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MAGAZINE

Security v. Freedom: Fallout of 9/11

The official publication of the Riverside County Bar Association

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Riverside Lawyer Magazine

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Mission Statement

Established in 1894

The Riverside County Bar Association, established in 1894 to foster social interaction between the bench and bar, is a professional organization that provides continuing education and offers an arena to resolve various problems that face the justice system and attorneys practicing in Riverside County.

RCBA Mission Statement

The mission of the Riverside County Bar Association is to:

Serve its members, and indirectly their clients, by implementing programs that will enhance the professional capabilities and satisfaction of each of its members.

Serve its community by implementing programs that will provide opportunities for its members to contribute their unique talents to enhance the quality of life in the community.

Serve the legal system by implementing programs that will improve access to legal services and the judicial system, and will promote the fair and efficient administration of justice.

Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Public Service Law Corporation (PSLC), Tel-Law, Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Inland Empire Chapter of the Federal Bar Association, Mock Trial, State Bar Conference of Delegates, and Bridging the Gap.

Membership meetings monthly (except July and August) with keynote speakers, and participation in the many committees and sections.

Eleven issues of Riverside Lawyer published each year to update you on State Bar matters, ABA issues, local court rules, open forum for communication and timely business matters.

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Annual Joint Barristers and Riverside Legal Secretaries dinner, Law Day activities, Good Citizenship Award ceremony for Riverside County high schools, and other special activities.

Continuing Legal Education brown bag lunches and section workshops. RCBA is a certified provider for MCLE programs.

MBNA Platinum Plus MasterCard, and optional insurance programs.

Discounted personal disability income and business overhead protection for the attorney and long-term care coverage for the attorney and his or her family.

Calendar

September

23 Annual Installation Dinner
Mission Inn – 6:30 p.m.

October

5 Joint RCBA/SBCBA Environmental Law Section
RCBA Bldg., 3rd Floor – Noon
MCLE

6 Bar Publications Committee
RCBA – Noon

7-10 State Bar Conference of Delegates
Monterey

12 PSLC Board
RCBA – Noon

13 Mock Trial Steering Committee
RCBA – Noon

Barristers
Cask ’n Cleaver, Riverside
6 p.m.
MCLE

15 Joint RCBA/PSLCE General Membership Meeting
RCBA Bldg., 3rd Floor – Noon
MCLE

President's Message

by Michelle Ouellette

It is with great excitement that I anticipate serving as this year's Bar Association President. As many of you know, I am a partner at Best Best & Krieger and Chair of the firm's Natural Resources Practice Group. Since the last Bar President from Best Best & Krieger was Dallas Holmes so many years ago, it seemed high time for another BBK'er to take a turn at the helm.

My practice is somewhat unique in Riverside, consisting solely of environmental law. Instead of spending time in a courtroom or my office, for the past several years, I have spent most of my time traveling throughout Southern California's mountains, deserts and wetlands, assisting in the development of large regional multiple-species habitat conservation plans. Locally, it has been my honor to provide legal representation during the development and implementation of the Western Riverside County Multiple Species Habitat Conservation Plan. This Plan provides protection and habitat for 146 species and is one of the largest habitat conservation plans ever permitted under the Federal Endangered Species Act. With the approval of this Plan in June 2004, the County of Riverside and the fourteen Western Riverside County cities covered by the Plan gained the necessary tools to plan for the futures of their citizens, to ensure that the economic growth and development that have driven and will continue to drive our region continue, and also to provide their citizens with a high quality of life by ensuring open spaces and protection of biological resources.

But enough about me. I am sure that we will have ample opportunity to become better acquainted during the next year. I do, however, want to take this opportunity to thank outgoing President Mary Ellen Daniels for all of her hard work and efforts over the last year on behalf of the Bar Association. Mary Ellen's leadership, energy, personality and fashion sense not only made it a pleasure to serve on the Board of Directors but also significantly increased attendance at the monthly Bar lunches! The fact that Mary Ellen is a sole practitioner who took time from her very busy family law practice, as well as her own family, to make enormous contributions to the Riverside County Bar Association will forever be appreciated. She will be a tough act to follow.

I anticipate that my job will be an easy one this year because of the groundwork Mary Ellen laid and because I have the pleasure of serving with an excellent board. Theresa Han Savage, David T. Bristow, Daniel Hantman, E. Aurora Hughes, Janet A. Nakada, John E. Brown, Harry J. Histen, III, Jay E. Orr, Mary Ellen Daniels, and Jeremy K. Hanson, the Barristers' President, are all enthusiastic and extraordinary members of Riverside's legal community and I am proud to be working with each of them. The Bar Association, thanks to the hard work of past boards and staff, continues to be in excellent economic health. Membership continues to increase, as does member participation. The Bar Association has a proud tradition, one that fosters both excellence and diversity. If the Bar Association is not already a part of your life, I hope you will visit us and consider joining our community.

If I haven't met you already, I look forward to meeting you soon. Please join us for the swearing-in ceremony on the evening of Thursday, September 23, 2004 at the Mission Inn. Additionally, we look forward to seeing you at the Second Annual Riverside County Bar Association Golf Tournament, which will be held on Monday, November 8, 2004 at the Canyon Crest Country Club. Last year's inaugural event was a huge success and we urge you and your organizations to participate in the tournament. Not only is it a good way to socialize with others in the legal community but it is also a fundraiser for the many worthwhile activities the Bar Association supports.

One final note regarding the theme of this month's Riverside Lawyer, "Security Versus Freedom Post 9/11." Since the events of September 11, the creation of the Department of Homeland Security, and the enactment of the Patriot Act and other security measures, politicians, citizens and the entire legal community have had to balance issues of security with the concept of civil liberty. Maintaining this balance is a challenge and requires the continued thoughtful participation of everyone. I remember that Past President Dan Buchanan promised at his installation dinner "to do no harm." He made this comment after the Bar Association had successfully survived several challenging fiscal years. I echo Dan's thoughtful comment, but would like to take this promise one step further. While security is, of course, necessary, it is equally necessary that we as lawyers remain cognizant of the need to balance the protection of security with the freedom of civil liberty during the nation's fight against ter-

(continued on page 5)

Barristers

by Robyn A. Beilin

Another Barristers' year is upon us! The Barristers' board has been working hard to put together a fun and informative schedule of events in the upcoming months.

I am pleased to announce the following members of our 2004-2005 Board:

Jeremy Hanson of Heiting & Irwin, ***President***

Robyn Beilin of the Law Offices of Harlan B. Kistler, ***Vice President***

John Higginbotham of Best Best & Krieger, ***Treasurer***

Chad Boylston of the Law Offices of Geoffrey H. Hopper & Associates, ***Secretary***

Chris Peterson of Reid & Hellyer, ***Member at Large***

I would urge those of you not already involved in Barristers to join us for our next meeting on October 13, 2004, at 6:00 p.m. at the Cask 'n Cleaver, which is located on University Avenue in Riverside. Barristers is a recognized activity of the Riverside County Bar Association for new attorneys in the Riverside legal community. Although Barristers is specifically designed for attorneys under the age of 37 or with under 7 years of practice, we welcome all RCBA members to our meetings and encourage any interested members to join us.

At each meeting, attendees have the opportunity to meet other attorneys in the area during a social hour. Afterwards, a selected speaker leads a discussion on invaluable topics for newer attorneys. Respected attorneys and judges volunteer their time to speak to our group over dinner, offering their experiences and advice on everything from trial advocacy to courtroom etiquette. Our October 13 meeting will actually be led by the Barristers' Board, who will provide tips for avoiding "Rookie Mistakes" while in your first few years of practice. One hour of MCLE credit is offered at the completion of each meeting.

I would strongly urge you to consider coming to Barristers, if you don't already, not only because you can pick up fantastic tips, but also because it is a wonderful opportunity to network and to meet other attorneys in your legal community. One of the benefits of practicing in Riverside is our close-knit community. Participating in Barristers allows you to make connections with other lawyers, which can lead to great friendships as well as solid business relationships. It has allowed me personally to develop a network of referrals and a group of people to turn to within my profession.

Last year, Barristers held an social event at BMW of Riverside, at which more established members of the RCBA were invited to meet and mingle with its newest members. We are hoping to hold a similar event this coming spring as well as a winter social in December 2004.

Again, please join us on October 13 for our first meeting of the 2004-2005 year. If you have any questions or if you would like more information, do not hesitate to contact me at (951) 686-8848 or beilinro@yahoo.com.

Robyn Beilin is with the Law Offices of Harlan B. Kistler and Secretary of Barristers.

President's Message *(cont. from page 3)*

rorism. So I would amend Dan's comment that we do no harm and add that we continue to support those concepts and principles that make this country great.

The future is upon us now. On behalf of the Bar Association, I am proud to say with absolute confidence we are ahead of the times and the best is yet to come.

Michelle Ouellette, president of the Riverside County Bar Association, is a partner at Best Best & Krieger, LLP in Riverside.

InterNEThics

by Allen C. Turner

You have registered your domain name (AnnaTourney.com) and secured a host for your website. You are ready to upload your webpages to your website.

But wait!

Before you upload, do an Ethics Check and a Grammar Check. At risk are not just your professional image, but also your license to practice law. This is your responsibility and not to be delegated to your website engineer, your treatise vendor, or your brilliant teenager.

First, read California Formal Ethics Opinion 2001-155 (the Opinion), http://www.calbar.org/2pub/3eth/ca2001-155.htm. Flawed as it is by paper-based thinking, it does state the rules for attorney websites. It is flawed because it does not recognize the realities and potentialities of electronic media. Supplement the Opinion with the ABA's "Best Practice Guidelines for Legal Information Web Site Providers," http://www.elawyering.org/tools/practices.shtml, and you should be in pretty good shape.

In the Opinion, the Committee on Professional Responsibility and Conduct (COPRAC) addresses this question: "What aspects of professional responsibility and conduct must an attorney consider when providing an Internet web site containing information for the public about her availability for professional employment?"

> "The web site includes a description of Attorney A's law firm and its history and practice; the education, professional experience, and activities of the firm's attorneys; law-related images; and an electronic mail form allowing for communication to any attorney in the firm. . . . The web site does not include live video interactivity, a bulletin board, links to other law-related web sites, or news group functions." *Id.*

The Opinion considers the website to be a "communication" subject to rule 1-400(A) of the California Rules of Professional Conduct and an "advertisement" under California Business and Professions Code sections 6157 through 6158.3. False, misleading, and deceptive messages, whether visual, written, or audible, are prohibited.

The Opinion notes that the Code requires all pages of advertisements to be retained for two years.

Interestingly, COPRAC opines that the website is not a "solicitation" under Rule 1-400(B) because it is not "delivered in person or by telephone." Email is okay because "[t]he static nature of an e-mail message allows a potential client to reflect, re-read, and analyze . . . ." http://www.calbar.ca.gov/calbar/html_unclassified/ca2001-155.html

Here are some problems that are not expressly addressed in the Opinion.

Misleading Keyword Metatags.

Webpages are not analogous to paper pages. Webpages are written in hypertext markup language (html). This source code instructs the browser software to display images and text on a computer screen. Much of the code is not displayed visibly on screen. Some of the code is directed to search engine robots that peruse the World Wide Web and collate its contents into searchable databases.

