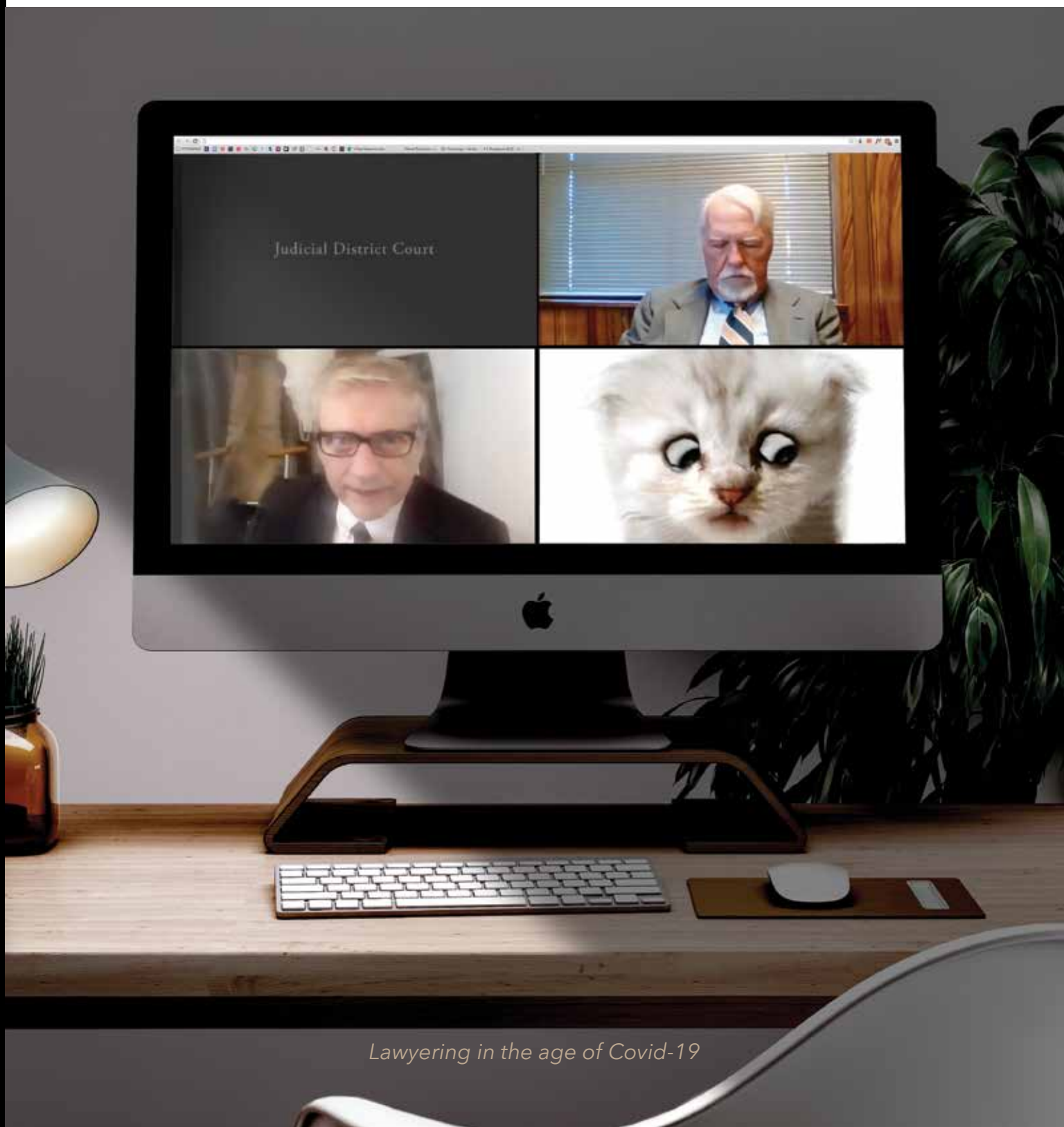
ISSUE 96 | SUMMER | 2021

JOURNAL

THE AMERICAN COLLEGE OF TRIAL LAWYERS



Lawyering in the age of Covid-19

American College of Trial Lawyers
JOURNAL

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

For comments, inquiries, and submissions,
please email the National Office at editor@actl.com
Liz Doten Design Director
Ben Majors Photographer, EventWorks

Dennis J. Maggi, CAE, Executive Director
American College of Trial Lawyers
1300 Dove Street, Suite 150
Newport Beach, California 92660
949.752.1801
www.actl.com

contents

LETTER FROM THE EDITOR

PLEASE SEND CONTRIBUTIONS OR SUGGESTIONS TO EDITOR@ACTL.COM

IF YOU SET OUT TO FAIL, AND DO, HAVE YOU SUCCEEDED?

Well, no. You have failed. It is no accomplishment to set and meet goals that make no sense. I reject the thought that you can succeed by setting out not to. So do you.

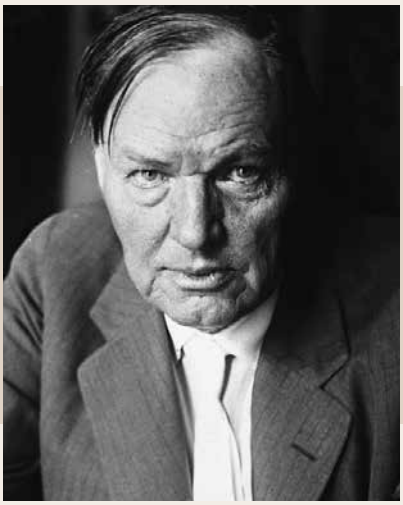
That's why I love real trial lawyers. Have you ever met one who set out to fail? No, of course you haven't. Trial lawyers set out to win; it's why we go to trial.

Now, "win" is a fudgy term in the context of trial work. A plaintiff is awarded five million dollars by the jury – a win for the plaintiff, a loss for the defendant, right? Wait, tell me more. What if the defendant offered to settle before trial for ten million? The jury gave plaintiff only half of what she was offered; the defendant gets off paying five million less than it was prepared to pay. An unambiguous win for the "losing" side.

In criminal trials there is only first place and second place, and second place really sucks. But a guilty verdict can still be a defense win if on a lesser charge or if it leads to a better sentence than whatever plea deal was offered. Sometimes, a criminal defendant has to go to trial without much hope of success, because no viable plea deal is even offered, and simply giving up is not an option. At those times, you still do not set out to fail. You are clear-eyed about the odds, but you still give it your best; you set out to win.

Trial lawyers set out to win. We don't always succeed, of course, but we always try. And when we don't succeed, we brush ourselves off and get ready for the next time. Michael Jordan famously said (he didn't say it first, but then, he's Michael, so he gets credit) "It doesn't matter how many times you fall; what matters is how many times you get up."

It's late April as I compose this, and I have watched the live coverage of the Derek Chauvin (George Floyd) trial and the resulting verdict. This trial makes me proud to be a trial lawyer. The prosecutors were remarkable. And so was the defense. One side appeared throughout to have the best of it, the best shot at success. But both sides, all of the lawyers set out to win, and all of them gave it their best.



"The only real lawyers are trial lawyers, and trial lawyers try cases to juries."

— Clarence Darrow

I'm not a psychiatrist, but I play one on this page. Why do trial lawyers try cases? I can't speak for you, but after 50 years of it, I know why I do. I do it because I'm insecure. I need to know whether I'm doing things right. I need validation. I need feedback. So I do trial work because it comes with real time, objective feedback.

Clarence Darrow said "The only real lawyers are trial lawyers." I have great respect for lawyers who don't try cases; they do important, good work. But here's the thing. You can practice law for fifty years, writing offering statements, reviewing prospectuses, negotiating contracts, drafting estate plans, brokering mergers, all of that. You are a success because no one has ever criticized your work. But the fact is that you will not actually know whether any of the work you did was done right. You will simply know that no one has complained about it. You cannot know whether the work was right unless and until some dispute arises and it gets resolved in a trial.

When something gets tried, there is pretty much instant feedback. The judge or jury rules. You know (subject to appeal) whether your work was right. Trial lawyers are real lawyers because they find out, after every trial, whether they plied their craft *right*.

Rep. Bill Foster of Illinois, the only Ph.D. physicist in Congress, describes the difference between trial lawyers and scientists: "Scientists want to know the evidence behind a statement; they want reproducible tests and verifiable facts. There is a big difference in the thought process of a trial lawyer, who is interested not in what's true but what he can convince a jury is true." The Congressman likely did not mean his comment as a compliment, but it does nicely sum up the essence of trial work. Success is not coming to the "Truth." It is, by ethically following the rules, convincing the jury that your side should win.

That is what we set out to do.

If you set out to succeed, and do, you have succeeded. And if you set out to succeed, and don't, you still have succeeded, so long as you gave it your best.

* * * * * * * * * *

We have some of the best for you in this Issue. We say hello to sixty-one newly inducted Fellows; we bid adieu to thirty-six departed Fellows. We offer abridged recaps of the outstanding group of speakers – one of them a Former President of the United States – who presented at the Spring Meeting. We spotlight two Justices of the Supreme Court of Canada in separate articles – one our regular feature "All In The College Family" highlighting FACTLs Justice Suzanne Cote and Gerald Tremblay, and a conversation with Justice Rosalie Abella, the longest serving judge on the current Court. We unpack the Electoral College. And more.

I hope we've succeeded in giving you a good read. It is, after all, what we set out to do.

Bob Byman ■

Both in-person and virtual options available. Choose your experience!

Exceptional Speakers

Induction Ceremony & Banquet

CLE

Evening Party at Navy Pier

Room Rates Only $309

SEPT 30 to OCT 3

2021 ANNUAL MEETING

IN-PERSON: At the Fairmont Chicago Millennium Park, Chicago, IL
OR ONLINE: At a computer near you! Visit ACTL.com for details.

PRESIDENT'S PERSPECTIVE – RODNEY ACKER

WHAT A YEAR IT HAS BEEN. LOOKING BACK, WE HAVE: (1) JUST PASSED THE ONE YEAR ANNIVERSARY OF THE PANDEMIC SHUTDOWN, WE HAVE SEEN AT LEAST FOUR COVID VACCINES APPROVED IN RECORD TIME, AND, AS OF APRIL, AVAILABLE TO ALL AMERICANS OVER 16, BUT NOT YET WIDELY AVAILABLE IN CANADA, AND SEEN INCREASED ATTACKS ON ASIAN AMERICANS – POSSIBLY IN RESPONSE TO THE ORIGINATION OF THE VIRUS IN CHINA; (2) WITNESSED WIDESPREAD CIVIL UNREST NOT SEEN SINCE THE 60'S FOLLOWING THE TRAGIC DEATH OF GEORGE FLOYD; (3) OBSERVED ONE OF THE MOST CONTENTIOUS U.S. PRESIDENTIAL ELECTIONS IN MEMORY FOLLOWED BY MULTIPLE LAWSUITS OVER ITS OUTCOME, AND AN UNPRECEDENTED ATTACK ON THE HALLS OF CONGRESS; AND (4) AN IMMIGRATION CRISIS ON OUR SOUTHERN BORDER. LOOKING FORWARD WE WILL SEE: (1) HOW EFFECTIVE THE VACCINES WILL BE AS OUR TWO NATIONS ATTEMPT TO RETURN TO THE NEW NORMAL, WHETHER LARGE GROUPS WILL DECLINE TO TAKE THE VACCINE, WHETHER THERE WILL BE LONG TERM SIDE EFFECTS FROM THE VACCINE, WHETHER ANY OF THE VACCINES WILL BE EFFECTIVE AGAINST EXISTING AND NEW VARIANTS, WHETHER BOOSTER COVID SHOTS WILL BECOME AS COMMON PLACE AS OUR YEARLY FLU SHOTS, AND WHETHER MASKS ARE HERE TO STAY; (2) HOW THE WORLD WILL REACT FOLLOWING THE CONVICTION IN THE GEORGE FLOYD MURDER TRIAL; (3) HOW NEW VOTER REGISTRATION LAWS IN MANY STATES WILL FARE AS THEY MAKE THEIR WAYS THROUGH THE COURTS; AND (4) REGARDLESS OF YOUR VIEWS ON IMMIGRATION, HOW THE HUMANITARIAN CRISIS AT THE BORDER WILL BE ADDRESSED.

Perhaps your reaction is that those observations just state the obvious: they are all political issues, and the College should stay out of them. You are certainly correct that those are political issues. And it is true that the College tries very hard not to be political. Of course, that is easier said than done. The College is as divided politically as our two countries are as a whole, and our Fellows are not shy and are very capable of articulating their diverse views. The Executive Committee has been regularly requested to speak out on all sides of these social issues, and has been occasionally criticized for either not saying enough, saying too much, speaking too soon, speaking too late or favoring one side over another. It is a hard line to walk because our Guidelines on Public Statements limit us both to matters that impact our core missions, and prohibit statements "which unduly threaten our collegiality by taking a position on one side of a matter of genuine and divisive controversy."

That finally brings me to the point of this Perspective - Collegiality and Engagement. While not specifically mentioned as a core mission of the College, collegiality is at the core of the College. No one gets into the College unless she or he passes the collegiality test of demonstrating "the very highest standards of trial advocacy, ethical conduct, integrity, professionalism and collegiality." As most of you know, President Clinton spoke at the Spring Meeting, and we heard from all sides about the advisability of having him speak (his comments are summarized at page 41). One take away from his comments was that citizens, as well as politicians, need to listen and talk to each other, even when they know that they will disagree. I felt like President Clinton was preaching to the choir. Over the past six months, I have had the opportunity to speak with many Fellows who felt passionately about an issue and were disappointed, either because the Executive

Committee declined to express a view or disagreed with a view that was expressed. I dreaded making those calls. But, to a Fellow, every one of those conversations has been collegial, and in the highest tradition of the College. While few minds were changed as a result of those conversations, I usually hung up thinking I had made a new friend and never felt as though I was being attacked or "cancelled."

How do we maintain that collegiality? For those Fellows who regularly attend National and Regional meetings, the reason is obvious; you witness that collegiality and fellowship every time you attend such a meeting. I feel confident that those meetings are soon to return with at least partial in-person attendance in addition to some virtual component. States and Provinces are beginning to consider scheduling in-person meetings in the coming months. The National Staff is planning for an in-person annual meeting in Chicago. I made my first in-person trip as President on May 12th to the Kentucky Fellows dinner. It was great not only to be there but also to witness the affection and collegiality the Fellows had for each other in their first gathering in more than a year. I hope that you can attend both the local and national meetings as we try to reconnect and strengthen our fellowship and collegiality. In the meantime, I hope you will join any virtual meetings in your state or province.

Speaking of virtual meetings, we just completed our second successful virtual national meeting. The Fellow registration was the second highest of all time, trailing last Fall's Annual Meeting by about 50 Fellow registrations.

President–Elect Mike O'Donnell did a fantastic job of arranging speakers. While you can read about the speakers in this issue of the *Journal*, I encourage you to sign up now and listen for yourself. It's not too late. While not the same as in-person, I enjoyed seeing old friends during the virtual cocktail hour and meeting many of the new Inductees. We have now inducted 156 new Fellows virtually. I hope each of you will take the opportunity to attend an upcoming in-person meeting and experience the black-tie induction in person.

The Board of Regents and our general committees were hard at work when they met prior to the Spring Meeting. In the week preceding the Board Meeting, President-Elect O'Donnell and I were able to meet with almost 400 committee members in 30 General Committees. The committees have successfully continued to function despite the pandemic. The work of the committees is detailed in their reports, but there are five areas that merit extra attention because they are areas where the College needs your help and participation.

Judicial Independence and the Administration of Justice: Our Mission Statement states that "The College strongly supports the independence of the judiciary, trial by jury, [and] respect for the rule of law." Most of the statements issued by the College over the last 18 months have been in support of the judiciary in response to verbal and sometimes ▷

physical attacks against judges. The College is doing more. In addition to making public statements condemning these attacks, the Judicial Independence Committee is engaged in an adult education program on the role of the judiciary and the importance of fair and impartial courts. Using a PowerPoint presentation created in conjunction with the National Association of Women Judges, Fellows speak to selected civic or educational audiences about: the structure and supremacy of the United States Constitution; the meaning of the rule of law; and the distinction between the judicial branch and the representative branches, emphasizing how judges make their decisions, the judicial qualities that support fairness and impartiality, and how judges are held accountable for their decisions. The Committee described the purpose and mechanics of the program in detail in the last issue of the *Journal*. Virtual presentations were given last Fall in San Diego, Oregon and Columbus, Ohio. The video recording of the San Diego presentation can be found at actl.com/publiceducation. The Committee's goal for 2021 is to present at least twenty programs - ten in the Spring as part of the Law Day celebrations, and another ten in the Fall during the celebration of Constitution Day. Fellows in Colorado, Illinois, Minnesota, Iowa, New York (Upstate and Downstate), North Carolina, Ohio, Pennsylvania, Texas, and Washington volunteered to plan and give the Spring presentations. They reached out to a wide range of audiences, including private, state, and community college classes and alumnae groups, Rotary Clubs, chambers of commerce, civic education associations, and libraries. The Downstate New York presentation, given by Fellow Matt Fishbein and Judicial Fellow United States District Court Judge Ann M. Donnelly and hosted by the Brooklyn Public Library/Center for Brooklyn History, attracted nationwide and international viewers. This is a fantastic project, but the Committee needs your help to reach more audiences across the States. If you have contacts at an organization that would be interested in hosting a presentation or you are willing to make a presentation, either virtually or in person, please contact Fellow Kathleen Trafford in Columbus, Ohio.

Pro Bono: The pandemic has put a great strain on the poor. This is especially true for those who have lost their jobs and are faced with eviction from their housing as a result. Our legal services providers helping those most in need during this difficult time depend upon our continued financial support and pro bono service. The College and the US Foundation have a long history of financially supporting and enhancing meaningful access to justice through our $100,000 annual Emil Gumpert Award to an outstanding access to justice program and by smaller cash awards made during the year to other entities providing significant service to those in need. The College also speaks out on a regular basis in support of pro bono efforts. Past President Doug Young and I, plus other Fellows in the College, were participants in the Canadian Spring Symposium 2021: The Advocate Making a Difference, co-sponsored with The Advocates' Society, focused on encouraging all lawyers throughout Canada to become more active in pro bono work. This year the College added four more Distinguished Pro Bono Fellows. In this present edition of the Journal, we feature the wonderful pro bono work of Charlie Weiss for the wrongfully convicted and imprisoned and welcome our 17th Distinguished Pro Bono Fellow, David Barry. I recommend you read our most recent Journal articles: Answering The Call To Help During Covid-19 (Spring 2021) and Justice For The Wrongfully Convicted (Fall 2020). In my recent April communication, I suggested that you consider starting an internship or fellowship program whereby a law student or new lawyer can receive much needed financial assistance and incentive to work during the summer or on a full-time basis with a public interest, legal services provider. There are many ways each of us can make a significant difference in the lives of those who really need and depend upon our help. What can you do to engage in this access to justice effort? If you are interested in helping in some way, but are not really sure what might be best for you, please contact our Emil Gumpert Award Committee and Distinguished Pro Bono Fellows Program Chair, Mark Surprenant, by telephone (504-585-0213) or email (Mark.surprenant@arlaw.com).

Diversity: The College is committed to diversity both internally and externally. Externally, the College has created the Thurgood Marshall Equality and Justice Award to recognize the efforts of those who have made significant efforts to the cause of equality and social justice. The first recipient is the late Congressman John Lewis. His family will accept the award in Chicago at the Annual Meeting. Internally, the College is committed to diversity of every kind—gender, race, practice area, and geographic. Each State and Province Committee has a Diversity Liaison charged with leading the efforts in that State or Province in identifying diverse candidates. While we aren't there yet, we are getting better. Over the last year and a half, the number of diverse candidates approved for membership has significantly improved. At the Fall Board meeting, 35% of the nominees who were approved were persons of color or women (or both). At the Spring 2021 Board Meeting, the percentage of diverse candidates approved was 42%. But the percentage of diverse Fellows in the College as a whole is only 12%. How can you help? There are fewer trials since the pandemic began. Many of the trials that have occurred have been virtual and less visible to the public and to Fellows who may have otherwise observed the lawyers who might be good candidates to be nominated. If you have the opportunity to observe either an in-person or virtual trial and you see a talented lawyer who meets our standards, nominate her or him. If you don't have access to sufficient information to make a nomination, at least give the name to your State or province Chair and let them take it from there.

Mentoring: The ability to mentor young lawyers during the pandemic continues to pose issues for the College and beyond. The Executive Committee has approved the plan of action proposed by the Mentoring Task Force discussed in the February eBulletin. An important aspect is to challenge Fellows to engage in direct mentoring of younger lawyers. This will require input from and involvement of State and Province Committees. We will soon be asking those Committees to accept a "mentoring challenge." We recognize that there are myriad forms that mentoring may take, including continuing legal education programs, one on one consultation, and pro bono assignments. In Ottawa, for example, a unique program called The Advocacy Club has trained hundreds of young lawyers through a more formal organizational structure. In order to coordinate our efforts, we will be asking that each State and Province Committee appoint a mentoring liaison to coordinate our efforts. Those efforts may involve communication with courts about efforts to ensure that younger, junior lawyers have opportunities in court; distribution of existing College teaching materials to inexperienced lawyers in need; counseling with public service or government lawyers, or participation in formal educational programs. We are hoping for creative development of mentoring programs. Please accept the challenge to do what you can to help insure the existence of well qualified trial lawyers and advocates.

Competitions: One of the most anticipated activities of being President of the College is participation in our four law student advocacy competitions. For the first time, all four were conducted virtually. The students are amazing and the future of trial practice is in good hands. The students are advanced in "Zoom Advocacy" and expertly handled their presentations virtually—something I would never attempt without my firm's IT department. We hope that next year the competitions will all be back to in-person. What can you do? When the call goes out, agree to judge. There is a need for great judges, not just at the finals but also at the regional and province levels. The College co-sponsors these events and our name is on them. The coaches and participants tell us that it is a remarkably better experience for the students when experienced trial lawyers are judging and critiquing the competition.

I hope you will take the opportunity to engage in the work of the College. If the areas mentioned above don't interest you, please review the Committee descriptions in the front of your blue directory and find one that does interest you. Then contact the National Office and they can assist in getting you involved.

I hope to see you in Chicago in September. ■

THE 25TH ANNIVERSARY OF THE *VMI CASE*:

REMEMBERING RBG

THE COLLEGE, IN CONJUNCTION WITH THE SUPREME COURT HISTORICAL SOCIETY, OFFERED A TWO-HOUR CLE PROGRAM AT OUR SPRING MEETING AS A TRIBUTE TO THE LATE JUSTICE RUTH BADER GINSBURG, ON THE TWENTY-FIFTH ANNIVERSARY OF HER OPINION IN *UNITED STATES V. VIRGINIA* (THE "*VMI CASE*").

Clare Cushman, Director of Publications at the Supreme Court Historical Society, moderated a panel comprised of Professor Deborah Jones Merritt of Ohio State University, who clerked for Justice Ginsburg at the Court of Appeals and for Justice O'Connor at the Supreme Court; **FACTL Ted Olson**, who argued *VMI* for the Commonwealth of Virginia and who subsequently served as US Solicitor General; Paul Bender, Dean Emeritus at the Sandra Day O'Connor College of Law at Arizona State University, who argued *VMI* for the United States as Deputy Solicitor General; and Lisa

Beattie Frelinghuysen, one of Justice Ginsburg's clerks who helped write the *VMI* opinion.

In 1971, Ruth Bader Ginsburg represented Charles Moritz, who sought a tax deduction allowed to unmarried women but not unmarried men, a discrimination that more likely was an oversight than a conscious decision to favor women. But the very lack of legislative reason made the case a perfect vehicle to challenge sex-based distinction.

At the time, a statute would be upheld if the classification bore a rational relationship to a legitimate purpose; but a more rigorous scrutiny was applied to classifications based on "inherently suspect" categories, such as race or ancestry. Gender did not make the list of suspect categories.

The discrimination in *Moritz* was suspect, Ginsburg argued to the Court of Appeals, even under the rational relationship test. But, she urged, sex, like race, should be a suspect class requiring the more rigorous scrutiny. The same year, 1971, Ginsburg argued *Reed v. Reed* in the Supreme Court, challenging a state statute that preferred men over women as administrators of intestate estates. There, Ginsburg urged the court to apply the strict scrutiny test for sex-based classifications. Though she won both cases, Ginsburg could not persuade either Court to adopt strict scrutiny.

She kept trying. In 1973, in *Frontiero v. Richardson,* Ginsburg quoted Sarah Grimke, a 19th century feminist: "I ask no favor for my sex," Ginsburg told the nine male justices, "All I ask of our brethren is that they take their feet off our necks." But the Court refused to move the standard.

Finally, in 1976, Ginsburg succeeded in getting the Court to adopt a more rigorous level of review than rational basis. Ginsburg filed an amicus brief in *Craig v. Boren*, which challenged a statute allowing women to purchase low alcohol beer at an earlier age than men. The court struck the statute, explicitly applying an intermediate level of scrutiny, that grew directly from the seeds Ginsburg had planted in *Reed*, *Frontiero* and other cases. Distinctions between men and women, the court declared, must bear a "substantial relationship to . . . an important governmental objective." In just five years, Ginsburg had persuaded the Supreme Court to take gender equality seriously and to apply a new elevated standard of review to government action that distinguished men and women. But still she had failed to persuade the Court to adopt a strict scrutiny test.

The final chapter is *VMI*, which challenged the men-only admissions policy of the Virginia Military Institute.

VMI was founded in 1839 to educate men as citizen soldiers to lead in civilian life or military service. VMI's graduates became generals, members of Congress and senior business exec-

utives. Its alumni gave generously to the school and supported one another through a tightly knit network.

The Department of Justice sued the Commonwealth of Virginia, alleging that VMI's men-only policy violated the Equal Protection Clause. The District Court upheld VMI's single-sex program, but the Court of Appeals reversed and directed Virginia to remedy the discrimination. In response, Virginia created a parallel program for women, the Virginia Women's Leadership Institute ("VWLI"). The lower courts approved, finding that men and women would obtain "substantively comparable benefits" from the two programs. The Supreme Court granted certiorari. This time, Justice Ginsburg was behind the bench instead of before it.

Ted Olson argued for VMI and the Commonwealth of Virginia. Clare Cushman asked Ted "Would VMI have to modify its practices if it admitted women?" Ted replied that "VMI prided itself on producing not just citizen soldiers but also preparing young men who needed an adversative system where there was a lot of stress, hard work, training and exercise. The young men were expected to stand up to the pressure and not be distracted. VMI did not think it could change and still have the same outcomes."

Olson believed he could meet the equal protection challenge by stressing that, according to the education experts, some students – men and women – receive a better education in a single-sex environment. That did not mean that a woman couldn't stand the stress of a VMI-type education. But the experts said young women who were looking for single-sex education were not looking for a VMI type of an environment.

Clare Cushman noted that *amicus* briefs from educators emphasized that men and women have different learning styles and that women prefer a more collaborative approach. And there were *amicus* briefs from single-sex women's colleges worried that if VMI had to open its doors to women, they would have to open their doors to men.

Ironically, though VMI was men-only, Olson's oral argument stressed diversity. It was important, he argued, that Virginia offer coeducational opportunities as well as equal single-sex opportunities to that small minority of students who wanted that environment. The diversity was the opportunity to choose between a coeducational environment and a single-sex environment.

There was no getting around that VWIL had fewer resources, inferior facilities, fewer Ph.D. faculty and no science or engineering curriculum. Olson could not deny the fact that VMI had 150 years of rich tradition and a very strong alumni association. VMI was an established institution. VWIL was new. The curriculum was designed by educators for young women who wanted a single-sex education. It had been set up with adequate resources but it was going to take time to develop. And VWIL did become a very respected institution. The percent of graduates commissioned to serve in the Armed Forces from VMI and VWIL are remarkably close. But those statistics did not exist in the formative years.

Justice Thomas recused himself because his son was a cadet at VMI. Cushman asked Olson whether it is different making an argument to eight justices, with a potential for deadlock? Olson replied that

> "It's only different in that you have one less justice to prepare for. I always think of the Supreme Court as nine courts; nine justices with their own sense of jurisprudence. They are the final court. This is the end of the line. There's a lot more latitude for the justices to make decisions, especially in constitutional cases, so you have to prepare to deal with each justice individually and to understand where they might be coming from, what kind of questions they might be asking, and where their background and previous decisions might lead them. You've got to form an ability to persuade five of the justices to go your way.

QUIPS & QUOTES

"Professor Bender actually knew Justice Ginsburg from youth. 'We were in the same high school class but we were not at all on the same level. It was a big class and she was a star, both academically and socially. She was in student organizations, everybody looked at her as a leader. It was no surprise where she ended up because you could tell in high school. I remember admiring her, that she did so well, she got along with everybody, she was a leader among students.'"

> "We had a good understanding of where Justice Scalia stood and it wasn't any secret that Justices O'Connor, Ginsburg, Stevens, Souter, and maybe even Kennedy were going to be important justices. We focused on each one of them but each one of them differently.
>
> "I was not confident that we would be successful with some of the justices, particularly Justice Ginsburg. But my approach is to take no justice for granted and to concede no justice; to find a way to understand how they see this case, the prism through which they see the issues, and to be able to address that. That's why we focused on the fact that single-sex education was beneficial to some young people. And single-sex education for women might be structured differently than single-sex education for men. Because upper education was predominantly coeducational, it was important to provide a publicly supported single-sex education designed by experts to fit men and women. But it was an uphill battle that we eventually lost."

Professor Paul Bender argued the government's case. A major decision for the government was whether to ask the court to apply strict scrutiny or the intermediate or heightened level of scrutiny. At the outset, Justice O'Connor asked Bender if he was arguing strict scrutiny. "Yes," he replied, "but we don't have to." Bender did not want to make it a point of contention. He was confident he could win the case under either standard.

Bender's core argument was that VWIL was not equal to VMI. You can't equate a time-honored, established institution such as VMI with a new place, completely different faculty, completely different buildings and different alumni. VMI maintained that women had not really been seeking admission because women really did not want to be part of an adversative training style. But the numbers were not the issue. The issue was opportunity. Women should not be treated differently.

Bender also emphasized that harmful stereotypes would be perpetuated by keeping women out of VMI. If women were excluded because they were perceived to be not strong enough to cope with adversative training, the stereotype wins. Letting women into VMI was the best way to beat the stereotype. "If you're adversative to men, wake them up in the middle of the night, make them do push-ups, you have to do the same to women," Bender said.

> I wanted to convince the court that it was not equal to set up a new military institute for women; that was not going to be equal. What occurred to me was Harvard Law School, which for many years, did not admit women. What if when Harvard couldn't keep women out any more, suppose it set up a separate Harvard Law School for women. It would have different kinds of teaching, different courses. That would not be equal; everybody would say, "That's the women's Harvard, not the real Harvard." That demonstrated that you don't treat women equally when you keep them out of an institution for a hundred years and the institution develops a reputation as a tough, strong place and men who go there are really good, strong people because they survived. You don't treat women equally if you say "we won't let them in to that old institute; we'll create a new one for them." No one would think that is the same.

Professor Bender actually knew Justice Ginsburg from youth. For someone with his own resume of accomplishment, Professor Bender seemed almost in awe of her:

> We were in the same high school class but we were not at all on the same level. It was a big class and she was a star, both academically and socially. She was in student organizations, everybody looked at her as a leader. It was no surprise where she ended up because you could tell in high school. I remember admiring her, that she did so well, she got along with everybody, she was a leader among students.

Lisa Beattie Frelinghuysen was able to relate what happened behind the scenes; she was one of Justice Ginsburg's clerks that term and was assigned to the VMI case. Justice Ginsburg did not typically

divvy up the case load among her four clerks; she left that to the clerks, who adopted a rotating pick system. But Ginsburg knew Lisa had a background in gender equality, so she asked Lisa to work on the case.

Not surprisingly, Justice Ginsburg was not persuaded by the arguments that Virginia and VMI had raised. And at the judicial conference, she learned that she would be with the majority in striking the men-only admissions policy. Ordinarily, the most senior justice in the majority assigns the opinion. Lisa had heard that the opinion would be offered to Justice O'Connor, the most senior female Justice. But O'Connor suggested letting Ginsburg draft the opinion. Justice Ginsburg seized the opportunity to write an opinion after bringing case after case as an advocate to establish gender equality. She joked that she could always count on her chief, Chief Justice Rehnquist, to be on the wrong side of a women's rights case. So in this case, she was really gratified that he joined her opinion.

Drafting the opinion, Justice Ginsburg wanted to make the point that VMI was a unique place, with its four-star generals and its elite alumni, its rat line, its adversative training and the citizen soldier focus; there really wasn't anything else like that. She also wanted to highlight a long pattern of gender discrimination in higher education. She really liked the language in Justice O'Connor's *Hogan* opinion about the need for an "exceedingly persuasive justification" in order to uphold a gender classification. In the end, Lisa said, "you can really hear Justice Ginsburg's voice" in the opinion.

Justice Ginsburg had a clear majority. She knew this area of the law better than anybody. She did not feel that she had to quote from anybody in order to hold them to the opinion. That said, when she read the summary of the opinion from the bench and she came to the exceedingly persuasive justification standard, Justice Ginsburg looked over at Justice O'Connor to give her a nod.

Justice Scalia wrote a 40-page dissent. He was clear that he thought if VMI went co-ed, it would change the school's unique character and its mission. But Lisa and the Justice visited VMI 20 years later. Ginsburg gave a speech and they met with some of the first women cadets, as well as the current women cadets. "This was typical of the Justice," Lisa recalled. "She was always interested in how these cases actually affected people and it was wonderful to see how well the women cadets were doing and to hear their gratitude; thanking her for opening the doors for them to pursue their dreams."

The *VMI* case is the capstone of Justice Ginsburg's legacy on gender equality. She knew that the two hardest hurdles for gender equality would be the military and single-sex education. In fact, there were some possible cases early on related to single-sex education that she did not pursue because she thought it was too early. Professor Merritt summed it up:

> So with *VMI*, you have the marriage of the two areas that were going to be the hardest to overcome. The strength of her opinion, the fact that the vote was seven to one, shows the effective groundwork she had laid all those many years. This was a very contentious case for some people, but it turned out to be a relatively easy one for the Supreme Court.

David Kitner
Dallas, TX ■

THE HONORABLE MARK E. RECKTENWALD – ACCESS TO JUSTICE IN THE AGE OF COVID

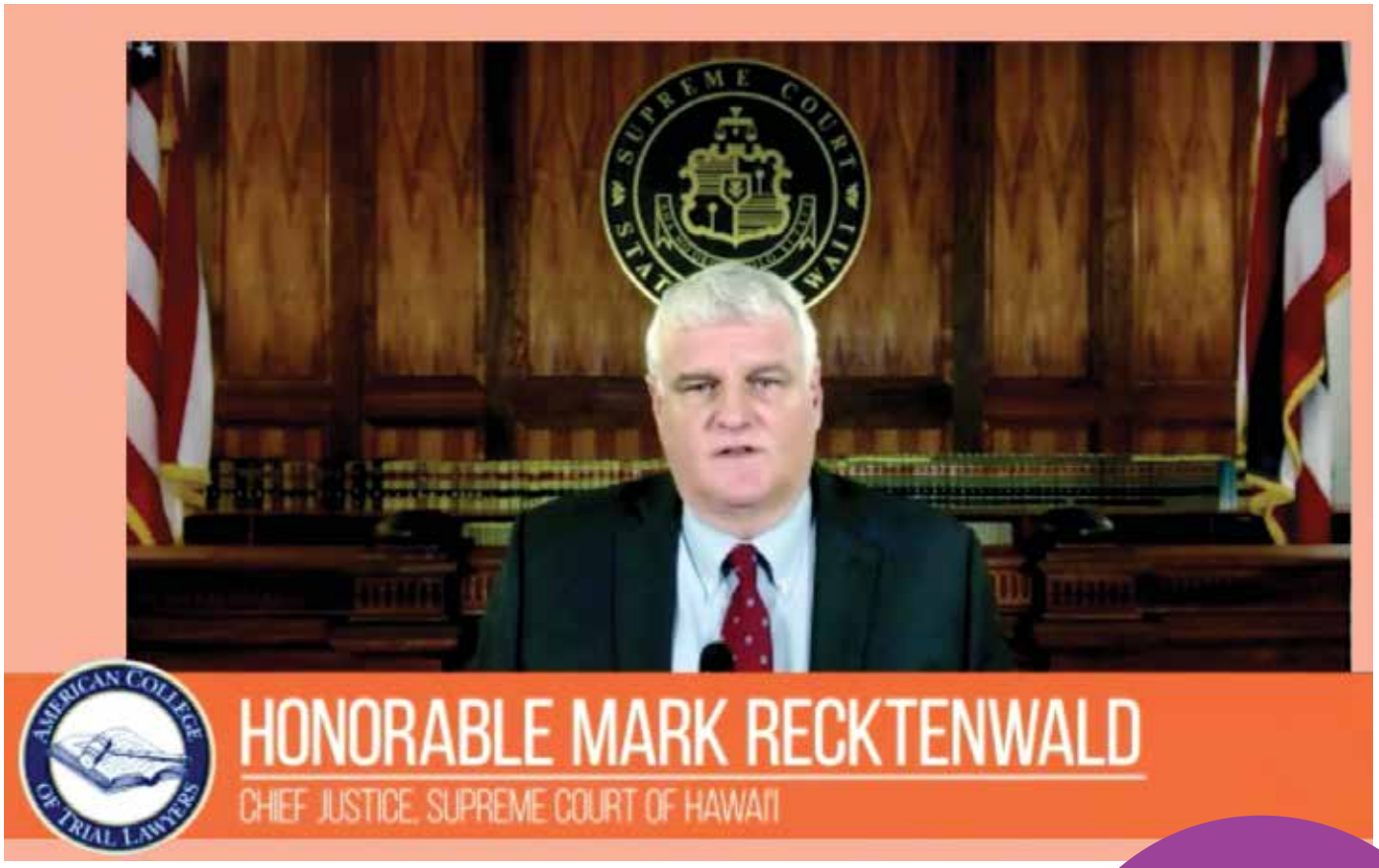
THE CHIEF JUSTICE OF THE SUPREME COURT OF HAWAII, MARK RECKTENWALD, JOINED THE COURT AS AN ASSOCIATE JUSTICE IN 2009 AND BECAME CHIEF IN 2010.

Winston Churchill once described Clement Attlee as "a modest man, but then he has much to be modest about." Chief Justice Recktenwald has nothing to be modest about, but yet he is. So in introducing him, **FACTL Lisa Woods Munger**, in deference to his preferences, simply shared some of the accomplishments of the judiciary he leads.

On Oahu, the Juvenile Drug Court diverts young people struggling with addiction from further involvement with the juvenile or criminal justice system. Hawaii's Opportunity Probation with Enforcement, aptly known as HOPE, provides intensive supervision to reduce victimization, crime, and drug use. The Veterans Treatment Court helps veterans build positive constructive lives while holding them accountable for their conduct. Honolulu's Driving While Impaired Court provides a comprehensive treatment program; the combination of accountability and treatment means safer streets. The Girls Court is an innovative effort to stem the rising tide of female delinquency. The Community Outreach Court is a unique mobile court that brings the court into the neighborhoods. In 2014, Hawaii became the second state in the nation with a statewide Environmental Court. These programs can only succeed where there is leadership like Chief Justice Recktenwald's.

His abridged remarks:

The past year has brought unprecedented challenges for the administration of justice. Covid-19 has forced the courts to rethink the way we do business, and the deaths of George Floyd, Ahmaud Arbery, Breonna Taylor, and so many others, have forced courts to confront racial inequity in our justice system. Out of the anguish of the last year, there is a silver lining: We have the opportunity to create courts that are more resilient, accessible, and responsive to the needs of an online world. And by listening to the voices that have been raised in protest, we can identify opportunities for meaningful, systemic change in our justice system.



There is an *ʻōlelo noʻeau*, a term which translates to "proverb" in Hawaiian, that embodies the challenges and transformations of the past year. *Pūpūkahi i holomua*, unite to move forward. This saying evokes paddlers and canoes, where all of the paddlers need to paddle together. We have all faced unforeseen challenges in the past year, and those challenges have forced us to reshape how we do business. As we do so, we are working together, collaborating within states and across the country, experimenting and exchanging ideas, and building court systems that are safe and ultimately more responsive to the needs of a modern community. As one trial judge told me, "We're all in the same canoe, paddling together."

There is an *ʻōlelo noʻeau*, a term which translates to "proverb" in Hawaiian, that embodies the challenges and transformations of the past year. *Pūpūkahi i holomua*, unite to move forward.

I would like to share how the Hawaii judiciary and judiciaries across the country are learning from the past year to permanently rethink how courts operate.

We realized in March of 2020 that we needed to shift operations online as much as possible, and so we leveraged video conferencing platforms like Zoom and WebEx to create virtual courtrooms. Now, at least some court business in every case type – civil, criminal, family, and the appellate courts – is done online. The response has been tremendous. In our trial courts, we held more than 128,000 hearings on remote platforms between August and December. Other states have similar experiences. Texas, which was an early rapid adopter of remote hearings, passed the million case mark in early February. Many people welcome the convenience of a hearing remotely rather than coming to a brick-and-mortar courthouse. And doing business online promotes transparency. For example, during one Hawaii Supreme Court oral argument in a case from Maui, more than 500 people watched the proceedings on YouTube. Pre-pandemic, that argument would have been held in our courtroom in Honolulu, and the cost of traveling from Maui to watch the argument would have been prohibitive for many. We are creating the courts of the future, courts that are more responsive to the needs of a community accustomed to doing business online. Remote proceedings will remain a significant part of our operations, even after the pandemic.

