

**Riverside
County**

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Constitutional Rights
Past Presidents' Dinner**



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Riverside
County

LAWYER

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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 County 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

August

**3 Joint RCBA/SBCBA
Environmental Law Section**
(Organizational meeting)
SBCBA office – Noon

5 Krieger Award Committee
RCBA – Noon

11 Bar Publications Committee
RCBA – Noon

17 RCBA Board
RCBA – 5:00 p.m.

September

6 HOLIDAY

8 Mock Trial Steering Committee
RCBA – Noon

9 CLE Brown Bag
RCBA 3rd Floor – Noon
(MCLE)





by *Mary Ellen Daniels*

I cannot believe that my year of service as your President will soon be ending. At a time like this, one must sit back and reflect upon the past year and thank those of you who have been so instrumental in the success of our Bar Association this year. During my term, I have attempted in some small measure to continue the fine traditions of our organization of serving its membership and our community.

I sincerely thank you for allowing me to serve as your President. I have received much more from having been President than I have given. The trust and respect given to me by the members of this association are things that I will always remember and will take with me for many years beyond this year in which I served you as your President.

I'd like to take this opportunity to thank my husband, attorney Albert Johnson, for putting up with the loss of a wife for an entire year. I never really thought about the effect that being President of the Bar Association could have on a marriage – especially given the fact that I am the female in our relationship and he is the male. It takes a really strong man to give up the things he gave up during this term. I remember before I became President how I loved serving my husband dinner on his favorite dinner tray in the evenings, while he watched the Lakers or just when he came home. That was so special to him. I would run back and forth from the kitchen to him and his big-screen TV. How he loved it! All those things kind of changed for twelve months, and I am really sorry. I am really thankful, though. I know that this is a man who will stick by me through thick and thin. I have thanked and thanked and thanked my husband for being so understanding this year. I love being a housewife kind of woman and

look forward to going back to being home early in the evening. I look forward to playing golf with my husband again and being out there, on the green, talking plenty of stuff as he beats the living daylights out of me. After all, that's part of being a partner to your spouse. I long not to be so tired that I fall asleep the minute I get home; I long to return to my job of being a wife first and an attorney only second. I thank my husband for being so patient and supportive.

I have written about all the little niceties of life, but what do I really take away with me from this position – this position of power, this position of popularity, this position of dignity and this position where I learned that I have accomplished more than the average attorney? I take with me the sense that I have friends like David Bristow, who has always been there for me. David has been the biggest asset that I, though not truly understanding at the time, brought with me into this position as President of the Bar Association. Just writing a paragraph and putting a person's name in it is not enough. You have to feel what you write and what a person means to you. I have not become acquainted with David Bristow just because of the Bar Association. I know David as a person and he has become my friend for life. He and I and my husband do things outside of the Bar Association. I participate with the Hospice in which he is involved and whatever he needs from us, we will be there. David Bristow is not just an attorney who is on the Board of the Bar Association. David is a man who has values, morals, and principles and who loves to help others. David is my friend because he is David, and not because he is just another Board member. I am very thankful to have spent the last five years learning the qualities that this man brings to our Board. In those times when I did not know how I was going to accomplish those things I really did not have time for, David Bristow (Mr. Personality) was there. I thank David for being my friend.

Roxanne Orrock will always hold a place in my heart. You see, my first friend was Roxanne. In 1979, Roxanne and I roamed and controlled the halls of Riverside Superior Court. They called us the Bobbsey Twins because we were always together. I remember going to pick up my son, Jyme, who was 5 years old at the time. He had somehow run into a pole at elementary school and he was dazed. I had been contacted by the school and told I had to come and retrieve him because he could not go back to class. As Roxanne and I picked him up and placed him in the car (I think they allowed us to use a sheriff's unit because it was an emergency), he said to me, "Mom, you look just like that woman, you are just black and she is a different color." We all laughed as he lay back down in the seat, not understanding that he had truly put his finger on our unique relationship. Roxanne and I were sisters from the day we met and we continue to be. Anytime I need her, she is there. Anytime she needs me (though she will never admit it), I am there. She and her husband, attorney Stan Orrock, have been there for me. She masterminded all

(continued on page 5)

President's Message *(continued from page 3)*

the activities this year and made sure I came out smelling like a rose. You can go into our Bar boardroom to see the contributions that Stan made to the Bar. He donated the table in our Conference Room. Yes, the table that must have cost BIG BUCKS. He and Roxanne are also the kind-hearted people who made sure that your first Golf Tournament was a success. Last but not least, they are the couple that I have depended on to make sure that I look good and the Bar looks good.

I have always loved Michael Clepper. Michael Clepper has always been an arrogant (though well-deservedly so) master of family law. I remember when I was a bailiff in Riverside Superior Court, I was – well, not really intimidated by him, but he kept me going. That was when I really realized that anyone could be an attorney and I decided to take the plunge. He was so sarcastic. He could say things to me that made me think about how I could knock his socks off with my quick verbal responses that could leave him gasping for air. He will never admit it, but I know that I am just as good as he is verbally. I can leave him bleeding, as a result of a statement, in the halls of his favorite place, the halls of Family Court. Michael Clepper has always been an inspiration to me. He has always been there for me, and his wit, his humor, and his words of confidence have helped to keep me on track, not just in my professional life, but in my daily life. I remember the first time I went to San Francisco with the Family Law Section. He took a group of us to the most expensive hotel, had a cocktail party for us in his suite and later treated us to the theater. He will never know what an effect this had on me. I felt like I had arrived, because he treated me with such dignity and truly understood that maybe I needed a little elegance to go along with my training and nurturing as a new family law attorney. He brought me into this position, as the host of last year's Bar Installation Dinner, and he stood by me throughout this year. No one could have controlled my installation as he did. He is a man of honor and I am so, so, proud to be his friend. He is a master of class. He is a master of eloquence, and I will always stand in awe of his courtroom presentation. I thank Michael for always being there for me.

I do not know if you all understand how much time your Executive Director, Charlotte Butt, puts into her position. Charlotte not only works for the Bar Association, she eats, sleeps and breathes the Bar Association. Many of you have no idea how much time it takes to manage the Bar Building, manage the staff of the Bar, make sure that all of our events go off without a hitch, make sure all of the staff are doing what they need to do, and make sure all of the committees and sections are keeping up with what they are supposed to be keeping up with. Charlotte Butt does that. We have a bond that was created this year. She has allowed me to keep my practice going and helped me to understand that I cannot micro-manage everything. As you will probably notice from our bar magazine, Charlotte has been instrumental in the fact that we have a 100% occupancy rate in our Bar Building. She and Dan Hantman, accompanied by Sue Burns, run around the building constantly, doing a wonderful job. We have had more new members join our Bar Association this year than I can recall. We have a budget that most bar associations would die for, and to tell you the truth, I cannot recall anyone who made a legitimate request this year for funds from

the Bar Association being denied. I believe that Charlotte, the staff and our past Boards have left the Bar Association in a better position than it was five years ago. This is an accomplishment, because five years ago we were thinking about bankruptcy.

