NUMBER 65

SUMMER 2010

THE BULLETIN

PRESIDENT-ELECT JOSEPH SEES IMPENDING CRISIS

Greg Joseph and wife Barbara

The American judicial system is at a turning point of historical proportions and new College president Greg Joseph pledges to focus on the issues as his highest priority for 2010-2011.

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FROM THE EDITORIAL BOARD

As is our custom, we have attempted to preserve, particularly for those Fellows who were not present, the essence of what a superb group of speakers had to say at the 60th Spring Meeting of the College in Palm Springs, California.

The economy and contentious national issues dominated the program In this issue you will thus find **Andrew Ross Sorkin's** riveting presentation of how he went about researching and writing his best-selling account of the 2008 financial meltdown, *Too Big to Fail.*

The presentation by Sullivan & Cromwell attorney **H. Rodgin Cohen** of his insider's blow-by-blow account of how close we came to a financial Armageddon in that meltdown and his detailed prescription of what we need to do to ensure that experience not be repeated may provide you with a checklist against which to grade the evolving steps we take towards that end.

Law firm consultant **Peter Zeughauser's** reflections on the impact of a changing economy on law firms are worthy of study, even for those who are not in large law firms.

Author **Bryan Burrough's** story of the rise and fall of Marc Dreier, whose large law firm itself turned out to be a massive Ponzi scheme, is a modern morality tale that every lawyer ought to read.

As for contentious national issues, Professor **Stephen A. Saltzberg's** analysis of the issues involved in deciding where, and in what tribunals, those accused of terrorism should be tried is an eloquent statement of one point of view on those issues.

All three of the subjects that Former White House Counsel **Gregory B. Craig**, FACTL, addressed, the impact of the present near stalemate in the confirmation of federal judicial nominees, the process of selecting a Justice of the United States Supreme Court and finally, the issue of closing the detainment center at Guantánamo Bay, are a revealing inside look at the inner workings of a national administration.

On the latter subject, Craig paid tribute to those lawyers who have stepped forward to represent detainees in habeas corpus proceedings. The Fellows of the College who have participated in those representations will be honored at the Fall Meeting in Washington, D.C.

The account of the debate between **David Boies**, FACTL, and **David B. Rivkin, Jr**. of the issues involved in *Perry v. Schwarzenegger,* the case challenging California's Proposition 8, which bans same-sex marriages, may provide you with a program guide as that case, raising one of the more contentious social issues of our time, wends its way through the federal appellate system.

We know Louis D. Brandeis as a legendary Associate Justice of the United States Supreme Court. Professor and historian **Melvin I. Urofsky's** account of Brandeis' thirty-eight years as a practicing lawyer casts a new light on Brandeis and chronicles a pivotal time in the evolution of the legal profession in the United States.

And finally, the inspiring story of **D. J. Gregory's** year-long odyssey as he walked every hole of every PGA tournament in 2008 in spite of his life-long battle with cerebral palsy, may be well worth reading to your children or grandchildren.

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IN THIS ISSUE

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

60TH SPRING MEETING PROGRAM A SUCCESS PALM DESERT, CALIFORNIA

The Desert Springs JW Marriott Resort and Spa at Palm Desert, California was the site for the College's 60th Spring Meeting.

John D. Wilson, Jr., FACTL, Debbi Wilson and Inductee Elizabeth (Liz) Leedom, all of Seattle, Washington, enjoy the Sixties Party

President-elect **Gregory P. Joseph**, New York, New York, had planned outstanding programs for both Friday and Saturday mornings, over which President **Joan A. Lukey**, Boston, Massachusetts, presided.

A Thursday afternoon professional program, entitled *Task Force on Discovery and Civil Justice Symposium: Let the Dialogue Begin*, launched the meeting. The Joint Report of the College's Task Force on Discovery and Civil Justice and the Institute for the Advancement of the American Legal System and their supplementary publications, intended to be used in pilot projects to test the findings and recommendations in the report, have stirred an ongoing national debate. This was the first occasion that the Fellows had to engage in a discussion of the Task Force's recommendations.

President Lukey introduced the moderators and panelists. The moderators were **Paul C. Saunders,** FACTL, New York, New York, and **Ann B. Frick,** FACTL, Denver, Colorado, Task Force Chair and Vice-Chair, respectively. The panelists were Task Force members **William U. Norwood, III**; FACTL, Atlanta, Georgia, **W. Foster Wollen**, FACTL, San Francisco, California, and Judge **Jack Zouhary, Jr.**, JFACTL, Toledo, Ohio. They were joined by **Paula Fisett Sweeney**, FACTL, Dallas, Texas,

Hon. **Sam Sparks**, JFACTL, Marshall, Texas and Hon**. T. John Ward**, JFACTL, Austin, Texas.

President Lukey and her husband, Phil Stevenson greeted the arriving attendees at a reception on Thursday night.

The Friday morning program commenced with an invocation by Regent **Robert A. Goodin**, San Francisco, California.

In the College's effort to present various points of view, the legal issues surrounding the detainees at Guantanamo Bay, Cuba, have been the subject of a number of programs at its national meetings. The first speaker, George Washington University Law School Professor **Stephen A. Saltzburg**, Washington, District of Columbia, continued that tradition. He delivered a provocative presentation entitled *Where To Try Terrorists*, exploring the pros and cons of using military commissions, military courts martial or Article III courts for this task.

The next speaker, author and *New York Times* reporter **Andrew Ross Sorkin**, New York, New York, author of the best-selling book *Too Big To Fail*, delivered a riveting inside look at some of the major players in the financial crisis of 2008 and recounted how he had gone about researching and writing his highly acclaimed account of that complicated saga.

Sorkin was followed by banking and finance attorney **H. Rodgin Cohen**, New York, New York, Chairman of Sullivan & Cromwell LLP, who had been in the middle of many of the critical moments in the 2008 financial meltdown. In remarks entitled *The Financial Crisis of 2008: "Never Again,"* Cohen both explained how the crisis had developed and gave a careful point-by-point outline of the remedies he sees as fundamental to protecting the financial system against a recurrence.

The Congressional legislation that has since been enacted is on its face a work in progress, with most of the details left to be filled in by administrative regulation. Cohen's outline, which is covered in detail in this issue, will serve as a convenient checklist for those who wish to follow how well we are addressing systemic problems in our financial system.

Cohen was followed by author **Bryan Burrough**, New York, New York, perhaps best known for his epic work, *Barbarians at the Gate: The Fall of RJR Nabisco*, published when he was twenty-nine years old. Burrough presented an inside look at the rise and fall of New York attorney Marc Dreier, whose entire law firm was exposed as one giant Ponzi scheme. Eclipsed by the subsequent exposure of the misdeeds of Bernie Madoff and Allen Stanford, Dreier's story, which has thus faded from the public view, is a modern morality tale well worth pondering and passing on to the next generation of lawyers.

The Friday morning program ended with a presentation by law firm consultant **Peter Zeughauser**, Newport Beach, California, who gave his analysis of the impact of the financial meltdown of 2008 and its aftermath on the legal profession.

The Friday evening entertainment, labeled *Celebrate the Sixties: Camelot to Haight-Ashbury. Began* with a sixties-era video clip of an Ed Sullivan introduction, followed by three Supremes lookalikes and others who turned out a string of nostalgic music, including such favorites as *You Keep Me Hanging On, Stop in the Name of Love* and *My Girl.* At one point in the evening, the announcer made a brief "public service" announcement, "Committee meetings start at seven in the morning," a reminder that had little impact on the remaining crowd of dancers, many of whom were actually old enough to remember the Sixties.

The first speaker on Saturday morning was former White House Counsel **Gregory B. Craig,** FACTL, Washington, District of Columbia, who shared his reflections on the log-jam in federal judicial confirmations, the considerations in selecting a nominee to the United States Supreme Court and the issues surrounding the proposed

closing of the detainment facility at Guantanamo Bay.

Professor and author **Melvin I. Urofsky**, Gaithersburg, Maryland, presented a look at the less familiar, but nevertheless illuminating, history of iconic Supreme Court Justice Louis D. Brandeis, during the thirty-eight years he was a trial lawyer before his confirmation to the bench.

In keeping with its tradition of exposing the Fellows to the pros and cons of current national legal issues, **David Boies,** FACTL, New York, New York, and **David B. Rivkin, Jr.**, Washington, District of Columbia, engaged in a debate, moderated by Regent **Paul S. Meyer,** Costa Mesa, California, dealing with same-sex marriage and entitled *The Constitution and Defining Marriage in the 21st Century.*

The final presentation of the morning came from **D.J. Gregory**, born with cerebral palsy, whose book, entitled *Walking With Friends: An Inspirational Year on the PGA Tour*, chronicles the year in which he walked every hole of every round of every PGA tournament. The showing of the made-for-television video about Gregory's venture, which has been ESPN's most often repeated program and its most often requested video, was followed by Gregory's own inspiring remarks to the audience.

Saturday was also the occasion for a luncheon for inductees, their spouses and guests to continue their introduction to the College, an introduction that culminated in their induction at a black-tie dinner, at which Past President **E. Osborne (Ozzie) Ayscue, Jr.,** Charlotte, North Carolina, delivered the now sixty-year-old induction charge. Inductee and new Fellow **Corinne E. Rutledge**, Cheyenne, Wyoming, who is also the wife of a Fellow, gave the response on behalf of the new inductees.

The meeting ended with both a sing-along and dancing that followed the induction banquet.

As is our custom, the presentations of the program speakers are preserved in separate articles in this issue, so that those who could not attend the meeting will have the benefit of the substance of the presentations.

As we begin this meeting of our great College, we pray for wisdom and humility as we pursue our critical mission, which, at its core, is to nurture, to protect and to extend the Rule of Law, both in our countries and around the world, because it is the Rule of Law which makes possible the institutions which guarantee the freedom, security, and prosperity of our people; and because it is the Rule of Law which offers the best hope, ultimately, for peace and the only meaningful hope for justice.

We also pray this morning for the safety of the brave men and women of our two countries who serve and defend us at home and around the world at great personal sacrifice to themselves and their families.

And, finally, we pray for relief from the suffering caused by two great natural disasters, for the people of Haiti and the people of Chile. Amen.

***Regent Robert A. Goodin**, San Francisco,*
Invocation at the opening session

ROSTER UPDATE

Preparations for the 2011 edition of the ACTL Roster are underway. Address change notices were sent to all Fellows mid July. Please mail any changes to the National Office so that we can update your listing. If you have changed firms or moved, please be sure to include your new e-mail address, telephone and fax numbers. As you verify the accuracy of your current Roster (Blue Book) listing, please also check the other listings in your state or province and notify us if we are currently listing deceased Fellows whose deaths have not been previously reported to us.

FELLOWS TO THE BENCH

Christine Byrd, Judge**,** Los Angeles County Superior Court, Los Angeles, California.

Sheila Finnegan, United States Magistrate Judge for the Northern District of Illinois, Chicago, Illinois.

Ann B. Frick, Judge, Denver District Court, Denver, Colorado.

David C. Harris, Q.C., Justice, Supreme Court of British Columbia, Vancouver, British Columbia.

Brian A. Jackson, United States District Judge for the Middle District of Louisiana, Baton Rouge, Louisiana.

Terrence J. Lavin, Justice, Illinois Appellate Court, First District, Chicago, Illinois.

Marc Marmaro, Judge, Los Angeles County Superior Court, Los Angeles, California.

Joseph M. Quirk, Judge, Sixth Judicial Circuit of Maryland, Rockville, Maryland.

David Stratas, Justice, Federal Court of Appeal, Ottawa, Ontario.

Marc T. Treadwell, United States Judge for the Middle District of Georgia, Macon, Georgia.

Matt J. Whitworth, United States Magistrate Judge for the Middle District of Missouri, Jefferson City, Missouri.

Continued from cover

"Judges are being attacked in the press. They are being paid shabbily. The system of adjudication by trial is withering. The pendulum has swung from an era forty years ago of wide-open discovery, liberal construction of pleadings and a more trial-centered system in federal court, to quite the opposite," says Joseph, one of the nation's leading authorities on federal rule-making. "Now we have a hostility toward trials, both client-fostered and institutional, that manifests itself in strict pleading rules, strict expert evidentiary rules, heavy reliance on dispositive motion practice. It is a series of hurdles that are created in order to get a case to trial."

Joseph has written about the institutional problem in federal court in a 2008 article entitled, *Federal Litigation-Where Did It Go Off Track?* He opened with, "Twenty-five years ago, it cost parties roughly the same to litigate in state and federal court. Plaintiffs chose federal court sometimes for expansive discovery or to get a preferred judge, even though state court was an available alternative and additur impermissible in federal court. Today, plaintiffs with non-federal causes of action flee federal courts, and those with federal claims scour the books for state law analogues."

Today the burden is particularly onerous on plaintiffs, Joseph says. "I'm not touting a plaintiff's position, but it makes it much more difficult and expensive for a plaintiff in a civil case to get it to trial."

Joseph has a daunting agenda ahead for him during his year as President.

"Judicial independence, judicial compensation and the vanishing trial are of the most importance to the Fellows professionally and to the College institutionally. We are a college of trial lawyers, not a college of dispute resolution lawyers."

"The biggest issue facing the College is the vanishing trial. It's not even the vanishing jury trial; it's the vanishing trial."

The College's role as a leader in efforts to improve the judicial system is becoming more important every year, Joseph says.

"Judicial independence has come more and more under attack. I recently visited a meeting of Fellows in a state where members of the state supreme court are the subject of a heavy-duty political campaign in a retention election. They are being attacked for their resolution of a hot-button issue they did not seek to decide. We see political attacks on judges with increasing frequency, regardless of the election cycle, with judges unable to respond on their own behalf. I really think it is up to Fellows of the College. We have the state committee structure in place, with the guidance of the Executive Committee and the Board of Regents, to be speaking out on behalf of judges who cannot speak for themselves."

Speaking out on judicial compensation will also be high on his agenda during the coming year, Joseph said.

"It has now deteriorated to the point that an experienced paralegal in a big firm in a major city can make more than a federal judicial officer, and that's a disgrace. I appreciate that the College had a very concerted and well coordinated effort when David Beck was president to try and move things along in Congress. Bob Byman and others put together an excellent paper analyzing the crisis in judicial pay that was taken to Congress by a member of the Supreme Court, but it fell on deaf ears. Congress ultimately voted itself a pay raise and, for the first time, did not include a pay raise for federal judiciary, so that congressional officials now make more than federal judges. It really is an untenable situation and it's something we have to speak out on."

Joseph said he realizes that change is unlikely during the current budgetary situation.

"I don't believe this is going to be a political action item. The College is not well-suited for

political action, but we have to keep speaking out on this issue because to keep quiet is to simply acquiesce."

The College has a unique role among legal organizations because it is apolitical, Joseph says. "The College is never going to be identified as liberal or conservative, as Republican or Democrat, as plaintiff-oriented or defense-oriented. People do not join the College to advance a political agenda and the College has no political agenda to advance, so the College should speak carefully because when it speaks it is listened to."

COLLEGE IS IN EXCELLENT SHAPE

"The College is in extraordinarily good health right now," says Joseph, who became a Fellow in 1993. "We have not lost Fellows because of the economy." The president faces a daunting travel schedule each year, but Joseph is looking forward to it. "We want the best trial lawyers and we need to have as platform for people to demonstrate that they are among the best."

Having grown up in Minneapolis, Joseph always wanted to be a lawyer, although no one in his family was in the profession. "I liked the debate, the intellectual combat," he said. Watching television shows like Perry Mason convinced him, "It looked like being a lawyer was a lot of fun and it is quite a lot of fun. So it was actually quite realistic."

GREGORY P. JOSEPH

EDUCATION

University of Minnesota, B.A. summa cum laude, 1972
University of Minnesota, J.D. cum laude, 1975

EXPERIENCE

Beginning his practice with a small firm in Minneapolis, he tried 30 cases in three years before coming to New York to Fried, Frank, Harris, Shriver & Jacobson, where he subsequently chaired its litigation department. He formed his own firm, Gregory P. Joseph Law Offices LLC, in 2001. He is widely regarded as one of the top commercial trial lawyers in the United States.

Inducted in the American College of Trial Lawyers in 1993, Joseph served as chair of the Downstate New York and Federal Civil Procedure Committees, and the Task Force on the Vanishing Trial.

OTHER MEMBERSHIPS AND AWARDS

A former chair of the Litigation Section of the American Bar Association, he served for six years on the Advisory Committee on the Federal Rules of Evidence. He was an Assistant U.S. Special Prosecutor in the early 1980s. He is the author of several books, including *Modern Visual Evidence; Sanctions: The Federal Law of Litigation Abuse*, and *Civil RICO: A Definitive Guide*, and over one hundred articles on trial- and evidence-related subjects. His books and articles have been cited in over 200 judicial opinions. He is the Secretary of the Supreme Court Historical Society and a member of the Board of Editors of Moore's Federal Practice.

After undergraduate and law school at the University of Minnesota in 1975, he joined a small firm in Minneapolis. But after winning a million-dollar verdict in 1978, he decided to move to New York, where he joined Fried, Frank, Harris, Shriver & Jacobson and quickly found a mentor in the person of Leon Silverman, one of the nation's top trial lawyers and a past president of the American College of Trial Lawyers.

"I learned quickly that the College was the kind of organization that every trial lawyer aspires to and I was alerted early on that one can't seek to become a member; one doesn't lobby for membership; that one earns membership without any action of one's own, other than litigating, trying cases."

When he was inducted in 1993, he was impressed with the caliber of the Fellows and the collegiality. "Everybody was very welcoming," he said. "I had been head of the litigation section of the ABA (60,000 section members), but you would walk into a group of a thousand people, not know anybody and have to work hard to earn a welcome. It might take many meetings before you make friends, but when you walk into a group of a thousand people at the College as an inductee everybody is reaching out to you, to talk to you, to welcome you, to tell you about the College. It's completely unique in my experience."

By 1982, Joseph had made partner at Fried Frank in New York and later chaired its litigation department. Along the way, Joseph built a reputation as an expert in securities class actions, complex commercial litigation and RICO cases. He also lectured and wrote papers and books including *Modern Visual Evidence* and *Sanctions: The Federal Law of Litigation Abuse*. He also found time to serve as an assistant special prosecutor in the investigation of the U.S. Secretary of Labor.

Joseph left Fried Frank in 2001 to launch his own firm and quickly built a solid list of high- profile clients, such as Citigroup in its 2008 attempt to merge with Wachovia.

Away from the office, Joseph enjoys jogging, Pilates and reading. He and Barbara, his wife of more than thirty years, have a weekend house in Connecticut and have been known to ship a box of books to their favorite vacation spot in Hawaii when they are able to get away.

FELLOW IN PRINT

Carol S.Vance of Houston, Texas has published his memoir entitled *Boomtown D.A.*, chronicling his years as prosecutor and chairman of the Texas Prison Board. It is available through Whitecaps Media at whitecapsmedia.com.

CENTENARIAN FELLOW, STILL ACTIVE, HONORED

S. Hazard Gillespie

S. Hazard Gillespie, among the College's oldest living Fellows, has added another high honor to his long list.

On January 30, Gillespie received the New York State Bar Association's highest honor, its Gold Medal, joining a distinguished group, which includes Frederick "Fritz" A.O. Schwarz, Jr., senior counsel at Cravath, Swaine & Moore LLP, Hon. Sandra Day O'Connor, retired U.S. Supreme Court associate justice; and Hon. Judith S. Kaye, retired chief judge of the State of New York.

Gillespie, who was 100 years old on July 12, 2010, was inducted in 1956. He is now senior counsel to Davis Polk & Wardell and continues to go to the office every day devoting most of his time to pro bono work.

"I was thrilled to be nominated to join the distinguished group of trial lawyers in 1956, and I have been in awe of the entire experience and continued membership," he said.

A graduate of Yale University, Gillespie received his LL.B. from Yale Law School in 1936 and was admitted to practice in New York in 1937. He served in the Army Air Force during WWII. He was elected president of the New York State Bar in 1958-59 and served as U.S. Attorney for the Southern District of New York from 1959 to 1961.

(The College office has identified fifteen Fellows whose ages range from 98 to 102. We would like to hear from — or about — them for future issues.)

WHERE TO TRY TERRORISTS

"The Obama administration . . . is struggling with a question that has been debated since former President Bush, shortly after the September 11th, 2001 attacks on the World Trade Center, signed the November 13 military order announcing, among other things, that certain noncitizens would be subject to detention and trial by military authority. The question for the Obama administration is where to try the accused mastermind of the September 11th attacks and other terrorists– in civilian courts, [in courts-martial] or in military commissions." Speaker introduction by Fellow **Gregory K. Wells**, of Rockville, Maryland.

Stephen A. Saltzburg

In keeping with its established policy of trying to hear all sides of a controversy of national proportions, the Spring Meeting in Palm Desert heard an address by **Professor Stephen A. Saltzburg**, a prolific author who has been a leading voice in the debate on the issue of where the United States should try alleged terrorists and a strong proponent of using either civilian courts or courts-martial for that purpose.

The Wallace and Beverley Woodbury University Professor of Law at George Washington University Law School, Saltzburg is a 1970 graduate of the University of Pennsylvania Law School. He served as a law clerk for a Judge of the United States District Court for the Northern District of California and for Associate Supreme Court Justice Thurgood Marshall.

He served as Associate Independent Counsel in connection with the Iran-Contra affair and as Deputy Assistant Attorney General in the Criminal Division of the Department of Justice. A former chair of the American Bar Association's Criminal Justice Section and its Commission on Effective Criminal Sanctions, he has also served as a member of the ABA Task Force on Terrorism

and the Law and its Task Force on Enemy Combatants.

Saltzburg began by noting that his appearance could not be more timely because it had been reported that very morning that the Administration was about to reverse itself and try Sheikh Mohammed and the other defendants accused of masterminding the 9/11 attacks in military commissions.

To put his presentation in perspective, he described his own first experience in dealing with terrorism: he was on duty at the Department of Justice the night a terrorist act sent PanAm Flight 103 crashing down in Lockerbie, Scotland with a loss of 270 lives. "Since then," he continued, "we in the United States, unfortunately, have had to grapple with it [terrorism]. We have new machinery and new mechanisms and all the same issues that we have had to face over the years and some new ones. The new issue since the horrible attacks on 9/11 is what to do with some of the people that we have apprehended."

THE OPTIONS FOR PROSECUTION

"There are," he continued, "three options, at least if you are going to prosecute people. . . . [Y]ou only prosecute people in the United States if they commit crimes; let us be clear about that. We can lock people up . . . and keep them for a long time, maybe indefinitely, as a kind of preventive detention. We keep people locked up to protect them from themselves and to protect communities in a number of different circumstances. But if we are going to prosecute them, we have to say they committed crimes."

"We have three kinds of tribunals that can do that: We have *Article III*, the regular federal district courts. We have *courts-martial*, where we prosecute military personnel who have violated the Code of Military Justice and sometimes the Law of War, and we have *military commissions*, which actually have a pedigree that goes back to even before the Revolutionary War."

"The question for us as a country is, 'What is the right tribunal for certain defendants?'"

ART. III COURTS AND COURTS-MARTIAL COMPARED

Saltzburg, who was a co-founder of the National Institute of Military Justice in 1991 and who has been its general counsel ever since, proceeded to outline the differences between military courts-martial and civilian courts. The greatest difference is that there is no grand jury in military courts. Instead, there is an investigatory proceeding, called an Article 32 proceeding, which, he asserted, is a better, fairer proceeding than a grand jury.

The other major difference is the way in which jurors are picked. In military courts the jurors, who are called "members," are picked by the commanding officer who convenes the prosecution. There are, he conceded, questions about whether that system is as fair as the random selection system that we use to assemble a jury in Article III courts.

The military rules of evidence are virtually identical to the Federal Rules of Evidence. The jurors in court-martial serve a function that is basically similar to that of jurors in an Article III court. The rules of confrontation are identical. Defense counsel and prosecutors are as well trained as are those in civilian courts.

Thus, he concluded, the choice between an Article III tribunal and a court-martial is really not a major one in terms of what kind of procedure is going to be employed. The question actually boils down to whether the military or a civilian authority is going to prosecute.

MILITARY COMMISSIONS CONTRASTED

"Military commissions," he continued, "are quite a bit different." Lumping together Article III courts and courts-martial as one alternative and military commissions as the other, he asserted, "There are three principal differences between military commissions and the other tribunals. They are: *One*, the rules of evidence do not apply in military commissions. The rules of evidence basically get tossed out, and military commissions can hear any evidence that a military judge believes is relevant. *Two*, . . .there is no right of confrontation, so that hearsay evidence can be used

that would never be admitted in a federal district court or a court-martial. . . . [T]hat is a big deal in terms of American justice, because the Supreme Court has recently held the Confrontation Clause of the 6th Amendment has real bite because testimonial evidence, which is all that kind of evidence that prosecutors gather with the intent to use it at trial, has to be cross-examined in an Article III tribunal or a court-martial, but not in a military commission."

"And then *[third]*, military commissions can receive a kind of evidence that no other court in America can receive: coerced confessions. As long as they are not tortured, simply coerced, they are admissible if the military judge finds them to be reliable enough. So you have this unique combination of advantages for the prosecution: . . . you have hearsay evidence that cannot be cross-examined from declarants who are either unavailable or located far away, and you have statements that are coerced from the people being tried, and maybe even from co-defendants, that are admissible, [statements] that would not be admissible in any other tribunal."

ARGUMENTS FOR MILITARY COMMISSIONS ADDRESSED

"The question is, 'Are military commissions fair? Are they fair enough? Are they preferable for some reason?'"

"The answer to these questions is not an easy one, and reasonable people can certainly differ on them, but I just thought I would share with you a few things . . . concerning the arguments that are made in favor of military commissions, to debunk most of them and to point out why none of them actually makes a strong case for the use of commissions over either Article III trials, or court-martials."

Judges at Risk

"First, the notion is that the judge who presides over a trial, an Article III trial, will be at risk for the rest of his or her life because the judge will be identified. People cite as an example the judge who presided over the first World Trade Center bombing in New York, who still has a marshal running around to protect him. Well, it is true that judges who handle unpopular cases may be at risk, and I do not want to diminish that for a moment, but it does go with the territory. It is part of the Rule of Law; it is part of what this country has seen for many years."

