

# Appellate Issues



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## IN THIS ISSUE

<b>A Conversation With Justice Kagan</b>	1
<i>By Nancy M. Olson</i>	
<b>The Landmark at the Lectern</b>	1
<i>By E. Travis Ramey</i>	
<b>Editor's Note</b>	1
<i>By David J. Perlman</i>	
<b>Pixels to Punctuation – Writing in the Digital Age</b>	12
<i>By Richard Kraus</i>	
<b>The Pain of Waiver</b>	16
<i>By Devin C. Dolive</i>	
<b>AJEI 2016 Summit – Election, 'Merit,' or Advice and Consent: Trends in Judicial Selection</b>	22
<i>By Howard J. Bashman</i>	
<b>Is the Pendulum Swinging? Mandatory Minimums</b>	25
<i>By Gaëtan Gerville-Réache</i>	
<b>Ross Guberman's: <i>The Role of Personality</i></b>	30
<i>By Wendy McGuire Coats</i>	
<b>Fireworks In The Crystal Ball</b>	34
<i>By Steve Emmert</i>	
<b>Strossen and Waldron on Hate Speech: Comparative Perspectives in a Post-Election America</b>	37
<i>By Katherine S. Barrett Wiik</i>	
<b>Canons of Construction</b>	40
<i>By D. Alicia Hickok and Vishal Shah</i>	
<b>Drones, Phones, and Other Digital Data Collection: Tracking the Intersection of Privacy and Security</b>	42
<i>By Katie A. Richardson</i>	
<b>An Ethics Lesson in Philadelphia</b>	45
<i>By David H. Tennant</i>	
<b>Judicial Ethics and Social Media</b>	47
<i>By Mark A. Kressel</i>	
<b>Class Actions: What Future?</b>	49
<i>By Julia F. Pendery</i>	
<b>Are Three Heads Better Than One? Generally, Yes.</b>	50
<i>By Katharine J. Galston</i>	
<b>Intuition, Deliberation, and the Appellate Process</b>	54
<i>By Deena Jo Schneider</i>	
<b>Dueling Appeals: A Comparison of Best Practices and Opportunities for Reform in Civilian and Military Appellate Systems</b>	58
<i>By Kirsten M. Casteñada</i>	
<b>The Interactive Constitution</b>	64
<i>By Timothy J. Vrana</i>	
<b>The Decline in News Coverage of Appellate Court Decisions</b>	65
<i>By Eric J. Magnuson and Chelsea A. Walcker</i>	
<b>Contributors</b>	67

## A Conversation With Justice Kagan

*By Nancy M. Olson*

As has become a tradition, AJEI Summit attendees enjoyed the rare opportunity of a visit with a Supreme Court Justice. Justice Steven David of the Indiana Supreme Court and Leane Capps of Polsinelli moderated the conversation. The moderators broke the ice by sharing a short bio of Justice Kagan. After hearing the bio, Justice Kagan quipped that each time she hears her

*Continued on page 2*

## The Landmark at the Lectern

*By E. Travis Ramey*

"Mr. Chief Justice, and may it please the Court." Many attorneys, probably most attorneys who consider themselves appellate lawyers, have at some point imagined standing at 1 First Street and uttering those words. Each pictures herself or himself playing the role of Thurgood Mar-

*Continued on page 7*

## Editor's Note

The depth and breadth of this *Appellate Issues* is a credit to the annual Summit of the Appellate Judges Education Institute, which was held in Philadelphia this past November. The articles in this issue distill the Summit's intellectual essence with the added bonus of the authors' insights. Just as attendees left Philadelphia newly

*Continued on page 12*

...Continued from page 1: A Conversation With Justice Kagan

bio, she learns something new about herself. This morning was no exception; today she learned that she is a fan of comic books. Who knew? (But see her opinion in *Kimbel v. Marvel Entertainment, LLC*, referencing Spider-Man!)

Jumping right into substance, the moderators asked Justice Kagan about the topic on everyone's mind: the presidential election that occurred four days earlier. Justice Kagan acknowledged that it was the elephant in the room but cautioned that she does not have a crystal ball. Her predictions are no better than yours or mine. Regardless of the outcome, Justice Kagan noted that the Supreme Court changes as fast as neither some hope nor others fear. She explained that her response would have been the same had Hillary Clinton won: no matter who wins, precedent can be a powerful brake on the dreams of change.

For judges, however, the role of precedent depends on whether you want change. Precedent can provide a foundation of civility, predictability, and humility because the collective body of law represents the wisdom of judges over generations. On the Supreme Court, the Justices' commitment to the rule of law and the values of the Court serve as a restraint on rapid change. As an aside, Justice Kagan noted that most Supreme Court justices are incrementalists rather than revolutionaries. Thus, one new justice on the Court does not put everything up for grabs. On the other hand, as members of the Court change, she noted that some change can be expected. Still, personnel changes on the Court typically bring slow rather than rapid change.

The moderators next inquired about a typical day in the life of a Supreme Court justice. Justice Kagan stated candidly that there is nothing all that interesting about it. In the morning, she attends arguments and conference or is working on reading briefs, writing, and discussing cases. Then she typically breaks for lunch with her clerks. The afternoon looks much the same as the morning. Sometimes she speaks to outside groups to avoid cabin fever. Even though her daily pattern feels routine, she loves the job and has no complaints about the routine. She noted that serving as a justice on the Supreme Court contrasts with being Dean of Harvard Law School, where every day was different.

Asked about her favorite part of the day, Justice Kagan highlighted lunchtime with her clerks. She enjoys the conversation, which is sometimes work-related, but often not. Being around young people thinking about the law in an engaged way adds to the enjoyment. It also allows her to keep up-to-date on matters such as technology, pop culture, and what life is like for young people.

Pivoting from what life is like for young people, the moderators asked Justice Kagan whether growing up in New York City influenced how she sees the world? She said that it must have. Although everyone thinks of her as a New Yorker, she has not lived there since she was 17 years old. She does believe it had an impact on her, though. Partly the place itself, partly the peculiar high school she attended. The school was a special, all-girl public school in Manhattan, but it accepted students from all five bor-

oughs. The student body was diverse in a variety of ways, including race and religion. Living in the city encouraged independence. For example, since her school could not find a typical school building, it set up shop on two floors of a midtown high-rise office building. So the students went out and about into the city for all manner of “normal” school activities such as lunch, the library, and physical education class in Central Park. She noted that learning how to negotiate a city like that at age 15 helps instill confidence.

Turning back to the Supreme Court, the moderators asked whether any of her prior positions provide something valuable to serving as a justice. Justice Kagan responded that being the Solicitor General of the United States was her best preparation for becoming a Supreme Court justice because, in that job, all you do is think about the Supreme Court. During her fifteen months on the job, her focus was the Court: its docket and oral arguments. She would argue cases every month and also watch the other attorneys in her office present oral arguments. The job, she said, gives you a front row seat to what is going on at the Court.

In addition, as a Supreme Court advocate, it is your job to convince nine justices of your position. As a justice, it is your job to convince eight. In other words, the similarity between the overarching goals of the positions can help the transition from one to the other. Being Harvard Law Dean also prepared her. As Dean, it was her job to move the community to a shared point of view, which helped her develop interpersonal and persuasive skills useful on the Court. Her teaching skills also proved helpful. She said

that when you sit down to teach a class of bright, engaging people, you have to figure out a way to convey complicated material to make it stick. This is very much what she thinks of when sitting down to write an opinion. In writing opinions, she sees her task not only as conveying something to someone who is not an expert on the subject matter, but also teaching them about it so they understand.

The moderators followed-up on Justice Kagan’s passion about teaching, querying whether she still feels like she’s teaching. She responded yes, in some ways. As a professor, you convey ideas and try to show all competing views, not convince everyone of one particular point of view. As a judge writing to persuade, however, you want people to walk away with the belief that you got it right. Like teaching, this work also falls into the “communication of ideas business.”

The moderators next steered the conversation to whether Justice Kagan has experienced any unanticipated challenges on the Supreme Court. First, she noted that she had never been a judge before President Obama nominated her to the Court. Thus, as a starting point, she had to figure out the mechanics of the job, such as when to read the briefs, how to use her clerks, the opinion writing process, etc. During her first term on the Court, three out of her four law clerks joined her chambers after finishing clerkships with other justices on the Court. This allowed her to gain varied and valuable feedback on different processes used by the other justices, and it helped her develop her own preferred processes. Sometimes her initial decision did not work and she would have to make changes.

The first year on the Court, she said, was a learning process.

The moderators followed-up by asking, is there anything you do as a justice that surprised you, or that would surprise us? Justice Kagan responded, not really. She kept waiting for the surprises, but came to the realization that courts change more slowly than you think. She spent twenty-three years away from the Court from the time she served as a law clerk to her return as a justice. During this time, the world experienced an information revolution. But, that is not the case at the Court. The justices, she said, still haven't really discovered email—although she noted that at least they don't use fax machines to communicate with each other like the Second Circuit.

The justices are, however, stuck at the "parchment paper stage." They write memos to each other to be hand-delivered between chambers. Hand-delivery notwithstanding, this method causes the occasional complaint of a delayed receipt. Justice Kagan shared her impression that the Court is functioning well as an institution and the consensus is that you do not change what is working. After two decades away from the Court, she noted that even the people have not changed much. She discovered that some of the Court staff still remember her from when she was a law clerk. When she heard this, she thought to herself, I hope I was okay as a clerk!

One facet of serving on the Court that she thought would be surprising was to learn the secrets of the "black box" of post-argument conference. Only the nine justices know what hap-

pens in conference and she wanted to learn about the mystery to figure out how to prepare. After experiencing it, she really likes the process. She described it as a serious discussion, appropriately detailed, and it allows the justices to flesh out ideas.

The moderators inquired regarding the level of warmth and the personal relationships among the justices. Justice Kagan responded that they all get along really well. Although they often disagree in what are sometimes cutting opinions, behind the curtain they all respect each other and believe in each other's good faith. Each of the justices is trying his or her best to get it right, even if they have differing views. Additionally, there are only eight other people who understand what you do on a daily basis. You can't talk about work problems with anyone else. They are your support group, for better or worse. Within this dynamic, the Chief Justice plays a leadership role in fostering collegiality, and on the Court there are some great friendships that cross "traditional lines."

Justice Kagan's reference to great friendships prompted the moderators to ask her about her hunting trips with Justice Scalia. Justice Kagan prefaced her remarks by noting that, ten years ago, if she heard "fan of hunting" in her bio, it would have seemed crazy. Growing up in New York City, she said, you did not wake up on Saturday morning and say, "let's go shoot a deer." Her background as a Democratic nominee with an urban legal background also includes serving four years as White House Counsel where she worked on gun regulation-related matters. Thus, as a Supreme Court nominee, some senators asked her if she understood their Constitu-

tional views regarding guns and to explain her views on guns and hunting. If the senators asked questions such as, have you ever touched a gun, do you know anyone who owns a gun, and the like, her answers were fairly pathetic.

One senator was skeptical of her appreciation of hunting. So she said, I haven't had the opportunity to try hunting, but if you would invite me, I would really like to go. She recalls the senator looking at her with abject horror. The staffer with her shook his head in disbelief. She acknowledges that perhaps it was not the right approach, but she told herself that if confirmed, she would ask Justice Scalia to introduce her to hunting. When she later relayed this story to Justice Scalia, he, of course, thought it was hilarious and was fully on board to take her hunting as soon as possible. First, he taught her to shoot at his gun club. Then he included her in a group of his hunting friends. They would usually go hunting in Virginia, but they also took a trip to Wyoming to hunt deer and antelope, and a trip to Mississippi for duck hunting.

Justice Kagan continued by sharing her thoughts on Justice Scalia. She said that he was a funny, warm, and generous man. He was great company with whom she was fortunate to spend six years on the Court. He was a great friend and she said she learned so much from him. She considers him a significant influence on matters from opinion writing, to questioning advocates from the bench, to keeping things moving in conference. She said she feels very lucky to have had the opportunity to be his colleague and believes Justice Scalia will go down in history as one of the Court's great justices.

On the topic of history, the moderators asked Justice Kagan whom she admires. She responded that Justice Thurgood Marshall, the justice for whom she clerked, was an impressive person in her life. She explained that, separate from being nominated to the Supreme Court, there are few lawyers who would also end up in the history books as great twentieth century advocates. He was a great trial and appellate lawyer. He was also extremely knowledgeable about American history and a great storyteller. During her clerkship, Justice Marshall reflected a lot on his life; hearing his personal stories exposed her to important facets of American history. Amazingly, he never repeated a story over the year she worked for him. What's more, he could make you laugh, cry, or do both at the same time. She said he embodied what it means to be a lawyer doing justice in the world.

Justice Kagan noted that she also admires the writing and judging of Justice Louis Brandeis. Recently she visited his namesake law school and was able to see his papers, including documents related to *Whitney v. California* (a First Amendment case known for Justice Brandeis's concurrence in which he conceptualized free speech as an important freedom at the heart of democratic society). On the bench, she sits in the "Brandeis chair." She likes to think of her seat as the "longevity chair" because it was formerly assigned to Justice Brandeis, Justice William O. Douglas, Justice John Paul Stevens, and now her. She thinks it unbelievable to be connected to Justice Brandeis in this way. She recognized that although you have to be who you are in the era in which you live and do the best you can under given circumstances, you can learn a lot from the judicial work of others.

Turning to attorney advocacy, the moderators next asked Justice Kagan for her advice on how attorneys should balance the need to maintain professionalism and civility while at the same time acting as zealous advocates for clients. Justice Kagan noted that the justices on the Supreme Court deal with a variant of this question. When they argue with each other in written opinions, they must first consider what language to use, being mindful of tearing apart a point of view versus casting personal aspersions. You want to be as passionate as you can without stepping beyond norms of civility. The justices model to the rest of the profession what type of advocacy and rhetoric falls out-of-bounds. Although the obligation to represent your clients comes first, she believes that usually attorneys can do this with civility and grace.

Turning to the topic of free time, the moderators asked Justice Kagan what she does for fun. She noted that she has no idiosyncratic hobbies. Rather, she enjoys sports, watching movies, and reading. On argument and conference days at the Court, all of the justices have lunch together. During these lunches, they have a “no work” rule, resulting in lunchtime discussions about things like sports and reading. Before leaving this topic, the moderators asked if she was okay with the Cubs winning the World Series this year. Although a New York fan, she responded in the affirmative because everyone should have their time. But the Mets next year!

As the end of the conversation neared, the moderators asked Justice Kagan to share one piece of advice with the group. Knowing that many Summit attendees are judges, she gratefully explained that she thinks Supreme Court justices

have the easier job by the time a case reaches the Court. Specifically, by that point, the issues have been clarified and one or two issues have been distilled for the Court’s consideration. The Court also has an outstanding bar. In her view, cases are much messier as they work their way through the system on the way to the Supreme Court. She considered the justices fortunate for how much of the “real serious and hard work” is done by other judges in the trial and intermediate appellate courts; honoring their contribution, she encouraged them to keep it up.

...Continued from page 1: The Landmark at the Lectern

shall, Daniel Webster, or some other famous advocate. Each imagines a decision of monumental importance, one affecting the rights of millions born and unborn.

Then reality sets in. For most of us, that day will never come. Oh, many of us will argue a case of some importance before a state supreme court or one of the courts of appeals. And in the hard-scrabble world of appellate advocacy, some fortunate few will stumble into a circuit split on a relatively important issue or trip over a complex question regarding ERISA, tax law, or another area requiring the Supreme Court's attention. Some will get their quill. But a landmark case? It's not impossible, but it is unlikely.

Still, as the purveyors of lottery tickets and other games of chance tell us, someone's gotta win. What if it's you? Say you find yourself with a case that raises an issue of great magnitude. Once you have read (and probably re-read a few times) the order granting certiorari, now what? What do you do?

A panel featuring Debo Adebile,<sup>1</sup> Caitlin Halligan,<sup>2</sup> and Paul Smith<sup>3</sup> and moderated by Michael Scodro<sup>4</sup> attempted to answer that question. Their answers suggested that in many ways, a landmark case is much like any other case. In other ways, however, it is a completely different animal. The panel's view of the principal differences largely revolved around the heightened need to manage the narrative. In their view, the advocate must seek to do so in the argument, in the amicus filings, and in the press.

Smith noted that the nature of a landmark case can overlay the whole process. As a result, an advocate must prepare for the historic moment without losing sight of the need to argue the merits of the case. Adebile stated that the best way to do that is to find a way to marry the technical aspects of the case to the historic moment. Doing so hopefully allows an advocate to marshal history as an ally without the merits being lost in the shuffle. Smith noted that when he argued *Lawrence v. Texas*,<sup>5</sup> he had a strong sense of the history and felt as though he were speaking for an entire community of people. Because of that pressure, he felt a real concern that might say something in the wrong way.

Indeed, the panel generally agreed that the attention the public pays to landmark cases affects an advocate's role as wordsmith. Halligan stated that it makes you more aware and careful about what you say and how you argue the case. Although you usually know where the "ugly spots" are in your argument and where (and often from whom) the tough questions will come, landmark cases require advocates to pay greater attention than usual to how you frame your answers. Smith suggested that the best way to prepare to do that is through moot courts. Halligan also noted that the need to be careful sometimes results in a slightly different argument than expected. Although the importance varies depending on who the client is, the narrative can sometimes matter as much to the client's long-term goals as the result.

Another way in which advocates can shape the narrative is through their amicus strategy. The

entire panel agreed that amicus briefs, and the strategy behind them, have become an important part of Supreme Court advocacy, particularly in landmark cases.<sup>6</sup> Halligan acknowledged she did not know how the Justices could read dozens and dozens of briefs, but she emphasized that amicus briefs allow the pursuit of points beyond the parties' merit briefs. They allow further discussion of the implications of a decision, the placing of technical points (whether scientific or arcane) before the Court, and efforts to garner sympathy from the Court. In doing so, they become a powerful storytelling device. Smith echoed this reasoning, noting the symbolic effect amicus briefs can have. He cited as an example the briefs filed in *Lawrence*, which he believed showed that mainstream America had moved past anti-homosexual sentiments.

The panel agreed that who files an amicus brief is sometimes just as important as what the amicus brief says. Smith indicated that briefs can be important simply because a particular party or advocate filed something. Citing an amicus brief from the military discussing the importance of diversity as an example, Adegbile argued that certain institutional actors and high-profile counsel can allow a Justice to view an issue differently. Halligan noted that the presence of a high profile firm can help to shift the optics of a case and convey a more complex message. Scodro also weighed in, echoing that the cover of the brief (and whose name appears on the cover) can both point to the substance of the brief and affect the narrative of the case. Who supports your position can reframe it.

As to how to formulate the amicus strategy, Halligan stated that advocates should think both offensively and defensively.<sup>7</sup> She suggested that the best way to do this is to think broadly about how the issue has been litigated and to look at who has participated in similar litigations. On the defensive side, the goals are immunizing yourself ahead of time and avoiding amicus briefs that shine light on tough spots in your arguments or gaps between your position and that of your co-parties. Optimally, amicus filers will share their position with you ahead of time so you can be ready.