Search engines, e.g., Google and AltaVista, look not just at the visible page, but at the invisible source code as well. The analogy to paper advertising fails to recognize that the visible pages may comply with the standards while the invisible source code violates them. The visible page may say, "licensed to practice in California," but if the site has a metatag that lists all states as keywords, e.g., *<meta name="KeyWords" content=" Alabama, Alaska, California, Delaware, . . . Wyoming">* or *< . . . "legal aid, we never lose, free, no fee">*, potential clients may be attracted based on misleading, invisible content. Arguably, the source code is a written message, albeit a message to search engines, not the human reader.

> **Recommendation:** Avoid anything misleading in the Title, Keyword, or Description tags.

Misrepresentation by Framing.

Framesets permit more than one page to be displayed on a screen simultaneously. This is useful, for example, to display a persistent menu in one "frame" and variable content pages in another frame. The value is that changes to a menu need be done on one file only rather than on all pages on the website. The problem is that the menu can call up pages from anyone's website. The viewer then sees my content on your site.

> **Recommendation:** Tell your web engineer to avoid framing external pages. They may be displayed with popups or on new pages, but should not appear imbedded in your site.

Archiving Website Revisions.

The Code requires all advertising copy to be retained for two years. The idea behind retaining copy is, I presume, to provide evidence as to whether a particular advertisement was compliant

and whether a client or potential client was justified in relying on it. The unasked, and unanswered, question is whether a hardcopy printout of the website is to be retained or the electronic source code. Neither the Opinion, the Code, nor the Rules expressly require that the source code be retained.

Recommendation: Archive the source code for every revision of your website.

Dynamic Web Content.

An associated problem, not addressed by the Opinion, is the dynamic nature of webpage content. Unlike a paper file, webpages can be constructed to automatically import variable content. How does one archive content that changes daily?

Real Simple Syndication (RSS) codes allow for daily newspaper headlines and links to the articles to appear on your website automatically. Suppose your clientele is the construction industry. You can receive and republish daily news articles on the construction industry. Are you potentially liable if a client misunderstands the implications of an article and holds you responsible?

Related dynamic content includes bulletin boards, chatrooms, and newsgroups. It is quite simple to frame (see above) on your website a discussion group like news:misc.legal.moderated. While legal discussions are interesting, the risk that the content may be attributed to you would probably outweigh any entertainment benefit your or your readers might enjoy.

Recommendation: Put a disclaimer on the news page stating that the articles, like magazines in your office waiting room, are not legal advice. Better yet, don't incorporate dynamic content.

Honor your Contracts.

Websites may contain copyright-protected scripts and other coding usable by permission only or with authorship acknowledgement. Images, readily downloadable with a right-click, are easily incorporated into your site. Content can easily be copied with a mouse click. Check to make sure that you have permission to use any text or images that are subject to copyright – including those convenient MapQuest images – and before you advertise your prestigious AV

(continued next page)

InterNEThics *(continued)*

rating, review the conditions imposed by Martindale-Hubbell.

Grammar Check.

Will your friends tell you when your grammatical slip is showing?

You have seen some technically excellent websites with bad grammar. They read as if they were dictated and transcribed without review. A great extemporaneous speaker, a persuasive orator, may be a lousy writer. Oral errors evaporate; written ones persist.

Make sure that every sentence has a subject and a verb and that they are in agreement as to number. Know and accept the difference between plurals and possessives. Avoid misusing apostrophes and comma's (sic) . Use your text editor's spell-checker and have an intelligent human follow up. You will enjoy a lot of credibility if you avoid "alot."

Avoid verbosity; make every word count. Strunk and White's "vigorous writing is concise" is especially apropos for websites where viewers prefer to skim content quickly and seldom scroll down to read more. To verify this assertion, observe your own online perusal patterns.

Recommendation: Get an editor; everyone needs an independent eye.

If you are assured that your webpages are ethically compliant and grammatically correct go ahead and upload.

Allen Turner is the webmaster of the RCBA website and a member of the Bar Publications Committee.

Kathy Gonzales to be Honored with Krieger Award

by Judge Craig Riemer

The late Kathleen M. Gonzales will be honored with the RCBA's James A. Krieger Meritorious Service Award on September 23, 2004. The award, which is the highest honor bestowed by the RCBA, will be presented to her family at a dinner at the Mission Inn. The officers of the RCBA and Barristers will be formally installed at the same dinner.

Kathy had long been an active and beloved member of the RCBA. Most recently, she chaired the association's Continuing Legal Education Committee, a position she had filled for many years. In addition to her many achievements within the association, she compiled a long record of public service, both as an attorney for Inland Counties Legal Services and later for the Riverside City Attorney's office and as a quiet but tireless worker within the community.

The RCBA established the Meritorious Service Award in 1974 to recognize those lawyers or judges who have, over their lifetimes, accumulated outstanding records of community service. The award, later named for James A. Krieger, has since been presented to James Wortz, Eugene Best, Arthur Swarner, Arthur Littleworth, Justice James Ward, Fred Ryneal, John Babbage, Patrick Maloy, Ray Sullivan, Justice John Gabbert, Jane Carney, Judge Victor Miceli, and Justice Manuel Ramirez.

The award is not presented every year. Instead, it is given only when the extraordinary accomplishments of a particularly deserving individual come to the attention of the selection committee.

The record of service left behind by Kathy Gonzales is a source of pride for all RCBA members and an achievement to be emulated by anyone lucky enough to have known her. Please join us on the evening of the 23rd to honor the memory of this exemplary colleague.

Judge Riemer is the chair of the Krieger Meritorious Service Award Committee and a past president of the RCBA.

Rare Vacancy in DRS Board of Directors

by Geoffrey H. Hopper

For those who are not familiar with Riverside County Bar Association Dispute Resolution Service (DRS), it is a nonprofit corporation which has been associated from its inception with the Riverside County Bar Association. It provides arbitration and mediation services directly to the public. It also has a contract with the County of Riverside to provide mediation services for parties participating in court proceedings.

Since its inception, the organization has continued to grow almost exponentially. The panel members who provide our mediation/arbitration services comprise some of the most impressive local representatives we have in the legal profession, which of course is our goal. Our Board of Directors carefully scrutinizes and screens numerous applicants who desire to be members of our panel. Many of our panel members participate quite frankly not for the minimal compensation they receive, which in many cases is simply waived by the panel members, but rather, I believe, to provide quality service to the public. Additionally, many want to enhance the reputation of the legal profession to the public as a whole. While many applicants to our panel meet the minimal requirements of practicing not less than 10 years in the state of California and actively being a member of the Riverside County Bar Association, candidly our screening process is much more thorough than that. It is our desire to continue to maintain our reputation as an organization whose panel members are the "cream of the crop."

As all individuals who have ever been members of the Board of Directors of DRS are aware, this is one of the easiest Board of Directors positions to hold. This is for many reasons, including the fact that we have an outstanding staff that makes all the board members look very good. Our meetings typically take place once every three or four months and last an hour to an hour and a half on the average, and you get a great free lunch; on top of that, all our board members sincerely believe that we are providing a great service to the community, which makes us all feel quite proud. It is for all of these reasons, I believe, that we have a very low turnover on our Board of Directors, which consists of seven individuals.

It has been quite a while since we have had a vacancy to fill on our board, and therefore we are putting out notice for this one opening. In the past, we have typically received numerous applications for a single position, as we anticipate will be the case in this situation, and therefore we are requesting that, if you have an interest in applying, you submit not only a cover letter, but also a résumé to be screened by our Board of Directors. If interested, please send your cover letter and any accompanying attachments you deem appropriate to: Charlotte Butt, RCBA Dispute Resolution Service, 4129 Main Street, Suite 100, Riverside, CA 92501.

Geoffrey Hopper is with the law firm of Geoffrey H. Hopper & Associates, specializing in labor and employment law, serves as the President of the RCBA Dispute Resolution Service and also is a Past President of the Riverside County Bar Association.

Musings from Iraq: Ka-Blume!!

by Stevan Rich

It's hard to put into print the actual sound. The "Ka" really isn't heard, but simply writing "Blume!" (or "Boom!," as some prefer) doesn't have the impact I want to convey. I'm with the 416th Civil Affairs Battalion – Chief of the Legal Team – in a combat zone, and impacts are important to me.

The sound comes through the walls of our reinforced concrete building as I boot up the Internet in hopes of reaching an email contact in Jordan. The effort to obtain books on democracy in Arabic must continue once I have connectivity, but old habits kick in. I grab my aid-bag, M-16A2 rifle, and booney hat, and head for the door. Doc Franz, bless his soul, grabs his bag as well and heads for the aid station up the road. His bag is ten times the size of mine and his value to any injured is ten times as great as well.

It's the old ambulance driver in me that's at work. My more recent pursuit is irrelevant right now. Life and limb are at stake, so the Iraqi legal system must wait another day for its Arabic language copies of Toni M. Fine's American Legal Systems: A Resource and Reference Guide. Is it an IED (Improvised Explosive Device)? Has a mortar shell landed?

Rich w/his assistant Specialist Jeff Danovich

Stevan Rich at the Dahuk Dam

The gate guard says it was about 800 meters out in "that" direction, as he gives me a vector with an outstretched arm. He does not notice the Judge Advocate branch insignia on my collar, only the embroidered Expert Field Medical Badge on my left chest, above the words "U.S. Army." "We'll shoot 'em up if they get close enough, sir, and you can then patch 'em up." We both know it must have been an IED. Perhaps the NCF (Non-Compliant Forces) are helping us celebrate the Army Birthday today (June 14). A patrol ventures out to see.

Doc Franz is back from the aid station, so the IED must have missed its intended target. We continue our efforts to bring stability and sanity to this province. (Sadly, though, we've had mortar rounds injure and kill some good people on our base in the last month.) But as most of the rounds are sure to miss, we shrug off the ka-blumes and continue to work.

Since the Internet won't respond to my pleadings (as an advocate, this is sometimes frustrating), I'll revise the order of priorities for reconstruction of the provincial courthouses. We have four facilities completed and a dozen to go. As three of them are in unfriendly towns, I recommend that they must wait. Napoleon recommended reinforcing your strengths, not weaknesses.

In any case, the judges will continue judging and the lawyers will continue lawyering, as they have for many months now. So what if the walls need painting or the ceilings leak during the infrequent rains – our pioneer circuit court judges literally rode from town to town to hold court in whatever building or courtyard was available. There are no saloons here, though. Which explains why a bar association for the lawyers is not a priority.

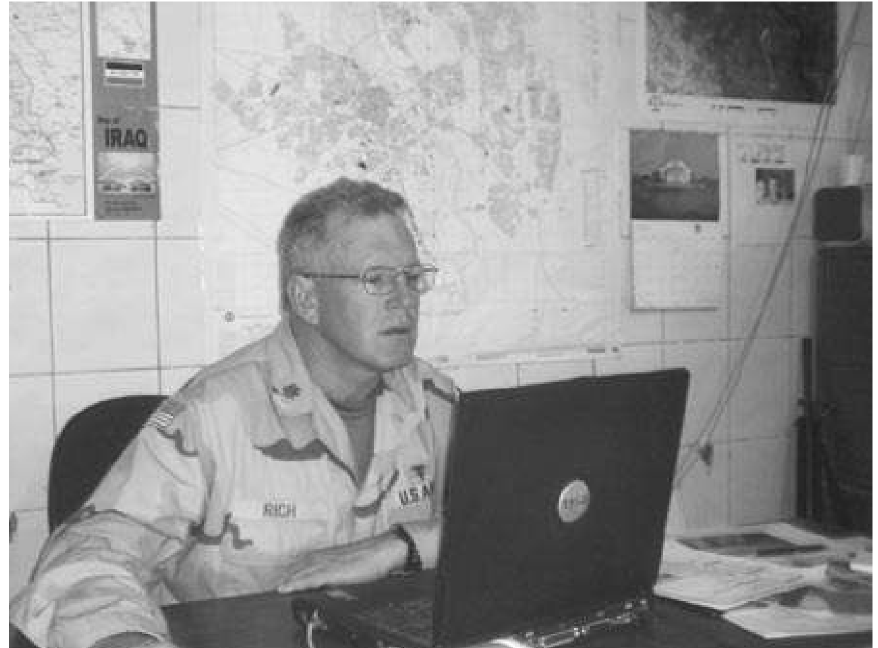
But my mission is to bring Iraq's Fourth French Republic legal system up to modern standards, so I'll also continue the effort to bring desktop computers to the outlying courts. Schools, police stations, clinics, and even prisons are not the only critical social infrastructures. Automobiles will help as well, because the judges, as investigators, often must travel to the scene of the crime. Pamphlets in Arabic and Kurdish explaining the provisions of the Transitional Administrative Law must be obtained and distributed.

