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John W. Reed, *Editor*

THE OFFICE OF INDEPENDENT COUNSEL: PAST HISTORY AND FUTURE CHANGES†

Robert B. Fiske, Jr.*

History and Operation of the Statute

As you probably know, the statute authorizing the appointment of independent counsel had its origin in the infamous Saturday night massacre back in 1973 after Archibald Cox subpoenaed the tapes as to which President Nixon claimed executive privilege. At that time, there was no independent counsel, but Attorney General Elliot Richardson, recognizing his own inherent conflict in investigating the President of the United States, had appointed Archibald Cox and had given Cox all the authority that Richardson had to conduct the investigation of the President. When Cox subpoenaed the tapes that Nixon didn't want to produce, Nixon instructed Richardson to fire Cox. Richardson refused and resigned. Nixon turned to the Deputy Attorney General, William Donald Ruckelshaus, and gave him the same instructions. Ruckelshaus refused and resigned. The next in line was Solicitor General Robert Bork. Richardson and Ruckelshaus talked to Bork and urged him to carry out the inevitable order and fire Cox; they felt they had made the point, and they considered it important that there be a person of stature in the position of Attorney General. Bork did fire Cox.

The result, of course, was a huge outcry from the public and Congress. After a lot of debate and discussion, Congress passed the Ethics in Government Act.[1] The basic reason for the statute was to give the American people confidence that an investigation of high-ranking government officials could be carried on completely impartially, completely independently, without any interference or control from the executive branch people who were under investigation.

Most of us are familiar with the basic elements of the statute's operation. The Chief Justice of the United States appoints three judges, one of whom has to be a member of the District of Columbia Circuit Court of Appeals, and they comprise a three-judge court having the exclusive authority to retain and su-

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† Address delivered at the Annual Convention of the International Society of Barristers, Hyatt Regency Grand Cypress, Orlando, Florida, March 12, 1998.

* Davis Polk & Wardwell, New York, New York; formerly Whitewater Independent Counsel.

[1] 28 U.S.C. §§ 49, 591 *et seq.*

pervise independent counsel. When there is an allegation of criminal conduct by a so-called "covered person"—which includes not only the President and the Vice President but virtually the entire Cabinet, the head of the CIA, the head of the IRS, and a number of people on the White House staff—the allegation goes to the Attorney General, who has a period of time—thirty to sixty to ninety days—to conduct an investigation. This is a very limited investigation because she can't use the grand jury, she can't give immunity, she can't plea bargain. At the end of the specified period of time, unless she is in a position to say there are no reasonable grounds to proceed with an investigation, she is *required* to apply to the three-judge court for the appointment of an independent counsel. Interestingly, the decision by her to apply to the court (or not to apply) is completely unreviewable. That is something that is completely in the Attorney General's discretion.

Once the application is made to the three-judge court, the court appoints an independent counsel who is then given a jurisdictional charter to investigate the covered person. Within the scope of the charter, the independent counsel has all the powers of the Attorney General, and he or she can be removed by the Attorney General only for "probable cause." If removal does occur, the independent counsel has the right to have the decision reviewed by the district court in the District of Columbia.

The basic rationale for the statute is pretty clear, I think. If there is an investigation by the Justice Department of someone in the executive branch who would be a "covered person" under the statute and there is an indictment, the system works fine without an independent counsel. There is an indictment, then a trial, the jury votes up or down, and the public can feel confident about the process. But what if the investigation is conducted by the Justice Department and the decision is not to prosecute? The concern that the statute was designed to address was that the public would not have confidence in a decision not to prosecute if the decision were made by somebody who has been working for the President of the United States.

ARGUMENTS AGAINST AND CONCERNS ABOUT THE STATUTE

From the beginning, there has been considerable opposition to the statute, which is effective for five years and then expires and has to be renewed by Congress. When it came up for renewal in the mid-1980s, Alexia Morrison was conducting an investigation of Assistant Attorney General Theodore Olson, and Olson had challenged the constitutionality of the statute. (Congress passed the renewal and President Reagan signed it but with a statement that he believed the statute to be unconstitutional and that he was signing it only because he believed the courts would declare it unconstitutional.) The principal

argument against its constitutionality was that it violates the fundamental principle of separation of powers by involving the judiciary in criminal investigation, which is vested exclusively in the executive branch. The D.C. Circuit Court of Appeals held the statute unconstitutional, but the Supreme Court held it constitutional,[2] over a very strong dissent by Justice Scalia[3] and despite the positions of Solicitor General Charles Fried and three highly respected former Attorneys General, Edward Levi, Griffin Bell, and William French Smith, who filed amicus briefs against the statute's constitutionality. The majority's basic rationale was that the limited role of the three-judge court was not enough to violate the separation of powers.

There are also compelling policy arguments that have been advanced against the statute. One of the most common and most forceful has to do with the nature of the independent counsel and how different that role is from the typical prosecutor's. The typical prosecutor has a number of cases, sometimes hundreds of cases during a year or during a career, and he has limited resources, which he has to allocate according to the priorities of his office. In the end he is judged not on the result of any one case but on his overall record. The independent counsel has just one case, against one person, and therefore does not have the balance and the perspective that come from having multiple cases. Also, there is inevitable pressure to judge an independent counsel not simply on whether he or she has done a complete, independent investigation but also on whether he or she has obtained indictments; and I think this pressure has gotten worse. Early on in a number of cases, the independent counsel determined that there was no basis to indict anyone. Today, there is tremendous pressure on the independent counsel to go forward and "accomplish something" by bringing an indictment.

In his dissent in the *Olson* case, Justice Scalia quoted from a speech that then Attorney General, later Justice, Jackson gave at a United States Attorneys conference in 1940:

> Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in

[2] Morrison v. Olson, 487 U.S. 654 (1988).
[3] *Id.* at 697.

> which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.[4]

Near the end of Justice Scalia's opinion, we find the following language which has been quoted repeatedly in recent weeks:

> The mini-Executive that is the independent counsel, however, operating in an area where so little is law and so much is discretion, is intentionally cut off from the unifying influence of the Justice Department, and from the perspective that multiple responsibilities provide. What would normally be regarded as a technical violation (there are no rules defining such things), may in his or her small world assume the proportions of an indictable offense. What would normally be regarded as an investigation that has reached the level of pursuing such picayune matters that it should be concluded, may to him or her be an investigation that ought to go on for another year. How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile—with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities. And to have that counsel and staff decide, with no basis for comparison, whether what you have done is bad enough, willful enough, and provable enough, to warrant an indictment. How admirable the constitutional system that provides the means to avoid such a distortion. And how unfortunate the judicial decision that has permitted it.[5]

In the amicus brief filed by former Attorneys General Levi, Bell, and Smith, the further point pressed is that the actions of the independent counsel are essentially unreviewable. He or she is a missile that, once launched, is basically unrecallable. There is the provision that the Attorney General can fire the independent counsel for probable cause, but you don't have to think about that for more than thirty seconds to realize how politically unpalatable that would be. So for all practical purposes, once this person is appointed by the court, he is in position for as long as he wants to keep going, and he can pursue whatever indictments he wants. If a U.S. Attorney wants to indict someone, there is a procedure for going to the Justice Department in Washington to have that reviewed. There is no such procedure for the independent counsel.

