Mandatory Continuing Legal Education

This is with reference to the Virginia State Bar's president's message in *Virginia Lawyer*, October 2006.

It is not enough that "(t)he MCLE rules serve a laudable purpose." Americans are inundated with laws based on good intentions. Laws should deliver a laudable result; otherwise the legal system itself will fall into disrepute.

The VSB president presents no evidence that Mandatory Continuing Legal Education does achieve the purpose ascribed to it, and the 40 percent of Virginia lawyers to whom she refers may think it does not. Among busy people procrastination is an ordering of priorities.

MCLE provides well-paid employment for people whose services might be more productively used, unless, of course, it is shown to work.

Keith F. Goodenough
Keswick, Virginia

Send Us Your Feedback

Send your letter to the editor* to:
coggin@vsb.org;
fax: (804) 775-0582;
or mail to:
Virginia State Bar,
Virginia Lawyer Magazine,
707 E. Main Street, Suite 1500,
Richmond, VA 23219-2800

*Letters published in *Virginia Lawyer* may be edited for length and clarity and are subject to guidelines available at **http://www.vsb.org/site/publications/valawyer/**.

Proposed Increases in Deliquency and Reinstatement Fees

For many years the Virginia State Bar has charged delinquency fees to lawyers who do not comply with their annual membership obligations in a timely fashion. It has also charged reinstatement fees to those lawyers who are administratively suspended for failing to comply with their membership obligations and seek to return to in-good-standing status.

The purpose of these delinquency and reinstatement fees is to require members who do not comply with their membership obligations in a timely way, as well as those who are administratively suspended for noncompliance, to bear a larger share of the cost of operating the bar's membership and Mandatory Continuing Legal Education departments. The costs of operating these two departments and dealing with members who do not comply with their obligations in a timely way have continued to rise through the years, and the bar intends to propose increasing those fees by amendments to Part Six, Section 4, Paragraph 19 of the *Rules of the Supreme Court of Virginia*.

These proposed fee increases will be considered by the Council of the Virginia State Bar at its next meeting on March 2, 2007, and the proposed changes are published below for comment. Any member of the bar having comments about the proposed changes may direct those to: Executive Director, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, VA 23219-2800 no later than February 15, 2007.

19. PROCEDURE FOR THE ADMINISTRATIVE SUSPENSION OF A MEMBER.—Whenever it appears that a member of the Virginia State Bar has failed to comply with any of the Rules of Court relating to such person's membership in the bar, the Secretary-Treasurer shall mail a notice to the member advising of the member's noncompliance and demanding (1) compliance within sixty (60) days of the date of such notice and (2) payment of a delinquency fee of $50, for each Rule violated, provided, however, that the delinquency fee for an attorney who does not comply with the timely completion requirements of Paragraphs 13.2 and 17 C. of these rules shall be $100, and the delinquency fee for an attorney who does not comply with the certification requirements of Paragraphs 13.2 and 17 D. of these rules shall be $100. The notice shall be mailed by certified mail to the member at his last address on file at the Virginia State Bar. This would include delinquency fees pursuant to 13.1 for professionalism course.

In the event the member fails to comply with the directive of the Secretary-Treasurer within the time allowed, the Secretary-Treasurer will then mail a notice to the member by certified mail to advise (1) that the attorney's membership in the bar has been suspended and (2) that the attorney may no longer practice law in the Commonwealth of Virginia or in any way hold himself out as a member of the Virginia State Bar. Thereafter the attorney's membership in the Virginia State Bar may be reinstated only upon showing to the Secretary-Treasurer (1) that the attorney has complied with all the Court's rules relating to his membership in the bar and (2) upon payment of a reinstatement fee of $150 for each Rule violated, provided, however, that the reinstatement fee for an attorney who was suspended for noncompliance with Paragraphs 13.2 and 17 of these rules shall be $250, and shall increase by $50 for each subsequent such suspension, not to exceed a maximum of $500.

Whenever the Secretary-Treasurer notifies a member that his membership in the bar has been administratively suspended, the Secretary-Treasurer shall also (1) advise the Chief Judges of the circuit and district in which the attorney has his office, as well as the clerks of those courts and the Clerk of the Supreme Court, of such suspension and (2) publish notice of the suspension in the next issue of the *Virginia Lawyer Register*.

An administrative suspension shall not relieve the delinquent member of his annual responsibility to attend continuing legal education programs or to pay dues to the Virginia State Bar.

Proposed Statutory Change to Authorize Annual Special Assessment for Clients' Protection Fund

At its meeting on October 27, 2006, the Council of the Virginia State Bar approved and recommended to the Supreme Court of Virginia, a proposed amendment to Section 54.1-3913.1, Code of Virginia, that would authorize the Court to approve an annual special assessment of up to $25 per member for the Clients' Protection Fund. This fund has been in existence since 1976, and it has paid a total of $3,188,300 to date to clients who have had their funds misappropriated by dishonest attorneys whose law licenses have been suspended or revoked by the bar.

The fund presently has just over $3 million in it, and the bar has been attempting to increase the size and adequacy of the fund by making annual contributions to the fund from its regular budget funded primarily by member dues. A recent actuarial study commissioned by the bar determined that the fund should have $9 million if it is to be able to pay the increasing number of such claims in the future. As the bar nears the end of its current dues cycle and is spending into its reserves, it has had to discontinue the transfers from its budget to the Clients' Protection Fund. Nevertheless, the needs of the fund are critical, and it is believed that these special assessments for the next several years are the best way to continue development of the fund. This is the way in which many such programs are funded in other states.

Assuming approval by the Court, the bar intends to submit the following amendment to the 2007 session of the General Assembly:

§ 54.1-3913.1. Clients' Protection Fund.

The Clients' Protection Fund is continued as a special fund of the Virginia State Bar. The Fund shall consist of moneys transferred to it from the State Bar Fund and the Virginia State Bar's Administration and Finance Account. Disbursements to the Clients' Protection Fund from the State Bar Fund shall be made only upon approval of the disbursements through the annual budgetary process of the Virginia State Bar. Notwithstanding this code section and the provisions of § 54.1-3912, the Supreme Court of Virginia may promulgate rules and regulations assessing members of the Virginia State Bar an annual fee up to $25 to be deposited in the State Bar Fund and transferred to the Clients' Protection Fund.

Anyone having comments about the proposed amendment should submit them to: Executive Director, Virginia State Bar, 707 E. Main St., Ste. 1500, Richmond, Va. 23219 no later than January 15, 2007.

Clients' Protection Fund Board Petitions Paid

On September 15, 2006, the Clients' Protection Fund Board approved payments to eight claimants. The matters involved six attorneys.

Attorney/Location	Amount Paid	Type of Case
Mikre-Michael Ayele, Arlington	$3,000.00	Unearned retainer/Immigration matter
Stephen W. Burcin, Richmond	$15,782.00	Embezzlement/Misappropriation of real estate settlement proceeds
Stephen W. Burcin, Richmond	$18,475.28	Embezzlement/Misappropriation of escrowed funds
Stephen W. Burcin, Richmond	$13,055.61	Embezzlement/Misappropriation of real estate settlement proceeds
Frederick L. Caldwell Sr., Virginia Beach	$516.66	Embezzlement/Failure to remit to client in a collection matter
Todd J. French, Richmond	$795.00	Unearned retainer/Bankruptcy
David Ashley Grant Nelson, Arlington	$275.00	Unearned retainer/Unremitted court costs/Traffic case
Jeffrey Bourke Rice, Fairfax	$550.00	Unearned retainer/Civil matter
Total	**$52,449.55**	

Highlights of Virginia State Bar Council Meeting

October 27, 2006

At its regular meeting on October 27, 2006, in Williamsburg, the Virginia State Bar Council heard the following significant reports and took the following actions:

VSB Budget

The VSB ended the 2005–2006 fiscal year with revenues of $10.1 million; expenditures and transfers of $10.4 million; and a draw on the reserve of $270,000. The reserve at year's end stood at 33.5 percent, or $3.5 million. Due to the declining reserve, the VSB did not transfer the $250,000 it had budgeted in 2005–2006 for the Clients' Protection Fund, and no further transfers to the fund from the operating budget are anticipated in the immediate future.

The VSB will need a dues increase by July 1, 2008. Any increase will require the General Assembly to raise the statutory cap on bar dues, currently set at $250.

In the interim, the VSB will ask the 2007 General Assembly to authorize the Supreme Court of Virginia to assess each member up to $25 per year, to be paid into the Clients' Protection Fund. (See page 7.) An actuarial analysis has recommended the fund be built to $9 million to meet anticipated needs. The fund currently totals $3.3 million.

VSB Executive Director Thomas A. Edmonds encouraged members of the council to talk to their legislators, as well as other lawyers, to explain why the dues increase will be necessary. The VSB will soon develop an outline of where the dues money is currently spent and how the increase will be allocated, to help in this educational process.

The Supreme Court has indicated that fees paid by non-Virginia lawyers under a proposed *pro hac vice* rule will be used by the Court for special projects. The proposed rule, which is pending before the Court, would track the Virginia court appearances of lawyers licensed in jurisdictions other than Virginia, and charge a fee for those appearances.

Access to Legal Services

Retired Judge Dale H. Harris of Lynchburg, chair of the Special Committee on Access to Legal Services, presented procedures developed by the committee for handling appeals by legal aid societies that are denied a license by the Virginia State Bar.

Under the new procedures, which were adopted unanimously by the council, appeals are limited to whether the bar acted properly under the statute and regulations that govern the licensing process.

Lawyers Needed for Conservation Cases

Virginia Secretary of Natural Resources L. Preston Bryant Jr. told the council the state is in need of lawyers to counsel landowners about the legal and tax ramifications of donating or selling conservation easements. No more than thirty lawyers have significant experience in this field, and more are needed—particularly in rural areas.

The VSB is partnering with the Department of Natural Resources to offer continuing legal education to prepare attorneys for this work. Governor Timothy M. Kaine has set a goal to conserve four hundred thousand acres during his four-year term.

Bryant encouraged lawyers to discuss conservation easements in estate planning sessions with clients.

More information on conservation easements can be found at **www.virginiaoutdoorsfoundation.org**.

Principles of Cooperation between Physicians and Attorneys

The VSB Executive Committee has approved an updated version of the "Principles of Cooperation between Physicians and Attorneys in the Commonwealth of Virginia." The document is on the VSB Web site—at **www.vsb.org/site/news/item/principles-of-cooperation-for-physicians-and-attorneys-in-the-commonwealth**—and paper copies will be printed. The document was updated by the Medical Society of Virginia and members of the health law sections of the VSB and The Virginia Bar Association.

Judicial Nominations

The Judicial Nominations Committee is preparing to change its process for evaluating prospective judges. Rather than recommending the three best-qualified persons for a vacancy on a statewide court, as it does now, the nomination committee would investigate, interview, evaluate and rate all candidates. The committee would prepare a written summary of the qualifications of each candidate, and the VSB president would present the recommendations in person to the appointing authority and field any questions.

The committee will present a formal proposal to the VSB Executive Committee for consideration on November 30, 2006.

President-Elect Designee

Manual A. Capsalis of Arlington is the VSB president-elect designee, to serve the 2008–2009 presidential term. He was uncontested.

License Waive-In for Law Professors

The council, by a vote of 38 to 13, rejected a proposal by the Education of Lawyers Section to ask the General Assembly to allow Virginia law professors who are admitted in jurisdictions elsewhere to be admitted here as active members without examination.

Business Casual for Test-Takers

The council unanimously defeated a proposal by the Environmental Law Section that the VSB request the Board of Bar Examiners to allow people to wear business casual dress while taking the bar examination.

Communication with Represented Persons

The council, by a vote of 46 to 9, passed a proposed additional comment to the Rules of Professional Conduct, Rule 4.2

(Communications with Persons Represented by Counsel) to clarify that a lawyer cannot communicate with a represented person, even if the person initiates the communication, except with the consent of the person's lawyer or in instances where the person is seeking a second opinion or a replacement lawyer. The proposal will be sent to the Court for consideration.

Undisclosed Tape Recording

The council unanimously passed proposed additional comments to Rule 8.4 (Misconduct) that would generally allow a lawyer to make undisclosed, lawful tape recordings on behalf of a client or in personal matters when the lawyer is not acting as an attorney. The proposed rule continues to discourage routine undisclosed recording by a lawyer of his or her client or another lawyer. The proposal will be sent to the Court for consideration.

Lee L. Nelms Joins VSB as Assistant Ethics Counsel

Lee L. Nelms has joined the Virginia State Bar staff as an assistant ethics counsel. She previously practiced with her husband, David O. Nelms, at Nelms & Nelms in Blackstone. Most recently she was a contract attorney at McGuireWoods in Richmond.

She holds a bachelor's degree in sociology from Gettysburg College and a law degree from Widener University School of Law.

Local and Specialty Bar Elections

Virginia Association of Black Women Attorneys
Kimberly Friend Smith, President
Robyn Nicole Seabrook, Secretary
Elaina Loréal Blanks, Treasurer

In Memoriam

Charles Harley Booth
Williamsburg
September 1931–July 2006

Sylvia Mary Brennan
Alexandria
May 1965–January 2006

Robert Lewis Clark
Dayton, Ohio
January 1948–October 2006

Jonathan Andrew Hack
McLean
March 1965–April 2006

William Peter Koczyk Jr.
Annandale
February 1953–May 2006

Mark Bennett Peterson
Charlottesville
December 1949–May 2006

T. Eugene Worrell
Charlottesville
July 1919–April 2006

Richmond Celebrates National Adoption Day

First Lady Anne B. Holton and Judge Angela E. Roberts

Richmond Juvenile and Domestic Relations District Court observed National, Virginia and Richmond adoption days on November 18 at the court, where thirty-one cases of children adopted from foster care were honored. Virginia First Lady Anne B. Holton (left), a former Richmond J&DR judge, was keynote speaker at the event, which was chaired by Richmond J&DR Judge Angela E. Roberts, who is a member of the Virginia State Bar Family Law Section's Board of Governors. The Greater Richmond Juvenile Bar Association was a cosponsor.

Bending Toward Justice

by Karen A. Gould, 2006–2007 VSB President

In preparing a column reflective of the history of legal services described in this issue of *Virginia Lawyer*, I must first disclaim any personal knowledge of pro bono work.

Although I have represented clients without expecting to be paid, as we all do, I have never participated in a program designed to represent clients who need legal services but cannot afford to pay for them.

I have lots of excuses: I'm a small-firm medical-malpractice defense lawyer. I don't practice family law, housing law, criminal defense or in any other area in which pro bono representation is needed. My "free" professional time has been spent doing significant volunteer work for the Virginia State Bar.

Yet, I believe that we have a duty, as officers of the court, to make sure that both sides in a contested matter have adequate representation. I try to fulfill the suggestions of Rule of Professional Conduct 6.1 by giving direct financial support to programs that deliver legal services.

What can we—the Virginia State Bar and the profession—do to motivate lawyers such as I to do pro bono work?

Other than doing pro bono, how can individual lawyers such as I support a system to provide legal services to people who can't afford them?

Many dedicated people offered their ideas and experiences as I was preparing this column. Here are some thoughts:

Training—You who practice in solo and small-firm general practices, I suspect, are the unsung heroes of the pro bono effort, in that you frequently represent uncounted clients who cannot afford to pay. You represent them because you know they need your help.

Lawyers such as I, who practice in a niche that doesn't address the vast majority of legal services needs, require training in specific areas of law. Training programs are free or low-cost and available on a flexible schedule, through legal aid clinics, local bar associations and projects designed for clients in need of targeted services (for example, domestic violence projects provide training in obtaining restraining and emergency custody orders).

Client Management—Legal services programs absorb much office overhead required for pro bono clients. Many programs provide intake, scheduling assistance, secretarial services and malpractice insurance for pro bono cases.

Firm Incentives—A few medium-size and large law firms encourage pro bono participation by giving credit to associates for pro bono hours. At least one firm requires that each lawyer provide fifty hours of pro bono service annually. I was told that when the requirement was first imposed, lawyers were reluctant to embrace the program. But the firm persisted, and now pro bono is accepted as part of the firm culture. Attorneys who go beyond the fifty-hour requirement are formally recognized.

Catch 'em young—Clinical programs for third-year law students use an enticing lure to get young advocates involved in public interest law: They promise early experience trying cases and representing clients before administrative tribunals. Clinics help black lung victims (at Washington and Lee University); juveniles and people with mental disabilities (at the University of Richmond); and low-income members of the military and their dependants (at George Mason University)—just to name a few.

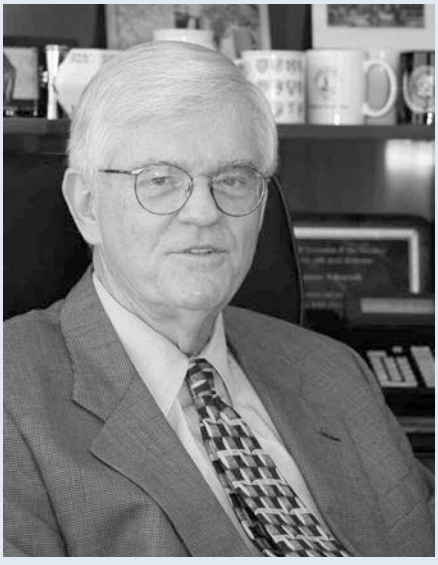
If you find that your practice does not allow time or opportunity for personal pro bono work, checkbook pro bono is perfectly appropriate under Rule 6.1(c). And the boards of pro bono programs are always in search of community leaders, including lawyers, to serve as directors and advocates. Participation by active citizen-lawyers is essential to the effort of making sure justice is equitably distributed.

Scan the legal services horizon. You will find exciting, innovative programs worthy of your time and money.

Martin Luther King Jr. assured us that "the arc of the moral universe is long, but it bends toward justice." The legal services leaders profiled in this magazine dedicated their careers to that concept. Now many are on the cusp of retirement. What are we doing to nurture the arc toward justice? What are we doing to put feet on the promises of the Constitution?

Recent issues of Virginia Lawyer *have described initiatives to increase funding for indigent criminal defense in Virginia. The articles that follow in this issue summarize the history of civil legal services for the poor in the commonwealth. The special section includes an overview of this work by comprehensive legal aid providers and independent, special-niche nonprofits. It is presented through recollections of some of the leaders of the movement to establish services for the poor.*

In the interview that follows, Virginia State Bar Executive Director Thomas A. Edmonds reflects on the history of legal services in the state, his service on the board of Legal Services Corporation of Virginia and the VSB's commitment to the legal needs of the underserved.



Thomas A. Edmonds *received his bachelor's degree from Mississippi College and his law degree from Duke University. He was dean, director of the law center, and professor of law at The University of Mississippi; and dean and professor of law at the University of Richmond Law School. He serves on the boards of directors in Richmond of Assisting Families of Inmates, a nonprofit that provides visiting-day transportation and other services to families of state prison inmates, and Boaz and Ruth, a program that teaches job and life skills to former prisoners. He has been the executive director and chief operating officer of the VSB since 1989. He will retire from the post in 2007.*

"If you go back into the pre-1960s era in Richmond—and Orlando, where I practiced law—there was a history of local bar associations operating legal aid programs. Volunteer lawyers from the firms around town would go and staff an office in the courthouse or someplace where people could come to receive counseling, but the only service they could receive had to be provided by the lawyer and his or her firm—and many did. Volunteer lawyers did good work, but such a system could, of course, never meet much of the need. It was all volunteer and pretty spotty, until the 1960s, when we made a national commitment.

"In the Lyndon Johnson era, in the 1960s, during the so-called War on Poverty, the U.S. Office of Economic Opportunity was the first federal agency to provide federal money for civil legal services delivered by full-time staff attorneys at legal offices.

"Part of the War on Poverty included a legal services component. Grants were made around the country to experiment with setting up these kinds of legal aid programs. I was involved with one in Mississippi. I was teaching at Ole Miss at the time—1966—and we got a grant that year to set up a rural legal services program that covered the Northern half of the state of Mississippi, focusing on the problems of low-income agricultural workers. There was resistance to concept—by other lawyers and politicians, primarily. Certainly, many volunteer lawyers were representing poor people for free in those days, and not worrying about a fee. But a lot [of lawyers] didn't. And certainly the needs of the poor were not being met to any significant degree.

