do so when the bill had political implications.

One Law Lord recently flouted this convention. The last government introduced a bill to prohibit foxhunting. Lord Scott, a Fellow of this College and a keen huntsman, was so outraged that he attended the debate and voted against the bill, to no avail. The bill was passed. Now huntsmen ride only to exercise their hounds, although if the hounds take off after a fox, who is to stop them?

A RADICAL CHANGE

I had only the briefest of spells in this fascinating world before returning to the Courts of Appeal to preside over its civil business as Master of the Rolls. It was in that capacity on the 12th of June 2003 that I found myself in a delightful inn called The Swan, in the Cotswold, in the depths of the country outside London. The Swan had been converted into a tasteful conference center. I was one of a number of England's top judges, headed by Lord Woolf, the Lord Chief Justice, who had taken part in a two-day meeting with the most senior officials in the Department of the Lord Chancellor to discuss the future of the justice system.

When we came down to breakfast on the first day, it was to learn that Tony Blair, the Prime Minister, had just announced some sweeping constitutional changes. The Lord Chancellor was to be abolished, to be replaced with a Secretary of State of Constitutional Affairs, who was to have no judicial functions. Lord Irvine, who was the Lord Chancellor, was standing down to be replaced by Lord Falconer, who had become the temporary holder of that office until its abolition. There would be new independent judicial appointment commissions to appoint judges. And last, but not least, the Law Lords were to be abolished, to be replaced by a new Supreme Court.

Can you imagine their consternation? None of the officials in the Lord Chancellor's department had the slightest inkling of the proposed abolition of the Lord Chancellor and of their department. Lord Woolf had not been consulted. There had been no consultation. Indeed, it seems that not even the Queen had been informed of the imminent demise of the official who, for a millennium or more, had been her most senior officer of state.

Tony Blair was subsequently to explain that he had not consulted about these changes because he knew that Lord Irvine, who had been the natural person to

conduct the consultation, was opposed. He conceded that the way in which he set about making the changes was "muddled" and "messy." Lord Strathclyde, the leader of the opposition in the House of Lords, described the changes as "cobbled together on the back of an envelope."

In the end, it proved impossible to abolish the office of Lord Chancellor, which was firmly entrenched in a very large number of statutes, but he was stripped of his judicial functions. The new Judicial Appointments Commission was set up, and the new Supreme Court was created.

The latter did not happen quickly. It took no less than six years to identify a suitable building, the old Middlesex Guildhall, ideally placed opposite the Houses of Parliament and next to Westminster Abbey, to obtain the planning permission and to convert it into the new Supreme Court. By this time, I had been promoted first to Lord Chief Justice of England and Wales, and then to be the Senior Law Lord, and thus I became the first President of our new Supreme Court, for the Law Lords were automatically converted into the first Justices of the Court.

But what was the object of this rather expensive exercise? It was the final step in the establishment of the separation of powers in the United Kingdom. The Law Lords had, in fact, operated as a Supreme Court that was totally independent of the legislature and of the executive, but it was not perceived as such. Indeed, so far as the man on the street was concerned, it was not perceived at all. He had no idea who the Law Lords were, nor what they did. I never experienced the problems which Justice Sotomayor spoke about when taking my car to the car wash [having to allow extra time, knowing that she would be approached for photos and autographs].

It was very difficult for the public to find their way to the committee rooms where the Law Lords sat. The ceremony of delivering judgment, which I have described, was incomprehensible to anyone who attended it, but no one ever did, apart from the mandatory Bishop. It was all too easy for the Law Lords to be confused with members of the government.

TODAY

It was important that the public should become aware of the existence of a final Court of Appeal and that this court should not only be independent but should be seen to be independent. I believe that we have achieved that objective. Our magnificently refurbished building has an open door, and we're currently attracting nearly a thousand visitors a day. Our website has 19,000 visitors a month from all over the world.

Uniquely in the United Kingdom, all our proceedings are filmed by cameras that are permanently in place, and we permit the media to broadcast these if they wish. They have not yet shown any great eagerness to do so except when we deliver judgments in high-profile cases. When we do this, the judge responsible for the lead judgment gives a very short summary of what the case was about and our decision. This often goes straight out on the national news.

This means that we are beginning to become public figures, but not in the same way as the Justices of your Supreme Court. The appointment of a new Justice to the Supreme Court to the United States receives considerably more media coverage in England than the appointment of one of our Justices. The most recent appointment, that of Sir John Dyson, received no media interest at all.

The reason for this is I think that your Supreme Court rarely is supreme, but ours is not. Your Court can strike down legislation on the ground that it's unconstitutional. It is a fundamental principle of our unwritten constitution that the Parliament can enact any law that it chooses, and courts–including the Supreme Court– have no option but to give effect to the laws enacted by Parliament.

Because we no longer give individual speeches, we are experimenting with different forms of judgment, trying to avoid a plethora of individual judgments. Our courtrooms are designed to preserve the informality that we enjoyed when we sat in the committee rooms of the Lords. We sit on the same level as the advocates and in close proximity to them. And my colleagues were adamant

that we would continue to wear no judicial gown. In the minority, one, I would have opted for a simple black gown like your Supreme Court.

We allow much more time for oral argument than does your Supreme Court. The hearing of a single appeal can last for up to four days. We control our diet because we decide which appeals we are prepared to hear, and that diet now consists largely of public law cases, although our jurisdiction extends over every area of the law.

A number of my colleagues did not wish to leave the House of Lords, but none of us would go back there now. We are happier under our own roof where we have much better facilities and a handsome dining room where we lunch together every day.

In the days of Chief Justice Marshall when the Supreme Court first moved to Washington, no courthouse was provided for the Justices. They sat, I quote, "in a half-finished committee room, meanly furnished, and very inconvenient" on the ground floor of the Capitol. But when they were sitting in Washington, they not only sat together, they lived together in Conrad and McMunn's boardinghouse, a bachelor existence, for their wives, perhaps wisely, did not accompany them to Washington.

Justice Story, writing to a friend, commented, "My brethren are very interesting men, with whom I live in the most frank and unaffected intimacy. We are all united as one, with a mutual esteem which makes even the labors of jurisprudence light. . . . We moot every question as we proceed, and familiar conferences at our lodgings often come to a very quick and, I trust, very accurate opinion in a few hours." And to his wife, he wrote, "The judges live with perfect harmony. . . . Our intercourse is perfectly familiar and unrestrained and our social hours, when undisturbed with labors of law, are passed in gay and frank conversation which at once enlivens and instructs." I would not suggest that our move has had quite this effect, but we are certainly much more collegiate than we were.

May I end by extending a warm welcome to all of you to look in on us when you're next in London, but please do not all come at once.

Madam President, ladies and gentlemen, it is exactly 200 years ago that John Marshall and his associate Justices moved into new quarters on the first floor of the Capital. This had involved considerable expenditure: Two hundred thirteen dollars for seven chairs for the Justices; $413 for mahogany tables; and $120 for no less than six cast-iron stoves.

Charles Ingersoll, a noted Philadelphia attorney, described the scene: "The judges in their robes of solemn black are raised on seats of grave mahogany; and below them is the bar, and behind that an arcade, still higher, so contrived as to afford auditors double rows of terraced seats."

The Court was a great social attraction. Ingersoll describes a group of society ladies on one side of the auditorium and on the other a group of Indians on a visit to the President, in their native costume, their straight black hair hanging in plaits down their tawny shoulders, with moccasins on their feet, rings in their ears and noses, and large plates of silver on their arms and breasts.

I've just completed the first year of sitting in our new Supreme Court. We sit not in robes of solemn black, but in ordinary business suits. And we sit on the same level as the counsel who address us. And we do not, alas, seem to have great success in attracting society ladies, albeit that some of our male visitors sport rings in their ears.

bon mot

Lord Phillips of Worth Matravers
President of the Supreme Court of Great Britain

FIVE NEW REGENTS

At the Annual Meeting in Washington, District of Columbia, the following were elected to four-year terms on the Board of Regents of the College.

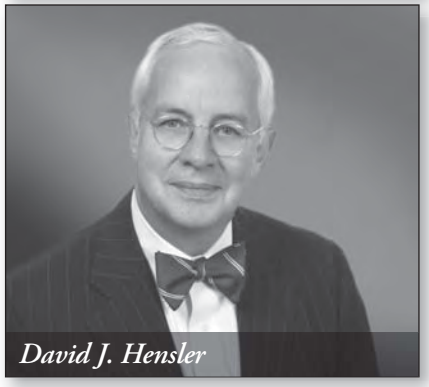
Trudie Ross Hamilton, a senior partner in Carmody & Torrance LLP, Waterbury, Connecticut, a native of Glasgow, Scotland, is the new Regent for Connecticut, Downstate New York and Vermont. She holds an LL.B. from the Faculty of Law, University of Dundee, Scotland, an M.A. in History, with First Class Honors from the University of Dundee, where she ranked first in her class, and a J.D. *cum laude* from the University of Connecticut School of Law. Among her other "firsts," she was both the first woman in Connecticut to be listed in *The Best Lawyers in America* and to be inducted into the American College of Trial Lawyers. She has served the College as the chair of the Connecticut State Committee, the Griffin Bell Award for Courageous Advocacy Committee and the Sandra Day O'Connor Jurist Award Committee.

David J. Hensler, Hogan Lovells US LLP, Washington, District of Columbia, is the new Regent for the District of Columbia and Maryland. He holds an A.B. *cum laude* from Saint Louis University and a J.D. *cum laude* from Saint Louis University School of law. After law school he joined the General Counsel's Office of the Securities and Exchange Commission, later entering private practice. The author of a number of published articles, for eight years he taught a course in economic analysis kin litigation at the Georgetown University Law Center. He has served as chair of the College's District of Columbia State Committee.

William J. Kayatta, Jr., a partner in Pierce Atwood, Portland, Maine, takes over as Regent for the Atlantic Provinces, Maine, Massachusetts, New Hampshire, Puerto Rico and Rhode Island. A *magna cum laude* graduate of Amherst College, he received his J.D., *magna cum laude,* from Harvard Law School, where he was an officer of the *Harvard Law Review*. After law school, he served as a Law Clerk for Chief Judge Frank M. Coffin of the U.S. Court of Appeals for the First Circuit. He has served as chair of his state's Board of Bar Examiners, of its Magistrate Judge Selection Committee, of the Maine Campaign for Justice and of Maine's Professional Ethics Commission, as well as serving as co-chair of the Maine Legal Services Response Team. A past president of the Maine Bar Foundation, he has also served a term on the American Bar Association Standing Committee on the Federal Judiciary. In 2010, he received the Maine Bar Foundation's Dana Award for his career-long *pro bono* work on behalf of low-income citizens. He most recently chaired the College's Emil Gumpert Award Committee. He was recently appointed by the United States Supreme Court as Special Master in an original action involving an intrastate dispute over water rights in the Republican River basin.

Jeffrey S. Leon LSM, a member of Bennett Jones LLP, Toronto, Ontario, where he is co-chair of his firm's litigation department, is the new Regent for Upstate New York, Ontario and Quebec. A graduate with honors of the University of Alberta, where he was a gold medalist, he holds an M.A. and an LL.B. from the University of Toronto. A former law clerk for the Chief Justice of Canada, he is a prolific author of articles, papers and books


Trudie Ross Hamilton


David J. Hensler


William J. Kayatta, Jr.


Jeffrey S. Leon


Douglas R. Young

and a frequent guest lecturer at the law schools of the University of Toronto and Osgoode Hall. He is the chair of Pro Bono Law Ontario. A past president of the Advocates' Society, he has been honored with the Law Society of Upper Canada's Law Society Medal for his service and contributions to the legal profession and the Catzman Award for Professionalism and Civility. He has served the College as co-chair of the Access to Justice Committee and as chair of both the Ontario Province Committee and the Canada-United States Committee.

Douglas R. Young, a partner in Farella Braun+Martel, LLP, San Francisco, California, is the new Regent for Northern California and Nevada. A *cum laude* graduate with highest honors from Yale University, he received his J.D. from the University of California Berkeley School of law, where he was Executive Editor of the *California Law Review*. A United States Marine Corps veteran, he served as law clerk to United States Judge Alfonso J. Virpoli, Northern District of California. He is a member of the American Law Institute and has served as President of the Bar Association of San Francisco and of his local American Inn of Court. A former Lawyer Representative to the Ninth Circuit Judicial Conference, he has served on that circuit's Advisory Committee on Rules of Practice and Operating Procedures and on the California Supreme Court's Advisory Committee on Lawyer Regulation. He was a 1992 recipient of the American Bar Association's Pro Bono Publico Award. He has served the College as chair of both the Northern California State Committee and the Federal Criminal Procedure Committee.

These five replace retiring Regents **John S. Siffert**, New York, New York, **Paul D. Bekman,** Baltimore, Maryland, **Bruce W. Felmly**, Manchester, New Hampshire, **Michel Décary, Q.C.**, Montréal, Québec and **Robert A. Goodin**, San Francisco, California.

Departing Regents (left to right): Paul D. Bekman, Bruce W. Felmly, John S. Siffert, Robert A. Goodin (abs. Michel Décary)

COLLEGE'S NEW SECRETARY SAYS OBJECTIVES *are on* RIGHT COURSE

Don Cowan, the College's newly elected Secretary, believes the College priorities for the future are right on target.

Don Cowan

The Raleigh, North Carolina lawyer says he will urge continued efforts in four major areas, ranking each equally: 1.) Support of the independence of the judiciary along with fair compensation; 2.) Support of the task force on the rules of civil procedure; 3.) Support of the College's pro bono efforts with Guantánamo prisoners and death penalty cases; and 4.) Support of the Code of Pretrial and Trial Conduct, especially with regard to teaching civility and professionalism.

Cowan was inducted as a Fellow at the San Francisco meeting in 1990. "I didn't know what the weekend was about, so I arranged to have dinner each night except Saturday night with friends that I had in San Francisco," he recalls. "But by the time my wife, Sarah, and I had finished going to the luncheon for new Fellows I was impressed and asked how in the world did this happen to me. I still don't know."

Although Cowan has been a member of numerous legal organizations, the College immediately stood out as the best, and he quickly felt at ease. "It's the fellowship. It's the excellent programs. It is objectives and ideals that are continually addressed and met and implemented," he says, encouraging all Fellows to make the effort to attend national meetings and become involved in committee work.

"What I do is try cases before a jury, and the College is the only professional organization that I belong to that the Fellows do the same thing," he says. "And the other thing is that at the national meetings no one is trying to impress anyone. There may be war stories, but war stories with a point or with humor, not trying to impress anyone."

But the College is much more than cordial fellowship, Cowan says. "I think it is very important that the College work to make trials affordable and practical for everyone. On one end of the spectrum you have

the legal services for people who cannot afford lawyers in civil actions, but on the other end, particularly in long complex federal trials, the paper discovery and depositions really prevent litigants who need the courts to have access to them."

The College must continue to be nonpartisan, Cowan says, because "it has to be to promote the profession and the objectives of the profession in civility, trial conduct and adequate representation. Anything affecting the profession, the trial practice, the College must be involved in."

Cowan believes the joint project of the College's Task Force on Discovery and the Institute for the Advancement of the American Legal system at the University of Denver is very important to get federal and state trials back to the purpose of assisting litigants to resolve their differences.

The pro bono criminal partnership that the College has with various organizations for Guantánamo Bay prisoners and in death penalty cases also must continue. "I think it's very important for people who need lawyers to have quality lawyers," says Cowan, who has extensive pro bono experience representing defendants in death penalty cases. "I think death penalty representation is under a larger umbrella of facilitating access to civil and criminal courts to all litigants and not to be deterred by the cost of the lawyer or the cost of the litigation," he says.

Although ADR and mediation have reduced the number of jury trials in the past thirty years, there are still plenty of cases being tried by jury, Cowan says, and compelling reasons for young lawyers to continue to practice before juries. "For many years state and federal judges have told law firms in which I have been a member that if you want your young lawyers to have jury trial experience, let me appoint them to represent criminal defendants in trials. On one hand, there are not as many jury trials today as there were when I began practicing, but I think lawyers who want to be jury trial lawyers have got to look harder, search harder, but I believe jury trial experiences do exist today."

Cowan's willingnesss to share his knowledge with fellow lawyers is legendary. For almost twenty years, he has given an annual program on recent developments in civil procedure, evidence and notable trials to both the North Carolina conference of Superior Court Judges and to the North Carolina Fellows. He has organized and chaired one panel discussion at a national College meeting, moderated two other programs and been a presenter at a fourth.

The Cowans are an accomplished family. Don's wife, Sarah, a former college professor, holds a Ph.D. in Textile Chemistry. In addition to their undergraduate degrees, son Coleman, Associate Producer of CBS "60 Minutes" and a former practicing attorney, has a J.D. with honors and an M.A. in Journalism and daughter Sarah, chief of a unit of the United States Department of Justice, earned an M.A. and a Ph.D. in Criminology.

JAMES DONALD COWAN, JR.

Ellis & Winters, LLP, Cary and Greensboro, North Carolina.

Education: B.A. Wake Forest University, 1965, J.D. with honors, Wake Forest University School of Law 1968. Editor-in-Chief, Wake Forest Law Review.

Practice: Broad general civil trial and appellate practice. Regularly accepts defense of death penalty cases at trial and appellate level. CPR Institute for Dispute Resolution Panel of Distinguished Neutrals.

Professional: President, North Carolina Bar Association,1992-93. President, Legal Services of North Carolina, Inc., 1998-99. American Bar Association House of Delegates, 2001-05. Adjunct Professor, Duke University School of Law, 1996-present. Prolific writer and lecturer on civil trial practice, procedure and evidence.

Civic: President, Wake Forest Law Alumni Association, 1984-85. Trustee, Wake Forest University, 1994-98, 1999-03, 2004-present.

American College of Trial Lawyers: Inducted 1990. 1993-95, Chair, Courageous Advocacy Committee, 1993-95, North Carolina State Chair, 1998-00, Chair, Special Problems in the Administration of Justice Committee, 2002-04, Regent, 2005-09.

Military service: Captain, United States Army. Active duty,1968-73. 82nd Airborne, Fort Bragg, North Carolina; 1st Infantry Division, Lai Khe, Vietnam, and 1st Armored Division, Nuernberg, Germany. Prosecuted and defended over 200 General Courts Martial. Parachute Badge, Army Commendation Medal, Air Medal, Bronze Star.

OLDER & WISER:
EMIL GUMPERT AWARD

EDUCATION FROGRAM FOR OLDER ADULTS AND CAREGIVERS DEALING WITH POVERTY

The most prestigious award given by the American College of Trial Lawyers to a program or project is named for the late Emil Gumpert, the founder and chancellor of the College. Its purpose is "to award to a program, public or private, which maintains and improves the administration of justice," one of the College's core values. The award carries a stipend of $50,000. One of the key criteria for the award is the winner's ability to use that sum to make a significant difference for those for whom the program is created.

Joseph Olimpi

The introduction of the 2010 winner, of the Emil Gumpert Award, the Older & Wiser program of the Neighborhood Legal Services Association of Pittsburgh, Pennsylvania (NLSA), was made by Gumpert Award Committee chair **William J. Kayatta, Jr., FACTL,** of Portland Maine.

GUMPERT AWARD COMMITTEE PROCEDURE

The nineteen-member Gumpert Committee received thirty completed applications from across the United States and Canada. These nominations came largely through the College's state and province committees.

Each year, the committee members review every application in detail and, over a series of conference calls, narrow down the field to three candidates. Teams of two committee members then visit each finalist to interview the people behind the program and to perform other due diligence. With the visiting teams' reports in hand, the

committee then selects the year's winner. The award presentation is normally made in the community where the winning program is located.

WINNING 2010 PROGRAM DESCRIBED

The Older & Wiser program is a project of the Neighborhood Legal Services Association of Pittsburgh, Pennsylvania (NSLA), a nonprofit legal services corporation, dedicated to providing legal assistance to the poor in four Pennsylvania counties. Simple in concept, but creative and novel, the program consists of a self-help seminar for older adults in poverty situations and their caregivers. The seminars are presented by state legislators and volunteer pro bono attorneys. Using a script prepared by Older & Wiser that provides a handy explanation of the issues confronting the elderly and outlining the resources available to address those issues, the program also distributes self-help brochures and forms to the attendees.

Although education and empowerment of low-income clients is not unique, the vehicle employed by Older & Wiser for delivering that service, teaming volunteer lawyers with state legislators, is unique. This approach provides publicity that produces large turnouts of those in need, and it creates awareness in the state capital of the needs of the disadvantaged in seeking access to justice.

The participation of a broad range of legislators from all parties, firmly enforced prohibitions against political proselytizing at these events and the use of election-cycle blackouts enable the program to gain these advantages without crossing the line into partisan politics. The Gumpert Committee saw in this novel program an opportunity to marshal the College's money, and even more importantly, its imprimatur, to encourage the winner's efforts and to facilitate its replication elsewhere.

Consistent with this goal, the presentation ceremony in Pittsburgh, which College President Joan A. Lukey attended, produced a large turnout of Pennsylvania Fellows, government officials and the press.

WINNER'S DIRECTOR RESPONDS

Gumpert Committee chair Kayatta introduced the managing attorney of the Older and Wiser program, **Joseph Olimpi**, a 1978 graduate of the University of Tulsa law school, who has spent his entire thirty-two year legal career with NLSA. Olimpi, who has represented older adults who were the subjects of guardianship and protective services petitions, was instrumental in founding and developing the Older & Wiser program.

Olimpi proceeded to explain the origin and the nature of the Older & Wiser program. He and his executive director were in the state capital, Harrisburg, talking to a group of legislators from Western Pennsylvania, which has the second highest concentration of older adults in the country. They discovered that many of the questions that the legislators get from the older adult population are the same kinds of questions that NSLA people working in the elder law area also receive.

The two of them came away with the thought that a program like Older & Wiser, using legislators to whom they had furnished program materials, would be a novel way to get public information and public education to older adults in their communities.

This arrangement enables NLSA to provide legislators with a good community education program without having to solicit funds from them. The program currently covers seven topics on the law as it affects older adults. The legislators are given materials that address areas about which they frequently get questions from constituents.

"We are able," Olimpi noted, "to offer them the materials, not just the materials for the seminar . . . [but also] PowerPoint presentations and take-away materials on each of the topics. They are also given sample or suggested press releases . . . and NLSA also suggests places where they might conduct these seminars."

"Their only responsibility," he added, "is to find a place to do these seminars and, most importantly, provide refreshments. If you don't provide refreshments -- coffee, cookies -- you're sunk with these things. That's very important. And we found that the more food that's offered at the seminar, the bigger the turnout."

PARTICIPATION OF BAR

"And we found out, "he continued, "that the third partner, which was just a natural choice for us, was to ask members of the private bar to participate in this project with us.

So it's really three of us in this partnership, and I think that's the unique thing about this vehicle for delivering this message and providing the community education that got us here today."

"The private bar has been just tremendous. We naturally look to our elder law committees and sections, as well as the probate, estate and trust sections, and one of the things we discovered in doing this and just thinking about this kind of a project [is that] we made some partnerships that we never had before. We really never had much contact, as you can imagine, at Legal Services with the probate, estates and trust sections. . . . [W]e never had an official relationship with the elder law committees, except some of us had practiced in that area. But it's opened up a whole new area for us, new volunteers that we just never would have thought about before. They love this program, and the private volunteer attorneys are the ones who actually go out and deliver the seminar content. And it's just been a great vehicle for us."

"At each of these seminars, we do make a point to pass out a simple one-page questionnaire. It's got eight questions on it, "yes" or "no," "circle the response," and one area for comments. And I have collected these responses from the participants, the audience, at every single one of these we've done. . . . [O]ther programs in the State of Pennsylvania are beginning to pick this up and to use this as an education model. . . . [O]ur approval rating from the audience is . . . just perfect ratings or excellent ratings from about ninety-nine percent of those in attendance, so we're very happy about that."