These carefully directed efforts and allocations of funds are not the only legal-related improvements to the justice system. The Court Appointed Attorney Program has provided counsel for defendants. Coalition Provisional Authority (CPA) Orders and Regulations have temporarily modified some onerous provisions of the Iraqi Criminal Code and Criminal Procedure Code. Judges have been vetted. Police and judges cooperate in a positive fashion. Chief Judge Fiseal, after receiving hours of computer training, is delighted that his docket appears on his desktop. I am ready to come home.

Not so fast! While the legal mission is accomplished up here in Mosul, loose ends need tying up. A Connecticut-based NGO (Non-Governmental Organization) wants to come to Ninewa Governorate to help reform the juvenile justice system. Lawyers Without Borders, you're certainly welcome to storm on over! I wish them luck.

And a new challenge now presents itself. Sheikh Al Shanary, a tribal chief from one of the less than friendly outlying towns, needs some assistance. Seems the CPA forces in his neighborhood are not returning the automobiles seized by Iraqi Police a few weeks ago. He has a court order from the local judge, but the American lieutenant says the judge can't tell him what to do. (These subtleties as to respect for the rule of *which* law will become more complex as Iraq receives status as a sovereign nation next week.) If I can persuade the lieutenant, the town may become less unfriendly. Challenges are opportunities.

So I have a continuing opportunity to enjoy the heat. (It does remind me of Riverside in July, so I'm not too homesick.)



Our 10-kilometer Fun Run honoring the Army Birthday early this morning included pre-race instructions on what to do in case of mortar attack. Maybe I can win the next run, on July 4. I do not look forward to the fireworks!

Stevan C. Rich, MAJ, JA, 416th Civil Affairs Bn Legal Team Chief

Generation of Terrorists

by Richard Brent Reed, Esq.

You've seen this headline before while checking your groceries. But this time, it's not just a sensational eye-catcher. It's the greatest threat to national security that we have faced since 9/11. The aliens that I refer to are not extraterrestrial. They walk among us.

Terrorists seek out democracies, to exploit their liberties and take refuge in their laws. As in most free nations, our laws are a sloppy patchwork of state laws, federal regulations, and local ordinances. In our case, a constitutional hole exists that an invading army is about to walk through. That hole is citizenship.

Citizenship is defined by the 14th Amendment thus: "All persons born or nationalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." To be a native-born American is a coveted status. For over two hundred years, people have come to this country to fulfill their dream: that their children will be born in America. That same dream, however, has its dark side.

(continued next page)

Oil For Soil

Let's say I'm a Saudi with secret connections to al Qaida and lots of money. As a visitor or even as a resident alien, my movements would be closely tracked the moment that I entered the country, thwarting any plans that I had to plant a bomb, poison a water supply, or even solicit recruits to my cause. But American citizens move freely and are free to speak their minds without fear of deportation. What I need, then, is a reservoir of Americans to do my bidding with unquestioning loyalty: a homegrown army, if you will.

So I find myself an American woman who will do anything for money (TV "reality shows" demonstrate that there is no shortage of those). I give her money to have my baby – a male child. That baby, born on American soil, is an instant citizen. If I decide that the American mother should deliver her baby on Saudi soil – or sand, as the case may be – citizenship is still available. If a child is born to an American parent outside the United States, Congress requires that the child stay in this country for five consecutive years, without interruption, between the ages of 14 and 28; then, the child may elect to become a citizen [*Rogers v. Bellei* (1971) 401 U.S. 815]. Or I could just go back to Saudi Arabia and wait for the mother to send the youngster to me for "education" at the local madrassah or some less obvious school in Germany or France or even Riverside. By the time he is 18, he will be fully indoctrinated and ready to attend an American university, where his anti-Americanism will go largely unnoticed.

Terrorist Tourist

Meanwhile, my teenage terrorist is free to inspect airports, commercial ports, and train stations. He may do some sight-seeing around Hoover Dam, go fishing on Lake Skinner, or take in the scenery all along the 800-mile California Aqueduct. He may even enroll in a flight school. He can travel as he pleases, protected by the Privileges and Immunity Clauses in Article IV, section 2 of the Constitution and in the 14th Amendment. If he visits a foreign country, he cannot be denied reentry. Even if he swears allegiance to that foreign power, he cannot be divested of his citizenship [*Vance v. Terrazas* (1980) 444 U.S. 252, notwithstanding 8 U.S.C. § 1481(a)(2)]. And with an American passport, he can even visit Israel.

As an American citizen, my young subversive can vote, hold office, purchase an airplane, or become a chemist, a druggist, an importer, a soldier, or a mail carrier, without suspicion. Now, let's imagine that my money was able to buy the services of several American women and that the young terrorist has a host of half-siblings. Let's multiply him by a factor of twenty or thirty or more. Al Qaida's next invading army won't have to invade at all.

This may sound like pulp fiction, but so did the 9/11 scenario before 9/11. It only took two out of nineteen terrorists to bring down the Twin Towers. The first attempt at destroying the World Trade Center was in 1993. Al Qaida waited eight years before implementing their second – their successful – attempt. Time means nothing to these people. Rest assured that whatever plans are being laid now have a very long fuse.

The USA PATRIOT Act: The Necessity of Practical Law Enforcement Applications in the War Against Terrorism

by Anthony R. Gordon, Esq.

"The advancement and diffusion of knowledge is the only guardian of true liberty"

— James Madison

Perhaps no other legislation in recent memory has attracted as much criticism from civil rights groups and as much praise from law enforcement circles as the USA PATRIOT Act passed by Congress shortly after the September 11th terrorist attacks.[1] The statute is far from simplistic and this article is not intended to be an encompassing review of it. Rather my intent is to show the reader the necessity of the practical applications that the PATRIOT Act provides law enforcement as it relates to the war against terrorism that our country is engaged in today.

Questions have been raised recently about whether the government can be trusted at all with the expanded law enforcement powers given to it under the PATRIOT Act. Debates about government power have been ongoing for centuries. As Sir Winston Churchill noted, "Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government, except all those others that have been tried from time to time."[2] While there is a delicate balancing in the PATRIOT Act between government and individual interests, it must be emphasized that the first responsibility of government is to preserve the lives and liberty of the people.[3]

I mention these often quoted words to point out that federal law enforcement does not operate in a vacuum, devoid of any historical reference to civil rights or the freedoms for which Americans have fought so valiantly for more than two hundred years. Law enforcement personnel are trained in constitutional law throughout their careers. To suggest otherwise without any substantial basis to the contrary, as some do in their attempts to undermine the PATRIOT Act, does a disservice and weakens the enforcement of the very laws designed to insure the safety of all Americans against terrorists who seek to destroy our government institutions for their own benefit.

I. BACKGROUND

The PATRIOT Act was passed 98-1 by the Senate and 357-66 in the House of Representatives. What a lot of people don't realize is that many of the powers granted by the statute have been utilized legally and fairly by law enforcement in non-terrorism contexts for decades. Effective crime fighting tools such as "roving wiretaps" are common in drug and organized crime cases, and grand jury subpoenas are routinely used in white collar crime cases to obtain records from businesses and financial institutions. These techniques can now be used in terrorism and intelligence related cases, subject to prior judicial approval and implementation in a manner consistent with First Amendment rights.

Contrary to some media reports, public opinion about the statute supports the government's efforts in the war against terrorism. For example, last August 2003, a USA Today/CNN/Gallup Poll asked: "Do you think the Bush Administration has gone too far, has been about right, or has not gone far enough in restricting people's civil liberties in order to fight terrorism?" Fifty-five percent of adult respondents answered "about right" and nineteen percent indicated "not gone far enough." Only twenty-one percent chose "gone too far."[4] With these facts in mind, let's look at some of the main provisions of the statute and the practical applications that it offers law enforcement in the fight against terrorism.

II. IMPROVING THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

One of the main federal statutes amended by the PATRIOT Act is the Foreign Intelligence Surveillance Act of 1978 ("FISA").[5] FISA was enacted to establish the authority and procedures for the government to conduct electronic surveillance in national security and intelligence cases. Before any electronic surveillance can be undertaken in these cases, the statute requires the demonstration of probable cause to a special FISA court in Washington D.C.[6]

After FISA was adopted, federal case law developed that required the government to

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separate foreign counter-intelligence cases from criminal cases. This requirement, intended to protect the FISA investigation, resulted in the running of two similar investigations simultaneously without either investigator knowing what the other was thinking or doing.[7] Such a result was impractical at best, and could be disastrous if critical information was not passed along to all individuals involved at the right time in an investigation.

The PATRIOT Act rectifies this undesirable situation by allowing the sharing with criminal investigators of intelligence information gained as a result of a FISA intercept or search.[8] This authorization is contingent upon the FISA investigation having initially had the significant purpose of foreign intelligence information gathering.[9] The FISA Court of Review approved this practice last year in the very first opinion issued by that Court.[10] Likewise, if foreign intelligence information is generated as a result of a federal grand jury subpoena and/or from a federal criminal wiretap, it can now be shared with U.S. intelligence officials in order to more effectively protect the country from terrorist acts.[11]

Earlier this year, the success of information sharing was seen in the federal indictment against former University of South Florida professor Sami al-Arian. The 50-count indictment includes charges of being the head of the Palestinian Islamic Jihad in the United States and using a university think tank and Palestinian charity as fronts to raise money for terrorist attacks. It has been reported that the free flow of information among investigators and prosecutors, as a result of the recently passed PATRIOT Act, contributed to the successful indictment.[12]

Finally, the information sharing provisions of the PATRIOT Act strengthen the role, responsibility, and accountability of the Director of the Central Intelligence Agency ("CIA"). Under the statute, the Attorney General and the heads of departments or agencies with law enforcement responsibilities must promptly disclose to the CIA Director any foreign intelligence information obtained as a result of a criminal investigation.[13]

III. APPLYING OLD TOOLS TO NEW PROBLEMS

As previously noted, many of the tools now available under the PATRIOT Act in terrorism cases have been used successfully for decades in drug and organized crime cases. Before the PATRIOT Act, the securing of a wiretap in criminal investigations was not available for the full range of terrorism related crimes. This deficiency has been corrected by making crimes related to chemical weapons and terrorism a predicate offense in the obtaining of a criminal "Title III" wiretap.[14]

Another such tool long available in drug and organized crime investigations, and one that is often misunderstood by the public, is the "roving wiretap." Under the PATRIOT Act, investigators can now obtain a wiretap against a specific subject of a terrorism investigation, as compared to a particular phone or communication device, which can easily be disregarded or changed by the subject.[15] One only has to go down to the local convenience store to see the readily available, off the shelf cell phones or calling cards that can be a barrier to law enforcement officers relying on a "traditional" wire tap that targets an individual phone number or internet address.