Another critical component of our judiciary's pandemic response has been the relaunch of jury trials. We put them on pause back in March, but we knew that pause could not go on indefinitely. On the criminal side, the defendant has a right to a speedy trial and can seek dismissal of the case as a remedy if that right is violated. On the civil side, the avail- ▷

ability of jury trials is critical to the timely and fair resolution of litigation.

QUIPS & QUOTES

Like many states, the pandemic has had a devastating economic impact on Hawaii. Our Governor imposed a moratorium on residential evictions through April 13, 2021, and we are anticipating a surge of evictions when the moratorium ends. Hawaii is not alone and experts have been warning for months of a national eviction tsunami.

Between March and November, our judges and court staff across the state worked tirelessly to plan for the restart of jury trials. They rearranged courtrooms to ensure social distancing, held walk-throughs with representatives of our Department of Health, and brought together attorneys for mock trial proceedings. We resumed jury trials across the state in November, and have completed about 20 jury trials in criminal cases. Jurors are screened in advance and have been willing to serve and responded to summons to appear. We have gathered feedback from the jurors who served in order to inform the process, and the response to our safety precautions has been positive. It is our highest priority to keep those who serve safe, and we will absolutely pause if we are not confident that we can do so.

Significant backlogs have developed in Hawaii and across the nation while jury trials were on hold. We currently have about 1,900 criminal jury trials pending on Oahu alone, plus hundreds more on neighbor islands. Resolving those pending cases will be one of the challenges of the coming year. In Hawaii, as in some other states, that task will be even more challenging given pandemic-related budget reductions, including reductions to the judiciary's operating budget.

As we transitioned to more remote proceedings, we also understood that the transformations precipitated by Covid-19 risked leaving the most vulnerable members of our community behind. Many do not have access to the internet or other tools needed to participate in our virtual courtrooms. This is especially likely for those who cannot afford an attorney. To help bridge this digital divide, we created guides to accessing virtual hearings, built a map of free Wi-Fi hotspots, and created kiosks where litigants without the required technology could go to access their court hearing. These efforts built upon the ongoing work in Hawaii to further access to justice in our civil courts.

National studies have shown ample evidence of a "justice gap," a gap between the civil legal needs of the most vulnerable Americans and the professional legal services that are available to help them. The Legal Services Corporation studied the resources available to meet the civil legal needs of low-income Americans and reported that in 2017, 71% of low-income households had experienced at least one civil legal problem in the prior year and one in four reported six or more such problems. For 86% of those problems, low-income households received inadequate or no legal help, overwhelmingly because of a lack of available resources. There is every reason to believe the economic insecurity of the pandemic has only exacerbated the problem.

In 2008, the Hawaii Supreme Court recognized the justice gap in our civil justice system and created our Access to Justice Commission. In the years since, the Commission has advocated on behalf of legal services providers, encouraged attorneys to volunteer pro bono, and made self-help resources available to those who cannot afford an attorney. One of the signature efforts of the Commission is the creation of self-help centers in judiciary facilities across the state. This year marks the 10th anniversary of the opening of the first self-help center on Kauai, which provides legal information to those who cannot afford an attorney in civil cases. In 10 years, volunteer attorneys staffing the six self-help centers statewide assisted more than 30,000 people at little or no cost to the public. After briefly closing during the early days of the pandemic, the self-help centers reopened remotely and have served more than 1,400 people since May, a great example of leveraging technology.

Like many states, the pandemic has had a devastating economic impact on Hawaii. Our Governor imposed a moratorium on residential evictions through April 13, 2021, and we are anticipating a surge of evictions when the moratorium ends. Hawaii is not alone and experts have been warning for months of a national eviction tsunami. Literally, tens of millions of Americans are at risk of losing their homes due to the pandemic. The coming surge is particularly concerning in light of the fact that in Hawaii, approximately 50% of all eviction cases filed result in a default judgment against the tenant and less than 10% of tenants involved in evictions have access to representation.

In February, my court established a tenant advocate pilot project to assist self-represented litigants in landlord-tenant disputes. Through the project, an advocate trained by the Legal Aid Society of Hawaii will be available in court to consult with unrepresented tenants facing eviction and provide assistance. Their involvement can range from simply providing information about procedures in the law, to participating in mediation, to full representation. We hope that this innovative pilot project will begin to fill the gap in landlord-tenant court and, ultimately, keep people in their homes whenever possible.

As we move towards a post-pandemic environment, we have the opportunity to redesign our courts using the lessons that I have just described. Undoubtedly, continued use of remote technology will be part of that vision. With appropriate steps to address the challenges posed by the digital divide, remote hearings make courts more accessible and transparent. For example, we have seen robust adoption of online proceedings by people who have been issued traffic citations. Remote hearings allow court users, especially self-represented litigants, to avoid taking time off work, finding childcare, or commuting to the courthouse. In short, they reduced some of the critical barriers to justice that exist in a traditional courtroom.

We need to look for more ways to use technology to make the experience for court users more consumer friendly. Even before the pandemic, the Hawaii judiciary began work on a pilot Online Dispute Resolution, or ODR project. The ODR service will provide a streamlined process to resolve small claims disputes online.

Another example of being more consumer friendly is the use of the reminders. We began an e-reminder system as a pilot project in December 2018 to provide text reminders to litigants in criminal and traffic cases. Early data showed that the failure to appear rate for defendants who received text reminders was 6%, almost one-half of the failure to appear rates for defendants who did not receive text reminders. Although e-reminders were temporarily suspended due to Covid-19, they were relaunched in more case types, including civil cases, in December 2020. Now all litigants, attorneys, the media and the public can subscribe to alerts about a particular case. A text reminder is a small but powerful intervention to help make sure cases are resolved on the merits.

While remote appearances work in many circumstances, we need to assess the data and the actual experience of courts when considering them in other circumstances, such as jury trials and jury selection. We also need to remain mindful of the unique constraints that exist in the context of criminal jury trials. Our jury system is a foundation of our democracy, and we must preserve the protections and benefits that it provides.

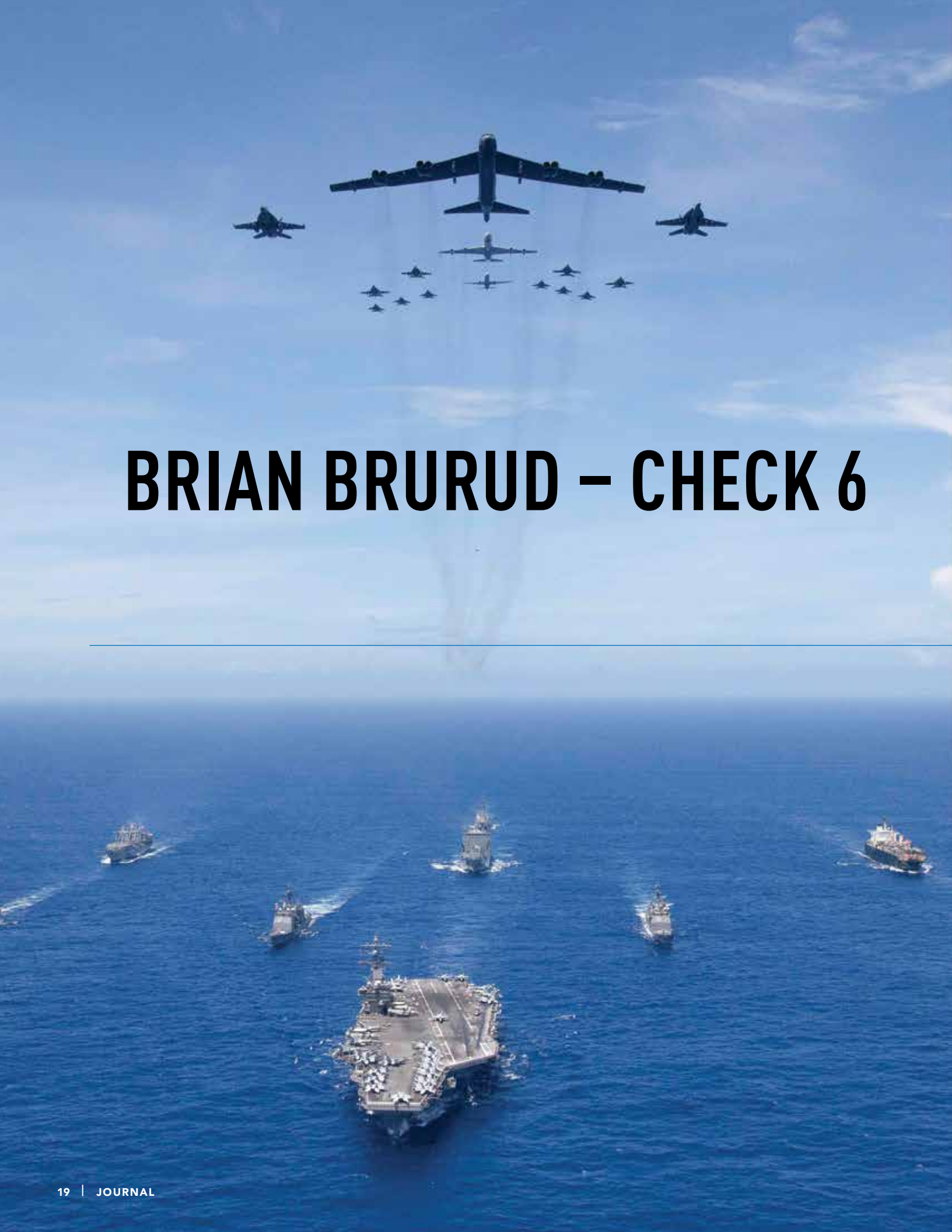
True access to justice also requires trust in the justice system, trust that the courts will resolve disputes fairly, impartially, and accessibly. But in order to build trust, we must acknowledge and address systemic inequities, and we have redoubled our efforts to ensure the Hawaii judiciary lives up to the promise of equal justice for all. We have taken some important steps by reforming bail and other aspects of our criminal justice system that may have disproportionate impacts, by training our judges and judiciary staff on how to recognize and address implicit bias, and by increasing access to our civil justice system. Moreover, our legislature recently created a criminal justice research institute that will use data to identify inequity within the criminal justice system.

This will be a long and sometimes difficult conversation but it is one that we must have. Our Committee on Equality and Access to the Courts is sponsoring a series of virtual events centered on racial equity and the response has been astounding. The first event, a virtual panel discussion of the Black Lives Matter movement in Hawaii, featured several local advocates and drew nearly 400 attendees. We are listening to those who have bravely raised their voices to fight for a more equitable future and we are committed to heeding the call to action.

There is perhaps no principle more treasured in a free society than equal justice for all, and a fair and impartial court system is the lifeblood of that ideal. But on January 6, 2021, the attack on the Capitol served as a painful reminder that we must continually work to fulfill the ideals of our nation. I am proud to lead a judiciary that has committed steadfastly to the pursuit of equal justice for all in its truest and richest sense. This requires facing past inequity, listening and learning, and doing the hard work to improve. This work is both the right thing to do and it is imperative to earning the faith and trust of those we serve.

The challenges of the past year have made this much clearer. The fair and impartial administration of justice is more important than ever to our democracy and to the very fabric of our community. Like so many courts across the country, the Hawaii judiciary's ability to fulfill that critical mission has been tested, but I am proud that through innovation and determination, we have continued to provide essential services that keep us all safe and on the road to recovery. As a result of that hard work, we have the opportunity to create a justice system that will use the hard-earned lessons of the pandemic to make us more accessible, transparent, and responsive to the needs of those we serve.

Lisa Woods Munger
Honolulu, HI ■



BRIAN BRURUD – CHECK 6

BRIAN "BRU" BRURUD IS THE MOST DECORATED U.S. NAVAL FIGHTER PILOT SINCE THE VIETNAM WAR. BORN AND RAISED IN BARTLESVILLE, OKLAHOMA, HE WAS A COWBOY AND AN ACCOMPLISHED FARRIER (HORSESHOER) BEFORE HE JOINED THE NAVY AND BECAME A CARRIER FIGHTER PILOT. HE FLEW F-14s, F-16s AND F-18s; ALL CARRIER BASED. HE FLEW 99 COMBAT MISSIONS, MADE 435 SUCCESSFUL CARRIER LANDINGS, AND SURVIVED 17 SURFACE TO AIR MISSILE ATTACKS, ALONG THE WAY EARNING THE SILVER STAR, THE BRONZE STAR, AND THE DISTINGUISHED FLYING CROSS; QUITE AN ACCOMPLISHED AVIATOR. HE SERVED AS AN INSTRUCTOR AT TOP GUN.

After his career in the Navy, Bru founded Check 6, a performance leadership company comprised of carrier fighter pilots and special operations operatives. Check 6 takes the best practices from one of the most dangerous operations on earth – flight operations on an aircraft carrier flight deck – and applies them to daily operations in other dangerous operations, such as the drilling industry, the chemical industry, and any other industry where precise, repeated operations are essential for safe and economical operations.

By way of example, in 2010, British Petroleum had rigs operating in the Gulf of Mexico. BP hired Check 6 to implement its program, its program, planning and performance culture on one of its drilling rigs in the Gulf of Mexico. That rig performed perfectly; no incidents, no issues, no problems. Its sister rig, the Deepwater Horizon, did not have the benefit of Check 6's services.

Former Regent John Tucker of Tulsa interviewed Bru, from which we offer a few abridged excerpts:

John asked, how does a cowboy and a horseshoer become a naval aviator?

Well, there's one word that describes that: it's called America. It's a bit of a progression to go from a life in agriculture and shoeing horses. But it's only in America where that kind of opportunity comes to people like me and others that are out there. So that's really what I have to say about that; just because of our great country that those kinds of things happen.

QUIPS & QUOTES

But there are only two things in the Top Gun movie that are really true. There is a place that is called Top Gun; it's known as a United States Navy Fighter Weapons School and they fly jets there. No volleyball. And certainly no Kelly McGillis in fishnet stockings.

What's it like to be an instructor at Top Gun?

How fun as it looks in the movie, it's so much better than that. I mean, it is absolutely a gift. What Top Gun does is it makes the best fighter pilots in the world and it trains the finest trainers in the world, which is why Check 6 is comprised of a bunch of that kind of talent. And it's just a dream. The challenge is, once you go through there, you're never quite going to be that good because the dedicated training just – it has a half-life; it's something that has to be practiced and there's always limitations on that. But it's truly an incredible program. But there are only two things in the Top Gun movie that are really true. There is a place that is called Top Gun; it's known as a United States Navy Fighter Weapons School and they fly jets there. No volleyball. And certainly no Kelly McGillis in fishnet stockings.

How did you get the idea for Check 6?

I've been a bit of a serial entrepreneur all my life and started in junior high school and so forth but when I first sat down and had the privilege of being in a fleet fighter squadron ready room and I looked around at the talent that was out there – the talent in there could do anything. I'd gotten out of the Navy, I was flying for FedEx and a host of other things, and I was approached by a deep-water drilling engineer from Canada who was reading a white paper from a doctor in behavioral science who had written specifically about drilling in ultradeep water operations. And the doc-

tor made an interesting observation – she said if you're going to do those operations, run it like a nuclear aircraft carrier. And have fighter pilots and astronauts teach it. So the engineer explained that he was in charge of two deep water drilling rigs in the Gulf of Mexico. They were drilling in 10,000 feet of water. Each rig was costing $1.2 million a day to drill and the total cost was $150 million a well. They kept having to do things twice. And he said, could you put together what she is talking about and deploy it out to my drilling rigs? That was how Check 6 got formed.

The results were incredible. From a safety standpoint, incidents went to zero. And from an operations standpoint, everything started to be done just once. When it costs you $16 a second to operate out there, that's a lot of savings. It doesn't look like anybody's moving any faster and they're not; they're just doing it once.

Can you comment about aircraft carrier operations?

I'd love to. First off, everyone, you own this stuff; we just get to drive it and operate it for you and it's an incredible thing. But when you first see a nuclear aircraft carrier, it's overwhelming in size; it's a massive structure that floats. The technology is just amazing. The planes talk to satellites, the boat does, that ship can go faster than you would need to barefoot waterski. The planes are unbelievable. That being said, what makes all of that stuff sing and work is a crew force of about 5,000 people. Now, guess what the average age is of those 5,000 people? It's very young; right now it's probably about 21 years old.

So figure this out: You go on deployment for six months and then you come back home for 12 to 18 months where they restock, resupply, make technology improvements, assimilate the changes. Then you deploy again. The turnover of personnel is about 85% from one deployment to another; everybody is short service. But here's how you have to operate; you have to be able to launch aircraft – daytime, nighttime, all weather. And here's the standards: There's 45 seconds between airplanes landing on the same runway. You can launch four airplanes in a minute. You can put 14 airplanes up in four minutes. That's incredible firepower these days. And so those are the operations that you have to have done by an incredibly young crew and it is the most fascinating thing you will ever witness in your life. And what it told me was that the potential of humans that are strongly led, that are taught on a process, and the discipline involved to stick to that process can do anything. And the normal appreciation we have on what humans can accomplish gets elevated tremendously. That's what we bring to bear – exposure of that potential as a team.

You'll see people crosschecking each other; that's part of the culture that you have. And the most important thing – and this is in the private sector, probably the thing that yields the greatest benefit – is the debrief culture. Once you're done with whatever you're doing – and this applies very well in law, as a matter of fact – done with depositions, any type of hearing that's done and I know what happens in your firm and others, but the debrief and just a reflection on what did we set out to do, what actually did happen, what did we learn from it, and what are we going to do different next time? It accelerates learning and that is how you get a very young, short-service crew force together to operate at that precision level. And it translates to the private sector in spades and in every measurable way. ▷

Why do people on aircraft carriers wear all different colors on the flight deck?

It's nonverbal communication; it deals with a job function. So you can look and see whether they're a mechanic or whether they refuel airplanes, they're in purple. The yellow shirts are the traffic cops; they own everything. And they're all – think how young they are! When I would land on that boat and be scared to death at night, legs shaking from adrenaline and you taxi out of the way, it's a young man or woman that's out there directing you and they own you. You don't question it; you don't override it; you have to follow that. When you're on that flight deck, the vibration and the noise is deafening. It's mostly nonverbal communication because there's only about a dozen out of a hundred or so people on that flight deck that actually have radios; most of it is just solid ear protection and nonverbal communication.

How does that translate to how you help out a drilling rig?

First, we read everything about their operating system and their management system. We break it down into three basic components of leadership, process and procedure, and the culture that leads towards compliance and doing things by the book. If the book's wrong, let's change the book. So we make flexible management systems that learn every day from the people that are actually doing the job and that's the stretch for a lot of companies. And the bigger they get, the more challenging that is.

Can you give some examples of how Check 6 culture has helped in specific circumstances?

The one that I'm most proud of is preservation of life; it kind of goes to the prior calling and service to the country and so forth because it's all about preservation of life. And the other one is making a difference in people to give them the skillsets to operate at a level beyond what they even thought they could do. And then we actually go out and put our arms around them and go, "I know these are concepts but let us show you what we mean by this." And so you've got the finest instructors in the world that had trial by fire – so whether it's a leadership issue, whether it's a process or procedural issue or a training issue or whether it's developing a culture within a unit that gives predictability about what comes. You want that in the legal field, we want it in manufacturing, we want it in high consequence industries out there and that's essentially what we do. We get very good at simple things and it's amazing how much that improves the outcome.

Who are the Check 6 instructors?

Well, I call them knuckleheads like me, you know? They're people that have been trained under, you know, the blessing of tax dollars to such an incredible level that horseshoers can even do this stuff. And then from that, you just deploy that out and share it with other people. But these folks are, they're men and women, that typically held command, which is an interesting thing, or they've been special operators where they've led people under very challenging circumstances. They don't sweat, they're very confident in their own skin. They may have post-traumatic stress like many of us do and having done that business and the demons you have to deal with, but they are advocates for veterans, they're advocates for sharing what they know that kept them alive. That translates very well into outcomes in the private sector.

What makes you excited to get up every day now?

Oh, man. I'll tell you what really makes – gets me excited – is making a difference in somebody's life. It's a precious thing, it's a blessing, it's very humbling to do that. I'll share one story with you. We had a leadership training course and there was a gentleman there who had an accident from a cousin dumping a turkey fryer on him; he'd been burned over 85% of his body. He had hundreds of surgeries and he was in his late 30's when I met him. And part of our curriculum was a briefing lab. It's a closed setting and it's a small intimate group but we get up and critique each other to learn the art of the debrief. It's not judgmental; it's for the purpose of getting better.

Well, this guy told me at the beginning of the class, he said, "I'm not going to get up and talk to anybody." He goes, "Look at me, for God sakes." And I said, "Well, just keep an open mind," and he was adamant about it. By the time we were done on day four, the gentleman got up and gave a presentation where in a group of 12 people, peers if you will, standing ovation.

The veterans we have had ridden on wet seats, uncomfortable conditions, noisy environments, all for the protection of our country. They have so much to offer that is limitless what they can do. And so I like putting them in jobs where they get the reward of what they can deliver and benefit the world; they love it and it compensates them at the rate that they should be and it's just a blessing to even be a part of it. But it all comes back to this is America and that's what happens.

John Tucker
Tulsa, OK ■

QUIPS & QUOTES

I was approached by a deepwater drilling engineer from Canada who was reading a white paper from a doctor in behavioral science who had written specifically about drilling in ultradeep water operations. And the doctor made an interesting observation – she said if you're going to do those operations, run it like a nuclear aircraft carrier. And have fighter pilots and astronauts teach it.

SCIENTIFIC COLLABORATION IN THE FIGHT AGAINST COVID-19

WHEN ASKED TO DESCRIBE HER, A MENTOR SAID ERICA OLLMANN SAPHIRE WAS CHARACTERIZED BY INTELLECT, INTEGRITY, AND STAMINA. NO DOUBT, THESE ATTRIBUTES WERE PART OF THE REASON DR. SAPHIRE WAS PRESENTED WITH A PRESIDENTIAL EARLY CAREER AWARD FOR SCIENTISTS DURING THE OBAMA PRESIDENCY — AN AWARD HONORING HER FOR HAVING "EXCEPTIONAL POTENTIAL FOR LEADERSHIP AT THE FRONTIERS OF SCIENTIFIC KNOWLEDGE." PERHAPS THE SAME CAN BE SAID FOR HER SELECTION BY THE BILL AND LINDA GATES FOUNDATION TO SERVE AS THE LEADER OF A GLOBAL CONSORTIUM EVALUATING THE HUMAN ANTIBODIES NEEDED TO PREVENT AND TREAT COVID-19.

Erica Ollmannn Saphire is a collaborator in a world full of incentives for self-promotion and advancement of one's own ambitions. Great scientific accomplishment leads to tenure, appointments to celebrated academic chairs, and prizes of notoriety. Whether in academic or private enterprise, success often means "first across the finish line" with a new discovery. The system rewards those who are best at wrapping new ideas in secret until a scientific advance is ready for publication. In a community known for large egos, building a collaborative work model can be a challenge. Enter a leader such as Dr. Saphire, who knows how to negotiate with colleagues so the paramount needs of science come before self-interest. She has leadership gifts that make sure the best ideas are those her co-partners pursue for the benefit of mankind.

Dr. Saphire is a Structural Biologist who employs cryo-electron microscopy to study viral proteins in a three-dimensional perspective. In groundbreaking discoveries, her team has determined just how molecular structures of viruses suppress the human immune system, and they have described how human antibodies can link up or "dock" with these viruses to invoke the immune system and prevent further damage.

In her timely remarks to the College's Spring Meeting, Dr. Saphire explained that when a virus replicates, it often mutates, and clusters of mutations create variants, such as the United Kingdom variant, the South African variant, the Brazilian variant and even a California variant of the novel coronavirus we call Sars-Cov-2. The United Kingdom variant took hold in September of 2020, but it did not come into

scientific consciousness until winter. It had been spreading by the time it was detected, as had the South African variant – over two months elapsed between its emergence in South Africa and its detection. So too, scientists have observed variants spilling into other animal species and then back from animals to humans, such as a notable episode in European mink farms. When the virus finds a new host, it quickly adapts to a new environment and picks up more mutations in order to enhance its capacity for binding and infecting other host cells.

The human immune system is activated with antibodies, which are remarkably precise, highly-specialized molecules launched to clear an infection and then to stay on board as a memory response. Shaped like the letter "Y," antibodies attach to a virus and inactivate it. Once attached, the antibodies recruit additional immune system warriors to destroy the virus and clear the infected cells. If one is exposed to an infection again, the immune system remembers the pathogen, finds the right antibody, and confronts the infection rapidly.

One commonly-known antibody therapy is Antivenom, a serum containing antibodies that find snake toxins and neutralize them before the venom can do its damage. Viral antibody ther- ▷

apy, whether delivered by a vaccine or intravenously as a drug, works the same way.

Dr. Saphire explained there are many antibody therapies for various cancers, autoimmune diseases, and infectious diseases. With cancers, she says it is known "the immune system finds and destroys individual cancer cells before you are even aware that they are there. That's a power you can harness if you understand it."

Viral mutation makes it important that we know whether human defenses will work as the virus changes. And change it will for years to come. Will our immune responses, our antibodies, do the job? And will the most effective antibodies be elicited by the antibody therapy and vaccines currently being administered?

The immune system can make a quintillion possible antibodies against anything with which one ever has had or ever will be infected. A quintillion is the number 1 with 18 zeros. The challenge is finding the exact antibody that is best-prepared to attack the pathogen in question. Dr. Saphire and her colleagues have strategies to find the best one, two, or three out of a quintillion antibodies for use as a drug. Talk about looking for a needle in a very, very large haystack! In her laboratory, Dr. Saphire studies molecules with an extraordinarily high-powered tool: an 11-foot-tall microscope that shoots a 300,000-electron volt beam. Today, there are as many as 100 companies racing forward to make antibody therapies, and each has used a different strategy to find that needle; they all have different therapeutic candidates moving forward; they all report their candidate is good. But, which therapy is the best?

Given a limited number of dollars to fund scientific research and a finite number of clinical trial volunteers to sustain statistical relevance, it is impossible to test every potential antibody therapy, and there is a need to discern which ones really are the most promising. As Dr. Saphire noted, Company A is likely to say, "Well, our therapy's the best and we know because we did Experiment XX to test it." Then Company

B says, "Well, our therapy is best and we know because we did Experiment YY to test it." And Company C says, "Well, we think we have the best therapeutic candidate, and we know because we did Experiment ZXY to test it." This produces an apples to oranges comparison. So how do we know whose treatment is the best? Where do we want to invest our money in clinical trial?

Dr. Saphire and her colleagues have been working on the "Best Treatment Conundrum" for more than a decade. This work began trying to find the right antibody therapies for Ebola virus, Lassa, and hemorrhagic fever in Africa. In 2020, she turned her attention to coronavirus and observed the scientific community once again competing from a host of individual silos. But when confronting a global pandemic, one needs to operate at a greater speed defending against a novel virus; one needs to develop new tools; one has to collaborate within a competitive space.

In 2020, the escalating pandemic made it mandatory to determine more rapidly which therapies were the best. There was little time for trial and error. The rapid transmission of coronavirus demanded that scientists go about research smarter and faster than ever before. This is where the leadership skill of an Erica Ollmann Saphire proved invaluable. She had brought together the best minds in science to help design antibodies for treating the Ebola virus. Nobody in the world had come to know more about the structure of the Ebola virus than Dr. Saphire. Now, she was tasked with bringing the bright scientific minds together, putting all the pieces of the puzzle together, and determining what molecules are right for delivery as a Covid Therapeutic.

She faced many obstacles. First, organizing a work group takes time and distracts from urgent research. Second, if one is in a big group, people naturally become subject to "group think," which can stifle individual voices who have good ideas. Like an ugly public statue chosen by a committee, so it can be with a large collaborative scientific and biomedical effort.

Leading and coordinating antibody research concerning coronavirus had a third challenge: how to get everyone working together. In a world of "publish or perish," scientists need to advance their own research; everybody needs to publish their own papers. Companies have invested millions in their candidate therapeutics, and investigators all have intellectual property. Who would hand over their molecules so a competitor could analyze or experiment in a way that jeopardizes a future product? Developing a collaborative approach required that Dr. Saphire protect others' intellectual property and permit competition while promoting a spirit of cooperation. She had to design a framework that could do all these things.

"QUIPS & QUOTES"

The immune system can make a quintillion possible antibodies against anything with which one ever has had or ever will be infected. A quintillion is the number 1 with 18 zeros. The challenge is finding the exact antibody that is best-prepared to attack the pathogen in question."

Confronted with the challenge of organizing the Coronavirus Immunotherapy Consortium — an initiative funded by the Gates Foundation and the National Institutes of Health – Dr. Saphire helped implement a protocol by which competing antibody therapeutics from four continents could be "blinded" and given code names. Everything would come into the study as an impersonalized number, such as "Sample 932," and a company's intellectual property would be protected while allowing an objective comparison of test data.

The Consortium coordinated by Dr. Saphire is studying 250 therapeutic candidates from small academic laboratories, nonprofits, start-up biotech companies, and major multinational corporations. Fifteen of the world's greatest experts are examining different aspects of ▷

QUIPS & QUOTES

Nobody in the world had come to know more about the structure of the Ebola virus than Dr. Saphire. Now, she was tasked with bringing the bright scientific minds together, putting all the pieces of the puzzle together, and determining what molecules are right for delivery as a Covid Therapeutic.

antibody function to discover what works, and data from this consortium informs therapeutic choices by the agencies of different governments. Working collaboratively, the Consortium is learning why some treatments are more effective. It also is helping understand which therapeutic candidates will remain effective as the coronavirus mutates. Knowing where and what footprint on the virus spike to target with an antibody has helped reengineer a better vaccine candidate.

A recurring question is whether vaccines will continue to work as the coronavirus mutates. Dr. Saphire explained if the human body makes a quintillion antibodies against every pathogen the body has known, there will be thousands of different antibodies poised to attack coronavirus. That is a swarm of different antibodies, some effective and some not, but they hit all the different viral footprints. Even if the mutant virus evades some number of antibodies, a person should still have potent antibodies available for protection.

Antibody response to a vaccine is not a light switch; it is not a matter of being "on" or "off." The immune system works more like a dimmer, so if the virus mutates and changes significantly, the immune response might get less intense, but it will not be turned off. Data from Covid patients has shown that a person's antibody population is not materially affected by any one mutation. Many mutations taken together can decrease antibody protection by about 20% for about 20% of the people, so while some people lose a bit of immunity, the other 80% are doing just fine. This data is consistent with the immune system operating like a large panel of dimmer switches, some eliciting T-cells, some eliciting innate immune response, some eliciting antibodies. If a vaccine is a perfect match for the circulating virus, that dimmer switch is turned "on" to its brightest. But if a person has accumulated a cluster of mutations or a variant virus, though immunity will have dimmed some, the immune response still will be better than not having received the vaccine. Dr. Saphire opined the vaccine still is expected to be effective: instead of getting very, very sick, one might get a proverbial sniffle, which is preferable to the alternative.

Many wonder if they can be reinfected with coronavirus if they previously were infected and recovered. And if one has been infected, can that person still spread the disease? Saphire cited a study of vaccinated healthcare workers in the United Kingdom which showed only 44 out of 6,600 individuals became reinfected five months after vaccination. That is 0.7%, with 99.3% of the vaccinated individuals free of infection. Just as birth control is not 100% effective, it is much better than no birth control at all.

Dr. Saphire spoke about a recent study involving Marine recruits—young men who had been quarantined in a hotel for two weeks before boot camp. Though all tested negative for Covid before training began, some of the young men previously had contracted the disease, and some were "seronegative," meaning negative for antibodies in their serum upon arrival for camp. Of those who had not been infected, one-half became infected with coronavirus in boot camp. But of those recruits who reported for boot camp with antibodies from some earlier infection, only 10% got reinfected, which evidences protection once antibodies are on board. Even those reinfected recovered much faster. Again, it is the dimmer switch analogy--the more light you have, the better.

If one already had Covid-19 and has antibodies, should that person still be vaccinated? Saphire noted such individuals would not be first in line because a lot of people are vulnerable and have no immunity. But when someone with some immunity and prior exposure to the virus has gotten vaccinated, even one shot instead of two, they have boosted levels of antibodies. If one can get a vaccine after people with the greatest need have been covered, there will be a stronger immune response, and that is going to be very protective.

Being a leader in the worldwide search for coronavirus therapies is a significant accomplishment, and a lesser person would evidence much more ego than Dr. Saphire displayed in her remarks to the Fellows and Guests. Her life story proves Harry Truman's point: "it is amazing how much can be accomplished if no one cares who gets the credit." Self-effacing and willing to let others bask in the limelight, Erica Ollmann Saphire's life-story makes the values of small-town America manifest. In Lago Vista, Texas, where football is king, a young woman looking for vigorous activity might consider many things before signing up for rugby. In college and in graduate school, Dr. Saphire played as a Rugby Forward, later playing on the Bay Area Seahawks and managing two tours of the U.S. Eagles Woman's Rugby team. No wonder lab colleagues would ask on a Monday morning whether all her bruises signaled the need for the telephone number of a battered women's shelter.

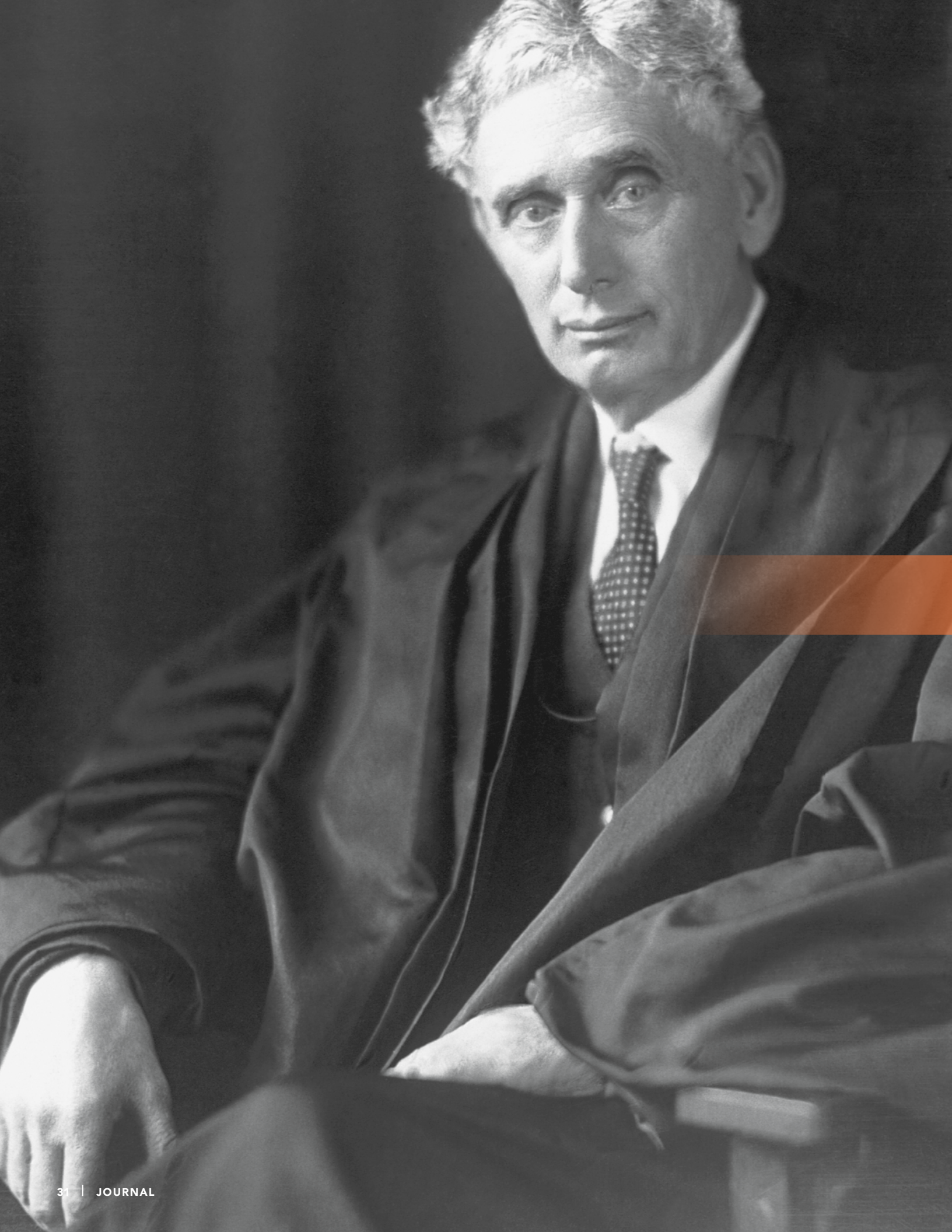
Dr. Saphire is unique. Taking a graduate cell biology examination, she answered the question with a limerick. An engaging smile and radiant charisma has enabled her to be a game-changer. Her never-ending quest to learn is evidenced by her present pursuit of an M.B.A degree to hone her leadership skills. A synesthetic, who sees numbers as having different colors, she thinks in singular ways others simply cannot. Recently named as the new Chief Executive Officer of the La Jolla Institute of Immunology, she is a role model for young women considering a career in science, and her many gifts have, in turn, been a gift to all of us.

In a world struggling to emerge from a pandemic, we are blessed to have a scientist who knows the value of collaboration and cooperation. Erica Ollmann Saphire's selflessness is a reason we have hope the novel coronavirus soon will be put behind us once and for all.

Charles H. Dick, Jr.
La Jolla, CA ■

QUIPS & QUOTES

Her life story proves Harry Truman's point: 'it is amazing how much can be accomplished if no one cares who gets the credit.'



THE IMPORTANCE OF SEPARATE OPINIONS – PROFESSOR MELVIN UROFSKY

MELVIN UROFSKY IS A MAN FOR ALL SEASONS. HE IS A LAW PROFESSOR, A HISTORIAN, A LAWYER, AND THE CHAIR OF THE EDITORIAL BOARD OF THE SUPREME COURT HISTORICAL SOCIETY JOURNAL, WHERE HE WRITES GRACEFUL INTRODUCTIONS FOR THE JOURNAL'S EDITIONS EACH YEAR. HE GREW UP IN LIBERTY, NEW YORK, IN THE CATSKILLS, WHERE HE WAS VALEDICTORIAN OF HIS HIGH SCHOOL CLASS AND RECRUITED BY LOCAL ALUMNI TO ATTEND COLUMBIA UNIVERSITY. PROFESSOR UROFSKY DIDN'T SIMPLY GET ADMITTED TO COLUMBIA; HE WON A FULL SCHOLARSHIP, AND HE WAS ON HIS WAY BECOMING A HISTORY BUFF.

Professor Urofsky earned a Ph.D. in history and eventually a law degree. He became fascinated with the history of Supreme Court Justice Louis Brandeis. In 1967, a grant from the National Endowment for the Humanities enabled Professor Urofsky to publish Brandeis' voluminous letters. Professor Urofsky's biography of Brandeis – a work that took many years – is widely recognized as the authoritative biography of the Justice.

Professor Urofsky, who calls Brandeis "the great dissenter," also has a book about the importance of dissents and separate opinions at the Supreme Court, about which his abridged remarks to us were:

I talk today about the importance of separate opinions. I will examine four in total, two dissents and two concurrences, that have since proven to be far more influential than the majority opinions that accompanied them. These separate opinions are the backbone of what I have called the Constitutional dialogue: a conversation that takes place primarily among the Justices of the Supreme Court, but also involves other branches of society: academia, the bar, and the public. It is a never-ending process, because even if, at times, it seems that a particular question has been definitively answered, it may always be reopened for discussion, usually because of an argument put forward in an earlier, separate opinion.

QUIPS & QUOTES

[S]eparate opinions are the backbone of what I have called the Constitutional dialogue: a conversation that takes place primarily among the Justices of the Supreme Court, but also involves other branches of society: academia, the bar, and the public, It is a never-ending process, because even if, at times, it seems that a particular question has been definitively answered, it may always be reopened for discussion, usually because of an argument put forward in an earlier, separate opinion.

Chief Justice Charles Evans Hughes may have said it best: "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed. Nor is this appeal always in vain."

Let us look first at Louis Brandeis' dissent in *Olmstead v. United States* in 1928. Roy Olmstead ran a popular business supplying alcohol during prohibition to the people of Seattle, who affectionally called him the King of the Bootleggers. It was a well-organized business; I've always thought that his operation would make a wonderful case study at the Harvard Business School.