A lot of things have happened this year. I have found myself being very fearful for life itself. As I write this article, my last article as President of the Bar Association, I suffer from the effects of just learning that my good friend and comrade, Maria Hoff, legal professional to Diane and Andy Roth, and President of the Riverside Legal Professionals Association this year, died today (June 23). I always want to do a great job and bring hope to our profession. Of course, this last article should be filled with words of hope and encouragement for the next year. I want to bring joy to our membership, but we must be very mindful of how precious life is and whether this practice of law is worth all that we put into it. Is this practice of law, with its consuming nature, so important that we should give up ourselves and sacrifice the time that we should be spending with our families? I sit and think about this, yet I know I love the law, the fame, the fortune, and the excitement that it offers. Is it really all right with me that someday, I may just fall out and die, without any notice? Am I willing to accept that possibility without reservation? Maybe I am. Is that all right with each and every one of you? If it is, fine. If it is not, you need to think of another profession. I have lost several friends this year. I must admit, my thought, my personal thought, is that their losses are a result, in some part, of the practice of law. I can only pray for my fallen comrades and hope that I can make the decision to cut back and live a little.

I leave you with this thought: "Feel a reverence for life and all that enhances life. There is nothing of which we are so fond, and yet sometimes so careless with, as life."

Once again, I would like to thank each and every one of you for giving me the fulfilling opportunity to serve as President of the Riverside County Bar Association.

Mary Ellen Daniels is president of the RCBA and is a sole practitioner in Riverside.



PAST PRESIDENTS' DINNER

by Sandra Leer

On June 2, 2004, past presidents of the Riverside County Bar Association gathered for their annual meeting/dinner – with Justice John Gabbert and Sandra Leer presiding.

On a sad note, we acknowledged the passing of two of our group during the past year. Both Jim Angell (1963 president) and Lee Badger (1967 president) were remembered with affection and a few stories.

On a happy note, Jim Wortz, at age 94, was recognized as one of our oldest past presidents along with John Gabbert (age 95).

Presiding Judge Doug Miller, Judge Sharon Waters, Judge Dallas Holmes, Judge Craig Riemer and Justice James Ward gave us updates on what's happening in their courts. Current president Mary Ellen Daniels gave us news of our bar association and Jim Heiting gave us information about the State Bar.

After hearing all the grim news of State Court's budget crises, we were all ready for the rest of the program. This always involves good hearted joshing (in senior past president's lingo) and insulting each other.

A good time was had by all. We look forward to next year.

Sandra Leer, a past president of the RCBA, is a family law attorney in Riverside.



Past Presidents Diane Roth (1998), Jane Carney (1989), Sandra Leer (1991) and current president Mary Ellen Daniels

Photos courtesy of Justice James Ward and Sandra Leer



The Five "Senior" Past Presidents' of RCBA: Justice John Gabbert (Ret.) (1949), Jim Wortz (1964), Judge Bill Sullivan (Ret.) (1968), Art Littleworth (1971), and Justice James Ward (1973)



Past President Jim Heiting (1996) with current President Mary Ellen Daniels

Judge Sharon Waters and Judge Doug Miller





*Past Presidents Art Littleworth (1971),
John Vineyard (1999), and
Judge Craig Riemer (2000)*



*Past Presidents Steve Harmon (1995)
and Judge Dallas Holmes (1982)*



*Past Presidents David Moore (1984)
and Terry Bridges (1987)*



*Louise Biddle, former Executive Director
of RCBA and Past President Terry Bridges*



TRADING GAVEL FOR FISHING POLE, JUDGE FIELD RETIRES

by Vicki Broach

*“For now I am a Judge
And a good Judge, too!”
– Gilbert and Sullivan, Trial By Jury*

After graduating from UCLA Law School, Charles D. Field joined the law firm of Best Best & Krieger in November 1963, in the same week President John F. Kennedy was assassinated. More than 40 years later, as Judge Field turns 68 years old this August, he will retire from the Superior Court of Riverside County.

At Best Best & Krieger, Judge Field specialized in labor law. After being appointed to the bench in January 1990 by then-Governor Deukmejian, he served his first two years in juvenile court and the remainder in the civil division. For the last two years, he handled a civil mediation calendar. Recently, he received considerable media attention for a case in which the Pechanga Indian Tribe is attempting to invalidate the enrollment of some of its members.

Judge Field speaks favorably of his years on the bench, citing the “luxury of objectivity” afforded by the judicial role. His most memorable case occurred when he decided the City of Riverside could properly refuse to place the so-called “anti-gay” initiative on the ballot.

He observes that the trial courts have been challenged by the recent changes in their funding, requiring the courts to perform functions for which they are not always well-prepared. Riverside and San Bernardino Counties have been especially affected by explosive population growth that has not been matched by corresponding increases in judgeships, as the state is unwilling to fund them. Consequently, it has become increasingly difficult to provide jury trials. Nevertheless, a judicial career is rewarding and Judge Field encourages good candidates to continue to apply for judgeships.

After August, Judge Field will still serve on court committees involving the continuing courthouse renovation and courthouse artwork. He has not yet decided whether to engage in private judging or mediation services. Instead, he and his wife, Virginia, anticipate visiting Australia and Alaska. With their blended family of three sons, two daughters, and many grandchildren living in the area, the Fields will continue to host pool parties and barbecues. Grandpa Charlie will lead fishing expeditions, offer golfing instruction, and recite Dr. Seuss upon demand.

After serving the Riverside legal community for decades, Judge Field looks forward to some years of carefree adventures and quiet satisfactions with his family and friends.

Vicki Broach is a Riverside lawyer and Judge Field's stepdaughter.



by Richard Brent Reed, Esq.

In 1914, Germany gave Belgium an ultimatum: step aside and let our army roll through your army unopposed or we will crush you. The Belgian army politely stepped aside, deciding that capitulation was preferable to a costly resistance. Had the Belgians stood their ground, France would have been able to engage the Germans on a better battlefield and the world might have been spared years of trench warfare along France's own Maginot Line. During Prohibition, Al Capone sent his "associates" around to Chicago business owners, offering to sell them "window breakage insurance." The businessmen figured that paying the goons off was cheaper than replacing their windows every week.

A few weeks ago, the ACLU sent a letter to the Los Angeles County Board of Supervisors, informing them that the tiny cross in the county seal is an "impermissible endorsement of Christianity" and, as such, violates First Amendment guarantees of separation of church and state. (The ACLU had nothing to say about the Roman goddess Pomona who dominates the seal, much as the goddess Minerva consumes much of the California state seal.) Fresh from a similar victory over the City of Redlands in February 2004, the ACLU issued its ultimatum to Los Angeles County officials: remove the cross or face a protracted court battle that the county could ill afford. All but two of the supervisors wanted to avoid the expense of litigation and the humiliation of losing, so they rolled over and put their paws in the air. They agreed to replace the cross with a Spanish-mission style building, absent a cross. The historical message of the new, cross-free seal will be clear: Los Angeles was founded, not by missionaries, but by Taco Bell.

The First Amendment begins: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." That is all that the Constitution has to say about religion. A Spanish cross on a county seal is a far cry from Congress making a church-establishing law. The policy of the ACLU is, in reality, one of zero tolerance. ("Zero tolerance" is just a politically correct way of saying "intolerance.") By ACLU standards, any graphic reference to Christianity on local government stationery would be an "impermissible endorsement of Christianity;" someone of another persuasion might see the cross, cherub or whatever and feel disenfranchised. Early in June, talk show host Dennis Prager (who is Jewish) held a rally in and around the county building. Of the two thousand Angelenos who showed up, over four hundred were Jews, Buddhists, atheists, and other non-Christians, all there to protest the revision of California history. The Board of Supervisors refused to alter its conciliatory position. California will survive the ACLU's bullying tactics, as will Christianity, but history may not.