A further benefit to law enforcement from the PATRIOT Act is the ability to obtain a search warrant from a federal magistrate judge in any federal district where activities related to terrorism may have occurred, and to execute the warrant within or outside that district.[16] While the normal probable cause standard for obtaining a search warrant has not changed, the law now saves precious investigative time by not compelling investigators to obtain a search warrant in every jurisdiction where a subject or property of the investigation is located. This provision of the act recognizes the often multijurisdictional nature of terrorism investigations.

Finally, another tool available to investigators under the PATRIOT Act in terrorism related cases, and again one that has been used for decades in drug and organized crime cases, is the provision allowing for delayed notification in the execution of a warrant.[17] The statute authorizes delay of notice if the court finds reasonable cause to believe that providing immediate notification of the execution may have an adverse result. The warrant issued by the FISA court prohibits the seizure of tangible property unless deemed necessary, and provides for the giving of such notice within a reasonable period of time after the warrant's execution.[18] Such delayed notice in drug and organized crime cases has long been recognized as constitutional by the courts and is sometimes necessary to avoid tipping off subjects who may destroy evidence or flee the country to avoid apprehension.[19]

IV. ACCESS TO BUSINESS RECORDS

Perhaps nothing has generated more controversy about the PATRIOT Act than Section 215, which authorizes access to certain business records for foreign intelligence and international terrorism investigations.[20] Unfortunately, many arguments in opposition to this provision have been short sighted and lack a clear understanding of what the section actually says. Nothing in Section 215 allows federal law enforcement agents, on their own whim, to go into a public library and demand to know what John or Jane Q. Public is reading or what books he or she has checked

out. If needed in normal criminal investigations, such business records have long been obtainable under a federal grand jury subpoena. Key clues in criminal investigations often stem from business records, such as hardware store receipts in bombing cases and bank account records in criminal financing cases. Section 215 only facilitates this process in a few specific instances.

Now, under the PATRIOT Act, where the grand jury process is limited or inappropriate to prevent disclosure of a terrorism investigation, there is a narrow and limited way to obtain such records. Even when authorized by the FISA court to obtain business records pursuant to Section 215, an investigation against a United States person cannot be based solely upon First Amendment activities.[21] Additionally, an application for records under Section 215 must be made by a high ranking FBI official who must certify that the statute's prerequisites are satisfied.[22] Section 215 also provides for Congressional oversight by requiring semi-annual reporting by the Attorney General regarding all requests for disclosure under the statute.[23]

V. ADDITIONAL PENALTIES TO PREVENT TERRORIST ACTS

Finally, the PATRIOT Act provides additional or expanded crimes and penalties in terrorism related cases that were not available prior to the passing of the statute. These provisions cover the punishment of terrorist attacks on mass transit systems,[24] the harboring of terrorists,[25] providing material support for terrorism,[26] the punishment of bio-terrorists,[27] and enhanced penalties for terrorism related conspiracies, which exceed the normal five year prison terms for general federal conspiracy crimes.[28]

CONCLUSION

In passing the PATRIOT Act, Congress found that "Arab Americans, Muslim Americans, and Americans from South Asia play a vital role in our Nation and are entitled to nothing less than the full rights of every American."[29] Congress also declared that the "Sense of Congress" was that the "civil rights and liberties of all Americans, including Arab Americans, Muslim Americans, and Americans from South Asia, must be protected, and that every effort must be taken to preserve their safety."[30] Federal law enforcement in this country, in using the expanded powers given to it under the PATRIOT Act, is devoted to nothing less than the protection of every American's safety, civil rights and liberties. In doing so, we try to protect the lives of the living, while upholding the memory and cherished American values of those who lost their lives that fateful September day.

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(ENDNOTES)

1 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("PATRIOT Act"), Public Law 107-56, 115 Stat. 272 (2001).

2 Churchill, Winston, Hansard, November 11, 1947, at brainyquote.com/quotes/quotes/s/sirwinston10549.html.

3 Prepared remarks of U.S. Attorney General John Ashcroft in Boise, Idaho, August 25, 2003.

4 USA Today/CNN/Gallup Poll, August 29, 2003. See also a July 31, 2003, Fox News/Opinion Dynamics Poll, where fifty-five percent of registered voters said that the PATRIOT Act was a good thing for America, while twenty-seven percent thought otherwise. Fox News/Opinion Dynamics Poll, July 31, 2003.

5 50 U.S.C. § 1801-1863 (1994).

6 50 U.S.C. § 1804.

7 United States v. Duggan, 743 F.2d 59 (2nd Cir. 1984); U.S. v. Pelton, 835 F.2d 1067 (4th Cir. 1987); and United States v. Megahey, 553 F. Supp. 1180 (E.D.N.Y. 1982). For a detailed discussion of the effects of this separation between national security and criminal cases, see Bulzomi, Michael J., "Foreign Intelligence Surveillance Act, Before and After the USA PATRIOT Act," FBI Law Enforcement Bulletin, June 2003.

8 For a listing of these crimes, see 50 U.S.C. § 1801 (a) to (c).

9 PATRIOT Act, supra note 1 at § 218 (amending 50 U.S.C. § 1804 (a) (7)(B) and § 1823 (a) (7) (B)).

10 In re Sealed Case, 310 F.3d 717 (Foreign Intel. Surv Ct Rev., 2002).

11 PATRIOT Act, supra note 1 at § 203a (amending F.R.C.P. Rule 6(e)(3) (c) (I)(V); and § 203b respectively).

12 Chachere, Vickie. "Ashcroft: Patriot Act led to USF Professor's Case", Tallahassee Democrat, (Associated Press), September 6, 2003.

13 PATRIOT Act, supra note 1 at § 905.

14 Id. at § 201 (amending 18 U.S.C. § 2516(1)).

15 Id. at § 206 (amending 50 U.S.C. § 2516(1)).

16 Id. at § 219 (amending F.R.C.P. Rule 41(b)(3)).

17 Id. at § 213 (amending 18 U.S.C. § 3101a).

18 Id.

19 United States v. Freitas, 800 F.2d 1451 (9th Cir. 1986); U.S. v. Villegas, 899 F.2d 1324 (2nd Cir. 1990).

20 PATRIOT Act, supra note 1 at § 215 (amending 50 U.S.C. §1861, §§ 501 through 503).

21 Id. at § 215(a)(1)(2)(b).

22 Id. at § 215 (a)(1) and (b)(2).

23 Id. at § 215 (amending 50 U.S.C. § 1861, § 502).

24 Id. at § 801.

25 Id. at § 803.

26 Id. at § 805.

27 Id. at § 817 (1) (C) (b).

28 Id. at §§ 810, 811.

29 Id. at § 102 (a)(1).

30 Id. at § 102 (b)(1).

Targeting Judges, Not Terrorists: How t
Oversight of Federal Surveillance and La

by Timothy H. Edgar, Esq.

After September 11, 2001, no one doubted the threat of terrorism was serious, yet Americans also understood that the threat to civil liberties from overzealous pursuit of our enemies – both real and imagined – was also quite genuine. Americans took heart in the Constitution's system of checks and balances, including meaningful judicial review.

Unfortunately, just six weeks after the September 11th terrorist attacks, Congress took aim at that system by passing the USA PATRIOT Act,[1] a lengthy and complex statute that amended federal surveillance, detention and law enforcement powers. The PATRIOT Act's controversial provisions share a common theme of undermining the role of the judge in overseeing law enforcement and intelligence powers. For the most part, the statute does not do so by eliminating judicial review of government actions altogether. Instead, it incrementally erodes judicial oversight by lessening the standards by which judges are to approve surveillance, detention, and other law enforcement actions.

The PATRIOT Act was enacted without adequate congressional consideration of effectiveness or impact on civil liberties. It did not respond to specific gaps in legal authority that had been identified by any independent inquiry as contributing to the September 11th attacks.[2] Rather, it was approved by Congress in unusual haste under pressure from the Bush Administration. In the House, basic committee prerogatives were ignored by the congressional leadership; in the Senate, the bill went straight to the floor without committee consideration. The truncated process alone should cast doubt on whether such changes comply with basic civil liberties principles.

A few provisions of the PATRIOT Act must be reauthorized by Congress or they will expire after December 31, 2005. Whether or not a given power is subject to the statute's sunset provision (Section 224), Congress should take the opportunity to reconsider the law as a whole and, where appropriate, enact limits and safeguards to protect civil liberties.

It is beyond the scope of this article to examine all of the contentious provisions of the PATRIOT Act that have the effect of minimizing judicial oversight. Instead, this article will focus on three "hot button" issues – the statute's intelligence wiretapping amendment, new records search powers, and "sneak and peek" searches.

I. SURVEILLANCE LAW BASICS

Understanding the impact of the PATRIOT Act on civil liberties requires an understanding of the basic distinction between two types of federal government investigative authority. The Federal Bureau of Investigation ("FBI") is both the lead federal law enforcement agency and the agency charged with domestic collection of "foreign intelligence information," i.e., information about the potentially hostile intentions and actions of foreign powers (foreign governments or organizations).[3] The FBI has surveillance powers in both criminal and foreign intelligence investigations.

The standards for FBI criminal surveillance are governed by federal statutes regulating criminal procedure and by the Fourth Amendment. Search warrants and electronic surveillance orders (such as wiretaps) require the approval of a federal district judge or magistrate and require probable cause that the surveillance will uncover evidence of criminal activity, including, of course, crimes of terrorism.

The standards for FBI intelligence surveillance are governed by the Foreign Intelligence Surveillance Act of 1978 ("FISA"). Search warrants and electronic surveillance orders under FISA are generally issued by a special court, the Foreign Intelligence Surveillance Court ("FISC"), which sits in secret. FISA search warrants and surveillance orders are not based on probable cause of criminal activity, but on an alternate showing – probable cause that the target of the surveillance is an "agent of a foreign power," i.e., is acting on behalf of a foreign government or organization (including, but not limited to, a foreign terrorist organization).[4]

The FBI also has powers, both in criminal investigations and in foreign intelligence investigations, to engage in some surveillance without probable cause. These include powers to obtain some business records, and powers to monitor the "routing information" of telephone, fax, and Internet communications. Routing information includes information such as telephone numbers dialed and the senders and recipients of faxes and e-mail, but is supposed to exclude the content of such communications.

II. FOREIGN INTELLIGENCE WIRETAPS

One of the PATRIOT Act's most contentious provisions upsets a delicate post-Watergate compromise designed to put limits on wide-ranging "national security" wiretaps – wiretaps conducted outside the confines of the government's criminal wiretap power, which requires judicial approval based on probable cause of crime.

For many years, successive Presidents asserted power to engage in national security wiretaps. Unsurprisingly, use of such wiretaps led to serious civil liberty abuses. The most famous victim was civil rights leader Dr. Martin Luther King, Jr. J. Edgar Hoover's FBI placed a wiretap on Dr. King's telephone conversations, without any court order, allegedly to investigate whether he had connections to international communism. Although none were uncovered, Hoover did discover damaging information about Dr. King's personal life. The government used that information in an attempt to sabotage Dr. King's Nobel Peace Prize, and threatened to reveal it in an anonymous letter urging him to commit suicide.[5]

In United States v. United States District Court[6] ("Keith"), the Supreme Court examined national security wiretaps for the first time. The court decided that wiretapping was subject to the Fourth Amendment even if it was conducted for national security purposes. That case involved a domestic terrorist conspiracy to bomb the office of the Central Intelligence Agency in Ann Arbor, Michigan. Still, without dismissing the real national security threat posed by such illegal activity, the court rejected Attorney General John Mitchell's claim of a clandestine domestic intelligence gathering power that would allow the executive branch to wiretap without court review or congressional authorization.