Controlling the narrative also requires handling the press. The panel uniformly agreed that managing the public narrative was both important and a fixture in landmark cases. Halligan noted that refusal to participate is simply abandoning the chance to shape the public narrative. Adegbile noted that doing nothing simply cedes the shaping of the narrative to the other side. He argued that core training in how to handle difficult questions at oral argument—a hat tip to the question, an answer, and then a pivot to what you want to talk about—also works when handling the media. Smith, however, noted a reluctance to be quoted by the media before argument.

The panelists also noted that the desire for advocates to manage the public narrative may vary significantly from client to client. Both Halligan and Adegbile noted that some clients, particularly corporate clients, may desire a less active campaign to manage the public narrative. That desire may come from risk aversion, or it may simply be that the best place for the client is a quiet place. Halligan believed that, in those

instances, the best strategy may be to participate with the hopes it becomes a non-event. The way to achieve that may be to frame the discussion in sterile, legal terms.

The need to manage the public narrative extends postdecision. Smith said that, although there is variation among clients, most want you to spin the outcome. Adegbile believes messaging at the time of decision is as important as messaging on the day of argument. That often requires further elaboration of the Justice's questions and criticisms. Both Smith and Adegbile agreed that managing the narrative postdecision requires advocates to make themselves available to the press.

Each member of the panel recognized the growing importance of blogs. Scodro called them an important source of pre-information, especially at the Supreme Court level. Smith thinks blogs may be more influential than the mainstream news, noting that the clerks and the courts are attuned to the blogosphere. Adegbile compared blogs to an independent source of amicus briefs. He believes the clerks have been going to these blogs since law school, their commentaries are influencing the clerks, and advocates therefore ignore them at their own peril. Problematically, as Halligan noted, developing and executing a strategy for managing the narrative coming from blogs is more difficult than managing the narrative in traditional media.

The panel also discussed to a lesser extent the mechanics of arguing a landmark case. It largely avoided talking about the general art of preparing for and delivering oral argument. Although picking the brains of the experienced advocates

on the panel would no doubt be helpful to the rest of us, the panel likely recognized that "how to orally argue an appeal" has been covered time and again. As early as 1940, John W. Davis—a former Solicitor General of the United States who argued 140 or so cases before the Supreme Court—described that subject as "well worn."<sup>8</sup> At the conclusion of a lecture before the New York City Bar Association, he commented that he was "painfully conscious" that he had added nothing new on the subject and had "not even been able to cover old thoughts with new varnish."<sup>9</sup> Notwithstanding Davis's humility, and however old the thoughts or varnish might have been, his decalogue regarding oral argument is fully consistent with more recent authorities discussing oral argument.<sup>10</sup>

There were three areas where the panel turned to more practical questions regarding arguing landmark cases. First, Smith noted that client pressure is often a major challenge an advocate must overcome. Because more is at stake, the client will likely expect more from you. They may also want more significant input than usual, even to the point of attempting to micromanage the process. The elevated client pressure can eventually reach a point where it impairs the advocate.

Second, Adegbile and Halligan discussed the likelihood that an advocate will end up splitting argument time with another advocate who represents another party. Adegbile noted that when splitting time you may not always start your argument on a clean slate. Therefore, although you prepare to argue the whole case, the Court may have narrowed the question by the time you reach the lectern. You have to be ready

to jump in where the argument stands. The best way to do that is often to frame the pivotal question as a response, which will hopefully allow you to get to your most important points.

Of course, splitting time can cause a different type of problem if the parties' interests are not perfectly aligned. Halligan focused on discovering where the gaps between the parties' interests lie and preparing (at least sometimes) to concede to the Court the existence of the space between the positions. Adegbile suggested the desire to avoid exposing rifts can create tension with the necessity of forcefully pressing your client's position. In the end, Halligan emphasized the need to inform the Court why, regardless of any misalignment, it can and should nonetheless rule in your favor.

One party with whom advocates commonly split time is the federal government. Halligan noted that the government typically has the obligation to defend a statute, even if it seems outdated or distasteful. Thus, it is often trying to defend the statute without feeding into any bias or prejudice. This role can likely cause some misalignment of the parties on the same side. Adegbile said, however, that splitting time with the Solicitor General's office allows an opportunity to take advantage of that office's expertise when preparing for argument. It also drives home the historical nature of the case.

Third, during the Q&A, the panelists were asked when a "regular Joe" attorney should consider handing off a case to an experienced Supreme Court advocate. This question recognized that advocacy before the Supreme Court has become increasingly specialized, with a se-

lect group of elite attorneys (including the panelists) dominating Supreme Court advocacy. The Supreme Court itself has helped foster the development of a specialized Supreme Court bar. The Justices have made known their preference for experienced advocates, and the Court has rewarded parties who engage attorneys who are repeat players.<sup>11</sup>

Halligan and Adegbile both pressed for engagement at the certiorari phase. Halligan reasoned that the petitions are technical writing that varies significantly from the merits briefs most advocates are used to writing. Adegbile echoed that sentiment, emphasizing that repeat players have a better understanding of the process, which can assist in turning the presumptive no into a yes or in convincing the Court to deny certiorari.

Smith took something of a broader stance. Although acknowledging his conflict of interest, he stated his belief that the Court strongly prefers that experienced Supreme Court advocates handle landmark cases. Adegbile (at least initially) agreed. He noted that it can be difficult for advocates who have lived with a case for perhaps years to back away from it, see the broader picture, and educate the Court on the potential implications beyond the specific case. Doing so requires the ability to accept that you are in a different part of the case, which he believes to be the toughest part for those who keep their case.

One audience member pushed back on this issue, suggesting that being part of the "club" of Supreme Court advocates can result in legal blinders.<sup>12</sup> Adegbile agreed. He stated that it can be important for the Court to hear new voic-

es. He also wanted to be clear that he was not advocating against new advocates being at the podium. Nevertheless, he maintained his belief that knowing how the Supreme Court's dance

works has some advantages. With that in mind, he believes (on balance) that experienced Supreme Court advocates do better.

<sup>1</sup> Adegbile is a partner in the New York office of WilmerHale. His previous Supreme Court arguments include *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009), and *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

<sup>2</sup> Halligan is the co-chair Gibson Dunn's Appellate and Constitutional Law Practice Group. Her previous Supreme Court arguments in *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015).

<sup>3</sup> At the time, Smith was the Chair of the Appellate and Supreme Court Practice at Jenner & Block. He recently joined the Campaign Legal Center at Georgetown University. His previous Supreme Court arguments include *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>4</sup> Scodro is a partner in the Chicago office of Jenner & Block. He most recently argued *Manuel v. City of Joliet*, No. 14-1581, on October 5, 2016.

<sup>5</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>6</sup> The panelists are hardly alone. The importance of amicus briefs and the strategy behind them has been a hot topic of late. See, e.g., Michael E. Solimine, *Retooling the Amicus Machine*, 102 VA. L. REV. ONLINE 151 (2016); Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1091 (2016); Allison Orr Larsen & Neal Devins, *Legal Scholarship Highlight: The Amicus Machine*, SCOTUSblog (Nov. 15, 2016), <https://goo.gl/ZkWM9n>; Anthony J. Franze & R. Reeves Anderson, *In Unusual Term, Big Year for Amicus Curiae at the Supreme Court*, NAT'L L.J., Sept. 21, 2016, <https://goo.gl/LTW6av>.

<sup>7</sup> As an aside, Halligan stated her belief that amicus briefs have real value when filed in state high courts. Because those courts receive fewer amicus briefs, she believes they tend to have more impact.

<sup>8</sup> John W. Davis, *The Argument of an Appeal*, 26 Am. Bar Ass'n J. 895, 895 (1940).

<sup>9</sup> *Id.* at 899.

<sup>10</sup> Compare *id.* at 895-99, with Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* (2008); Bryan A. Garner, *The Winning Oral Argument*; Timothy S. Bishop, *Oral Argument in the Roberts Court*, *Litigation* (Winter 2009), at 6-11; Michael B. King, *Remembering John W. Davis: The Oral Argument of an Appeal*, *For the Defense* (Nov. 2000), <https://goo.gl/vDcOVw>.

<sup>11</sup> See, e.g., Larsen & Devins, *supra* note 2, at 1908 ("The Justices seem to prefer a system dominated by Supreme Court specialists who can be counted on for excellent advocacy."); *id.* at 1915-16 ("Although there are technically over 262,000 members of the Supreme Court Bar, the vast majority of cases now feature a select group of fewer than 100 lawyers who are repeat players at the Court."); Joan Biskupic et al., *The Echo Chamber: At America's Court of Last Resort, a Handful of Lawyers Now Dominates the Docket*, REUTERS INVESTIGATES, Dec. 8, 2014, <https://goo.gl/tj2NqM> ("[E]xclusive interviews with eight of the nine sitting justices indicate that most embrace the specialty Supreme Court bar. To them, having experienced lawyers handling cases helps the court and comes without any significant cost. Effective representation, not broad diversity among counsel, best serves the interests of justice, they say.")

<sup>12</sup> The audience member was Alan Gura, who has argued before the Supreme Court twice; both were landmark Second Amendment cases. Chi.-Kent Coll. of Law at Ill. Tech, *Alan Gura*, Oyez, <https://goo.gl/IHPjSu>. Gura is not alone in this opinion. Former Fourth Circuit Judge Michael Luttig, now general counsel for Boeing Co., has stated that the specialized Supreme Court bar "has become a guild, a narrow group of elite justices and elite counsel talking to each other." Biskupic, *supra* note 7. His concern is that the Court and bar that are increasingly "detached and isolated from the real world, ultimately at the price of the healthy and proper development of the law." *Id.*

...Continued from page 1: Editor's Note

inspired, this issue conveys the same spark generated by deep thinking about our profession.

One of the great rewards of the Summit is connecting with kindred spirits from around the country. In a sense, it's a retreat where we set aside our adversarial armor – or, perhaps, a magisterial robe – and discover that collegial fellowship abounds. This issue reflects that spirit as well. It's evident in both the authors' individual style and their dedication.

Looking ahead, I will be sharing responsibilities with an editorial board. More minds and laboring oars will facilitate the process and enrich the final product. Anyone interested in serving

in an editorial capacity should contact me if we haven't communicated.

The theme of the next issue will be announced soon. Anyone interested in contributing an article – even if they have an idea unrelated to a prescribed theme – should contact me at [dip@davidjperlmanlaw.com](mailto:dip@davidjperlmanlaw.com).

*Appellate Issues* is a great opportunity to publish on the law or legal profession. I am honored to be part of its expanding community.

David J. Perlman

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## Pixels to Punctuation – Writing in the Digital Age

By Richard Kraus

E-filing has become the standard for most appellate courts. The benefits of e-filing are many. For practitioners, there are considerable efficiencies and cost savings in electronically filing, processing, and serving bulky appellate filings. For courts, e-filing permits judges and staff the ability to access briefs, trial court records, and supporting materials electronically, and more recently, review them on tablets and other highly portable electronic devices. While the technical aspects of e-filing will continue to develop and improve, the procedural mechanisms are firmly in place.

The *Pixels to Punctuation* session at the AJEI Summit focused on “e-briefing,” which is a separate than e-filing. The nascent topic of e-briefing deals with ways to use electronic filings more effectively and persuasively. Too often, practitioners simply file a Word document that has been converted into PDF format, or even worse, a scanned version of a printed document. In either case, the electronic brief is nothing more than an on-screen version of the printed page, and fails to take advantage of the opportunities for advocacy offered by new technologies.

Robin Aoyagi and Eric Magnuson unveiled [Recommendations and Options for Appellate Courts to](#)

*Improve the Functionality and Readability of E-Briefs*, an exhaustive study generated by the Council of Appellate Lawyers. The project drew on the research and insights of sixteen CAL members, with the assistance of many judges, court staff, and experts. The report assembles the research on how courts and practitioners read and use electronic briefs, records, and other materials, and then offers a number of recommendations and options for courts to consider when implementing electronic systems and adopting court rules and procedures for e-filing.

Eric Magnuson offered some historical context, from the days when “cut-and-paste” relied on using scissors to recycle sections from previous briefs and opinions to the present availability of complex and advancing technologies available to courts and practitioners. He explained that appellate practice has become electronic in most jurisdictions and will be in all jurisdictions in the relatively near future. As a result, courts must adapt to the changes in briefing and accessing trial court records. The rules and procedures imposed by some courts demonstrate the difficulties in transitioning, such as requiring electronic filing but mandating use of mono-spaced fonts left over from the typewriter era. Mr. Magnuson emphasized a very basic point: choosing to stay with an old font is a choice, a decision to adhere to standards that make briefs less readable.

Robin Aoyagi then discussed the fixed electronic formats that are in use and available. The most common format is PDF, which makes it simple to generate a document that is easy to search and annotate. An archival format, PDF/A, is designed to ensure that briefs and opinions

will always appear the same, by using embedded fonts and disabling external links. The CAL report recommends against adoption of PDF/A by courts since it prevents use of effective techniques such as hyperlinking to research and record materials or embedding video or audio evidence. Another option for courts to consider is allowing a party to file briefs in both PDF and a non-fixed format such as Word, html, or rich text. The additional non-fixed formatted copy would give judges more flexibility, such as changing font types and sizes to adapt to the device used for viewing, or cutting and pasting key text from briefs into memos and opinions.

Mr. Magnuson raised an interesting point, noting that enhanced functionality of electronic briefs does not just affect readability. The ability to include video and audio content in briefs can directly impact a judge’s examination of evidence and influence the standard for reviewing jury findings. As an example, he noted that judges frequently watch videos of Miranda warnings and in-custody interrogation when reviewing issues relating to the voluntariness of a defendant’s statements. Decisions by courts about the required format (PDF vs. PDF/A) or limits on the size of uploaded files (videos can greatly increase the size of briefs) could affect the substantive review of dispositive issues.

Ms. Aoyagi then discussed the need to consider readability of briefs that are viewed on electronic devices. Most electronically filed briefs look the same as a printed document, due both to the learning curve for practitioners and the formats required by court rules in many jurisdictions. The latter reason is especially important in courts that retain page limits rather than word

counts. Constrained by page limit or font size requirements, practitioners may be unable to employ basic measures to enhance readability such as adequate white space or alternative fonts. Ms. Aoyagi strongly encouraged practitioners to find out what devices and annotation software are being used by judges in their jurisdictions. Reviewing a sample brief on the same device can provide insight into how judges read and work with briefs. (The CAL report has a table listing devices and software currently used by both federal and state appellate courts.)

Ms. Aoyagi summarized the key findings from studies that have identified the effect of “text density” on readability on electronic devices. A page with margins of one-and-a-half inches is much easier to read. Left justification is better than full justification. Times New Roman is a narrow font designed for newspaper columns and is difficult to read on screen. Fonts in the Century Schoolbook family are broader and more readable. The increasingly common 14-point standard may be best for Times New Roman, but other recommended fonts are most readable at 13-point size or even smaller. Double-spacing is disruptive for readers. It is a leftover function of typewriters that is made worse in Word, where double-spacing is actually 2 1/3 lines. The recommended line spacing for tablets is 1.2 to 1.3. Using bold or italic fonts for emphasis is far more effective than underlining or capitalization. Headings in all caps or title case are strongly discouraged. Mr. Magnuson explained that existing court rules do not reflect the research on readability. Studies on eye-movement and tracking demonstrate the need for shorter line length, which is promoted by wider margins.

Another overlooked consequence of electronic format is page numbering. In a PDF file read on a device, “page 1” is the cover. The standard practice of using Roman numerals for the introductory sections and restarting with Arabic numbers for the body can be confusing and impede navigation within a document. An internal reference in a brief to “page 10” may be useless if a judge changes font size to make reading easier. One solution is the use of paragraph numbering throughout the brief, which is unaffected by the use of non-fixed fonts and is better for pinpoint cites. Both Ms. Aoyagi and Mr. Magnuson discussed the need to make it easy for a reader to navigate within a document. Bookmarking is essential in electronic briefs, and is even more effective when combined with hyperlinking in the table of contents.

Other uses of hyperlinking in electronic briefs are still underutilized. Hyperlinking offers many advantages to a judge or law clerk reading a brief. A practitioner can include a link to exhibits and transcripts included in an appendix (which should be combined with the brief as a single document). Courts could consider allowing direct access and hyperlinking to electronically stored trial court records. While internal hyperlinking to materials filed with the brief or maintained on the court’s system is safe, there can be problems with external hyperlinking. Asking judges or staff to access the internet presents security and virus risks, especially when going to sites other than PACER, Westlaw or Lexis. The Fifth Circuit currently does its own hyperlinking of briefs to the electronic record and research services. Texas adds hyperlinks to research citations. The CAL report offers sug-

gestions for effectively using hyperlinking in briefs.

Justice Barbara Jackson talked about the changes she has seen at the North Carolina Supreme Court. She recalled the practice of filing seven copies of briefs and appendices on onion skin paper, prepared on computers that were used as nothing more than typewriters with storage capacity. Even with e-filed briefs, many of her colleagues work with hard-copy printouts. The legislature in her state has mandated that courts adopt a strategic plan that addresses technology needs, metrics, enterprise management, document management, and integrated case management. The goal is to implement an electronic system from initial filing in the trial court to the final steps in the appellate courts. Justice Jackson also talked about the benefits to the public of electronic access to opinions, briefs, and court filings. The level of transparency will enhance the accuracy of reporting about the courts.

Justice Jackson described her court as excited by the prospect of changes, even at the basic level of changing to exclusively using word counts rather than the current option of page limit or word count, mandating the use of serif and proportional fonts, and increasing font size. She and other colleagues enjoy the ability to have all briefs and record materials available on tablets while on the bench, as opposed to having stacks of some, but not all, briefs.

Judge Sam Thumma of the Arizona Court of Appeals views state courts as laboratories for exploring the use of technology to advance appellate practice. His court posts oral arguments to YouTube. "How-to" videos are available to

assist attorneys and pro se parties with procedural requirements, effective briefing techniques, and tips on oral argument.

The panelists encouraged the session attendees to review the recommendations in the CAL report, to employ the techniques that are allowed under existing court rules, and to work with courts to consider rule changes that will enhance the efficiencies and effectiveness of the appellate process.

The report is available [here](#).

## The Pain of Waiver

By Devin C. Dolive

Justice Frankfurter once remarked: “Wisdom too often never comes, and so one ought not to reject it merely because it comes late.”<sup>1</sup> Nevertheless, wisdom that arrives late can create problems for the appellate attorney. A client might not engage the appellate attorney until after trial counsel has already developed the record in the court below and the record is closed. Or the appellate attorney might herself file the notice of appeal and submit the appellant’s opening brief, and only then realize, on reply, that she should have raised some other issue or argument. Any number of scenarios can leave the appellate attorney wishing she had a time machine. This year’s AJEI Summit in Philadelphia may not have given attending appellate attorneys the key to the Tardis or some other time-travel device, but it provided the next best thing, in the form of a panel discussion entitled, “The Pain of Waiver: Everything You Ever Wanted to Know About Waiver but Were Afraid to Ask.”