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[4] *Id*. at 728.
[5] *Id*. at 732.

Another point in the amicus brief of the three former Attorneys General was based on the perspective of law enforcement. Within the Justice Department, there are checks and balances to make sure some U.S. Attorney doesn't go off half-cocked and do something that will bring disrepute to the government and set a bad precedent for law enforcement generally. You can't subpoena a member of the press without getting authority from someone in Washington, you can't get a warrant to search a lawyer's offices without getting approval from someone in Washington, you can't bring a racketeering or money laundering indictment without getting approval from career people in Washington who look at the statute, look at the situation, and make a judgment about whether the case is really the kind the government wants to bring, in terms of overall priorities or possible adverse precedent. The independent counsel has no such restrictions.

To give you a personal example, when I had been on the job in the Whitewater investigation for about a month, there were articles in the paper about meetings between the Treasury Department and the White House with respect to investigations that were then being conducted by the RTC, and those articles related facts that raised the question of whether there was some interference with the investigation or obstruction of justice. We looked at those articles and said we wanted to investigate, and we wanted to do it promptly. That night we issued grand jury subpoenas to top-ranking people in the White House and top-ranking people in the Treasury Department, and we had them before the grand jury three days later. I couldn't help but think about how long this would have taken and how many layers of authority we would have had to go through if this had been within the Justice Department. This illustrates the power that the independent counsel has—you do whatever you want to do when you want to do it, and no one can tell you not to do it.

Having summarized the principal arguments that have been raised against the statute, I will give you my own view of it. There certainly is a compelling need for public confidence in an investigation in the situation where a high-ranking government official is being investigated. If the investigation is conducted by the Justice Department and the end result is no indictment, the public will wonder whether this was really a no-holds-barred, thorough investigation or whether someone was pulling his punches. So, in my view, where there are allegations against the President, Vice President, or Attorney General, you cannot allow the investigation to be conducted by the Justice Department. For public confidence, you have to go outside regular Justice Department personnel to investigate those individuals. In all other situations, however, including most of the ones that have resulted in the appointment of independent counsel over the years, the dangers from the operation of the independent counsel statute outweigh the need to have an independent counsel.

Also, it is an insult in many ways to U.S. Attorneys around the country and to the professionals in the Justice Department to say they are not capable or qualified, that they do not have the professional integrity and independence, to conduct an investigation against a cabinet official or against the head of the CIA. Indeed, most U.S. Attorneys and most career people in the Justice Department would give their eye teeth to have the chance to make a case against and indict a sitting cabinet official, and the idea that someone is going to pull his punches and not do that because he has been appointed by the President is totally mistaken, I think. What needs to be done is to get that message across to the American people: These investigations can be trusted to the career prosecutors, except in the three situations I described before, where the need for public confidence does outweigh leaving it in the hands of the Justice Department.

RECURRING ISSUES

I would like to discuss briefly three issues that I confronted and that are relevant to the debate that's going on today.

1. Scope. The first is this: What is the scope of the investigation? What should the scope of authority of the independent counsel be? In my case, the Attorney General asked me to conduct the Whitewater investigation and told me, basically, to write my own jurisdiction (within reason, obviously). I did, and she signed it. That later became the authority Kenneth Starr is operating under because that's what was presented to the three-judge court when he was appointed.

In sum, the first paragraph gave me the authority to investigate allegations involving the relationship between the President or Mrs. Clinton and Whitewater, Madison Guaranty, or Capital Management Services, which was a small business administration company then run by David Hale, who had alleged that he had been pressured by the President (then Governor Clinton) to make an illegal $300,000 loan. A second paragraph gave me the authority—and this is where the controversy arises—to investigate any allegation that arose out of the investigation into the matters set forth in the first paragraph. The expansion of the original jurisdiction of the independent counsel flows from that provision.

When I was working on Whitewater, we faced numerous situations in which people came in, basically off the street, with allegations about corruption in Arkansas. With respect to most of them, it was our judgment that they were far enough removed from our basic mandate that we shouldn't divert resources into them; we gave those back to the regular law enforcement personnel. There were, however, three matters we did pursue.

One of those involved the allegations about Webster Hubbell defrauding his law firm. We were already looking into issues relating to the Rose Law Firm,

and it seemed sensible for us to look at the Hubbell allegations instead of compelling the appointment of another independent counsel.

Secondly, when David Hale pleaded guilty to the charges we brought against him and began to cooperate with our investigation, he made allegations that led to the indictment of Governor Tucker and the two McDougals for activities that were clearly Whitewater-Madison related. He also made allegations against Governor Tucker relating to a bankruptcy tax fraud, and, although it had absolutely nothing to do with Whitewater, Madison Guaranty, or Capital Management Services, we felt that David Hale was "our witness," and we were already investigating Tucker, so we didn't feel we should turn this allegation over to the Justice Department. Later on, when Ken Starr took over and an indictment was handed down, Tucker challenged it in court, and the Arkansas judge threw it out as beyond Starr's jurisdiction. The Eighth Circuit, however, said the matter was within his jurisdiction and reinstated the indictment. Tucker then pleaded guilty.

The third situation outside our literal mandate into which we thought it appropriate to inquire involved campaign finance activity.

In the last analysis, the issue of how far the independent counsel should range from his or her original mandate comes down to the judgment of the independent counsel. That, of course, highlights the critical importance of the criteria that the three-judge court applies in selecting the person in the first place.

2. The Relationship Between Congress and the Independent Counsel. The second recurring issue is the relationship between Congress and the independent counsel. In my case, difficulties arose when Congress planned, in March 1994, to start hearings into everything I was investigating in Arkansas. I wrote letters and met with the leaders of the Senate and House banking committees to ask them not to hold those hearings. I acknowledged, of course, that I could not stop them, but I expressed two concerns. First of all, the lesson of the North and Poindexter cases was that if they gave immunity to anybody, that person would become, for all practical purposes, unprosecutable. To their credit, they met that concern by assuring me that they would not give anyone immunity unless I approved it. My second concern was more subtle but also extremely important. We were going back fifteen years in Arkansas, and we needed to build the case up from the bottom, starting with documents and then talking to lower-level witnesses, who would implicate the higher-level witnesses. We didn't want to talk to James McDougal or David Hale or Susan McDougal or Governor Tucker until we were confident that we had developed all the evidence we could, so that we could feel confident that the story we got from them was as truthful and accurate as possible. If those people testified before Congress in March 1994, they would say they didn't do anything wrong and nobody else did anything wrong. Then, if we could

show at a later time that wrongs were done, Congress would have undermined the value of those people as witnesses by having them give denials under oath. This second concern was harder to address.