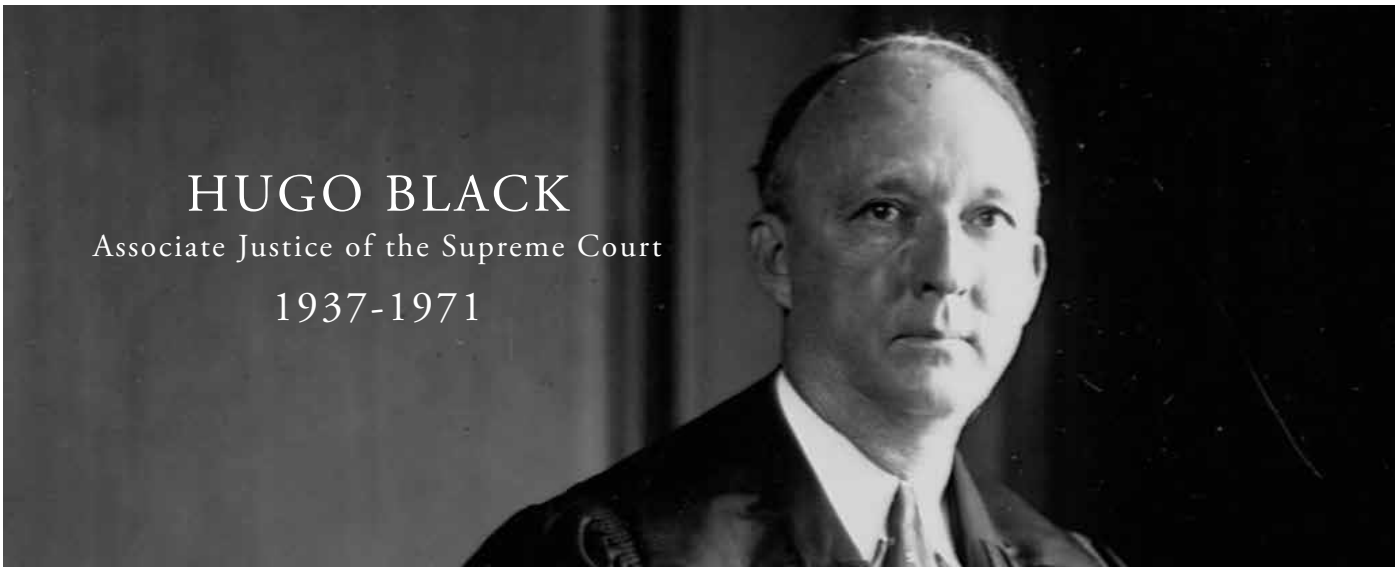
While local police, whom Olmstead paid off, had no interest in stopping him, federal agents did. They set up a wiretap of his home and office. This was not the sophisticated wiretap that later technology would make possible. It was essentially little more than two alligator clips and a headphone. The federal agents took notes and, with that evidence, secured a conviction under the Volstead Act.

Olmstead argued that the evidence should not be admitted because it had been secured without a warrant. Chief Justice William Howard Taft, in one of the most wooden opinions to be found, dismissed this argument because the wiretapping had been located outside the building and, therefore, the Fourth Amendment had not been transgressed. In fairness to Taft, he relied on the basis of prior jurisprudence, which interpreted the Fourth Amendment to protect only property rights.

In his dissent, Brandeis did two things. First, he completely changed the focus of the Fourth Amendment away from the question of entering property to protection of the rights of the people involved. "The makers of our constitution sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred as against the government the right to be left alone, that most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."

It took nearly 40 years before the Court adopted the Brandeis view. In *Katz v. New York*, Justice Potter Stewart said, in Brandeisian terms: "The Fourth Amendment protects people, not places." Stewart, in fact, based his opinion on Brandeis' dissent in *Olmstead*, where Brandeis also introduced the idea that individual privacy is constitutionally protected. The debate over that argument is, however, a story for another day.

Now to the 1942 case of *Betts v. Brady*, where the Court held that the Constitution did not require states to provide counsel to indigent defendants, except in capital murder cases. Smith Betts had been convicted of a mere felony (robbery). According to Justice Owen Roberts, the lack of an attorney did not deny Betts due process.



Hugo Black, who at the time was the only member of the Court with criminal trial experience, entered a powerful dissent. Drawing on his own experience, Justice Black declared that in any criminal trial, the accused needs a lawyer. "Any other practice seems to me to defeat the promise of our democratic society to provide equal justice under the law." Black denied the proposition put forward in the majority opinion that the average person is intelligent enough to understand the law and the charges against them. The Sixth Amendment, Black wrote, "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skills to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious."

For the next 20 years, the Court wriggled about the *Betts* ruling, finding technicalities and special circumstances that required the state to provide an attorney. In all these cases, Justice Black's dissent, even when not cited (although it usually was) hovered over the decision, a reminder to the justices that the right to counsel was fundamental in insuring a fair trial.

Unlike Brandeis, whose dissents would often not be embraced until after his death, Black lived to see his *Betts* dissent adopted by the full Court in 1963. He took so much satisfaction that Chief Justice Earl Warren assigned to Black the opinion in *Gideon v. Wainwright*. As he told a friend, "When *Betts v. Brady* was decided, I never thought I'd live to see it overruled."

Black's *Gideon* opinion is essentially the same as his dissent in *Betts*: the 14th Amendment incorporates the guarantees of the Sixth Amendment and applies them to the states. In *Gideon*, he concluded, the Court was doing nothing more than "Restoring Constitutional principles established to achieve a fair system of government and justice."

While dissents say to the majority, "You got it wrong," a concurrence is more muted and usually more tactful. It may, in certain circumstances, say, "You got it right but not for the reason you used. Here's the correct argument." An example is the concurring opinion of Justice Robert Jackson in *Youngstown Sheet and Tube Company v. Sawyer* in 1952. At issue was President Harry Truman's seizure of American steel mills to avoid a crippling ▷

QUIPS & QUOTES

While dissents say to the majority, 'You got it wrong,' a concurrence is more muted and usually more tactful. It may, in certain circumstances, say, 'You got it right but not for the reason you used. Here's the correct argument.'

Charlotte Anita Whitney

"Miss Whitney was convicted of the felony of assisting in organizing, in the year 1919, the Communist Labor Party of California, of being a member of assembling with it. These acts are held to constitute a crime because the party was formed to teach criminal syndicalism"

strike during the Korean War. Truman based his decision on the fact that Franklin Roosevelt had seized some corporations during the Second World War and also because Chief Justice Fred Vinson had privately told the President that he had authoritative power as Commander-in-Chief.

Truman had a theoretical option under the 1947 Taft-Hartley Act, where he could have invoked an 80-day cooling-off period. Congress had overridden Truman's veto of that measure but the President did not want to use its provisions. Taft-Hartley would not have provided a permanent solution, but it at least enjoyed statutory legitimacy and might have bought time in which a settlement could have been negotiated. Six members of the Court believed Truman did not have the power, but they could not agree on a rationale. Justice Black, as the senior member of the majority, wrote what is technically the court's opinion, but it is rarely cited in cases involving presidential power.

The most cited opinion from *Youngstown* is Justice Jackson's concurrence, which Professor Louis Jaffe has called, "A most brilliant exposition of undefined Presidential powers and their relation to legislation." Presidential authority, according to Jackson, stood at its height when the chief executive acted at the direct or implied command of Congress and, also relied on his own inherent powers. In circumstances where Congress had not acted, the President might act relying on his own powers. But in *Youngstown* a twilight zone existed, in which it would not be clear who had the ultimate responsibility.

Presidential authority was weak, as Jackson said, when the President acted in defiance of either expressed or implied legislative intent. In such circumstances, the Court could uphold the President only by ruling that Congress lacked power to legislate on the subject. In this instance, Congress did have the power and it had spoken quite clearly as to its intent. In *Youngstown*, the Constitutional dialogue was quite explicit, with every member of the majority submitting his own opinion and basing his finding on some different portion of the Constitution. In the end, it has been the separate opinion of Robert Jackson that has had the most influence.

Finally, I turn to what is technically a concurrence: Louis Brandeis' separate opinion in *Whitney v. California* in 1927. It is of such stunning power

that the Constitutional historian, Mark Tushnet, has called it the greatest dissent ever written. Anita Whitney had been convicted under the California Criminal Syndicalism Act of 1919 for helping to organize the Communist Labor Party in the state. The law made it a felony to organize or be a member of any organization founded to advocate the commission of crimes, sabotage, or acts of violence. Although Whitney denied that the group had ever advocated violence and her lawyers claimed the act and the trial violated the due process clause, the free speech clause of the First Amendment had not been part of Whitney's defense. Brandeis believed he could not dissent on grounds that Whitney's lawyers had not raised (a sin for which he often criticized his conservative brethren). He wanted, however, to make a statement about what he thought the speech clause of the First Amendment should mean. Beginning with the 1919 *Abrams* case, Oliver Wendell Holmes and Brandeis had argued in one dissent after another for a more speech-protective interpretation of the First Amendment. Brandeis believed that surely the Framers had more in mind than simply letting people engage in rigorous debate.

A few years ago, I gave a talk on Brandeis for the Supreme Court Historical Society. Justice Elena Kagan introduced me. She said that in the entire corpus of U.S. Reports, her favorite was the Brandeis *Whitney* opinion. She proceeded to read some of its most eloquent passages. This is one of them: "Those who want our independence believe that the final end of the state was to make men free to develop their faculties, and that in its government, the deliberative forces should prevail over the arbitrary. They value liberty both as an end and as a means. They believe liberty to be the secret of happiness and courage to be the secret of liberty. They believe that freedom is to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."

For Brandeis, the most important position in a democratic society belonged not to any elected official but to the individual citizen. Citizenship in a democracy conferred privileges but also carried responsibilities, especially the need to participate in debate over public policy. In order to do this, citizens had to have access to all sides of the question, even arguments that many considered frivolous or even dangerous. The cure for bad speech, said Brandeis, is not to silence it, but to allow more speech. Where Holmes saw speech as an abstract question, a means of philosophical inquiry, Brandeis saw it as a crucial element of a free society. He wanted the debate. He wanted people with radical ideas to challenge the mainstream; to make people think about the values they cherished and not be complacent to them.

Perhaps more than any other of his opinions, the *Whitney* concurrence has shaped American constitutional law. In it, he developed a legal doctrine identifying the scope of protection protected by the First Amendment. In 1969, the Court fully embraced the Brandeis rationale in *Brandenburg v. Ohio*. As one scholar noted, the opinion is the best example we have of what a dissent can do.

One of the great dissenters of the later 20th century, William J. Brennan, when asked what makes certain separate opinions enduring, responded that such dissents "Often reveal the perceived congruence between the Constitution and the evolving standards of decency that mark the progress of a maturing society and that seek to sow seed for future harvests. These are the dissents," he said "that soar with passion and are brimming with rhetoric." For Brennan and many other dissenters, both conservative and liberal, the Constitution's vitality depends on an interpretation that addresses the needs of the community. When a justice perceives an interpretation of the text to have departed far from its essential meaning, that justice is bound by a larger constitutional duty to the community to expose the departure and point toward a different path. The great separate opinions, both dissents and concurrences, all point to a different path. And in many instances, that has ultimately been the path that the Court and the country have taken.

QUIPS & QUOTES

[D]issents "Often reveal the perceived congruence between the Constitution and the evolving standards of decency that mark the progress of a maturing society and that seek to sow seed for future harvests. These are the dissents . . . that soar with passion and are brimming with rhetoric."

Chilton Varner
Atlanta, GA

■

DR. PATRICK CONNOR — TREATING PANTHERS

WHEN I WAS ASKED TO INTRODUCE DR. PATRICK CONNOR AT THE SPRING MEETING, I WAS HONORED, BUT I ALSO KNEW THAT, UNLIKE MOST TASKS I AM GIVEN, I AM IMMINENTLY QUALIFIED. MY LACK OF HUMILITY WAS NOT ARROGANCE; IT WAS THE FACT THAT DR. CONNOR IS MY BROTHER AND LIFELONG BEST FRIEND. DR. CONNOR LIVES IN CHARLOTTE, NORTH CAROLINA, WITH HIS WIFE, TISH, AND EIGHT CHILDREN. HE WENT TO MEDICAL SCHOOL IN OKLAHOMA, THEN TO CHARLOTTE FOR A FIVE-YEAR RESIDENCY IN ORTHOPEDIC SURGERY, FOLLOWED BY A FELLOWSHIP AT COLUMBIA UNIVERSITY IN SHOULDER SURGERY AND ANOTHER FELLOWSHIP AT THE MAYO CLINIC IN ELBOW SURGERY. IN 1997, HE ENTERED PRIVATE PRACTICE IN CHARLOTTE, AND BECAME THE TEAM PHYSICIAN FOR THE CAROLINA PANTHERS. HE WAS THE HEAD TEAM PHYSICIAN FOR THE PANTHERS FROM 2001 TO 2021 AND HAS BEEN ON THE SIDELINES FOR OVER 350 NFL GAMES. HE IS A FORMER PRESIDENT OF THE NFL TEAM PHYSICIAN'S SOCIETY, WHICH CONSISTS OF THE 32 HEAD TEAM PHYSICIANS IN THE LEAGUE, AND HE HAS BEEN ON ITS EXECUTIVE BOARD FOR 17 YEARS. HE IS ALSO THE HEAD TEAM PHYSICIAN FOR NASCAR TEAMS JOE GIBBS RACING AND HENDRICK MOTORSPORTS, THE CHICAGO WHITE SOX TRIPLE A TEAM IN CAROLINA, AND OTHER TEAMS. PAT WAS THE FIRST FOUR-TIME STATE SINGLES CHAMPION IN TENNIS IN HIGH SCHOOL IN THE STATE OF OKLAHOMA. HE PLAYED WITH ME FOR TWO YEARS IN COLLEGE UNTIL I GRADUATED, THEN TRANSFERRED TO OKLAHOMA STATE AND WAS AN ALL-AMERICAN AND TOP 10 PLAYER IN THE NCAA. HE HAD MANY SPONSORSHIP OFFERS TO PLAY PROFESSIONAL TENNIS, BUT SKIPPED THE PROFESSIONAL TENNIS TOUR TO BECOME AN ORTHOPEDIC SURGEON. WHAT FOLLOWS IS AN ABRIDGED VERSION OF HIS REMARKS.

The NFL medical team is a team effort. All teams have a group of core physicians, athletic trainers, usually two orthopedic surgeons, and two internal medicine physicians working with a handful of athletic trainers as the core group. We also have physician consultants in every aspect of medicine – from cardiology to urology, dermatology, dentists, neurosurgeons, and more. On Sundays, each location has about 30 medical staff on the sidelines for the sole purpose of taking care of players and player health and safety, including airway management specialists, neurosurgeons, dentists, and others.

The role of an NFL team physician is multifaceted. Our number one priority is to take care of players, but we also take care of their wives, friends, and the organization's families. We too have a role as medical consultants to the club, assessing medical risk any players are bringing into the organization. We are also medical consultants to the league to work through protocols, research and other endeavors.

I thought I would take you through a typical season. The NFL season starts at the NFL Combines. Players come in and we attack them like bees on honey and pull on their shoulders and arms and knees and assess their orthopedic condition. We examine every player (usually about 350) and get x-rays, MRIs, and other tests. It is not unusual to find previously undiagnosed injuries including Jones fractures, Lisfranc injuries, stenotic cervical spines, cardiomyopathies, and more. We use an electronic grading graph where just one player may have 10 sets of x-rays and seven different MRIs just to get through the Combines. In 2020, we had over 1,000 MRIs to review, over 50 CT scans, a handful of EMGs, bone scans, and ultrasounds. I personally review every single MRI and do not rely on the radiologist's interpretation. We put all this information together and give every player a medical grade. We meet with our owner, general manager, head coach, head college scout, and go through every single player. We explain their medical grade and the organization takes that medical grade and incorporates it into the overall draft board.

Free agency opens in March. There are unrestricted and restricted free agents, and this process is a first come, first serve basis. It is always urgent. We get phone calls that say, "We need to do a physical immediately, so we don't lose this player to a different team." And there is a complete lack of candor from the players during this period. I am not judging, but that fact is not helpful. There is a ton of money on the line for these free agents and it is common they will say nothing is bothering them, they have no pain, and we must have our antenna up because our physical is the last step before signing a free agency contract.

QUIPS & QUOTES

The NFL medical team is a team effort. All teams have a group of core physicians, athletic trainers, usually two orthopedic surgeons, and two internal medicine physicians working with a handful of athletic trainers as the core group.

While there are many, one of my experiences several years back involved a player for which the organization drafted a four-year, $20 million contract with a $4 million signing bonus, pending my

physical. I had about 7 surgeries that day and he was rushed in to see me between surgeries. I asked him about a small bandage on his heel, and he said: "Really Doc, it's nothing." I asked him to remove the bandage and he said, "Oh, I just put a new one on; it's really nothing, Doc." I told him I had plenty of bandages and insisted he remove it so I could evaluate his heel. He had this huge lesion on the back of his heel. Apparently, he had a little too much to drink on a golf cart in the Caribbean during the off season and had this horrible injury that needed some major reconstructive surgery. Had I not looked underneath that bandage, it would have cost the organization a lot of money.

That takes us to the NFL draft. The team physician's role during that is primarily to discuss relative risk, which can be stressful when the team is "on the clock" and trying to decide between two or three players. Thereafter, the teams have mini-camps – the rookies in May and the entire team in June – and this is with helmets, and no pads. Injuries and issues are not uncommon. Next is the NFL training camp, which usually starts the last week of July. It is about four to five weeks, which includes the preseason games. This is a period where prevention of injuries is key. Several years back, we scrimmaged with the Dolphins and in one day we had a knee dislocation, a player had an ACL and a lateral meniscus tear, and another player had a recurring ACL tear. Training camp in July and August is usually in hot environments. After Korey Stringer tragically died because of a heat illness and heatstroke, we did research on the creation of practical heat illness prevention guidelines to create protocols, which all the teams have adopted to try to avoid any of these catastrophic problems.

I will discuss the regular season, essentially as a week in a glance. Monday mornings after the game, I am at my office at the stadium and see players then and throughout the week as needed. I am there evaluating their injuries, getting x-rays, MRIs, and other testing. I meet with the general manager and coach at 11:30 to assess injuries so they can plan for the week. We travel on Saturday for the away games, and I am there every Sunday, whether it is home or away.

The post-season is much more stressful up to the Super Bowl. We have been lucky enough to be in two Super Bowls, and they are really a unique life experience. After the Super Bowl, the stress goes away. There is no stress, as you may imagine, with the Pro Bowl. I have been the NFC head team physician in two Pro Bowls, which were essentially vacations with a lot of camaraderie and friendship.

The season wrap-up is important. We do exit physicals for every player which protects both the player and the organization to make sure that injuries are documented. If a player leaves the organization healthy and comes back in April with an ACL injury, that is not going to be attributed to him playing with the team. We do off-season surgeries, usually about half a dozen or so, toward the end of the season to get players ready for the next season. That takes us very quickly back to February and back to the NFL Combines where the whole process begins anew.

The NFL Physicians Society is comprised of the head team physicians from all 32 teams. The two head team docs per team from all 32 teams combined represent about 850 years of combined NFL experience. We get together at the Combines, share information and experiences, and deal with unique issues like the bargaining agreement, liability with professional athletes, different medical guidelines, drug programs, issues with DEA, licensure, and of course this past year, a very active collaboration with Covid protocols.

We talk openly about the potential conflict of interest in being a team physician. Can a team doc really do what is in the best interest of the player when he or she is getting paid by the organization? Certainly, potential conflicts of interest should be disclosed, and they are. But a potential conflict of interest does not mean there is an actual conflict of interest. It calls upon our professionalism to make sure that does not happen. These issues we come across daily in our professional lives and the examples are endless, such as seeing a patient in the office and recommending that they have surgery. That is a potential conflict of interest because surgeons are paid more for surgeries, but we make those judgments professionally and in the best interest of our patients, just as good lawyers do with their clients.

I was very lucky to start with Jerry Richardson, who was the founder and owner of the Panthers, and he told me the first day I walked into the stadium: "Pat, if you do or recommend what's in the best interest of the player, you will by definition be doing what's in the ultimate best interest of the organization." That is a tremendous vote of confidence and a tremendous insight into an owner who was the only owner to ever play the game, and he certainly lived that perspective as all organizations should.

Although I have a busy private practice, being a team physician in the National Football League is another full-time endeavor. All players have my cell phone number and, therefore, all their neighbors and their wives also have my cell phone number, and they use it day and night. Communication is also critical. These guys are pros, they are smart, and they want to be part of the decision-making process about their bodies, so it is important for a team physician to have compassion and empathy, but also confidence and to be assertive. As I tell my residents and fellows, be genuine, honest, and respectful. An important component of communication is to make sure that every level of the organization hears a consistent message. There is nothing more confusing or frustrating for a player than to hear conflicting information from a team doc, a trainer, a coach, or an owner.

QUIPS & QUOTES

Vinnie Testaverde spent the last year of his career with us. He told us a story about his early years in the League, when his evaluation for a possible concussion consisted of the strength and conditioning coach hitting him upside the head with his helmet on to see if his head was clear enough to play."

Informed consent is critical, but slightly different in the NFL. During the week or during off-season, the athlete, parents, and agents can chime in and have shared decision making regarding the player's needs. On game day, however, it is time for the team doctor to be authoritative regarding returning to play. It is our job to know whether a player can safely return to the field. Nobody else gets a vote. There are just too many variables that cloud others' judgment on game day, including sweat, emotion, peer pressure, athleticism, and a strong desire to get out on the field and win. As I tell our fellows and residents, a good team physician cannot be a fan. Fans sit in the stands. Team docs, if they are going to be on the sidelines taking care of players, need to be physicians first. I do not ever want a player to think that my judgement might be altered by a win-loss record, how many minutes are left in a game, or the score of the game.

Sports medicine is what we do, but the ACLs, shoulder dislocations, and Achilles' injuries are the easy things. The medicine part of sports medicine is what is hard. These are a few examples of things we have encountered. While there are many examples, one player came out and said, "Doc, I've got a sore thumb," and he had a little infection in his thumb. He ended up, over the course of about 24 hours, getting a diagnosis of Hodgkin's Lymphoma and was immunocompromised because of his cancer. Another player came to one of us and said, "Hey, Doc, can you just give me something for my diarrhea," and rather than giving him a little Tums, our doc had his antenna up, investigated things, and two days later, diagnosed him with metastatic adenocarcinoma.

Concussions are always a big topic and we have come a long way. Vinnie Testaverde spent the last year of his career with us. He told us a story about his early years in the League, when his evaluation for a possible concussion consisted of the strength and conditioning coach hitting him upside the head with his helmet on to see if his head was clear enough to play. Clearly, we have come a long way since then. In 2011, Colt McCoy was tackled and concussed, but allowed to return to play because the team docs did not see the play, but everyone watching television did. We all now have earpieces, video replays on the sidelines, and an athletic trainer in the booth who sees everything America sees on replays. There are unaffiliated trauma consultants and neuropsychologists who work with all of us on this concussion protocol in a very collaborative and consistent way. Every team has the exact same protocol.

There is an association between lowering the head and concussions and, when the head is lowered and contact is initiated with the helmet, the risk of injury is elevated for both players. Research indicated lowering the head increased the neck injury risk to the striking player by over two times. However, the person who was struck had over an 80 times higher incidence of concussions if struck head-to-head. This initiated the rule change that you cannot lower your head and, if so, you are penalized.

I could talk forever on Covid and I think we have all heard enough about that. It is estimated that the league lost about $3 or $4 billion in 2020 but, as John Mara said, "Losses were manageable," which is obviously a reflection of the size and scope of the business of the National Football League. The league spent over $100 million on Covid testing alone and I got tested every day for 17+ weeks.

There is some good and bad to everything, which certainly applies to being an NFL team physician. The good is, without question, the relationships we would not have had otherwise. There are only 32 of us in the world, so it is clearly a unique life experience. It is professionally challenging, always something new, never dull, and Continuing Medical Education on steroids. Another good is the legacy. Three of my fellows I have trained are active NFL team physicians, which really makes me proud. And the not so good, of course, is time away, and difficulty balancing private practice, call and little free personal time.

And so, as JFK once said, "With great privilege comes great responsibility," and it has certainly been my great privilege to be a team physician in the National Football League the last 24 years.

James W. Connor, Jr.
Tulsa, Oklahoma ■

A CONVERSATION WITH THE FORMER PRESIDENT OF THE UNITED STATES

AT THE SPRING MEETING, OUR FELLOW AND FORMER COLORADO STATE CHAIR JAMES M. LYONS HAD A CONVERSATION WITH WILLIAM JEFFERSON CLINTON. JIM HAS BEEN A FRIEND OF THE FORMER PRESIDENT FOR OVER FORTY YEARS, SERVING IN VARIOUS CAPACITIES DURING THE CLINTON CAMPAIGNS AND TRANSITIONS. IN 1993, PRESIDENT CLINTON APPOINTED JIM TO BE THE US OBSERVER TO THE INTERNATIONAL FUND FOR IRELAND; AND IN 1996 JIM WAS APPOINTED TO SUCCEED SENATOR GEORGE MITCHELL AS THE SPECIAL ADVISOR TO THE PRESIDENT IN SUPPORT OF THE PEACE PROCESS IN NORTHERN IRELAND. THIS IS AN ABRIDGED VERSION OF THEIR CONVERSATION.

James M. Lyons

The 42nd President of the United States presided over the longest period of economic expansion in our history, including the creation of 22 million jobs, welfare reform, and peace agreements in Bosnia and Northern Ireland. Since leaving office, he's devoted his time and considerable energy to global philanthropy and humanitarian causes through the Clinton Foundation. His entire adult life has been dedicated to public service in and out of office. It's my honor and great pleasure to welcome my friend of over 40 years, President Bill Clinton.

Let me start with something that happened quite recently. At the Biden inaugural, you and former presidents Obama and Bush appeared together, spoke of your willingness to support and assist the new administration in whatever way asked. As far as I can tell, this is the first time three former Presidents of different parties have done that. I wonder if you can tell us how that came about?

President Bill Clinton

First of all, we ought to give due credit to George W. Bush for being there with me and Barack Obama and wanting to try and unite the country. We all cannot stand the level of division and personal animosity that has characterized not only our government, but our country. We should all be free to disagree with each other but our goal should be to try to hold our country together and make a more peaceful, secure, and prosperous world for all people. We know there's too much inequality, we know there's too much stagnation; we know there are all kinds of problems. But we can't solve them by fighting each other for momentary advantage and daily headlines.

James M. Lyons

How do you think ordinary Americans can help in this effort?

A CONVERSATION WITH PRESIDENT CLINTON

President Bill Clinton

Well, I think every community, every county, every state ought to have some mechanism through which ordinary citizens have more direct input in identifying and then seeking to solve together our big challenges.

For example, George W. Bush and I started a program called the President's Leadership Scholars Program. We take people, mostly between the ages of 29 and 44, who are rising in their own careers and who all have some interest in some social problem. And he picks 30 and I pick 30 a year and the 60 people come together. They are very diverse in terms of what they do for a living, racially and politically. If you begin with an end in mind, they wind up being totally surprised at how much they have in common.

We have to slowly shift the mindset here away from resentment to reconciliation and reconstruction. The problem we have is the media eco-structure – and I'm not blaming anybody; I'm just saying it's a fact with the social media and also with the economic pressures that are on more of the mainstream media – and the continued shortening of the attention span is that all these divisive, emotional, foaming at the mouth encounters we have momentarily may be satisfying but then the satisfaction immediately goes away until you get another hit. And that doesn't solve problems. People who solve problems have to do hard work and it's not always glamorous but we have more in common than we know. And the differences that we have, which are cultural, including different religious convictions, can all be accommodated in a thriving, diverse democracy if we're for inclusive tribalism, not divisive tribalism.

For example, you and I have been very involved together in working toward peace in Northern Ireland and in trying to harmonize the relationships with both the Irish Republic and the U.K. We didn't ask Catholics to stop being Catholic, Protestants to stop being Protestants; we didn't ask them to start agreeing on every single issue. We just asked them to agree on a means of resolving their differences ▷

QUIPS & QUOTES

For example, George W. Bush and I started a program called the President's Leadership Scholars Program. We take people, mostly between the ages of 29 and 44, who are rising in their own careers and who all have some interest in some social problem. And he picks 30 and I pick 30 a year and the 60 people come together. They are very diverse in terms of what they do for a living, racially and politically. If you begin with an end in mind, they wind up being totally surprised at how much they have in common.

that involved shared economic benefits and shared political participation so that everybody counts. And that's what we've got to do in every community in America.

George Bush and I had and still have real disagreements on issues that are of profound importance. And he didn't like me because I defeated his father. But we became friends, and when we can do something together that helps the country or the world, we do it. And I think we need to get back to that. We don't want people to check their brains at the door, we don't want them to stop their disagreements, but we need to stop trying to destroy one another.

James M. Lyons

Do you think a cross community economic model could work here as it did in Northern Ireland?

President Bill Clinton

I do. And I think you can work on non-economic things, too. I think we have to find a way to accommodate and live with sharply conflicting cultural and social ideas, too. And we have to have some room for compromise there and we have to know when certain things cannot be compromised.

I remember – and you'll remember this – when we set up the first local government in Northern Ireland. The whole idea after the Good Friday referendum passed was that they would have a government that would be mixed from both Catholic and the Protestant communities and across the other ideological divides within all those parties. Martin McGuinness, who had been an IRA leader, was appointed education minister. The first thing he did was to put more money into the Protestant communities with poor schools. And in the end, he wound up doing more for the Protestants than he did for the Catholics. He wanted to start by showing his good faith; that he believed in the Good Friday Agreement, that they had to share the future, and that people who'd been on one side of the divide had to prove that they could be fair and inclusive to people on the other side. We just have to start doing that. I don't pretend that it's easy or that it's all reconcilable but it's really important.

James M. Lyons

Let's look at the United States now and our relations with China and Russia and increasing competition, clearly economic competition with China. How do you see the United States dealing with that in the coming years?

President Bill Clinton

Well, that obviously depends partly on China. According to the news reports, President Biden and the Chinese President Xi had a conversation and he raised, as he should have, some of the issues that should concern everyone, including the removal of the Uyghur Muslims in the northwest of China, more than a million of them, into "reeducation camps." That brought up bad memories of the Cultural Revolution in China in the 60's. And also President Biden is concerned about whether the pact that led Hong Kong back into China has been broken; they were supposed to have one country and two systems. And thirdly, we're concerned about whether China's expansive and exaggerated view of this sovereignty over the South China Sea is going to lead to the abuse of their smaller neighbors from the Philippines to Southeast Asia.

At the same time, we need to work with China in avoiding the worst consequences in climate change. It's the biggest common threat the world is facing now and it could cause problems including economic distress all over the world. That will fall most heavily on the poor but already is affecting our country with severe storms and fires.

So I think the answer is to be brutally honest with each other in private and identify those areas where we can work together and then to reach some agreement about how we will navigate the areas where we're very much at odds with each other.

James M. Lyons

Let me ask you about our own hemisphere. You were the architect in the first NAFTA agreement with Canada and Mexico and we're now into the second iteration of that. How do you see our hemispheric relations developing and what should the United States be doing to facilitate better economic, as well as social relationships, with both Canada and Mexico?

President Bill Clinton

Well, first of all, since I left, the subsequent events in Latin America have gotten a lot murkier; Cuba was the only nondemocratic country in Latin America when I left office. And as you know, if you look at what's happened in Venezuela, the upheaval in Brazil, the problems that Argentina has had, and the recent electoral battles in Ecuador and Bolivia, there have been a lot of losses for democracy. These need to be recovered. I think these Latin societies work much better if they have democratic systems.

With regard to Canada and Mexico, I still believe the original vision was right; we need to work together to unite all the Americas because we don't really know what's going to happen in the larger world, both economically and politically in the years to come. When I was President, we had a trade surplus in Latin America as a whole. It didn't bother me that we had a trade deficit with Mexico because a lot of jobs moved from China into Mexico, and if we imported a product from Mexico on balance, 40% of that product, whatever it was, came from America. If we ordered something from China on balance, 4% came from America. So I see the Americas as a big part of America's future.

James M. Lyons

You and I have always been voracious readers and over the years, we would trade recommendations for books. What are you reading now?

President Bill Clinton

I just finished Gene Sperling's book *Economic Dignity*. I'll make full disclosure – he was my economic adviser. We started working together very early in 1992 but he worked for President Obama and supported and advises President Biden. But he has written a book about what we could do to shift from basically a shareholder dominated society to one in which all stakeholders were taken into account. That is, how can we recognize the world as interdependent when we have 4% of the world's population and 20% of its wealth? We've got to sell something to somebody else and be open to the rest of the world. And with a declining population among the native-born Americans, we have to have more immigrants. ▷

How can we do all this in an orderly way and still make people feel included who are so alienated? It's almost impossible to imagine now but, you know, I won West Virginia, Kentucky, Tennessee, Louisiana, Arkansas and Missouri twice and all those people have gone way, way away from that because they don't feel a part of the future. So Sperling's book, I recommend.

QUIPS & QUOTES

The other thing is we have gotten into dueling resentments that dominate the media; you know, my resentment's more important than yours. Everybody's got something they resent but the question is what are you going to do now? Are you going to give one more day of your life away to resentments? Or are you going to figure out how to make something good happen?

The other thing is we have gotten into dueling resentments that dominate the media; you know, my resentment's more important than yours. Everybody's got something they resent but the question is what are you going to do now? Are you going to give one more day of your life away to resentments? Or are you going to figure out how to make something good happen? And I decided that we both thought too much and too little of ourselves. So I have tried to learn something about biology and science, particularly both astrophysics and particle physics, that would help us put things in perspective to understand how we're just passing through here and we have to make the most of it.

So I'm reading a book called *The End of Everything* by Katie Mack. She is a physicist who teaches at North Carolina State. She explains why at some point in the future, in one way or another, the universe that we know will come to an end.

And another friend of mine, Brian Greene, has written a book *Until the End of Time* about the inevitability of the entire universe going away. And, believe it or not, it's not a downer. I mean, we're talking about way distant in the future unless something terrible happens. This helps me to understand the miracle of the life we have and a universe with well over a million solar systems. We saw a couple years ago the first photographs from 55 million light years away of this massive black hole, which is basically condensed pure magnetic energy surrounded by a massive flame, that if our entire solar system went by this hole fast enough, close enough, it would be sucked in and immediately disintegrate into a pile of dust you could fit in a thimble. I thought, well, I guess it doesn't matter so much who's on Mount Rushmore!

I also read Sanjay Gupta's book *Keep Sharp* about how old people can keep their minds going. And my writing partner, James Patterson, has a new book, *Walk in My Combat Boots.* I'd give anything if every American can read it because I think the most improved American institution over the last 30 years has been the military. They found a way to accommodate all of these social changes that are going on and maintain very high standards and become ever more inclusive. *Walk in My Combat Boots* is a series of interviews from all kinds of backgrounds about why they serve and what they got out of it and how they used what they experienced, including tragedy, sometimes including a loss of their limbs and other problems, but went on with their lives. They just say, "This is my life, this is why I did it. This is what I saw," and you know, I like things that are on the level. It's so inspiring.

I started reading more autobiographies and I just started and I'm about 60 pages into one that you may have already read, Gabriel Byrnes, unbelievable autobiography. *"Walking with Ghosts.* He grew up in a poor Irish family and he became a big-time movie star. He's a fabulous writer, so it's like every page is full of poetry. And it's by turns funny and tragic and maddening but there's something so powerful about it. I keep trying to remember things I believed all my life that I was raised to believe: everybody's got a story. Not everybody can tell their story but everybody's got a story and if you understand it, it's strangely comforting about your own life, whatever your life story is. And so, that's what I do with autobiographies.

I've been trying to finish a book on my life after the White House, which I basically put on hold for a few months because I couldn't think about anything else until I knew we had this Covid thing going in some kind of a right direction and I knew what was going to happen in the election. So I'll soon finish that book. But I'd rather read than write because I can't learn anything talking

about myself. I learn a lot from writing but, as you know from your book on Northern Ireland, it is hard work. [1]

James M. Lyons

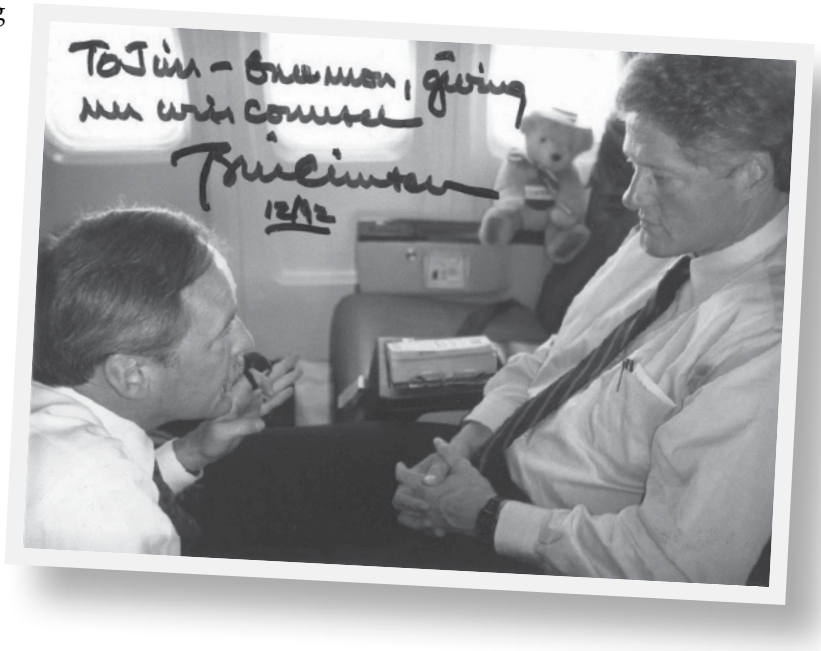
Well, let me ask you one final thing. Although, I already know the answer to this, tell us a little bit about your grandchildren and how you and Hillary enjoy being grandparents.

President Bill Clinton

Well, you know, where Chelsea and Mark live in lower Manhattan was the epicenter of Covid plague in the beginning and they had to get out. We brought them next door and I've had one of the most remarkable years of my life. You know, you just can't see these children grow up with all their dreams and all their natural ability to love and their need to be instructed to find a way out of their frustrations. Watching my daughter and my wonderful son-in-law, watching them be parents, it's just awesome; it's been the greatest thing. Like I said, this thing's been terrible for America and the world but in that sense, it's been the greatest gift Hillary and I could have ever had.

James M. Lyons

I'm sorry our time is coming to an end. It was good seeing you; you look pretty good for an old guy.



President Bill Clinton

Yep! I'll never forget when we met so many years ago. You walked into my AG's office and we hit it off immediately. I've always been grateful to you. Your friends in the trial law community, your community looking at this, they need to know what a major role you played in the peace in Ireland; the work you did there. And I'm very grateful to you for that and a thousand other things but mostly for a lifetime of friendship and I thank you.

James M. Lyons

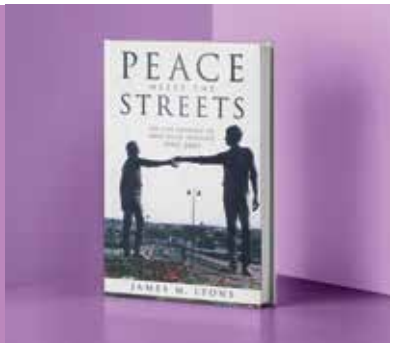
Well, I thank you. You have done more to enhance my life than you will probably ever know. Give my love to Hillary and to Chelsea and take good care of yourselves.

President Bill Clinton

We'll try.

■

[1] **EDITOR'S NOTE:** Jim Lyons is the author of *Peace Meets the Streets, On the Ground in Northern Ireland, 1993-2001* (Amazon) which chronicles his service in the Irish peace process.



NEVER OUT OF THE FIGHT – THE EDDIE GALLAGHER COURT MARTIAL

MARC L. MUKASEY, FACTL

MUKASEY FRENCHMAN & SKLAROFF LLP

REGENT LARRY KRANTZ INTRODUCED "ONE OF OUR OWN, A FELLOW OF THE COLLEGE INDUCTED IN 2016," ***MARC MUKASEY***, DESCRIBING HIM AS A "SUPERSTAR TRIAL LAWYER" AND A "TRIAL MACHINE," WHO TRIED MORE THAN FORTY CASES DURING HIS EIGHT YEARS IN THE U.S. ATTORNEY'S OFFICE FOR THE SOUTHERN DISTRICT OF NEW YORK. AFTER LEAVING THE U.S. ATTORNEY'S OFFICE, MARC BECAME THE HEAD OF THE WHITE-COLLAR DEFENSE GROUPS AT TWO INTERNATIONAL LAW FIRMS, AND THEN STARTED HIS OWN TRIAL BOUTIQUE, MUKASEY, FRENCHMAN, AND SKLAROFF. HIS SUCCESS ON THE DEFENSE SIDE HAS BEEN STELLAR, PROVING HIMSELF TO BE A FEARLESS ADVOCATE WHO TAKES ON TOUGH, HIGH PROFILE AND OFTEN UNPOPULAR CASES, WINNING WITH DETERMINATION, PREPARATION, SKILL AND GRIT.

MARC SPOKE ABOUT HIS FIRST TRIAL AFTER HE STARTED HIS BOUTIQUE, DEFENDING EDDIE GALLAGHER, A NAVY SEAL CHARGED WITH MURDERING A DEFENSELESS ISIS TERRORIST IN IRAQ, BEFORE A MILITARY TRIBUNAL CONDUCTED UNDER THE UNIFORM CODE OF MILITARY JUSTICE. MARC SECURED ACQUITTAL ON THE MURDER, ATTEMPTED MURDER, AND AGGRAVATED ASSAULT, AN EXTRAORDINARY RESULT.

MARC'S ABRIDGED REMARKS FOLLOW.

