Not Your Everyday Divorce Issues—9 AM–3:30 PM on January 20 at the University of Richmond. Sponsored by the Virginia Trial Lawyers Association, the Virginia chapter of the American Academy of Matrimonial Lawyers, and the National Center for Family Law. Details: Allison Love, (804) 343-1143, ext. 310.

Virginia Lawyer publishes at no charge notices of continuing legal education programs sponsored by nonprofit bar associations and government agencies. The next issue will cover February 21–April 13, 2011. Send information by January 9, 2011, to chase@vsb.org. For other CLE opportunities, see "Current Virginia Approved Courses" at http://www.vsb.org/site/members/mcle-courses/ or the websites of commercial providers.

Letters

Send your letter to the editor to:
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707 E. Main Street, Suite 1500, Richmond, VA 23219-2800

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Institute of Law, Psychiatry, and Public Policy
University of Virginia

January 21, 2011, Charlottesville, VA
Advanced Seminar in Juvenile Forensic Practice

Sullivan v. Florida: The U.S. Supreme Court Tackles Developmental Issues and Life Sentences for Juveniles: Andrew Block, Esq., U.Va. School of Law

Are Adolescents Really Less Mature than Adults: The MacArthur Foundation Research Network on Adolescent Development & Juvenile Justice:
Jennifer Woolard, PhD, Georgetown University

Providing Responsible Care to Juveniles: Sexual Victimization in Juvenile Facilities Reported by Youth, 2008-2009: Allen Beck, PhD,
Bureau of Justice Statistics, US DOJ

and A Panel of Response, including
Jay Malcan, PhD, Virginia State University, and Gina E. Wood, Director of Policy and Planning, Joint Center for Political and Economic Studies, Washington DC

Continuing Education: http://www.ilppp.virginia.edu/continuing-education.html
This program has been approved for 5.5 credit hours of Continuing Legal Education by the Virginia Mandatory Continuing Legal Education Board (0 credit hours for Ethics)
This program is expected to convey up to 6 hours of Continuing Education contact hours or credits for physicians, psychologists, and others.
Hour(s) or credit(s) for ethics of professional practice may be available.

Registration: http://www.ilppp.virginia.edu/contact/program-registration.html
For more information—including registration costs—
please inquire at els2e@virginia.edu

by Irving M. Blank

It's Time to Thaw the Judicial Hiring Freeze

IF WE ARE GOING TO HAVE ANY INFLUENCE on our legislators in funding the vacant judgeships that were frozen by the 2010 General Assembly, action is needed now. The legislature comes back to Richmond on January 12, 2011, and we are looking for a delegate to assume a leadership role in electing judges to those empty seats.

My recent contacts with many members of the General Assembly on this issue have left me with some surprising impressions. Foremost, there is little understanding that the judiciary is an equal branch of government. The citizens of Virginia are entitled to a vibrant and independent judiciary that is funded to provide the essential services. Funds to accomplish this are mandated by the Virginia Constitution, as well as our history. The founders of the nation — especially those from Virginia — understood and stated the need for an independent judiciary. Otherwise, the rule of law that protects all of us would be in jeopardy. Funds for judges, clerks, and technology for our courts differ from funds for other services provided by executive and legislative agencies of state government.

Second, there seems to be an overemphasis on the number of cases heard by different circuit and district court judges. I, too, have been guilty of this in referring to the Eleventh District juvenile and domestic relations judge who is projected to be assigned almost eleven thousand cases in 2010. (See Chart I on page 11.) I have cited this situation as an example of how devastating the judicial freeze is to a court. I assume that members of the General Assembly appreciate that a three-week complex commercial case is not the same as a fifteen-minute hearing to approve an infant settlement. Hopefully, the General Assembly will correct the most egregious of the vacant judgeships.

Third, the freeze on judicial hiring should be lifted and followed by a studied and reasoned approach based on location and workload. We need to fix the problems of the last budget now and then seek a global solution. I do not envision merit selection of judges in my lifetime, but there is a bipartisan desire for a long-term solution. The legal community would support a thoughtful and reasoned proposal to insure that our judiciary is strong and independent.

Our immediate problem, however, is to address the crisis that began in January 2010. Courts across the commonwealth will not be able to fulfill their obligations to litigants and the public if immediate action is not taken.

Local bar associations in the Eastern Shore, Prince William County, and the far southwestern regions of Virginia have passed resolutions addressing the judicial vacancies. Judges are doing more than their share to keep the courts serving the public. Many of you have contacted your legislators.

Many members of the General Assembly responded that they will support amendments to the budget, but others said that they are not hearing from the legal community and doubt the seriousness of the situation.

We need to document situations in which, due to the hiring freeze, litigants — including some of our most needy citizens — are suffering from long delays in getting their cases heard.

We have offered to assist the General Assembly in developing a solution to the crisis. We have asked the governor to use his office and unique knowledge to help. We, along with the Judicial Conference, have suggested that the mandatory retirement age for judges be increased from 70 to 73. That alone would have a substantial impact on the funding problems cited by the legislature. (See Chart II on page 58.)

I call upon you again to contact your House and Senate members, have your local bar associations send resolutions to the General Assembly, write your local newspapers and get editorials printed, and contact your clients and civic organizations to tell our legislators that the people of Virginia understand that, if we are to be protected by the rule of law, we must first have a strong and independent judiciary.

Chart I — Virginia Courts with Judicial Vacancies

Source: Office of the Executive Secretary, Supreme Court of Virginia

Circuit Courts **Circuit/Localities**	**Cases per Judge, 2009** **2009 Statewide Average = 1,837**	**Projected Cases per Judge, 2010**
30th Circuit Lee, Scott, Wise	2,355 (3 judges)	3,532 (2 judges)
5th Circuit Isle of Wight, Southampton, Suffolk	2,034 (3 judges)	3,052 (2 judges)
27th Circuit Bland, Carroll, Floyd, Giles, Grayson, Montgomery, Pulaski, Radford, Wythe	2,348 (5 judges)	2,935 (4 judges)
15th Circuit Caroline, Essex, Fredericksburg, Hanover, King George, Lancaster, Northumberland, Richmond County, Spotsylvania, Stafford, Westmoreland	2,466 (8 judges)	2,819 (7 judges)
9th Circuit Charles City, Gloucester, James City County/Williamsburg, King and Queen, King William, Matthews, Middlesex, New Kent, York/Poquoson	1,804 (4 judges)	2,405 (3 judges)
11th Circuit Amelia, Dinwiddie, Nottoway, Petersburg, Powhatan	1,647 (2.66 judges)	2,190 (2 judges)
6th Circuit Brunswick, Greensville, Hopewell, Prince George, Surry, Sussex	1,852 (2.34 judges)	2,167 (2 judges)
2nd Circuit Accomack, Northampton, Virginia Beach	1,864 (10 judges)	2,071 (9 judges)
24th Circuit Amherst, Bedford, Campbell, Lynchburg, Nelson	1,625 (5 judges)	2,031 (4 judges)
13th Circuit Richmond City	1,673 (8 judges)	1,912 (7 judges)
General District Courts	**2009 Statewide Average = 26,929**	
20th District Fauquier, Loudoun, Rappahannock	29,781 (4 judges)	39,708 (3 judges)
6th District Brunswick, Emporia, Greensville, Hopewell, Prince George, Surry, Sussex	29,288 (4 judges)	39,050 (3 judges)
19th District Fairfax	34,026 (11 judges)	37,429 (10 judges)
2nd District Virginia Beach	29,184 (7 judges)	34,048 (6 judges)
13th District Richmond City	24,149 (8 judges)	27,599 (7 judges)
25th District Alleghany, Augusta, Bath, Botetourt, Buena Vista, Craig, Highland, Lexington/Rockbridge, Staunton, Waynesboro	20,663 (4.70 judges)	26,247 (3.70 judges)
Juvenile and Domestic Relations Courts	**2009 Statewide Average = 4,385**	
11th District Amelia, Dinwiddie, Nottoway, Petersburg, Powhatan	5,468 (2 judges)	10,935 (1 judge)
27th District Bland, Carroll, Floyd, Galax, Giles, Grayson, Montgomery, Pulaski, Radford, Wythe	4,860 (4 judges)	6,480 (3 judges)
15th District Caroline, Essex, Hanover, King George, Lancaster, Northumberland, Richmond County, Spotsylvania, Stafford, Westmoreland	5,503 (7 judges)	6,420 (6 judges)
14th District Henrico	4,496 (5 judges)	5,620 (4 judges)

President's Message continued on page 58

by Karen A. Gould

Chief Justice Leroy R. Hassell Sr. Made Justice More Accessible

WHEN LEROY ROUNTREE HASSELL SR. became Virginia's Chief Justice in 2003, he said he wanted the Virginia State Bar — an agency of the Supreme Court — to be of greater service to its members.

He told me that when I was president of the bar in 2006–07, and again when I became executive director in 2008.

Now, as Chief Justice Hassell concludes his second term and hands administrative responsibilities over to Justice Cynthia D. Kinser, I can assure you that he accomplished that initiative, along with many others, during his tenure.

He encouraged the VSB to provide free online legal research to all its members — a service the bar now has in place, through Fastcase.

Working with the VSB's Bar Services Department, he established the annual Indigent Criminal Defense Seminar to train public defenders and court-appointed lawyers in advanced skills; 2011 will be the seminar's sixth year.

He appointed a committee, overseen by Justice Kinser, that worked with the Conference of Local Bar Associations and bar staff to hold Solo & Small-Firm Practitioners Forums and Town Hall Meetings in every pocket of Virginia. The forums offer continuing legal education credits on topics related to practice management.

And he called the VSB together with the statewide voluntary bar associations to address pro bono legal services for the poor.

Behind each of these changes was his desire to improve the practice of law and ensure that all Virginians would have access to high-quality legal representation, regardless of their economic standing.

THE VSB COUNCIL has recognized many of Chief Justice Hassell's achievements in the following resolution:

WHEREAS, Leroy Rountree Hassell, Sr., has served with honor and distinction as a member of the Supreme Court of Virginia since 1989, when he was appointed by Governor Gerald L. Baliles, and as Chief Justice since 2003, after being elected by his peers to become the first elected Chief Justice; and

WHEREAS, Chief Justice Hassell is a person of great energy and determination, with a passion for the judicial system as an equal branch of government, and has shown compassion for the indigent, the addicted, mentally ill persons, military service members and veterans, and youth; and

WHEREAS, Chief Justice Hassell's term coincided with the 50th anniversary of the U.S. Supreme Court's decision in *Brown v. Board of Education of Topeka*; the 400th anniversary of the founding of Jamestown, and the 230th anniversary of Virginia's first Constitution. He observed those anniversaries by telling his own story as Virginia's first African American Chief Justice, and by requiring that committees and commissions under the purview of the Court reflect the geographical, religious, racial, and gender diversity of Virginia; and

WHEREAS, under Chief Justice Hassell's leadership, the General Assembly increased compensation paid to court-appointed criminal defense attorneys and public defenders, and he established an annual seminar to provide free continuing legal education to experienced practitioners of indigent criminal defense; and

WHEREAS, he encouraged Virginia's statewide bar associations and the Virginia State Bar to work together to expand pro bono legal services for indigent persons; and

WHEREAS, during challenging economic times, he championed and helped preserve drug courts; and

WHEREAS, based on recommendations of his Commission on Mental Health Law Reform, the General

Assembly amended the Code of Virginia to enhance consistency and introduce therapeutic elements to the involuntary commitment process, to ensure fairness and due process in commitment hearings, to develop a psychiatric advanced directive, and to improve availability of mental health treatment to jail inmates; and

WHEREAS, he established a Solo and Small-Firm Practitioner Forum under the leadership of Justice Cynthia D. Kinser, and personally hosted Town Hall Meetings to improve the practice management skills of lawyers and the quality of legal services, and his leadership made online legal research available without charge to all members of the Virginia State Bar; and

WHEREAS, based on recommendations by a committee he appointed and placed under the guidance of Justice Donald W. Lemons, the Court amended its appellate rules to make them fairer, more efficient, and easier to use; and

WHEREAS, he successfully worked for legislation that reformed the state's magistrate system by upgrading educational requirements and providing increased support and supervision through the Office of the Executive Secretary; and

WHEREAS, on his initiative, the General Assembly created the Courts Technology Fund, which supports ongoing improvement of the Supreme Court's information technology systems and makes possible electronic access and online filing; and

WHEREAS, he established the Judicial Security Initiative, which, with grant monies from the U.S. Department of Homeland Security, developed a program to assess courthouse security and recommend improvements in more than 100 courthouses around the Commonwealth; and

NOW, THEREFORE, BE IT RESOLVED, on behalf of the 45,000 members of the Virginia State Bar and the statewide bar organizations in the Commonwealth, we express our thanks and gratitude to Chief Justice Hassell for his service to the Commonwealth and its citizens; and

BE IT FURTHER RESOLVED, that this Resolution be incorporated in the permanent record of the Virginia State Bar and that a copy be presented to Chief Justice Hassell in testimony of our collective respect and admiration.

ADOPTED on this15th day of October 2010, effective January 31, 2011.

Irving M. Blank
President, Virginia State Bar

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We are proud to have been a small part of Chief Justice Hassell's work to make the justice system accessible to all Virginians. We look forward to continuing to work with him on the Supreme Court.

Highlights of the Virginia State Bar Council Meeting

October 15, 2010

At its meeting on October 15, 2010, in Charlottesville, the Virginia State Bar Council heard the following significant reports and took the final actions:

UPL Prosecution
The council voted 64 to 1 to seek legislation in the 2011 General Assembly to extend the statute of limitation on prosecution of unauthorized practice of law and to increase the penalties for committing UPL, a misdemeanor under current law. Under the proposal, Virginia Code § 19.2-8 would be amended to allow prosecution within two years of the complainant's discovery of the offense. In addition, restitution could be ordered in a criminal conviction under proposed amendments to § 54.1-3904, and, in a civil proceeding to enjoin unauthorized practice, a complainant could recover attorney fees, costs, damages, and civil penalties, including treble or punitive damages. The proposed statutory changes have been sent to the Supreme Court of Virginia for its consideration.

MCLE Rules Proposal Approved
The council approved proposed amendments to Rules of Virginia Supreme Court, Part 6, § IV, ¶ 17, that would increase the Mandatory Continuing Legal Education Board quorum needed to change MCLE regulations. The proposal also would give the council the authority to suspend a new or amended MCLE regulation until the Supreme Court has considered it. Under the proposal, approval by seven members of the twelve-member MCLE Board would be required for a regulation change to pass. A two-thirds vote would be required for the council to reject implementation of a regulation pending review by the Court. Proponents of the council-override measure said it would give the council input while maintaining the MCLE Board's independence. The proposal was passed by a vote of 58 to 6. It has been sent to the Court for its consideration.

Paragraph 13 Proposals Approved
The council approved proposed changes to Rules of Virginia Supreme Court, Part 6, § IV, ¶ 13, that would establish procedural authority for regulating multijurisdictional practice by lawyers who are not members of the Virginia State Bar, but who are authorized to conduct a limited practice here. The proposed changes also would incorporate in Paragraph 13 requirements for persons serving as members of a district committee, the Disciplinary Board, and the Committee on Lawyer Discipline. These requirements are also found in the Bylaws of the Virginia State Bar. The proposals have been sent to the Court for its consideration.

Resolutions
The council approved without dissent resolutions honoring Leroy Rountree Hassell Sr. for his accomplishments during eight years as Virginia's Chief Justice, and Cynthia Dinah Fannon Kinser on her election as Chief Justice for 2011-15.

Bar Card Update

Permanent Virginia State Bar cards have been sent to associate members who paid their 2010 dues, and temporary cards with a December 31, 2010, expiration date have been sent to other members.

Members with active, active/Virginia corporate counsel, active/military legal assistance attorney, judicial, and emeritus status were sent the temporary cards, and will receive their permanent cards in December.

Other members — corporate counsel registrant, retired, and disabled — will no longer be sent bar cards, under the policy that began in fiscal 2010-11.

Questions should be addressed to the VSB Membership Department at membership@vsb.org or (804) 775-0530.

Keep Up with the VSB — Read the E-News

Have you been receiving your Virginia State Bar E-News?

The E-News is an important way of keeping informed about your regulatory bar.

It is a brief summary of deadlines, programs, rule changes, and news.

We e-mail it monthly to all VSB members, except for those who opted out of receiving it.

If you didn't get yours, check your spam filter for December 1 and see if it's in there.

If your Virginia State Bar E-News is being blocked by your spam filter, contact your e-mail administrator and ask to have the VSB.org domain added to your permitted list.

"Good Lawyers" Project Wins National Award

The Virginia Is for Good Lawyers campaign by Jon D. Huddleston during his Virginia State Bar presidency last year has received a Thomson Reuters Legal Luminary Award for excellence in marketing.

The award, bestowed by the National Association of Bar Executives, recognized the project to promote the role of the citizen lawyer, public service, and discourse between lawyers and the public. The messages were conveyed through video and essays by Virginia lawyers and judges. http://www.vsb.org/site/about/va-good-lawyers/

"Way to go," commented one of the Luminary Award judges. "Success achieved through utilizing a broad range of mediums. The national attention is good for the entire profession. The template to help other bars is a nice service to provide all of us."

The VSB was among sixteen bar associations and their communications professionals to receive Luminary Awards this year.

Local and Specialty Bar Elections

Virginia Association of Defense Attorneys

Dennis John Quinn, President
Lisa Frisina Clement, President-elect
Elizabeth Guilbert Perrow, Secretary
Glen Alton Huff, Treasurer

In Memoriam

Sidney Jackson Baker
Williamsburg
August 1930–September 2010

Paul Joseph Burke
McLean
October 1918–January 2010

Hugh P. Cline
Norton
March 1919–June 2010

Edward Jude De Lozier
Parker, Colorado
April 1951–April 2010

Robert E. Eicher
Richmond
May 1936–October 2010

Amanda R. Ellis
Arlington
October 1932–May 2009

David Gay Gartner
Arlington
September 1935–September 20009

John Conway Gould
Hopewell
May 1953–September 2010

Karen Estelle Holt
Knoxville, Tennessee
September 1955–October 2009

Kenneth C. King Jr.
Roanoke
February 1942–September 2010

Joseph Richard Loschi
Norfolk
January 1935–June 2010

Steven Lynn Lovell
Big Stone Gap
February 1959–April 2010

Joseph Vincent McGrail
Alexandria
December 1933–August 2010

Hon. Montie S. Meeks
Virginia Beach
March 1921–February 2010

Thomas McCarty Moncure
Stafford
July 1920–June 2009

Edward Stephen O'Keefe Jr.
North Redington Beach, Florida
August 1939–January 2010

Thomas Louis Patten
Washington, D.C.
October 1945–June 2010

Ralph Richard Russo
Alexandria
June 1953–December 2009

Thomas Duncan Scanlin
Stafford
October 1944–May 2010

Hon. John G. Sowder
Providence Forge
November 1918–August 2010

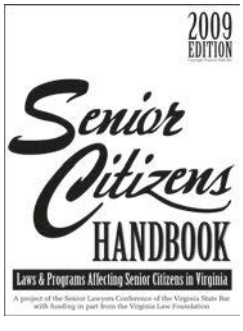
Joseph Miller Wood II
Charlottesville
August 1927–August 2010

Got an Ethics Question?

The VSB Ethics Hotline is a confidential consultation service for members of the Virginia State Bar. Nonlawyers may submit only unauthorized practice of law questions. Questions can be submitted to the hotline by calling (804) 775-0564 or by clicking on the blue "E-mail Your Ethics Question" box on the Ethics Questions and Opinions web page (http://www.vsb.org/site/regulation/ethics/).

Free and Low-Cost Pro Bono Training

Visit the Pro Bono page on the VSB website for free and low-cost pro bono trainings and volunteer opportunities: http://www.vsb.org/site/pro_bono/resources-for-attorneys



The *Senior Citizens Handbook*: a resource for seniors, their families, and their caregivers. 2009 edition now available.