Obviously, politics enters into this. The Democrats controlled Congress at the time, and they were extremely sympathetic to my position. The Republicans, on the other hand, wanted to go forward. We finally reached an uneasy compromise under which they would hold hearings on matters I had carried to such a stage that they would not be compromised by congressional hearings—such as Foster's suicide and the handling of the papers in his office—but not on anything relating to Arkansas. In other words, it got to the point where the leaders of the committees went forward with hearings but only on what I told them was okay. This caused great consternation, especially for Bob Dole and other Republicans. I hasten to note, however, that when the Republicans got control of Congress, they recognized the same principles and have been very accommodating to Ken Starr in not conducting investigations in certain areas until he thought it was appropriate.

The bottom line here is that this is Congress's responsibility. If congressional leaders think the public's right to know is more important than getting criminal indictments, it is their prerogative to go ahead with hearings. They have to recognize, however, that this may complicate any criminal investigations, and they should take the heat if prosecutions are derailed.

3. The Reporting Requirement. The third issue, or set of issues, stems from the reporting requirement in the Ethics in Government Act: At the end of an investigation, the independent counsel must write a report describing all of his activities. The statute originally required that if there was no indictment of the person investigated, the independent counsel had to give the reasons. For example, when Jim McKay investigated Edwin Meese, his report concluded that there was evidence that Meese had committed crimes, and McKay thought he could obtain a conviction, but he was not going to bring charges because he thought the crimes were technical and didn't warrant prosecution. Of course, all hell broke loose. No U.S. Attorney would make a public announcement of charges not pursued; investigations and decisions not to indict generally are and should be secret. Yet, in the case of the independent counsel, the statute required public disclosure. This problem has been mitigated because the statute has been amended to make disclosure of reasons discretionary; but independent counsel still must write a report describing the investigation.

That reporting requirement, I believe, contributes to another aspect of independent counsel investigations that has engendered a lot of criticism—their duration and cost. There is a compelling concern about the President or any other top official being under a "cloud" while an investigation is going on, and it always seems to go on much longer than a normal investigation in a

normal prosecutor's office would. There are a lot of reasons for that, but one is the reporting requirement. The independent counsel knows he has to write a report describing everything he did so that the public can feel confident that the investigation was thorough, aggressive, and independent. If the independent counsel is heading in the direction of not bringing an indictment—and he knows he is right in the middle of a political hotbed such that his decision is not going to be well received by certain elements—it is human nature to run down every last lead, and spend a lot of money in the process, to ensure that he can write a report that is as bulletproof as possible against the inevitable criticism. It is my belief that the length and expense of investigation are significantly related to this reporting requirement.

QUESTION AND ANSWER

Q: How did you get replaced?

A: Let me begin with how I got appointed. Because of the Republican reaction to Iran Contra, the independent counsel statute had lapsed in 1993. Late in that year, when the allegations first surfaced in Arkansas, the Republicans began calling on Janet Reno to appoint an independent counsel under her own authority, as Richardson had done with Cox. Reno was reluctant to do that because she was sure that no matter whom she chose, and even if Congress approved the person, somebody would later say, "How can this person possibly be 'independent' if they've been picked by the Attorney General, who is appointed by the President?" She thought Congress should re-enact the independent counsel statute, so that she could go to the three-judge court and let them appoint an independent counsel, if that was appropriate. The pressure built up, however, and in January of 1994 prominent Democrats began to call for the appointment of someone. Finally, on January 20, the President himself publicly said that he was asking the Attorney General to appoint someone under her own authority. That's when I was appointed. I was given essentially the same powers as an independent counsel under the statute; I was subject to removal only for probable cause; I had all the authority of the Justice Department. The only difference was that I was picked by the Attorney General instead of by the three-judge court.

Then, throughout the spring of 1994, there was debate about renewing the independent counsel statute, and finally it was renewed at the end of June. At that point, the Attorney General applied to the three-judge court for the appointment of an independent counsel, describing the jurisdiction in the same terms under which I'd been operating. She strongly recommended that the court appoint me, because I had been doing the job for six months, had a staff in place, and seemed to be off to a good start (or something like that). Time

went by—about five weeks—but in August of 1994, the three-judge court appointed Ken Starr. The rationale was the point that the Attorney General had made several months before: The court said it did not have any quarrel with my performance or my independence, but the court thought there could be an *appearance* of a lack of independence because I was appointed by the Attorney General, who works for the President; therefore it was preferable that there be a new person selected by the court. That's how I left and Ken Starr took over.

THE OKLAHOMA CITY BOMBING CASES

Editor's note: *At the Barristers Society's most recent convention, participants in the Oklahoma City Bombing Cases spoke of their experiences: Larry Mackey, one of the prosecutors; defense counsel Stephen Jones; and Alan Treibitz and Ray Hauscel, who provided technical assistance to the prosecution. Each presentation included audio-visual materials that had been introduced at the McVeigh and Nichols trials, which cannot, of course, be reproduced here.*

I. HUGE CASES WITHOUT THE MEGA-TRIAL†

Larry A. Mackey*

All of us can rewind in our minds the procedural history of the Oklahoma City bombing case and know that the crime occurred in Oklahoma City but the trial took place in Denver. The distinguished federal judiciary and the people of Colorado welcomed all of us—prosecutors, defense teams, and, most importantly, the victims. People in Denver said, "If we can help in any way, please call." It was not uncommon for victims to travel from Oklahoma City and stay in the homes of Denver residents. It was not uncommon for people who lived and worked in Denver to come downtown as early as three o'clock in the morning to stand in line to get one of the precious seats in the courtroom for a victim's family. Just a couple of months ago, we had a ceremony to honor the volunteers in the city of Denver, and more than 500 people attended. We were so grateful.

I can tell you that all of the lawyers on the case understood what was at stake; we all understood how important it was for the system of justice to perform and to perform well. Remember the timing: The results of the O. J. Simpson case had come in just a few months after the bombing. We prosecutors were acutely aware that the bombing victims were looking to us to assure them that the system would work. They weren't so sure at the beginning; I think they were by the time the trial ended.

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† Address delivered at the Annual Convention of the International Society of Barristers, Hyatt Regency Grand Cypress, Orlando, Florida, March 12, 1998.

* Barnes & Thornburg, Indianapolis, Indiana; formerly Chief, Criminal Division, Office of the United States Attorney, Southern District of Indiana; Oklahoma City Bombing Prosecutor.

There are many reasons why, in my judgment, the Oklahoma City bombing case went well and represented our system of justice well. A lot of the credit, of course, goes to Judge Matsch, who navigated a difficult case with lots of novel issues and uncharted waters and brought us safely to shore. But I do think one of the main reasons it went well was that we did not let a huge, high profile case become a mega-trial. Everything about the Oklahoma City bombing case was big. It started with an immense terrorist truck bomb, unprecedented death and destruction, a nationwide manhunt, intense public interest, and literally tons of evidence, which led to armies of lawyers, scores of experts, proceedings that took place in twelve different federal judicial districts, three different state trial courts, two state appellate courts, and three federal appellate courts. The Tenth Circuit Court of Appeals has already disposed of eight separate appeals. It was an enormous case, but it didn't have to turn into, and didn't turn into, a mega-trial.