The pharaohs of ancient Egypt routinely effaced references to their predecessors, replacing the images of former pharaohs with their own. Stalin, wishing to purge the Russian collective memory of fellow revolutionary Trotsky, had him redacted from textbooks and even expunged him from photographs. Eventually, he expunged Trotsky himself. More recently, the infamous Taliban dynamited two famous, centuries-old statues of the Sleeping Buddha in an effort to eradicate Afghanistan's Buddhist past.

And, now, the ideological cleansing of America begins. How long before the ACLU, chisel in hand, starts whacking away at the numerous references to "God" on the monuments and buildings around the nation's capital? There is no constitutional right to rewrite the historical record, nor do Americans need to be protected from their own history.

Richard Reed is a member of the RCBA publications committee.



MILITARY TRIBUNALS, DUE PROCESS AND INDIVIDUAL RIGHTS

by Eric Strong

The phrase “military tribunal” has been tossed around in the media with abandon in recent years. Military attorneys cringe at its mention in the same way most in the general legal community would upon hearing the phrase, “legal problem.” The diversity and scope of formal military legal proceedings are vast. Boards of officers (sometimes including non-commissioned officers) in the United States military exist to provide due process in a variety of decisions. Regulations exist directing a wide assortment of tribunals to do such divergent tasks as assign administrative responsibility for lost equipment, decide the fate of a random civilian on the battlefield, or weigh whether to convict a U.S. service member of a capital crime.

The tribunals most discussed recently, however, involve the fate of individuals detained by the United States. Even under that broad definition, the appropriate tribunal may vary widely, depending upon the individual in question. For example, within the military, the Uniform Code of Military Justice ensures relatively standardized treatment of many recently newsworthy defendants. Captain James Yee (the Muslim chaplain accused and later exonerated of espionage charges), the Abu Ghraib military police defendants, and Army deserters unwilling to go back to Iraq after brief recreational leaves in the United States are all under military jurisdiction. This is because they allegedly perpetrated misconduct while on active military duty.

While many individual liberties are waived when entering military service, the U.C.M.J. stands as an exception. This code of criminal law and procedure compares favorably with those of the various state criminal forums. The rules of evidence mirror the federal rules and the protections of the Fourth, Fifth and Sixth Amendments remain largely intact.

Tribunals for non-U.S. military detainees are an entirely different matter. The problem posed is that the variety of types of detainees makes implementing due process and defendants’ rights difficult. Because the nature of detainees varies so greatly, the degree of due process varies. Most would agree that “adjustable”

due process is no due process at all. This is not a new problem. In World War II, two detainee tribunal incidents, one famous, one obscure, demonstrated the difficulty.

The first was the case of the Long Island saboteurs. After the United States entered the war against the Third Reich, the Germans hatched a plan to deposit U.S.- raised Germans on American shores to blend into the population and eventually destroy certain infrastructure targets. A U-boat put men ashore in Long Island and Florida. They were initially undetected, but before they could wreak any havoc, one of the agents got bored and lonely and visited some friends. Hardly showing steely, Teutonic efficiency, this lapse caused the entire scheme to collapse and all were quickly captured. The subsequent proceeding was a makeshift tribunal leading to their hasty conviction as spies.

Normally, an enemy combatant in uniform who is captured and later accused of criminal conduct is supposed to face the same system one of his captors would face. The United States adheres to this policy generally. Accordingly, an accused enemy prisoner of war (in military parlance, known as an “EPW,” to distinguish a captured American, called a “POW”) would face a court-martial under the U.C.M.J. He would then possibly receive more protections than if prosecuted in his own military because of the safeguards within that code derived from our own Bill of Rights!

The Long Island saboteurs were not accorded this treatment. The government concluded that, as non-uniformed infiltrators, they did not have the rights of prisoners of war. Soon after their conviction, most were executed.

Another less well-known incident involving captured Germans set an even broader precedent for government latitude in detainee trials. During World War II, approximately 600,000 German prisoners of war were held throughout the United States. In one camp in the South, captured U-boat prisoners were held as a large group. One of the submariners was found murdered. This individual had been cooperating with his American captors in trying to find and destabilize groups of hard-core Nazi prisoners among the more mainstream captured naval personnel. After an investigation, a group of approximately ten sailors were segregated and accused of murder. For reasons of security and possibly politics, a standard court-martial was ruled out. Instead, these accused sailors were tried, not under the U.C.M.J.’s precursor, but instead in

a fashion similar to the Long Island saboteurs, with reduced defendant protections. Additionally, the entire episode occurred in strict secrecy, so it was not generally known until long after the war. Again, most of the men were eventually executed.

In these and similar World War II episodes (such as the detention of Americans of Japanese ancestry), the courts, including the United States Supreme Court, consistently ruled that Article II of the United States Constitution, designating the president the top military decision-maker as commander-in-chief, prohibited judicial interference. Accordingly, the precedent those cases set remains largely intact to this day.

The present detainees face a legal situation comparable to those recounted above. Modern detainees receiving the most outside scrutiny are those held at the U.S. base at Guantanamo Bay, Cuba. The military has elected to designate those persons “unlawful combatants” and thereby give itself vast discretion in how to handle them. The constitutional right to a speedy trial is unavailable, so many have been incarcerated there for literally years now. However, international media attention and generally different legal mores than those of World War II have spared them the fate of thrown-together tribunals and prompt execution.

The military’s need for intelligence is one of the factors in keeping these individuals in indefinite detention. As long as they are in detention, they can be interrogated. Another factor is the likelihood that, if released, they could continue to endanger U.S. security because they are not part of a structured military. In a traditional military force, a captured enemy combatant would be assumed upon resolution of hostilities to respect the accord terminating hostilities by obeying the demobilization orders of the combatant’s government or a successor. Al-Qaeda combatants are not fighting on the behalf of a recognized nation-state nor do they have a traditional chain-of-command. These are the types of issues associated with detentions that the U.S. Supreme Court views as exclusively military and therefore within the basically unfettered discretion of the executive branch.

President Bush and his administration have received much criticism, some of it justified, for policies related to the alien detainee issue (of course, some detainees such as Yaser Esam Hamdi and José Padilla aren’t foreign at all, but actual U.S. citizens). No matter who is in the White House, however, the problem of balancing respect for the cherished liberties created by the Bill of Rights against the dangers of a world fraught with terrorism will remain.

Eric Strong, a member of the RCBA, is with the firm The Partners in Riverside.



LOS ANGELES COUNTY AND THE CITY OF REDLANDS TO REMOVE CROSSES FROM THEIR SEALS DUE TO ACLU CHALLENGES

by Yoginee Braslaw



Pressure from the American Civil Liberties Union (ACLU) led Los Angeles County supervisors to agree to remove a tiny cross from the county's official seal rather than face a potential lawsuit. During an emotional debate, one possible compromise under discussion involved replacing the cross with the image of a Spanish mission and the indigenous people who predated the missionaries.