We're as busy as ever at age fifty-five and over, and we face new challenges and opportunities, with little time to search them all out. How can anyone find out about them all and, with such an array of choices, how does anyone begin to make a selection?

The *Senior Citizens Handbook*. Available online at http://www.vsb.org/docs/conferences/senior-lawyers/SCHandbook09.pdf.

Former Chief Justice Honored with John Marshall Medal

by Dawn Chase

Harry L. Carrico, Chief Justice of the Supreme Court of Virginia from 1981 until he took senior status in 2003, has been presented with the John Marshall Medal in Law by the John Marshall Foundation.

The award recognizes persons of national or international prominence who exhibited professional excellence in a field related to John Marshall's career, and who are willing to personally support the foundation's efforts.

Past recipients include U.S. Associate Justice Anthony M. Kennedy and the late Griffin B. Bell, U.S. attorney general under President Jimmy Carter.

Carrico received the award October 29. It was presented by attorney and bestselling novelist David Baldacci. U.S. Associate Justice Samuel Alito Jr. had been scheduled to attend, but was unable to because of illness.

Earlier in the day, the University of Richmond hosted a symposium about Marshall's life and legacy. One panel featured Virginia Justice Donald W. Lemons, Judge Roger L. Gregory of the U.S. Court of Appeals for the Fourth Circuit, Justice Randy Holland of the Supreme Court of Delaware, and attorney Charles J. Cooper of Cooper & Kirk PLLC in Washington, D.C., as moderator.

That panel described how Marshall, as Chief Justice of the United States from 1801 until 1835, led the U.S. Supreme Court to assume its role as an independent and equal third branch of government by articulating its responsibility for judicial review, Lemons said.

Gregory said that Marshall advocated for what would become a national government because of what he had seen as a soldier in the American Continental Army, wintering at Valley Forge. Men starved and died of exposure there, and Marshall came to believe that a strong centralized defense was essential to providing adequate resources to soldiers who would be tasked with defending the United States.

Marshall's vision of the Constitution as a living document kicked off the states' rights tug-of-war that continues to play out today. His view was that "the rule of law is a process, not a 'correctness,'" Gregory said.

Carrico (left, wearing medal) and Baldacci. Photo by Taylor Dabney.

Lemons
Photo by Clement Britt.

"'We the people' is what Marshall knew," he said. As a youth, Marshall had absorbed Alexander Pope's *Essay on Man*, and in the framework of the Constitution he saw an approach to guiding the country through the uncertainties described by the poet, speaking to Man:

> All Nature is but Art unknown
> to thee;
> All chance direction, which thou
> canst not see;
> All discord, harmony not
> understood;
> All partial evil, universal good:
> And spite of Pride, in erring
> Reason's spite,
> One truth is clear, *Whatever is,*
> *is right.*
> *(Epistle I, Part 10)*

Lemons observed that, in the seminal case *Marbury v. Madison*, Marshall had conflicts of interest but did not recuse himself. Why not? "Was it just too tempting? Were his personal and political views so strong that he could not overlook the obvious conflicts?"

Last summer, under questioning by South Carolina Senator Lindsay Graham, soon-to-be Supreme Court Associate Justice Elena Kagan offered her definition of judicial activism. An activist judge, she said is one who fails to follow three principles: Deference to the political branches in policy making, respect for precedent, and deciding cases narrowly and avoiding constitutional questions, if possible.

Under Kagan's definition, "Was John Marshall an activist judge?" Lemons asked. "I report. You decide."

In a 2007 speech to a Richmond audience, award recipient Carrico offered his opinion of Marshall's place in American history:

"From whence comes the Constitution's longevity? How did it achieve the preeminence it occupies?" Carrico asked.

"I know that no one person can be responsible. But in my opinion, John Marshall in his role as Chief Justice of the United States is due much of the credit.

"James Madison, with his authorship, may have given the Constitution the body. And George Mason and Patrick Henry, with their insistence upon a Bill of Rights, may have given it a heart.

"But John Marshall, with his amazing, creative mind, gave it a soul, and helped make it the most powerful political document the world has ever known."

The 2011 General Assembly will be asked to reconsider its decision to freeze all nonappellate judicial vacancies for the 2010–12 biennium. (See Virginia State Bar President Irving M. Blank's column, page 10.)

Presently, the following current and known future judicial vacancies remain unfilled:

Circuit Courts

2nd Circuit — retirement of A. Joseph Canada Jr. of Virginia Beach in February 2010; mandatory retirement of Glen A. Tyler of Accomack in February 2011, mandatory retirement of Frederick B. Lowe of Virginia Beach in February 2012

5th Circuit — retirement of Westbrook J. Parker of Suffolk in June 2010

6th Circuit — mandatory retirement of Samuel E. Campbell of Prince George in February 2012

9th Circuit — death of N. Prentis Smiley Jr. of York County and Poquoson in December 2008

11th Circuit — retirement of Thomas V. Warren of Nottoway in February 2010

13th Circuit — retirement of Theodore J. Markow of Richmond in February 2010; mandatory retirement of Walter W. Stout III of Richmond in February 2012

14th Circuit — mandatory retirement of Burnett Miller III of Henrico County in February 2011; mandatory retirement of Daniel T. Balfour of Henrico County in February 2012

15th Circuit — retirement of Horace A. Revercomb III of King George in March 2010

17th Circuit — mandatory retirement of Benjamin N.A. Kendrick of Arlington in February 2011

18th Circuit — mandatory retirement of Donald M. Haddock of Alexandria in February 2012

24th Circuit — retirement of J. Leyburn Mosby Jr. of Lynchburg in February 2010

27th Circuit — retirement of Ray Wilson Grubbs of Christiansburg, in February 2010

30th Circuit — resignation of Joseph R. Carico of Wise County in September 2010

General District Courts

2nd District — retirement of Virginia Ladd Cochran of Virginia Beach in November 2009; mandatory retirement of Robert L. Simpson of Virginia Beach in February 2012

4th District — mandatory retirement of James S. Mathews of Norfolk in February 2012

6th District — retirement of Kenneth Wilson Nye of Hopewell in February 2010; mandatory retirement of J. Larry Palmer of Hopewell in February 2011

12th District — retirement of Thomas Leroy Murphey of Chesterfield in April 2011

13th District — retirement of Thomas O. Jones of Richmond in December 2009

19th District — election of Lorraine Nordlund of Fairfax to circuit court in February 2010

20th District — retirement of Charles B. Foley of Warrenton in February 2010

25th District — retirement of A. Lee McGratty of Staunton in December 2008

27th District — retirement of Edward M. Turner of Hillsville in December 2010

Note: The 19th District has a preauthorized unfilled vacancy which has remained vacant for several years.

Juvenile and Domestic Relations District Courts

11th District — retirement of James E. Hume of Petersburg in December 2009

14th District — retirement of Sharon B. Will of Henrico County in April 2010

15th District — retirement of Larry E. Gilman of Hanover in March 2010

27th District — resignation of M. Keith Blankenship of Wytheville in December 2008

Note: The 29th District has a preauthorized unfilled vacancy which has remained vacant for more than twenty years.

Source: Division of Legislative Services

Mentoring Law Student Pro Bono Volunteers: Two Ways to Give

by Kimberly C. Emery

The current economic crisis has created incentives for attorney pro bono partnerships with law student volunteers. Legal services programs, facing cutbacks in funding, are suffering staff reductions and layoffs. While the availability of government-funded legal services declines, the number of low-income clients who need assistance with a diverse array of legal issues continues to grow.

Meanwhile, law students facing a difficult job market are eager to develop their legal skills and build networking opportunities through pro bono work. The need for pro bono attorneys has never been greater, nor has the interest from law students in volunteering ever been stronger.

Attorneys who are reluctant to commit the time necessary to handle a pro bono matter should consider leveraging their services by mentoring a law student volunteer. Last spring, the Supreme Court of Virginia issued a challenge to lawyers in the commonwealth to address the crisis of unmet legal needs by providing additional pro bono services. Pairing experienced attorneys with dedicated law students can both increase the amount of legal assistance available to indigent clients and inculcate the ethic of pro bono in the next generation of lawyers.

Law students, who are not yet members of the bar, require supervision from licensed attorneys in order to provide clients with legal advice and assistance. As the assistant dean for pro bono and public interest at the University of Virginia School of Law, I understand the challenge of convincing busy attorneys not only to provide pro bono services, but also to agree to mentor a student volunteer. Yet, lawyers in any type of private practice — from a national firm with multiple offices to a solo practitioner in a small town — can supervise a law student volunteer. In exchange, the attorney will receive assistance with pro bono work, such as legal research, drafting of documents, or client interviews. Over the past several years, the law school's Pro Bono Program has developed successful projects that pair private attorney mentors with volunteer law students. For example, the Hunton & Williams Pro Bono Partnership provides free legal services to victims of domestic violence and indigent persons seeking asylum or other immigration-related representation Student volunteers are supervised by attorneys from the firm's Richmond office or by the pro bono associate in the Charlottesville pro bono office.

According to Harry M. "Pete" Johnson III, a Hunton & Williams partner in Richmond, "The Hunton & Williams-U.Va. Law School Pro Bono Partnership has given us a wonderful opportunity to work on significant legal matters with bright, enthusiastic, and engaging law students. Our pro bono office in Charlottesville benefits greatly by having law students helping to represent victims of domestic violence and immigrant clients who are seeking asylum in this country because of persecution in their country of origin. The enthusiasm and hard work of these students make a significant contribution to the outcome of the clients' cases and, needless to say, the clients really appreciate their efforts."

Other student volunteers, under the supervision and mentoring of local family law attorneys, work with the No Fault Divorce Pro Bono Project, to assist with the preparation and filing of no-fault divorces for indigent clients referred by the Central Virginia Legal Aid Society. Both of these projects require students to make a year-long commitment of several hours each week. Ongoing and consistent participation in a pro bono project facilitates a strong relationship with the mentor attorney and decreases time spent on training, while also allowing the student to hone legal skills and potentially follow a case through to resolution. By pairing their attorneys with law student volunteers who provide additional resources, law firms can increase the size of their pro bono docket.

The Pro Bono Program also offers ad hoc pro bono opportunities in response to attorney requests for law student assistance. These projects require less time commitment from the student volunteer and, in some instances, can be carried out by e-mail or phone. Discrete legal research projects are particularly suitable for this type of mentoring.

For example, several students assisted with preparation of an employee handbook for a domestic violence shelter. Melissa W. Riley, the supervising attorney at the Charlottesville office of McGuireWoods LLP, said, "Working with U.Va. law students on this project was a rewarding experience. The students were knowledgeable and eager to share their time and enthusiasm. In return, I was able to give them a glimpse at the real-life practice of law. I would gladly participate in this program again."

Another student assisted a local tax lawyer with a pro bono matter for a small nonprofit organization. Richard H. Howard-Smith from Feil, Pettit & Williams PLC in Charlottesville found that using a student volunteer made it more feasible for him to accept a request for pro bono services. "I have very much enjoyed working with a law student vol-

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Drive-To-Work Benefits All Virginians

by O. Randolph Rollins

Early in his new administration, Governor Robert F. McDonnell made offender reentry a major initiative. Everyone recognizes that the key to successful prisoner reentry is jobs. But if a person cannot drive, how can he or she get a job? According to a national research report, "If you don't have a valid driver's license, you don't have a prayer of getting and keeping a job over time."

Virginia has about 5.5 million drivers. At any time, more than 700,000 persons have suspended licenses. That's 13 percent of all drivers. While suspensions result from driving-under-the-influence citations, habitual offender status, and other driving-related violations, more than half of all suspensions are for nonpayment of fines and costs.

The effect of offender financial obligations on reentry was confirmed in a recently published study. *Criminal Justice Debt: A Barrier to Reentry*, by the Brennan Center for Justice at New York University School of Law, examined the practices of fifteen states, including Virginia, regarding offenders' financial obligations, such as fines and costs, child support, and restitution. It concluded that "criminal justice debt significantly hobbles a person's chances to reenter society successfully after a conviction." The study observed that fourteen of these states, including Virginia, "utilize poverty penalties — piling on additional late fees, payment plan fees and interest when individuals are unable to pay their debts all at once." Also, it found that eight states, including Virginia, "suspend driving privileges for missed debt payments."

In 2007, Drive-To-Work was organized as a tax-exempt, nonprofit corporation with a mission to assist low-income and previously incarcerated persons to restore their driving privileges so they can drive to work and keep a job. Over the next three years, Drive-To-Work received nearly two thousand applications and assisted about six hundred persons with their license problems. Of these persons, 180 have had their licenses reinstated. In the process, more than $110,000 has been remitted to the state in previously unpaid fines and costs.

In over 80 percent of our cases, one of the reasons for suspension is unpaid fines — usually for multiple convictions in several courts. When these fines are old, interest accrued at a 6 percent statutory rate can easily double the amount owed. There are suspensions for fines as low as a few hundred dollars and as high as $75,000. And while the fine is a part of the punishment and costs are needed to pay for the courts, interest on unpaid fines is much harder to justify — particularly when the offender is incarcerated and incapable of paying the fine.

A person whose license is suspended because of fines and costs can be reinstated by paying the outstanding total, including interest; establishing a payment plan; or getting a six-month restricted license from the courts. There are differing pay plan requirements among the courts. Some require significant down payments, such as 50 percent of the total, which often is unattainable by poor defendants; others limit the time for payment to one year, which is not possible for fines in the thousands of dollars. No jurisdiction has the time or resources to evaluate cases on "ability to pay," as expected by decisions of the U.S. Supreme Court. So for the average defendant, there is little chance of exception from a particular court's standard pay plan. Indeed, difficulty of administration has led some courts to decline to offer any pay plan, despite the authorization provided in the law.

Drive-To-Work presents courts with pay plans that have a reasonable down payment and a monthly payment within the means of the defendant. We have had success in seeing our plans accepted, in some cases as a result of new judicial flexibility. Many of our clients have gotten their licenses back as a result. The immediate benefit is eligibility for more jobs and pay increases of 25 percent or more because the individual can now drive. More broadly, the governor's reentry initiatives are being accomplished through successful reentry.

But our efforts are case-by-case. A more expansive approach is legislation, either following the lead of other states or charting our own Virginia course. For the past several years, bills have been offered in the General Assembly to give judges the authority to waive interest on fines and costs "for good cause shown." One such cause might be inability to pay because the defendant is in jail or on disability. Another might be that the defendant pays off the original fine in full if the interest is waived. A third might be letting the defendant "earn down" the fine and interest by keeping a job and staying out of trouble for a period of time.

Most of these proposals died when opponents cited "soft on crime" arguments and when others asked why it is fair to give a break to offenders when nonoffenders do not have the payoff options. The governor's reentry initiative offsets the "soft on crime" arguments. To the other objection, why not give judges discretion to adjust interest for all those owing fines and costs, who could include soldiers fighting in foreign lands and those enduring long-term unemployment.

Drive-To-Work seeks pragmatic solutions in individual cases and in legislative or judicial decisions that benefit all citizens. This means respecting judicial decisions to impose fines as part of

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Arlington Firm Receives Affordable Housing Award

Jonathan C. Kinney (seated) of Bean, Kinney & Korman PC has been recognized with the 2010 Affordable Housing Award by the Arlington Partnership for Affordable Housing for his work to develop and preserve affordable rental housing in the community. Shown are (seated, left-right) Carol J. Schrier-Polak, Kinney, and Ela Flynn and (standing) Philip M. Keating, Raighne C. Delaney, James W. Korman, Leo S. Fisher, Richard T. "Tad" Lunger III, David C. Hannah, and Donna Snarr-Ingram. All work with Bean, Kinney.

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the sentence, and at the same time promoting practices that offer offenders who try to meet their responsibilities both an incentive and a reward. ⚖

O. Randolph Rollins is founder and president of Drive-To-Work, a nonprofit corporation that assists persons to restore their driving privileges so they can keep a job. He is a retired partner with McGuireWoods LLP, a former Virginia secretary of public safety, and a current member of the Virginia State Bar Council, representing the city of Richmond. He owns and farms Blue Knob Farm in Henry County.

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unteer in connection with my pro bono work for charities. Being a tax lawyer in a small town, I get asked to help organize charities a lot. The volume and sophistication for the legal work required has greatly increased in recent years, making it ever more difficult to accept these requests. Having a law student volunteer to do most of the drafting and detailed tax work is the most practical solution possible to help the charity and the lawyer accomplish these tasks."

Finally, daylong pro bono clinics such as Wills for Seniors, which is sponsored by the law firm Williams Mullen, provide an easy way to match attorneys with law student volunteers.

Pro bono collaborations such as these offer experienced attorneys an opportunity to give back twice — first, by providing much needed legal assistance to low-income clients and second, by sharing their expertise and commitment with a law student volunteer. ⚖

Kimberly C. Emery has been assistant dean for pro bono at the University of Virginia School of Law since 2004. She previously was assistant dean for public service and founder and director of the Mortimer Caplin Public Service Center. She oversees programs that give students and graduates experience with domestic violence law, immigration and asylum, child health advocacy, legal aid, no-fault divorce, and legal outreach at soup kitchens, homeless shelters, and low-income housing. She holds degrees from Carleton College and U.Va. law. In 2000, she was recognized as volunteer of the year by the Legal Aid Justice Center.

Access to Justice in the United States

Findings from the Newly Released Rule of Law Index of the World Justice Project

by Roderick B. Mathews and Juan Carlos Botero

The World Justice Project

The rule of law is the foundation for communities of opportunity and equity — it is the predicate for the eradication of poverty, violence, corruption, pandemics, and other threats to civil society.

— William H. Neukom, founder, president, and chief executive officer of the World Justice Project

The World Justice Project[1] (WJP) is a multinational and multidisciplinary movement whose mission is to strengthen and reinforce worldwide civil society's understanding that the rule of law is not just for judges, lawyers, and the courts, and that the rule of law is fundamental to safe, secure, and prosperous communities of equity and opportunity.

The rule of law is the cornerstone to improving public health, safeguarding participation, ensuring security, and fighting poverty. Without the rule of law, medicines do not reach health facilities due to corruption, women in rural areas remain unaware of their rights, people are killed in criminal violence, and firms' costs increase because of expropriation risk.

The WJP movement is unique in that it is based in collaboration and mutual support among all of the trades, disciplines, and professions, from architects and engineers to people in education, public safety, faith, journalism, military service, the arts, and beyond — as well as lawyers, judges, and the courts.

The WJP definition of the rule of law[2] has been vetted over the last three years in multidisciplinary mainstreaming regional conferences on five continents and in two World Justice Forums.[3] More than twenty scholars, including two Nobel laureates, have produced original research that establishes that the rule of law is essential to communities of equity and opportunity.

A 501(c)(3) tax exempt organization, WJP achieves its mission through three core initiatives, each informing the others: international and domestic mainstreaming, scholarship and research, and the *Rule of Law Index*.

The *WJP Rule of Law Index*

The *WJP Rule of Law Index* is a new, trademarked quantitative assessment tool designed by the World Justice Project to annually measure countries' adherence to the rule of law and track changes across time.

The *WJP Rule of Law Index* examines practical situations in which a rule of law deficit may affect the daily lives of ordinary people. For example, the *Index* evaluates whether citizens and companies can access public services without the need to bribe a government officer, whether a basic dispute among neighbors or companies can be peacefully and affordably resolved by an independent adjudicator, or whether people and companies can conduct their daily activities without fear of crime or police abuse.

The *Index* provides new data on the following ten dimensions of the rule of law:

- limited government powers;
- absence of corruption;
- clear, publicized, and stable laws;
- order and security;
- fundamental rights;
- open government;
- regulatory enforcement;
- access to civil justice;
- effective criminal justice; and
- informal justice.

These ten factors are further disaggregated into forty-nine subfactors. The scores of these subfactors are built from more than seven hundred variables drawn from assessments of the general public and local legal experts.