THE ENORMITY OF THE CRIME

In my limited time this morning, I want to begin by conveying the magnitude of the crime itself. All of us can draw to mind the televised images of the gaping hole in the Alfred P. Murrah Federal Building and translate for ourselves what a crime that must have been. Statistics provide one way to describe it, and I will share just of few of those with you. The building itself is gone; it would cost $35 million to replace that building today. Financial and property losses amounted to some $600 million. Hundreds of individuals were injured, twenty-eight of them so badly that they would have died but for the rescue efforts of the people who responded. There were, of course, 168 people who did die. One hundred sixty-three were inside the Murrah building at the time of the explosion; three were in buildings across the street; one young woman died as she got out of her car to report for her first day of work; and another young woman, a nurse, died as a result of injuries suffered when she was helping in the rescue efforts at the scene. Of the 163 dead who were in the Murrah building when the bomb exploded, thirty were visitors seeking government services at the facility, and nineteen were children, all of them five years of age or younger. Baylee Almon, the young child who was captured in the photograph as the fireman carried her from the building, was one of those. She had celebrated her first birthday the day before. Fifteen of the children who died were there because they were enrolled in the day care center in the Murrah building; and all of the adult workers in the day care center died. The other four children who died were with family members who were visiting the Social Security office; one was a four-month-old baby whose mother was there to file for his Social Security number.

Statistics, as we all know, don't tell the whole story. We learn that through the accounts of witnesses; and, as could be expected when a large truck bomb explodes in front of an occupied federal building early in a work day in the middle of a work week, there were hundreds of witnesses. It fell to the FBI and the prosecutors to hear those stories and to piece together exactly what happened.

I want to share with you just one story that illustrates the enormity of this crime. For many years, Florence Rogers had been the chief operating officer at the Federal Employees Credit Union, which took up a large portion of the third floor of the Murrah building. It was her practice to call regular staff meetings. On Wednesday, April 19, 1995, her managers assembled in her office at 9:00 in the morning; one by one, they gathered opposite her desk. Unbeknownst to all of them, Tim McVeigh had parked a truck bomb outside the building, set the detonator, and run away. After the explosion, Mrs. Rogers climbed out of the debris that had fallen on top of her, lifted herself up just enough to peer over the desk where she had been sitting—and all she could see was sky. Everybody and everything that had once been just beyond her desk was gone; her managers had fallen three floors, and the six floors above them had fallen on top.

After the bombing, a common question in the Oklahoma City area was, "What did you think when you heard the blast?" The answer usually was, "I thought a gas main had exploded," or "I thought the building's heating system had blown up." The reality after the bombing, of course, is that federal buildings are no longer looked at quite the same way, Ryder trucks cause fear, at least for people in Oklahoma City, and people think about Oklahoma City when they hear about explosions.

THE INVESTIGATION AND TRIAL

The FBI's investigation moved very quickly. Within hours after the explosion, the axle that had belonged to the truck had been located, the vehicle identification number had been run and been traced back to a rental shop in Junction City, Kansas. By the next day, April 20, the FBI had gotten Tim McVeigh's name from the motel where he had stayed in Junction City. Within sixty hours after the bombing, both Tim McVeigh and Terry Nichols were in federal custody. The investigation grew. Almost 30,000 witness interviews were conducted, hundreds of lab findings were made, every record of Ryder for a two-year period was reviewed, millions of motel records and phone records were gathered and studied—all for the purpose of piecing together the origin and the life of the bombing conspiracy.

From the lawyer's standpoint, the sheer volume of information presented a special problem—determining how much of it should become courtroom ev-

idence. The principle the prosecution attempted to apply in both Oklahoma City bombing cases was a simple one: less is more. We had a lot of witnesses and evidence available, but the guiding principle was to find the story and communicate it in simple yet convincing terms. We resisted the pressure—and there was some—to tell every bit of the story in the courtroom. We understood, too, that this is a visual age and that jurors remember much of what they see and less of what they hear, so we tried to find those items of evidence that would communicate visually the important pieces of the case.

In the McVeigh case, the United States put on 140 witnesses in 20 court days during the guilt phase, and 30 witnesses in 3 court days during the penalty phase. In the Nichols trial, we put on 102 witnesses in about 20 court days and again used about 3 days during the penalty hearing. In total, almost 500 witnesses were called by both parties during the two trials, and in neither trial did the testimony take longer than six weeks.

Much of the efficiency was due to the computer evidence display system developed by Z-Axis, a company in Denver.[1] This system was immensely helpful in getting information in front of the jury quickly and in a way that could be understood and recalled.

Beyond the technology, much of the credit for the efficiency goes to Judge Matsch. He employed what I would describe as the simple rule of protect and respect the jury. For example, he expected long trials, but he made a decision early on that the juries would not be sequestered. Judge Matsch anticipated the special demands and pressures that are placed on jurors in high profile cases and recognized the advantages of letting them go home at night and maintain normal family routines. As a result, unlike the experience in the O. J. Simpson trial, no juror in either panel had to be dismissed.

Another aspect of Judge Matsch's rule was that once the jury was seated, we were at work. There were very few side bars, and when evidentiary issues arose, they were addressed early in the morning, over the lunch hour, at night, or on weekends, not on jury time. Judge Matsch also worked hard to protect the privacy of the jurors; we selected an anonymous jury in both cases, and the judge took special precautions to get them to and from the courthouse each day in a way that protected their privacy.

The other thing Judge Matsch did was monitor and shape the evidence itself, and in that way ensure that the trials did not become anything more than what they were supposed to be—a test of the government's evidence as to the guilt of the charged defendants. The Oklahoma City bombing was intended

[1] A description of Z-Axis contributions to the cases appears in Treibitz and Hauscel, *Demonstrative Evidence in the Oklahoma City Bombing Trial*, *infra*, p. 339.

to be more than a bombing; rather than an isolated act of violence, it was to be "the second shot heard around the world." It was intended to incite a revolution and instill terror in the American people. Outside the courtroom, issues about Waco, the Constitution, and our federal government were discussed; but inside the courtroom, thanks to Judge Matsch, issues were confined to whether guilt had been proved, motive established, culpability shown. And they were.

NOT GIVING UP

We talked earlier about the effects of the O. J. Simpson case on the confidence of the American public in our judicial system. I believe the Oklahoma City bombing cases have helped and will help restore that confidence. We must not give up.