IMPACT OF THE AWARD

"I have had an opportunity to speak to a lot of people about our being the recipient of this award, and I will tell the College that we are changing all of our templates so that it is proudly displayed on all of our take-away materials, our PowerPoint templates, to indicate that we are the 2010 Emil Gumpert recipient."

"It's just a great opportunity for us to open new partnerships. And we found out that we've gotten older along the way, but I think we've gotten a lot wiser, and we've gotten wiser because we have opened up new partnerships, like this one. . . . Just the opportunity to talk with those of you who I've met through the review process has really opened our eyes, and I know that we're going to use this grant, not just to do some of the financial things, although it's very important to have that money to help revise some of our templates, freshen them up, make them look nicer, to be more current, to get things rewritten so everything's current."

"[I]t's [also] an opportunity to use it as a springboard . . . . . [W]e have every hope that this program will be replicated across the country. I've already had a couple of calls from other states who just happened to be looking around the website for the American College of Trial Lawyers that said, 'Gee, we noticed you guys got this award, this Emil Gumpert Award, and it's a great program. Can you send us some materials and tell us how this works?'"

PRESIDENT LUKEY RESPONDS

In responding, College President Joan A. Lukey remarked that in presenting the check at the ceremony in Pittsburgh, "I think that I took away more than I was leaving. This program is very, very special. Present at that ceremony were many of the legislators who are involved, and I thought, "What a creative idea. Even though this program isn't

going to those legislators, asking them for money, a relationship is formed. And you know in the future if there is a need for the elderly or otherwise in the legal services community, these folks are now friends and committed partners to the program. I love the concept of the springboard that Joe mentioned. That's exactly what the Emil Gumpert Award wants to do, to help a single program from which others will grow."

THE GUMPERT COMMITTEE'S REQUEST

Kayaatta left the following request of the Fellows of the College: "[T]he Gumpert Committee needs you, the College's Fellows and our leadership, to help us identify programs for the coming year that merit consideration for this award. The home page on the College's website has a link to our selection criteria, a nomination form and an application. It's very easy to use. I encourage you, if you know of a program in your state or province, to get them to that site and get an application in this year before November 15th."

SUZANNE TAVARES RETIRES AFTER 19 YEARS WITH THE COLLEGE

Suzanne Tavares retired from the American College of Trial Lawyers on December 31, 2010, after 19 years of service. Suzanne began her employment with the College in 1991, and she quickly worked her way through most of the positions at the National Office before settling into her niche in the Meetings and Conference Department.

In the early years, Suzanne worked directly with Mary Kate Lowe. Following Mary Kate's departure to raise a family, Suzanne became the natural choice as the new Meetings and Conference Manager. In her new position, she worked closely with then-Executive Director Robert Young, ably handling administrative responsibilities of the College's national meetings. When Young retired, Suzanne became the Fellows' primary contact for all College National meetings.

Through the years, Suzanne made many friends among the Fellows and spouses. Upon last fall's announcement of her impending retirement, congratulations and good wishes poured in. The College's 60th Anniversary Annual Meeting in Washington, D.C., was Suzanne's final event. Her breadth of experience and outgoing personality will be missed by the Fellows, College staff and the individuals at her many travel locations. Suzanne and Fred look forward to travel and time with family.

We wish Suzanne and Fred safe and happy experiences in this next chapter of their lives.

97 INDUCTED AT WASHINGTON

ALABAMA:
Robert P. MacKenzie, III,
Birmingham

ARIZONA:
Paul F. Eckstein,
Phoenix;
Marshall Humphrey, III,
Tucson;
William J. Maledon,
Robert J. Shutts,
Georgia A. Staton,
Timothy J. Thomason,
Phoenix

SOUTHERN CALIFORNIA:
Clark R. Hudson,
San Diego;
Linda Miller Savitt,
Glendale

COLORADO:
Mark A. Fogg,
Denver

CONNECTICUT:
Kevin M. Tepas,
Stamford;
Michael J. Walsh,
Hartford

DISTRICT OF COLUMBIA:
Thomas Abbenante,
Henry W. Asbill,
Blair G. Brown,
William P. Lightfoot,
Paul J. Maloney,
Stephen L. Urbanczyk,
Washington

FLORIDA:
Mark F. Bideau,
West Palm Beach;
Denis M. deVlaming,
Clearwater;
Joseph H. Varner, III,
Tampa

GEORGIA:
Thomas M. Cole,
Gainesville;
Elizabeth Green Lindsey,
Nicholas C. Moraitakis,
Atlanta

IDAHO:
Gary L. Cooper,
Pocatello;
John F. Kurtz, Jr.,
Boise

ILLINOIS:
David J. Bradford,
Robert M. Collins,
Patrick J. Fitzgerald,
Chicago;
J. William Lucco,
Edwardsville;
Emily Nicklin,
Chicago

IOWA:
Terry J. Abernathy,
Cedar Rapids;
Edward J. Keane,
Sioux City;
Thomas H. Miller,
Des Moines

KENTUCKY:
Douglas H. Morris, II,
Louisville

LOUISIANA:
Gary A. Bezet,
Baton Rouge;
Miles P. Clements,
New Orleans;
Gordon L. James,
Monroe;
Richard E. Sarver,
New Orleans

MARYLAND:
David C. Driscoll, Jr.,
Rockville;
Peter E. Keith,
Baltimore

MASSACHUSETTS:
David E. Meier,
Charles W. Rankin,
Boston

MICHIGAN:
Douglas A. Dozeman,
Grand Rapids;
Kevin J. Gleeson,
Southfield;
Richard M. O'Connor,
Bloomfield Hills

MINNESOTA:
Robert W. Kettering, Jr.,
Charles F. Webber,
Minneapolis

MISSISSIPPI:
Kathryn N. Nester,
William R. Purdy,
Jackson

NEBRASKA:
Thomas J. Culhane,
Omaha

NEVADA:
Edward J. Lemons,
Margo Piscevich,
Reno

MEETING

NEW YORK:
Stuart J. Baskin,
New York;
Vincent E. Doyle, III,
Buffalo;
Peter M. Hobaica,
Utica;
Susan G. Kellman,
Brooklyn;
Steven G. Kobre,
Anthony L. Ricco,
Michael S. Sommer,
New York;
Mark Spitler,
Buffalo

NORTH CAROLINA:
Mark E. Anderson,
Raleigh;
W. Thompson Comerford, Jr.,
Winston-Salem

OHIO:
Thomas M. Green,
Dayton;
Stephen A. Skiver,
Perrysburg

OKLAHOMA:
John J. Carwile,
Tulsa;
Gerald E. Durbin, II,
Oklahoma City;
Stanley D. Monroe,
Tulsa

OREGON:
Daniel C. Dziuba,
Edwin A. Harnden,
Larry N. Sokol,
D. Laurence Wobbrock,
Portland

PENNSYLVANIA:
Lynn E. Bell,
Pittsburgh;
Deborah F. Cohen,
Philadelphia;
W. Patrick Delaney,
Erie;
Patrick J. Egan,
Brian P. Flaherty,
Philadelphia;
Victor H. Pribanic,
White Oak;
Witold J. Walczak,
Pittsburgh

RHODE ISLAND:
Patricia K. Rocha,
Providence

SOUTH CAROLINA:
Kenneth C. Anthony, Jr.,
Spartanburg;
William A. Coates,
Greenville

SOUTH DAKOTA:
Jeff A. Larson,
Sioux Falls

TENNESSEE:
Harriett Miller Halmon,
Memphis;
Mariah A. Wooten,
Nashville

TEXAS:
David A. Sheppard,
Austin

VIRGINIA:
Michael N. Herring,
Richmond

WASHINGTON:
Robert C. Tenney,
Yakima

WEST VIRGINIA:
Dina M. Mohler,
Charleston

CANADA

ALBERTA:
Randall W. Block, Q.C.,
Calgary;
Frederick S. Kozak, Q.C.,
Edmonton;
Lenard M. Sali, Q.C.,
Gerald F. Scott, Q.C.,
Calgary

ONTARIO:
Peter G. Hagen,
Ottawa;
Alan Mark,
Harry Underwood,
Toronto

QUÉBEC:
Isabel J. Schurman, Ad. E.,
Montréal

INDUCTEE DELIVERS INSIGHTFUL RESPONSE

Richmond Commonwealth Attorney

Each year, one new inductee is asked to give a response on behalf of the inductee class. At the 60th Annual Meeting in Washington, Virginia Commonwealth Attorney for the City of Richmond ***Michael N. Herring****, was called on to respond on behalf of the ninety-seven inductees. Herring's remarks, laced with humor and insight and ending in a tribute to the legal profession, follow.*

Michael N. Herring

I developed a very practical view on the law beginning in 1982, when I was competing for a scholarship to attend the University of Virginia. This was the first time I had been in the company of lawyers and only the second time I had been down to Main Street, which is where most of the firms in Richmond are. The first occasion was shortly after my 15th birthday, when I decided I needed a summer job. And so, I pressed my best Izod pullover, I neatly creased my nicest pair of khakis, I hopped on the Richmond city bus and proceeded to find fame and fortune on Main Street. Suffice it to say, I didn't find either. I didn't get a job at the age of 15, but I did have some familiarity with Main Street the next time I was there, which was the occasion of this scholarship interview.

I think one of the things that makes us good at what we do is our ability to read crowds. So on this occasion I'm reading the crowd, I'm reading the fellows around the table, and if memory serves me correctly, there's roughly eighteen to

twenty men at the biggest table I had ever seen in my life. And I concluded fairly early on that I wasn't going to get the scholarship. But, on the way out I sensed an "opportunity." So as the person who was escorting me to the elevator as politely and gently as he could leans to me and says, "Best of luck," I turned to him say, "Thank you, can I get a job?"

INTRODUCTION TO THE LAW

And sure enough, that was the beginning of my association with the law, and from there on every summer I worked at Hunton & Williams, through college, as a runner in the days before email, when we actually *were* the email, and we carried it from firm to firm.

You know, I'm a media baby as I suspect some of you are, so that my perspective of the law really was shaped by the images that I saw on the TV screen. And so, this is the early to mid-80s, and the shows that were successful at the time were the tragically satirical *Night Court*, the weekly brews of the *Hill Street Blues*, which from my opinion was the first time that a major network featured a strong female litigator. She was a hauntingly beautiful Veronica Hamel, who played the part of Barracuda, the prosecutor. And then of course there was disorganized brilliance-in-seersucker *Matlock* and, the beginning of the end, the dysfunctional, unrealistically diverse, sexually active boutique law firm on *L.A. Law*. When I graduated from law school and had the good fortune of going back to Hunton & Williams as an associate, it was a bit of a shock to me, but probably not a surprise to you folks here, that the reality of practice at Hunton did not in any way mirror L.A. Law. Whatever love and romance there was in the firm, it didn't play itself out in the conference room, I tell you that.

The prominent figures at that time for me, the prominent practitioners, didn't really look the part.

One stands out in particular. He wasn't tall; he didn't wear custom-made suits from the local tailor; he wasn't suave. In fact, he didn't have a rapturous voice; his voice was more like a drill sergeant, and his name was Lewis Booker [FACTL}. . . And Lewis Booker was one of these people who, I'm convinced, didn't sleep. Legend had it Mr. Booker survived on four hours of sleep a night. But an even bigger legend, which I doubted, of course, as a young titan, as all young lawyers do. You know, you doubt the stories of your older predecessors in the firm. But there was one story that Mr. Booker was involved in mass tort litigation out in St. Louis, and he was scheduled to be heard on motions, and he suffered the tragedy of being mugged on the morning of his hearing. And legend had it that Mr. Booker was mugged, he suffered an injury, he went to the emergency room, where he was promptly and ably bandaged. He thereupon proceeded to the courtroom with his bandages and won his motion hearing. And that was the first time that my 'stuff,' if you will, as a trial lawyer, was questioned.

My second, . . . was later on, when I was a bit of an environmental litigator. And for all you guys in the room, you know this is true, when you go to the restroom with a guy there is a cardinal rule: [Y]ou never, ever, ever, ever, ever, ever . . . look to the right or to the left. . . . Chicken Little could be telling the truth and that the sky is really falling. You look straight ahead the whole time you are in the restroom. So on this occasion, for whatever reason, something caught my eye, and . . . it was a sheet of paper, so I looked to the left, and . . . this fellow, who's a partner, is . . . reading and billing at the same time! At that point, Houston radioed into me and said, "We have a problem."

A TRANSITION

So as rich as my experience at Hunton & Williams was I, like I suspect many of you, longed for something different, because as an associate you don't have much ownership of your cases. And so, I went to work for the person who to my memory enjoys the dubious distinction of being the only elected Commonwealth Attorney in the State of Virginia to have actually gotten in a fist fight with a defense lawyer dur-

ing trial. So, the heat of the moment can get to all of us, but this fellow actually got in a fist fight with the defense lawyer. There was a silver lining to that cloud, however, because it afforded me the opportunity to come before a judge who is near and dear to me to this day. I heard Judge Sparks [winner of the O'Connor Jurist Award] offer his wonderfully inspiring remarks this morning, and he described the time in Texas when many younger lawyers were trained right there at the bar. If you didn't have a mentor in your life, your training was done at the hands of the trial judge.

Well this person, his name was Robert Duling. Judge Duling, as I knew him, frankly defied all of my stereotypes of what I thought he would be, because he was a descendant of a long-standing, long-standing, Richmond family that had been involved in the criminal justice system. Indeed, it had produced a police chief in the turbulent 60's & 70's in Richmond, and you can imagine all of the trappings that came with that. But it was also known for producing Sergeant Dan, who according to my mother, was known for chasing bootleggers with his sidecar.

So when I appeared before Judge Duling, I'm expecting the worst, expecting the worst from this ardent southern Richmonder, who is going to have this new, somewhat more humble prosecutor before him. And I couldn't have been more pleasantly surprised. As it turns out, Judge Duling was consummately professional. He was kind, and I think he was widely regarded as one of the best, if not the best, judge on the criminal bench. He and I developed a very close relationship over the years, and from it, I learned that he expected of me what he expected of all lawyers, which is what I believe you all expect of inductees to the College. He insisted on preparation; he insisted on honesty, and he had an utter disdain for laziness and complacency.

But he also had a sense of humor. In Richmond in 1992, the city wasn't terribly diverse, but if you were African-American and you wore bow ties, you were in all likelihood a member of the Nation of Islam, and I was not. I was not, right? Well, I show up in front of Judge Duling one morning, and I've got on my most conservative bow tie, and I've done the best I can to tie it, and my clothes are just so, and I'm still trying to make a really good impression on the judge. And I catch [sight of] him from counsel table, and his right eyebrow just kind of goes up and then he promptly leaves the bench. Everyone is standing there, wondering what's going on causing Judge Duling to leave the bench. Ten minutes passed, and we still have no word, no clue as to what has happened. The judge returns, comes back to the bench, sits down, and he's wearing a bow tie. And he looks at me and says, "You're not the only one with *style*, Mr. Herring."

I learned two things from Judge Duling, and I try to abide by these with everything that I do in my work now as the Commonwealth Attorney for the City, and that is you figure out the right thing to do and you do it no matter how uncomfortable it feels, no matter how much scrutiny and scorn it draws from those around you. But also, I learned to believe what I believe he felt, and what I suspect all of you share, and that is an uncompromising belief in the importance of fairness in our justice system. . . . Over the twenty years of my practice, I have had the pleasure of doing so many different things, . . . and much as I know that our system isn't perfect, I am convinced that it is the best on the planet. I mean no offense to our brothers from Australia, the UK and Canada, but I generally believe that, with our constitutional protection of due process, our goal of access to justice and the simple right to be heard.

RIGHTING WRONGS

Notwithstanding these procedural safeguards, sometimes we simply get it wrong. Sometimes in the civil justice system, but more to my point, sometimes in the criminal justice system we really get it wrong, we really just get it wrong. Recently, states are beginning to identify with increasing frequency, persons who have been wrongfully convicted of some pretty awful things, and this is due in large measures to advances in DNA science and technology.

What are the odds that a person would come into contact with *two* such people in the span of seven years? The first occasion that it happened to me, I was a defense lawyer. I had been appointed to represent a person who had tried to exonerate a wrongfully convicted man [by confessing that he himself was the guilty party]. He had gone to court, admitting his role in a horrible rape, but the judge and prosecutor thought he was a lunatic because he insisted that everybody involved in the judicial process was a closet Klansman.

The second occasion has been more recent. In my capacity as the Commonwealth Attorney, I had an occasion to go out to the Department of Corrections, and I met a fellow who is now serving twenty-six years of a functional life sentence. And when I met him, as on the occasion that I met the previous fellow, I was struck by something: I was struck, not by a sense of anger or a sense of hatred, which is what I suspect I would have projected if I had been them, but I was struck by their humility. In fact, these guys were both a little shy in the same way that they probably were at the ages of eighteen or nineteen when they were arrested. The most recent person had been exonerated of two of the original offenses from the 1980s, and that's because of biological evidence having been preserved. On the third crime, however, there was no biological evidence, because it was a crime of attempted robbery and attempted sodomy.

And so, we, meaning myself and his lawyers, agreed to subject him to a polygraph. I know that you're thinking the same thing that I do: We all have a predisposition against polygraph results in that it is, in some respects, junk science. So, we found the best guy that we could. At one time . . . this fellow was [the FBI's] go-to guy on every major suspect or witness who needed to be polygraphed in the world. And so, he goes with us out to Greensville Correctional Facility, and he interviewed, got the background, performs the examination of this fellow and comes out to where and his lawyer and I were waiting out in the wing, and he says, "That ain't your guy".

Now, immediately I didn't know what to think. It was one of those moments when you don't know quite what you feel, and the moment I became more comfortable with my emotions, they went from a sense of happiness, because I actually believe he's innocent, to a feeling of absolute embarrassment. I stood there, and I looked at him, and I was ashamed of what we had done to him. At the age of eighteen, on the way to school, his profile was consistent with that of the offender, and so his life had been permanently interrupted. This man had not been home since the age of eighteen because he was serving time for offenses he did not commit. Indeed at eighteen, we wrongfully judged him to be a serial rapist.

THE REAL HEROES

I've taken away from this encounter a lesson that I would like to share with you. I think that a part of the reason we have matured into the good lawyers, indeed the excellent lawyers, that we are, is because we learned long ago not to pass judgment. We learned long ago not to disparage judges, jurors and witnesses when at the end of trial we don't achieve the desired outcome. But more importantly, we've learned that the real heroes of the courtroom and of the justice system are the parties. There are our clients, be they [civil] plaintiffs or defendants, the State or criminal defendants, who submit to the rule of law and the authority of the court with dignity.

I stand here and I pinch myself, I'm still pinching myself, but I remain mindful to the fact that ultimately, as much the class of 2010 owes a debt to you, the members of the College, for accepting us into your fold, we owe an equal debt to those people that we have represented, because they trusted our assurances to do our best, our very best, to protect their interests.

So on that note, I will thank you again.

bon mot

When Mike Smith, one of my colleagues from Richmond, who I suspect had something to do with my presence here, asked me to consider being the respondent, he told me a number of things, and one of them was that I could be funny. Well, I am joined tonight by my lovely and patient wife, Aster, and I have learned over the years that my sense of humor isn't always timely. . . . Aster is strategically placed right in front of me, and that's good for a variety of reasons . . . . I don't know how many of you have grown up in households with teachers. For those of you who have, and where those women who were both teachers and mothers, you know that they have this uncanny ability to give you a look that could stop time. Right? And for those of you who grew up in those households and are also Star Wars fans, you know that the Jedi, including Yoda, don't have anything on a kindergarten teacher when she's looking at you.

Inductee Responder Michael N. Herring

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At the induction ceremony, the traditional induction charge was delivered by way of a tape recording of Chancellor Founder Emil Gumpert reciting the charge he had authored in 1950 and delivered to each entering group of inductees until his death. In doing so, he used the original wording "you gentlemen," which provoked a chorus of laughter. At the end of the charge, Joan A. Lukey, the College's first woman president, added, "And ladies, our sisters [of whom there were a number in the group of inductees], we welcome you as well."

bon mot

FELLOWS TO THE BENCH

The College is pleased to announce the transition to the bench of the following Fellows:

R. H. Wallace, Jr., 96th District Court, Fort Worth, Texas

Karen S. Townsend, District Court, Missoula County, Missoula, Montana

Beverly J. Cannone, Quincy District Court, Quincy, Massachusetts

Jamie O. Thistlethwaite, Superior Court, Santa Rosa, California

Robert A. Mello, Vermont Superior Court, Hinesburg, Vermont

Edward P. Leibensperger, Associate Justice of the Superior Court, Newton, Massachusetts

FIRST COLLEGE COMMITTEE WEBSITE CREATED

Access to Justice Committee

To provide broader access to the workings of the College to all Fellows, the College has created its first committee website, that of the Access to Justice Committee. The Access to Justice website will be used to assist in bringing noteworthy public service cases to the attention of the Committee. Through it, Fellows will be able to find cases appropriate to their practice that they may be willing to undertake as a fulfilling step in giving back to the profession and to the College.

Conceived under the leadership of incoming President **Gregory P. Joseph,** the College has authorized the creation of similar websites for other committees who may find this a useful tool in furthering their work. State, Province or General Committees that would like to utilize the College website to reach out to the Fellowship regarding their work should direct their inquiries to the College staff for permission and assistance.

REGENTS APPROVE PUBLICATION OF THREE PAPERS

During 2010, the Board of Regents has approved the publication in the name of the College of three papers, all of which can be accessed on the public section of the College website. They are:

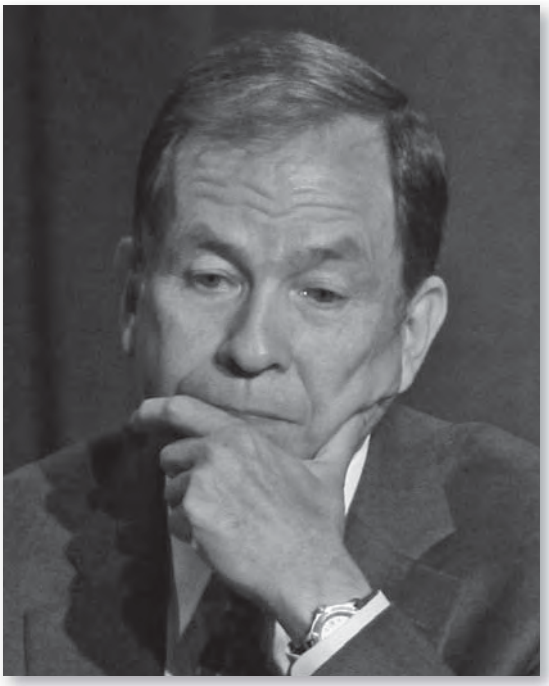
Jury Instructions Cautioning Against the Use of the Internet and Social Networking, produced by the Jury Committee.

Attorney-Client Privilege in Congressional Investigations, produced by the Attorney-Client Relationships Committee.

Cross-Border Litigation Manual, a project of the Canada-United States Committee.

THE LEHMAN BROTHERS BANKRUPTCY: WHAT HAPPENED?

*In a presentation subtitled "The First Domino in the Financial Crisis," Chicago Attorney **Anton R. Valukas, FACTL,** recounted the story of the bankruptcy of Lehman Brothers, the largest bankruptcy in history. In January 2009, Valukas had been appointed by Southern District of New York Bankruptcy Judge James M. Peck as examiner in that bankruptcy, and his presentation was based on what he learned in that role.*



Anton R. Valukas

After law school at Northwestern, Valukas had spent eight years in public service, first as assistant director of the National Defender Project and then as an Assistant U S Attorney, before joining the Chicago firm of Jenner & Block. He had later served for four years as United States Attorney for the Southern District of Illinois. Having then rejoined the firm, he eventually became its chairman.

The Court described his 2010 report on the Lehman bankruptcy thus: "I consider this to be one of the most extraordinary pieces of work product I have ever encountered. It's extraordinarily comprehensive. It reads like a best-seller, and it's so well-organized that it's actually useful. So my compliments to everyone who had any meaningful input in what I consider to be the most outstanding piece of work product ever produced by an examiner."