Panelists were Justice Erin Peradotto of the New York State Supreme Court, Appellate Division, Fourth Department,<sup>2</sup> Chief Judge Brooks Smith of the United States Court of Appeals for the Third Circuit, and Judge Randy Smith of the United States Court of Appeals for the Ninth Circuit. David Tennant, an appellate attorney with Nixon Peabody LLP’s Rochester, New York, office (and not the Scottish actor who played Hamlet on stage and also starred in a certain TV series about time travel!) moderated this panel discussion with the two Judges Smith and Justice Peradotto.<sup>3</sup>

The panel presentation began with an eye-opening moment for appellate lawyers. The panel polled the appellate judges in the audience and asked whether any of them had **not** been called upon to address waiver. In a room full of appellate judges, not one hand went up.

The presentation, however, was not all “doom and gloom” for attorneys afraid of waiver. Certain issues and arguments cannot be waived. Judge (Randy) Smith noted that subject-matter jurisdiction is non-waivable;<sup>4</sup> doctrines going to justiciability, such as lack of Article III standing (in federal court) or an assertion of sovereign immunity or (in federal court) Eleventh Amendment immunity, are not easily waived. Even for issues and arguments that are waivable, application of waiver generally remains within the appellate court’s discretion. As Chief Judge (Brooks) Smith observed, while appellate courts prefer specificity in the arguments raised on appeal, the courts will also not be “blind” to what can be reasonably “teased out” from the briefs and the record. Judge (Randy) Smith pointed out that, in federal courts, there’s often no jurisdictional bar to considering new issues on appeal.<sup>5</sup>

Where appellate courts have the discretion to apply waiver, courts are less likely to exercise this discretion when (i) appellate review is necessary to prevent a miscarriage of justice; (ii) the trial court itself considered an issue or argument that the parties had not raised; (iii) a new issue or argument arises because of an intervening change in the law; (iv) the issue or argument is a purely legal one and does not depend on

the factual record already developed in the trial court; or (v) appellate review will remedy a plain error. Needless to say, the litigant's view of what constitutes a "miscarriage of justice" may be different from the appellate court's, but courts have also acknowledged, at least in the criminal context, that "relief from waiver may be granted when a defendant shows **good cause** for his failure to raise the issue in a timely manner ...."<sup>6</sup> Such "good cause" or "extraordinary circumstances"<sup>7</sup> standards underscore that waiver can, on occasion, be overcome.

Attorneys should assume that appellate courts are looking at whether or not issues and arguments have been preserved below, even if opposing counsel never once breathes the word "waiver" on appeal. Judge (Randy) Smith explained that there are generally three rationales for applying waiver: (i) it promotes the fullest development of the factual record and legal issues and arguments below, thereby promoting judicial efficiency and conserving judicial resources; (ii) it gives the appellate court the benefit of the trial court's analysis and shows respect for the tribunal; and (iii) it is often a matter of fairness to the parties, necessary to prevent "sandbagging." This last point makes clear that waiver is not just a "technicality" that appellate courts deploy, when it suits them, to police their dockets. If appellate courts were not attuned to waiver, then parties could stay silent in the trial court and wait to raise the "real" issues in the case on appeal, depriving their opponents of the opportunity to develop a full record. Parties could similarly "sandbag" their opponents by withholding arguments from an opening brief on appeal.<sup>8</sup> These are questions of fairness,

which is one reason why appellate courts sometimes apply waiver less stringently to *pro se* litigants and to those litigants who retain new counsel.

The panel at the AJEI Summit discussed how, and when, an appellate court will consider waiver *sua sponte*, without prompting from the litigants. The panel gave a simple answer – an appellate court will consider waiver *sua sponte* if there's value in doing so. A court will sometimes avoid addressing waiver head-on by issuing an opinion that says, in effect: "Appellant raises Argument X on appeal, but neither party addressed that argument in the record below. Therefore, Argument X is waived, and this Court need not consider it. However, even if Argument X had not been waived, the Court would reject Argument X as inconsistent with the following binding precedents ...." When asked when an appellate court will actually invoke waiver as the basis for its decision, the panel remarked that this can depend on the issue to be decided and who is in the majority.

When an appellate court opts to confront waiver head-on, the court still has to determine **what** has been waived. Chief Judge (Brooks) Smith's court addressed this question in *United States v. Joseph*.<sup>9</sup> This decision surveyed case law on appellate waiver from the First, Second, Third, Fifth, Eighth, Ninth, Tenth, and D.C. Circuits, and noted the courts have variously described **what** is being waived as a "question," a "theory," an "issue," an "argument," a "contention," a "ground," and a "basis."<sup>10</sup> Seeking to bring order to the chaos created by this inconsistent vocabulary, the *Joseph* court explained: "[T]he synonymous words 'question'

and ‘issue’ are broader in scope than the synonymous words ‘argument,’ ‘contention,’ ‘theory,’ ‘ground,’ or ‘basis’ in that the former words can encompass more than one of the latter.”<sup>11</sup> Justice Peradotto interjected that she uses visual imagery to describe the “issue versus argument” dichotomy discussed in *Joseph*: an “issue” is a big ball, while “arguments” are the little balls inside the big ball.

The procedural posture and facts of *Joseph* illustrate how the “issue versus argument” dichotomy works in practice – and the difference it can make. *Joseph* addressed the waiver of a suppression argument under Rule 12 of the Federal Rules of Criminal Procedure, presented in the context of an appeal from Mr. Joseph’s criminal conviction for counterfeiting. In the trial court, Mr. Joseph had raised the **issue** that his arresting officers lacked probable cause. Specifically, he had **argued** in the trial court that the officers lacked probable cause as to the *actus reas* of showing that his \$100 bills were, in fact, counterfeit. On appeal, he changed tack and **argued** that the officers lacked probable cause as to the *mens reas* of showing that he had the requisite intent to defraud when “passing” these \$100 bills at a gentlemen’s club.<sup>12</sup> The Third Circuit concluded that it was not enough for Mr. Joseph to have preserved the general “issue” of probable cause at the trial court’s suppression hearing. Instead, the Third Circuit affirmed Mr. Joseph’s criminal conviction on the grounds that Mr. Joseph had not preserved his *mens rea* “argument” on probable cause at the suppression hearing.

The *Joseph* court attempted to clarify that a party must preserve the specific “arguments” and not

just the broader “issues.” However, not all courts are in agreement with the Third Circuit’s analysis. Judge (Randy) Smith believes that the Ninth Circuit may be more of an “issue” court than an “argument” court,<sup>13</sup> but as noted in the case law collected in *Joseph*, the Ninth Circuit has itself used the words “theory,” “argument,” and “issue” interchangeably.<sup>14</sup> Chief Judge (Brooks) Smith was quick to point out that, even within the Third Circuit, *Joseph*’s “issue versus argument” dichotomy has generally been applied only in the criminal context in which it arose, namely, the suppression of evidence under Rule 12 of the Federal Rules of Criminal Procedure.<sup>15</sup> Applying this dichotomy in other contexts could potentially call into question the Supreme Court’s analysis in cases such as *Lebron v. National Railroad Passenger Corp.*<sup>16</sup> and *Yee v. City of Escondido*.<sup>17</sup> The Supreme Court has said that it will consider a litigant’s new “argument” in support of a “claim,” provided that the litigant previously raised its “claim” in the court below.<sup>18</sup>

Litigants concerned about waiver face a particularly thorny dilemma in deciding whether or not to cross-appeal a favorable judgment from the trial court. Chief Judge (Brooks) Smith gave the example of a summary judgment ruling entered in a defendant’s favor. When the plaintiff appeals the trial court’s summary judgment ruling, is it necessary for the defendant to cross-appeal the trial court’s decision finding the plaintiff’s expert’s opinions admissible under *Daubert*? If the appellate court were to find that the expert’s opinions create a dispute of fact sufficient to reverse the summary judgment ruling, has the defendant waived its *Daubert* challenge

to this expert's opinions by not filing a cross-appeal? Mr. Tennant gave another example: the intellectual property case where the trial court finds a valid patent but also finds no infringement of the patent. When the plaintiff appeals the "no infringement" ruling, must the victorious defendant cross-appeal the "valid patent" ruling in order to preserve the record on remand if the appellate court reverses the trial court's "no infringement" ruling?

Where applicable, the so-called "tipsy coachman" doctrine may help to mitigate against a multiplicity of cross-appeals from victorious parties. The Florida Supreme Court defines its "tipsy coachman" doctrine as follows: "[I]f the trial court reaches the right result, but for the wrong reason, it will be upheld if there is any basis which would support the judgment in the record."<sup>19</sup> Many federal circuits and other states apply similar rules,<sup>20</sup> but some of these jurisdictions limit application of their "right for the wrong reason" rules to affirmances based on reasons that the parties themselves had articulated - and thus preserved - in the court below.<sup>21</sup>

The panel at the AJEI Summit did not have an opportunity to discuss the "tipsy coachman" doctrine and other variants thereof, but Justice Peradotto was able to bring a state-court perspective to the discussion. She noted that state intermediate appellate courts may have some discretion to review issues not raised in the trial court's record below - the Appellate Division of the New York State Supreme Court has this discretion - but the highest court in the state may not have the same discretion. The distinction makes sense: in many states, there is no appeal

as of right from the intermediate appellate courts, so state high courts may decide to limit their discretionary review to those issues or arguments actually raised below, be they raised in trial court or in the intermediate appellate court.

Thus, the waiver analysis in an appeal from an intermediate appellate court may need to be two-fold: (i) was the issue or argument preserved in the trial court, and (ii) was the issue or argument also preserved in the intermediate appellate court? Chief Judge (Brooks) Smith pointed out that the Supreme Court has adopted a stringent standard when reviewing decisions from state high courts. If the federal question presented to the Supreme Court was **not** actually decided by the state high court, then the Supreme Court will **not** review the state high court's decision.<sup>22</sup> It is not enough for a litigant merely to raise a federal question in the state court proceedings; the state's high court must actually decide the federal question before that question can reach the Supreme Court.

Justice Peradotto noted that appellate courts are generally less concerned about waiver on interlocutory appeals than on appeals from final judgments. In interlocutory appeals, there will be more opportunity for the trial court to get things "right," and there is less concern about sending everything back to the trial court for a complete and total "do over." Of course, in New York state practice (and in other jurisdictions whose appellate courts lack a "final judgment" rule), there is an incentive to appeal just about every interlocutory order from the trial courts. The risk in not appealing an unfavorable order is that the appellate court might later conclude the interlocutory order did not affect

the final judgment. As such, the “safer practice,” at least in New York state courts, is to appeal practically every adverse order. Not every state, however, offers as broad a right to interlocutory appeal as New York. It may be difficult to develop general, across-the-board rules regarding waiver in state courts; instead, attorneys should remain cognizant of how the states in which they practice apply the “final judgment” rule and related doctrines.<sup>23</sup>

The panel at the AJEI Summit offered valuable practical pointers for avoiding waiver. Judge (Randy) Smith cited the old adage that anyone who can kiss a pretty girl (or boy) while driving is not giving the girl (or boy) the attention she (or he) deserves. For appellate attorneys with little opportunity for kissing while driving, the adage still applies: if an issue or argument is important (and pretty) enough to present on appeal, it’s also important (and pretty) enough to present in the trial court and again in the opening brief on appeal. The panel agreed that rais-

ing arguments only in footnotes, in cross-references to the record, or in appellate reply briefs could invite waiver. At the trial level, it is important to get a ruling, and for purposes of preserving the record on appeal, a “bad” ruling from the trial court is better than no ruling at all. Attention should also be paid to preparing the notice of appeal and in designating the record for appeal. And, after all of this, appellate attorneys should not forget the oral argument. No matter how well an issue or argument is preserved in the record below and in the appellate briefs, a concession at oral argument can still invite waiver.

In short, while the AJEI Summit in Philadelphia did not provide attendees with a time machine they can use to “fix” their past waivers, the attorneys in attendance received good pointers on avoiding waiver in future cases. Of course, the appellate judges in attendance also received good pointers for spotting and applying waiver, so litigants (and their counsel) beware!

<sup>1</sup> *Henslee v. Union Planters Nat’l Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

<sup>2</sup> For those unfamiliar with New York’s appellate system, the Appellate Division, Fourth Department is one of four intermediate appellate courts in the state. The Fourth Department sits in Rochester and covers 22 counties in upstate New York. Justice Peradotto has her chambers in Buffalo.

<sup>3</sup> The panel also expressed their gratitude to Deena Schneider (who, like Mr. Tennant, is active with the Council of Appellate Lawyers) for her role in preparing the comprehensive written materials provided to attendees.

<sup>4</sup> See, e.g., Fed. R. Civ. P. 12(h)(3) (“If the court determines **at any time** that it lacks subject-matter jurisdiction, the court must dismiss the action.”) (emphasis added).

<sup>5</sup> Whether “waiver” is jurisdictional or discretionary may depend on the context and the underlying statute. For example, in conferring jurisdiction on courts to review agency actions, some statutes expressly limit the court’s jurisdiction to reviewing objections raised as part of the agency’s proceedings. See, e.g., *Oldwick Materials, Inc. v. NLRB*, 732 F.3d 339, 341 (3d Cir. 1984) (finding application of LMRA § 10(e) to be “mandatory, not discretionary”; LMRA § 10(e) limits judicial review, at least in the absence of “**extraordinary circumstances**,” to those objections raised before the Labor Board).

<sup>6</sup> *United States v. Warren*, 788 F.3d 805, 811 (8th Cir. 2015) (declining to consider a waived issue where the defendant failed to offer any explanation for his failure to raise that issue in a timely manner) (emphasis added); see also Fed. R. Crim. P. 12 (codifying this “good cause” standard in the trial courts).

<sup>7</sup> See *Oldwick Materials*, 732 F.3d at 341.

<sup>8</sup> See *Fogarty v. Southworth*, 953 So. 2d 1225, 1232 (Ala. 2006) (per curiam) (“If the rule were otherwise, an appellant could ‘sandbag’ an appellee by withholding an argument on an issue until the reply brief, thereby depriving the appellee of the opportunity to respond.”) (footnote citing the dictionary definition of the verb “sandbag” omitted).

<sup>9</sup> 730 F.3d 336 (3d Cir. 2013).

<sup>10</sup> See *id.* at 339.

<sup>11</sup> See *id.* at 340.

<sup>12</sup> See *id.* at 338.

<sup>13</sup> See *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004) (“As the Supreme Court has made clear, it is claims that are deemed waived or forfeited, not arguments.”).

<sup>14</sup> See *United States v. Scott*, 705 F.3d 410, 415-16 (9th Cir. 2012).

<sup>15</sup> But see *Lincoln v. Magnum Land Servs., LLC*, 560 Fed. App’x 144, 151 (3d Cir. 2014) (unpublished) (a civil case finding waiver of an “argument” under *Joseph*); *Greene v. Virgin Islands Water & Power Auth.*, 557 Fed. App’x 189, 197 n.11 (3d Cir. 2014) (unpublished) (“We are cognizant that the rule expressed in *Joseph* arose in the context of a criminal proceeding .... Nevertheless, we see no reason to refrain from applying it in this [civil] context.”).

<sup>16</sup> 513 U.S. 374 (1995).

<sup>17</sup> 503 U.S. 519 (1992).

<sup>18</sup> See *Lebron*, 513 U.S. at 379-80; *Yee*, 503 U.S. at 535. In *Lebron*, the petitioner not only failed to raise his “point” below; “he expressly disavowed it in both the District Court and the Court of Appeals.” See *Lebron*, 513 U.S. at 379. Nevertheless, the Supreme Court held that this expressly-disavowed “point” was “not a new claim ... but a new argument to support what has been his consistent claim.” See *id.* at 380. In *Yee*, the Supreme Court stated the rule as follows: “A litigant seeking review in this Court of a claim properly raised in the lower court thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below.” *Yee*, 503 U.S. at 535.

<sup>19</sup> See *Dade Cnty. School Bd. v. Radio Station WQBA*, 731 So. 2d 638, 645 (Fla. 1999). The phrase “tipsy coachman” originates in an Oliver Goldsmith poem that the Georgia Supreme Court recited in an 1879 decision: “[T]he pupil of impulse, it forced him along, [/] His conduct still right, with his argument wrong, [/] Still aiming at honor, yet fearing to roam, [/] The coachman was tipsy, the chariot drove home.” See *Lee v. Porter*, 63 Ga. 345, 346 (1879).

<sup>20</sup> See, e.g., *Queen v. Schultz*, 747 F.3d 879, 884 (D.C. Cir. 2014) (“We may affirm summary judgment on any ground supported by the record, even if it differs from the theory applied by the district court, ‘provided that the opposing party has had a fair opportunity to dispute the facts material to that ground.’”); *Leecan v. Ropes*, 893 F.3d 1434, 1439 (2d Cir. 1990) (“[W]e are free to affirm an appealed decision on any ground which finds support in the record, regardless of the ground upon which the trial court relied.”); *Outdoor Media Dimensions Inc. v. State*, 20 P.3d 180 (Or. 2001) (“[T]he ‘right for the wrong reason’ principle permits a reviewing court – as a matter of discretion – to affirm the ruling of a lower court when certain conditions are met.”); *Ex parte Ryals*, 773 So. 2d 1011, 1013 (Ala. 2000) (“[A]n appellate court can affirm a summary judgment on any valid argument, regardless of whether the argument was presented to, considered by, or even rejected by the trial court.”); *Driscoll v. Commonwealth*, 417 S.E.2d 312, 313 (Va. Ct. App. 1992) (“An appellate court may affirm the judgment of a trial court when it has reached the right result for the wrong reason.”).

<sup>21</sup> See, e.g., *EEOC v. Simbaki, Ltd.*, 767 F.3d 475, 481 (5th Cir. 2014) (“We may affirm summary judgment on any basis **raised below** and supported by the record.”) (emphasis added); *Dye v. United States*, 360 F.3d 744, 750 (7th Cir. 2004) (“However, we are permitted to affirm on any basis identified in the record that was **argued below.**”) (emphasis added).

<sup>22</sup> See *Wolfe v. North Carolina*, 364 U.S. 177, 196 (1960).

<sup>23</sup> For example, in the author’s home jurisdiction of Alabama, the “final judgment” rule applies, and there is no automatic right to an interlocutory appeal. The Alabama Supreme Court will, however, grant *mandamus* review over a wide variety of interlocutory rulings. This does not mean that the Alabama Supreme Court will, in fact, exercise its discretion and grant *mandamus* review in every case involving an interlocutory order fit for *mandamus* review. Therefore, rather than roll the *mandamus* “dice,” the Alabama litigant may sometimes prefer to take solace in the “final judgment” rule and wait to appeal as a matter of right following final judgment and the development of a complete record.

## AJEI 2016 Summit – Election, ‘Merit,’ or Advice and Consent: Trends in Judicial Selection

By Howard J. Bashman

The difficult and often mysterious issues of judicial selection and retention were the subject of a spirited and interesting panel at the 2016 AJEI Summit. Rebecca Love Kourlis, executive director of the Institute for the Advancement of the American Legal System and a former justice on the Supreme Court of Colorado, served as the moderator. The panelists consisted of then-Justice Brent D. Benjamin of the Supreme Court of Appeals of West Virginia (whose term concluded on December 31, 2016); Carrie Severino, chief counsel and policy director of the Judicial Crisis Network, a conservative group that favors judicial elections; and law professor Jed Shugerman of the Fordham University School of Law, author of *The People’s Courts: Pursuing Judicial Independence in America* (Harvard Univ. Press).