This brings to mind yet another story from the bombing. A woman named Royia Sims worked at a building separated from the Murrah building by a parking lot. Her building had undergone a recent renovation, and large plate glass windows had been installed. Royia Sims sat at her desk within inches of a window at 9:02 a.m. on April 19, 1995. When the bomb exploded, the blast wave came across the parking lot and shattered every single plate glass window, shooting pieces of glass into the bodies of anyone nearby. Royia Sims had been a beautiful woman; but when they took her out of the building that day, her skin was, quite simply, ripped to shreds. At the triage center, where the paramedics made their difficult assessments of whom to attend to and who was beyond help, paramedic Melissa Webster studied Royia Sims and found no signs of life. Another paramedic came up, made the same assessment, and advised that they should move on to others they could help. Melissa Webster decided to stay. She loaded Royia Sims into the first available ambulance and sent her racing to the hospital; and despite all evidence at the scene, Royia Sims lived. Melissa Webster did not give up on Royia Sims, and we, as trial lawyers and members of the legal profession, must never give up on our system of justice.

II. REFLECTIONS ON THE OKLAHOMA CITY BOMBING, FROM THE DEFENSE PERSPECTIVE†

Stephen Jones*

When I was invited to speak to you, I was hesitant at first. I cannot speak about successful techniques that we used in defending Timothy McVeigh, because, of course, we lost. The jury found my client guilty and gave him the death penalty. So it would be presumptuous of me to tell you about brilliant strategies we devised for Mr. McVeigh's trial. Also, we hope there will never be a need for another trial of that type in the United States, so strategies we developed should be irrelevant. But as I thought about my experiences, I realized that some parts of them might be of interest and benefit to you.

Appointment to the Defense

On the evening of May 5, 1995, I was at home when the telephone rang at about 9:30. I went into the library, picked up the phone, and heard a voice say my name. After I said, "This is Stephen Jones," the voice said, "Mr. Jones, this is the Department of Justice, Washington, D.C. Please hold the line for Chief Judge Russell from Oklahoma City." In a moment I heard the familiar voice of Chief Judge Russell, and the voice from Washington said, "Judge Russell, Mr. Jones is on the telephone. This is a secure line." Judge Russell greeted me and then came right to the point. He said "Steve, I want to know whether you'll accept an appointment to represent an individual who has been or will be charged in the Oklahoma City bombing." I thought for a moment and said, "Judge, I don't have any professional problem with it; I understand what you're trying to do, and I've certainly been involved in controversial cases in the past. But I've never been involved in one in which I thought my wife, children, home, or office associates might be at some risk. Can I think about it for twenty-four hours? Would it be all right if I called you at home tomorrow evening?" He said it would be.

When we finished our conversation, I turned around, looked out at the garden behind the library, and lost myself in thought. I remembered the time when I was about seven, standing outside our apartment in Houston, and I could hear the explosion when a cargo ship loaded with ammonium nitrate

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* Jones, Wyatt & Roberts, Enid, Oklahoma.

blew up in the harbor at Texas City, sixty miles away. It killed more than 500 people, including every member of the Texas City fire department. I remembered another day, when I was nineteen, and the elementary school I had attended in Houston was struck by a bomb brought onto the school grounds by a man from another state. This occurred the week before I went to law school, and I was finishing up my summer job at a funeral home. I was one of the first ambulance drivers on the scene, and the first thing I saw was a little boy staggering around from the back of a building, with his right arm blown off.

As I was lost in these thoughts, my wife returned home, and I asked her to come into the library. I told her, "The call you were afraid would come has come." She said, "Oh! What are you going to do?" I told her that she and I would talk it over and then call the children to talk about it as a family. We did that, and the next day I also called friends, people whose judgment, maturity, and experience I respected. Then I called Judge Russell. I repeated back to him the very words he had addressed to me: "Your Honor, in response to your question of whether I would accept an appointment to represent an individual who has been or will be charged in the Oklahoma City bombing, the answer is yes." Judge Russell said, "Great. I appoint you to represent Timothy James McVeigh. Please be in my office at 1:30 Monday afternoon."

On Monday afternoon, after showing every credential I had and being cleared through the gates by the National Guard, the police, and the sheriff's office, I went into the federal courthouse and up to Judge Russell's chambers on the third floor, where a little ceremony was held and I was appointed to represent Mr. McVeigh. After the ceremony, Chief Judge Russell asked everyone but me to leave. When we were alone, he got up from behind his desk, walked over to where I stood, shook my hand, looked me in the eye, and said, "I hope I haven't signed your death warrant." I responded, "Well, Judge, that makes two of us."

THE BOMBING

Before I tell you more about the process of defending Mr. McVeigh, I have to take you back, unfortunately, to that terrible morning of April 19, 1995, in Oklahoma City. It was a morning not unlike others in Oklahoma at that time of year, which start off with the promise of spring but by late afternoon are often punctuated by rains and an occasional tornado warning. On the morning of April 19, the mayor of Oklahoma City held his annual prayer breakfast at the Myriad Convention Center. About 2,500 people attended. One of those was Marine Captain Michael Norfleet, who lived in Stillwater but worked in Oklahoma City as a recruiter for the Marines. He left the prayer breakfast, got into his vehicle, drove to the recruiting office in the Alfred P. Murrah Federal Build-

ing, and parked right in front of the building. When he got out of his vehicle, he walked in front of a large, yellow Ryder truck that was sitting directly outside the main door and then he took the elevator up to the Marine office.

As Captain Norfleet was arriving at the Murrah Building, across the street at the Water Resources Board a routine administrative law proceeding was beginning. The board did not have enough money to employ a court reporter, so they used a tape recorder. At 9:02 a.m., the tape recorded the roar of a horrific blast.

The force of the explosion shook the city and could be heard and felt fifty miles away. In one terrifying moment, it destroyed the Murrah Building, collapsing the north front into a pile of rubble. Windows were shattered in a ten-square block radius. The force and heat of the blast caused more than sixty automobiles to catch fire. The impact area was a scene of terror and chaos: Dazed, shaken survivors came running out of buildings; hundreds of people were bleeding from lacerations caused by flying glass; the wounded and non-wounded, some with their clothes in shreds, were wandering about in shock.

Even before the first fire alarm had sounded, six trucks from station number 1, just five blocks down the street, had reported, and immediately a four-, then five-, then six-alarm fire was called in. At 9:20 a.m., the mayor of Oklahoma City was notified by the city manager that a "Stage 1 Disaster" had occurred downtown. By 9:45 a.m., the mayor had called the governor's office, was put directly through to Governor Keating, and said that the City needed additional assistance from the state. At 9:45 a.m., the governor ordered a state of emergency for downtown Oklahoma City, activated the Oklahoma National Guard, called the Department of Public Safety to release available troopers to the downtown area, and ordered the Department of Civil Defense to go on twenty-four-hour operations. In less than an hour, 210 patients had been transported away from the explosion site; physicians' parking lots at the city's hospitals were filling up; St. Anthony's Hospital, the largest in the city, went to Code Black, releasing any patient already in the hospital who could walk out; and the Roman Catholic Archdiocese for Oklahoma City was notified that its sister hospital, Mercy, had to stand by to take care of the overflow.