Many believe the ACLU was emboldened to challenge the seal of Los Angeles County after the City of Redlands succumbed to a similar complaint in February 2004 and removed a cross from its seal because it thought it would lose if challenged in court. The ACLU then received calls complaining about the Los Angeles County seal.

"Los Angeles County is the most diverse county in the United States, and if the City of Redlands decided it had to do something, we think the County of Los Angeles should also," explained ACLU Foundation of Southern California Executive Director Ramona Ripston. Hence, last month the ACLU wrote a letter to Los Angeles County supervisors demanding the removal of the small cross from the county's official seal.

The letter said the seal "prominently depicts a Latin cross, a sectarian religious symbol that represents the beliefs of one segment of the county's diverse population." The ACLU concluded that this cross symbol in the seal is an "impermissible endorsement of Christianity," and, as such, violates First Amendment guarantees of separation of church and state. Warning that the seal is "unconstitutional," the ACLU gave county officials two weeks to remove it or they would seek to have the matter resolved in court.

The cross that appears in the seal represents the Spanish missionaries who founded the Los Angeles County missions during the 18th Century. The seal was designed by the late Supervisor Kenneth Hahn and drawn by noted local artist Millard Sheets. It has been used since March 1, 1957. The panel that depicts the small cross and two stars above the Hollywood Bowl is one of six that surround the seal's main figure, Pomona, a Roman goddess of fruits and trees, representing the region's agriculture. The seal's other symbols are: a triangle and caliper to represent industry; oil derricks; the Spanish galleon San Salvador that was sailed into San Pedro Harbor in 1542 by the explorer Juan Rodriguez Cabrillo; and a tuna and a champion cow named Pearlette, representing the once-huge fishing and dairy industries.

Los Angeles County officials had maintained that the seal includes historically accurate information about the origins of the county. County spokeswoman Judy Hammond noted that the seal is prevalent in many government buildings as well as on business cards, flags, stationery, vehicles, plaques, Internet web sites and more. She said the price of changing it at this point is immeasurably high.

Cardinal Roger Mahony asked that the tiny gold cross on the Los Angeles County seal be retained, even though the Board of Supervisors had decided to eliminate it to avoid an ACLU lawsuit. The Roman Catholic Archbishop of Los Angeles reiterated arguments that the cross recalls the importance of Catholic missions in the county's heritage, the Los Angeles Times reported. "To remove the cross would be to deny the historical record," Cardinal Mahony wrote, according to the Times.

Los Angeles County Supervisor Don Knabe said removing the cross was like "rewriting his-

tory” in a region shaped by Catholic missionaries. “Where does it all end?” he asked. “I do not think we should capitulate. As the largest county in America, if we roll over, what’s next?”

But other supervisors indicated that they wanted to avoid a court battle that some predicted the county would lose. Federal courts ruled against government agencies in similar cases in New Mexico and Illinois in the 1990’s. Nonetheless, one U.S. Supreme Court case has approved some public displays of religious symbols. And the Fifth Circuit Court of Appeals found that a cross on the Austin, Texas, seal did not violate the First Amendment’s Establishment Clause. Lawyers in those cases argued that the cross was a historic, as opposed to a religious, symbol. However, on Monday, June 7, 2004, the Ninth Circuit Court of Appeals ordered a cross on federal parkland in the Mojave Desert removed.

Note: Information compiled from the Los Angeles Times and the Associated Press

Yoginee Braslaw is a member of the RCBA publications committee.



CONSTITUTIONAL RIGHTS OF D

by Hal Gerber*

A body of statutory and decisional law regarding the rights of detainees has developed in the United States since the Sept. 11, 2001, terrorist attacks. On Sept. 18, 2001, Congress passed Public Law 107-40 in the form of a joint resolution authorizing the President to use all necessary and appropriate force against nations, organizations, or persons that he deems planned, authorized, committed, or aided the attack on Sept. 11 or harbored such organizations or persons in order to prevent future acts of international terrorism against the United States by such nations, organizations, or persons. The President then signed an order on Nov. 13, 2001, directing that al Qaeda members and others who helped or agreed to commit terrorists acts aimed at this country or harbored such persons and who are not U.S. citizens will be subject to trial by a military tribunal, and not by federal or state courts of this country.

In exploring and discussing the arrest and detention of people suspected of being terrorists, I find that a vast majority of these people are being held without formal charges and, for the most part, incommunicado. Because I have no sympathy for or patience with terrorists, my commentary is based on my concern with statutes and decisions that invoke penalties and procedures in violation of the Constitution of the United States and even more so with future dangers to the rights, freedom, and liberties of U.S. citizens, especially in connection with the conduct of political affairs.

This concern is best illustrated by a review of the U.S. District Court for the Southern District of New York's decision in *Jose Padilla*, by Donna R. Newman as next friend, *Petitioner v. George W. Bush, Donald Rumsfeld and Commander Marr*, Respondents, 233 F. Supp.2d 564 (S.D.N.Y. 2002) decided Dec. 4, 2002. Donna R. Newman, attorney for and as next friend of Padilla, brought suit pursuant to 28 U.S.C. § 2241, seeking habeas corpus relief by challenging the lawfulness of Padilla's detention and seeking an order directing that he be permitted to consult with counsel. The government filed several motions regarding Newman's standing, the court's territorial and personal jurisdiction, the lawfulness of Padilla's detention, the right of Padilla to consult with counsel, and whether or not the President had some evidence to support his finding that

Padilla was an enemy combatant. District Judge Muskasey's opinion, although both thoughtful and well stated, held among other things that Padilla was being legally detained. The Court of Appeals for the Second Circuit reversed the District Court's opinion.¹

The New York District Court's Decision

Jose Padilla, a U.S. citizen, was arrested May 8, 2002, in Chicago on a material witness warrant that the District Court for the Southern District of New York issued pursuant to 18 U.S.C. § 3144 to enforce a subpoena to secure Padilla's testimony before a grand jury in the Southern District. Then on June 9, 2002, the government ex parte notified the court that it was withdrawing the subpoena. The court vacated the warrant. No criminal charges were filed or have ever been filed against Padilla. At that time, the government disclosed that the President designated Padilla as an enemy combatant associated with al Qaeda. Padilla is being detained without formal charges against him and without the prospect of release after giving grand jury testimony.

On June 11, 2002, Newman filed a habeas corpus petition regarding the facts surrounding Padilla's capture and transfer to New York and her activities in connection with representing him in proceedings relating to a motion to vacate the material witness warrant, as well as his transfer to the South Carolina brig where he is being held. Newman averred that the government told Newman that she could not visit Padilla in South Carolina or to speak with him and that he would not even be permitted to receive correspondence if she wrote to him. The court denied the government's standing motion, as well as its attack upon the jurisdiction of the court, both territorial and personal.

The District Court was presented with two basic questions: Was Padilla being lawfully detained, and if so, could the President exercise that authority without violating 18 U.S.C. § 4001(a) that bars detention of American citizens, except pursuant to an act of Congress? A third issue regarded what standard the District Court must apply to determine whether the evidence adduced by the government was sufficient to justify Padilla's detention. The District Court answered the first two questions affirmatively; as to the third, the District Court held that it would examine only whether there was some evidence to support the President's findings.