"In 1964, Lewis F. Powell Jr. served as president of the American Bar Association. He led the ABA in lobbying for federal support for legal services. That Lewis Powell and the ABA pushed for this meant that the organized bar at the national level for the first time worked to achieve the notion of a public responsibility to help address the legal problems of the poor—it was not just the responsibility of the bar.

Blue-Ribbon Committee Appointed

"In Virginia, the Virginia State Bar and The Virginia Bar Association appointed a blue-ribbon committee in 1991. The ten-member Joint Committee to Study Legal Services in Virginia began its work just after publication of an independent survey of poor citizens in the state. The survey found that there was a widespread unmet need for legal services for the poor, that many individuals who sought aid were turned away, that many individuals were unaware of legal aid, and that legal services were vastly underfunded. Gail S. Marshall and Phillip B. Morris were cochairs of the committee. Membership was comprised of some of the top lawyers in the state.

"This legal needs assessment, paid for with a grant from the Virginia Law Foundation, confirmed our suspicion that only about 20 percent of the legal needs of the poor are addressed in any formal way with the assistance of a lawyer. That created quite a push for increased support for legal aid for the poor in Virginia. The bar instituted the Interest on Lawyers' Trust Accounts program (IOLTA), for example, to help fund legal aid. The program was initially administered by the Virginia Law Foundation, with a good part of the income going to legal aid programs.

Legal Services Corporation of Virginia

"There was more interest in the work of the Legal Services Corporation of Virginia, which predated the legal needs study of the joint committee, but I don't think a lot had been accomplished up to that point on the state level in terms of support for legal aid in Virginia. Once that study was done, and the legal community became more aware of the shortcomings of the system, there was quite a lot of interest in getting the bar to do more, in getting lawyers to do more pro bono—a combination of things that might address the problem. At that time we added our pro bono coordinator position. Sarah Jane Wyatt was our first pro bono coordinator. Maureen K. Petrini was our second. So, the state bar began to do more, particularly in lining up pro bono help.

"We have always supported Legal Services Corporation of Virginia's efforts to get more public funding through the General Assembly. Ultimately, LSCV did achieve both a filing fee add-on that was dedicated to legal aid and a general-fund appropriation that runs almost $2 million per year now. We now get $3 million to $3.5 million in public monies per year though a filing fee and the general appropriation. LSC receives another $2.5–$3 million from the interest from the IOLTA program. So, that total—$6 or $7 million at least per year—is distributed to the field programs in Virginia and represents state support that did not exist before the early 1990s. So we've made some progress, but we have a long way to go.

"The LSCV-supported network of programs in each area of the state is the official bar-sponsored effort, because it is comprehensive and covers the whole state. It is funded partially by the federal government through grants directly to individual programs and partially through state grants from LSCV.

"Each program also raises local money—some more successfully than others. Some of these participate through their local United Way campaign, and some of them have independent campaigns. Altogether, federal, state and local money probably exceeds $20 million.

"So, we've committed more resources and we're doing a lot more than ever, but the question is, what remains to be done and how might we do it? That always is an issue for the bar, because access to legal services is one of the three prongs of our mission statement—providing access for all citizens to the system—on both the criminal and civil side. This is part of what we work for, and why we have worked so hard to increase fees for court-appointed attorneys fees and funding of the public defender system.

Independent Network

"In addition to LSCV, there is this network of mainly grant-supported, sometimes government-supported, sometimes volunteer-supported enterprises that are usually organized around some particular social problem, like domestic violence, the problems of the elderly or problems in particular areas of the law—Virginia Tax Law Project, for example. They are organized around some area of the law or some target population, and they often are not just providing legal services. They may promote social services and financial support, or operate shelters, but legal services are a part of it.

"I think these independent providers are an important part of the picture, and they deserve our interest and our support. The Community Tax Law Project went to the General Assembly and got their own public support—(which comes through the bar's budget, just as LSCV's does). We have supported its budget renewal every time we put a budget request in. So, we're not solely focused on LSCV. The bar's interest is in helping to meet the legal needs of all Virginians who do not have access to the system. Whether that is military dependents of lower-level personnel, or whether it's the elderly whose incomes drop off to a low level when they retire, or the infirm—all of those needs would be of equal interest to the bar. But it is only the comprehensive providers that operate statewide and undertake to address generally the needs of the poor—like landlord/tenant issues, consumer protection, domestic relations—only the LSCV network comes close to responding to the bulk of the need. Both [kinds of programs] are good, but the bar's interest has to be in providing the greatest amount of service with the limited funds available. I serve on the LSCV board, because I think that is where the greatest amount of the need can be met.

Virginia Compared

"The blue-ribbon joint committee got the attention of a lot of people who had no idea what the legal needs of the poor were and no idea what the deficiencies were. It got us moving, and LSCV and many of the independent providers have continued to move in the right direction. Many other states had a substantial lead on us in terms of interest and commitment on the part of their bars, but in the last twenty years we

have gained a leadership role—in terms of our attitude in trying to address this problem. Certainly, the General Assembly has done more than most state legislatures. They have been receptive, and LSCV has done a fine job of educating members of the Assembly about the needs and the public nature of the responsibility to meet those needs.

Retirement

"I would certainly be willing to be involved in the legal aid community in the future—in volunteer time and commitment to the enterprise. I have always been interested in the welfare of the community and in folks who seem to need a helping hand. I did start the Assisting Families of Inmates program that has been operating in Richmond now for about thirty years. It provides transportation for families of prisoners on visiting days, social service referrals and the like. I am also involved with Boaz & Ruth in Richmond, which I think holds the promise of really doing some good in a part of town that needs all the help it can get. It is helping turn lives around for some persons who are just coming out of prison.

"On the legal services front, I have been a volunteer at Central Virginia Legal Aid—helped to staff the hotline calls and gave advice—and that's about all I have had time to do while serving on the bar staff.

"I've always admired past VSB President John A.C. Keith's father—Judge James Keith—who was one of the early recipients of our Powell Pro Bono award. When he left the bench, he became almost a full-time volunteer at Legal Services of Northern Virginia. I don't know that I will follow suit to that degree, but I will remain involved after I retire.

"One of the reasons we passed the Emeritus Rule was in the hope that we would have lawyers retiring and that it would encourage them to devote their skills acquired representing clients to pro bono clients through legal aid programs in their areas." ⚖

Lewis F. Powell, Jr. and the Birth of Legal Services

by John C. Jeffries Jr.

Reprinted from the December 1998 issue of *Virginia Lawyer*.

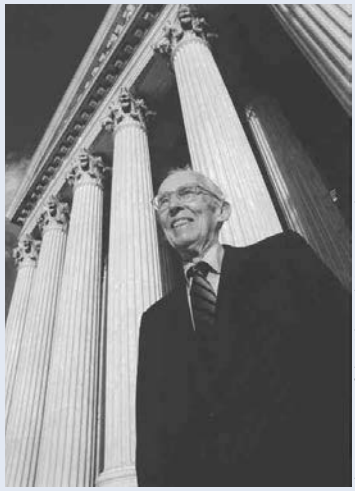


Photo Courtesy of the *Richmond Times-Dispatch*

In the days before his appointment to the Supreme Court, Lewis F. Powell Jr. was known as the quintessential establishment lawyer. He had the largest clients, the best connections, and the greatest national reputation of any lawyer in Virginia. Yet Powell was also deeply involved in the provision of legal services to the poor. His leadership in that field was crucial to the birth of the private-public partnership that eventually became the Legal Services Corporation.

As a young lawyer in the 1930s, Powell devoted many hours to the Family Service Society of Richmond. That organization was typical of legal aid societies of the era. It was led by establishment lawyers, largely staffed by volunteers, and closely allied to the local bar. The goal of the Family Service Society of Richmond and of others like it was not to attack poverty as such but to provide legal representation to those who happened to be poor.

This approach was at once progressive and conservative. By furnishing competent counsel at reasonable cost, legal aid societies not only gave indigents a better shot at obtaining equal justice under law; they also sought to maintain the allegiance of the poor to a legal system that did not always seem to be on their side. As Powell told the American Bar Association in 1964, "[R]espect for law is at its lowest with underprivileged persons. There is a natural tendency for such persons to think of the courts as symbols of trouble and of lawyers as representatives of creditors or other sources of 'harassment.'" Powell wanted to assure that competent lawyers were available to "provide the advice and assure the just treatment that will engender increased respect for the law."

Federal involvement came from an entirely different direction. Lyndon Johnson's "War on Poverty" put Peace Corps director Sargent Shriver in charge of a newly created federal agency, the Office of Economic Opportunity. The OEO functioned as an umbrella agency for a wide variety of anti-poverty programs, aimed not at protecting the legal rights of the poor but at correcting the underlying economic deprivation of poverty itself. The idea of including a legal services program in OEO originated with Jean Camper Cahn, an African-American graduate of Yale Law School and dedicated anti-poverty activist. The backbone of the OEO was the Community Action Program, consisting of a collection of local community action agencies. Cahn had served under such an agency in New Haven, only to have it

See Powell continued on page 27

How I Got Here

by John Levy

"To no one will we sell, to no one refuse, delay, right or justice." —Magna Carta, 1215

"The law in all its majesty prohibits the rich as well as the poor from sleeping under the bridges of the river Seine." —Anatole France

"I was in a pretrial conference in the chambers of a judge of the United States District Court for the Western District of Virginia. The year was 1969 or '70. The lawyer for the other side and I had begun to discuss the upcoming trial with the judge. My cocounsel from the Legal Aid Society of the Roanoke Valley was the only woman lawyer in Roanoke who did trial work at that time. She had been detained and we had started without her.

"When she arrived, the judge and the lawyer for the other side started doing a little 'dance.' A woman entered the room, they started to rise. No, it is a lawyer for the other side; no, it's a woman. Up down, up down. Finally, tradition won out and they both stood up and I introduced Meg. This was clearly a transitional time in the practice of law in Virginia. How I got there and some of my experiences in legal aid in Virginia are the subject of this article.

"I was born in Washington, D.C. My father was a lawyer and my mother a teacher—two things I thought I'd never be. After graduating from New York University I joined the Peace Corps and taught in Nigeria, West Africa, where I met my wife. We married there and our first child, Shanti, was born there. I took my Law School Admission Test in Enugu, Nigeria, in a thatch-roofed building with goats running in and out. I've always blamed this distraction for my unimpressive score.

"I graduated from Syracuse University Law School in 1968 and received a Reginald Heber Smith Fellowship, which paid one's salary to work for a legal aid program. My wife and I looked at the list of existing programs and selected our top three choices in order of preference: Seattle, Portland and Roanoke. At the time Roanoke was the only federally funded program in Virginia. Slots in the first two programs were filled, so we ended up in Roanoke. This stroke of luck proved to be a very rewarding and exciting three years.

"The Legal Aid Society of Roanoke Valley was established in 1966 at the Total Action Against Poverty (TAP), Community Action Agency, Office of Economic Opportunity, with the support of the Roanoke Bar Association. My remembrance is that the support was far from unanimous. TAP was fully engaged in the War on Poverty: organizing, lobbying, etc. I got involved in welfare rights. One of the reasons for the Reggie Program, in addition to recruitment of legal aid lawyers, was to have lawyers whose salaries were not at the mercy of local boards and who would be able to bring about changes in the law that would benefit poor people in general, not just an individual client. This meant "impact litigation"; class actions; lobbying for law reform and working with organizations of poor people who were "fighting the war." The tension between representing as many individual clients as possible and doing time-consuming cases that affect numbers of people over time has been a recurring debate, and still goes on.

"In Roanoke with TAP helping to organize women on welfare (Welfare Rights Organization), I started to litigate welfare issues. For example, a client was applying for Aid to the Permanent and Totally Disabled (APTD), the predecessor to Supplemental Security Income (SSI). The client was told that a lien would be put on the client's house, and the lien would grow with the amount of assistance the client received. I had never heard of such and researched the law. I found that there was a statute that allowed such a lien for Old Age Assistance but not APTD. I sued and the state eventually removed all these liens. I filed suit in Roanoke and had a "Plea in Abatement" filed against me. I had never heard of such a pleading. (It was to challenge venue because I was suing the state, which had to be done in Richmond.)

"Other cases dealt with issues such as getting access to the Welfare Manual; having Virginia implement the right to a hearing prior to terminating benefits as required by the U.S. Supreme Court (*Goldberg v. Kelly, See also Dillard v. Industrial Commision*, S.Ct.) dealing with the paternity laws and proposed changes; the work requirement for mothers receiving benefits (*Woolfolk v. Brown*, 325 F.S. 1162, 456 F2d 652 (1972)); and localities deciding on whether or not to have federally funded food programs.

"One case that gives a feeling of the times was in Botetourt County. I was representing a woman whose child had been taken into custody by the welfare department. It was being appealed to circuit court and at docket call, when I stood up as the case was called, the judge announced that legal aid lawyers could not represent clients in his court. We brought a case in federal court to force the judge to let us practice in his court. Our board of directors was not happy with us taking a Virginia judge into a federal court; they brought an

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Original Writ of Mandamus in the Supreme Court of Virginia and the judge relented.

"I became the deputy director of Roanoke Legal Aid and after some time applied for the directorship of a new federally funded program opening in Charlottesville. My reputation as a 'troublemaker' may have followed me, as I didn't get that position. Soon after that, Richmond got an OED grant to start a legal aid program and I was hired to be its director. Neighborhood Legal Aid was originally housed in the Richmond Community Action Program (RCAP) and its first hurdle was to get licensed by the Virginia State Bar.

"When the Richmond Bar Association heard that the Office of Economic Opportunity was going to fund a legal aid program, they started the Metropolitan Legal Aid Society. When I applied for the license I was told that there could only be one legal aid in a jurisdiction, and Metropolitan had been licensed to serve Richmond. I have always believed that was the reason behind the bar's establishing Metropolitan. I let it be known that I was preparing a federal case (before Judge Robert R. Merhige Jr., the only federal district judge in Richmond at that time), challenging the VSB's refusal to license Neighborhood Legal Aid. Very soon thereafter a license was given.

"In Richmond I continued to litigate issues that I believed would impact the lives of poor people. Some welfare cases were brought, although the Welfare Rights organizing had almost ended. The issues I remember at that time were more about women's rights such as marital rape, which was not a crime. I worked with others in the General Assembly to get the first marital rape law passed. We also successfully challenged in federal court the law that required a married woman to get her husband's consent before she could be sterilized. A vivid memory of a moment in the oral argument was when I was discussing the legal changes that do occur when someone gets married, and one of the judges interjected, 'Yes, when a woman gets married she can no longer go to the movies with a strange man. Can she?' Not knowing how to make a coherent response, I just ignored it.

"In 1976, after five years of running Neighborhood Legal Aid in Richmond, the College of William and Mary Law School advertised for a one-year visiting professor to start their clinical law program, which the American Bar Association had recently required of law schools. I had worked with University of Richmond law students and found it rewarding and I felt that I was 'burning out' as a program director. A year in academe sounded like a nice break. I was offered the job and remained at W&M until retirement in 2002.

"Williamsburg did not have a legal aid program when I came. Having spent my whole career in legal aid, that was the only clinical model I could envision. Together with Robert C. 'Bobby' Scott (who was not a congressman at the time), we organized and got funding for the Peninsula Legal Aid Center. Much of the local bar was supportive, but a significant number pushed for a 'Judicare' Program. For the next twenty-five years, third-year law students under my supervision represented legal aid clients in the Williamsburg area. We represented individual clients. A few years after I retired from teaching, I went back to legal aid as the acting director of the Peninsula program while it and the Tidewater program merged.

"My almost forty years in legal aid in Virginia have been rewarding and fulfilling. One of the most gratifying changes I have seen has been with the attitude of the bar toward legal aid. At the local level support such as pro bono representation by local lawyers has grown steadily. From the Virginia State Bar, with Thomas A. Edmonds leading the way, legal aid could have not asked for more support. Also, the Virginia Law Foundation has been a great source of financial support.

"However, even with such support and progress, the legal needs of Virginia's poor are still largely unmet. The latest study showed that only 20 percent of those needs are presently being met. The restrictions on what types of cases federally funded programs can bring (e.g., no class actions) and what relief can be requested in cases which are brought (e.g., no request for attorney's fees) make the quotations at the beginning of this article still relevant." ⚖

John Levy is Chancellor Professor of Law, Emeritus, at the College of William and Mary Marshall-Wythe School of Law. Levy has spent a lifetime in the law and public service. After two years in the Peace Corps teaching English and African history in a secondary school in Nigeria, a stint in the U.S. Department of Health, Education and Welfare's education office; and work as director for Richmond's Legal Aid Society, he moved to the W&M law school, where he became a mainstay of its Legal Skills Program as well as director of clinical education, the summer program abroad, and the graduate master of laws program. The law school has a loan repayment assistance program that honors Levy by helping graduates who work at low pay in public service.

Service in the Public Interest:

Employment, Pro Bono and Nominal Compensation Options

A Report from the Virginia State Bar Pro Bono/Access to Legal Services Office, by Maureen K. Petrini, Director

Virginia is home to a complex array of programs that directly provide free and reduced-fee alternative dispute resolution and legal services to vulnerable individuals and those on the economic margins of society. Ideally, through public law libraries and other venues, Virginians also have access to affordable real-time multilingual translation services, pro se court forms with procedural instructions, and user-friendly kiosks in cyberspace, as well as adaptive technology such as new Federal Communications Commission-sponsored video relay systems for the hearing impaired.

This tapestry of law-related programs tied to the civil and criminal justice systems offers service opportunities to attorneys and affiliated professionals—opportunities intended to be compatible with the scheduling preferences and philosophical sensibilities of individual volunteers. Heightened awareness of other providers and resources help lawyers refer questions they are not comfortable answering.

Projects range from "big-box" endeavors—such as the federal government-sponsored military Legal Assistance Offices (LAOs)—to boutique operations with very limited resources that target narrowly-defined needs.

Military LAOs provide free legal assistance to all active duty and retired service members and their dependents under federal law 10 USC 1044. There is no means test. Enlistees are increasingly atypical in comparison to their peers in the general population.* In the wider District of Columbia-Northern Virginia area, this translates to more than 155,000 potential clients annually, including numerous individuals who qualify as 100 percent disabled, low-income and/or modest-means.

Certified mediators who participate in Virginia's Coalition of Community Mediation Centers offer sliding-fee programs to thousands of low-income and modest-means individuals, many at or below 200 percent of the federal poverty level. These programs operate under the auspices of the Supreme Court of Virginia and serve citizens who would not otherwise be able to afford access to private mediation services. In fiscal year 2002–2003, they conducted seven thousand custody, visitation and support mediations. The average extrapolated income of parties served under Virginia Code Section 20-124.4 was $20,000 to $22,000, and the average family size was three. Almost a quarter of the mediators certified to accept referrals from juvenile and domestic relations courts under the program were attorneys.

Functioning as the centerpiece of this virtual network on the civil side are the Virginia State Bar-licensed legal aid societies. These programs collectively log more than thirty thousand cases annually and touch the lives of thousands of other Virginians every year when family size is added to the equation. Although funded primarily by the state and federal governments, the programs operate without any centralized viable pension plan for their employees—some of whom routinely tithe or give back part of their modest salaries to help underwrite program operations. The programs deliver basic civil legal services. They make training and legal malpractice insurance available to attorneys who participate in private bar initiatives, such as pro bono, Judicare and Neighborhood Assistance Program state tax credit projects. A few legal aid programs sponsor tuition loan forgiveness plans for new hires who commit to extended years of service.

Undercompensated public service opportunities also worthy of attention from new and experienced lawyers include alliances, especially in remote areas, with overburdened public defender offices overseen by the Virginia Indigent Defense Commission; commonwealth attorney's offices; and hundreds of court-appointed counsel opportunities to represent indigents accused of crimes, incapacitated adults, and parents in child-removal proceedings.

Supplementing the aforementioned work are law school clinics; corporate, voluntary bar association, and law firm signature projects; Employer Support of the [National] Guard & Reserve; the Virginia Office of Protection and Advocacy, an independent state government agency that represents persons with disabilities; and independent legal services providers, some of which do public interest work seed-funded by the Virginia Law Foundation. Collectively, these programs' substantive law concentrations span a spectrum from faith-based efforts on behalf of victims of domestic violence and human trafficking and the prison reentry population to programs that focus on constitutional rights, low-income taxpayers, children with special education needs, and health law for cancer and AIDS/HIV patients.