The *Index's* rankings and scores are the product of a rigorous data collection and aggregation process. Data comes from a global poll of the general public (1,000 respondents per country) and detailed questionnaires administered to local legal experts. To date, more than 35,000 regular citizens and 900 experts from around the world have participated. A statistical audit of the *Index* data was conducted by the European Commission's Joint Research Centre. Both the report and the statistical audit are available for download at www.worldjusticeproject.org.

The *Index* data is intended for a variety of audiences, from reform-oriented governments willing to advance the rule of law in their countries to multinational companies interested in testing the temperature of the institutional environment around the world.

The *Index* currently covers 35 countries and is set to expand to 70 countries next year and 100 countries in 2012. It was made possible by funding from the Neukom Family Foundation, Bill & Melinda Gates Foundation, GE Foundation, Ewing Marion Kauffman Foundation, and LexisNexis.

Access to Justice in the United States
According to the 2010 report, which assesses countries on thirty-seven rule of law dimensions, the United States scored high in a number of areas, including open government, freedom of speech, freedom of religion, checks and balances on the government's powers, effective regulatory enforcement, and clear, publicized, and stable laws.

The United States obtained low scores, however, in providing effective access to civil justice. In this category the United States appears to lag behind other developed nations sampled (Australia, Austria, Canada, France, Japan, Netherlands, Singapore, South Korea, Spain, and Sweden). In need of improvement in this category are access to and affordability of legal counsel in civil disputes for low-income people and delivery of civil justice without unreasonable delays.

These problems appear to affect poor Americans the most. According to a *Rule of Law Index* poll of one thousand people in New York, Chicago, and Los Angeles, a significant gap exists between rich and poor individuals in terms of both actual use of and satisfaction with the civil courts system. For example, only 40 percent of low-income respondents who used the court system in the past three years reported that the process was fair, compared to 71 percent of wealthy respondents. This 31 percent gap between poor and rich litigants in the United States is the widest among all developed countries sampled. In France this gap is only 5 percent; in South Korea, 4 percent; and in Spain, it is nonexistent.

Several reputable organizations[4] have found that fewer than one in five low-income persons in America obtain the legal assistance they need. The *Rule of Law Index* confirms these findings and provides a new comparative perspective on this problem. As Professor Anthony Sebok argued in a recent opinion piece,[5] there may be a problem of allocation of resources within the civil justice system in the United States.

WJP Projects in Virginia

In addition to developing the *WJP Rule of Law Index*, the World Justice Project is associated with civil education and Law Day events across the United States. One is the Teach the Kids program in Virginia, through which volunteer lawyers have taught middle school students in more than twenty school districts about the rule of law. Teach the Kids is sponsored by the Virginia Bar Association with a grant from the Virginia Law Foundation.

The WJP also has been involved in Law Day programs cosponsored by the Virginia Holocaust Museum and the Virginia Law Foundation. The programs brought together people of different disciplines to discuss such topics as human rights and hate speech, to strengthen understanding of the rule of law.

On the other hand, the *Index* found that the U.S. criminal justice system ranks fourth among all countries surveyed in adjudicating criminal cases in a timely and effective fashion, as well as in guaranteeing due process of law and protecting rights of the accused in U.S. courts. However, in terms of people's perceptions of the criminal justice system's equal treatment of defendants regardless of ethnicity, national origin, and socioeconomic status, the United States was found to lag behind income peers included in the sample.

Despite the *Index's* methodological strengths, its findings must be interpreted in light of certain inherent limitations. While the *Index* is helpful in tracking the "temperature" of the rule-of-law situation in the countries under study, it does not provide a full diagnosis or dictate concrete priorities for action. A 95 percent confidence interval for the *Index's* nine factors is available at the statistical audit conducted by the European Commission's Joint Research Centre. For further details, visit www.worldjusticeproject.org.

Endnotes:

1 The World Justice Project is the vision of William H. Neukom, a past president of the American Bar Association.
2 The WJP definition of the rule of law is at www.worldjusticeproject.org.
3 The third International Forum will take place in Barcelona in June 2011 and will be attended by as many as four hundred representatives from more than ninety countries
4 Institute for Survey Research and American Bar Association, 1994; National Center for State Courts, 2006; Legal Services Corporation, 2005 and 2009; American Bar Association, 2010, among others.
5 The New York Times, "*Helping Ordinary People*," November 16, 2010. Available on-line at: http://www.nytimes.com/roomfordebate/2010/11/15/investing-in-someone-elses-lawsuit/helping-ordinary-people

Roderick B. Mathews of Richmond is an officer of the World Justice Project, a past president of the Virginia State Bar and the American Bar Endowment, and a retired partner of Troutman Sanders LLP.

Juan Carlos Botero is director of the World Justice Project's *Rule of Law Index*; he has led its development and implementation for three years. With law degrees from the Universidad de los Andes in Colombia and Harvard University, Botero previously developed international performance surveys for Yale University and the World Bank.

Globalism, Trade and Virginia

by Stuart S. Malawer, special editor

GLOBALISM AND GLOBALIZATION DEFINE THIS DECADE. They determine economic and political relationships among countries and affect state and national policies. This issue of *Virginia Lawyer* explores three areas of importance to international practice today — global trade and the environment, national security and individual rights, and trade and investment activities of the Commonwealth of Virginia.

My article examines two significant aspects of global trade today — the role of World Trade Organization litigation and United States-China trade relations. In another article, Catherine P. MacKenzie of Oxford University assesses recent developments in international environmental law and, in particular, the regulation of toxic substances and hazardous waste.

Robert H. Wagstaff, also of Oxford, discusses surveillance and individual rights under U.S. and British law. He examines habeas corpus in this comparative context. He assesses U.S. and British developments post-9/11, after a decade of historical judicial and government action, and with new governments and administrations in both Great Britain and the United States.

James S. Cheng, Virginia secretary of commerce and trade, describes Governor Robert F. McDonnell's international initiatives as central to promoting Virginia's economic development. Paul H. Grossman Jr., director of international trade for the Virginia Economic Development Partnership, advises lawyers in this process.

While some economists opposed state incentives, the federal courts upheld them. The old debate between those for and against state incentives was often held in the context of economic war among the states and "beggar-thy-neighbor" policies. But in the twenty-first century it is not competition between North Carolina and Virginia that is critical. It is global competition between Virginia and aggressive foreign governments. Virginia has opted for proactive policies to promote global trade and investment to ensure economic welfare of its citizens. These state policies are critical in this global era of hyper competitiveness. More trade means more jobs.

The International Practice Section hopes these articles will serve as an introduction to these critical issues.

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United States-China WTO Litigation (2001–2010)

by Stuart S. Malawer

Stuart S. Malawer (right) is distinguished service professor of law and international trade in the School of Public Policy at George Mason University. He is the author of the casebooks *U.S. National Security Law* (2009) and *WTO Law, Litigation & Policy* (2008). He holds a law degree from Cornell University and a doctorate in international relations from the University of Pennsylvania. He was a delegate on Governor Mark R. Warner's China trade mission and was appointed by Governor Timothy M. Kaine to the board of directors of the Virginia Economic Development Partnership. He is a former chair of the VSB International Practice Section. Warner is on the left.

In 1995, a dispute resolution system was established as part of the new World Trade Organization (WTO). "The dispute resolution system, launched without much fanfare or recognition, has become the most effective system ever to adjudicate and implement global trade rules."[1] From December 11, 2001, when China acceded to the WTO, it has been an active litigant in the WTO. From the very outset of China's accession, both the United States and China have taken offensive actions against each other in the dispute resolution process.

For example, in September 2010 the Obama administration filed two cases against China in the WTO. These cases involve China's restrictions on imports of steel from the United States and on electronic payments by American credit card firms in China. The Obama administration is considering filing additional cases concerning China's restrictions on the export of rare earth minerals and China's clean-energy subsidies. Last year, China filed two cases against the United States in the WTO regarding U.S. agricultural restrictions on Chinese exports to the United States and U.S. antidumping duties on tires imported into the United States. While the continuing China–U.S. conflict over the valuation of the yuan highlights a significant issue in bilateral trade relations, it has not yet been the subject of a U.S. complaint against China in the WTO. However, many in Congress and in the private sector have been lobbying for just such a case.

An examination of cases filed by China and the United States against each other illustrates the role of WTO litigation in the context of bilateral U.S.–China trade relations, highlights the type of issues at stake, and suggests significant implications for both American trade policy in particular and foreign policy in general.

China has been a complainant in seven cases and a respondent in twenty in the dispute resolution system of the WTO; most of the cases brought by China have been against the United States. Likewise, most of the actions against China have been taken by the United States. A careful analysis of the cases indicates an even starker relationship between these two countries. Since many cases were filed by the United States and then others joined in, filing parallel actions, the number of total cases is inflated. In fact, all of the cases brought by China have been against the United States, with only two against the European Union. Similarly, all of the cases filed against China have been filed by the United States, with various other nations filing parallel actions. The EU is the only party that has filed an independent case against China. China has won two cases, and the United States has won four. Three cases have been resolved diplomatically after consultations were requested but prior to a panel decision. The remaining cases are pending.

This leads me to conclude that the bilateral trade relations between China and the United States are indeed being fought out in the WTO. This has significant implications for bilateral trade relations between the two countries, of course: The role of WTO litigation in U.S. trade policy is growing, from the George W. Bush administration to the Obama administration. WTO litigation is becoming a significant aspect of global trade relations, at the expense of traditional trade negotiations. In my opinion, given the failure of trade negotiations, the implications are generally favorable.

Overview of Cases

United States as Complainant

In 2004, the Bush administration filed its first case against China; it concerned China's value added tax (VAT) on integrated circuits.[2] The case was settled by a mutually agreed-upon solution without resorting to the establishment of a panel. China amended or revoked the VAT refunds. In 2006, the Bush administration filed a complaint that contested China's measures affecting imports of automobile parts,[3] arguing that classifying automobile parts as completed automobiles and then taxing them at the higher rate was improper. The case was filed jointly with the

European Communities[4] and Canada.[5] In 2008, the WTO panel and its Appellate Body ruled in favor of the United States. China subsequently implemented the recommendation to stop treating imported automobile parts as though they were completed automobiles. It should be noted that this was essentially one case decided by a single panel, but since there were three separate filings, the data lists it as three cases.

The Bush administration then filed a case against China contesting tax refunds by the government to enterprises in China.[6] Various other countries joined the consultations but then elected to go forward only as third parties. Subsequently, China and the United States reached a diplomatic agreement in the form of a memorandum of understanding. A similar dispute was filed by Mexico was likewise settled.[7] In April 2007, the Bush administration filed twin cases against China over China's lack of enforcement of intellectual property rights[8] and its restrictions on importing electronic entertainment products.[9] In the former case, the United States argued that the threshold for criminal prosecutions of intellectual property violations was too high. In the latter, the United States contended that restrictions on foreign firms involving the import and distribution of electronic entertainment products were not permissible as an exception to the protection of public morals. A panel generally ruled in favor of the U. S. claims of the lack of enforcement of intellectual property rights. China did not appeal and agreed to comply with the panel's recommendations. The Appellate Body ruled in favor of the United States regarding improper restrictions on the import and distribution of electronic entertainment products. China has agreed to remove these restrictions.

In 2008, during its last year in office, the Bush administration filed a complaint concerning China's restrictions on financial information services that required the use of government-designated distributors.[10] In December of that year, the two countries settled the dispute during their consultations. The European Communities and Canada filed similar complaints, which were also settled.[11] Immediately after this case was concluded, the Bush administration filed another action against China, attacking that country's Top Brand Program and Chinese Famous Export Brand Program as providing improper incentives.[12] Mexico and Guatemala filed similar cases.[13] No further action has been taken as of this writing.

In June 2009, within five months of coming into office, the Obama administration filed its first case against China to contest measures relating to the export of various raw materials; the complaint that the measures involved improper export restraints.[14] The European Community and Mexico filed similar actions.[15] No further action has yet been taken. Most recently, in September 2010, the Obama administration filed twin cases against China concerning its restrictions on credit card and electronic payments by U.S. firms in China[16] and China's antidumping and countervailing duties on the import of steel from the United States.[17] Consultations have been requested. Also in 2010, the European Communities filed a new action against China concerning its antidumping duties on steel fasteners.[18]

China as Complainant

China has filed seven cases as a complainant. Five of the cases were against the United States and two were against the European Communities. It is instructive to note that the first action involving the two countries was filed by China against the United States.[19] It was filed in March 2002, just a few months after China's accession to the WTO. This was a separate but parallel action to cases filed by the European Communities, Japan, and Korea. China argued that the safeguard measures imposed by the Bush administration on the import of steel were not consistent with the WTO obligations of the United States. A single panel was established. It issued a report against the United States. The Appellate Body's report in November 2003 upheld the panel findings. Almost immediately afterward, the Bush administration announced that the president had issued a proclamation terminating all safeguard measures that were subject to the dispute.

WTO litigation is becoming a significant aspect of global trade relations, at the expense of traditional trade negotiations.

China did not file another case until 2007. In all, China has filed four additional cases since 2003, two of which are still pending in the consultation stage. In 2007, China filed a complaint alleging improper preliminary antidumping and countervailing duty determinations on coated

paper exports to the United States.[20] This was after the United States had already filed three cases. A year later, China filed a similar case against the United States concerning a final determination of such duties on certain exports (tires and steel) from China. In late 2010 a panel ruled in favor of the United States largely upholding its methodology and treatment of state-owned enterprises.[21] In 2009 China filed a complaint against U.S. law on the import of poultry products from China, pursuant to new U.S. legislation restricting the authority of the U.S. Department of Agriculture in terms of processing such imports. This was decided in China's favor in September 2010.[22] In response to the Obama administration's imposition of safeguard measures on the import of Chinese tires under Section 421 of the Trade Act of 1974, implementing China's accession obligations, China filed an action in 2009.[23] The panel report is still pending.

Often, litigation has occurred before Congress takes up tough proposals regarding China — proposals that the administration does not favor.

The only other cases that China has initiated are two against the European Communities in 2009 and 2010. The first case concerns the antidumping duties imposed by the European Communities on iron and steel fasteners from China,[24] and the second, similar duties imposed on shoe imports from China.[25] A panel gave China its biggest win in the WTO when it ruled in its behalf concerning fasteners in early December 2010.

Observations

The complaints of the United States against China cover a wide variety of restrictions involving taxation, customs classification, intellectual property rights, services, protection of domestic production, and export restrictions, along with antidumping and countervailing determinations. To some extent, China's complaints against the United States mirror some of those same concerns: safeguard measures — both antidumping and countervailing duties — and agricultural restrictions that protect domestic industry. The elephant in the room for the United States has not involved WTO actions; rather, it has had to do with the valuation of Chinese currency, which the United States administration and many in Congress, the public, and the business community consider to be manipulated and undervalued. Neither the Bush nor the Obama administrations initiated WTO litigation against China over the currency issue and neither has declared China a currency manipulator. Other countries manage their currencies and, indeed, devalue them to promote exports. Japan and Korea have done so recently and the United States, of course, did this in the 1980s with the Plaza Accord. The United States is currently undertaking greater quantitative easing as a monetary policy that is resulting in devaluing the dollar.

As a matter of policy, the Obama administration seems to have seamlessly adopted the Bush administration's offensive policy concerning WTO litigation. It filed its first action against China within six months of coming into office. It uses litigation to contest trade restrictions the United States has not been able to remove through diplomatic negotiations. It determines the use of litigation in the context of both domestic politics and larger foreign policy considerations. The United States actively and aggressively uses the litigation process as a means of confronting China on a range of trade restrictions, although not all such issues are challenged. This clearly gives Congress and the American public the appearance of being tough on China without confronting the currency issue. Often, litigation has occurred before Congress takes up tough proposals regarding China — proposals that the administration does not favor. The decision to legally contest restrictions is balanced against other foreign policy considerations relating to non-trade issues that require China's cooperation and support.

Likewise, China actively and aggressively uses the litigation process for both domestic and foreign policy purposes. It was the first of the two countries (the United States and China) to bring suit against the other. All of China's WTO litigation as a complaining party is against the United States, except for two cases against the European Communities. It uses the litigation process to contest U.S. trade restrictions and, often, as a response to U.S. actions both in and outside the WTO. China brings actions as a means of responding to domestic pressures, as do most states. Sometimes, this may be for the good. It allows the Beijing government to rationalize

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U.S.-CHINA WTO LITIGATION (2001–2010)

Stuart S. Malawer (Data as of December 7, 2010)

CHINA as COMPLAINANT (against U.S.) — U.S. as Respondent.

		Subject Matter of Case	Filing Date	DS Case #	Status	Winning Party
1		U.S. Safeguard Measures on Steel Imports from China	2002	252	AB (2003) for China	China
2		Dumping & Subsidies — Free Sheet Paper Imports from China	2007	368	Pending since 2007	
3		Dumping & Subsidies — Certain Products Imports from China	2008	379	Panel for U.S.	U.S.
3		§ 727 (2009 Act) Denial of Poultry Imports (USDA) from China	2009	392	Panel (2010) for China	China
5		§ 421 (1974 Trade Act) Safeguard — Tire Imports from China	2009	399	Panel pending since 2009	
		[China Complaints against Other Members.]				
6	EC	Dumping — Iron & Steel Fasteners from China	2009	397	Panel (2010) for China	China
7	EC	Dumping — Footwear Imports from China	2010	405	Pending since 2010	

U.S. as COMPLAINANT (against China) — China as Respondent.

1		VAT on Integrated Circuits	2004	309	Mutually Agreed Solution	Resolved
2		Measures on Import of Auto Parts	2006	340	AB (2008) for U.S	U.S.
3		Taxes & Refunds to China Firms	2007	358	Panel — MOU (2007)	Resolved
4		Protection of IPR.	2007	362	Panel (2009) for U.S. (no AB)	U.S.
5		Distribution Audiovisual Services Entertainment Products	2007	363	AB (2009) for U.S.	U.S.
6		Financial Information Services & Information Suppliers	2008	373	Consultation — MOU (2008)	Resolved
7		Grants & Loans (Subsidies)	2008	387	Consultation since 2008	
8		Raw Material Export Restraints	2009	394	Panel since 2009	
9		Restrictions on Credit Card Electronic Payment Services	2010	413	Consultation	
10		China's A/D & CVD on U.S. Steel	2010	414	Consultation	
		[Complaints by Other Members with the U.S. (Parallel Actions)]				
11	EC	Measures on Import of Auto Parts	2006	339	AB (2008) for EC	EC
12	Canada	Measures on Import of Auto Parts	2006	342	AB (2008) for Canada	Canada
13	Mexico	Taxes & Refunds to China Firms	2007	359	Panel — MOU(2008)	Resolved
14	EC	Financial Information Services & Information Suppliers	2008	372	Consultation — MOU(2008)	Resolved
15	Canada	Financial Information Services & Information Suppliers	2008	378	Consultation — MOU(2008)	Resolved
16	Mexico	Grants & Loans (Subsidies)	2008	388	Consultation since 2008	
17	Guatemala	Grants & Loans (Subsidies)	2009	390	Consultation since 2008	
18	EC	Raw Material Export Restraints	2009	395	Panel since 2009	
19	Mexico	Raw Material Export Restraints	2009	398	Panel since 2009	
		[Complaint by Other Members]				
20	EC	Iron & Steel Fasteners from EU (Dumping)	2010	407	Consultations since 2010	

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unpopular actions that need to be taken domestically in order to comply with WTO disciplines.

China has complied with the decisions of the WTO. It has become more active in filing cases against the United States and the European Union. China views WTO litigation as part of diplomacy, rejecting its traditional opposition to litigation. China is playing by the rules of the international trading system, indicating a growing support of that system.

The more the dispute resolution system resolves conflicts over these transactions and the deeper economic integration they involve, the better it is for all.

Is China's currency policy an export subsidy that violates its WTO obligations? This legal question has not been presented to the dispute resolution system. This is probably because the issue is not really within the scope of the WTO disciplines, and both the Bush and Obama administrations have wanted to avoid escalating trade disputes with China, despite the fact there is significant pressure in Congress to enact legislation declaring China's currency policy an export subsidy. Seeking a WTO trade remedy for global monetary chaos is nonsensical and counterproductive. It does not help the rules-based trading system; nor fix the lack of regulation in global finance.