The District Court's decision regarding the designation of Padilla as an enemy combatant raises several points. First, the court noted that the laws of war draw a fundamental distinction between lawful and unlawful combatants who may be held as

DETAINEES — A COMMENTARY

prisoners of war but are immune from prosecution. Generally, four criteria are used to determine a lawful combatant: (1) the combatant must be commanded by a person responsible for his subordinates; (2) the combatant must have a fixed distinctive emblem recognizable at a distance; (3) the combatant must carry arms openly; and (4) the combatant must conduct operations in accordance with the laws and customs of war. Those who do not meet those criteria, including saboteurs and guerrillas, may not claim prisoner-of-war status and may be tried by military tribunals.

The District Court examined the distinction between lawful and unlawful combatants using the Supreme Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942), which holds that the basic difference is that a lawful combatant is subject to capture and detention as a prisoner of war by opposing military forces, whereas unlawful combatants are subject to capture and detention but are also subject to trial and punishment by military tribunals. The court then focused on the central issue of the case, the authority of the President to designate, as an unlawful combatant, an American citizen captured on American soil and to detain him without trial. Without much discussion, the court found that Padilla was lawfully imprisoned in spite of 18 U.S.C. § 4001(a). That section bars detention of American citizens "except pursuant to an act of Congress." The court held that this section was satisfied by the joint resolution passed by Congress on Sept. 18, 2001, which has the force of law.

If the American concept of equal justice under law means anything, in criminal cases a person accused of a crime is entitled to constitutional protection, contrary to the holding of the court that Padilla's detention is not part of a criminal proceeding. This does not amount to coddling criminals, as some would have it. Instead, it serves to protect people from indiscriminate detention or arrest and indefinite confinement for political reasons, as was the case in the 20th century in Russia, Germany, Cambodia, and Serbia, to name a few. Equal justice under the law does mean that every accused has the constitutional right to be charged and to receive a trial.

If this, indeed, is a criminal case, the court places an undue burden on Padilla. As a defendant, Padilla has no burden. It is not up to Padilla to prove anything. See *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Stain*, 372 U.S. 293 (1963) (neither was cited by the court). *Fay v. Noia* is a virtual treatise on habeas corpus. Both cases base great emphasis on the Judiciary Act of Feb. 5, 1867 (presently codified as 28 U.S.C. § 2243), which was enacted after the Civil War. This act was one of many such statutes, in addition to constitutional amendments, designed to protect the rights of former slaves, not to mention all other citi-

zens. The act provides that, in proceedings upon a petition for habeas corpus, among other things, "[t]he said court or [j]udge shall proceed in a summary way to determine the facts of the case by hearing testimony. . . ." *Townsend*, at 850 (emphasis added). Apparently, any information the President has is the result of double hearsay, which would be a reason for an evidentiary hearing, where the court could determine the admissibility of the facts and testimony presented.

The Second Circuit's Decision

The Court of Appeals reversed the District Court in a two to one decision in *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003). The Second Circuit emphasized that its review was limited to the case of an American citizen arrested in the United States and not on a foreign battlefield or while actively engaged in armed conflict with the United States. The court found that the President lacked inherent constitutional authority as commander in chief to detain American citizens on American soil outside a zone of combat. . . .

In sum, the Court of Appeals held that: (1) Donna Newman may pursue habeas relief on behalf of Padilla; (2) Secretary Rumsfeld is a proper respondent and the District Court has personal jurisdiction over him; (3) in domestic context, the President's inherent constitutional powers do not extend to the detention, as an enemy combatant, of an American citizen seized within this country away from a war zone; (4) the Non-Detention Act prohibits detention of American citizens without express congressional authorization; and (5) neither the joint resolution nor 10 U.S.C. § 956(5) constitutes such authorization under § 4001(a). The essential difference between the District Court and the Court of Appeals is that the latter does not consider that the joint resolution authorizes detention of Padilla under § 4001(a), with which the dissenting opinion takes issue.

The Court of Appeals did not deal with the effect of the Fifth and Sixth Amendments as did the District Court. The controlling part of the opinion of the Court of Appeals deals with 18 U.S.C. § 4001(a), which reads in essential part: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

The appellate court remanded the case to the District Court with instructions to issue the writ directing the release of Padilla within 30 days. The government could then transfer Padilla to civilian authorities who could

(continued next page)

Constitutional Rights of Detainees . . . (continued)

bring criminal charges. Also, if appropriate, Padilla could be held as a material witness in connection with grand jury proceedings. "In any case, Padilla will be entitled to the constitutional protections extended to other citizens." Padilla, 352 F.3d at 699.

Conclusion

The trouble with the manner in which the government incarcerated Padilla is twofold: (1) the rights of people like Padilla who are being indefinitely detained incommunicado without charge, and (2) the danger that some future President could inappropriately use these enactments and decisions as the basis of becoming a dictatorial leader. These constitutional invasions and these hastily drawn statutes, which cannot pass constitutional muster themselves, lay a legal framework for some future unscrupulous politician to gain and use power. A more frightening prospect is use of such precedent for individual political oppression; that is, any citizen can be arrested and held incommunicado without being charged if the President says he has some evidence, even hearsay, to support his charge that a person is an enemy combatant – whether he is or not. Unless people, citizens or not, are afforded the constitutional protection as described, great danger lurks in the future.

This discussion goes far beyond the rights of Padilla. It goes to the basis of the constitutional rights of citizens of this nation. I question any provision of law that gives the right to the President to declare an American citizen an unlawful combatant, especially in this case, based on the hearsay declaration of some obscure person employed by the Defense Department. This provision gives the President a power not provided in the Constitution. We have three separate but equal branches of government that are supposed to share all governmental power. In this case, the power has become unequal – setting a dangerous precedent.

The American philosophy of law is important because it is the cornerstone of our liberty. It is in times like these that the unconstitutional imposition of restraints and the encroachment of our civil liberties are easily overlooked or excused. But it is in times like these that we are most vulnerable.

A statement of the U.S. Supreme Court in *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524 (1886) is worth noting:

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Endnotes

¹The Supreme Court granted certiorari in this case on Feb. 20, 2004.

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THE CHURCH OF SCIENTOLOGY AND OTHER SIGNS OF DEMENTIA

by Peter Gibbons

I recently defended a man who was under investigation by the IRS. The IRS served multiple (over ten) different summonses on my client, the target of the investigation, as well as on various third-party recordkeepers, such as banks and other institutions.

The IRS was allegedly investigating him for violations of 26 U.S.C. §§ 6700 and 6701, which are, respectively, the promotion of an abusive tax shelter and assistance in preparation of a tax return that “understates” liability. An interesting thing is that each of those activities has been defined by regulation, the Internal Revenue Manual, and by precedent. We opposed the summonses through petitions to quash; the Department of Justice petitioned to enforce them.

Our contention was that none of the activities my client was alleged to have engaged in fit the definition of proscribed activities under either of those code sections. Further, neither the declaration of the investigating agent nor any published material on my client’s web site indicated he was involved in any proscribed activity and he filed a contradicting declaration stating categorically that he was not engaged in any activity proscribed by either of those two code sections. We requested an evidentiary hearing at which the IRS agent could be examined, whereby we hoped to establish that there was no rational relationship between the ostensible purpose of the summonses and the documents demanded by them. In other words we hoped to show that the records summoned were incapable of providing any information relevant to possible violations of §§ 6700 or 6701. The court denied our request for an

evidentiary hearing and ordered all summonses enforced. We appealed. Meanwhile, we requested a stay of enforcement pending appeal on the ground that providing the government documents to which it was NOT entitled represented an irreparable violation of my client’s right to privacy and Fourth Amendment security of papers and effects. Further, tender of the documents prior to a decision on the appeal would render the appeal moot, as there would no longer be a case or controversy. The district court denied the request for stay and ordered the summonses enforced forthwith. My client, rather than try to unring the bell, later refused to comply with the court order, on the ground that he was being forced to forego one right (the right to liberty) in order to preserve another right (the right of appeal), which is an untenable position.