Other important components include lawyer referral services sponsored by the VSB and several voluntary bar associations that, for a nominal fee, provide panel attorneys to advise members of the public about their legal rights; legal insurance programs run by trade unions and other entities; and speakers bureaus and emergency legal services initiatives, including those sponsored or cosponsored by the VSB and the Supreme Court of Virginia.

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Legal Aid in the 1980s: Moving Government, Building Support, Paying the Bills

by Dawn Chase

Jack L. Harris came to Virginia legal aid after four years in the Air Force, college, law school, and brief jobs practicing in Florida.

Legal aid had been operating in urban pockets of Virginia—Richmond, Roanoke and Charlottesville among them—for many years, nurtured initially by the federal Great Society programs of the 1960s and supplemented by local governments, local bars, United Way and other community resources.

But in the mid-1970s, after the establishment of the national Legal Services Corporation, an additional infusion of federal funds, funneled through the Virginia Department of Social Services, was used to create legal aid programs in every area of the commonwealth. That money also was the impetus to establish Legal Services Corporation of Virginia (LSCV), which has become the central clearinghouse for money and, with the Virginia Poverty Law Center, for support services such as training to assist all the local programs.

Bright young lawyers were migrating to Virginia and joining the legal aid pioneers. Many took up the challenge of helping poor people case-by-case with their legal problems. But the lawyers also dreamed of solving those problems systemically, by changing law and forcing compliance with existing laws, to benefit many people, instead of just one at a time.

Harris came to legal aid in 1978, at age thirty-one. "I was one of the older ones," he said. Virginia's poor faced many challenges—for example, "A surprising percentage of Virginia homes didn't even have indoor plumbing."

He started as director of LSCV, and soon took a second job job as well—as director of the Virginia Poverty Law Center, which was formed in 1978 to bring about systemic change.

Harris describes LSCV as traditional and conservative, and the Poverty Law Center as aggressive, committed to forcing change where necessary. "As strange as it seems, I was director of both the conservative and aggressive organizations at the same time," he said.

While legal aid programs funded by LSCV met the immediate needs of the poor, the Poverty Law Center lawyers went to the housing projects, community action programs, area agencies on aging and other venues where the people were. They organized task forces around the state—on public benefits, food law, healthcare, housing and child support.

They also organized buses and clients to fill those buses, to attend rallies in Washington.

They went to state government, to the General Assembly and to court to make needs known and to insist that government meet those needs where law required.

"We were one fired-up group," Harris said. "We were very excited about what we were doing. At that time we thought we had an ability—and we did—to move things forward."

In 1980, Ronald Reagan became president. In his first year, the federal support of legal aid was cut by 25 percent. Virginia legal aid programs laid off attorneys and support staff and closed satellite offices.

Ensuing years saw further cuts, as well as increasing limitations on what types of causes legal aid could undertake with federal funds. Declared off-limits were many cases involving class-action suits, reproductive rights, undocumented aliens and political redistricting.

Then LSCV and the Poverty Law Center faced a new challenge that required as much commitment and persuasive power as their legal advocacy did. They had to convince the conservative legislators of Virginia that the state needed to step in and pay lawyers to help the poor.

"We began the process of seeking state funding for legal aid from the General Assembly," Harris said. Legal Aid's first legislative advocate was then-Delegate William P. Robinson Jr., who had just been elected to his deceased father's seat in Norfolk. Robinson worked the issue hard, and the Byrd Democrat stalwarts who led the legislature supported it. Legal aid received strong support from William L. Lukhard, a longtime commissioner of social services. In its first attempt, Legal Aid's advocates won an appropriation of five hundred thousand dollars, awarded without restrictions.

Meanwhile, individual legal aid programs turned to their communities for additional help—in some cases tapping sources developed two decades before by the programs in their infancy. The communities responded, and LSCV realized the programs had established trust—that they would use money wisely and that they offered valued services.

State legislators accepted legal aid's arguments that investment in legal services would save state money that would otherwise be paid out in social services benefits.

"Lawyers around the state really helped us out," Harris said. "The General Assembly had many many more lawyers than it has today, and there was a recognition that

pro bono services alone would never meet this need.

"The Virginia State Bar and its leadership, especially its executive directors N. Samuel Clifton and Thomas A. Edmonds, were key supporters of legal aid, then and now."

A little more than a decade after he arrived, Harris left both his legal aid jobs, and eventually landed at the Virginia Trial Lawyers Association, where he is executive director. He continues to serve on the boards of LSCV and the Virginia Poverty Law Center.

He listed some accomplishments of the 1980s which continue to play a role today: Child support enforcement was improved. Nutrition benefits, such as food stamps, became more widely available because outreach and distribution are in compliance with law and regulation. Utilities regulators have a seat reserved for consumers. Health and disability benefits keep people off welfare. A Landlord-Tenant Act requires at least minimal standards for rental housing. Consumer laws now provide improved protection from fraud.

There were failures, too. In the first years of the Poverty Law Center, "The primary issue, believe it or not, was removal of the tax on food."

Now, legal aid "may not be storming the ramparts," Harris said. "But it has accomplished something more important than that, in my view: It has withstood the test of time and is still there to serve those in need."

Today the legal aid system enjoys broad support that includes religious institutions, established bar groups, community foundations and social services organizations, in addition to local government.

"Without community leaders who are informed of and a part of what you're doing, a small organization like a legal aid office can't succeed," Harris said.

Virginia made legal aid history in the 1980s. It was one of the first ten states in the country to appropriate funding for civil legal aid. It was also one of the first ten to adopt an interest on lawyer trust accounts program; the interest was paid over to the Virginia Law Foundation, with a primary purpose to support legal services to the poor.

Harris treasures the memory of "an outstanding migration of young lawyers" who came out of the 1960s and '70s committed to testing their perception "that you could actually get into those programs and make a difference—not with words like 'love' and 'freedom,' but actually moving the government to do what we believed it had the constitutional responsibility to do." ⚖

The 1980s: Legal Aid Challenged the System, Brought Change

When Gregory E. Lucyk received an invitation to come to Virginia and advocate for the poor, he was a Philadelphia lawyer working at a legal aid program called Community Legal Services, in its Center City "impact office." He had made a name for himself litigating class actions to make government nutrition programs more available to people who needed them.

Jack L. Harris, then director of the Legal Services Corporation of Virginia and the Virginia Poverty Law Center, hired Lucyk in January 1979. "I was hired to provide legal support and training for legal aid staff and, let's say, ignite some excitement into the programs in the commonwealth," Lucyk said. His objective was to "enhance the ability of local programs to have a broader impact on a greater number of people."

He started out with the Poverty Law Center's Food Law Project. There he found that many of Virginia's social services offices were lax in implementing the federal requirements for providing supplemental nutrition through food stamps, Women Infants and Children (WIC) and other programs. The programs weren't doing outreach to identify eligible recipients, and they weren't employing enough staff to meet demands for service in a timely fashion. Indigent people, some in emergency situations, were being turned away. Harris called it a "horrendous situation."

Lucyk took the problem on, with the help of legal aid clients and testers who checked compliance in offices statewide. Eventually, he won a favorable settlement in a large class-action suit against the city of Richmond. The tide began to turn.

Along the way, he learned a different style.

In Philadelphia, "The way I learned to do business was to come out swinging," he said. In Virginia, "What changed over time for me was that I became less confrontational. While I still used the tools of the law to accomplish the purposes we were attempting to achieve, I think that I acted with a greater level of courtesy and civility in how I dealt with program officials and governmental lawyers and others.

"I softened my approach."

While Lucyk and his legal aid colleagues were waging the larger battles, the community experienced peripheral benefits. For example, legal aid community organizer Deborah D. Oswalt focused on bringing together the people and

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Legal Aid in the 2000s: Tens of Thousands Benefit, But Still a Need

by Dawn Chase

Now in its fifth decade, legal aid in Virginia has evolved in ways unforeseen by the lawyers who started it in the 1960s.

Once, it was made up of a handful of urban clinics. Now, the network funded by the Legal Services Corporation of Virginia (LSCV) comprises ten field programs that oversee thirty-five offices and penetrate every area of the commonwealth.

Money for the system comes from a broad base: Interest on Lawyer Trust Accounts (IOLTA) ($1.7 million in 2004–2005); state appropriations ($1.6 million in general revenue and $3.4 million from court filing fees); the federal Legal Services Corporation ($5.4 million; cities and counties ($1.8 million); foundations ($900,000) other federal programs ($700,000); and other sources, including the United Way and donations from the private bar ($550,000 in cash donations and $2.5 million in donated volunteer time).

Virginia legal aid programs are governed by volunteer boards of community leaders, clients and others who offer insight into how best to help low-income people meet legal needs.

The programs employ about 125 attorneys and about 150 nonlawyer staff, a majority of whom are paralegals.

The programs have drawn in pro bono lawyers, who in 2004–2005 completed 3,356 cases involving 16,846 hours. At $150 per hour, the commitment represented a donation of $2.5 million.

During the same year, Legal Aid directly closed 31,500 cases benefiting 114,535 people, most in cases that included consumer, family, and housing law. They prevented unlawful evictions and foreclosures, advocated in child support and custody cases, obtained protective orders and intervened in cases of fraud, wage garnishments and credit denial.

The legal aid staffs helped people obtain benefits—$27.5 million worth in 2004–2005. That amount included $12.5 million in Social Security and Supplemental Security Income benefits; $9.9 million in child support; and $2.6 million in affirmative judgments.

The staffs also helped teach another 127,544 people to represent their own interests. The programs distributed newsletters and other written materials, sponsored community workshops and directly assisted self-represented litigants.

Based on funding sources alone, Mark Braley, executive director of LSCV, reported to the General Assembly this year, "What the state gets is basically a $20 million Legal Aid system for about $5.5 million."

In his office in downtown Richmond, Braley sits at command central for this system, as LSCV allocates money, provides technical assistance and support to the programs, reviews program financial audits, conducts grantee performance evaluations, lobbies the General Assembly to maintain and increase funding and collects and analyzes statistics that document legal aid activities throughout the commonwealth.

Braley came to the program in 1992, after a stint as a prosecutor in Petersburg and a private practice. He, like many in legal aid, was influenced by the civil rights movement. "It brought a lot of focus on the general problems of poverty," and law offered a way to address those problems, he said.

In the past fourteen years, Braley has seen many skirmishes and a few outright wars over funding and other issues.


Mark Braley

Despite the ongoing challenges, the LSCV network of programs is healthy, Braley said.

The funding is broad-based and able to provide some cushion for changes. "While we encourage our grantees to create small reserves to weather through tough times, the viability of legal aid is always tenuous," he said. "It only takes one significant cut in funding from a major source like the federal government, or like recent downturns in IOLTA funding, to put legal aid programs into retrenchment mode."

The program boards of directors are for the most part strong. Relations with legislators and community groups have remained stable through changes in leadership. Local officials and community leaders recognize the good work that their local legal aid offices do and communicate that to state and federal legislators. Clients are being served.

Legal aid is not what its founders envisioned in the 1960s. Efforts toward systemic change are generally confined to legislative advocacy. In helping clients, legal aid programs heavily rely on telephone advice—often provided by paralegals and pro bono lawyers—instead of direct representation.

The founders of legal services dreamt that, eventually, full legal representation would be available to every low-income person.

"The reality is that resources have never come close to allowing that," Braley said. "As a result, only about 30 percent of those we serve receive extended repre-

sentation, while 70 percent receive only brief advice and services. Until appropriate resources are provided, this will continue to be the case."

More than 650,000 Virginia residents live below the poverty level, and another 150,000 have incomes less than 125 percent of the federal poverty guideline (legal aid's cut-off). Roughly one in eight Virginians are eligible for free civil legal services from LSCV-funded programs.

National estimates conclude that 80 percent of legal needs are unmet. This has been confirmed in Virginia recently by a new legal needs survey conducted by LSCV and the Virginia Law Foundation. Legal aid turns away more than twenty thousand Virginians each year. The system does not yet offer the "justice for all" that legal aid's founders worked for.

And the system has not been able to address problems with recruitment and retention of attorneys. Salaries—for lawyers faced with tens of thousands in school loans—start at about $30,000, less than public defenders and other public sector attorneys. The growth potential is minimal, and pension benefits are limited or nonexistent. Programs every year must balance compensation for attorneys against the always daunting unmet legal needs of clients.

"It's one thing to commit yourself to poverty law. It's another to commit yourself and your family to poverty, and that's what we are basically asking a new attorney, just out of law school with $80,000 in school loans, to do," Braley said.

Jack L. Harris, who remains on the LCSV board after serving in Braley's job in the 1980s, said Virginia legal aid must respond to the resources and political climate of the times.

The reality its leaders face is that, with inflation adjusted, the programs have never regained the funding levels achieved in the late 1970s by the Great Society infusion of federal legal services money, he said.

Legal aid has adapted by offering telephone advice, legal information hotlines and Web-based legal information as the best way to reach the maximum number of people. And the system has supplemented that advice with a pro bono initiative, which has recruited lawyers in private practice to take representations, even of complex cases.

Participants in the effort have included local bar associations, the Virginia State Bar and its Access to Legal Services Committee, The Virginia Bar Association and private law firms. "In an organized way, the bar has stepped up," Harris said.

"We could wish that legal aid would be better supported and therefore able to provide more of the legal representation needed by low-income Virginians. But we should all feel very proud of legal aid in Virginia and all that it, and all those who work in it, have accomplished. I know I am," Harris said.

"Access involves more than being able to enter a courthouse," Braley said. "It involves being able to state one's case and being assured that one's case is presented and deliberated on fairly. An individual without resources, appropriate education and an ability to articulate one's legal position faces losing all of those things necessary to being a contributing member of society—a roof over one's head, food on the table, education for one's children."

A legal aid lawyer can make the difference, so the individual can maintain a standard of living.

"Legal aid programs create a return on the investment made by the state in its services. Besides the incalculable benefit to the courts of having litigants represented, the dollar benefits achieved by legal aid programs for their clients represent a five-fold return on the commonwealth's investment."

Braley said he is gratified by the combination of financial assistance and pro bono services that ensure that Virginia's poor have access to legal services. "But we can do more, and we need to do more as long as we are turning away more than twenty thousand applicants a year," he said. "It's my job to convince everyone of that." ⚖

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resources instrumental in founding the Central Virginia Food Bank.

Lucyk is the grandson of Ukrainian immigrants. "I was very blessed and very fortunate because I had opportunities in my life," he said. He chose to work in legal aid to try to make opportunities available to others.

After seven years, frustrated by funding cuts and limitations on the ability of programs to effect systemic change, he moved on. After serving eighteen years in the office of the Virginia Attorney General, he now is chief staff attorney for the Supreme Court of Virginia.

He salutes his former colleagues who carry on in legal aid, still trying to achieve civil justice for the indigent, case by case.

"Every lawyer and every state bar has an obligation to insure that legal services are available to those who are unable to hire a lawyer, and particularly those in our society who are unempowered or have no voice in the process," he said. "Legal aid fulfills some of that responsibility, but more needs to be done.

"Attorneys who work in legal services are heroes, and I am thankful for their commitment to this critically important public service." ⚖

Half My Life

by Larry T. Harley

The "Theory of Relativity"—that's what I call it. I don't mean Einstein's version, although it shares some similarities. I mean the one about gaining perspective in life. It bumped up against my comfort zone just recently. My good friend John J. Gifford, a private attorney in Abingdon, had just turned fifty. John and I met when he interviewed for an attorney position with our legal aid program in 1981. At the time I was our thirty- year-old senior attorney, and John . . . well he was just a twenty-five year old law school graduate. I felt seasoned; he seemed so young. Now, that five-year age difference seems so small; so relative. In perspective, that is.

John's birthday had me looking back. Could it really have been a quarter of a century ago that he interviewed for that staff attorney position? In twenty-five years John has grown from an eager young attorney looking for that first professional opportunity into a very highly regarded bankruptcy attorney. When John started with legal aid he used to frequently ask me for advice; he counted on me for years. Now it's me calling him for advice and asking him to accept yet again another pro bono referral; I've counted on him for years.

Of course, it wasn't just John coming of age in this quarter century; Virginia's legal aid programs were finding their legs during this same period. Virginia's first legal aid program was founded during the 1960s. In the 1970s, legal aid programs expanded into most of the commonwealth. It was not until the early 1980s, however, that a legal aid program served every county and city in Virginia.

Legal aid is now a well established part of the legal landscape, but this wasn't always the case. It was forward-thinking community groups and bar associations that led the formation of Virginia's legal aid programs. My own legal aid program now serves seventeen southwestern Virginia counties and four cities. We served only two rural counties when the Smyth County Bar Association established our program in 1972. That was, if you are old enough to recall, a turbulent time; we were a greatly divided nation. It might have been an inauspicious time to begin such a challenging venture had it not been for the dedication of our founders and the dedication of those first legal aid lawyers. Our first board president was John H. Tate Jr., who later served in the Virginia House of Delegates. Our first two attorneys were Joseph H. Tate and Eugene E. Lohman. Each is now a district court judge with an encyclopedic knowledge of the law. These attorneys were our pioneers. They blazed trails of legitimacy for our infant program by earning respect for their excellence in representation of low-income clients.

Of course, there have been many pioneers for Virginia's legal aid programs. Many of these pioneer attorneys still work in Virginia legal aid offices. Our current numbers include several project directors who have guided outstanding programs longer than our newest attorneys have been alive. Among these seasoned (not old, mind you) are William L. Botts III of Rappahannock Legal Services in Fredericksburg, Henry W. McLaughlin III of Central Virginia Legal Aid in Richmond and Henry L. Woodward of Legal Aid Society in Roanoke. Legal aid attorneys who have argued or cocounseled cases before the U.S. Supreme Court include Jill A. Hanken and James W. "Jay" Speer of the Virginia Poverty Law Center in Richmond, Katheryn L. Pryor in Richmond, Henry Woodward, and Martin D. "Marty" Wegbreit of the Central Virginia Legal Aid Society in Richmond.

Many others make up our colorful legal aid history. There are those who are leaders in state and local bar associations. There are those who are recognized as among Virginia's best in their fields of concentration. There are those who have helped to craft many of our laws impacting low-income people. There are those who are leaders on the national legal aid scene. There are those who have helped to energize low-income communities.

Think of the best legal aid attorneys you have known. My colleagues around the commonwealth could have worked anywhere and earned far more. Why do some of Virginia's best work at legal aid? I think it's that relativity thing again; perspective.

Marty Wegbreit, currently a senior staff attorney at Central Virginia Legal Aid and the first recipient of the Virginia State Bar Legal Aid Attorney Award, espouses the "Add a Zero" Rule. To understand what a legal dispute feels like to a low-income person add a zero to every dollar amount. So, the client needs only $300 to catch up on that rent? How does $3,000 feel to you? She only needs $430 to fix that car? How would $4,300 feel to you? It's all relative; It depends on your perspective.

Almost half my life. I've worked for legal aid almost exactly half my life and I am in awe of my legal aid colleagues—the ones with gray hair and the ones right out of law school. They "get" the relativity thing. They are changing the world . . . one client at a time. ⚖

Larry T. Harley is executive director of Southwest Virginia Legal Aid Society, based in Marion.

Powell *continued from page 18*

collapse in the face of political opposition to her decision to defend a young black man accused of raping a white girl. From this experience, Cahn concluded that neighborhood law offices should be free to serve their clients without regard to the views of welfare bureaucrats or local politicians. Cahn was therefore eager to take advantage of the traditional independence of lawyers and willing to cooperate with the organized bar.

Other anti-poverty activists disagreed. In November 1964, organizers of a federal conference on experimental legal services programs in New Haven, Boston, and New York failed to invite anyone from the ABA or from the National Legal Aid and Defender Association. Indeed, they actually refused a request that ABA and Legal Aid representatives be allowed to attend. Fortunately, that intransigence was circumvented, and two observers were eventually permitted to attend the conference. There they heard searing criticism of the traditional legal aid societies, thinly veiled contempt for the mostly white, middle-aged volunteers who staffed them, and deep suspicion of the establishment bar. On the last day of the conference, they also heard that OEO had decided to launch a federally-funded national legal assistance program and that Shriver had appointed Jean Cahn to head a task force for that purpose.

The suspicion and hostility with which most anti-poverty activists treated the organized bar were returned in kind. On November 17, 1964, Sargent Shriver gave a speech proposing the creation of "supermarkets of social service" that would include, among a variety of other services, legal assistance for the poor. This formulation raised the fear that the vaunted independence of lawyers and their freedom to represent clients as they thought best would be subordinated to the demands of bureaucrats and politicians. Moreover, Shriver spoke of training lay persons to act as "legal advocates for the poor," performing many functions traditionally thought to require lawyers. The organized bar now saw the fledgling federal program not only as the long arm of big government but also as publicly funded competition for the struggling neighborhood lawyer. Letters poured into the ABA's Chicago headquarters demanding that the organization mobilize its resources to kill the federal program.