"When Judge Robert Merhige desegregated the schools in Richmond, he had threats on his life daily. People poisoned his dog, . . . and he had marshals living with him for years. But he presided because it was the right thing to do. We have judges who deal with the most contentious issues that this society faces, . . . which drive the population to political extremes, and judges render their decisions and they take some risks."

"But, more importantly, military judges, whether they're in commissions or not, get identified. There is no reason to believe that a judge who presides in a commission, if there is going to be risk, is less immune from risk. It is true that a military judge, until he or she retires, is probably going to be in somewhat more secure places than the average Article III judge, but it does not mean they are not at risk. Maybe more important . . . groups like Al Qaeda, terrorist groups, do not necessarily retaliate against an individual judge. They can retaliate against any Article III judge in order to show their displeasure with what the United States is doing in terms of apprehending, prosecuting, convicting and sometimes executing the people who come from their midst. The World Trade Center, . . . the Pentagon . . . they were not attacked because of retaliation against something they particularly did. They were symbols, and, unfortunately, every federal judge is a symbol."

Jurors at Risk

"What about juries? The idea is that jurors will be safer and feel more secure in a military commission. We know and have great familiarity now with the use of anonymous jurors. It is very possible to have jurors who are never filmed, whose names are never used, and those jurors can feel as secure in their anonymity as any juror who sits or any member who sits on a commission."

Media Circus

"It is said that trials will become a circus if they're held in Article III courts and we ought not to let that happen. . . . [I]f there is

anything resembling a circus, it is the uncertainty that we see every day in Guantanamo. Just read the reports of those who go down. Here we are, nine years after the attacks of 9/11, and two people have been tried, . . . one, the driver for Osama Bin Laden, and the other, I cannot even remember what he supposedly did. Nobody has been tried for 9/11. The only person who even came close to being tried for 9/11 was Zacarias Moussaoui, *who was tried in an Article III court*, convicted, and sentenced to life imprisonment without parole, where he belongs. If anyone wants to turn a tribunal into a circus, they will have the opportunity to do that."

A Forum for Political Statements

"Similarly, it is said that terrorists will use a trial as a forum to make political statements. Sure they will; they are going to do it in Guantanamo. They are going to do it in New York. They are going to do it wherever you have a trial. But it is their right, by the way, . . to avail themselves of whatever procedure is available to make their own statements. And if they are found guilty, they will then pay the price."

But good judges, as Judge Brinkema was in the Moussaoui case, basically can control how much of a forum they have and end up, as Judge Brinkema did, having the last word when she told Zacarias Moussaoui that for all his bluster, she was going to tell him that he was going to see daylight for the last time as they locked him up in a maximum security prison and he would spend the rest of his life looking at those walls and wondering about what it was that he did and how righteous he felt as he faced a life in prison."

DO TERRORISTS DESERVE DUE PROCESS?

"It is said that the terrorists do not deserve the protections that come with an Article III trial. . . . When we try people for crimes, when we put them in risk of their life, why do they not deserve the procedures that we say are fundamental in the United States? . . . Common Article 3 of the Geneva Conventions promises everyone, whether they are a soldier or a civilian, if they are charged with violating the law of war, they are promised that they are going to be tried in a 'regularly constituted tribunal.'. . . [I]t is really hard to say that a military commission . . . where the rules are written by the President and the Department of Defense and those rules differ from every other tribunal throughout the United States, is a 'regularly constituted tribunal.'"

THINGS THAT REALLY MATTER

The Cost of Security

". . . . What about the cost of security? And what about security itself? I think it is and was a mistake to think about trying terrorists in Manhattan. . . . [I]t is not just because we are worried about Al Qaeda attacking. When you have any highly publicized trial, especially the trial of the century now, you have a risk of the crazies coming out, the loonies who come out, because they can see an opportunity to make history with an act of violence. And so, if the terrorists had been tried in Manhattan, the security risks were real. The costs . . . were high. And there really is reason to be concerned about those things."

The Choices of Venue

" . . . . You would come to believe, if you listen to the . . . commentators, that the choice is Manhattan or Guantánamo. That is not true. Years ago, Gene Fidell, . . . the president of the National Institute of Military Justice, and I wrote a little piece which said you can conduct an Article III trial anywhere in the United States. You can conduct an Article III trial on a military base, where there is security and the security is awfully good. You can provide jurors, Article III jurors, civilian jurors, with the security of a military base. There is no reason the choice has to be New York City or Guantánamo. There are plenty of places. There are Fort Bragg and Fort Ord and all the places around the country where you could constitute an Article III tribunal, and you could actually play by the rules if you wanted to. The costs would be no higher than they would be to conduct a court-martial in the same vicinity."

WHY WE ARE HAVING THIS DEBATE

Saltzburg then addressed in strong terms his view of the reason

we are even having this debate: "The real reason . . . in my view, that we have this debate [about which courts to use] is one that the Attorney General, for whom I have great respect, Eric Holder, was candid about when he testified before Congress. . . . [H]is testimony, in some ways was, for me, the most disappointing bit of testimony that I have heard in many, many years. . . . Here is what he said when pressed by senators about trying people in a civilian court, 'I'm confident we have the evidence.' And he said, 'Losing is not an option.' . . ."

"What does that mean, losing is not an option? That is what trials are about. I do not know, and you do not know, whether Sheikh Mohammed actually organized 9/11 and whether Ramses Bin Osaid was guilty as charged or whether the other three defendants actually were key players or whether they, in fact, are wannabes, like Zacarias Moussaoui. Nobody knows. We have a presumption of innocence in this country. Then when the President of the United States said the same thing: 'They will be convicted. They will be executed.' I said, 'Wait a minute. That is not what the President's supposed to do.' Past Presidents have done it, and the organized bar stood up and said, 'You are trying to prejudice the people.'. . ."

"The Rule of Law is what you protect; the Rule of Law is what we stand for. In my judgment, we do not really support the Rule of Law when we have an Attorney General who kowtows to the Congress and tells them, 'Don't worry. Wherever we're going to try these people, we guarantee you victory.' That is not justice. That is not America. That is not what we know. What we guarantee is we are going to have a fair trial and convince the American people that, in fact, if people are convicted, it is because they did what they were charged with."

THE PLACE FOR MILITARY COMMISSIONS

"There is a place . . . for military commissions. The American Bar Association, in February 2002, shortly after the 9/11 attacks, said, 'We support the use of military commissions where appropriate. We recommend, however, that the rules for courts-martial apply in military commissions, except for Article 32 proceedings, the complex investigation procedure.' And the reason was that Article III courts, courts-martial, guarantee fundamental liberties. They are regularly constituted tribunals. We have demonstrated that we can convict Americans who commit atrocities like Mei Lai in a court-martial. We can convict terrorists like Zacarias Moussaoui in an Article III proceeding."

"We ought to be prosecuting people like those who attacked the *USS Cole* in Yemen . . . in *military commissions*. Military commissions have a great place when people commit war crimes abroad. We capture them abroad and we want to prosecute them immediately. The [military commission] . . . is a perfect tribunal to do it. If we are going to do it, though, even in tribunals, we ought to play by the American rules. . . . It is not because anybody believes that the people who hate us won't hate us if we use the typical trial procedures. They are going to continue to hate us. We do not try to appeal to them."

WHY IT MATTERS

"It is the people who admire us, it is the people who follow us, it is the people who look to the United States for leadership that we generally try to appeal to. And when you look around the world . . . and you ask, 'What it is they expect from the United States?' They expect the United States to use the tribunals that made the United States the admiration of the world. Anybody who thinks that we cannot try a terrorist in an Article III court or in a military court-martial is mistaken. If we choose not to do it because we want a guaranteed conviction, we are making a bad choice. If we choose to use military commissions in the right places, we are making a good choice. . . . It is not right for the President, it is not right for the Attorney General, and it is not right for the Congress to basically, all as a chorus, say, 'These people will be convicted; losing is not an option; they must be convicted.' They must be tried; they must be tried fairly. And if they are convicted, whatever punishment is imposed, . . . that punishment will be a punishment that is given more respect if the rules that governed the proceeding are fair."

"The American people are an amazingly just people. Zacarias Moussaoui, who essentially wanted to die, was given a life

sentence by a jury who did not think he deserved death. They did not want to make a martyr out of a guy who was mostly dangerous and partly crazy. Instead, they put him where he belongs, behind bars, looking at a wall for the rest of his life. Whether it is the death penalty, whether it is life imprisonment or whether it is acquittal, . . . as long as it is done with justice, the American people can be proud."

"When you go out of here today and you ask yourself where they should be tried, just make sure if you say it is a military commission, you are doing it for a reason that makes sense. So far, none of the reasons that I have been given make a whole lot of sense to me."

bon mot

"I have been dealing with terrorism issues for twenty-two years . . . . I can take you back to December 21, 1988. . . . The Attorney General, the Deputy Attorney General and all the Assistant Attorney Generals were at the White House Christmas party, and I was the highest ranking Justice Department official present at the Department because I was not invited to the White House Christmas party. . . ."

"The Command Center called, and I answered the phone, and they said, 'We've just gotten a report that PanAm 103 has gone off the radar over Scotland. What do you want to do?'"

"In 1988, the entire mechanism in the Department of Justice to deal with terrorism was located in a section of the Criminal Division . . . called the General Litigation Section, and it had four to six people who were . . . supposed to be the experts on terrorism. So I called in the head of the Terrorism Section and I said, 'I've just gotten this report. I've already made up my mind what I'm going to do. I just want to know, what do you think I should do?'"

"And he said, 'I think we should go home. . . . We have no information that anything wrong has happened. . . . It's four days before Christmas. We should go home.'"

"And I said, 'Thanks.' He left and I called John Martin, who was the head of the Internal Security Section in the Criminal Division and . . . I told him what happened and I said, 'What do you think we should do? . . . 'The other guy thinks we should go home.'"

"And he said, 'I think we should treat it as a terrorist attack until we know otherwise.' And I said, 'Well, I'm glad you said that 'cause that's what I was going to do. I just wanted to have somebody who's a career person tell me that this wasn't nuts.'"

"So I called the Command Center and I said, 'You're to treat it as a terrorist incident until you know otherwise. And if anybody else challenges that, you just tell them it's my decision. I'll take responsibility for it, because I know one thing: tomorrow morning when we get up, nobody is going to see a headline saying 'PanAm 103 Goes Down, Justice Goes Home'"

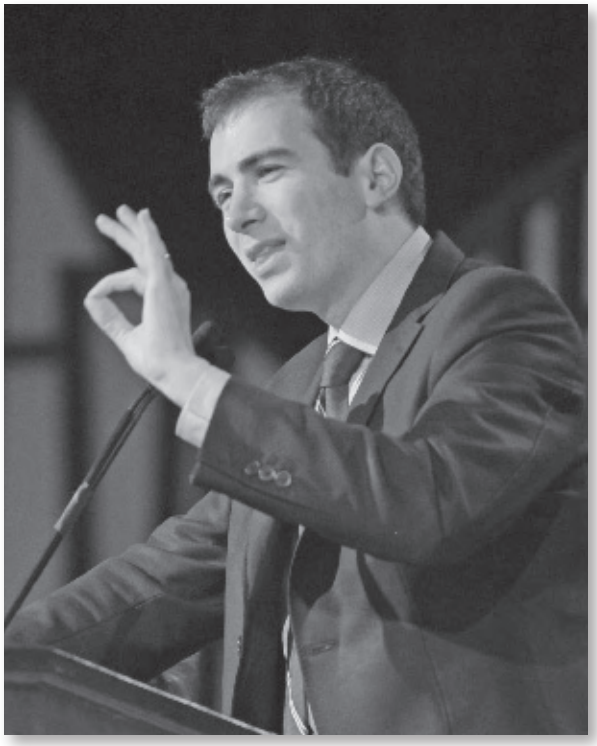
"And that was my first experience dealing with terrorism . . . ."

Professor Stephen A. Saltzburg

bon mot

TOO BIG TO FAIL—WHAT HAPPENED

"You know, . . . now . . . [when] we look at the bail-out, . . . we have a lot of questions about whether it worked, whether it was executed properly and, frankly, whether it was needed at all. . . [I]f you appreciated how bad it really was, I think that the world really might have fallen off of its axis. . . . [A]s unsatisfying as it is to say, . . . I think it was more than required; it was necessary."



Andrew Ross Sorkin

Andrew Ross Sorkin, chief mergers and acquisitions reporter for *The New York Times* and author of the widely acclaimed account of the financial crisis of September 2008, *Too Big To Fail: The Inside Story of How Wall Street and Washington Fought to Save the Financial System—And Themselves*, gave the attendees at the College's Spring meeting an inside look at how the crisis came about and how close we may have come to a financial Armageddon.

A reporter who began writing for the *Times* while still in high school, he is the author or co-author of, or contributor to, over 2,000 articles for the *Times*, 120 of them published on the front page, and editor of the *Times*' online daily financial report, *Dealbook*. He has won the Gerald Loeb Award for Excellence in Financial Reporting, the Society of American Business Writers and Editors Award for Breaking News and the World Economic Forum's recognition as a Young Global Leader.

College Secretary **Chilton Davis Varner**, Atlanta, Georgia, laid the scene for Sorkin's presentation:

"Cast back with me, if you will, to March of 2008. A faint tremor of anxiety, little more than that for most of us who lived outside of Manhattan, emerged as Bear Stearns was sold at a fire sale for $2.00 a share, later raised to $10, allegedly because of an error in the documents by the legal counsel. That deal was engineered by then Fed Chief Timothy Geithner and Jamie Dimon of J P Morgan Chase. . . .

"Fast forward to the autumn of 2008. With the failure of Lehman Brothers, the tremor accelerated into a shudder, and then another shudder with AIG, and another with Fannie Mae and Freddy Mac, and don't forget Citi, Merrill Lynch and Wachovia. And then, as Congress fiddled while New York burned, we had the stomach-dropping collapse of the Dow for 777 points in a single morning. Anxiety had quickly become a deeply embedded thread in all our lives, and when you read Mr. Sorkin's book, you'll learn that we didn't know the half of it. This crisis was different. . . ."

The Economist, termed Sorkin's account of this crisis: "Too good to put down. It is the story of the actors in the most extraordinary financial spectacle in 80 years, and it is told brilliantly. Meticulously researched, drawing on interviews with more than 200 of those who participated. A compelling reconstruction of the drama."

And *Bloomberg* said, "Sorkin has pulled off a rare feat. He has turned more than 500 hours of interviews and documentary evidence, ranging from e-mails to call logs, into an engrossing fly-on-the-wall account of one of the most tumultuous years in U.S. history. What sets this account apart is its smooth synthesis of telling details, conversations and multiple story lines into a seamless narrative, written in lean, unembroidered sentences. It reads like a thriller without the hype."

Rather than trying to summarize his 539-page work, Sorkin, by using anecdotes, gave his audience a taste of both how this financial saga unfolded and how he went about gathering material to tell the story. His account, slightly edited, follows.

THE ORIGIN OF A BOOK

[T]his book, in fact, started on September 15th, 2008 at 2:30 a.m. in the morning. . . . [I]t was about forty-five minutes after Lehman Brothers had filed for bankruptcy, about five hours after Merrill Lynch had just sold itself to Bank of America, and about thirty-two hours before we, the taxpayers, ponied up $85,000,000,000 to give over to AIG. I had just completed the front-page story for the paper that was going to be in Monday's paper. . . .

I had gotten home, and I didn't have anybody to talk to, and I was kind of freaked out, because I couldn't believe that this had happened. I had been covering mergers and acquisitions for years, but I had never lived through a Sunday like this. So, I wanted to talk to the only person I could; I woke up my wife, who, of course, was none too pleased, . . . and I said to her, "You're not going to believe it." I went through all of the machinations of what had happened over the weekend. I looked at her and I said, "It's so dramatic . . . it's like a movie."

And she's sort of not really paying attention, and she just looks at me, and . . . before rolling over, she goes, "No, Andrew, it's like a book." And that's sort of how this project began. . . .

HOW BAD IT REALLY WAS

What I thought I would do is try to spend a little bit of time trying to explain how we got here and, frankly, how bad it really was. . . . [N]ow . . . [when] we look at the bail-out, I think we have a lot of questions about whether it worked, whether it was

executed properly and, frankly, whether it was needed at all.

I thought I would start by telling you a little story that happened, actually, *after* the famous Lehman weekend. We have all spent a lot of time focused on the panic of that week where we took over Lehman and Merrill got sold and AIG gets bailed out, but, in fact, it's the weekend after that that's oddly more interesting. And it's oddly more interesting because you never read about it in the newspapers, and if you appreciated how bad it really was, I think that the world really might have fallen off of its axis.

Let me give you a couple of examples. On Friday, the week after Lehman Brothers, Lloyd Blankfein of Goldman Sachs calls up John Mack—and there's a view, by the way, at this point, that Morgan Stanley could be on the verge of bankruptcy, that they might have seventy-two hours to do something quite drastic. Lloyd calls him up and, at the end of his conversation, he says, quote, "John, you better hang on because I am thirty seconds behind you." The view was that had Morgan Stanley fallen, Goldman Sachs would fall too.

But it was the domino after that that actually had people more concerned within the Treasury Department, within the Federal Reserve and, frankly, within the White House, which was that if Goldman Sachs had fallen, all of a sudden this problem, which we had thought was contained or contained to the extent it was on Wall Street, would migrate in a meaningful way to Main Street. And that would have actually happened in General Electric,. . . the next domino. You know, we think of General Electric as this massive conglomerate that makes light bulbs and ovens, but, in fact, it was as much a product of Wall Street as anything else, in that virtually half of its business was a bank in something called GE Capital. So the view was that this domino would go next, and after that, as we all imagined, Armageddon.

There was a point on Thursday of that week where J P Morgan and Citigroup literally stopped trading . . . [with] each other; again, something that was not publicized. But when you think about what that means, when you think about the system truly seizing up, there was a moment at which Bank of America, which rolled paper for McDonald's, which McDonald's relied on to pay its people, the people who literally flip the burgers, they weren't going to do it.

WAS THE BAILOUT NECESSARY?

And so I think when we look back now and we say, "Was the bailout necessary, was it required?" as unsatisfying as it is to say, oddly enough, I think it was more than required. It was necessary. I say that because when you really think about what would have happened, and when you look and you get inside and see some of these documents and some of the measures that the Treasury and the Fed had been making, we were talking about 25 percent unemployment.

Hank Paulson loves to go around now and say that he thought there'd be 25-percent unemployment. There's actually a document within Treasury that shows that we might have had 35 percent unemployment at that point.

And so, while I think we can all be very frustrated with the bailout and with its execution in that there weren't as many strings attached as I suspect many people would have wanted, I think it was necessary, because I don't think that we, the American public, appreciated how bad it really was, and that what happens on Wall Street really does impact Main Street.

And I would argue, actually, that the government, in a way, did a horrible job of articulating the connection, so that today, when we look at the strides that Wall Street has made and we look at

Main Street and the strides that they have not, there seems to be this divide, this disconnect. And there is one; I don't want to suggest there is not. but the connection was much greater than anybody appreciated.

The other thing that I think today that we don't appreciate is what the bailout was supposed to do. In some ways, Hank Paulson oversold it to all of us, . . . [saying], "The good news is that the patient is now stable; and that's what the goal of the project was. The bad news is that we're not in rehab yet."

That is the harder part for people to appreciate, in part because it looks like Wall Street has already gone through its own rehab. And so, I tell you all of that because I think what we're all trying to do is appreciate and understand what happened during this period. And I think when you actually can get inside the details, when you can see and see the people in the moment, it may change your view.

I will tell you another quick funny story. . . . The weekend after Lehman Brothers, Tim Geithner tried to put—are you ready for this— Goldman Sachs and Citigroup together. At another point, he tried to merge Goldman Sachs and Wachovia together. At another point, he tried to merge Morgan Stanley and Wachovia together, and at another point, he tried to merge J P Morgan and Morgan Stanley together. In fact, . . . at some point the CEOs started calling him eHarmony, given his role as matchmaker. But it says a lot about how bad the people in the room actually thought things were.

HOW THE BOOK WAS RESEARCHED

. . . . I spent the past year literally interviewing over 200 people for over 500 hours, some of whom, I would argue . . . spoke to me for all the right reasons, some of whom spoke to me for all the wrong reasons, reconstructing their legacy and whatnot. My job was, of course, to try to keep them honest. The third group, by the way, was the most interesting. This was the group that didn't want to speak to me at all. As you'd imagine, there are a number of civil and criminal suits, or investigations, at least, that are still ongoing.

One of the great experiences as a reporter is when you can almost force the interview. So there was a moment very early on in my reporting where I'd gone in to see a CEO, and he sat with his lawyer, actually, two lawyers, and his PR person. And they had early told him not to say anything. And this was, I have to argue, one of the worst interviews I'd ever had in my whole life. I did it for about an hour and a half, nothing really happened. It was bad.

But at the end of the interview, I asked him a question, and it was one of those questions you could only ask if you knew, if you had been in the room, and he sort of looked at me and he really didn't respond. About a half-hour later, I'm walking down the street. I get a phone call on my cell phone. He says, "I heard your question. Can you come to my house on Sunday? And don't tell anybody I'm calling."

I didn't leave his home till 11:00 o'clock on Sunday night, and he literally showed me every piece of notes, his calendars, everything. And it was one of the most remarkable experiences as a reporter.

The other piece was I actually got a guy, a lawyer, no less . . . a lawyer who did not want to participate at all, former lawyer, actually . . . For months I had been beating him down trying to get him to speak with me. He finally picks up the phone. . . . So I say to him, "Listen, I know you don't want to speak, but let me tell you what I've got." And I said, "I'm going to put you in a scene at John Mack's house on July 12th, 2008. It's a Saturday morning. It's 10:30. You sat on the couch on the right. It was a green couch. You were eating a chicken wrap sandwich that his

wife, Christy, had brought you. Your son's lacrosse game was at 1:30 and you were late because you were going to get there at about 2:00. You took these three calls at 11:02, 11:58 and 12:10." He said, "I think we should talk." . . . It was that, it was getting inside the room, that I think allows you to really understand and appreciate what took place during this extraordinary time.

HOW MUCH WE DID NOT KNOW

The great surprise to me, by the way, throughout all this was actually how much we didn't know and how much, unfortunately, I think the government and many folks on Wall Street actually did know.

The greatest example of that, I would tell you, is the TARP plan. You know, we all thought that TARP was written in September of 2008. This was originally the plan to buy toxic assets. It seemed like something you would write after a crisis. But, in fact, almost sadly in some ways, though . . . you might be able to give them some credit for this, TARP was written on April 15th, 2008 by the Treasury Department. There was a view inside Treasury that the world might truly fall off its axis, and that they might as well get a plan together. It's an 11-page plan.

The original plan was actually to buy up 500 billion dollars of toxic assets, not 700. So they were off by about 200 billion dollars, but it was really one of those extraordinary moments that you realized that what we knew and what they knew was something very different. I would also tell you, unfortunately, Hank Paulson gave a speech literally the next day, where not only did he not tell you anything about this, but told you that everything was just fine. So you're excused if you didn't know this was coming.

WHERE WE ARE NOW

The last piece that I wanted to leave you with, if I could, was to really talk about where we are now, sadly. When I started this project, one of the conversations I used to have with my editor was that I was going to have to write a new epilogue, because I imagined there would be enormous amounts of regulatory reform, that Wall Street would have changed remarkably by the time this book was finished. And here we are, more than a year later, and nothing has happened. [Editor's note: this address was given before the enactment of the Restoring American Financial Stability Act of 2010.] But I would tell you not only has nothing happened in Washington, but nothing has happened on Wall Street. One of the saddest parts of this is really that the ethos, that of the culture hasn't changed. Maybe my expectations were too high. But one of the phrases that many of the CEOs who I spoke with use when they think about themselves and refer to themselves in the context of what happened is that they call themselves "survivors." That's the word they use. And I always thought that was a very odd choice of words, because they say it as if they're cancer survivors. And I think there truly is a lack of appreciation still, sadly, that they were rescued and what that means and what the responsibilities, therefore, are to the rest of the country.

When you look at . . . the regulations and real transformation that took place on Wall Street after the Great Depression, much of those regulations were pushed for or at least accepted very easily by many people on Wall Street. Today, if you look at where the push-back is coming from, it's from the people you would expect, it's Wall Street. There has not been the leadership that I think many people expected in terms of really trying to change and transform this business.

THE STATE OF THE ECONOMY

Finally, a quick note on the economy. . . . I seem to get a lot of questions about where things may or not be going. I hate to ruin everybody's breakfast, and if you've eaten, I apologize already, but I do want to tell you that I do think, given all the peo-

ple I've been spending too much time with these days, that we are really in much more of a perilous state than we would like to even imagine. When you think about the recovery, we're having people talk about a jobless recovery, here are some numbers just to think about.

Currently, we really are not at a jobless number that's around 10 percent. We're at a jobless number that's literally over 17 percent. When you think about how many jobs need to be created tomorrow just to get back to the old normal, the five-, six-percent unemployment in this country, you need 10,000,000 jobs. You need to come up with 10,000,000 new jobs. Given the number of new people coming into the job market every day, just to stay stable where we are today, you need to generate 1.25 million new jobs a year, and that's to stay at unemployment at 10 percent.

The number, by the way, to pay attention to more than any other number in all of this is actually the average hours worked, and that's a number that's actually the scariest of all, which is, we're still hovering in the 33-, 34-hours-a-week range. The problem with that number is that when you think about a company that wants to be more productive, that wants to have more output, instead of going out and hiring more people and bringing that 10-percent number down, you're going to make the guy or the woman who's working for you, instead of working 34 hours a week, you're going to make them work 35, 36, 37, 38, 39, 40 hours a week. So there is a long way to go when you think about the opportunity for unemployment to come down . . . .