Such an unchecked power, the Supreme Court observed, would inevitably pose dangers to lawful dissent: "Though the investigative duty of the executive may be stronger in such [national security] cases, so also is there greater jeopardy to constitutionally protected speech .... History abundantly documents the tendency of Government – however benevolent and benign its motives – to view with suspicion those who most fervently dispute its policies .... The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power."[7]

The court ruled that wiretaps for domestic security investigations could not take place without a warrant based on probable cause of criminal activity, but left open the door for a more lenient standard for surveillance for foreign intelligence purposes. Congress responded to the Keith decision by passing FISA. The statute was a compromise that authorized foreign intelligence wiretaps when approved by the FISC for "the purpose" of acquiring foreign intelligence information from an "agent of a foreign power."[8] Courts understood this provision of FISA to mean that the main or "primary purpose" of FISA surveillance must be foreign intelligence, rather than criminal prosecution.[9]

Section 218 of the PATRIOT Act[10] strikes at the heart of the FISA compromise, which was to allow limited national security surveillance where the government establishes probable cause, not of illegal activity, but that the target was connected to a "foreign power." A critical check on this power to evade the Fourth Amendment's normal probable cause requirement was the requirement that the "primary purpose" of such surveillance be to obtain foreign intelligence. Where the primary purpose was criminal prosecution, the government was supposed to use its criminal wiretapping power.

The intent of the "primary purpose" test was to ensure that FISA was being used for foreign intelligence purposes rather than as an end-run around Fourth Amendment requirements of the federal wiretapping statutes. Section 218 lowered the "primary purpose" standard to allow FISA surveillance if the gathering of foreign intelligence is "a significant purpose" of the surveillance.

The "primary purpose" test did not establish a "wall" within the Justice Department between foreign intelligence and criminal investigations that could never be breached. FISA anticipated and allowed that evidence of crime gathered using the Justice Department's intelligence powers could be used in a criminal case.[11] In fact, such evidence was shared with criminal prosecutors, under procedures designed to ensure that prosecutors did not abuse intelligence powers.

In describing its use of the PATRIOT Act in response to questions from the House Judiciary Committee, the Justice Department admitted "there was no legal impediment to introducing in a criminal prosecution evidence obtained through FISA before the PATRIOT Act."[12] Rather, the Justice Department acknowledged that, even prior to the PATRIOT Act, "intelligence officials could seek approval to 'throw information over the

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wall'" where intelligence evidence demonstrated a crime "has been, is being, or will be committed."[13]

In November 2002, the Foreign Intelligence Surveillance Court of Review – a special court that hears government appeals of any adverse decisions by the FISC – rejected a Fourth Amendment challenge to the PATRIOT Act's "significant purpose" test and rejected various safeguards that the FISC had imposed to prevent prosecutors from abusing expanded intelligence powers.[14] Justice Department officials have claimed that, as a result of the PATRIOT Act and this decision, intelligence information has become available that could never before be used by criminal prosecutors.

In fact, the PATRIOT Act was not needed to allow such information sharing. In response to the House Judiciary Committee's simple request to "identify all cases brought since the FISA Review Court's decision [upholding the PATRIOT Act] that use information that was previously unavailable under FISA procedures," the Justice Department was unable to cite even one case.[15] The reason, of course, is that such information was never unavailable to prosecutors, as long as proper procedures were followed.

The public knows very little about the real-world impact of the PATRIOT Act's lowering of the FISA standard. The only case that the Justice Department has cited as resulting from the lower standard for FISA surveillance has nothing to do with September 11 or Al Qaeda. Instead, the case is that of Sami Al-Arian, an Arab American leader in Tampa, Florida who has been accused of raising funds for Palestinian terrorism abroad.[16] The accusations concerning Mr. Al- Arian have been well known for almost a decade. In fact, virtually all of the FISA intercepts that form the basis of the indictment against Mr. Al-Arian were approved prior to the passage of the PATRIOT Act and therefore were obtained under the old, "primary purpose" standard.[17]

The PATRIOT Act was not needed to authorize sharing of information from foreign intelligence wiretaps with criminal prosecutors. Rather, the effect of the PATRIOT Act was to reduce the oversight of intelligence wiretapping by the FISC by making it more difficult for judges to ensure that intelligence wiretaps do not become federal prosecutors' chosen method of getting around the Fourth Amendment.

III. ACCESS TO PERSONAL RECORDS

The PATRIOT Act contains a number of provisions – two of which are examined here – that expand the government's access to personal records without probable cause, or even reasonable suspicion, that the target of the records search is involved in criminal activity.

Section 215 of the statute[18] amended FISA in two ways to expand the government's power to demand personal records in foreign intelligence investigations. First, it expanded the types of records that could be obtained in FISA investigations from a limited group of travel and business records[19] to include any record or other "tangible things." Second, it eliminated a requirement that, to obtain such records, the government show "specific and articulable facts giving reason to believe that the records pertain to an agent of a foreign power."

A FISA records order does require an order by the FISC or a federal magistrate, but, because the PATRIOT Act eliminated the requirement of individual suspicion, this judicial review is far less meaningful than before. The FISC is required to issue the order so long as the government certifies that the records are "sought for" an

investigation to "protect" against international terrorism or "clandestine intelligence activities." Investigations cannot be based "solely" on the First Amendment activities of a United States person, but the impact of such a wide-ranging intelligence power certainly will have a chilling effect on First Amendment activities. Already, in a broad constitutional challenge to the provision, libraries, bookstores, religious and political organizations, and refugee resettlement organizations have expressed reasonable fears that their records could be seized by the federal government under the PATRIOT Act.[20]

The recent revelation by the Attorney General that no orders had been issued under Section 215[21] shows that fears of abuse, at least of this particular power, have not yet been realized. However, the revelation also calls into question the alleged national security need for this power. If the FBI was able to conduct what it describes as the most comprehensive investigation in American history without, even once, using this controversial power, why does it need it? And what would be the harm of requiring individual suspicion, where the government has stated if it ever issues orders under Section 215, it would do so sparingly?

Section 215 may be less important, at least for the moment, than a different records power expanded by Section 505 of the PATRIOT Act, which reportedly has been used "scores" of times.[22] This provision authorizes so-called "national security letters" that allow the FBI to demand certain kinds of information without a court order at all. Most notably, the FBI can issue a national security letter to obtain "subscriber information" from "a wire or electronic communications service provider."[23] This includes telephone and Internet billing records. When members of Congress asked the Justice Department about possible monitoring of the records of library patrons, the Department responded that the national security letters would be a "more appropriate tool" to obtain information from libraries than its FISA records power.[24] This would include, for example, the records of who used the library's Internet terminals, on a theory that a library that offers Internet access is a "communications service provider" and that this information was "subscriber information" subject to seizure through a national security letter.

Defenders of the PATRIOT Act have argued that there is no reasonable expectation of privacy in information in the hands of third parties, and hence no Fourth Amendment problem.[25] While the case law does not stand for such a sweeping proposition, the courts' reluctance to protect Americans' privacy is exactly the problem. A patchwork of privacy laws does offer statutory protection for certain kinds of information, usually in response to controversy about government snooping into particularly sensitive records. For example, in response to an inquiry into Supreme Court nominee Robert Bork's videotape rental records, Congress enacted the Video Privacy Protection Act of 1988.[26] However, these laws leave unprotected many other kinds of sensitive records. One reason why so many Americans fear widespread surveillance under the PATRIOT Act is the simple fact that "[i]n the United States there is no omnibus statute or constitutional provision that provides comprehensive legal protection for the privacy of personal information."[27]

Some records plainly do have constitutional protection under the First Amendment. The Supreme Court has recognized a "vital relationship between freedom to associate and privacy in one's associations."[28] Where individuals participate in unpopular political or religious organizations, members of those organizations fear – often with good reason – "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[29] Routine, intrusive government investigations of lawful, but unpopular, political organizations would clearly pose a serious risk to the First Amendment because their members would fear that such information, if leaked, could be used against them. As a result, some records, such as membership lists of certain organizations, are protected from forced disclosure by the government.

Defenders of the PATRIOT Act have also argued that the statute does no more than make available in foreign intelligence investigations a power that is already available in criminal investigations through a grand jury subpoena. The grand jury does have extraordinary authority, but its powers are intended to facilitate investigation of criminal activities. A grand jury subpoena can be challenged before a judge, while there is no such process for a FISA records order. The recipient of a grand jury subpoena is free to complain publicly about government overreaching, while a FISA records order contains an automatic gag rule that prohibits disclosure. While the grand jury certainly can be abused, an intelligence power to demand personal records unrelated to a criminal investigation presents substantial potential for abuse, particularly in light of the history of intelligence investigation abuses.

The PATRIOT Act was not needed to give the government the power to obtain records in terrorism investigations. Rather, its only purpose was to reduce the judicial oversight that the government must undergo when obtaining these records through its traditional criminal surveillance powers.

IV. "SNEAK AND PEEK" SEARCHES

Section 213 of the PATRIOT Act[30] for the first time gave Congress' blessing to the federal law enforcement practice of "sneak and peek"

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searches. These searches allow the government to delay, potentially indefinitely, notice of the execution of a search warrant in any federal criminal case. The PATRIOT Act's "sneak and peek" provision is not limited to terrorism cases but represents a broad change in the way federal criminal search powers can be used – and the government has used the power broadly, in cases ranging from drugs to fraud.[31]

Notice of the execution of a search warrant is generally required by the Fourth Amendment under the "knock and announce" rule. Before the PATRIOT Act, the Justice Department sometimes sought to delay notice under judge-made standards. These standards were often stricter than the PATRIOT Act. For example, courts set specific (renewable) time limits – for example, seven days – after which notice would have to be provided.[32]

Under the PATRIOT Act, however, notice can be delayed for an unspecified "reasonable time," which in practice has meant as long as three months or even for an indefinite period until an indictment has been unsealed. The PATRIOT Act also permits delays to be granted not only in specific circumstances that courts have approved, such as to prevent the flight of a suspect or destruction of evidence,[33] but also whenever notice of a search might produce an adverse result – i.e., jeopardize a prosecution or delay a trial.[34]

These standards have the effect of reducing the judge's role in ensuring that "sneak and peek" warrants are not abused. Under the seven-day rule some courts had imposed, law enforcement agents had to go in front of a judge each week to justify continued secrecy. Likewise, the loose "adverse result" standard means that a delay can be justified based on information uniquely in the hands of law enforcement. Judges can decide whether the government has made a case that notice would cause flight or destruction of evidence, but usually will not be in a position to independently evaluate a law enforcement claim that notice would jeopardize a prosecution or delay a trial.

The PATRIOT Act was not needed to allow the government to delay notice in federal criminal cases where the government could show specific harm would otherwise result. Rather, the enactment of looser standards for "sneak and peek" searches substantially reduces the judge's role in overseeing this invasion of privacy. The PATRIOT Act's loose standards threaten to make "sneak and peek" the norm, rather than the exception, in all federal criminal investigations – not just terrorism investigations.