I've spent my career in the courtroom. Once I got my first taste of standing in front of a jury, I was hooked; I was hooked on the pressure, the adrenaline, the competition, the fight, the passion, the teamwork, the commitment to the mission and the feedback, right? The immediate feedback when the jury returns and the foreperson rises and reads the verdict, it's crystal clear; you're either a winner or you're a loser. It's total euphoria or complete despair. I'm addicted to that feeling, I crave it. I'm sure most of you do also, and the court martial murder trial of *United States. v. Eddie Gallagher* epitomized all of that for me. And as you'll hear, what I learned from the *Gallagher* trial was that no matter how great the odds, how big the adversary, how strong the opponent, if you're a trial lawyer, you're never out of the fight.

QUIPS & QUOTES

Eddie Gallagher was a special operations chief on SEAL Team 7 Alpha Platoon. . . . Eddie was charged with murdering an ISIS terrorist in Mosul, Iraq, in 2017. And you might ask yourself, 'Isn't killing ISIS terrorists part of the job of a Navy SEAL?' So how did this happen? Well, let me tell you how it shook out.

Eddie Gallagher was a special operations chief on SEAL Team 7 Alpha Platoon. He was a decorated Navy SEAL. He was a medic and a sniper. He'd done eight tours in Afghanistan and Iraq and he was a legend in the SEAL teams for his courage in combat, his tenacity on every mission, and just his plain guts.

Eddie was charged with murdering an ISIS terrorist in Mosul, Iraq, in 2017. And you might ask yourself, "Isn't killing ISIS terrorists part of the job of a Navy SEAL?" So how did this happen? Well, let me tell you how it shook out.

It's 2017 and Eddie and SEAL Team 7 are deployed to Mosul, where they were taking the city back from ISIS. And while no deployment is easy, this one was a particularly difficult deployment. There was tension within the SEAL team. They weren't exactly a perfect band of brothers. Eddie was the most senior officer; he had a lot more combat experience than any of the men he was leading. He was pushing the team hard and some of the less-experienced SEALS just flat out didn't like his hardnosed approach, and there was a lot of tension in the ranks.

And the tension led to accusations being thrown around. And a lot of these accusations were pointed directly at Eddie Gallagher. It all came to a head after a missile attack that occurred outside the city of Mosul. And it was a day when the allied forces had launched a hellfire missile into a building where ISIS fighters were hiding out.

Almost everyone in the building was killed but one skinny guy, about 20 years old, came hobbling out of the building, bleeding, his clothes were half ripped off, he pledged allegiance to ISIS and he collapsed on the ground in front of Eddie's team. And this is all captured on a helmet cam video. And you can also see Eddie, who's a medic, get down on his hands and knees and start applying medical care

to this young ISIS terrorist. And he cuts off his pants, he bandages his leg, and he puts what's called a crike in his throat to help clear his airways and help him breathe. And he's down on his hands and knees helping this ISIS fighter with a bunch of other SEALS and a couple of other medics gathered around. And the ISIS fighter is wailing and screaming and trying to speak; he's badly wounded but he's clearly alive.

Then the video stops. And the next thing you see is the dead ISIS fighter's body lying on the ground with Eddie Gallagher and a bunch of other Navy SEALS posing for pictures with the dead body. That's the end of the scene. There's no footage of the death.

A bunch of the guys who were particularly hostile to Eddie went to the Naval Criminal Investigative Service, the NCIS, and they told them about the dead ISIS fighter back in Mosul. And they told NCIS that even though the ISIS fighter was badly wounded, he was defenseless and he was not a threat. They said Eddie Gallagher stopped providing medical care and stabbed the ISIS fighter in the neck and murdered him. And SEAL after SEAL after SEAL after SEAL walked into NCIS, on video, and told the same story. Nobody would admit to actually seeing it happen, but they all accused Eddie of murder.

When the NCIS agents heard this, they got all fired up. This is going to be their chance to bag a Navy SEAL. A hot shot! Eddie was charged with premeditated murder under the Uniform Code Of Military Justice and nine other counts. A conviction would put him away for life.

So this case was going to have everything you could ask for as a trial lawyer: It was a murder case against a decorated Navy SEAL involving the death of an ISIS fighter, the first time that the very secretive SEAL teams would be exposed in a courtroom, and even more controversial because SEALs were testifying against their chief and breaking the code of silence and the code of loyalty between these special warfare operators.

From the prosecuting JAG's point of view, Eddie was an unhinged and out of control war criminal. From our review of the evidence, Eddie never stabbed the ISIS fighter and he was being set up by disgruntled members of his team and NCIS agents who wanted to put his SEAL trident pin on their trophy shelf. And that became our defense theme. This wasn't a murder by Eddie; it was a mutiny against Eddie.

Now for those of you who have never done a court martial – and I'd never done one before – it's basically the same as a federal criminal trial. A few differences: It's conducted under the Uniform Code Of Military Justice. We have nine jurors instead of 12. The verdict doesn't have to be unanimous; two-thirds will do it.

And like most trials, I had to learn new subject matter and a new language to really understand the case. I was learning about the rules of engagement, Article 31 rights, and every military acronym.

Now, my favorite part of every trial is the bonding with your trial teammates. And our defense team came from different backgrounds, we had different trial experiences, we had different styles. We had a Marine JAG from Jersey, we had a civilian mom who was eight months pregnant during trial prep. We had an ex-Navy officer who tried mob cases for a living. We had a Navy JAG who's now deployed in Bahrain. And we had a Jewish kid from Manhatten.

We were a motley crew, we were diverse, we were fighting against the United States military. And I'm not exaggerating when I say we grew to love each other. And I have to say that our client and his family were the guiding lights who provided emotional support, tactical knowledge, and never let us forget Eddie's motto, "You're never out of the fight."

Now here's where it starts to get crazy. About a week before the trial was scheduled to start, a total bomb dropped – and it spoke volumes about how badly the NCIS wanted to get Eddie Gallagher. About a week before the trial, we learned that the JAG prosecutors and NCIS had placed tracking devices on our defense team's emails; I kid you not. No warrant, no court order; they were literally monitoring our defense team communications. Not the content but who we emailed and when.

And ladies and gentlemen, it was the most heinous, odious abuse of the Constitution I'd ever seen. Total, complete, blatant violations of the Fourth, Fifth, ▷

QUIPS & QUOTES

So this case was going to have everything you could ask for as a trial lawyer: It was a murder case against a decorated Navy SEAL involving the death of an ISIS fighter, the first time that the very secretive SEAL teams would be exposed in a courtroom, and even more controversial because SEALs were testifying against their chief and breaking the code of silence and the code of loyalty between these special warfare operators.

and Sixth Amendments, prosecutorial misconduct of the highest order, and where I come from in the Southern District of New York, that kind of conduct would get your ass disbarred and probably prosecuted. That's how badly the prosecutors and NCIS wanted to nail Eddie Gallagher.

So we promptly filed a motion to dismiss the indictment and I argued it with more than a little righteous outrage. But by this time, the case was all over the news and it was too much pressure for the judge to completely dismiss it. But he did bring some measure of justice to the case; he threw the lead prosecutor off the case. He actually reduced the maximum sentence that Eddie could face if he were convicted so that it wouldn't be a mandatory life sentence. And most importantly, he released Eddie on bail; he released him from the Naval Base brig. And that fired up everyone on our team to fight like hell.

The first key witness was the lead NCIS agent. The guy testified for about 30 minutes on his direct examination; and even though I practice and preach short, tight, get up, make your point, sit down crosses, my cross-examination of this guy lasted about six hours.

I took him through the best practices in homicide investigations, and he agreed that it was critical to visit the crime scene and he agreed that it was critical to take photographs and critical to recover the body and critical to conduct internal and external autopsy examinations, critical to take measurements, critical to do toxicology and blood tests. And then he admitted that none of those things were done.

He agreed that it was important not to feed information to the witnesses, not to let the witnesses talk to each other about the case, not let them conform their testimony with each other, not let the witnesses become influenced by the media. And then this agent agreed that he let all of that happen in this case.

So I summed up in closing argument that the agent basically took the manual of best practices in a homicide investigation and threw it right out the damn window, because all he wanted to do was convict our client. And by the way, to top it all off, in a total peacock, showboat, grandstanding move, the agent had Eddie arrested on September 11th. The jury was appalled by that. Well, that took care of the case agent; we wiped him out.

The other witness I want to tell you about was another SEAL medic. Now you know that it's only on TV or in the movies that someone gets on the witness stand and confesses to the murder and exonerates your client; the Perry Mason moment, right? Never happens.

Well, that's exactly what happened in this case. And it happened because the investigation was shoddy and the prosecutors were careless. They called the medic to the stand. And he said that Eddie applied medical care and he said that Eddie was down on his hands and knees and he said the ISIS fighter died; that was pretty good circumstantial evidence. And then we got him on cross and the full story came out. The medic said, yes, it was true, Eddie was down on his hands and knees. Yes, it's true Eddie even took out his knife and touched the fighter's neck but didn't draw any blood and didn't cause the death. The medic said that he himself killed the ISIS fighter by asphyxiating him, cutting off his airway, because he had mortal wounds and he was going to die anyway. The witness copped to the killing.

The prosecutors had never bothered to ask the witness about those details before they gave him immunity and put him on the witness stand. So he made that admission without any fear of prosecution. It was an absolutely stunning moment.

But we weren't home free yet. The witness' testimony was that Eddie touched the fighter on the neck with a knife. If we adopted that testimony in total, Eddie could have gone down for assault and spent 10 years in prison. So we used the witness's admission to epitomize the totally corrupt

and negligent prosecution and told the jury his admission just makes none of this – none of this – understandable, believable, or provable.

I remember locking eyes with each and every juror. There was a SEAL in the back row. There was a hard marine with a big scar on his face in the front row. There was a chief warrant officer next to him. And smack in the middle, the president of the jury was a battleship commander; the foreperson. It was an incredible and attentive and intelligent jury.

We pointed out that we respected everybody's service, even the SEALs who testified against Eddie. I closed the summation by saying, "Members, tomorrow is July 4th. Deliver the verdict that gives Chief Gallagher his independence. Deliver the verdict that gives Chief Gallagher his liberty. Deliver the verdict that gives Chief Gallagher his freedom. Deliver a verdict on all charges of not guilty." And the next two days of deliberations were torture; absolutely excruciating. Eddie and I agreed that we'd get tattoos if we won but the waiting is the hardest part, right? That's when the case is out of your control. But then it comes, that moment, the verdict, and I love talking to other trial lawyers, other people who get that feeling. Your knees are weak, your heart's pounding, your nerves are frayed, your mind is racing, and I can clearly remember the judge saying, "Members, have you reached a verdict?" "We have, your Honor." "Will the defendant please rise?" And Eddie stood up and snapped to attention; he was wearing his dress whites. I rose, I stood to his left; we were shoulder to shoulder.

"On specification number one, premeditated murder, we the members find the defendant," and then the longest millisecond in history. I could feel Eddie's body on fire. This is a guy who's trained to be in pressurized situations at the highest order and he was white hot. He was coiled, tight, tense, and I could feel the electric rhythms in my own heart. You know that feeling when every cell in your body is buzzing? It was dead silent in the courtroom but I couldn't hear a damn thing because my senses were so overwhelmed and supercharged. And then it came: "Not guilty."

Specification two, not guilty. Specification three, not guilty. There was one guilty verdict on the lowest count, not even a crime in real life: taking a photo with a corpse, conduct unbecoming. But the trial got so much publicity that Eddie eventually got pardoned for that infraction so he could receive his full 20-year pension.

It was the most important trial of my career. It was the most emotional trial of my career. It was the most difficult trial of my career. But it was the best experience of my career because of the way lawyers from different backgrounds came together, civilian and military, formed a team, became a family, and fought for a man who had fought for us.

Oh, and I did get a tattoo on my back. It says, "Never out of the fight."

Larry H. Krantz
New York, NY ■

EDITOR'S NOTE: Taking nothing away from Marc's outstanding advocacy and obvious belief in his client, it should be noted that Chief Gallagher's pardon was not without controversy. The Washington Post Editorial Board summed it up: "Against the advice of top Pentagon officials, Mr. Trump this month pardoned Navy Seal Chief Petty Officer Gallagher, convicted by a military court of posing for a trophy photo with a corpse of a fighter in Iraq. . . . It was the first time a President had pardoned a service member for war crimes, and it prompted fierce backlash from veterans and legal experts who said it will erode the system of military justice and hurt U.S. credibility abroad. Mr. Trump's response was to add fuel to the fire, issuing Thursday's tweet challenging plans by Navy commanders to strip Chief Gallagher of his Trident pin, a badge of honor, and expel him from the SEALs. This elite force has been shaken by a series of scandals in recent years, prompting Navy officials to take a tougher stance on ethical issues. Restoring to service someone who was turned in by members of his unit who wouldn't tolerate his behavior sends precisely the wrong message."


SHELTER IN PLACE


VACCINE
COVID-19


TEMPORARILY
CLOSED
DUE TO
COVID-19

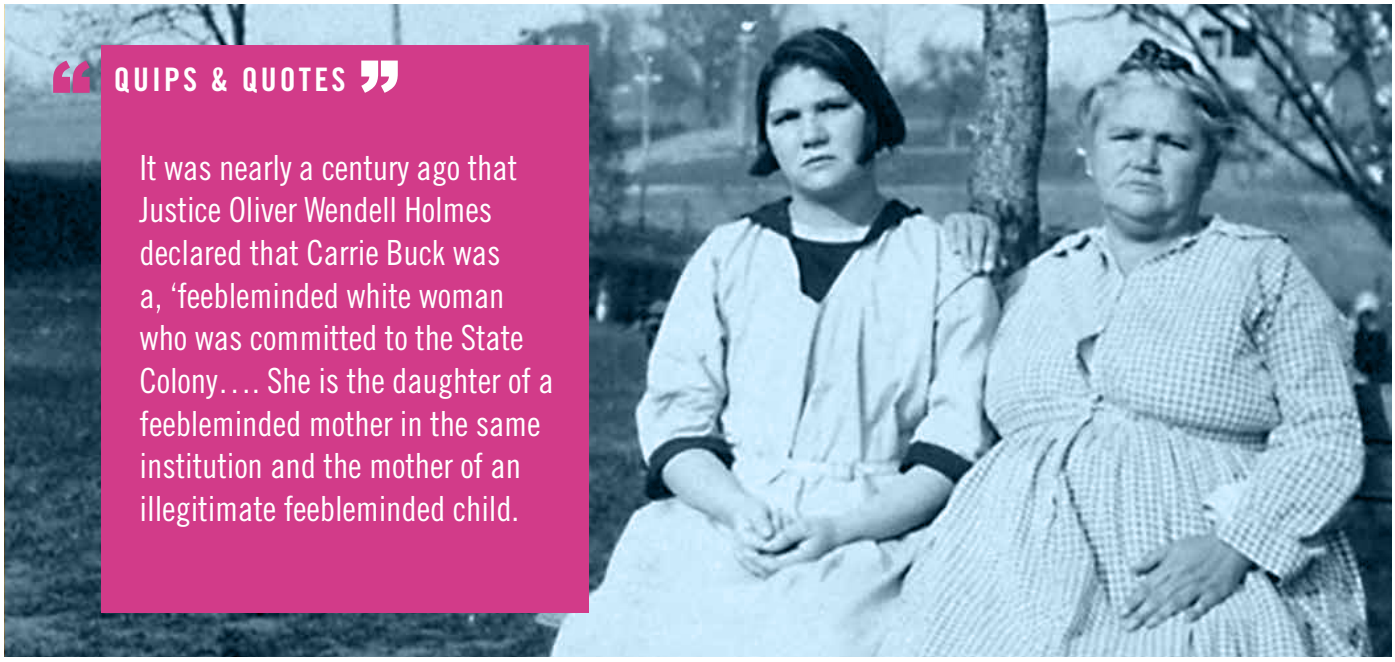
QUARANTINE: THE REACH AND LIMITS OF GOVERNMENT ACTION

PROFESSOR MICHELE BRATCHER GOODWIN, THE CHANCELLOR'S PROFESSOR OF LAW AND DIRECTOR OF THE CENTER FOR BIOTECHNOLOGY & GLOBAL HEALTH POLICY AT THE UNIVERSITY OF CALIFORNIA, IRVINE, IS A NATIONALLY RECOGNIZED AUTHORITY IN EQUALITY AND JUSTICE IN OUR SOCIETY. A REVIEWER OF HER WIDELY ACCLAIMED, FIFTH BOOK, PUBLISHED IN 2020, *POLICING THE WOMB: INVINCIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD*, SAID IT WILL "DISABUSE YOU OF THE ILLUSION THAT OUR SOCIETY IS BECOMING FRIENDLIER TO WOMEN." THE NEW ENGLAND JOURNAL OF MEDICINE HAS DESCRIBED HER HEALTH LAW SCHOLARSHIP AS EXCEPTIONAL. AND HER RECENT ARTICLE ON CIVIL LIBERTIES IN A PANDEMIC, WHICH WILL BE PUBLISHED IN THE CORNELL LAW REVIEW, PROVIDED THE THEME OF HER REMARKS AT THE SPRING MEETING, "QUARANTINE: THE REACH AND LIMITS OF GOVERNMENT ACTION." A FEW (ABRIDGED) EXCERPTS:

It was nearly a century ago that Justice Oliver Wendell Holmes declared that Carrie Buck was a "feebleminded white woman who was committed to the State Colony…. She is the daughter of a feebleminded mother in the same institution and the mother of an illegitimate feebleminded child."

Buck v. Bell is a landmark case that legalized compulsory sterilization of individuals who were deemed to be socially unfit. It ushered eugenics into the American consciousness, our vernacular, our political landscape, our legal landscape, and our medical landscape, pivoted on finding Virginia's sterilization law constitutional.

Now, you may be wondering what in the world does this have to do with a pandemic? Well, you see, *Buck v. Bell* itself was justified based on findings in various states that we were being swamped by unfit people and that these unfit people should be stopped from being able to continue their kind.



QUIPS & QUOTES

It was nearly a century ago that Justice Oliver Wendell Holmes declared that Carrie Buck was a, 'feebleminded white woman who was committed to the State Colony…. She is the daughter of a feebleminded mother in the same institution and the mother of an illegitimate feebleminded child.

At the time there were scientists who thought that unfitness was a public health concern. And so there were scientists, eugenicists, long before Nazi Germany, in the United States. These scientists claimed that heredity played a key role in the spread of cognitive impairment, social unfitness, and insanity. The Court relied on its 1905 ruling in *Jacobson v. Massachusetts,* a compulsory vaccination case, to justify Carrie's sterilization and the legalization of American eugenics. In other words, if states could inoculate against viruses like smallpox, why not social traits such as intergenerational poverty?

Justice Holmes claimed that the principles sustaining compulsory vaccination in states like Massachusetts were broad enough, "to cover cutting the fallopian tubes because public welfare, including the public's health, calls upon the best citizens for their lives." Strange as it may seem now, vaccination was considered by many to be a sacrifice and a risk not only to one's health but also one's life. And so, considered in that vein according to the Court, if a state could call upon people to be vaccinated, it could certainly call upon people like Carrie, who was 16 years old, to be forcibly sterilized.

Justice Holmes claimed that Carrie Buck's case was neither the first, nor would it be the last, that this rationale of protecting the public's health would serve a purpose such as this: "It is better for all the world if instead of waiting to execute degenerate offspring for a crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind." He concluded, "Three generations of imbeciles are enough."

I want to discuss the limitations of government action in a time of pandemic, in a time in which there are national security concerns. The death toll that has been associated with Covid-19, now exceeds nearly 500,000 people with nearly 28 million infections. And to place this kind of suffering in context, think about this: more Americans died during the first three months of Covid-19 than in all of the Vietnam War. The first three months of Covid saw 100,000 deaths. In Vietnam, over a span of 9 years, we had about half of those deaths (58,000) in terms of American casualties. In the first three months, Covid-19 killed more Americans than Americans had witnessed in the last 50 years of war and disease combined.

But of course, none of this would matter, some might say, except that the concerns about what can happen during a time of pandemic viewed against our own backdrop with regard to race, class, and xenophobia, particularly as racism, classism and xenophobia have marked aspects

of Covid-19, dangerously similar to perceptions in the past about people who are polluted and people who are unfit. Some of these concerns have made their way into national and also international policy.

After Carrie Buck, eugenics exploded in the United States, state by state. More than half of the states adopted eugenics laws and bragged about how many people they could sterilize.

Many associate eugenics, the forced sterilization of people, with Nazi Germany. Well, the basis for the laws that were taken up by the Third Reich actually came from the United States. In fact, Germany at some point thought perhaps the U.S. law was a bit more aggressive than they were willing to go.

Germany took its playbook from the United States. At a certain point, U.S. officials began to say the Germans are beating us at our own game. The Nuremberg trial was not only a trial against the Nazi soldiers, military and political officials. There was actually a trial of Nazi doctors. And out of this trial something very interesting happened. American judges tried 17 Nazi doctors involved in eugenics and experimentation on people. And their chief defense was that they did what we were doing in the United States.

This ugly past is relevant to thinking about the limitations of government authority in times of a perceived health crisis. Disconcertingly, very few scholars and commentators have actually done the important work of contextualizing how the U.S. government and States have taken advantage of public health crises or perceived public health crises in order to advance agendas that infringe upon civil liberties and civil rights.

What is this history in the United States and what can we learn from it? In the wake of Carrie Buck being forcibly sterilized, there were tens of thousands of Americans who met the same fate, sterilized against their will. Calling attention to this social backdrop is important because we must be concerned about the weaponization of xenophobia, racism, and sexism and the powerful effect of stereotypes, symbolism and xenophobia in shaping our public and political consciousness.

In the wake of Covid-19, one of the things that we've seen is our borders closing. Some of that is important for protecting public health. But, in my opinion, what we should be doing is thinking about the virus in relation to promoting public health being moved by science and not by stereotype and stigma, being concerned about how we balance government authority with also protecting the individual civil liberties and civil rights of individuals.

What does this mean in practical ways in our country? What should we be thinking about?

There are fundamental questions about constitutional law that have arisen in the wake of Covid-19. The Coronavirus crisis has brought to the forefront a national debate relating to the interactions between constitutional rights, state police power and also federalism. What are the limits of government action in the midst of a pandemic?

QUIPS & QUOTES

Do governors actually have the authority to issue executive orders to shelter in place or quarantine? Can the legislature prioritize some business activity as essential while not granting that same status to others? Is it legal to impose shelter in place on Sunday, a day that many Americans associate with seeking worship? The short answer is that for nearly three centuries dating back to 1738, quarantine has been justified.

Do governors actually have the authority to issue executive orders to shelter in place or quarantine? Can the legislature prioritize some business activity as essential while not granting that same status to others? Is it legal to impose shelter in place on Sunday, a day that many Americans associate with seeking worship? The short answer is that for nearly three centuries dating back to 1738, quarantine has been justified and legally upheld in U.S. provinces, even before the official founding of the United States. In an 1824 case, *Gibbons v. Ogden*, the Supreme Court specifically referenced state authority to regulate health and enact quarantine laws. ▷

Eighty years later, the Supreme Court spoke directly to state police power to protect the public health in *Jacobson v. Massachusetts,* upholding an ordinance requiring compulsory vaccination for all persons who were fit for inoculation, as a valid exercise of local police power to protect public health and reduce the spread of smallpox.

Consider the myriad of rallies that have taken place across the country to reopen, some filled with very vile and violent imagery, including death threats against some government officials, as we saw in Michigan. The reality is that it's

within the scope of government to impose shelter in place orders and to impose quarantine related orders because that is within the scope of their police powers to protect public health and safety. But the key here is that this is not an authority to be used in abusive ways.

Government infringements on civil liberties and civil rights should be driven by science. They should be confirmed by medical evidence and should be tailored to address the very specific health harm and threat.

But what if there isn't consensus or sufficient scientific consensus and you don't have the luxury of waiting for consensus? What do you do?

Sadly, we're in an era where that is an important question, because we've veered into opinion shaping parades as real empirical data. Some of this is familiar We go through a process in court where experts have to be qualified in order to be expert witnesses. We want to see how their data has been vetted. We look to the empirical articles that they have read and have been vetted by their colleagues. We look to their stature in the field. I think that we can be guided in the same way so that we don't fall prey to things that are just simply maniacal, lunatic type of science and health. All parades of science don't actually qualify or count.

One place to begin is our learned institutions within government, such as our CDCs, our public health departments, and so forth. But there can be political capture within these institutions. We expect that these are institutions that are neutral, are objective, and that they're not geared toward political motivations or captured by political parties. But as we've seen from time to time, that is not the case. I would say overall there are the institutions that we can rely on with learned individuals who care about public health and safety. Those scientists who are in those institutions are trustworthy for the most part. Although I do accept the caveat that political parties can try to put in people in place who will veer towards a political ideology rather than responsibly engaging in science.

There are still people who don't want to be vaccinated. In 2021, is compulsory vaccination constitutional? If so how do you reconcile that with freedom of choice? And what happens when you bring race, social status and economic status into the mix? What are the implications there?

The Supreme Court has said that it is constitutional in *Jacobson v. Massachusetts*. And we can't divorce ourselves from the realities of our nation. It is worth understanding that the nation was founded on pushing indigenous people out of their land and then the kidnapping and trafficking of people from Africa, with the profiteering of individuals, corporations, and states, and also the broader nation. That's an important foundation because it sets in place so much else that takes place during Jim Crow and through the 1964 Civil Rights Act and 1965 Voting Rights Act. So when you add in race, there are questions with regard to access to vaccines and also questions related to trust of the medical field.

Harriet Washington, a brilliant researcher and journalist, wrote a book that won many awards, *Medical Apartheid*. She documents, across so many areas of healthcare, abuse of black bodies for nonconsensual experimentation, during the times of slavery, and during Jim Crow. This includes being kicked out of medical facilities or not even being allowed in medical facilities when one needed care just because of the color of a person's skin.

These things informed how people interact with healthcare. There are numerous studies that show us that so much associated with medical exclusion has been rooted in racial bias, implicit or explicit. And some of that we actually see even through Covid. For example, some of the earliest cases of children dying because of Covid weren't actually because their parents did not advocate for them and take them to hospitals and pediatricians. These were black parents and their kids died. They kept being sent home. In one tragic case in Michigan, the parents had taken their daughter time and time again to the pediatrician, then to the emergency room, and each time, they were told, "Well, just wait it out." You know, "give her some Tylenol." But the 5 year old girl wasn't actually given the Covid test and she died with Covid. It's these kinds of stories that shape people's realities and this gap reflects a lack of medical trust.

What are the rights of incarcerated prisoners to access to vaccination?

The reality of medical neglect behind bars is real. The spread of Covid-19 is horrific in our prisons and jails where individuals have not been able to have appropriate access to testing and likely won't have appropriate access to inoculation. And it's shocking, it's inhumane, and it's so wrong. You know, in 1966, Dr. King said of all of the inequities in our society injustice in healthcare is the worst of them all. He said that because people die from inequities in healthcare. What could be more profound? And for individuals who are incarcerated, the justification is that they are doing time associated with a crime that they've committed. But we must maintain the importance of what civil liberties mean, even if you happen to be incarcerated. It's associated with their human dignity and also ours as a liberal society. Humanity matters even when you happen to be incarcerated.

What is your take on the recent U.S. Supreme Court church opening case?

What we see is a dramatic mishmash coming from the Court with regard to the opening of places. The Supreme Court was willing to lean in and to lift the restrictions with regard to churches and church services. Clearly there would be confusion when some states have said casinos could be open while other facilities closed. If you happen to be a congregant or you happen to be a religious leader of a church, you might ask, well, if the casinos could be open, why do we have to be closed? I think the decision was wrongly decided because what medical evidence and science does show is that hot spots, very dangerous hot spots, can be created in places where people congregate in large numbers without the appropriate measures for social distancing. And that endangers us all.

I'll give you just one example. Over the last summer, and likely in between, there have been instances where people gathered for weddings and there were people who died who were actually not at those weddings. People contracted Covid while there. Then they went back home to their communities, likely not knowing it, and infected other people. Those people died. This is why it's really so important that we have comprehensive explanations about the effects of Covid-19 and how it can affect people who are not even in the room if we're going places and traveling.

Jeffrey S. Leon
Toronto, ON ■

DEFENDING THE SKIES - GENERAL VICTOR EUGENE ("GENE") RENUART, JR.

THE NORTH AMERICAN AEROSPACE DEFENSE COMMAND, TODAY KNOWN AS "NORAD," IS A COMBINED US - CANADIAN ORGANIZATION THAT MONITORS – 24/7 – EVERY AIRPLANE ALOFT AND MANY OF THE SHIPS AND SUBMARINES OPERATING IN INTERNATIONAL WATERS. NORAD AND THE UNITED STATES NORTHERN COMMAND ("USNORTHCOM"), CREATED IN 2002 FOLLOWING THE SEPTEMBER 11, 2001 ATTACKS, ARE BASED AT PETERSON AIR FORCE BASE IN COLORADO SPRINGS AND ALSO OPERATE THROUGH AN ALTERNATIVE UNDERGROUND AND HARDENED FACILITY DEEP IN NEARBY CHEYENNE MOUNTAIN. RETIRED AIR FORCE FOUR-STAR GENERAL VICTOR "GENE" RENUART, JR., COMMANDED NORAD AND USNORTHCOM FROM 2007 TO 2010. HE WAS INTERVIEWED BY IMMEDIATE PAST PRESIDENT DOUGLAS R. YOUNG.

General Renuart spent almost 40 years in the Air Force, including service as a Command Pilot who led some 60 combat missions in the Middle East. He has flown at least seven different types of military aircraft and has more than 3,800 flight hours on his official record. His call signs have been "Top Spin" (a tribute to his feats as a tennis player in college and in interservice competition) and "Sun Ray" (not so much a tribute as a friendly skewer, inspired by reflections off of his thinning pate). The General's service in combat, and his leadership in that role, are evident in his own descriptions of his days overseas:

> I was fortunate enough as a young aviator to become a fighter pilot, and I think most young fighter pilots aspire to show their skills in combat and certainly to lead men and women in combat; and I was fortunate enough to do that a couple times over my career. . . . We ask a lot of the young men and women in the United States each day to preserve and protect the freedoms that we all enjoy and sadly, that comes at a real price.

The General noted that when he served during Desert Storm, the United States had not been at war for some time. He attributed the training he and others had received as being a key contributor to his success as a combat aviator: "Some 60 missions later, I think that [the training] is still the case. Sadly, it came with some loss, but fortunately the training really does prevail."

In addition to his flight responsibilities, General Renuart held a variety of positions during his career, including distinguished service at the Pentagon as Director of Strategic Plans and Policy for the Joint Staff and as a senior military assistant to Secretaries of Defense Donald Rumsfeld and Robert Gates, roles in which he also had direct interactions with U.S. Presidents and earned the right to wear the Joint Chiefs of Staff and the Office of the Secretary of Defense Identification Badges, in addition to the US Air Force Command Pilot Badge he had already earned. (The General has earned too many medals and awards to list in this article or during the interview, but among ▷

the many medals he is authorized to wear is the Canadian Meritorious Service Cross.) In 2007 he assumed the command of NORAD and USNORTHCOM.

General Renuart's interview focused on NORAD and its mission, beginning with its creation during the Cold War, but he emphasized that while NORAD and USNORTHCOM are two distinct commands they are bound together and united in a common purpose: to provide for the defense of the United States and Canada. The original NORAD operations were located only in the heavily fortified command center in Cheyenne Mountain, from which the NORAD commander could conduct operations in the event of an attack by the Soviet Union. Eventually, and especially after September 11, 2001, the mission expanded beyond defense against airborne attacks (including intercontinental range ballistic missiles) to include surveillance of potential maritime threats from both ships and submarines. Because NORAD is a joint US-Canadian operation, General Renuart actually reported to two Commanders-in-Chief. "I traveled to Ottawa to brief the Prime Minister; I traveled to Washington, D.C. to brief the President; I routinely interacted with Parliament and with Congress; and I routinely addressed issues with both the Chairman of the Joint Chiefs of Staff and with the Minister of Defense in Canada. It's the only command like that in the U.S. military and one that both the U.S. and the Canadians are very proud of."

The U.S.-Canadian cooperative efforts are in effect all day and every day, and a Canadian three-star general or equivalent works as second-in-command with the commanding U.S. four-star general or equivalent. The USNORTHCOM command focuses on the defense of the U.S. homeland, both against military threats from abroad and in support of civil authorities during crises such as hurricanes, floods, the delivery of vaccines, or even drug interdiction missions. NORAD and USNORTHCOM are, in the General's words, part of an "interdependent mission" that address ever-changing military and other challenges – from "near-peer competition like Russia and China", . . "rogue nations like Iran and North Korea," . . . and "cyberthreats that affect not only the Department of Defense but each of us in our every-day lives, from the banking industry to infrastructure." These threats require that our countries are able to deploy what the General described as "a very versatile and agile military structure, combined with a civil structure" as "changes in security threats continue to evolve . . . and certainly as large peer nations like Russia and China modernize their militaries and become more expansive in their presence." In meeting these challenges, NORAD and USNORTHCOM "fit together almost like hand in glove; you can't really do one without the execution of the other; and so having them both together . . . really has made sense."

NORAD and USNORTHCOM interact with the new U.S. Space Force, relying upon space-based resources to identify and follow potential threats. For example, when North Korea recently tested missiles, various overhead systems were able to identify the launches while different systems assessed the trajectories and narrowed what a point of impact might be for a particular

weapon. That data was passed to the commander of NORAD/USNORTHCOM, who has the authority to launch defensive systems against potential threats. General Renuart finds the relationship between the Space Force and NORAD/USNORTHCOM to be "critical and key to the real defense of our nations."

NORAD's Cheyenne Mountain fortified position has always fascinated the public, in part because of the engineering required to develop it into an effective operational facility. The facility was actually designed by the Navy, because "they develop submarines and know how people live and work in very tight spaces in compressed areas." The designers developed a shock absorption technology using heavy-duty springs that are capable of absorbing the shock of a nuclear blast. The Army Corps of Engineers – "really good at blowing big things up" – handled the blasting of rock and tunneling that created the space within which to place the operations. The interior created for the NORAD operation, which is "a small town bunkered inside a big mountain," is protected by a series of layered blast doors that guard the more than half-mile distance to the operations center.

At the center, the staff works shifts during what are basically one-month rotations, allowing them to develop and run simulated tests "off-line" while the every-day work of NORAD/USNORTHCOM continues at the operations center in Colorado Springs. The Cheyenne Mountain operations center houses basic shared sleeping facilities (cots and sleeping bags) and areas for eating, fitness, medical care, barber facilities, etc., all supported by massive life support technologies such as generators and air filtration systems that allow the inhabitants to sustain operations for long periods of time.

COVID-19 has presented challenges for the Cheyenne Mountain operation, but the NORAD command has adapted to meet them using some of the techniques that the civilian world has also used to adapt: modifying the spacing in the operation center to permit social distancing, wearing masks, and providing appropriate work-rest cycles for the teams. The current commander of NORAD/USNORTHCOM has prioritized the work of the commands and coordinated work between Cheyenne Mountain and Peterson Air Force Base so as to create additional physical space within the facilities and spread necessary support activities in ways that have allowed ▷

a seamless network to operate effectively and safely. As a result, NORAD has even been able to continue its traditional role, tracking Santa Claus on Christmas Eve. As the General noted: "Santa's a pretty cooperative partner in this. NORAD gives him detailed weather briefings and route-of-flight briefings and he can avoid the presidential no-fly zones very easily each year."

When asked to describe the women and men who serve our countries and to address our countries' "readiness to defend and protect today," General Renuart had "really good news for our nations:"

> The young men and women who raise their hands today to serve are just impressive in almost every respect. They understand the importance and seriousness of the role they take on. They are committed to service . . . . [including] service to the nation in places like the State Department and USAID and in the Peace Corps. . . . [That] they are going to be asked to potentially go into harm's way is something they very much understand and have respect for [and] they are focused on being able to do the job. . . . When it gets to the serious decisions of what's important to the country they center on the bubble and focus, and I'm very optimistic that the country will be in good hands as they grow up into their roles defending the nation.

The General's description of today's service people could equally have been said of him, as he began his career in the early 1970s and served with distinction in so many varied capacities over time. His final thoughts were these:

> When I took the roles at NORAD/USNORTHCOM there was nothing more important to me than being able to defend this nation. And I was really privileged to lead in that regard, and I'm

QUIPS & QUOTES

NORAD's Cheyenne Mountain fortified position has always fascinated the public, in part because of the engineering required to develop it into an effective operational facility. The facility was actually designed by the Navy, because 'they develop submarines and know how people live and work in very tight spaces in compressed areas.'

privileged to be able to share some these thoughts with you and all the members of the College.

Past President Young closed the interview by telling the General "We know that in protecting our freedoms during your career you have made countless meaningful choices: choices to be committed to a code of conduct that values honor and duty and chooses the harder right over the easier wrong. You have lived your patriotism, not just recited it. And we are honored and genuinely inspired to have had you with us."

General Renuart is proof, consistent with the core values underlying the College's mission, that President Kennedy was right when he said: "We must never forget that the highest appreciation is not to utter words, but to live by them."

Doug Young
San Francisco, CA ■

HEATHER YOUNGER: A RESILIENT WOMAN IN EXTRAORDINARY TIMES

FOR THE HUNDREDS OF FELLOWS PARTICIPATING BY VIDEO IN THE SPRING MEETING, TWO THINGS WERE ABUNDANTLY APPARENT FROM THE MOMENT THAT HEATHER YOUNGER APPEARED ON THE SCREEN: THE TWO DIMENSIONAL MEDIUM IN NO WAY DETRACTS FROM HER CHARISMA AND DYNAMISM, AND HER RELENTLESS POSITIVE MESSAGE OF RESILIENCY MAKES HER A VALUED WOMAN OF OUR EXTRAORDINARY TIMES.

Ms. Younger is an attorney by training, but by profession is a highly regarded workplace leadership coach and consultant through her own company (@EmployeeFanatix.com) and the author of *The 7 Intuitive Laws of Employee Loyalty* and *The Art of Caring Leadership.* Ms. Younger opened by acknowledging the uncertainty that we all feel living in a pandemic world. "What I want you to do is to take into consideration the risks, but do not let them overwhelm you [or] stop you in your tracks." She framed the comments that she was about to make by describing the need to replace the "lens that was given to us much earlier in our lives" with a new lens that allows us to set aside the fear of the unknown and to focus on developing resilience," which she cogently defined as "the ability to recover quickly in difficult circumstances … a mental toughness."

Ms. Younger suggested that we analogize the development of emotional and psychological resilience to a concept with which we are all much more familiar: that of building muscle. The latter requires repeatedly creating and healing small tears over time, while the former requires repetitive cycles of facing and overcoming challenges. For both, "[i]t's some really hard work, and if we do it right, it hurts like heck and we sweat a lot." But, in the end, our strength and our resilience have been increased. This, she said, is the genesis of the idiom that "what doesn't kill you makes you strong[er]."

Ms. Younger suggested two principal strategies for facing adversity and building resilience that we would all do well to take to heart:

First, we need to "reframe the circumstances" when we confront adversity, such that we focus, not on the negative emotions of fear, rejection, or failure, but rather on the positive opportunities with which we may be presented. As a personal example, Ms. Younger referenced her early history as the daughter of inter-racial, inter-faith parents. She and her Black father were excluded from invitations to family gatherings on her White Jewish mother's side of the family, causing her to develop feelings that she just wasn't good enough. She wanted so much to please her maternal grandmother who referred to Heather in their private meetings when Heather was a child as "my little lawyer," that she went to law school and entered into private practice. But, in truth, it was not her calling. When she was summoned into a partner's office a few years later, the partner said, "Are you happy? Because you're making a lot of mistakes in your work and you don't seem to be focused enough." Not surprisingly, she felt once again that she wasn't good enough. When the firm fired her, she allowed their perceptions to derail her career entirely; and she left the practice of law.

That feeling resurfaced when she was part of a large lay-off at her next job two years later. This time, however, she stopped to contemplate philosophically the many things that she had learned on her life's journey, and to consider on a practical level that her severance would allow her to move forward with her dream: starting her own business. By reframing her circumstances and focusing on the positive rather than the negative, she realized that the lay-off was not a barrier to her success, but rather the opportunity to pursue her true calling. The first article that she published on Linkedin, discussing how to lay employees off with dignity, jump-started her current career, helping employers to build employee loyalty, and ultimately earning her the nickname "the employee whisperer." Reframing, she noted, when intentionally undertaken, works in any profession, including the law. We could, for example, submit to angst over the loss of a major client to the perils of the pandemic, or we could focus on markets that are less at risk or potentially less fee-sensitive and more fulfilling. Or, we could decide to focus business development efforts on creating a more diverse client portfolio. When we are fighting to survive and even to thrive in the face of a challenge or crisis, Ms. Younger suggested, the strategy of refocusing is the most effective tool in our arsenal.

The second strategy for turning adversity into opportunity is to learn the art of focusing prospectively, rather than retrospectively. Ms. Younger pointed to the heart-rending example of a man who had been dealing for years with an emotionally challenged and physically abusive spouse, but couldn't bring himself to walk away. The situation simply continued until the spouse called one day, informing him that she had done something terribly wrong to one of their children. He rushed home to find his son with blood flowing from his forehead, the result of a glass mug thrown at his head by his troubled mother. Without hesitation, the husband and father knew that he had to act promptly to change the circumstances, by moving forward for the well-being of himself and his children without regard to who was at fault or how he could possibly have allowed circumstances to devolve to this point. His children, following their father's strong model, did the same, focusing on one step, then the next step, then the one after that.