BLAME

We spend a lot of time blaming people. This is a country that loves to blame. We're looking for the villains. People call me up and they say, "Who's the villain in this book? Is Dick Fuld your villain? Is Hank Paulson the villain? Who is the villain?" And I, before writing this book, watched an interview with Quentin Tarantino and Charlie Rose. And one of the things he said to Charlie Rose was that his goal with any movie project that he did was that when the audience left the room, he really wanted them, every single one of them, to feel like they saw a different picture. I thought it was sort of an amazing idea, and that's really what I tried to do with this book. But more than anything else, I think that when you actually get inside the room, when you actually get to see the decisions that people were making, what looks like black and white today is much more gray. And so, finally, I wanted to leave you with a quote. For those of you who read the book, you'll know where this is coming from. It's at the end of the book, and it's a remarkable quote that I think applies to this situation, but also applies to life, which is that in October of 2008, after the bail-outs, Jamie Dimon sent Hank Paulson a note with a quote from a speech that President Theodore Roosevelt had delivered at the Sorbonne in April 1910, entitled "Citizenship in the Republic." And it reads:

> It is not the critic who counts: not the man who points out how the strong man stumbles or where the doer of deeds could have done better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs and comes up short again and again, because there is no effort without error or shortcoming; but who knows the great enthusiasms, the great devotions, who spends himself for a worthy cause; who, at the best, knows in the end, the triumph of high achievement, and who, at the worst, if he fails, at least he fails while daring greatly, so that his place shall never be with those cold and timid souls who knew neither victory nor defeat.

Thank you very, very much.

FINANCIAL CRISIS OF 2008: NEVER AGAIN

"We were able to back away from the edge of a financial abyss only through a combination of decisive action by a handful of key government officials, massive government intervention and, let's face it, a very large measure of luck. . . . [I]t is unthinkable that we would not address the fundamental issues that were responsible for the greatest financial crisis in seventy-five years . . . . "

H. Rodgin Cohen

[Editor's note: The address of H. Rodgin Cohen at the College's Spring meeting was a systematic analysis of the regulatory changes he felt needed to avoid another financial crisis. Recently, Congress enacted the Restoring American Financial Stability Act of 2010, leaving much of its implementation to yet-to-be-formulated administrative regulations. Reform thus remains a work in progress. Mr. Cohen's address provides an analytical framework for analyzing the progress to date in addressing this major economic problem.]

H. Rodgin Cohen, Sullivan & Cromwell, New York, New York, generally regarded as the preeminent banking lawyer of our time, addressed the Spring 2010 meeting of the American College of Trial Lawyers. His topic, "Financial Crisis of 2008: Never Again."

Named by *Institutional Investor* as the only lawyer among the twenty-five most influential people in the world of finance worldwide, he has, since the bankruptcy of Franklin National Bank in 1974, been involved in almost every significant transaction in the financial services industry. *The American Lawyer* named him #1 on its list of "Dealmakers of the Year," recogniz-

ing his participation in nearly twenty substantial credit crisis-related transactions in the wake of the 2008 crisis.

His introducer, his law partner College Past President **Michael A. Cooper**, New York, pointed out that in September 2008 Cohen was closer to the molten core of the financial crisis than any other lawyer. He was at the side of Lehman's CEO when the government permitted it to fail. Among others, he represented Goldman Sachs and AIG. "During that turbulent time," Cooper continued, "they all turned to him because of his extraordinary grasp of the complexities of the financial system and the patchwork of regulatory controls; and also because of his ability to go directly to the crux of an issue, his judgment in resolving it, and his calm decisiveness."

Cohen began by saying, "I have titled my presentation "Financial Crisis of 2008: Never Again," because it is unthinkable that we would not address the fundamental issues that were responsible for the greatest financial crisis in seventy-five years . . . ."

The address that followed was a carefully organized checklist of his prescription for reaching that result.

WHAT HAPPENED IN 2008

What occurred in 2008 was true financial contagion. Depositors, creditors, other counterparts simply were unwilling to assess the creditworthiness of individual financial institutions. They just fled the entire system. We were able to back away from the edge of a financial abyss only through a combination of decisive action by a handful of key government officials, massive government intervention and, let us face it, a very large measure of luck.

Had we plunged over the abyss, the results may not have been limited to the financial system, or even the broader economy. There could have been profound social and political consequences of the type not seen since the 1930s. It would be an indictment of all involved—the Administration, Congress and the financial services industry—if we do not enact a truly meaningful legislative response. . . .

WHAT NEEDS TO BE DONE

First, *self-recognition of the flaws in both the banking industry and in the regulatory system.* Only if these flaws are recognized and acknowledged can an appropriate set of remedies be fashioned. In the banking sector, we had a number of financial institutions that just took too much risk. There was excessive leverage, the suspension of prudent credit underwriting standards, and an absence of controls. On the regulatory side, there were two serious gaps. First, many financial institutions were unregulated or under-regulated. Second, even for those institutions that were subject to a comprehensive regulatory regime, certain activities—those largely related to real estate—were not subject to sufficient regulatory scrutiny or a limitation. Recognition of the sector and system flaws is essential if we are to implement the comprehensive regulatory reform that will enable us to avoid, or at least satisfactorily deal with, future financial crises.

Now, my ***second*** action item is *an effective resolution regime for major financial institutions that ends "too big to fail" as both a perception and a reality*. . . . No country should ever again be confronted with the Hobson's choice of: one, a free-fall bankruptcy of a leading financial institution with the attendant severe impact on the global financial system and, two, massive taxpayer bailouts.

Moreover, even before we reach the failure stage, "too big to fail" creates competitive inequity and exacerbates so-called moral hazard, because creditors believe there is no real credit risk. A new regulatory system that permits individual bank failure without devastating systemic consequences should be the linchpin of regulatory reform legislation. . . . I believe [there] are two critical questions which really have been obscured, and these are critical

for an effective regulatory system. First, you need to figure out what are you going to do with creditors as their claims become due. Banks are not like industrial and commercial companies. Every day you have got billions and billions of dollars of claims becoming due. . . Second, you have got to figure out who is going to pay for it.

Perhaps indicatively, these questions have been largely ignored in the legislative debate in favor of process issues, such as, "Should we amend the Bankruptcy Code or have a new free-standing statute?" In response to the first question, I would recommend an approach in which creditors would promptly receive a payment based on a conservative estimate of their ultimate recovery. This idea is actually based on what the FDIC has done for years . . . when it has a bank in receivership and there are uninsured deposits which are not assumed.

If you take that as the position, you need to supplement it with some mechanisms, because the estimate could be wrong, so you have got to be able to adjust it as more information becomes available. What you would also need to adopt are provisions from the Bankruptcy Code, such as a preference avoidance arrangement and an *ex post facto* provision which avoids acceleration clauses.

There have been two other options suggested for dealing with creditors, but each has serious defects. First, it has been widely suggested we should do it just like the Bankruptcy Code and have an automatic stay: nobody gets paid for a long period of time. The problem is, that creates financial contagion because creditors of the failed institution may be unable, as a result, to pay their own creditors. And even if they were able, there is likely to be a widespread misperception that they cannot. The second option is, just pay out the creditors a hundred cents on the dollar, but that simply institutionalizes "too big to fail."

With respect to the second question, remember, we are talking about liquidity and that liquidity can be dealt with by a government guarantee of private-sector financing. The government guarantee would, however, be first priority in settling all claims, so that there is no risk of taxpayer loss and, in addition, the government would be paid a guarantee fee.

My ***third*** action item is *comprehensive consumer protection, particularly in the area of home mortgage lending.* There were no standards applied by the unregulated institutions, and too lax standards by many regulated institutions. The need for a separate consumer protection agency may be debatable, but we must at least have greater dedication by the existing regulatory agencies to identifying and prohibiting lending practices that mislead or otherwise harm the consumer. Transparency, it is clear, is just not sufficient. We must have rules of uniform and comprehensive applicability.

The ***fourth*** action item is *a council of regulators that has the responsibility for identifying risks and dictating guidelines for dealing with those risks* to what are called the microprudential regulators, those who have the hands-on regulatory responsibility.

Let me just offer one example. The explosion of credit default swaps created risk at many levels, the exposure of the swap writers, such as AIG and MBIA, overreliance by purchasers, such as Merrill Lynch, and the use of these instruments for questionable purposes. More generally, these instruments, which were developed as a risk mitigant, were transmogrified into the world's biggest gambling casino, yet no one had the overarching regulatory authority even to determine the volume of credit default swaps, much less their purpose or the exposures.

One other key function of the systemic risk council would be to identify gaps and inadequacies in the regulatory system and deal with them. This could include, for example, restricting regulated institutions from dealing, except on a limited basis, with unregulated institutions.

Now, there are concerns, appropriately, about a council ap-

proach to systemic risk. Diffused responsibility is all too often unexercised responsibility. But we are dealing with political realities here, so the emphasis needs to be on the structural effectiveness of the council.

My ***fifth*** action is a controversial one, but it is *a leading role for the Federal Reserve in the ongoing regulatory and supervisory process.* No other organization has the independence, the depth of knowledge, the expertise, the balance, the international reputation and contacts and the *esprit de corps* to be such an effective supervisor. At the risk of a strained analogy, there was considerable criticism of our intelligence agencies in the wake of the failed Christmas Day bombing for a failure to connect the dots. The Federal Reserve is best positioned to connect the monetary and economic dots. It is not impossible that a new agency could, over time, replicate those qualifications, but at best it will take a very long time.

Let me make one other important, I think, argument in support of a prominent supervisory role for the Federal Reserve. The catastrophic impact of asset bubbles in the overall economy is presumably beyond question, but there appears to be a widespread consensus that monetary policy is an overly blunt or ineffective tool to deal with those unfortunately reoccurring phenomena. In contrast, regulatory policy can be used to deal effectively with the asset bubble. These are just numerous tools: capital requirements, margin requirements, enhanced disclosure and absolute limits.

As just one example, we would be in a very different place today if, in 2004, the regulators had dealt with the asset bubble in home mortgage lending by imposing strict loan-to-value requirements, cash down payment and income verification obligations. Only the central bank, the Fed, has the capacity to recognize these asset bubbles and effectively deploy regulatory mechanisms to deal with them.

I say all this, recognizing that there were deficiencies in the Federal Reserve's supervisory performance in the period leading up to the 2008 crisis. The deficiencies were a function of both error and philosophy, but what should be equally recognized is that the Fed has been promptly self-critical and has made major, if subtle, changes to prevent repetition.

My ***sixth*** action relates to what is arguably the most serious regulatory defect exposed by the financial crisis. There were, apparently, no *plans for dealing with individual institutions if they encountered severe financial instability*. The resolutions in 2008 were often imperfect precisely because they had to be so *ad hoc*. The regulators should have a glass panel with the signage "break here in case of fire" for every financial institution.

My ***seventh*** action relates to *improved capital requirements*. I am consciously using the word "improved" rather than higher, because the real task here is to relate capital more closely to actual risk. Specifically, we must address the problem of the outsized risk in certain assets on banks' balance sheets. There is a cap: you cannot risk weighing an asset at more than 100 percent under the current regime. There is no logical reason for such a cap, which would rate a CDO cubed equally with a triple-A corporate loan.

My last two actions are, unfortunately, not dealt with, or dealt with only at the margin, by the current legislative proposals.

My ***eighth*** recommendation is *a regulatory system that encompasses all financial institutions that compete with banks and insurers.* There is a regulatory corollary to Gresham's Law, and that is bad regulation drives out good regulation. What we need is a comprehensive regulatory system.

Ninth and last, our *home mortgage system* is totally broken. When one considers what a substantial part of the nation's GDP is represented by home mortgage debt, as well as the importance of home ownership in

creating financial, familial and societal stability, a resolution to this problem must be of the highest import and priority. The GSEs (government-sponsored enterprises), Fannie Mae and Freddie Mac, are overwhelmed by their huge losses, and they continue to have a market-distorting impact. At a minimum, they should be reduced, not necessarily by size, but by purpose. They should no longer be seen as the dominant end providers of mortgages. They do have a role as providers of mortgages under specific government programs.

In order to accomplish this goal, it is essential that mortgages be an appropriate asset for banks to hold, as they have been for decades until the 1980s. This requires, among other things, prudent underwriting standards and prepayment penalties to prevent banks from being constantly whipsawed by interest rate changes.

WHAT WE NEED TO AVOID

[W]hat we need is action, not inaction. But, at the same time, it is essential that the legislative solutions be thoughtfully calibrated rather than simply reflexive or punitive. Those solutions should be directed to the actual causes of the crisis and crafted in a way that avoids undermining the important role, the critical role, of banking in our economy or places additional pressure on a still weak economy . . . .

Banks: Big Is Not Necessarily Bad

The specific actions that should be avoided are those directed to implementing the related contentions of "big is bad" and "banking should be boring." The idea that banks are inherently more risky if they are big has gained substantial currency, notwithstanding the lack of any empirical support and even a record that contradicts the assertion. If size truly correlated to risk, then how do you explain the hundreds of smaller institutions that have and are experiencing severe financial distress? How can you explain the experiences in Canada and Australia, which have probably the two most concentrated banking systems in the world, yet their banks were able to withstand the international financial crisis better than their counterparts worldwide?

A more legitimate rationale for the "big-is-bad" theory is that big banks do create greater risk for the system if they fail. But there is a fundamental inequity in penalizing all large banks because of the possibility that one of them may cause greater systemic risk. The clearly more appropriate, fairer and direct response to this risk is to create an effective resolution scheme if they fail, which I previously discussed.

It is also necessary to understand that big can be good. There are advantages for consumers in terms of geographic and product scope. There are advantages of risk reduction through diversification, and there is an ability to resolve failing institutions with the least cost to the taxpayer and the least systemic consequences. What would have happened if there had been no institution large enough to acquire Bear Stearns, Wachovia or Washington Mutual?

Banks Need Not Be Boring

Equally flawed is the related argument that banking should be boring. Acceptance of this argument would threaten both longstanding and long-term financial well-being of our banks and the potential for an economic recovery. If banks are too small and too confined to meet the legitimate needs of consumers, the economy suffers because those consumers cannot grow and expand. If banks cannot develop new products, their customers' progress is likewise confined. And if every loan gets repaid in full, there are a lot of good loans that will not be made.

The utility risk-free model for banks both misunderstands the nature of banking and threatens banks' ability to advance the economy. The basic business of banking, taking deposits and making loans, has inherent risk. The principal risks are the credit risk of the borrowers and the

asset-liability mismatch of borrowing short and lending long. These risks can only be eliminated, totally eliminated, at the cost of lower overall credit availability, sharply less credit for smaller businesses and increased risk for businesses and consumers in the deployment of their funds.

Banks As Fuel of the Economy

Banks should not be viewed . . . as the engine of the economy, but banks are the essential fuel of the economy through their credit payment processing and intermediation roles. If those roles are overly confined in an effort to squeeze out all risk, the economy will sputter. Let me state it differently: throughout modern history, there has not been a great economy without a supportive and successful banking system.

Proposed Banking Regulation Misguided

Let me . . . discuss two manifestations of these contentions, "big is bad" and "banking should be boring." The first is a bipartisan . . . proposal by Senators Cantwell and McCain to roll back the 1999 partial repeal of the Glass-Steagall Act, which had separated commercial and investment banking. The second, which has received much prominence recently, is the so-called Volcker rule, which would ban banking organizations from engaging in proprietary trading and investing in hedge funds and private equity.

The suggestion that the partial repeal of Glass-Steagall was the leading cause, nine years later, of the 2008 financial crisis is decisively refuted by even a cursory review of the major failures and near failures. In chronological order, none of the following had anything to do with the repeal of Glass-Steagall: Bear Stearns, Fannie and Freddie, Lehman, AIG, Washington Mutual, Wachovia. Indeed, most economic historians now agree that the Glass-Steagall Act itself was originally enacted on the false premise that bank securities activities had been a principal cause of the 1929-33 financial collapse.

The Volcker rule is a somewhat more limited version of the Glass-Steagall proposal, but the basic issue is the same: Where is the evidence that the to-be-banned activity created significant financial distress at any financial institution? There is no record whatsoever from the proponents. But there is an even greater defect in the Volcker Rule, and I say this with all humility, because there is no individual with greater knowledge and greater intellectual integrity than Paul Volcker. If you think it through, what he proposes to do is reduce risk in the banking system, but that is not going to end the risk. The risk will move to the non-regulated sectors of the financial industry. And what that means is that we will have the same level of risk, but in entities which are unregulated.

The Real Cause of the Crisis

Of perhaps most importance, all of these proposals which focus on securities-related activities threaten to divert attention from the real cause of the most serious problem at banks—and this has been true in the last decade, it has been true in the '90s, the '80s, and you can go back in time, including the '20s and '30s—and that is an overconcentration in risky real-estate-related obligations.

THE NEED FOR A POSITIVE RESPONSE FROM BANKS

I thought I would close by reiterating [a point] about the banking industry itself and its response to proposals for change. I would suggest that it is suboptimal for the banking industry to respond to these proposals with only opposition and vague statements of policy. The banking industry and the country would be better served by a coherent and a specific statement of what the industry is for, rather than for what it is against. . . . I do see some major leaders of Wall Street understanding that calculus and, hopefully, stepping to the fore.

LARGE LAW FIRMS IN A CHANGING WORLD

In the wake of what has been termed the worst year for the legal market in at least the last fifty years, author and law firm consultant ***Peter Zeughauser****, Newport Beach, California, addressed the Spring Meeting of the American College of Trial Lawyers in a presentation entitled The Brave New Legal World.*

Peter Zeughauser

Although his address dealt mainly with large national and global law firms, a world to which a majority of the Fellows of the College and a far larger portion of the general lawyer population are strangers, it contained some illuminating insights of value to every lawyer.

In his introduction, Past President **David Beck** of Houston, Texas, pointed out that in his career, Zeughauser has worn multiple hats: He has been both a lawyer and a client. He served for over ten years as Senior Vice President and General Counsel of The Irvine Company, a very large real estate development company. Under his leadership, its law department was recognized by the *National Law Journal* as one of the top ten law departments in the country.

The author of a widely acclaimed book entitled *Lawyers are From Mercury, Clients are From Pluto*, in which he shares his insights on law firm management, Zeughauser is a contributing editor of the *American Lawyer* magazine and is frequently quoted in such diverse publications as the *Wall Street Journal*, *Business Week*, *Corporate Counsel* magazine, and many others. He has served as past chair of the American Corporate Counsel Association.

Setting the stage, Beck noted, "Today's American Bar

Association weekly newsletter reported that law firm associate offers are down seventeen percent. According to the *National Law Journal*, in 2009, 5,258 lawyers were laid off at our country's 250 largest law firms. And then you superimpose on those layoffs scaled-back recruiting, salary cuts, rescinded job offers and postponed associate starting dates, and you can see that 2009 was probably one of the worst years in the history of our profession."

THE BRAVE NEW LEGAL WORLD

In his address, Zeughauser made three major points, which he characterized as his answers to questions he is frequently asked. They were:

1. The basic law firm model is not dead.

2. For many firms, however, the model is changing.

3. The "golden era" for law firms is not over, and the future is actually very promising for American law firms, for successful worldwide law firms and for litigation specifically.

Zeughauser pointed out that in 2008, the *American Lawyer 100* firms (the hundred firms with the highest reported gross revenues) for the first time in seventeen years saw declines in both profits per partner and in revenue per lawyer. The result of the incredible decline in the economy, that decline in revenue and profits marked the end of an era of tremendous growth.

Recent reports, he then observed, indicate that the *AmLaw 100* firms, who had been pulling away from the rest of the profession in terms of their success and profitability for about a generation, were losing ground to the next tier down, the *AmLaw 200* firms. He described how incredible pricing pressure on law firms, imposed by clients as a result of the economy, is currently causing legal work to migrate to lower-priced firms. While the sixty-eight of the *AmLaw 100* firms that had already reported their 2009 results as of the date of his presentation were still off in profitability for that year, the second hundred were up nearly ten percent in profitability.

The reports indicated that 2008 was a bad year and that 2009 was worse for the largest firms, though the fourth quarter of 2009 was promising, indicating that the market was clearly coming back.

THE MARKET FOR LEGAL SERVICES

Turning to what he saw as happening broadly in the market for legal services, some of the large trends, he began by defining that market. In the last full reported year, the gross revenue of the *Global 100* law firms, the largest firms in the world in terms of gross revenue, was about 85 billion dollars. That market, he asserted, continues to consolidate. Approximately 75 percent of the firms in the *Global 100* are indigenous U.S. law firms, so that one might infer that roughly three-quarters of that 85 billion dollars, in excess of 60 billion, is in the U.S. legal market.

CONSOLIDATION

That market is consolidating significantly. The *AmLaw 25* firms have just slightly less than half, 49 percent, of the total revenue of the entire *AmLaw 100*. The *AmLaw 13*, firms with revenue of a billion dollars or more, have 29 percent of the market share, or about 2.2 percent each. Indeed, the top three firms have nine percent of the market share, leaving the other 97 to compete for the remaining 91 percent. Fifteen years ago, no firm would have had more than one-and-a-quarter percent.

The mergers we read about are evidence of a consolidating industry, one that continues to consolidate. Overall, most, though not all, of the *larger* firms have made great gains on the *most profitable* firms and are emerging as dominant global players and dominant U.S. players. Consolidation is being driven by the increased resources needed by law firms to achieve top status around the world for a market that is increasingly driven by the interdependence of the world's economies, particularly the interdependence of the world's capital markets and the dispersion of the

world's financial assets outside of the United States and London to other emerging markets, such as those people call the "brick" countries: Brazil, Russia, India and China.

There is certainly less litigation, or at least fewer trials. It is difficult to tell whether there is less litigation, but clearly litigation is consolidating among larger firms. They are gaining greater market share as a result of their higher top-of-mind status in the client community and as clients, under increasing cost pressure, find that by bundling their work among a smaller number of firms with greater breadth and depth, they can achieve cost savings. This, he pointed out, is not true across the entire market, but looking at the market for legal services broadly, it is a significant trend.

The *AmLaw 100* have gone from a group of largely regional firms to become a group of national firms, and they are increasingly becoming international, shedding their regional and national status.

The second hundred firms, which more recently were regional, are following suit and becoming national. Mid-size, single-city firms are becoming more distinct. That is not bad for them as long as they are focused on excelling in their markets as they define them. What all of this is telling us, what we are learning from it, he continued, is that the market is segmenting, and a firm either needs to position itself in the market where it wants to be or the market will position it in the consolidation.

As a result of the economic crisis, we have seen the acceleration of trends in the legal industry, acceleration to the point that for some firms, it has actually become a crucible of change. The change is inexorable, and there is great pressure on law firms to tweak their models, not abandon them, but tweak them.

SEGMENTATION

The trends he sees include globalization, consolidation, convergence (clients reducing the number of firms they use) and segmentation. As to the latter, clients are becoming smarter about who they hire to do which work, realizing that they can get some work done at a lower cost than other work, and that not all of the work that lawyers do in every matter is rocket science. Clients are therefore unbundling packages and sending different pieces to different firms. In turn, law firms, particularly the successful firms, are responding by going after more specific segments of the market. All of this also has driven the increased specialization in firms and in the profession.

LAWYER COMPENSATION

Two big trends in the profession relate to staffing. There has been a significant crack in the national starting salaries with the market segmenting, some firms saying that to make the kind of money they need to make, they have to pay their starting lawyers less, while attracting, developing and retaining the staffing level they would like. The present glut in the market allows them to do that. That is a message that has been very well received by clients, and it is part of the reason work is migrating to those firms.

The other trend we are seeing is a move away from lock-step compensation. We are in a consolidating free market. Law firms and lawyers are competing more and more based on merit. They are not viewed generically by clients, who want to hire the best at whatever it is they need solved. Everyone is competing much more on merit today than ever before. People who achieve at a high level all through school, who do well in a great college, who go to a great law school and excel, and then join a great law firm, and are told, "I'm going to pay you a lot of money by the hour to get it right," will get it right.

The profession has produced an amazing level of quality, which is a great thing, but that is not so distinctive anymore. Firms do not compete just on quality. They compete on results and on their ability to deliver those results cost-effectively. In a free market where people are competing on merit, people must be paid by merit. That is a major trend in the profession, not just at the associate level, but also at the partner level.

It is, however, as Zeughauser pointed out, difficult to generalize on this point. Some of the most

successful law firms in the world do not pay by merit. They often have lock-step compensation, but they live in a rarified world of high expertise, and there is not enough room at that level for every other firm among the *AmLaw 200*, and so most of the profession is experiencing a change away from lock-step compensation and towards merit-based compensation for associates and for partners. That, in turn has led to a lot of cherry-picking, and in a down time, we have seen a lot more cherry-picking, and partner talent is much less "sticky."

When you pay people based on merit, you make decisions about who, based on merit, should be in the partnership in the first place, and we are seeing shrinkage in the equity and non-equity partner ranks because of the pressure on firms to maintain high levels of profitability so that they can keep their best performers. We are seeing significantly increased compensation ratios among the firms that have gone to merit-based compensation for partners. Over the last five years, the average ratio has probably gone up from about four-to-one to about five-and-a-half to one, and we see firms in the market that have ten-to-one and even thirty-to-one ratios based on perceived relative merit.

CHANGING PRICING MODELS

We are also seeing changes in the pricing model as a result, because firms need to find ways to become more profitable than they can be charging only on a cost-plus system. Many people were unaware that last year for the first time, some of the top firms were discounting their accounts receivable as much as forty percent to get money in at the end of the year, and discounting their charges for new matters ranging as high as twenty-five to fifty percent. This all ties back to consolidation and a huge battle for market share, and even for survival, that is going on among the *AmLaw 200* as a result of the economic crisis. These were long-term trends, but they have been significantly accelerated as a result of the economy.

THE BASIC LAW FIRM MODEL

Thus, Zeughauser posited, the model is changing, but the basic model is not dead. First of all, he reminded the audience why clients hire lawyers and law firms. This is essentially a relationship business, and it is about perceived value. No matter how many requests for proposals go out and no matter how many convergences occur, in the end, particularly for the best work, which is what lawyers aspire to get, it is still very much a relationship business. Relationships involve understanding and satisfying client needs; nothing has changed about that. Clients perceive value differently for different types of work; nothing has really changed about that.

To determine whether the basic model has changed, you need to look at the basic model for practicing law in the United States and around the world, which is to take very bright, young, new graduates of law school and invest the time and energy in training them and teaching them the skills to successfully resolve client problems cost-effectively, and serve productively as a partner in the firm. That is the basic model, which Zeughauser does not think is going to change. He thinks that the most successful firms in the world will be those who do that well, and if that changes, we will have an upheaval in the way legal services are delivered, and, he suspects, quality will be greatly diminished.

He believes that firms are religious about that model, that the better firms are at adhering to that, the more successful they will be, and that that is unlikely to change.