The district court ordered my client incarcerated for contempt of court. We appealed the contempt order. The Ninth Circuit Court of Appeals denied the appeal based on the case of *Church of Scientology of California v. United States*, 506 U.S. 9 (1992) (*Church of Scientology*).

The *Church of Scientology* decision involved an IRS summons for two tapes in the possession of a state court clerk. The district court had ordered the clerk to comply with the summons. The Church filed a timely notice of appeal, requesting a stay pending appeal. The stay was denied and the tapes were delivered to the IRS. As a result, the appellate court dismissed the appeal as moot. A petition for certiorari was granted by the Supreme Court. The Supreme Court vacated the appellate court’s dismissal and remanded.

The Supreme Court found that, while enforcement of the district court order could create an irreparable privacy violation if the government received documents which it might later be found not to have a right to, the appeal was not moot because the appellate court could at least fashion a “partial remedy.”

The *Church of Scientology* decision is flawed. It sets a dangerous precedent, posing a great threat to the privacy and the expectations of minimal governmental intrusion secured to the American people by the Bill of Rights, and should be overruled.

1. The Supreme Court concluded that there was nothing in the statute to suggest that Congress sought to preclude appellate review of district court enforcement orders. *Church of Scientology*, 506 U.S. at 16. This is a flawed conclusion, in that there is nothing in 28 U.S.C. § 1291 that would indicate that Congress intended to preclude appellate review of any district court decision or order, yet many have been

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precluded by the doctrine of mootness. Therefore, legislative intent with respect to appellate review is not rationally related to mootness, in spite of the fact that a theoretical “partial” remedy is postulated in what can only be characterized as an advisory opinion. I am unaware of any change in the Supreme Court’s prohibition on advisory opinions, yet this case represents just that.

2. The Supreme Court’s conclusions are flawed because the court splits hairs with the “intervening event” principle. As in this case, the question is whether or not the IRS is entitled to the records it has requested in its summons. If it is entitled, it should obtain the records; if it is not entitled, there is no legal reason for it to have the records, and thus, it should not by any means be able to obtain such records. The court’s decision in *Church of Scientology* attempts to create a tax exception to the “case and controversy” requirement of the federal Constitution, which contains absolutely no tax exception clause. See *United States v. Troescher*, 99 F.3d 933 (9th Cir. 1996).

3. The Supreme Court in the *Church of Scientology* decision clearly recognizes the individual’s interest in maintaining privacy of his papers and effects, and also that once the IRS has successfully obtained that material that interest is violated. *Church of Scientology*, 506 U.S. at 14. The court in a curious twist of logic then postulates that the partial remedy of ordering the IRS to return the records and destroy any copies made could suffice as a remedy, as if the privacy right which is acknowledged as violated somehow is no longer of consequence. This is flawed reasoning because the court would have no contempt powers over the IRS in the event the order was not fully complied with. As a fictitious entity, the IRS cannot be incarcerated, nor can it be criminally prosecuted. The court’s order could and would be ignored with impunity. The offended party is deprived of any method for enforcement of the “partial remedy” granted by the court. Even the proposed partial remedy is completely toothless, adding insult to the injury of the violation of the party’s privacy right.

4. The court’s reasoning in the *Church of Scientology* decision is further flawed in that it places complete faith in the honesty and integrity of the IRS. The debates published in the Federalist Papers and Anti-Federalist Papers, as well as the debates in Congress with respect to the Bill of Rights, all are conclusive that faith in government is ludicrous, and that only “the chains of a constitution” can constrain it. The Bill of Rights was adopted to provide additional protections, restrictions, chains and constraints on governmental overreaching. In light of the many recent Congressional investigations relating to IRS abuses of the American public, and the Taxpayer Bills of Rights which have resulted from Congressional investigation, such blind faith isn’t shared by legislators or the voting public either. For the Supreme Court to suggest that any enumerated right in the Bill of Rights should give way to faith in the honesty and integrity of government ignores virtually every educated conclusion as to the framers’ intent. It also ignores the preeminence of secured fundamental rights over expediency in the exercise of police power.

5. The court’s reasoning in the *Church of Scientology* decision is also flawed in saying that a partial remedy is any remedy at all, or is somehow sufficient to make one whole. Axiomatically a “partial remedy” is insufficient to make one whole. If such reasoning were applied to the law of torts it would be the same as saying that an individual who lost both legs in an accident caused by another is made whole if the tortfeasor is ordered to provide only one prosthetic leg to the injured party. No competent jurist would suggest such a thing in a tort case. Why should tax decisions be devoid of such common sense? This adds weight to item 2, above.

6. The court’s reasoning in the *Church of Scientology* decision is further flawed from an evidentiary standpoint. In evidence, every law student learns that once evidence is presented to the jury, you can’t “unring the bell.” If the IRS is able to obtain evidence to which it is not entitled, there is no remedy

that can erase the information gathered from the minds of the agents who obtain it. Yet here the Supreme Court seems to be of the opinion that the federal courts have recently become endowed with the power to “unring the bell,” and that by court order IRS and DoJ agents can be made to forget.

To make matters worse, since the decision in *Church of Scientology*, the Ninth Circuit has continued to dismiss summons enforcement appeals as moot whenever the government moves for such dismissal on the ground that the lower court has denied a stay pending appeal and has ordered the summons enforced. Unless the summoinee’s counsel is aware of the *Church of Scientology* decision, the appeal will be dismissed as moot. On the other hand, when a summoinee opposes compliance with an enforcement order based on the mootness issue, the government trots out the *Church of Scientology* case and the stay pending appeal is denied. So, in actuality, the *Church of Scientology* decision is applied by the court of appeals only when it is convenient to the government.

The reader is encouraged to read the *Church of Scientology* decision as it is hard to comprehend how such drivel passes for jurisprudence at our highest court. The *Church of Scientology* case belongs in the Supreme Court’s Hall of Shame right next to *Bennis v. Michigan*, 516 U.S. 442 (1996), *Wickard v. Filburn*, 317 U.S. 111 (1942), and *United States v. Miller*, 307 U.S. 174 (1939).



POETIC INJUSTICE

by Richard Brent Reed, Esq.

In the Spring of 2001, at Santa Theresa High School in San Jose, fifteen-year-old Julius wrote *Faces*:

Who are these faces around me?
Where did they come from?
They would probably become the
next doctors or loirs [*sic*] or something. All
really intelligent and ahead in their
game. I wish I had a choice on
what I want to be like they do.
All so happy and vagrant. Each
original [*sic*] in their own way. They
make me want to puke. For I am
Dark, Destructive, & Dangerous. I
slap on my face of happiness but
inside I am evil!! For I can be
the next kid to bring guns to
kill students at school. So Parents
watch your children cuz I'm BACK!!