Former Justice Kourlis began the discussion by asking each panelist to offer introductory remarks and to identify what method of judicial selection the panelist views as preferable. Justice Benjamin spoke first. He came to national attention as the judicial officer who was the subject of the U.S. Supreme Court’s ruling in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). In that case, the Court ruled by a vote of 5-to-4 that Justice Benjamin should have recused himself from hearing an appeal involving a corporation whose campaign contributions and independent expenditures supporting Benjamin’s election to West Virginia’s highest court constituted

more than 50% of the donations and spending on his candidacy’s behalf.

Justice Benjamin stood for reelection in 2016, and by that time West Virginia had changed from partisan to non-partisan judicial elections. West Virginia also had instituted an optional system of public financing for judicial candidates, in which Benjamin chose to take part. In the 2016 election, the major corporation that had donated so much money to Benjamin’s 2004 campaign no longer supported him because he had voted against the company in numerous cases involving hundreds of millions in damages. In 2016, Benjamin ended up losing his seat on West Virginia’s highest court to a candidate who did not opt for public financing.

In the years following the U.S. Supreme Court’s decision in *Caperton*, Justice Benjamin has become a frequent and outspoken critic of the elective method of selecting judges. That may come as a surprise to many who learned of him, via the *Caperton* decision, as the judge most notoriously associated with having attained judicial office through a partisan, privately-financed system of judicial elections. Justice Benjamin concluded his initial remarks by stating that his preferred method of judicial selection is a form of merit selection where a state’s governor chooses among nominees selected by a nominating commission, followed by some form of legislative approval of the governor’s choice.

Carrie Severino spoke next, announcing at the outset that, in her view, the partisan election of

judges was the best method of judicial selection. She observed that many political factors go into judging, chief among them that in state courts the judges are responsible for deciding the scope and direction of the common law. She noted that partisan elections are a less expensive method of choosing judges from the perspective of the states using that method. Severino noted that no evidence existed that elected judges were of lower quality than judges selected via another method, but evidence does exist that elected judges are more productive in deciding cases. Severino also reported that public confidence in the decisions of elected judges is not reduced despite the fact that candidates for judicial office must raise money for their campaigns.

Professor Shugerman began his remarks by tracing the somewhat surprising origins of judicial elections in the United States. Judicial elections arose as a method of selection intended to counteract the judges of the pre-Civil War era who were viewed as being too much under the influence of politicians who had previously been in charge of the judicial selection process. Those who backed judicial elections in the ten-year period before the Civil War, when that method of selection grew in popularity, thought that electing judges would make them more, not less, independent of politicians, and that voters would pick the best judges.

Shugerman explained that in the 1930s, big business was a strong supporter of the merit selection of judges, but that business later grew to oppose merit selection as the judges chosen via that method began to skew more liberal. He also observed that lawyers in general may be more

pro-business but also more liberal on social issues than the overall public.

In Professor Shugerman's view, the length of a judge's term correlates most directly with the amount of judicial independence the judge enjoys. He agreed with Severino that the evidence is mixed concerning whether judges selected through a merit system are somehow better than judges selected via other methods. Professor Shugerman also observed that one major disincentive to voting against a sitting judge in an up-or-down retention election is that the alternative to the current judge remains entirely unknown, to be determined later. The excerpts from Professor Shugerman's book *The People's Courts*, provided in the session's written materials, demonstrate that there is no one "best" method of judicial selection. Rather, each method has its advantages and drawbacks, and as the drawbacks of any given method are exploited more, other methods may begin to look preferable by comparison.

After initial remarks from the panelists, former Justice Kourlis noted that in Colorado, judges receive intense scrutiny through an evaluation process from lawyers before they stand for retention. In her experience, the judges who have received the highest evaluations often achieve the highest margins of support in retention elections in Colorado.

During the discussions among the panelists that followed, Justice Benjamin expressed a concern that judges might alter their votes on controversial matters as retention elections approach. He was also critical of the public finance system for judicial elections in which he chose to partici-

pate, noting that it gave candidates who were not participating a target for how much money they needed to raise to outspend the candidates who relied on public funds. He characterized judicial elections as “full contact sports.”

Severino, in her second round of remarks, focused criticism on the so-called merit selection of judges. She noted that individuals serving on the commissions that propose candidates to a governor are unknown. Although it might be beneficial to have non-lawyers participating on such commissions, Severino feared that lawyers on those panels would always have greater influence than non-lawyers. She was very skeptical that up-or-down retention votes gave members of the public enough of a voice in the process, noting how very infrequently sitting judges have lost retention contests. If retention elections were meaningful, more judges would fail to attain retention, Severino observed.

In his final comments, Professor Shugerman bemoaned the likely influence of so-called “dark money” campaign financing in judicial elections. The manner in which First Amendment concerns apply in ordinary political elections likely will continue to raise especially difficult and vexing problems in the area of judicial elections going forward.

The moderator saved some time at the end for questions from the audience, and several of the judges who asked questions were from states that elected their judicial officers. Their questioning displayed a notable degree of disenchantment from sitting judges who reached office and have remained there as the result of judicial elections.

Given the variety of methods that the 50 states use to select and retain their judges and the unlikelihood that any one method can be shown to be distinctly superior to the other methods, not to mention the difficulty any given state will likely face in seeking to alter its method of judicial selection, disagreement over the preferred method of judicial selection and dissatisfaction with the methods currently in use is certain to continue far into the future.

## Is the Pendulum Swinging? Mandatory Minimums

By *Gaëtan Gerville-Réache*

Since the 1970s, state and federal governments have implemented significant sentencing reforms, with many jurisdictions shifting away from a system of broad judicial discretion under indeterminate schemes to more structured schemes such as determinate sentencing, mandatory minimum penalties, and sentencing guidelines. Dueling criticisms spurred these movements: On the one hand, tough-on-crime advocates complained that judicial discretion allowed for too much leniency and disrespect for the law. On the other hand, social reformers and civil-rights advocates argued that it allowed personal bias and subjectivity to infiltrate the decision-making process, resulting in unjustified disparities and unfair sentences for the socially disadvantaged. But since 2000, dozens of states have repealed mandatory minimums, particularly for drug-related offenses, in response to criticism that the minimums were draconian, overcrowded the prisons, and came to close a one-size-fits-all approach. In that same timeframe, the United States Supreme Court has further increased judicial discretion by issuing a series of decisions that largely invalidate mandatory sentencing guidelines as a violation of the Sixth Amendment.

At the recent AJEI Summit, Justice Lana Myers from the Texas Court of Appeals, Fifth District, led a star-panel of experts from three different sentencing systems--military, state, and federal--in a discussion of trends within different criminal justice systems in the exercise of sentencing discretion. Jonathon Wroblewski, Deputy As-

sistant Attorney General, U.S. Department of Justice, offered his insights into the federal system. The Honorable Stefan R. Wolfe, Lieutenant Colonel U.S. Army, from the U.S. Army Court of Criminal Appeals, spoke from inside the military system. And the Honorable Michael Keasler from the Texas Court of Criminal Appeals, discussed his experience with his state's sentencing system.

### **Is the pendulum of sentencing discretion and reform swinging?**

The discussion began with Jonathon Wroblewski explaining that the pendulum is definitely swinging in the federal system, but maybe not in the direction everyone thought it would, after November's election results. Wroblewski, who has worked in the federal criminal justice system for 28 years, said that mandatory minimums are from a bygone era, and unfortunately, the recent movement to reform them across the country bypassed the federal system. Because federal mandatory minimums are in the criminal code, they can't be divorced from it without new legislation. Wroblewski has seen the introduction of considerable sentencing-reform legislation to eliminate mandatory minimums or reduce their severity. After the recent election, criminal justice reform will still be on the agenda, but it will probably look somewhat different. The good news is that the existing movement is a bipartisan effort with interesting alliances, such as the Koch brothers and the ACLU on the same side of the issue, leaving some question as to how much influence recent political developments will have on the current

movement's direction toward greater judicial discretion.

The federal guidelines system has also swung in a new direction, according to Wroblewski. The federal system is fraught with overlapping and redundant laws, each with their own minimum and maximum penalties. For example, stealing has been illegal from the time of common-law crimes, but every time someone comes up with a new way to steal, Congress feels the need to come up with a new law to address it, resulting in a host of overlapping statutes addressing mail fraud, securities fraud, consumer fraud, etc., each with its own special sentencing requirements. The sentencing guidelines were enacted in 1997 to make sense of these various disparities and bring greater uniformity to federal sentencing. But the guidelines themselves have become highly complicated. From Wroblewski's point of view, the federal code and guidelines are not a great model for sentencing. Though the guidelines were meant to be presumptive (some would say mandatory), the United States Supreme Court found them unconstitutional in *United States v. Booker*, 543 U.S. 220 (2005), and made them advisory. The movement toward structured sentencing in the federal system was partly undone by *Booker*, returning considerable sentencing discretion to the federal judiciary.

The military sentencing system stands on the other side of the spectrum from the federal system, according to Judge Wolfe. In 1950, the government created a jury-only sentencing system, where the jury selects a sentence anywhere in the range for a given offense, from no punishment to the maximum authorized punishment.

There are few mandatory minimums: premeditated murder requires a minimum sentence of life without parole. Spying requires a mandatory minimum sentence of death. This resistance to mandatory minimums may in part be explained by the characteristics of the typical defendant in these cases. A military court-martial is usually for a first-time offender. This is a productive member of society, someone who volunteered to serve his or her country, and often someone working to support a family.

Not much has changed in terms of mandatory minimums since the 1950s. In the late 1980s, the government stopped paying salaries for those in jail; an uncontroversial amendment. It also passed a mandatory minimum of dishonorable discharge for rape. The maximum sentence for rape is now life without the possibility of parole. Other than these two changes, the system has remained largely the same, giving broad discretion to the jury in most instances to enter anything from the maximum penalty to no penalty at all.

Last year, the Department of Defense forwarded a bill that would require judge-only sentencing in non-capital cases, along with non-binding guidelines. It also proposed unitary sentencing, that is, a system that provides one sentence, no matter how many offenses are committed. The Senate passed it with minimal changes, and it has been in conference in the House. Judge Wolfe noted that as the pendulum has swung one way in the federal system with *Booker* granting trial courts more discretion, it may be swinging the other way in the military system, where legislation has been introduced to con-

strain or guide sentencing authority. Perhaps the two systems are meeting in the middle.

Judge Keasler explained that in Texas, the trial bench still has discretion "with a vengeance"--there has been no real change. For first-degree felonies which are not capital (such as aggravated sexual assault and aggravated kidnapping), the available sentences range from 5 years to life imprisonment. Texas does offer jury sentencing. The defendant has a choice whether to have the judge or a jury assess the punishment. But the judge can tailor the sentence to the defendant. Two people can commit exactly the same crime, one judge can assign five years and another life. The judiciary receives little criticism for the disparities that result because juries, by comparison, are "just crazy" in the sentences they impose. Judicial sentencing is usually the preferred option. And the appellate courts in Texas have little discretion to reform those sentences.

### **What do you see as the benefits and drawbacks of mandatory minimums?**

On the pros and cons of mandatory minimums, Wroblewski said that the threat of imprisonment can be an effective deterrent, but only if people know what the consequences will be. Swift, certain, and fair consequences can have deterrent effect. Mandatory minimums can reduce unwarranted disparities in sentencing, and can lead to greater respect for the law. But there is a major drawback: Wroblewski has yet to find central rule-making authority that can come up with a rule or rules that will provide for just sentences in most, let alone all, cases. There have been attempts to take the relevant mitigating factors into account in sentencing.

But one murder is not the same as another and authorities have been unable to create rules that capture all of the relevant considerations. For this reason, the rules need to leave some discretion to the court. Balance is the answer. Find balance between certainty and indeterminacy, between legislative mandate and judicial discretion. Calls for reform usually involve an argument that the balance is off.

Judge Wolfe disagreed with the idea that mandatory minimums were appropriate: for a mandatory minimum to be appropriate it must be appropriate in all cases, which is not the case. An air force pilot who was drunk on duty should not be viewed in the same light as a seaman standing watch drunk. A disparity between the sentences under these different circumstances makes sense. This is why the military permits so much discretion in sentencing, all the way down to no sentence at all.

Though he favored great discretion, Judge Wolfe recognized that juries are untrained, their sentences vary wildly, and discretion allows impermissible biases to influence the sentence. For instance, people likely to be more lenient with the sort of people they can identify with than those they cannot. The greater the discretion, the greater the danger that the sentence will be determined based on inappropriate factors, such as whether the defendant presented an affirmative defense, whether the jury felt misled, and how the defense attorney presented himself. There is also inconsistency associated with a system of unfettered discretion. When sentences vary based on who the judge was, or his or her branch of service, that is a problem. When it is the same crime with the same harms,

it becomes much harder to justify a significant disparity.

Judge Keasler agreed with Judge Wolfe that the problem with discretion is that it allows for unjustified disparities. One chief judge in the Texas trial courts, who noticed significant disparities within his own court, took action to minimize those disparities by meeting with other judges before sentencing day. They would review and discuss all cases together, and each would tell the others what sentence he or she would impose in his or her own cases and in the other judges' cases. They would then discuss the disparities. The judges still retained complete discretion in their own cases, but they found the discussions resulted in significantly more uniformity from one courtroom to the next.

**What effect does the presence of sentencing discretion and mandatory minimums have on prosecutorial discretion and plea negotiations?**

To show that mandatory minimums affect plea negotiations, Wroblewski shared a telling anecdote about his work as a defense lawyer in Alameda County, which includes such diverse communities as Berkeley, Oakland, Pleasanton, and Fremont. Each municipality has its own municipal courts, and the sentences in each one vary widely because the communities they serve are quite different. Before guidelines were enacted to guide and cabin sentencing discretion, only 85% of criminal defendants accepted a plea bargain. After the sentencing guidelines were enacted, the percentage rose to 97%. The guidelines had a dramatic effect not only on defendants but on prosecutors as well. Once

they had a system that provided predictable sentencing, both sides could more objectively evaluate what the case was worth in terms of penalties and come to an agreement on a plea bargain. Achieving this necessarily required reining in the discretion of individual judges.

Of course none of the policy changes have been satisfactory to everyone. Memos circulated in the republican administration have argued for charging the highest offense. Mr. Wroblewski believes a greater reduction of judicial discretion of this sort might work if it were consistent with local community values, but not when the level of sentencing is set much higher than the local community believes is reasonable.

Judge Wolfe agreed that without guidelines, no one knows where to begin the plea bargaining. The parties start without much information, only the personal experiences of the attorneys involved. Sentences given in recent military cases vary greatly because there are no guidelines to guide the jury's discretion. Consequently, it is difficult to predict what sentence a defendant will receive. Because of this, there are not many guilty pleas. Judge Keasler offered a word of caution that the more you take discretion out of the court's hand, the more you put it in the prosecutor's hand.

**How much authority do appellate courts have to revise sentences? What are the benefits and drawbacks to this appellate-court authority?**

Mr. Wroblewski started the discussion of appellate review by explaining the new world of federal sentencing under *Booker*. The appellate courts now review sentences for

"reasonableness." There is both a procedural and a substantive component to their reasonableness review. On procedural grounds, the trial courts are quite open to reversal for unreasonableness. In most cases, however, the judge gives the exact same sentence on remand. That cannot happen when the sentence is found to be substantively unreasonable, but such reversals are rare. Courts have struggled to determine what substantive reasonableness means, given that the guidelines are advisory and a judge can take anything into consideration, including his own sentiments on policy, even when they are contrary to the United States Sentencing Commission's policy. Consequently, there have only been a few instances where a judge grossly departed from the guidelines and the appellate court corrected the sentence.

Unlike the federal system, a military court of appeals conducts a *de novo* review of a sentence to ensure it is appropriate, according to Judge Wolfe. Under Article 66(c) of the Uniform Code of Military Justice, a court can only affirm those parts of a sentence it finds correct as a matter of law and fact. Moreover, the court of appeals is only authorized to reduce a sentence, not increase it. One would expect with *de novo* review that adjustments would be plentiful, but Judge Wolfe's court rarely decides a jury's sentence is too high. He has no explanation for this phenomenon, except that he has always determined the sentences he has seen were appropriate.

The main problem with appellate sentencing review, according to Judge Keasler, is that the appellate court was not there in the courtroom. The cold record often does not accurately and

fully reflect what was seen and heard at trial. There are many subtleties and nuances not apparent to an appellate court. Not even the trial judge will notice all from the bench. In his view, the jury, between its twelve members, comes closer to capturing every nuance.

Mr. Wroblewski closed with a cautionary note that sentencing is not a science. There is not one right answer. The sentence often reflects community priorities and values. Those values differ from one community to the next and they change over time. What may have been appropriate 20 years ago may be inappropriate now, and Wroblewski sees nothing inconsistent about that. Finding the right balance between discretion and restraint often entails identifying the actor in the best position to exercise that power. Wroblewski finds that many of the problems with the federal system arise from imbalances of power; the power is deployed in the wrong places. The federal system has not recognized that, for the high-crime era of 70s and 80s, one particular balance of power may have been appropriate, but a different balance may be more appropriate now in this low-crime era.

## Ross Guberman's: *The Role of Personality*

By Wendy McGuire Coats

By now, you hopefully have sitting on your bookshelf or desk either or both of Ross Guberman's guides for legal writers, *Point Made. How to Write Like the Nation's Top Advocates* or *Point Taken. How to Write Like the World's Best Judges*.

In November, Guberman made his second appearance at the AJEI Summit in Philadelphia, during which he asked the diverse legal writers in the room to consider what, if any, role personality plays in legal writing. What follows is a compressed taste of Guberman's observations and examples on the injection of personality into legal writing.

A master of the writing workshop, Guberman began with a rhetorical opener: "*When people read my writing, I hope they see me as . . .*" When the audience was faced with that question, things got real, real quick.

So are you a pure or impure writer? First, Guberman described the writers in Judge Posner's dichotomy as *pure* or "lofty, form, imperious, impersonal" legal writers and *impure* writers, who write directly in a forthright manner that is more "informal, frank, even racy." Ultimately, Guberman posits that whether a writer takes a more *pure* approach or a more personalized *impure* one, the choice of which tone to take necessarily is a personality choice. To that end, Guberman's premise is this: It is impossible to avoid any semblance of a personality in writing because stripping legal analysis of any human touch naturally conveys a personality, one that is cold, imperious, and remote.

Consequently, he queries whether the Platonic ideal of pure, personality-free writing is even possible and if it is, whether it is desirable or persuasive.

So back to his initial obvious and challenging question, "*When people read my writing, I hope they see me as . . .*"

For comparison and consideration, Guberman suggests four complimentary and aspirational qualities: Engaging. Candid. Imaginative. Approachable. To be sure, Guberman never hints at or suggests that the legal writer aspiring to incorporate these qualities should trip over into a tone of disrespect or self-indulgence.