Zeughauser sees a bright future for lawyers. He bases this on his view of what lawyers do for clients. He posits that it is essentially the aspiration of all people in the world, the essential nature of the human condition, to improve their lot in life. People do this by investing assets, their time and their money, and they use time and money to create or use property, real and personal property, intellectual property, natural resources, and to turn them into financial assets that they can reinvest and do more of the same with. That he argues, is how the human condition has improved

in civilized society. All humans aspire to live a better life.

THE GLOBAL LEGAL MARKET

The rest of the world, whatever the political system, has adopted or is adopting as a model an appropriately regulated free market. Even China, a communist country with a completely different form of government from ours, has decided that an appropriately regulated free market is the best way to improve the condition of the lives of the Chinese people and provide stability for Chinese society. That is true in India; it is true in Brazil; it is true in Russia, and it is true in all of the world's growing economies. It is the western-style, appropriately regulated free market, to which the world aspires as the best vehicle for improving the human condition.

Zeughauser posited that a lawyer's work is at the intersection of the use and protection of assets. "We are in the engine room of the very effort of all of human kind to improve its condition."

He agreed with those on the program who had spoken on the crisis in the financial world that we made some errors in how to appropriately regulate the free markets, but that as long as we learn from those mistakes, this is not a fundamental flaw of the system. We will fix those mistakes, and he termed it inevitable that the world's economy will resume its growth.

Returning to the global market, he noted that although seventy-five percent of the largest law firms in the world are indigenous U.S. law firms, there are 1.5 billion people in China. Shanghai alone has built and occupied each year for five years as much office space as there is in all of downtown Manhattan. We have ten cities in the United States with over a million in population. There are twenty with over ten million and two hundred with over a million in China. China is rising and it is roaring, and they are weak in lawyers and legal ability and in know-how about how to appropriately regulate a free market.

DEMAND FOR WESTERN-STYLE LEGAL SERVICES

Though China is now experiencing a pretty good run, they will make their own mistakes, and they are essentially learning from our mistakes. The demand around the world for western-style legal services, the level of quality and the know-how to operate, to help people invest and resolve disputes over the use of assets, can only grow exponentially as China and the other emerging countries' economies grow. It is the greatest challenge of the largest and best U.S. law firms, to penetrate those markets. Assuming that they are successful, the future is very great.

We have a robust plaintiffs' bar because of punitive damages, treble damages in some cases, jury trials, and rare loser-pays rules. The U.S. legal system is unique in that regard in the world. Zeughauser posited that while there may be some changes around the margins, that is likely to stay the same. As companies become more global and plaintiffs have grievances about them, they will want those grievances resolved in U.S. courts. They are the most attractive venue for those reasons and also because we have built "a pretty good legal system."

THE FUTURE

There is a limited supply of lawyers. It is still difficult to get a license to practice law. We are a highly-regulated profession because of the important role we play in the prosperity of the world's people, but there will be much greater demand going forward than there is supply, despite this blip. It is inexorable that the market will come back, and legal services will be strong and still more expensive, and they will be a great value.

Zeughauser therefore does not think that the golden era is over, certainly not for the largest and best U.S. law firms. The U.S. is by far the richest legal market in the world. Of that 85 billion in gross revenues among the *Global 100*, 65 billion is in U.S. firms. Among the *AmLaw 200* in 2008, the total revenue for the top 200 firms was about 102 billion dollars. He estimated that roughly forty percent of that came from litigation, which

is roughly a 31-billion-dollar market today.

LITIGATION COSTS IN CONTEXT

Clients complain that litigation is expensive, and when you are writing the check, it does seem expensive. "But if you look at it in the scheme of things," he observed, "it's actually not that expensive. In 2009, after a significant drop in the value of the world's financial assets -- that's all debt and equity assets -- the value of those assets was about 176 trillion dollars. That's a lot of money. If you look at the cost of litigation in that context, it's about 31 billion dollars. It's 1/50th of one percent. That is an amazingly inexpensive number for resolving disputes over the world's financial assets. It actually is an incredibly strong and efficient and cost-effective system."

"And so," he concluded, "I think there is a very promising future."

AWARDS, HONORS and ELECTIONS

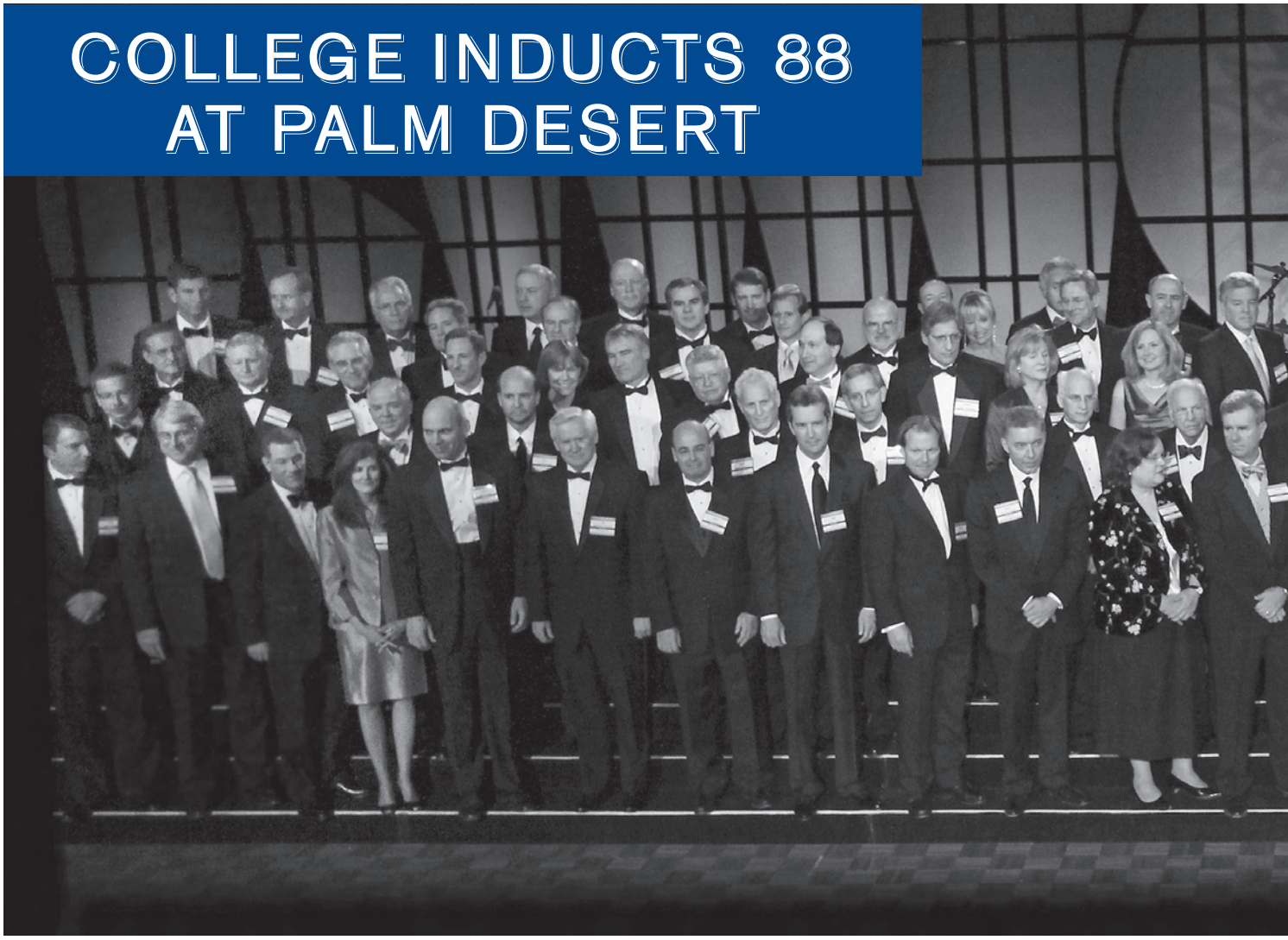
U.S. Attorney **Sally Quillian Yates** of Atlanta, Georgia, has been named to a two-year term on the U.S. Attorney General's Advisory Committee. This policy-making and advisory body serves as the voice of the nation's U.S. attorneys at the Justice Department.

Four Fellows of the College were honored with the American Inns of Court Professionalism Award at their respective Federal Circuit Judicial Conferences in 2010. Created to recognize "lawyers and judges whose life and practice display sterling character and unquestioned integrity, coupled with ongoing dedication to the highest standards of the legal profession and the rule of law," the recipients were: Past President and University of Oklahoma School of Law Dean **Andrew M. Coats**, **James R. Figliulo**, Figliulo & Silverman, Chicago, Illinois, **Mark O'Neill**, Weston Hurd, LLP, Chicago, Illinois, and **Dan K. Webb**, Winston & Strawn, LLP, Chicago, Illinois. .

Past President **E. Osborne Ayscue, Jr.,** McGuireWoods, LLP, Charlotte, North Carolina has received the Judge John J. Parker Memorial Award from the North Carolina Bar Association. The Association's highest award, it recognizes conspicuous service to the cause of jurisprudence in North Carolina.

Mark O'Neill, Weston Hurd, LLP, Chicago, Illinois has also won the American Inns of Court's Lewis Powell, Jr. Award for Professionalism and Ethics. The award is given for exemplary service in the areas of legal excellence, professionalism and ethics.

COLLEGE INDUCTS 88 AT PALM DESERT



UNITED STATES

ARKANSAS:
Kirkman T. Dougherty, *Fort Smith,*
Jim L. Julian and Lyn P. Pruitt, *Little Rock*

ARIZONA:
Bruce F. Griffen, *Flagstaff*

NORTHERN CALIFORNIA:
Robert A. Buccola, *Sacramento,*
Clement L. Glynn, *Walnut Creek,*
Susan J. Harriman, William P. Keane and Wayne T. Lamprey, *San Francisco,*
Frank M. Pitre, *Burlingame,*
Walter H. Walker, III, *San Francisco*

SOUTHERN CALIFORNIA:
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John W. Marshall, *Riverside,*
Patrick McNicholas and Gregory P. Stone, *Los Angeles,*
Stephen P. Swinton, *San Diego*

COLORADO:
Gary J. Ceriani, *Denver,*
William D. Meyer, *Boulder*

CONNECTICUT:
John J. Kennedy, Jr., *New Haven,*
Craig A. Raabe, *Hartford*

DELAWARE:
Donald J. Wolfe, Jr., *Wilmington*

FLORIDA:
Jeffrey R. Garvin, *Fort Myers,*
Thomas M. Gonzalez, *Tampa,*
Kirk N. Kirkconnell, *Winter Park,*
Dixon Ross McCloy, Jr., *Panama City,*
Scott N. Richardson and Peter A. Sachs, *West Palm Beach;*

HAWAII:
Howard K. K. Luke and Lisa Woods Munger, *Honolulu*

IDAHO:
Amil N. Myshin, *Boise*

ILLINOIS:
Wendell W. Clancy, *St. Charles*

INDIANA:
Thomas H. Bryan, *Evansville*

KENTUCKY:
Barton D. Darrell, *Bowling Green,*
Robert E. Stopher, *Louisville,*
J. Guthrie True, *Frankfort*

MARYLAND:
Richard C. Burch, *Towson,*
J. Mark Coulson, *Baltimore,*
Thomas L. Kemp, *Elkton,*
Michael Schatzow, Kerry D. Staton and Jerrold A. Thrope, *Baltimore*

MAINE:
J. William Druary, Jr., *Waterville*

MISSOURI:
Steve Garner, *Springfield,*
Jeffrey O. Parshall, *Columbia,*
Kevin E. J. Regan, *Kansas City,*
John L. Roark, *Columbia*

NEBRASKA:
Donald W. Kleine, *Omaha*

NEW HAMPSHIRE:
Charles P. Bauer,
Concord,
Gregory S. Clayton,
Littleton,
Blaine R. Hawkes,
Dover

NEW JERSEY:
Michael J. Maggiano,
Fort Lee,
Robert E. Paarz,
Northfield

NEVADA: Scott A. Glogovac,
Reno

TENNESSEE:
G. Gordon Bonnyman, Jr.,
Nashville,
W. Kyle Carpenter,
Knoxville,
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Memphis,
Richard A. Schulman,
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Thomas B. Thurman and Edward M. Yarbrough,
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David B. Weinstein,
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Toronto

QUEBEC:
Francois M. Grenier and Olivier F. Kott,
Montreal,
Suzanne H. Pringle,
Laval

THE SAGA OF MARC DREIER, ATTORNEY

"Everybody can relax, take a deep breath, stretch a little bit, 'cause I'm just going to tell you a story. I'm going to tell you a story about one of your own, who is not here today because he's in a minimum-security prison outside Minneapolis."

Bryan Burrough

Eclipsed by the exposure of Bernie Madoff, whose story broke less than a week later, that of New York lawyer Marc Dreier, leader of a 200-plus person law firm whose members were unaware that the firm he had created was itself a massive Ponzi scheme, is a modern morality tale that has perhaps received too little attention from the profession.

Drier's chilling story had been the subject of an article in *Vanity Fair by* **Bryan Burrough**, author, former investigative reporter for *The Wall Street Journal* and for years special correspondent for *Vanity Fair.* Three-time winner of the Gerald Loeb Award for Excellence in Financial Reporting, and co-author at age twenty-nine of the now-legendary 1989 work, *Barbarians At the Gate*, and of a number of more recent books, including *Public Enemies* and *The Big Rich: The Rise and Fall of the Greatest Texas Oil Fortunes*, Burrough is a master storyteller.

At the invitation of College President-Elect **Gregory P. Joseph**, who introduced him, Burrough retold Dreier's story at the College's Spring meeting in Palm Springs. That story, slightly edited, follows.

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The story begins . . . when shortly after the . . . fall of Lehman and everybody else, a fellow was arrested at LaGuardia coming back from Canada. His name was Marc Dreier. *The Post* and the *Times* and everybody had the story the next morning that this fellow was being charged with a Ponzi scheme, that somehow, some way, nobody quite understood it, he had managed to steal something on the order of $400,000,000 from a series of hedge funds.

By and large, the name "Marc Dreier" was then forgotten, because about five days later, a fellow named Bernie Madoff hit the headlines, and Dreier's story kind of bled away. Ultimately, he became number three on the hit list of this era's Ponzi schemers, behind Madoff, behind Allen Stanford of Stanford Financial down in Houston.

For the sake of this audience, Dreier has the most relevance, because he was not only an attorney, he was a trial attorney; he was a litigator. . . .

AN IMPOSSIBLE ASSIGNMENT

About a month after this happened, right after Christmas, I got a call from the editor of *Vanity Fair*, as often happens. And the story assignments at *Vanity Fair* come with a great amount of detail and thought; and the conversation, as I recall, was "Go do Dreier," click.

I've been there eighteen years and I know what that means, and what I quickly discerned is that this was a thorough loser of a story because the guy had pled. He was never going to tell his story, and, basically, I was going to end up running around talking to clients of his 270-member law firm and former attorneys, friends, et cetera. In other words, I was going to end up writing a 7,000-word profile of a New York litigator, and it was going to put me to sleep and probably most of you all.

So, long story short, I waited around and twiddled my thumbs and eventually realized that this story was going to be so bad, my only hope was to somehow get to Dreier himself. That took several weeks. Unfortunately, I had waited too long and I was down way behind Andrew Sorkin and *Business Week* and everybody else on the list of potential interviewers.

Luckily, . . . one of my neighbors is the number-three guy at *60 Minutes*. And I pigeonholed him one night and said, "Hey, how about we go try Marc Dreier together?" And he said, "That's a good idea." I said, "Why don't you have Steve Croft call and, you know, you guys do the TV stuff and I'll do the print?" . . . Anyway, it worked. *60 Minutes* got the TV, I got the print, and we both went in and started interviewing this fellow in April.

THE GOLDEN BOY

Let me tell you, he was like talking with a corpse. This was a guy who had always been a golden boy. He had gone to Yale undergraduate, to Harvard Law. He was 59. He was staring at . . . easy 20, 30 years, and he basically knew his life was over.

I sat there, and I've got to tell you, it was one heck of a nice apartment. He had, I want to say, 7,000 square feet, $11,000,000 apartment. If you ever go to La Cirque when you go to New York, it's in that little courtyard along with Bloomberg. He was on the 34th floor straight over La Cirque.

He started telling me the story, and it's a pretty good story. . . . Marc Dreier was born in 1950, which makes him about 60 right now. He grew up . . . out on Long Island, Lawrence . . . . Marc Dreier was always above average, smart kid, good talker, voted most likely to succeed at Lawrence.

He goes to Lawrence High. He goes off to Yale. He goes off to Harvard [law], does everything he's supposed to do. Right about 1977 he joined a nice, medium-sized firm, Rosenman & Colin, and, again, did everything he was supposed to do, worked 60- and 80-hour weeks, carrying the briefcase initially of the head litigator at the firm; went on to third chair, moved up to second chair, and kind of cut his teeth in a famous suit years ago, the *Betamax* suit. . . . . Dreier was a young guy on the make.

"ENTITLEMENT" UNFULFILLED

Around about '85, [he] gets married, has a couple of kids and he

makes partner; and the future should be assured. But the one word you've got to keep in mind when we talk about Marc Dreier, and it is a word that always is in my mind when I am on Wall Street . . . from time to time: "entitlement." This is a guy who had been told since the age of five or six that he was a genius, that he was a golden boy; they said it at Yale; they said it at Harvard, they said it at Rosenman.

When he made partner in 1985, he found that it was not quite everything that he wanted it to be. He was a lead in the litigation section, but he found that an awful lot of the attorneys, the older attorneys, did not want to share their clients with him, that he would, in fact, have to go around and hustle them up. . . .

I don't think Marc Dreier wanted to work that hard. I don't think he wanted to eat what he killed. He got frustrated out there trying to continually talk up and chat up attorneys who might give him business. So [he] . . . started looking around.

In 1990, Fulbright & Jaworski hired him to be head of their new New York litigation section. Suffice it to say, it did not go well because, once again, he entered a new firm thinking, "Oh, golly, all these Fulbright partners down in Houston, they're just going to be calling me to handle all the litigation needs of Exxon and whatever other clients are there: Baker, Hughes." Unfortunately, Houston already had some fine firms, . . . and, once again, Mr. Dreier found himself having to have lots of dinners with people . . . in which he basically found himself begging for business. I don't think he liked that either.

He ultimately got into the snit that you knew he would with Fulbright and their management committee, and in around about '95, he wrote kind of a *Jerry Maguire* memo . . . and he decided to go out and his own. . . .

[He] joined a three-lawyer firm. They didn't get along either, so in two more years, Mr. Dreier decides to go out on his own. He gets a small office over in Rockefeller Center and, once again, starts hunting up business, takes on a couple of partners. That doesn't go too well. And, basically, along about the year 2000, he's 50 years old; he's got a nice little office in Rockefeller Center; he's got a duplex on 73rd; he's got a wife; he's got two kids, and he's still out there hustling for business, and he feels like, "I was destined for greater things. I shouldn't have to be doing this."

DEPRESSION

And then 9/11 hit, and he went into a bit of a depression. He went through a nasty divorce. . . . [H]is great case—I see this with litigators often—there's always the one home-run case that's always back in the drawer that when this one comes, "I'm going to really make my nut." His involved a piece of securities litigation against Avon products, . . . and when that one came in, when it finally went to trial, Marc knew that . . . that was going to be worth 10,000,000 to him. He knew he was going to get Joe Jamail money on that one.

Unfortunately, he lost that two months after 9/11, and he went into a long depression. He was now alone, without his wife. He had a few associates, and he went into a long depression that lasted for about eighteen months.

A BEACH HOUSE

In the summer of 2003, he found himself walking down the beach in Westhampton, Long Island, where he had a meager beach house, and he found himself staring up at some of the nicer houses, the ones on the beach. And I asked him, just about that time I said, not knowing what he was going to say, "Gosh, did there every come a moment where you knew you were going to cross the line, where you saw something you had to have?"

And he said, "Oh, yeah. It was the beach house." And he admitted to me . . . that, essentially, the entire reason that he ultimately embarked on a life of crime was that he wanted a bigger beach house. "I wanted to just, well, appease myself; well, not appease myself, gratify myself. I was very, very caught up in seeing the criteria of success in terms of professional and financial achievement, which I think was a big part of the problem, I guess. But I thought it would make me happy, and I wanted to be happy again."

THE FIRM OF HIS DREAMS

So he decides that he's going to begin hiring lawyers. He's going to take his little one-man firm and he's going to hire entire groups and he's going to build Dreier, LLC, into the firm of his dreams.

There is something of a problem with this approach in that it requires large amounts of cash. Banks, he found, did not want to loan him large amounts of money to build the firm of his dreams. He initially started getting loans from factors, even on his receivables. Even that didn't work, so, having hired a few-dozen attorneys and realizing that they needed to be paid, in 2004, he's sitting in front of his computer, saying, "Oh, my God, how am I going to do this? I've got a whole floor. I've got all this technology. I've got 24 attorneys."

CROSSING THE LINE: "I JUST DID IT"

I asked him, "Was there a moment where you, where you determined to cross the line, where you had this great ethical quandary of 'what type of person am I going to be?'" He said, "Huh-uh, no. I just did it."

In 2004, if you were going to steal, and you were in New York, there's only one place to steal; and that was from hedge funds. Hedge funds basically had more money than they knew what to do with. They were all looking for investments, so he realized he had to come up with something to sell to a hedge fund. It couldn't be a security or anything. It had to be something they couldn't investigate, so he came up with the idea of selling debt, essentially selling IOUs.

But who would issue it? His largest client was a very secretive real estate developer named Sheldon Solow. He . . . called up an Excel spreadsheet. He didn't know much about financial statements, so he took some from other real estate companies, dummied up numbers, came up with a piece of debt. He knew Solow's auditors. He got their . . . letterhead, put it under their letterhead; found a . . . hedge-fund guy up in Connecticut to buy it and, voila, in 10 days he had $20,000,000.

All his debt is gone. He's able to hire another few-dozen attorneys. He's able to get an Aston Martin and the first beach house. There would later be a second beach house.

Long story short, in the next two years, what happens the first time anybody does something wrong? They tell themselves—and I can't tell you, over 27 years as a reporter at the *Wall Street Journal* and *Vanity Fair*, how many times I've heard this—"I only thought I would do it the one time. I would pay it back."

No, it never works like that. Oh, come on, the second time is so much easier than the first because now you know how to do it. Over the course of 24 months, that $20,000,000 note becomes 18 more notes on the order of $250,000,000. Dreier, LLC goes from one floor to 11 on Park Avenue. It has a flag of its own on the building. He had—you cannot make this stuff up—he has two more floors in L.A., another 60 attorneys in L.A. And they've got cute clients like, you know, the Go-Gos and movie stars and stuff. He opens a sushi restaurant out there, another beach house.

THE BUBBLE BURSTS

You know, when Dreier happened, everybody thought that somehow the guy had gotten in over his head and he was forced to embezzle a little around the edges to pay [for] you know, the way that this firm was living. In fact, everything about this firm, from lawyer number three to lawyer number 275, was paid for with outright fraud.

Long story short, what happens is the housing market goes down in 2006. And by 2007, Mr. Dreier suddenly finds that not only is it not as easy to sell some of these notes, but there's an awful thing about selling IOUs. At some point you have to "you." And he found not many of these firms that he was selling 12- and 18-month notes to wanting to roll over. So instead of selling notes with 10 percent interest, he suddenly is selling 12 percent, 14 percent. Instead of 18 months, he's now selling 12-month notes.

Unfortunately, by about the time that Lehman and all the others start to fall into the canyons of Wall Street in the fall of 2008, nobody wants any of his notes and he's got

$200,000,000 due. It's about this time that he starts to contemplate a number of options. The best involved selling new notes to people in Abu Dhabi and things like this. The worst of his options included suicide. So he did what everybody would do at this point. He actually managed to sell about another 150 in notes, but, at some point, he just ran out of options.

PLAYING BOTH ENDS

The ultimate—and this is kind of the climax of the article, unfortunately, of his life—the only way he was able to make these notes at the end was by impersonating those who were issuing them. So he had famously called a meeting in Sheldon Solow's conference room, which neither Mr. Solow nor any of his people knew about, in which Mr. Dreier ran a meeting with some of the noteholders. He managed to find a . . . [client] that he'd represented at some point to impersonate, to show up as Mr. Solow's COO. That worked for a while.

THE MOMENT OF TRUTH

The next time he did it, he impersonated a lawyer at a large Toronto trust fund. Unfortunately, there came the moment of truth when the buyer of the note showed up at the Toronto hedge fund's offices where Mr. Dreier was sitting in a conference room, smiling, not that anyone inside the fund knew it, and, unfortunately, the lawyer got suspicious when he couldn't answer things like, "Where's the bathroom?"

And he [the lawyer] happened to know somebody, and so he said, "Do you mind if I call Tom Jones down the hall?" And Dreier said, "Oh, no." And, unfortunately, he realized he was going to call to say, "Is this guy part of the firm?"

At that point, Mr. Dreier decided that he badly needed to go to the bathroom, rose, walked out of the conference room, got on the elevator, and went to his private plane. Ultimately, he was sitting on the private plane when he got a call from the buyers of the note who said, "Something's gone wrong. Someone's impersonating you."

THE END OF THE STORY

At that point, Dreier decided he could either flee or he could go back and face the music. At age 59, with two children, he told me he did not relish a life on the lam in Venezuela or wherever it might be. So he went back, turned himself in to the exceedingly polite RCMP [Royal Canadian Mounted Police] detectives. Long story short, he will now be, probably for the rest of his life, sitting in a nice little Club Fed up in Minnesota.

I was very surprised when he acceded to the interview. It was sad. I've done it before. I will say he was remarkably candid. He had a very clear sense of everything he'd done wrong . . . morally, legally, and in every other part of it.

I will close just by saying I think that the one thing that Marc Dreier took out of this that made him happy is that he became far better known as he walked off to prison than he ever had been as a trial attorney.

> *[I]t's a good reminder to us, as we teach those who are junior to us, that one step over the line is straight onto a slippery slope.*
>
> *President **Joan A. Lukey**, Boston, Massachusetts*
> *Reflecting on the Mark Dreier story*

LOUIS BRANDEIS, TRIAL LAWYER

Lost to many of us is the recollection that before Louis Dembitz Brandeis became the iconic United States Supreme Court Justice, he was for almost forty years a practicing lawyer, a fact of which he was quite proud, in an era that saw a sea change in the practice of law.