Powell refused. In his inaugural speech as ABA president in August, 1964, Powell had announced expansion of legal services to the poor as one of three priorities for the coming year. Now he held off the demands for a declaration of war, ordered a detailed study of the federal proposal, and opened negotiations with its backers. In retrospect, it seems clear that both sides had much to gain from compromise. The "Feds" had money and good relations with the urban poor. The legal aid movement had existing organizations and good relations with local lawyers. Perhaps most important, the organized bar, unlike local community action agencies, supported representation even for the most unpopular clients. In essence, alliance with the establishment bar would help legal services lawyers assert their independence within the anti-poverty movement.

However clear these advantages seem in hindsight, at the time differences in politics, background, and outlook threatened to preclude agreement. The problem was not so much disagreement over policy as it was the gulf of estrangement and mutual suspicion that separated the two sides. As Jean Cahn later recalled, the "distance to be bridged could hardly have been cast more symbolically than to ask a white lawyer from the ranks of Southern aristocracy leading the then lily-white ABA and a black woman lawyer representing the 'feds' to hammer out a relationship of trust and cooperation." But Powell and Cahn succeeded in doing just that. The ABA agreed to endorse and support the federal program, and the OEO agreed not to deny federal funding to existing legal aid societies and to accept shared control of some local organizations. The traditional independence and professional standards of lawyers were guaranteed, and their energies were now to be harnessed in the federal program.

For Powell, forging an alliance with the OEO proved easier than selling the deal to the ABA's House of Delegates. Powell labored tirelessly in the small-group politics of which he was master to secure delegates' support. He drafted a resolution to be presented to the House of Delegates, secured the advance endorsement of leading figures, arranged who would speak on behalf of the proposal, and sketched what they would say. On February 7, 1964, the ABA endorsement that many OEO officials thought impossible to obtain was passed without a single dissenting vote.

In the ensuing months, additional difficulties arose, especially over the degree of local political control over federally-funded legal aid societies. Behind the scenes, Powell negotiated successful concessions from OEO; in public he sponsored a "symbolic handshake" between the traditional legal aid movement and the new government program. At the ABA's annual meeting that August, Powell chaired a special session at which Sargent Shriver addressed the assembled delegates, apologized for certain missteps, and announced that he had created a National Advisory Committee on which Powell and other ABA leaders had agreed to serve.

Powell's role in forging the public-private partnership that became the Legal Services Program was crucial to its success and was seen as such by the other participants. Seven years later, Powell found himself before the Senate Committee on the Judiciary as President Nixon's nominee to the Supreme Court. As a politically conservative white Southerner who had been head of the Richmond School Board during the painful early days of desegregation, Powell was naturally subject to questioning about civil rights. Eloquent support for his confirmation came from an extraordinary eighteen-page letter from Jean Cahn. In her letter, Cahn told the story of the tortured birth of the Legal Services Program and of Powell's role in

See Powell continued on page 28

Powell *continued from page 27*

steering it through the ABA, how he committed his personal prestige to the project and persuaded those who opposed federal funding. She also told how Powell had worked closely with the all-black National Bar Association and how he had arranged her opportunity to become the first African-American lawyer, male or female, to address a plenary session of the ABA. Powell, she predicted, would "go down in history as one of the great statesmen of our profession."

* * * * *

In a sense, Lewis Powell's contribution to legal services was the more exemplary because he was not a "public interest lawyer." He was not one of those extraordinary individuals who devote their lives and talents to serving the less fortunate. On the contrary, Powell practiced law in a large law firm, represented corporate clients, made money, and lived well. He was in fact, as well as reputation, the quintessential establishment lawyer. Yet Powell believed that the obligation of public service fell on all lawyers, not just on the committed few. Powell believed that every lawyer owed something to the community. Lawyers not only were economically and socially privileged; they were also officers of the court and custodians of the rule of law. Powell believed that lawyers were leaders by aptitude and training and that with the opportunity of leadership came responsibility to match. Powell demonstrated these beliefs in his own life, and he structured his firm to allow and reward public service by others. ⚖

John C. Jeffries Jr. is Emerson Spies Professor of Law, Arnold H. Leon Professor of Law, and Dean of the University of Virginia School of Law. The material for this essay comes from John C. Jeffries Jr., *Justice Lewis F. Powell Jr.* (Charles Scribner's Sons, 1994), and the sources cited therein, especially Earl Johnson Jr., *Justice and Reform: The Formative Years of the American Legal Services Program* (Transaction Books, 1978). It first published in *Virginia Lawyer*, December 1998.

Service *continued from page 21*

The primary entity at the Virginia State Bar with an overriding interest in this delivery system is the Special Committee on Access to Legal Services. Its sister entity, the VSB Indigent Defense Task Force, is charged with making policy recommendations related to indigent criminal defense reform. The Access Committee was formed during the 1992-93 fiscal year as a merger of the pro bono and legal aid committees. Since that time, the committee's mission has evolved under actions taken directly by the VSB Council and the Supreme Court of Virginia.

These developments include the council's approval of new Rules of Professional Conduct, particularly Public Service Rules 6.1, 6.2, etc.; a Resolution to Enhance Pro Bono Publico in Virginia; a resolution adopting the American Bar Association's "Ten Principles for a Public Defense Delivery System"; and the Emeritus Rule of Court, which acknowledges, in promoting service options for retiring attorneys, the broad-based network of providers that receives Virginia Law Foundation and government grant funds.

The Access Committee's goal is to improve access to the legal system for all Virginians and for the nonprofit charitable and civic groups that serve the public good. The committee promotes pro bono *publico* services by Virginia lawyers and encourages the integrated development of like contributions from law school faculty and students and members of related professions. It also supports efforts to reform the criminal justice system that fall under the recommendations of the bar's Indigent Defense Task Force.

In preparation to meet future challenges, the committee is currently considering amendments to certain rules and regulations. For more information about these developments or related public service opportunities (paid and unpaid) contact me, or see the program Web site at **http://www.vsb.org/site/pro_bono/**.

*According to the *Atlantic Monthly*, 42 percent of today's Army enlistees are ethnic or racial minorities. While nearly 50 percent of 18- to 24-year-olds in the general population have some exposure to college education, in the U.S. military today, only 6.5 percent of U.S. military members of this age have had such exposure.

Maureen K. Petrini is director of the Virginia State Bar Pro Bono/Access to Legal Services Office.

Pro Bono for Young Lawyers in Virginia

by Michael Signer and Samantha Ahuja

Goals and Background of the Commission

The young family about to be evicted. The domestic violence victim with nowhere to go. The immigrant about to be deported. Through pro bono representation, thousands of Virginians who cannot afford the fees many lawyers charge still require legal representation each year. As many Virginia lawyers know, pro bono representation can be one of the most rewarding ways to practice law; it is also one of the best ways to improve legal skills, increase the professional reputation of lawyers and law firms and forge connections with judges and other members of the bar.

The Pro Bono Commission of the Young Lawyers Conference (YLC) of the Virginia State Bar was created to provide overarching guidance to the pro bono efforts of the YLC. The commission's mission is to "assess current pro bono programs and to develop programs designed to improve the quantity and quality of pro bono activities of young lawyers."

The Pro Bono Commission began its activities in earnest in August of 2006 when it named a steering committee, which comprises Michael Signer of Wilmer Cutler Pickering Hale & Dorr LLP in Washington, D.C., chair; Samantha Ahuja of Womble Carlyle Sandridge & Rice PLLC in Washington D.C., vice-chair; Robert M. Byrne of Martin & Raynor PC in Charlottesville; Meghan M. Cloud of McGuireWoods LLP in Charlottesville; J.P. Cooney of Jones Day in Washington, D.C.; Tyler Kidd of Williams Mullen in Richmond; Bryan M. Rhode of the Richmond commonwealth's attorney's office; Samuel T. Towell of Williams Mullen in Richmond; and Nathan J.D. Veldhuis of Tremblay & Smith LLP in Charlottesville.

The steering committee plans to increase awareness among the Virginia legal community of the importance of pro bono representation, to improve understanding of the state of pro bono representation at Virginia law firms and to advocate for greater emphasis on pro bono representation in Virginia law firms.

The commission has now surveyed Virginia law firms that responded to a National Association of Legal Professionals request for information on pro bono. The results of this survey are described below.

Pro Bono: A Work in Progress

In the past thirty years, the American Bar Association has advanced the commitment of the legal community to effective pro bono service. These steps include ABA Model Rule 6.1, which provides that every lawyer should aspire to provide fifty hours of pro bono legal services per year, and the ABA's formal pro bono challenge, which encourages law firms to commit to a goal of either 3 percent or 5 percent of their total yearly billables dedicated to pro bono services. Many, if not all, state bar associations have followed the ABA's example, and encouraged their members to provide legal services to persons of limited means, as well as to the organizations that serve those in need.

Everybody Wins

There is some tension between pro bono work and law firms' bottom lines. Some firms are reluctant to invest time and resources in pro bono cases or to allow associates billable credit for their pro bono cases, assuming a zero-sum relationship between a pro bono and a billable hour. On the other hand, many other firms recognize there is more than meets the eye to pro bono work.

Altruistic arguments for pro bono representation are self-evident. There are also pragmatic arguments for a commitment to pro bono by Virginia law firms: Pro bono provides training for young lawyers in legal skills that will benefit the firm and its clients. Through pro bono, young lawyers frequently gain their first trial experience, draft original legal documents and interact with clients, thus acquiring the practical skills of client interaction. Pro bono helps young lawyers build relationships and a reputation within the bar, allows lawyers the opportunity to interact with judges and other lawyers and confers lawyers' good reputations in the bar. Finally, pro bono is economically beneficial for firms. Pro bono cases frequently lead to "impact litigation," as pro bono cases often touch on novel issues or service clients whose stories are compelling to a wide audience. Law firms can increase their profiles by working on pro bono cases that raise singular or galvanizing issues.

The Virginia State Bar and YLC Pro Bono Programs

The Virginia State Bar has a special Access to Legal Services Committee that focuses on promoting and facilitating support for free and reduced-fee legal services for individuals and nonprofit charitable and civic groups in Virginia. The committee also works with the Supreme Court of Virginia and bar organizations to address ethical, financial and other issues related to pro bono services. The Virginia State Bar Web site (www.vsb.org) provides a comprehensive listing of the services offered, resources for attorneys and individuals seeking help, as well as other information needed to promote pro bono services.

Other YLC programs include the Voter Education Program, the Emergency Legal Services Response Plan, the Wills for Heroes Program, and the Oliver Hill/Samuel Tucker Pre-Law Institute. The YLC trains Virginia attorneys to represent and protect the rights of domestic violence victims. As part of this effort, the YLC has distributed more than two hundred thousand safety and legal brochures.

Taking Stock

The Pro Bono Commission's first project this year was to survey Virginia firms that had responded to the annual survey of the National Association of Legal Professionals. The survey included queries on pro bono activities. We wanted to contact firms to supply greater detail on pro bono by Virginia law firms than is available in the NALP report, including the average hours of pro bono representation per associate and whether pro bono hours count toward yearly billable requirements and toward bonuses.

Difficulty Gathering Data

It was difficult to gather data from Virginia firms. Of the twenty-six firms we contacted, we received completed surveys from ten. Even after leaving voice messages and emails with each firm, the response rate was less than 50 percent. The difficulty we had gathering data is related to systemic problems. Pro bono may not have a sufficiently prominent place in the culture of many firms, and some firms may be self-conscious about disclosing the data. As the chart shows, we had the most difficult time gathering data from firms with fifty to seventy-five lawyers—of eight firms, six did not provide data.

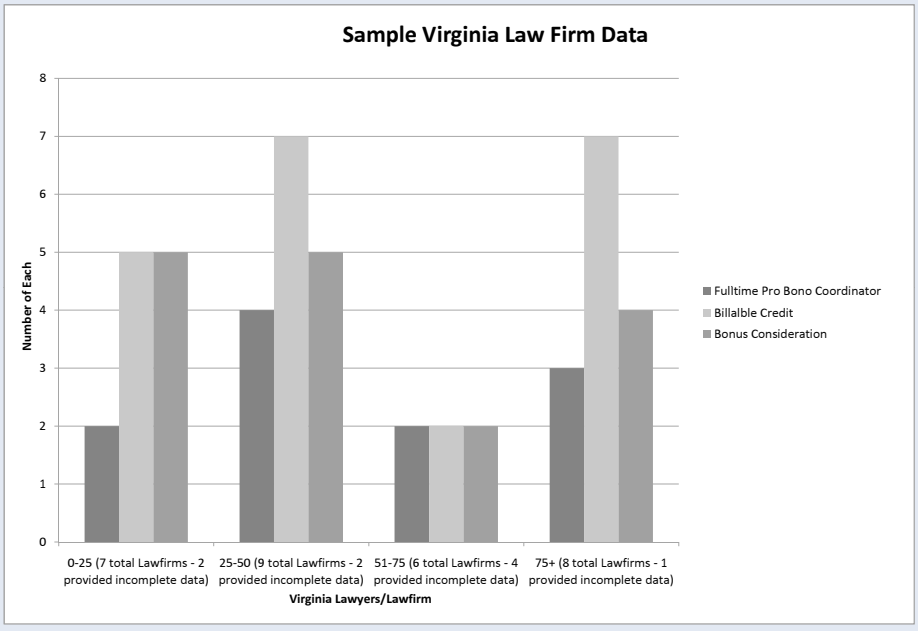
Definitions Vary

The definition of pro bono varies widely at Virginia law firms. Some firms credit only direct client services and legal representation to indigent clients. Others will count a broader range of activities, such as research, representation to organizations or service groups, or assistance to advocacy groups.

A Wide Range

We found a wide range in minimum suggested pro bono hours, from twenty to two hundred, with the majority of firms recommending approximately fifty hours—the ABA suggested minimum.

Most Virginia firms that responded to the NALP survey allow associates to claim a certain amount of billable hours toward their yearly requirements. Of twenty-six firms that answered the NALP survey, only five do not count pro bono toward billable requirements. The size of a law firm did not necessarily determine its commitment to pro bono. As the chart shows, five of seven small firms gave billable credit, whereas seven of nine of the firms with more than seventy-five lawyers gave billable credit.



Seven firms do not allow pro bono work to count toward a bonus. Of the seven firms, two are major Virginia law firms with over one hundred lawyers. Also, the largest firms—those with more than seventy-five lawyers—were less likely to give bonus credit than those with fewer than fifty lawyers. Many Virginia firms credit the fifty hours per year required by ABA Model Rule 6.1. Three firms—Buchanan Ingersoll, DLA Piper, and Hogan and Hartson—credit one hundred hours. Five firms—Greenberg Traurig, Holland & Knight, Latham & Watkins, Sands Anderson Marks & Miller, and WilmerHale—grant bonus consideration to 100 percent of pro bono hours. (Notably, all but two of the firms in these two groups are large international firms.)

YLC Pro Bono Commission Chair Michael Signer of Wilmer Cutler Pickering Hale & Dorr LLP in Washington, D.C.; michaelsigner@gmail.com

YLC Pro Bono Commission Vice-Chair Samantha Ahuja of Womble Carlyle Sandridge & Rice PLLC in Washington D.C.; sahuja@wcsr.com

Average Pro Bono Hours per Associate

There was a wide range in the average pro bono hours per associate, a finding unexplained by the size of a law firm. The average hours for law firms surveyed ranged from a low of twenty-nine hours (at one of Virginia's largest firms) to ninety-five (again, at one of Virginia's largest firms.)

Total Pro Bono Percent of Billable Hours

The ABA offers firms two levels of pro bono commitment—3 percent and 5 percent. From our survey and the NALP results, it appears that many Virginia firms are not providing data, are not participating in or are below even the 3 percent target. One of the largest Virginia firms declined to provide us with a figure. Two other major law firms were at 2.3 percent and 1 percent.

Next Steps

As the Pro Bono Commission proceeds with this research project, we plan to contact more firms in an effort to learn what factors shape a firms' approach to pro bono. We encourage lawyers or law firms with advice, feedback or questions to contact either Michael Signer at michaelsigner@gmail.com, Samantha Ahuja at sahuja@wcsr.com, or any of the members of the steering committee. ⚖

National Security Law

Since September 11, 2001, anxiety about national security has grown exponentially in the United States and worldwide. This phenomenon has grave implications for global commerce and the rights of individuals.

The International Practice Section presents this issue of *Virginia Lawyer* to explore this new reality.

Two articles examine the impact of increasing national security considerations in global commerce, by assessing global mergers and defense contracting. Other articles appraise the historical challenge that President George W. Bush's policies pose to the Constitution, international legal order and American values. They analyze recent cases concerning executive power, international agreements and new federal legislation detailing rights of detainees. The issue concludes with a review of a new publication, edited by professors from the University of Virginia Law School, on the political and legal legacy of the Vietnam War.

National security cuts across disciplines: contributors are from George Mason University's schools of law, public policy and information technology.

Stuart S. Malawer, J.D., Ph.D., is Distinguished Professor of Law and International Trade at George Mason University. He is also a visiting professor at St. Peter's College, Oxford University. He is a former chair of the International Practice Section of the Virginia State Bar. Dr. Malawer is special editor of the articles sponsored by the International Practice Section featured in this issue of *Virginia Lawyer*. He is the author of two-volume *WTO Law, Litigation & Policy* (2007). Photo taken in Moscow's Red Square. E-mail: StuartMalawer@msn.com. Web site: www.InternationalTradeRelations.com

Global Mergers and National Security

by Stuart S. Malawer

The world of global mergers today is like a Virginia steeplechase, frantic and exciting, with a field of powerful participants. The competitors are hyperactive; adrenalin is flowing, leaving spectators anxious and amazed. In an instant a horse may stumble; if so, it will almost certainly face a horrible end.

Global mergers are in a turbo-charged environment, where activity is at a historical high. Corporations look for deals worldwide. But in the postmortems of all tragedies, one can usually spot early warning signs, almost always overlooked until it is too late. Were there unforeseen obstacles? Were the participants new and inexperienced? Did they understand the rules? Did the participants react irrationally?

Since September 11, 2001, the global merger field has become more dangerous. New, inexperienced players have entered the world of cross-border acquisitions and mergers. Each player has its agenda. Now the home countries of the experienced firms and others are beginning to change the rules—creating new challenges for all.

The Global Landscape—Investment Data and Recent Deals

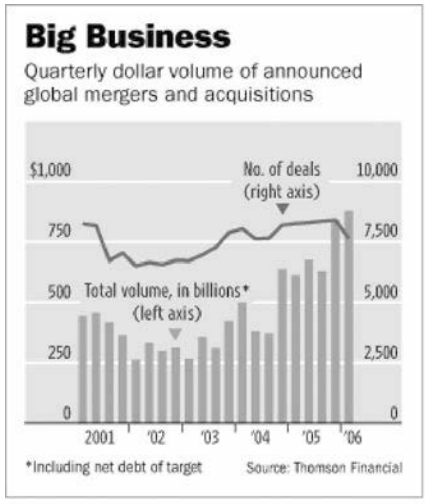
International transactions are at the heart of economic globalization,[1] and foreign direct investment is a critical aspect of these transactions. Cross-border acquisitions and global mergers are at the transactions' core. Transnational corporate undertakings have raised national security anxieties worldwide.[2] Resource nationalism and renewed reaction to globalization further stir global anxieties. Combine these concerns with the growing number of global takeovers by private and state-owned firms from China, Russia and India, and a dramatically new and unsettling global landscape emerges.[3]

This latest global environment has evolved in the post-9/11 world, in part from reactions to the threat of global terrorism, but also in large measure from economic change in developing and transitional economies. The change has been accentuated by high energy and commodity prices and an international economy awash in private capital, as well as corporate and government surpluses.

Global Data

The merger boom of the late 1990s is back.[4] Worldwide deals reached a total volume of $2.8 trillion in 2005, up from $1.9 trillion in 2004.[5] In the first quarter of 2006, $857 billion in global mergers and acquisitions were announced—the highest level since 2001.[6] *See chart 1.*

Chart 1



WALL STREET JOURNAL (April 4, 2006).