This trend toward using more litigation is good for the WTO and global trade relations. The settlement of concrete trade disputes by a regularized adjudicatory system is a great advance in global governance and in the creation of a rules-based trading system. The benefit becomes increasingly evident as bilateral trade negotiations repeatedly fail to reach accommodations, and the multilateral negotiation process of rule-making becomes bogged down in the Doha negotiations. In regard to the rules already accepted by the global trading community, these rules are clarified by litigation and applied to an ever-developing global trading system that confronts historical challenges and involves a host of rapidly changing areas, such as finance, services, technology, the environment, and economic development.

The WTO governs transnational transactions that affect core domestic concerns. The more the dispute resolution system resolves conflicts over these transactions and the deeper economic inte-

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U.S.-CHINA TRADE LITIGATION — IMPORTANT WEBSITES

Official China Web Sites for Foreign Affairs & Foreign Commerce

Foreign Ministry of Commerce	http://english.mofcom.gov.cn/
Ministry of Foreign Affairs	http://www.fmprc.gov.cn/eng/
Mission to the World Trade Organization	http://wto2.mofcom.gov.cn/aboutus/aboutus.html
Embassy to the U.S. (Commercial Counsellor)	http://us2.mofcom.gov.cn/index.shtml

Official U.S. Websites for International Trade

Office of the United States Trade Representative	http://www.ustr.gov/
USTR — Enforcement	http://www.ustr.gov/trade-topics/enforcement
USTR — China & U.S Trade	http://www.ustr.gov/countries-regions/china
USTR — WTO & MultIlateral Affairs	http://www.ustr.gov/trade-agreements/wto-multilateral-affairs
U.S. International Trade Commission	http://www.usitc.gov/
U.S. Dept. of Commerce (International Trade Administration)	http://trade.gov/

Official WTO Websites (Dispute Resolution)

World Trade Organization	http://www.wto.org/
WTO — Dispute Settlement	http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm
WTO — Understanding the WTO — Disputes	http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm
WTO — Appellate Body	http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm

Toxic Waste, Toxic Law

Treaty-Making for an Interdependent World

by Catherine P. MacKenzie

Catherine MacKenzie is a member of the Bar of England and Wales and of the High Court of Australia. She is a fellow of Selwyn College and a lecturer in environmental law at Cambridge University. She also is an academic fellow of the Inner Temple, one of the four British Inns of Court, and a research associate at Oxford University. She has served as a rule of law monitor with a United Nations mission in Liberia and is currently advising on the establishment of the first law school for women in Saudi Arabia.

It is now almost twenty years since the 1992 United Nations Conference on Environment and Development[1] endorsed environmentally sound management of toxic substances and prioritized waste reduction. But progress has been slow. After two decades of international environmental lawmaking, there are now numerous international agreements on chemicals, industrial wastes, persistent organic pollutants, and agricultural pesticides, but there is little coordination between international instruments and there are gaps and inconsistencies in regulation. Clearly, the release of toxic substances into the environment may have adverse effects on human and animal health. Further, pollutants that originate in the industrial areas of the United States and Europe may drift northwards and cause permanent damage to the marine life and biodiversity of the fragile Arctic regions. Many developing countries have continued to use toxic pesticides and other hazardous chemicals long after such substances were restricted or banned in the United States and Europe, and many nations, both developed and developing, continue to trade in hazardous wastes. There is a clear relationship between human health and economic prosperity. Analysis of international law suggests that more could be done to reduce this form of pollution and thus strengthen the economy.

Background

Many lawyers agree that international environmental law is simply the application of international law to environmental issues. Indeed, one leading English scholar did not use the term "international environmental law" and suggested instead that international law in the area of environment protection is simply one aspect of mainstream international law, from which it derives its general rules, principles and norms.[2] Irrespective of terminology, it is clear that international law informs the development of national and international laws designed to protect the environment and provides the broader context in which that law is located.[3] Further, it is clear that the resolution of international legal problems, howsoever categorized, requires the application of international law as a whole, in an integrated manner. This is particularly relevant to hazardous chemicals and toxic wastes, because regulation of those substances straddles several areas of international law. But one of the most problematic issues in the international debate on transboundary pollution is the legal principle of sovereignty over natural resources, on the basis of which some nations assert that they have an absolute right to use their own resources to further their economic development, despite consequential environmental degradation caused to neighboring states. Other aspects of international law that are relevant to chemicals, pesticides, and hazardous wastes, particularly in economically impoverished areas that may be dependent on a single industry, include the legal concepts of common heritage,[4] common concern,[5] and the protection of human rights.[6] There is some overlap too between international environmental law and sustainable development, but the goals of each differ; sustainable development encompasses economic development and international environment regulation, whereas the primary focus of international environmental law is environmental protection. This is important because international law on toxic substances developed within the context of international environmental law but has now outgrown its ori-

gins and spans the laws of intellectual property, international trade, and human rights. The challenge now is to find a way of regulating the creation, use, storage, and disposal of highly toxic substances which balances the need for economic development with legitimate concerns for human health and environmental protection.

History

Before the 1940s, international law on hazardous wastes and toxic substances was not well developed[7] and it was not until the 1960s that environmental protection became a significant feature of national and international legal and political agendas.

As tort lawyers know, the unlawful use of highly toxic substances has caused extensive and irreparable damage in some of the most vulnerable communities ...

In the late nineteenth century, a few international environmental agreements were created.[8] Generally, these were premised on unrestrained national sovereignty over natural resources. The agreements' focus was boundary waters, navigation, and fishing rights — not the regulation of newly emerging industries. In the late nineteenth and early twentieth centuries, two environmental disputes were submitted to international arbitration. These were the 1893 *Behring Sea Fur Seal Fisheries Arbitration (Great Britain v. U.S.)*[9] and the 1941 *Trail Smelter Arbitration (U.S. v. Canada)*.[10] These are relevant because they subsequently became important sources of modern international environmental law and a basis of agreements on pollution. The 1893 *Behring Sea Fur Seal Fisheries Arbitration* resolved a dispute between the United States and the United Kingdom over the right of states to adopt regulations to conserve fur seals in areas beyond national jurisdiction. The United States argued that states had the right to assert jurisdiction over natural resources outside their jurisdiction to ensure the resources' conservation and that it was acting as trustee "for the benefit of mankind and should be permitted to discharge their trust without hindrance."[11] That tribunal rejected that argument, accepted the United Kingdom's argument that the United States' position was "shorn of all support of international law and of justification from the usage of nations"[12] and was "based solely on a claim of property."[13] The tribunal established regulations[14] for the protection and preservation of fur seals outside jurisdictional limits. The tribunal's award shaped the form and content of subsequent international agreements and provided an early insight into the role that international law could play in resolving environmental disputes.

The 1941 *Trail Smelter Arbitration* arose from a dispute between the United States and Canada about the emission of sulphur fumes from a smelter located in Canada that caused damage in the state of Washington.[15] Relying on a more general principle of international law set out in the *Corfu Channel* case,[16] the tribunal held that "under the principles of international law … no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or to the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."[17] The finding of the tribunal on the state of international law on air pollution in the 1930s has come to represent "a crystallising moment for international environmental law which has influenced subsequent developments in a manner which undoubtedly exceeds its true value as an authoritative legal determination."[18] Notwithstanding this, these two international arbitrations, the early environmental treaties, and the establishment of the United Nations in 1945 provided the foundation for the development of law and international organizations relating to the environment in the second half of the twentieth century.

In the 1930s and 1940s, treaties relating to natural resources were established. By the 1950s, liability for nuclear damage and oil-based marine pollution reached the international agenda. These agreements did not, however, create institutional arrangements for administering international commitments, ensuring implementation or monitoring compliance. And treaties were not premised philosophically on broader notions of environmental protection, since those notions had not yet been popularized.

From about 1960 onwards, there was a growth of public consciousness about the environment.[19] Environmental issues gained legitimacy and political currency to the extent that the regulation of hazardous waste and toxic substances became part of mainstream international law. At about the same time, decolonization spread rapidly in Africa and Asia, and unprecedented economic development propelled many

developing countries towards industrialization and urbanization. This led to the development of a body of law, national and international, related to the environment. Initially, those laws were designed to remedy environmental problems after damage had been caused. By the early 1970s, a preventative approach to environmental management had developed.

In 1972, the UN Conference on the Human Environment was held in Stockholm. In the years that followed, international environmental agreements proliferated, environmental issues were added to the mandates of existing international organizations and new international organizations for the environment were established. In 1992, the UN Conference on Environment and Development met at Rio de Janeiro. It created further international environmental agreements,[20] but implementation of many of those international environmental obligations was limited by absence of political will, lack of resources and poorly drafted and inconsistent laws. Ten years later, the 2002 World Summit on Sustainable Development in Johannesburg was designed to monitor the progress of the Rio agreements, but its agenda was overshadowed by the attacks of September 11, 2001, and the urgent need to discuss critical issues of security, terrorism, and arms control. By 2010, it had become apparent that there were numerous international agreements on hazardous substances and toxic waste, but implementation was fragmented and, in many regions of the world, very limited indeed. The time was ripe for further international action.

Mercury

Mercury, a highly toxic substance often found in industrial wastes and atmospheric pollution, has been on the international legal agenda since 2001, at which time the Arctic Council noted the harmful effects the release of mercury was having on the fragile Arctic ecosystem. As tort lawyers know, the unlawful use of highly toxic substances has caused extensive and irreparable damage in some of the most vulnerable communities within the United States and globally, and there is an urgent need to identify and close legal loopholes at an international level and to outlaw the dumping of highly toxic substances — the use of which has long been highly regulated in the United States — in economically vulnerable and legally unsophisticated nations.

A series of UN Environment Programme (UNEP) resolutions[21] in 2003, 2005, and 2007 led to the creation of the Mercury Program by the UNEP Chemicals Branch. That branch seeks to protect humans and the environment from adverse effects caused by hazardous wastes and toxic chemicals by promoting environmentally sound management of those substances. It works directly with countries to develop national capacity for the clean production, use, and disposal of chemicals and promotes and disseminates information on chemical safety. After several years of negotiation, at its twenty-fifth session in 2009 the governing council of UNEP resolved to create a legally binding instrument on mercury, with work commencing in 2010.[22]

Preparatory work is now underway, but drafting will be a complex task as the economic interests of several key industries (including aviation, cement, coal-fired power plants, nonferrous metals, road transportation, and waste incineration) will have to be balanced against international environmental norms. As part of this preparatory work, UNEP has established the UNEP Global Mercury Partnership. This is a voluntary initiative in which governments, including that of the United States, and nongovernment, public, and private entities have agreed to work together in a systemic manner in order to protect human health and the global environment from the release of mercury and its compounds by minimizing and, where feasible, eliminating global anthropogenic releases to air, water, and land. With five partnership areas (coal, waste, artisanal and small-scale gold, air transport, and mercury-containing products), the Global Partnership aims to deliver immediate action on mercury. Many U.S. and European industries use best-available technology and have made tremendous progress in reducing their environmental impacts. Elsewhere in the world, however, there are industries that continue to release high concentrations of toxic substances into the atmosphere and that assert that they have little choice but do so unless newer technology is made available to them at little or no cost. In the short term, such cross-border subsidization could reduce the competitiveness of U.S. and European industry, so the subsidized transfer of technology is not generally considered feasible in the current economic climate.

For international lawyers, the situation is complex as a number of other binding agreements already deal with one or more aspects of mercury use, release, and disposal. The 1989 Basel Convention on the Control and Movement of Transboundary Wastes and Their Disposal, for example, operative since 1992, aims to protect

human health from adverse effects resulting from transportation across borders of hazardous wastes. With 175 parties, the Basel Convention is one of the most widely ratified international environmental agreements, but it has been widely criticized for its focus on the transportation, instead of minimization, of hazardous waste.

Another international agreement relevant to mercury is the 1998 Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. Operative since 2004, the Rotterdam Convention covers pesticides and industrial chemicals that have been banned or severally restricted under the domestic laws of member states. Parties notify the convention secretariat of their domestic requirements, the secretariat follows a clearly defined procedure — the outcome of which may be that the chemical or pesticide is added to a list of severely hazardous pesticides — and a "decision guidance document" on the chemical or pesticide is then circulated to all parties. Parties have nine months to prepare a response concerning their future import of the chemical. That response may be either a final decision to permit, prohibit, or allow — subject to defined conditions — the import of the chemical, or it may be an interim decision. A scientifically sophisticated agreement, the Rotterdam Convention offers a useful template for the regulation of chemical and pesticide imports, but it relies for its effectiveness on the integrity of national authorities. Not all foreign authorities adhere to the standards of transparency and accountability that apply in the United States. A third international agreement directly relevant to mercury is the 2001 Stockholm Convention on Persistent Organic Pollutants. It aims to protect human health and the environment from chemicals that remain intact in the environment for long periods of time and that may accumulate in the fatty tissue of humans and wildlife. These chemicals can create a serious hazard to human and animal health, so the convention requires parties to take measures to eliminate or reduce their release into the environment.

Principles of Treaty Drafting

Given the existence of several international agreements on certain aspects of mercury, the creation of a new and comprehensive international instrument on all aspects of mercury will challenge lawyers. Those drafting the new treaty would do well to remember four basic points.

First, it is important to avoid international agreements that overreach. In international environmental law, overreaching tends to occur in three areas: provisions may exceed capacity for implementation, provisions may exceed what is necessary to achieve reasonable and legitimate objectives, and provisions may exceed what is socially acceptable. The balance of these three elements will be different in each country in which the international agreement is implemented, so a broad framework agreement that provides for local variation for mercury may be more appropriate than an agreement with specific obligations. Agreements that overreach are not inherently flawed, since they have an aspirational value. But the experience of a range of international environmental agreements in areas such as energy, water, biodiversity, and land use confirm that aspirational agreements are almost impossible to implement. Since ineffective implementation is likely to squander scarce resources and may also cast doubt on the legitimacy of a new mercury agreement, it may be better to draft a more restricted agreement that can be implemented effectively, rather than an aspirational agreement that may be ignored.

Second, unnecessary, superfluous, or cumbersome licensing and approval requirements are to be avoided. Common law developed on the basis that all actions are lawful unless explicitly prohibited. But some chemical and pesticide legislation is premised on the reverse assumption; i.e., approval is required for very ordinary activities, notwithstanding that the policy rationale for imposing this requirement is dubious. These requirements increase bureaucracy and provide opportunities for corruption, particularly in countries in which government lacks capacity to implement the procedures stipulated in chemical legislation. Consequently, even those inclined to comply may find numerous obstacles to prevent them from doing so. The burden of enforcing unnecessary legislation may also reduce the capacity of government to enforce more important legislation. Chemical legislation that imposes licensing and approval procedures is not inherently flawed, but it may serve no discernible policy objectives and may add an unnecessary layer of bureaucracy. From these challenges may develop an entire professional subspecialty, the sole purpose of which is the design, development, and enforcement of unnecessary legislation. This is likely to lead to another layer of administrative activity, the sole purpose of which is the review or appeal of decisions under that legislation. For leg-

islative drafters, the inclusion in chemical legislation of a requirement to obtain permission for an action may be a prudent check on the operation of that legislation. For the communities on which such a requirement is imposed, the requirement may be costly, it may obstruct time-sensitive production processes, and it may be so distant from the objective of environmental management that it appears to be — and often is — pointless. Consequently, at each stage of the drafting of the new mercury agreement, it will be important to question whether policy objectives can be better achieved by establishing broad parameters for private action rather than by mandating approval and licensing requirements and corresponding penalties for breaches of those requirements.

Third, provisions that enhance the transparency and accountability of decision-making processes are essential at all levels. Often, chemical legislation does not include administrative processes designed to ensure transparency. This may be because such legislation is supported by broader administrative laws that mandate transparency across all decision making processes, or it may be because transparency and accountability are not yet recognized as essential elements of governmental processes in some jurisdictions. This exacerbates the tendency in some parts of the world for the granting of industry concessions to be a secretive matter, conducted at a high political level on an ad hoc basis. Typically, countries in which governments operate in that manner lack tendering or bidding processes, published criteria and identifiable time frames for decision making.[23] At a national level, chemical legislation should provide criteria and time frames for decision making, a process for public review, and independent oversight bodies. The effectiveness of such legislation will depend on a number of factors, including public knowledge of the legislation and access to enforcement mechanisms. This may require long-term societal change. Without such legislation, this change is unlikely to begin.

Fourth, enforcement mechanisms must be effective, otherwise even the most basic laws will be unenforceable. This requires the absence of corruption since corruption can undermine the integrity of enforcement mechanisms. This in turn can lead to the collapse of the rule of law. A strong and independent legal system is one of the pillars of a market economy, so the collapse of the legal system may even foreshadow more general economic collapse. Consequently, for any form of development to be sustainable, a strong and independent legal system must already be in place. This is particularly important in situations in which ownership or use of industrial resources may be in dispute, since access to an independent decision maker, such as a court or an arbitrator, may be the first step in securing sustainable economic development. It follows that a corrupt legal system can undermine even the smallest chemical project. It can also reduce foreign investment in large projects since foreign investors are unlikely to invest in countries in which enforcement of contracts or more general regulation is unpredictable or impossible.

The burden of enforcing unnecessary legislation may also reduce the capacity of government to enforce more important legislation.

Two issues are important here. First, the procedures by which law is enforced must be appropriate for the conditions in which that law operates. If, for example, law enforcement officials are required to investigate matters involving the use of one chemical but not another, those officials must be trained in the identification of chemicals. They must also have sufficient power to prosecute alleged offenders, they must receive a salary sufficient to ensure they are not susceptible to bribes, and their personal safety and that of their families must be not threatened. Properly trained and adequately remunerated defense counsel must be available to ensure that parties receive a fair trial, and the judiciary must not be susceptible to political or other influence.

Second, the penalties for chemical-related offences must be proportionate to the offence. An insignificant penalty will imply that an offence is insignificant, a large penalty will imply that an offenses is significant. If penalties are not sufficiently large they may not deter potential offenders but if they are unnecessarily severe, courts may be reluctant to enforce them. Mechanisms for alternative dispute resolution or restorative justice programs may alleviate the burden on courts but may also suggest that chemical-related offences are not sufficiently grave to be considered by the court. This will be exacerbated if, for example, the theft of livestock is routinely prosecuted but damage to the environment in which that livestock lives is not. Clearly, the enforcement of national and international law on toxic substances is simply one aspect of broader law

enforcement, but if chemical law has not been effectively enforced in the past, it may be appropriate to emphasize that new laws will be enforced and to ensure that they are drafted in a manner that makes them enforceable.

Treaty Enforcement

Effective law enforcement is premised on the existence of stable legal and political institutions and on the rule of law. Legislation alone will not prevent misuse of toxic substances, but if properly used, law is an important tool in the fight. A comprehensive solution will require technological innovation, improved surveillance techniques, financial resources, societal change, and above all, political will at national and international levels. If law, either national or international, is to provide a realistic foundation for its own implementation, it must provide for consultative or participatory approaches, it must facilitate transparency and accountability, and it must establish processes and requirements that are feasible and achievable. At both a national and an international level, the principles set out above are likely to be important in the management of mercury and other highly toxic substances.

The Westphalian legal order, based on independent, sovereign and territorially defined states, allowed each state to pursue its own interests within its sovereign territory and gave each state equality within the global system. International law emerged as "the body of rules and principles of action which are binding upon civilised states in their relations with one another."[24] That classical view of international law distinguished clearly between international and domestic law and between public and private international law. Public international law — the domain of sovereign states — provided a body of customary law and series of binding instruments, the purpose of which was to govern relationships between states. The framework was "stylized, hierarchical and static".[25] It assumed that states agree to international treaties when those treaties correspond with state interests, and that, having agreed to a treaty, states comply with that treaty by implementing it within their sovereign territory. If a state fails to comply, mechanisms for the resolution of international disputes are available and sanctions will deter and punish offenders.[26]

Our world is more complex. States continued to be the primary actors, but other parties had begun to contribute to the development, interpretation, and implementation of international law. The distinction between public and private international law had blurred and voluntary or nonbinding international instruments have emerged. Patterns of compliance with international treaties have changed[27] and the private sector has developed initiatives such as chemical certification schemes. Now, states often agree to treaties to be seen to be exercising leadership, because other states are doing so, because states with leverage are encouraging them to do so, or because failure to do so would result in political or economic isolation. Some states agree to treaties knowing that they lack the capacity to comply with those treaties, while others have capacity but do not intend to comply.