Such a prospective focus, Ms. Younger suggests, can more easily be maintained if we choose to concentrate on a mission that is bigger than ourselves, as the father did for his children. She learned through the ups and downs of her own childhood that she wanted to follow a different path from many of the adults in her life. Rather than treading on other people's feelings, unwittingly or otherwise, she wanted to lift them up, and make them feel as important as every individual truly is. With these aspirations in mind, those other people became her mission. That mission, which was bigger than herself, in turn formed a protective barrier around her, imbuing her with greater resilience when adversity presents itself.

To make her point in a lighter way, she pointed to the real message behind the humor in the classic Bill Murray comedy, *Groundhog Day*: Every day is the same. But Murray finally realizes that while the ***day*** is the same, ***he*** doesn't have to be; ***he*** can change the day. One need not change one's circumstances, only one's mindset.

Today, she noted, each of us confronts perhaps the worst adversity in American history, the pandemic. This is, of course, a frightening and isolating time for all of us. But, we have a choice: We can remain mired in an unhappy place, or we can strengthen our resilience by reframing our circumstances in as positive a light as feasible, and by identifying a mission that is bigger than ourselves. Forged by adversity, Ms. Younger persuasively counsels, we and those around us can emerge stronger and in a better place.

We owe a debt of gratitude to this leadership consultant/author/inspirational speaker extraordinaire for her uplifting message. Thank you, Heather.

Joan Lukey
Boston, MA ■

SPRING 2021 INDUCTION

SIXTY NEW FELLOWS WERE VIRTUALLY YET ACTUALLY INDUCTED AT OUR 2021 SPRING MEETING. ANOTHER WAS INDUCTED IN A SPECIAL CEREMONY SHORTLY BEFORE HER APPOINTMENT TO THE UTAH DISTRICT COURT. OUR SIXTY-ONE NEW FELLOWS LIVE AND WORK IN 36 DIFFERENT STATES AND PROVINCES. THIRTEEN ARE WOMEN; FOUR IDENTIFY AS MINORITIES; THREE ARE VETERANS, TWO OF THEM WEST POINT GRADUATES. MANY HAVE SERVED AND THREE REMAIN IN PUBLIC SERVICE.

INDUCTION CHARGE

Past President Andrew M. Coats gave the induction charge – the same charge that has been given to every Fellow since the College was founded over 70 years ago.

Andy, Dean Emeritus of the College of Law at the University of Oklahoma, presented the charge from the courtroom in the Andrew M. Coats Hall. Before he read his 70-year old script, Andy confided that "I haven't had the chance to get acquainted with each of you but I know so much about you. I know, for example, that you are a superb advocate, one of the very best in your state or province. I know that your word is always good and that an agreement with you is cast in stone. I know that you are reasonably civil and pleasant to litigate with or against. I know that you are reasonable to stipulate and settle with and I know you're damn hard to beat.

"And it's all of those things, qualities that you have, that bring us to this time as we celebrate your entrance as a Fellow into the American College of Trial Lawyers."

INDUCTEE RESPONSE

The charge given, **Shaffy Moeel** gave the Inductee Response on behalf of her class of new Fellows. After seven years as a federal Public Defender, Shaffy opened a solo practice in Oakland, specializing in white-collar criminal defense, handling matters including health care fraud, tax fraud, international arms trafficking, international economic sanction violations, securities fraud, money laundering, trade secret and economic espionage. Shaffy summarized the class:

> Look at them! They are brilliant, they are hardworking, and they are shining rays of light in each of their communities. Our inductees were doing big things even before they became lawyers; they were doing big things even before they became adults.
>
> One inductee was an eagle scout, class valedictorian, student council president, and played on a state championship football team. Another inductee ran a house for HIV positive infants and children in foster care before she went to law school. Before becoming a lawyer, another inductee had already worked as a travel writer, a photographer for an engineering company, and a newspaper journalist.
>
> Many are college athletes. One inductee has swum from Alcatraz to San Francisco – twice – after turning 60. Another inductee pitched a 14-inning complete game in high school, throwing over 250 pitches.
>
> We have among us many marathoners, but one has competed in 13 Boston marathons.
>
> We have among us the Chair of the Board of Directors of Vermont's Special Olympics Organization and two board members of the Canadian Cancer Organization.
>
> This incoming class of new Fellows is not only a highly accomplished lot but a big group of love bugs who adore their partners, their kids, and their pets. From ziplining through Croatian mountaintops with their six-year-old to playing basketball with their sons and daughters, coaching their youth hockey games, or hiking outdoors with loving partners, this is an obviously loving and well-loved group.

We typically ask the Inductee Responder to share a bit about her own background, to suspend modesty just long enough to relate how she came to be asked to be a Fellow. Shaffy told us

> I was raised by two tremendous parents who taught me to believe in myself, two parents who when they were much younger than I am now, overcame intense personal hardship as a result of geopolitical forces outside of their control. My parents made it to the United States from the Middle East in the mid-1980's with my sister and I in tow. They were young engineers who came to the U.S. with nothing but their degrees, knowledge in their minds and strength in their hearts.
>
> Even still, it took them years to overcome prejudice in the liberal San Francisco Bay area to find suitable employment in their profession. Before they could find an employer who was willing to look past their accents, their ethnicity, the obscurity of their universities, even though they were the best in their own respective countries, they worked in diners, burger joints, coffee shops, gas stations, and flower stands for years. Their tenacity, their brilliance and confidence led them to raise daughters with what President Obama called the "audacity of hope." They taught us that we could, in fact, do anything; that we could, in fact, one day become a member of an exclusive and elite group of North American lawyers.
>
> They taught us that our futures were worth their sacrifices and with their unconditional love and deep personal sacrifices to make the world better for everyone, they taught my sister and I to prioritize seeking justice for all. And I have spent every day of my legal career trying to do just that.

Shaffy conceded that she was "truly humbled to be speaking with you today and I wish it were ▷

in person in Maui. What a full 12 months it has been! So many national conversations going on at once. There's the full spectrum of discussions surrounding the pandemic, there are the events that followed the killing of George Floyd in Minnesota, and the conversations regarding confronting our collective legacy of slavery. Then there was the election and the insurrection and the impeachments. The one common denominator in all of these conversations has been the rule of law, the rule of the lawyer and the rule of the courts. What a time to be an advocate! We are at our apex."

Shaffy has her priorities straight. She proudly related that her due diligence into her class revealed that "Over and over again in describing both their accomplishments and the things they are most proud of in their lives, our inductees have talked about their families. That's certainly true for me, as I've already told you about my parents, but I'm also married to a wonderful husband, Steve Hernandez, and together we raise our two hilarious little kids. Steve is not a lawyer; he's a longtime chef who transitioned his career a couple years ago to project management. He's been patiently listening to my opening statements and closing arguments for 15 years. . . . I, like all of the other inductees, have been supported and loved by our families throughout our entire legal careers and that's how we arrive to this day."

Shaffy graduated from Law School in 2005. Do the math. We require that a person be fully engaged in trial practice for fifteen years to become a Fellow. The average age of this class of Fellows is, in a word, grandparent. But Shaffy is about as young as one can be to be a Fellow. And with her remarks, she proved she has earned it. Thanks, Shaffy. Welcome to the College.

We could write a book about each of the members of Shaffy's class; but we have room for just a few words about each of them.

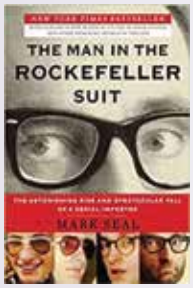
INDUCTEE CLASS

ALABAMA

Preston S. Trousdale enjoys hunting and fishing. He is a lover of remote places and has a special affinity for the American West and Alaska. He also enjoys hiking, skiing and travel; and working around the farm, gardening and working (playing).

CALIFORNIA

J. Bernard Alexander III is a 1986 graduate of Southwestern School of Law who practices plaintiff's employment law. Bernard has played tennis since age 12 and remains an avid player. He describes himself as a huge fan of the LA Lakers and is upset he could not attend the team's playoff and championship games this season. Bernard is most proud of his three adult sons, one pursuing a masters in bio-engineering and teaching at UC Riverside, one a rookie police officer with the LAPD, and one a budding music producer and star basketball talent, who Bernard can no longer defend.



Habib Balian received his law degree from USC in 1995. He is a prosecutor in the Los Angeles District Attorney's Office, handling high profile and complex criminal matters, including the "Rockefeller imposter case" in which the defendant posed as a member of that famous family, a 30 year-old "cold case" murder with no physical evidence and many witnesses who were gone or who could not remember important details. As reported by the LA Times, Habib spent "three weeks weaving together a case from circumstantial evidence" and secured a conviction. Habib loves hiking and spending time with his family. He recently hiked to the top of Half Dome in Yosemite with his 15-year-old daughter and 17-year-old son.

James B. Betts has been an avid runner the past 30 years. At the "Lawyers Have a Heart" charity race in Fresno some years ago, the top five runners (Jim was not among them) took a wrong turn and veered far off-course. So to Jim's surprise, as he crossed the finish line, he was heralded as the fastest attorney in the Central Valley of California. But while he needed help to excel at running, he has - fair and square - won blue ribbons for his peach and berry jam entries, and he won the American Bass Association circuit for the Central Valley of California in 2004, and was anointed as the Angler of the Year.

Jeffrey M. Fisher did a stint as a summer associate at a large Chicago-based firm where his supervisor was Michelle Robinson, who we know better as Michelle Obama. He now tries intellectual property cases, specializing over the past few years in techniques for hyperscale data centers.

Steven N. Geise graduated from Ohio Northern University law school in 1995 and, after clerking on the 10th Circuit Court of Appeals and practice in in South Carolina, relocated to San Diego in 2007. He once pitched a fourteen inning complete game, throwing over 250 pitches, but lost the game. He has had better luck with litigation, snagging the "Top Defense Verdict Award" (The Daily Journal) in a tobacco trial in the Bay Area.

Knut Johnson is a 1986 graduate (cum laude) of the University of San Diego School of Law and received his undergraduate degree from Tulane University in Earth Science. He spent three years as a geologist with Gulf Oil before attending law school. Knut is a criminal defense lawyer, first with the Federal Defenders office in San Diego and then in private practice, where he focuses on complex criminaal law. Knut devotes much volunteer time, including teaching a popular course on Criminal Procedure at USD and serving on the board of directors of Na Koa Kai, a youth organization dedicated to teaching youth Hawaiian culture and HeiHei Wa'a (Hawaiian outrigger canoe racing).

Shaffy Moeel, our Inductee Responder, was profiled at the beginning of this article.

Craig M. Wilke is the son of a Marine Corps fighter pilot, and a clinical psychologist. So, naturally, he became a lawyer. After completing a federal judicial clerkship in New Mexico, Craig was an Assistant Federal Public Defender in the Central District of California for 15 years, eventually becoming the Chief Assistant for the Orange County Office. For the past 12 years, he has been in a solo federal criminal defense. Craig's wife, Elizabeth Dahlstrom, serves as an Assistant Federal Public Defender.

COLORADO

Richard F. Bednarski graduated with Honors from Wake Forest University with a degree in Psychology and Minors in Biology and Mathematics. He attended law school at Washington University, and after spending a summer in Colorado, he knew that was where he was destined to be. Rick moved to Colorado in 1999 and worked for the State Public Defender's Office in Colorado Springs. After three years as a Public Defender, he moved to private practice, handling criminal defense and civil litigation. Judges, prosecutors, law enforcement and opposing counsel have all remarked that if they were ever in trouble, they would want Rick as their lawyer. Rick loves golfing, skiing and travelling to new places with his wife, Kristina, and their 12-year old son, Charlie.

CONNECTICUT

Michael J. Gustafson has been an AUSA in the District of Connecticut for the past 26 years, serving in many roles, including First Assistant and Chief of the Criminal Division. He has tried over 15 cases as an AUSA, earning effusive praise from judges and adversaries alike. In his college days, he was the starting cornerback for the Amherst Little Three Champions in his junior and senior seasons (1981 - 1982). During the pandemic he decided to learn Spanish on Duolingo, after an abysmal effort in high school. On April 27, 2021, he became Judge Gustafson, when he was sworn in as a judge of the Connecticut Superior Court.

Joshua D. Koskoff is the third generation of Koskoff's at his firm, Koskoff Koskoff & Bieder. He practices plaintiff-side medical malpractice cases and has won record-setting verdicts throughout Connecticut. He represented families of victims of the 2012 Sandy Hook Elementary School shooting in a landmark case against the Remington Arms Company – the manufacturer of the assault rifle used to carry out the attack. On behalf of those same victim families he sued conspiracy theorist Alex Jones for his false claims that the shooting was a hoax.

Richard A. O'Connor practices medical malpractice defense and has tried over eighty cases to verdict, earning the respect and admiration of the Connecticut bar. He married the love of his life after they met in college. He is passionate about ice hockey and played in college and continued to play on men's league teams. He claims there is a connection between his hockey experience and his med mal defense practice; he was a hockey goalie and so has always been defense oriented. Richard is a devoted father of three grown children and a serious chef. He regards the keys to his life as family, the law and hockey.

DELAWARE

Peter J. Walsh is a graduate of the Johns Hopkins University, where he played Division III football for the Blue Jays. He attended Washington & Lee University School of Law, where he served as a member and an Executive Editor of the Law Review. Following law school, Pete clerked in the Delaware Court of Chancery. An accomplished runner and triathlete, Pete has competed in dozens of triathlons, road and trail races. He has qualified for and completed 13 Boston Marathons, including a sub-3:00 hour race and one in which he returned to his office in Wilmington that same evening to prepare for a case.

FLORIDA

Jonathon Lynn focuses on medical malpractice defense, representing physicians and hospitals. He has a deep command of medicine. One judge in the Fort Lauderdale area said "Everything I learned about being a trial lawyer, I learned from him. I tell young lawyers if they want to learn the art of trial practice, to go watch Jon Lynn." While a student at Lafayette College, Jon studied abroad for a summer at Exeter College in Oxford.

Sidney L. Matthew is an honorary member and official historian of East Lake Golf Club in Atlanta, Georgia. Sid has authored eight books and produced two documentaries about golf legend Bobby Jones. In 2014, Sid donated his research collection on Bobby Jones to Emory University consisting of more than 80 boxes of newspaper and magazine articles, photographs and various other memorabilia. Sid is known for his handlebar mustache, wearing traditional golf attire and taking difficult cases for deserving clients and causes.

Gary M. Paige is a plaintiffs' lawyer with a list of victories totaling almost $500,000,000 in verdicts against the tobacco industry, including the first "Engle Progeny" case. [In 2006, after the Florida Supreme Court decertified a class action initially filed in 1994 by Howard Engle for injuries suffered from the effects of smoking, former class members filed thousands of individual suits.]

GEORGIA

Anna G. Cross ran a house for HIV+ infants and children in foster care in the early 1990s, before she attended law school. She is 23-0 in cases when she opened wearing a particular strand of black pearls. The necklace is -- for obvious reasons -- the most valuable item of personal property she owns. One of her best memories is calming a witness with an impromptu Yoga class in an empty courtroom.

IOWA

Kenneth R. Munro is a bit of a throwback in the sense that he does about 50% plaintiffs' personal injury litigation and 50% insurance defense work as a sole practitioner in Des Moines. Ken was a boxer at Notre Dame. His daughter is at Notre Dame now, a member of the women's boxing club team. Ken senses some karma in that. Ken has served as a coach for youth hockey, youth football, and mock trials. He once tried 20 jury trials in a single year, including four jury trials in four weeks. But, he says, he was younger then.

Mark A. Schultheis grew up the youngest of five children in a military family that settled in his mom's hometown of Clinton, Iowa, when his father retired from the Air Force. High school lockers were arranged alphabetically by last name, so his was next to Debra Schwartz. They had been friends, but just friends, since Mark moved to Clinton. They ran into each other again at the University of Iowa and decided (ok, *she* decided, Mark admits) that they should finally start dating. They've been married for 26 years. Mark says that it was Debra who told him that he should go to law school. Mark was always active in sports, so he jumped at the chance to help out with coaching his son's elementary school football team. That decision turned into a volunteer coaching career that lasted through his son's senior year in high school.

ILLINOIS

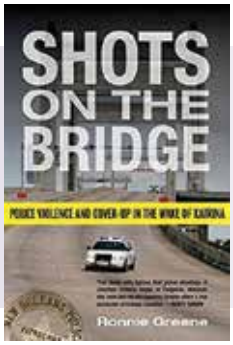
Joseph A. Bleyer first became aware of the College in 1976 when his father, James, loaded his mother, his wife, and their six children into the family station wagon to drive to Atlanta for James' induction into the College. The family started the trip with $300 in their collective pockets. They stopped for lunch somewhere in Tennessee, and when James received the bill, he realized that he was not going to make it through the week in Atlanta. Luckily, a colleague and Fellow Inductee, Richard Jelliffe, was also in Atlanta, and James was able to borrow money to survive the week. Jelliffe, to the day of his passing, always joked about a country bumpkin lawyer taking his family to the big city without enough cash. James B. Bleyer is 92 years old now and still practices on a limited basis. Because the induction ceremony was virtual, James and Joe's siblings were all able to watch and enjoy reminiscing about their trip to Atlanta.

INDIANA

Michael B. Langford was a high school debate champion and now pays it forward as a high school debate coach. Mike stood on the Berlin Wall as it was being torn down in the Spring of 1990. He is a regular guest commentator on legal issues on national radio programs.

Nicholas C. Pappas is a first generation American. His paternal grandparents immigrated to the United States from a small village near Sparta, Greece in the early 20th century. Three of their boys fought for the United States in World War II, including Nick's father, Chris J Pappas. Chris's service instilled in Nick a love of studying and reading about World War II. After the War, Chris went to law school and practiced law in Gary, Indiana. Chris passed away the same year Nick graduated from law school, so Chris was never able to see Nick in a courtroom, but Chris would have been very proud of Nick's induction as a Fellow.

Wayne C. Turner was the first member of his family to attend college or graduate school. His mother attended a one-room school. Wayne grew up in the greatest of settings – on a farm – where he learned the satisfaction derived from honest hard work.



LOUISIANA

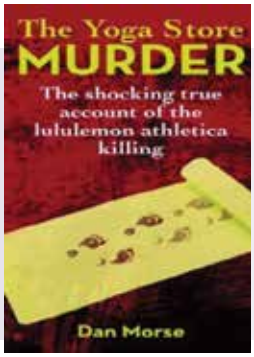
Claude J. Kelly III is the Federal Public Defender for the Eastern District of Louisiana. He began his career as an assistant district attorney, then became an assistant federal public defender. In private practice he has been involved as defense counsel in many high profile criminal cases in New Orleans, such as acting as lead defense counsel for the officers in the Danzinger Bridge shooting that occurred in September 2005 after Hurricane Katrina. In his spare time, Claude enjoys participating in all activities, sports and otherwise, with his two daughters.

MASSACHUSETTS

Frank E. Scherkenbach has tried more than 40 patent cases to jury verdict, specializing in cases related to computer software, semiconductors, medical devices, and life sciences. A graduate of Stanford University and Harvard Law, he knew as a student he wanted to do patent work — he was the Co-Founder and Editor-in-Chief of the *Harvard Journal of Law & Technology.*

MANITOBA

Stuart J. Blake discovered the hard way (his daughter needed a stem cell transplant at 12) that Canada did not have a umbilical cord blood bank, so he set about to establish one. Today Canada has a national cord blood bank, and he and his daughter – 21 and healthy – raise funds for it. He also is involved with Cancer Care of Manitoba as a founding member of the board of directors. He considers himself a "passionate" fan of the Winnipeg Jets.



MARYLAND

Marybeth Ayres is the chief of the Major Crimes Division of the Montgomery County, Maryland State's Attorney's Office. She was also previously a prosecutor in Baltimore City in the Homicide Unit, and in Queens, New York in the Domestic Violence Unit. She has tried fourteen murder trials to a jury verdict of guilty, including the infamous LuluLemon murder trial, and two murder-your-wife-for-hire jury trials. One judge said of her "She's the best attorney I've been asked about for the College in fifteen years. She is superb at everything." Beyond the law, one of Marybeth's passions is sponsoring three children who live in poverty in Uganda, Tanzania and Ecuador.

MONTANA

Peter Michael Meloy of Helena has been practicing law for 50 years. Mike is the "go to" attorney in Montana on the constitutional issues of right to know and discrimination. He previously served as a Member of the Montana House of Representatives and Majority House Leader. The High School Soccer team he coaches recently won two State Championships.

NORTH DAKOTA

Mark R. Hanson practices in Fargo, North Dakota. He has spent his entire life living within 160 miles of his current law office, even in the summer when his family goes to a lake in nearby western Minnesota, where they have a cottage. Mark does not take any technology with him to the lake; he locks his cell phone in the glove compartment. One day Mark went into the local convenience store. There he encountered three gentlemen earnestly trying to connect with the internet. He guessed, asked, and confirmed that they were trial lawyers. Mark has never seen a transactional lawyer trying to find the internet in the store. Mark loves being a trial lawyer.

NEBRASKA

Julie Bear has lived in one town her entire life: Plattsmouth, Nebraska, population 6,502. She commuted 20 miles one-way to Creighton University in Omaha for college and then law school. She started clerking in law school at the law firm where she practices today – in Plattsmouth. Not surprisingly, she absolutely loves to travel and has seen much of the world, from Hong Kong to Egypt, from Cuba to Bali, to most of Europe and all sorts of places in between. She loves to read "easy" fiction and to bake. Her dream is to become a pastry chef. In Plattsmouth.

Bradley D. Holbrook is a native Nebraskan who practices in Kearney. He grew up in nearby Lexington, as did his spouse Gina. Their first date was in 8th grade; he took her to Pizza Hut. She continued to date him anyway and eventually married him. They and a brand new infant son moved to Omaha, where she worked as an RN and Brad started law school. Brad decided on law school as pretty much a last resort, but his parents were not at all surprised, as they had dealt with him arguing everything throughout his childhood.

Ronald F. Krause recalls as his fondest academic memory the look on his professor's face when he stopped off after work as a summer railroad track hand with the Burlington Northern Railway, wearing coveralls and covered in creosote, to pick up his Phi Beta Kappa Key. Ron is an Eagle Scout; he was his High School valedictorian, student council president and played on a state championship football team. At age 18, Ron bicycled 462 miles to visit his grandmother. Ron credits his success as a trial lawyer to the best advice he ever received from his father: Learn how to talk with a wide variety of people.

NEW JERSEY

Joseph B. Shumofsky has run the New York City Marathon twice; he has scuba dived at the Great Barrier Reef.

NEWFOUNDLAND

Derek J. Hogan has been a legal aid defense lawyer for three decades, saying "I'd rather drive a cab than work in private practice." A native of Halifax, he moved to Newfoundland in 1988 and was called to the bar in 1989. He had no doubt where he wanted to work. "You get to help people who need help and working at Legal Aid is much more interesting than private practice." Derek has appeared more than 100 times before Newfoundland and Labrador Court of Appeal panels and has argued nine cases before the Supreme Court of Canada. Derek believes that if a movie is ever made about him, the best person to portray him would be Art Garfunkel.

NOVA SCOTIA

Stanley W. MacDonald grew up in a small town in Cape Breton, Nova Scotia, Canada, the ninth of ten children. He and his wife, Catherine Blewett, have two sons and a daughter. Stan's sons are both lawyers, working with him and practicing almost exclusively criminal law. Stan articled with his principal, Raymond Wagner, Q.C., who was also inducted as a Fellow at the Spring Meeting. Stan is an avid supporter of youth sports, and has coached at various levels, primarily baseball and hockey.

Raymond F. Wagner, Q.C. has dedicated the majority of his 40 years of legal practice to representing injured plaintiffs with a primary focus on class actions, medical negligence with a special focus in birth trauma, and personal injury litigation. He obtained his law degree from Dalhousie Law School and was called to the Bar of Nova Scotia in 1980.

NEVADA

Alzora Jackson served as a Deputy District Attorney in Reno, where she was recognized as Law Enforcement Officer of the Year. After several brief ventures into private practice, Alzora returned to public service in the Special Public Defender's Office in Las Vegas. She found her passion in this work and for the last 21 years has defended persons accused of capital murder. Alzora has been recognized as Defender of the Year by her peers, and as Attorney of the Year by the National Bar Association, Las Vegas Chapter.

NEW YORK

Laura M. Jordan obtained the largest medical malpractice verdict in a rural Upstate New York county and is the President of the New York State Academy of Trial Lawyers. She has two very busy and involved children (ages 13 and 10). She loves to be outside downhill skiing, hiking, kayaking, camping, or walking her dog.

Daniel S. Ruzumna specializes in white-collar criminal defense and related regulatory proceedings. He was an AUSA in the SDNY for 6 years, where he served as Acting Chief of the Major Crimes Unit. He received one of the Justice Department's highest honors, the John Marshall Award for Asset Forfeiture. When he is not practicing law he is likely to be on his road bike, spending time with his wife and two kids, or rooting on the University of Michigan.

OHIO

Nathaniel Lampley, Jr., the seventh of eight children, lost his younger sister and his mother at an early age. The family then lost their home and their possessions to fire, rendering them essentially homeless when he was twelve. Despite those hardships, Nate graduated from college and law school with honors, and went on the become the managing partner of his firm's Cincinnati office at the age of 42. A commercial and employment trial lawyer who is active in numerous professional and business groups in Cincinnati, Nate says he still gets excited about the opportunity to serve people. That has never gotten old.

ONTARIO

Sarit Batner received the Gold Medal in Mathematics in University, then pivoted to a successful career as a trial and appellate lawyer, with a busy practice in complex commercial litigation and professional negligence defence. She has received numerous awards and recognitions including the Lexpert Zenith Award for mid-career excellence, Benchmark Canada Top 50 Trial Lawyers in Canada, and Lexpert Rising Stars – Leading Lawyers under 40. She was lead counsel before the Supreme Court of Canada in the leading case on summary judgment in Canada. In her spare time, she raises two children and enjoys running.

Richard B. Swan was a successful counsel in the Waxman litigation, one of the longest, best known and complex commercial trials in Ontario, and was named Ontario Litigator of the Year by Benchmark Canada in 2015. He clerked at the Federal Court of Appeal prior to embarking on a commercial trial practice, served on the Board of Directors of The Advocates Society and teaches Advanced Commercial Litigation at Osgoode Hall Law School.

PENNSYLVANIA

Thomas J. Farrell is drawn to interesting people. To real people. Maybe it comes from a career in the criminal-law field, but whether it's former clients or just people he encounters, unusual life stories grab him. His friendships include a professional women's pro football league quarterback, an alleged steroid-using born-again MLB baseball player, a heavy-metal-loving leather-clad rocker he met on a plane, and a cadre of juvenile lifers fortunate to be back in society. Tom sees the good in all people, but he's drawn most to those with "wow" story lines.

Virginia A. Gibson is, of course, a lawyer's lawyer - but far more importantly - she is beyond duplication as friend; a spouse; and as a mom. What more can be said about any of us?

Thomas A. Sprague has specialized in personal injury and commercial disputes for 40 years. Starting his career in the Philadelphia City Solicitor's Office, Tom transitioned from the defense side to the plaintiff's side of civil trial practice where he has distinguished himself. When he is not in a courtroom, you can find Tommy (as his long-time friends call him) playing tennis on the weekends with his high school buddies, captaining his boat down in Stone Harbor, New Jersey, or mixing a mean martini. His wife Judy's and his proudest achievements are their two beautiful daughters.

QUEBEC

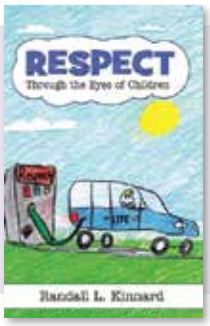
Marie-Helene Betournay graduated with Distinction from the National Program (Civil and Common Law) at McGill University, then settled in Quebec City, where she maintains a busy insurance and civil litigation practice. She is active in the Canadian Bar Association (as a member of the Insurance and Civil Litigation executive committee), is a member of the Board of Directors of the Association of Women in Insurance of Quebec and sits on her firm's management committee. Marie-Helene is recognized by The Best Lawyers in Canada for her achievements in insurance and product liability litigation.

Julie Desrosiers had the chance as a young lawyer to represent the Canadian Cancer Society in an intervention and was awarded the Queen's jubilee medal in 2002 for marquee contribution to the Society. She and her husband, also a Fellow of the ACTL, are the parents of a blended family of nine children from 19 years old to 34. Julie climbed the ice-capped, inactive volcano Chimborzao with the last ice merchant of Ecuador, Baltazar Ushca.

Judith Robinson has a busy intellectual property trial practice, with expertise in cross-border patent trials and data protection of pharmaceuticals. She is a Fellow of the Intellectual Property Institute of Canada and has received numerous other awards and recognitions including being named as one of Canada's Most Powerful Women: Top 100 (2015) and as one of the most influential women in Intellectual Property Law by IP Stars.

RHODE ISLAND

J. Patrick Youngs III is a career prosecutor, having spent thirty five years in the Rhode Island Attorney General's Office. His public service includes inspiring students, as he is shown here, recounting to a high school class the evidence he introduced to obtain a conviction in a high profile triple homicide.



TENNESSEE

Randall L. Kinnard, a West Point graduate, served two tours of duty in Vietnam with the 173rd Airborne Brigade, earning the Vietnamese Cross of Gallantry, the Purple Heart, the Bronze Star, and the Air Medal. The vast majority of his career has been devoted to representing plaintiffs in medical malpractice lawsuits. He has served as Chair of Fundraising for Nashville Legal Aid, and on the board of a non-profit organization that helps people with mental illnesses. He has also published a book for children called "RESPECT Through the Eyes of Children," a collection of writings and drawings from fifth graders on their thoughts on respect.

Gregory D. Smith wanted to be a lawyer since the age of eight, but worked in careers as a travel writer, photographer, and newspaper journalist before becoming a lawyer. He rides and collects bicycles, and also collects board games, primarily those with historic themes. As a family law specialist, he was not sure the College was ready for a lawyer in a field where many believe the outcome of a case is determined by a reasonable preponderance of the perjury, conduct he actively discourages in his clients but enjoys exposing when committed by an adverse party.

TEXAS

Jane E. Bockus is an Oklahoman who practices in San Antonio, Texas, where she moved right out of college for a teaching job. Teaching was not her calling, but she fell in love with San Antonio. After turning 60, Jane made the swim from Alcatraz to San Francisco - TWICE! After law school, Jane was the first woman hired in a law firm established 79 years earlier. She currently focuses on products liability cases involving drugs and devices.

UTAH

Cristina J. Ortega, our new Judicial Fellow, was appointed to the Second District Court of Utah in March 2021, shortly after she was inducted as a Fellow in a special ceremony. Judge Ortega received her J.D. from the University of Utah, S.J. Quinney College of Law, and graduated *cum laude* with a bachelor's degree in Criminal Justice-Law Enforcement and Latin American Studies/Legal Studies from Weber State University. Judge Ortega served as a deputy county attorney in the Davis County Attorney's Office and a deputy district attorney in the Salt Lake County District Attorney's Office before becoming an AUSA in 2018, where she served as the point of contact and liaison between all state and federal law enforcement partners and the U.S. Attorney's Office and as the Project Safe Childhood Coordinator in the prosecution of child exploitation investigations. She has served on the Board of Trustees for the University of Utah and as a Regent for the Utah System of Higher Education.

Jonathan Yeates received a national award from the United States Attorney General for his pro bono work in representing indigent victims of domestic violence in seeking protective orders. Jon plays amateur table tennis competitively and has won various singles and doubles medals at the Utah Summer Games.

VERMONT

Nicole Andreson practices medical malpractice and personal injury defense. She is the go-to lawyer for many major hospitals, including UVM Medical Center. Prior to moving to private practice she did a stint in the Chittenden County State's Attorney's Office, prosecuting sex crimes. She has also served in the Vermont Attorney General's Office. When not trying cases you might find her on the tennis court, having been the Captain and MVP of the St. Lawrence University Tennis Team, where she graduated *magna cum laude* and earned Academic All-America Honors.

VIRGINIA

Jonathon P. Harmon practices in Richmond, where he specializes in bet-the-company litigation for Fortune 500 companies. He and his wife both graduated from West Point. Jonathan fought in an armored combat division during Operation Desert Storm. In July 2020, Jonathan was one of five experts appointed by the U.S. Army to conduct an independent review of the command climate, culture and sexual harassment claims at Fort Hood, Texas. For the last 20 years, Jonathan has spent his free time teaching bible studies to inmates, from juveniles to hardened felons, in state and federal prisons. Jonathan authored an opinion/commentary published by the Wall Street Journal in June 2020, entitled *My Father's Advice: 'Don't Hate, Don't Hide, Don't be a Victim.'*

WASHINGTON

Wayne C. Frick is the first lawyer in his family. He grew up in a military family, until his father retired and returned to his birth state of North Dakota. Wayne and his siblings were encouraged to attend college, in part because their dad was taken out of school to "work the farm" after completing the 9th grade. Wayne also farmed during summers. He was active in sports, primarily hockey, but after moving to the northwest he focused on bicycling and rock climbing, culminating in summiting Mt. Rainier and riding the 200 plus mile Seattle to Portland (STP) bike ride in one day at the age of 45. Wayne and his wife, the Hon. Theresa L. Fricke, a Federal Magistrate Judge, take care of four Nigerian Dwarf goats.

Todd J. Maybrown is based in Seattle and defends complex serious felonies, including death penalty cases at the trial and appellate level. A native New Yorker, Todd relocated to Seattle after his Michigan law degree to clerk with the Chief US District Court Judge for the Western District of Washington. Todd is an adjunct professor at the University of Washington Law School, and a founder of the King County Legal Task Force for the Homeless.

WISCONSIN

Mark T. Budzinski grew up in a small blue collar Wisconsin town (Manitowoc), the only son of a single mother who owned a tavern. His family has a significant history of military service, and he enlisted in the Marine Corps Reserve right out of high school. Like his father in Vietnam, Mark was infantry, and he successfully completed his initial obligation in 2001. Following 9/11, Mark learned his former infantry company would be deployed to Iraq. In late 2004 he re-enlisted in the Marine Corps and spent the majority of 2005 leading a team of Marines and Iraqi soldiers from the 3rd Battalion 25th Marine Regiment, as part of Regimental Combat Team 2, fighting the insurgency.

WYOMING

G. Bryan Ulmer III graduated from the University of Wyoming College of Law in 1995, first in his class. He represents plaintiffs across the country out of his office in Jackson, focusing primarily on cases involving serious injury and death, but his curiosity has led him to successfully represent plaintiffs in a wide variety of cases including business litigation and intellectual property disputes. Bryan enjoys spending time outdoors, chasing trout, biking, skiing or simply taking in the beautiful vistas nature has to offer. ■

SPRING 2021
NEW INDUCTEE WELCOME

AT EVERY NATIONAL MEETING, A PAST PRESIDENT IS ASKED TO ADDRESS THE ABOUT TO BE INDUCTED NEWFELLOWS AND THEIR SPOUSES, TO EXPLAIN THE PROCESS THAT LED TO THEIR SELECTION. AT THE SPRING MEETING THAT HONOR WAS ASSIGNED TO **DAVID J. BECK**. DAVID SERVED AS PRESIDENT OF THE COLLEGE FROM 2006 TO 2007. DAVID HAS ALSO SERVED AS PRESIDENT OF THE ACTL FOUNDATION AND AS PRESIDENT OF THE STATE BAR OF TEXAS. HE IS A FORMER TEXAS TRIAL LAWYER OF THE YEAR AND HAS SERVED SINCE 2015 AS A REGENT OF THE UNIVERSITY OF TEXAS SYSTEM.

SLIGHTLY ABRIDGED, DAVID TOLD THE INCOMING INDUCTEES:

"Duty, honor, country." Those words were spoken almost 60 years ago to the cadets at West Point by General Douglas MacArthur. Had he been a trial lawyer and speaking to you today, his words might have been a little different. His words might have been character, integrity, professionalism.

You inductees are here today because in addition to your exceptional trial skills, you epitomize those three qualities. The American College of Trial Lawyers is a truly unique organization. It is the only organization that counts among its members every Justice of the United States Supreme Court and the Supreme Court of Canada. And every member of those courts agreed to accept fellowship in the American College of Trial Lawyers for one reason and one reason only: The unparalleled and the superb reputation of the College and its Fellows.

Lewis Powell was the president of this organization two years before he became a member of the United States Supreme Court. And he said the College is a prestigious organization because of its smallness and its selectivity based on merit. You cannot apply, you can't lobby yourself to Fellowship. It is by invitation only. We only want trial lawyers. We only want the very best trial lawyers. And we only want the very best and ethical trial lawyers. As one of my Fellows has commented, we do not want those who have delusions of adequacy.

In 2006 and 2007, I had the great privilege to serve as president of the American College of Trial Lawyers but, frankly, by far the greatest honor I have ever achieved was my induction as a fellow in 1982. I still remember how I felt when I raised my hand and was inducted into the College in front of a lot of my friends and colleagues who had preceded me as Fellows of the College.

So let me explain a little bit about how you got here. Simply stated, somebody noticed you. It was either an adversary, a co-counselor, or a judge. And your name was then brought forward to your state or province committee. If you have a friend or partner who tells you that they got you into the College, you should thank them, but please understand, they don't have a clue what they're talking about. There's only one way to gain admission to the College: you must earn it.

Let me go through now the various steps that got you here today. The first step in the process is the compilation of your list of trials, the number of trials, the duration of trials, the significance of your trials. Who were the opposing lawyers and who were the judges? Many outstanding trial lawyers will be rejected at this point because of an insufficient number of trials, for example, or because of comments that are generated by the performance of that particular lawyer. The College is not a litigation organization; it is an outstanding trial lawyers organization. We're not an organization of paper shufflers; we're trial lawyers. If you're not a trial lawyer, you do not meet our qualifications.

Well, that's the first step. There is yet another step in the process. After the compilation of your list of trials, an investigator, a Fellow of the College, was assigned to go through every trial that could be documented, talk to your opposing counsel, and the judges you appeared before and your co-counsel. Why? To find the quality of your performance, your temperament, and your professional behavior, particularly under stress. We don't just want outstanding trial lawyers; we want trial lawyers who adhere to the highest ethical and professional standards. That's what the American College of Trial Lawyers is all about.

After the investigator has made all these contacts, he or she must determine that you have no ethical issues, no professionalism issues, and no disciplinary problems with respect to your nomination, in addition to you being an exceptional trial lawyer. As one former president of the College succinctly put it, is this the kind of lawyer you can play poker with over the telephone? Each of you made it over that first hurdle.

Well, what is the next step in the process? There's also a second investigation at the state or province committee level. The first investigator's report about you talks about your trials, the quality of your performance, and what lawyers and judges say about you and all of that information is presented to your state or province committee. So those committees, which are the representatives of your state or province, will then go through all of that material and determine whether you measure up to our high standards. You're here today because your state or province committee said that you did live up to our high ethical standards so you made it over our second hurdle.

There's yet a third hurdle. Your name was then forwarded to the College's National Office in California. It sends out a confidential poll to every Fellow in your jurisdiction and they're asked about you. Do you know this lawyer? What do you think about this lawyer? What is this lawyer's reputation? How good a trial lawyer is this particular lawyer?

You were then graded by all of those Fellows in your jurisdiction about the quality of your behavior and the quality of your reputation and the quality of your performance. Fellows were also given the opportunity, on a confidential basis, to write anything that they wanted about you, good or bad. There's nothing that produces frank comments by the Fellows of the College about nominees more than confidentiality. I know when I was a Regent of the College and had to present nominees from my region, some of the comments were memorable. I remember one fellow confidentially commented, and I quote, "Looking for trials that this lawyer

has had is like looking for weapons of mass destruction in Iraq; there are none." Or you have another Fellow who commented on someone's ability by saying, "This guy is all hat and no cattle." Now, being from Texas, I had to interpret that for some of my colleagues, but I think the meaning is pretty clear.

The confidential poll results are then tallied by the National Office and that is the stage where we frequently learn of issues that had previously been uncovered: Sanctions in a discovery dispute years earlier, a malpractice suit may come to light, or there may be ethical issues or collegiality issues that arise. And if any of those issues arise at that stage, they are promptly investigated and, hopefully, resolved.

So what happens to these confidential poll results? They're given to your Regent, who's the only one that sees those confidential results because of the importance of maintaining confidentiality. And the Regent then undertakes, yes, another investigation. The Regent has to verify the cases you tried, has to talk to the judges to make sure that you have exceptional trial skills, and that you do meet our high, ethical standards. And he or she has to investigate every potential issue, ethical or otherwise, that may arise. Everything has to be reviewed again for accuracy and completeness.

Why does the Regent go through this type of homework and detailed analysis? Well, the reason is because the Regent has to defend your nomination before the Board of Regents and all the Past Presidents. And the Regent is going to be asked how many cases did this nominee try in the last five years? What type of cases did this nominee try during the last five years? I noticed this from the confidential poll; the comment, not knowing who made the comment. Why is that? Why is this person saying that this person is unsatisfactory? These are all statements that that Regent has to defend because that Regent is going to be cross-examined about you.