The year 2006 may set new records.[7] As of May 2006, global mergers and acquisitions topped $1.3 trillion, a 40 percent increase over the same period the prior year. The announced U.S. merger activity for the current year as of May 2006 was $476 billion, the highest since 2001.[8]

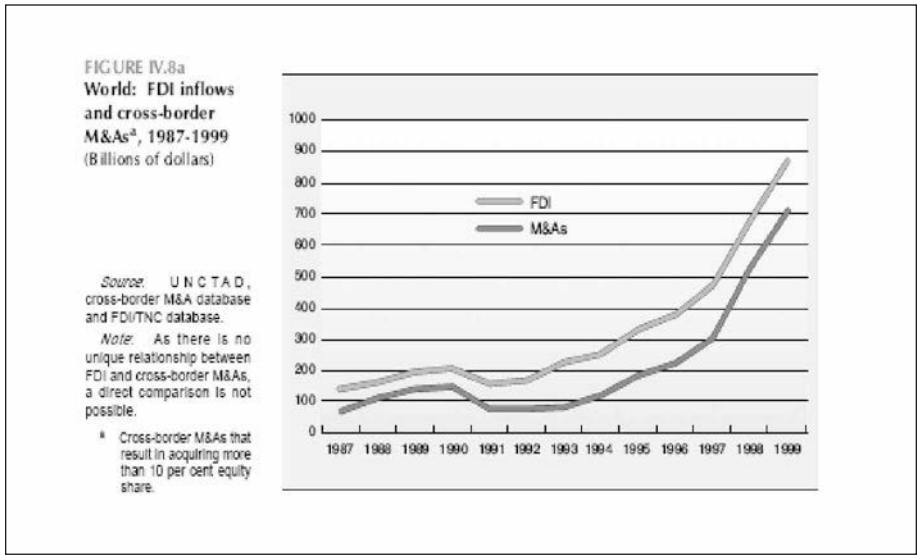
A recently released annual study on foreign direct investment by the United Nations Conference on Trade and Development (UNCTAD) determined that global foreign direct investment (FDI) inflows rose by 29 percent to $916 billion in 2005, compared to a 27 percent increase in 2004.[9] "As in the late 1990s, that growth was spurred by cross-border mergers and acquisitions," the study concluded.[10] The study found that the value and number of mergers and acquisitions in 2005 were comparable to the averages in 1999–2001.[11] The study also noted that many parts of the world undertook intense discussions on economic protectionism.[12] It did not discuss the issue of national security,[13] and it ominously concluded that "the number of changes (to a host country's regulatory environment) making a host country less welcoming to FDI was the highest ever recorded by UNCTAD."

This current pattern of FDI growth and importance of global mergers is similar to the go-go years of the late 1990s. An earlier study by UNCTAD in 2000 determined that global mergers amounted to $710 billion as part of the total worldwide foreign direct investment of $880 billion in the 1990s.[14] *See chart 2 , above right.*

The study determined that eighty percent of foreign direct investment into the United States during the late 1990s resulted from cross-border mergers and acquisitions.[15] According to the U.S. Bureau of Economic Analysis, foreign direct investment into the United States last year reached its highest level since 2001.[16]

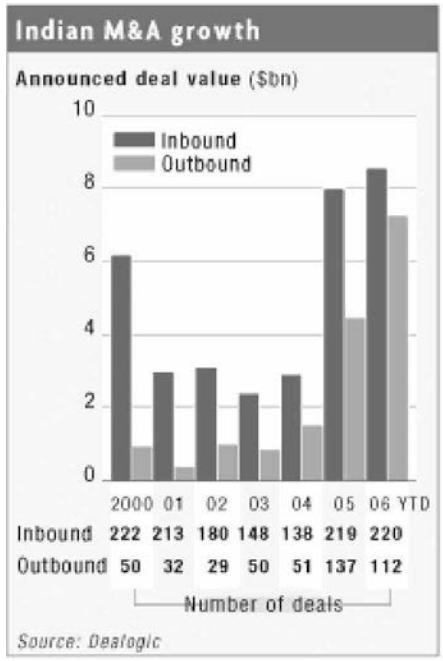
Recent data confirm that the global merger boom is roaring back. Such mergers are the major source of FDI into the United States, and, despite the war on terrorism, foreign direct investment into the United States and its accompanying cross-border

Chart 2



WORLD INVESTMENT REPORT 2000 (UNCTAD).

Chart 3



FINANCIAL TIMES (October 4, 2006).

mergers and acquisitions of U.S. firms are at their highest levels since 9/11.[17]

Global Deals

American anxiety over global mergers and their implications for national security reached record heights with the aborted management takeover of several U.S. port facilities by the United Arab Emerates-based Dubai Ports World in early 2006. This political fiasco for the Bush administration came a few short months after the China-based CNOOC Ltd. dropped its bid for U.S.-based Unocal and its global oil reserves. This aborted acquisition occurred shortly after the takeover of IBM's PC business by China-based Lenovo and Singapore Technologies Telemedia's purchase of Global Crossing and acquisition of its global fiber optics network. The recent transatlantic purchase of Lucent Technologies by France's Alcatel raised concerns of national security regarding sensitive telecommunications research.

National security concerns are not limited only to the United States government. China Mobile Communication's Corp, the world's largest wireless operator based on subscribers and market capitalization, was forced to drop its $5.3 billion bid for European-based Millicom International Cellular.[18] This decision came in the midst of mounting concern in Europe of Chinese ownership in the telecom sector. Only after a severely bruising battle did India-based Mittal take over European-based Arcelor to form one of the largest steel companies in the world—and only after the Russian firm Severstaal was dropped, perhaps for being viewed as more of a national security risk.[19]

The offer by Tata Steel to buy British steelmaker Corus Group would make it the biggest foreign acquisition by an Indian company. However, the more recent offer by the Brazilian steel giant Compania Siderurgica Nacional (CSN) for Corus strikingly highlights the tip of a very large iceberg of a rapidly changing structure of global trade. Global mergers are significantly driven by companies from developing countries. These companies are well on their way to becoming the great industrial enterprises of the Twenty-First Century.[20]

India's outbound merger and acquisition growth is greater than ever.[21] Its outbound investment is almost as great as its inbound deal value.[22] *See chart 3 above.*

However, India is also concerned about national security—particularly the effect of foreign investment into its infrastructure. China has complained that several Chinese companies, including telecommunications firm Huawei Technologies Co., have been blocked from bidding on projects because security clearances have been withheld.[23] India is considering new legislation similar to the legal regimes in the European Union and the United States that review foreign investment in context of security concerns. China is also raising fears that it will restrict foreign takeovers of state-owned companies.

Russia-based Gazprom's proposed takeover of Centrica in the United Kingdom and its interest in investing in European pipelines has raised concerns in the United Kingdom and Europe, relating primarily to the aggressiveness of Russian firms in the global energy sector.[24] This aggressiveness has particularly aggravated the situations in France[25] and Germany.[26] Russia's cutoff of natural gas supplies to the Ukraine earlier this year, and its interest in increasing its stake in EADS, an aerospace group, has further inflamed political sentiment.[27]

The Russian Federation's most recent threat to curb foreign investment into the massive Sahalin-2 project and the

Shtokman natural gas field,[28] along with its growing restrictions on investment in the energy sector generally, highlight a new dimension of global mergers and national security—one of "resource nationalism," in which the protection of natural resources, principally oil and energy reserves, is viewed as a matter of national security. This trend is also visible in Bolivia's recent restrictions on foreign firms participating in its oil industry[29] and the attempt by Ecuador to terminate its long-term production agreement.[30] These actions by Bolivia and Ecuador further extend resource nationalism in Latin America that is evidenced by Venezuela's long-standing restrictions on its oil industry, which are clearly directed against the United States.

> "Foreign corporate takeovers have been made subject to tighter political scrutiny in major countries, both members and non-members of the OECD."

The intriguing aspect of these new global realities is that many of the global mergers are now emanating from companies in the Middle East, China, India and Russia. For example, the recent merger of two Russian firms (Rusal and Sual) and a Swiss firm (Glendore) created the world's largest aluminum company, overtaking Alcoa of the United States.[31] If concluded the proposed acquisition of Oregon Steel by the Russian firm Evraz will be the largest Russian takeover of a U.S. firm.Many of the transactions are energy and commodities related. But now some of these countries are concerned about growing foreign investment into their strategic industries. Countries are beginning to restrict foreign takeovers based on their own national security calculations—in many ways mirroring those made in the United States and Europe.

This increasing concern for national security in economic and business transactions is new to today's global economy. The recent 2006 report of the Organization for Economic Co-operation and Development (OECD) on foreign direct investment states, "Issues of security and other strategic concerns have moved to the forefront of domestic and international investment policy making."[32] The secretary-general of the OECD noted it recently. He said, "The global economy is also facing a resurging risk of international investment protectionism. Foreign corporate takeovers have been made subject to tighter political scrutiny in major countries, both members and non-members of the OECD."[33] Indeed, the OECD considers recent action restricting takeovers to be going "beyond just national defense to include energy security."[34] The report notes that "concerns about security and other essential national interests are on the rise" and can be seen in Europe, the United States, China and India.[35]

Major Developments

Four newer realities in global trade in the post-9/11 world are clearly discernible:

- Takeovers and foreign investment are emanating from firms based in developing countries such as India and the United Arab Emirates (UAE), as well as from countries transitioning from central planning such as China and Russia.

- National security fears are arising among many governments, not only those in the United States and Europe, but also governments in Russia, India and China.

- More resource nationalism is evident in countries with significant oil and gas reserves and production facilities.

- This rise occurs in tandem with latent protectionism in many countries and with an increasing reaction against global integration, now referred to by some as "economic patriotism."

Most important is understanding why takeovers and foreign investment are emanating more today from developing countries and those transitioning from central planning to free markets. There are five major reasons and five supporting causes.

The five major reasons are:

- The World Trade Organization (WTO) has spurred the growth of world trade and investment over the last ten years. India and China have greatly benefited from membership in the WTO, and the Gulf states have prospered from both trade liberalization and higher oil prices.

- Foreign companies that have foreign government equity are in a strong position to mount foreign takeovers. They do not have to worry about the reaction of public markets. This is true of firms in many countries, including China and Russia.

- Growth in foreign corporate profits and surpluses (retained earnings) provide a ready war chest to be utilized by foreign corporations in their cross-border takeovers.[36]

- Foreign countries have amassed huge surpluses that can help finance private takeovers and investments.

- The increase in oil revenues and those due to higher commodity prices have allowed foreign governments to finance overseas activities. Russia and the UAE are examples of this development.[37]

Because abundant liquidity exists throughout the world, it is easy to convert corporate reserves into corporate bids. Historically low interest rates for corporate borrowers facilitate ever more cross-border transactions. An explosion in foreign capital markets of initial public offerings (IPOs) allow for even greater financing.[38] For example, the IPO of the Industrial & Commercial Bank of China, Ltd. (ICBC), in October 2006, was the world's largest IPO. This has pushed China's stock exchanges into the world's biggest source of new listings, ahead of those in New York and London. Growth in private equity, respon-

sible for more than 20 percent of recent merger activity in the U.S. and the EU, introduces a new and potentially significant and worrisome player into global mergers, and strong economic growth in a range of countries provides firms a strong basis for global undertakings.

There are new major players in global trade that have so much capital available and growing market prowess that they are able to more strenuously compete for global mergers—which they have done with increasing success.

U.S. Response to the New Landscape

The U.S. response to this new landscape has been to bog itself down with a debate over foreign investment focused on revamping the Exon-Florio legislation and the related congressional review process. Public demand for increased congressional oversight of foreign takeovers persists, but to a weakened degree. "A key issue for Congress is whether and in what way it should respond to essentially private economic investment activities and how to assess the impact of such investments on the nation's security."[39] After a year of consideration, Congress has not enacted any changes.

The principal legislative and regulatory process to review foreign takeovers of U.S. firms is the Committee for Investment in the United States (CFIUS) as strengthened by the Exon-Florio amendment. This review process gives the U.S. president significant powers to block particular types of foreign investment.

In 1975 an executive order established CFIUS as an interagency panel, primarily to monitor foreign direct investment into the United States.[40] In 1988 the Exon-Florio amendment strengthened and better focused the review of acquisitions and mergers.[41] This amendment was enacted amid congressional concerns over foreign acquisitions of U.S. firms, particularly by firms from Japan. This change was included as a provision of the Defense Production Act. The new legislation authorized the president to investigate the impact of foreign acquisitions of U.S. companies on national security. It also authorized the president to suspend or prohibit acquisitions that might threaten national security. CFIUS was delegated responsibility for investigating foreign acquisitions, when necessary.

Chart 4

CFIUS 1997–2004 Data					
	Notifications	Acquisitions	Investigations	Notices w/d	Pres. Determinations
1997	62	60	0	0	0
1998	65	62	2	2	0
1999	79	76	0	0	0
2000	72	71	1	0	1
2001	55	51	1	1	0
2002	43	42	0	0	0
2003	41	39	2	1	1
2004	53	50	2	2	0
Total	470	451	8	6	2

GAO Testimony, "Implementation of Exon-Florio." p. 13 (GAO-06-135T—October 6, 2006).

The legislation established a ninety-day review process involving a voluntary submission by the acquiring party, an initial review period of thirty days to determine whether the acquisition could pose a threat to national security, and an additional forty-five-day investigation that results in a report to the President. The president then has fifteen days to allow, suspend or prohibit the transaction. It is important to note that national security is not defined; only factors to consider are enumerated. Withdrawing and refining notices restart the review clock.

In 1992 amendments were adopted that require greater reporting to Congress. A report to Congress was required if the president made any decision. An investigation was required if the acquiring company is controlled or acting on behalf of a foreign government (Byrd Amendment). When credible evidence was found, a report was also required every four years.

The current regulatory process is minimally transparent and discretionary only. The committee's mandate is not well defined; there is no definition of national security to provide guidance to the committee or parties to a transaction. The statute provides for factors to be considered in determining a threat to national security. They include the transaction's impact on domestic production for national defense; the effect on the capacity of industries to meet defense requirements; the foreign control of commercial activity; the transaction's implications for national security, the military, technology transfer as to terrorism; and the potential effects on U.S. technological leadership.

In a seminal study last year, the Government Accountability Office empirically examined the cases considered by the CFIUS between 1997 and 2004. The CFIUS had 470 notifications[42] and only 45 investigations, resulting in just two presidential determinations—both concerning telecommunications. *See chart 4 above.*

Clearly, this process has not resulted in many or even significant decisions blocking foreign takeovers for national security reasons. It seems that the CFIUS process draws more heat than the outcome would otherwise suggest.

Legislative proposals during the 2006 congressional session have generally required greater congressional notification and greater review by the CFIUS. The Senate and House have considered two different sets of proposals. Currently, legislators are at a standoff. Strangely, the House's delib-

erations are more balanced and less restrictive—contrary to its normal position in trade matters when compared to the Senate.

In the Senate, the Shelby-Sarbanes Bill required congressional notification when a review is initiated. It mandated a forty-five-day investigation when a foreign government-controlled entity is involved. It also required a ranking of countries based on compliance with weapons-control deals. In the House, the Blount Bill was less stringent than the Senate deliberations would have required. The House appears to have recognized to a greater extent that economic security entails encouraging foreign investment. Congressional notification would be required only upon the completion of a review. Other items also considered were the tracking of mitigation agreements that protect critical infrastructure and provide for new roles for the Department of Homeland Security and the Director of National Intelligence.[43]

As of the 2006 mid-term elections, the Congress has not enacted any changes to the CFIUS regime. Virginia Senator John W. Warner has been a voice of reason,[44] who blocked an attempt to push through the Senate a proposal that would have toughened national security reviews of foreign takeovers of U.S. assets.[45]

Conclusions

The policy challenge to the United States is to continue promoting the economic benefits of global trade and mergers within this new global dynamic. The unanswered question is whether in the coming years new national security goals will outweigh other goals that promote economic development and political development. The future of the trading system depends on the answer that the United States and others provide.

We have had a change in the political dynamics within the United States and within other countries. The role of national security and reaction against globalization are growing pieces of this new post-9/11 era. In global trade relations today, the world is more multipolar, as evidenced by the rise of the BRIC countries (Brazil, Russia, India and China) the reemergence of Japan; and the dynamic growth of Korea. New sources of wealth from global trade and petrodollars are fueling and super-charging global mergers. New players are emerging with new interests.

Warning signs show that the global trading system could suffer a disaster. Russia is reimposing controls on foreign investors in strategic industries. India is considering controls on Chinese investment into its infrastructure and energy sectors. China is wary of foreign takeovers of its state-controlled industries. Korea is worried about foreign private equity in its industry reorganization.[46] The Ukraine is considering restricting foreign participation in the development of its Black Sea oil and gas reserves.[47]

The promotion of global mergers promotes global trade, which holds the promise of aiding in transforming inefficient markets and undemocratic societies.

The current slowdown in the U.S. economy and continuous growth overseas will only enhance the activities of foreign firms and create even more fertile ground for global mergers.[48] This year's record U.S. investment abroad in foreign capital markets only adds greater fuel to cross-border takeovers to be undertaken by a range of foreign firms.[49] The declining dollar will also spur greater acquisitions of U.S. firms.

The promotion of global mergers promotes global trade, which holds the promise of aiding in transforming inefficient markets and undemocratic societies. However, a concern for national security is increasingly posing a challenge to the growth and promise of trade in the post-9/11 era. The reemergence of latent protectionism fueled by growing reaction to global integration only adds to this situation. But if the warning signs are heeded, the global system may yet avoid a catastrophe.

There are positive global developments. While investment controls are being considered worldwide, few have been adopted. The United States has recently concluded negotiations with Russia concerning its accession to the WTO and Vietnam has won admission to the WTO.[50] The proposals to change U.S. legislation regulating foreign direct investment have stalled. U.S. policy remains anchored in the belief that global business transactions, global mergers, trade and investment are beneficial to bringing needed political and cultural change worldwide.

However, as a result of the historical victory of the Democratic Party in the mid-term elections, there is now a new uncertainty about U.S. trade policy. The Vietnam trade bill extending most-favored-nation treatment to Vietnam was initially defeated prior to its passage in the end-of-the year tax and trade bill. Congressional approval of legislation implementing Russian accession to the WTO as well as renewal of "Fast Track Authority" has become more questionable.[51]

The global economy seems strong; all of its horses are running. But warning signs are present. Almost a century ago an earlier era of globalization was ended by a single shot. Overreaction today could have the same result. ⚖

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National Security, Foreign Ownership and Defense Contractors

by Arun Sood

When corporations have significant non-U.S. ownership, special arrangements are made to protect the classified information.

U.S. national security interests require a determined and continuing attention to proper handling of classified information. This often requires restricting access to such information. On the other hand, technology and market considerations require that multiple corporations should have the ability to compete for classified work. When corporations have significant non-U.S. ownership, special arrangements are made to protect the classified information. This creates additional overhead in these companies, but this has not deterred these companies from undertaking classified work.

Multinational corporations often undertake classified contracts. This requires companies to adhere to rules that govern the exchange of data within the corporation, as well as restrictions on sharing of the information with corporate executives. These rules are typically incorporated into a special security agreement and approved by the Defense Security Service and the agencies for which the classified work is undertaken.

To understand the approach taken by such corporations and problems confronted by them, this article examines two companies: BAE Systems North America and Headstrong Public Sector Inc. The first is a very large multinational corporation: the second is a smaller company. Both companies undertake classified work. Their differences include diversity of customer base, fraction of revenue derived from classified work, type of work performed and type of ownership. The companies also have similarities: Both have some foreign ownership, operate in multiple countries and have become larger through mergers and acquisitions.

BAE Systems North America

BAE Systems North America (BAE-NA), with headquarters in Rockville, Maryland, is a wholly owned subsidiary of BAE Systems. The parent company has its headquarters in the United Kingdom. The North American subsidiary has twenty-six thousand employees and annual revenue of $5 billion. BAE-NA is among the top ten defense contractors in the U.S. BAE worldwide has ninety thousand employees, with its largest employee base in the U.K. of fifty thousand and smaller operations in Germany, France, Saudi Arabia and Sweden. BAE-NA has targeted an annual growth rate of 25 percent. It manufactures and supplies high-tech equipment to U.S. government agencies. BAE-NA operates as a separate corporation with an independent board of directors. All the directors are U.S. citizens and have security clearances.

Headstrong Public Sector Inc.