Melvin I. Urofsky

In his address to the Spring 2010 Meeting of the College, Professor **Melvin I. Urofsky**, J.D., Ph.D., the author of a number of books about Brandeis, including *Louis D. Brandeis, A Life* (2009), chose to deal with Brandeis, whose graduating average at the Harvard Law School has never been equaled, as a practicing lawyer.

Urofsky received his BA, MA and Ph.D. from Columbia University and is a graduate of the University of Virginia School of Law. Retired from the history department at Virginia Commonwealth University, where he taught for over thirty years, he is currently a Senior Fellow at the National Endowment for the Humanities and, since 1993, has chaired the Board of Editors of the Supreme Court Historical Society's *Journal of Supreme Court History*.

Pursuing the theme of his address, Urofsky observed, "[W]hen someone once complimented him [Brandeis] on the quality of a judicial opinion he had written, he told them, "You must remember, for thirty-eight years I was a lawyer." Indeed, as Urofsky noted, "[T]he habits and skills he developed in the law office permeated all aspects of his life, as a litigator, a reformer, the head of

the American Zionist Movement, an advisor to the presidents, and, of course, one of the greatest Justices in the Court's history."

Of added relevance to an audience of lawyers was the history lesson implicit in his story. The years of Brandeis' practice, from the late 1870s to 1916, coincided with a sea change in both legal education and the nature of the practice of law that shaped the profession in ways we now take for granted. The impact of his career as a practicing lawyer on his role on the Supreme Court was, likewise, not lost on the audience.

An edited version of Urofsky's address follows.

BRANDEIS' LEGAL EDUCATION

As a youth, he [Louis Brandeis, born in Louisville, Kentucky] was greatly influenced by his uncle, Louis Navatal Dembitz, considered one of the finest legal minds in Kentucky . . . . His nephew so admired him that he changed his middle name from David to Dembitz, and apparently never considered any other vocation except the law.

When the depression of 1873 hit, his father, Adolph Brandeis, liquidated his wholesale grain business in Louisville, and took the family to Europe to visit family and the great cultural centers there. During that time, Brandeis attended the Annen-Realschule in Dresden for three terms, a school that was more than an American high school, yet less than a college.

When the family returned to the United States in May 1875, they stopped in Boston to visit friends, and the 18-year-old Brandeis went to Cambridge to see the dean of the Harvard Law School, Christopher Columbus Langdell, and convinced him to admit him to the fall class.

Brandeis' enthusiasm for the law and for the law school is evident in the letters he wrote to his family . . . , "You will have heard from others, 'How well-pleased I am with everything that pertains to the law.' " To a sister he declared, "Law seems so interesting to me in all its aspects, it is difficult for me to understand that any of the initiated should not burn with enthusiasm."

He finished the then two-year course at Harvard with the highest grade level in the school's history; it has never been equaled. In fact, he was so young that . . . [the University] had to pass a special resolution to allow him to graduate. He stayed on for what we would now call a year of graduate study, and then, at his sister's urging, he joined her in St. Louis to start his practice.

THE BEGINNING OF A CAREER

It was a bad time for the many young lawyers who flocked to the city. . . . [H]e did get to do some trial work, and that pleased him greatly; even when the man whose office he worked in . . . assigned him cases with little chance of success. The next week he wrote home, "I expect to try a case for George, which we both fully expect to lose. In fact, our only chance of winning rests in the possibility of total mental aberration of the judge. That probably is the reason why George shifts the work and responsibility onto my shoulders." . . .

When his law school classmate and friend, Samuel D. Warren, who had stood second in the rankings, wrote and urged him to come and form a partnership in Boston, it must have seemed as if he had been thrown a lifeline. Boston also had a lot of hungry young lawyers, and Warren suggested that it might be possible to secure the editorship of two law journals published in Boston, positions that would give them a cushion of income while they built up their practice. Brandeis wrote back that it was a good idea, but it could not be the main work, saying, "Although I am very desirous of devoting some of my time to the literary part of the law, I want to become known as a practicing lawyer."

The editorship failed to materialize, but Brandeis became a part-time secretary to the Chief Judge of Massachusetts, Horace Gray, where he . . . formed the

template that he would use with his own clerks four decades later when he went on to the U.S. Supreme Court.

The firm of Warren & Brandeis thrived from the start. The Warren Paper Company became their first client, but the fame of the two bright young men soon brought them in other business. Charles Bradley, who had been one of their teachers at Harvard and a former Chief Justice of the Rhode Island Supreme Court, brought Brandeis down to argue a case before that tribunal. Although he lost the appeal, as he expected, he did get the court to reduce the judgment against his client. Aside from a hefty fee, the case won him admirers and clients among Rhode Island businessmen and lawyers.

On New Year's Day 1881, Louis sent greetings to his sister and jokingly mourned, "Yesterday was a sad day. We buried irretrievably a half-dozen of the most beautiful and lucrative lawsuits, and all for the love of our clients. The only consolation is that we get our opponent for a client."

In the firm's early years, Brandeis handled much of the trial work, as well as appeals to the higher courts. "I have spent much time of late before juries," he told his sister, "and am becoming quite enamored of the common sense of the people." He argued his first case, unsuccessfully, before the U.S. Supreme Court in November 1889, and he would return to that tribunal several times during the course of his legal career. . . .

FROM ADVOCATE TO COUNSELLOR

Aside from the trial work, Brandeis pioneered in the revolutionary change in legal practice that took place in the late 19th century. Prior to the Civil War, one went to a lawyer after the event. . . . And the pre-Civil War attorney was a generalist, who practiced more or less alone, and he sued on behalf or defended the client against suit. . . .

But with the great industrialization of the country, it became too expensive to wait and see if you were going to be sued. It was one thing to argue about a $20 livestock sale, quite another to run into a problem after tens or hundreds of thousands of dollars had been invested in a new factory or railroad. Businessmen started going to lawyers ahead of time, telling them what they wanted to do and seeking their advice on how best to avoid legal problems. "A lawyer's chief business," said Elihu Root, a leader of the New York Bar, "is to keep his clients out of litigation."

The shift from advocate to counsel and the adjustment to the new requirements of practicing proved difficult for many lawyers and for many clients. One of Brandeis' long-time clients and friends, Edward Filene of the department store, later wrote him, "I recall especially how mystified I was at first at a great lawyer's efforts to keep his clients out of court. I could not comprehend the strategy, but you taught me the wisdom of conciliation."

KNOW THY CLIENT

The ability to give advice required the lawyer to know not only the law, but business as well. "Why should a man come to me for advice," Brandeis said, "unless I know his business as well as he does." In the early years . . . Brandeis spent many hours at the Warren Paper Mills, learning about the business, since many of the questions that the Warren officers asked them affected business, as well as legal questions.

Perhaps the best example of how Brandeis filled the role of counsel involved William McIlwain, who started from scratch and built up a multimillion-dollar shoe business in little over a decade. In 1902, he asked Brandeis to help him. The country was in a mild recession, and McIlwain wanted his workers to accept a wage cut without a strike. Well aware of his own humble beginnings, McIlwain had tried to treat his workers fairly, maintaining a safe working environment and

paying them good wages. He thought they had little grounds to complain, and he did not understand the resentment.

The matter McIlwain brought to Brandeis was . . . a business problem. Brandeis began familiarizing himself with the shoe manufacturing business by talking not only to McIlwain's managers, but also to the leaders of the labor unions at the plants. He learned that although the work force did, indeed, enjoy high wages, they received that pay only for the weeks they worked. The shoe business ran on cycles. When salesmen sent in their orders, the factories worked on full shift, often with overtime. Then men would be laid off until the next batch of orders came in. Most manufacturers closed their factories completely at least twice a year for several weeks at a stretch and often had additional periods of slack time when the men worked partial shifts.

McIlwain's high wages proved illusory, since what a laborer could make over a year amounted to less than a living wage. The men understood that, and resisted the wage cut in busy times, knowing that there would be no money at all in the slack periods. Brandeis learned that this situation permeated the entire business. . . .

The more he [Brandeis] studied the situation, the less sense it made to him. . . . "I abhor averages," he declared. "I like the individual case. A man may have six meals one day and none the next, making an average of three per day. But that's not a good way to live." . . .

McIlwain asked him what he should do. After all, the entire industry operated on this basis. Brandeis suggested that McIlwain reorganize the sales end of his business. Salesmen went out on the road with shoe samples for styles that would be made the following year, and they would travel until they had accumulated a fair batch of orders before filing them with the factory. However, some retailers would not put in orders until the last minute because they didn't want to tie up either their capital or shelf space.

Brandeis suggested that the salesmen file their orders earlier, as they received them, and not accept orders from retailers unless they came in well ahead of the delivery date. Then McIlwain's managers could plan their work for weeks, even months ahead, set up the work force so that the men can work regularly and so there need not be either overtime or enforced layoffs. "Do not accept last minute rush orders, but promise the customers they will get their delivery on time only if they order on time."

McIlwain agreed, and within a few years had completely revamped the shoe business. His men . . . now worked more than 300 days a year. Not only did McIlwain regularize his work force, but by imposing some order on the sales force, rationalized the business as a whole.

McIlwain followed Brandeis' advice, not only because he saw the wisdom of it, but because he trusted the man. He knew that Brandeis would never suggest any plan that did not take into account the facts of the situation. And facts to Brandeis, as to any good lawyer, mattered greatly.

BRANDEIS' OBSESSION WITH FACTS

Years earlier he had written in a chapbook, "Know thoroughly each fact; don't believe client witnesses; examine documents; reason; use imagination; know bookkeeping, the universal language of business; know persons; know not only specific cases, but whole subjects; can't otherwise know the facts, know not only those facts which bear on direct controversy, but know all the facts and law that surround."

. . . . [T]his obsession with facts is one of the keys that made Brandeis a great lawyer. One should not think that all he did was research different industries and then hand out sage advice to businessmen. On many occasions, litigation could not be avoided, and once involved, he would be a tireless, some said a ferocious, adversary. He

prepared his trials and had little patience with lawyers who had not done their homework on time, and this often earned him the enmity of opposing counsel.

A DEFICIT IN COLLEGIALITY

In explaining some of the animosity of the Boston Bar at the time of Brandeis' nomination for the Supreme Court, his friend and long-time pillar of the New York Bar, Charles C. Bellingham, noted that many lawyers resented Brandeis because he neither asked for nor gave favors in the usual give and take of the law. If one lawyer asked for an adjournment, for whatever reason, professional courtesy dictated that the opposing lawyer agreed on the understanding that at some point in the future, the tables might be reversed. Brandeis, according to Burlingham, never gave any favors to anybody. His justification was that he was representing his client. Bellingham himself thought that Brandeis was wrong on this, and it contributed to the ill feeling against him by the Boston Bar.

We also have evidence that Brandeis did not suffer fools gladly, even outside the courtroom. . . . [He was] a fierce opponent, but not necessarily a lovable one.

Although his clients trusted him and some became his friends, a trip to Brandeis' office was not one of life's more pleasant experiences. There are numerous stories of clients or would-be clients coming in to ask Brandeis to take on their cases. In the winter, they kept on their coats, since Brandeis deliberately kept the temperature in his office chilly so that people would not be tempted to stay and chat. They would ask his help, make their case and then be subjected to a grilling on who had the right. If Brandeis decided that the man stood in the wrong, he would tell him so and suggest reaching an accommodation as quickly as possible. . . . .

If, on the other hand, Brandeis thought his client was in the right, he would agree to take the case, and the client would then thank him, through chattering teeth, and go out into the warmth of the winter. If there appeared to be right on both sides, as in the McIlwain situation, Brandeis might seek a solution beneficial to all parties. He liked this role of what he called "counsel to the situation," a role that occasionally got him into difficulty . . . . .

THE CONSUMMATE ADVOCATE

We have a description of Brandeis before the Supreme Court . . . . "Brandeis slowly, deliberately, without seeming to refer to a note, built his case from the particular to the general. It was the result of intense preparation beforehand. Submerging himself first in the source material, he was determining the exclusion or inclusion of detail, the order, the selectiveness, the emphasis which marked his method. Once determined upon, it had all the spontaneity of a great address, because he had so mastered the details that they fell into place, as it were, as a consummate whole."

But it was always in the facts that he believed a case could be won. On more than one occasion he tripped up an opponent by knowing more about the subject at hand than the other man did. Once the subject involved the price of feathers for mattresses and pillows. Brandeis, at one time, had some trouble sleeping and, for his own purposes, had researched the different types of stuffing used in bedware and the market prices. A man who apparently forgot nothing, this information came to his client's aid years later.

ECONOMIC SUCCESS

This work . . . did not go unrewarded, and Brandeis must be counted among the top-paid lawyers in the country. The range of incomes in the profession . . . varied greatly. Young lawyers in large firms made more than those in small offices. Two-thirds of the lawyers practicing in New York

at the end of the 19th Century made about $3,000 a year, while those working in the large firms . . . made thrice that. Of the 1,500 lawyers in Philadelphia in the late 1880s, fewer than one-third were thought to be self-supporting . . . .

In Boston in the 1890s, the best estimate is that perhaps a half-dozen made $20,000 a year, a dozen more made $10,000, and another quarter $5,000, and the remaining three-fourths made less, often far less. . . . In 1890, at the age of 34, [Brandeis] earned more than $50,000 a year, well over $1,000,000 in current value, . . . while 75 percent of the lawyers in the United States made less than $5,000. As late as 1912 when he was devoting much of his time to reform, he received $105,000 from his practice. The young man who had told his mother that he needed challenges to prove had, indeed, done well.

Then he did good, devoting more and more of his time to pro bono work.

THE BRANDEIS BRIEF

Of course, the great example of Brandeis and facts involved what we still call the "Brandeis Brief," the appeal he made in the Supreme Court in 1908 in defense of an Oregon law establishing maximum hours for women workers in factories, laundries and mills. The unusual brief he filed in *Muller v. Oregon*, with only a few pages of legal citations and over a hundred factory and medical reports on the effect of long hours on women's health, would become a model ever since for whatever reform legislation is challenged in the courts. . . .

BRANDEIS, THE LAWYER, AS A JUSTICE

Brandeis . . . carried this passion for facts into his work on the Supreme Court. Today, many Justices will assign one of their clerks to write up the factual part of an opinion, but Brandeis did this himself, believing that unless he understood the facts of the case, he could not know the law. He was determined, he told one clerk, that he would never be caught in a factual error . . . . And if his great dissents often sounded, as the political scientist Harold Laski complained, like Brandeis Briefs, that, in fact, was his purpose.

bon mot

Thank you so much Professor Urofsky. I have to tell you, as a member of the Boston Bar and a former State Committee member in Massachusetts for this organization, there has often been a joke that many of the people that we passed over for lack of collegiality were more collegial than Louie Brandeis, and that Louie Brandeis, were he to have come before the State Committee of the ACTL, would not have made it through because of lack of collegiality. However, he was certainly brilliant, and that was the reason that little character flaw seems to have been overlooked, and we consider him a local gem.

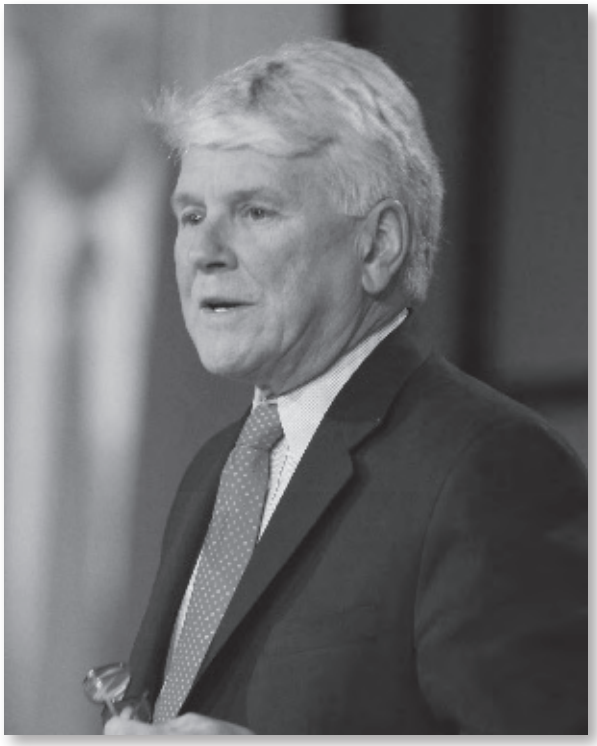
College President Joan Lukey,
Responding to the address on
Justice Louis Brandeis

bon mot

FORMER WHITE HOUSE COUNSEL SPEAKS

SELECTION OF FEDERAL JUDGES, CHOOSING A SUPREME COURT JUSTICE AND CLOSING GUANTÁNAMO

*Former White House Counsel **Gregory B. Craig**, FACTL, of Washington D.C., since January 2010 a partner in Skadden, Arps, Slate, Meagher & Flom, LLP, shared with the Spring Meeting audience some of his reflections on his experience as White House Counsel in the first year of the Obama Administration.*



Gregory B. Craig

In introducing Craig, Past President **Gene Lafitte**, of New Orleans, Louisiana, noted that he "has had an amazing career as a lawyer . . . at the White House, on The Hill, in the State Department and in the courtroom. . . . a fine American, devoted to his country, as exemplified by his public service to our nation."

The son of a World War II naval officer who became Dean of Men at Stanford, went on to become president of several colleges and universities and was the first Director of Training for the Peace Corps, Craig is a graduate of Harvard and of Yale Law School.

He began his legal career at Williams & Connelly, under the tutelage of Edward Bennett Williams. In public service, he served as Advisor on Foreign Policy, National Security and Defense to Senator Edward Kennedy, as Assistant to the President and Special Counsel, coordinating the defense of President Clinton in his impeachment proceeding, and as Director of Policy Planning and

Special Coordinator for Tibetan Issues under Secretary of State Madeleine Albright.

The first White House Counsel in the Obama administration, he was in the forefront of the efforts to fulfill the President's campaign pledge to close the detention facility at Guantánamo Bay, and he was instrumental in changing the interrogation and detention policies at that facility. He also participated in the search that led to the nomination of Sonia Sotomayor to the United States Supreme Court.

In his years in private practice he has represented, among others: John Hinckley, the would-be assassin of President Ronald Reagan; Juan Miguel González, in the custody proceeding involving his son, Elián González; United Nations Secretary General Kofi Annan before the Volker Commission in the oil-for-food program investigation; the Panamanian government in the trial of former president, Manuel Noriega; former CIA director, Richard Helms for alleged perjured testimony before the Senate Foreign Relations Committee; Victor Posner when he was charged with income tax evasion, and Alexander Solzhenitsyn, in a 1978 libel case.

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Disclosing that he had been asked to talk about "anything that is on my mind," Craig chose, out of all his experiences as White House Counsel, to discuss three subjects: picking Federal judges, picking a Justice of the Supreme Court and the detention center at Guantanamo.

SELECTING FEDERAL JUDGES

"[I]n my judgment," he began, "finding good candidates for the bench and appointing individuals of character and quality to serve as judges is one of the most important functions . . . [of] the President of the United States . . . ."

"Now, as you know, the process of appointing judges is not simply the President picking a name and saying, 'That's going to be the judge.'. . . The Constitution says that the President shall nominate and by and with the advice and consent of the Senate shall appoint judges of the Supreme Court. Now, that has gone on to mean not only judges of the Supreme Court, but federal District Court Judges and Courts of Appeal. So the Senate plays an important role . . . . [T]he White House counsel spends a lot of time with members of the Senate talking about judges."

He observed that the Senate's precise role is a matter of some debate. The "blue-slip" rule, which allowed both senators from a state, regardless of political party, a veto over the selection of the Federal judges nominated to serve in the trial bench in their state, had been abolished by a Republican majority in 2001 and restored by a Democratic majority in 2006. The effect of the blue slip rule is to require in those states where the senators are not of the same party a measure of bipartisanship in judicial selection.

THE CRITICAL IMPORTANCE OF TRIAL JUDGES

Observing that his was not an audience to which he needed to explain the critical importance of judicial appointments, he offered his three reasons why this is so. First, "I believe that for those of us who practice in courts, the quality of our lives depends heavily on the quality of the judges that we appear before. Judges that do not measure up turn our lives into more agony than ecstasy, and those prosecutors and those federal defenders that have to live with the judges who do not have the temperament or the interest or the ethic to serve as conscientious judges . . . do enormous damage . . . ."

"Secondly, I believe that conscientious judges are responsible for the credibility of the entire system. Depending on the district, sometimes eighty percent of the criminal defendants in a jurisdiction are indigent, and there is not a strong political constituency that looks after this particular sector of our society. In my judgment, this is the emergency room of the criminal

justice system, the way in which we handle these individuals, the prosecutors and the defenders. What is most important to me is the quality of the judges that call the balls and call the strikes and maintain the legitimacy and the fairness of the criminal justice system."

"My view remains the same, that . . . those federal judges playing that role in the criminal justice system really are absolutely essential to the legitimacy of the entire system of constitutional government, because, as I say, this is one place where the Constitution every day is in the hands of these individuals."

"A final perspective," he continued, "on the importance of federal judges also reflects my own personal experience. . . . I do believe American history happens in federal district courts all the time. We know that it happens in Supreme Court opinions, because we read about it and debate about it. It gets a good deal of attention. But it also happens in the courtrooms where powerful, strong, smart, federal district court judges every day operate and issue their opinions and hand down their decisions. I would just say, in my own life, look at John Sirica, look at Barrington Parker, Gerhard Gesell. The number of strong and powerful and important district court judges that have made a difference in American history is really very significant."

"Now," he concluded, "no one is more passionate about the legitimate role of the Senate in the process of providing their advice and consent with respect to individual nominees than I am. It is an important and a vital check, and it also balances out the presidency when it comes to what would otherwise be unfettered presidential power to remake the federal judiciary in the President's own image."

DELAY AND OBSTRUCTION

Craig went on to assert his opinion that in the present Administration the "check" has been abused and the "balance" is not right. He went on to give examples as of the date of his address. Since his inauguration on January 20, 2009, President Obama had sent 48 nominations, including that of Justice Sotomayor, to the Senate. Not one of those nominations had been rejected, but only sixteen had been confirmed. Fourteen names have been sent by the President for confirmation to the Courts of Appeal in the federal appellate courts, but only five had been confirmed. None had been rejected. "There has been, with respect to each one of them," he asserted, "extraordinary delay that I believe is unconscionable and indefensible."

Noting that in less than sixty days from his inauguration the President had sent up the nomination of District Judge David Hamilton, a nomination enthusiastically supported by the Republican senator from his home state, to the Seventh Circuit Court of Appeals. The nomination, which was ultimately confirmed by a margin of more than twenty votes, was filibustered and not voted on in the full Senate until eight months later.

Craig went on to list three other appellate court nominees, whose confirmations took from five to seven months from the date of nomination to a vote in the Senate, though none of the confirmation votes was close. Indeed, in one that took seven months, the vote was 97 to nothing. He called attention to a fifth nomination, that of Virginia Supreme Court Justice Barbara Keenan to the Fourth Circuit, that had been subjected to "massive delay," ending the week before his address with a cloture vote of 99 to nothing to end a filibuster of her nomination. "It seems to me," he suggested, "that that is an example of delay and procedural . . . obstructionism that is unnecessary and unworthy of the Senate. It just took up floor time and delayed the confirmation of a totally qualified judge."

"In my judgment," he continued, "this delay in the confirmation of these judicial appointments will be seen [to] and could undermine the President's constitutional right . . . to make the appointments that he is entitled to make."

SELECTING A SUPREME COURT NOMINEE

Craig observed that the nomination of Justice Sonia Sotomayor provided "an experience I think we can all learn from." He noted that since January 1969, when President Nixon took office, Republican Presidents have proposed seventeen individuals to be Justices of the Supreme Court and that twelve have been confirmed and the rest rejected, withdrawn or withheld. The three nominees of Democratic Presidents were confirmed.

He reported that from the very earliest days of the transition, President Obama, a teacher of constitutional law, knowing that he might well have a Supreme Court vacancy to fill, was talking informally with his staff about names of potential nominees in the university community, the appellate court community, the practitioner community and elected and serving government officials. The staff then performed a fairly complete vetting of each person who might be considered, so as to be prepared to act if a vacancy occurred.

LESSONS FROM SOTOMAYOR NOMINATION

He reminded the audience that on May 26, 2009, the day Judge Sonia Sotomayor was nominated to fill the vacancy created by the retirement of Justice David Souter, "she started her courtesy calls on the leadership of the Senate, and those private meetings, one on one with Senators on both sides of the aisle, continued throughout the process until the final vote in August. And . . . one of many extraordinary things about the process is that by the end of the process, Judge Sotomayor had met with 93 members of the United States Senate. That is a record that will probably never be surpassed."

He noted in passing that there were two "firsts" involved in her swearing-in ceremony. It became known that members of the Supreme Court wanted the ceremony to take place in the Supreme Court, rather than at the White House, and so Chief Justice Roberts performed the ceremony there. The other "first" was the live filming on national television of the ceremony in the Supreme Court building.

Craig went on to list eight lessons learned from the Sotomayor experience. ***Lesson number one:*** "By far the single most important factor in . . . any process involving a Supreme Court confirmation, was Justice Sotomayor's own impeccable credentials, her qualifications, her personal character, her record and her professional integrity, her competence and her self-evident adherence to the rule of law. This is a good place, by the way," he suggested, "to begin with all considerations of a potential nominee. . . . I think [it] is so important that the selection of a nominee . . . begin and end with the consideration of these factors: personal integrity, professional competence, capacity to write and articulate lucidly. . . . "

Lesson number two: "[A] a compelling personal story, where she came from, where she grew up, what she had accomplished in her own life. And that powerful personal narrative emerged over and over again during the process and strengthened an already very strong candidacy. It also was there for Justice Alito. It was also there for Justice Roberts. That compelling story is always very important, at least to the presentation of the candidate to the American public."

Lesson number three: "[D]uring the first forty-eight hours of a nomination, the public's perception and understanding of that nominee, the character, personality and story of that nominee, is largely established, and so if you want to have a successful nomination, you spend a lot of time developing the presentation of that nominee to the American public, because after that positive image and positive frame have been established, it is very difficult for the opponents to change the view of that person, because they have to change the public's mind."

Lesson number four: "[B]ehind every successful Supreme Court nomination is a powerful champion in the Senate. . . . So there

is something to be learned there when you consider the various potential candidates: does that person have someone who will go to bat, will be in the corner prepared to go out and defend the nomination under all circumstances?"