CONCLUSION

The PATRIOT Act's contentious provisions were not needed to give the government the power to investigate and prevent terrorism. Prior to the statute, it was always possible to delay notice of a search, under judge-made rules that limited the reasons for such delays and imposed time limits. It was always possible to obtain library and bookstore records, or other sensitive records, with a search warrant based on probable cause. It was always possible to share intelligence information with criminal prosecutors, under careful procedures overseen by the FISC. Thus, the PATRIOT Act's contentious provisions instead had the effect of undermining the checks and balances that prevent abuse of these powers.

Terrorism threatens not only our sense of safety as Americans, but also our freedom and way of life. Terrorists intend to frighten us into changing our basic laws and values and to take actions that are not in our long-term interests. In passing the PATRIOT Act, Congress took a significant step towards undermining important civil liberties which it needs to correct.

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(ENDNOTES)

1 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Public Law 107-56, 115 Stat. 272 (2001).

2 The Joint Inquiry of the House and Senate Intelligence Committees did not complete its report until December 2002, more than a year after passage of the PATRIOT Act. The report did not endorse any part of the PATRIOT Act and makes clear that the government's failure to prevent September 11 was not the result of excessive judicial oversight but rather the government's failure to effectively use existing powers. Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001: Report of the U.S. Senate Select Comm. on Intel. and U.S. House Permanent Select Comm. on Intel., S. Rep. No. 107-351, H.R. Rep. No. 107-792 (December 2002).

3 50 U.S.C. § 1801(e).

4 50 U.S.C. § 1805.

5 See Marvin Johnson, ACLU Washington National Office, The Dangers of Domestic Spying by Federal Law Enforcement: A Case Study on FBI Surveillance of Dr. Martin Luther King, Jr. (Jan. 2002), available at http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=10610&c=207.

6 407 U.S. 297 (1972).

7 Id. at 313-314.

8 50 U.S.C.A. § 1804(a)(7)(B) (1991). The FISC has not proved an obstacle to widespread use of national security wiretaps of suspected foreign agents. The FISC has, almost without exception, approved government surveillance applications. From 1979 to 2002, annual reports show that 15,264 applications for surveillance orders have been approved (only five with modifications), and only one denied. The government did not appeal that denial.

9 See, e.g., ACLU Foundation of Southern California v. Barr, 952 F.2d 457, 460-62 (D.C. Cir. 1991); cf. United States v. Truong, 629 F.2d 908, 915 (4th Cir. 1980).

10 50 U.S.C. § 1804(a)(7)(B).

11 40 U.S.C. § 1806(b) (information derived from FISA surveillance may "be used in a criminal proceeding with the advance authorization of the Attorney General.").

continued on page 25

Military Families Post 9/11

by Eric M. Strong, Esq.

I am sitting in Ventura County, in a World-War-II-era hangar that has been converted to a deployment station for army reservists. I lead a squad of military attorneys and enlisted support soldiers. Unlike our infantry comrades downrange (Army slang for "deployed in a hostile place"), we are armed with a battery of laptops and portable printers rather than arms. Tangled extension cords and a waiting area surround our position instead of barbed wire.

A forty-something man comes to my station and with a grim face explains his family's lifestyle, finances and future will be changed forever if he's deployed. Not changed for the better. An extended period on active duty will mean his family would be forced to move out of their mid-sized home in a nice area. The younger kids will change schools. The older ones better hope public colleges offer freshman slots. All face disruption.

My momentary client is a successful, self-employed medical professional whose compensation as an activated Lieutenant Colonel would be a fraction of his civilian earnings. To the less affluent, he and his family's fate could seem less than sympathetic, but pain is relative. When we think "military family" there is one group we do not think about: This gentleman's four lower-paid employees and their families will face a fate like that of his wife and kids if deployment closes the doors.

He wants someone to allay his fear. I can't do it. All I can do is lamely ask if he needs a will or has any generic legal questions. Despite legislation, sympathetic private organizations, and the efforts of the military chain of command, many reserve soldiers "fall through the cracks" of the protections designed to ease activation difficulty.

In an earlier article, I related some of my experiences as a U.S. Army Reserve JAG officer. This article will focus on 9/11's effect on those closest to soldiers: military families.

Modern expectations, combined with the timeless journey soldiers take to war, create great stress in the 21st-century American military family. All soldiers, from teenage active-duty recruits to near-retirement reservists, have loved ones impacted by the global war on terror.

While the opening story is troubling, the system's failure for small business owners has been a known and unsolved problem for a long time. A more unusual phenomenon I see often here in Southern California is what I call the "rich private" syndrome. Given our region's high cost of living and concentration of high-paying jobs in various information-technology, entertainment and service industries, a surprising number of relatively low-ranking reserve soldiers make huge incomes.

A composite example of these people would be a 28-year-old mortgage broker who joined the Reserves purely out of patriotism. Her military rank is specialist, which means she will earn about $15,000 total her first year deployed. The problem is, her civilian income is a jaw-dropping $170,000.00 per year! She has a jumbo mortgage on a condo at the beach, a big car payment, and a Visa balance equal to twice her annual military salary. Deployment for this soldier and others like her means apocalyptic financial restructuring, or bankruptcy.

In the heyday after 9/11, many private employers sought to create goodwill by loudly proclaiming they would make up the difference to deployed soldiers between military and civilian pay. Those declarations have dried up. More common now are the anecdotal tales of a six-figure employee deploying for an extended eighteen-month tour, the company's money and morale draining away to an absent executive, followed by the company quietly dropping the policy forevermore.

For lower income or government-employed reservists, deployment seems to be a lesser financial but greater emotional event. In fact, I have witnessed people who regarded deployment like winning the lottery. If you make minimum wage, military pay allowances and benefits in a tax-free war zone with minimal expenses can actually be a boon.

However, no amount of money can replace a mother or father's presence. For some families, especially in depressed neighborhoods, the loss of a parent can pull at the very fabric of a clan's ties. In some cases, to make ends meet, both parents serve in the Reserves and face activation and deployment.

An example of this group would be a 40-year-old man, with a wife and two children living in the home. As he is a sergeant first class in the Reserves, his income will not change significantly. However, with shared custody of two minor children from a previous relationship, he approaches us to find out if his current wife can "get my share of custody." He suspects the mother of the two

older children will use his deployment as a means of going to court and making mischief. He tells us she isn't abusive in any way, but she "doesn't like my wife." Given these facts, we try to explain that, as a downrange father, facing a non-abusive mother, there just isn't much he can do. We commiserate with him, then suggest he pay a private family law attorney but keep his expectations low.

One unusual problem for many military families is what I will call the "send me" syndrome. This problem exists at all age, family status, rank and income levels. While the majority of reserve soldiers will grit their teeth and report to do their duty, and a tiny minority will desert, shirk, or malinger in any fashion to avoid the call, a third group also exists. These are the "send me" soldiers. Whether young people looking for adventure, older guys who want Iraq instead of a sports car and a mistress, or people who simply feel that to contribute they actually have to be over there, a surprising number of reservists work very hard to get themselves deployed.

The Reserves' structure lends itself to volunteers. Because the Reserves act to supplement the regular Army, opportunities in ones and twos come along more often than in the active force. Accordingly, many soldiers get the chance to pick up and go if they desire. This creates a huge problem, because the families never, ever, ever have the same degree of enthusiasm as their gung-ho reservist loved one. The pain, acrimony and recriminations within families can be very serious. Many family members perceive the soldiers as choosing the Army, war, etc., "over" them. Additional problems exist for these soldiers' civilian careers. The soldier can tell both families and bosses he was "activated" without mentioning the volunteer part. This obfuscation creates other obvious problems as well.

Sadly, the families most tragically changed are those whose soldiers are killed or maimed. I have been fortunate enough not to know of anyone I personally counseled who ended up a casualty. I hope that streak continues.

Perhaps I paint an overly gloomy portrait. After all, if a family is highly supportive, with no financial troubles, and will just miss their soldier, no one probably need even talk to a JAG. "You are checked off . . . proceed to dental." However, the increasing reliance on the Guard and the Reserves, combined with the high tempo of worldwide operations, mean families are being impacted, and will continue to be.

Eric Strong is an attorney in Riverside with the firm The Partners.

Targeting Judges, Not Terrorists . . . *(continued)*

[12] Letter from Office of Legislative Affairs, U.S. Department of Justice to House Judiciary Chairman F. James Sensenbrenner, May 13, 2003, at p. 12, available on the House Judiciary Committee website, at http://www.house.gov/judiciary/news052003.htm (hereinafter "DOJ Letter to Sensenbrenner."). Previous questions and answers are also available, at http://www.house.gov/judiciary_democrats/dletters107.htm.

[13] DOJ Letter to Sensenbrenner, supra note 12 at 14.

[14] In re Sealed Case, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002).

[15] DOJ Letter to Sensenbrenner, supra note 12 at 13.

[16] See Matthew Brown and Sean Mussenden, Officials: Patriot Act Helped Al-Arian Case; Critics Questioned the Usefulness of the Legislation in Probing the USF Professor, Orlando Sentinel, Feb. 23, 2003.

[17] The indictment in United States v. Al-Arian is available on the Tampa Tribune's website at: http://reports.tbo.com/reports/alarian/alarianindictment.html.

[18] 50 U.S.C. § 1861.

[19] This more limited business records section was enacted in the Intelligence Authorization Act for Fiscal Year 1999, Public Law 105-272, at § 602, 112 Stat. 2396 (1998).

[20] Muslim Community Ass'n of Ann Arbor v. Ashcroft (filed E.D. Mich. July 30, 2003). The complaint is available on the ACLU's website at http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13248&c=206.

[21] In September 2003, Attorney General Ashcroft declassified the number of times section 215 has been used – zero – and announced, in a speech ridiculing the American Library Association, that "charges of abuse of power are ghosts unsupported by fact or example." See Dan Eggen, Patriot Monitoring Claims Dismissed: Government Has Not Tracked Bookstore or Library Activity, Ashcroft Says, Washington Post, Sept. 19, 2003, at p. A2.

[22] Section 505 expanded the government's national security letter power to obtain telephone toll and transactional records, 18 U.S.C. § 2709(b), financial records, 12 U.S.C. § 3414(a)(5)(A), and consumer credit reports, 15 U.S.C. § 1681u. The Washington Post reports "scores" of such letters have been issued. See Eggen, supra note 21.

[23] 18 U.S.C. § 2709(a).

[24] Letter from Office of Legislative Affairs, U.S. Department of Justice to House Judiciary Ranking Member John Conyers, July 26, 2002, at p. 4, available on the House Judiciary Committee website, at http://www.house.gov/judiciary_democrats/dojpatriot responseltr72602.pdf.

[25] See, e.g., United States v. Miller, 425 U.S. 435 (1976).

[26] 18 U.S.C. § 2710.

[27] Gina Marie Stevens, Congressional Research Service Report for Congress, "Privacy: Total Information Awareness Programs and Related Information Access, Collection, and Protection Laws," at 4 (updated Feb. 6, 2003).

[28] NAACP v. State of Alabama, 357 U.S. 449, 462 (1958).

[29] Id.

[30] 18 U.S.C. § 3103a.

[31] See DOJ Letter to Sensenbrenner, supra note 12 at p. 10.

[32] See, e.g., U.S. v. Villegas, 899 F.2d 1324, 1337 (2nd Cir. 1990) (imposing a renewable seven-day notice requirement for "sneak and peek" searches); United States v. Freitas, 800 F.2d 1451, 1456 (9th Cir. 1986) (same).

[33] See Villegas, supra note 32 at 1336 (noting that "sneak and peek" searches may be authorized to prevent "escape of the suspect or the destruction of critical evidence") (citation omitted).