The *American Lawyer* commented, "Years from now, when historians and economists look back at the great recession, there's one document they have to read, the 2,200-page report by Anton Valukas, a feat of research and writing."

Business Week said, "The 2,200-page Lehman report released on March 11th constitutes the single-most penetrating document we have on the recent misbehavior on *Wall Street*."

And The Wall Street Journal concluded, "The report by Anton Valukas paints the most complete picture yet. Mr. Valukas has given taxpayers a taste of what they deserve and are long overdue. It is time to clone Anton Valukas."

WHAT HAPPENED? WHAT HAPPENED?

Valukas began his presentation by repeating the question most often raised by the Lehman Brothers bankruptcy, "What happened? What happened?" This is the answer in his own words:.

On January 2, 2008, the share price of Lehman Brothers, one of the world's premiere financial institutions, closed at about $62, implying a market capitalization of approximately $35 billion. It was a stunning year for Lehman. In the January bonus session, millions of dollars worth of bonuses were paid out to Lehman executives. They had $4 billion in revenues that year. That was a record.

Less than eight months later, on Friday, September 12th, their stock was at $4, a decline of almost ninety-five percent. The following Sunday night, Monday morning, Lehman filed for bankruptcy, the largest bankruptcy in history, [a] $691 billion bankruptcy.

If you took the five largest bankruptcies and totaled them up, they would not come close to what the Lehman bankruptcy was. GM, WorldCom, Enron, CIT, Washington Mutual, and you could go on and on, it would not equal what Lehman was, nor could it begin to equal what happened as a result of the Lehman bankruptcy.

Over the September 12th-15th weekend, something that has been described in the press and will be known forever as "Lehman Weekend," Secretary [Henry] Paulson, SEC Chairman [Christopher] Cox, and New York Fed President [Timothy] Geithner, met with the top executives–and I mean the top executives–from all of the major financial institutions in the western world in the basement and conference rooms in the Federal Reserve in the lower part of Manhattan. What they tried to do that weekend, desperately tried to do twenty-four hours a day during that time, around the clock, was find a way to save Lehman and ultimately, as they came to understand it, to save the economy of the western world.

But late Sunday afternoon, Lehman's president, Bart McDade, went back from the meetings at this Manhattan center to Lehman's headquarters and reported stunning news: there would be no government bailout for Lehman Brothers and that he was being told Lehman Brothers should declare bankruptcy. As the directors, including the former chairman of IBM, and other extraordinarily distinguished individuals digested this report, they noted they had never considered bankruptcy as an option for Lehman Brothers. Here we are that Sunday. The option had never been on the table.

And then one of the most extraordinary phone calls in American business took place. Chairman Cox of the SEC called the boardroom of Lehman Brothers and said, "I'm not telling you to do anything, but the markets are opening in Asia soon, and we've already expressed our opinion to your people."

There were no other options. Within hours, Lehman declared bankruptcy. It did not have the liquidity to open for business the next day. That bankruptcy was the first domino in the global economic calamity that we are now still living through. The Dow fell 500 points the next day. The buck was broken. AIG needed to be bailed out. And we are living and continue to live through the results. When the book is written on the global recession of 2008, Lehman Brothers will get its own chapter.

WHAT HAPPENED?

On January 20, 2009, about four months after the Lehman bankruptcy was filed, I was appointed by Judge Peck to serve as the examiner. I was invited to, and directed to, investigate a broad base of individual issues, but the most significant issue was "the

events that may have resulted in the bankruptcy." In other words, I was asked to investigate and determine why Lehman failed and whether anyone–the officers, the board, the government itself–was responsible for this failure.

I had never served as an examiner before. My experience in Bankruptcy Court was one piece of litigation a long time ago, so I had limited familiarity with the venue. The haystack in which I was asked to find the needles included potentially thousands of witnesses, and ultimately the base of documents was in the range of 250 billion documents that could have been considered relevant for purposes of review. Lehman's financial structure and instruments were breathtaking in their sophistication and nuance. If I learned one thing here, it is that very few people truly understood what this global institution was about.

So it was an easy, simple and regular everyday assignment for a trial lawyer. And you, as trial lawyers, know that there is only one thing you can do under those circumstances. We take a complex set of facts in a complex discipline, we investigate, we analyze, we synthesize, we distill these facts into a cohesive presentation to an audience, and we tell the truth. . . .

I approached this actually not as the trial lawyer that I am, but as the client. It was terrific. First thing I did as the client was I hired a lawyer who came out of the American College of Trial Lawyers, Bob Byman [Regent Robert L. Byman]. Naturally, as all smart clients do, they listen to their lawyer and they defer to their lawyer. And I will tell you, this report has received remarkably high praise, for that which I am most grateful, but the person who was most responsible for this report was Bob Byman. He is the person who lawyered this case. He is the person who made sure that the process produced the results it did. The work product which forms this report is really a testament to Bob and the team. . . .

[M]y job was to find culprits if they existed, but not to find villains if there were none. I told Bob and my team the mantra was simply this: Gather the facts, gather them honestly, set them out, lay the cards face up on the table, so the American public can understand what really took place here. We were not advocates.

FACTS REVEALED

Let me describe what those cards showed. After Bear Stearns' near failure in March of 2008, the widely held view was that Lehman was next. This is extraordinary, because people were trading billions of shares of stock, but inside the government, the sense was Lehman was in trouble.

When Lehman announced its first quarterly loss in June of 2008, Secretary Hank Paulson told us that he told [Lehman] CEO Dick Fuld that he had until the next quarter to find a buyer. Otherwise, there was going to be large problem, and the government would not be there to help. And that was repeated to us. That was something which everybody asked. "Did the Secretary tell them clearly that there would be no bailout?" And the answer is he did. The problem was, people didn't believe it.

Lehman's options were limited by that time. It had become increasingly clear that the long-term survival was in doubt. We found emails June 13, 2008 from Donald Cohen, vice president of the Fed, sent to Chairman [Ben S.] Bernanke that said, "The question is when and how Lehman goes under, not whether it will."

But Lehman's demise in 2008 wasn't a result of the economic climate in 2008 or some act of God in 2008. It was the result of business decisions made in 2006 and 2007. It was a result of a decision that Lehman had made, consciously made, and it's in their emails and traffic, to seek greater profit by taking on greater risk through increased investment in real estate-related instruments. Lehman continued its high-risk strategy, even in the face of growing awareness in 2007 that there was a crisis in the subprime mortgage. Remember the end of 2007, . . . their best year ever.

Lehman's board member, Dr. Henry Kaufman, who is considered one of the lions of Wall Street, told us that Lehman made the calculated decision to, "double down," as the subprime mortgage unfolded,

hoping to profit by a countercyclical strategy. Lehman bet its future that the subprime market would not spread disaster, the subprime crisis would not spread beyond the subprime housing market. And Lehman wasn't alone in holding that position. At the same time, Chairman Bernanke was making the same public statements about the market.

But as Lehman pumped up its steam in its economic engine, Lehman ignored its own safety valves. It took on more and more risk. Lehman blew past the limits which its own internal risk models set. Those limits, of course, were self-imposed. They were not imposed by government regulation. They were free to adjust those limits, and they did. Rather than reassess its strategy, rather than reduce its risk, rather than slow down as it went over these limits, Lehman simply raised the limits as it went along, with the acquiescence and the agreement of the Board.

Had the countercyclical strategy been right, Lehman would have been called a visionary. Instead, it's called "debtor-in-possession."

Lehman had historically been in the moving business. Lehman typically acquired assets for short-term needs for resale and redistribution, pocketing enormous fees in doing so. But by the latter part of 2007, Lehman found itself struggling to sell or syndicate or securitize those assets which had become increasingly illiquid, what Lehman executive identified in their emails as "sticky assets, assets which we cannot get rid of." Lehman was no longer in the moving business. Lehman had moved into the storage business.

Unlike banks, investment banks finance themselves not off government, not off of individual deposits. They get their funding by daily going into the short-term repo market, posting collateral and borrowing literally hundreds of billions of dollars a day in order to stay open for business. To keep that funding rolling, Lehman required the confidence of the repo counterparties. And to maintain that confidence, there were two words on Wall Street that mattered: "leverage" and " liquidity."

In the first part of 2008, that was the focus of the marketplace. The Street wanted Lehman's leverage down. Leverage is arithmetic. Assets and liabilities divided by capital. Leverage could be lowered then by raising capital or disposing of assets. But Lehman didn't want to raise more capital, because that would dilute its existing shareholders, which included many of the officers of Lehman, and also because of the belief it would signal a weakness in the marketplace.

And in terms of selling assets, they had a problem. As we've noted, they were illiquid, becoming illiquid, "sticky." And Secretary Geithner told us in an interview in his office that there was a double-whammy. If in fact they started selling specific assets at significantly less than what they were marked on their books, they would not only take a loss with regard to those assets, but the market would then begin to suspect the other assets they had on the books were not worth where they had them marked.

FUDGE THE NUMBERS

There was no other way. Ah, but Lehman found a third way. That third way was called "fudge the numbers." And how did it do this? And this is what has become known in the public as Repo 105. It was an accounting device that Lehman used in essence to take what was an ordinary repo, as we've just described it, where, for instance, you would sell $101 million of financial instruments for $100 million and then reverse the transaction two days later. You would do the same thing, but you would post $105 million and sell that for $100 million to reverse the transaction three days later. And under the accounting rules, that could be called, it could be treated as a sale rather than a financing.

But in order to accomplish this, the accounting rules required that they have the opinion of counsel that in the jurisdiction in which the sale occurred, it would be constituted as a true sale. They could not get the opinion of any United States lawyer that in the United States this would be considered a true sale. They did get the opinion of counsel in

the United Kingdom that under the United Kingdom law, it could be considered a true sale.

So three days before they would make their published figures on their balance sheet, they would transfer, through a series of transactions, tens of billions of dollars to their London subsidiary, who would then execute these transactions, which would then remove the assets through a complicated series of transactions from the balance sheet. Three days after the published figures had been put into the marketplace, they would quietly reverse those transactions, and these assets would then reappear on the balance sheet of Lehman Brothers.

The reduction in leverage was dramatic. Lehman used this Repo 105 transaction to remove $50 billion in assets three days or so before the end of the quarter, and those assets reappeared after the published figures had gone out three days afterwards.

Lehman led off the second quarter call in 2008 touting its supposed reduced leverage numbers, which came as a result of this asset movement, and which had artificially moved the leveraged numbers dramatically, in a conscious effort to mitigate the bad news that there had been a loss in that quarter for the first time in history. It was a shell game.

The emails within Lehman Brothers described as follows: Lehman Brothers' own president described it as "Repo 105: It's a drug we are on." Lehman's internal accounting personnel described it as "accounting gimmicks, a lazy way of managing the balance sheet, window-dressing." They stated that there was no business purpose for this other than to dress up the balance sheet.

THE "LIQUIDITY POOL"

Let me turn then to the other item, liquidity. In June of 2008 it was announced that notwithstanding the second quarter losses, Lehman further was able to soften the blow by pointing to $40 billion which was located in their liquidity pool. But the assets in that pool were not as they described them. As Lehman's banks became increasingly more concerned about Lehman's condition, they demanded what they called "comfort deposits." Please put five billion on deposit here. Sure, you can get it back later on– maybe."

The concern that the government has was [that] they disagreed. They didn't believe those assets should be in the liquidity pool. They did not think they were part of the liquidity pool at all. By mid-August, unbeknownst to the public, almost twenty percent of Lehman's liquidity pool, $7 billion, had been pledged to banks. Even more troubling, Lehman had told the public that they were performing stress tests which established that Lehman would in fact survive a liquidity crisis.

But the stress tests that they put in place excluded the most vulnerable of all their assets. Those assets were very complex, very difficult to price and to determine in terms of value. And so Lehman simply excluded these assets with the knowledge of the government. The exclusions were significant, in fact, overwhelming. The largest proportion of Lehman's actual risk lay with the precise business lines that were not included in the stress tests.

What was the result? When the real economic crisis occurred, Lehman could not survive. In September of 2008, Lehman's liquidity pool literally evaporated in the space of a week, going from $32 billion on Monday to $2 billion on Friday.

REGULATORS ASSENT

Where was the government? Where was the government? The people who run regulated businesses, the officers and directors of these organizations, have the right to make bad business decisions. But the public has the right to assume that the regulators were watching and, well, actually regulating. That did not happen here. There was a startling failure to communicate among the agencies. The SEC knew that there was a $2 billion pledge deposit which went to Citibank but did not tell the Federal Reserve about that.

The Federal Reserve knew about a $5 billion deposit that it made in JPMorgan Chase. They did not tell the SEC about that. They were

sitting in the same room. They had been assigned to monitor Lehman Brothers, and they were not communicating with each other about this. And neither said anything to the investing public, who actually believed there was $40 billion in the pool.

There is a September 10, 2008 email in which an SEC lawyer finally realizes what the Federal Reserve knew, what they knew. And it's kind of like, "Oh, my God, do you know what's happening?" And Lehman was in bankruptcy four days later.

In each instance, liquidity, risk exceedences, stress tests, the SEC knew about these issues but simply acquiesced in Lehman's decisions. Remarkably, though the SEC's overall mission is to protect investors by ensuring full and adequate disclosures, the SEC never directed Lehman to disclose its disregard of its risk limits, its issues with the liquidity pool.

And as to Repo 105, the SEC didn't know about it, because it never asked questions. There is no evidence that Lehman would have lied to the SEC had they asked them specifically about Repo 105. After my report became public, the SEC sent out a directive and asked those questions of the various financial institutions. It got startling reports back, that indeed this window dressing was occurring at other financial institutions. It was somewhat startling to me that in light of Enron and the off-balance-sheet transactions that those questions had not been asked earlier.

Last week [September 2010], the SEC passed a rule requiring the disclosure of all of those window-dressing activities. And I think in an act of true graciousness, Mary Schapiro, the chairperson of the SEC, called me last Thursday to thank us for this report, which helped precipitate that rule.

CONCLUSIONS

After I submitted my report, I was asked to testify before Congress with regard to the Dodd-Frank bill. And that bill, if it is in fact implemented the way one hopes it would be, would address some, but not necessarily all, of the issues involved in Lehman Brothers.

A few weeks ago, executives at Lehman testified before the Financial Crisis Inquiry Commission and concluded that Lehman had failed because the government failed to act to save it. That was the story. And a number of economists and experts have varying and contradicting opinions as to why Lehman failed. George Bernard Shaw said a long time ago, "If all the economists in the world were laid end to end, they could not reach a conclusion." And with that, I agree. I'm not an economist. And it is my conclusion that Lehman failed because of its own bad choices.

I'm not selling anything here. Hopefully I'm trying to follow in the great tradition of . . . simply being an advocate of the truth. And the truth is, Lehman failed because of its own mistakes. The government could have done a better job regulating, but it is far from clear that anything could have saved Lehman by 2008 after it had implemented the strategy from 2006 and 2007. And Lehman compounded its errors in judgment in potential actionable attempts to cover up the true state of its affairs.

Mistakes aside, had Lehman been transparent about its risks, about its liability and its leverage, and had the regulators required it, Lehman's deterioration would have unfolded in a gradual evolution into the marketplace, an evolution where the market might have been able to absorb, rather than under the circumstances where a cataclysmic event occurred on a Sunday night with no one expecting it to ever have happened.

The truth was revealed over a few days, and the end, in the middle of September 2008. The truth was out there to be seen over an eighteen-month period of time. Had there been more transparency, the parties could have had more time, and with more time, there would have been more options.

And maybe, just maybe, with more options Lehman Brothers would not have been, as it is presently described in one publication, quote, "the shorthand for the collapse of the American economy."

A LOOK AT THE OFFICE OF SOLICITOR GENERAL

*Acting United States Solicitor General **Neal Katyal**, addressed the 60th Annual Meeting of the College. A graduate of Dartmouth College and of the Yale Law School, who had clerked for Associate Justice Stephen Breyer, he replaced former Solicitor General Elena Kagan upon her elevation to the Supreme Court.*

Neal Katyal

The Paul and Patricia Saunders Professor of National Security Law at the Georgetown University Law Center, forty year old Katyal previously served as National Security Adviser in the Department of Justice. He was lead counsel for the Guantánamo Bay detainees in *Hamdan v. Rumsfeld,* in which the United States Supreme Court found that the military commissions set up there by the Administration violated both the Uniform Code of Military Justice and the Geneva Conventions.

In his introduction, Past President **Earl J. Silbert** pointed out that in preparation for the argument in *Hamdan,* Katyal, in an incredible tour de force, had insisted on fifteen moot court presentations, while at the same time organizing and coordinating the forty amicus curiae briefs filed by various interested parties.

After describing the structure and composition of his office, Katyal explored the Solicitor General's practice of confessing error where a lower court had wrongly decided in the government's favor, describing one historic wartime departure from that tradition in *Hirabayashi* and *Korematsu* and the way in which it the resulting injustices were ultimately resolved.

STRUCTURE AND PROCESS

As Katyal described it, the Solicitor General's small office in the Department of Justice consists of only twenty-one attorneys. Only the Solicitor General and the Principal Deputy are political appointees nominated by the President.

The most junior among the three present career deputies has been in that office for about seventeen years, has argued "only" about sixty cases in the United States Supreme Court. The most senior deputy's total approaches one hundred twenty. There is, in short, a wealth of experience among the deputies.

There are fifteen Assistant Solicitors General. They have been out of law school for approximately six to twelve years, and they typically get to argue two or three cases in a Supreme Court term. The deputies normally argue four or five cases a year and in the ordinary course the Solicitor General will argue six or seven. Last year the office argued a total of fifty-seven cases in the Supreme Court.

The other divisions of the Department of Justice, particularly the Office of Legal Counsel and the divisions that conduct litigation, are staffed with far more political appointees. "We are different," Katyal explained. "[W]e really do value, . . . place a lot of emphasis on, stability with the Court on a continuing dialogue and [on] not having positions lurch from one administration to the next when you have a new Solicitor General come into the office. That results in, I think, a very different relationship with the Court than indeed some of our other divisions . . . have."

Katyal's small office is responsible not only for the oral arguments in the Supreme Court, but also for every single appeal by the government throughout the United States. "So if you're an AUSA in San Francisco and you lose your motion, your suppression motion. and you want to take it up to the Court of Appeals, the process is as follows: You write a memo to your boss, the US Attorney, saying, 'I want to appeal this.' The US Attorney writes a memo to main Justice saying, 'We should appeal this.' That then goes to the litigating department at the Department of Justice, the relevant one, maybe the Criminal Division in this case, it would be. They write a memo saying we should appeal or not appeal."

"Then it comes to the Assistant Solicitor General . . . [who] writes a memo on top of that. Then it goes to the Deputy SG, . . . [who] writes a memo. So in every single appeal throughout the country in which the United States is thinking about whether to appeal, you have these four or five different memos with four or five different perspectives."

"That's an enormous amount of work. It's done to ensure that there's some continuity in the positions we take, so that the AUSA in San Francisco isn't telling the Court something different than what the AUSA in Boston is saying."

Katyal then drew a stark economic comparison that may make the Solicitor General's office appear unique in a growing federal government. "We do it for roughly ten and a half million dollars a year. That's our total budget, including printing. Before I came into this job, I consulted on a Supreme Court case. The budget for that Supreme Court case [alone] was over ten and a half million dollars."

HISTORY OF THE OFFICE

Katyal then turned to the history of his office and its unique tradition.

"Our history is, I think, rich. . . . It is the office that Thurgood Marshall served in. It is the office that Robert Jackson served in. It is the office that now Justice Elena Kagan once served in. There is a lot to be celebrated. . . ."

"[O]ne tradition that I want to highlight . . . is the practice of confessing error in the Supreme Court, a confession–and this is an unusual thing for a litigant–a confession of error, when the Solicitor General tells the Supreme Court, 'We made a mistake below, we shouldn't have won a case that we actually won. We were wrong.'"

"This started as early as 1891 . . . when Solicitor General and later, of course, Chief Justice and President Taft admitted error in a case coming out of the Eastern District of Texas. It was a murder case. And

he said that the trial Court had erred by admitting certain hearsay evidence into that murder proceeding, leading to the guilty conviction of this man for murder."

"Taft said to the Supreme Court, 'We were wrong. We shouldn't have won that case.' And later the Court in an opinion written by first Justice Harlan said, 'The representatives of government in this action frankly concede, as was their duty to do so, that the actions of the Court below were so erroneous as to entitle the defendants to a reversal.'"

"Now, since Taft's time, the SG's Office has done this in every administration, told the Court that we made a mistake. . . . I don't think our office's position has changed much from one administration to the next. . . ."

"[C]onfessing error is a popular practice in one sense. It shows, I think, the way in which our office operates: true candor with the Court. It doesn't always win you friends everywhere. You can imagine if you're that AUSA who prosecuted that murder case or whatever and you're told . . . 'You won it in the Court of Appeals, and . . . we're actually going to drop this, we're going to tell the Court you got it wrong,' That isn't a way to win many friends."

Katyal pointed out that Second Circuit Court of Appeals Chief Judge Learned Hand once said, "It is bad enough to have the Supreme Court reverse you, but I'll be damned if I'll be reversed by some Solicitor General."

"And so there is, you know, some hostility to the practice, but it's a practice we take enormously, enormously seriously. One Solicitor General, Frederick Lehmann, when he did his first confession of error, is said to have been muttering the words as he signed the slip saying 'Confess Error,' 'The United States wins its point whenever Justice is done to its citizens or in the Courts,' which are the words above the Attorney General's Office."

DARKER MOMENTS

"There are." Katyal continued, "some darker moments in the office's history. . . . I spent some time this summer really investigating one of them, . . . the way in which our office has treated matters of race, and in particular matters about Asian-Americans. The history there isn't as good."

"There was a case once . . . about defending a law that said that if you were a Chinese immigrant and only a Chinese immigrant, you had to carry a permit showing that you were validly supposed to be to in the country. The Solicitor General at the time was Charles Aldrich, and he told the Supreme Court–well, he actually blamed 'distinguished members of the bar'– for advising these Chinese-Americans that they shouldn't have to carry these permits, saying that they're the ones who are creating this Court case and making a molehill out of nothing."

"His brief to the Supreme Court called the Chinese 'a class of people not suited to our institutions, remaining a separate and distinct race, incapable of assimilation, having habits of the most pernicious character, working at wages that debase our own labor class, not bound by any considerations of the sanctity of an oath, given to evasions of other laws of Congress and by that body declared to be a people of such a character and so inimical to our interests as to require that their coming to America be prohibited and means taken to identify those already here.'"

"Well, a few years later in a case about whether people from where my parents come from, India, could immigrate to America, Solicitor General Beck said that the relevant immigration statutes limited immigration to 'the civilization of white men.' . . . He told the Supreme Court that, 'The people of India were a subject race, and while the ideals of liberty, equality and fraternity were being preached in Europe and America, there is no reason to believe that anyone seriously extended their applications to the people of India or believed their people were of the kind to be assimilated by western civilization.'"

"He concluded in telling the Supreme Court that immigration of the teeming millions of people of Asia into America was unthinkable. He got that one a little bit wrong. . . ."

Katyal then turned to the case that he asserted "has the most salience . . . for all sorts of things that we think about today, . . . the Office of Solicitor General's participation in the Japanese internment cases in World War II.

Everyone in this room," asserted, "knows about one of those cases, Korematsu. There was another one as well, called Hirabayashi."

WORLD WAR II

The Japanese internment cases arose after the bombing of Pearl Harbor. In February 1942, President Roosevelt had authorized military commanders to declare areas of the United States military areas, "from which many or all people can be excluded." In March 1942, Lieutenant General DeWitt issued a public proclamation stating that the Pacific coast was subject to attack and attempted invasion, and he therefore imposed restrictions on Japanese-Americans, including a curfew and restrictions on their movement.