Lesson number five: "[B]e sure that you know that every nominee, no matter how flawless and issue-free, will have some problems. . . . [A]s problem-free as Judge Sotomayor was, there were some issues in some of her opinions and some of the speeches that she had given that we had to identify in advance and address the challenges and prepare for them."

Lesson number six: "[I]t is important to have a comprehensive strategy and a mechanism to coordinate the various components of the confirmation process. There are the legal issues. There are the political issues. There is the outreach. There is the media. And let me tell you, one of the greatest challenges is to deal with the single-interest issue groups that always participate in the Supreme Court process. . . . [S]ingle-interest issue groups that support you can do as much damage to your nomination or to your candidate as single-interest issue groups that oppose it."

Lesson number seven: "Courtesy calls, you have to prepare for. They begin immediately, so you have to work with your candidate long before the announcement is made. She goes up and meets with the majority leader and minority leader the day of the announcement, and those courtesy calls will be discussing all the hot topics that the Court is dealing with. And, although it is an informal conversation, . . she will have to be prepared to deal with all those issues right from the get-go. The courtesy calls do not change opinions. They will neutralize opposition, but they can do real damage, I think, to the candidacy if they're not handled well."

Lesson number eight: "[I]t is not a sign of weakness, to prepare to spend time with the candidate. No candidate, not even someone as well-read and sophisticated as Chief Justice Roberts or as knowledgeable of the law as Judge Sotomayor, is fully conversant with all the legal issues that will be discussed, so it makes sense to spend time organizing thoughts, legal briefings and dealing also with the land mines that are unique to Washington D.C."

Craig ended this part of his address by commenting on the process itself. He noted a raging debate among academics about whether or not this process is worthwhile, whether the open public hearing covered by television and cable television, and now the blogs, is a public service or a public detriment. "Those are all interesting questions . . . for the academics," he said, "but not for the practitioners. Live radio and television coverage of the Supreme Court confirmation process . . . is here to stay . . . and so, in my view, we've got to get ready the next time around for exactly the same thing."

"I think," he continued. "there is much to be said for these open hearings. I know . . . the academics . . . would like a more robust debate. They do not satisfy the purists or the ideologues who would like to explore every nook and cranny of a potential candidate's history and thinking about an issue. But, in my view, this is the only place that the American people have a chance to get to know the members of the Supreme Court without going to the Court themselves and as a member of the public . . . to sit and watch an oral argument. And that, I think, is valuable."

GUANTANÁMO

Finally, Craig asserted that, "I believe that the President of the United States is still fully committed to closing the detention facility at Guantánamo, and I believe he will succeed in that mission. It is true that we did not succeed in making the deadline that was set forth in the Executive Order that he signed on January 22nd, and that there has been a delay in that. But that delay is not attributable to any lack of commitment on the President's part or any lack of competence on the people that have been working on the problem. It is a difficult . . . a tough problem that has become politically charged. It is going to require work to achieve without

permanent disruption, I think, of Washington D.C."

"But what remains to be done? There still remains vigorous diplomacy. When the President took office, there were approximately 250 detainees there. It has now been worked down to 188, and that will be broken down into three groups. And you will see that develop in the next months and weeks. But the truth is, we have made enormous progress in placing detainees carefully and safely with other nations who have been willing to help us solve a problem that is not of their making. And Secretary of State Clinton has done a magnificent job working with her special envoy, Ambassador Dan Fried, to make this happen."

"The second major challenge is to get bipartisan congressional action to fund the new facility in Thompson, Illinois, and this is the critical political challenge for the President. In my view," Craig continued," if he can persuade the Republicans to join a bipartisan effort to close the detention facility and to support funding for that facility in exchange for trying the 9/11 detainees in military tribunals, as opposed to Article III courts, that would be a good result and a fair and a positive compromise."

REPRESENTATION OF GUANTÁNAMO DETAINEES

Craig ended his address by asserting, "Finally, I would like to comment briefly on the recent attacks that have come out of the blogosphere and some of the most extreme elements of the political spectrum, raising questions about the patriotism and the character of government attorneys who come from law firms that represented detainees or who themselves were involved, in their private practice, in representation of detainees."

"The lawyers who took those cases did so, at least in part, in response to the Supreme Court's opinion in *Boumediene* that concluded that the detainees were entitled, under the Constitution, to habeas corpus procedures. . . . [T]hat necessarily requires legal representation, so even these individuals who were being held as terrorists were entitled to counsel. The willingness of American lawyers to take on these cases, in my judgment, was praiseworthy, not blameworthy. That they did so, I think, was consistent with the highest and best traditions of the American criminal justice system."

"I need not point out to this audience that this tradition goes back in our country hundreds of years, and that John Adams' willingness to take on the representation of an English soldier charged with murder because he shot into an unarmed crowd in Boston, an incident you all know as the Boston Massacre, is only one of many examples in our history where lawyers taking on unpopular clients, even evil clients, do enormous service to the country. So I find the effort to characterize lawyers serving in the Department of Justice as 'terrorist lawyers' to be really reprehensible, and I applaud Former Solicitor General Ted Olson and his counterpart, Walter Dellinger. They are to be commended and emulated, in my judgment, in condemning these attacks in public, and I would hope other former government officials would do the same. I would urge this body, through its officers, to consider using the precise language, because to use Walter's very good word for this, it is really 'shameful.'"

PRESIDENT LUKEY'S RESPONSE

In thanking Craig for his remarks, President Joan Lukey pointed out that approximately eighty Fellows of the College have been involved in representation of Guantánamo detainees, even in circumstances and in locations where it was not popular for them to do so. "We thank them for their service," she concluded, "and we are proud that the College could play a role in helping to reduce the number of detainees at Guantánamo and to protect the Great Writ."

bon mots

I . . . [am] reminded of the wife who elbowed her husband in the middle of the night and said, "Wake up, Dear. I" -- I hear noises on the other side of the house. I think we have a burglar." The husband sleepily, but dutifully, got up out of bed and went to investigate. And as he rounded the hallway and looked into the living room, sure enough, there was the burglar rifling his wife's purse. He flipped on the light switch, and ran over to the burglar and grabbed him and gave him a big hug and said, "Praise the Lord, you finally arrived. My wife has been expecting you for 12 years."

Past President Gene Lafitte.
Introducing Greg Craig, FACTL

* * * * * * * * * * *

And I always remembered when I learned that I had passed the Bar, I went running . . . in to Ed's [Edward Bennett Williams] office, and I was feeling pretty proud of myself and pleased with myself. And I said, "Ed, I just got the news. It's good news. I passed the Bar." And I would say about a gallon of cold icy water came throwing down on me. And he says, "It's just like the Wassermann test." And I said, "I don't know what the Wassermann test is. Could you tell me?" He says, "It's a medical test designed to determine whether or not you have been infected with the disease of syphilis." And like the Bar, the Wassermann test, no one pays much attention if you pass. But if you fail, it could be a disaster."

. . . .

[I]f there were such a thing as estoppel in American politics, we'd be in great shape.

Greg Craig, FACTL, Washington, D.C.
Former White House Counsel

bon mots

Almighty God, we ask you to bless this food and this occasion, a gathering of dedicated Fellows of the American College of Trial Lawyers, joined by a very special assembly of inductees, together celebrating a unique institution, embracing members of the trial bar of the United States and Canada, two great neighboring nations, each, while enjoying distinct cultural traditions, nonetheless sharing a commitment to the pursuit of access to justice.

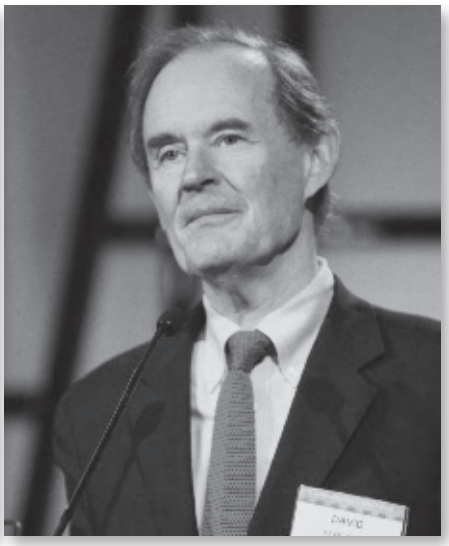
Our shared values include a fierce dedication to the notions of the highest standards of ethical professionalism, practiced in an environment of civility and friendship. We pray the special privileges and opportunities which we enjoy will serve to fuel our ambitions to do well by the citizens of both our nations and that our traditional standards of both commitment and fellowship will be renewed and refreshed by the presence of our distinguished colleagues at the Bar who, by way of this timeless induction ceremony, will shortly join our ranks as Fellows of the American College of Trial Lawyers. Amen.

Past President David W. Scott, Q.C.,
Spring Induction Banquet

CONSTITUTIONAL IMPLICATIONS *of* BANNING SAME-SEX MARRIAGE DEBATED

Following its tradition of using national meetings of the College to focus on contemporary issues, the Spring meeting featured a debate between counsel representing opposing sides in Perry v. Schwarzenegger, *the case challenging the constitutionality of Proposition 8, which banned same-sex marriages in California. The district judge before whom the case was then pending had denied summary judgment and had held extensive evidentiary hearings. At the time of this writing, that court has found Proposition 8 unconstitutional and the case is on appeal to the Ninth Circuit Court of Appeals, which has stayed implementation of the trial court's decree. The following account of the debate frames issues that will be debated in other jurisdictions and that may well ultimately be decided by the United States Supreme Court.*

David B. Rivkin, Jr.



David Boies

In a debate entitled *The Constitution and Defining Marriage in the 21st Century*, **David Boies**, FACTL, of Armonk, New York and **David B. Rivkin, Jr.**, Washington, District of Columbia, explored the issues underlying the ongoing debate on same-sex marriage. Boies, as co-chief counsel with Fellow Ted Olson, currently represents the plaintiff in *Perry v. Schwarzenegger*, challenging the constitutionality of California's Proposition 8. Rivkin is defending its constitutional validity.

Boies, the founder and chair of Boies, Schiller & Flexner, was lead counsel for Vice President Gore in *Bush v. Gore* (in which Olsen was his principal opponent) and Special Trial Counsel for the Department of Justice in the Microsoft antitrust litigation. Named Lawyer of the Year by the *National Law Journal* and runner-up Person of the Year by *Time* magazine, he has served his country as counsel or chief counsel in a multitude of capacities.

Rivkin, a senior litigation partner with Baker Hostetler, is a noted writer and commentator on constitutional issues, international law and foreign and defense policy. He was legal advisor to the President's Counsel in the first Bush Administration, and Deputy Director of the Office of Policy Development for the United States Department of Justice and has served in a number of high-profile issue-oriented organizations.

In setting the stage for the debate, Regent **Paul Meyer** of Costa Mesa, California, who introduced the two speakers and moderated the debate, noted that the evidentiary phase of the case had been concluded and the case was awaiting oral argument in the trial court.

The trial judge had ruled that, in addition to the primary constitutional issues of due process and equal protection, the issues of fact explored in the evidentiary phase should include an examination of the state's underlying interest in Proposition 8. Thus broadened, the evidentiary phase had included testimony of historians, sociologists and psychologists, to whose testimony the speakers referred in their presentations. .

IN DEFENSE OF PROPOSITION 8

In his opening statement, Rivkin asserted that the debate involves two core issues: whether or not it was rational for the people of California to adopt a particular definition of marriage as reflected in Proposition 8, and what is the proper judicial role in the area of marriage.

Rationality

Conceding that the judgment reflected in Proposition 8 is something on which we can disagree and which may well be wrong, Rivkin argued that that did not make it irrational. Unlike government regulation of intimate and private conduct that does raise constitutional concern, he argued that no fundamental constitutional issues are implicated either by the definition of marriage or regulation of various aspects of marriage. Horizontal and vertical separation of powers, he argued, thus leaves marriage to be regulated by the states, rather than the federal government.

He then argued that Proposition 8 rationally advances legitimate government interest. The first underlying purpose is the desire to ensure that the definition of marriage is configured in a way that advances marriage's core traditional goal, procreation, of which same-sex unions are incapable without outside help, and through it, the preservation of our species.

The second, he asserted, is supported by a body of knowledge that suggests that children are best reared in a domestic environment that includes a resident father and mother. Conceding that children are not always brought up in tranquil surroundings, given the incidence of divorce, domestic violence and death, he argued that it is nevertheless rational for the people of California to aspire to adopt a definition of marriage that maximizes the prospects of a two-parent home.

Rivkin went on to suggest what

he termed a more fundamental rational purpose that Proposition 8 advances, the unique role that family plays in our system of ordered liberty. That system requires that governmental power be cabined and exercised only in a carefully delineated sphere and that it be balanced and constrained, not only by the set of constitutional restrictions, but also through the existence of a vigorous and dynamic private sphere. This private sphere, he asserted, is populated by participants ranging from corporations to not-for-profit entities, but, most importantly, by families. Preserving the viability of a family is thus of utmost importance, not just for some abstract governmental purpose, but for preservation of individual liberty.

It was not, he argued, irrational for the people of California to conclude, when California courts began to act as if alternative arrangements could, indeed must, qualify as marriage, that marriage as traditionally defined was being displaced in favor of "multiple arrangements." It was then legitimate for the people of California to conclude that true traditional definition of marriage had to be shored up. The problem was not just the broadening the definition of marriage, but also how it was being done, through judicial, rather than political, channels.

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Further, Rivkin argued, if California courts leaned towards a legal conclusion that denying same-sex partners symbolic state imprimatur violated some California statutory or constitutional provision, the same argument could then be made of a state's refusal to classify a polygamous or polyandrous union of adults as marriage.

Thus, Rivkin concluded, the people of California had a choice either of preserving the traditional definition of marriage as the baseline or dispensing with marriage altogether in favor of multiple and complex arrangements, an outcome that he asserted would have greatly harmed individual liberty. In his view, in a very real sense the people of California had to balance two competing liberty interests, an exercise he termed inherently infused with rationality.

Constitutional Issues

On the due process issue, Rivkin noted that marriage was once regulated by religious institutions and by the concept of private marriage contract. There are wide variations in legal provisions among states as they relate to property rights, custody of children and the like, States, he asserted, could get out of the business of regulating marriage entirely by refusing to sanction any kind of union as marriage, leaving this to the private sector, or they could refuse to infuse marriage with any particular set of legal consequences.

Conceding that L*oving v. Virginia* and other Supreme Court cases can be read to define marriage as a fundamental right, he argued that this language "really describes, not the state-sanctioned symbolic aspects of marriage, but the intimate and private elements of marriage . . . which we know is largely, almost exclusively, immune from state regulation. Even here," he asserted, "the courts have dealt with traditional marriage defined as the union of man and woman."

Rivkin conceded that case law suggests that a key starting point in discerning whether a particular right is fundamental for the purposes of substantive due process analysis is to ascertain whether it enjoys sufficiently robust recognition and widespread recognition in the body polity. He conceded that although same-sex unions do not presently enjoy this degree of recognition, he could envision a situation in the future where, *through democratic channels*, a sufficiently large number of states come to endorse and even praise same-sex unions. In that event, legal impediments such as Proposition 8 would have to be reviewed under a high level of scrutiny. That, he argued, is not the case today.

As to the equal-protection argument, Rivkin pointed first to the fundamental procreation-related differences between same-sex and heterosexual couples, arguing that they were, therefore, not similarly situated. Second, he

argued that Proposition 8 does not facially discriminate against gay and lesbian Californians at all. It does not prevent a gay person of one gender and a bisexual person of another or two gay persons of opposite gender from marrying. If, he argued, you can decouple marriage from procreation, who can say that marriage cannot be decoupled from sex.

Arguing that Proposition 8 does not directly implicate the equal protection clause at all, he asserted that at most, it has an asymmetrical, disproportionate impact, on gay and lesbian Californians. While, he argued, disproportionate impacts can be a basis for finding a violation of statutes and civil rights acts, they do not necessarily make a constitutional violation.

Rivkin ended his opening remarks by pointing out what he called the ultimate irony, that there are no practical differences between marriages and civil unions and that the pending case is all about symbolism. "What is really being sought here is to force the . . . people of California to give their symbolic blessing to same-sex unions. This goal . . . can be accomplished through democratic channels. To take it out of these channels, . . . to literally shove it down the throats of people of California by judicial action, would be counterproductive and would only further polarize the debate in ways that so tragically plagued our discourse about many other contentious public policy issues, including abortion, that got taken out of the democratic vortex in favor of judicial decision-making."

IN OPPOSITION TO PROPOSITION 8

Restating the two basic issues, Boies asserted that they are, first, whether marriage is a fundamental right that has been recognized by the courts and, second, whether there is justification for California limiting marriage to couples that are members of the opposite sex.

Marriage as a Fundamental Right

"The problem with the first argument," he asserted, ". . . is that the Supreme Court has already ruled on that issue. . . . The Supreme Court has ruled repeatedly that marriage *is* a fundamental right. Contrary to the argument that . . . the courts should stay out of this area, . . . leave it up to the democratic legislatures to decide the definition of marriage, the United States Supreme Court has repeatedly said that this is such a fundamental right of all individuals that the Supreme Court has an obligation, under the due-process and equal-protection clauses of the Constitution, to make sure that states do not discriminate, do not enact laws that . . . have a disproportionate effect on certain of its citizens. . . . [T]hey did so in *Loving v. Virginia*, in which they held that people of different races could not be barred from marrying, and, incidentally, they did that at a time when 64 percent of the American people believed that interracial marriage was wrong."

"This was not a situation in which the Supreme Court said, 'Well, we're only going to rule this after the public has already decided that.'. . . [I]f you took that approach to the Constitution, you would not need a Constitution; you would simply look at what the voters decided. The purpose of having a Constitution, particularly the purpose of having an equal-protection clause and due-process clause, is that there are certain rights that no minority should be deprived of, regardless of whether it's 52 percent of the public, as it was in Proposition 8, or . . . or 64 percent of the public, which was the case in the poll with respect to interracial marriage."

Boies went on to cite other similar holdings: a case invalidating a Wisconsin statute that withheld a marriage license where the applicant had abused a prior marriage and a case from Missouri invalidating a restriction of marriage for prisoners facing incarceration for long periods. These holdings by the Supreme Court illustrate that the courts do have a role in making sure that every person has the right to marry the person they choose.

Absence of Rational, Compelling Justification

On the issue whether there is a sufficiently rational, compelling justification for the State of California to restrict marriage to opposite sex couples, Boies asserted that "if you believe in the values of marriage, if you believe that marriage is good for society, if you believe in the governance reasons for marriage, if you believe that marriage helps stability with children, then there are two questions to ask: "If marriage is so good for society and so good for children, why don't you expand it to same-sex couples and the children that they are raising?" Indeed at trial the witnesses for both sides agreed that both spouses and the children being raised by same-sex couples would materially benefit from such an expansion.

Addressing the question whether allowing gay and lesbian couples to marry harms heterosexual marriage, Boies postulated: :"If your gay or lesbian neighbor got the right to marry, would you say, 'Well, that's it for me. If they can marry, I don't want to be married anymore?' For those of you who have children who fall in love and want to get married, can you imagine them . . . if they found out that their gay and lesbian friends could get married, saying, 'No, we don't want to get married. If they're going to get married, why should we get married?'

Suggesting that this does not reflect either common sense or the support of scholarship, he asserted that Canada, South Africa, and Spain have legalized gay and lesbian marriages and that states as diverse as Iowa and the District of Columbia have legalized same-sex marriage. Yet, "Nobody at the trial could come forward and say, 'This is how or this is why or this is maybe why allowing gays and lesbians to marry can somehow deprive us heterosexuals of our marriage or the value of our marriage or the stability of our marriage.'"

Boies asserted that the studies Rivkin had referred to actually say that it is important for children to be raised by two loving parents and that there is no discernible difference in the performance and adjustment of children raised by two loving gay and lesbian couples, compared to heterosexual couples.

In short, Boies argued that the evidence shows that allowing same-sex marriages helps the gay couple, helps their children and hurts nobody else. Thus, he argued, even if the standard were a rational basis, the Proposition would fail. But, he argued, if there ever was a group of people who have been subjected to historical discrimination, it is gays and lesbians, which makes them, under established equal-protection and due process doctrines, a group that deserves strict scrutiny of actions that disproportionally affect them.

"Obviously," he concluded, "if the Proposition cannot withstand a rational basis scrutiny, it cannot withstand strict scrutiny, so that the courts have already ruled that this is something that's appropriate for judicial review. And if you look at this particular situation, there simply is no rational basis to say that there is a need to deprive gays and lesbians, and the children that they are raising, of the benefit of a stable marital advantage."

QUESTIONS FROM THE MODERATOR

Moderator Meyer then asked Boies why a proposition approved by the voters of an entire state should not be honored. His response was that constitutional rights are not subject to a vote. "[T]he whole point of a written Constitution, and the Supreme Court to enforce it, is so that you have an ability of the courts to say 'no.' In this area the people do not get to decide."

Rivkin, responding, conceded that, "The Constitution does . . . take the disposition of some issues out of the democratic context and the judiciary is allowed, indeed, obliged, in that case, to strike down the particular manifestations of a popular will. . . . [But] those occasions are very, very infrequent, they are meant to be infrequent by the Framers, and certainly should not be augmented by the courts. . . . To enforce the Constitution really is

nothing more than to enforce the democratic choices at the time of the founding, so it's really a matter of one democratic choice trumping other."

Meyer than asked if a finding of animus, bad motive, behind the will of the people has a role in judging such cases. Boies replied in the negative. "Animus is not really the critical issue here." The critical issue, he asserted, "is whether the state is drawing distinctions between members of its citizenry that are irrational or unsupportable. And remember, in California, you have 18,000 gay and lesbian couples who are married, and the state recognizes those marriages. . . . . You have thousands more gay and lesbian couples who were married in other states . . . where it was legal, who have come here to California, and California continues to recognize their marriages as legal. And yet, the thousands of other gay and lesbian couples who are not already married, can't get married. In addition to that, if some of the gay and lesbian couples who are lawfully married get divorced, they can't remarry. They can't even remarry themselves, and that's the kind of disproportionate classification system that the equal-protection clause is particularly directed at, regardless of the question of animus."

RIvkin agreed that animus does not matter that much. "You really look primarily at the text of the legislative enactment or referendum, and . . . look at the underlying motivations in a situation where you sort of have a prima facie problem . . . that does not seem to strike you as being particularly rational."

Responding to Boies' other point, Rivkin conceded that we have the "somewhat anomalous situation where you do have similarly situated couples, same-sex couples, whose marriage is recognized and, obviously, this marriage would not be recognized. . . . But . . . in some sense, this is an artifact of how this issue has been driven in the State of California, which does not really . . . cast fundamental doubt on the rationality of this choice. "

Rivkin suggested that Boies' argument "looks at the marriage almost in a retail sense. . . . I'll be the first one to agree, that I have absolutely no problem if my neighbors are gay and obtain a sanction for their union. It would not affect my marriage at all. But that's not the issue . . . . And I would also stipulate that, indeed, in some intangible way, getting a symbolic affirmation of same-sex unions would be good for both partners. That's what they're seeking it for. I trust they know best what they want. I certainly would not gainsay, and it would be good for the children they are raising."

"But I would submit to you that's not the end of the analysis. You look at the thing as a society, as a rational body polity, beyond those retail instances. You look at the more underlying existentialist interest involved."

Rivkin then suggested that if the recognition of same-sex unions prevails, there would be no meaningful distinction between them and other alternative unions among adults. The rationality arguments would be the same, and there would be no marriage as a uniform stable arrangement left.

Meyer then asked Rivkin for more insight into the benefit to society of defining marriage in a specific way, as Proposition 8 does. In responding, Rivkin noted that we focus on the idea of the Bill of Rights protecting us against an overbearing government, "But there is also the fundamental recognition that the government would be hemmed in by a robust private sphere." He equated this with his concept of an "ordered liberty."

Rivkin went on to argue that heterosexual marriage is a part of human history and that if we recognize same-sex unions, we would not be able to draw the line there. "You really would open up Pandora's box."

Boies, in response, pointed out that even counsel in the pending case had been unable to tell the court how same-sex marriage threatened heterosexual mar-

riage. He discounted the argument that same-sex marriage would lead to legalization of polygamy and polyandry unless you can say that somehow the adoption of same-sex marriage would somehow lead heterosexual couples to want to be married to more than one person.

Furthermore, he argued, the Supreme Court can say that, though there is no basis to prohibit gay marriage, there is a basis to prohibit polygamy, and that the states can prohibit polygamy, but not gay marriage.

He suggested that it is "the total absence of any justification for a ban on gay and lesbian marriage that causes people to try to defend Proposition 8 by talking about things that have nothing to do with Proposition 8, like polyandry and polygamy."

Rivkin responded that in that case there would be no principled reason for distinguishing among the other forms of marriage.

Rivkin then reverted to what he termed the thrust of his opening remarks, "that if you accomplish this through democratic channels, you can come up with a set of outcomes . . . at least most of us would find palatable. If you drive it from judicial channels, you would not be able to do that. All you would rely on is the ability of a future Supreme Court to somehow . . . weasel out of the implications of its decision. That's not a good thing. That is certainly not the way courts should function."

Boies, disagreeing, asserted, "It has nothing to do with weaseling out of the decisions. What a court does in every due-process and equal-protection clause case, is to say, 'Is there a sufficient justification for this discrimination? Is there a sufficient justification for treating these two groups of people differently?' . . . . But the fact that there is a sufficient justification for prohibiting polygamy and polyandry does not mean that there is a sufficient justification for prohibiting two people who happen to be gay or two people who happen to be lesbian from getting married."

Meyer then asked Rivkin for his view on whether we are dealing with an essentially disenfranchised group. Rivkin responded that, unlike race, which is clearly subject to the highest level of scrutiny, sexual orientation is not subject to more than an intermediate level of scrutiny. He argued that we are not dealing with a law that facially discriminates against gays and lesbians, but only with a symnbolic affirmation of marriage, as distinguished from civil unions, which has a disproportionate impact on this group.

Rivkin ended by agreeing with Boies that, "[I]n some sense, it [Proposition 8] is either rational, and it is rational enough to withstand even a heightened level of scrutiny, or it is not rational, in which case it would not withstand it, irrespective of the equal-protection analysis.".

Meyer then asked, "Do you think it is wise to have a decision like this come via judicial channels? What are the consequences of taking the decision away from the political arena?"