[34] 18 U.S.C. § 2705(a)(2) (defining "adverse result").

Cybernetic Bio-Weapons Deployed Daily

by Gary Ilmanen

Hello. My name is Gary, and I am guilty of aiding and abetting terrorism. How, you may ask, was I drawn into the evil web of intrigue? The enemy didn't recruit me with offers of money, fine food, wine, and beautiful women. No, I simply fell into their trap, and I sense that I am not alone!

The Nascent WMD

Weapons of Mass Destruction. Nerve gas. Anthrax. Bah! These are merely trifles! Few Americans have even come close to being affected by these toys. A more pervasive threat is unleashed daily from the lairs of the terrorists, deep in dark holes, hidden from all. The terrorist regularly mutates his cyber weapon so that existing inoculations are powerless against it. For each mutated threat, a new inoculation must be developed to protect us.

The threat is born in the terrorist's computer, and deployed silently through a small pair of wires. The wires are disguised as telephone cable, and many times actually connect to a telephone. It is a computer virus. It is targeted – well, no, it isn't targeted as much as splattered across the globe. It then drips and runs and oozes to fill in the gaps, until every computer that is connected to the internet has been touched.

The Mole

When a virus strikes your computer, it burrows into your files and/or memory. It may lay semi-dormant for weeks, months, or even years before it activates. During that time, it will attempt to spread to any other computer with which you have contact.[1] It will piggyback onto email that you send. It may have its own mail server, and pull email addresses from your address books or other files. A recent trend in viruses[2] sets the "From" address as one of the other email addresses that it harvested, effectively masking the identity of the carrier of the infection.[3]

The Third Tower

As many as 200 new viruses, worms, trojan horses, and variants are released DAILY. How many of these were set loose by terrorists with the intention of crippling our economy? I don't know. I doubt that anyone does. But the fact is that Americans regularly spend millions of dollars in time, equipment, software, and lost productivity each time a virus strikes.

But I Have an Antivirus Program!

How do we keep our computers from becoming infected? We have been told for years to use antivirus programs to protect ourselves against these computer viruses. We were warned never to open email from anybody we didn't know. Now, this may not be enough.

Even firewalls and routers could not protect us in June 2004, when news broke of a virus that would jump into your computer merely by way of your looking at a website. The virus took advantage of programming errors in both the Microsoft IIS web server software and Microsoft Internet Explorer. It delivered its payload with the help of JavaScript. Savvy internet users immediately disabled JavaScript support. Many gave up on using the Microsoft Internet Explorer web browser and migrated en masse to Mozilla, Firefox, Opera, and other less-well-known browsers.

Shepardize Your AntiVirus Protection

With the number of new viruses set loose each day, it is impossible for the antivirus program vendors to protect you. There may be several days of lag time before they can analyze a new virus and update their virus databases. Then YOU must download the updates to protect yourself. There is no doubt that we are all vulnerable at least some of the time.

A serious attack by a virus may leave you with no choice but to reformat your hard drive and start from scratch. This is not a big deal if your computer is "factory fresh." But it is a daunting task if you have installed more than a few programs on your computer.

First, you need to find your system restore disk, or the operating system disk, if you are lucky enough to have one. That's simple enough, unless you lost a disk. When faced with that additional problem, many people just go out and buy a new computer. Assuming you can bring your system back to the factory configuration, you then must load drivers and software for all the peripherals you bought. Of course, you have to find those disks too.

Word Processor, Time and Billing, Calendar. . .

And then there are the applications to re-install . . . When you can't find all of your own application disks, you will have to either buy new ones or find someone who will lend theirs to you. With luck, you may have your computer up and running again, fully reconfigured with your programs, within a day or two. Or three.

Letters, Motions, and Briefs, Oh My!

Almost home free? No. You must restore your data. What is the phrase most often uttered after a computer crash? No, not the one with all the four-letter words. It pops out when you tell your tale of woe to the first kindly-looking soul: "You had a backup, right?"

Safe Computing

Too many people are guilty of failing to perform regular backups of their data. I believe that this is because hard drives are much more reliable than they used to be, and now rarely fail. Most last until they become too cramped for space, and are replaced by bigger drives. But how would you feel if all of the past week's brilliant arguments, briefs, spreadsheets, and email just evaporated? Hard drive failure or a nasty virus can make that happen. In fact, gamma rays from the sun nibble away at computer files, taking a random bit here and there as time goes on. Eventually, the error-correcting checksums cannot help anymore, and you get system errors or other strange behavior when you access the file.

You can save yourself a lot of grief by making daily incremental backups, and weekly full backups of your data. There is no excuse for not doing this, now that CD and DVD burners and media are so inexpensive. For less than an hour or two of billable time, you can get the hardware and software to do it easily. You don't even have to open up your computer if you opt for an external burner, with USB or FireWire plug-and-play capability.

For best protection, take your backup media offsite for storage. That way, if there is a disaster at the office – such as a fire – you will be able to restore your files to another computer.

Summary

Back up your data. If you don't have an up-to-date antivirus program, either get one, or regularly use an internet-based virus scan.[4] Back up your data. If you are not behind a router, consider installing a firewall[5] to protect you from internet worms and data scavengers. Back up your data. Install critical updates that have been issued for your operating system.[6] Back up your data. Cross your fingers. And finally, remember to back up your data . . . daily and weekly.

Gary Ilmanen, an attorney in Riverside, is a member of the Bar Publications Committee.

(FOOTNOTES)

1 The earliest viruses infected the operating system files such that whenever a floppy disk was inserted, the virus would be written to it, then spread to other computers was by what techies call "sneaker net." The sneaker net is a tennis-shoe based network in which files are transferred by carrying the floppy from one computer to another.

2 Technically, we should use the plural of virus, viri, but that sounds funny, so we won't.

3 Tracing the individual IP address, along with the port and time stamp, can identify the individual computer that sent the email. However, if an offshore "Open Relay" that does not forward that information in the message headers is used, it is nearly impossible to trace.

4 See, e.g., http://housecall.trendmicro.com.

5 See, e.g., http://www.zonelabs.com.

6 For Windows, http://windowsupdate.microsoft.com.

Barristers Profile: Jason D. Klein

by Robyn A. Beilin, Esq.

Those of you reading this article who are among our more experienced attorneys might remember the Barristers' meetings of yesteryear (I use the term "experienced attorneys" rather than "old-timers" to avoid any backlash that I would get!). I hear so many stories of attorneys sharing the wonderful experiences that they have had by being a part of Barristers while in their first years of practice. Unfortunately, attendance and interest in our meetings have inexplicably dwindled. Those of us who have been active in Barristers still urge that membership and monthly attendance have so many advantages – practice tips from established colleagues in the bar and from well-respected judges, the opportunity to network and share your experiences with others similarly situated to you and the ability to make new friends. Let's face it – the first couple of years in practice can be rough. You have no idea what you are in for when you are finally admitted to the bar, and no class in law school can prepare you for the nuances of actually practicing. For that reason, the Executive Board of Barristers has made it a goal to try to bring Barristers back to the glory days that we all have heard so much about, and it has put forth a great deal of effort in convincing others to join us for our meetings.

Every once in a while, I have the opportunity to see the results of that effort. One day, I received a telephone call from a new associate in town, who had recently joined the firm of Burke, Williams & Sorensen. When he said he was interested in learning how he might be able to get involved, I have to admit that I couldn't have been more pleased with his interest in Barristers. And once again, having now had the opportunity to meet him and get to know him a little bit, I am pleased that Jason D. Klein has become a member of our Riverside legal community.

Jason, who originally hails from the Cleveland area in Ohio, completed his undergraduate career at Ohio University in 1998 with a Bachelor of the Arts degree in Soviet History and a Bachelor of Science degree in Environmental Geography. He also participated in two foreign study programs – one at the University of Yucatan in Mexico and the other in New Castle, Australia. After studying Spanish while in Mexico, Jason concentrated on environmental issues while he was in Australia. In particular, his focus was on the environmental impact of coal mines and on geology and geography.

When he completed his undergraduate course of study, Jason went on to join the work force as an account manager for a computer company. In that capacity, he was certified in networking systems and computer software. After two years, however, Jason realized that he wanted to attend law school, which was a dream that had first begun when he was in high school.

While a senior in high school, Jason participated in a mock trial competition. At first, he had no real interest in becoming an attorney. However, as a defense attorney in a mock murder trial, he soon realized that he excelled in oral argument and ultimately won the competition. He knew then that a career in law was something that he wanted. "When I got to undergrad, I just kept thinking about law, law, law, and then I started taking some environmental courses and thought that was what I wanted to do with my life."

Jason enrolled in the law school of the University of Oregon in 2000 and began an impressive academic career. He was the Articles Editor for the Journal of Environmental Law and Litigation and had two articles published. One of the those articles, entitled "Does Buckhannon Apply? An Analysis of Judicial Application and Extension of the Supreme Court Decision Eighteen Months After and Beyond," was published in the Duke Environmental Law and Policy Forum in the fall of 2002. 13 Duke Env. L. & Pol'y F. 99 (2002).

In that article, Jason explored the implications of *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Services,* a United States Supreme Court decision, which was issued on May 29, 2001. In that case, the court visited the issue of defining a "prevailing party" with respect to attorneys' fees under the ADA and the FHAA. Jason's article focused on the fact that this decision, which was a major deviation from established circuit court precedent, has been interpreted to extend to all other statutes employing the "prevailing party" language. This case, which essentially required a "judicial stamp of approval" before a prevailing party can be awarded attorneys' fees, has significant consequences for public-interest attorneys, includ-

ing environmental-law attorneys, who rely on fee-shifting statutes to be compensated for their legal services. Jason's other article, "Attorney's Fees and the Clean Water Act After Buckhannon," which was published in the Hastings Law Journal, focused on the implications of that same case, but specifically on the Clean Water Act and the Clean Air Act. 9 Hastings W-Nw. J. of Envtl. L. & Policy 109 (2003).

While in law school, Jason also became active in the Public Interest/Environmental Law Conference, which is held annually in Eugene, Oregon. Not only was he one of the main organizers of this event in his third year of law school, serving as its treasurer, but he was also one of the speakers at the conference, which is attended by approximately 5,000 people. Jason is still involved in this conference and attends annually. In fact, he continued to be an invited panelist at this past year's event.

Jason's professional experience began during his first year of law school when he clerked for the firm of Hershner Hunter, which was the largest law firm in Eugene, Oregon. While clerking at that litigation firm, Jason focused on business litigation and wills and trusts as well as contract law and had the opportunity to assist in the negotiation of a baseball contract.

During his second year of law school, Jason went on to clerk for the Land and Water Fund of the Rockies, which is a public interest group located in Boulder, Colorado. There, he gained invaluable experience through his involvement in cases concerning the environmental impact of post-fire litigation. He also worked that same year for the Western Environmental Law Center, another public interest group that also focused on post-fire litigation.

After graduating from the University of Oregon with his J.D. in May of 2003, Jason decided that he wanted to move to Southern California, no doubt in part because he was sick of the cold, rainy weather of the Pacific Northwest. He relocated to San Diego and successfully sat for the California Bar Exam in July of 2003. While acclimating to a new city and state, Jason began his job search and had the opportunity to meet several attorneys. One of those attorneys recommended that Jason attend a San Diego Bar Association meeting for environmental attorneys, which ultimately led to Jason joining the firm of Burke, Williams & Sorensen here in Riverside.