Much like his books, Guberman's teaching strength is his cache of illustrative examples, which transform the theoretical into something tangible.

### The Engaging Writer - Advocate John Roberts:

For generations, Inupiat Eskimos hunting and fishing in the DeLong Mountains in Northwest Alaska had been aware of orange- and red-stained creekbeds in which fish could not survive.

In the 1960s, a bush pilot and part-time prospector by the name of Bob Baker noticed striking discolorations in the hills and creekbeds of a wide valley in the western DeLongs. Unable to land his plane on the rocky tundra to investigate, Baker alerted the U.S. Geological Survey.

Exploration of the area eventually led to the discovery of a wealth of zinc and lead deposits. Although Baker died before the significance of his observations became known, his faithful traveling companion—an Irish Setter who often flew shotgun—was immortalized by a geologist who dubbed the creek Baker had spotted “Red Dog” Creek.<sup>1</sup>

The engaging writer develops a knack for seamlessly dropping the reader into the narrative, drawing the reader in and sweeping them along. The engaging writer tackles the tough road cluttered with abstract and often archaic legal principles and uses language to transform the dense issue into story. And probably the most impressive hallmark of an engaging writer is the ability to generate empathy and admiration out of fact patterns that do not traditionally lend themselves to character and story. The compelling narrative grounds the legal principles in context, which will aid judges and lawyers since legal issues generally do not make sense when taken out of the underlying story.

### **The Candid Writer - Justice John Roberts:**

DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices. The Federal Government and the States have recognized this, and have developed special approaches to ensure that this evidentiary tool can be effectively incorporated into established criminal proce-

dures—usually but not always through legislation.

Against this prompt and considered backdrop, the respondent, William Osborne, proposes a different approach: the recognition of a freestanding and far-reaching constitutional right of access to this new type of evidence. The nature of what he seeks . . . .<sup>2</sup>

The candid writer could also be referred to as the “good news, bad news” writer because of the ability to quickly frame the losing or opposing side’s viewpoint in a palpable, pragmatic way before undermining or rejecting it. The candid writer flips the coin and flips the outcome. The candid writer writes with an honesty and balance that fairly addresses counterarguments. In many ways, the candid writer’s skill respectfully postures the opposition’s position just before handily dismantling it. But in respecting the opposing view, the candid writer deepens, not diminishes, respect for the argument that should carry the day.

### **The Imaginative Writer - Justice Elena Kagan:**

Imagine a friend told you that she hoped to meet “an actor, director, or producer involved with the new Star Wars movie.” You would know immediately that she wanted to meet an actor from the Star Wars cast—not an actor in, for example, the latest *Zoölnder*. Suppose a real estate agent promised to find a client “a house, condo, or apartment in New York.” Wouldn’t the potential buyer be an-

noyed if the agent sent him information about condos in Maryland or California?<sup>3</sup>

Literally, imagine. The imaginative writer is the master of analogy, who invites the reader into the legal world, typically through clever and evocative verbs. Whether it is Justice Ginsberg's use of *pigeonhole*<sup>4</sup> or Paul Clement's use of *smack*,<sup>5</sup> the vividness of verb choice transforms the traditional into the imagery in an instant.

So, too, does the imaginative writer take the opportunity to paint a more detailed picture. The imaginative writer not only invites the reader but also entices the reader to read on. The imaginative writer's talent shapes the reader's view to see the law through a crisp lens, leaving no room for doubt in the position held. To wit, Justice Scalia:

I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross and that the judges of this august Court would someday have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot really a golfer?<sup>6</sup>

### **The Approachable Writer – Patricia Millet:**

More broadly, the real test of a “compelling interest” is not whether all

50 States have laws against the conduct— **there are lots of laws against lots of conduct** –but the government's allegiance to that interest when confronted with powerful countervailing interests.<sup>7</sup>

The approachable writer breaks down the law using folklore, idiom, and direct, natural language. The approachable writer offers up analysis using language just casual enough to easily read without falling into a slang style that diminishes the importance and reverence for the brief or opinion. The approachable writer has a sense of time and place along with deep empathy for the reader. The approachable writer uses a direct and somewhat conversational dialogue that is classically impure in character. The approachable writer is most assuredly adept at confidently expressing bad news, typically to the losing side of the argument.

After these examples, Guberman resisted recommending a path all legal writers should follow. Instead, he left us pondering several questions to consider both in the legal writing we read and that we write.

Where could these characteristics take today's legal writer and the resulting prose?

First, permitting personality into legal writing through the use of straightforward, engaging language in no way condones caustic, personally aggressive, or abusive language or pronouncements. Such can hardly be reconciled with the adjectives: engaging, candid, imaginative, and approachable. The writer who confuses passion with pot shots and invective takes

the easy way out and avoids the intellectual challenge of actually reasoning through the law and the facts.

Second, Guberman repeatedly circled back to his first premise: Is there even a choice to leave all personality out of legal writing? And if so, isn't this a personality choice in and of itself. So if the choice is to allow more impure conversational personality into the legal writing, is there danger that it will diminish the professionalism

and respect of the work product? And where is the balance? For example, even when a writer attempts to engage through narrative and candidly provide a fair picture of the other side, the writer must be cautious not to show off or become self-indulgent with the writing itself.

To keep the balance, Guberman offered up this final fulcrum: The writing must always serve the brief or the opinion. Personality should serve the writing, not the writer.

<sup>1</sup> John Robert's brief: [www.legalwritingpro.com/briefs/alaska-epa.pdf](http://www.legalwritingpro.com/briefs/alaska-epa.pdf).

<sup>2</sup> *District Attorney's Office for the Third Judicial District, et al. v. Osborne*, 557 U.S. 52 (2009).

<sup>3</sup> *Lockhart v. United States*, 577 U.S. \_\_\_\_ (2016) (Kagan, J., dissenting opinion).

<sup>4</sup> *Patrica Millet's Brief*: [www.fepproject.org/courtbriefs/Stevens.Respondent'sBrief.pdf](http://www.fepproject.org/courtbriefs/Stevens.Respondent'sBrief.pdf).

<sup>5</sup> Paul Clement's brief: [www.legalwritingpro.com/briefs/clement-brief.pdf](http://www.legalwritingpro.com/briefs/clement-brief.pdf)

<sup>6</sup> *PGA Tour, Inc. v. Martin*, 52 U.S. 661 (2001)

<sup>7</sup> *United States v. Stevens*, 559 U.S. 469 (2010)

## Fireworks In The Crystal Ball

By Steve Emmert

First-day attendees at the 2016 Appellate Summit got more than they expected during the panel discussion entitled, “Evolution or Revolution? The Future of the Supreme Court.” SCOTUSblog’s Amy Howe moderated the conversation that included Prof. Sanford Levinson of the University of Texas, Ed Whelan of the Ethics and Public Policy Center, and UC-Irvine Dean Erwin Chemerinsky.

It’s worth mentioning at the outset that this program was planned after the death of Justice Scalia in February, but before the November 8 election (just two days before the Summit convened) that gave us President-Elect Trump. The widely unexpected results of the latter event no doubt caused the panelists to revise their presentations a bit.

Howe first asked the panel to comment on the extended vacancy on the Court after Scalia’s death. She cited Sen. Ted Cruz’s statement that there’s precedent for a court with fewer and nine members, and Justice Breyer’s assertion that the vacancy “doesn’t affect us.” Are they right?

Chemerinsky’s well-known liberal views prompted him to jest that he’d be fine with an eight member Court for the next four years. He chided Senate Republicans for refusing to vote on the President’s nomination of Judge Merrick Garland, but acknowledged that there is no way to force the Senate to act, even though the Constitution assumes Senatorial good faith.

That’s all academic now, he sighed, noting that a Republican Senate will soon confirm Trump’s nominee – though likely not in time for the new justice to be seated for OT16 arguments. That isn’t likely to change the Court’s overall philosophical makeup, since a foreseeably conservative justice would be stepping into Scalia’s seat.

What really matters, he added quickly, was the stamina of Justices Ginsburg, Kennedy, and Breyer. If Trump has the opportunity to replace one or more of them, too, he foresees a “radical change in the Court.” This might bring into play previously settled issues such as abortion, affirmative action, campaign finance, and religious involvement in government.

Whelan, who occupies the opposite end of the philosophical spectrum from Chemerinsky, spoke next. He believed that an eight-member court was no constitutional crisis, and disagreed that the Senate had any duty to act on a presidential nomination: “The Appointments Clause does not contain the word *shall*” when it refers to the Senate’s role. He also pointed out that during the George W. Bush Administration, Chemerinsky had supported the use of a Senatorial filibuster to prevent Bush’s judicial nominees from being seated. He felt that any obligation on the Senate to act was political, not constitutional.

Levinson noted that each panelist had “lists of opinions we despise.” For himself and Chemerinsky, those included *Citizens United* and *Shelby County v. Holder*; for Whelan, it included *Roe v. Wade* and the *University of Texas* affirmative-

action decision. He opined that the election made it more likely that rulings on Whelan's list would be overturned.

Levinson added some historical perspective when he spoke of the public's regard for, and sometimes distrust of, the Court. In their famous debates, Stephen Douglas accused Abraham Lincoln of trying to pack the Court, adding, "Why should Democrats trust a Republican-appointed Court?" These days, Levinson continued, the courts are considered spoils of elective office, and that undermines their legitimacy in the eyes of the public.

At this point, Chemerinsky replied to Whelan's comments. Noting their often-caustic nature, he expressed the view that judicial opinions should evince civility, and that terms like "frivolous," "insipid," and "silly" had no more place in a panel discussion than they did in those published opinions. This brought on a wave of applause from the crowd, which had quite clearly found Whelan's response intemperate.

But before Chemerinsky could finish the thought, the fire started as Whelan interrupted in a sharp tone: "Then don't issue foolish opinions." He went on to criticize Chemerinsky's views in a manner that the audience received with palpable astonishment. Civility seemed to be something for another day, or at least another panel.

Chemerinsky endured the interruption calmly, and then just as calmly argued that an eight-member court for two Terms is indeed a constitutional crisis. He cited 24 previous instances where a vacancy had occurred in a president's

final term, resulting in 21 confirmations, three rejections, and zero instances of refusal to act – until now. As for the spoils system, he noted that that's been true throughout US history.

Howe then noted that in the recent past, liberal justices such as Stevens and Souter had been nominated by Republican presidents, and that divergent personalities such as Ginsburg and Scalia had been confirmed by unanimous Senates. But nowadays, we assess justices strictly by the party of the president who nominated them, counting on doctrinaire judicial views. How can we fix that?

Levinson smilingly described several historical presidential misfires – Truman's fury with Justice Tom Clark and Ford's disappointment with Stevens' liberal bent, among others. He forecast "interesting stories" about the nomination of Justice Souter when the elder President Bush's personal papers become public.

Chemerinsky pointed to several nominations that were overtly ideological, but opined that we now have four conservative justices, all nominated by Republicans, and four liberals, all nominated by Democrats, and that makes the court seem more political. He added that those ideologies matter, because often, "there's no way to answer Constitutional questions without value judgments."

Whelan took a different view, observing that confirmation hearings have always turned on which party controls the Senate. That's why, he continued, Justice Scalia made it through and Robert Bork didn't, and President Clinton was able to push Justices Ginsburg and Breyer

through only after clearing things with Republicans. As for the impact of a Trump nominee, “I hope for a Supreme Court practicing judicial restraint.”

Levinson pointed out that the Republican’s position on judicial appointments and judicial activism has shifted since the 80s and 90s. Back then, the Right criticized judicial activism, but that’s now been supplanted by the concept of “judicial engagement,” in order to rein in what a given party regards as troublesome legislation. In this sense, Chemerinsky asserted, it matters whose ox is gored: a Republican would urge judicial restraint when the Court reviews conservative legislation, but would take the opposite tack when he disagrees with the statute (think Affordable Care Act). Whelan agreed, and added that both parties do this.

Howe then shifted the panel’s focus, returning to a topic that Chemerinsky had first raised: What will be the effect of a Trump presidency on the *next* Supreme Court vacancy, after the current one is filled? And how will it affect hot-button issues such as abortion and affirmative action?

Chemerinsky began by noting that there have been at least five Republican-appointed justices ever since the Nixon nominees in 1971. Garland would have changed that, but Trump’s win will ensure that that majority continues. On abortion, he explained that replacing Scalia with another conservative won’t change anything because the current justices are divided 5-3 in favor of upholding *Roe*. But the next vacancy, if Trump fills it, would foreseeably furnish a fifth vote to overturn it, returning abortion decisions to the states.

He felt the same way in the affirmative-action context. The recent 4-3 *University of Texas* decision – with Kagan recused – could easily become a 5-4 vote to ban race-based considerations. Same-sex marriage, though, might be different. Adding two justices to the side of Chief Justice Roberts and Justices Thomas and Alito would certainly make a difference; but the issue of same-sex marriage never arose in the presidential debates, and Trump might not find it to be a priority. There would also be practical problems, such as the status of couples legally married after *Obergefell*, and differences in marriage definitions among the states.

Whelan agreed, noting that there have been “plenty of times” when *Roe* was in danger before, without its being overturned. He interjected a belief that we might see more turnover in the short run – he foresees the possibility of a second seat’s becoming open “within months.” (Notably, no other panelist picked up on that thread.)

Howe then invited questions from the audience. One in particular generated grudging agreement between the panelists: Is stare decisis in danger? Whelan offered what might have been a cynical observation, that only Justice Thomas has explained a coherent view of stare decisis, and that’s that it’s one thing for decisions you like, and another thing for decisions you dislike. Whelan predicted that it probably won’t, and shouldn’t, be given much weight.

Chemerinsky agreed: “Precedent should be followed except when it should be overruled.” (A cynic might note, *thus passeth judicial predictability*.) He conceives that especially with hot-

button issues, the justices won't care about the weight of stare decisis.

What began with fireworks thus concluded with a measure of accord, despite the clear subtext of philosophical divide among the panel-

ists. The audience, most still in a post-election haze, got some insight, and perhaps a bit of clarity, about the election's effect on the next collection of justices.

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## Strossen and Waldron on Hate Speech: Comparative Perspectives in a Post-Election America

By Katherine S. Barrett Wiik

One of the many engaging breakout sessions at the 2016 AJEI Summit was "*Hate Speech in the Marketplace of Ideas: A First Amendment Dilemma*," featuring esteemed law professors Nadine Strossen and Jeremy Waldron. The panelists, and the audience, grappled with challenging questions of whether and how to regulate hate speech in a democratic society. Given the atypically divisive presidential election this year, and incendiary pre- and post-election discourse coming from numerous perspectives and targeted at various communities and constituencies, the panel's focus on hate speech in a democracy was timely.

Professor Strossen, who now teaches at New York Law School, is well known for her high-profile leadership on civil liberties issues from her decades of service as the president of the American Civil Liberties Union. Professor Waldron, a native of New Zealand, was educated in New Zealand and England and taught at Oxford University for many years. His extensive academic writings in the areas of philosophy

and law have focused on, among other topics, dignity, theories of rights, homelessness, and international law. Thus while Professor Strossen's perspective on hate speech is grounded largely in her decades of civil liberties advocacy in the United States, which rejects the regulation of hate speech as violating the First Amendment, Professor Waldron's perspective has been shaped by his education and experiences in other Western democracies. Waldron contributed an important comparative and international approach to the question of whether hate speech can or should be regulated by governments that may have been new to audience members less familiar with how other democracies tackle this issue.

There was substantial agreement between the panelists on why democracies should be concerned about the effects of hate speech, primarily the potential harm to individuals and communities as a result of being the targets of hate speech. The two also agreed on core values motivating the concern with hate speech. Professor Waldron began his remarks by explaining the

three concerns that he sees as largely motivating the legislation banning fairly narrow and specific types of hate speech in some western democracies, which are the values of civility (particularly in professional spaces such as classrooms and courtrooms), the desire for social peace, and concerns for individual human dignity. Professor Strossen agreed with these three core values, which along with equality, she sees as values that live at the heart of civil liberties, and which are at least as important values in a healthy democracy as free speech.

The panelists (always speaking with much civility and dignity towards each other) strongly disagreed about whether democratic governments should ever seek to legislate hate speech. While Professor Strossen argued that democracies should refrain from legislating hate speech, Professor Waldron advocated for “very, very careful” legislation of hate speech. Professor Waldron advanced the perspective, which he recognized is a departure from existing American jurisprudence, that democratic governments should carefully consider prohibiting specific and limited categories of hate speech such as that outlawed by the British Racial and Religious Hatred Act of 2006. That Act, for instance, states that “[a] person who uses threatening words or behavior, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.” “Religious hatred” is defined as hatred against a group of people defined by reference to religious belief or lack of religious belief. Professor Waldron explained that this legislation does nothing to limit attacks on *beliefs*, but rather to limit certain speech-based attacks on *peo-*

*ple*. Professor Waldron likened such hateful speech to environmental harms and slow-acting toxin, which can accumulate and spread over time. Just as sane public administration is concerned with ensuring safe and healthy physical environmental standards, so should it be concerned with ensuring safe and healthy public discourse.

Professor Strossen acknowledged that Professor Waldron was successful in making the strongest case of the harm to dignity that can be caused by words. She agreed in the power of words, and that hate speech must be responded to in powerful ways, but not through regulation or censorship. She argued that many things that people frequently provide as examples of what should be unprotected, such as speech that intimidates or threatens violence, or hate speech in the private sector, is already unprotected. The government can also ban hate speech in its role as an employer, which it does through stringent restrictions in prisons, the military, and public schools. And even as the regulator in the public sphere, the government may legitimately punish hate speech in certain situations. For example, as Professor Strossen explained, the government may punish hate speech when there is a demonstrable connection to certain concrete harms such as when it constitutes a “true threat” or is an intentional incitement of imminent violence, where there is targeted harassment of an individual or group (often called bullying), where it creates a hostile work environment, or when it is an element in a hate crime.

More general regulation of hate speech, Professor Strossen warned, is inherently subjective and susceptible to abuse; hate speech may become any speech that is hated by the person or authority that is enforcing the rule. Regulation also drives hateful speech underground and hides it from view. She posited that: isn't it healthier as a society to know that you have hatred in your citizenry (as has become increasingly obvious in the United States these days) than, for instance, in Germany, where neonazism is banned yet is thriving underground? Professor Waldron's parting thoughts were that Americans should carefully consider whether, if we choose to retain our formula that only speech that presents a clear and present danger can be limited, might we find ourselves in a situation where that is a standard that is a hard one to walk back from.

A number of current events and data points suggest that debates about what to do about hate speech will likely intensify in our public discourse and courts in the coming years. Generational shifts are likely to put pressure on the American approach to hate speech as well. Professor Strossen reported that college students indicate support in high numbers for the suppression of hate speech. President-Elect Trump triumphed in the electoral college with the support of numerous constituencies including (but certainly not limited to) white supremacists, who many see as being in the business of hate speech. Yet at the same time, he is calling for the banning of flag burning and more relaxed defamation claims to wield against the media and his critics. First Amendment advocates may be in for a wild ride.