Earlier this week, we spent two days considering 78 candidates, of which some still didn't make it after all of those other hurdles had been overcome. Why? Because somewhere, somehow, something surfaced that determined that that nominee did not meet our very high standards. The whole purpose of this rigorous process is to ensure that we admit to Fellowship only the best; only the very best. We hold ourselves and everyone else to a very high standard and you're here today because you meet - you unquestionably meet - that very high standard.

Now, let me say just for a moment a few words to our spouses.

While we're trying cases, it is our spouses who have to live with us and the tensions we face while practicing our profession. And sometimes, it's not easy. One of the joys of the College meetings is you get to meet and know the spouses of the Fellows and you meet people that are interesting and extremely accomplished: Teachers, lawyers, doctors, people active in their communities, writers, musicians, and that's part of being the College family. We want to thank all of you spouses who are here today to thank you for all you have done to support your husband or wife in our very challenging profession and for allowing them to make the sacrifices necessary to achieve excellence.

This is truly a great day for you and because you are here, it's a great day for the College.

One of the things I learned many years ago is that there are two words that will bring an audience to its feet and those two words are, "In conclusion." So in conclusion, let me say to you, new Fellows, congratulations and welcome! And to your spouses, thank you for allowing our new Fellows to practice their profession at the very highest level.

Thank you, and welcome, to everyone! ■

THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE

IN THE PAST TWENTY YEARS, TWO DIFFERENT US PRESIDENTS WERE ELECTED AND INSTALLED BY AN ELECTORAL COLLEGE VOTE, EVEN THOUGH THEY HAD LOST THE POPULAR MAJORITY VOTE. HOW CAN THAT BE? WE TOOK THE OPPORTUNITY TO GET SOME INSIGHT FROM PROFESSOR EDWARD B. "NED" FOLEY, THE EBERSOLD CHAIR IN CONSTITUTIONAL LAW AT THE OHIO STATE UNIVERSITY MORITZ COLLEGE OF LAW, WHERE HE ALSO DIRECTS ITS ELECTION LAW PROGRAM. HE IS A CONTRIBUTING OPINION COLUMNIST FOR THE WASHINGTON POST, AND SERVED AS AN NBC NEWS ELECTION LAW ANALYST DURING THE 2020 ELECTION SEASON. FORMER REGENT KATHLEEN TRAFFORD INTERVIEWED NED ABOUT HIS BOOK, *PRESIDENTIAL ELECTIONS AND MAJORITY RULE*, (OXFORD UNIVERSITY PRESS, 2020).

***Kathleen**: Ned, it struck me that the United States stands apart from all other modern democracies in that it employs the Electoral College System instead of a national popular vote to elect its chief executive officer. What were our founding fathers thinking when they adopted the Electoral College?*

Ned: We need to talk about the two versions of the Electoral College – the original version created at the 1787 Constitutional Convention, and its redesign by the Twelfth Amendment in 1803 – because there are important differences. The Convention delegates' goal was to create a deliberative body of electors who would convene in each state to deliver a consensus non-partisan choice who would be above the fray – presumptively George Washington. They hoped to avoid the creation of competing political parties, like the Whigs and Tories in England. They appreciated that there would still be interest groups – farmers, bankers and merchants – with different economic interests, but believed the architecture they put in place, with its separation of powers and checks and balances, would result in a permanently fluid competition that would keep the presidential election a

consensus choice devoid of red team/blue team competition. Their vision, however, was a complete failure. When Washington left office after two terms, competition between the Adams/Hamilton Federalists and the Jefferson/Madison Republicans quickly developed and almost derailed the country in the 1800 election. This lead to the reform of the Electoral College by the Twelfth Amendment.

Kathleen: *How did the goals and expectations change?*

Ned: The elections in 1796 and 1800 were intensely partisan and very close, and proved that the consensus choice system was not working. John Adams was elected president in 1796 by only one more than the minimum required electoral votes. Thomas Jefferson was elected in 1800, but only after a nerve-racking contest between him and his own running mate Aaron Burr, who tied for president due to the mechanics of the original Electoral College voting system which gave each elector two equally-weighted votes that did not differentiate between president and vice-president. Jefferson was the clear choice for president but Burr refused to concede that point. If you saw the musical *Hamilton*, you have an accurate sense of Burr's appalling self-promotion. The House of Representatives decided the election only after Hamilton, who hated Jefferson's politics but found Burr completely unprincipled, convinced the House Federalists that Jefferson was the better choice. The Jeffersonians, knowing they would again face competition from the Federalists in the 1804 election, resolved that the Electoral College should be reformed to assure that the majority candidate – presumptively Jefferson, who was a very popular president due to the Louisiana Purchase – would indeed win. The reformers knew that a national popular poll was not in the cards due the strong sense of federalism prevalent at the time. They opted to adhere to the federalism concept by combining majority rule with the notion that in a federated republic the states should play a role. A candidate would achieve a majority of Electoral College votes by accumulating a majority of votes in each state. A compound majority-of-majorities. While the states would remain free to choose their preferred method for appointing electors, the expectation was that the states would use that power to reflect the majority choice in each state.

Kathleen*: You conclude in your book that Jeffersonian Electoral College performed mostly as expected but at times malfunctioned as a result of what you refer to as a "virus" that invaded the system at the state level. What was the virus and how does it threaten the Jeffersonian objective?*

Ned: Coincident with the ascendancy of Andrew Jackson in 1828, the Jeffersonians' key assumption began to erode. The dominant method the states used to appoint presidential electors converted from the majority rule to a plurality rule, winner-take-all, derailing the philosophical vision of the Twelfth Amendment. As a result of individual state law changes the founders never thought would happen, coinciding with the emergence of minor parties, it was now possible for a candidate to win all the state's electoral votes without being the majority preferred candidate in that state; and a candidate could assemble an Electoral College majority from states in which the majority of voters actually preferred another candidate. If we had a faulty system today that some engineer designed, we could blame the engineer and say "it's that person's fault; he or she designed a bad system." But the Jacksonian transformation of the Electoral College system was unplanned, even unintentional. The system we have now is not the product of a single vision; it's a disconnect between the Twelfth Amendment vision and subsequent changes that took place state-by-state leaving us with a hodgepodge rather than a rational plan.

Kathleen*: You document three times the Electoral College malfunctioned according to the Jeffersonian majority-of-majorities principle. What were these malfunctions and how consequential were they?*

Ned: Let me start with the most recent malfunction because it will resonate more with folks today, but the same problems existed in the past. The good news is that malfunctions have not happened

all that often, at least not in the 20th Century. Of the 25 elections from 1904 to 2000, the Electoral College clearly failed to award the presidency to the candidate capable of achieving the requisite majority-of-majorities only in the final one. But there are reasons to worry it may happen more often now, which is why we should think about what we want out of our system.

So everybody remembers the 2000 *Bush v. Gore* election because of Florida's hanging chads and butterfly ballots. But none of that matters if we focus on the more fundamental majority rule concept. The most consequential factor in Florida was that there were ten tickets on the presidential ballot – eight representing various third party interests, the Green Party, Socialist Party, the Socialist Workers Party, the Natural Law Party and other minor parties. A well designed system would allow all these parties to compete fairly but would include some method to winnow the contest to two candidates to produce a clear majority winner. But that is not system we have. The Electoral College was designed on the assumption there would be no competing parties and then revised on the assumption there would be only two parties; the concept of a significant third party was never on the radar. Because there was no winnowing mechanism to adjust for third-party candidates in Florida in 2000, Ralph Nader, running to the left of Gore as the more pro-environment, pro-consumer candidate, was able to amass over 97,000 votes, tipping the very close race (a mere 537 votes) between Bush and Gore to Bush, even though there is no doubt a majority of Nader voters would have preferred Gore to Bush. In 2000, whoever won Florida won the Electoral College. Gore was the "correct" winner under the Twelfth Amendment majority-of-majorities vision because he had majority support in enough states for an Electoral College majority, yet the system gave the presidency to Bush because it could not handle the majority vote split.

How consequential is the result? Historians tell us that 9-11 and the war in Afghanistan would most likely have happened even with Gore as president, but Gore might not have taken the country into the war with Iraq as Bush did. Thus, for the Electoral College to make a mistake by putting a person in the Oval Office who a majority of Americans did not want can have consequences for the country and the world given the president's power over war and peace.

An example from the 19th Century is every bit as consequential. The election of James Polk, the Democratic candidate, in 1844 is the first failure of the Jeffersonian Electoral College, and it was structurally identical to the 2000 election. Polk was an aggressive expansionist willing to force the annexation of Texas if necessary. Henry Clay, the Whig party candidate, favored expansion and an- ▷

nexation only by peaceful means and was also a moderate abolitionist. James Birney enters the race as the abolitionist Liberty Party candidate, and threatens to split the abolitionist vote, particularly in the determinative state of New York. Abraham Lincoln, a Whig protégé of Clay, is apoplectic about the possible outcome. He writes letters urging the Whig abolitionists not to throw away their votes on Birney, whose views he believes are too soon and too much, and to vote for Clay as the only practical candidate for curtailing slavery. Polk wins but only because he, not Clay, received all of New York's 36 electoral votes. There is no doubt that Birney siphoned significant anti-slavery votes from Clay, and that as between Clay and Polk, Clay was the majority-preferred candidate in New York. Clay was the genuinely Jeffersonian choice in the race because, with New York's electoral votes, he would have achieved an authentically compound majority-of-majorities. The consequences of Polk's win were enormous. Polk took the nation to war with Mexico to conquer new territory. The new states added to the Union were slave states, causing some historians to speculate that Polk's victory put the nation on the path to the Civil War.

The other clear malfunction, Grover Cleveland's 1884 election, is not as historically significant, but nevertheless documents the system's vulnerability. Cleveland, the Democratic candidate, was opposed by James Blaine, the Republican, and two minor party candidates representing the Greenback Party and the Prohibition Party. Without the minor party candidates in the race, Blaine would have won majorities in Massachusetts and Michigan where he was the plurality winner over Cleveland. Cleveland had a slight plurality over Blaine in the pivotal state of New York, but Blaine probably would have pulled ahead in New York had there been only two candidates. Thus, Blaine was the genuinely Jeffersonian choice; the system malfunctioned, although without severe consequences.

***Kathleen**: You identify other elections for which we cannot be certain the winner was the majority-preferred candidate. Please give us examples of these dubious results and explain why they should concern us?*

Ned: The most recent example is 2016. There is no real proof that Jill Stein or Gary Johnson affected the outcome of the election, but the most honest appraisal is that because the system does not account for this issue, there is reason to worry whether 2016 is like 2000. Stein and Johnson got a significant share of the votes in six states that caused Donald Trump to achieve an Electoral College majority even though Hillary Clinton won more votes nationwide. If you drill down on the numbers, Trump is so close to 50% in Arizona, North Carolina and Florida that you should feel confident he would have won these states head-to-head with Clinton. But in Michigan, Wisconsin and Pennsylvania Trump is far enough away from 50%, so you cannot say for sure he would have won in a two-way race. You have to ask, therefore, if there was a run-off in those states, or if Stein and Johnson voters had a second choice, do we know whether Clinton or Trump would have won? And the very fact that we do not know means the system is not well designed for the way in which we conduct elections.

One of the most dubious results is the 1992 election. No one can say for certain, but there is reason to believe that Ross Perot negatively affected George H. Bush and tipped the election to Bill Clinton. Bush folks will swear on bibles that Perot was the "spoiler" in that race, and there is some plausibility to that claim. Bush and Perot were both Texas entrepreneurs, with Perot being the prototypical populist contrasting with the very traditional Republican Bush. William Jefferson Clinton is the least Jeffersonian winner in history. Clinton got above 50% in only his home state, Arkansas, and the District of Columbia. In a bunch of the states he won he got less than 40% of the vote. Yet his Electoral College win looks decisive, because he is winning a lot of states in a three-way race.

***Kathleen**: Given the risk of malfunctions and dubious results, why hasn't there been more interest in fixing the system?*

Ned: From 1912 to 1992, there is not a single election that would cause us to worry the system was backfiring, despite there being third party candidates like George Wallace in 1968 and John Anderson in 1980. So that is an 80 year period – the heart of the 20th Century – in which it seems the system is serving the Nation well enough. Americans got comfortable with idea that so long as we have decisive Electoral College winners, we are okay with the system we have. As a country, we have not caught up with the reality: combining the problem in 1992, a clear mistake in 2000, and a possible mistake in 2016, gives us *three* questionable results in a relatively short period of time. It is also true, that to the extent there are concerns, they focus on why the system does not elect the national popular vote winner. The focus is not on the more fundamental problem of allowing plurality votes to supplant the majority rule. It would not be good for the country if in a three-way contest someone could become president by winning only 38%. One of the reasons why we have not had a national popular vote amendment is that none of the proposals has adequately explained how to handle this issue. I have the same concern regarding the Multistate Compact Plan, a proposal that developed in the aftermath of the 2000 election and gained more traction after the 2016 election. The Plan seeks to have states that together have a majority of Electoral College votes agree to award their votes on the basis of the national popular vote, not the popular vote in their own states. The fundamental defect in the Plan is that it too would award the president to whichever candidate received the greatest share of the national popular vote, which could be significantly less than 50%.

***Kathleen**: When you published your book in early 2020, you posed a scenario in which there likely could be a misfire in the 2020 election due to a serious independent or third party candidate. That did not happen, and Joe Biden won the national popular vote as well as the Electoral College vote. Are you still concerned about misfires looking forward to 2024 and beyond?*

Ned: I am worried about 2024 for sure, and if you believe in majority rule you should be concerned as well. The concern for 2024 is the potential of third-party fracturing and what it means for majority rule. 2024 may look much like 1992 with the possibility of a Republican Party fractured by the populist, pro-Trump base and the more traditional Republican base. Or 2024 could look more like the Bull Moose Election of 1912, in which former President Teddy Roosevelt challenged his handpicked successor, William Howard Taft, resulting in a triangular fracturing of the electorate in most states. As a result Woodrow Wilson attained an Electoral College majority by winning popular-vote pluralities in 29 of the 48 states, even though Roosevelt would have won without Taft in the race. At this point in time the potential for fracturing is an equal if not greater concern – but also an opportunity for a constitutional amendment. An opportunity that I did not think was realistic when I wrote the book in 2019.

There has never been a moment in history, or at least the last 50 years, quite as fluid as we have now. The Republican Party traditionally favors the Electoral College and hates the national popular vote, but that is true only when there is two-party competition. Now it has to be concerned about a three-way split, even without Trump in the race. Therefore, for the first time in history we have a political dynamic that may give momentum for reform. Reform could happen if both parties appreciate the threat of a three-way race and act in their own best interest to achieve a constitutional amendment in a relatively short time as we saw in 1803. A compromise deal would have to give Democrats the national popular vote they desire and guarantee Republicans a two-party contest at the end. The amendment could be as simple as: "The president shall be elected by a majority of voters nationwide; Congress has the power to pass rules to enforce this provision." If a constitutional amendment is not politically palatably for lingering partisan reasons, there is still an alternative at the state level. Each state has the power to re-align its system of picking electors with the Jeffersonian premise and expectation by guaranteeing that a candidate cannot receive all the state's electoral votes without achieving a majority of the state's popular vote. States can exercise this power by ordinary legislation or, if Supreme Court precedent holds, by ballot initiative or referendum. States could guarantee majority rule by ranked choice voting, a runoff election, or other mechanism to winnow the choice to a final two. If the pivotal battleground states did this, it would make a huge difference in restoring the Jeffersonian Electoral College commitment to majority rule. Such reform should not be a partisan issue. The objective is to have a state's electoral votes go to the genuine majority choice in the state –an objective all Americans likely value.

By necessity, this was a highly abridged version of a much longer – and fascinating- interview. Do yourself a favor and enjoy the book. To learn more about other contemporary election issues, you can read Ned's Op-Eds in The Washington Post, follow Ned on Twitter, or tune in to the Apple podcast, "Free & Fair with Franita and Foley."

Kathleen Trafford
Columbus, OH ■

A CONVERSATION WITH JUSTICE ROSALIE ABELLA OF THE SUPREME COURT OF CANADA

THREE JUSTICES OF THE SUPREME COURT OF CANADA – ROSALIE ABELLA, RUSSELL BROWN AND NICHOLAS KASIRER, ALL HONORARY FELLOWS – PRESIDED OVER THE FINAL ROUND OF THE 2021 GALE CUP MOOT COMPETITION. THE AWARDS CEREMONY FEATURED A CONVERSATION BETWEEN JUSTICE ABELLA – WHO WILL RETIRE FROM THE COURT ON JULY 1 UPON REACHING THE MANDATORY RETIREMENT AGE OF 75 – AND TORONTO FELLOW ANIL KAPOOR.

Introducing Justice Abella, Anil commented that "two things that stand out about Justice Abella and speak to her qualities as a person and as a jurist." First is the fact that Justice Abella is universally respected across the political spectrum and by other judges. For his August 2019 profile of her in the *Los Angeles Times*, David Shribman interviewed a number of people about Justice Abella as she was about to become the longest serving jurist in Canadian history. Three people in particular had interesting things to say. The polemicist and historian Conrad Black, who disagrees with just about everything she does but believes but "she would get my vote as an ecumenical Saint." Alan Dershowitz, who merely disagrees with *most* of what she does and believes he "would trade her for two American Supreme Court Justices and a draft choice to be named later." The late Ruth Bader Ginsburg said of Justice Abella that she was "proud to count her as one of her dearest sisters in law." Second is her deep and longstanding commitment to equality. By way of example, as a member of the Ontario Court of Appeal in 1998, Justice Abella decided a case in which the question was whether the word "spouse" in the *Income Tax Act* includes a same-sex partner. Justice Abella opined: "Differences in cohabitation and gender preferences are a reality to be equitably acknowledged, not an indulgence to be economically penalized. There is less to fear from acknowledging conjugal diversity than from tolerating exclusionary prejudice."

An abridged version of their conversation follows.

Anil Kapoor: How did you enjoy the Moot?

Justice Abella: I loved it. What always astonishes me when I see law students in moots . . . is how incredibly confident and poised and prepared they are, unintimidated by the questions they get from the judges, who do not in anyway patronize ▷

them. The questions that my two wonderful colleagues asked today were questions they would have readily asked in a courtroom. And the three of us felt that we could easily have had that advocacy in the Supreme Court during a hearing and been very happy with it. The three of us thought that the quality of the advocacy was outstanding.

Anil Kapoor: We hear from law students about their anxiety around grades, how are they going to get "the job" and how they are going to pay off their student debt. What can you say about that to these soon-to-be members of our bar as they embark upon their legal careers?

Justice Abella: I can only tell you what I feel very deeply about advice. It is that you shouldn't take advice from anybody. People will always give you their best suggestions but they don't necessarily work for who you are.

If I had listened to people, I would never have gone to law school because they said girls aren't lawyers. I wanted to be a litigator; I like talking. I don't think I ever saw another woman in the courtroom in the four years that I was practicing law before I became a judge. I wouldn't have gone to the Family Court because people said the Family Court, is, in the hierarchy of the judiciary, the lowest court. It turned out to be where I learned how to be a judge. They said don't go to the labour board, it's controversial, don't do a royal commission on equality, it's controversial, don't go to the law reform commission, it's tanking. So, every single thing I did was against the advice of most people.

But I saw all of these things as opportunities rather than as advancement missions. If I do have one thing to tell law students, it is that the anxiety you feel is very normal. Financial pressures are so tough, as is not knowing what your future is going to be. But you don't have to figure out where you are going to end up. . . . If opportunities come your way, just go with them, because you never know where you're going to end up. It'll surprise you, but it'll be a happy surprise. So don't box yourself in.

Anil Kapoor: What advice do you have to young women who are considering having a family and trying to stay in the practice?

Justice Abella: Well again, I won't give advice to anybody. There was no question that I was hoping to get married and have children. . . . When I first became a judge 45 years go, I used to get a lot of calls from the press who asked, "How do you balance things?" I would say to them, "I am very lucky to have this constellation of support around me. Why don't you write articles about the women who are the real heroes, the women who work at underpaid jobs and then come home and perform their unpaid domestic duties and then get up early in the morning to take their kids to child care? Everybody wants to find a work-life balance; well, there is no such thing, because your kids come first, and your spouse comes first, and sometimes your parents comes first and your work comes first. Everything comes first. So "balance" means how your life feels and if it feels okay, you've got the right balance.

Anil Kapoor: I want to ask you about preparing and arguing for an appeal. In particular, the relationship between written advocacy on the one hand and oral advocacy on the other hand. . . . What tips do you have for young advocates – or any advocate for that matter?

Justice Abella: Preparation is the best builder of confidence in everything. I used to always be nervous before I spoke or went into a courtroom as a lawyer. The only thing that makes me less nervous now is to know that I am really, really prepared. When I read a factum, I find my brain working either towards or against the argument I am reading. It's like reading a book – you either get taken along on the journey or it just isn't working for you. The key is to be open. If I had to say what makes a good judge – and this is something all lawyers should know – it's to have an open mind. Not an empty mind where there's nothing in there and you have no pre-conceived notions. That's ridiculous, because if you prepare for a hearing, you have a pretty good idea of what the case is about. It's not about pre-conceived notions, it's about being open to having those ideas changed by what you hear and read. The more I judge, the less judgmental I feel.

Anil Kapoor: Do you ever go back to the oral argument when you're preparing your judgments?

Justice Abella: I do sometimes go back to the transcript. I still use a pen. I don't know how to use a computer. I underline and make notes in the corner. And by the way, some of my best ideas have come from disagreeing with something. As Isaiah Berlin said there's no pearl without some irritation in the oyster. It's how I came to deciding that equality should be defined as accommodating differences and respecting them rather than as a similarly situated approach the Americans use. I read the 14th Amendment jurisprudence, where everybody is treated the same, and thought, no that doesn't work, that doesn't make sense – because if I am not able bodied I need a wheelchair to get into a building and if you're going to treat me the same as everybody else, then I don't get the ramp. But it was from reading the American jurisprudence I disagreed with that I came to a different position.

Anil Kapoor: I want to ask you about the selection of judges and the sort of criteria should we looking for. What do we want in a judge? Is being a lawyer the best training to be a judge?

Justice Abella: There was a time when people said we don't want people on the bench who were just criminal lawyers or just family lawyers or just real estate lawyers. I think a good legal mind is a portable tool. Anybody with a good legal mind can learn. We learn all the time. No judge on our court is a specialist in everything, so we're always learning.

So I think everything is good training for being a judge. Is there anything that's better? I think on my Court it's helpful to have had appellate experience, but we've had very good judges on our court who were just very good advocates and they managed very well. I think that the qualities of a good judge are the qualities of a good person. Are you curious? Are you ready to see what's in front of you, instead of "top down" where you judge from what you think is the right answer? Learning to see people from the ground up is key. Someone who is compassionate, intelligent, thoughtful. I am also a believer in literacy, so I think it helps to have someone who is well-read. And by "well-read" I mean not just reading the law and the cases, because that's a really narrow view of what law is. I mean reading novels, reading biographies, reading magazines, reading newspapers, going to movies. Seeing all varieties of movies, from great films to the less elegant. For me, movies, don't have to be good art; they have to be entertaining. But when I read books, I want good books. I have learned from good literature and biographies most of what I know about what people are like, because most of our own experiences are limited to what we've experienced ourselves. They don't fully explain the human experience.

I really think Canada is so lucky in the lawyers and the judges that we have. I am not unfamiliar with what goes on in other countries in the judiciary and in the profession, and I have from the day I graduated from law school been a romantic about our profession. I love being a lawyer. I am so proud of the judiciary and the lawyers. Whatever we've done, we seem to have done it pretty well.

Anil Kapoor: How do you see the role of your court? Is it an instrument of social change? Is it meant to be more passive? Is there anything to this debate between activist and non-activist judges?

Justice Abella: I never heard the expression "activist" or "politicization of the judiciary" until the 90's, and it was coming from a particular political perspective. In the 80's, when we first got the Charter of Rights and Freedoms, I think the public was really excited that we finally had a Supreme Court that was engaged in taking rights very seriously and took a muscular approach. Then the discourse changed in the 90's. This may have resulted from the different approaches taken by political leaders in the United States and Britain in the decade before. We had Thatcher and Reagan, both with a different view. So the kinds of things that the public had liked about the Court being muscular suddenly turned in to the Court being comprised of activists. I don't know what that means, "active" – after all, we actively decide legal issues. But the debate got particularly silly when they said that judges interpret law, they don't make the law. In 1929 when the Privy Council decided that the word "persons" in the *British North America Act* included women, that was an interpretation of a word and it was making law. Women became persons. ▷

It's just a pillow fight, and it's a pillow fight among people who, when they say "activist," or "political," or "politicians in robes," what they mean is "we don't like the decision." Because you can certainly have different approaches to what you see as the roles of the courts. But in a constitutional democracy – where the court has been assigned the role by the legislature to determine whether the legislature is compliant with the constitution – when you strike down laws or when you uphold them, you are making law. People agreeing or disagreeing with the result makes sense – it's what would expect. There is never a decision where the person who lost thinks the judge was right. In 100% of the cases, somebody inevitably thinks you got it wrong. But if you can show that the result has been reached with integrity and that you have considered the arguments and that this isn't just a flight of fancy, your decision is justifiable.

As judges we are not defined by which government or political party appointed us. I was appointed by the Conservatives and by the Liberals in my career. That is true for most of my colleagues. When I tell that to Americans, they're stunned. But that's our strength; we just decide the cases before us to the best of our ability. Sometimes we stretch the law, sometimes we keep it as it was, but in every case, each judge brings a solid understanding of what the role of a constitution is, the role of a statute is, and the role of law in a democracy is. Every one of us feels that we have a transcendent duty – not to public opinion, whatever that is, but to the public interest. I have never met a judge in this country who doesn't take that seriously – ever.

Anil Kapoor: What do you see is our greatest challenges going forward in the areas of civil liberties and human rights?

Justice Abella: In the 70s we were debating everything. We were just opening up. What do we do about language, what do we do about disabilities? What about equality for women? How do we start paying attention to our shocking conduct towards Indigenous people? That was all just starting. And people said are we really going to be able to do this? Then suddenly you had 11 women who have served on the Supreme Court of Canada and a female Chief Justice for 18 years, and now 40% of the judiciary is female. But we still have to take care of women in the profession to make sure we can hold on to them.

In the 80s the legal debate focussed on the Charter and how do we deal with rights and what are the respective roles of parliament, legislatures and judges? We worked that out. Then in the 90s . . . people were concerned about the Court's focus on the rights of the accused, but of course you *should* focus of the right of the accused.

So what do I see ahead? Well, for one, technology has produced enormous pressures on the legal system because we can't keep up with all of the changes, so we have to think about whether we hold on to basics or whether we need to adjust them, like privacy. Diversity, including religious diversity, what does inclusion mean? On what basis do we make sure that this country continues to keep allowing the mainstream to include as many as possible? All of those were issues when I started practicing law, but they are more intense now because the solutions seem elusive. They slip through our fingers and they get re-config-

ured into something different. What I do know is that given the quality of the people in the legal and judicial professions, the public servants, and the academics who think through these issues, we'll get there. I have absolute confidence that Canada has what it takes to keep democracy safe in its lawyers, judges, professors and parliamentarians. And I think that's what people want, so we'll get it.

Anil Kapoor: And finally, what's the future for you? What are you going to do?

Justice Abella: Hopefully see my grandchildren more. You know in all of the careers that I've had, what I have never said is, "What am I going to do next?" It just kind of happened, so hopefully things will continue to happen. I have a lot of books I want to finish. There are issues out there that I probably haven't even thought about yet. All I hope is it that my family can stay healthy and that we are able to enjoy each other and the things that we love to do together. In my family we have had a very lucky time since coming to Canada in 1950, I don't take a bit of it for granted. I just hope there is more of the same, but I don't presume it.

Brian Gover
Toronto, ON ■

EDITOR'S NOTE: Justice Rosalie Abella – "Rosie" to her many friends – has been a staunch friend of the College. In addition to her participation in various College sponsored Judicial Exchanges, Rosie has honored the College by agreeing to be a speaker at four separate National Meetings – once when she was on the Ontario Court of Appeal and three times as a Supreme Court Justice. Rosie keeps being asked to speak for the simple reason that she is one of the most entertaining speakers we have ever had. We suspect she will be asked to speak again.

DISCOVERING A SPECIAL TALENT THROUGH PRO BONO SERVICE TO OTHERS

EDITOR'S NOTE: WE TAKE IT AS A GIVEN THAT WE COULD THROW A DART AT THE BLUE BOOK AND WRITE AN ARTICLE ABOUT SOME REMARKABLE ACHIEVEMENT THAT RANDOMLY SELECTED FELLOW HAS ACCOMPLISHED. WE ALL HAVE GREAT STORIES, AND THERE ARE 5000 OF US, SO WE CAN'T TELL THEM ALL. BUT IN THE WORLD OF REMARKABLE, IT IS TRULY SPECIAL WHEN A FELLOW ACCOMPLISHES GREAT GOOD AT GREAT SACRIFICE, BY LABORING PRO BONO TO EXONERATE THE WRONGFULLY CONVICTED. THIS IS ONE OF THOSE STORIES.

"There is nothing more important to me as a lawyer than to do everything in my ability to see that truth and justice are served, and that innocent persons wrongfully convicted of serious crimes, who have no means to afford lawyers, are provided with competent legal assistance to correct the wrong." - Charlie Weiss

For decades, FACTL **Charlie Weiss** has been a highly skilled and nationally recognized trial lawyer in the St. Louis office of Bryan Cave Leighton and Paisner. But starting in 2006, Charlie discovered through his *pro bono* work that he had a special talent and ability when it came to representing wrongfully convicted and imprisoned individuals. For the past 15 years, Weiss has successfully exonerated several individuals whose lives were forever changed because of his unwavering determination to right wrongs and correct injustice when our legal system failed.

FACTL **Jim Wyrsch**, then Chair of the College's Access to Justice and Legal Services Committee, recruited Charlie in 2006 to represent Josh Kezer, convicted in 1994 by a Missouri jury in the 1992 murder of Angela Lawless. Kezer, only 19 years old at the time of his conviction, was sentenced to 60 years in prison.

The opportunity to represent Kezer arose when Rick Walter, newly-elected Sheriff of Scott County, Missouri, decided in 2006 to reopen the criminal

investigation of the murder. Sheriff Walter had been assigned to the murder investigation team as a young reserve deputy in 1992, but had always been skeptical of Kezer's guilt. When Weiss and his partner Stephen Snodgrass took on the *pro bono* representation of Kezer, he had already spent 12 years in prison.

Angela Lawless had been found shot dead in her car. There was no physical evidence of any kind linking Kezer to the crime. The police focused on Kezer only after jailhouse snitches, trying to get the State to go easy on their own cases, concocted a story about Kezer bragging to them at a party that he had killed Lawless.

Weiss and his team thoroughly investigated all aspects of the case. Their extensive work led to key prosecution witnesses recanting previously provided testimony and to the discovery of prosecutorial misconduct – exculpatory evidence pointing directly at prime suspects had been improperly withheld from the defense.

Following extensive discovery, an evidentiary *habeas corpus* hearing was held before Cole County Circuit Court Judge Richard Callahan, who concluded that "no reasonable juror would convict Kezer on the basis of the evidence now presented." Kezer was judicially declared innocent and walked out of prison in 2009, after being behind bars for close to 16 years. Kezer's story was subsequently featured on the TV show "48 Hours."

Left to Right — Judge Callahan, Josh Kezer, Sheriff Walter, Charlie Weiss

Forever grateful for his freedom, Kezer enthusiastically states: "Charlie is an incredible, humble person; more like a father to me than simply my lawyer. He has greatly impacted me, my family, and many others. He continues to be involved in my life in many ways. Charlie has this wonderful talent in this area of the law, which he probably never even realized he had until he got involved in my case. Charlie handles these kind of cases not for a victory trophy, but because of his desire to help others. He has inspired an entire generation of lawyers to handle one of these cases."

From that beginning, Charlie Weiss has gone on to obtain complete exoneration for three other individuals: George Allen, Jr. (2013)(30 years in prison); David Robinson (2018)(17 years in prison); and Donald "Doc" Nash (2020)(12 years in prison). Barry Scheck, the co-founder and co-director of The Innocence Project at the Benjamin N. Cardozo School of Law in New York, recounts that "Charlie has, for years, been a godsend to the innocence community; the one person in 'Big Law' that could always be counted on to do the right thing in the tough cases." Jim Wyrsch says of Charlie: "He and his colleagues worked on these cases *pro bono* and devoted an enormous amount of time and expense in their representation, while at the same time maintaining an outstanding nationwide civil litigation practice. Charlie is also someone who has given back to his profession. He has been, for instance, President of the Missouri Bar Association and received its prestigious Spurgeon Smithson Award. In connection with his work freeing the innocent, Charlie received the Missouri State Public Defender Director's Award in 2017 and the Sean O'Brian Freedom Award from the Midwest Innocence Project. In short, Charlie is a wonderful example of a lawyer who has exhibited the highest qualities of our profession."

As to Charlie's most recent success, Donald "Doc" Nash had been arrested and charged with brutally murdering his live-in girlfriend, Judy Spencer, 26 years after the crime. In 1982, Spencer had been strangled with a shoelace taken from one of her shoes and then shot in the neck with a shotgun through the shoelace. In 2008, after pressure from the victim's family to solve the murder, the Missouri Highway Patrol

Donald "Doc" Nash

performed DNA testing on some of the victim's clothing found at the crime scene and on her fingernails clipped at the autopsy and kept as evidence. Nash's DNA was found under her fingernails.

While at her girlfriend's apartment the night of her murder, the victim had washed her hair before going out by herself to some of the local bars. The "expert" lab technician for the Missouri Highway Patrol provided key trial testimony when she opined that the hair washing had a "great effect" in removing any previously existing DNA. The State used that testimony to convince the jury that Nash had to be the killer because only his DNA was found under the victim's fingernails at the time of the murder.

In 2012, two of the Sheriff's deputies who worked on the murder investigation and Nash's brother convinced Weiss and his colleagues Stephen Snodgrass and Jonathan Potts to represent Nash. That began an eight year ordeal for Weiss and his team as they faced several legal obstacles in both state and federal court.

In 2015, Weiss had the victim's shoe from which the shoestring used to strangle her had been taken tested for DNA. That showed an unidentified male's DNA and excluded Nash. Furthermore, in a deposition in 2017, the highway patrol's lab technician retracted her previous speculative trial opinion and now testified that she could no longer state that the hair washing would have a "great effect" on removing pre-existing DNA. Because of the work done by Charlie and his team, there was simply no evidence of any kind linking Nash to this crime.

Following a three-day trial on Nash's writ of *habeas corpus*, the appointed Special Master issued a 226 page report discrediting the State's junk science regarding the hair washing theory and declared Nash "actually innocent." At a special session of the Missouri Supreme Court held on July 3, 2020, a national holiday that year, the Court declared that Nash had established his gateway innocence claim and vacated the 2008 murder conviction for which he was serving a life sentence without parole, allowing Nash to walk out of the state prison the following day at the age of 78 after wrongfully serving 12 years behind bars.

Nash became only the fifth person in Missouri history to win a declaration of his innocence following a wrongful conviction. Three of those five were represented by Charlie Weiss and his team.

Despite the decision from the Missouri Supreme Court, the prosecution surprisingly indicated it planned to retry Nash. However, the State eventually dismissed with prejudice all charges against Nash on October 9, 2020, ten days before the scheduled new trial, bringing Nash's nightmare to an end. Weiss states: "Like all functions administered by human beings, our criminal justice system is far from perfect and innocent persons are wrongfully convicted and committed to long sentences in prison. As Justice Marshall noted in his concurring opinion in *Furman v Georgia*, 408 U.S. 238, 367 (1972), 'No matter how careful our courts are, the possibility of perjured testimony, mistakes, honest testimony and human error remain all too real.'" Weiss additionally notes: "Our justice system provides a remedy in the form of a writ of *habeas corpus* to correct these wrongs and to achieve truth and justice."

The *pro bono* cases handled by Charlie highlighted here presented significant factual and legal challenges at every step of the legal process. But as Justice Scalia stated in *Kansas v, Marsh*, 548 U.S. 163 (2006): "[r]eversal of an erroneous conviction…determines not the failure of the system, but its success." Weiss has been repeatedly able to turn years of failure of our legal system into a final success for his clients. "We took on these cases simply because each of these exonerees was able to persuade us of his innocence, despite knowing we could toil for years with uncertain odds of success. It is very gratifying for a lawyer to see his or her client being declared innocent and watching the client walk out of prison into the arms of his or her family."

For Charlie, it is that gratification and knowing that he has used his God-given talents and abilities as a lawyer to the fullest which compel him to do what he does for those in need.

Mark C. Surprenant
New Orleans, Louisiana ■

HEROES AMONG US
JOHN H. HALL

It has become a regular *Journal* feature to tell the stories of the heroes among us, the stories of Fellows who wore the uniform, who fought and bled to keep us all safe. This is one of those stories. If you have one, please share it with us . . .

Throughout World War II, William Allen Ward wrote a series of brief stories entitled "Battle Action" for the Dallas Morning News. On February 24, 1945, he wrote:

On Leyte, where death hid behind every bush, Pfc. John Hall of Dallas learned that the duties of a ration-carrier are far from safe and easy. Up in the hills, the Japanese had retreated for a last-ditch stand and Americans of the 112th Calvary regiment (unmounted) were attacking. Hall crawled for a while, then raised to his feet and instantly a sniper's bullet whizzed past, missing him by an inch. Again, Hall started crawling but he was making slow progress and the rations were badly needed. So Hall exposed himself again and when the sniper fired and missed, Hall hurled a grenade and there was one less sniper. But other snipers were hidden in the underbrush as Hall and his comrades moved forward. Hall suspected something when he heard a noise and immediately hurled a grenade. Other carriers opened fire with machine guns and the ambushers were slain. Then the carriers went up the muddy road to the positions of the dismounted cavalrymen.

I had the privilege to practice law with John Hall for more than 20 years at Strasburger & Price, LLP, now Clark Hill Strasburger. When I joined the firm out of law school in 1973 John was a well-known and accomplished trial lawyer. He was already a Fellow of the American College of Trial Lawyers, having been inducted in 1970. John freely shared his legal knowledge and mentored the young lawyers in the firm but rarely spoke of his service in the Pacific during World War II. John was modest to a fault, always deflecting credit to others. But, fortunately, he shared stories with his son John Hall II.

John grew up in Dallas. He attended The University of the South (Sewanee, TN) for one semester in the fall of 1943 – knowing that he would be drafted the following Spring. He recalled "it was not as big a deal as you would think, because everyone was having to do it. I was certainly not alone, and it was just what we did."

Shortly after John's arrival for active duty in April of 1944, the 112th was assigned to the 32nd Infantry Division in Aitape, Papua New Guinea. From July 10 to August 15, 1944 the regiment fought elements of six Japanese regiments in the defense of the Afua area in the Battle of Driniumor River (see the Sidebar); the regiment was credited with killing 1,600 Japanese soldiers.

In October 1944, the newly-activated *112th Regimental Combat Team* (RCT) consisting of the 112th Cavalry Regiment and the 148th Field Artillery Battalion (105MM Howitzer), departed Aitape for Leyte in the Philippines. John was on an Australian attack transport to Leyte and went ashore in one of the early assault waves in November of 1944.

The transport had 5 tiers of "bunks" which were essentially pieces of canvas tied to a rectangular pipe frame. The men wore "big bulky kapok life jackets" most of the time. Two "meals" were served daily, typically "raw bacon swimming in a sea of beans." The ship rolled constantly. Sea sickness was the main enemy while at sea. John would chuckle when remembering an Aussie broadcaster sounding like he was describing a rugby game or other contest, such as "the torpedo which went astern of our ship and the plane which tried to hit us with it being shot down by the navy ship astern . . . "

John was a machine gunner on the Philippine Islands for 15 months. Soldiers carried 40-pound machine guns and other gear while slopping through mud and swampy conditions. Fond memories these were not.

On Leyte, the 112th Cavalry Regiment was immediately attached to the 1st Cavalry division, where it fought in the Mt. Minoro area, and assisted in the clearing of the Ormoc Road and the capture of Lonoy and Kananga. Still attached to the 1st Cavalry division, the 112th RCT then embarked for Luzon in January of 1945.

On January 27, 1945 the 112th RCT was temporarily placed in 6th Army reserve. Under successive commands of the XIV and XI Corps, the 112th RCT carried out a series of security, screening and reconnaissance missions on the 6th Army's left flank from February 9 to June 30 of 1945.

In May of 1945, John was asked to join the Honor Guard for General Douglas MacArthur and his family. The Honor Guard was formed at that time for the purpose of guarding General MacArthur's headquarters and residence during World War II. It later served the General and his family until MacArthur was relieved of his command in April 1951 during the Korean War. The original members of the Honor Guard were chosen from each of the Divisions of the U.S. Army in the Pacific theater, many of whom were ▷

decorated combat veterans. For acceptance into the Honor Guard, the men had to meet criteria very similar to the requirements for Officer Candidate School.

The unit maintained a strength of about 200 officers and men. One half guarded the General's headquarters; the other half where John served guarded the MacArthur family residence at the United States Embassy compound. Because of their proximity to MacArthur, the men of the Honor Guard were not only witnesses to major events in history, but also in some instances were themselves actually a part of those events. Members of the Honor Guard are visible in many of the hundreds of photographs taken of General MacArthur during the Occupation of Japan.