Jason has now almost completed his first year of practice with Burke, Williams & Sorensen, where he has concentrated on environmental law. As a member of the firm's Environmental and Natural Resources Law Practice Group, he has a caseload mostly comprised of representing cities in various environmental disputes and litigation. One of the cases on which he has assisted involves the city of Santa Clarita and a large federal mining project that is being developed in that area. Jason is involved in the environmental impact of that project. Other cases to which Jason is assigned involve the defense of General Electric in various asbestos suits.

Jason admits that he is "just at the brink" as he concludes his first year of practice. "I am just trying to get my head out of the fog." But so far, he seems happy with his career choice. "I really enjoy the intellectual challenge of the law."

Given his impressive accomplishments, I am sure you can agree that Jason is a welcome new addition to our bar association. Please join Jason and the rest of our Barristers for our next meeting on October 13, 2004, at 6:00 p.m., at Cask 'n' Cleaver (on University Avenue in downtown Riverside), for "Tips on Avoiding Rookie Mistakes."

Robyn Beilin is with the Law Offices of Harlan B. Kistler and Secretary of Barristers.

Judicial Profile: Judge Christopher Sheldon

by Rick Lantz

L: What is your idea of perfect happiness?

S: Perfect happiness would be a world of peace.

L: What is your greatest fear?

S: That my son will get killed in Iraq.

L: He's there now?

S: Yes.

L: It must be on your mind constantly.

S: Only every minute.

L: If not a judge, what would you like to be?

S: Palaeontologist, probably.

L: If you could hold any political position, be it elected or appointed, what would it be?

S: That's a tough one. Maybe senator.

L: What figure do you most identify with?

S: Darwin.

L: Why is that?

S: Because he was curious, as I am.

L: Which living or dead person do you most admire?

S: Kennedy, JFK.

L: Which trait do you most dislike in yourself?

S: Procrastination.

L: You're not procrastinating in answering these questions. Most people have to think, because these are not exactly easy questions. What trait do you most dislike in others?

S: Arrogance.

L: If you could come back as any person or thing, what would it be?

S: St. Peter.

L: I find that pretty interesting, if you think about it. St. Peter and Darwin.

S: Right. I have a lot of interests. I like Darwin, but if I had a choice, I would come back as St. Peter to see what really happened.

L: What is your greatest extravagance?

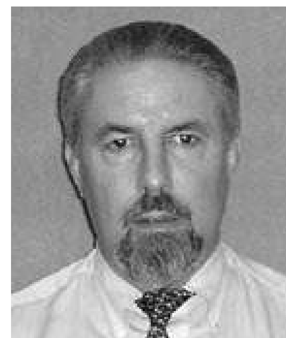
S: Sports.

L: I'm going to guess and say your favorite sport is basketball.

S: Nope.

L: The reason I said that is you went to Helix High School, which is Bill Walton's school.

S: Bill Walton was there when I was there. He was a freshman when I was a senior. And my most enduring memory of him is in one of the halls. He was leaning against the wall and he's got both feet in casts up to his knees. He was real brittle growing up. Then I went to UCSD as an undergraduate and UCLA Law School. When he got to UCLA, I was starting law school, so I had him all three years there. It was wonderful.



L: If not basketball, then . . . ?

S: I like hockey.

L: Hockey. That's interesting. Out here in Riverside County.

S: When I was going to UC San Diego, we discovered the San Diego Gulls, a minor league hockey team. And they were cheap, so we could go there for $2.00 and watch a game. Back then, you had chicken wire instead of glass, so we used to sit close to the ice, and we felt the ice. We cheered the players. You could hear them. It's a beautiful sport.

L: When and where were you the happiest?

S: My first few years on the bench.

L: Has it become old hat?

S: Well, there's a lot of things that have happened in the last 15 years. But when I was in private practice in Blythe, I was very unhappy and I was going to move here. At the end of summer '89, I saw the governor's appointments secretary, and I got appointed in October. And being appointed was a big burden lifted off my back. So just having that relief of not having clients constantly on you, and in your head 24 hours a day, it was a wonderful relief. I was searching for something like that to do other than being a lawyer.

L: You went to heaven.

S: That's right. It's been wonderful.

L: Keeping clients happy must have been a difficult task.

S: You get frazzled and it wears on you.

L: Which talent would you most like to have?

S: Music.

L: An instrument or to sing?

S: Piano, probably.

L: Do you play it now?

S: No. I just don't have the opportunity.

L: Who are your favorite writers?

S: Well, I was really into Tony Hillerman for awhile, but I'm pretty eclectic.

L: What book are you currently reading, or the book you last read . . . ?

continued on next page

Judicial Profile: Christopher Sheldon *(cont.)*

S: "My Life," by Clinton.

L: Who is your favorite hero in fiction?

S: The hero in "The Red Badge of Courage."

L: What do you like best about being a Superior Court judge?

S: What I like best is that I feel competent doing what I'm doing and I enjoy the job.

L: After how many years did you feel competent on the job?

S: About three minutes. I had been in Muni Court for 14 years when I got appointed. I was very comfortable. It just got better. I went to Superior Court and we consolidated and then differentiated. All the criminal cases went through me, a lot of cases. I had the feeling that I could settle most of them if I got the other side to read their files and talk. Then I went from criminal to civil. I had done civil before, but I found that it was something that you could learn and it was interesting. A lawsuit is a lot more involved and interesting.

L: You prefer civil over criminal?

S: Yes. The lawyers in civil are more civil and less contentious. They are usually more experienced, and if they have a problem with you they come and talk to the court, not to some other agency. So I like them, they like me. I have no complaints. I'm doing fine.

L: What would you like to be doing 10 years from now?

S: Unearthing mammoths in South Dakota.

(Judge Sheldon's judicial profile listed various interests, which led to the next question.)

L: What would you rather be, a herpetologist, archeologist or judge?

S: Herpetologist.

L: That is kind of unique, is it not?

S: In San Diego, we lived on top of a valley. And I spent most of my time in the canyons and I read every book on animals I could. I took classes at the zoo, San Diego, and the Museum of Natural History, so when I got to high school I knew natural history really well. And I said I wanted to be a herpetologist when I grew up. Then I got to school at UC San Diego. It wasn't a biological-oriented school, it was physics and math, and the math killed me. I was also into history. My verbals and writing were good,

so I got my history degree and went to law school.

L: What's your biggest regret?

S: I didn't go into herpetology.

L: If you could change one thing about yourself, what would it be?

S: About 30 years.

L: With the same knowledge you now have, of course.

S: That goes without saying.

L: When you retire from the bench, how would you like to be remembered?

S: As a fair and honest judge.

L: What are some of your hobbies.

S: Herpetology, anthropology, archeology, reading, travel.

L: Are you married?

S: Married. I have one step-son here and I have two adult children living elsewhere. My son is in Iraq in the Army and my daughter is in Mexico.

L: When's he coming back, do you know?

S: They have no idea. He's in Samarra. They take mortar rounds and stuff like that. They haven't had a lot of casualties in his unit, but you know, they're not doing the job they were trained to do. They're not social workers, they're not policemen, they're soldiers.

L: I ran out of questions. You're so quick.

S: It was easy.

Rick Lantz is a member of the Bar Publications Committee.

Letter to the Editor, September 2004

Dear Editor:

Each month I await my copy of the Riverside Lawyer with some degree of eagerness. Hopefully, it will contain observations by Michael J. Capelli, which assure me of receiving some degree of therapy. And, hopefully, it will also contain an article by Richard Brent Reed which, no matter how arcane its sources, will engender a silent "Right On!" Except for the July/August issue. Nothing from the Machiavellian trove of humor, and words from Mr. Reed with which I most definitely disagree. "Cross burning" is clearly in line with the sentiments of most Americans, who see nothing wrong with governmental symbols which incorporate the cross – or which, in fact, may be a cross. The majority simply does not "get" that governmental sponsorship of religion, to almost any degree and in almost any form, is, or should be, prevented by the Constitution. The Founders were well aware of the anti-democratic, anti-pluralistic effects of establishment – and they prohibited it even though many of the Colonies were specifically created as havens for one or another group of believers.

Mr. Reed's title seems inaccurate. I am no expert on the symbolism of the Ku Klux Klan (were I an officer, I would rather quickly be relegated to being the Klutz), but it seems to me that the burning of crosses was never a symbol of their removal. Rather, the burning cross was very likely intended as a powerful sign that the full force of Christian faith, coupled with governmental inaction and Jim Crow law, was to be applied to renew or defend the existing social order.

Recently, I wrote to the editors of the Press-Enterprise about the issue. They had opined that the City Council of Redlands could be excused for not spending the money to defend the depiction of the cross in the city seal, because it was such a small issue. It is, however, a big issue. It is made even larger by the rise of Christian fundamentalism in America, and the rapid spread of ideology that Jesus is not merely the Son of God, but God Him/Herself. Many of the crosses erected in public places or placed on seals are of fairly recent origin, reflecting the rekindled passion of believers. To defend the perpetuation of the religious symbol, many believers insist that it is simply there to reflect history. But it is clear that their insistence that government can and should include the symbol is based on deep faith – and rarely on the given excuse. Inasmuch as my letter to the Press-Enterprise had as much chance of being published as the current President of winning a landslide vote in West Hollywood, I am sending it along.

Editor, The Press Enterprise

To Christians of all denominations, whether worn on a chain of gold or simple string, whether crowning the steeple of a church, a hill, or a gravesite, a cross is the symbol of the life, death, and resurrection of Jesus Christ. It is the single most recognizable symbol of their faith. It should have profound meaning to all Christians. It is also understood as central to Christian believers by those who profess other or no religious beliefs. I have no doubt that those who wish to have the sign of the cross incorporated on flags, or coins, or other emblems of government authority, or to have governments erect or maintain crosses on public land, intend to support and recognize their faith. Yet, in order to prevent application of the clear and unambiguous Constitutional prohibition against governmental promotion of any organized religious belief system, those who want the cross to remain publicly insist that it is simply some sort of standardized memorial, or represents some secular historic event, or they maintain that some other non-religious symbolism exists. Rather than honoring the cross, they trivialize it and, with a wink and a nudge, seek to have one religion, theirs, become the beneficiary of government approval. By engaging in excuses and misrepresentation of their true intention, they cheapen the fundamental symbol of Christianity, dishonor the principles of our Constitution, and prove themselves to be willing to subvert the truth, their truth, in the name of their religion. The City of Redlands, and every other government which is now removing religious symbols from places where they do not belong, should be commended – on principle. Obviously, the editors of the Press Enterprise are willing to engage in denigration of a primary American policy by claiming that the issue has no importance. They should remember that the same Constitutional provision that protects us from the abuse of political power by religious groups, some of which would eagerly try to terminate freedom of speech, protects the freedom of this newspaper's editors to express their opinions.

Joseph Peter Myers, Riverside.

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Missing Will of Gwendolyn Broyls

of Moreno Valley. Did you draft her Will? If so, please contact: Gordon Reid Wallack, Esq.; 15760 Ventura Boulevard, 7th Floor; Encino, CA 91436; (818) 995-9415.

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Membership

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective September 30, 2004.

Donald R. Ferguson –
Sole Practitioner, Crestline

Lori Carver Hershorin –
Hershorin & Henry LLP, Mission Viejo

Richard R. Leuthold –
Sole Practitioner, San Diego

Julie M. McCloskey –
Knobbe Martens Olson & Bear, Riverside

Douglas Smith –
Lubrani & Smith LLP, Riverside

Paul C. Supple –
Sole Practitioner, Santa Ana