Rivkin responded, "[M]y concern is not whether or not we should, as a society, sanction same-sex marriage. It's how we get there."

Boies responded, "[I]f you're going to have an equal-protection and due-process clause, you're going to have the courts. The courts have to review what the legislature or the people do in a democratic elected sense in order to have enforcement of constitutional rights. . . . That's what you've had in all of the cases against discrimination, whether on the basis of race or sex or any of the other classifications."

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This debate will continue as the case winds its way through the appellate judicial system towards what many think will be ultimate resolution in the United States Supreme Court.

WALKING WITH FRIENDS

I am confident. . . that everyone in this audience, at some time during their lives, has longed to live their dream. How many of us, however, have had to overcome abiding adversity to live our dream? How many of us have taken steps on the way to our dreams and fallen, gotten back up and fallen and gotten back up? And how many of us have done something no one else has ever done? And perhaps, most importantly, how many of us, in our journey toward our dreams, have impacted everyone along the way? Past President **John A. (Jack) Dalton**, Atlanta, Georgia, introducing D. J. Gregory.

D.J. Gregory

The Saturday morning program at Palm Desert ended with the inspiring story of thirty-two year old **D. J. Gregory**, Savannah, Georgia. It began with the showing of a made-for-television account of the year-long quest of a young man, born with cerebral palsy, to walk every hole of every PGA tournament for an entire year and to record his journey. His published account of that journey is entitled *Walking with Friends*.

EXCERPTS FROM THE VIDEO:

NARRATOR: For all its lush quiet, its apparent stillness, it is a game obsessed with movement: measuring it, controlling it, perfecting it. For D.J. Gregory, golf has a movement all its own, a long walk, not toward perfection, but possibility, a walk beyond measurement. . . . Born with cerebral palsy, his lungs underdeveloped, legs entangled, doctors told D.J.'s parents about his future in blunt terms.

NARRATOR: . . . D.J. endured five surgeries on his legs by the time he was in first grade.

FATHER: They took his lower legs and cut both bones and turned his feet out so that they went straight, then they put them back together and put two full-length casts on him and that's how he had to survive for a while. . . .

MOTHER: The low point was that he was really into sports. And he couldn't actually play. You know, he couldn't play basketball or football, but he can play golf.

GREGORY: I started playing golf when I was 9 years old. My swing is a self-taught swing. I swing one-handed. The one reason why golf is my favorite is 'cause it is a sport that I can play competitively. . . . I play from the forward tees. I shoot anywhere from 105 to 115, but I love the game.

NARRATOR: As D.J.'s love for the game grew, so did his love of watching the pros play. His father took him to his first tournament in Greensboro, North Carolina in 1990 to get autographs. That's when CBS golf commentator, Ken Venturi, spotted him and invited a 12-year-old boy up to the announcer's booth.

VENTURI: I said if I have to carry him on my shoulders, I'll get him up there.

NARRATOR: And then he introduced D.J. to [sportscaster] Jim Nantz.

NANTZ: He would sit in our tower while we were on the air. We always gave him full access. And he would do that for years.

NARRATOR: As the years passed and his relationship with Jim Nantz grew, D.J. tackled more challenges off the course, earning a master's degree in sports management from Springfield College in Massachusetts. Still, golf was a constant, and from it came an idea all D.J.'s own, a goal both simple and unfathomable.

FATHER: Walking every hole of every round of every golf tournament this year [2008]. What I kept telling him is there is not a player out here that walks every round of every tournament. There's nobody. I mean, nobody does this. . . .

NARRATOR: With the help of Nantz and his supportive sponsors, the PGA Tour gave D.J. his chance to walk every tournament. As part of his personal quest, he would follow a different player each week, interview him and write a blog about the experience.

GREGORY: What's the greatest challenge you face in the game of golf?

GOLFER: The greatest challenge is trying to stay consistent. And just the fact that he's walking every tournament, every round, for the entire year. I mean, we, as PGA Tour golfers, we're exhausted at the end of the year. I mean, I can't even imagine what he's going to feel like. . . .

FATHER: His toes overlap, . . . so the pressure and all is unbelievable. And he was putting seven Band-Aids, eight Band-Aids, on every day . . . to minimize the blisters.

NARRATOR: The first steps came in January in Hawaii with his father at his side.

GREGORY: On the Plantation Course at Kapalua, there is not one even piece of land on that golf course, and I'm proud to say that I did not fall once there.

NARRATOR: But over the weeks and months, from Palm Springs to Hartford, D.J. Gregory did fall . . . More than two dozen falls. He kept track of every one and kept on walking.

GREGORY: You know, if I fall, I fall . . . it's just another challenge. I'm going to fall. It's just the way it is. I'm going to do it. So you know what? You get back up and you learn from your mistakes and you don't do it again.

FATHER: Isn't that what we tell everyone, you fall off a horse,

pick yourself up, get back on the horse and do it again? So why shouldn't he do the same? . . .
NARRATOR: At every tour stop, D.J.'s journey gained greater momentum and deeper respect. . . . In particular, from the players he walked with, moving from curiosity to admiration, Kenny Perry was the first to request that D.J. follow him at a tournament. That was in March. They've been close ever since.

PERRY: How can you see a kid struggle around the golf course and then you're out there complaining playing golf? I mean, it just really changed my perspective about my life and about my golf game. . . .

NARRATOR: Inevitably, as he walked on through the months, D.J.'s trek drew national attention . . . .

NARRATOR: For the past eleven months, every step has led here to Orlando, to this day, Sunday, November 9th, the final day of the PGA Tour this year. . . .

FATHER: It's going to be a very emotional thing for all of us. I mean, he's going to complete something that nobody would have given him a chance to do.

NARRATOR: It's the walk that left a trail from a boy told he would never walk, to a man who left his footsteps across an entire sport.

IN GREGORY'S OWN WORDS

As the video ended, Gregory made his way forward to a standing ovation from the audience. This is his story in his own words:

I was born ten weeks premature, so when I was born, my lungs were not fully developed. For the first month of my life, I was in an incubator. During that first month, the nurses tried to force some oxygen into my brain, and at one time it burst one of the capillaries in my brain that controlled my leg muscles; hence part of the reason why I have cerebral palsy. . . .

[M]y parents were told, when I was 2 years old, that I would never walk, [would] be in a wheelchair for the rest of my life. They did not take that for an answer. They consulted with doctors to find out what surgeries could be done so that I would have a chance to walk and stand on my own. One of the surgeries . . . was to cut my abductor muscles. Those are the muscles in your legs that control your balance. Since my abductor muscles were cut, I have no balance . . . and I use a cane for that reason. . . . For the first four or five years of my life, I Army-crawled around the house . . . that is basically one arm over another.

I have had . . . six surgeries on my eyes. In addition to having cerebral palsy, I was also born cross-eyed, and with your eyes, they only could do a little bit at a time. So do a little bit, make sure it heals correctly, do a little bit more, it heals correctly, and so on . . .

I progressed to a walker with four wheels, to a walker with two wheels and two crutch tips, to a walker with four crutch trips, to two canes, to one cane. . . . I have been determined all my life and I feel like I get that determination from my parents . . . . Every time I put my mind to something, I'm going to do it, no matter what. I don't care what I have to do. I don't care how hard I have to work.

For me, I think goal-setting is extremely important. . . . Because that way you can see a light at the end of the tunnel; there's a reason why you're doing something. You may not know it at the time, but there's always a reason. . . .

I'm a sports fanatic . . . but golf is my favorite. . . . Prior to 2008, I always went to about six or seven events on my own, and I would always walk with a player that I know, so I knew I could do the journey. And just what would it be like to go to every event, get to know the players on a more personal level, but at the same time, accomplish a personal challenge? . . .

I lived out a dream. When I

started the journey, it wasn't to inspire or motivate people; it wasn't for the media coverage. . . . I did it for personal selfish reasons, because I wanted to live out a dream, but I quickly realized, by what I was doing, I could inspire and motivate others in their own lives. I could inspire others to set goals and dreams for themselves, and I could motivate others to achieve those goals and dreams.

I didn't do the journey for the media coverage. But having said that, I'm never going to turn down a media request, not because I want to see myself on TV or read about myself in the newspaper or on the Internet, but because if people are going to take the time to tell my story, then I'm going to give them the time to do what they want. . . .

That video you just saw has been seen by over 4,000,000 people across the world. It's the most watched video on ESPN.com and most requested video from ESPN. I didn't expect that and I will never get used to it, but I appreciate the support and encouragement from others. . . . It's special for me to hear somebody say, "You're doing a great job. Keep up the good work, but you inspire me in my own life."

I know everybody in this room has a goal and a dream; everybody does. And I'm living proof to show you that through hard work, anything is possible. Don't take "no" for an answer. Just keep on going. . . .

[W]hen I did the journey, I also did a blog on PGAtour.com and I talked about my experiences with the players and my experiences at the tournaments. But I also kept some stats . . . . I consumed 332 sodas -- number of beers is not included, by the way -- 280 bottles of water, 259 sports drinks, walked over a thousand miles, traveled 80,077 miles, walked 3,256 holes. I went through five pairs of golf shoes . . . . And from January 1st to November 16th, I was home a grand total of four days.

There's one stat that I kept track of that I got questioned about all the time, and that is my number of falls. People said, "Why do you keep track of your number of falls?" Well, I like to have a good time. I like to joke around. I kind of like to make fun of myself, so I felt like keeping track of my number of falls was another way for me to show my personality. It was my goal to average less than one fall per week, which would be 44 falls in 45 weeks, or in 44 tournaments. I'm proud to say I came in at 29.

But I also think it's extremely important for me, . . . keeping track of the falls. I knew there wouldn't be a chance that I would go 44 weeks without falling at least once. And when you set goals, you're not always going to take the easiest road. There's always going to be bumps in the road. And, for me, those bumps in the road during the journey were when I fell. But that's how you handle those tough situations that make you a better person. . . .

You may not win a case . . . , but in every situation you can learn from it and it makes you a better person, so the next time you get in that similar situation, you don't do the same things. You may change it up a little bit, but in every situation, through the tough times, through the good times, it's how you handle those situations that makes you a better person.

People ask me . . . what do I take away most from the journey? It's the friendships I have, the friendships I have with the players, their families, the staff of the PGA Tour and people I met all across the country. I have some of the best friends from what I did in 2008, and I've met some incredible people along the way from what I did. And I cherish all those friendships. . . .

[T]here are some players that I'm closer with than others, but every player was great. . . . I'm so fortunate to have so many good friends and so many great relationships. And . . . I cherish every one of them. But what is important to me is that . . . they're not my friends because they feel sorry for me because I have a disability. I don't look at myself as having a disability. . . . I can do anything anybody else

can do, but maybe some things it takes a little bit more time.

I'm fortunate that when I was younger, my parents treated me just like anybody else. I still had chores. I still had to make my bed. I still had to take out the trash. But I loved that, because that's just what everybody else did. I don't want anybody to treat me any different.

I'm not sure if many of you have seen my book, but . . . there are some great stories in there from players. Rich Beem actually has a nickname for me. He calls me "pimp with a limp," or "pimple" for short. And I love that . . . because the players feel comfortable enough with me to joke around, and they know that I'm going to be able to handle it and it's not going to bother me. And they know that I'm going to give it right back. . . .

[T]he one thing I enjoy the most is being able to go out and speak to different groups, organizations, schools, get my story out there and, hopefully, inspire and motivate others, inspire them to set goals for themselves and motivate them to achieve those goals, because, as I said earlier, through hard work, anything is possible. Don't let anybody tell you [that] you can't do something. If you put your mind to something, you can do it, no matter what.

If I took the advice of people, I sure wouldn't be standing here right now, and I sure wouldn't be talking to you, and I sure wouldn't have walked over a thousand miles. It's determination. It's believing in yourself and knowing you can do it. I did not second-guess if I could walk every hole. Yes, sometimes those early morning tee times were difficult. Yes, walking thirty-six holes in one day was a challenge sometimes, but I had the best gig in the world, . . . because all I had to do was get up every morning, walk some of the most beautiful golf courses in the country and meet some of the greatest people.

Along the way, I've been able to inspire and motivate others. That's not what I started out the journey to do, but that's the card I've been dealt, and that's the card I'm going to play to the best of my ability, no matter what. People continue to tell me and stop me every day in the airport, on the golf course, and tell me what impact I've had on their lives. And that's why now, in 2010, I've started a foundation, Walking for Kids Foundation, to raise money for children's charities, just because I wanted another way to continue to make a positive impact on people's lives. . . .

A couple months ago I was in Hartford, Connecticut and I was in the airport. And I was just walking to the baggage claim, and this girl comes running over to me. And she says, "I saw your video on ESPN. It was the best thing I've ever seen." She said, "I needed it more than anything because my parents just finished chemotherapy." At the same time, both her parents were fighting cancer. She said, "I was extremely down, but watching your video really lifted my spirits."

And she said, "I hope I'm not bothering you." And I absolutely said, "No, not at all. I really enjoy when people come up to me and talk to me. I appreciate the support and encouragement." . . . I gave her one of my cards. The next day she sent me an e-mail and she said, "I was so excited to meet you, I forgot to tell you my name." I didn't realize it, but for 15 minutes we talked and she never even said her name . . .

I love talking to people and I absolutely love to see the impact it has on other people. I am who I am, and I don't want what I did to change who I am as a person. As I go on now, I realize that the next journey in my life is to continue to get my story out there and inspire and motivate others.

So as I close today, if I can repeat what I said earlier, through hard work, anything is possible. Don't take "no" for an answer. Don't let anybody tell you [that] you can't do something. If you have a goal, you can achieve it through hard work.

IN MEMORIAM

In this issue, we report the passing of fifty-three Fellows, the youngest, fifty-eight, the oldest ninety-seven. Of those, only three were younger than seventy-one, eleven were in their seventies, twenty-five in their eighties and a remarkable fourteen in their nineties. We also note among those who lived long lives the large number of marriages lasting more than fifty years. Thirty of the fifty-three saw service in World War II, most of them in the military, but two in the FBI, and two of those also served in the Korean Conflict. One other Fellow served in Korea. Seven served in peacetime military service. The World War II stories include flying "the hump" in a C-47 cargo plane, piloting a PBY Catalina "flying boat" in the Pacific, spending over twenty-four hours floating in the Adriatic Sea with a broken leg after parachuting from a burning B-17 Flying Fortress, commanding a landing craft on D-Day, flying fifty missions as the lead squadron pilot in a B-24 Liberator in Italy and being assigned as liaison to British General Bernard Montgomery on D-Day. One led a combat rifle platoon in Korea. The legal careers are equally colorful. Many were presidents of their local and state bars and of national organizations. One was an organizer of the ABA Litigation Section and later chaired it. Several, including one who became the Chief Justice of his state's Supreme Court, served on the bench. Many were adjunct professors of trial practice. One conducted the first deposition under oath of a sitting President of the United States. Another negotiated the pardon given President Richard Nixon. One was a cofounder of the National College of District Attorneys who later chaired the commission that reviewed the lessons to be learned from the 1999 tragedy at Columbine High School. One was the first person of Asian ancestry to argue a case before the United States Supreme Court. In their other lives, four were college football players, one of whom went on to coach under the legendary University of Georgia coach, Wally Butts. One was an ordained Presbyterian minister. In retirement many of their generation moved to warmer climates, one even to Hawaii. Another spent ten years cruising the waters of New England and the Inland Waterway before settling in Florida. Another moved to a farm and raised cattle and bees. And finally, there is the story of the son of one deceased Fellow who temporarily disappointed his father by taking a low-paying job with a small newspaper instead of joining the family law firm, but who redeemed himself by breaking, with a fellow reporter, the story of the Watergate break-in. Collectively, these stories of the lives of deceased Fellows are a tribute to both the profession and the College.

Editor's note: the numbers in parentheses indicate the year of induction into the College.

James Louden Armstrong, III (82), a Fellow Emeritus from Coral Gables, Florida, former managing partner of Smathers & Thompson, Miami, Florida and of the Miami office of Kelley, Drye & Warren, died September 2, 2009 at age 77 of complications of cancer. A graduate of Miami High School, Phillips Exeter Academy (where he and the late Billy Wells were a legendary backfield duo) and Yale, where he also played football, he was a graduate of Yale Law School. A past president of the Dade County Bar Association and of the Orange Bowl Committee, he had also co-chaired the Community Partnership for Homeless. His survivors include his wife, a daughter and a son.

W. T. Barnes (82), a Fellow Emeritus from Ottumwa, Iowa, who had spent most of his career with Barnes, Schlegel and McGiverin until his retirement in 1986, died January 16, 2000 at age 90. A graduate of the University of Iowa and of its School of Law, he had been president of the Iowa Academy of Trial Lawyers. Finishing law school in 1942, he entered the Army Air Corps and during World War II was a pilot and flight instructor in the India-China Division of the Air Transport Command, winning a Distinguished Flying Cross flying a C-47 cargo plane over the "hump." A widower who had remarried, his survivors include his wife, two sons, a daughter, a step-daughter and a step-son.

Perry S. Bechtle (74), a Fellow Emeritus who had practiced law in Philadelphia, Pennsylvania and later retired to Virginia Beach, Virginia, died May 9, 2010 of a stroke at age 84. A ball turret gunner in a B-17 Flying Fortress in World War II, he and his fellow crewmen had parachuted into the Adriatic after an engine on their plane exploded and caught fire, causing him to suffer a broken leg and to lose most of his hearing in one ear. All but one of the crew, of which he was the last living member, had survived after spending over twenty-four hours in the water. After two years at what is now St. Joseph's University, he was admitted to Temple Law School, from which he graduated in 1951, second in his class. Beginning his career with Liberty Mutual Insurance Company, he had later practiced with various law firms, including Pepper, Hamilton & Scheetz, Krusen Evans & Byrne and LaBrum & Doak. He had also served as Vice-President and General Counsel of General Accident Insurance Company and

ended his active career as an arbitrator and mediator. A past president of the International Society of Barristers, he had taught as an adjunct professor at the law schools at both Villanova and Temple and was a frequent lecturer for a variety of state and national legal organizations. He served several terms as the College's Pennsylvania State Chair. The Philadelphia Association of Defense Counsel had honored him with its Distinguished Service Award. His survivors include his wife, five sons and two daughters.

Bayard F. Berman (75), a Fellow Emeritus from Beverly Hills, California, retired from Hicks, Recasens & Berman, died January 20, 2010 at age 88. After attending the University of California at Los Angeles, he had earned both an MBA and a law degree at Harvard. He had been a Captain in the Army Air Corps in World War II and had also served in the early days of the Korean Conflict. His survivors include his wife and a daughter.

Donald Robert Bryant (77), a Fellow Emeritus from Dover, New Hampshire died October 23, 2009 at age 93 after a period of declining health. A Phi Beta Kappa graduate of Bowdoin College, he had earned his law degree from the Harvard Law School and clerked on the Massachusetts Supreme Judicial Court for two years before serving for four years as an officer in the U.S. Navy Amphibious Force in World War II. Beginning his law practice with Laflamme and Nourie, he then practiced with the firm now known as Burns, Bryant, Cox, Rockefeller and Durkin until age 90. He had served as president of his local bar and of the New Hampshire Bar Association, as well as serving as president or a board member in numerous civic and service organizations, including the presidency of the Society of Mayflower Descendants in the State of New Hampshire. He had been named Dover's Citizen of the Year and had received a Community Service Award in recognition of his many years of civic service. His survivors include his wife of sixty-five years, two sons and two daughters.

Arthur D. Byrne (81), Knoxville, Tennessee, retired from Baker, McReynolds, Byrne, Brackett, O'Kane & Shea, died June 26, 2007 at age 88. A graduate of Maryville College and of the University of Tennessee School of Law, where he was a member of the Order of

the Coif and editor of his law review, he had served as an officer in the Army Air Force in the South Pacific Theater in World War II. A past president of his local bar and a former vice-president of the Tennessee Bar Association, he had also served as president of the Knoxville Symphony Orchestra. His survivors include his wife of sixty-five years and two daughters.

Philippe Casgrain, Q.C. (88), Montréal, Quebec, a founding member of Fraser Milner Casgrain, died February 28, 2010. Born in 1927, he had served as chairman of the Junior Bar Association of Montréal and had served as president of the Bar of Montréal and on the General Council of the Québec Bar, which had conferred on him the honorary title of *Advocatus Emeritus* (Ad.E.). He had served on several boards of directors and was involved in various cultural and social organizations. His survivors include two sons and a daughter.

Robert G. Clayton, Jr. (78), a Fellow Emeritus from Toledo, Ohio, retired in 1998 from Shumaker, Loop and Kendrick, died May 25, 2010 at age 80. A graduate of the University of Cincinnati and of its School of Law and a member of the Order of the Coif, he had earned an LL.M. from the University of Michigan and had served in the United States Marine Corps in the Korean Conflict. He had also served on the Executive Committee of the National Association of Railroad Counsel. A widower, his survivors include a daughter and a son.

Paul Jerome Curran (78), New York, New York**,** died September 4, 2008 at age 75 of complications of cancer. After graduating from Georgetown and Fordham Law School, he had served as an officer in the U.S. Air Force. He began his career as a federal prosecutor, later joining Kaye Scholer, LLP, where he was a partner and later Special Counsel. He had led that firm's legal department for more than a decade and had served on the firm's executive committee. In his early days, he had served in the New York State Assembly, leaving that post to become Mayor John Lindsay's city lobbyist in Albany. Governor Nelson A. Rockefeller had appointed him chair of the State Commission of Investigation, probing into various forms of public corruption. Then, on leave from his firm, he had served as the United States Attorney for the Southern District of New

York, succeeding Whitney North Seymour, Jr., FACTL. In that office, he had successfully prosecuted mobster Carmine Tramunti and Representative Bertram L. Podell. In 1979 he was appointed Special Counsel to the Department of Justice to investigate loans made by the National Bank of Georgia, run by director of the Office of Management and Budget, Bert Lance, to the peanut business of the family of President Jimmy Carter, run by his brother, Billy Carter. After a seven-month investigation that included the first sworn deposition of a sitting President, Curran found no evidence of unlawful conduct by either the President or his brother. He had later served as Special Consultant on Intelligence Matters to the Secretary of Defense. He had also chaired numerous professional and charitable organizations, including the alumni association of his law school and the University Club. His survivors include his wife, three sons and four daughters.

Hon. William H. Erickson (67), a Judicial Fellow from Englewood, Colorado, a former Chief Justice of the Colorado Supreme Court, where he had served for twenty-five years, died January 13, 2010 at age 85 of Parkinson's Disease. A graduate of the Colorado School of Mines and of the University of Virginia Law School, he had practiced in Denver for twenty-one years before his appointment to the Court. At the time of his appointment he was the College's Colorado State Chair. He had been president of his local bar and had served on the Board of Governors of both the Colorado Bar Association and the American Bar Association, had chaired the American Bar Foundation and had been a member of the Council of the American Law Institute and the Board of Directors of the American Judicature Society. He had served on the National Advisory Commission on Criminal Justice Standards and had chaired the Criminal Justice Section of the ABA and the commission that formulated the ABA Standards of Criminal Justice. He had served on the National Commission for the Formulation of Standards for Accreditation of Law Enforcement Agencies and had chaired the President's National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance. Co-founder of the National College for District Attorneys and Defense Lawyers at the University of Houston, he had been a Director of the National Judicial College and a member of the faculty of the NYU Appellate Judges School. He had been a Woodrow Wilson

Fellow at Washington and Lee University and had been president of the International Society of Barristers. He had served on the Erickson Commission on Police Shootings in Denver and in retirement had chaired the Columbine Review Commission, appointed by the Governor of Colorado to conduct an independent investigation and to report on the lessons to be learned from the April 20, 1999 tragedy at Columbine High School. He was the co-author of a four-volume treatise on the decisions of the United States Supreme Court on criminal law and procedure. His survivors include his wife, two daughters and two sons.

Thomas Mabry Ervin, Jr. (90), Tallahassee, Florida, senior partner in Ervin, Kitchen & Ervin, died January 5, 2010 at age 69. A graduate of Florida State University, he served in the U.S. Marine Corps before earning his law degree at the University of Florida College of Law. A past president of his local bar and of the Florida Council of Bar Association Presidents, he served four terms on the Board of Governors of the Florida Bar, chairing numerous committees and serving on that organization's executive council. He had also served as a director of the Florida Bar Foundation. He had received the Florida Bar President's Award of Merit and the Outstanding Past Voluntary Bar Association President's Award. His survivors include his wife, three daughters and a son.

Jack S. Francis (75), New Martinsville, West Virginia, a partner in Jackson Kelly, PLLC, died January 13, 2010 at age 88. A veteran of World War II, in which he served in the 1st Army Infantry and then in the Signal Corps Intelligence Service, he was a graduate of the University of West Virginia and of its School of Law. A past governor of the West Virginia State Bar Association, he had served as legal counsel to several local boards and commissions. His survivors include his wife of sixty-seven years and two sons.

Daniel John Furniss (06), Palo Alto, California, a partner in Townsend, Townsend & Crew, died February 5, 2010 of a heart attack at age 58. An honors graduate of Stanford University, he received his law degree from Boalt Hall at the University of California, Berkeley. He had chaired the Board of Trustees of the Hillsborough School and spent his free time coaching children's soccer teams and refereeing games. His

survivors include his wife, two daughters and a son.

Benjamin Gim (93), a Fellow Emeritus from New York, New York, died January 16, 2010 at age 87. The son of Chinese immigrant parents who settled first in Idaho, then moved to Salt Lake City, Utah, and who died before he reached his teenage years, Gim and his siblings were kept together through the Depression years by an older sister. He left the University of Utah to serve in the United States Army in the European Theater in World War II. Returning to the University to enter law school, he was told by the Dean at the end of his first year that, despite his high marks, he "did not have a Chinaman's chance" of practicing law successfully in Utah. He then transferred to Columbia Law School, where he was one of only two Asian students, and completed his law school education on the GI Bill. Finding no law firm that would hire him, he became New York's first Assistant Attorney General of Asian ancestry. Then, establishing his own law firm, Gim & Wong, he practiced law in New York's Chinatown, principally as an immigration lawyer, for almost fifty years. He was the first Asian American to argue a case before the United States Supreme Court. A frequent lecturer on immigration law and frequently quoted in the press on that subject, he was the first Asian American president of the American Immigration Lawyers Association. He was a founding member of the Asian American Legal Defense & Education Fund and had served as chair of the American Council for Nationalities Services. In honoring his career, the American Immigration Law Foundation described him as "a pioneer in his field, . . . a true role model. Ben's devotion to the cause has brought honor and respect to the immigrant experience in America. He will forever be an inspiration to us all." He was also the recipient of the National Bar Association's Wiley A. Branton Civil Rights Award. Divorced from his first wife, who has since died, his survivors include his second wife, a daughter and a step-daughter.