John's favorite photo of General MacArthur is one where he gave his famous left-handed salute. While it might seem that such a position would be a stroke of good fortune, it pained John greatly to be separated from his team. It was a difficult transition from combat to standing by the pool at the MacArthur compound watching "Little Arthur" swim.

John Hall was honorably discharged on January 11, 1946, with 4 Bronze Stars.

John never received an undergraduate degree but was allowed to go straight into law school after his military service. He attended SMU Law School and was called "the kid" by his classmates, being 2-3 years younger than most of them.

John's experience in the war had a lot to do with his approach to practicing law. He was known as someone who was always prepared, and his success was driven largely by fear of letting someone down. He seldom did.

After graduating from SMU Law School in 1949, John moved to West Texas. He was working for a small firm in Big Spring when Henry Strasburger (considered by many at that time to be the best trial lawyer in Texas) approached John in the lobby of a hotel there, asking if he wanted to come to Dallas. John was overwhelmed. He often recalled that he had many doubts as to whether he deserved such a great opportunity. John spent every day of his career doing his best to live up to that trust. John eventually became know as a "lawyer's lawyer," being one of the first lawyers in Texas to defend other lawyers when they were sued.

John received many honors during his career, but no award meant more to him than becoming a Fellow in the College. Most certainly it was because the qualifications to become a Fellow of the College – only the best trial lawyers who were also ethical and collegial – were the same qualities that he demanded of himself and others in his career.

John retired from the firm on January 1, 1994. He passed away at the age of 90 on February 2, 2016. He was a true hero in many ways to those who were fortunate enough to know him.

David Kitner
Dallas, TX ■

THE BATTLE OF DRINIUMOR RIVER

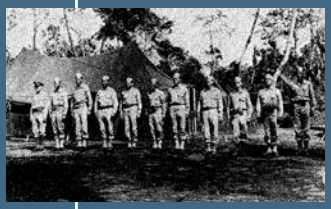
In 1942, the Japanese occupied northern New Guinea as part of their general advance south. On April 22, 1944, as part of a general advance towards the Philippines, US Army forces landed in the Aitape region, bypassing the strong Japanese positions located around Wewak and Hansa Bay and cutting off approximately 30,000 to 35,000 men from the Japanese 18th Army.

The Driniumor River runs roughly 20 miles east of Aitape and 70 miles west of Wewak. Intelligence indicated that the 18th Army was approaching the Driniumor (referred to by the Japanese the *Hanto*) with the intention of breaking through the Allied line and retaking Aitape. In response, in late June, the Allies began moving troops, including the 112th Cavalry Regiment, into the area to guard Aitape's eastern flank on the line of Driniumor River. Despite these preparations, the Allied intelligence picture was confusing and contradictory. The 18th Army was reported to be in dire supply, living on half-rations and low on ammunition. General Douglas MacArthur's chief of intelligence, Brigadier General Charles A. Willoughby, believed that the Japanese were incapable of conducting an attack. So when the attack began the Americans were taken by surprise.

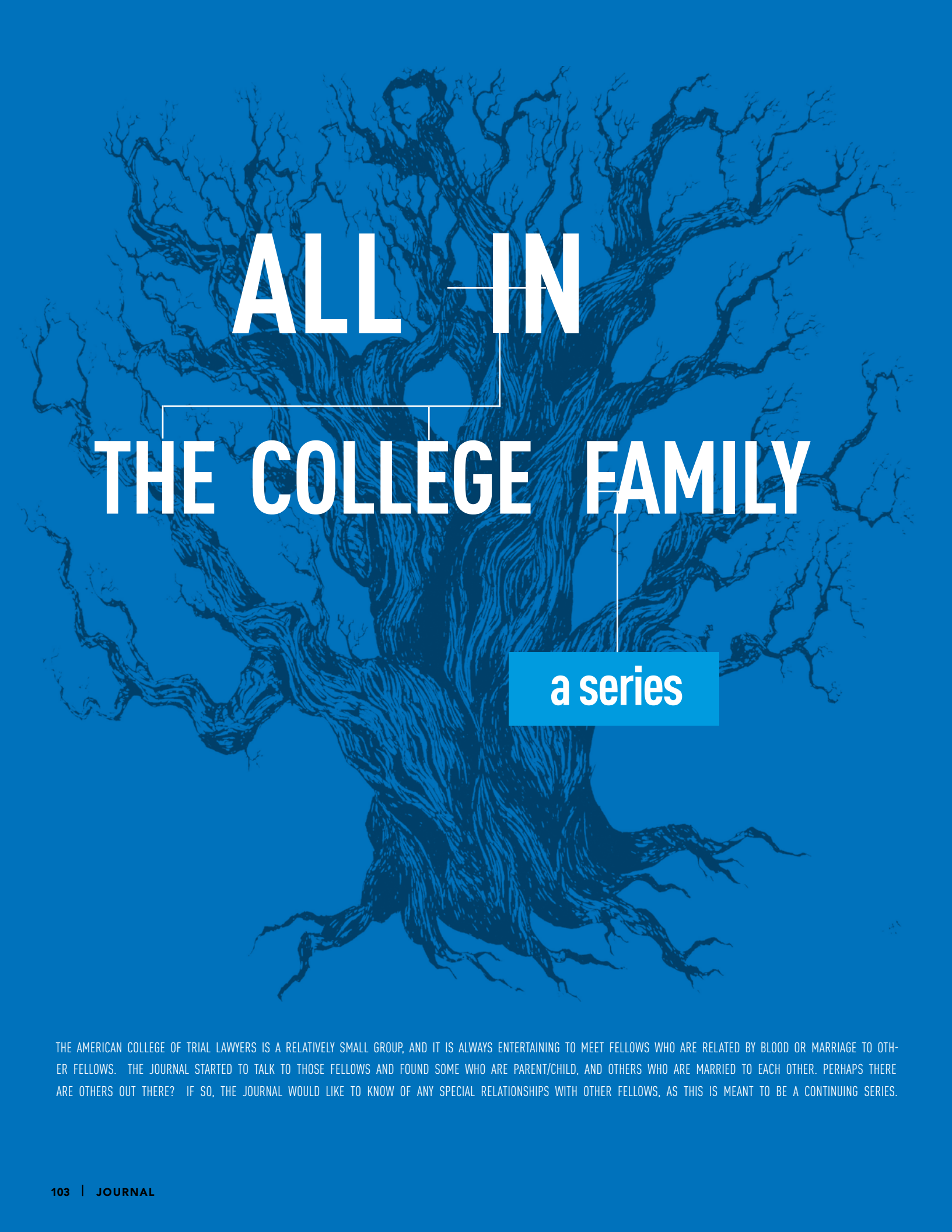
On the night of July 10, following a five-minute artillery bombardment, an assault force of around 10,000 Japanese swarmed across the Driniumor. The attack was poorly coordinated, being hampered by the terrain. The Japanese attack plan was to have three regiments — the 78th, 80th and the 237t — attack simultaneously in a contiguous line, but the 78th launched their assault twenty minutes early and the 237th was two hours behind. By 03:00 hours on July 11, the assault had gained only about 1,300 yards. The Allies' massed firepower inflicted heavy casualties on the assaulting Japanese troops. Nevertheless, the Japanese troops forced a major breach in the American line and US forces began withdrawing to delaying positions about 3 miles west of the river to prevent further Japanese advances. But the Japanese were unable to take full advantage of their initial success due to supply and communications problems. On July 13, US forces counterattacked and restored their line.

The Japanese launched a renewed attack on July 15, resulting in heavy clashes with John Hall's 112th Cavalry. The fighting continued throughout July as platoon/troop, company/squadron and battalion-sized units clashed in the jungle and fighting often devolved into hand-to-hand combat.

By the beginning of August, the Japanese drive had foundered and they were pushed back east over the Driniumor. By August 4, the Japanese commander ordered a complete withdrawal towards Wewak, although fighting continued until August 10 as US troops harried the Japanese rearguard. The battle was officially declared over on 25 August.



Four US soldiers were posthumously awarded the Medal of Honor for acts of outstanding valor during the battle. The Americans suffered almost 3,000 casualties – 440 killed, 2,550 wounded, 10 missing – while the Japanese lost 8,000–10,000 men (including non-battle casualties due to starvation and disease). Of the US units involved, the 112th Cavalry suffered some of the heaviest casualties.



ALL IN THE COLLEGE FAMILY

a series

THE AMERICAN COLLEGE OF TRIAL LAWYERS IS A RELATIVELY SMALL GROUP, AND IT IS ALWAYS ENTERTAINING TO MEET FELLOWS WHO ARE RELATED BY BLOOD OR MARRIAGE TO OTHER FELLOWS. THE JOURNAL STARTED TO TALK TO THOSE FELLOWS AND FOUND SOME WHO ARE PARENT/CHILD, AND OTHERS WHO ARE MARRIED TO EACH OTHER. PERHAPS THERE ARE OTHERS OUT THERE? IF SO, THE JOURNAL WOULD LIKE TO KNOW OF ANY SPECIAL RELATIONSHIPS WITH OTHER FELLOWS, AS THIS IS MEANT TO BE A CONTINUING SERIES.

HON. SUZANNE COTE AND GERALD TREMBLAY

Although neither was introduced by their family members to the law as a chosen profession, it was a natural progression for Canadian Supreme Court Justice Suzanne Cote ('05) and Gerald R. Tremblay ('88). They seem a perfect match for each other in purpose, passion and personality. Both have roots in rural Quebec (Gerald from Arvida, in the Saguenay-Lac-Saint Jean region, Suzanne from Cloridorme, in the Gaspe Peninsula). Both eventually migrated to Montreal.

Suzanne is the only current Justice of the United States or Canada Supreme Court who did **not** receive Honorary Fellowship in the American College of Trial Lawyers. Instead, she earned her Fellowship the old-fashioned way, as an exceptional trial lawyer. She was inducted in 2005, after first attending a number of College meetings as Gerald's spouse. She was appointed a Justice to the Canadian Supreme Court in November 2014.

Before Gerald settled on the law as a career, he spent three years in seminary preparing to become a priest. But, he says wryly, he was unable to embrace one key element of the priesthood – celibacy. His guidance counsellor suggested he study law, since he liked to communicate, although he very nearly chose a path of science, or perhaps philosophy. He loved philosophy: "Where do we come from? What's the real meaning of life? I never stopped talking about that." Gerald completed law school at the University of Ottawa and was admitted to the Quebec bar in 1968. He is currently counsel for McCarthy Tetrault's litigation group in Montreal, where he focuses on civil, corporate, commercial and environmental law, as well as class actions, constitutional and administrative law litigation.

Gerald became a Member of the Order of Canada in 2003, which recognizes outstanding achievement, dedication to the community, and service to the nation. He has been generous with his time, involved in the Canadian National Institute for the Blind (president in 2003 and a member of its board of directors for many years), as well as the Fondation du Theatre Jean Duceppe and CARE Canada.

Suzanne decided she wanted to study law when she was quite young, after reading about high-profile criminal cases in newspapers in Gaspe. She was entranced by the stories and started law school, thinking that she would become a notary, as she was very shy. Her professors dissuaded her from the notarial path, telling her this was not her personality. She said: "But I am so shy." They told her she could get over that, so she did, and ultimately became a litigator. But Suzanne's career plan was to cease the practice of law at the age of 55, and return to school to become a doctor.

Suzanne completed law school at University Laval in Quebec City, and was called to the bar in 1981. She began practicing in Gaspe, but after about eight years, travelled to Montreal where she quickly rose to become Head of litigation at Strikeman Elliott LLP; she was recruited to Ostler, Hoskin & Harcourt LLP, where she also became Head of litigation at the Montreal office. Not wanting to leave a new job so quickly, she put her plan to become a doctor on hold. Then, at age 56, she was called to the Supreme Court. And the rest is history.

Gerald also has a history with the Supreme Court of Canada, as he worked as the very first law clerk at the Court when he completed law school. He then worked for eight years at Stikeman Elliott, before joining McCarthy Tetrault. Several years after he had left Stikeman, and shortly after Suzanne started there, her senior partner asked her to represent a corporation that was a co-defendant in a multi-defendant lawsuit. Gerald was representing another company, and leading the defense.

The more senior defense counsel split the work, with each taking a particular question of law; they assigned a minor point to Suzanne. At the hearing, when it was Suzanne's turn to argue her minor point, Gerald recalls thinking that he was glad she was doing the argument because he didn't believe in it. She started her presentation, and because Gerald was nearby, he tugged on her robe, saying "I can't believe you are arguing that." She ignored him and continued. The case was finally taken under advisement and when the written judgment was received, ▷

Gerald recounts, the senior lawyers all lost on their issues. The only prevailing point was the one Suzanne had presented. Gerald added that "she's always right, whether she dissents, or is in the majority."

Although Suzanne and Gerald worked together for the two to three years the matter proceeded through the courts, they did not have a personal relationship during that time. Suzanne says Gerald would frequently invite her to dinner, but "I refused, because I knew the day I said yes, it would be done." Finally, after about three years, because he was so insistent, she relented and said "OK, let's have dinner." They celebrate that date as their wedding anniversary, although they did not share a roof until a few years later.

Suzanne is quick to explain her attraction to Gerald: "his brains." She says "he is a great advocate; his advocacy skills are amazing. All judges, when he is in front of them, are all smiling, because he has a magnificent sense of humor." She says she has to do meticulous work, but Gerald sees the big picture. And, in all the years they have shared, "I have never heard him say a bad thing about anyone." When she has sometimes had some negative thoughts about someone, Gerald reminds her that she needs to remember "We are all passengers on the same boat. So, let's try to have a wonderful trip."

Plus, he was "very seducing and charming." After all their time together, she says "it is always a celebration when I come back and see him, we are always happy to see each other." Gerald notes that they two "compliment each other." She is not only right all of the time, she is meticulous. She reads the files inside and out because she really believes the devil is in the details.

Some 30 years later, they are still not officially married. Past ACTL President **Joan Lukey** introduced Suzanne at a College meeting in 2016 and mentioned that Suzanne was there with her husband, the legendary Gerald R. Tremblay. When Suzanne took the podium, she said she needed to set the record straight: "Mr. Tremblay is not my husband. In fact, he has been my 'eternal fiancé' for the last 25 years. Although he is excellent in making decisions in his professional life, he is quite slow in the decision-making process in his personal life – he has never proposed. So, we are not married, although we have been living together since 1999."

****

[EDITOR'S NOTE: A website maintained by the Government of Quebec notes that "It is now common in our society for two people to live together as a couple without being married or in a civil union. Their choice of lifestyle is known as a *de facto* union." But we are confident that thirty-plus years of living together is a *real* marriage.]

When Suzanne received a phone call from the Prime Minister about her possible appointment to the Supreme Court, she at first thought it was a joke. A gentleman from the Department of Justice called and asked if she was aware she was on a short list. She thought he was calling to hire her for a file; she responded positively as she was very happy to be on a short list without having to go through a beauty contest (the usual process for file assignments from the Crown). He responded that there was no file – the short list was for the Supreme Court of Canada. She asked to think about the offer overnight and then called him the next day. He explained there were five names on the list, and she, thinking her risk of appointment was zero, agreed to remain on the list. Six days later, he called back, to ask if she would take a call from the Prime Minister of Canada.

Did she consider rejecting the offer? Yes, but when she talked to Gerald, he asked "Have you lost your mind? You are a lawyer in private practice. Unless you have cancer in the terminal phase, you have no option but acceptance." She took his advice and was the first woman appointed to the Canadian Supreme Court directly from private practice. Although it was a huge change from a busy private practice to the appellate court setting, she believes it is a very great privilege to make such important decisions having such an impact on the day-to-day lives of Canadians.

The appointment was a big change for Gerald as well. He wanted to continue to practice law in Montreal, but now had to exclude fund raising, balls, and many public functions. And after living as a couple since 1999, she had to move her permanent residence to Ottawa, so there are "moments" when they are not together. Gerald compensates by trying to go to Ottawa as much as he can, and when she can return to Montreal, she does. He told her from the beginning that "I am a bit older than you, whenever you need me, I will be there to support you." And he has.

One of the first occasions when he was present was the private ceremony where Suzanne was sworn in, prior to the official ceremony. He said he was in the room with all of the other members of the Court, and someone asked Gerald if he had anything to say. Gerald said he found the ceremony very moving, as he himself had started his career as a law clerk in the Supreme Court, and began expounding upon the judges on the Court at that time. Everyone was laughing, until he was stopped by Suzanne: "Gerald, it's not a joint appointment."

Gerald's philosophical roots are ever-evident: "I have never stopped talking about that. There's one aspect of me. I love my fellow human beings. What are we doing now? You could have the old Encyclopedia Britannica stored on the head of a pin. As much space as there is between a nucleus and an electron, there is between the earth and the sun. Who are we in this whole damn thing that keeps evolving? I keep thinking of these basic things and empathy for my fellow human beings."

Suzanne says that when Gerald is discussing these concerns with her, "where we are

from and where we are going, sometimes I get very scared, so I say, stop the conversation, and I am going to clean the house. It's more pragmatic because otherwise, we will go crazy because we can't answer all those questions."

The two liked to travel before Covid limited them, but they plan to travel again in the future. They also enjoy cooking (Suzanne), entertaining (both) and gardening (Suzanne). She says they are not complicated people. They like to listen to music; they like to dance. Gerald describes their mutual interest in hosting people. His favorite activity is to have 10 people at their dinner table and have interesting conversations on various topics. "Suzanne will talk about gardening, and I will speak about where we come from."

As a result of her position on the Canada Supreme Court, Suzanne was invited to assist in adjudicating a mock trial at an annual Shakespeare Theatre festival in DC in 2018 that was hosted by the Shakespeare Theatre Company. The theatre presented "Camelot," and the following day, the mock trial based on the play was presented. Suzanne was one of the jurists, along with US Supreme Court Justices Elena Kegan, Ruth Bader Ginsburg, and Stephen Breyer, as well as DC Circuit Court Judge Patricia Millett. She treasures the photograph taken that day of herself and Justice Ginsburg, and said they had a lovely, long conversation over dinner.

The College is important to both Suzanne and Gerald. Gerald says that, for him, the brotherhood has been fascinating; he loves it. And he is always impressed by the quality of the meetings and the writings produced by the College. Suzanne would tell her fellow Fellows: "Don't be shy of giving your opinions on – sometimes -- very controversial and difficult issues. Please continue to believe in ideals and resist external pressures. It is part of integrity to continue to believe in ideals and not to be shy of it, to keep that independence, to resist external pressures, and to give what is really a true opinion." That is what she has always admired about the College.

Carey Matovich
Billings, MT ■

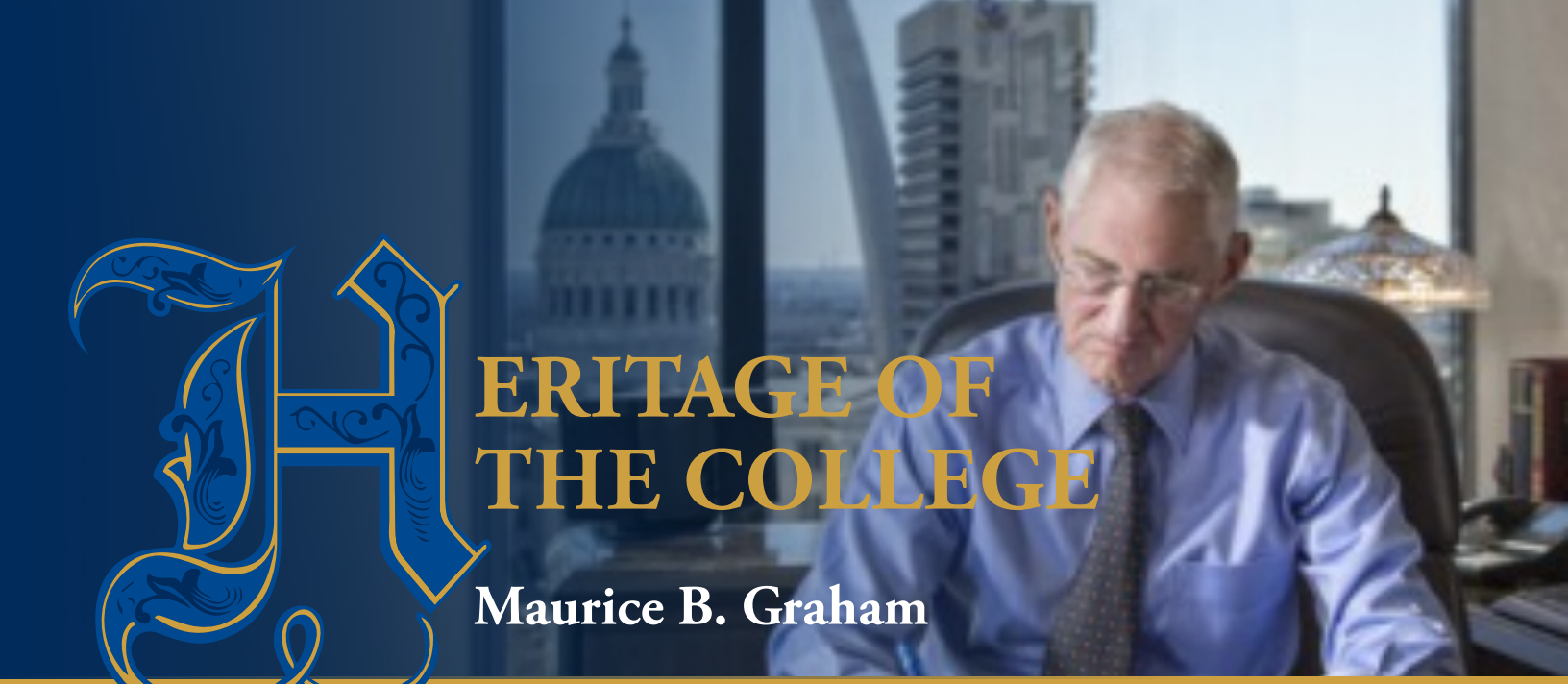
sidebar

THE SUPREME COURT OF CANADA

The Supreme Court of Canada is the only bilingual (French and English) and bijural (two legal systems) Supreme Court in the world. It handles and decides cases in both French and English, with the assistance of a simultaneous translation application. Although created in 1875, it did not become the final court of appeal in Canada until 1949. Before then, decisions could be appealed to the prive counsel in London.

The Court has nine justices, with each appointed until age 75. Currently, there are four women and five men on the court. When Justice Cote was inducted into the Court, then Chief Justice Beverly McLachlin remarked "Four down, five to go."

The two major legal traditions before the Court include common law matters, based on English law, which is applied in all provinces and territories except for private law matters in Quebec, and Quebec civil law, which is based on French civil law and applies to private law matters in Quebec (such as contracts and civil liability).



HERITAGE OF THE COLLEGE

Maurice B. Graham

The mandate of the College's Heritage Committee is, in part, to create and maintain a permanent archival facility to preserve the history of the College by conducting videotaped interviews of Past Presidents and other senior Fellows. The full video interviews will be made available as they are finalized via links on the College's website. As a regular *Journal* feature, we highlight an abridged version of one such interview.

One of the most famous golf courses in the world is the Players Championship at TPC Sawgrass in Ponte Verda Beach, Florida. Specifically, Hole 17, the "Island Green," is the most recognizable. On Saturday, March 10, 2001, Tiger Woods slammed his iron shot onto the edge of the green, almost going into the water. The ball was more than 60 feet away from the downhill pin with several impossible breaks contoured onto the green, making a successful putt nearly impossible.

But Tiger made that put. It is still remembered as one of the most memorable events of Tiger Woods' career, in part due to the announcer Gary Koch's iconic call. After Tiger stroked the ball, Koch incanted "Better than most . . . Better than most . . . Better than most . . . " as the ball gracefully traversed 60 feet to drop into the hole.

Maurice Graham, better known as Marcie, is better than most. Over the past nearly sixty years, he has been one of the premier trial lawyers in Missouri. Marcie earned his undergraduate degree from Central Methodist University and his law degree from the University of Missouri Law School. He is President of the St. Louis Law Firm, Gray, Ritter & Graham, P.C.

Marcie commenced his career in 1963. He has practiced in Missouri, Montana, Oklahoma, Arkansas, South Carolina, Illinois, Iowa, Texas, Arizona, and New Mexico. His practice includes major "bet the company" litigation matters, complicated civil litigation, and major malpractice matters, in which he has secured some of the highest jury awards in the State of Missouri.

While Marcie has had an accomplished history of substantial litigation victories, the story he likes the most is his very first trial. As a young lawyer, he began his practice in Southeast Missouri. For some reason, there were anglers in Southeast Missouri who found trying to catch "rough fish" more fun than fly fishing on the Madison River in Montana. Rough fish are defined as fish not common-

ly eaten and not desirable. Nevertheless, in Southeast Missouri there was a strange affection for rough fish. There was even a rough fish season. Rough fish are not caught with a fly rod, nor a rod and reel, but instead by a process called "gigging," using a multiprong spear to spear the fish. For some unknown reason, the local conservation officer became concerned about out of season "gigging" for rough fish in Southeast Missouri. An out of season gigging angler was arrested and Marcie was assigned to prosecute. The local Rough Fish Gigging Association took the matter very seriously and raised substantial funds to hire an expensive attorney to represent the defendant. Marcie looks back at the conviction of the gigging angler as one of the major victories of his life.

In 1988, Marcie was inducted into the American College of Trial Lawyers. At that time, there had previously only been two Southeast Missouri fellows in the College, Marcie made the third. Marcie, early in his career was a defense lawyer in civil matters, but determined to focus on plaintiff work. He moved his practice to St. Louis and became a member of Gray, Ritter, & Graham, a firm described as doing first rate work with first rate people.

Marcie was a member of the Missouri Bar Board of Governors from 1980 through 1989 and was the President of the Missouri Bar Association for 1988 and 1989. He has been the ABA delegate for Missouri. He has been Chair of the Supreme Court Advisory Committee of Missouri, which oversees lawyer discipline. Marcie has been active in the College having served as the State Chair of the American College of Trial Lawyers for Missouri.

Marcie remains actively involved with the University of Missouri Law School. He has served as Chairman of the University of Missouri Law School's $17 million endowment campaign. He has been honored at the law school with its distinguished Alumni Award. He has received a Citation of Merit from the Law School in 1988.

Marcie is adamant of the importance of the College and its impact on his life as a lawyer. He believes that the College and the Fellows in the College have made him a better lawyer as he has been fortunate to be surrounded by excellent role models within the College.

Marcie's nearly 60-year practice reflects a lawyer living the College's Codes of Pretrial and Trial Conduct. Marcie points out that a Fellow who follows the College's Codes of Pretrial and Trial Conduct will not only have an effect on young Fellows, but non-fellows as well.

Marcie's law firm, Gray, Ritter & Graham, sponsors a symposium to train young lawyers. It is free of charge and open to all who might be interested. In this program, Marcie lectures on the ACTL's Codes of Pretrial and Trial Conduct. In an interview with Heritage Committee Vice Chair Kent Hyde of Springfield, Missouri, Marcie shared three things that he would advise to other lawyers.

Marcie recognizes the number of trials is diminishing. It's vitally important that a young lawyer starting a practice who wants to be a trial lawyer find a mentor or mentors. Marcie next urges any young lawyer to be involved in the profession. A lot will be gained from that experience. His final point is to make sure the client knows how much you appreciate the opportunity to represent them. Marcie sums it up, "The client doesn't care how much you know; the client only cares how much you care." Make sure the client understands they are a part of the team and at the end of the first meeting with the client, how important it is to make sure to shake the hand of the client and tell them what an honor it is to represent them.

As to any future retirement, which does not seem to be imminent, Marcie points out that he stays very fit and is very careful with nutrition, but he understands that he would rather retire one year early than one year late. In recent years, Marcie secured the largest medical malpractice plaintiff's award in St. Louis County history.

At the end of the interview, Kent Hyde asked Marcie how he balanced his life having a son and a long-time marriage to Edna? Marcie mused a bit that he had to work hard and that the law required a lot of time. Marcie pointed out that he really had no hobbies; his only interest was his family and practicing the law. Nevertheless, he concluded that looking back on how he did as a father and a husband, he thought he did "Better than most."

Just like Gary Koch called the great Tiger Wood's incredible putt was "Better than most," it's clear that Marcie Graham's career is certainly "better than most."

Ron McLean
Fargo, ND

■

THE ACCESS TO JUSTICE DISTINGUISHED PRO BONO FELLOWS PROGRAM WELCOMES ITS NEWEST FELLOW

THE COLLEGE'S MISSION STATEMENT EXPRESSLY ARTICULATES ITS GOAL TO MAINTAIN AND IMPROVE THE ADMINISTRATION OF JUSTICE BY SUPPORTING ACCESS TO JUSTICE AND THE FAIR AND JUST REPRESENTATION OF ALL PARTIES TO LEGAL PROCEEDINGS. THE ACCESS TO JUSTICE DISTINGUISHED PRO BONO FELLOWS PROGRAM MAKES THE MISSION STATEMENT MORE THAN ASPIRATIONAL: IT RECOGNIZES, IN TANGIBLE WAYS, THAT TRIAL LAWYERS CAN ENHANCE HUMAN DIGNITY WHEN THEY WORK TO IMPROVE OR DELIVER LEGAL SERVICES TO THE POOR, THE UNDERREPRESENTED, AND THE DISADVANTAGED IN OUR TWO COUNTRIES. APPROVED IN 2018 AS A ONE-YEAR PILOT AND MADE PERMANENT IN 2019, THE PURPOSE OF THE PROGRAM IS TO IDENTIFY AND PUT A SPOTLIGHT ON FELLOWS OF THE COLLEGE WHO ARE RECOGNIZED AND RESPECTED LEADERS IN THEIR OWN COMMUNITIES WHO COMMIT TO DEVOTE AT LEAST 250 HOURS A YEAR IN SIGNIFICANT ACCESS TO JUSTICE WORK. WE SHINE THAT LIGHT NOT SIMPLY ON OUR FELLOWS, BUT MORE IMPORTANTLY ON THE OFTEN UNDERFUNDED AND UNDERSTAFFED LEGAL SERVICE PROVIDERS WITH WHOM EACH FELLOW IS PARTNERED WHO ARE THE BACKBONE OF ACCESS TO JUSTICE.

We welcome the 17th Fellow to be designated a Distinguished Pro Bono Fellow, David A. Barry.

David received his B.A. from Yale University, his M.A. from Columbia University, and his L.L.B. from Harvard Law School. A Fellow of the ACTL since 1991, David served as Chair of the Emil Gumpert Award Committee from 2015 to 2017 and is well-known throughout the College. David retired from the Boston firm of Sugarman, Rogers, Barshak & Cohen, P.C. on December 31, 2020.

David now spends a considerable amount of his time in *pro bono* work. In particular, David is partnering with *Discovering Justice*, a non-profit located in Massachusetts, whose mission "brings students and communities together to examine the workings of the justice system, explore the ideals of justice, and prepare them to engage in our democracy.»

As Luke Matys, Senior Education Associate at *Discovering Justice*, explains: "David's role consists of creating new cases for our middle school trial and appellate programs; building and leading a team of volunteer attorneys to assist the students in arguing their case in front of a judge and jury at the end of a ten week program; recruiting new legal mentors to grow our volunteer base and expand our impact across the state of Massachusetts; and overseeing and revising the legal and administrative requirements for our programs to make sure our forms and policies are up to date and consistent with our organizational goals."

Through his partnership with *Discovering Justice*, David is making a significant difference in the lives of many middle school students who are being introduced to our legal system through their active participation in mock trial and mock appellate arguments: "At the beginning of my fellowship, I observed middle schoolers preparing for their mock trials under the tutelage of legal mentors recruited from local law firms and presided over by one of our U.S. District Court judges. The kids were enthusiastic and unbelievably impressive. I then served as a legal mentor in the mock appeal program following the completion of the mock trial program. Once again, the kids are amazing and seem to love learning about or 'discovering justice.' During the program, I have two sessions per week with the students. We have three or four legal mentors in each session and I have recruited three of my former colleagues at Sugarman Rogers to be legal mentors. Finally, I've spent a fair amount of time developing cases for use in future mock trial and appeal programs. It's more challenging than I first imagined because the cases need to satisfy several different criteria like raising important social issues, being interesting to and understandable by middle school kids, and having a factual dispute that can be credibly (and comfortably!) argued by both sides. Several cases I've written have passed the first hurdle and may be used in future trials and appeals."

Because of David Barry's *pro bono* service, these *Discovering Justice* students are receiving a valuable education in civics and about our legal justice system at a young age. That should serve them and our society well in many ways for the rest of their lives.

Mark C. Surprenant
New Orleans, Louisiana

■

FACING OUR PAST: MEET THE AMEN PROJECT OF THE CENTER FOR DEATH PENALTY LITIGATION

THE YEARS 2020 AND 2021 WILL BE ETCHED INTO OUR NATIONAL PSYCHE FOR AS LONG AS ANYONE ALIVE TODAY WALKS THE FACE OF THE PLANET. IN 2020, IN ONE PAINFUL YEAR, WE CONTEMPORANEOUSLY CONFRONTED THE ONSET OF THE PANDEMIC AND A JARRING NATIONAL EXPOSURE TO RACIAL INEQUITIES. IN 2021, HOPE FINALLY GLIMMERED FOR A PATH TO HERD IMMUNITY, AND – OF GREATER IMPORTANCE TO MY MESSAGE TODAY – OUR REELING NATION TOOK THE FIRST STEP IN THE VERY LONG JOURNEY TOWARD RACIAL RECONCILIATION.

The Trustees of your Foundation are gratified that our first major grant in 2021 after the Emil Gumpert Award went to an inspiring organization that is addressing the issue of race in our criminal justice system. AMEN (**A**toning, **M**aking Amends, and **EN**ding Race Discrimination) was a previously unfunded program proposed by the Center for Death Penalty Litigation (CDPL), a non-profit law firm in Durham, North Carolina. FACTL **Donald Beskind** is the Board President of the CDPL and one of the grant sponsors of AMEN, so kudos to him. CDPL's application noted that the Foundation was being offered "an opportunity to support efforts to set a national standard for litigation challenging the role of race on our criminal punishment system . . . including cases in which Blackness can make the difference between life and death." While we might wish that the latter statement was hyperbolic, regrettably it is not.

The genesis of the concept of AMEN dates back to 2009, when the North Carolina Legislature enacted the Racial Justice Act (RJA). The RJA resulted from the recognition that systemic racism had played, and was playing, an outsized and decidedly adverse role in the imposition of the death penalty in North Carolina. At its heart, the RJA allowed inmates on death row to attempt to prove through solid statistical evidence that racism had indeed been a significant factor in the imposition of the death penalty in their respective cases. If successful, an inmate's punishment, instead of death, would be a life sentence without the possibility of parole. (Anyone who might be tempted to question the relative burden of those sentences should contemplate the pleasure of reading the works of a favorite author or a favorite genre, the joy of hearing one's favorite music, and, most especially, the opportunity to see and participate to some extent in one's offspring's and their progeny's growth and development over the years, all activities that can be experienced even when incarcerated.)

Sadly, the empathy demonstrated by the state legislature in 2009 was unceremoniously upended in 2013 when the newly comprised legislature repealed the RJA, not merely in its entirety, which was bad enough, but also retroactively. This blow was visited most cruelly on the so-called Cumberland Four, four individuals whose death sentences had already been commuted and were now being told that they were returning to death row. In addition, approximately one hundred and thirty individuals were awaiting their RJA hearings, only to be told that this would never occur.

It is hardly surprising, and it is certainly appropriate, that the 2013 repeal spawned several constitutional challenges. In June of 2020, in the fateful year of, and only days after, the cataclysmic death of George Floyd, the North Carolina Supreme Court held, in *State v. Ranseurs,* that the retroactive repeal of the RJA was unconstitutional because the state constitution prohibited *ex post facto* laws. The holding was certainly important; but it was the Court's statement of its reasoning that truly lifted the spirits of those awaiting the decision: "the harm from racial discrimination in criminal cases … undermines the integrity of our judicial system and *extends to society as a whole*." Yes, the emphasis is mine, but those words were imbued with a life of their own, inspiring those committed to access to justice to carry forward the principle that the words embraced.

But, nothing is simple or certain in a venue where the legislature rejects a premise that the highest court embraces, and where judges are elected and the electorate holds closely divided views. Sadly, the Chief Justice who presided over the six-to-one *Ranseurs* decision and spoke of her fears for her own Black son in the summer of 2020 lost her bid for reelection by just a few hundred votes in the November election. Not to be deterred – and perhaps even finding inspiration to fight on in light of the Chief's regrettable defeat -- the CPDL decided to take the lead in continuing a very necessary fight. In their grant application, which came to the Foundation through the Emil Gumpert Committee, the CPDL proposed to use the requested grant to coordinate the statewide RJA litigation work with an initial focus on five representative cases, one from each of the five North Carolina judicial districts. A good chunk of the requested funds, if awarded, would be used to hire a qualified death penalty lawyer to help identify the critical test cases and to coordinate with the CDPL to create, "a vault of tools and information for other jurisdictions to follow if so inclined." Not surprisingly, amenability to replication is a strong plus when the Trustees of the Foundation consider grants.

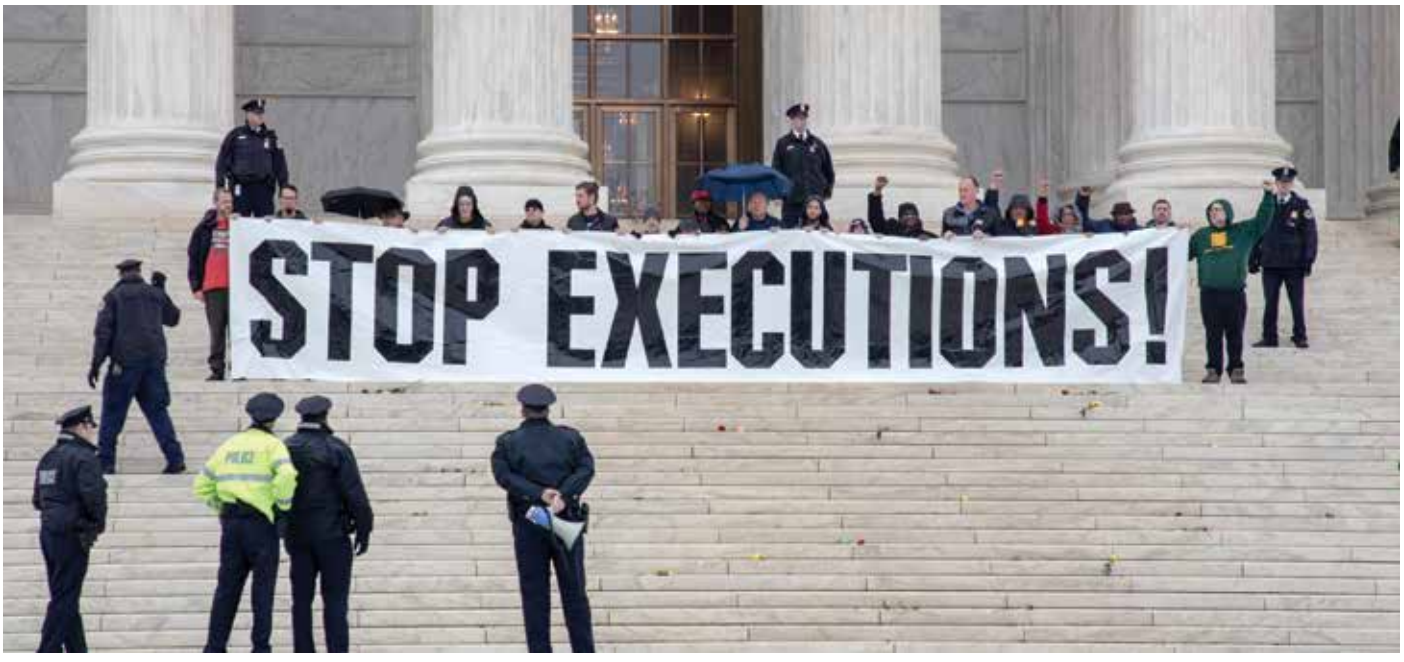
North Carolina is one of twenty-eight states that still has a death penalty statute on its books. With one hundred and thirty inmates on death row, the state ranks only behind California, Texas, Florida, and Alabama. In the words of Gretchen Engel, the Executive Director of CDPL:

> It's time to confront the clear and undeniable evidence that race still determines who is sentenced to death. … Ending the death penalty is just one small part of what's needed to finally begin erasing the stain of racism from our criminal punishment system, but it's an important first step. As long as the state is still trying to execute people in our names, we cannot say we are serious about rooting out the legacy of slavery and racial terror.

I doubt that there is a Fellow of the American College of Trial Lawyers who does not embrace the desire to "root out the legacy of slavery and racial terror." We may have a variety of reasons to embrace that desire and a multitude of ideas as to how best to accomplish the goal; but, we hope that you will agree that your Foundation's grant of $75,000 to the CPDL's AMEN project constitutes dollars very well spent. One small step, but a very meaningful one.

Because Justice can't wait.

Joan Lukey
ACTL Foundation President
Boston, MA ■



Original hermit and horse design created by Former Regent John S. Siffert

"We know that your attainment of the front ranks of the bar has not been without its costs, and we recognize that our specialty exacts much of those who win its favor. Truly, we are, in Lord Eldon's words, the hermit and the horse."