The Solicitor General at the time was Charles Fahy, who later served thirty years on the DC Circuit as a distinguished judge. His involvement came in late 1942, when two individuals, Gordon Hirabayashi and Frank Korematsu were arrested and convicted for violating these curfew and exclusion orders. Edward Ennis, who had formerly worked in the Solicitor General's office was now in the Justice Department's Alien Enemy Control Unit. He advised Fahy that the convictions were unnecessary, and the orders DeWitt gave unconstitutional, and that the government was likely to lose the cases in the Supreme Court.

Fahy rejected that advice on the ground that national security was involved. Hirabayashi's case went up to the Supreme Court. Fahy's brief to the Supreme Court omitted relevant facts. "In particular," Katyal observed, "the Office did not present evidence to the Court that cast doubt on all of the national security rationales that the Justice Department was advancing to defend the exclusion orders of Japanese-Americans."

"The story is this: The brief is being written. There's a draft in the office. And Edward Ennis, that man who used to work in the Office of Solicitor General, finds out that Navy Intelligence had written a report called the Ringle Report. And the Ringle Report, written by the Navy when the Navy has the lead in Japanese counterintelligence, totally rejects this whole idea that there's some sort of Japanese threat. They conclude that only a tiny percentage at most of Japanese-Americans were potentially disloyal, that the ones that were were already known to the government. Most of them were already in custody, and the ones that weren't were under surveillance."

"They conclude that, 'The entire Japanese problem has been magnified out of true proportion, largely because of the physical characteristics of the people.' And J. Edgar Hoover–this is no friend of civil liberties–agrees with the Ringle Report and says that there is no need for these exclusion orders."

"Ennis reads the report, brings it to the Solicitor General and says, 'We have to consider carefully what our obligation to the Court is. I think we should consider whether we have a duty to advise the Court of the existence of the Ringle memo and of the fact that this represents the views of the Office of Naval Intelligence. It occurs to me that any other course of conduct might approximate the suppression of evidence.'"

"Fahy decides not to tell the Court about the Ringle Report. Rather, he says in his brief to the Court that the mass internment was necessary on grounds of national security. The brief goes further. The brief goes on to say that the Japanese-American threat is of severe necessity and defends the idea, the necessity, on the racial characteristics of the Japanese."

"There are fifteen pages in the Hirabayashi brief of, 'facts' about how the Japanese-Americans have not assimilated, that the Japanese-Americans, may lack to some extent a feeling of loyalty toward the United States as a result of their treatment and may feel a consequent tie to Japan, a heightened sense of racial solidarity and a feeling of racial pride in Japan's achievements."

"The brief goes on to say that these Japanese-American schools which are teaching kids Japanese, are a 'front,' and they are a place where 'the Japanese language schools afford a convenient medium for indoctrinating the pupils with Japanese nationalistic philosophy.'"

At the oral argument, Fahy repeated these arguments, which led to immediate questioning by Justice Robert Jackson. Justice Jackson said, "Well, wait a minute. If this argument is true, it might apply to Irishmen as well as the Japanese." And the Fahy responded, "Certainly this could not be done. What makes it reasonable now is the war power and circumstances of war. We do not admit there is any discrimination involved."

Then Jackson asked, "Well, why? How could that be that there's no discrimination? It's only an exclusion order that targets Japanese-Americans." Fahy responded, "Japanese-Americans have never become assimilated, and Japanese language schools made it not unreasonable for those charged with the defense of the West Coast to fear that in case of an invasion, there would be among this group of people a number who might assist the enemy."

In June 1943, the Supreme Court unanimously upheld Hirabayashi's conviction, saying that national security justified it. "The Court." Katyal pointed out, "didn't know about the Ringle Report. The SG didn't bring it to the Court's attention."

"Then," he continued, "the Korematsu case comes before the Court. And just like [in] Hirabayashi, the most notable characteristic of the SG's position before the Court is what the SG didn't tell the Court."

"That story . . . begins with another man who had previously served in the SG's office, John Burling. John Burling also went to this Alien Enemy Control Unit, and he finds out that something that the government had been repeatedly telling the Court, the lower Courts, and what they were going to tell the Supreme Court was just wrong. What . . . the government had been saying was that there were signaling reports showing that Japanese-Americans were standing on the shores of the Pacific coast and signaling to Japanese subs various things about US troop movements and the like."

"Now, the FBI and FCC had both investigated these reports and concluded that there was no evidence whatsoever of signaling [or] that Japanese-Americans were doing this, but nonetheless we had said this in our Court proceedings below. Burling tells the SG at the time, Fahy, that there was, 'Incontrovertible evidence that these justifications for internment are wrong,' yet they formed the basis for General DeWitt's exclusion orders."

"Burling writes the first draft of the brief to the Supreme Court, and he thoroughly repudiates this idea of signaling, and the War Department finds out about it, and they get very upset and say, 'We can't pull back now. We'll look like we're not credible. It looks like we're making things up, and we can't convey that impression to the highest Court in the land.'"

"Well, Ennis and Burling together tell the SG, 'Well, that's what you've got to do. You have to tell the Court that this stuff is wrong. We can't rely on it.' And they threaten not to sign the brief unless some language is put in to repudiate these signaling reports. The War Department says, 'We won't do it.'"

"Finally, a compromise is reached and the following . . . is put into the brief to the Supreme Court: 'The final report of General DeWitt,' [which is the signaling part], 'is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place thereto. We have specifically recited it in this brief, but we ask the Court to rely on it only to the extent it relates to such facts, nothing else.'"

"Well, the War Department wasn't happy with that, but that's the Justice Department thought, 'Well, that sends a signal to the Court that they should be careful when relying on this whole report and signals and so on.'"

"Well, the matter goes to oral argument. . . . [A] few years ago I wrote a story, I wrote a law review article, and I celebrated the Justice Department lawyers for standing up to the War Department and saying, 'Well, put this footnote in, confess that we made a mistake.'"

"But there's more to the story. This summer I read the oral argument, and in the oral argument the Solicitor General is asked, 'What does this footnote mean?' And the Court asks to see the DeWitt final report and all the evidence on

signaling. And the SG, Mr. Fahy, says, 'There is nothing in the brief of the government which is any different in this respect from the position it has always maintained since the Hirabayashi case, that not only in the military judgment of the General, but the judgment of the government of the United States has always been in justification of the measures taken, and no person in any reasonable position has ever taken a contrary position, and the government does not do so now. Nothing in its brief can be validly used to the contrary."

"So the Supreme Court is essentially not told about the signaling. And in a six-to-three decision, as you all know, the Supreme Court upholds the internment of the Japanese-Americans, again, on grounds of military necessity."

Katyal's understated conclusion: "The SG's conduct in those cases wasn't admirable."

WRONGS RIGHTED

In the 1980s, historians went back and looked at that record. It became the basis of a coram nobis petition to invalidate the 1942 convictions. In 1984, a federal judge invalidated Korematsu's conviction, saying that the evidence that the government had from the Navy and FCC about the signaling reports and the suppression of that evidence led to manifest injustice in the proceedings.

In 1987, the Ninth Circuit did the same thing with Hirabayashi's conviction, emphasizing "the traditionally special relationship between the Supreme Court and the Solicitor General which permits the Solicitor General to make broad use of judicial notice and command special credence from the Court." The Court of the Ninth Circuit said it unlikely that the Supreme Court, "would have reached the same results if the Solicitor General had advised the Court of the true basis for General DeWitt's orders."

Katyal observed, "Hirabayashi and Korematsu stand, I think, as relevant reminders that one has to be careful not just in candor with the Court but the way in which arguments are made to the Court. Those are, of course, a sad moment of our time. They are products of that time, and hopefully we won't see them again."

"There is," he concluded, "a positive story, because . . . even at that time, even during the height of the war, [there were] people standing up; there were people like Ennis and Burling, who said to the powers that be in the government, 'We're wrong, and we need to tell the Court so.'"

bon mot

[W]e at Georgetown have gone to blind grading, which means that you're not allowed to put your name on the exam. And the reason for that is that you have these students who all semester are really very nice to you, and you see their name and you think, "Boy, you know, they're such a nice person, A or B minus, or something like that."

So we've made them put a random number on the exam, so you don't know whose exam it is when you're grading it. . . . [T]hat works out pretty well, but our law students are pretty smart. They figured out some ways around that. So at the bottom of this random exam now, it will say, you know, "Thank you, Professor, for the greatest class ever," or "Hug your child today," or "What a beautiful tie you're wearing."

[B]ut a few years ago I was teaching criminal law, and I had a student who said at the bottom of her exam, "Professor, should I have one hour left to live, I should like to live it in your class." So I'm sitting there thinking, "Okay, do we have A plusses at Georgetown?" And then there's a footnote at the bottom of the exam, because it's a law student. It says, "Turn the page over." . . . I turn the page over. [It continues,] "That is because, Professor, you make one hour seem like an eternity."

Acting Solicitor General Neal K. Katyal

PASSING THE MAUL

Rather than using a gavel, the President of the College presides over meetings with a maul made from a lignum vitae tree that survived the London Blitz of World War II. The maul was a gift of the British judiciary, symbolizing the relationship between the British and American legal systems. The transition from one College president to the next traditionally involves the passing of the maul at the Annual Induction Banquet. Following are the remarks of ***Joan A. Lukey,*** *the College's first woman president, as she passed the maul to her successor,* ***Gregory P. Joseph.***

Joan A. Lukey

My final thanks go to all of you, the Fellows, in part in thanks for the hospitality and the warmth that you have shown me as we've traveled all around the United States and Canada over the course of this past year. But it's thanks for more than that. It's thanks for the extremely humbling privilege of allowing me to serve as your president. As with every president of the organization, I understand that I was a temporary steward, that I am no smarter than any of the rest of you, no more clever or creative in coming up with ideas, no more devoted to the mission of the College than all of you are. I just was the lucky one whom you allowed to be at the helm for one year. For that, you have my eternal gratitude and my eternal commitment to the College. So thank you so very much. . . .

Now, it is my enormous privilege and pleasure to introduce my successor, and I'd just like to say a few words about him. I know that some think the tradition is to be shorter and simply allow him to come up, but I want you to know a little bit about him, because he is really an extraordinary person. . . . Greg has written several books that you will recognize as the leading treatises in their various fields of the law. He

has more than a hundred articles published in professional journals. . . . His books and articles have been cited in more than two hundred reported decisions and in more than three hundred law review articles, almost unimaginable. Probably meaning more to him is that his articles have been cited by the Advisory Committee in the Advisory Committee Notes to the Federal Rules of Civil Procedure. . . Greg is a court rule junkie. He loves rules of civil procedure and rules of evidence, and he knows them as well as any person I believe in this country. He is an incredible expert on the rules.

When he was Secretary of the College, . . as we wrapped up our Executive Committee meetings, the minutes arrived on our Blackberries before we packed up our brief cases. . . . What has always impressed me in particular, and it may be a fault of my email system, is that I get emails from Greg responding to other Executive Committee members before I get emails from the Executive Committee member. So, I will get an email from Greg, saying "That's a great idea.". . . Twenty seconds later I'll see the proposal from Chilton. His come in first. That's how fast he is at responding and that's how good his technology is at his law firm. . . .

Greg, would you come up here please and allow me to hand off the maul for the coming year?

The past-presidents in the audience understand that there's a certain affection for this large object called the maul, which is quite antique and quite beautiful. And at the end of the president's term, which you'll see tonight roughly around 10:00, I will hand the maul off to President-Elect Greg Joseph, and at that moment he becomes the president of the College. And the standing joke among past-presidents and those of us in the line is that there are some presidents from whom the president-elect must wrest the maul away, and there are others who are passing it overhead across the stage as they take off. I've told Greg [Joseph] to practice his reception skills.

President Joan A. Lukey

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bon mot

Now, before I actually introduce the introducer [past President David W. Scott, Q.C], I want to comment on the pictures up here [behind the dais]. David Scott's wife, Alison, said to me yesterday, "Why are your picture and my husband's picture hanging right next to each other? It doesn't look right." I said, "Well, this is an attempt, as some of you have probably figured out, to reflect firsts in the College's history, and each of these represents a particular first. David was, of course, the first Canadian president, and I am the first president with spiky hair. So we thought there were moments that should be memorialized, though I didn't exactly know this was going to happen until the last minute. It's a little embarrassing to stand in front of your own portrait, but I realize it may be a while before you again have a president with spiky hair.

President Joan A. Lukey

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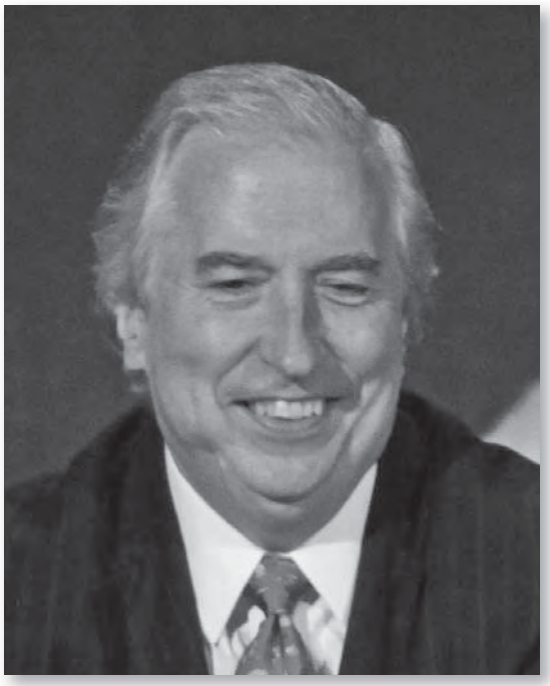
Good morning. Thank you very much, Madam President. For my part, I'm not the least bit embarrassed at the photograph. In fact, I thought it well-earned when I saw it yesterday.

Past President David W. Scott

bon mot

THE NEXT NEW FINANCIAL CRISIS: WHERE ARE WE?

Following up on the College's Spring 2010 meeting program, which was in great part devoted to the causes and effects of the recent financial crisis, the College invited noted Columbia Law School Professor ***John Coffee****, one of the nation's leading authorities on corporations, securities regulation, class actions and white-collar crime, to address the 2910 Annual Meeting in Washington, D.C. on the remedies thus far adopted by Congress to address future economic problems. Those who wish to follow the thinking of legal scholars on measures needed to prevent the recurrence of a financial meltdown and on the adequacy of the legislative measures undertaken to date may find it useful to revisit banking lawyer Rodgin Cohen's list of needed steps in the last issue of the Bulletin along with Professor Coffee's less than optimistic analysis that follows, an analysis he prefaced with the warning, "parental discretion advised."*



John C. Coffee

A graduate of Amherst College, Yale Law School, with an LLM in taxation from New York University School of Law, **Professor John C. Coffee, Jr.** spent a year as a Reginald Hebert Smith Fellow, then practiced for six years in a large New York law firm. He then taught at Georgetown University Law School for four years before joining the faculty at Columbia Law School, where he holds the Adolph A. Berle chair. He has served as a visiting professor at the law schools of the universities of Michigan, Harvard, Stanford and Virginia.

The author of two casebooks, *Securities Regulation* and *Corporations,* he is perhaps the leading authority in those areas, and he has written on a wide variety of subjects.

In recent months, Professor Coffee had been in the forefront of the commentary on the causes of and the proposed solution to the financial crisis, including testifying at least six times before Congress.

In introducing Professor Coffee, one of the most popular professors at Columbia, Past President **Robert B. Fiske**, New York, New York, quoted some of his students:

"He was an impeccable dresser with fantastic cuff links."

"As a 1L in his criminal law class, I remember watching CNN one morning, and all of a sudden seeing Professor Coffee on there talking about some white-collar crime issue. It was super-exciting to see him on TV."

"I had Professor Coffee in a corporate litigation seminar in the spring of 2009, which he co-taught with Judge Jacobs of the Delaware Supreme Court. This was a truly terrific class. Each weekly session focused on a recent court decision, and Professor Coffee invited to the seminar the judge and the lawyers, often major firm partners, to discuss their strategy and decision-making in a particular case. The seminar was also filled with fascinating moments, and Professor Coffee would politely but persistently grill the lawyers or the judge, federal and chancery judges, about their decisions in the case. And they always seemed somewhat less comfortable than they probably expected to be when they had originally agreed to be a guest of his class."

Professor Coffee's presentation was so coherently organized that we have reproduced it, lightly edited, in its entirety.

Professor Coffee

Now, as you are aware, we have seen two major developments the last several weeks, the passage of the Dodd-Frank Act [by the United State Congress] and Basel III [by the international Basel Commission on Banking Supervision], both of which I think are definitely steps in the right direction. Nor do I want you to think that I an ideological opponent of more regulation in the financial sector. . . . I actually did testify something like six times before Congressional committees on the Dodd-Frank Act, and, in truth, I drafted a good deal of the language in the credit rating agency section. So if the concept of estoppel could ever be applied, it probably should be applied to me. How can I criticize something that I was pretty close to?

I am not so much criticizing the efforts and the intent. What I am really doing is taking you back to Churchill's comments about generals. Churchill said that all generals fight the next war in terms of the mistakes of the last war. Financial regulators do exactly the same. The Dodd-Frank Act invests very heavily, very heavily, in prevention and oversight. I applaud that, but there are limits to how much we can anticipate, to how much we can recognize what is going to happen in the future.

And what happens if a problem sneaks in under the radar screen and suddenly erupts? That is where the new problems are for the future, because what Dodd-Frank does in response to the bailouts of the past is very much to tie the hands of federal financial regulators once a crisis has begun.

INEVITABLE SYSTEMIC STRESS

And my assertion today, or at least my premise, is that episodes of extreme stress in the financial sector are close to inevitable, even if their timing is unpredictable, and even if we assume absolutely optimal financial regulation and absolute attention on the part of federal regulators, which actually we cannot always assume. Why is major systemic stress more or less inevitable, more or less likely to recur? Now, this is where if this was a classroom, I could take the next forty-five minutes and give you an elaborate lecture. I am instead going to do this in a couple of topic sentences.

First, topic sentence one: Inherent bank fragility has to be assumed, and it defines the parameters. Banks, including shadow banks, investment banks and people like AIG, face a fundamental mismatch between the . . . the short-term character of their liabilities and the much longer-term character of their assets. They lend long-term and they borrow short-term, and that means there is always this danger of a run.

And we saw a run on the bank, a classic run, when Washington Mutual failed in 2009. You will tell me that is not going to happen because really the 2008's crisis was not about classic bank

runs. It really was about, however, a variant of a classic bank run. This was a run on the investment bank. Investment banks do not have depositors, but they finance themselves with very short-term borrowings, typically in the overnight repo market. Because of the short-term character of their liabilities, there is always this danger that if a crisis begins, regulators have almost no time to respond.

But differently, regulators, at best, will have the weekend. And it was a weekend before Bear Stearns or Lehman suddenly hit the fan, so we do not have a long time. It is a short fuse, and there always will be this inherent mismatch between the assets and the liabilities. That is problem one, why future stress is to be predicted.

Problem two, which you've all heard: interconnectedness. Banks are not so much too big to fail because they are too interconnected to fail. The over-the-counter derivative market knits together major financial institutions into a complex web of counterparties and interdependents.

Now, what does that mean in terms of the regulators' problem? Well, it means that crises no longer come to individual firms on a case-by-case basis. Rather, they come to the banking system as a whole, because they are all linked in arms and they all could go over the cliff together. At least that is the nightmare scenario.

Last sort of overall generalization: This is the regulatory sine curve; that is, regulatory intensity is never constant. After a crash or catastrophe, regulatory oversight will be very intense. There will be very little tolerance, very little margin for error. But as we return gradually and hopefully to normalcy, then regulatory oversight tends to relax. Why? Because the easiest way for a financial institution to increase its profitability is to increase its leverage, and thus there will be constant lobbying, constant pressure on the part of the industry to get increased leverage and to find ways to relax some of the controls that keep them from using greater leverage.

HOW FUTURE STRESS MAY DEVELOP

Typically the way this happens, the way it happened during the 1990s, is through a kind of regulatory arbitrage. In the 1990s, American banks all pointed to London and said, "That world of light-touch regulation with its strong distaste for enforcement, that is the ideal world, and the US is suffering from competitive disadvantages because we are so tightly regulated. We do not have the freedom and the ability to maneuver that the financial world in London has."

Now, London is probably a little less committed to the light-touch regulation for the future than it was in the past, but there will be someplace else, maybe Singapore, maybe Hong Kong, and the same dynamic will begin of "the US is suffering from international–a lack of competitiveness because it is too tightly regulated." This process will sooner or later produce some loosening of controls that we now have. That is all the backdrop. So far, I have really said nothing new. I have just said, "Here are the forces that make it likely that there will be a further period of financial stress."

CURRENT REMEDIES MAY PROVE INADEQUATE

Now, how does the Dodd-Frank Act change all this? Now we come to the scary part. Traditionally, central bankers and bank regulators saw the challenge in a crisis as distinguishing between those financial institutions that simply faced a liquidity problem and those that were truly insolvent.

More than 100 years ago, a famous financial journalist, Walter Bagehot, wrote a book called *Lombard Street*, in which he explained banking and bank regulators in a manner that was still quite accurate up to a couple of years ago. He said that in a challenge, in a crisis, what the bank regulators had to do was figure out what banks just had a liquidity problem, give them, advance them, funds, and which banks were really insolvent, and they had to be wound down and shut as rapidly as possible.

Now, strangely, the Dodd-Frank Act reverses this approach. It creates two new institutions: The resolution authority procedure, which it entrusts to the Federal Deposit Insurance Corporation, the FDIC, and mandatory clearinghouses for the over-the-

counter trading market. In both of those cases, it gives almost no ability to regulators to do something after the crisis begins.

Let me contrast 2008 and the future. In 2008 when the crisis began, we saw the Federal Reserve Board effectively proceed in a very traditional fashion by arranging a federally assisted merger for the clearly failing Bear Stearns. It assisted the merger through various financial inducements to its chosen merger partner, JPMorgan Chase, so that it would acquire Bear Stearns. That is the classic approach. The Fed was effectively serving as the marriage broker for a shotgun marriage.

Now, that, however, is going to be less possible than in the past. When the crisis developed, it went out and gave a full-scale bailout of AIG. Bailouts became politically extremely unpopular, extraordinarily unpopular, so that the Dodd-Frank Act was crafted with a very strong commitment, an understandable commitment, to avoid any future moral hazard problems by denying federal regulators the ability to reorganize a failing financial institution with federal credit.

Specifically, the Dodd-Frank Act takes away from the Federal Reserve its former power under Section 13 to make emergency loans to a failing financial institution. Instead, federal assistance now can only come through, a "broadly available facility that provides liquidity," "to the financial system and not to a failing financial company," meaning that you can't lend money to a failing bank like AIG or Bear Stearns in the future.

The Fed loan–any loan made by the Fed–must be made on an investment-sound basis, and it must be secured by collateral, "sufficient to prevent taxpayers from, or protect taxpayers from losses." The Fed is pretty much out of the business of lending to a bank that is teetering on the precipice of disaster.

In the place of the Fed, FDIC has been made the critical actor, but its role is only that of an undertaker. In Dodd-Frank, it received what is called "orderly liquidation authority" that empowers it to impose a receivership on a failing non-bank, that is, an investment bank or an AIG. But its exclusive mission is not to reorganize the company, but instead to administer a winding up or receivership that effectively sells off the assets and ends that firm's existence. All of the board members and the executives have to be axed and dismissed. There would not be a survival of the firm once it goes into orderly liquidation authority.

Now, what am I suggesting? My suggestion is that the Dodd-Frank Act may be painting us into a corner and may be imposing a financial straightjacket. Let me illustrate. I am not alone, by the way, in saying this. Suppose in 2015–I want to give you a few years' rest in peace, so I will make it 2015–a new financial crisis begins, following the collapse of still another asset bubble. Assume our second largest investment bank, which I will hypothetical call Stanley Goldman–just hypothetical–faces a liquidity crisis. The Fed cannot lend to it. It cannot get bankruptcy protection, because it cannot go into bankruptcy. The FDIC can only lend or guarantee its obligations if it is placed into a receivership that will in effect be a death sentence.