In today's world, the international legal environment is dynamic, not static. Compliance may adhere to a horizontal, not vertical, model. Parties interact in complex ways over time, resulting in the rapid formation and destruction of state- and nonstate-based alliances. We must forge new alliances and legislate in new ways while upholding the best traditions of American lawmaking. Only when we understand this will we understand how best to make treaties, such as the new international instrument on mercury, that secure and protect our interdependent world. ⚖

Endnotes:

1 UNCED, at which 178 countries were represented, met at Rio de Janeiro, Brazil, in June 1992. The agreements concluded at the conference are the Rio Declaration on Environment and Development, Agenda 21, the Convention on Biological Diversity, the United Nations Framework Convention on Climate Change and the Non-Legally Binding Forest Principles.

2 I. Brownlie, *Principles of Public International Law* (7th ed.) (Oxford: Oxford University Press, 2008), 276.

3 For sources of international law in the context of environmental protection see, for example, P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment* (3rd ed.) (Oxford: Oxford University Press, 2009), 12-37; A. Kiss and D. Shelton, *International Environmental Law* (2nd ed.) (New York: Transnational Publishers, 2000), 31-52; P. Sands, *Principles of International Environmental Law* (2nd ed.) (Cambridge: Cambridge University Press, 2003), 123-150.

4 For the concept of common heritage see, for example, Birnie, Boyle and Redgwell, 128-30.

5 For the concept of common concern see, for example, T. Iwama, "Emerging Principles and Rules for the Prevention and Mitigation of Environmental Harm" in E. B. Weiss (ed.), *Environmental Change and International Law: New Challenges and Dimensions* (Tokyo: United Nations University Press, 1992), 114-116.

6 For human rights see, for example, Birnie, Boyle and Redgwell, 271-303; A. Boyle and M. Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon, 1996); R. S. Pathak, "The Human Rights System as a Conceptual Framework for Environmental Law" in E.B. Weiss (ed.), *Environmental Change and International Law: New Challenges and Dimensions* (Tokyo: United Nations University Press, 1992).

7 For the history of international environmental agreements see E.B. Weiss, "Global Environmental Change and International Law: The Introductory Framework" in E.B. Weiss (ed.), *Environmental Change and International Law: New Challenges and Dimensions* (Tokyo: United Nations University Press, 1992).

8 *See* E.B. Weiss, "International Environmental Law: Contemporary Issues and the Emergence of a New World Order" (1993) 81 *Georgetown Law Journal* 675, 675-684.

9 1 *Moore's International Arbitration Awards* 755.

10 Trail Smelter Arbitration, (1939) 33 *American Journal of International Law* 182; (1941) 35 *American Journal of International Law* 684.

11 (1893) 1 *Moore's International Arbitration Awards* 755, 813-814.

12 Ibid 845.

13 Ibid.

14 Those regulations were the basis of three subsequent treaties: 1911 *Convention between the United States, Great Britain, Russia and Japan for the Preservation and Protection of Fur Seals*, 1942 *Provisional Fur Seals Treaty* and *1957 Interim Convention on the Conservation of North Pacific Fur Seals*.

15 *See* generally A. K. Kuhn, "Comment, The Trail Smelter Arbitration – United States and Canada" (1938) 32 *American Journal of International Law* 785.

16 The Corfu Channel Case (UK v Albania), 1949 *International Court of Justice* 4 at 22: "certain general and well-recognized principles, namely … every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."

17 (1941) 35 *American Journal of International Law* 716.

18 Sands, 30. For examples of this see A. P. Rubin, "Pollution by Analogy: The Trail Smelter Arbitration" (1971) 50 *Oregon Law Review* 259, 259 states "[e]very discussion of the general international law relating to pollution starts, and must end, with a mention of the Trail Smelter Arbitration between the United States and Canada".; L. A. Malone, 'The Chernobyl Accident: A Case Study in International Law Regulating State Responsibility for Transboundary Nuclear Pollution' (1987) 12 *Columbia Journal of Environmental Law* 203, 208 states "[a]ny analysis of foreign liability necessarily begins with the landmark Trail Smelter case."

19 The publication of the book, R. Carson, *Silent Spring* (Boston: Houghton Mifflin, 1962) — which first appeared as a series of articles in the *New Yorker* — is widely regarded as one of the most important early steps in the development of the environmental movement. Other literature which informed or inspired early environmentalists included: B. Commoner, *Closing Circle: Man, Nature and Technology* (New York: Knopf, 1972); P. R. Ehrlich, *The Population Bomb* (New York: Ballentine Books, 1968); G. Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243; D. H. Meadows, D. L. Meadows et al, *The Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind* (New York: Universe Books, 1972); E. F. Schumacher, *Small is Beautiful: Economics as if People Mattered* (New York: Harper and Rowe, 1973).

20 By 1992, there were at least 870 international legal instruments which either dealt directly with international environmental issues or had at least one provision addressing these. See E.B. Weiss, 'Global Environmental Change and International Law: The Introductory Framework" in E. B. Weiss (ed.), *Environmental Change and International Law: New Challenges and Dimensions* (Tokyo: United Nations University Press, 1992), 9.

21 UNEP Governing Council Decisions 24/4 (2003), 23/9 (2005) and 24/3 (2007).

22 UNEP Governing Council Decision 25/4 (2009).

23 Often older legislation empowers a government official to grant a permit authorizing a specified activity within a particular region but does not identify the basis on which that power is to be exercised. It may, for example, be a discretionary power but the legislation may not stipulate the basis on which discretion is to be exercised and it may not be exercised in a manner which is compatible with sustainable chemical management or with the overall management plan for mercury.

24 J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th edition by H. Waldock) (Oxford: Clarendon Press, 1963), 1.

25 E.B. Weiss, "Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths" (1999) 32 *University of Richmond Law Review* 1555, 1558.

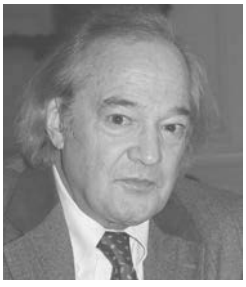
26 H.K. Jacobson and E.B. Weiss, "Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project" (1995) 1 *Global Governance* 119, 122.

27 See, for example, E.B. Weiss, "International Environmental Law: Contemporary Issues and the Emergence of a New World Order" (1993) 81 *Georgetown Law Journal* 675.

In the Wake of *Boumediene*

The International Rule of Law Remains in Jeopardy

by Robert H. Wagstaff



Robert H. Wagstaff has practiced law in the western United States since 1967, emphasizing litigation and constitutional appellate practice. He has successfully argued two cases before the U.S. Supreme Court. He is former president of the Alaska Bar Association and a bar-elected member of the Alaska Judicial Council. He currently is a doctoral student at the University of Oxford, where he has been awarded two postgraduate law degrees.

The landmark U.S. Supreme Court decision of *Boumediene v. Bush,* 553 U.S. 723 (2008), holding that Guantanamo detainees were entitled to habeas corpus was seen as a watershed victory for the rule of law. *Boumediene* focused on the due process and fair trial requirements of the rule of law and was based on the habeas corpus clause of the United States Constitution of 1789, which traces its origins to the 1215 Magna Carta of England. In an earlier parallel decision, *A & Others v. Secretary of State for the Home Department,*[1] the highest United Kingdom court ruled that it was illegal and disproportionate to detain in Belmarsh Prison nondeportable aliens suspected of having terrorist ties with a suspicious organization. *A & Others* was based on the Human Rights Act 1998 and the enforceable European Convention on Human Rights. Despite the rulings in *Boumediene* and the preceding U.S. Supreme Court Guantanamo detainee cases,[2] many ongoing U.S. lower court decisions are in conflict with the rule of law and with human rights and humanitarian principles embodied in customary international law. There is no certainty that any of these post-*Boumediene* decisions will ultimately be reviewed by the U.S. Supreme Court, and some have already been denied review.

In the United States, political and ideological influences unfortunately affect judicial review of executive and legislative actions. The U.S. Supreme Court is sharply divided — one vote made the difference in *Boumediene*. Many lifetime legacy appointees in the lower federal courts support the concept of unbridled unitary executive power, and the Supreme Court is parsimonious in granting review. Many of the George W. Bush administration policies and positions have been retained by the current administration, and the residual consequences are grave. Many detainees who were abused and tortured remain in U.S. custody. The Obama administration has thus far not sought to hold anyone responsible for indefinite detention without charge or for torture and abuse; it has not even held an investigation to determine what occurred. The overall prospects for imposing meaningful and effective judicial limits on counterterrorism operations remain somewhat limited.

The United Kingdom and United States have taken somewhat dissimilar approaches in countering terrorism. The Bush war on terror, conjured in the wake of the attacks of September 11, 2001, served as a useful rhetorical and political tool, but it has no standing in law or fact. Nonetheless, the U.S. counterterrorism strategy is being carried out within a war paradigm. In the United Kingdom, on the other hand, strong lessons were learned during the Troubles in Northern Ireland, when the use of the military proved to be counterproductive and served principally to enhance the Irish Republican Army. Thus the United Kingdom determined to use principally the criminal law, involving long-term police operations, surveillance, arrest, and trial. The U.K. courts directly consider the issues presented for review within the context of the Human Rights Act 1998 and international human rights law, particularly the European Convention on Human Rights. The U.S. courts consider customary international law less directly, as it is not as embedded in domestic law.[3]

The United States' war paradigm was strongly condemned in a 2009 Report by the International Commission of Jurists:[4]

> The U.S.'s war paradigm has created fundamental problems. Among the most serious is

> that the U.S. has applied war rules to persons not involved in situations of armed conflict, and in genuine situations of warfare, it has distorted, selectively applied and ignored otherwise binding rules, including fundamental guarantees of human rights laws. This has not only had draconian consequences for the persons concerned, but also has utterly distorted humanitarian law's customary and treaty-based field of application.[5]

Nonetheless, the Obama administration continues to use the war paradigm. In May 2009, President Obama announced that:

> Al-Qaeda terrorists and their affiliates are at war with the United States, and those that we capture — like other prisoners of war — must be prevented from attacking us again. ... [T]here remains the question of detainees at Guantanamo who cannot be prosecuted yet who pose a clear danger to the American people. ... [W]e are not going to release anyone if it would not endanger our national security, nor will we release detainees within the United States who endanger the American people.[6]

For President Obama, prevention includes targeted killings, use of remotely controlled Predator drones, and the inevitable resultant collateral damage.

In several recent decisions discussed below, the U.S. lower courts continue to operate within a war paradigm, affirming the assertion of the state secrets doctrine and denying *Bivens* claims[7] to those who seek redress for harm suffered.

El-Masri v. Tenet

El-Masri, a German citizen, was detained in Macedonia, rendered to the Central Intelligence Agency, and taken to a detention centre near Kabul, Afghanistan, where he was held incommunicado for months, beaten, and otherwise mistreated and abused. Five months after his detention, the CIA determined it was a case of mistaken identity and El-Masri was transferred to a deserted road in Albania and released. He made his way back to Germany on his own. He sued the CIA and the United States, claiming damages for kidnapping and abuse. The federal district court dismissed his claim, holding it could not be tried without revealing "state secrets" relating to the CIA. The U.S. Circuit Court of Appeals for the Fourth Circuit affirmed and the U.S. Supreme Court declined to hear the case:[8]

> Under the state secrets doctrine, the United States may prevent the disclosure of information in a judicial proceeding if "there is a reasonable danger" that such disclosure "will expose military matters which, in the interest of national security, should not be divulged." *United States v. Reynolds,* 345 U.S. 1, 10, 73 S.Ct. 528, 97 L.Ed. 727 (1953).[9]

The overall prospects for imposing meaningful and effective judicial limits on counterterrorism operations remain somewhat limited.

"Reasonable danger" is broad enough for a coach and four. The courts' decisions translate to a no-go abdication, inconsistent with the rule of law's requirements for legal responsibility and accountability. The U.S. government is thus effectively put above the law.

Arar v. Ashcroft

Maher Arar was born in Syria and had been a citizen of Canada for seventeen years when, in 2002, he was questioned by U.S. authorities at John F. Kennedy International Airport in New York while returning to Canada. He was detained based on information given by the Canadian police, denied counsel and consul, and deported to Syria, where he was imprisoned in a grave-like cell and tortured. After a year of this unproductive abuse, the Syrians released him and he returned to Canada. The Canadian government conducted a judicial inquiry and concluded that Arar was actually innocent of any wrongdoing and was a victim of combined misfeasance by U.S., Syrian, and Canadian officials. The commissioner of the Canadian police resigned, and compensation was paid to Arar in the amount of ten million Canadian dollars. Arar brought a parallel action against the U.S. government in the U.S. courts, yet once again the state secrets doctrine was asserted and upheld by the courts.[10] In a sua sponte en banc 7-4 decision, the U.S. Court of Appeals for the Second Circuit dismissed Arar's claim. Dissenting judge and legal scholar Guido Calabresi wrote:

> [B]ecause I believe that when the history of this distinguished court is written, today's majority decision will be viewed with dismay,

> I add a few words of my own, "... more in sorrow than in anger." *Hamlet,* act 1, sc. 2. … In its utter subservience to the executive branch, its distortion of *Bivens* doctrine, its unrealistic pleading standards, its misunderstanding of the [Torture Victim Protection Act] and of § 1983, as well as in its persistent choice of broad dicta where narrow analysis would have sufficed, the majority opinion goes seriously astray. It does so, moreover, with the result that a person — whom we must assume (a) was totally innocent and (b) was made to suffer excruciatingly (c) through the misguided deeds of individuals acting under colour of federal law — is effectively left without a U.S. remedy.[11]

A *New York Times* editorial decried the subsequent denial of certiorari by the Supreme Court as "a bitterly disappointing abdication of duty."[12] The Obama administration opposed certiorari.

Rasul v. Myers

After prevailing in his 2004 Supreme Court Guantanamo habeas corpus case against President Bush,[13] Shafiq Rasul and others brought an action for damages against various government defendants.[14] They claimed that they had been tortured in violation of the Torture Victim Protection Act, the Geneva Conventions, and the Religious Freedom Restoration Act; that they had been denied due process of law guaranteed all "persons" by the Fifth Amendment; and that they were subjected to cruel and unusual punishment prohibited by the Eighth Amendment, thus giving rise to justiciable *Bivens* tort claims. But the U.S. Court of Appeals for the District of Columbia determined the officials were entitled to qualified immunity and the detainees were not protected persons under the Religious Freedom Restoration Act. The Supreme Court granted certiorari, vacated, and remanded for consideration in light of its opinion in *Boumediene.* On rehearing, the Court of Appeals held per curiam that *Boumediene* did not change the original result and the court reinstated its judgment.[15] Certiorari was then denied.[16] Once again the Obama administration opposed certiorari.

It stretches credulity to suggest that officials, who were legally required to know that torture was a U.S. war crime ...

On the remand, the Court of Appeals determined that prior to *Boumediene* it could not have been readily apparent to any of the defendants that the detainees in Guantanamo had any clearly established enforceable rights whatsoever. In other words, defendants had good cause to believe that Guantanamo was in fact a legal black hole:

> No reasonable government official would have been on notice that plaintiffs had any Fifth Amendment or Eighth Amendment rights. At the time of their detention, neither the Supreme Court nor this court had ever held that aliens captured on foreign soil and detained beyond sovereign U.S. territory had any constitutional rights — under the Fifth Amendment, the Eighth Amendment, or otherwise.[17]

It stretches credulity to suggest that officials, who were legally required to know that torture was a U.S. war crime,[18] had no inkling that a federal court would have jurisdiction to adjudicate a resulting tort occurring on a U.S. Navy base, and they were thus free to torture and abuse at will, leaving no remedy for Rasul. *Boumediene* only applied to the question of habeas jurisdiction — not the legality of torture and the efficacy of the Geneva Conventions.

Al-Bihani v. Obama

Boumediene specifically left it up to lower courts to fashion procedures for habeas corpus. While in theory this is a useful procedure from an administrative standpoint, it means that there will be additional litigation and, for those affected, there will not be a readily foreseeable end. *Al-Bihani v. Obama* is a court of appeals decision addressing post-*Boumediene* procedures to be applied in habeas corpus actions.[19] Al-Bihani is a Yemeni citizen held at Guantanamo since 2002. The court found that he was lawfully detained and that continuing detention was lawful, notwithstanding the use of a preponderance of evidence standard, a presumption the government's evidence was accurate, and hearsay evidence deemed admissible if it appeared more likely than not that an accuser who was not present and not cross-examinable was speaking accurately.

The court held that the war powers granted by the post-9/11 Authorization for the Use of Military Force (AUMF) are not limited by the international laws of war because the authoriza-

tion contained no actual statement that "Congress intended international laws of war to act as extra-textual limiting principles for the President's war powers under the AUMF"[20] and the laws of war as a whole have not been implemented domestically by Congress:

> [W]hile the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks, *see Hamdi,* 542 U.S. at 520, 124 S.Ct. 2633, their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President's war powers. Therefore, putting aside that we find Al-Bihani's reading of international law to be unpersuasive, *we have no occasion here to quibble over the intricate application of vague treaty provisions and amorphous customary principles*. The sources we look to for resolution of Al-Bihani's case are the sources courts always look to: the text of relevant statutes and controlling domestic caselaw.[21]

The court of appeals is saying in part that while the scope of the AUMF may be limited, the president's powers cannot be limited by anything or anyone. Treaty provisions are cast as "vague" and customary international law as "amorphous." Speaking for the court, Judge Janice R. Brown professes dislike of "amorphous customary principles" and "vague treaty provisions" — the binding fundamental human and humanitarian rights contained in the 1949 Geneva Conventions, the 1966 United Nations International Covenant on Civil and Political Rights, the 1948 UN Universal Declaration of Human Rights, the 1984 UN Convention Against Torture, and customary international law. As of the date of this writing, a petition for certiorari has not been filed.

Al Maqaleh v. Gates

On 21 May 2010, the U.S. Court of Appeals for the District of Columbia determined that three persons who had been detained by the U.S. military without trial at Bagram Air Base in Afghanistan had no habeas corpus recourse to the U.S. courts.[22] A three-judge panel ruled unanimously that, inasmuch as Bagram was the sovereign territory of another government and there were "pragmatic obstacles" to giving hearings to detainees in an active war, *Boumediene* did not apply. According to the panel, Bagram is different from Guantanamo. This was the result argued for by both the Bush and Obama administrations. But the detainees at issue had been captured outside of Afghanistan and brought to Bagram for incarceration. If this opinion stands, the U.S. will have a free hand to kidnap persons from other parts of the world and lock them away indefinitely at Bagram.

President Bush's claim of extravagant executive power — effectively creating a law-free zone in Bagram — has been embraced by the Obama administration. The district court's decision was in fact quite narrow and applied to a relatively small number of persons imported to Bagram who had been held without charge. U.S. District Judge John D. Bates had recognized that Bagram was an active theatre of war, but felt that objection to review could not properly apply to a detainee who was intentionally imported into the war zone. As of this writing, a petition for certiorari has not been filed.

The Case of Binyam Mohamed: An Unflattering Comparison

In the U.K. case of Binyam Mohamed the state secrets doctrine did not prevail.[23] Mohamed is an Ethiopian national and a legal resident of the United Kingdom. In April 2002 while attempting to return to the United Kingdom using a false passport he was arrested at the Karachi airport, and was turned over to U.S. authorities. Subsequently, he was subjected to U.S. extraordinary rendition and incarcerated in prisons in Pakistan, Morocco, and Afghanistan. He alleges that while in Morocco interrogators tortured him using scalpels and razor blades, repeatedly cutting his penis and chest. He was next transferred to Guantanamo and allegedly subjected to continued abuse and humiliation.