Seeking to join the school's poetry club, he made the mistake of passing this poem to a classmate, with this inquiry: "These poems describe my feelings. Tell me if they describe you and your feelings." She read the poem, fled the campus, and notified a teacher, who phoned the police. When the policeman came to his house, Julius gave him another poem entitled, "*Faces In My Head*," including the lines: "I feel as if I am going to go crazy. Probably I would be the next high school killer." Instead of sending the boy to counseling, the authorities sent him to juvenile hall for three months. Julius was convicted of making a criminal threat under Penal Code § 422.

The Sixth District Court of Appeal affirmed the trial court's ruling, 2 to 1. Julius, now 18, has placed his case before the California Supreme Court. At oral argument, Chief Justice Ronald George declared that poetry is not exempt from prosecution. Justice Janice Brown asserted that, "Roses are red, violets are blue, give me the money or I'll shoot you," would still be a hold-up note, despite the versification.

Penal Code § 422 requires a threat to be "so unequivocal, unconditional, immediate and specific as to convey a gravity of purpose and an immediate prospect of execution of the threat." Justice Joyce L. Kennard pointed out that "The poem doesn't say, 'For I *will* be the next kid to bring guns to school. It says,

'For I *can* be the next kid to bring guns to school.'" Justice Kennard's point is well taken. The poem's conditional musings are not "unequivocal, unconditional, immediate," nor do they constitute a threat.

The court has framed the issue in a disturbing way: Can poetry carve a First Amendment protection exception out of Penal Code § 422? The issue should be stated: In this case, does Penal Code § 422 carve an exception out of the First Amendment? A poem that says, "I would like to have your money," does not have the legal significance of one that says, "Give me your money." Likewise, a poem that says, "I feel like bringing guns to school," is not a note saying, "I have guns and I'm bringing them." A statement of feelings is not a statement of fact or intent and is, therefore, not a threat. Notwithstanding the uneasiness of the squeamish reader, a dark poem is not a threat, even by the standards of Penal Code § 422. To criminalize dark thoughts sets a dangerous, Orwellian precedent.

Had Julius handed his classmate one of the many rap CD recordings advocating the beating of women or the shooting of cops, would he have been arrested? Probably not. Yet by the standard imposed by the Sixth District, he could be arrested for passing any of the following verses:

Christopher Marlowe wrote in 1592:

I am Wrath. I had neither father nor mother: I leapt out of a lion's mouth when I was scarce half-an-hour old; and ever since I have run up and down the world with this case of rapiers, wounding myself when I had nobody to fight withal. I was born in hell; and look to it, for some of you shall be my father.

— *Dr. Faustus*: Act II, Scene 2

Shakespeare wrote in 1598:

They come like sacrifices in their trim,
And to the fire-eyed maid of smoky war
All hot and bleeding will we offer them:
The mailed Mars shall on his altar sit
Up to the ears in blood. I am on fire
To hear this rich reprisal is so nigh . . .

— *1 Henry IV*, Act IV, Scene 1

George Gordon, Lord Byron, wrote in 1816:

And War, which for a moment was no more,
Did glut himself again; – a meal was bought
With blood, and each sate sullenly apart
Gorging himself in gloom

— *Darkness*

When, upon the occasion of the detonation of the first atomic bomb in 1945, physicist J. Robert Oppenheimer said, translating from the Sanskrit, “I am become death, the destroyer of worlds,” should we have locked him up as a terrorist?

Writing dark poetry is what adolescence is all about. It’s a healthy outlet. Putting pen to paper

is preferable to putting a gun in your backpack. Such poems are cries for help, not threats. Julius’ poetry is dark, but not dangerous. What this state’s supreme tribunal is contemplating is dangerous. To criminalize thought makes action inevitable. Kids who feel overwhelmed by their demons need intervention, not jail. The proscription of dark poetry will not prevent another Columbine incident. It makes one more likely.

Richard Brent Reed, Esq., is a member of the RCBA Publications Committee.



BOOK REVIEW: “HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?”

reviewed by Christopher C. Faille*

How Democratic Is the American Constitution?

Second Edition

By Robert A. Dahl

Yale University Press, New Haven, CT, 2003. 224 pages, \$15.00.

In Henrik Ibsen’s 1882 play, “An Enemy of the People,” the protagonist, a successful and idealistic physician, discovers that his coastal town’s baths are contaminated with the by-products of a tannery. Unfortunately, the townspeople don’t want to hear such news. They believe that the baths make their town a tourist attraction, provide new customers for their businesses and bring a higher resale value for their homes. The mayor warns Dr. Stockmann that he ought to learn to “acquiesce in subordinating himself to the community” and not interfere with the town’s happiness by bringing news of contamination.

Stockmann decides to appeal to the townspeople over the heads of their political officials, so he has a friend rent him a hall, and he holds a town meeting. Almost everybody lines up against him there, even those he had counted on as allies. One resident suggests that he has an alcohol problem. Another says the problem is more likely genetic insanity. Still another thinks he’s angling for an increase in his salary as the baths’ doctor. Despite these differences, the townspeople agree that Stockmann should be labeled an “enemy of the people,” and they chant that phrase at him amidst their boos and hisses as he and his family leave the meeting.

I suggest that my readers keep that plot summary in mind as I discuss a new book by Robert Dahl, Sterling Professor Emeritus of Political Science at Yale University, who answers the simple question of its title – “How democratic is the American Constitution?” – with the dual claim that it is exceedingly undemocratic and that this fact is a misfortune.

One of the undemocratic features that disturbs Dahl is the role of the president. Dahl believes that a parliamentary system – one in which the legislature chooses the chief executive – is more democratic than a presidential system, in which the legislature and executive are divided. One effect of divided government is the stultification of majority will, which happens in the United States even when the president and the leaders of both houses are all of the same political party – a circumstance that, though existing now, has itself become rare. But Dahl notes that American political culture is so deeply imbued with an idealized presidency – a half-monarch, half-politico – that “short of some constitutional breakdown, which I neither foresee nor, certainly, wish for,” there will be no move toward a more democratic alternative except perhaps “a bit around the edges.”

On a second front, Dahl contends that the judicial review of legislative actions has gone too far – that federal judges regularly usurp the proper province of elected officials. This view, of course, is shared by many on both the left and the right. Each side believes, naturally enough, that the court is usurping the legislative role when it strikes down laws that represent victories for its own side of the ideological divide, but is exercising a valuable counter-majoritarian function when it strikes down laws that represent victories for the other side.

In his brief discussions of judicial review, Dahl merely alludes to issues that require careful consideration and that have generated an enormous literature, a sizable minority of which is quite thoughtful. Dahl’s allusions are meant chiefly to contribute to his display of pessimism, not to add to these jurisprudential debates.

Our system is undemocratic, thirdly, because campaigns are privately financed. In the crucial passage on this point, Dahl supposes that he and his audience are citizens of a New England town with the traditional town meeting. About 400–500 people show up for one such meeting, he imagines, and the moderator proclaims some rules “in order to ensure free speech under rules fair to everyone here.” One of the rules is that no one will be allowed to speak for more than two minutes. “Perfectly fair so far,” Dahl suggests, but the moderator then announces that, after everyone who wants to speak for two minutes on a specific motion has done so, further discussion will proceed on the basis of an auction for time, each minute going to the highest bidder. Dahl imagines that the ensuing uproar would drive the moderator and the board of selectmen out of town. Yet, he asks, isn’t that what the U.S. Supreme Court decided in *Buckley v. Valeo*?