Headstrong Public Sector Inc. is a wholly owned subsidiary of Headstrong Corporation, with headquarters in Fairfax, Virginia. Headstrong Corporation is a $160 million company, with 2,600 personnel. In addition to several locations in the U.S., Headstrong has operations in India, Japan and the Philippines.

Headstrong Public Sector undertakes classified contracts. The Public Sector Division comprises forty-one personnel, twenty-eight of whom have clearances. Eight of the personnel hold high-level security clearances that allow work with intelligence agencies. Headstrong Public Sector's focus is on consulting services like enterprise architecture consulting, and even the classified work has a large high end consulting service component.

Although, BAE-NA and Headstrong are quite different, the classified work constrains the operations of both. The handling of the classified business was quite similar. This article identifies the common characteristics of the classified business operations of these companies. This focus potentially identifies characteristics that are generally applicable to firms doing classified work.

Why Does the U.S. Government Contract with Such Firms?

The U.S. government wants the best technology at the lowest cost. The U.S. technology base is rich and competitive compared to other countries; however, in some niche technology areas other countries have an advantage. If a non-U.S. manufacturer develops hardware with similar functionality but a different manufacturing process and lower cost, then it benefits the U.S. when this knowledge is acquired. Costs can be contained by increasing competition in the marketplace—by encouraging military manufacturers headquartered in allied countries to build new facilities or acquire companies in the U.S.

In the commercial sector, the scale of production is often many times greater than military demand. For this reason, the military tries to use commercial off-the-shelf products. However, software and systems are complex. Many computer systems are manufactured and assembled in other countries. Monitoring the quality of these systems and ensuring that they do not have unauthorized software installed is a challenge. This encourages systems development in the U.S., where the processes can be better managed and supervised by personnel who have been vetted.

The United States wants to build consistent and reliable relations with allies, and to encourage the sale of U.S. military hardware, software, systems and technology to allies. This happens when companies headquartered in allied countries are given opportunities to invest in the U.S.

Companies serving the intelligence community have a particularly challenging task. If a U.S. company that serves the intelligence community merges with another company with significant foreign ownership, then often the acquiring company shifts its contracts to other firms that support the intelligence sector. On the other hand, the intelligence community interest in maintaining continuity of operations can often lead to arrangements in which related activity is compartmentalized and isolated. Government agencies have continuity of operations and reliable staff who understand the technology's applications.

Why Is This Good Business for Commercial Firms?

Some foreign defense manufacturers focus on the defense market. These companies work with ministries of defense in their headquarters' countries. Investing in the U.S. helps manufacturers increase their revenue and diversify their client base. Such investments are usually encouraged by foreign defense ministries as a way of collaborating with U.S. defense manufacturers and strengthening relations with the U.S. government. Investments in the U.S. are also an easy way to get better access to the capital markets, especially the venture capital markets. Often an acquisition of a U.S. company provides the foreign investor rapid access to a technology base that has been validated and found appropriate in the defense environment. The company gets technical staff, which helps the company in technology transfer while continuing to meet security requirements of a federal agency. The company can apply this technology to other parts of its defense operations—potentially increasing revenue for the foreign-owned company.

In some cases, the defense or intelligence-related business merges with a larger firm. Why should a U.S. corporation with worldwide operations and significant foreign ownership retain a defense-related business? Consider the case of a corporation for which the defense and intelligence business is approximately 10 percent of its revenue base. Typically, the defense and intelligence agency clients are earlier adopters of technology, and hence performance on contracts for such clients can be used as an additional selling point with civilian and commercial customers. Technology developed for nonmilitary use can be readily moved to the secure world, but this requires increasing security levels. Additional security has increased appeal to the commercial and civilian government sectors. Successful implementation of systems in the more stringent defense environments is also recognized by foreign governments.

Some foreign-owned businesses pursue additional classified work because they want to employ a highly skilled and trained workforce. Consultants that serve commercial clients travel constantly, but those that serve a federal agency travel less—a factor in retaining high-value consultants.

Organizational Constraints

Contracts for performing classified work flow to foreign-owned companies under a special security agreement between the company and the federal agency. Typically, all the work has to be performed in the U.S. In some cases, all the classified work is done at the client site, or at the site of a federal agency contractor who has the requisite site clearances. Foreign-owned businesses can request to have their facilities cleared for security if they can demonstrate that a clearance is necessary. Usually, the manager of the corporate division performing classified work has the necessary security clearances, and this person is the contact between the federal agency and the company. A division manager makes recruitment decisions for this division. Employees are U.S. nationals with appropriate clearances. The federal agency may also require that board members have clearances. Among the division corporate officers, the only person who could be a parent company representative is the chief financial officer. The security agreement also restricts the flow of information between the foreign owner and the division performing classified work.

The security requirements often stipulate a firewall between the classified and the unclassified operations of the company, and a firewall between the foreign owners and the group performing classified work. These firewalls also limit the information

that is available to the board of directors. The chief executive officer of the entity performing classified work has to have clearances. The security agreement may require that additional members of the board also have clearances. There are restrictions on the information that can be disclosed to the entire board. Most disclosures are restricted to generic explanation of the issues, and are generally related to financial and accounting performance issues. In some cases, the sponsoring agency may restrict that the agency name not be disclosed to the board members. The board can be told that an unidentified federal agency is disputing contract payments, but the board will not have access to the reasons that lead to the dispute. As part of the company's security agreement with the federal agency, the members of the board have to agree that they can perform their fiduciary responsibility without knowing the details of the classified work.

Classified work is not the only time that the board of directors makes financial commitments with only limited knowledge of the details. Privacy considerations also lead to similar constraints. Disputes with employees under the Health Insurance Portability and Accountability Act (HIPAA) have similar constraints. The HIPAA restricts the disclosure of the distribution of health-related information about the employees or their dependents to other parties. Thus, members of the board do not have access to such information and may have to make decisions without knowing the nature of the illness, the nature of the dispute or the reasons why the employee feels that the employer is responsible. The board has to decide based on terms of the settlement, litigation alternatives, related cost estimates and the extent of corporate liability. Typically, the corporate general counsel and the chief executive officer are the only members who have access to all details. The situation is similar for the entities undertaking classified work.

Other areas in which the board acts on the basis of limited information are in merger-and-acquisition and research-and-development investment decisions. Foreign-owned businesses in the classified work space often grow by merging with or acquiring a company in the appropriate work space. In this case, a division manager presents the relevance of the acquisition and the strategic growth plan. This includes technology assets acquisition, but not classified information. There are similar information disclosure constraints for R&D investments in the division performing classified work. Once again the board's role is strategic and includes approval of the financial implications.

The classified work space requires particularly stringent constraints on the acquisition of commercial off-the-shelf products produced in foreign countries.

Intracompany Technology Transfer

Classified work gives the foreign-owned company exposure to higher-end technology. The deployment of this technology outside the classified work space may be an advantage to the company. However, because of the classified nature of the work, there are restrictions on the transfer of technology. Commercial off-the-shelf software acquisition illustrates the technology transfer possibilities. The classified work division acquires and integrates software, and it learns the functionality and limits of the software. Working with the vendor, work-arounds are developed. Unless there are specific national security concerns, this experiential information can be transferred to personnel not employed by the classified work division. On the other hand, application-related information cannot be exchanged with the other divisions. A copy of the software used in the classified arena may not be deployed outside the classified laboratory.

If the commercial software product has been integrated with other classified software, there are additional restrictions. In all cases the test is the impact of the transfer on national security, and the company must ensure that disclosure about the classified application or objectives is avoided; otherwise the government may debar the company from undertaking classified work. In this scenario, technical employees from the classified divisions are available to assist the adoption of commercial off-the-shelf technology for commercial and civilian government clients.

Export and Import Rules

The export control regulations apply to all exports from the U.S. Vendors interested in exporting from the U.S. must comply with these regulations. In addition to export controls, the exporters of military hardware must also meet the International Trading in Armaments Requirements. These regulations are also applicable to technical meetings with personnel who do not have clearances.

Other regulations affect the import of software and systems. The intelligence community is careful of the software that is imported and installed on its computers. Software that may be acceptable in the context of the civilian government agencies may not pass the scrutiny of the intelligence community.

The classified work space requires particularly stringent constraints on the acquisition of commercial off-the-shelf products produced in foreign countries. A concern relates to development of software and hardware when there is no control of the development process. Since so much of electronic products and software development has been outsourced to foreign locations, it is difficult to assess the contents of the system. Other concerns include installation of worms, viruses, Trojan horses or sleeper software that is triggered years after installation on the computer. Often contractors are not allowed to use foreign-developed software in support of the intelligence community projects.

Conclusions

By examining BAE Systems North America and Headstrong Public Sector key factors become apparent that are of importance to

the US government and the respective corporations in undertaking classified work. The early adopter reputation of these government agencies makes working for them particularly attractive to firms working in the high technology arena. However, classified work has to be undertaken in the context of a special security agreement, and this places restraints on operational, intra-corporate technology sharing and management disclosure. While all companies have to abide by the export control regulations, these companies must also abide by the stricter ITAR regulations.

The following are lessons for managing a defense contractor in the era of heightened national security:

- Companies undertaking classified work require an approved "special security agreement."
- Strict firewalls are required between classified and unclassified units of the company and between related companies.
- Members of the board have very limited access to information concerning classified projects.
- Military and intelligence agencies are early adopters of sensitive technology and are valuable customers for higher-end services.
- Compliance with laws governing security and export controls of sensitive data is mandatory. Through proper corporate policies and organization they can be met by both domestic and foreign firms.

Arun K. Sood is professor of computer science at George Mason University. He received his undergraduate degree at the Indian Institute of Technology, Delhi, and his master's and doctorate at Carnegie Mellon University. Photo of Sood (left) with former Virginia governor Mark D. Warner in India.

U.S. Obligations for the Treatment of Detainees

by James P. Pfiffner

The obligations of the United States government for treatment of prisoners during wartime are defined in international law, particularly the Geneva Conventions. Uncodified "customary international law" may also bind the United States by forbidding torture of prisoners. In addition, the United Nations Convention Against Torture, which has been implemented in the U.S. criminal code, also prohibits torture. This analysis will briefly examine the legal constraints on the United States in its treatment of prisoners. It will be argued that even if the Geneva Conventions are deemed not to apply to detainees, other laws prohibit torture.

Geneva Conventions

The four Geneva Conventions of 1949 were designed to protect individuals who are captured or at the mercy of the enemy during times of war. The Third Convention protects enemy combatants who are captured as prisoners of war. The conventions apply to those countries that have signed the treaty. This includes Iraq and arguably Afghanistan, but President George W. Bush declared through executive order that U.S. obligations under Geneva do not apply to members of the Taliban in Afghanistan nor to terrorists who may have plotted against the United States. The memo stated that "as a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, *to the extent appropriate and consistent with military necessity*, in a manner consistent with the principles of Geneva." (emphasis added)[1] The First Convention deals with the wounded and sick in the field; the

The four Geneva Conventions of 1949 were designed to protect individuals who are captured or at the mercy of the enemy during times of war.

Second Convention deals with the wounded, sick and shipwrecked at sea; the Third Convention deals with prisoners of war; and the Fourth Convention deals with the treatment of civilian persons during time of war.[2]

Geneva Convention III

The highest level of protection is accorded to prisoners of war and provides that prisoners must be treated humanely and that, if interrogated, they cannot be forced to reveal information beyond their name, rank, date of birth, and serial number.[3] The convention does not forbid interrogation, but it limits the methods that can be used to those that are humane.

The Third Convention regarding prisoners of war states that: "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind."[4] This prohibition of coercion would rule out many of the interrogation techniques and treatment of prisoners at Guantanamo Bay and at Abu Ghraib.

In order to qualify as a prisoner of war, members of states that have signed the treaty must (among other things): belong to an organized group that is a party to the conflict that is commanded by a responsible person; wear a "distinctive sign" identifying them as a combatant; must carry arms openly.[5] If there is some doubt whether a detainee is entitled to status as a POW, the person is to be treated with prisoner of war status until a properly constituted tribunal has determined the person's status.[6] The United States recognized as prisoners of war those captured in the Korean, Vietnam and first Gulf wars.

Geneva Convention IV

Article IV of the Geneva Conventions applies to civilians under control of a military power. It forbids any "measure of such a character as to cause the physical suffering or extermination of protected persons . . . . [including] murder, torture, corporal punishment . . . .[7] Many of the prisoners at Abu Ghraib fall into the category of civilian detained by an occupying power.

United States Army Regulations 190-8 provides for treatment of enemy prisoners of war. It states that "all persons taken into

custody by U.S. forces will be provided with the protections of the [Geneva Convention on Prisoners of War] until some other legal status is determined by competent authority." The regulation prohibits "inhumane treatment," specifically "murder, torture, corporal punishment. . . sensory deprivation. . . and all cruel and degrading treatment."[8]

Common Article 3 and Customary International Law

Each of the four Geneva Conventions has several common articles that are identical. Common Article 3 prohibits certain practices in the treatment of those persons under the control of military forces. The article requires that detained persons be treated "humanely," and it prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture," and "outrages upon personal dignity, in particular humiliating and degrading treatment . . . ."[9] According to Jennifer Elsea of the Congressional Research Service, "...Common Article 3 is now widely considered to have attained the status of customary international law."[10]

Customary international law may bind the United States in its treatment of prisoners, irrespective of whether the Geneva Conventions are considered to apply. According to the *U.S. Army Field Manual of the Law of Land Warfare*, "unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law. The unwritten or customary law of war is binding upon all nations."[11]

Protocol I, Article 75 of the Geneva Conventions, signed in 1977 but not ratified by the United States, also is considered to be part of customary international law. Protocol I provides that some acts "shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents." These acts include "murder," "torture of all kinds," and "outrages upon personal dignity, in particular humiliating and degrading treatment."[12] Goldman and Tittemore conclude that "the core provisions of Article 75 should also be considered to constitute a part of customary international law binding on the United States."[13] Thus, even if the Geneva Conventions are deemed not to apply to captured persons suspected of terrorism, customary international law binds the United States to treat detainees humanely.

U.N. Convention Against Torture

The treatment of prisoners is also constrained by the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[14] The Convention Against Torture (CAT) defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession . . . ."[15] The U.N. Torture Convention provides that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[16]

Goldman and Tittemore conclude that, based on the U.N. convention against torture and Article 75 of Protocol I (as part of customary international law) that it is "beyond question that the United States is subject to an absolute and nonderogable obligation under international human rights and humanitarian law to ensure that unprivileged combatants under its power are not subjected to torture or other cruel, inhuman or degrading treatment or punishment."[17]

In 1994 the United States passed legislation to implement the U.N. Convention Against Torture (18 U.S.C., par. 2340), which provides for criminal sanctions for perpetrators of torture, including the death penalty. Section 2340 of the law defines torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . ."[18] Thus even if the Geneva Conventions are deemed not to apply and customary international law is considered not to be binding on the United States, the U.S. criminal code prohibits torture.[19]

The McCain Amendment of 2005

U.S. Senator John McCain endured five years as a prisoner of war in Vietnam and suffered severe torture. Thus his publicly expressed outrage at reports of torture perpetrated by U.S. soldiers and civilians at Guantanamo, Abu Ghraib, and in Afghanistan carried a large measure of legitimacy. McCain introduced an amendment to the Department of Defense Appropriations Act for 2006 that would ban torture by U.S. personnel, regardless of geographic location. Section 1003 of the Detainee Treatment Act of 2005 provides that "no individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."[20]

President Bush threatened to veto the bill if it were passed, and Vice President Richard B. Cheney led administration efforts in Congress to defeat the bill.[21] Cheney first tried to get the bill dropped entirely, then to exempt the Central Intelligence Agency from its provisions. The efforts were unavailing, and the measure was passed with veto-proof majorities in both houses—90 to 9 in the Senate, and 308 to 122 in the House. In a compromise, McCain refused to change his wording, but he did agree to add provisions that would allow civilian U.S. personnel to use the same type of legal defense that is accorded to uniformed military personnel.[22]

However, in a signing statement, President Bush used language that called into question whether he considered himself or the executive branch bound by the law. A signing statement is a statement by the president when a bill is signed that indicates how the president interprets the bill. It is intended to provide evidence of presidential intent corresponding to the weight given by federal courts to congressional intent in interpreting the law.[23] When President Bush signed the bill, he issued a signing statement that declared: "The executive branch shall construe Title X in

Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power . . . ."[24] Previous memoranda of the Bush administration interpreted executive power in expansive ways that argued that the president is not subject to the law when acting in his commander-in-chief capacity.[25]

President Bush's memorandum excluding al Qaeda from the Geneva Accords declared that detainees would be treated humanely "to the extent appropriate and consistent with military necessity." This presidential directive led to (or allowed) the abuses that occurred at Guantanamo and Abu Ghraib. Thus, if President Bush's reservation to the McCain amendment is interpreted in a similar fashion, there may be a loophole that allows torture deemed by the executive branch to be a "military necessity."[26]

Another possible impediment to the enforcement of the McCain amendment is a provision sponsored by Senator Lindsey Graham that precluded inmates at Guantanamo from appealing their incarceration to U.S. federal courts. The Justice Department argued in court that Yemeni Mohammed Bawazir, who claimed that painful force-feeding of him at Guantanamo constituted torture, did not have standing to sue because of Graham's provision. The Justice Department argued that even if the force-feeding was in violation of the McCain amendment, the law provides no recourse for the victim in court.[27] Some might conclude that if the law is unenforceable in court, it is not binding. But that conclusion seems merely to avoid the issue of the status of laws in the United States constitutional system. It would seem that U.S. officials have the obligation to obey the law, even if the victims of abuse have no standing to bring an action in court.

Supreme Court Speaks

The U.S. Supreme Court delivered several setbacks to President Bush's claims to executive power. Yaser Hamdi was an American citizen who was captured in Afghanistan; when he was being held in Guantanamo, he filed for a writ of habeas corpus in order to challenge the right of the government to continue to hold him prisoner. In *Hamdi vs. Rumsfeld* (159 L.Ed. 2d 578, 2004) the Court ruled that Congress had authorized the war against al Qaeda and thus the president had the authority to detain enemy combatants to prevent them from returning to the battlefield, but that "indefinite detention for the purpose of interrogation is not authorized."[28]

It would seem that U.S. officials have the obligation to obey the law, even if the victims of abuse have no standing to bring an action in court.

The Court declared that "the most elemental of liberty interests" is "the interest in being free from physical detention by one's own government ["without due process of law"] . . . . history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat . . . ." Thus "we reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law ...." This requirement of due process does not apply to "initial captures on the battlefield," but "is due only when the determination is made to *continue* to hold those who have been seized."[29] In making these judgments, the Court asserted that it had jurisdiction over executive branch imprisonments and that it was willing to enforce constitutional rights even during a time of war. In *Rasul v. Bush*, the Court held that noncitizens also had the right to challenge their imprisonment through a habeas corpus petition.[30]

On the issue of whether the United States is permitted to try noncitizen enemy combatants by military commission, the Supreme Court in *Hamdan v. Rumsfeld* ruled in the negative, overturning a U.S. Court of Appeals decision.[31] Hamdan was a Yemeni national who was captured in Afghanistan in November 2001 and turned over to U.S. forces. He was transported to Guantanamo, where he was charged with conspiracy to aid al Qaeda (as Osama bin Laden's driver) and was going to be tried by a military commission established by President Bush.[32]

Hamdan filed a habeas corpus petition, arguing that he was entitled to be tried under the requirements of Common Article 3 of the Third Geneva Convention and that the charge of conspiracy was not a violation of the law of war. Justice John Paul Stevens, writing for the Court, after ruling on standing and justiciability, concluded that the military commissions and procedures established by President Bush were not authorized by the Constitution or any U.S. law (not the Authorization to use Military Force, the Detainee Treatment Act, nor the Uniform Code of Military Justice, UCMJ), and thus the President had to comply with existing U.S. laws. Stevens wrote that the "structures and procedures violate both the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949."[33]

Part of the problem was that the accused could be excluded from being present or being told of the evidence used against him. Also, the commission could use any evidence that the presiding officer thought "would have probative value to a reasonable person," and thus might included evidence coerced through torture. The commissions also violated the Geneva Convention Common Article 3 which provides that detainees, "as a minimum" are entitled to be tried "by a regularly consti-

tuted court affording all the judicial guarantees . . . recognized as an indispensable by civilized peoples."[34] The court did not say that Hamdan could not be detained for the duration of the hostilities, but if the government wanted to try him for a crime, it had to use regularly constituted courts that comply with minimal requirements of procedural due process to do so. The court concluded: "Even assuming that Hamdan is a dangerous individual who would cause great harm or death to innocent civilians given the opportunity, the Executive nevertheless must comply with the prevailing rule of law in undertaking to try him and subject him to criminal punishment."[35]

Perhaps the most important principle established in these Supreme Court cases was Justice Sandra Day O'Conner's statement in the majority opinion of the *Hamdi* case: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[36]

Military Commissions Act of 2006

In order to overcome the roadblock that the Supreme Court decisions threw in the way of administration policy, President Bush sought legislation that would authorize the creation of military commissions and spell out limits on the rights of detainees. President Bush argued that the types of harsh interrogation methods that he termed "the program" used by the CIA to interrogate detainees were essential to the war on terror. But *Hamdan* had called into question whether these techniques were legal and entailed the possibility that those who administered them could be charged with crimes under U.S. law.