On August 7, 2007, Mohamed was one of five Guantanamo detainees that British Foreign Secretary David Miliband requested be freed. On June 28, 2008, the *New York Times* reported that the U.K. government had sent a letter to Mohamed's U.K. attorney confirming they had information about Mohamed's allegations of abuse.[24] This spawned a lawsuit in the U.K. courts requesting that the Foreign Office be compelled to turn over their evidence.[25] On August 21, 2008, the U.K. trial court found in Mohamed's favor, ruling that the exculpatory material should be disclosed as it was essential for his defense in the United States.[26] The documents were in fact disclosed but they were not released to the public. In October 2008, it was announced that the U.S.

charges against Mohamed and four other captives at Guantanamo were being dropped.

On February 23, 2009, almost seven years after his arrest, Mohamed was returned to the United Kingdom where he was released after questioning.[27] Shortly thereafter, Mohamed publicly claimed that British intelligence had colluded with his U.S. interrogators in the torture and abuse that led him to make false confessions. Mohamed sought public release of the discovery materials to support his claim. The Obama administration requested that the discovery material not be released publicly because it would prejudice the special relationship between the two countries. The foreign secretary concurred. After intense American pressure, including warnings from U.S. Secretary of State Hillary Rodham Clinton, the Foreign Office argued that summary publication could cause irrevocable damage to intelligence sharing between the United States and Britain. Rejecting the government's protestations, the three-judge appeals panel ruled that seven paragraphs that give details of "the cruel, inhuman and degrading treatment" administered to Mohamed by American officials were to be made public inasmuch as the public had a right to know. State secrets were not recognized. The foreign secretary decided not to appeal. This was the first time that a British court had been so blunt about its disapproval of interrogation techniques utilized by the Bush administration. The court observed that had these techniques been carried out under the authority of British officials, they would be breaching international treaties:

> Although it is not necessary for us to categorise the treatment reported, it could easily be contended to be at the very least cruel, inhuman and degrading treatment of [Mohamed] by the United States authorities.[28]

A fair reading of the documents now produced supports the contention that, at best, the United Kingdom acquiesced to the U.S. programs of rendition and torture or, at worst, were eager participants.[29] More documents are to be released in the future, and that litigation continues. Meanwhile, British Prime Minister David W.D. Cameron has agreed to a judge-led inquiry into all of the pending claims that Britain's security forces were complicit with the United States in the torture and abuse of terrorism suspects.[30]

On November 16, 2010, the U.K. government announced it had agreed to pay Binyam Mohamed and fifteen other British citizens and residents several million pounds in settlement of their claims for the United Kingdom's complicity in torture and abuse they suffered at Guantanamo and rendered U.S. secret sites. The U.K. government will continue with plans for a formal judicial inquiry led by a retired appellate jurist.[31] Under these circumstances it will be difficult for the United States to continue to evade its responsibility for torture and abuse.

Mohamed v. Jeppesen Dataplan Inc.

On September 8, 2010, an en banc panel of the U.S. Court of Appeals for the Ninth Circuit ruled 6-5 in *Mohamed v. Jeppesen Dataplan Inc.*[32] that the same Binyam Mohamed and four other detainees could not proceed with a parallel private civil suit against Jeppesen Dataplan, a subsidiary of the Boeing Company, because of the state secrets doctrine enunciated in *U.S. v. Reynolds*.[33] Mohamed and others had initiated their lawsuit in 2007 under the Alien Tort Statute. Jeppesen Dataplan arranged the rendition flights that flew Mohamed and the others to Morocco, Egypt, and Afghanistan, where they were tortured. The U.S. government intervened in the litigation, asserting the state secrets doctrine. A three-judge appeals panel had held in August 2009 that the suits could proceed.[34] Invoking the state secrets doctrine, the U.S. Department of Justice sought rehearing en banc urging that the claims be dismissed.

The five-judge en banc dissent pointed out that the plaintiffs never had a chance to present nonsecret evidence. It was publicly disclosed that, according to the sworn nonsecret declaration of Robert W. Overby, the former director of Jeppesen International Trip Planning Services:

> "We do all the extraordinary rendition flights," which he also referred to as "the torture flights" or "spook flights." Belcher stated that "there were some employees who were not comfortable with that aspect of Jeppesen's business" because they knew "some of these flights end up" with the passengers being tortured. He noted that Overby had explained, "that's just the way it is, we're doing them" because "the rendition flights paid very well." [35]

The case was dismissed before Jeppesen had filed an answer to the plaintiff's complaint. The dissenters note:

> Plaintiffs have alleged facts, which must be taken as true for purposes of a motion to dismiss, that any reasonable person would agree to be gross violations of the norms of international law, remediable under the Alien Tort Statute. They have alleged in detail Jeppesen's complicity or recklessness in participating in these violations. The government intervened, and asserted that the suit would endanger state secrets. The majority opinion here accepts that threshold objection by the government, so Plaintiffs' attempt to prove their case in court is simply cut off. They are not even allowed to attempt to prove their case by the use of nonsecret evidence in their own hands or in the hands of third parties.[36]

The seemingly apologetic majority peculiarly awarded the losing plaintiffs all costs on appeal and suggested the alternate remedy of asking Congress for reparations as were awarded to the plaintiffs in *Korematsu*,[37] a remedy that occurred some fifty years after the fact. As of this writing no petition for certiorari has been filed.

Al-Kidd v. Ashcroft

In the September 4, 2009, decision in the case of Abdullah al-Kidd, an African American U.S. citizen born in Kansas and a successful college football athlete who converted to Islam, the Ninth U.S. Circuit Court of Appeals allowed a lawsuit to proceed against former attorney general John D. Ashcroft, alleging abuse of process through the material witness statute.[38] The statute permits the court to place restrictions on travel and residence of witnesses when there is a risk they will not be available for trial.[39] It does not permit detention for investigation. Nonetheless, al-Kidd was detained in jail for investigation under the pretext that he was a material witness in a criminal case. He has never been called as a witness or charged with a crime.

The record showed that Ashcroft had previously announced publicly that he would employ the material witness statute to prevent "new attacks." Federal Bureau of Investigation director Robert S. Mueller III publicly identified al-Kidd as a "major success" in "identifying and dismantling terrorist networks." Al-Kidd was detained in a maximum security facility, shackled, repeatedly strip-searched, and released from his twenty-four-hour illuminated cell for only one to two hours per day. Subsequently he was effectively placed under house arrest, separated from his wife and two children, and lost his job. His detention was based on an FBI affidavit that said he had a one-way $5,000 first-class ticket to Saudi Arabia and that he was believed to have information critical to a prosecution. That information has never been identified. In fact, al-Kidd was going to Saudi Arabia to study Islam and had a $1,700 round-trip coach ticket. The affidavit failed to disclose that he was married and had two children, that all were U.S. citizens, and that he had fully cooperated with the FBI in the past.

A fair reading of the documents now produced supports the contention that, at best, the United Kingdom acquiesced to the U.S. programs of rendition and torture or, at worst, were eager participants.

Al-Kidd's subsequent civil action seeks to hold Ashcroft personally liable in tort for abuse of process. Ashcroft claimed absolute prosecutorial immunity. In a 2–1 decision in al-Kidd's favor, the Ninth Circuit disagreed. Certiorari was granted on October 18, 2010.[40] U.S. Supreme Court Justice Elena Kagan recused herself. Justice Anthony M. Kennedy appears to be the swing justice. A 4–4 split would result in affirmance.

Unlike in the United Kingdom, the U.S. administration, Congress, and many courts have steadfastly declined to make any investigation or inquiry into U.S.-sanctioned torture and abuse, notwithstanding that it is only through such a review and allocation of responsibilities that steps can be taken to insure their nonrepetition. The public has extracted no political price for torture and there appears to be no interest in assessing the consequences. Enhanced interrogation primarily affects foreign nonwhite Muslims. Most of the public appears ignorant of the issues and satisfied with the refrains of the apologists that torture works and the detainees are the worst of the worst, despite evidence to the contrary and notwithstanding that Article 12 of the Convention Against Torture, a treaty ratified by the U.S. Senate, requires the United States to "proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."

President Obama has recently authorized the targeted killing of an American citizen, Anwar Al-Aulaqi, in Yemen.[41] The American Civil Liberties Union and the Center for Constitutional Rights have brought suit to enjoin the government from extrajudicially executing a citizen by such an ex parte executive fiat.[42] The Department of Justice has moved for dismissal, claiming, among other things, that the decision to target and kill an American citizen is a "political question" and that information "properly protected by the military and state secrets doctrine" would be revealed.[43] There are no public guidelines for targeted killings, there is no limitation to targets of last resort, and there is no judicial or independent oversight.[44]

Although the United Kingdom is not doing everything perfectly,[45] as David Cole suggests, "The Brits Do It Better."[46] Perhaps Edward Coke's "gladsome light of jurisprudence"[47] may in the end shine on the United States from across the pond, exposing the extent of the torture and abuse officially sanctioned at the highest levels of government under the Bush administration. ⚖

Endnotes:

1 [2004] UKHL 56, [2005] 2 AC 68.
2 *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush,* 542 U.S. 466 (2004); *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006).
3 But *see Hamdan* (n 2).
4 Nongovermental organization based in Geneva, devoted to promoting the understanding and observance of the rule of law and the legal protection of human rights throughout the world. Mary Robinson, president of the International Commission of Jurists, is the former president of Ireland and the former United Nations high commissioner for human rights. She was awarded the Presidential Medal of Freedom by President Obama in July 2009.
5 *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counterterrorism and Human Right*s, (Executive Summary, Geneva, 2009), at 9.
6 Remarks by the president on national security, May 21, 2009 http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/
7 *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971).
8 *El-Masri v. Tenet,* 437 F. Supp. 2d 530 (ED Va 2006), Order affirmed by 479 F.3d 296 (4th Cir 2007), cert. denied 552 U.S. 947 (2007).
9 *El-Masri v. U.S.,* 479 F.3d 296 (4th Cir 2007), 302.
10 *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir 2009), cert. denied 130 S.Ct. 3409.
11 Ibid 630.
12 "No price to pay for torture," *New York Times,* 15 June 2010.
13 *Rasul v. Bush*, 542 U.S. 466, 124 S.Ct. 2686 (2004).
14 *Rasul v. Myers,* 512 F.3d 644 (D.C. Cir. 2008).
15 *Rasul v. Myers*, 563 F.3d 527 (CA DC 2009).
16 *Rasul v. Myers,* 130 S.Ct. 1013 (2009).
17 *Rasul v. Myers* (n 15) 530 (2009) (footnotes omitted).
18 18 USC § 2441.
19 *Al-Bihani v. Obama*, 590 F.3d 866, 870 (DC Cir 2010), rehearing en banc denied by 619 F.3d 1 (D.C. Cir. August 31, 2010).
20 Ibid.
21 Ibid 871-2 (DC Cir 2010) (emphasis added).
22 *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).
23 *Mohamed, R (on the application of) v. Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65.
24 http://www.nytimes.com/2008/06/21/world/europe/21gitmo.html?_r=1&ref=raymond_bonner
25 http://jurist.law.pitt.edu/paperchase/2008/07/uk-guantanamo-detainee-asks-court-to.php
26 *Mohamed, R v. Secretary of State for Foreign & Commonwealth Affairs* [2008] EWHC 2048 (Admin); *Mohamed, R v. Secretary of State for Foreign & Commonwealth Affairs* [2008] EWHC 2100 (Admin).
27 http://www.guardian.co.uk/uk/2009/feb/23/binyam-mohamed-guantanamo-plane-lands
28 *Mohamed*, (n 23) Appendix (x).
29 http://www.guardian.co.uk/law/interactive/2010/jul/14/toture-files-key-passages
30 Wintour, P and Cobain, I, "David Cameron agrees terms of British Torture inquiry" The Guardian (29 June 2010). http://www.guardian.co.uk/uk/2010/jun/29/david-cameron-uk-torture-inquiry
31 "Government to compensate ex-Guantánamo Detainees," BBC (16 November 2010).
32 614 F.3d 1070 (9th Cir. 2010).
33 345 U.S. 1 (1953).
34 *Mohamed v. Jeppesen Dataplan Inc.,* 579 F.3d 943.
35 *Mohamed* (n 32) 1096 FN 5.
36 Ibid 1094.
37 323 U.S. 214 (1944).
38 *Al-Kidd v. Ashcroft,* 580 F.3d 949 (9th Cir. 2009).
39 18 USC § 3144.
40 Ashcroft v. al-Kidd, 79 USLW 3062.
41 S. Shane, "U.S. Decision to Approve Killing of Cleric Causes Unease" New York Times 13 May 2010 http://www.nytimes.com/2010/05/14/world/14awlaki.html
42 *Al-Aulaqi (al-Awlaki) v. Obama,* 10cv1469, U.S. District Court, District of Columbia (Washington) Complaint for Declaratory and Injunctive Relief <http://216.86.138.142/complaint.pdf>.
43 *Al-Aulaqi (al-Awlaki) v. Obama,* 10cv1469, U.S. District Court, District of Columbia (Washington), Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss http://216.86.138.142/dojmtd.pdf
44 "Lethal Force Under the Law," *New York Times* (October 9, 2010).
45 Many of the U.K. legal processes are infected with the virus of secrecy. Control orders, preventive detention, special advocates, and the Special Immigration Appeals Commission are still operative. Secret evidence is being used with increasing frequency in deportation hearings, control order proceedings, parole board cases, asset freezing applications, precharge detention hearings in terrorism cases, employment tribunals, and even before planning tribunals. In some criminal cases secret evidence is never made public and anonymous testimony is presented.
46 D. Cole, *The Brits Do It Better*, *New York Review of Books*, 12 June 2008.
47 Edward Coke, *First Institute*, Epilogue.

WTO Litigation continued from page 32

gration they involve, the better it is for all. The global trade landscape has changed immensely since the post-war era, through the demise of the Soviet Union and since the attacks of September 11, 2001. The recent global financial crisis and its currency wars further highlight these changes. Strategic rivalries in the future pose grave threats to U.S. national security. Managing the growing tensions over global trade is of the utmost importance.

With a greater global trade volume and a larger number of nations expanding their trade transactions, one would expect more commercial and policy disputes. With the rise of more trading powers and development of the multilateral system, it is preferable that trade disputes be settled through rules adopted by the global community and interpreted by an impartial system in concrete cases. While litigation is never a friendly act, it is not necessarily an unfriendly one. When litigation is resolved properly it establishes a strong basis to move forward in trade relations and negotiations.

It is incorrect to think that litigation decides only cases between the actual parties. While litigation is binding only on the actual parties, it has two broader effects. The first is that it applies and clarifies trade rules in concrete situations, often newer situations that did not exist at the time of negotiation of the rule. Second, litigation removes trade restrictions, which benefits all WTO members. Both of these effects are significant advances for a rules-based trading system and helps provide multilateral governance to an explosive area of international relations. Litigation removes competitive unilateralism.

It is better that trade disputes are resolved, rather than spinning out of control and affecting other foreign policy interests. U.S.–China trade relations are no exception. Such litigation is a means of sanitizing disputes to restrict their toxic overflow. Many disputes filed with the dispute resolution system are resolved prior to going through the full litigation process. As in domestic litigation, the threat of full litigation encourages settlement, and that is the preferred manner of settling disputes, which is good for the system and good for the United States. ⚖

Endnotes:

1 Malawer, Stuart S., "Litigation and Consultation in the WTO – 10th Anniversary Review," 54 VIRGINIA LAWYER 32 (June / July 2005).

> The dispute resolution system of the World Trade Organization (WTO) is of central importance to the global trading system. Within the last ten years it has become critical to global trade relations. The largest and the smallest of nations participate in litigation before the WTO. Cases involve an extraordinary wide range of economic and trade issues with significant domestic and international political implications. Stuart Malawer, "Introduction," WTO LAW, LITAGATION & POLICY (Wm S. Hein & Co. 2007).

2 Value Added Tax on Integrated Circuits, Dispute Settlement (DS) 309.
3 Measures on Import of Auto Parts (DS 340).
4 Measures on Imports of Auto Parts (DS 339).
5 Measures on Imports of Auto Parts (DS 342).
6 Taxes & Refunds to China Firms (DS 358).
7 Taxes & Refunds to China Firms (DS 359).
8 Protection of Intellectual Property Rights (DS 362).
9 Distribution of Audiovisual Services Entertainment Products (DS 363).
10 Financial Information Services and Information Suppliers (DS 373).
11 Financial Information Services and Information Suppliers (DS 372) and (DS378).
12 Grants and Loans (Subsidies) (DS 387).
13 Grants and Loans (Subsidies) (DS 388) and (DS 390).
14 Raw Material Export Restraints (DS 394).
15 Raw Material Export Restraints (DS 395) and (DS398).
16 Restrictions on Credit Card & Electronic Payment Services (DS 413).
17 China's A/D and CVD on U.S. Steel (DS 414).
18 Iron & Steel Fasteners from EU (Dumping) (DS 407).
19 U.S. Safeguard Measures on Steel Imports from China (DS 252).
20 Dumping and Subsidies – Free Sheet Paper Imports from China (DS 368).
21 Dumping and Subsidies – Certain Product Imports from China (DS 379).
22 § 727 (2009 Act) Denial of Poultry Imports (USDA) from China (DS 392).
23 § 421 (1974 Trade Act) Safeguards – Tire Imports from China (DS 399).
24 Dumping – Iron and Steel Fasteners from China (DS 397).
25 Dumping – Footwear Imports from China (DS 405).

Foreign Investment in Virginia

by James S. Cheng

James S. Cheng was president of Totus Lighting Solutions when he was appointed secretary of commerce and trade by Virginia Governor Robert F. McDonnell. Before that, he founded and served as chief executive of CHM, a government contracting company specializing in information technology, and he held management and technical positions with ECI. He holds a bachelor's degree in computer science from Old Dominion University, a master's in business administration from the Darden School at the University of Virginia, and a law degree from Georgetown University.

As inauguration day in January 2010 drew closer, I began to understand the magnitude of the commonwealth's economic quandary. The new governor would inherit a $4.2 billion deficit on a $76 billion biennial budget, high unemployment levels, and an economy deep in recession. Difficult decisions would have to be made so as to not raise taxes and continue to hinder a crippled economy.

Many would have suggested to make further cuts to our economic development programs to help make up the $4 billion deficit. Even in the private sector, where I spent my earlier career, often the first line item to be slashed is public relations costs. However, there is a saying that in down economies, good companies do not cut marketing, and the best will increase their marketing budgets. Fortunately, Governor Robert F. McDonnell took this adage to heart. Not being one to shy away from principle, instead of cutting our economic development programs, he added an extra $50 million to expand, recruit, and retain business.

This investment was more than just a token statement. For nearly a decade, we had not promoted Virginia in a significant way outside of the commonwealth. Most importantly, these new economic development dollars targeted programs that have historically provided returns of between six and ten times in jobs and increased revenues.

With an energized tool kit, the governor increased marketing and economic development efforts internationally. In the late 1990s, fewer than 15 percent of companies investing in Virginia were from overseas. Recently that number has increased to nearly 50 percent. Asset values in the United States are lower and the dollar is at historic lows; this created opportunities for foreign companies, and there have been many takers. Despite the recent economic difficulties, the United States remains the biggest consumer market on earth. Many overseas manufacturers want to move manufacturing closer to their intended market. By using the local labor and supply chain, they dampen the effects of currency fluctuations.