At 10:28 a.m., the Command Center received a report that two more bomb devices had been found. The fire marshall exclaimed, "My God, they're going to kill us all," and ordered the signal for a fire general alarm. In the 104-year history of Oklahoma City, there had never been a fire general alarm. Such an alarm sends every truck, every man, every piece of equipment owned by the City downtown; and the surrounding cities such as Mustang, Yukon, El Reno, Edmond, Guthrie, Midwest City, Del City, Shawnee, Moore, and Norman are called upon to send their emergency equipment to a second perimeter in the event the conflagration is so overwhelming that Oklahoma City's fire department support cannot sustain the effort.

At 10:30 a.m., the following teletype message was received at the Department of Justice in Washington, D.C.: "Urgent! Highest Priority to the Attorney General of the United States from USAOWJDOKC [United States Attorney's Office for the Western Judicial District Oklahoma City]. An explosion of undetermined origin has destroyed the Alfred P. Murrah Building in downtown Oklahoma City within the last hour. Emergency rescue and recovery teams are on site; extent of casualties is unknown but feared very high; 500 federal employees worked in this building; there is also a child day care center involved. FBI/SAC/OKC has been asked to begin an immediate, preliminary investigation. We request all appropriate government agencies be notified and that the Federal Emergency Management Administration commence immediate operations in Oklahoma City. A tragedy of unbelievable proportions has occurred this morning in Oklahoma City." The President of the United States was interrupted and informed.

At 2:00 p.m., the provost of the University of Oklahoma's College of Medicine placed a call to Dr. Andrew Sullivan, Chief of the Department of Orthopedic Surgery, to tell him that he was needed downtown and that a state police car had been sent for him. Throwing a few pieces of surgical equipment into a small doctor's bag, he ran out of the building and into the state police car. When he arrived at the scene, he was escorted down into the bowels of the building to an area called "the cave." There he saw a young woman named Daina Bradley. Her right ankle was buried under tens of thousands of pounds of debris which could not be lifted in time to save her life; unless her leg was amputated right then, she would not survive. Dr. Sullivan crawled in on top of Daina Bradley, as members of the fire department placed two-by-fours above them to keep the cave from falling in; without benefit of anesthetic, Dr. Sullivan performed a fifty-three minute operation to amputate Daina Bradley's leg. While he operated, the building was swaying in the wind and debris was falling in on top of the cave. Dr. Sullivan, fearing he would not survive, silently prayed that if he died, his family would not forget him. He did not die, and the operation was a success. Daina Bradley was removed and taken to the ambulance. She survived. Her mother and her two little children, however, had died in the wreckage.

At 6:30 p.m., the Command Center was notified by the National Weather Service that a severe thunderstorm, with lightning, hail, and high winds, would pass over the downtown area at 8:00 p.m. The architects advised the Command Center that the building, in its weakened condition, would not withstand the winds. There was nothing those at the Command Center could do except pray—which is what they did. They stopped work, stood up, held hands, and asked for divine intervention at least to shift the winds away from downtown. At 7:45 p.m., the Weather Service informed the Command Center

that the direction of the winds had changed, and they would pass to the south-southwest of downtown Oklahoma City.

The next morning at 5:30 a.m., the state medical examiner held a press conference. He announced that thirty-two bodies had been recovered, twelve of them children under the age of six. As he turned away, not realizing his microphone was still on, he told his assistant to order an additional 200 body bags. At 10:00 a.m., three large, black, semi-trailer refrigerated trucks arrived and were parked across the street in a church parking lot, to serve as a temporary morgue. A company of the Oklahoma National Guard provided an honor guard, and arc lights were strung up so the dead would not be left in darkness.

On Sunday, 12,000 people, including the President and Mrs. Clinton and the Governor and Mrs. Keating, attended a memorial service. One week after the explosion, at 9:02 a.m., the nation observed a one-minute moment of silence, and all work in the greater Oklahoma City area came to a standstill. The churches' carillons tolled in mournful unison.

The bomb killed at least 168 people; it killed grandfathers, grandmothers, grandchildren, aunts, uncles, nieces, nephews, mothers, daughters, fathers, sons, lovers, friends, co-workers, strangers. Five married couples perished together as did two sets of infant brothers, one mother and son, two women heavy with child. More than two dozen children lost both parents; more than 200 lost one. In addition to the dead, the bomb left more than 500 survivors injured, many of them terribly: burned, deaf, dumb, blind, without an arm, a leg, a nose, an ear, an eye. Finally, it did nearly $1 billion worth of damage. As a result of the bomb, more than twelve buildings in downtown Oklahoma City were razed. The skyline of Oklahoma City has been permanently changed by the events of April 19, 1995.

REPRESENTATION OF TIMOTHY MCVEIGH

This was the case I was asked to defend. I was appointed not pursuant to an act passed by some liberal Democratic Congress nor under some rule imposed by the Warren Court but in accordance with the Crimes and Offenses Act of 1790,[1] the sixth piece of legislation passed by the First Congress in New York City, and signed into law by George Washington. It provided that any person facing a capital charge in federal court would be entitled to the appointed services of a "lawyer learned in the law" in order that the accused might make his "full defense."

[1] Act of April 30, 1790, 1 Stat. 118 (codified, in pertinent part, at 18 U.S.C. § 3005).

When I accepted Mr. McVeigh's brief, I told Judge Russell I could not do it with one arm tied behind my back. I was required to be zealous, to raise everything I could on his behalf, to say and do for him what he could not say and do for himself. My job was to see that nothing was taken from him except by due process of law consistent with our Constitution.

I have been asked, "What was it like? What did we feel? What did we think? What did we experience? How did it affect me and my family? Were we afraid?" The representation of Tim McVeigh affected me, my family, and those who assisted me in profound ways. It meant familiarization with some of the most advanced techniques of our government for criminal investigation and foreign intelligence gathering. It meant a scheduled appointment with the Attorney General of the United States. The morning after I was appointed, it meant a 6:30 a.m. tour of the Murrah building, where the presence and odor of death remained pervasive. It meant recurring dreams of someone parking a Ryder truck outside my home and blowing it up and of my being assassinated in the office hallway. It meant the reality of no less than half a dozen serious security incidents at my home, the knowledge that the FBI investigated threats against my life, and the presence of armed guards on our property. My wife, my children, and I lived in an atmosphere of motion detectors, electronic eyes, unlisted telephone numbers, and emergency response numbers.