## Canons of Construction

By D. Alicia Hickok and Vishal Shah

On Saturday morning, Professor William N. Eskridge, Jr. of Yale Law School led a panel discussion on the canons of construction. He was joined by the Honorable Jeffrey S. Sutton of the United States Court of Appeals for the Sixth Circuit and the Honorable Mariano-Florentino Cuéllar of the California Supreme Court.

The presentation began with an overview of the canons, which Professor Eskridge categorized as follows:

- **Textual.** Textual canons involve the analysis of the actual text at issue and the accompanying text. The ordinary meaning of the words anchors the textual canons. Examples include the definition canon, *noscitur a sociis* (known by its associates), pet fish canon (where the word group may be more or less than the sum of its parts), term of art, grammar, absurd results, and the whole act rule (whereby one interprets each provision in the light of the entire statute).
- **Extrinsic Source.** Extrinsic source canons focus on materials outside of the text. Examples include *stare decisis*, legislative or regulatory history, and agency deference. *Stare decisis* is the flagship of this group, at the center of any analysis. Professor Eskridge spent considerable time discussing the legislative history canon, and explained that practitioners (and judges) often focus on how different parts of a statute relate to one another, where words appear (or do not), and how goals are perceived and pursued.

With regulatory history, the question is how an agency interprets the language, and is often fleshed out by expert opinion in light of the purpose. Professor Eskridge noted that Justice Scalia had argued against using regulatory history, and that there has been growing skepticism associated with deference to agencies such as is found in *Chevron* deference. That has, of course, been borne out in an unexpected way, with the House passing the Regulatory Accountability Act of 2017 to manage the standards for viewing regulations, including repealing *Chevron* deference. Justice Scalia was also skeptical of legislative history, worried that it would be used in a “gotcha” way, although he admittedly recognized that it was useful to see how language was used at the time of enactment.

- **Substantive.** Substantive canons center on substantive legal presumptions. Examples include the rule of lenity and the avoidance canon, which presses judges away from an unconstitutional interpretation of the text at hand and leads to a narrower interpretation.

After the overview, the judges engaged in a discussion, first addressing the question of whether the canons serve merely to support analysis or whether the canons really drive outcomes.

The panel recognized that the canons potentially play three normative roles:

1. Canons assure predictability (but not in hard cases);
2. Canons serve merely as window-dressing; or

3. Canons are an interpretive regime, with a transparent array of considerations.

In Judge Sutton's view, legislative history does not drive outcomes. It does not enable or define judicial discretion, but it does provide potential pieces of evidence that can be used to support a position. He expressed that he does not like to bind himself to deciding a case on a canon and cautioned the audience to "be very careful and humble about using" them. One of the factors for him is whether they are being used in a collegial setting, in which case there should be fewer things in play rather than more. Also, the further out one relies on the canons, the more skeptical he becomes and the more the cases turn on the facts. He sees the challenge with canons as not so much the case in front of the panel as the implications of the use of canons for future cases.

Judge Cuéllar added that canons should be interpretive and not normative. This is particularly true with regard to international law. The enthusiasm for canons is fueled by worry that state judges will overstep bounds into legislation. But that raises concerns about whether what others think should serve as a judicial restraint. Principles of interpretation often do not use the word "canon" but serve a similar function. California, for example, views purpose as central but does not call it a canon. The word "canon" (or a Latin description) does not give a tool added weight.

The question was raised whether a legislature could codify a canon or abolish the rule of lenity. California did, but it frequently invokes the rule notwithstanding that – although the gov-

ernment almost always wins when it does.

When looking at whether a canon is "filling in the blanks," the question is easier to answer if the question is one of policy. It is much harder in the criminal area where there is no common law construction to apply. Currently, most statutes have agencies in the background filling in the details. For example, the United States Supreme Court has slowly followed the interpretations of the Department of Justice and the Federal Trade Commission in looking at Sherman Act questions. Judge Sutton contended that the most difficult area in which to use canons is when there is no agency guidance and there are significant differences in the policies advocated by different sides. At that point, purpose really comes into play. He also noted that changing technology provides a challenge under the canons. For example, calls were taxed based on time and distance, but cell phones make time and distance meaningless measurements.

Professor Eskridge pointed out that policy often gets updated by an agency, with judges playing a monitoring role. Professor Eskridge also noted that legislative history was used more in state courts than in the United States Supreme Court, and was used more in those jurisdictions with the most widely available legislative history online. His view was that legislative history should not be resisted, but should be used carefully. He noted that it was of particular value in undertaking textual inquiries and in examining the structure of a statute. He also observed that judges often view legislative history the way Justice Scalia viewed the Federalist Papers; it provides insight into the way the words and structure were understood at the time.

The panel concluded that the best advice they could give is as follows:

- Know your judge! Some judges are more receptive to canons, so determine which canons are important to the judge or judges you need to persuade and give them a reason to support the outcome you want.
- At most, canons of construction should be used to support a decision, not to arrive at a decision. That way, the canons provide an

additional basis for a decision, but your position is won by your other arguments.

- Start at the text and work your way outward to support your position.
- Some canons are safer to invoke than others. For example, textual canons are less controversial for judges to apply.

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## **Drones, Phones, and Other Digital Data Collection: Tracking the Intersection of Privacy and Security**

*By Katie A. Richardson*

Data collection and individual surveillance have been staples of both law enforcement and national security efforts for decades. But advances in technology, and the use of technology to accomplish these dual objectives, have resulted in a greater awareness of—and, for many, a greater concern about—the degree to which governmental security efforts impinge upon one’s privacy.

In the wake of social media, Google data searches, smart phone data storage, and other means of digital data collection, the public disseminates vast amounts of personal information into the technological ether every day. Whether privacy interests in information can survive in the digital age was a question at the center of an interesting and informative panel discussion at this year’s AJEI Summit. Moderated by Indiana University School of Law Professor Fred H.

Cate, panelists Colonel Gary P. Corn, Staff Judge Advocate, U.S. Cyber Command, and Ben Wizner, Director of the ACLU’s Speech, Privacy & Technology Project, discussed a wide range of privacy challenges presented by digital technologies.

Professor Cate began the discussion by highlighting the tension that animates the privacy versus security debate: on the one hand, technologies are making it possible for the government and industries to obtain private information at an extraordinary level; on the other hand, those technologies, and the information gleaned from them, are extraordinarily useful in combatting threats to national security.

### **A Privacy Primer**

Although many people consider their privacy rights within a legal framework, Wizner noted that much of the privacy protection individuals

have historically enjoyed derived not from law, but from cost. Surveillance was expensive; advancements in technology have changed that. In *United States v. Jones*, 132 S. Ct. 945 (2012), the Supreme Court had to consider that fact when deciding whether the use of a global positioning system (GPS) tracking device on the undercarriage of a car constituted an unlawful search under the Fourth Amendment. As Justice Alito explained in his concurring opinion, “[i]n the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical. Traditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken. The surveillance at issue in this case—constant monitoring of the location of a vehicle for four weeks—would have required a large team of agents, multiple vehicles, and perhaps aerial assistance.” *Id.* at 963.

In today’s digital world, it is now technological and financially feasible to collect and store immense amounts of information about an individual’s movements and activities. In Wizner’s view, if we want to preserve traditional notions of privacy, the Court and legislature are going to need to create new legal rules and reexamine existing ones.

### Current Trends and Challenges

From a military operations perspective, Colonel Corn described different forms of data gathering—distinguishing between sensory enhancing technologies, such as thermal imaging, and data collection technologies, such as drones—and advised that the United States military employs a “rule of precaution” before taking action on

information about a perceived danger or threat to national security. A question he raised is, to whom does the data belong? One can imagine, for example, the use of a military drone in public airspace for the purpose of obtaining intelligence about an individual whom the government has reason to believe poses a potential threat to national security. If that drone collects information about individuals and activities taking place in one’s home or curtilage, does the data collected belong to the government for national security purposes, or does the individual retain some level of privacy in his movements and activities? Colonel Corn admits the question presents a challenge of degree.

Addressing the Supreme Court’s increasing sensitivity to the use of technologies to obtain personal information, Wizner noted that the two cases the Court has decided on the issue since 2012—*Jones* and *Riley v. California*, 134 S. Ct. 2473 (2014)—were both decided against the government. In *Riley*, the Court considered whether police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. As in *Jones*, the Court acknowledged that the data collection mechanisms at issue were “based on technology nearly inconceivable just a few decades ago . . .” *Id.* at 2484. Confronted with a novel search method not contemplated during the founding era, the Court “generally determine[s] whether to exempt a given type of search from the warrant requirement ‘by assessing, on the one hand, the degree to which it intrudes on an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental inter-

ests.'" *Id.* In balancing those competing interests, the Court held that police, when conducting a search incident to a lawful arrest, must generally obtain a warrant before searching information on a cell phone. *Id.* at 2494-2495.

### **The Third Party Doctrine**

The panel addressed additional challenges presented by the third party doctrine, which allows the government to obtain information from third parties like Google and Facebook without a warrant, and without otherwise complying with the Fourth Amendment prohibition against search and seizure without probable cause. Relying on that doctrine, government agencies now frequently use subpoenas to obtain information about individuals from third parties, when historically a warrant would have been required. As Professor Cate noted, it is rare that one has meaningful information about oneself that someone else does not also possess. He then inquired whether the third party doctrine is the appropriate governing rule.

In response, Colonel Corn pointed out that even if one provides information to a third party with an expectation of privacy, that expectation doesn't negate the fact that the information has been turned over to a third party. Wizner countered Corn's suggestion that one loses a degree of privacy simply by disclosing information to third parties. In Wizner's opinion, the idea that sharing information with one person precludes you from hiding it from the government is wrong from the outset. Ultimately, both Corn and Wizner agreed that the challenges presented by the third party doctrine necessitate strict rules for governing data collection.

### **A New Way of Thinking**

Professor Cate concluded the afternoon's discussion by touching on technology's reach, both domestically and internationally. He noted that the international commercial aspect of technology complicates the privacy-security debate because the Fourth Amendment has never been an absolute protection. Encryption creates a new and different level of security, and thus a new way of thinking about both privacy and security.

Although the panel members did not provide simple answers to the many challenges that arise in the context of digital data collection, they did offer a good overview of the framework within which to analyze these difficult issues. And, one thing is clear: as technology continues to advance, we can expect to see courts and legislatures grapple with the ongoing legal and practical challenges inherent in balancing governmental and privacy interests.

## An Ethics Lesson in Philadelphia

By David H. Tennant

The AJEI Summit's ethics program focused on "what not to do," addressing thorny ethics questions for appellate judges and lawyers through hypotheticals ripped from today's legal headlines. Doug Richmond, Director for Chicago-based AON Risk Management, led the highly interactive program using his unique combination of humor and cheap game-show prizes.

A featured hypothetical involved the real world problem of appellate judges undertaking in-chambers demonstrations to test a party's factual assertions (can you say "donning and doffing," as in Judge Posner's clerks donning and doffing protective suits to see how long it would take?) as well as the more common phenomenon of searching the internet for facts pertinent to deciding a case. Such independent factual investigations raise important questions about judicial ethics and fairness to the parties (due process). The hypothetical involved a federal circuit judge who did not understand the national craze of the "augmented reality" game called *Pokemon Go!* The game was at the center of a distracted driver / wrongful death case involving a teenager who ran his car off a cliff at a national park --- while trying to capture the elusive Pokemon creature known as Pichu. The federal judge asked her law clerks to download the app; she began playing the game in the courthouse; she took the game outside; she drove to the national park, looked at the cliff; and then undertook internet research on augmented reality games, distracted driving, and motor vehicle accidents involving *Pokemon Go!*

The judge-lawyer discussion was spirited as some voiced support for allowing appellate judges to undertake some non-case-specific background research (e.g., to get oriented to the operation of the game) but everyone seemed to agree that the judge had crossed over a line by visiting the accident scene and undertaking independent factual research to better understand how driver distraction occurs through augmented reality.

Guidance for judges is provided by Rule 2.9 of the Model Rule of Judicial Conduct. Rule 2.9(C) prohibits judges from undertaking independent factual investigations whether by visiting the accident scene or undertaking case-specific factual research on-line (or otherwise). See ABA Model Rule 2.9(C) (2007)<sup>1</sup>; D. Tennant & L. Seal, *Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case?* (ABA The Professional Lawyer 2005) available at [www.americanbar.org/content/dam/aba/migrated/judicialethics/resources/TPL\\_jethics\\_internet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/judicialethics/resources/TPL_jethics_internet.authcheckdam.pdf); see also *Judicial Use of the internet - American Judges Association* (2010) available at [http://aja.ncsc.dni.us/conferences/2011Annual/SpeakerMaterials/13%20-%20Brenden\\_Priester\\_Internet.pdf](http://aja.ncsc.dni.us/conferences/2011Annual/SpeakerMaterials/13%20-%20Brenden_Priester_Internet.pdf). In Federal District Court of Louisiana, before the dawn of the internet, when chambers needed to understand the operation of something highly technical like the functioning of a ring-laser gyroscope, the court hired an MIT expert as the court's own advisor -- with full disclosure to the parties and with the parties given the oppor-

tunity to respond to information flowing from the expert to the court. As a general rule, appellate judges should not resort to independent factual research in evaluating or deciding a case. If facts are missing from the appellate record, those omissions should be brought to the parties' attention with full disclosure of any factual research independently conducted by the appellate court, with a meaningful opportunity for the parties to respond. Any material development of facts should be undertaken in the lower

court on remand. Following these principles promotes judicial economy; avoids unfairness to the litigants; and saves appellate judges from possible ethical violations. That sounds like a win-win-win even in Philadelphia that even W. C. Fields could appreciate.<sup>2</sup>

<sup>1</sup> Model Code of Judicial Conduct (2007)

CANON 2: Model Code of Judicial Conduct (February 2007):

A Judge Shall Perform the Duties of Judicial Office Impartially, Competently, and Diligently;

Rule 2.9(C): A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

Comment to Rule 2.9[6]: The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.

*States that have adopted this Canon/rule or some variation thereof:*

Arizona	Arkansas	Colorado	Connecticut	Delaware	Hawaii
Indiana	Iowa	Kansas	Maryland	Minnesota	Montana

<sup>2</sup> According to W. C. Fields, when it comes to prizes, first if prize is a week in Philadelphia, second prize was two.

## Judicial Ethics and Social Media

*By Mark A. Kressel*

John G. Browning, of Passman & Jones, P.C. presented a talk on Judicial Ethics and Social Media on Saturday morning at the AJEI Summit. Browning discussed the impact social media is having on the legal system, the range of ethical considerations implicated by social media for judges, and stories of judges who crossed ethical boundaries using social media.

Social media is having a strong impact on the legal system in general. An individual can now become subject to a state's personal jurisdiction based on social media activity directed at the forum state. Some courts have even authorized service of process on a defendant via Twitter.

Social media usage involves many judicial ethics cannons. Cannon 2A generally deals with avoiding impropriety or the appearance of impropriety in all of the judge's activities. Cannon 2B prohibits a judge from allowing family or other social relationships to influence the judge's conduct. Because social media increases a judge's opportunities to interact directly with individual members of the public, often on what may be described as an *ex parte* basis, judges using social media must be careful to abide by Cannons 2A and 2B. Cannon 3 includes prohibitions on, among other things, performing duties with bias or prejudice, entertaining *ex parte* communications, and commenting publicly on pending matters. Again, social media is often used by members of the general public to express opinions about others, comment on ongoing events, and communicate through private

messaging, and so implicates Cannon 3. Finally, Cannon 4A1 requires a judge to conduct all extrajudicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially, and cannon 4B requires a judge to conduct all writing and speaking about legal and nonlegal subject matters in conformity with the other judicial ethics cannons.

Browning commented that opportunities and temptations for social media use and misuse arise because it could be seen as "political malpractice" for a judge not to stay involved with social media, at least to some degree. There are certainly main benefits to using social media: accessibility to the public, political survival, transparency, community outreach, and digital competency.

Browning reviewed some anecdotes of judges that have gotten into ethical trouble using social media, for example, "friending" litigants or attorneys. A judge in Florida was Facebook friends with one of the lawyers appearing before him, and was exchanging direct Facebook messages with the lawyer during the course of the trial, even commenting on the lawyer's trial strategy. Another Florida judge sent a friend request to the soon-to-be-ex-wife in a divorce proceeding pending before her. After the litigant ignored the judge's friend request, the judge appeared to act vindictively against the litigant in deciding the case. A male judge in Georgia sent a friend request to a female defendant in a case that had just concluded before him. The two then entered into an appropriate relationship. The judge then began advising her

on another criminal case against her, and then also gave private information he had learned from the woman to the prosecution in a separate criminal case against her ex-boyfriend.

Other areas where judges have gotten into trouble are “friending” witnesses or confidential informants appearing in a case before the judge, and “friending” family members of litigants and victims.

Not every social media interaction, however, causes an ethical violation. Courts have begun to be able to distinguish between true friendship and Facebook “friendship.” The fact that a judge is someone’s Facebook friend does not, without more, raise an appearance of impropriety. Similarly, the mere fact that a judge “follows” someone on Twitter does not necessarily mean the judge cannot be impartial about that person.

Another area where judges have run into ethical challenges using social media concerns campaign activities. A judge in Kansas “liked” the campaign Facebook page for a political candidate, and this was held to be an improper political endorsement. A judge in Florida got into trouble for urging her Facebook friends to oppose a candidate running for office against her husband. A federal judge started a blog that, innocently enough, was supposed to discuss themes about the role of the judge. Unfortunately, over time, the blog started to drift off topic and eventually ran several posts criticizing Ted Cruz during the primaries.

Finally, judges must remember never to go on Facebook or other social media and comment

on a case pending before the judge. Browning stated that although this should be obvious, it happens time and again.

Browning discussed judicial ethics opinions nationwide and their different approaches to social media use. The ABA issued Formal Opinion 462, “[Judge’s Use of Electronic Social Networking Media](#),” and the United States Courts issued Advisory Opinion no. 112, “[Use of Electronic Social Media by Judges and Judicial Employees](#).” Both of these opinions say that there is nothing inherently wrong with judges using social media, but that judges must adhere to the same ethical rules they would have to follow if they were using any other method of communication. A more restrictive approach is taken in Florida, Massachusetts, Oklahoma, and California. In Florida, for example, judges are not even supposed to be on LinkedIn. A less restrictive approach is taken in Arizona, Connecticut, Kentucky, Maryland, Missouri, New Mexico, New York, North Carolina, Ohio, South Carolina, Texas, Utah, Washington.

In conclusion, going forward, judges need to strive for a better understanding of the functionality of social networking platforms, including their privacy settings. We need to have a better understanding of the meaning of “friendship” in the digital age.

## Class Actions: What Future?

By Julia F. Pendery

Leane Capps, moderator of “Class Actions: What Future?” and CAL Chair and shareholder in Polsinelli, PC, introduced panelists Elizabeth Cabraser of the San Francisco office of Lieff, Cabraser, Heimann, & Bernstein, LLP; Professor Robert Klonoff of Lewis and Clark Law School; and Mary Massaron of Detroit’s Plunkett Cooney PC.