As a result, predictably, I expect that an investment bank in that position will resist receivership, will deny that it is on the precipice of disaster, and there will be an unstable, uncertain period in which it is saying that it should not be put into receivership, and the FDIC is wavering because it is a very politically controversial move to put something under this kind of death sentence. Therefore, it is going to be teetering there, and the market is going to become nervous.

Meanwhile, its plight, alarming the market as it will, causes a substantial counterparty to also suffer a major stock price drop. Let us suppose that the biggest financial investment bank in the country is someone called Morgan Sachs, and its price also begins to fall because of the troubles over there at Stanley Goldman. At this point, no one really can intervene. No one can really advance credit. The only thing that can be done is put you into the execution process of orderly liquidation withdrawal.

The danger here, the prospect here, is for a series of falling dominoes, because we will not

see the federal government rush to come in and execute, but we will see them barred from advancing credit in the classic manner that central bankers dealt with liquidity crisis. Worst yet, under the Dodd-Frank Act, the FDIC actually can issue guarantees to failing financial firms, but only if it first gets the express explicit approval of Congress.

There is an elaborate procedure in the statute for an expedited Congressional approval. I think that is unlikely to be used successfully, because if they go to Congress and say, "Please authorize us to bail out this failing institution," Congress is going to remember what happened in 2008, and they are a going to see some congressmen who voted for the TARP funding lose office this Fall, and that is going to leave a bad taste in Congress's mind about advancing any more bailout funds.

Thus, even though there is a procedure for express Congressional permission, I do not think you are going to see Congress do that. They are going to say instead, "Use that orderly liquidation withdrawal procedure."

IMPLICATIONS FOR INTERNATIONAL BANKING

Now, let us move beyond the US's shores. This prospect of multiple US funds being put into this receivership, it really is an undertaker's procedure, is going to have an impact on global markets. At this point, we move from the problem of banks in the US that are too big to fail to the European problem of banks that are too big to be saved. That is actually the worse problem.

Countries like Belgium, Italy, Switzerland, Ireland and others may be incapable of bailing out their largest financial institutions. So the US problem, triggered by what is happening through multiple receiverships may have a worldwide impact.

The bottom line is that we have seemingly reversed the usual rules. Bagehot said that it was understood you helped the troubled, but you did not do anything for the truly insolvent. We can now do a lot for the truly insolvent and put them to rest, but we cannot do anything for those that are merely troubled, facing a liquidity crisis. That is the world of liquidation or resolution authority.

CLEARING HOUSES

I mentioned to you earlier that the other major innovation of Dodd-Frank was clearinghouses for OTC derivatives. Clearinghouses make an awful lot of sense. All other kinds of markets, securities and future markets have clearinghouses. Essentially, they place the entire market behind the trading firm so that its obligations will be picked up and guaranteed. And thus, traders do not have to worry about counterparty risk.

But by definition, clearinghouses centralize risk. The hope is that the clearinghouse will monitor and regulate the trading firms so that there will be no problem. But, but, suppose for a moment that clearinghouses are somewhat lax. They might be lax because all their members want to see greatly increased trading, and they do not want to increase margin rules, because margin rules are like sand in the gears. They slow down trade, and they reduce overall trading volume.

So if the clearinghouse is just a little bit lax and does not strictly enforce rules, then we have the prospect of the new AIG, wearing a different name. But a new AIG takes on excessive risk. It did not have to post adequate margin. And now what will happen? A failure of an AIG dimension would doom any conceivable clearinghouse to also fail along with it. That is really an epic problem.

Now, what does Dodd-Frank do? Well, Dodd-Frank, because it is absolutely concerned with one thing, preventing bailouts, it instructs all financial regulators that the Fed and the FDIC and others cannot advance funds to a troubled clearinghouse. This is a very sensitive institution, but it cannot receive any federal funds if there was any kind of a liquidity crisis.

I think, once again, we are assuming that the answer is always complete oversight, complete prevention, complete *ex ante* monitoring. And I am telling you that there is always the danger that, despite the best of intentions, some problem will creep under the radar screen, and at that point regulators have hands that are very much tied.

Now, what are the answers to this problem? I do not want to leave you saying the world is going to be totally destroyed by a future crisis.

PRIVATE BAILOUT FUNDS

The two answers that usually are pointed to: the first is the idea of a private bailout fund which is contributed to by the industry. This is what the International Monetary Fund has been pushing for two years, and they say that an adequate bailout fund would require all the major financial countries to, in effect, propose a tax equal to three or four percent of a country's gross domestic product on its major financial institutions to create that fund of that three to four percent size.

The IMF has been pushing that, and France's President Sarkozy pushed this idea before the United Nations earlier this week. It would be funded by this mandatory bank tax. That idea was in the first draft of Dodd-Frank and it passed the House in that fashion. But as the statute went along, the idea of even a private-industry-funded bailout fund became politically toxic. The argument became that any bailout fund is a bad thing and a private bailout fund will only be used as a cover to justify a future public bailout fund to supplement it. So Dodd-Frank left us without any kind of industry-funded bailout procedure. But the rest of the world may all favor this approach, but the US is not going there in the short run.

CONTINGENT CAPITAL

The other major possible approach involves a word that you have not probably heard before in most cases. This is a word called "contingent" capital. And in the small print of the Dodd-Frank Act, there was authority created for the Federal Reserve to impose a contingent capital standard. What is contingent capital? Essentially, it's a requirement that financial institutions of systemic significance issue debt securities that at certain predefined trigger points convert into equity securities, so that they never default. That is, we avoid bankruptcy and default by forcing the debt security to convert over into an equity security.

Suppose, for example, that a debt security contained a number of trigger points, beginning with an initial trigger point at a twenty-five percent price decline in its stock price. The idea is to have an early trigger to give warning to the world that you are taking at that point the debt securities and moving them over into equity securities, because equity can never default. You might have a series of later trigger points at a fifty percent decline and the loss of an investment grade rating, et cetera.

The goal here is to avert the sudden Lehman-like collapse by having gradual recapitalization of the firm, not by government action, but by the government mandating *ex ante* in advance, that the securities move from debt to equity as the creditworthiness of the company deteriorates. This is an idea that is very popular in Europe. By the way, Canada has also endorsed it in the last several weeks. And, interestingly enough, we have seen Lloyds Bank and some other European banks actually do contingent capital offerings this year. You are going to hear more about this idea. I think it is one of the solutions that might work.

Strangely enough, I have a long paper you can find on SSRN [Social Science Research Network] about how to design this. But interestingly, interestingly, this is an approach that lets us do something *ex ante* that deals with the *ex post* problem. I am afraid the problem we are painting ourselves into is that we are saying everyone should be intelligent and perceptive and appreciate these problems at the outset, but we will not let you do anything after the crisis erupts.

CONCLUSION

And that is, again, as Churchill said, fighting the battles of the next war in terms of the mistakes of the last war. The one thing I leave you with is that sooner or later, a problem will sneak under the radar screen. And at that point as the crisis erupts, regulators need some flexibility to do what they have done for a hundred years, which is distinguish between those banks that can be saved and those banks that cannot be saved.

And on that note, I think it is time to let me turn the floor over. I warned you about parental discretion being advised, but we have some future problems ahead of us, and I hope that we continue to be flexible as we approach those unforeseen but very predictable future problems.

NOTED PROFESSOR ADDRESSES ACCESS TO JUSTICE

A major theme of the 60th Annual Meeting of the College was access to justice in its many forms. ***Laurence H. Tribe,*** *Carl M. Loeb Professor at the Harvard Law School, then on leave of absence to serve as Senior Counselor for Access to Justice within the United States Department of Justice, delivered an address describing the Obama Administration's Access to Justice Initiative. He described the growing chasm between our constitutional ideals and the reality of the present day, outlined some of the measures needed to address this problem and ended with a challenge to the College as an institution devoted to the administration of justice.*

Laurence H. Tribe

Widely recognized as one of the nation's top constitutional scholars, Laurence Tribe is a summa cum laude graduate of Harvard College and a magna cum laude graduate of the Harvard Law School. After serving as a law clerk for Justice Matthew Tobriner of the California Supreme Court and then for Associate Justice Potter Stewart, he went directly to the law faculty at Harvard four years after his law school graduation and received tenure a short four years later.

He has been a mentor to a variety of Harvard Law students, including President Barack Obama, Chief Justice John G. Roberts, Jr., Associate Justice Elena Kagan and former Stanford Law School Dean Kathleen Sullivan. A co-founder of the American Constitution Society, he has argued more than thirty-five times before the United States Supreme Court.

His address, entitled *The Obama Administration's Access to Justice Initiative,* follows.

INTRODUCTION

When I was invited to address this gathering, I recognized that I would be talking to . . . the most distinguished group of trial lawyers in the English-speaking world, so I knew I needed to begin my keynote speech with, what else, a good lawyer joke. . . . One of my favorites is a New Yorker cartoon that depicts a nattily dressed gentleman talking to an attractive, apparently much younger, woman at a cocktail party. "Oh, yes, I am a lawyer," he says to her, "but not in the pejorative sense."

I am sure we have all heard our fair share of lawyer jokes . . . but have you ever found yourself wondering, "Why are lawyer jokes of the truly pejorative variety quite so prevalent? Why do so many of our fellow citizens seem eager to disparage the vocation that we all share and the work that we perceive as honorable? Why, to be blunt, do most Americans have a view of lawyers that is almost as unfavorable as their view of journalists and of congressmen?"

One could answer, as John Adams famously replied to his father after receiving a letter of public reproach for representing British soldiers accused of murder at the Boston Massacre: "I never harbored the expectation, nor any great desire, that all men should speak well of me. To inquire my duty and to do it is my aim."

John Adams' modern-day counterparts, the forty-four ACTL Fellows who represented Guantánamo Bay detainees and the ACTL Access to Justice Committee that coordinated the pro bono response to the Supreme Court's 2004 decision in *Rasul v. Bush* share a bond of fellowship with the young Adams.

DUTY IN THE FACE OF CRITICISM

Duty is precisely the point. Public critique comes with the territory. When we embrace the very best of what our profession promises, the very best of what your organization practices, the singular role of the lawyer as defender–sometimes the last defender–of the constitutional principles upon which our society rests, and of the Great Writ that protects those principles, you are, as Eric Holder told an audience at the Pro Bono Institute Annual Conference this March, patriots in the truest sense of the word. I think the greatest virtue of our profession is its commitment to the steadfast defense of constitutional principles, principles that promise equality and human dignity as embodied in our brand of constitutional democracy, democracy constrained by the rule of law.

I have dedicated forty years of teaching and writing to buttressing the rule of law, which I think is the central tenet of our American sense of order, equality, prosperity and optimism. In those forty years, I have encountered and taught, and in some instances had the privilege of mentoring, some remarkable people, among them the Chief Justice of the United States, the President of the United States, who was my most impressive research assistant, the most recent Justice of the US Supreme Court. (Elena Kagan, who was my research assistant four years earlier than the President, and I have gotten into some contests . . . over why I called him the most impressive.) It has been an amazing trip.

MAKING THE RULE OF LAW A REALITY

Throughout that period, I have retained the view that central to what I want to accomplish, certainly in my life, is to make the rule of law real for all Americans and eventually hopefully be honored beyond. The sense that the rule of law is central is a uniquely American sense. It finds its highest expression in a constitutional tradition that values stability and predictability, but also celebrates growth and responsiveness to changing conditions and evolving understanding.

A week ago yesterday, I gave the Constitution Day speech for the Government at the Great Hall in the Department of Justice, addressing . . . our government's lawyers about what I thought

was their solemn responsibility, not only to the particular component of the government that they administer, but to ensure fidelity to the Constitution . . . .

Of course, government lawyers have no special purchase on the truth. I could just as easily have been speaking to you, to the pinnacle of our country's trial bar. Adherence to and defense of the rule of law is a necessary, but not a sufficient condition of justice. Law and justice, of course, are not synonymous. Law is a means; justice is an end. And all too often throughout world history, and sadly our history as well, law has been an instrument, not of justice, but of injustice.

After all, the law in the United States not so long ago . . . denied freedom, even full personhood, to an entire race of human beings. For a full half century after the passage of the 14th Amendment, our law denied full citizenship, including the right to vote, to an entire gender, over half the population, and our laws still deny full equality to many of our LGBT brothers and sisters, including those who defend our country by serving in the military.

Earlier this year, I had the privilege of attending The White House swearing in of the newly confirmed members of the board of Legal Services Corporation, including my friend and colleague and the remarkable Dean of the Harvard Law School, Martha Minow. Justice Kennedy was doing the honors, and he prefaced the ceremony with the reminiscence of a commencement speech that he had heard the great Soviet writer and dissident Aleksandr Solzhenitsyn deliver. Solzhenitsyn's theme was a challenge to the rule of law, not simply a claim that the rule of law was honored in the breach, both in his country and sometimes in ours, but a bolder claim that the rule of law was itself a false ideal, one not worthy of defending.

At the time, Justice Kennedy was perplexed. But later he realized that the impulse underlying Solzhenitsyn's complaint was understandable in terms of Russia's history and culture. Never having experienced law as an expression of democracy, Solzhenitsyn saw it only as an edict of the state . . . . To him, law represented something cold and unforgiving, the inflexible command of the sovereign, not the protection of those otherwise under the sovereign's thumb.

THE BURDEN OF THE UNREPRESENTED

In the fulfillment of the aims of our democracy, law is not simply a command, but a promise, a promise that makes justice not an inert goal, but an active verb. And yet, many in this country and in the current generation would have a difficult time recognizing justice in the workings of our legal system. Our public defender offices are underfunded and overworked. Annual caseloads can range from 500 to 900 felony cases and over 2,000 misdemeanors per lawyer. Just three years ago, some defenders in New Orleans averaged 19,000 cases a year, allowing an average of just seven minutes per case.

A startling majority of civil litigants in our country go to court without any lawyer, often facing a well-lawyered opponent, left by their economic circumstances to life-altering events, like the loss of their home, the loss of custody of their children, the loss of the privilege to reside in the United States.

To qualify for federally funded legal assistance in this country, one must earn no more than twenty-five percent above the poverty level. More than fifty million Americans qualify by that criterion, a number that was calculated before the Census Bureau released its startling poverty figures for 2009, making matters much worse. But over half of those who qualify and seek assistance from federally-funded legal assistance programs must be turned away because the level of available funding is so low. As we know, the proportion of poverty among blacks and Latinos is nearly three times as that among whites.

THE JUSTICE GAP

Justice is not well in America. I am sure that many of you saw the particularly disturbing arti-

cle in the *New York Times* several weeks ago describing the foreclosure mills being implemented in Florida, where, if the article is even partially accurate–and my investigation suggests that it is more than just a little accurate–docket backlogs have seized precedence over the due process rights of families fighting to save their homes, so a rocket docket ejecting people from home ownership becomes the solution to overcrowded dockets in the other part of the court's agenda.

And in case the system was not already in enough trouble, the court systems in twenty-eight of our states had hiring freezes in fiscal 2010. Thirteen states froze court staff salaries. Six states mandated court furloughs. Six closed courtrooms one day each month . . . . With fewer open courtrooms and court staff, predictably people with desperate legal needs have to wait even longer to secure the rights to which they are entitled, if they manage to do so at all.

It's little wonder that both President Obama and Attorney General Holder have recognized that the perennial deficiencies in indigent defense and the enormous gaps in civil legal services, not only for the poor, but for the middle class in the United States, constitute not just a problem, but a genuine crisis.

I really do have to echo for the United States the sentiment powerfully expressed [earlier in the program] by Justice Cromwell for Canada. The justice gap here is indeed a justice chasm. And I cannot help thinking that this chasm has at least something to do with the sentiment behind that New Yorker cartoon and Solzhenitsyn's dilemma. We would fool ourselves if we imagined that we are unpopular just because we are all noble patriots and are willing to defend people who are themselves despised. That is one reason, but it is not the only reason.

LOSS OF RESPECT

I am afraid that the crisis in our justice system and the resulting widely-held belief that it operates only, or mostly, to benefit the very wealthy has caused our profession to lose a good bit of its luster and its respect. Although many of us remain convinced that the rule of law is the most salutary alternative to, and the most powerful tool against, rule by power, and although many of you should be proud that you dedicate yourselves to unpopular but deserving causes in testament to that very premise, many in our society, with some justification, cannot see the distinction between the two, viewing law as too much, too often, the tool of the powerful.

In a more lighthearted vein, I am reminded of a New Yorker cartoon . . . depicting a couple of characters who look like Pilgrims on a boat that might be the *Mayflower* gazing at a bit of land visible on the horizon, and one says to the other, "My immediate objective is religious freedom and equal justice under law, but my long-term plan is to go into real estate."

THE ACCESS TO JUSTICE INITIATIVE

The Access to Justice initiative that I have led since its creation this March . . . is charged with addressing these crises in our criminal and civil justice system and has been focusing with special care on the most vulnerable among us, including juveniles, immigrants, veterans, victims of domestic- and sex-based violence. Since its inception, my office has been working vigorously with agencies both within and outside the federal government, with law schools and legal clinics, with federal and state courts, with public defenders and prosecutors, with mayors and other elected officials, to begin to remove obstacles to legal help in these varied settings and to help forge partnerships that can make legal assistance more accessible in an enduring way.

There is not time this morning . . . for me to report . . . all of our various endeavors, but I thought I would share just a couple from the past several months. In July, I addressed the National Conference of State Chief Justices in Colorado on behalf of the Justice Department. There I prescribed a set of achievable goals, including several related to supporting

pro se litigants and improving juvenile justice systems, goals that my audience there was in a unique position to influence by rule of court. As a result of that speech, the Chiefs unanimously resolved to respond to another of the specific challenges that we made by working to establish state access to justice commissions in the twenty-six states that do not yet have them. As those of you who are from states with powerful and operating access to justice commissions know, they can be a powerful catalyst for improvement.

Last month, I encouraged more extensive systemic and innovative pro bono work in keynote remarks I made at the ABA's annual conference, and I urged that those projects be followed by the rigorous development and study of courthouse self-help centers . . . . . Such centers are, I must say, well more advanced in the UK . . . and in Canada . . . than they are here. Here, a lot of people think that if you advocate improving self-help centers, you are simply distracting people from the need for more pro bono legal assistance and better funding from the LSC and less restrictions on the LSC. . . .

[I]t is not an either/or proposition. We will never solve all the legal problems of this country with lawyers. There are a lot of problems that people can learn to cope with, with less than fully licensed legal help. It is something that we have to face in a way that carefully regulates for unethical and unprofessional behavior, but does not assume that anyone who does not get the services of someone in this room might as well be thrown into a pit without any assistance, without any advice.

SOME EXAMPLES

A week ago I took part in a joint announcement with the National Telecommunications and Information Administration of the Department of Commerce. The NTIA, after consultation with my office, awarded several million dollars in grants to innovative projects, pilot projects in North Carolina and throughout the State of Washington that will use broadband technology from the stimulus funds to increase access to justice for underserved communities, including the rural poor and those living on Indian reservations. That is an example of the way my office has had to work. We do not have a bunch of money. We have to go scrounging for it. We have to look for synergies. We have to look for ways in which money that is being allocated to the FTC or to the Department of Commerce or to HUD or to the Veteran's Administration can be leveraged to broaden access to justice.

These broadband technology centers will create public computing and videoconferencing capabilities in anchor institutions like health centers, public libraries, community centers, low-income housing complexes, historically black colleges and universities, and will enhance online access to services and resources for those who have historically been excluded, while increasing computer literacy among some of our most vulnerable populations.

It turns out that when you try to make things more accessible through technology, through Web technology, you sometimes tend to forget that an awful lot of people, people older than our ten- and twelve- year-old children or grandchildren, really cannot tell the difference between a computer and a toaster and need a lot of help in navigating what modern technology can provide.

In the next several months, my office will partner with others very high in the Executive Branch to announce several projects addressing the foreclosure crisis, legal and health services for veterans, workers' rights, domestic violence and violence against women. So, I suppose you could say that after four decades in academia, hundreds of books, dozens of instances of testimony, dozens of arguments, I have decided finally to *do* something, that is, not just to pontificate, not just to talk and write, fun as those things are, but to really get something sustainable done about the issues that I have spent my life lecturing and writing and arguing about.

AN INVITATION

I hope you will not think it is too presumptuous of me if I spend just a little time this morning asking you to join me. You are uniquely positioned to influence real change, the kind of change that could make a sustainable difference in the lives of people across this country and Canada and that could be a beacon to the planet, people for whom the system of justice has not been as generous or giving as it has been for those of us in this room.

When many of you cut your teeth in legal trenches and foxholes around the country, defending the disadvantaged and the despised, you were wearing suits that cost, I would surmise, a small fraction of those that you are wearing today. Now that you are famous and successful and can doubtless afford excellent dry-cleaning, I want to invite you to jump back into those trenches and once again get yourselves a little muddy. I want to encourage you to do more than tackle a somewhat higher number of pro bono cases, to do more than donate somewhat more of your time to representing folks who might otherwise be outgunned by powerfully represented opponents.

I know that the people in this room do more than their share. The average American lawyer spends half an hour a week on pro bono work, and sometimes what that really means is, "I helped my cousin with his divorce." I know you do more than your share, but my task is to convince you to work to identify systemic problems and to become persistent, persuasive advocates of essential increases in needed funding and of necessary reforms.

Now, I understand the diversity of interests and perspectives that are represented in this room. It is clear that no legal discipline, no sector of the bar, no political belief has a monopoly on excellence in courtroom performance or client representation, but I believe that the cause of access to justice is one around which you can coalesce. It is a cause that can surmount our differences and merge us in our common calling as lawyers, remind us of why it is we chose this profession.

A MOUNTING CRISIS

John Broderick, the outgoing chief of New Hampshire's Supreme Court and a very proud member of the ACTL, has been among the most outspoken and perceptive observers of the mounting crisis in our state courts, where more than ninety-five percent of this country's litigation takes place. He has has warned of the slow but sure disappearance of complex civil jury trials where underfunded courts are overburdened with pro se litigants and criminal cases.

He warns that there may well come a day where the only state court litigants to be found are those without lawyers and those charged with crimes, while folks with means–in other words, folks who can afford your services–flee to private judges and mediators. I know this crisis has already to some extent hit home. . . . And that is my not-so-subtle stab at trying to convince you that even as your interests and perspectives and ideologies diverge, as lawyers you do have a common responsibility and as an organization a common institutional interest in seeking effective workable solutions to the access to justice crisis. . . .

In my short time in government, I have already witnessed lots of promising programs and been exposed to numerous auspicious ideas. Let me mention just two undertakings that I think are especially well suited to the talents and stature of this decorated audience, undertakings I hope you will embrace.

DEFENSE OF INDIGENTS

First of all, I know how aware you are of the crisis in indigent defense. I also know that many of you are already using your considerable talents to address the problem. Along with providing pro bono representation to Guantánamo detainees, you are taking court-appointed cases, including . . . a handful of post-conviction capital cases, providing free training to indigent defense providers and mentoring young defense attorneys.

I want to encourage you to continue and where possible to add to those crucial efforts. But I want to suggest in addition that you turn your justly deserved reputations for persuasion to the task of convincing state legislatures that have been failing in their constitutional responsibilities to provide adequate funding for indigent defense agencies, an obligation that surely belongs to the states under the Sixth Amendment, but one that they too often treat as optional.

As defenders of the Constitution, I hope you make greater use of your ample courtroom skills to advocate not only for the least popular defendants in individual cases–that is important–but also for what just might be, with apologies to those seeking comprehensive immigration reform, among the least popular causes: more and adequate stable levels of funding for indigent defense services. A lot of places recognize that you have got to have hospitals, you have got to have schools, you have got to have highways, but when you start talking to state legislatures about a justice systems that really works for more than a few, you really have to wake them up before they recognize that that is the indispensable safety net on which everything else rests. I do not think, if you cannot do it, really anyone can.