I viewed photographs of 168 dead men, women, and children, taken where their bodies were found, recovered, and identified. I held, in my hand, a leg that cannot be matched to any victim. It meant, on occasion, working longer than twenty hours at a stretch, and the opportunity to meet some of the most bizarre, fanatical, and paranoid people on the face of the earth. I traveled to China, Hong Kong, Macao, and the Philippines to interview terrorists who were in custody. I went to terrorist bombing sites the world over. I traveled by jumbo jet, airbus, very small aircraft, automobile, limousine, taxi, on foot, by bicycle, and once by camel. I studied the statements of Ramzi Ahmed Yousef, a terrorist who was convicted of the bombing of the World Trade Center. We read over 30,000 witness statements, studied over 15,000 FBI lab sheets and reports, examined over 100,000 photographs, hundreds of hours of video and audio tapes, and nearly a million phone records and hotel registrations. I also got to have breakfast with Peter Jennings, lunch at the 21 Club with Tom Brokaw, dinner at the Four Seasons with Dan Rather, and tea with Barbara Walters in her elegant apartment, and I met news people from all over the world—from Israel, Colombia, the Republic of China, France, Germany, and London.

I knew, when I accepted Mr. McVeigh's brief, that it would be impossible for me to satisfy everyone. So I set as my mark the satisfaction of my personal and professional conscience. If I spoke to the media too much, they accused me of self-promotion; if I didn't speak to them, they accused me of hiding

something. Some considered me not zealous enough and said it was because I was being paid by the federal government and was a "toady"—part of a conspiracy. Others considered me too zealous and accused me of wasting the taxpayers' money, injuring the victims' sensitivity, and flying in all directions. So, in the final analysis, we had to defend Mr. McVeigh based on those first principles that we all learned in law school and then reinforced by our experiences. It was not just professionally rewarding and challenging; it was enriching and I hope ultimately ennobling.

Even though our client was convicted and given the death penalty, I think he was represented by zealous lawyers, who were successful on a number of issues: We secured the dismissal or recusal of all the federal judges in Oklahoma City; we persuaded the court to give us a change of venue, which is very rare in criminal cases; we obtained a separate trial from Terry Nichols's and kept his statements out of our trial. We also received, pursuant to the court's order, discovery of over one million documents. A substantial portion of the results of a secret test conducted by the British and American governments in New Mexico was suppressed and could not be used by the government's witnesses. We obtained many other favorable rulings, not the least of which was individualized voir dire of potential jurors, in which the lawyers got to participate.

All of this occurred against a backdrop of congressional criticism and interference in the proceedings and three successful efforts to change the law in the middle of the trial. There were, in reality, three trials of Tim McVeigh. First came the public trial through the media, in which the presumption of innocence was replaced by the assumption of guilt. Then there was the official trial proceeding before Judge Matsch. Third, there was the trial that Congress was conducting in Washington, D.C. As we struggled with the media attention and congressional interference, we would occasionally turn on the television or read a newspaper or magazine and find the "Monday morning quarterbacking" by lawyers who had not been in the courtroom, had not read the transcripts, did not know anything about the case, and certainly did not have the responsibility for it.

TWO CONCLUDING OBSERVATIONS

Rather than belabor my experiences, I want to conclude with two observations. The first is that in the Oklahoma City bombing, death or escape from death was determined by decisions or happenstance that seemed largely unimportant at the time. When Captain Norfleet, whom I mentioned at the beginning, got to his office, he sat down at a desk to place a call to Washington, D.C., to find out whether a colleague, Sergeant Benjamin Davis, had been ac-

cepted into officer candidate school. The line was busy so Captain Norfleet hung up the phone, got up from the desk, and walked into another room. This saved his life although it cost him an eye and his career as a Marine. Another officer, Captain Randolph Guzman, sat down at the desk Captain Norfleet had left and was sitting there at 9:02 a.m. when the bomb went off. He was found dead, still sitting at the desk, several days later. Sergeant Davis also died, without learning that he had been accepted into officer candidate school.

An Oklahoma City policeman, one of the first on the scene, ran into the building and, as the smoke was clearing, saw a woman's hand sticking out of the rubble. He ran over and frantically tried to clear away the debris, but there was too much of it, and he could not get to the woman. So he sat down and held the woman's hand, which was warm and alive; and he continued to hold it until it turned cold and lifeless.

Florence Rogers, director at the Federal Employees Credit Union, had a meeting scheduled in the conference room at 9:00 a.m. that day but moved it to her office because there was already a meeting going on in the conference room. She sat behind her desk, as eight women filed in and sat around the other side of the desk. At 9:02 a.m., in the blinking of an eye, those eight women dropped to their deaths. Only Florence Rogers survived; the crater of the bomb ended inches in front of her desk. Where once she had looked at a wall with a picture, she now looked out into blue sky and at a damaged building across the street.

Oklahoma City wasn't chosen because there were two ATF agents there that were also in Waco. It was chosen because the terrorists knew that a bomb in New York, Atlanta, Los Angeles, Chicago, or any of the other great cities of the United States would not have nearly the impact on the country and the world as a bomb in downtown Oklahoma City, in the heartland of the country. This was a strike against people who were innocent, in the larger meaning of the term, with no security guard whatsoever at the door. In that respect, the terrorists were right.

The second observation is one on which I do not expect your agreement, because my views are certainly controversial; even I did not believe them at one time. (By the way, this is not something I learned from any confidential source; it's not anything Tim McVeigh told me or didn't tell me; it comes from a simple study of the facts.) The reason for the bombing was what happened two years before, to the day, 250 miles south on the same interstate—when the ATF and the FBI "raided" the Branch Davidian compound, as the media called it. As I studied what happened there, I learned that the views I had held were wrong. The Branch Davidians were not some marginalized cult led by some crazy man, David Koresh. Among the people who died that morning were a graduate of Harvard Law School and a registered civil engineer in the state of

Texas. The Branch Davidians had lived on that same spot for sixty years as a division of the Seventh Day Adventist Church. They didn't have a bunch of guns there, at least no more so than the average Texas home, and the ones they had were not illegal. The last time someone had wanted to arrest David Koresh for a felony, the sheriff had called him on the phone and told David he needed to come in because the sheriff had a warrant for his arrest. Mr. Koresh had gone in, stood trial, and was acquitted.

On the day the ATF planned to conduct the largest raid in its history, they tipped off the media, thus compromising the safety and security of the men and women who were going to participate in the raid; but the director of the ATF—the Secretary of the Treasury, who had been a United States Senator from Texas—didn't even know his own agency was planning its largest raid in history in his home state. On the morning the FBI inserted into the Branch Davidian home "CS gas," which is banned for use against our enemies in war, the Attorney General of the United States left the command post to give a speech in Baltimore, Maryland. After this fiasco in which nearly one hundred people, including twenty-one children, were killed, the blunders were covered up. The Branch Davidians were indicted for murder and, of course, acquitted by a Texas jury. Four ATF agents who were fired were quietly rehired. Because of the cover-up, because Waco became a running sore, because there was no justice, others took the law into their own hands. That is not an extenuation, it is not a mitigation, and it is not a defense for what happened in Oklahoma City, but I believe it to be truly the cause.