Previous administrations successfully marketed Virginia to European and Japanese companies. Virginia began as an English business venture, and it has a higher percentage of European investment than other states. Centrally located in the mid-Atlantic region, Hampton Roads is one of the best deepwater ports in the world. However, Virginia once had four full-time trade representatives in Europe and now only has one. Adding another representative in Europe is a priority of this administration. During our trade mission to Europe with Governor McDonnell, it was obvious to us that Europe will continue to be a major investor in the commonwealth. We must continue to make sure the Virginia story is told in Europe and other parts of the world.

"Virginia Is for Lovers" is one of the country's best-known marketing campaigns. In the U.S. business world, Virginia has been consistently ranked as one of the best states in which to do business. But overseas, the commonwealth is less well known because we have not been marketing there.

It is not so obvious why Japanese companies have a large presence in Virginia. There are more than 120 Japanese companies in Virginia. Most of them are manufacturers — the most highly prized

In the U.S. business world, Virginia has been consistently ranked as one of the best states in which to do business. But overseas, the commonwealth is less well known.

type of company to economic developers. But because of marketing and economic development efforts by Virginia governors for more than twenty-five years, we have a thriving network of Japanese companies, managers, and executives. They are happy to tell their peers about what a great state Virginia is to build a factory, work, play, and raise a family.

Japan, like Europe, will continue to be a significant source of international investment for Virginia. However, most economists will agree that Japan and Europe will see limited growth in the near future. Instead, the highest growth rates in the world will come from countries such as China and India, which, combined, represent 40 percent of the world's population. This is why our governor has put a high priority on establishing trade representatives in these two countries. As Chinese and Indian companies grow and mature in their markets, our goal is to make Virginia their top choice to locate their factories and distribution centers.

With 1.3 billion people, China's gross domestic product is expected to surpass that of the United States in the next decade. Currently, Virginia has a part-time economic development representative located in Hong Kong. But Hong Kong has not been considered the business center of China for years, so we hope to establish a presence in Shanghai or Beijing and increase our marketing and economic development efforts.

We have a similar plan for India. With a population of 1.2 billion, India's GDP growth rates rival China's, much of which can be attributed to India's recent efforts to reform and open its economy. In the past few years, India's investment in the United States has increased by 48 percent. Surprisingly, we currently have no representation in India, but hope to have a presence by late 2011.

In the past few years, I have travelled to many locales around the world — including Asia. We have a tremendous opportunity to expand international investment by making Virginia a top location for international companies — especially Asian companies. The governor and I believe that when the economy is poor, when other states cut their development budgets, the states that continue to market will win in the long term. And Virginia will be an even better place to do business. ⚖

Attorneys Practicing International Trade in Virginia

Ten Tips to Help Your Exporting Clients

by Paul H. Grossman Jr.

Paul H. Grossman Jr. is director of international trade and investment for the Virginia Economic Development Partnership. He oversees the promotion of Virginia products and services to markets worldwide and the recruitment of international companies to establish business operations in Virginia. He holds a master's degree from the Thunderbird School of Global Management.

President Obama announced in his 2010 State of the Union address the goal of doubling U.S. exports by 2015. Never before has this country recognized to this degree the value of exports as a positive contributor to our economy. A recent study by the U.S. Department of Commerce revealed that exports supported 10.3 million American jobs in 2008 and accounted for 12.7 percent of U.S. gross domestic product. To support the president's goal of doubling exports, the federal government has launched the National Export Initiative and through it will work to remove trade barriers abroad and help U.S. firms overcome hurdles to entering new export markets.

This article is for attorneys working with Virginia companies that are exporting or considering exporting. Five trends and five tips are presented that apply to Virginia companies doing business globally.

Five Trends in International Trade

1. The more things change, the more they stay the same.

You and your clients have heard time and again about the rise of China as an economic powerhouse. Statistics clearly support this fact: China's economic growth over the past thirty years is staggering. However, Virginia exporters should note that while China is the state's second largest export destination, its purchases of Virginia goods are dwarfed by purchases by our European trading partners and our neighbor to the north. Note the following:

- Of the top ten export destinations for goods from Virginia in 2009, four were European countries and, combined, Europeans purchased more than twice as much from Virginia as China did in the same year.

- Canada, Virginia's top export destination for the past thirteen years, purchased twice as many goods from Virginia as China purchased last year.

It cannot be ignored that China is the second-largest economy in the world, and the second-largest importer of goods. But, there are many other markets to consider that have a long history of purchasing Virginia goods and services.

2. "Nothing is as invisible as the obvious." (*Management of the Absurd*, Richard Farson)

International trade and its importance to the U.S. economy has increased steadily over the last fifty years. In 1960, trade represented only 5 percent of U.S. GDP. In 2009, that number had grown to 24 percent. Another measure of the rising contribution of exports to the U.S. economy is the growth in the number of jobs supported by exports. In 1993, 7.6 million American jobs were supported by exports. By 2008, this number had grown to 10.3 million, an increase of 2.7 million jobs. This increase accounted for 40 percent of total job growth in the United States during this period.

International trade has become commonplace. Your clients are paying attention, and they are either already playing the international game or are strongly considering taking that step soon. There are many good reasons: more than six billion potential customers living outside of the United States, growing middle classes in China and India, the opportunity to diversify from reliance on the U.S. market, and higher profit margins, just to name a few.

3. Products aren't permanent, and service sells.
If you thought tangible products constituted the entirety of U.S. exports, welcome to the service era. The United States is the world's largest exporter of services. Service exports are growing as a portion of total exports from both the United States and Virginia. In 2007, the United States exported $480 billion in services — a 16 percent increase over 2006. Virginia alone exports about $12 billion per year in services, which represents about 44 percent of total state exports. The growth of service exports is good news for American workers, because 80 percent of U.S. jobs are in the service industry, providing significant opportunities for growth in service exports.

While the United States has lost its competitive edge in some manufactured goods, U.S. services are in high demand around the world. American companies are exporting a wide range of services, including financial, education, legal, professional, and information technology services. Unlike manufactured goods, the U.S. exports more services than it imports, equating to a services trade surplus in 2007 of more than $70 billion.

4. Look to the Clouds.
Many of your clients receive inquiries daily from potential international customers. They take orders online, track shipments via the Internet, market their products on their websites, and speak with international partners through Skype. This is a dramatic shift from the way companies were transacting international business just fifteen years ago, and it is making conducting business on a global scale ever easier and more practical. Customers from around the world are finding U.S. companies through the Internet, giving these companies instant access to a worldwide market that would have been much more difficult and more expensive to approach using traditional marketing methods.

The emergence of e-commerce as a way of conducting business presents both new business opportunities and new business models. Many Virginia companies have formed lasting business partnerships with international companies that first contacted them via their websites. Others are tracking visitors to their websites and using that data to determine which international markets to target next. In a recent emerging trend, companies are also turning to social media as a low-cost method of connecting with clients overseas.

5. You can't sell tanks to Wal-Mart.
Virginia companies in the defense industry have benefited greatly from increases in U.S. defense spending over the past decade, fulfilling contracts for weapons, shelters, communications equipment, and vehicles. Future defense budgets, however, include significant budget reductions. As a result, companies in the defense industry are looking for new customers abroad, including foreign governments and commercial customers overseas. The U.S. Department of Defense reports that sales of U.S. defense products and services to foreign militaries reached $38 billion in 2009, a 465 percent increase since 1998.

Fortunately for Virginia's defense firms, there is demand abroad for a wide range of their products and services, including military clothing, armor, satellite communications equipment, and logistics and procurement services. Virginia companies are selling these items to India, Australia, and our NATO allies, just to name a few. Foreign governments and private-sector companies abroad are in the market for defense items in order to increase their readiness for security threats posed by terrorists and rising tensions over nuclear threats in Iran and North Korea.

While the United States has lost its competitive edge in some manufactured goods, U.S. services are in high demand around the world.

Five Tips for Exporting Companies

Here are some lessons learned about how effective U.S exporters conduct business internationally. Apply these observations to your exporting clients and see if they ring true.

1. Don't change the way your clients do business.
If your clients don't give exclusive representation rights to one company for the entire U.S. market, why should they do it overseas? If your clients wouldn't enter into a business relationship with

an American company without first meeting in person, why should they overseas? If your clients wouldn't roll out a new product in the U.S. without first establishing its market potential, why should they consider doing so overseas?

Encourage your clients to apply the same degree of due diligence and the same intellectual rigor to their international marketing as they do to their domestic business. All too often a mental haze comes over U.S business executives when they step off the airplane onto foreign soil, to the point that they accept the false argument that "it's a different country and we do things differently here." The result can be that they end up doing stupid things. Your advice should be, "Don't." Don't change your clients' guiding principles of doing business and, more importantly, don't allow them to change the way they do business.

A simple way to tell if your client is serious about international business is to look at the background of decision makers within the company.

2. Hiring good people is more important than having good products.

The greatest mistake that U.S. companies make is thinking that because their products are "Made in USA," they will sell. The second biggest mistake that U.S. companies make is believing that because their products incorporate the latest technology, they will sell.

There are countless good products, just like your client's, already on the market. What differentiates your client's product or service from its competitors' is the people selling it. In the international marketplace, where relationships and longevity matter so much more than in the United States, whom your clients have representing them is critical. Time spent selecting the appropriate in-country representative is critical for effective market penetration, and more time is spent undoing ineffective representation than finding the right person from the start.

3. If your clients get what they pay for, they had better know what they want.

Your clients can't conduct international business on a part-time basis. They can't take an employee who is fully engaged with the domestic market and simply tack on international responsibilities. They will fail. And you will lose clients. If you are investing time and money in developing an exporting client, doesn't it make sense for your client to invest time and money in a sound international business strategy by hiring experienced international staff to take on the job?

A simple way to tell if your client is serious about international business is to look at the background of decision makers within the company. If key executives have served in the military overseas, have studied abroad during college years, were born or reared overseas, or through some other experience have had their eyes opened to business opportunities beyond U.S. borders, they will commit their company to a diligent pursuit of international business and allocate the necessary resources. That is, they know what they want and are willing to pay for it.

4. Set your clients' goals high, then raise them.

Pursuing international sales is a strategic management decision. It requires the allocation of precious time and money. Your clients should not be doing this if their only expectation is to take export sales from 3 to 5 percent or to enter just one new market and stop there. Those companies that have 10 percent of international sales today are just as vulnerable to international competition as those that had zero percent a few years ago. And the new threshold for a healthy American company is 20 to 25 percent of sales coming from international markets.

5. Your clients may come late to international trade, but they are always on time.

One could make a compelling argument that your clients who are just now beginning to export are too late. They should have already been selling overseas. If they are exporting, they should have been selling more. One could argue that international competition is already in place that will limit your clients' success. Or that the cost of market entry is prohibitively high. All of that would be true. And, at the same time, all of that would be false.

The reason that your clients' entry to international trade is timely is because global business is an ever-expanding pie. There are more opportunities for U.S. businesses to sell internationally today than at any time in the history of the world. Colonial business ties have eroded. Capitalism, indeed consumerism, has taken hold in China. Middle classes in the hundreds of millions of people are emerging in India and Brazil. Delivery is easier. Payment is more certain.

So, for your clients who are just starting today to proactively pursue international markets, there could never be a better time. And for your clients who have already achieved success, there are many new markets to conquer, with more on the way tomorrow.

It is instructive to remember the advice of the famous gangster Willie Sutton, who, when asked why he robbed banks, replied, "Because that is where the money is." International business has been increasing for the past fifty years. There have been commodity bubbles, dot-com bubbles and housing bubbles, but the rise of international trade has yet to decline. Odds are that there is money in this thing called international trade for years to come. Best wishes for great success to you and your clients. ⚖

by Nancy M. Reed, Chair

Local Bars Should Defend the Independence of Judges

On October 22, 2010, in Roanoke, the Conference of Local Bar Associations hosted the first of two Bar Leaders Institutes scheduled for 2010–11. Seven members of the CLBA Executive Committee joined Virginia State Bar President Irving M. Blank, President-elect George W. Shanks, local bar leaders, and other members of the legal community, for presentations about programs available through the Virginia State Bar, local bar associations, and the federal and state court systems.

Speakers also included Judges G. Steven Agee, Jacqueline F. Ward Talevi, and Charles N. Dorsey; Jennifer Lewin of the American Bar Association Division for Bar Services; Virginia Bar Association Rule of Law Project coordinators; Timothy J. Heaphy, the U.S. Attorney for the Western District of Virginia; and U.S. Probation Officers Jason B. Perdue and Daniel E. Fittz.

The second Bar Leaders Institute will take place March 7, 2011, at the University of Richmond School of Law.

Judge Agee, who sits on the U.S. Court of Appeals for the Fourth Circuit, was the keynote speaker in Roanoke. He urged participants to actively and zealously advocate for the independence of the judiciary. He said that the citizen lawyer has a responsibility to educate citizens about the need for an independent judiciary. "The bar needs to be proactive and aggressive in how it plans for these threats to judicial independence in the future … and proactively set up systems to go to the public at large to present the story," he said.

The Virginia State Bar Bench-Bar Relations Committee closed the day with a panel moderated by W. Hunter Old and featuring general district and circuit judges, Heaphy, and the probation officers. The panel talked about the relationship between the judiciary and the public. They highlighted judges' current concerns arising out of the General Assembly's freeze on filling judicial vacancies in the commonwealth, as well as ways the federal courts in the Western district are reaching out to communities with crime-prevention programs. Their discussion emphasized the need for attorneys and local bars to work with and educate our communities.

Currently the independent judiciary in Virginia is threatened by the judicial hiring freeze and budget cutbacks in the court system at all levels. President Blank is urging attorneys across Virginia to contact their legislators and inform the public about the threat these actions create to the administration of justice. As Judge Agee and President Blank both said, we must advocate for an independent judiciary as the third branch of government, not an agency of the legislative or executive branch. Local and specialty bar associations are in a unique position to publicize the facts about the effects of the freeze.

I refer you to President Blank's column on page 10 for a summary of the effects of budget cutbacks on the state judicial system.

The practical effect of these judicial vacancies and clerks' office staff vacancies is already being felt throughout the commonwealth, but not uniformly. The Twenty-sixth Judicial Circuit, where I practice, does not have any judicial vacancies at this time, so our court days remain the same. In other circuits, judges are sitting extra days to make up for an unfilled position. In some circuits, substitute judges are filling in some of the lost days. Clerks' offices that are understaffed have long lines and delays in providing essential services to the public. As the freeze continues, the impact will spread to more jurisdictions.

We urge local and specialty bar associations to let their legislators know how seriously the reduction in funding of the courts is affecting individuals, businesses, and members of the bar in their communities.

Currently the independent judiciary in Virginia is threatened by the judicial hiring freeze and budget cutbacks in the court system at all levels.

by Carson H. Sullivan, President

YLC All-Stars

IT IS HARD TO BELIEVE it is already December. It seems like we were just at the beach for the Virginia State Bar Annual Meeting, and now it is cold and we are halfway through the bar year. The Young Lawyers Conference has been busy since June. We have already held many of our signature programs, and we are planning many more. In my last column, I promised to report on the YLC's successes. None of these programs would have been possible without our dedicated volunteers. The folks who are listed below, most of whom are YLC committee chairs or cochairs, are our "YLC all-stars."

Oliver Hill/Samuel Tucker Prelaw Institute. The Institute, which is designed to provide high school students with an introduction to the legal profession and the opportunity to experience college life, was held July 18–July 23 at the University of Richmond. The students lived in the dorms and attended a number of classes and seminars on trial advocacy, career opportunities in the law, and the college admissions process. Several judges, including Roger L. Gregory of the Fourth U.S. Circuit Court of Appeals, spoke to the students. The week culminated in a mock trial exercise, with many local attorney volunteers to mentor the students. **Antoinette N. Morgan** and **Lakai C. Vinson** are the YLC all-stars who worked tirelessly to organize this year's Institute, which was a huge success.

Professional Development Conference. This year's PDC was held on October 1 in Richmond. The theme was "What Every Attorney Needs to Know: Six Core Tips and Traits of Successful Young Lawyers." Attendees received five hours of continuing legal education credit, including one hour of ethics. This year we had nearly one hundred attendees — more than ever before. YLC all-star **Monica A. Walker** was chair of the event, with assistance from dedicated committee members **Crystal Y. Twitty, Jennifer L. Moccia, Paul G. Gill** and **Richard W. Hartman III.**

Domestic Violence Safety Project. This committee has already presented two CLE programs, on July 21 and October 15. Attendees learned about the federal remedies available to undocumented immigrant victims of domestic or sexual violence. Attorneys who completed the CLE now have the opportunity to represent pro bono clients through a pilot clinic in the Richmond area. **Lara K. Jacobs** is the YLC all-star who is chair of the Domestic Violence Safety project and planned these important programs.

Students Day at the Capitol. I am very pleased to report the numbers from this year's Students Day at the Capitol program: On October 22, *four hundred* middle school students from six different schools were given tours of the Capitol and the Supreme Court of Virginia. They ate lunch in Capitol Square, and ten attorney volunteers gave presentations on the legal profession and how the practice of law fits into the governmental branches the students were visiting. **Melissa Y. York** and **Amanda A. Reid** are the YLC all-stars who planned and organized the event, and they are responsible for the amazing turnout this year.

Minority Prelaw Conferences. Our prelaw conferences expose college students — particularly minority students — to many aspects of a legal career, including the law school admission process. Panel discussions with the bench, bar, and law students provide valuable information to students considering a career in the law. This year, our Southern Virginia Prelaw Conference took place at Washington and Lee University on September 25, and the Tidewater Prelaw Conference, cosponsored by the W.C. Jefferson chapter of the Black Law Students Association, took place at the College of William and Mary on October 30. Attendance was excellent at both conferences, and the feedback we have received from the students has been extremely positive. Kaplan generously donated a Law School Admission Test prep course for each conference. The YLC all-stars who were largely responsible for making these two great events happen were **Erin W. Hapgood, Heather R. Willis, Christen C. Church** and **Sherita D. Simpson.** Our Northern Virginia Prelaw Conference, led by **Brian T. Wesley** and **Broderick C. Dunn**, is scheduled for February 25–26, 2011, at the George Mason University School of Law.

If you know any of the individuals listed above, please congratulate them on work well done. The YLC could not meet its goal of service — to our members, the bar, and the community — without the contributions of these individuals and the many more who serve on our committees and who are working on our ongoing and upcoming programs. I will continue to highlight our programs and list our all-stars in my upcoming columns.

If you would like more information about the programs highlighted above — or any of our programs, for

YLC continued on page 58

by John H. Tate Jr., Chair

Senior Lawyers Handbook and Green Lawyers Project

AS THE REPRESENTATIVE of the Virginia State Bar Senior Lawyer's Conference, I attended the VSB Executive Committee and Council meetings in Charlottesville on October 14–15, 2010. I had forgotten all the work that is placed on the council to represent the lawyers of Virginia. Being a part of that group again is a real pleasure, and the members can have confidence that their interests are seriously considered in the actions of the council.

As I was preparing my Senior Lawyers Conference report for the meetings, I realized that we may sometimes overlook our obligation to let the bar, and especially the members of the Senior Lawyers Conference, know about the goals the conference is attempting to promote. We must always encourage our conference members to participate in our programs, and to inform the bar as a whole of the work that is being done by the conference. This is not a responsibility just of the members who serve on the SLC Board of Governors, but also of senior lawyers in general.

The conference is proud of the work that went into the publication of the *Senior Lawyers Handbook*, revised and republished in 2009. This contains wonderful information and is one of the most downloaded publications of the VSB.

The conference is a real bargain. You automatically become a member when you reach age fifty-five, and there are no dues. The conference needs lawyers to distribute the *Senior Lawyers Handbook* to seniors, other members of the bar, and the public who would benefit from it.

Based on judges' reception of the book in my circuit, I know your local judges are interested in this publication. I had copies available for the members of the council in October. I would like to take this opportunity to ask our 14,900 conference members and all members of the State Bar to secure copies for your clients and local judges, libraries, senior citizens' organizations, public assistance employees, and government offices.

Handbooks are available at a minimal charge. If you join the SLC in widening the distribution of the handbook, together we will make a difference in the lives of senior citizens in Virginia. You may place orders for single copies and bulk purchases by contacting Paulette J. Davidson at davidson@vsb.org or (804) 775-0521.