Professor Klonoff is a member of the ABA committee reviewing changes to FRCP 23. The committee decided not to address *cy pres* distribution of leftover class-action funds or issues of individual class representative “pick-off” settlement offers raised by the *Campbell-Ewald* decision. Instead, the committee is focused on clarifying the two-step certification process. They want the preliminary stage to be robust. Professor Klonoff noted that the circuits have different standards for certification. The committee hopes to unify the criteria for class certification. Procedures to require the best method practicable for notifying class members, be it social media, email, or United States mail, are being updated.

Professor Klonoff noted that the issue of commonality has become central to class actions, following the decision in *Wal-Mart v. Dukes*. Ms. Cabraser said the central issue in a class-action should be the ability to pose important questions where answers will solve a problem for many people. As a plaintiffs’ lawyer, in seeking certification, she thinks about what the jury questions will be from the outset and strives to come up with common questions of law and fact.

Ms. Massaron represents defendants in class actions. She encouraged early scrutiny on the predominance issue. If the allegations are too broad to be resolved in the same way, class certification should be challenged. She said it was difficult to determine the effect of the *Spokeo* decision, a narrowly-tailored opinion issued after Justice Scalia’s death. In *Spokeo*, the Court found a consumer did not satisfy the injury-in-fact demands of Article III standing by alleging that a website operator published inaccurate information about him, in violation of the Fair Credit Reporting Act. It held that a concrete particular injury must be pleaded, but the Court did not set a bright line.

Ms. Cabraser noted that a concrete injury does not necessarily mean monetary damages. Neither is an injury-in-fact requirement satisfied simply because Congress has granted the right to sue. The basis of suit needs to be a right that has been protected in the past, such as the right of privacy in wiretap cases. She and Ms. Massaron agreed the inquiry will be very fact specific. Professor Klonoff noted that *Spokeo* left open the question of whether you must show only that the class representatives themselves were injured.

The panelists were asked to address emerging trends. Ms. Cabraser said the class-action vehicle was being used for early settlement of large cases, including wrongful death ones. Many of the Deepwater Horizon claims exceeded \$1 million per class member. The Volkswagen clean diesel class settlement of \$15 billion was noteworthy because Volkswagen had to pay the at-

torneys' fees on top of the class pool of funds rather than the attorneys taking them as a percentage.

Professor Klonoff felt fewer cases would settle because the circuit courts have been disapproving settlements, with Judge Posner in the fore-

front on that trend. He felt even bet-the-company cases were more likely to go to trial. Ms. Massaron agreed. She said defendants have a major concern about no-injury cases. The cost is ultimately borne by consumers, so they are vigorously challenging them.

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## **Are Three Heads Better Than One? Generally, Yes.**

*By Katharine J. Galston*

During this Saturday afternoon breakout session entitled "Are Three (or More) Heads Better Than One? How Groups of Judges Decide," a distinguished panel discussed the particular decision-making practices of appellate courts within the context of social science research on group decision-making generally.

The Honorable Christopher J. McFadden of the Court of Appeals of Georgia served as the moderator and a panelist, and the other panelists included Professor Susan Brodie Haire, PhD, of the University of Georgia, the Honorable Renee Cohn Jubelirer of the Commonwealth Court of Pennsylvania, and Reid Hastie, PhD, of the University of Chicago Booth School of Business.

The format of this session was an interesting and engaging one. Professors Haire and Hastie began the program by giving an overview of the substantial body of behavioral science research that has focused on the decision-making strengths and weaknesses of groups and teams generally, as well as some specific research related to appellate courts.

Professors Haire and Hastie brought extensive experience in social science research to this breakout session.

Professor Haire is the Director of the Criminal Justice Studies program at the University of Georgia, Franklin College of Arts and Sciences, as well as a professor within the Department of Political Science, School of Public and International Affairs at the University of Georgia. Professor Haire has conducted extensive research on federal courts, including on the role of judge gender and race, and she has published works in a variety of social science and law journals.

Professor Hastie studies judgment and decision-making, memory and cognition, and social psychology, and he teaches courses on those subject areas at the Chicago Booth School. Professor Hastie has published more than 100 articles in scientific journals and is best known for his research on legal decision-making.

Professor Hastie began the breakout session's discussion with the observation that, on average, small groups make better decisions than individuals. He proceeded to discuss general behavioral science principles and theories re-

garding the decision-making of small groups. Professor Hastie explained that behavioral science research supported both the conclusion that a diversity of views on a judicial panel benefits its decision-making as well as the conclusion that some interdependence of views, or at least the sharing of certain initial premises, was also necessary.

Professor Haire emphasized the important behavioral dimension regarding the characteristics of the individuals who comprise the judicial panel, encouraging the attendees to consider questions such as:

- How diverse are the backgrounds of the panel's members?
- How is case-relevant expertise distributed across the panel?
- What is the pattern of seniority and "social power" in the panel? For example, are there any judges sitting by designation? If so, might a judge sitting by designation have a tendency to defer? What is the tenure and seniority of the panel members?
- What is the gender composition of the panel?
- What is the duration and degree of familiarity among the panel?

Professor Hastie and Professor Haire then discussed the dynamics of "panel effects" – whether and to what degree the decision of a judge on the panel may be influenced not only by that judge's particular preferences but also by the preferences of the other panel members.

In particular, the scholars referenced a research study by Professor Hastie and Cass Sunstein of Harvard Law School, which examined the voting patterns in three-judge panels on federal appellate courts. This research "found that both Democratic and Republican appointees show far more ideological voting patterns when sitting with other judges appointed by a president of the same party." Cass R. Sunstein & Reid Hastie, "Making dumb groups smarter," 92 *Harvard Business Review* 90 (2014) (available at <https://hbr.org/2014/12/making-dumb-groups-smarter>) (hereinafter, "Sunstein & Hastie"). This research concluded that, while the party of the president who appointed the judge is a "pretty good predictor" of how an appellate court judge will vote in an ideologically contested case, "in many areas of the law, an even better predictor is who appointed the other judges on the panel." *Ibid.*

Professor Hastie placed Sunstein's research on federal appellate courts within the more general decision-making concept of "group polarization," a phenomenon seen by behavioral scientists when studying deliberating groups in a variety of different contexts.

As an example, Professor Hastie cited an experiment that he conducted in which residents of two Colorado cities – Boulder, which is known by its voting patterns as predominantly liberal, and Colorado Springs, which is known by its voting patterns as predominantly conservative – were assembled in small groups, all from the same city, to discuss their beliefs on highly contested political topics, including climate change, affirmative action, and same-sex civil unions. See Sunstein & Hastie, *supra*. Group

members recorded their views individually and anonymously both before and after group deliberation. The experiment revealed that the groups became even more polarized after the deliberation with the groups from Boulder becoming more liberal and the groups from Colorado Springs more conservative. The deliberation of the groups had also decreased the diversity among group members with the discussion bringing liberals in line with one another and conservatives in line with one another. The result was that there was a lot less variation in individual views.

This study demonstrates the potentially strong effect of the “group polarization” phenomenon in the decision-making of small groups. Professors Hastie and Haire did explain, however, that, in the context of a panel of appellate judges, the presence of a “counter judge” can have the effect of moderating the majority – whether that judge chooses to dissent or not.

Professors Hastie and Haire also noted that none of the research measures the *quality* of decisions rendered by a group of judges, as there is no consensus on an objective methodology for measuring the quality of an appellate opinion.

After the examination of these and other behavioral science theories regarding group decision-making generally, the panelists then discussed some specific appellate court practices within the context of such theories.

Judge McFadden and Judge Jubelirer first discussed the procedures by which appellate panels are constituted in their particular courts.

Judge McFadden explained that in the Georgia Court of Appeal, the intermediate appellate court in Georgia with fifteen judges hearing cases in three-judge panels, it is the chief judge who appoints the presiding judges and decides panel assignments. Once a panel is assigned, that panel sits together for an entire year. Cases are then randomly assigned to each panel.

Judge Jubelirer, in explaining the practices of the Commonwealth Court of Pennsylvania, one of two statewide intermediate appellate courts, first noted that women judges are the majority on that court. There are five women and four men on the court. The judges sit together once a month in panels of three judges, holding oral argument in various locations throughout Pennsylvania. Seniority determines the presiding judge on each panel. The President Judge of the court assigns the cases to be heard by each argument panel. After argument, it is the presiding judge of the panel who will assign responsibility for writing the opinion to a judge in the majority.

Professor Haire commented on the practices of each court, noting the potential opportunities for “panel effects” depending on the particular panel’s composition, and recognizing that both the time the panel has spent together as well as gender were likely to have impacts on the panel’s decision-making process. Dr. Reid commented that more diversity is a good thing. He gave his opinion that while diversity tends to reduce collegiality among a panel, which is a negative side effect, it can increase dissent, which is positive to a degree. Dr. Reid commented that there is a “sweet spot” of how much dissent will be a good thing for the group’s decision-making.

The panel then considered various other appellate court practices such as how cases are assigned to non-argument and argument panels, court management systems, with Professor Haire and Dr. Reid sharing perspectives on those practices from the behavioral science research on group decision-making.

For example, Judge McFadden and Judge Jubelirer each described the decision-making process of the oral argument panel in each of their courts. Judge McFadden explained that on the Georgia Court of Appeals the panels traditionally do not conference – not before or after oral argument. There are some discussions by the judges one on one, with cases generally discussed by the two most senior judges before there is a discussion with the third judge.

Judge Jubelirer explained that for cases on the oral argument calendar in the Commonwealth Court of Pennsylvania, the panel has a conference after oral argument. There is no formal conference, however, for cases that are submitted on the briefs without oral argument. In those cases an opinion is drafted and then submitted for a vote. Judge Jubelirer also explained that members of the panel often share bench memoranda before an oral argument.

Dr. Reid commented that the amount of interaction between the judges throughout the decision-making process may have a significant impact. Increasing interaction increases the quality of the information and the completeness of the information possessed by each individual. Yet, at the same time, such interaction also increases interdependence and may lead to a loss of independence. All courts are seeking a balance of

independence and interdependence. Dr. Reid recommended that any court contemplating a change of its procedures should rely on the judges themselves to determine whether, in their judgment, practices are weighted too much toward independence or interdependence.

Judge McFadden and Judge Jubelirer also described the procedures in each of their courts by which a panel votes on an opinion.

Judge McFadden explained that in his court, the opinion is drafted and then circulated in order of seniority of panel members. If the first judge to whom the opinion is circulated disagrees or writes a dissent, then there may be some back and forth between those two judges before the third judge gets involved. When there is a dissent, there is a procedure by which the case then goes to an en banc court of nine judges who then vote.

Judge Jubelirer described the internal system in the Commonwealth Court of Pennsylvania that allows every judge on the court to see the panel's vote and also have an opportunity to object or comment. The judge authoring the panel's opinion takes such objections or comments into consideration. If four or more judges disagree with the panel's decision, the case then goes to a judicial conference, regardless whether the panel itself agrees. The judge who wrote the majority opinion has to defend the opinion, with others weighing in. Judge Jubelirer noted that this process is quite respectful and animated.

Professor Haire commented that the practice in the Commonwealth Court of Pennsylvania –

and to some extent the Court of Appeals of Georgia when there is a dissent – could have the effect of pulling the en banc court into every panel decision. While such practices are beneficial to improve the consistency of law in that court, there are drawbacks in terms of having its panels function independently. Dr. Reid recognized that such practices also implicated the struggle to find a balance between independence and interdependence in panel decision-making, which again is an issue to be considered by appellate courts and judges when evaluating their decision-making procedures.

The discussion during this breakout session thus demonstrated how a consideration of this body of behavioral science research can offer greater insights into the particular practices of appellate courts and the process by which a group of judges reach decisions in appellate cases.

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## **Intuition, Deliberation, and the Appellate Process**

*By Deena Jo Schneider*

The final program at the 2016 AJEI Summit was a plenary session devoted to a discussion of how judges make decisions and their use of both intuition and deliberation in the process. One of the two speakers was Professor Jeffrey J. Rachlinski of Cornell Law School, who holds an M.A. and Ph. D. in psychology as well as a J.D. and has conducted significant research into the application of cognitive and social psychology to judicial decision making. Also presenting was Judge Delissa Ridgeway of the U.S. Court of International Trade, who has extensive experience in international law and litigation as both a judge and a private practitioner and has chaired numerous ABA initiatives concerning perceptions of justice and implicit bias. The panelists presented strong and (at least to me) somewhat surprising evidence showing that judicial decision making is often significantly

based on intuition and emotion rather than reasoned deliberation.

### **Intuition vs. deliberation**

Professor Rachlinski explained that there are two basic models or methods of decision making. The so-called “intuitive” model involves spontaneous and automatic or emotional associations and leads to rapid and confident judgments. The so-called “deliberative” model involves mental deductions and execution of rules and leads to slow and cautious judgments. Intuition is often used to make real-life decisions (such as quickly moving out of the way of a bus) and will frequently but not always lead to good results. But most people would agree that in the case of judicial decision making, it is also important to assess and analyze a case before making a ruling. We do not want our judges to rely just on “hunches” – but that does not mean

that intuition should be completely removed from the process. A good judge might be analogized to an expert chess player, who has terrific intuition about how to play the game but will stop, think, and second guess each move when playing another expert. Both types of decision making are valuable.

A leading psychological study of decision making processes is the Cognitive Reflection Test (CRT) developed by Professor Shane Frederick of Yale, which is designed to distinguish between intuitive and deliberative processing. The CRT consists of three questions to which there is an obvious but incorrect intuitive answer:

- The first question asks if a bat and ball cost \$1.10 in total and the bat costs \$1.00 more than the ball, how much does the ball cost? The intuitive answer that immediately comes to most people's minds is \$.10, but that is wrong because then the two items would cost \$1.20. The correct answer, which can be calculated by solving the equation  $2x + \$1.00 = \$1.10$ , is \$.05.
- The second question asks if it takes five machines five minutes to make five widgets, how long would it take 100 machines to make 100 widgets? The intuitive but wrong answer is 100 minutes. The correct answer is five minutes since each machine can make a widget in five minutes.
- The third question asks if there is a patch of lily pads that doubles in size every day and it takes 48 days for the patch to cover the entire lake, how long would it take for the

patch to cover half of the lake? The intuitive and incorrect answer is 24 days. The correct answer is 47 days because the lake will be covered the next day.

Most college students who have taken the CRT answer the majority of these questions incorrectly, provide the intuitive answers, and also label the questions easy. People who provide more correct answers are more likely not to label the questions easy. This study shows that in general intuition plays a larger role in decision making than deliberation. As might be expected, engineering students performed the best as a group, followed by students at highly selective universities.

Professor Rachlinski and his colleagues have administered the CRT to numerous groups of judges. Interestingly, the results are quite similar to those obtained by Professor Frederick when testing college students. Although judges are often characterized as deliberative thinkers, most of those who have participated in this test provided the intuitive but incorrect answers to most of the questions and also found the questions to be easy. The good news is that like engineering students, as a group judges answered more questions correctly than other groups. Administrative law judges performed slightly better than trial judges, and military judges performed better yet.

Professor Rachlinski and his colleagues have also studied the decision making of judges when performing judicial functions as opposed to general problem solving. Their research shows that judges tend to react intuitively when provided certain types of cues in cases present-

ed to them. Intuition is not necessarily determinative but is clearly one of the factors at play, and reasoned deliberation will not override it completely.

### **Intuitive decisions based on anchors**

Some studies of judicial decision making have involved “anchoring,” which is the use of an initial number to provide a starting point for making a numeric estimate. As a general rule, while people make adjustments to an anchor in reaching their final estimate, the adjustments tend not to be sufficient, which results in giving the anchor greater influence on the end result than it should have. Studies have shown that the anchor has this effect even when it is transparently irrelevant to the analysis. For example, a group of people was directed to add 400 to the last three digits of their phone number and then asked whether Attila the Hun was defeated before or after that date A.D. Although there is obviously no connection between the responders’ phone numbers and history, their estimates of when Attila the Hun was defeated nonetheless correlated with their phone numbers.

Anchoring also impacts judicial decisions. Professor Rachlinski described a hypothetical civil rights case involving a secretary employed in the public sector whose new supervisor called Mexican Americans racial epithets in front of co-workers. The employee obtained another job that paid more money but sued the former employer for mental anguish. In a television show, \$415,000 was awarded the plaintiff in a different case. Although this was clearly not admissible evidence in the hypothetical case, 87% of the administrative law judges who participated in this

study concluded that admission of the result in the TV show would be harmless error. However, the median award of the same group of ALJs in this hypothetical was \$5,000 without that anchor but \$50,000 with it.

Similar results were obtained when judges were asked to consider a hypothetical case involving violation of a municipal noise ordinance by a club operating in a residential neighborhood. The ordinance provided for a fine to be assessed based on the degree of disruption and to deter repetition of the offence. The median amount awarded in this hypothetical was \$500 when the club’s name included the number 48 but \$1,500 when the name included the number 11,866.

### **Intuitive decisions based on framing**

Another study of judicial decision making involved “framing,” which is when options are viewed in relation to the status quo or a reference point. In general, people react more strongly to losses than gains. They are more upset about being out of pocket \$50 on a lost bet than foregoing a pay-out of \$100 had they won the bet. Professor Rachlinski and his colleagues presented judges with a hypothetical employment discrimination case involving a 61 year old plaintiff who claimed that four people all under the age of 50 received more favorable treatment. The university defendant stated that its employment decisions were based on the “energy” and “understanding of today’s college students” by the younger group. When the hypothetical sought redress for the university’s failure to hire the older plaintiff, 15% of the judges ruled in his favor – but when redress was sought for the university’s firing of the

plaintiff and the loss of his job, 35% of the judges ruled in his favor.

### **Use of emotion in decision making**

The program then turned to a discussion of the extent to which emotion plays a role in judicial decision making. Some judges, including Justices Kagan and Sotomayor, have suggested that it is appropriate for emotion to be involved as long as the rule of law is given priority. While some commentators would disagree with this approach, psychologists' research suggests that many judicial decisions are based in part on the decision maker's feelings.

Consider, for example, a prosecution for possession of marijuana where the defendant claims to be using the drug for medicinal reasons. Presented with a hypothetical 19 year old suffering from seizures, 50% of judges from Canada and New York said they would dismiss the charges. When the hypothetical involved a 55 year old suffering from bone cancer, 90% of the judges said they would dismiss. The panel suggested that judges' ability to issue non-precedential rulings may be a factor in opening the door to these types of emotional decisions.

Another situation where emotional favoritism may come into play is when a case involves both in-state and out-of-state litigants. Justice Richard Neely of the West Virginia Supreme Court claimed when he was on the bench that he regularly ruled against out-of state companies to increase awards to in-state plaintiffs. He apparently was not alone. In a case involving defendants charged with dumping toxic chemicals into a lake and a Minnesota farmer who

was poisoned by arsenic after swimming in the area, liability and compensatory damages were determined through a settlement, leaving only the question of punitive damages. Half the defendants were from Minnesota, and half were from Wisconsin. The judges considering this case assessed the in-state Minnesota defendants \$1 million in punitive damages but the out-of-state Wisconsin defendants \$1.75 million.