Rather than answering that question, I think it best to say that the thought experiment is poorly conceived. It reminds me of the Ibsen play. Note that the fictional Norwegian

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Book Review *(continued)*

town didn't have such meetings as a regular practice in a public place. The doctor had the resources (through a friend, but those are the sort of friends successful professionals often have) to hire a hall and give himself at least a chance to speak. It didn't help, but what's worthy of note is that the doctor's hiring of a hall wasn't (in Ibsen's mind) part of the problem – it was part of a (failed) solution. The problem was one of mass psychology, and in this case, a majoritarian denial of an unpleasant reality.

Still, Dahl might tell us, a privately sponsored town meeting wasn't what he had in mind. We may respond, though, that the New England town meetings that he did have in mind – that he idealizes – tend to occur in communities where few of their laureates would really want to live. When such towns and their direct democracies are workable at all, it's only because informal social sanctions set strict limits on the actions of the selectmen or of the majorities at the meetings. Furthermore, the few remaining examples of such towns have stagnated for generations precisely because their ambitious young people depart, to their hometowns' loss.

To say this is, in essence, to say that I disagree utterly with the value judgment in favor of democracy that underlies this book. I also believe, as a longtime admirer of much of Dahl's work, that Dahl himself once disagreed with that judgment.

The Tannery and the Baths

But returning to the world of Ibsen's play, we'll step outside the plot and consider the setting. In our own anachronistic 21st-Century way, we might look at the underlying problem as one of riparian rights. Apparently a tannery is emptying its by-products into a stream that issues into the ocean near the baths. Who owns the surface water as it passes by the tannery? If property rights are clearly assigned, then conditions exist for productive bargaining. I know nothing of Norway's laws, but in Anglo-American common law, the owner of the land through which a stream passes had or has the right to "reasonable use," such use not to interfere with reasonable uses downstream. Under this rule, the owner of the baths likely has a cause of action against the interfering upstream tannery.

Either through court action or negotiations toward a settlement, he could have the tannery bear the financial burden of a purification plant or a diversion of the stream. If the tannery couldn't bear that burden, it would have to close, and the problem would be solved in either case. If the tannery were forced to close, that fact would demonstrate that the value of its production had been less than the attendant costs.

But suppose that the owner of the baths has no such cause of action? Suppose property rights are clearly the other way, in favor of the tannery; but also suppose the baths are likely to be the great boon to the town that the play portrays. From the reasonably anticipated profits of the venture, it should be possible for investing parties to fund either purification or diversion. So long as property rights are clear, in one direction or the other, a bargaining solution is possible. The tannery and baths can coexist. The political problem is to prevent government or mob interference with the higgling and haggling necessary to bring about such a bargaining solution.

What, then, is my view of the particular undemocratic practices that are the targets of Dahl's critique? The question of whether a chief executive ought to be appointed by and answerable to the legislature does not concern me overmuch, precisely because I do not believe it biases the outcome of politics in one direction or another, toward or away from the outcomes I value. I do, though, accept Dahl's judgment that an independent executive is woven into American culture so completely that any substantial change in that feature of our system is very unlikely.

Judicial review does concern me, however. I believe it indispensable to the sustenance of a free and prosperous society, and for reasons beyond those Dahl concedes. One such reason is that litigation is part of the process by which clear definitions of property rights emerge and adapt to changing conditions over time. The common-law process is vastly preferable to legislative codification. Sometimes, the guardians of that process – judges – have to strike out at the meddling of elected codifiers.

Finally, the private financing of elections is crucial to protecting the rights of unpopular but relatively affluent minorities – the “kulaks” of every society – who might otherwise become easy prey for demagogues who could use public-financed opportunities to stir up envy at their expense. Although financing the hall didn’t work for good Dr. Stockmann, it is a poor response to his plight to tell us no such attempt will be permitted in the future.

I said above that I disagreed with the value judgment in favor of democracy that underlies this book. One might naturally ask: What would I put in its place? In answer to that, I would find it difficult to improve upon the words of the philosopher Alfred North Whitehead:

Now the intercourse between individuals and between social groups takes one of two forms, force or persuasion. Commerce is the great example of intercourse by way of persuasion. War, slavery, and governmental compulsion exemplify the reign of force.

My own value judgment is that persuasion – in a sense that emphatically includes the higgly-haggle of commerce – is superior to force everywhere and always, even (or especially) when that force has large numbers on its side. When the human race is ready, it will abandon force as a form of organization altogether. Until that happy day, we can at least work to free our minds, to rid ourselves of the myths that legitimate force – myths such as the populist conception of democracy to which Robert Dahl, alas, now seems to subscribe.

Christopher C. Faille is the co-author of Basic Economic Principles: A Guide for Students (2000) and the author of two other books. He also provides daily content for the news page of HedgeWorld.com, a comprehensive alternative investment Web site.

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FROM THE COUNTY LAW LIBRARY

by Gayle Webb

Beginning Thursday, July 1, 2004, the hours of operation have changed at both the Victor Miceli Riverside County Law Library and the Desert Branch in Indio's Larson Justice Center. The new hours are:

Riverside:

Monday-Thursday, 8am-**7pm**

Friday, 8am-5pm

Saturday, 9am-**1pm**

Indio:

Monday-Friday, 8am-5pm

Saturday, 9am-**1pm after Sept. 6***

(*Indio will be **closed** entirely on

Saturdays **during July and August**)

We want to thank all of you who took the time to fill out our surveys regarding what combination of hours you wanted – the majority voted for the hours as listed above.

Please remember that our website www.lawlibrary.co.riverside.ca.us has two opportunities for asking online reference questions. The ASK US form will send your question to our reference desk, where we can assist you during regular service hours. The ASK NOW website, which you can link to, is a 24/7 reference service in which public, university, special and law librarians across the state participate. Our website also links you to many of the best legal sites for cases, codes, forms and law-related material that is free on the internet. Again, thank you for your interest and supportive comments.

Gayle Webb is the Riverside County Law Library Director.



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

Charles A. Bradley (A) –
Sabbah & MacKoul, Riverside

Jennifer C. Brown –
Best Best & Krieger, Riverside

William H. Buster –
Sole Practitioner, Riverside

Janice S. Cleveland –
Eric Bladh & Associates,
San Bernardino

D. W. Duke –
D. W. Duke APC, Canyon Lake

Eileen K. Fry-Bowers –
Law Student, Riverside

Thomas L. Halliwell –
Chapman Glucksman & Dean,
Riverside

Stephen J. Hansen –
Sole Practitioner, Norco

Dennis K. Hasty –
Redwine & Sherrill, Riverside

Jennifer Chia-Wen Hsu –
Elliot Snyder & Reid, Redlands

Mark A. Mellor –
The Mellor Law Firm, Riverside

Tracy C. Miller –
Law Offices of Tracy C. Miller,
Riverside

Jose Ramirez –
Retired, Santa Ana

Joel C. Renk –
Sole Practitioner, Riverside

Gregory S. Richardson –
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Wilfred J. Schneider, Jr. –
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