Samuel McPheeters (Mack) Glasgow, Jr. (67), a Fellow Emeritus from Nashville, Tennessee, retired from Glasgow and Veasey, died in December 2009 at age 93.
He received his undergraduate degree from Vanderbilt University and his law degree from the University of Washington. He served as a JAG officer in the U.S. Army Field Artillery

in World War II. He had served as a deacon and elder in his church, sat on or chaired the boards of two local schools and chaired the county elections board for sixteen years. His survivors include his wife of seventy years, two sons and two daughters.

Claire Herman Greve (78), Folsom, California, died January 29, 2010 at age 89. A graduate of Wayne State University and of Stanford Law School, where he was a member of the Order of the Coif, he had served as a navigator in the Army Air Corps in World War II. He had practiced law with Greve, Clifford, Wengel & Paras in Sacramento, California, until 1998. He had lived in Hawaii from 1998 to 2004, then moved to Folsom. His survivors include his wife, four daughters and two sons.

John F. Hayes (70), Hutchinson, Kansas, died January 14, 2010 at age 90. A founding partner or Gilliland & Hayes, he was a graduate of Washburn University and of its School of Law. An officer in the U.S. Army in World War II, he had served in New Hebrides and the Philippines. He had been a delegate to the Republican National Convention and had served six terms in his state legislature, chairing the Insurance and Judiciary Committee and serving for a time as majority floor leader. He is credited with supporting a number of progressive legislative enactments. He had been president of his local bar and of the Kansas Association of Defense Counsel. For over thirty years a member of the National Conference of Commissioners on Uniform State Laws, he had been a director and vice-president of the Kansas State Chamber of Commerce and had led a number of business, civic and social organizations. He had also served as the College's Kansas State Chair. His survivors include his wife, a son and a daughter.

Edward R. Hays (69), a Fellow Emeritus from Lexington, Kentucky, whose passing had previously gone unreported to the College, died September 7, 2003 at age 90. A graduate of Cumberland Junior College and, in 1936 at age twenty-three, of the Jefferson School of Law, he was an FBI agent during World War II, He had practiced in his native McKee, Kentucky, later moving to Pikeville, where he a was a partner in Baird & Hays, and then in Lexington, where he practiced with Hays, Moss & Lynn. A widower, his survivors included a daughter and a son.

Charles T. Herndon, III (81), a Fellow Emeritus from Johnson City, Tennessee, of counsel to Herndon, Coleman, Brading & McKee, died January 23, 2010 at age 89. A graduate of Vanderbilt University and of the University of Virginia School of Law, he had served as a finance officer in the U.S. Army in World War II and had retired as a colonel in the Army reserves. He had served on the Tennessee Board of Professional Responsibility and, for over twenty-five years, was a trustee of Cannon Memorial Hospital in Banner Elk, North Carolina. An elder in his church, he had taught a men's Bible class for twenty-five years. His survivors include his wife of sixty-seven years, a daughter and a son.

John W. Houghton (65), a Fellow Emeritus from Indianapolis, Indiana, retired from Barnes & Thornburg LLP, died July 25, 2009 at age 89. A graduate of the University of Indiana at Bloomington and a cum laude graduate of the University of Indiana Law School, he was editor- in-chief of his law review and a member of the Order of the Coif. A Fellow of both the College and the American College of Trust and Estate Counsel, he had been president of his local bar and of other local legal organizations. A director of Goodwill Industries of Central Indiana for thirty-one years, he had been president of the Indianapolis Legal Aid Society and had served as chair of his law school's Board of Visitors. He had been inducted into the Academy of Law Alumni Fellows, the highest recognition accorded by his law school to its alumni. His survivors include his wife and three sons.

James Ernest Hudson (97), Athens, Georgia, retired from Hudson, Montgomery and Kalvoda, died January 11, 2010 at age 80. A graduate of Wofford College, where he played football, he served in the U.S. Army, then coached at the South Carolina School for the Deaf and Blind, where he was honored as Coach of the Year. While enrolled in law school at the University of Georgia, he coached the freshman line under Coach Wally Butts and scouted for the San Francisco Forty-Niners. After practicing law for fifty years, he retired in 2007. A past president of the Western Judicial Circuit Bar Association, he spent many years as a faithful friend of Bill W. His survivors include two daughters and a son.

Alan Dale Hunter, Q.C. (02), a Fellow Emeritus from Calgary, Alberta, retired from Code Hunter, died April 6, 2010 at age 72. Raised by a grandmother and an aunt, educated at the University of British Columbia, he had been a Bencher and then President of the Law Society of Alberta, a director of the Environmental Law Center and of the Uniform Law Reform Commission and chair of the Alberta Law Reform Institute. He was a founder of both Advisory Legal Guidance and Pro Bono Law Alberta. He had been made an Honorary Professor of the Alberta Law Society and was a recipient of the Alberta Centennial Medal in recognition of his service to the people of that province. His survivors include his wife of fifty years, two sons and a daughter.

Noah Hannibal Jenerette, Jr. (73), a Fellow Emeritus from Jacksonville, Florida, founder of Boyd & Jenerette, P.A., died February 26, 2010 at age 86, of cancer. An Eagle Scout, he left the University of Florida to enroll as an aviation cadet and was a carrier pilot in the U.S. Navy in World War II. After graduating from the University of Florida School of Law, he was a special agent in the Federal Bureau of Investigation for three years before entering private practice. Nicknamed "the Silver Fox" for his mane of white hair, he was an elder in his church, led several civic and social organizations and ran in races until he was seventy-four years old. His survivors include his wife of sixty-four years and three daughters.

Frederick K. William Joyner (88), Springfield, Missouri, a former member of Lowther Johnson, LLC, died January 26, 2010 at age 71. A graduate of Northwest Missouri State University, he received his law degree from the University of Missouri-Columbia.

James E. Kehoe, Jr. (73), a Fellow Emeritus from Olean, New York, retired from Kehoe & DeRose, whose passing had previously gone unreported to the College, died January 9, 2003 at age 82. A college athlete at Alfred University, where he was named All Western New York Quarterback, his education was interrupted by service in the U.S. Army in World War II. He received his law degree from the University of Buffalo. A past president of his local bar and a parish trustee, he had served on the board of his local hospital. A widower, his survivors included six daughters.

Arthur Wellington Kelly, Jr. (82), a Fellow Emeritus, retired from Thompson & Colgate, Riverside, California, died in January 2010 at age 88. Employed by Bank of America after high school, he served in the U.S.Coast Guard in World War II. Working for Seaboard Oil Company, for five years he attended law school at night at Southwestern University, earning a certificate in law. After five more years with Seaboard, he entered private practice in 1961 and practiced until his retirement in 1986. He had served on the board of his local hospital. A diplomate of the San Bernardino Chapter of ABOTA, he had received its first Civility Award. His survivors include his wife and a daughter.

Elwood S. Levy (68), a Fellow Emeritus, retired to Sarasota, Florida after a career in Philadelphia, Pennsylvania, died April 27, 2007 at age 95. A graduate of the University of Pennsylvania, where he was a member of Phi Beta Kappa, and of the Harvard Law School, he had served as a naval air combat intelligence officer in the Pacific Theater in World War II. He had served on or chaired many committees of the Philadelphia Bar and had served a term on its Board of Governors. He had also served on or chaired a number of committees of the Pennsylvania Bar and had served in its House of Delegates. He had served on the Board of Governors of the Association of Trial Lawyers of America and was a permanent member of the Third Circuit Judicial Conference. A prolific writer, he had been Associate Editor of the N.A.C.C.A. Law Journal. A partner in Richter, Lord & Levy and later a sole practitioner, he had retired in 1985 and had spent the next ten years cruising the Inland Waterway and the waters of New England before settling in Sarasota. He had received the Fidelity Bank Award for improving the quality of justice in Philadelphia and the Justice Michael A. Musamanno Award for his contribution to tort law and the judicial selection process. In 2006 he had been honored by the Philadelphia Bar Association as a 70-year "Philadelphia Lawyer." His survivors include his wife, a son and a daughter.

Richard H. Lewis (75), a Fellow Emeritus, retired to Fort Lauderdale, Florida, died March 20, 2010 of heart failure at age 80. A graduate of the College of William & Mary and of its School of Law, he practiced until his retirement with Lewis, Trichilo, Bancroft & McGavin in Fairfax, Virginia. His survivors include his wife and five children.

Hon. James P. Lynch, Jr. (65), a Judicial Fellow from Natick, Massachusetts, retired Chief Justice of the Massachusetts Superior Court, died February 25, 2010 at age 88. A graduate of the College of the Holy Cross and of Boston College Law School, between undergraduate and law school he had served as a landing craft officer in the U.S. Navy in World War II, participating in the D-Day invasion of Normandy. After a clerkship with a federal district judge, he had joined Ropes & Gray, then served as an Assistant United States Attorney before joining Nutter, McClennen & Fish, where he practiced until his 1972 appointment to the bench, from which he retired in 1991. He had taught evidence at Boston College Law School and lectured and taught trial practice at the Harvard Law School. In 1988 the Boston Bar had presented him with the Haskell Cohn Distinguished Judicial Service Award. A widower, his survivors include a daughter and a son.

Robert B. Maucker (75), a Fellow Emeritus, retired to Fort Myers, Florida, whose passing was only recently reported to the College, died October 3, 2005 at age 90. A graduate of Augustana College and of the University of Illinois Law School, he had been an FBI agent in World War II. He practiced in Alton, Illinois until his retirement. His survivors included his wife, two daughters and a step-son.

James J. McLaughlin (73), Trenton, New Jersey died April 29, 2010 at age 81. A graduate of St. Joseph's College and of the Fordham University School of Law, he had begun his career as a Deputy Attorney General of the State of New Jersey. Beginning his practice as an associate of Richard J. Hughes, who became Governor and later Chief Justice of New Jersey, he was later a founder of McLaughlin and Cooper. He had served as president of his local bar, as a trustee of the New Jersey Lawyers' Fund for Client Protection and as chair of the College's New Jersey State Committee. A long-time teacher of trial advocacy at both Fordham and Widener University School of Law, he had received the Trial Bar Award from the Trial Attorneys of New Jersey, the Michael J. Nizolek Award for service to his local bar, the Professional Lawyer of the Year Award from the New Jersey Committee on Professionalism in Law and in 1998 was the first recipient of the New Jersey State Bar Association's James J. McLaughlin Professionalism Award, which it named for him. His wife survives him.

Toney Daniel McMillan (99), a partner in McMillan, McCorkle, Currie and Bennington, Arkadelphia, Arkansas, died November 22, 2009 at age 67. A graduate of Davidson College and of the Austin Presbyterian Theological Seminary, he had been a Presbyterian minister for five years before entering law school at the University of Arkansas. After his graduation, he joined the firm founded in 1859 by his great grandfather. He served on the board of the Louisville Presbyterian Seminary and held several positions in his church and the Arkansas Presbytery. His survivors include his wife and two sons.

François Mercier, O.C., Q.C. (75), Montréal, Quebec, died February 4, 2010. Born in Paris in 1923, he was a magna cum laude graduate of the Université of Montréal. A founding member of Stikeman Elliot, he was named Queen's Counsel in 1961 and an officer of the Order of Canada in 1976. He had served as the College's Province Chair. He had also served as secretary of the Montréal Bar Association and as a chair member of the Droit des assurances de l'Université de Montréal. He was also actively involved in several arts-related organizations. His survivors include his wife, two daughters and a son.

Frederick M. Meyers (87), Of Counsel to Mills Meyers Swartling, Seattle, Washington, died March 27, 2010 at age 71. A graduate of the University of Washington and of its School of Law, he served as Operations Officer for the First Airborne Battle Group, 327th Infantry, 101st Airborne Division between undergraduate and law school, graduating from Ranger, Airborne and Jumpmaster schools. He began his career as a local prosecutor before entering private practice. Active in a number of bar organizations, he was a former faculty member of the Trial Academy of the International Association of Defense Counsel and had chaired the Litigation Section of his state bar. His survivors include his wife, two daughters and a son.

Hon. William L. Millard (80), a Judicial Fellow from Columbus, Ohio, died May 20, 2010 at age 79. A graduate of Amherst College and the University of Virginia Law School and a former member of Lane, Alton & Horst, he was a judge in the Court of Common Pleas for Franklin County. He was a long-time member

of the board of his local public library. A widower, his survivors include a daughter and three sons.

Herbert J. (Jack) Miller, Jr. (81), a Fellow Emeritus from Washington, District of Columbia, died November 14, 2009 at age 85 of complications from influenza. His undergraduate education interrupted by World War II, he was an officer in the U.S. Army, serving in New Guinea, the Philippines and Japan. After the war he returned and graduated from George Washington University and then its School of Law. He began his practice with what is now Kirkland & Ellis. Democrat Robert Kennedy recruited Republican Miller to become Assistant Attorney General for the Criminal Division of the Department of Justice. In that position, he led the fight against Teamsters leader Jimmy Hoffa and the bosses of La Cosa Nostra and prosecuted President Lyndon Johnson's aide Bobby Baker for influence peddling. He was a pallbearer at Robert Kennedy's funeral. A founding partner of Miller, Cassidy, Larroca & Lewin, since merged with Baker Botts, he and the late Edward Bennett Williams are generally credited with pioneering white collar defense practice. Among his many clients in various proceedings had been Senator Ted Kennedy in the wake of Chappaquiddick, Richard Nixon, whose pardon Miller negotiated with President Gerald Ford, Attorney General Richard Kleindienst and former White House Deputy Chief of Staff Mike Deaver. The District of Columbia Bar, of which he had been president, had named him both its Lawyer of the Year and a Legend of the Law. He had also received the Potter Stewart Award from the Council on Court Excellence. His survivors include his wife and two sons.

Michael Mines (77), a Fellow Emeritus from Seattle, Washington, died February 9, 2010 at age 80. A graduate of the University of Washington and of its School of Law, he was a co-founder of Betts Patterson and Mines. He had been local counsel for Chemical Bank in the litigation that followed the $2 billion bond default by the Washington Public Power Supply System, at the time the largest such default in history. He was a past president of the Washington Defense Trial Lawyers, a former member of the board of the International Academy of Trial Lawyers and a former chair of the trustees of his law school's

alumni association, which had honored him with its Law's Service Recognition Award. A community leader, he had filled many leadership roles, including being president of the Board of Trustees of Horizon House, a continuing care retirement facility, and Moderator of the Pacific Northwest Conference of the United Church of Christ. He was on the organizing committee of the Coalition for Quality Integrated Education, an organization that worked to integrate the local public schools in the 1960s. He had chaired the College's Washington State Committee. His survivors include his wife of fifty-three years, three daughters and a son.

James Long Newsom (69), a Fellow Emeritus, a retired partner in the Durham, North Carolina firm Newsom, Graham, Hedrick, Bryson and Kennon, who had moved in retirement to Chevy Chase, Maryland, died February 28, 2007 at age 92. A graduate of Duke University and of its School of Law, whose alumni association he had chaired, he served in the U.S. Navy in World War II on Guadalcanal, the Solomon islands and New Caledonia, was Staff Intelligence Officer on the staff of the Commander, South Pacific Area and retired as a Commander in the Naval Reserve at age sixty. He had chaired a number of local civic and service organizations, as well as the trustees of his church. A widower, his survivors include a daughter and a son.

John W. Nolan, III (96), a Fellow Emeritus from Bon Aqua, Tennessee, retired from Nolan, Porter, Niewold, Evans, Hagan, Travis, David & Garrett, Nashville, Tennessee, died February 8, 2010 of pancreatic cancer and a neurological disorder at age 72. A graduate of the University of Tennessee and of its School of Law, his obituary described him as a cattle farmer, photographer, collector, philosopher, bee-keeper and horseman. A widower whose first wife had been his law school classmate, he had remarried sixteen years after her death. His survivors include his second wife, two daughters and two sons.

James Madison O'Leary (92), a Fellow Emeritus from Austin, Texas, retired from the Odessa, Texas firm, Shafer, Davis, O'Leary and Stoker, died January 8, 2010 at age 79. A graduate of Austin College and of the University of Texas School of Law, where he served on the law review and was a member of the Order of the Coif, he had served in the U.S. Army Judge Advocate General Corps in the 1960s. His survivors include his wife of fifty-five years, two daughters and a son.

Louis Oneal (79), San Jose, California, died April 8, 2010 at age 77 of congestive heart failure. A graduate of Stanford University and of Santa Clara University School of Law, he had served in the U.S. Marine Corps between undergraduate and law schools. An athlete, he had coached his basketball team to the Hawaiian Marine Championship while on active duty. He had practiced with Rankin and Oneal, a firm founded by his grandfather. His survivors include his wife of fifty-four years, a son and a daughter.

Bernard S. Peck (68), Naples, Florida, retired from Peck and Peck, Bridgeport, Connecticut, died July 31, 2009 at age 93. A Phi Beta Kappa graduate of Yale University and of its School of Law, he had served as an officer in the U.S. Army in World War II. He had also served a four-year term as a judge in the local court in Westport, Connecticut and had been the chair and moderator of the governing body of that town. He had chaired the boards of YMCAs in both Westport and Naples. He had successfully defended the Connecticut Bar Association in a libel suit brought by the author of *How to Avoid Probate.* He had chaired the College's Connecticut State Committee. In his later years, he had practiced with his son in Naples. His survivors include his wife, a son and a daughter.

Judd N. Poffinberger, Jr. (72), a Fellow Emeritus from Pittsburgh, Pennsylvania, died December 2, 2009 at age 90. A graduate of the University of Pittsburgh and of the Harvard Law School, he was the first associate at Kirkpatrick & Lockhart and was the senior surviving partner of what is now K&L Gates. An officer in the U.S. Army Ordnance Department in World War II, he had served as the president of his local bar and as the College's Pennsylvania State Chair, as well as serving on the Pennsylvania Bar Association's Board of Governors. His survivors include his wife, a daughter and two step-sons.

William Clarence Reed (85), a Fellow Emeritus from Augusta, Georgia, died September 2, 2007 at age 78 following several years of declining health. Joining the U.S. Marine Corps after high school, he had graduated from West Georgia College and had been recalled to active duty in the Korean Conflict. A graduate of the University of Georgia School of Law, he was retired from Fulcher, Fulcher, Hagler, Harper and Reed. He had served as president of his local bar. A widower who had remarried, his survivors

include his second wife, two sons, a step-daughter and a step-son.

Robert Given Rose, II (76), a Fellow Emeritus from Johnstown, Pennsylvania, died December 28, 2009 at age 85. Joining the Army Air Corps after high school, he was the pilot of B-24 bomber in the 15th Air Force in Italy in World War II, the lead pilot in his squadron, flying fifty missions and receiving numerous medals for his service. A graduate of Penn State University and of the Dickinson School of Law, where he was a member of the law review, he spent most of his career with Spence, Custer, Saylor, Wolfe and Rose, retiring after fifty years of practice. A civic leader, he was twice president of his church council, president of his county bar, and for forty years served on the board of his local hospital and was chair of the board for twelve of those years. His survivors include his wife of sixty-one years and two sons.

Asa Rountree (70), a Fellow Emeritus from Birmingham, Alabama, died February 11, 2010 at age 83. After graduating from the Capital Page School in Washington, District of Columbia, where he was a page in the United States Supreme Court, he entered the U.S. Army, serving in the Ordnance Corps and as a military policeman. A Phi Beta Kappa graduate of the University of Alabama and a magna cum laude graduate of the Harvard Law School, between undergraduate and law schools he was recalled to active duty as a combat rifle platoon leader and then an assistant battalion operations officer in the Korean Conflict. From 1954 to 1962 he practiced with Cabaniss & Johnston in Birmingham, Alabama. In 1962, he moved to New York City, where he was a partner and for many years the chief financial officer of Debevoise & Plimpton. In 1991 he retired from that firm and became a shareholder in the Birmingham firm of Maynard, Cooper & Gale, retiring in 2000. One of the founders of the Litigation Section of the American Bar Association, he was its chair in 1980-81. A prolific writer, he was the author of *The Roman Republic: A Historical Parallel?* His survivors include his wife and two sons.

Theodore P. Shield (77), a Fellow Emeritus from Long Beach, California, died May 31, 2010 at age 90. A football player at both Compton Junior College and the University of California at Berkeley, he enlisted in the Army Air Corps less than a month after Pearl

Harbor and served with the 347th Fighter Group in the South Pacific throughout the war. After graduating from the University of Southern California School of Law, he began his career as a Deputy District Attorney in Long Beach, then joined the Los Angeles firm of Betts, Ely & Loomis, which later became Shield & Smith. An active trial lawyer for over sixty years, he spent his last nineteen years as counsel to the firm of Ford, Walker, Haggerty & Behar. He had served as president of the International Association of Defense Counsel and on the Board of Directors and Executive Committee of the Defense Research Institute. A former member of the Board of Governors of the State Bar of California, he had served as the College's State Chair for Southern California. In 1974 the American Board of Trial Advocates had elected him its Trial Lawyer of the Year. A widower whose wife of sixty years had predeceased him, his survivors include three daughters.

Jerry V. Smith (99), a Fellow Emeritus from Lewiston, Idaho, retired from Smith and Cannon, died April 11, 2010 at age 85 from secondary injuries from a fall while walking his dog. His undergraduate education at the University of Idaho was interrupted by service in the U.S. Navy in World War II in which he piloted a PBY Catalina "flying boat." After the war, he returned to finish his undergraduate education and then graduated from the University of Idaho School of Law. He had served as president of the Idaho State Bar, which had honored him with its Distinguished Lawyer Award, and of the Western States Bar Conference, which had honored him with both its professionalism and pro bono awards. He had served as an adjunct professor of trial practice at his law school. His survivors include his wife, a son, two step-sons and a step-daughter.

Oscar M. Smith (72), a Fellow Emeritus from Rome, Georgia, died January 9, 2010 at age 86. A Phi Beta Kappa graduate of the University of Georgia, he was an officer in the U.S. Army in World War II, seeing service in the European Theater as a member of the 153rd Engineer Combat Battalion in the 1st, 3rd and 7th Armies. The first honor graduate in his law class at the University of Georgia, he was a partner in the firm of Smith, Shaw, Maddox, Davidson and Graham. Serving as general counsel for several corporations, he also devoted a good part of his practice to

hospital and medical malpractice law, serving for nineteen years as attorney for his county hospital authority. A past president of the Georgia Defense Lawyers Association, he had been president of the Board of Visitors of the University of Georgia Law School Alumni Association and chair of the law school's Board of Visitors. He had received the law school's Distinguished Service Award. He had also chaired the Georgia State Board of Bar Examiners and had also led numerous charitable and civic organizations. After his retirement, he became a national champion builder of rubber-powered scale model airplanes. His wife of sixty-one years predeceased him. His survivors include two sons.

Norman Stallings (59), a Fellow Emeritus from Tampa, Florida, died March 23, 2010 at age 95. A graduate of the University of Florida and of the Harvard Law School, where he earned both an LL.B. and an LLM in taxation, he was editor of the Harvard Law Review. As an officer in the U.S. Army in World War II, he served in General Omar Bradley's 12th Army Group before the invasion of Europe, was with British General Bernard Montgomery during the invasion and then served to the end of the war in the Army's Forward Headquarters. After practicing in Atlanta, Georgia, for a few years, he joined the Tampa, Florida firm, Shackleford, Farrior, Shannon & Stallings. A past president of his local bar and a former member of the Board of Governors of the Florida Bar, he served on the boards of both Jim Walter Corp. and Jack Eckerd Corp. A leader in numerous civic organizations, he was vice-chairman of the Hillsborough County Aviation Authority and had a major hand in the creation of Tampa International Airport. He served a term as the College's Florida State Chair. A widower, his survivors include a daughter and a son.

James E. Tribble (87), a Fellow Emeritus from Tallahassee, Florida, died October 27, 2008 of a cerebral hemorrhage. Born in 1933, he earned his undergraduate degree at Wake Forest University and graduated first in his class from Stetson University Law School, where his father had once served as Dean. After service in the Judge Advocate General Corps, he was a law clerk on the Florida Supreme Court before moving to

Miami, Florida, where he joined the firm of Blackwell, Walker & Gray. A Fellow of both the College and the American Academy of Appellate Lawyers, his survivors include his wife, two daughters and a son.

Hon. Alfred E. Woodward (63), a Judicial Fellow from Wheaton, Illinois, died February 20, 2007 at age 93 of congestive heart failure. A graduate of Oberlin College, where he was captain of the football team, he earned his law degree at Northwestern University School of Law. He served as an officer in the U.S. Navy in World War II. A partner in the Wheaton firm, Rathje & Woodward, he was elected to the Circuit Court bench in 1971, served as its Chief Judge for four years, and in 1977 was elevated to the 2nd District Appellate Court bench, retiring from the bench in 1994 at age 81. A widower, his survivors include seven children. At the time of his death, his son Robert recalled that there had always been the expectation that he would follow in his father's footsteps, go to law school and join his father's firm. Instead, to his father's consternation, he took a $110 a week job at a small newspaper in Montgomery County, Maryland. That son: the Bob Woodward of Watergate fame.

Louis Young (69), a Fellow Emeritus from Delray Beach, Florida, whose passing was only recently reported to the College, died December 7, 2005 at age 97. He had practiced his entire career with the Syracuse, New York firm Melvin & Melvin. A graduate of the Syracuse Law School, he had been a member of its Board of Visitors and had received a Distinguished Service Award from its alumni association. A past president of his local bar, which had honored him with its Distinguished Lawyer Award, he had served in the House of Delegates of the New York State Bar and as Secretary of that organization. He was a veteran of World War II, serving with the 5th Army, 88th Division in the Italian Campaign. At the end of the war he had become a JAG officer, remaining on active duty for another year before returning to civilian life. He had been president of his local Legal Aid Society and for many years served on the Board of Directors of the Jewish Home of Central New York. His wife predeceased him by one week. His survivors include two sons.

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

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