At our organizational meeting this year, I suggested a new project for the Senior Lawyers Conference: a program for Virginia Lawyers, young and old, to participate in a "green" initiative by planting trees across Virginia. The reaction from everyone I have approached has been positive. As of this writing, the program has not been given a name, but the idea is to have members of the bar join in a statewide effort to plant appropriate trees in their communities.

I made contact with Alan D. Albert, an attorney at LeClair Ryan, who worked on a similar project in Norfolk. Norfolk actually has a vibrant project to replant trees in the city. We invited a speaker from the Virginia Department of Forestry to make a presentation at the next meeting of the SLC board.

Council member Roy F. Evans Jr., who, like me, is from Marion, went last month to the Sunbelt Ag Expo in Moultrie, Georgia. At this expo there was a display of tree planting, and they were touting my personal choice for this proposed project, a dawn redwood tree, rediscovered in China and found in fossils around the world.

Roy said they had an example of this tree at the expo, and recommended it for areas in Virginia with moist soil, because it is fast-growing and has the attributes of a sequoia over the long haul. This tree may exceed one hundred feet in height over its long lifespan.

There have been contacts with the Arbor Day Foundation, which has an ongoing tree-planting program. There are other organizations that may be interested in this initiative if it becomes a program of the Senior Lawyers. Your input is greatly appreciated, and your support is crucial. You may contact me at annieshults@gwyntate.com or Ms. Davidson to express your opinions about this proposal.

Key Resources in International Law

by Heather Hamilton

Many useful resources are available to lawyers who practice international law. A lawyer does not have to be a seasoned veteran to find needed information; rather, he or she only need know where to look. The following resources run the gamut from free to subscription-based, but they are all valuable tools to any lawyer practicing international law.

GlobaLex (http://www.nyulawglobal.org/Globalex/) is an electronic site focusing on foreign, international, and comparative law research. GlobaLex is maintained by the New York University School of Law and is continuously updated. The site's articles and guides are provided by leading international scholars and practitioners in foreign, comparative, and international law and by specialists in domestic law. GlobaLex is free and useful for those who may not regularly practice international law.

Zimmerman's Research Guides (http://law.lexisnexis.com/infopro/zimmermans/) are available on several international law topics and are provided by LexisNexis and the Electronic Information System for International Law, an online database of treaties and international conventions offered by the American Society of International Law. The society also provides an electronic resource guide that serves as a self-guided tour for practitioners.

The **Foreign Law Guide** (http://www.foreignlawguide.com/) is an excellent starting point for practitioners faced with foreign legal issues. The Foreign Law Guide is subscription-based and offers comprehensive information about almost two hundred countries and jurisdictions. It provides sources to find legislation for legal fields such as intellectual property laws, marriage laws, and property laws. Additionally, the Foreign Law Guide was created with the American user in mind and offers English-language legislation or translations of foreign legislation into English. The guide offers more extensive coverage of issues and information than a site such as GlobaLex. The Foreign Law Guide is a convenient source of primary and secondary information for branches of law within many countries. For a firm regularly engaged in international law practice, the price is negligible when measured against the volume of information available.

Hein Online (http://heinonline.org/) offers a Foreign and International Law Resources database that includes international yearbooks and other serials, U.S. digests and cases concerning international law, decisions from international tribunals, and other significant works related to foreign and international law. Hein Online also offers a World Trials database that contains many famous cases, as well as commentary. Currently, the World Trials database contains American and English cases as well as war crimes trials, and it continues to add trials from other countries. The Hein Online international law databases are subscription-based.

Another valuable fee-based resource is the **Max Planck Encyclopedia of Public International Law** (MPEPIL) http://www.mpepil.com/. This database serves as a comprehensive guide to current events and international law topics. MPEPIL places each topic in context while explaining current trends and presenting the majority view for comparison purposes. MPEPIL reflects global and regional perspectives of international law. The authors of the articles are international legal scholars and practitioners.

Finally, one of the most important resources for an attorney is a law librarian, especially one who has a background in foreign and international law. Scattered throughout Virginia are several law librarians, working in both academic and firm environments, who are active members of the foreign, comparative, and international law special interest section of the American Association of Law Libraries.

Heather Hamilton is the reference and research services librarian at the University of Richmond School of Law, where she also teaches legal research in the first-year Lawyering Skills course. She has a master's degree in library science from Drexel University and a law degree from the College of William and Mary.

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thrilled that I realized my dream in Virginia. I think of him just as Scout did her father: "It was at times like these I thought my father, who hated guns and who had never been to any wars, was the bravest man who ever lived."

This essay is part of Reflections*, a collection by and about Virginia lawyers that was solicited by Virginia State Bar Immediate Past President Jon D. Huddleston as part of his Virginia Is for Good Lawyers initiative. http://www.vsb.org/site/about/va-good-lawyers/#reflections*

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Chart II — Mandatory Judicial Retirements, 2011–12

Source: Division of Legislative Services

Courts	Circuit or District — 2011	Circuit or District — 2012
Circuit	**2nd** Glen A. Tyler of Accomack **14th** Burnett Miller III of Henrico **17th** Benjamin N.A. Kendrick of Arlington	**2nd** Frederick B. Lowe of Virginia Beach **6th** Samuel E. Campbell of Prince George **13th** Walter W. Stout III of Richmond **14th** Daniel T. Balfour of Henrico **18th** Donald M. Haddock Jr. of Alexandria
General District	**6th** J. Larry Palmer of Hopewell	**2nd** Robert L. Simpson Jr. of Virginia Beach **4th** James S. Mathews of Norfolk
Juvenile & Domestic Relations	None	None

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that matter — please visit http://www.vsb.org/site/conferences/ylc/. Past issues of our *Docket Call* newsletter are available on our website as well. Also, we are on Facebook now — find us at "Young Lawyers Conference of the Virginia State Bar" and keep up with our programs and events.

Before I close, I would like to once again congratulate and welcome our newest members of the bar and the YLC. As I said when I spoke at the Admission and Orientation Ceremony in November, I hope you will take advantage of our many volunteer opportunities. We are always looking for new all-stars. If you want to get involved, please contact me at (202) 551-1809 or carsonsullivan@paulhastings.com or contact our membership chair, Nathan J. Olson, at (703) 934-1480 or nolson@cgglawyers.com

Sheri R. Abrams of Falls Church has published a book, *Don't Gamble with Your Social Security Disability Benefits*, that describes the process and how an attorney can help. For information and a link to download the book without charge, see http://tiny.cc/10zck. Abrams is counsel to Needham Mitnick & Pollack PLC. Her practice focuses on Social Security disability and special-needs estate planning.

Arthur H. Blitz, who practices with Paley Rothman in Bethesda, Maryland, has been reelected to the board of directors of EagleBank, a local community business bank in the Washington, D.C., metropolitan area. Mr. Blitz is one of the original directors of the bank, which opened in 1998. Blitz is a Virginia-licensed lawyer.

David A. Buzard, who practices with Jeremiah A. Denton III PC in Virginia Beach, has been recalled to active duty in the U.S. Navy Reserve Judge Advocate General's Corps. He is affiliated with the Defense Institute of International Legal Studies, an arm of the Defense Security Cooperation Agency, as director of its In-Country Rule of Law Program in the Democratic Republic of the Congo. He oversees all facets of the United States' efforts to build and strengthen the capacity of the Congolese military justice sector in conjunction with the United Nations Stabilization Mission in the Congo.

Mary G. Commander and **Ellen C. Carlson** have formed **Commander & Carlson, Attorneys And Mediators**, a practice emphasizing family law, bankruptcy, and mediation. 5442 Tidewater Drive, Norfolk, VA 23509; phone (757) 533-5400

Patrick M. Connell and **Travis W. Vance** have joined the Harrisonburg firm Wharton Aldhizer & Weaver PLC. Connell practices corporate and employment law, and Vance practiced in South Carolina before he came to Virginia.

Donald F. Craib III, Marion F. Werkheiser and **Gregory A. Werkheiser** have launched **Cultural Heritage Partners LLC** to serve clients in the field of historic preservation. 9104 Old Mt. Vernon Rd., Alexandria, VA 22309; phone (703) 539-2473; www.culturalheritagepartners.com

Justine A. Fitzgerald and **David A. Rhodes** have formed **Fitzgerald & Rhodes LLP**, with offices in Falls Church and the District of Columbia. The firm focuses on commercial contracts and corporate and real estate transactions. Both attorneys formerly practiced with Arnold & Porter LLP.

Vivian F. Brown Henderson has been hired as a senior assistant commonwealth's attorney in the Virginia Beach commonwealth's attorney's office, and **M. Janeice Robinson** has joined the office as an assistant commonwealth's attorney. Henderson previously prosecuted in Portsmouth and practiced with the Office of the Attorney General. Robinson prosecuted in Norfolk.

Patrick C. Henry II has joined Meyer Goergen & Marrs PC in Richmond, where his cases involve commercial litigation, collections and receivables management, and construction and personal disputes. He is a recent graduate of the College of William and Mary School of Law.

Amy E. Hensley has joined the Midlothian firm Owen & Owens PLC as an associate. She will practice criminal defense, domestic relations, civil litigation, and real estate law. She is a graduate of the College of William and Mary School of Law, and she worked as a legislative correspondent for Senator Jim Webb and a research assistant at the Henry L. Stimson Center in Washington, D.C. She is proficient in Spanish.

Richmond Commonwealth's Attorney **Michael N. Herring** has been inducted as a fellow in the American College of Trial Lawyers, which admits less than 1 percent of U.S. attorneys to its membership. Membership in the college is granted to attorneys who have at least fifteen years of active trial experience and who meet highest standards of professional excellence, ethics, and collegiality. Herring has been Richmond's chief prosecutor since 2005.

James Webb Jones has joined the Suffolk office of Pender & Coward. He works primarily in the eminent domain and public-private partnership practice groups. He was formerly a senior assistant attorney general with the Virginia Office of the Attorney General and served as staff counsel for the Virginia Department of Transportation's Southeast Region.

Nicholas R. Klaiber has joined Troutman Sanders LLP as an associate in its products liability group in Richmond.

Michael P. Kuhn has joined Reed Smith LLP as counsel in the firm's Richmond office. His practice focuses on general corporate and business law, international business operations and transactions, intellectual property, and employment matters. He formerly was with Sands Anderson PC.

Joyván L. Malbon has joined the Virginia Beach law firm Bullock & Cooper PC as an associate. She will concentrate her practice in personal injury, family law, and traffic matters.

Regina Maria Policano has returned to Midkiff, Muncie & Ross PC in Richmond as counsel, after seventeen years as staff counsel for the Fourth U.S. Circuit Court of Appeals. She will defend workers' compensation claims, professional liability, and other insurance matters.

Jeffrey L. Rhodes has been named managing partner of the civil division of Albo & Oblon LLP. He has been a partner in the firm's Arlington office for several years. His practice includes labor and employment law, corporate law, and commercial litigation.

C. Patrick Tench has joined Atwill, Troxell & Leigh PC in Leesburg as an associate. His practice will include construction and commercial litigation, real estate disputes, eminent domain, and land use litigation. He previously practiced in Newport News and Warrenton.

Sarah E. Tozer has joined the Alexandria office of MercerTrigiani as an associate. Her practice focuses on general representation of common interest community associations and litigation services, including assessment collection, to the firm's clients. She previously worked in community association management positions.

Tiziana M. Ventimiglia has become a partner in the firm Hartsoe, Mansfield & Morgan PLLC, which has changed its name to **Hartsoe, Mansfield, Morgan & Ventimiglia PLLC**. Her practice will include real estate and estate planning. 4084 University Drive, Suite 100-A, Fairfax, VA 22030-6803; phone (703) 591-2503; fax (703) 273-7292; tventimiglia@verizon.net

Ronald D. Wiley Jr. has joined the Charlottesville office of MartinWren PC as counsel. He will support the firm's real estate, title insurance, and settlement law practice. He previously was vice president and regional counsel of Southern Title Insurance Corporation for seventeen years.

CONSULTANTS & EXAMINERS

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MED-MAL ATTORNEYS: Deciding whether to take a case OR what strategy is best once you have taken it? I am a member of the Virginia State Bar and a **Primary Care Physician** as well. I am available to review patient charts and assimilate medical facts with legal angles. Bio and references on request. Contact Dr. Deborah Austin Armstrong at (804) 539-5031 or drdebarmstrong@hotmail.com.

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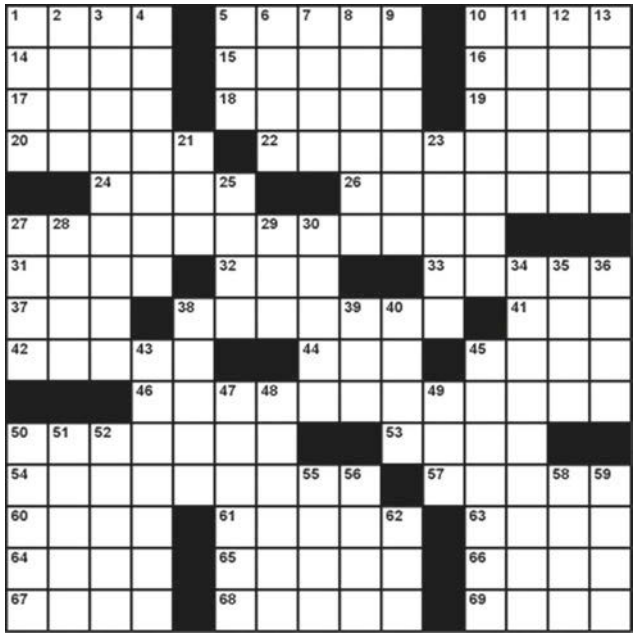
It's Funny
(But Not "Ha-Ha" Funny)

by Brett A. Spain



Crossword answers on next page

Across

1. Blowout
5. NASA command
10. Quarrel
14. Syrian, e.g.
15. He makes do
16. Lawyer's filing system at times
17. Stitches
18. Raccoon relative
19. Termini
20. Do kindergarten work
22. What's the difference between a lawyer and a bucket of pond scum?
24. Atkins subj.
26. 1991 Steve Martin film
27. What do you get if you put 100 lawyers in a basement?
31. Crackpot
32. Duty
33. Bad ones can lead you astray
37. Also
38. Pigeon favorite
41. Metallica hit
42. Progressive rival
44. Word for Beethoven's Symphony No. 9
45. Court martial acronym
46. What do lawyers do after they die?
50. Augmented fourth
53. Harness part
54. What is a greedy lawyer?
57. Good comparison (2 wds.)
60. Recipe requirement often
61. Curved moldings
63. Dry
64. Inspiration for some
65. Chart again
66. Beseech
67. Strokes
68. Scent
69. IRA alternative

Down

1. Wheeze
2. Geometric calculation
3. Where do vampires learn to suck blood?
4. Follow *Pullman* or *Younger*
5. SEC rival
6. Eighty-six
7. Moonfish
8. Recount a report
9. Courts generally not subject to federal oversight
10. James Bond nemesis
11. McCarthy target
12. Birch relative
13. On edge
21. Sea eagle
23. Contract in practice
25. Test or blocker
27. Title ins. form
28. Imitate Spot
29. Ripken, Jr. or Sr.
30. Laud
34. What do you get when you run an "honest lawyer" contest?
35. Alkene compound
36. Hawk
38. Journey guitarist Neal
39. Dictator Amin
40. ____ do well
43. Harmonizes
45. Status upon answering
47. *Bewitched* mother-in-law
48. *The Right Stuff* pilot
49. Black or Red
50. Pound
51. Theatrical parody
52. In other words for Caesar
55. Pixar fish
56. Cowboys or Indians
58. Therefore
59. Make tears
62. Pamper place

This legal crossword was created by Brett A. Spain, a partner in the commercial litigation section of Willcox & Savage PC in Norfolk. He can be reached at (757) 628-5500 or at **bspain@wilsav.com**.

Crossword answers.

Babe

by the Hon. Johanna L. Fitzpatrick

My interest in the law began with two men — Atticus Finch and Babe Levenson. Atticus was, and still is, my favorite fictional character, and my father, Babe Levenson, is just my favorite. Two different characters — one an educated lawyer, one a self-made man with a seventh-grade education — were so alike in so many ways. Atticus Finch said "The one place where a man ought to get a square deal is in a court room." I believed him and that lead me to the law. My father lived the "square deal" credo. He tried to give everyone a fair shake in his workplace, no matter who or what they were. Scout, Atticus's daughter described her attitude about people in just the way Babe would have: "I think there's just one kind of folks —folks." He looked for the best in everybody.

My father, Babe Levenson, was a bit of legend in Birmingham, at least in the Jewish community. In 1934 he married my mother, who was a Southern Baptist. Neither family took this too well. His father, "The Old Gent," was a Jewish cantor who emigrated in the late 1800s from Russia as a result of the pogroms. My mother's father was a Baptist minister. As you can imagine, this was a difficult relationship. After many years some type of truce occurred, because I have a very clear memory of the two grandfathers sitting in the kitchen of our house arguing with each other. Who knows who won? It might have been a draw because my brother ended up as an Episcopalian, and I followed The Old Gent.

Babe was born in 1900, the youngest of five children. When he was fourteen he left school to help support his family and at an early age became a merchant. He was the adventurer in his family. He traveled all over the country and supplemented his income by becoming a card player — an excellent card player. He lived in Los Angeles in the late 1920s and early 1930s, and often played poker with Howard Hughes and Louis B. Mayer. He said Hughes was a "big talker and a small bettor."

In 1936 he moved to Birmingham, and opened Levensons, a dry goods store. He sold everything — rubber girdles to furniture. The store was located in an old building with an elevator you had to pull with a rope to make it go up and down. He taught me at age six to "work the floor" — sell anything to anybody. That was an education that I could never have gotten in school. It was the first lesson in "folks is just folks." In 1960 he opened a new, modern department store, Tillman-Levenson, that merged the old dry goods — buy a deal, sell a deal at a discount — with department-store regular goods. It became the Southern prototype of Loehmann's or Filene's Basement. It was a great success. People loved getting the deals, and they loved talking to Babe. He would sit in the front of the store and talk to anyone who came in. He knew their children and their problems, and he learned the history of his customers. There were only two rules at the store. Everyone was to be treated politely, no matter who they were (or what race they were), and bathing suits and evening gowns are the only things that can't be returned. Both are good policies.

Every May first was $1.00 wig day. The store would open at 8 a.m. instead of 9:30. People would line up in the parking lot, and when the doors flew open, five hundred women would rush in and start grabbing wigs. I have never seen anything else like it. Any color, any style, any length. I remember one woman yelling, "Mr. Babe, that woman took my wig." He said, "Now, dear, Miss Martha will find you one just like it." "No, Mr. Babe, that was MY wig, the one I wore in here!" I don't know what he did with that one.

When I was ten years old, my parents divorced and Babe raised me as a single parent. No one else I knew had divorced parents, and certainly no one I knew was raised by a single father. I think knowing how hard he worked to raise his children alone gave me an understanding of divorce that was a beacon for me during my years on the bench. He raised me to appreciate the opportunities I had and to put whatever talents I had to good use. He was a man who thought there was nothing his daughter couldn't do. If she wanted to be a lawyer and there weren't any women lawyers, well it was time there was one. If I wanted to be Atticus, I could. He was a gentle, kind man who did the best he could every day — an example I tried to follow. He died in 1978, before I went on the bench, but I know he would be

Reflections continued on page 58

Johanna L. Fitzpatrick was named to the Virginia Court of Appeals in 1992, became chief judge in 1997, and served until her retirement in 2006. She formerly held juvenile and domestic relations and circuit judgeships in Fairfax County. She won recognition for distinguished service by the Virginia Trial Lawyers Association, for jurisprudence by the Fairfax Bar Association, for achievement in government by the Virginia Commission on the Status of Women, and for her role as an outstanding woman attorney by the Virginia Women Attorneys Association and the Metro Richmond Women's Bar Association.