My office and . . . its small staff of half a dozen lawyers, spends a lot of its time reaching out, traveling across the country to encourage the systemic study of innovative and potentially effective programs in an effort to figure out what works and what does not, to learn what should be replicated and what should be phased out. There are some things like innovative pretrial release projects that, in the end, communities ideologically opposed embrace because they lower recidivism rates rather than raising them, and because in the end they save money. There are others like the community defender model that operate with great success and that can be replicated elsewhere, that can go viral.

The point is that successful programs do exist. In the months that I have been in this job, apart from being distressed at the justice chasm, I have been inspired by the fact that there are pockets within the country where people are doing things that are exciting, innovative, and that can bring justice to ordinary people. What we need to do is highlight and accentuate those and replicate them. I am not saying simply that you should ask for more money, go and lobby for more money for public defenders . . . but in addition to that, your requests can reflect your extensive courtroom experience and your resulting insights to how we can do things better, because I think you know the difference that a good lawyer can make and how much waste can be avoided for all concerned by good lawyering.

I think you are in a great position to influence effective change, and I cannot think of a more honorable legacy for this 60th convening of the ACTL to leave behind.

JUSTICE REFORM

The second thing I would like to ask you to do is to take your message of justice reform to your circuit conferences, where you undoubtedly exert a greater degree of influence than that measured just by your numbers alone. When I spoke at the Ninth Circuit Judicial Conference last August on behalf of the President and the Attorney General, I inquired about the process for passing circuit resolutions, partly because I learned shortly after taking office about how effective the DC Circuit's pro bono committee had been in encouraging the largest firms, not just to have more associates do a little pro bono work, but to have signature projects in which pro bono opportunities provide a major way for training young associates who otherwise would not get trial or transactional experience, and encouraging those signature projects in which larger numbers of partners play a serious mentoring role.

When I raised the issue of why that did not happen in more of the circuits, I was told by the judges that the resolutions of

those circuits generally are not considered because influential lawyers do not really propose them. So I think the burden is on you. You know better than I the maladies that impact access to justice most acutely in your particular corner of the country, so I would encourage you to become more active in your respective circuit conferences to promote resolutions that further access to justice. They could involve creating pro bono committees, establishing better self-help centers . . . The possibilities are really limitless.

THE COLLEGE'S HERITAGE

When Emil Gumpert kept Les Cleary up all night on that fateful train ride in California some six decades ago, where he spelled out his vision of what would become the American College of Trial Lawyers, he must have had in mind an ideal whose whole would be greater than the sum of its parts and become a force actively engaged in bettering the administration of justice in the United States.

Surely if Mr. Gumpert were here to watch his beloved vocation diminish in stature even as it grows in wealth, to see how much more public good the members of the College do as individuals than the College manages to do as a collectivity, I think he would praise you all as individual lawyers, while . . . challenging you to join hands in making your collective efforts draw greater strength from your unity.

He would challenge the American College of Trial Lawyers to do more as an organization to ensure that all our fellow citizens have meaningful access to the courtrooms in which lawyers like you have made your reputations and to the justice that those courtrooms are there to make available. I think he would urge you as the standard bearers of your profession to make access to justice a passionate common cause.

CONCLUSION

So let me end where I began. People are fond of saying that lawyer jokes have been around since Shakespearean times, referring, of course, to that notable line from *Henry VI*, "The first thing we do, let's kill all the lawyers." . . . Although the Bard of Avon was probably trying to elicit some laughs at the expense of our profession when he wrote those words, some commentators have observed that the line was in fact spoken by a character named Dick the Butcher, a member of a murderous clan bent on treachery and chaos, and that the Butcher spoke them as he and his crew contemplated inciting a revolution in England. In other words, among the lessons of that Shakespearean joke is that the necessary first step to bringing about social chaos is to eliminate the rule of law's greatest protectors, the lawyers.

On the other hand, I doubt that any equally profound pro-lawyer lesson lurks in the pejorative lawyer cartoon with which I opened my talk. Sometimes, as they say, a cigar is just a cigar, and that New Yorker cartoon probably conveyed nothing beyond a good old-fashioned laugh at the expense of our sometimes pompous profession. But I would hate to have the cartoon lose its bite, its edge as a cautionary tale, while we in the legal profession stand by as our system of justice crumbles around us.

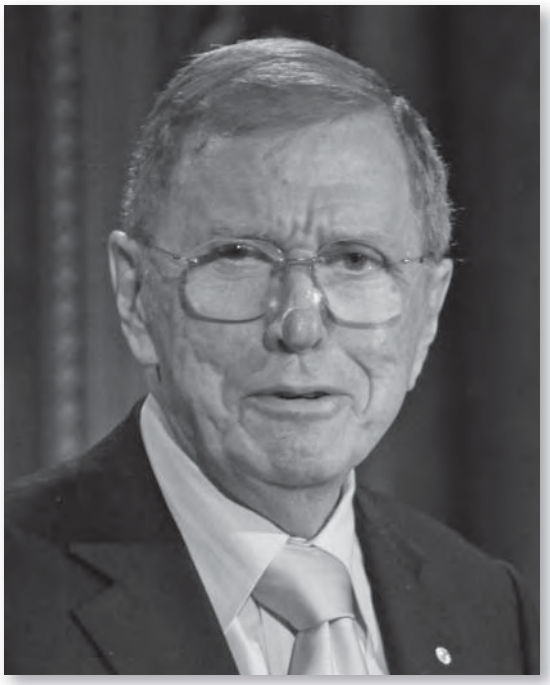
In the face of the undeniable crisis that confronts our justice system, I urge you, in Chief Justice Broderick's words to honor it, improve it, most importantly defend it. It is a birthright only if you protect it. Nothing less hangs in the balance than the noblest aspirations of our Constitution's preamble which exhorts us in soaring words to "establish justice (the first phrase), insure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity."

I have no doubt that you, the nation's finest trial lawyers, are up to that task.

THE USE OF FOREIGN PRECEDENTS: TIME FOR AMERICAN LAWYERS TO JOIN THE WORLD

Retired Australian Supreme Court Justice Speaks

*The Honourable **Michael Kirby, AC, CMG,** Retired Justice of the High Court of Australia, addressed the 60th Annual Meeting of the American College in Washington in an eloquent argument that the courts of the United States should take into consideration the reasoning of other courts, not as precedent, but as a background of useful relevant fact in thinking through problems and reaching conclusions on issues that have been addressed by other courts in other countries. At the conclusion of his remarks, he chose to address in frank personal terms an unrelated but contentious issue, that of the role of one's sexual orientation in public life.*



Michael Kirby

In his introduction, President-Elect **Gregory P. Joseph** described Justice Kirby as "a truly remarkable individual." Educated at the University of Sydney, where he received a bachelor of arts degree, a bachelor of economics degree, a bachelor of law degree and a master of law degree, Joseph noted, "You will see there is a theme of overachievement and intellectual voraciousness throughout this introduction."

A solicitor and a barrister before becoming the youngest person ever appointed to federal judicial office in Australia, when he retired from the High Court in February of 2009, Kirby was the longest-serving judge in Australian history, having served in the federal court as President of the New South Wales Court of Appeal and on the High Court of Australia.

Among many other honors and posts, he served as the president of the International Commission of Jurists in Ge-

neva and as the United Nations' Special Representative for Human Rights in Cambodia. He has been named one of the ten most creative minds in Australia, one of the top-ten public intellectuals, and one of the one hundred most influential Australians ever.

In August 2010, the Michael Kirby Center of Public Health and Human Rights opened at Monash University in Melbourne, Australia, and in the same year he received an International Justice Prize, the Gruber Prize. He holds eighteen honorary doctorates.

Since 1975, Joseph noted, his bibliography shows 2,455 articles, speeches, book reviews and book chapters, 'but that bibliography is sadly incomplete, since it reflects only what he had accomplished so far in putting it together. And his writings," Joseph continued, "are substantive. They reflect the fundamental faith in the human capacity to enact just laws and to enforce them fairly and to make law responsive to the public, to effect reform to achieve equality."

On a humorous note, Joseph continued, "But not everything about this distinguished gentleman is formal. He seeks to make the law resonate with the public in occasionally nontraditional ways. In 2007, to inaugurate Victorian Arts Law Week, he collaborated with a rapper . . . . Now, when he was sitting as president of the New South Wales Court of Appeal, he admits to having occasionally, during dull points in argument, done caricatures of the barristers who would appear before him. Now, we have all had dull cases from time to time, and you do what you can to make the argument scintillating. And finally you see the judge very solemnly taking what appear to be notes, and what do you find out later? It was a caricature. Fortunately, most of us would never find that out. We can rest comfortably in the thought that it would be a note."

Turning to Justice Kirby's topic, Joseph laid the groundwork by calling attention to 2002 and 2003, when the United States Supreme Court for the first time cited and relied upon foreign precedents in two cases. In *Atkins v. Georgia*, the court said, "Within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." A year later in *Laurence v. Texas*, it relied upon and cited favorably some decisions of the European Commission of Human Rights, which set off a debate as to the appropriateness of citing foreign law in American cases.

After paying tribute to the speakers on the preceding day's program, remarking that "it was a day that will stay in my mind for a very long time," Justice Kirby addressed his subject. His remarks follow.

KIRBY'S CAREER IN CONTEXT

Now, just to put my career into perspective, I was appointed first a judge in 1975. That was the year in which Justice Stevens was appointed to the Supreme Court of the United States. I had to wait a further twenty years before, in December 1995, I was appointed to the highest court of my country.

But by 1980, I had been in office for five years at the time that Chief Justice Roberts was appointed a clerk to Chief Justice Rehnquist in the Supreme Court of this country. And in this year, 2010, Justice Stevens has left the Supreme Court of the United States after a marvelous service to this nation and to the law.

TRIBUTE PAID TO JUSTICE STEVENS

It's a sort of symbol of the point I want to make to you, that in Australia, in the High Court of Australia, we often had read to us, often, the opinions of Justice Stevens. We always listened to them with care and attention, as they would be listened to in the House of Lords and now the Supreme Court of the United Kingdom [and] the Supreme Court of Canada.

No questions asked, whether on a matter of private law or on a matter of public law or on a

matter of constitutional law, no questions asked. If somebody got up to read the opinion of a great judge like Justice Stevens, and if it had some relevancy to the issues which we were debating, discussing or considering, no one questioned the entitlement of the advocate to read it and of the entitlement of the judges to use it.

I would not want this conference of this College to pass without the opportunity for all of us to pay a tribute to Justice Stevens for his magnificent service on the Supreme Court of the United States and for his leadership in the world of ideas, because the privilege we have as lawyers, and the special privilege of trial lawyers, is in the world of ideas. Very few thoughts come out at the other end in the final court of a nation which have not first formulated in the minds of a trial lawyer somewhere in a local court. It is the trial lawyers who put forward the ideas and pass them on through the appellate process, and it comes finally for resolution in a final court.

[Editor's note: Justice Stevens is scheduled to speak at the College's 2011 Annual Meeting.]

FOREIGN PRECEDENT IN CONTEXT

Now, it might be thought that to talk at this conference about the issue of the use of foreign precedents is a divisive matter, and there is no doubt that it has been a matter that has been divisive amongst politicians and amongst some lawyers and judges in the United States. But we all know, as trial people, that it is by division, by sharp conflicts and by differences of view that the great engines for truth begin to work and the best ideas prevail.

Think about Justice Sotomayor's confirmation process. When she was being confirmed, two observations which she had made in speeches when she was a judge of the Appeals Court were picked up by critics who resisted the confirmation of the brilliant and notable judge we saw yesterday [the preceding day when Justice Sotomayor was made an Honorary Fellow]. One of them was her reference to her . . . experience as a Latina to . . . the value of the voice of a wise Latina.

How could it be otherwise that her experience would be brought to bear in her task as a judge? Why should it be otherwise than that that experience would be useful for her discharging her function as a judge of a final court? And I thought yesterday she explained very well in words that I would endorse for my court, how important it is to have diversity, because without diversity, often it is the case that a court will not see a problem. It is diversity of experience and background that ensures that the problems get drawn to attention of the other members of the court, thereby going to the consideration that the court gives.

But on the issue of the day, she was attacked for the following words that were attributed to her from a speech she made for the ACLU in Puerto Rico. . . : "To suggest to anyone that you can outlaw the use of foreign or international law is a sentiment that is based on a fundamental misunderstanding. What you would be asking American judges to do would be to close their minds to good ideas." And by inference, Justice Sotomayor was saying you do not close your mind to good ideas. They are part of the information, the background, that comes into your reasoning and your thinking when you're grappling with the big ideas that come to a final national court. For those remarks, Justice Sotomayor was strongly criticized in her confirmation process . . . that that was a view which was a novel idea and a dangerous idea that has no place in the interpretation of American law.

As . . . most of you would know, during the 2000s, a number of cases came before the Supreme Court of the United States where this issue was brought to the fore by the way in which the judges of the court reasoned. In *Roper v. Simmons*, a 2005 case, the following were the short encapsulations of the position of three screens within the US Supreme Court.

Justice Scalia said, "The basic premise of the court's argument that American law should con-

form to the laws of the rest of the world ought to be rejected out of hand."

Justice O'Connor said, "We should not be surprised to find congruence between domestic and international values expressed in international law or in the domestic laws of individual countries."

And Justice Kennedy said, "The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."

And so, from the position of Justice Scalia, which is that the approach of using foreign dicta or foreign authorities ought to be rejected out of hand, Justice Kennedy said this provides confirmation for our own conclusions that we have reached within our own bailiwick.

RELEVANCE TO DEVELOPMENT OF THE COMMON LAW

And what I want to show to you today is that in the arguments that are proceeding elsewhere in the world, in all but one particular, there is really no argument in the common law countries of the Commonwealth of Nations about the use of foreign jurisprudence. And, in fact, it is part of everyday work.

Now, we can get some things out of the way, first of all. First, if we look at the common law, I do not think there would be a big fuss in the United States if an advocate told a judge in this country who was considering the formulation or expression of a common law principle, "Well, this is what the Supreme Court of the United Kingdom has said on the matter or this is what the High Court of Australia has said."

And in my own country, if we in a common law case, because the High Court of Australia was . . . like the Canadian court, the final court for common law, as well as statute law, state law as well as federal law, if we had case, say, on the forum non conveniens principle, or if we had a case, say, on the issue of wrongful birth or wrongful life, the sort of cases that technology throws up into the court system that tend to work their way up the system to the final courts, we would not hesitate. Indeed, we would invite -- indeed, Lord Phillips's court [the United Kingdom's new Supreme Court] requires -- that you come along with what has been said in the great courts of the common law.

USE OF INTERNATIONAL LAW PRINCIPLES

More controversial is the question of whether you can use international law in formulating the common law. And in Australia, in the early days of the colony, the view had been taken that the Australian aboriginal people did not have any right to land. That was founded in part on a factual premise that they were nomadic and uncivilized, on a legal premise that there was never a treaty with them, and therefore, that the Crown did not owe a duty to respect and recognize their law.

But in 1992, a great case came before the High Court of Australia, before my appointment, called *Mabo v. Queensland*, which challenged that position. And one of the arguments that was advanced was that you could look to the principles of international human rights law, the Universal Principles of Human Rights, and see how very wrong it was for Australian common law to be rejecting out of hand any recognition and respect for the rights of the indigenous people to title to their land.

And the court, by a vote of six to one -- we are seven -- six to one upheld that proposition. And this is what our Justice Brennan said: "International law brings to bear on the common law the powerful influence of the international covenant on civil and political rights and the international standards that that covenant imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially where international law declares the existence of universal human rights. A

common law doctrine founded on unjust discrimination on the basis of race and the enjoyment of civil and political rights demands reconsideration."

So, the Court reached out to the universal principles of international human rights to require the reconsideration of the state of the common law in Australia, and it re-expressed the common law to give respect to the unallocated lands that the aboriginal people claimed.

Similarly, I do not think there would be much dispute in this country in respect of the interpretation of a local statute or of a treaty which is given effect in the United States. Take, for example, the Refugees Convention. This is a convention of 1951, as amended by a protocol, which applies in all the countries who subscribe to it, and that includes the United States, Australia, Canada and other countries of recourse from people who seek protection from refugee status.

In that treaty there are at least two controversial phrases. One of them is that the applicant must have "a well-founded fear of persecution." What does that mean? The other is that the applicant must be from a particular group, one group being a recognized social group. What does that mean?

Now, in interpreting those provisions, it is natural, it is appropriate, it being international law, that countries that subscribe to the treaty should look to what courts in other countries say about this. And so in Australia and in Canada, and I would feel confident in the United States, you would look to what is decided in other courts about these groups.

Just the other week, a decision was reached in the Supreme Court of the United Kingdom in a case concerning gay refugees from Iran. The proposition had been advanced and had had some success in the lower courts that because those applicants could, by keeping a low profile, avoid any difficulty with the Iranian authorities, they did not have a well-founded fear of persecution.

But the Supreme Court of the United Kingdom looked to decisions in Australia in some of which I have taken part, in which the court said that that is not the postulate of the convention, that people have to keep their religious beliefs or their sexuality' or any other essential attribute of their human existence and dignity quiet, that if that is the postulate, the convention would not work properly, and the Supreme Court of the United Kingdom adopted that approach.

So, looking to what other judges have said can often be extremely helpful in an international sphere to make sure that you get a common interpretation.

Similarly, there is the Warsaw Convention about airline responsibility. And in a case that came before the High Court of Australia concerning DVT, deep venous thrombosis, the question was, did that constitute an 'accident' within the Warsaw Convention on civil liability of airlines. And in that case, we in Australia had the advantage of a learned opinion given in the Court of Appeal of England by Lord Phillips. And there was no reason for us to reinvent the wheel, and certainly not to ignore what Lord Phillips had said. So we used that in adopting our own interpretation of the international treaty.

APPLICATION TO CONSTITUTIONAL LAW

But it is when we get to public and constitutional law that we can have some problems. In the constitutional area, the fact is that most countries in the world received their written constitutions, unlike Canada, which was in the 1860s, and Australia in 1901, they received them after the Second World War. And many of them copied, as we in Australia did, aspects of the Constitution of the United States. And many of them attach a Bill of Rights to their constitutions, and many of those provisions in their Bill of Rights build upon the Bill of Rights of the United States, and many of them contain provisions which are exactly the formula that you

use in your Constitution. So, what a foolish thing it would be for the judges in those countries to completely ignore the learning, reasoning, the high elaborations, the conflicts, the differences and ignore and put out of their minds any consideration that has been given in this country to those phrases.

ORIGINAL INTENT

But then you get the harder question. Now we are getting to the rub. You get the question of what happens if it is not exactly the same. And it is here that in the United States reasons have been advanced by Justice Scalia, Justice Thomas and other judges of the Supreme Court for not paying attention to what the foreigners are up to, what they do.

One of the reasons is the original intent view, that you have to look at what the original Founders intended. And of course they, not knowing of the developments of universal human rights, not knowing of Eleanor Roosevelt's committee that drafted the Universal Declaration of Human Rights in 1948, they did not know of this, and therefore you cannot take it into account.

If you take that view of the interpretation of the Constitution, well, I can understand why you would ignore what other jurisdictions and people and later people have said. But most historical study today shows that the founders of your republic, and certainly the founders of the Australian Commonwealth, did not intend and did not presume to claim the power to control everything that happened.

And there is a very strong view, probably the majority view in Australia, that the very nature of a constitution, of a written constitution which is to last from age to age and from century to century is going to be a document which has to adapt of its character, nature and purpose to the changing times and needs of different times, as, indeed, your Constitution has and as the Constitution of Australia has.

But still the resistance comes. "We should not use this because ours is a historical narrative. It is our Constitution. We should just look into ourselves. Anything that foreigners write lacks democratic legitimacy. The risk is there that the judges will cherry-pick and just pick what they want, pick up something in order to advance an idea which they want to impose on the Constitution."

And so this is the area where there is a real point of difference. And there is no point of shilly-shallying. This is the cutting edge of the issue.

Now, one of the things I have done in recent years is to act as one of the editors of the Laws of the Commonwealth, and it is a series of case reports which picks up the cases of the final court, sometimes intermediate courts, around the Commonwealth of Nations.

And if you look through those cases, you see even in very sensitive matters there is no hesitation in any Commonwealth country -- I can say this without a shadow of a doubt -- in looking at what judges in other countries have said if it is analogous. It is not a precedent.

Justice Roberts in his confirmation was asked about this point, this question. And he said, "Well, it is not a precedent." Of course it is not a precedent. It is not a binding rule as you would within your own court system, but it is a background of relevant fact that you use in thinking through the problem and reaching your conclusion.

In the latest parts of the Law Reports of the Commonwealth, the decision of the Ghana High Court on whether mandatory life sentences for the offense of rape was within their constitution, led to looking at decisions of India, of the United States and of other countries of the Commonwealth.

In Australia, we had a case about what happens when a judge falls asleep. I do not like to say this, but most of the cases that were cited were cases from the United States of America. And the question was, "What follows?" Of course sometimes I might even myself once or twice have had a millisecond nap. Then I went back to my sketching to keep myself awake. But it is

useful. It is very useful to look at how the judges of this country have dealt with the problem when it is effective, when it affects the outcome of the case.

In India a recent decision of the Delhi High Court struck down the Indian inherited law against homosexuals. And of course they looked to Laurence and Texas, and of course they looked to decisions in South Africa which had dealt with similar problems.

In Malaysia, even on the very sensitive question of apostasy, the cases, the decisions both for and against the applicant in the Lina Joy case were full of references to decisions in numerous countries. And the judges of that country did not hesitate to look at them as background, as information.

In Canada, the Supreme Court of Canada, to which distinguished court Justice Cromwell [newly inducted Honorary Fellow of the College] has now been appointed, had to face these issues in the late 1990s and the early parts of this decade. And in the case of Suresh and Canada, in the early decision the court was divided. Justice Iaccobucci and Justice Cory, very great judges of the Supreme Court of Canada, dissented in the use of international human rights law.

But in the case of Suresh and Canada, which was decided in 2005, this is what the Canadian court said, which is very similar to what Justice Brennan said in my court: "International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. However, in seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada's international obligations qua obligations; rather our concern is with the principles of fundamental justice. We look to international law as evidence of those principles, and not as controlling in itself."

AN EXAMPLE

Just before I left the High Court of Australia, a case came before the court in which we were faced frontally with this question. The case was a challenge by a Ms. Roach. She was a prisoner in Victoria, and she happened to be an aboriginal Australian -- a lot of prisoners are from the indigenous community -- and she was objecting to an amendment to the Electoral Act in 2006 which took away her right to vote, and she was saying that that was unconstitutional, because in Australia, as in Canada, as in most countries, but not the United Kingdom, the court has the power to strike down the legislation.

In looking at the legislation, we had no Bill of Rights. We had no due process clause. We had no equal opportunity, equality clause. However, we had the structure of the Constitution and the fact that the Constitution pays a great deal of attention to the issue of the election of the Parliament, of the three-year cycle and of the importance of preserving the right to vote.

There was also a provision that a member of Parliament could be elected even if he had had a conviction of more than one year. So that was a bit of a clue that convictions were not, as such, disqualifying for the much more onerous responsibility of being a member of Parliament. And so could you remove the right to vote of all prisoners? And that was the question.

Now, this was a situation where we were six, because one justice, Justice Callinan, was about to retire. And I knew that three of us, Justice Gummow, Justice Susan Crennan and myself, were minded not to uphold the law. But two, Justices Hayne and Heydon, were minded to uphold the law. And so the crucial decision was what Chief Justice Gleeson would do.

And you remember yesterday Justice Sotomayor was asked, "Who do you ask your questions for?" Well, I agree with her, you usually ask them for yourself. You want to clear something up. Sometimes you ask them for the litigants and for their advocates to make it clear that you have thought about and considered the issue. But this was a direct moment where I made a pitch

for the Chief Justice of Australia, and I said, "Does the government's proposition, Solicitor General, mean that it would be possible for the Australian Parliament to restore into law the disqualification of Roman Catholics from voting?"