– from the College Induction Charge

CELEBRATE YOUR FELLOWSHIP
IN THE AMERICAN COLLEGE OF TRIAL LAWYERS

_____
Name

_____
Address

_____
City **State/Province** **Postal Code**

_____
Phone **Email Address**

____ **Blue Neck Tie** $150 x ____ = $_____

____ **Blue Bow Tie** $90 x ____ = $_____

____ **Red Neck Tie** $150 x ____ = $_____

____ **Red Bow Tie** $90 x ____ = $_____

____ **Scarf** $250 x ____ = $_____

Total $ _____

Prices include shipping and handling.

____ **Check enclosed**
(payable to ACTL Foundation in U.S. Dollars)

____ **Visa** ____ **Amex** ____ **MasterCard**

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

☐☐/☐☐

_____
Name as it appears on card **Exp. Date**

_____
Signature

Send Payment by Email: nationaloffice@actl.com
Send Payment by Fax: 949-752-1674
Send Payment by Mail: ACTL Foundation
1300 Dove Street, Suite 150, Newport Beach, CA 92660

With each purchase, the following contribution is made to the Foundation:
Bow Tie: $25 Neck Tie: $50 Scarf: $25

FELLOWS TO THE BENCH

PETER N. BROWNE, Q.C., was appointed as a Judge of the Supreme Court of Newfoundland and Labrador on March 24, 2021. Mr. Justice Browne received his Bachelor of Laws from Dalhousie University in 1984 and was admitted to the Bar of Newfoundland and Labrador in 1985. He was appointed Queens Counsel in 2008 and was inducted as a Fellow of the American College of Trial Lawyers in 2018. Mr. Justice Browne's legal practice focused on complex civil litigation, including medical malpractice defense, administrative/human rights issues and corporate/commercial matters. Justice Browne is an avid runner who has competed in track and field and road racing provincially and nationally for over 40 years. In recent years, he has served as President for Athletics Northeast, the province's largest running club. He enjoys spending time with his wife, Barb, their three children, and their dog, hiking the trails of the Avalon.

KRISTEN BUXTON, a career prosecutor, was unanimously confirmed by The Governor's Council on February 3, 2021, to become a Justice of the Massachusetts Superior Court. Justice Buxton grew up in Marblehead and graduated from Colgate University and Tulane Law School and joined the Essex District Attorney's office in 1996, eventually becoming supervising prosecutor before moving to the district attorney's superior court team in 2000. Over the course of her career, Justice Buxton prosecuted a number of high-profile cases, including the robbery and murder of Shui Keung "Tony" Woo, the popular owner of Ipswich's Majestic Dragon in 2011. She also prosecuted the case of a former babysitter who kidnapped a toddler from her Hamilton home in 2015 and left her at the side of the road. Justice Buxton was inducted into the American College of Trial Lawyers in 2020.

MICHAEL J. GUSTAFSON was an AUSA in the District of Connecticut for the past 26 years, serving in many roles, including First Assistant and Chief of the Criminal Division. He tried more than 15 cases as an AUSA, earning effusive praise from judges and adversaries alike. In his college days, he was the starting cornerback for the Amherst Little Three Champions in his junior and senior seasons (1981 - 1982). During the pandemic he decided to learn Spanish on Duolingo, after an abysmal effort in high school. On April 27, 2021, he was sworn in as a judge of the Connecticut Superior Court.

CRISTINA P. ORTEGA was appointed by Utah Gov. Spencer J. Cox to the Second District Court bench on February 8, 2021. Judge Ortega served as an Assistant United States Attorney since 2018. Prior to her that, she served as a deputy county attorney in the Davis County Attorney's Office and a deputy district attorney in the Salt Lake County District Attorney's Office. Judge Ortega received her J.D. from the University of Utah, S.J. Quinney College of Law, and graduated *cum laude* with a bachelor's degree in Criminal Justice-Law Enforcement and Latin American Studies/Legal Studies from Weber State University. Judge Ortega was inducted as a Fellow in a special ceremony just prior to being installed as a judge.

IN MEMORIAM

Since our last Issue, we have learned of the passing of thirty-six Fellows. Two succumbed to COVID. Four were judges. Nineteen served their country in uniform, five in World War II. Since taking over the drafting of these memoriams, I have written more than 200 of them; but as a stark reminder that we have miles to go to reach gender equality in our membership, in this Issue, for the first time, one of our departed Fellows was a woman, a way too young woman of sixty-six at her passing. Many were athletes – including one professional who played for the Chicago Bulls and another who played on a National Championship football team. Giving real meaning to the term "family business," one departed Fellow had practiced with both his grandfather and his grandson.

They ranged in age from fifty-seven to ninety-nine. They all died too young. We will miss them all.

You will note that some of these memoriams are overdue. We can only honor those we know have passed, when we know. So, when you learn that a Fellow has passed, we urge you to assure that the National Office is informed.

These pieces are necessarily brief. We don't have space to list all surviving family members, so we name only spouses; we count but do not name children and grandchildren. Yet every one of our departed Fellows left scores of family and friends who will miss and remember them. Through those memories, these Fellows live on.

George N. Arvanitis, '82, of West Allenhurst, NJ, passed away peacefully on February 17, 2021, at the age of ninety-three. George graduated high school in 1946 and went to Rider College in Trenton on a football scholarship, described by his teammates as the "hardest running back on the team." George graduated from St. John's University School of Law in 1953 and served in the Army Staff and Judge Advocate Office until 1955, when he began his legal career, centered on civil litigation, product liability, personal injury and legal malpractice. George and his wife, Penelope Karagias, were together for over 66 years, raising four children, twelve grandchildren and one great-grandchild. George and Penny enjoyed travelling throughout the United States and Europe, making yearly trips to the Eastern Shore of Maryland, Charleston, Savannah and Sea Island. George's family remembers his happy habit of walking in the door whistling. He was a voracious reader with a remarkable memory and a classic storyteller who often laughed before getting to the punch line. George had that rare gift of never missing an opportunity to express his love as well as his gratitude.

Pamela A. Bresnahan, '08, passed away peacefully in her home on March 31, 2021, survived by her husband, Peter F. Axelrad. Pam was a triple graduate of the University of Maryland, graduating from its law school in 1980 to commence a legal career that spanned four decades. She was named as one of the 100 most influential lawyers in America and one of the 50 most influential women lawyers in America by the National Law Journal, and was recognized as one of Washington, DC's top lawyers by the Washingtonian Magazine and The Washington Post. She testified before the United States Senate, as a member of the ABA's Standing Committee on the Federal Judiciary, during the confirmation hearings of now Chief Justice John Roberts. Pam devoted many years of dedicated service to the American Bar Association as Chair of the House of Delegates' Rules and Calendar Committee, member of the Board of Governors, and many other leadership roles. She was the Chair of the National Institute of Trial Advocacy Board of Trustees, a member of the National Judicial College Board of Trustees, a member of the Board of the American Bar Endowment. Active in the College, Pam served on the DC State Committee and several General Committees.

Thomas R. Brett, '73, a Judicial Fellow, died February 6, 2021 at age eighty-nine. Judge Brett's tenure with the U.S. District Court for the Northern District of Oklahoma spanned parts of four decades. Appointed in 1979, he was Chief Judge from 1994 until his semi-retirement in 1996, at which time he assumed senior status until retiring fully in 2003. Tom met Mary Jean James in the fourth grade; she later became his wife of sixty-nine years and the mother of their four children. In high school, Tom was a starting guard on the 1948 state championship basketball team – beating Tulsa Central 32 to 31. Tom served as an artillery officer, witnessing eight atomic bomb tests. He remained in the Reserves after active duty, eventually retiring as a full Colonel. Tom attended Oklahoma University for his undergraduate and law degrees. Tom began his legal career in Tulsa as an Assistant District Attorney, and afterwards continued in private practice as a trial lawyer. He served on OU's Board of Regents from 1971-1977, and as Board President from 1977-1978. Tom was an avid (Mary says 'rabid') golfer who once held a six handicap. Judge Brett is survived by Mary, four children, eleven grandchildren and seventeen great-grandchildren.

Bernard C. Brinker, '89, passed away on February 21, 2021 at age eighty-nine, survived by his wife of sixty-five years, Jane Darrah Brinker, two children and two grandchildren. Bern attended Washington University, where he received his undergraduate degree in 1953 and a J.D. degree in 1955. While engaged in all types of civil litigation, Bern concentrated on defense work and mediation in St. Louis. Bern could often be found on a handball court, but he and Jane were fixtures at their granddaughters' soccer and basketball games, recitals and theatrical events. Bern introduced his grandchildren to "edutainment" – no holiday dinner

was complete without engaging wind-up toys and games, delighting all. He read everything from Paradise Lost and Dylan Thomas to the Dead Sea Scrolls and the latest Grisham novel. His love of all types of music influenced his kids, introducing them to the Beatles and Jimi Hendrix as well as Etta James and Tony Bennett.

Paul Joseph Bschorr, '91, died peacefully on February 21, 2021, due to complications from Parkinson's disease. Paul graduated from Yale University with a B.A. in Political Science in 1962. During his college summers, he worked in the accounting department at Cedar Point, a seasonal amusement park known for its roller coasters. He went on to the University of Pennsylvania Law School on a full scholarship, graduating *cum laude* in 1965. Paul married his wife of fifty-two years, Anne Leventritt, in 1969. Paul practiced in New York City for 48 years. Paul successfully tried many consequential cases, including the first jury verdict against big tobacco on behalf of an insurance payor. His clients included John Kerry, Teresa Heinz, and Ivana Trump. Paul chaired the Litigation Section of the ABA from 1990 to 1991. Paul was a lifelong, passionate fan of the New York Yankees and an avid reader of biographies and historical fiction. His hobbies included building model boats and an apprenticeship with a wooden boat builder. Paul is survived by Anne, three daughters and eight grandchildren.

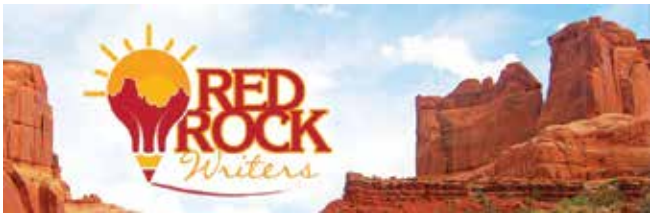
James Burton Burns, '95, longtime Illinois Secretary of State Inspector General and a former US Attorney for the Northern District of Illinois, died December 10, 2020. He was seventy-five. After leading Northwestern University's basketball team in scoring for three seasons, Jim was drafted 34th overall in the 1967 NBA draft by the Chicago Bulls. His professional basketball career was brief – he played in only 3 NBA games before moving to the ABA (where he played in 33 games) – and in 1968 he returned to Northwestern for Law School.

Upon graduation in 1971, Jim served as an AUSA until 1978, eventually becoming chief of the criminal litigation division, before moving to private practice. President Bill Clinton appointed Jim as Chicago's top federal prosecutor in 1993, where he led the Operation Silver Shovel corruption investigation and the Operation Haunted Hall ghost-payroll prosecution. His office also took on the Gangster Disciples street gang. One of Jim's colleagues in the office recalled Jim as "the epitome of what you would want, and expect, the US Attorney to be." Following his time as US Attorney, Jim unsuccessfully sought the Democratic nomination for governor in 1998. In 2000, Jim's record as a corruption-buster led Secretary of State Jesse White to tap him to become his first Inspector General. As Inspector General, Jim expanded the size of the office, hired professional investigators from a variety of backgrounds and initiated legislation that made the post permanent and broadened its reach. Jim is survived by his wife, Marty, and their three children.

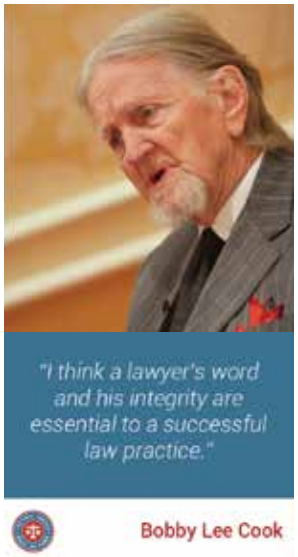
Thomas S. Calder, '86, died February 25, 2021, at age eighty-eight, predeceased by his wife Patricia "Pat" Calder (nee Coffey) and survived by two children and three grandchildren. Tom clerked for Potter Stewart when he was on the Sixth Circuit, just before Stewart's appointment to the Supreme Court. Tom was active in the College, serving on the Ohio State Committee and three different General Committees.

Dwight Gary Christian, '83, passed peacefully at age ninety-one on January 4, 2021. He was a man with a passion for writing, delight in scholarship, and pride in his Icelandic heritage. He was an accomplished lawyer, musician, photographer, athlete, poet, philosopher, father and grandfather. Gary is survived by his wife of sixty-five years, Patricia, their three children and three grandchildren. Gary was born in Portland, Oregon, but grew up on the southern plains of Alberta, Canada in "Raymond Town." Growing up, Gary was the definition of dirt poor. Beginning at the age of 13, he played trumpet professionally in a dance-band to earn money in support of the family. He never graduated from high school. As soon as he was old enough, Gary enlisted in

the United States Army, where he served on Okinawa shortly after World War II. He used the G.I. Bill to become the first in his family to earn a college degree. Most universities had no interest in a student who lacked a high school diploma, but Brigham Young University admitted Gary after he passed the high school equivalency exam. Following BYU, Gary married his sweetheart from Raymond, Patricia Mitchell, and enrolled in law school at the University of Utah. After a stellar 35-year legal career in Salt Lake City, Gary retired and began his real calling – poetry – banding together with a group of local poets who became what is known today as the Redrock Writers.



Bobby Lee Cook, '95, one of the premier trial lawyers in America, died at his mountain home in Cloudland on February 19, 2021, at the age of ninety-four. Bobby Lee represented hundreds of accused murderers over his career. His clever maneuvers in court, combined with a gentlemanly charm, made him perhaps Georgia's most famous attorney. He was reputedly the inspiration for the television character Ben Matlock (Andy Griffith), though the producer of the show denies it. But true or not, he was for sure a role model. He represented labor union organizers when no one else would. He counseled the Rockefellers and the Carnegies. And, with a fearless, fiery resolve, he won far more trials than he lost, all the while radiating the charm of a well-read, nattily attired country gentleman. Bobby Lee was born just outside of Summerville, about 90 miles from Atlanta, where he lived in a house with no running water. He attended the University of Alabama and Vanderbilt University law school. At twenty-one, he successfully won a seat in the State House of Representatives and later in the State Senate. He returned to Summerville to open his law office. For decades every Saturday morning, he welcomed anyone needing assistance. He'd call in one person after another and try to help them solve some thorny legal problem, often free of charge. But those who could pay did. He routinely commanded six-figure fees, usually upfront. He used those fees to buy vacation homes, fine works of art, and a chauffeured Rolls-Royce. A gregarious – and often hilarious – raconteur, Cook wore custom-tailored suits with a gold watch and chain attached to his vest. He sported a bristly white goatee, parted his hair down the middle and kept his small, gold-rimmed spectacles perched at the bottom of his nose so as not to shield his intense blue eyes. A friend asked him if he worried what rural jurors would think of him showing up at a courthouse in a chauffeured Rolls and dressed like an English squire. Bobby Lee twinkled back "I want that jury to know I'm the smartest person in that courtroom and that I'm successful and rich because I know what I'm talking about. If so, they will look to me to tell them what to do." More often than not, jurors did just that. Bobby Lee was famous for his cross-examination skills. At times he could be enchanting, other times withering. He said, "There's a time and place to be genteel. Church. Weddings. Funerals. Be genteel there. But not in court." Stories abound about Bobby Lee's antics, some of which may be apocryphal, but all of which are entertaining. Like the time the state's star witness insisted he was certain Bobby Lee's client had fired exactly two shots. Expecting that testimony, Bobby Lee stationed a friend outside the courthouse and had him fire off six rounds on cue. The state's witness couldn't say for sure how many shots had just been fired. Bobby Lee's client walked. Bobby Lee was predeceased by his wife of sixty-seven years, June Cook, and survived by his two daughters and several grandchildren.

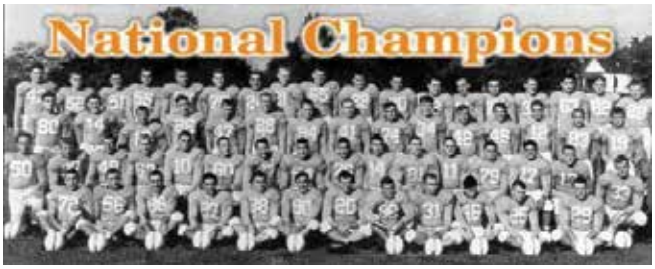


Damon Grant Cook, ’83, passed away on March 13, 2021 at the age of eighty-three, predeceased by his son and survived by his daughter, son-in-law, and grandson. Grant was born in Fort Worth and attended Tulane University and Baylor Law School, where he earned his degree in 1961. For the ensuing sixty years, Grant was a trial lawyer in Houston, representing many Fortune 500 companies. Grant was an avid golfer and a proud member of the Tejas Vaqueros.

John Czarnecki, ’02, age eighty, passed on January 9, 2021, after a two year battle with metastatic cancer. Judge Jack Puffenberger of the Lucas County Probate Court, a former law student of John’s, said: “He was one of the most highly respected lawyers in the Toledo area, that’s for sure.” “John was universally wise,” said Gerry Kowalski, his law partner for more than 20 years. John was a woodworker and a restorer of classic automobiles and motorcycles. John is survived by his wife, Sue Bedra, two daughters and three grandchildren.

William R. Davis, ’75, of Hartford, CT, passed away peacefully at his home on February 9, 2021 at age ninety. Bill was predeceased by his wife, Doris O. Davis and their two daughters, and by his second wife, Joanne Gleason; he is survived by his son, eight grandchildren and two great-grandchildren. Bill was a graduate of Providence College and received his law degree from the University of Connecticut School of Law in 1955. He served proudly in the United States Army. An avid athlete, Bill ran and walked numerous marathons and enjoyed a great love for baseball and football. The University of Connecticut School of Law, where he served on the Adjunct Faculty for over 20 years, honored him by naming its Moot Courtroom “The William R. Davis Courtroom.” Bill taught generations of young lawyers what it means to be a trial lawyer.

Hugh Pierce Garner, ‘87, practiced law in Chattanooga for over 62 years. He was eighty-eight when he passed on February 11, 2021. Hugh attended undergraduate school at the University of Tennessee where he was a four-year starter on the football team and a member of the 1951 National Championship Team. Hugh received the ROTC Leadership Award and served in the United States Army and the United States Army Reserve after graduation. After the University of Tennessee College of Law, he practiced law as a name partner in a firm that always bore his name. Hugh is survived by his wife, Marilyn Burnett Garner, two children, four grandchildren and a great-grandson.



Gordon W. Gerber, ’75, a member of the Greatest Generation, was ninety-eight when he passed on February 23, 2021. He was a graduate of Duke University (Phi Beta Kappa) and the University of Pennsylvania Law School (Order of the Coif), but interrupted his education to enlist shortly after the bombing of Pearl Harbor. Commissioned as a second lieutenant in the Army Air Corps, Gordon served as an intelligence officer in the China, Burma India Theater. After graduation from law school, Gordon served as law clerk to Pennsylvania Supreme Court Justice Horace Stern and practiced law with his father, Harry J. Gerber, for three years in Philadelphia before joining one of Philadelphia’s largest firms. After retiring from the firm as required at age seventy-three, Gordon served (pro bono) as a Judge Pro Tem in the Philadelphia Common Pleas Court for the next twenty-three years. Gordon’s first wife (of fifty-five years), Martha Permenter, passed away in 1999. Gordon was widowed again when his second wife of eleven years, Ethel Sunny David, died in 2017. He and Sunny had been friends for decades; indeed, Gordon

and Martha had attended Sunny's wedding to her first husband, a classmate of Gordon's, in 1948. Gordon is survived by five children and ten grandchildren.

William Flournoy Goodman, '72, was a month short of his ninety-second birthday when he died on January 7, 2021, from complications from COVID. Bill attended Millsaps College where he met his future bride, Edwina McDuffie, of Aberdeen, Mississippi. In 1949, aided by two part-time jobs and a small scholarship, Bill enrolled in the University of Mississippi School of Law. He was on the Law Journal and completed both undergraduate and law school in less than five years. Graduating with distinction in 1951, he enlisted in the United States Army, serving as a first lieutenant during the Korean War, after marrying Edwina and beginning their sixty-four year marriage. In 1953, Bill began his legal career at the firm established in 1895 by his maternal grandfather. Through the years he had the pleasure of practicing with several family members, ranging from his grandfather to his grandson. When Bill was named the 2009 Alumnus of the Year of the University of Mississippi School of Law, Dean Sam Davis said "Bill Goodman is perhaps the most highly respected member of the Bar in Mississippi. It seems trite to say it, but he is a real lawyer's lawyer, a highly skilled advocate, the personification of professionalism, and the epitome of a Southern gentleman." Bill is survived by his three children, six grandchildren, and nine great-grandchildren.

Robert Louis Green, '77, age ninety-two, passed away peacefully on January 24, 2021, survived by his five children, nine grandchildren and two great-grandchildren. We don't often highlight an honest mistake, and certainly not in a memoriam to the departed. But we can't help ourselves here. When Bob filled out his statement of qualifications as all inductees must, he should have entered his name, "Robert Louis Green." But instead, he wrote "Robert Louis Stevenson." A Freudian slip, no doubt, a subliminal clue that Bob had literary ambitions. The second oldest of 11 children, Bob was predeceased by his nine brothers and one sister. (Tony, Mary, Hugh, Bill, Danny, Jim, Mike, Jerry, Martin and Andy). Bob attended Tulane University on a Naval R.O.T.C Scholarship. After receiving his B.A. in June 1950, Bob entered Tulane Law School. In June 1951, he was ordered to active duty and spent three years aboard the U.S.S. Mindoro, which operated in the Atlantic from Norway to Haiti. Released from active duty in June 1954, Bob returned to Tulane for his law degree, but he remained in the Naval Reserve, eventually retiring as a Captain. Bob's 60 plus years of legal practice focused on med mal defense. He served as President of the Memphis Bar Association and on the Tennessee Board of Law Examiners for 19 years (1962-1981), completing his service as President of the Board. He cherished the privilege of signing hundreds of the law licenses that grace the walls of lawyers from one end of the state to the other.


American College of Trial Lawyers

Peter Welles Hall, '97, a Judicial Fellow who served on the United States Court of Appeals for the Second Circuit since 2004, died on March 11, 2021 at the age of seventy-two. Chief Judge Debra Ann Livingston recalled "Judge Hall distinguished himself as a thoughtful and humane jurist. He was generous with his colleagues and ever considerate in matters both big and small. Judge Hall was committed to public service and taught us all by his example." Judge Hall attended the University of North Carolina. After graduation and a year as a high school teacher, he returned for a master's degree and a stint as assistant dean of students, followed by Cornell Law school, where he served as president of the Legal Aid Clinic and graduated *cum laude* in 1977. After a clerkship with Judge Albert Coffrin of the District of Vermont, Judge Hall joined the United States Attorney's Office for the District of Vermont. After eight years as a prosecutor, Judge Hall left government service for a civil litigation practice. Judge Hall served as president of the Vermont Bar Association and of the Rutland County Bar Association. In 1997, he was inducted into the College. Four years later, in 2001, he was confirmed by the Senate as United States Attorney for the District of Vermont. In 2004, he was appointed to the Second Circuit.

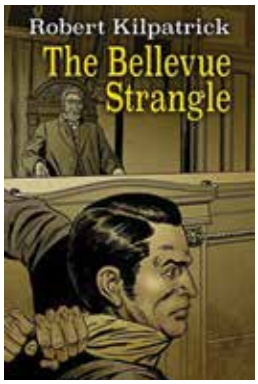
One of Judge Hall's passions was service to the international judicial community. From 2007 to 2016 he was a delegate from the Federal Judge's Association to the International Association of Judges. In this capacity he traveled the world, working with foreign judiciaries on matters of administration, independence, continuing education and governmental relations.

Judge Hall left a lasting mark on a generation of law clerks. The bonds were close and the affections were mutual. One recently reminisced: "One winter morning we were working away in chambers and he had not turned up. Not unusual but we were all wondering if something had happened. He rolled in midday with his dirty work pants and torn flannel shirt—in other words, no more haggard than usual. He explained that he had taken his truck through the woods that morning after taking care of the horses, but had gotten stuck. Luckily he had an axe, so it was only a matter of chopping down a few trees to put under the truck tires for traction. He freed himself and made his way into chambers like it was nothing: just another day on the Second Circuit."

Judge Hall is survived by his wife, Maria Dunton, five children, and five grandchildren.

Robert John Kilpatrick, '85, died at age ninety-nine on November 27, 2020. A member of the Greatest Generation, Bob served two tours of duty with the U.S. Marines during World War II and the Korean War, and truly earned the 21-gun salute at his military funeral. For years, Bob would ride his 18-speed bike the 2.2 miles from his home to his law office in downtown Long Beach, take the bike up the elevator and change into a suit and tie — ready to go to work. Bob liked riding so much that one day he had an idea: Why not put a bicycle path on the city's shoreline, from downtown to Belmont Shore, so everyone could enjoy the ride and the view? The 3.1-mile bike path and pedestrian walkway was completed in 1988 and has provided enjoyment for thousands of bikers and walkers since. In retirement, Bob traded in the 18-speed bike for a Townie and then an adult tricycle, riding it until he was ninety-eight. Bob was never without a book; he even authored one. His passion for literacy led him to become one of the originating members of the Long Beach Public Library Foundation, which has raised millions for literacy. Called to duty in WWII, Bob became a Marine Corps aviator and flight instructor. After the War, he attended law school at the University of Chicago. While there, a young man was put up for membership to the fraternity for which Bob served as president, but there was opposition because the candidate was Jewish. Prejudice won out. Bob quit the fraternity.

After his tour during the Korean War, Bob, then living in Long Beach, went to work for Walt and Roy Disney before Disneyland opened. Bob retired in 1989 but continued consulting and doing work for other lawyers. Bob is survived by his wife of forty-eight years, Judy, and three children.



David B. King, '98, was seventy-nine when he passed on December 18, 2020. After earning his bachelor's degree from Tennessee Technological University, David graduated from law school at Vanderbilt University, where he was an Editor of the Law Review. After law school, David completed a tour of duty in Vietnam as a U.S. Marine and then moved to Orlando, Florida to begin his legal career and start a family with his college sweetheart Marilyn (née McDaniel), a Central Florida native. Over a 55-year career, David focused on complex commercial litigation,

personal injury and wrongful death cases. David was president of the Orange County Bar. David became known for his consummate integrity; he had a knack for turning his courtroom adversaries into lifelong friends and admirers. David acted as a mentor and inspiration to scores of young lawyers, always taking the time to guide and encourage the next generation of attorneys.

David's most notable work was his many years serving as the lead attorney for the Fair Districts Coalition, a movement to end partisan gerrymandering in Florida. Under David's legal stewardship, Fair Districts successfully challenged the Congressional and State Senate maps, resulting in new district boundaries and ensuring a more representative government for millions of Floridians. David and Marilyn loved to travel the world together, never tiring of learning about the culture, history, and politics of every destination. Wherever they were, they made time for David to indulge his passion for books and reading, visiting bookstores all over the world. David was predeceased by one son but survived by Marilyn and two other sons and three grandchildren.

Charles W. Kitchen, '79, peacefully passed away at the age of ninety-four on November 7, 2020, preceded in death by his wife of 69 years, Mary Helen Kitchen (nee Applegate) and survived by his other two children, ten grandchildren and 22 great-grandchildren. Charlie was an Eagle Scout and attended Western Reserve University, until he left to serve in the USAAF toward the end of WWII. He returned to Western Reserve to complete his undergraduate degree and earn his law degree in 1950, Order of the Coif. Charlie defended product liability, malpractice and other civil lawsuits. Charlie and Mary traveled the world for over thirty years, Paris being their favorite destination.

The Honourable Robert D. Laing, Q.C., '88, a Judicial Fellow, died peacefully on October 10, 2020, one week after his eightieth birthday. Bob is survived by his two children, two grandchildren and his wife Joanne Hrabinsky of Port Moody, BC. He was predeceased by his first wife of 50 years, Donna (née Sipko). From

modest beginnings in the east end of Montreal, Bob spent most of his life in pursuit of justice and the law, ultimately retiring at age 75 from the Court of Queen's Bench for Saskatchewan. After graduating with a BA from McGill University in 1962, he joined the RCMP, which soon recognized his potential, sending him to Law School at the University of Saskatchewan in 1964. He graduated *cum laude* in 1967. Although he continued working for the RCMP in Toronto in their Special Fraud Division, both he and Donna missed Saskatchewan, and returned for private practice. During his years as a lawyer, Bob was President of the Law Society of Saskatchewan, President of the Federation of Law Societies of Canada, Chairman of the Saskatchewan Police Commission, and a frequent lecturer on, and promoter of, legal education. He was appointed to the Court of Queen's Bench in November 1994. He was appointed Chief Justice of the Court of Queen's Bench in 2006, Bob was an avid hunter, fisherman, golfer and curler. His capacity for friendship can be seen in the annual fall hunting trips he hosted for many years with his fraternity brothers from McGill. He enjoyed golf, travel, good food, single malt scotch, and spending time with his family and friends.

Denis James Lawler, '12, passed away peacefully at home on April 7, 2021, a victim of cancer at the age of seventy-two, survived by his former wife, Pamela Rainey Lawler, three children and four grandchildren. Denis attended St. Joseph's University and Villanova Law, where he was the editor of the Law Review. Denis began his career practicing alongside his father. He specialized as a trust and estates attorney, a field that does not often sufficient trial opportunities to become a Fellow, but Denis earned his Fellowship, and he was proud of it – so

proud that his daughter, at the celebration of his life, recounted that the one thing Denis told her to mention was his induction into the College. Former Philadelphia District Attorney, Lynne Abraham, said "He was a tough opponent and very gifted, but he never felt the need or desire to advertise his talents. He let his work speak for him. Judges knew he was always over prepared and would deliver a stellar product for his clients while providing the Court with sound judgments and ample legal authority to support the opinions they wrote." Denis loved sitting on a bench and reading at Swann Fountain, a block from his Center City apartment.

Stuart R. Lefstein, '83, died from complications of COVID-19 at his home surrounded by his family, a week before his eighty-seventh birthday, on December 26, 2020. Stuart's college sweetheart and wife of fifty-seven years, Esther Urdangen, preceded him in death in 2013. Stuart grew up in Rock Island and graduated from Augustana College and the University of Michigan Law School. Stuart began his legal career as an Assistant Rock Island County State's Attorney before entering private practice. Stuart enjoyed tennis, vacationing in Palm Desert, California, and being with his beloved grandchildren. Stuart is survived by his two daughters and three grandchildren.

Walter D. McQuie, Jr., '77, died at age ninety-one on January 17, 2021, from complications from surgery. Walt graduated from the University of Missouri School of Law in 1953, then served for two years in the Army, working as a law clerk for a judge in Germany. He then returned to Missouri where he practiced for more than forty years. Walt was a Khoury League baseball coach, a member of the Montgomery City Volunteer Fire Department and a Meals on Wheels deliverer. In retirement, Walt taught himself to play the tuba and played in community bands throughout Missouri. Walt is survived by his wife, Jane, three of their four children, and two grandchildren.

Forrest Alonzo Norman, '82, of Shaker Heights, OH, age ninety, passed away on Friday, June 5, 2020, survived by three children and five grandchildren. Born into a coal mining family and raised in coal towns in the Depression, Forrest determined in childhood to become a lawyer and worked his way through college and law school at Case Western Reserve, where he was Order of the Coif and Editor of the Law Review. Forrest held many national leadership positions, including Federation of Insurance Counsel (president), National Association of Railroad Trial Counsel (executive committee), and Defense Research Institute (vice president). Forrest served in both the U.S. Army and U.S. Naval Reserves, was a champion weightlifter, and was an honest high handicap golfer.

Allan O'Brien, '05, passed away on April 4, 2021, after being diagnosed a little more than two years ago with multiple myeloma. He was seventy-five. After a brief stint as a teacher, Al decided law school might be for him. With the support of his wife, Gail, he enrolled at the University of Ottawa. Al remained in Ottawa and was called to the bar in 1975. Al became a go-to lawyer for lawyers facing negligence claims. He was also famous for always finding an Irish pub, no matter what foreign city he was visiting. Al was active in the College, serving on a number of Committees and Chairing the Canadian Competitions Committee. Al is survived by Gail, three children and six grandchildren.

David Allen Parker, '78, passed peacefully on January 8, 2021 at his home; he was eighty-five. An Army veteran, David was a graduate of Bucknell University and Rutgers University Law School. David was President of the New Jersey Defense Association and served as Vice-Chairman of the Prosecutors and Judicial Appointments Committee of the New Jersey State Bar Association. After a long and distinguished legal career, David retired in 2000, and bought Motts Creek Inn in Galloway, NJ, where he held court, mostly in the Inn's bar, where he met people and forged new friendships, feeding his love of a good party, his love of people, and his abiding love for what remains of the hunting and fishing culture and the old ways of the Jersey Shore where he spent so much of his life. David is survived by his wife of 32 years, Barbara, three children and nine grandchildren.

James Edward Redmond, Q.C., '82, passed on January 9, 2021, at the age of eighty-nine after a 60 year career as one of Canada's leading trial lawyers. Jim obtained his Bachelor and Law degrees from the University of Alberta, where he was gold medalist in his law class and was the recipient of a Rhodes Scholarship. Jim mentored countless young lawyers as a Bencher of the Law Society of Alberta and as a lecturer at the University of Alberta. Jim was active in the College, having served as Province Chair and on a number of General Committees. Jim loved and supported the Edmonton Arts, including the Symphony, Opera, and the local jazz scene. He was also an avid skier and tennis player, playing regularly in men's and mixed leagues well into his 80s. Above all, Jim loved his family. Jim is survived by his wife of sixty-three years, Vivian, three children, eight grandchildren and one great-grandson.

Kenneth Hutchinson Reid, '79, a member of the Greatest Generation who served as an Army officer in a Field Artillery Battalion in Europe during World War II, passed away peacefully on January 07, 2016, just two weeks shy of his ninety-eighth birthday. Kenneth returned from the War and graduated from the University of Missouri School of Law in 1948. Always active in Bar activities, Kenneth served at various times as President of the Greene County Bar Association (now the Springfield Metropolitan Bar), as Chairman of the Civil Practice Committee of the Missouri Bar Association and as a member of the Missouri Supreme Court Committee on Jury Instructions. Kenneth was preceded in death by his wife of 66 years, Jeannette. He is survived by three children, seven grandchildren and two great grandchildren.

Richard Cornelius Roberts, '84, was eighty-three when he died on March 25, 2021. At the University of Kentucky, Richard was a varsity debater for four years. He continued his oral advocacy at Yale Law School, where he was a member of the school's National Moot Court Team. He declined an invitation to be an editor of the Yale Law Journal, instead choosing to teach accounting to Yale undergraduates. Richard was a member of the Kentucky Bar Association's Board of Governors and served the KBA in many other positions, as Chair of the Young Lawyers Section, the Rules Committee, the Ethics Committee and the Commission on Bar Admissions. For many years, Richard sponsored the Yale Book Award at Paducah Tilghman High School. He was a founder and first president of the Paducah Symphony Orchestra; he was a member and vice-president of McCracken County Master Gardeners Association.

Terrance Charles Sullivan, '93, age seventy, passed away on January 16, 2021, surrounded by family. Terry attended the University of Georgia where he received a Bachelor of Arts, *magna cum laude*, in 1972. After joining the US Air Force Reserves, Terry attended The University of Virginia School of Law. Over a distinguished 45-year legal career as a trial lawyer in Atlanta, Terry tried more than 175 jury trials to verdict. Terry was proud to work with and mentor lawyers younger than himself. He felt his most important work as a lawyer was passing on the skills and knowledge that he had learned over the course of his career, and he always aimed to give young lawyers the same opportunities to learn and grow that he had. Terry was a voracious reader with a sincere love of history. His friends knew to expect at any moment a lesson on his favorite Civil War battles, a random bit of history about whatever city they were traveling to, or at the very least, a quote from General George Patton. Terry was also an avid traveler, having visited over 30 countries and all 50 states. Terry is survived by his wife, Kathy, five children and two grandchildren.

Robert Greye Tate, '89, died January 9, 2021, at the age of eighty-eight. Bob attended the University of Alabama for his undergraduate and law degrees. After undergraduate graduation in 1954 he married his lifelong companion Ann (Chalifoux). Bob served in the Army Judge Advocate General Corps before joining his father's law firm in Birmingham, where he practiced for four decades. Bob ended his legal career with one of his proudest achievements, combining his work as an attorney with his love of the environment. He led the Cahaba River Society as it joined with the Environmental Protection Agency to negotiate an agreement with Jefferson County that resulted in a new county sewer system and created the Freshwater Land Trust. Bob and Ann set aside eleven acres of their own land near the Cahaba as part of the Trust. Bob and Ann shared a lifelong love of the outdoors. They were members of, and Bob served as president of, the Birmingham Audubon Society, the Alabama Wildflower Society, and the Cahaba River Society. Bob is survived by Ann, two sons and four grandchildren.

John R. Tomlinson, Sr., '83, age ninety, passed peacefully on March 22, 2021 after a brief illness. He met Susan J. Weaver in high school. They were married in 1953 and were an inseparable couple for sixty-eight years. John attended the University of Washington and was president of his class. Upon graduation in 1955, he joined the Air Force and served as a Judge Advocate from 1955-57. In practice in Seattle, John litigated large and complex cases, and he was active in the American Bar Association, serving as Chair of the Litigation Section. John is survived by Sue, their four children, ten grandchildren, and one great-grandchild. John was an avid golfer; he loved all things outdoors, which perhaps started when he became an Eagle Scout in his youth.

Charles Horace Warfield, Sr., '91, passed away on February 19, 2020, at the age of ninety-five. Charlie earned his B.A. and J.D. ('49) at Vanderbilt University. While an undergraduate, he left school and entered the V-12 Navy College Training Program, serving during WWII in the Pacific theater as the Assistant Gunnery Officer on the U.S.S. Yokes, where he fought in the Okinawa Campaign. In law school, Charlie and several other classmates founded the Vanderbilt Law Review. On July 22, 1950, he married Martha Hardcastle, and they raised their three boys. Charlie's civic activities included being the President of the Nashville Junior Chamber of Commerce; President of the Nashville Chamber of Commerce; longtime Board Member of the Legal Aid Society of Middle TN and the Cumberlands; Chairman of the Nashville Chapter of the American Red Cross; Board Member and Vice Chairman of the Board of the National Red Cross; President of the Nashville Bar Association. Charlie coached various sports teams. Charlie was humble, quick-witted, caring, scholarly, and a gentleman.

Robert S. Warren, '74, passed away peacefully at his home in San Marino on February 13, 2021. He was ninety. Bob graduated from the University of Southern California in 1953, and USC Law School in 1956. At law school, Bob graduated as salutatorian and with honors, serving as an editor of the USC Law Review. Following graduation, he served in the U.S. Army Judge Advocate General's School before beginning a private practice that spanned forty-one years before his semi-retirement in 2000. Even after his formal retirement, Bob continued to work as the lead trial lawyer in a massive toxic tort case. Bob was the trial lawyer who could and did handle any kind of case.

His practice included high stakes cases covering a broad range of issues that reached the highest courts of appeal, including the United States Supreme Court where he argued in *Bateman Eichler v. Berner*, establishing important legal precedent in the securities field. Bob's philanthropy included the creation of the Warren/Soden/Hopkins Family Foundation, which focuses on medical research. Bob served on the board of the Huntington Library, Art Museum, and Botanical Gardens in San Marino from 1996 until being elected Emeritus in 2017. Bob was married to Betty Lou Soden Warren from 1955 until her death in 1991. He was married to Anna Marie Trench Pretzel Warren from 1993 until her death in 2014. Bob is survived by his two children, two grandchildren, and by three stepdaughters. ■

UPCOMING EVENTS

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

NATIONAL MEETINGS

2021 ANNUAL MEETING
FAIRMONT CHICAGO MILLENNIUM PARK
CHICAGO, ILLINOIS
SEPTEMBER 30-OCTOBER 3, 2021

2022 SPRING MEETING
HOTEL DEL CORONADO
CORONADO, CALIFORNIA
FEBRUARY 24-27, 2022

REGIONAL MEETINGS

August 26-29, 2021	**10TH CIRCUIT REGIONAL MEETING**

STATE/PROVINCE MEETINGS

June 12, 2021	**Maryland and Washington, D.C. Supreme Court Dinner**
June 18, 2021	**Texas Fellows Summer Luncheon**
July 9, 2021	**Alaska Fellows Dinner**
August 13-14, 2021	**Iowa Fellows Meeting**

OTHER MEETINGS

October 31-November 2: **LEADERSHIP WORKSHOP, RITZ CARLTON DOVE MOUNTAIN, TUCSON, ARIZONA**

JOURNAL

American College of Trial Lawyers
1300 Dove Street, Suite 150
Newport Beach, California 92660

"In this select circle, we find pleasure and charm in the illustrious company of our contemporaries and take the keenest delight in exalting our friendships."

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

Statement of Purpose

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