The race and national origin of litigants also may affect judicial decision making – although not always. When judges were presented with a hypothetical criminal case of battery involving a fight in a locker room and a claim of self-defense, their rulings did not vary depending on the race of the parties. And when bankruptcy judges were presented with a hypothetical request to discharge a student loan based on hardship because the student was pregnant and had to drop out of school, their decisions were the same when the student's name was Lakeisha and when it was Emily. On the other hand, in another study, family court judges were presented with a child custody case involving a legal resident alien father who wanted to take a child out of the country to visit his sick mother but promised to return. The divorced mother opposed the trip, and the father had previously stated his desire to move back to his home country. When the father was identified as Ronald McDowell from Ireland, 70% of the judges agreed to permit the trip. However, when the father was identified as Raj Mandapur from India, less than 40% of the judges consented.

Of course, racial and ethnic bias is not limited to judges. In one study involving lawyers, a legal

brief containing a variety of errors was given to 60 partners to evaluate along with the supposed name of the person who wrote it. The lawyers who were given a name generally associated with whites gave the brief an average grade of 4.1; the lawyers who were given a name generally associated with blacks gave the brief an average grade of 3.2. And in a line-up involving a case of armed robbery, witnesses identify a dark-skinned person 75% of the time, whereas when the case involves fraud, they identify a lighter-skinner person 80% of the time.

At times, judges react emotionally to other triggers. For example, criminal sentences appear to decrease when statutes or guidelines refer to terms of months as opposed to years because the numbers are larger. One study indicated that sentences went down by 25% when the terms were expressed in days.

## Conclusion

The research presented during this program demonstrates that while judges engage in deliberation, they also rely extensively on intuition and emotion in making decisions. In short, as Jerome Frank noted in 1931, judges are human. This raises interesting questions concerning the extent to which judges should be encouraged to deliberate more to verify the reliability of their decisions and also how lawyers might present evidence and arguments to appeal to both methods of judicial decision making. I feel confident that future AJEI Summit programs will provide guidance on these points as well.

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## Dueling Appeals: A Comparison of Best Practices and Opportunities for Reform in Civilian and Military Appellate Systems

*By Kirsten M. Casteñada*

The opportunity to hear about the similarities, differences, and opportunities to do better in civilian and military appellate systems drew a packed house for this breakout panel. Dwight H. Sullivan from the Department of Defense Office of General Counsel moderated the panel and participated in the discussion with the other panelists: the Honorable Steven David of the Indiana Supreme Court (and *COL USA Retired*), Associate Dean Lisa Schenck of the George Washington University Law School, and the Honorable James

*Wynn, Jr., of the U.S. Court of Appeals for the Fourth Circuit. Opening the session with an introduction was the Honorable Andy Effron, U.S. Court of Appeals for the Armed Forces, Retired.*

Recognizing that many audience members' curiosity about the military justice system far exceeded their experience with it, Dwight Sullivan provided an overview of the military justice system. In general, each branch of the armed services hold courts martial, and if a matter reaches a certain sentencing threshold, it goes on automatic appeal to one of four courts of

criminal appeals. Above that level sits the United States Court of Appeals for the Armed Forces, and at the highest level is the Supreme Court of the United States. In addition to the intersection between the military and civilian courts at the SCOTUS level, other intersections can arise through collateral review, *e.g.*, habeas corpus or matters in the Court of Federal Claims.

The panel used an example to describe how the court martial process might function in a given case:

- If a sexual assault is reported, it must be investigated by the service investigation department.
- If charges are preferred, a special court-martial convening authority (SPCMCA) will order an Article 32 preliminary hearing, after which, if the SPCMCA believes the matter should move forward, the SPCMCA will forward the case to the general court-martial convening authority (GCMCA).
- A GCMCA staff lawyer must provide a recommendation (*i.e.*, Article 34 advice).
- If the recommendation is to move forward, a trial by court-martial will commence.
- If the trial results in a conviction, the matter is sent to GCMCA again for further action.
- If the sentence reaches a certain threshold, the case goes on automatic appeal to one of four courts of criminal appeals.
- After that stage, there can be a petition for discretionary review to the U.S. Court of Ap-

peals for the Armed Forces (CAAF), which also has mandatory jurisdiction in some instances.

- From the CAAF, there can be a petition for writ of certiorari (available since 1984) to the Supreme Court of the United States.

As opposed to this clear intersection between military and civilian courts, there also can be murky areas in which the divisions between those courts are difficult—but critical—to discern. For example, take the case of a person who, while asleep at Camp Swampy, is subjected to sexual molestation without penetration. The military police (MPs) are called and take the alleged perpetrator into custody. Two alternative scenarios could exist: one in which the military courts have jurisdiction, and the other in which jurisdiction rests with civilian courts. Determining which scenario has arisen depends on: (1) the jurisdictional status of the installation; and (2) the status of the detainee. If the installation is in an area of federal jurisdiction and the detainee is a civilian, the matter would belong in a United States District Court. If the installation is in an area of federal jurisdiction and the detainee is military, the matter could belong in: (a) U.S. District Court, a court martial, or state court; or (b) a court martial *and* state court; but (c) *not* a court martial and U.S. District Court (because both of those courts are federal).

Judge Wynn provided a general overview of appellate options in cases in which the installation is in an area of federal jurisdiction and the detainee is a civilian. In general, the United States Code conveys a right of appeal to a defendant convicted in federal court. If he has en-

tered a plea, the right of appeal may be very narrow. For example, the defendant may have reserved certain rights of appeal in the plea bargain. Alternatively, there may be questions of double jeopardy or subject-matter jurisdiction. The time to file a notice of appeal from a judgment entered for the defendant is significantly shorter than the time to file a notice of appeal from a judgment entered for the government.

Associate Dean Schenck discussed a variety of limits that apply to appellate review in cases in which the installation is in an area of federal jurisdiction and the detainee is military. For instance, if the convening authority approves a sentence that includes discharge, punitive discharge, or less than one year of confinement, the judgment is subject to one scope of appellate review. A different scope of review would apply if the defendant entered a guilty plea. In a guilty plea, the defendant cannot waive appellate review. Other limits would apply if, after the convening authority approves a sentence and the matter is sent to court-martial, the court dismisses a portion and sends the matter back to the convening authority, which decides to retry the accused. In that event, a cap is placed on the sentence, such that it cannot exceed the sentence the convening authority originally approved.

Justice David discussed some of the differences between the limits placed on appellate review and proceedings on remand in the military system and in state courts. In Indiana state courts, defendants generally have a right of appeal without regard to whether an adverse judgment resulted from a plea or a finding of guilty by a

factfinder. Appellate review can be bargained away by plea. And if a criminal case is remanded for new trial, the slate is usually wiped clean. Nevertheless, if the defendant entered a guilty plea and the case was remanded due to an error in sentencing or in the count with which the defendant was charged, the defendant usually would not be exposed to a greater sentence on remand.

Justice David noted that Indiana has a unique provision that provides, in addition to other appellate review, a “7(b)” review to look at the sentence and determine whether the trial court sentenced the defendant appropriately within the law. This 7(b) review is available, but sparingly used.

Judge Wynn described the differences in appellate review when trial is before a federal magistrate. These trials involve relatively minor charges. An appeal from a magistrate’s conviction to the district court follows the same guidelines as an appeal from a district court to circuit court of appeals.

With regard to the distinctive military limit precluding a defendant from waiving appellate rights in a plea bargain, Dwight Sullivan asked the audience their view on the pros and cons. An audience member observed that it is usually the prosecutor, not the defendant, using the right of appeal as a bargaining chip. The audience member would prefer the military system, where appellate rights are not a bargaining chip for either side.

Associate Dean Schenck discussed the drain on resources in the military system created by the

automatic appeal process. In the appeal, the defendant is provided appellate counsel. There is a bucket of cases in which there really is nothing to appeal, but the automatic right and assignment of counsel requires devoting a lot of resources anyway. Guilty pleas get the same level of review as any other conviction. This level, in CAAF, requires rigorous inquiry. So the automatic right of appeal takes a lot of resources to fulfill.

Justice David recounted his experience that there is nothing more satisfying and unsatisfying, simultaneously, than being military defense counsel for a client who pleads guilty but later wins his case in an appeal you never knew was initiated, on an issue you never raised, based on facts found by the appellate court that you never discussed in the trial court. Although that does not happen often, it is a potential outcome in the military system.

Judge Wynn observed that, with regard to the pretrial agreement and its use as a tool to prevent appellate review, it makes sense that pleading guilty would preclude a defendant from appealing; the basis of the plea is a confession. However, there are suppression issues that can be preserved for appeal in a plea and used as a bargaining tool. Furthermore, double jeopardy and subject-matter jurisdiction may present appellate issues despite a plea bargain.

Dwight Sullivan asked Associate Dean Schenck to discuss the aspects of Article 66(c) review. In every case, military service courts have an opportunity to conduct factual sufficiency reviews as well as sentence appropriateness reviews. When the case goes to one of the four courts of

criminal appeals, the entire transcript goes with it. One justice in the court has an obligation to read the entire transcript and, for any contested charges, to say whether the court agrees with the trial court on guilt or innocence and the sentence. It's a brand new review, off the page without seeing the witnesses or being at trial. The criminal appeals judge must weigh credibility, making some allowance for the fact the trial court heard and saw the witnesses. In essence, the criminal appeals judge is the "reasonable doubter."

Despite this overarching duty, Dwight Sullivan explained that the appeal does not afford *de novo* review of everything. Most of the rulings—like evidentiary rulings—are reviewed for abuse of discretion. Only the question of guilt or innocence and sentence appropriateness are reviewed in this full-record way.

Associate Dean Schenck placed these unique military procedures in context. The military system is very old, and its historical goal was to protect the accused. This goal was particularly important in the climate of World War II. As Judge Wynn added, the people who are subject to the military system generally have volunteered to serve our country. The system is unique, given to the military by Congress with a desire to protect the defendant in a context where due process might be viewed by military officers differently than civilians view it. Associate Dean Schenck noted that this difference is a reason for the automatic appeal process and automatic appointment of counsel at trial and on appeal without cost.

To contrast the unique parameters of review in the military courts of criminal appeals with the procedures a defendant might experience in state court, Dwight Sullivan asked Justice David to describe the type of review the Indiana Supreme Court might conduct in a criminal case. Whether the case involves a guilty plea or a conviction by factfinders, a transcript of two pages or 5,000 pages, the case would be briefed with issues raised, and the court will either affirm in whole or in part or remand depending on those issues raised in the brief. The court would have the entire transcript, but review would not be a *de novo* retrial. Instead, in contrast to the military system, the Indiana Supreme Court would not be looking at issues that weren't raised.

Justice David also noted that, in the military system, rank makes no difference in the defendant's right to free counsel and many pretrial protections exist that do not apply in the civilian system. A new trial judge in civilian court would benefit from experience as a military judge, who is responsible for many more things and has a more difficult task to try a case to conclusion without it's being overturned on appeal. For example, Judge Wynn pointed out that the providential inquiry on a guilty plea in military court can last hours, but might take only a few minutes in a civilian court.

Associate Dean Schenck contrasted the necessity of specifying issues in civilian courts with the practice in military courts. In military courts, the participants can raise issues or submit the case on the merits or for sentence-appropriateness review. A military court can specify issues and ask counsel to brief them.

The court also could order oral argument on specified issues, so the appellate courts will have a more illuminating record to review. The record is provided both to counsel and the accused him/herself. The accused is authorized to provide issues, whether in their own handwriting or typed, and the counsel appointed to represent the accused in the automatic appeal then must sort through those issues. Dwight Sullivan contrasted this process with the *Anders* approach, which obligates the defendant's appellate counsel to explain why there are no meritorious grounds for appeal.

Dwight Sullivan noted another difference between military and civilian courts. In the military system, there are no separate post-conviction proceedings. Issues requiring extra-record material (such as ineffective assistance of counsel) are handled in the direct appeal. Justice David contrasted this procedure with the Indiana process, in which state courts hold post-conviction proceedings. Occasionally, a post-conviction proceeding might be pursued in federal court, but usually not a collateral attack. Judge Wynn noted that one reason for the rarity of post-conviction review in federal court is that they've been seriously restricted. Although a defendant does not have an automatic right to counsel in a post-conviction appeal, if the court submits a defendant to a hearing, the court will have counsel appointed to represent the defendant.

Dwight Sullivan asked how often Judge Wynn has seen trial counsel also acting as a defendant's appellate counsel in criminal appeals? Judge Wynn observed that trial counsel most

often withdraw when an appeal is filed. In that instance, the Criminal Justice Act allows appointment of counsel. The majority of the time, a federal public defender will perform that representation.

Justice David agreed that it is rare for the same public defender who tried a case to be the public defender representing a criminal defendant on appeal. Indiana does not have a unified public defender system; most often, a public defender assigned as appellate counsel will be different than the counsel assigned at trial. Judge David also explained that the Indiana intermediate and high appellate courts see some *pro se* appellants. The Indiana Supreme Court normally will not have oral argument involving a *pro se* litigant, but if the court believes the case merits oral argument, the court will make efforts to get the public defender's office or another attorney to represent the litigant.

Dwight Sullivan raised the point that, under 18 U.S.C. § 3771(d)(3), a victim of a crime can seek mandamus relief for violations of the Victims' Rights Act in civilian courts. Judge Wynn observed that there has been perhaps one such mandamus petition per year over the last ten years. He also noted that there is a circuit split on the proper standard of review for such proceedings . . . and the Fourth Circuit hadn't yet addressed the issue. Dwight Sullivan summarized the split: did Congress mean to import the "extraordinary" requirement into these mandamus proceedings, or did they establish mandamus as a vehicle for direct appeals for violations of the Act?

So, in the end, how do the differences between the two systems play out? In response to an audience question, Justice David opined that an innocent person accused of a crime would prefer to be in the military justice system, but a guilty person probably would rather be in the civilian justice system. In the military system, opportunities exist at the pretrial level that do not exist in civilian court, *e.g.*, access to evidence early before charges are filed, pretrial cross-examination and taking testimony under oath, and the discretion afforded the convening authority (more than a prosecutor). Although the convening authority picks the panel of jurors, other considerations make the military system more protective of defendants' rights.

Chief Judge Effron concluded the panel by remarking that, although there are differences between the military and civilian justice systems, each can learn from the other.

## The Interactive Constitution

*By Timothy J. Vrana*

Have a question about a clause in the United States Constitution? Want to know how it's been interpreted? Want to get more than one point of view?

There's an app for that.

Jeffrey Rosen, President and Director of the National Constitution Center, told attendees at the Summit's first session that the Center has developed an app, "Interactive Constitution," that provides information about each of the provisions in the U.S. Constitution. For each provision, scholars of different perspectives co-authored a 1,000-word essay covering points of agreement. For each provision, those same scholars then wrote separate essays about points of disagreement.

The experts were selected with the guidance of two prominent constitutional law organizations: The American Constitution Society and The Federalist Society.

The experts' essays are at your fingertips once you download the app on your mobile device. Even for those of us who are not tech-savvy, the app is easy to download and easy to use. And what a wealth of information!

The app also includes information about state constitutions that preceded the drafting of the U.S. Constitution. You can also use the app to compare and contrast the U.S. Constitution to constitutions of other countries.

Mr. Rosen also mentioned that the National Constitution Center holds debates throughout the United States about constitutional issues. Anyone interested in sponsoring such a debate can contact Mr. Rosen at the Center.

The National Constitution Center also produces podcasts.

By the end of the session, I was reminded of the old adage, "Give a man a fish and you feed him for a day. Teach a man to fish and you feed him for a lifetime." Although Mr. Rosen responded to some substantive constitutional-law questions, the session was most helpful when he taught us to use the app to develop our own answers.

## The Decline in News Coverage of Appellate Court Decisions

By Eric J. Magnuson and Chelsea A. Walcker

On the final day of the 2016 Appellate Judges Education Institute Summit, a panel of esteemed current and former journalists tackled the pressing issue of declining news coverage of appellate court decisions in the United States. Moderator Howard Bashman, a Philadelphia appellate lawyer and popular legal blogger, invited the panelists to address the decline in reporting of appellate court decisions by the traditional news media and to offer suggestions for how journalists and courts can inform the public about appellate court decisions in order to foster the public's understanding of the appellate legal process and judiciary as a whole. The consensus among the panelists was that the shrinking of traditional news media coverage has ushered in a change in reporting on appellate court decisions and that such reporting, particularly at the state level, is generally limited.

Panelist Chris Davey, Assistant Vice President for Media and Public Relations for Ohio State University, provided a summary of overall trends in news media and explained that declining news media coverage as well as newspaper subscriptions pose serious concerns for the public's understanding, trust, and confidence in the courts. To compensate for the "dying news media," Davey suggested that appellate courts engage the public directly. However, Davey acknowledged that approach is not without challenges; the judiciary's traditional independence does not necessarily lend itself to public engagement. Davey cited the U.S. Supreme

Court's stringent rules for journalists, such as limiting the number of pencils and paper that can be brought into the courtroom, as an example of the U.S. Supreme Court not being in the twenty-first century in terms of accessibility. Nonetheless, Davey suggested that courts must find ways to reconcile their traditional independence with the absolute necessity of supporting understanding of the judiciary in order to foster public trust and confidence in the courts.

Panelist Paula Reed Ward, writer at *The Pittsburgh Post-Gazette*, offered a slightly different view of the legal journalistic landscape. Ward stated that while daily journalism has declined significantly over the past several years, at least some newspapers still prioritize court coverage. However, Ward explained that such coverage is increasingly limited to major appellate court decisions that are readily available to the news media. Ward criticized the limited public information available to reporters seeking to cover appellate court decisions in the media. For example, Ward said that in Pennsylvania, appellate courts do not post briefs online, so reporters might waste an hour attempting to locate appellate briefs only to ditch the article in order to meet other pressing deadlines. As a remedy, Ward suggested that courts post briefs online, preferably in real time. Ward also suggested that courts do more to engage the press by inviting reporters to attend events or to discuss upcoming case dockets before decisions are released.

Panelist Josh Gerstein, senior writer at Politico, agreed with the other panelists' views on the decline of news media coverage, particularly coverage of appellate court decisions. Gerstein suggested that the Internet can help address these problems. Gerstein identified a number of concrete steps that appellate courts can take using the Internet to ensure that news coverage of court decisions is accurate and timely. For example, Gerstein encouraged courts to post briefs online, provide an RRS feed – which would enable journalists to track cases and receive filing alerts, and post oral argument videos online to reach broader audiences. Gerstein also encouraged appellate judges to draft their opinions to make them understandable to the public and media at large and to provide a summary or clear issue statement to save reporters time in reviewing sometimes lengthy decisions.

The panelists and moderator appeared to be in agreement that the “crisis” in news media coverage has created an opportunity for courts to play a more important role in ensuring that the public remains informed about appellate court decisions and the appellate court process. Although some appellate courts have embraced the use of official court websites and other technologies to directly communicate with the public at large, it remains to be seen whether the judicial branch as a whole will embrace a more active role in providing information on appellate court decisions to the public—a role that was traditionally reserved to journalists.

## Contributors

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