The Chief Justice of Australia was a faithful adherent to the Roman Catholic Church. I saw him look up. And the answer [of the Solicitor General] came back, "Well, Your Honors, of course the Parliament wouldn't ever enact such a law." I said, "I did not ask that. I want to know what your proposition is. Can Parliament enact -- restore the disqualification of Catholics?" And he said, well, "umms" and "ahhs," but ultimately "yes." "And also restore the disqualification of aboriginals?" "Yes." "And also restore the removal of Asian-Australians in the vote?" "Well, yes. But, Your Honors, that would never –" "I don't know what is going to happen. I want to know what your theory of the Constitution is."

When the numbers came out, they were Chief Justice Gleeson with Justices Gummow, Crennan and myself disallowing the legislation and held that it was disproportionate. And in doing so, we called upon two very important source documents, a decision of the Supreme Court of Canada in Sauve and The Queen, and a decision of the European Court of Human Rights in *Hirst v. United Kingdom*.

No hesitation in referring to these materials. And why did we refer to them? They did not bind us. They were not a precedent. But they were written by very clever judges. They ticked the boxes and put crosses in some boxes. They honestly acknowledged the fact that they had been helped by other decisions. They made it clear they were not governed by the decisions of other courts, but found them useful. They had their own context, but we had our context.

And this is the world, members of this College, of the Internet, of the jumbo jets and of much else that is the product of American technology.

A REMARKABLE PERSONAL CLOSING NOTE

Now, finally, I want to say a personal thing. I have considered whether I would say this, but I think I should, because it will be good for you. During the long time of my service on the High Court of Australia, and during the long time on my earlier service in the Court of Appeal of New South Wales, and earlier than that in the Law Reform Commission and the Arbitration Commission, I was accompanied in my journey by my partner, Johan van Vloten. He is not here today, so I cannot ask him to stand up to receive your acclamation. But he was there that whole time. Indeed, he was there seven years before I was first appointed. And he has been with me on that whole journey.

You and I know, Fellows of this College, there have always been gay lawyers. You and I know there have always been gay judges. And I can tell you there have always been gay judges of final courts. This is a reality. This is the truth. But in the past, the convention was there that you had to be ashamed of it, that you had to keep it very much to yourself.

And so for a time I did. But then AIDS came along, and my partner became an ankhali, which is an aboriginal word like "buddy," and he looked after people. He cleaned toilets, he sat there and talked with many people with AIDS, often lonely, frightened. And so, we began to turn up at these things, and so the secret was a non-secret.

And when I was appointed to the High Court of Australia in 1996, Prime Minister Keating turned to one of his staffers, who he knew was gay, and said, "There, Bill, that's one for you." Bill said to him, "Prime Minister, have I got news for you!"

Now, in recent events, on the 30th of April of this year, the *Washington Post* contained a poll of irrelevant considerations for the . . . the seat that Justice Kagan was proposed for. Race?

Eighty-one percent of persons said "irrelevant." Irrelevant it was another African-American. Gender? Eighty-one percent of Americans said irrelevant. Irrelevant if it is a woman. Non-Protestant? There are no Protestants left on the court. The principle of religious denomination? "Not relevant," said eighty percent of the people. Gay or lesbian? Well, seventy-one percent of your fellow citizens said "not relevant."

But I confess to a little disappointment that The White House felt it was necessary to assure the Senate about Senator Kagan's sexuality. I hope I live to see the day with the seventy-one percent that it becomes eighty percent and ninety percent and that people get over it and that it is no big deal and that a person can be appointed and that nobody feels a need to assure people they are not gay, because when I walked past your Supreme Court yesterday, I saw on that magnificent building at the top those immortal words, "Equal justice under law." "Equal justice under law." It means just that. "Equal."

And I thought in Justice Kennedy's opinion in *Laurence* – I have never seen it put better -- that if those who drew and ratified the due process clauses of the Fifth Amendment or the Fourteenth Amendment had known the components of liberty in its manifold possibilities, they would have been more specific. They did not presume to have this insolate. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their search for greater freedom.

Well, I would like to finish as Mike Mone finished yesterday. God indeed blessed the Constitution of the United States of America, and may its light continue to shine, because it is engaged with the world. May it continue to have great influence in every land that looks to this land for examples of liberty.

And may you sometimes find lights, shards of light, from other lands that can shine light on your Constitution and on the liberties of all Americans.

LETTER TO THE EDITORIAL BOARD

Congratulations on your new approach to the In Memoriam section of *The Bulletin*. It personalizes the names of the deceased, gives insights into the history of the College, and, most importantly, demonstrates how diverse and interesting College members are in their backgrounds and interests. When I was inducted in 1979, my father (William Bruce Hoff of Parkersburg, West Virginia) believed that he and I were the only father-son combinations to have been elected to the College from different states.

— William Bruce Hoff, Jr., *Winnetka, Illinois*

IN MEMORIAM

In his issue we record the deaths of sixty-one remarkable Fellows of the College, the oldest ninety-seven, the youngest fifty-seven. The average age at the time of death was eighty-two. Eight were in their nineties. We could identify sixteen who had been married fifty years or more. We lost another twenty-three of "the greatest generation." One had been the commanding officer of his landing craft at age twenty, participating in three island invasions in the Pacific. One, the pilot of a B-17 Flying Fortress at age nineteen, had flown thirty-three bombing missions over Europe. One, an officer at age nineteen, spent the last three months of World War II as a prisoner of war after his B-24 Liberator was shot down over Hungary. One had survived the Battle of the Bulge. Four, two of whom had also been in World War II, served during the Korean Conflict, at least two served in the Vietnam era and six others had other military service. Five had been judges. One of those had presided over the trial of serial killer Ted Bundy in one of the nation's first televised trials. Two practicing lawyers had sat as temporary justices on their state's highest court. One had been a United States Attorney at age thirty-four. One had been a law school dean. One had served on his law review with two future Justices of the United States Supreme Court. One had successfully prosecuted Jimmy Hoffa, a sitting United States Attorney General and two White House staffers. One had successfully taken three pro bono criminal cases to the nation's highest court. One had investigated the early stages of what turned into the Lincoln Savings and Loan-Keating Five scandal. One had successfully taken the exclusion from the Newport Jazz Festival of the rock group Blood, Sweat and Tears to the nation's highest court. One had been General Counsel to the Ladies Professional Golf Association. One had drafted the contracts for both Sonny Liston-Muhammad Ali fights. One had been General Counsel of the Postal Service. One had pursued an appeal that successfully dismantled the Chicago patronage system. One had been legislative assistant to a young Representative Lyndon B. Johnson. As a bar leader, one was credited with successfully challenging the "white-shoe" law firms of Philadelphia to begin hiring women and racial and religious minorities. Many had shared their knowledge and experience as adjunct law professors. Their avocations were equally fascinating. One had been a cattle rancher who engaged in quarter-horse racing. One, with a commercial pilot's license, had logged over 4,000 hours flying time. One, a semi-pro baseball player, had played against prison teams of felons he had helped to convict. Several, one of whom had made writing a second career, were published authors. Collectively, these are the accounts of the lives of Fellows that stretch over the past forty-seven of the College's sixty-year existence.

Regrettably, the deaths of several Fellows who were long retired were reported so late (one had died in 1994) that we could not find published obituaries. As is our custom, the date that follows the name of each deceased Fellow, ranging from 1964 to 2008, is the date of his induction into the College.

Wilbur Coleman Allen, '68, a Fellow Emeritus from Richmond, Virginia, died January 18, 2011 at age 85. A graduate of the University of Virginia and of its School of Law, his education was interrupted by World War II. After naval officer training school, at age twenty, the youngest man on his ship, he was placed in command of an LCT (Landing Craft, Tank), participating in the fighting at Midway and the invasions of Saipan, Tinian and Guam. With his father and brothers, he built the Richmond plaintiff's personal injury firm, Allen, Allen, Allen & Allen, of which he was the president for thirty-three years. Ultimately, four of his own children became attorneys and joined the firm. He had served as President of the Richmond Bar and as Senior Warden of his church. His survivors include his wife of sixty years and five children.

Lehman Murray Alley, Jr., '77, a Fellow Emeritus from Birmingham, Alabama, of counsel to Cabaniss, Johnston, Gardner, Dumas & O'Neal, died November 29, 2010 at age 78. A graduate of the University of Alabama and of its School of Law, where he was a law review editor, he served as a translator in the United States Army between undergraduate and law schools. An Eagle Scout and an avid outdoorsman, he was a member of teams that won both the National Debate Championship and the National Moot Court Competition. His survivors include his wife of fifty-four years, two daughters and two sons.

Edwin W. Ash, '89, of the Tulsa, Oklahoma, Ash Law Firm, died October 20, 2010 at age 75 as the result of a fall. A native of West Virginia, he did his undergraduate work at Salem College and the University of West Virginia and was a graduate of the Tulsa University School of Law. A plaintiff's personal injury lawyer since 1965, his Statement of Qualifications for the College disclosed that he had also engaged in cattle ranching and quarter-horse racing. His survivors include his wife of almost fifty years, two daughters and two sons.

Mark Alan Ash, '08, a member of McGuireWoods LLP, Raleigh, North Carolina, died February 21, 2011, one day short of his fifty-eighth birthday. A cum laude graduate of Harvard College, his law degree was from the University of Virginia School of Law. After law school, he was a Bigelow Fellow at the University of Chicago School of Law. He practiced for seven years in Boston before coming to North Carolina. While law was his career, flying was his passion. A commercially rated pilot, he logged more than 4,000 hours in everything from aerobatic biplanes to twin-engine transports. His survivors include his wife, a son, a daughter and his parents.

Darst Barnard Atherly, '78, a Fellow Emeritus, who had practiced as a member of Atherly, Butler & Borgott, Eugene, Oregon, and then in retirement relocated to Seattle, Washington, was recently reported to have died

in 2000. Born in 1930, his undergraduate career at Western Michigan University was interrupted by a five and one-half year tour of duty in the United States Air Force. A graduate of the University of Michigan School of Law, he had taken Emeritus status in 1995. [Ed. Note: Because of the passage of time, we were unfortunately unable to locate a published obituary.]

Robert Evans Barnes, Q.C., LSM, '85, a Fellow Emeritus from Windsor, Ontario, retired in 2004 from Sutts, Strosberg after a fifty-year legal career, died February 1, 2011 at age 92. A graduate of the University of Toronto who took his law degree from Osgoode Hall, his undergraduate studies were interrupted by World War II, in which he served as a Captain in the Royal Canadian Artillery. Founding director and the first President of the St. Leonard's Society of Canada, he had received the Advocates Society Medal in 1987. His survivors include four children.

William Barr Browder, '64, Lampasas, Texas, died July 8, 2010 at age 91. His undergraduate studies were at Sam Houston State Teachers College. He studied law at the University of Texas, the University of Arizona and the Southern Methodist School of Law, from which he graduated in 1936. He began his career in San Jacinto County, where he was Assistant County Attorney and practiced with his uncle. In the late thirties, he had moved to Houston, where he was employed by Humble Oil & Refining Company, before entering private practice. When World War II broke out, he joined the legal staff of the Petroleum Administration for War in Washington, DC. After the war, he returned to Houston, joining what was then Vinson, Elkins & Weems. Moving to Midland in 1952, he practiced until his 2002 retirement after sixty-six years of practice with what was to become Stubbeman, McRae, Sealy, Laughlin & Browder. A widower, his survivors include a son and a daughter.

William Ronal Buesser, '91, a member of Buesser & Buesser, PC, Birmingham, Michigan, died December 24, 2010 at age 66 of a heart attack. A graduate of the University of Michigan and of Wayne State University School of Law, he began his career with his father's firm, Buesser, Buesser, Snyder & Blank. Eventually he founded his own firm, Buesser & Buesser, His survivors include his wife, a daughter and two sons.

John O. Burgess, '79, a Fellow Emeritus, retired from Short, Cressman & Burgess, PLLC, Seattle, Washington, died September 19, 2010 after a prolonged battle with cancer. Born in 1937, he was a graduate of the University of Washington and of its School of Law. His survivors include his wife, a son and a daughter.

Garland Delmont Cherry, Sr., '82, a member of Kassab, Cherry & Archbold, Media, Pennsylvania, died November 17, 2010 at age 80. He had enlisted in the United States Air Force after graduating from high school and had served as a radio operator and technical instructor. A graduate of Pennsylvania Military College and the University of Pennsylvania Law School, he was a founding partner of Cherry & Curran. In his early career he represented the promoter of heavyweight boxer Sonny Liston, drafting the contracts for his two fights with Cassius Clay (later Muhammad Ali). His survivors include his wife of fifty- nine years, two daughters and three sons.

Einer Christensen, '80, a Fellow Emeritus from Racine, Wisconsin, retired from Constantine, Christensen & Krohn, died December 2, 2010 at age 83. Entering the United States Coast Guard directly from high school, he served in the North Atlantic in World War II. A graduate of the University of Wisconsin and of its School of Law, he served his community in a number of capacities. His survivors include his wife of sixty-one years and two sons.

Marvin Comisky, '67, a Fellow Emeritus, Chairman Emeritus of Blank Rome, Philadelphia, Pennsylvania, died November 12, 2010 at age 92. He had been the firm's first managing partner. A graduate of Temple University and of the University of Pennsylvania School of Law, where he was a member of the Order of the Coif, he had clerked for three judges, the last a member of the Pennsylvania Supreme Court. Both a trial and an appellate lawyer, he was a visionary in broadening the base of his own firm, and he became a legendary mentor to the firm's younger lawyers. Coming from a poor background, he was known for his humility and compassion. On the eve of his installation as Chancellor of the Philadelphia Bar, America's oldest metropolitan bar association, Comisky, of Jewish heritage, had been instrumental in sending a message to the heads of each of the legendary "white shoe" firms in the city, uniformly composed of white Protestant males, informing them that if they did not take steps to end their historic segregation, he would make that the subject of his first address in office. His action is generally regarded as the beginning of the religious, racial and gender integration of the major Philadelphia firms. During his tenure the Bar created a plan for making legal services available to the poor and established a fund for underemployed lawyers. He had served as President of the Pennsylvania Bar Association and as a member of the American Bar Association House of Delegates. His survivors include his wife and three children, a daughter and two sons, all three of whom are lawyers.

Leonard W. Copple, '94, a Fellow Emeritus from Tempe, Arizona, died May 17, 2010 at age

68 of acute lymphocytic leukemia, A graduate of the University of Arizona and of its School of Law, upon graduation he entered the United States Army Judge Advocate General's Corps, volunteering for duty in Vietnam, where he earned a Bronze Star. After practicing for several years in Phoenix, he established his own solo practice in Tempe, where he practiced for thirty years. He taught legal writing at the Arizona State University College of Law and was a frequent lecturer at legal seminars. For many years he read law books for Recording for the Blind. He served on several state bar committees and was a Hearing Officer and the Chair of its Disciplinary Hearing Committee. He had served for ten years as a judge pro tem in the local court. His obituary noted that he had a parallel career as a visionary community volunteer and leader. He was a board member and President of the Tempe Centers for Habilitation, which had named its vocational training center building for him. A member for nine years of the local planning and zoning commission, he chaired the Vision Tempe Task Force, which established a foundation for much of the modern development of downtown Tempe. Twice elected to the City Council, he was instrumental in the financing and installation of a local light rail system. After his death, the city named the courtyard at the local transportation center in his memory. He and his wife, who had shared the city's Community Leader Award in 1994, were leaders in the Tempe Sister Cities organization, traveling to sister cities and hosting exchange students in their home. He had been instrumental in a number of annual events that enriched the city, including bringing both an annual marathon and an iron man triathlon to Tempe. He served as a Trustee and an Elder in his church and was a leader in the local arts community. As a teenager, he had been a magician, an actor, a debate champion, a Governor of Arizona Boys' State and a disc jockey. His obituary noted that he "passed away at the age of 68, but packed 100 years of service, achievement and happiness into that time." His survivors include his wife of fifty years, two daughters and a son.

Frank M. Coyne, '75, a Fellow Emeritus from Madison, Wisconsin, retired from Coyne, Schultz, Becker & Bauer, S.C., has been reported to have died May 24, 2007 at age 87. He was a graduate of the University of Wisconsin and of its School of Law (1944). [Ed. Note: Unfortunately, we have been unable to locate more than a one-sentence published obituary.]

Leonard Decof, '77, founder of Decof & Decof, PC, Providence, Rhode Island, died December 31, 2010 at age 86. He began his undergraduate education at the University of Rhode Island, left to spend three years on Guam as an officer in the United States Marine Corps in World War II, then transferred to Yale University, from which he graduated. His

legal education at the Harvard Law School was interrupted by two more years of active stateside duty in the early stages of the Korean Conflict. Founder of the first Rhode Island law firm devoted exclusively to representing plaintiffs, in his long career he prosecuted numerous cases that established ground-breaking legal precedents. His successful representation of the rock group Blood, Sweat and Tears, excluded by the City of Newport from the Newport Jazz Festival, went all the way to the United States Supreme Court. He won another landmark case before that Court, establishing the right of medical insurance policyholders to sue malpractice insurers under the antitrust laws. He successfully established a client's claim to have originated the cowboy character Paladin. At the behest of the then governor of Rhode Island, he had prosecuted civil claims that followed the collapse of the insurance system that had backed state credit unions and the resulting banking crisis, recovering hundreds of millions of dollars for the benefit of depositors. He had twice won the Rhode Island Bar Association's Award of Merit for Outstanding Service to the public and the Profession. An avid golfer, he had represented many professional golfers and had been General Counsel to the Ladies Professional Golf Association. He was a frequent lecturer and writer, had chaired and been the principal lecturer for the Rhode Island Supreme Court Clerkship Program and had chaired the state's Board of Bar Examiners. An accomplished piano and saxophone player, he was a licensed pilot who enjoyed recreational flying for many years. A widower who had remarried, his survivors also included a daughter and a son, Mark B. Decof, who is also a Fellow of the College.

Joseph A. De Paul, '80, a Fellow Emeritus who before his retirement to Lake Worth, Florida had practiced with De Paul, Willoner & Kenkel in College Park, Maryland, died February 27, 2010 at age 85. Born to Italian immigrants, he had lived in Italy before his family settled in the United States. A graduate of George Washington University School of Law, he had served in the United States Army in World War II, participating in the Battle of the Bulge. His survivors include his wife of fifty years, a son and a daughter.

Patrick Hayden Dickinson, '86, a Fellow Emeritus, retired from Dickinson & Gibbons, PA, Sarasota, Florida, died July 1, 2007 at age 78. A graduate with honors from Union College, he lettered in three sports. Upon receiving his law degree from the University of Kentucky School of Law he went directly into the United States Army Judge Advocate General's Corps during the Korean Conflict. After two years with a Tampa, Florida firm, he moved to Sarasota, where he practiced until 1994. He had been president of the National Federation of Insurance & Corporate Counsel and of his county bar and a member of the Board of

Governors of the Florida Bar. Among his civic activities, he had chaired the Sarasota Memorial Hospital Foundation and served on the boards of several banks. In retirement, he and his tennis partner had purchased a number of west coast Florida automobile dealerships. His survivors include his wife of fifty-three years, two sons and three daughters.

John F. Dolan, '72, a Fellow Emeritus, retired from Rice, Dolan & Kershaw, Providence, Rhode Island, died June 10, 2010 at age 85. The son of an Irish immigrant, a graduate of Providence College and Boston College School of Law, he served as an officer in the United States Navy in the Pacific Theater in World War II. He had chaired the Rhode Island Board of Bar Examiners and was a recipient of the Rhode Island Bar Association's Semonoff Award for Professionalism. His survivors include his wife, a daughter and three sons.

James Lee Everson, '75, a Fellow Emeritus, of counsel to Everson, Whitney, Everson & Brem, SC, Green Bay, Wisconsin, died June 15, 2010 at age 83 after quietly battling Parkinson's Disease for over a decade. His undergraduate education at St. Norbert College had been interrupted by World War II, in which he was a radar technician in the United States Navy. He was a graduate of Marquette University School of Law. A past president of his local bar, he had served on the boards of several banks and had been active in the presidential campaign of John F. Kennedy. He was also an accomplished pilot and sailor. A widower, his survivors include four daughters and two sons.

George Edward Fitzgerald, '85, a Fellow Emeritus, retired to Carmel, California, from Gibson, Dunn & Crutcher, Los Angeles, California, died April 14, 2008, six days short of his eightieth birthday. A graduate of the University of California at Los Angeles and of the Stanford University School of Law, he had served as an officer in the United States Army during the Korean Conflict.

George W. Flynn, '87, a member of Flynn, Gaskins & Bennett, Minneapolis, Minnesota, died September 21, 2010 at age 68 of cancer. A graduate of St. John's University (Minnesota) and of the Georgetown University School of Law, where he finished at the top of his class, he had practiced for twenty-eight years with Faegre & Benson before forming his own firm. He had chaired the College's Minnesota State Committee. His survivors include his wife, a son, three daughters and two step-daughters.

The Honorable William J. Flynn, Jr., '67, Getzville, New York, retired judge of the New York Supreme Court, died January 14, 2011 just short of age 95. As a student at Culver Military Academy, he rode in the Black Horse Troop that had escorted then-President Herbert Hoover and performed in the 1932 Chicago World's

Fair. A graduate of Canisius College and of the University of Buffalo School of Law, in World War II he served as an officer in the United States Army in the Philippines. He practiced law with his father before going on the bench and had been president of his county bar and of the Trial Lawyers Section of the New York State Bar. Appointed to the trial bench in 1973, a 1982 newspaper survey among local trial lawyers ranked him at the top of the twenty-one trial judges in his area. In retirement, he was an accomplished photographer who printed his work in his own home darkroom. His survivors include his wife of sixty-seven years, two sons and a daughter.

Francis J. Ford, '75, a sole practitioner from Bethesda, Maryland, died February 1, 2011. Born in 1934, he was a graduate of St. Joseph's College and of the Georgetown University School of Law. A widower, his survivors include two sons and two daughters.

Charles Wayne Harris, '90, a member of Warner, Smith & Harris, PLC, Fort Smith, Arkansas, died November 10, 2010 at age 73 of esophageal cancer. A graduate of the University of Oklahoma and of its School of Law, he served for four years in the United States Army Judge Advocate General's Corps. His survivors include his wife and two sons.

Harold Francis Herring, '80, known to his friends as "Fish" Herring, a sole practitioner in Gurley, Alabama, died October 30, 2010 at age 86. Graduating from high school at age sixteen, he had entered The Citadel in Charleston, South Carolina. His education interrupted by World War II, he joined the United States Army Air Corps, was assigned to the 8th Air Force, and by age twenty, piloting a Boeing B-17 Flying Fortress, his squadron's lead pilot, had flown thirty-two missions over Europe, earning a Distinguished Flying Cross. After the war, he completed his undergraduate studies at the University of Alabama and received his law degree from its law school. He had practiced with several different law firms in Huntsville before moving to Gurley. He had participated in rewriting the Alabama Constitution and had been awarded the Alabama Bar's Award of Merit. Devoting a great deal of his time to various libraries and library organizations, he had been instrumental in creating a public law library in Huntsville. An outdoorsman and environmentalist, he and his wife had created a certified Treasure Forest. He was also an avid beekeeper and the source of pots of honey for his friends. He had served his church in many capacities, including as its Senior Warden. His survivors include three daughters and a son.

The Honorable John D. Holschuh, Sr., '70, Senior United States Judge for the Southern District of Ohio, Columbus, Ohio, died January 26, 2011 at age 84. The son of a millwright, he attended Miami University of Ohio on a scholarship, graduating first in his class. He

received his law degree from the University of Cincinnati School of Law, which he also attended on a scholarship, was the editor of his law review and a member of the Order of the Coif. After a clerkship with a federal judge, he practiced law for twenty-seven years with the Columbus firm of Alexander, Ebinger, Holschuh, Fisher & McAlister. Appointed to the federal bench in 1980, he continued to sit until his death. A widower who had remarried, his survivors include his wife and a son, John D. Holschuh, Jr., also a Fellow of the College.