In its argument for Senate Bill 3930 the White House reversed its previous position against the Detainee Treatment Act (DTA) sponsored by McCain. The Office of Legal Counsel analysis argued that using the DTA as the basis for interrogation policy would give the CIA interrogators more leeway than Common Article 3 of the Geneva Conventions allowed. President Bush argued strongly for passage of the administration's proposal, saying that it would provide "intelligence professionals with the tools they need."[37] The allowed interrogation techniques were not specified in the law, but were said to include prolonged sleep deprivation, stress positions and loud noises, but administration sources said that "waterboarding" (simulated drowning) would not be used in the future.

After several weeks of contentious debate between the two political parties, Senate Bill 3930 was passed by both houses of Congress. President Bush signed the Military Commissions Act of 2006 (Public Law 109-366) into law on October 17, 2006. The law gave the Bush administration most of what it wanted in order to enable it to deal with detainees in ways that were prohibited by the *Hamdan* ruling. The law authorized the president to establish military commissions to try alien detainees believed to be terrorists or unlawful enemy combatants. The law defined "enemy combatant" as "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents," or "a person who . . . has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal" established by the President or Secretary of Defense (Sec. 948a). These provisions seem to allow the possibility that U.S. citizens could be declared enemy combatants.

The law denied alien enemy combatants access to the courts for writs habeas corpus concerning "any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States." (Sec. 7 (2). The law forbids the use of testimony obtained through "torture," and it specifically outlaws the more extreme forms of torture. The interrogation methods of statements that can be used against the accused also exclude those methods that "amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005." (Sec. 948r)

Critics complained, however, that this language did not amount to the acceptance of Common Article 3 of the Geneva Conventions and might be interpreted to allow very harsh treatment that could amount to torture. Techniques such as stress positions, sleep deprivation or loud noises could amount to torture, said critics, depending on the intensity and duration of their use. Proponents of the act said that waterboarding was outlawed, but the terms of the law were not explicit on these techniques. Statements obtained with these methods could be used against a detainee if the presiding officer decides that the "interests of justice would best be served" and that "the totality of the circumstances renders the statement reliable and possessing sufficient probative value." (Sec. 948r) Although some top-level military lawyers objected to parts of the administration's bill, Department of Defense General Counsel William J. Haynes was able to convince the top service lawyers to sign a letter stating that they "do not object" to the section of the law concerning treatment of detainees. It did, however, take several hours in a meeting for Hayes to prevail in his efforts to get them to sign the letter.[38]

Critics of the administration argued that the new law would allow U.S. forces to capture anyone declared an "enemy combatant" anywhere in the world, including those thought to have purposefully supported hostilities against U.S. cobelligerents, and hold them indefinitely. These suspects could be held without charges being filed against them, and subjected to harsh interrogation techniques with no recourse to the courts for writs of habeas corpus, and thus there would be no check on executive actions. Critics also questioned whether the law could suspend the writ of habeas corpus as the law purported to do.[39]

Conclusion

In the end, practical and moral arguments against torture may be more compelling than legal analysis. McCain spoke to the efficacy of torture and said that when he was asked by the North Vietnamese for the names of the members of his squadron, he gave them the names of the offensive line of the Green Bay Packers. "It

seems probable to me that the terrorists we interrogate under less than humane standards of treatment are also likely to resort to deceptive answers,"[40] McCain said in November 2005. Representative John P. Murtha, a former marine officer who served in Vietnam, who was the ranking minority member of the House Appropriations Defense Subcommittee, said that, aside from questions of efficacy, "Torture does not help us win the hearts and minds of the people it's used against . . . If we allow torture in any form, we abandon our honor."[41] Finally, as McCain asserted, "This is not about who our enemies are, it's about who we are."[42] ⚖

Endnotes:

1 Memorandum for the Vice President, et al., Subject: Humane Treatment of al Qaeda and Taliban Detainees (February 7, 2002), signed by President Bush. The memorandum is reproduced in Kareh J. Greenberg and Joshua L. Dratel, *The Torture Papers: The Road to Abu Ghraib* (NY: Cambridge University Press, 2005), pp. 134-135.

2 For full legal citations see: Robert K. Goldman and Brian D. Tittemore, "Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law," (Washington, D.C.: American Society of International Law Task Force Paper, 2002., p. 2, note 2.]

3 On POWs see L.C. Green, *The Contemporary Law of Armed Conflict* (Manchester: Manchester University Press, 1993, pp. 188-206., p. 197.

4 Article 17, paragraph 4, quoted in Jennifer K. Elsea, "Lawfulness of Interrogation Techniques under the Geneva Conventions," Washington: Congressional Research Service Report to Congress (RL32567), September 8, 2004, p. 2.

5 Goldman and Tittemore, "Unprivileged Combatants," p. 11.

6 Green, *Contemporary Law of Armed Conflict*, p. 190.

7 Elsea, "Lawfulness of Interrogation Techniques," p. 5.

8 U.S. Army Regulation 190-8, quoted in Elsea, "U.S. Treatment of Prisoners in Iraq: Selected Legal Isssues," Congressional Research Service Report for Congress (RL32395), December 2, 2004, p. 10.

9 Elsea, "Lawfulness of Interrogation Techniques," p. 7

10 Elsea, "Lawfulness of Interrogation Techniques," p. 8.

11 U.S. Law of Land Warfare, Field Manual 27, paragraph 4(b), 7(c), quoted in L.C. Green, *The Contemporary Law of Armed Conflict* (NY: Manchester University Press, 1993), p. 31.

12 Elsea, "Lawfulness of Interrogation Techniques," p. 9.

13 Robert K. Goldman and Brian D. Tittemore, "Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law," (Washington, D.C.: American Society of International Law Task Force Paper, 2002, p. 38.

14 General Assembly Resolution 39/46, Annex, 39 U.. GAOR Sup. No. 51, U.N. Doc. A.39/51 (1984).

15 Elsea, "Lawfulness of Interrogation Techniques," p. 9.

16 Goldman and Tittemore, "Unprivileged Combatants," p. 49.

17 Robert K. Goldman and Brian D. Tittemore, "Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law," (Washington, D.C.: American Society of International Law Task Force Paper, 2002., p. 49

18 18 U.S.C. par. 2340, quoted in Jennifer K. Elsea, "U.S. Treatment of Prisoners in Iraq: Selected Legal Issues" Congressional Research Service Report for Congress (RL32395) December 2, 2004), p. 14.

19 The War Crimes Act of 1996 defines war crimes as "grave breaches" of the Geneva Conventions and violations of Common Article 3. Source: P.L. 104-192, 110 Stat. 2104 (1996), 18 U.S.C. par. 2441. Elsea, "U.S. Treatment of Prisoners in Iraq: Selected Legal Issues" Congressional Research Service Report for Congress (RL32395) December 2, 2004), p. 11.

20 The Act defines cruel, inhuman, or degrading treatment as "the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution, as defined in the United State Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment of Punishment done at New York, December 10, 1984." Source: "H.R. 2863, Department of Defense Appropriations Ace, 2006 (Enrolled as Agreed to or Passed by Both House and Senate)." Found at **http://thomas.loc.gov/cgi-bin/query/F?c109:7./temp/~c109yVTxt7:e189414:**

21 Josh White, "President Relents, Backs Torture Ban," *Washington Post* (December 16, 2005), p. 1.

22 That is, if the U.S. person undertakes interrogation practices that "were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful." Source: "H.R. 2863, Department of Defense Appropriations Ace, 2006 (Enrolled as Agreed to or Passed by Both House and Senate)." Found at **http://thomas.loc.gov/cgi-bin/query/F?c109:7./temp/~c109yVTxt7:e189414**

23 The argument that the president's intent should be given equal weight with congressional intent when interpreting the law is undermined by the first words of Article I of the Constitution, "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." For an analysis of signing statements, see Phillip J. Cooper, "George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements, *Presidential Studies Quarterly* Vol. 35, No. 3 (September 2005), pp. 515-532.

24 The White House, "President's Statement on Signing of H.R. 2863, the 'Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006.'" December 30, 2005. Found on White House Web site, **http://www.whitehouse.gov**.

25 For analysis of these constitutional issues see, James P. Pfiffner, "Torture and Public Policy," *Public Integrity* Vol. 7, no. 4 (Fall 2005), pp. 313-330.

26 Even though Iraq was officially covered by the Geneva Conventions, the Schlesinger Report concluded that the techniques used at Guantanamo migrated to Abu Ghraib.

27 Josh White and Carol D. Leonnig, "U.S. Cites Exception in Torture Ban," *Washington Post* (March 3, 2006), p. A4.

28 *Hamdi et al. v. Rumefeld*, 159 L.Ed. 2d 578, 2004.

29 *Hamdi et al. v. Rumsfeld, Secretary of Defense* 159 Lawyers Edition 2nd 578 (2004).

30 *Rasul V. Bush* (159 L. Ed. 2nd 548 (2004).

31 *Hamdan v. Rumsfeld*, No. 05-184 (decided June 29, 2006), Slip Opinion, Supreme Court Web site.

32 The commissions were established by Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Cictizens in the War Against Terrorism," Federal Register: Vo. 66. no. 222 (November 16, 2001), pp. 57831-57836.

33 Slip Opinion, p. 4.

34 Slip Opinion, pp. 4, 6

35 Slip Opinion, p. 7.

36 *Hamdi et al. v. Rumsfeld*, Secretary of Defense 159 Lawyers Edition 2nd 578 (2004). In remarks after she had retired from the Supreme Court, Justice O'Conner said about the intimidation of federal judges, "we must be ever-vigilant against those who would strongarm the judiciary into adopting their preferred policies. It takes a lot of degeneration before a country falls into dictatorship, but we should avoid these ends by avoiding these beginnings." Her remarks were reported by Nina Totenberg of National Public Radio according to Raw Story, "Retired Supreme Court Justice hits attacks on courts and warns of dictatorship," (March 10, 2006), Web site: **rawstory.com**.

37 R. Jeffrey Smith, "Beehind the Debate, CIA Techniques of Extreme Discomfort," *Washington Post* (September 16, 2006), p. A3; R. Jeffrey Smith, "Detainee Measure to Have Fewer Restrictions," *Washington Post* (September 26, 2006), p. 1; Charles Babington and Jonathan Weisman, "Senate Approves Detainee Bill Backed by Bush," *Washington Post* (September 29, 2006), p. 1.

38 Mark Mazzetti and Neil A. Lewis, "Military Lawyers Caught in the Middle on Tribunals," *New York Times* (September 16, 2006), p. 1, A11.

39 See Scott Shane and Adam Liptak, "Shifting Power To a President," *New York Times* (September 30, 2006), p. 1; Kate Zernike, "Senate Approves Broad New Rules to Try Detainees," *New York Times* (September 29, 2006), p. 1; Tim Grieve, "The pres-

James Pfiffner is a professor at George Mason University School of Public Policy. He is a leading authority on public management, American presidents, and the American system of government. He has published ten books and lectures extensively on these topics to audiences in Europe and in the United States.

ident's power to imprison people forever," Salon, (September 26, 2006); Michael A. Fletcher, "Bush Signs Terrorism Measure," *Washington Post* (October 18, 2006), p. A4.

40 Scott Shane, "McCain Pays A Tribute At Funeral Of Ex-P.O.W.," *New York Times* (December 15, 2005), p. A14.

41 Eric Schmitt, "House Backs Ban on Inmate Abuse," *New York Times* (December 15, 2005), p. 1, A14.

42 Scott Shane, "McCain Pays A Tribute At Funeral Of Ex-P.O.W.," *New York Times* (December 15, 2005), p. A14.

Human Rights and Counterterrorism: A Tale of Two Districts

by Michael I. Krauss

The First Amendment gives more extensive protection to those who are not government employees, so any restriction on their freedom to publish information must be narrowly drawn and subject to "close judicial scrutiny."

Sometimes it seems that our country is composed of two contingents that have no common understanding of the crucial nexus between our ongoing war on Islamist terrorism and our need to protect the human rights that the Islamist terrorists wish to eradicate. Two federal district court rulings—one in Virginia and one in Michigan, rendered within days of each other in August 2006—are poster children for this division of our society. I believe that both decisions are incorrect. One is a careful literalist opinion that gives too short shrift, in my opinion, to fundamental individual rights; the other is a stunning piece of judicial activism that abstracts totally from the fact that our country is involved in a war against those who would obliterate these rights.

United States v. Rosen[1]: Espionage, or Exercise of the First Amendment?

This case involves two former employees of the American Israel Public Affairs Committee, a political action committee that exists to publicize to Congress and the American public the defense needs of the State of Israel and what it describes as a moral and historical affinity between our country and the Jewish state.[2] The two employees were charged with conspiring to communicate "information relating to the national defense" to a person "not entitled to receive it," in violation of Section 793 of the Espionage Act.[3] From the charge, one might imagine that the defendants snuck onto a secret military installation and took secret photographs, which they then proceeded to sell to a foreign nation. The defendants did nothing of the sort. They were charged with doing what lobbyists, reporters, researchers and authors do all the time: contacting government employees to elicit useful information.

The indictment lists many meetings between the lobbyists and an employee of the U.S. Department of Defense. Some meetings were by phone, and other meetings were at a baseball stadium and a train station, where the DOD employee allegedly gave classified information to lobbyists. The defendants allegedly turned over the information to their superiors at AIPAC and to a "senior fellow at a Washington, D.C. think tank." The lobbyists moved to dismiss the case, arguing that either Section 793 did not cover their behavior or was void as violative of their First Amendment rights to free speech and to petition the government.[4] The motion to dismiss was filed by a group of distinguished attorneys that included Viet Dinh, a former U.S. assistant attorney general for legal policy, who was largely responsible for the drafting of the Patriot Act.[5]

On August 9, 2006, in the Eastern District of Virginia, Judge T.S. Ellis III denied the defendants' motion to dismiss the case. The judge conceded that most defendants under the Espionage Act are government employees who have taken oaths of secrecy (such as the DOD employee, who had already pleaded guilty in a different proceeding). Government employees have diminished First Amendment rights, and may clearly be subjected to prosecution if they abuse their position of trust to disclose national security information to someone not entitled to receive it.[6] The judge concluded that the plain text of Section 793, which has remained "largely unchanged since the administration of William Howard Taft,"[7] applied to people outside government as well. He found this obligation allowed under the Constitution

both by "common sense" and by "the relevant precedent."[8] The First Amendment gives more extensive protection to those who are not government employees, so any restriction on their freedom to publish information must be narrowly drawn and subject to "close judicial scrutiny."[9] The judge's scrutiny was not, however, as close as the defendants wished. So long as the recipient knows that he or she is receiving national defense-related information that the provider of the information was not legally entitled to communicate, and so long as the information "could cause injury to the nation's security,"[10] the outside recipient who recommunicates the information is committing espionage. Ellis balanced the sweep of government's legitimate interest in protecting the national security against the fear that might be engendered in anyone who communicates with a government employee, and found that the law's "effect on First Amendment freedoms is neither real nor substantial as judged in relation to this legitimate sweep."[11]

The judge was troubled by his ruling, and he invited Congress to review and revise the statute.[12] The defendants were researching a national security issue (the Pentagon's attitude toward Israel, compared with its attitude toward Arab states) in order to do their job—to petition the federal government on behalf of American citizens favorable to Israel. They found a DOD employee so disgruntled about his employer's recent behavior that he was willing to leak it to these lobbyists. Similarly, any journalist or author looking into national security questions now risks indictment if his or her research results in the disclosure of classified material. In *Rosen* the details of what was disclosed by the AIPAC lobbyists remains unpublished; we know only that some of it pertained to "a foreign government's [Iran's?] covert actions in Iraq" and to "potential attacks upon United States forces in Iraq."[13] Presumably the information released by the press almost every day about secret prisons in Eastern Europe, or about mining of data from select international phone calls, or about tracking certain international money transactions, are even more obvious violations of the Espionage Act.

The defendants in *Rosen* did not republish any secret document or produce any tape or "smoking gun." They were given what Ellis called "intangible information"—they repeated what they were told about American defense operations. Judge Ellis held that when intangible information is disclosed, the government must prove that defendants had "reason to believe the disclosure could harm the United States or aid a foreign government"[14] in order to obtain a conviction under Section 793. Defendants must have either intended this harm/aid or been in reckless disregard of it.[15] This does not seem to immunize newspapers that publish, for example, information about secret prisons—even if their principal purpose is to inform the American public, the newspapers know or should know (and therefore are presumably at least recklessly indifferent to the fact) that the revelation of this classified information will help enemy states. Indeed, in *Rosen,* defendants' primary purpose was to do their job. To more effectively lobby the American government about its support of Israel, they needed to know as much Israel-related information as they could find.

What if the *New York Times* had been prosecuted instead of AIPAC? Would the former have received constitutional protection that has now been denied the latter, even though petitioning the government is explicitly protected by the First Amendment? It is highly significant that two individual lobbyists who did nothing more than receive and use classified information from a disgruntled defense employee are prosecuted for using it, while newspapers that routinely do exactly the same thing continue unmolested. The former, unlike the latter, can ill afford the legal fees that are required now that a full trial has been ordered. Will they be tempted to plea bargain to avoid a lengthy prison term? If they do, a travesty of individual rights may have occurred here. Ellis was clearly uncomfortable with these implications. But I submit he could have interpreted the First Amendment more extensively than he chose to do. He could have held that the plain meaning of Section 793 cannot withstand constitutional scrutiny in cases such as *Rosen.*

ACLU v NSA[16]: War on Terror? What War on Terror?

In a stunning ruling on August 17, 2006, Eastern District of Michigan Senior Judge Anna Diggs Taylor ruled that the warrantless surveillance of international phone calls between foreign Al Qaeda members located abroad and "U.S. persons" by the National Security Administration is an unconstitutional violation of the Fourth and First amendments. This decision—perhaps the most poorly reasoned federal court ruling this author has ever read—contrasts markedly with the carefully articulated view of Judge Ellis, who in my opinion nonetheless errs in favor of the government. Here, though, Judge Taylor has concocted an absurdity.

Taylor discusses at length "The History of Electronic Surveillance in America."[17] She gets this history all wrong, though. She averred that the *Katz* case in 1967[18] held that wiretaps "conducted without prior approval by a judge or magistrate were per se unreasonable"—but she omitted footnote 23 of *Katz*, which expressly exempted "national security" wiretaps from the entire holding.[19] She relies repeatedly on the 1972 *Keith* case[20] to support her ruling—but *Keith* required warrants only for *purely domestic* national security wiretaps, and expressly declined to rule on "the activities of foreign powers, within or without this country," or their "agents" inside the United States. In the 1990 *Verdugo* case, the Supreme Court held that the Fourth Amendment does not apply to "actions of the Federal Government against aliens outside the United States territory,"[21] which arguably immunizes the NSA program—all phone intercepts took place abroad. As no warrant was needed to listen in on Al Qaeda abroad, the fact that one party is located in the United States is purely collateral.[22]

Taylor outlandishly opined that the Fourth Amendment "requires prior warrants for any reasonable search, based on prior-

existing probable cause."[22] As my colleague Robert Turner of the University of Virginia has pointed out,[23] it is established that airport screenings are Fourth Amendment "searches," and firearms are found in only about 0.0004 percent of searches—hardly "probable cause." Judge Taylor's ruling would shut down the airline industry.