The Honorable Wallace M. Jopling, '75, Gainesville, Florida, retired Florida state court trial judge, died June 17, 2010 at age 93. A graduate of the University of Florida and of its School of Law, he practiced law for a year, then became an officer in the United States Army in World War II, serving in the Pacific Theater. Remaining in the reserves, he had retired with the rank of colonel. After the war, he had practiced in Lake City, Florida until his appointment to the state court bench in 1977, where he served until his retirement in 1993. Before that appointment, he had served as a municipal judge, as Deputy Commissioner of the Florida Industrial Commission and as a member of the Board of Governors of the Florida Bar. He had achieved national recognition in 1979 for the way in which he had conducted the trial of legendary serial killer Ted Bundy for the murders of four members of the Chi Omega Sorority at Florida State University. One of the first televised trials in the nation, it was attended by 250 reporters from five continents. Jopling's wife of sixty-four years had died in 2008. His survivors include two sons and a daughter.

John Muir Kilroy, '64, a Fellow Emeritus, retired from Posinelli Shughart, PC, formerly Shughart, Thomson & Kilroy PC, Kansas City, Missouri, died July 9, 2010 at age 92. A graduate of the University of Missouri School of Law, he served as an officer in the United States Army in World War II. His survivors include two sons.

Allan M. Littman, '73, a Fellow Emeritus, of counsel to BartkoZankel, San Francisco, California, died December 20, 2010 at age 81 of cancer. Born in London, England, he and his mother were evacuated to the United States during World War II. Returning to England after high school, he graduated with first class honors from University College, University of London. A cum laude graduate of the Harvard Law School, he began his career in San Francisco with Pillsbury, Madison & Sutrow, where he practiced for forty-two years. In 2002 he became counsel to BartkoZankel. He had served as special trial counsel to the California State Board of Accountancy and special trial counsel to the Federal Home Loan Bank Board of San Francisco in what later became the

Lincoln Savings and Loan/Keating Five scandal. He had recently published a book, *The Fraud Triangle*, detailing century-long breaches by auditors of their public trust to detect and expose fraud that he suggested had played a role in the recent financial crisis. Having announced his retirement a number of times but drawn by an interesting case to postpone it, on the day he died, he had called his secretary to give her some last-minute instructions on an arbitration he was handling with a younger partner. Active in his community, Tiburon, he had chaired both the College's Northern California State Committee and its Specialization/Advertising of Legal Services Committee. His survivors include his wife of 59 years and three sons.

Robert Dudley Looney, Sr., '72, a Fellow Emeritus from Oklahoma City, Oklahoma, retired from Looney, Nichols & Johnson, is reported to have died on July 26, 2008 at age 89. A graduate of the University of Oklahoma and of its School of Law, he served as an officer in the United States Coast Guard in World War II, based in Greenland. One of the founders of the Oklahoma Bar Association's Lawyers Helping Lawyers Section, he had served as a deacon and an elder in his church and had been the local president and District Governor of Rotary International. A widower whose first wife of 52 years had died, his second wife, a lawyer also predeceased him. His survivors include a daughter and two sons.

Donald Carl McKinlay, '77, a Fellow Emeritus who had practiced in Denver, Colorado, is reported to have died November 12, 2002 at age 86. A graduate of Dartmouth College, which he later served as a Trustee, and of the University of Chicago School of Law, where he later served on the Board of Visitors, he was an officer in the United States Navy in World War II. A former Assistant Attorney General of Colorado, he had practiced first with Holme Roberts & Owen, LLP and later with Mayer, Brown, Rowe and Maw. He had been appointed Special Counsel to the Governor of Colorado in a Supreme Court proceeding and had served as a Trustee and as Secretary of the Aspen Institute for Humanistic Studies. In retirement he had been a volunteer for the local Legal Aid Society. His survivors include a daughter, two sons, a stepson and a step-daughter.

H. Fred Mercer, Jr., '68, a Fellow Emeritus from Pittsburgh, Pennsylvania, retired from Mercer & Mercer, died August 14, 2010 at age 97. He had attended Williams College, graduated from the University of Pittsburgh and received his law degree from the University of Michigan. He had served as the College's Pennsylvania State Chair. Predeceased by his wife of fifty-six years, his survivors include a son and two daughters.

The Honorable Herman D. Michels, '71, a former state court judge and, at the time of his death, counsel to Gibbons, PC, Newark, New

Jersey, died December 31, 2010 at age 83. Upon his graduation from high school in the latter stages of World War II, he enlisted in the United States Navy, receiving a shipboard assignment to an admiral's staff at Pearl Harbor, Hawaii. He graduated from Muhlenberg College and the Rutgers University School of Law, where he was a member of the law review staff. After a judicial clerkship, he entered private practice. At the time of his elevation to the bench he was a partner in Michels and Schwartz in Newark. At various times in his judicial career, he served as both a judge of the Superior Court and of the Appellate Division and was a member of numerous court-oriented committees, including the Ethics Commission. For thirteen years after his judicial career, he was an active arbitrator and mediator, a member of the panels of a number of national and international alternative dispute resolution organizations, serving in over four hundred separate cases. He had also served as Senior Warden of his church. His survivors include his wife of fifty-five years, three daughters and two sons.

Clifford B. Mitchell, '76, a Fellow Emeritus who had spent his entire career in Mitchell, Brisso, Delaney & Vrieze, Eureka, California, a family firm of which his father was a founder, died October 15, 2010 at age 83. Graduating from high school just before the end of World War II, he entered the United States Navy. He began his undergraduate education at Humbolt State College, then transferred to Stanford University, from which he received both his undergraduate and law degrees. He served on the Stanford Law Review with both Chief Justice William H. Rehnquist and Associate Justice Sandra Day O'Connor. He represented the plaintiff in the first California case that awarded punitive damages against an insurance company. A world traveler, master level chess player, tournament bridge player, fly fisherman, astronomer, competitive golfer and tennis player and avid reader and history buff, he was a true renaissance man. His survivors include his wife of fifty-eight years and four children.

Fredric H. Montfort, '73, a Fellow Emeritus, retired after fifty years from Montfort, Healy, McGuire and Salley, Garden City, New York, died June 13, 2010 at age 90. A graduate of Dartmouth College whose legal education at Columbia University School of Law had been interrupted by World War II, at the time of his death he was living in Cheshire, Connecticut. His survivors include his wife of sixty-six years, a son and two daughters.

Walter Brooks Morgan, '75, a Fellow Emeritus, retired head of the litigation department of Exxon USA, died September 22, 2010 at age 93. A graduate of the University of Texas and of its School of Law, where he was president of the law school student body, he had served as an officer in the United States Army Judge Advocate General's Corps in World War II. A widower, his survivors include a son and a daughter.

William R. Moss, '88, a Fellow Emeritus, retired from Crenshaw, Dupree & Milam, LLP, Lubbock, Texas, died September 13, 2010 at age 81 of Alzheimer's Disease. A graduate of Texas A&M University, he served as an officer in the 8th Army, 7th Infantry Division of the United States Army in Korea. After graduating from the University of Texas School of Law, he served for a year as Administrative Assistant to the Speaker of the Texas House of Representatives before entering private practice. He had been president of his local bar and of the Texas Association of Defense Counsel. In addition to serving as a Deacon and Chair of the Board of Elders of his church, he had led innumerable civic and charitable organizations, including the Association of Former Students of Texas A&M University. A widower who had remarried, his survivors include his wife and two sons.

James Foster Neal, '81, a partner in Neal & Harwell, PLLC, Nashville Tennessee, died October 21, 2010 at age 81 of esophageal cancer. A graduate of the University of Wyoming, which he attended on a football scholarship, he served in the United States Marine Corps during the Korean Conflict before entering Vanderbilt University School of Law, where he graduated first in his class and was the editor of the law review. After completing a Masters at Georgetown University School of Law, he practiced for a time, then became Special Assistant to United States Attorney General Robert Kennedy. There, he procured a conviction of Teamster head Jimmy Hoffa for jury tampering. He then served as United States Attorney for the Middle District of Tennessee before entering private practice. In the early 70s, he was recruited by Archibald Cox as Associate Special Prosecutor on the team that pursued government officials in the Watergate scandal. He negotiated a guilty plea with White House Counsel John Dean and won convictions against Attorney General John Mitchell and White House staffers John Ehrlichman and H. R. Haldeman. In private practice he had defended clients ranging from Louisiana Governor Edwin Edwards to Elvis Pressley's physician. He successfully defended Ford Motor Company in a homicide prosecution arising out of the defective gas tanks in the Ford Pinto and had represented Exxon after the Exxon Valdez oil spill. He had been recalled to government service in investigations into the Abscam and Iran Contra scandals. His clients had ranged from Vice President Al Gore to country music performers. Johnny Cash had cast him as a lawyer in a made-for-television movie, and he had played himself in the 1994 television series *Watergate*. He had been awarded an honorary doctorate by the University of Wyoming. His survivors include his wife, a son, a daughter and a step-daughter.

The Honorable David Aldrich Nelson, '81, a Judicial Fellow, retired Judge of the United States Court of Appeals for the Sixth Circuit, died October 1, 2010 at age 78 of heart and

lung disease. Valedictorian of his class at Hamilton College and a member of Phi Beta Kappa, he began his legal studies as a Fulbright Scholar at Cambridge University, taking first class honors. Graduating cum laude from Harvard University School of Law, he began his practice with Squire, Sanders & Dempsey in Cleveland, Ohio. He then served three years in the Office of the General Counsel of the United States Air Force. He later served as General Counsel of the Post Office Department, then as Senior Assistant Postmaster General and General Counsel of the newly organized United States Postal Service. He was awarded the Benjamin Franklin Award for his work on the Postal Reorganization Act of 1970, which created the Postal Service. Rejoining his old firm, he was appointed to the federal bench in 1985. He retired in 2006 after twenty-one years' service. His survivors include his wife of fifty-four years, two sons and a daughter.

Charles Edward Nichols, '88, a Fellow Emeritus from Greensboro, North Carolina, retired from Nichols, Caffrey, Hill, Evans and Murelle, died November 24, 2010 at age 83. His undergraduate education at the University of North Carolina was interrupted by service in the United States Navy in World War II. He graduated with honors from the University of North Carolina School of Law. He had served as president of his local bar and on the boards of three local banks. His survivors include his wife of sixty years, two daughters and two sons.

Marvin Powers Nunley, '86, a member of McCarroll, Nunley & Hartz, Owensboro, Kentucky, died May 22, 2010 at age 68. He had earned his undergraduate degree at the University of Tennessee and his law degree from the Vanderbilt University School of Law. He had served as a Magistrate Judge in the Western District of Kentucky, had once served as a temporary Justice on the Kentucky Supreme Court and had been the president of his local bar. He had also served as Senior Warden of his church. His survivors include his wife, a daughter and two sons.

James P. O'Neill, '72, a Fellow Emeritus, retired from O'Neill, Schimmel, Quirk & Carroll, Whitefish Bay, Wisconsin, died August 14, 2010 at age 82. A graduate of Saint Thomas College and Marquette University School of Law, he was a legal officer in the United States Air Force Reserve and a Liaison Officer for the Air Force Academy. His survivors include his wife of 58 years, three sons and two daughters.

Albert Lauriston Parks, '85, a sole practitioner in Jamestown, Rhode Island, died September 10, 2010 at age 75 from complications from chronic obstructive pulmonary disease. A graduate of Kent State University and of the University of Chicago School of Law, he had practiced for thirty-nine years with Hanson, Curran & Parks in Providence, where he had been managing partner. An avid sailor, he had retired from that

firm, moved to Jamestown and opened his own firm in 2000. He had served as Senior Warden in two churches and had been the College's Rhode Island State Chair. His survivors include his wife, a daughter and two sons.

Thomas L. Patten, '90, retired from Latham & Watkins, Washington, District of Columbia, died June 18, 2010 at age 64 of gastrointestinal cancer. A graduate of the University of Missouri and of its School of Law, he had served in the United States Army Judge Advocate General's Corps. A semiprofessional baseball player, while he was an Assistant Attorney General for the State of Missouri, he often played against teams composed of felons from the state prisons. Considered a top expert on governmental contracts, he had chaired a joint task force of the American Bar Association and the United States Justice Department, helping to create a guide for state and local prosecutors for cases involving procurement fraud. His survivors include his wife of forty-four years and three daughters.

Andrew G. Patillo, Jr., '76, a Fellow Emeritus, retired from Patillo, McKeever & Rice, PA, Ocala, Florida, died November 2, 2010 at age 81. A graduate of the University of Florida and of its School of Law, he was a past President of the Florida Bar Foundation. His survivors include his wife of fifty-seven years, a son and four daughters.

Edmund W. Powell, '68, a Fellow Emeritus from Whitefish Bay, Wisconsin, retired from Borgely, Powell, Peterson & Frauen, died September 30, 2010 at age 87. His undergraduate education began at St. Thomas College, was interrupted by World War II, in which he served in the United States Marine Corps, and was completed at the University of Minnesota. A magna cum laude graduate of Marquette University School of Law, he later served in the Marine Corps in the Korean Conflict. His survivors include his wife of sixty-one years, two daughters and a son.

Diehl Randall Rettig, '94, a member of Rettig, Osborne, Forgette, Kennewick, Washington, died May 10, 2010. Born in 1943, he had earned his undergraduate degree from Seattle University and his law degree from Gonzaga University School of Law. After serving as a law clerk for a federal district judge, he had practiced in Kennewick until his death. A civic activist, he had been named Kennewick Man of the Year in 1995. His survivors include his wife of 34 years, three sons and a daughter.

James Kenneth Robinson, '88, a partner in Cadwallader, Wickersham & Taft, Washington, DC, died August 6, 2010 at age 66 of gastrointestinal cancer. Beginning his education at Grand Rapids Junior College, he was a graduate of Michigan State University and of Wayne State University School of

Law. After a judicial clerkship on the United States Court of Appeals for the Sixth Circuit, in a varied career, he had practiced in Detroit, been appointed United States Attorney for the Eastern District of Michigan at age thirty-four, returned to private practice, been a Professor of Law and the Dean of the Wayne State Law School, served as an Assistant Attorney General in the Criminal Division of the United States Department of Justice, returned to Wayne State to teach and finally returned to Washington to join Cadwallader. He had also been president of the Michigan Bar Association. His survivors include his wife, a son and a daughter.

Raymond Rosenberg, '86, a Fellow Emeritus from Des Moines, Iowa, retired from the Rosenberg Law Firm, died November 13, 2009 at age 87. A graduate of the State University of Iowa and of its School of Law, he served in the Pacific theater in World War II as an officer in the Army Air Corps. His survivors include his wife of 60 years, three sons and two daughters.

James Vincent Ryan, '73, a Fellow Emeritus, retired to Greenwich, Connecticut from the New York City firm Rogers & Wells, died November 12, 2009 at age 82. A graduate of Purdue University and the Fordham University School of Law, he had served briefly in the United States Navy. At the beginning of his career, he had served as a Special United States Attorney General and then as Assistant United States Attorney for the Southern District of New York. A widower, his survivors include a daughter and three sons.

Theodore R. Scott, Jr., '75, a Fellow Emeritus, retired to Deerfield, Illinois from Jones, Day, Reavis & Pogue, Chicago, Illinois, died November 13, 2010 just short of his 77th birthday. A Phi Beta Kappa graduate of the University of Illinois and of its School of Law, he had been a law clerk on the United States Court for the Seventh Circuit. An officer at age 19, navigator of a B-24 bomber in the 15th Army Air Corps, 461st Bomb Group, on his 21st mission his plane was shot down over west Hungary, where he was a prisoner of war for eighty-nine days until he was liberated at the end of the war. A past president of the Seventh Circuit Court of Appeals Bar Association, he was a patent lawyer whose firm had merged into Jones Day. A widower who had remarried, his survivors include his wife, three daughters and a son.

Leon Earl Sheehan, '81, a Fellow Emeritus, member of Moen Sheehan Meyer, Ltd, La Crosse, Wisconsin, died November 8, 2010 at age 86. His undergraduate education was interrupted by service in the United States Army Signal Corps in the South Pacific in World War II. Starting at Loras College, he completed his undergraduate degree at St. Mary's College, Winona, Minnesota, began his legal studies at Loyola University and graduated from the

University of Wisconsin School of Law. He had served on several civic boards and had been president of his local bar and Chair of the Board of Governors of the Wisconsin Bar Association. His survivors include his wife of 60 years and two daughters.

Benjamin Richard Slater, Jr., '77, The Slater Law Firm, Slidell, Louisiana, died January 20, 2011 at age 82. He earned his undergraduate degree from Tulane University and was a graduate with high honors from its School of Law, where he was a member of the law review and the Order of the Coif. He was for many years division counsel of the Southern Railway and was its resident vice-president for the State of Louisiana. His survivors include his wife, a son and three daughters.

Jerold S. Solovy, '82, Chairman Emeritus of Jenner & Block, Chicago, Illinois, died January 19, 2011 at age 80. A graduate with honors and distinction of the University of Michigan, where he was a member of Phi Beta Kappa, and a cum laude graduate of the Harvard Law School, where he was a member of the board of editors of the law review, he was a legendary advocate whose service to the profession, pro bono contributions and civic involvement rivaled his accomplishments as a trial lawyer. His civil trial work involved dozens of high-profile cases, including his representation of the Kennedy family in a major commercial case. He led his firm's commitment to pro bono work, handling hundreds of pro bono cases himself, including taking three criminal cases to the United States Supreme Court. His careful reading of the trial transcript in a death penalty case led to the establishment in *Witherspoon v. Illinois* of a new national standard preventing rejection of potential jurors because of their doubts about the death penalty. He negotiated a major settlement of claims for attorneys' fees in the National Tobacco Litigation, saving the State of Illinois hundreds of millions of dollars. Frequently called on by the courts for his leadership in reform efforts, he chaired the Cook County Special Commission on the Administration of Justice in the wake of the Greylord judicial corruption scandal. The local and national civic organizations to which he lent his leadership are too numerous to list. He was a prolific author and writer who authored two chapters of *Moore's Federal Practice*. The numerous lifetime recognitions he had earned include the American Bar Association Litigation Section's John Minor Wisdom Public Service and Professionalism Award, the American Law Journal's Lifetime Achievement Award, and the American Judicature Society's Herbert Harley Award. His survivors include his wife, three sons and a daughter.

Richard Ross Sugden, Q.C., '92, a Fellow Emeritus, retired in 2004 from Sugden, McFee & Ross, LLP, Vancouver, British Columbia, died January 5, 2009 after a lengthy illness in Irvine, California, where he had moved

after his retirement. Born in 1947, he was a graduate of Simon Fraser University, where he played football for four years. He earned his law degree at the University of British Columbia. He had chaired the College's Province Committee for three years. His survivors include his wife of 38 years, a daughter and a son.

William Tomar, '71, a Fellow Emeritus, retired from Tomar, O'Brien Kaplan, Jacoby & Graziano, Camden, New Jersey, died September 10, 2003 in an assisted living center in Potomac, Maryland at age 86. He had attended Rutgers University and had graduated cum laude from the Rutgers School of Law, which later awarded him its Arthur E. Armitage Distinguished Alumni Award. Admitted to the bar in 1940, he had been a businessman before entering private practice in 1948. He had served on the Board of Governors of the American Trial Lawyers Association, then served as its parliamentarian, and had been an Associate Editor of the *ATLA Law Journal.* A member of a number of local and national boards, he had been a non-governmental delegate to the United Nations. He had been an adjunct professor at the Rutgers Law School and served on the faculty of the National College of Advocacy. In addition to serving on the boards of various civic and charitable organizations, in 1993 he had been a member of an Operation Smile delegation to Vietnam. A widower, his survivors include two sons.

John Corlis Tucker, '78, a Fellow Emeritus, retired in 1985 from Jenner & Block, Chicago, Illinois, to a second career as an adjunct professor and author, died October 9, 2010 in Lanexa, Virginia at age 76 of lung cancer. A graduate of Princeton University and a graduate with honors from the University of Michigan School of Law, he was a founding board member of Princeton 55, which sponsors students and graduates in paid public interest positions. One of the developers of Jenner & Block's white collar crime section, he had defended several high-profile public figures and had been counsel to the defense lawyers in the *Chicago 7* case. His most significant victory was *Elrod V. Burns*, in which the United States Supreme Court struck down Chicago's patronage system. Much of his work was done pro bono. Moving to Virginia to pursue a writing career, his first non-fiction book, *May God Have Mercy*, was a finalist for an Edgar Award and his professional memoir, *Trial and Error: The Education of a Courtroom Lawyer*, received critical acclaim. He had taught trial advocacy as an adjunct professor at the Marshall-Wythe School of Law at the College of William and Mary. His survivors include his wife, three daughters and a son.

Carl Rupert Vendt, '68, a Fellow Emeritus, retired from the Oakland, California firm Ricksen, Hogan and Vendt, died September 17, 1994 at age 84. A graduate of the University

of California at Berkeley, he received his law degree in 1935 from the University's Boalt Hall. [Ed. Note: Sixteen years after his death, we were unfortunately unable to locate a published obituary.]

Otto J. Weber, Jr., '71, a Fellow Emeritus, retired from MehaffyWeber, Beaumont, Texas, died June 5, 2010 a month short of his 90th birthday of complications from Alzheimer's Disease. A 1941 Phi Beta Kappa graduate of the University of Texas, he first began working as an administrative assistant to then Congressman Lyndon B. Johnson. The next year, he was commissioned an officer in the Army Air Corps, serving until the end of World War II. After the war, he earned his law degree from the Yale University School of Law and began his practice with Baker & Botts in Houston, later moving to Beaumont, where he practiced until his retirement in 2000. He had served as president of his local bar and as a director of the State Bar of Texas and the Federation of Insurance Counsel. He was a leader in many civic and charitable organizations. An elder in his church, he and his late wife pursued an active ministry, participating in mission trips to countries in Central and South America, Africa and Eastern Europe. A widower, his survivors include a daughter.

David A. Welts, '79, a sole practitioner from Mount Vernon, Washington, who had begun practice with his father and an uncle, died July 25, 2010 at age 75. A graduate of the University of Washington and of its School of Law, he had served as an officer in the Judge Advocate General's Corps of the United States Army during the early stages of the Vietnam War. He had been President of the Washington State Bar Association and Mount Vernon City Attorney. His survivors include two sons.

William Reese Willis, Jr., '81, a member of Willis & Knight, PLC, Nashville, Tennessee, died July 30, 2010 at age 79 of cancer. A graduate of Middle Tennessee State University and of Vanderbilt University School of Law, where he was a member of the Law Review, he had served as an officer in the United States Army Judge Advocate General's Corps during the Korean Conflict, stationed for two years in Korea. He had been president of his local bar and had served as a Special Assistant to the Attorney General of the United States, as Special Chief Justice of the Tennessee Supreme Court and as Special Circuit Court and Special Criminal Court Judge. A founding member of his local Inn of Court, he had also served in the American Bar Association House of Delegates. He also led many local civic and charitable organizations. His survivors include his wife, four sons and a daughter.

A BEAUTIFUL SCENE BY NEW ORLEANS ARTIST

Henry Casselli

New Orleans watercolorist **Henry Casselli** delighted the Fellows at the Washington meeting with his address and display of his paintings, including this scene entitled, "Where's Papa?"

After service as a combat artist in Vietnam, at the request of NASA, he painted astronauts in the final moments before they boarded their ships to go into space. In the late 1980s, he was commissioned to paint President Reagan's official portrait. Some of his paintings were on dispay at the National Gallery, the venue of the Friday night event.

THE BULLETIN
of the
AMERICAN COLLEGE OF TRIAL LAWYERS
19900 MacArthur Boulevard, Suite 530
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