Taylor also held that the National Security Agency's electronic surveillance program also violates the *First* Amendment by abridging the freedom of speech of those who, inside the United States, communicate with Al Qaeda operatives abroad. Taylor claimed this conclusion followed from the *Bates* case, where the Supreme Court struck down an Arkansas requirement that the National Association for the Advancement of Colored People submit a list of its members to a government body.[25] *Bates* correctly found that the government may not frighten off potential members and contributors to the NAACP.[26] Judge Taylor seems here to believe that for this reason the government may not try to frighten off potential members and contributors to Al Qaeda. And, of course, the Little Rock publication requirement was overt while the NSA program was covert, so the entire basis of the *Bates* analogy is flawed.

Taylor invoked the Constitution's separation of powers to ground her argument, claiming that the president must "faithfully execute" all laws, including the Foreign Intelligence Surveillance Act (FISA), which establishes a mandatory procedure for national security wiretaps. Incredibly, Taylor declined to decide whether or not the FISA was unconstitutional to the extent it infringed on inherent presidential power, calling that question "irrelevant."[27] She failed to recall that:

- *Federalist 64*[28] left the president free "to manage the business of intelligence in such a manner as prudence may suggest."

- Upon enactment of the FISA, President Carter's Attorney General Griffin Bell insisted that the law would not deprive the president of his constitutional powers (as a Carter campaign worker and Carter judicial appointment, the judge might perhaps have remembered this).

- The FISA-established federal appeals panel noted in 2002 that, FISA notwithstanding, every court ever to consider the issue has found that "the president did have inherent authority to conduct warrantless searches to obtain foreign intelligence information."[29]

No governmental interest is stronger than national security.

Taylor blithely concluded that searches always require "probable cause" and "warrants." Her conclusion blissfully ignored Supreme Court decisions allowing many kinds of searches in the absence of one or both.[30] From health inspections to sobriety checkpoints to airport and border searches, inspections have been allowed. The *Von Raab* case itself quoted from a 1974 case in which the court held, "When the risk is the jeopardy to hundreds of human lives and millions of dollars of property interest in the pirating or blowing up of a large airplane, that danger alone meets the test of reasonableness."[31]

Finally, Taylor acknowledged that the "state secrets privilege" requires a judge to dismiss a case if the "very subject matter of the action" is a state secret.[32] But since the government admitted that the NSA program existed, the judge concluded it was no longer "secret," even though its details (who was being listened to, when, and how) remain classified. Time after time after time, the Supreme Court has indicated that in cases involving safety, the balance between governmental interests and individual privacy can justify warrantless searches.[33] No governmental interest is stronger than national security.

Judicial Watch has revealed[34] that, according to her 2003 and 2004 financial disclosure statements, Taylor served as secretary and trustee for the *Community Foundation for Southeast Michigan* (CFSM). She was reelected to both positions in 2005. CFSM made a recent grant of $45,000 to the American Civil Liberties Union of Michigan, a plaintiff in this case. According to CFSM's Web site, "The Foundation's trustees make all funding decisions at meetings held on a quarterly basis." [CFSM donated $180,000 in 2003 to the Arab Community Center for Social and Economic Service, a defendant in another case on Taylor's docket.[35]] There is no indication that the judge informed the parties of her connection here, which might well have prompted a recusal motion. This does not appear to explicitly violate canons of judicial ethics, but it does give the appearance of bias. Many judges probably either belong to the ACLU or have given it some support, but in this case Taylor, as an officer of an organization that is a major benefactor to the Michigan chapter, has presided over a lawsuit the Michigan chapter brought.

Conclusion

Within three weeks, one carefully reasoned district court opinion arguably gave too little weight to the First Amendment, while a second ruling from a different district court arguably gave no weight at all to precedent or to the president's constitutional role defending national security. Both cases are being appealed, and the

Michael I. Krauss is a professor of law at George Mason University School of Law; a member of the board of governors of the National Association of Scholars; and a fellow of the Foundation for the Defense of Democracy (DC), Manhattan Institute (NY), and Virginia Institute for Public Policy.

NSA case will surely be overturned. Thankfully, a circuit court panel quickly suspended its effect.[36] For now, the simultaneous publication of both decisions highlights the tremendous division in American politics and law—how to reconcile individual rights with an unprecedented war on terror. ⚖

Endnotes:

1 No. 1:05CR225, 2006 U.S. Dist. LEXIS 56443 (E.D. Va. Aug. 9, 2006).

2 American Israel Public Affairs Committee, Who We Are, http://www.aipac.org/whoWeAre.cfm (last visited Oct. 8, 2006).

3 18 U.S.C. § 793 (2000).

4 *Rosen*, 2006 U.S. Dist. LEXIS 56443, at *11-12, 22.

5 Pub. L. No. 107-56, 115 Stat. 272.

6 *Rosen*, 2005 U.S. Dist. LEIX 56443, at *90.

7 *Id.* at *121.

8 *Id.* at *94-95.

9 *Id.* at *82.

10 *Id.* at *112-13.

11 *Id.* at *113-14.

12 *Id.* at *121-22.

13 *Id.* at *8, 9.

14 *Id.* at *88.

15 *See id.* at *57.

16 438 F. Supp. 2d 754 (E.D. Mich. 2006).

17 *Id.* at 771-73.

18 *Katz v. United States*, 389 U.S. 347 (1967).

19 *Id.* at 358 n.23.

20 *United States v. United States Dist. Court*, 407 U.S. 297 (1972).

21 *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990).

22 If a wiretap is legal, it may also record the statements of every person who communicates with the legally wiretapped individual, without showing any second "probable cause."

23 *ACLU*, 438 F. Supp. 2d at 775.

24 R. Turner, "Shaky Surveillance Ruling," *Washington Times*, August 27, 2006, p. A15.

25 *ACLU*, 438 F. Supp. 2d at 776 (referencing *Bates v. City of Little Rock*, 361 U.S. 516 (1960)).

26 *Bates*, 361 U.S. at 527.

27 *ACLU*, 438 F. Supp. 2d at 781.

28 THE FEDERALIST NO. 64 (John Jay).

29 *In re* Sealed Case, 310 F.3d 717, 742 (FISA Ct. Rev. 2002).

30 *E.g., Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

31 *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974).

32 *ACLU*, 438 F. Supp. 2d at 762 (citing *Kasza v. Browner*, 133 F.2d 1159, 1166 (9th Cir. 1998).

33 *See, e.g., Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

34 **http://www.judicialwatch.org/5862.shtml**

35 Case 06-10968, Mich. E.D.

36 *ACLU v. NSA*, No. 06-2095, 2006 WL 2827166 (6th Cir. Oct. 4, 2006) (granting a stay of the district court's order pending appeal).

Book Review

by Stuart S. Malawer

TO OPPOSE ANY FOE— The Legacy of U.S. Intervention in Vietnam.

Edited by Ross A. Fisher, John Norton Moore and Robert F. Turner. (Carolina Academic Press, 2006)

Let every nation know, whether it wishes us well or ill, that we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe, to assure the survival and success of liberty.

—From John F. Kennedy's Inaugural Address, January 21, 1961.

How dated this quote now sounds: "To assure the survival and success of liberty." Didn't that attitude get us into Vietnam, and now Iraq? Isn't the foe today global terrorism, not another nation? This book examines the influences of the Vietnam War on contemporary policy issues. The editors intend that the reader assess the Zeitgeist of the Vietnam era and its implication for American foreign policy almost a half a century later.

Most of the book's essays were written for a fifteen-year University of Virginia Law School seminar on the Indochina War. Professors John Norton Moore and Robert F. Turner, cofounders of the U.Va. Center for National Security Law, taught the seminar.

The book contains three sections assessing the historical, legal and contemporary aspects of the U.S. intervention in Vietnam. The historical section of the Vietnam legacy contains essays on the Kennedy administration, global security, the Paris Agreement, and the Khmer Rouge and Cambodia. The legal legacy section has essays on early legal advice, naval interception and command responsibility (My Lai). The third segment on contemporary policies has essays on gradualism and Somalia.

The book could have benefited from a general conclusion about the implications of Vietnam on current policy. Nevertheless, the individual essays are uniformly excellent and present an informative interdisciplinary discussion of the Vietnam War's aftermath. Ross Fisher, in his insightful and chilling essay on the Kennedy administration and the overthrow of President Ngo Dinh Diem, concludes that had Diem lived, American involvement in Vietnam would have been substantially different. How many American lives could have been saved if that had been the case?

He Ain't Heavy, He's My Brother[1]

by George W. Shanks, 2005–2006 Conference of Local Bar Associations Chair

As we approach the season of light, the season of giving, of forgiveness, of generosity, peace and goodwill toward men, I want to take a moment to talk about those among us who view this time with decidedly less enthusiasm. I realize this approaches the political correctness level of dragging in the dead cat, but this time of year can be devastating to those afflicted with drug and alcohol dependency or mental illness. I am not talking about "bah, humbug" in the face of seasonal bonhomie. I speak of the type of genuine, gut-wrenching illness that much of society still views with medieval suspicion and contempt.

Statistics tell the unhappy story: practicing lawyers suffer from clinically significant levels of depression at the rate of 18 percent, versus 9 percent within the general population—and from alcohol abuse and drug dependency at a rate twice the national average. Lawyers' suicide rate is twice as high. I will not mince words or be polite: Each of you reading this article is in a local bar with at least one colleague who falls into this category, and you probably saw and spoke to her or him in the last week.

So much for sweetness and light.

But we are our brother's keeper. If we don't take care of our own, who will? To that end, more than two decades ago, a joint task force of the Virginia State Bar and The Virginia Bar Association was formed to address the problem, which was almost unspeakable at the time. Drunk lawyers? Why, that's oxymoronic. What a great joke. Then the wave of white powder crashed on the marbled steps of our hollowed halls of justice and the jokes turned into felony prosecutions and lives ruined in public, as well as private. We could no longer whisper about these problems as if they affected only the weak, irresolute or insignificant.

And then, dear reader, came Father Time, with his bag of silvery gray hair, benign smiles of age and the greatest corruption of all, the withering of intellect and wisdom on a profession that prides itself on its staying power.

Today, Lawyers Helping Lawyers is a vital, vigorous program that addresses alcohol and substance abuse and mental disorders within the bar and within the extended families of the bar. (If your spouse, child, partner, associate, legal assistant or paralegal has a problem, then you have a problem.) LHL has staff experts to deal with these medical problems in the context of the legal profession. The consultation is confidential. It is not part of the bar's disciplinary system. It is available with a toll-free call to 1-877-LHL IN VA (877-545-4682) or to (804) 644-3212.

Why am I raining on the parade at this time of year? I have a genuine desire to get all of us to be leaders on this subject of untreated medical disorders. I also feel that we owe it to each other, and to the larger community, to fix what we can and to lobby others to fix what we cannot. This one we can fix.

Those of you who have attended the Solo and Small-Firm Forums and Town Hall Meetings sponsored by the Supreme Court of Virginia and the VSB Conference of Local Bar Associations have already learned of the outreach and availability of Lawyers Helping Lawyers from Jim Leffler, its enthusiastic and highly-qualified executive director. For those of you who have not yet attended, please do so. Few of the lawyers who attended the four presentations around the state knew about Lawyers Helping Lawyers before they attended. Ads (some of the catchiest and clever I have seen in a bar publication) aren't getting the word out.

So here I am, getting the word out to the folks who really count in our profession—the practitioners in the local bars, who tend to the day-to-day legal needs of 7.5 million Virginians. That's 14,852 of us who perform this service. There are not enough of us. There can never be enough good lawyers.

You can do your part. Don't just give your inebriated colleague a ride home. Save her life. Call Lawyers Helping Lawyers for advice and assistance. Don't just view mental lapses by a befuddled opponent as a tactical gift from the gods of litigation. Get help for your colleague from Lawyers Helping Lawyers.

Don't just do it because it's the right thing to do. Do it because he's your brother. ⚖

1 Motto for Boys Town, (1941)
Song written by B. Scott and B. Russell
The Hollies (1970)
Neil Diamond (1970)
Olivia Newton-John (1976)

Pre-Law Institute, Conference Address Diversity Challenges

by Maya M. Eckstein, 2006–2007 Young Lawyers Conference President

The Young Lawyers Conference has long been concerned about diversity. While the legal profession has become more diverse, the profession does not reflect society's diversity. In 2000, attorneys of color made up less than 15 percent of the profession. Individuals of color made up approximately 30 percent of the U.S. population. (**http://www.abanet.org/yld/chooselaw/diversity.shtml**). There are not enough minority associates, partners, solo practitioners, corporate counsel, government lawyers, or judges.

Our programs address this disparity. The YLC holds an annual prelaw conference for minority college students on preparing for law school; the course addresses the law school experience and explores legal careers. We have Law School Admission Test prep courses, mock law school classes, a mock trial, and panel discussions with the bench, bar and law students. The conference provides valuable information to Virginia college students considering a career in the law. Previously held in Richmond, last year's conference was held at George Mason University and will be there again in spring 2007. Next year the YLC also will hold a conference in Southwest Virginia.

The YLC also annually organizes the Oliver Hill/Samuel L. Tucker Prelaw Institute—a free, one-week overnight camp that targets at-risk high school students and encourages them to consider the legal profession. It gives students the opportunity to meet with lawyers in a variety of legal positions (judges and corporate, government and private lawyers). It also teaches how to conduct opening and closing statements and direct and cross examinations. Students participate in mock trials.

The YLC honors women and minority lawyers recently elevated to the bench at its Celebration Bench/Bar Dinner, during which young lawyers meet judges in a casual atmosphere. The YLC will continue sponsoring this event until the elevation of women and minorities to the bench no longer seems an anomaly.

The YLC will introduce a new Choose Law program developed by the American Bar Association's Young Lawyers Division. The program will be presented in schools across the commonwealth this fiscal year. Like the Oliver Hill/Samuel Tucker Prelaw Institute, the Choose Law program encourages minority high school students to become attorneys. It educates them about the legal profession, exposes them to attorneys in different legal careers; emphasizes the importance of law in society; highlights minority attorneys and judges who played crucial roles in obtaining and enforcing civil rights and ensuring opportunities for members of racial minority groups; stresses the importance of education, and teaches students how to apply to law school and become lawyers.

As president of the YLC, I hope for a day when such programs are no longer necessary—for the day when the legal profession truly reflects the diversity in our society. Until that day arrives, the YLC will address the disparities and encourage enhanced diversity in our profession. ⚖

Handbook, Law Days In Conference Mission

by Jack W. Burtch Jr., 2006–2007 Senior Lawyers Conference President

Part of the mission of the Senior Lawyers Conference is "[t]o serve the particular interests of senior lawyers and promote the welfare of seniors generally." Sometimes it is difficult to put the abstract aspirations of a mission statement into programs which actually help people. But keeping an eye on our mission statement helps us stay on course. So far this year, the conference has emphasized two initiatives that have widespread, practical results.

We are revising the *Senior Citizens Handbook*. First released in 1979, the handbook had gone through eleven complete revisions by 2005 and revisions were made for a limited reprinting in late 2006. It is so popular we had simply run out of copies. This year, William H. Oast III, of Portsmouth is leading the revision project. The handbook provides up-to-date information about Social Security benefits, healthcare and long-term care opportunities, housing issues, information about legal rights and future planning, including estate planning and advance medical directives. It is a resource for individual senior citizens and the institutions and organizations that serve them. The easy part of our job is distributing the handbook. Almost everyone who sees it wants one. The hard part is keeping the book current. Our conference is grateful to those who continue to make the handbook a valuable resource.

As part of another conference initiative, local bar associations and area agencies on aging sponsored Senior Citizens' Law Days. Recently the Smyth County Bar Association presented a Law Day with 125 attendees. This was a cooperative effort of the local bar and Smyth County governmental agencies including the health and social services departments. There were presentations by lawyers, family advocates, social workers, state executives and judges. A bank advertised the event, which included lunch. Our board member, John H. Tate Jr. of Marion, brought the law day together.

If your bar association is interested in presenting a Senior Citizen's Law Day, we have a template to make it easier. Call Patricia A. Sliger at the VSB's office in Richmond (804) 775-0576 or email sliger@vsb.org, and she will send you the road map to a successful program.

Part of our mission is to "serve the particular interests of senior lawyers." This aspect of the mission is being addressed by Frank O. Brown Jr.'s frequent presentations before lawyers on "Protecting Your and Your Clients' Interests in the Event of Your Disability, Death or Other Disaster." None of us wants to think about death, disability or disaster, but our duty to protect our clients extends beyond our personal ability to do so. If you have the opportunity to be present at one of Frank's presentations, you will be glad you heard him.

The Senior Lawyer's Conference is a service of our Virginia State Bar. All lawyers over fifty-five years old are members. If there is a project you feel would help us accomplish our mission, please write or call me. Our board and our staff do not have a monopoly on good ideas. If you want to participate more actively, please let me know. For me it is simply a privilege to serve with a group of lawyers who want to continue to serve our profession and our communities. ⚖

"An Ounce of Prevention . . ." Continued.

by Janean S. Johnston

This is the fourth installment in the "Firm Fitness Check-up" series. This time I am addressing an issue that seems to cause more stress for Virginia lawyers than any other single topic involved in law office management.

Financial management—especially trust accounting ethics requirements—usually bring a groan or a rolling of eyes from attorneys. Lawyers can handle their clients' legal matters and focus their time and energies on those duties. Frequently they have little experience in handling financial records, beyond balancing their own checkbooks. (A few do not get around to it for years.) I have seen younger lawyers who learned their trust accounting procedures from older, experienced attorneys who have not been accounting correctly for years. Do not assume every certified public accountant knows our ethical requirements, either.

Because our law school experience has not trained us to maintain client trust accounts, this article will focus on the general record-keeping provisions of Rule 1.15(e) of the Rules of Professional Conduct. While most attorneys attempt to comply with the recording of the cash receipts and cash disbursements, some do not maintain required client subsidiary ledgers. Properly used, subsidiary ledgers perform an important risk management function. Double-checking in these records deters lawyers from stealing or borrowing clients' funds.

Reconciling the three records above is the most frequently overlooked requirement that I have observed during my work in Virginia. Monthly reconciliations are required for cash balances. These are derived from the receipts and disbursements journals—or a bound, detailed checkbook—that reconciles the escrow account checkbook balance with the escrow account bank statement balance.

The greatest error in maintaining proper procedures in trust accounting is not performing a periodic trial balance at least quarterly (within thirty days of the end of the quarter). The trial balance of each client's individual subsidiary ledger (showing the balance on hand at the end of the period) must be totaled and must agree with the beginning balance for that period, increased by deposits or decreased by disbursements, and must agree with the cash balance on hand. Have the reconciliations approved by the lawyer—especially if another person has been the preparer.

Part of the escrow accounting requirements includes clearly identifying the escrow account and ensuring that the account is in a financial institution approved by the Virginia State Bar. A list of approved banking institutions can be found on the bar's Web site at **www.vsb.org/site/members/trust-account-depositories/**. These banks have an agreement with the bar to timely notify the VSB whenever there are insufficient funds in the escrow account, regardless of whether the instrument is honored. If you want a visit from the VSB's disciplinary office, overdrawing your escrow account is how to get one.

Manual and computerized systems help manage trust account records. Two popular accounting software programs are Quicken and QuickBooks. QuickBooks offers an online tutorial at **www2.mnbar.org/qbguide/qbguide1.htm**. for using this program to maintain trust accounts.

Frank A. Thomas III has forms in the appendix of his Virginia CLE book, *Lawyers and Other People's Money*, for those who use a manual system. A third edition is in the process of being updated, and it should be available next year.

Now, let's find out how you are doing with your own trust accounting procedures.

Trust Fund Accounting and Control

- Is there a separation of trust and general operating funds?
- Do you avoid comingling your funds with your clients' funds?
- Is your trust accounting current?
- Do you reconcile your trust accounts monthly?
- In addition to your cash receipts and cash disbursement journals (or adequately detailed and bound checkbook entries for each), do you maintain a subsidiary ledger for each client?
- Do you perform a quarterly (at least) trial balance of the subsidiary ledgers?
- Do you initial and date the above periodic reconciliations, in order to demonstrate your oversight of the trust funds?
- Are two signatures required for all withdrawals of funds from client trust accounts? (This does not apply to solos.)
- Are clients provided a complete accounting before funds are disbursed?
- Do you keep all financial records for at least five years following the termination of the fiduciary relationship?
- Do you know it is a "best practices" procedure to have an annual review/audit by an accountant of all trust accounts?

Because I have not covered this important topic in detail, please read Rule 1.15. If you have other trust accounting questions, call me at (703) 567-0088. ⚖