Today, if you were to go to Waco, you would see no memorials; weeds have overgrown the central Texas plain, and there are only a few trees planted to honor the dead. Soon a handsome, expensive, and fitting memorial will be erected in Oklahoma City to the 168 who died there. But sometimes that which is unseen is more permanent than that which is built and seen. And so the 268 Americans—men, women, and children—who suffered and perished at Waco and in Oklahoma City endured the passion of death and received in return the gift of grace. They are dead and we are alive, but in truth they are not dead, for is it not so, that the spirit of the dead always survives in the memory of the living?

III. Demonstrative Evidence in the Oklahoma City Bombing Trial†

Alan Treibitz* and Ray Hauscel*

On April 19, 1995, the worst act of terrorism ever to take place on U.S. soil occurred when a 4,800 pound bomb destroyed the Alfred P. Murrah Federal Building in Oklahoma City, killing 168 people, including 19 children, and injuring more than 500. This case resulted in what was called "the largest criminal investigation in the history of this country."

Under orders by the U.S. Attorney General, the government offered a $2 million reward for the arrest and conviction of the person or persons responsible. When Timothy J. McVeigh was stopped for a traffic violation in Noble County, Oklahoma, shortly after the blast, PETN, a highly explosive powder used to line the inside of detonator cords, was in his pocket. Within days, Timothy McVeigh and Terry Nichols were arrested for planning and executing this act. The 27-year-old McVeigh was alleged to have detonated a bomb made of ammonium nitrate fertilizer and nitromethane drag-racing fuel just outside the Murrah building. He pleaded not guilty.

Evidence found near the site of the explosion took investigators on a long path that ultimately led to McVeigh's trial. One piece of evidence was the rear axle of the Ryder truck, a 250-pound piece of metal, that landed more than a block from the blast. The vehicle i.d. number on the axle verified it had been part of a Ryder rental truck that had been rented in Junction City, Kansas, to "Robert Kling." Descriptions of Kling led to McVeigh's arrest as the man who allegedly rented the truck.

The prosecutors were an extremely well-organized and well-prepared team, and they knew their objective: to effectively and succinctly communicate the gist of a complicated combination of circumstantial, forensic, eyewitness, and co-conspirator evidence in an easy-to-follow narrative. They had to prove beyond a reasonable doubt that Timothy McVeigh destroyed the Murrah building by means of a huge fertilizer bomb, killing many people, and that he had committed an act of terror and violence intended to serve a selfish political purpose. They needed to show that McVeigh knew what he was going to do from the very beginning, how the steps necessary to purchase, store, and then integrate the bomb ingredients were planned, and how the plan

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† Adapted from a presentation at the Annual Convention of the International Society of Barristers, Hyatt Regency Grand Cypress, Orlando, Florida, March 13, 1998.

* Z-Axis Corporation, Denver, Colorado.

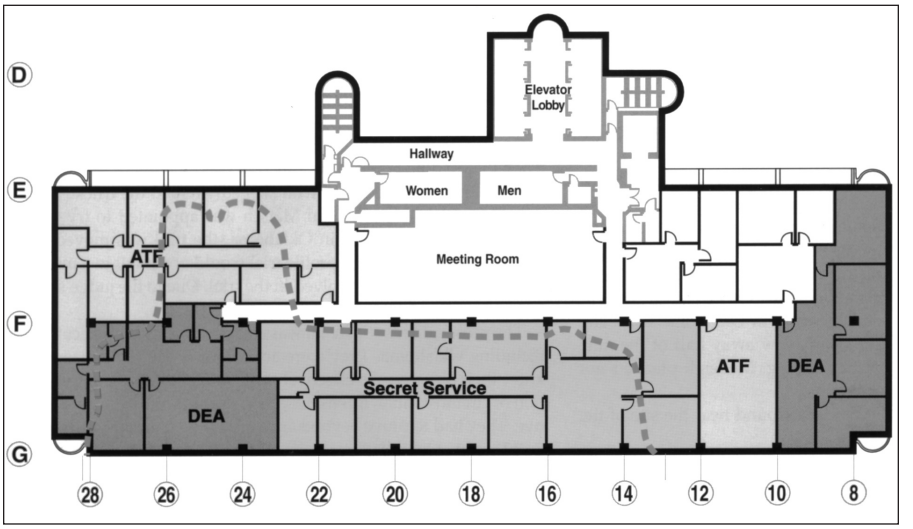
was financed and ultimately implemented over a period of several months. To prepare for trial they had to take a myriad of small pieces of evidence and paint a big picture. Because of the scope and nature of the exhibits that might be displayed, the Department of Justice hired our company, Z-Axis, to assist in the challenging task of visually presenting the most pertinent evidence in a clear and concise manner.

In the time between the bombing and the trial, government investigators had conducted thousands of interviews, amassed literally tons of evidence, and generated hundreds of thousands of pages of documents. As trial approached, the prosecutors were aware that they had a lot of witnesses and a great deal of evidence to present, but they also knew that the judge expected them to move quickly. Logistically the courtroom was going to be at capacity with attorneys and spectators, and the judge did not want cumbersome computer technology in the courtroom. Since space for exhibits was at a minimum and the speed of display needed to be rapid, it was determined that the combined technology of laserdisc, video, a sophisticated overhead projector, and VuPoint,[1] the computer-based presentation system with touch screen access developed by Z-Axis, was the solution. All technology was hidden in a small case nearby and exhibits were accessed by the prosecutor at the podium on a small, moveable, touch screen. It was quick and easy to call up exhibits by merely touching the custom menus on the flat-panel screen. Specific portions of an exhibit could be highlighted or enlarged, and one could use the built-in pointer or drawing tools to emphasize key issues. VuPoint's powerful organizational system made it easy to locate exhibits and assemble them for presentation. As exhibits were selected they were enhanced during the assembly process before trial, but changes were easily made at the last moment. Freed from the constraints of a fixed "script," an attorney could change any presentation as the trial evolved.

Since the case was about the 168 victims who died in the explosion, and the focus was on the victims, the largest portion of the exhibits was used to support witness testimony. An exhibit board of every floor was used to show each agency and the areas on each floor most affected by the bombing. Witnesses from each agency verified the agency location and victims. As victims

[1] The VuPoint visual presentation system is designed to be transparent in the courtroom. A small flat-panel display weighing only a few pounds sits unnoticed on the podium yet controls a vast array of technology. Simply by touching the virtually invisible screen, attorneys can call up all types of exhibits, including documents, photographs, charts, video, or animation. They can highlight, zoom-in, draw in multiple colors, or use an on-screen pointer to direct a judge, jury, and witness to selected areas. VuPoint has a powerful organizational structure that makes it easy to locate exhibits and assemble them for presentation. While VuPoint is a presentation system rather than a research tool, existing databases can be converted to the system for presentation. Presentations and enhancements can be printed out for distribution to judge and jury.

were identified their names were placed on the board showing the location of their offices prior to the bombing. The sound of the magnet on the board was often the only sound heard in the courtroom as names were placed in the correct location on the board. Acetate overlays indicated the area on each floor that had been destroyed by the bomb. Photographs of the victims were then displayed on large exhibit boards.

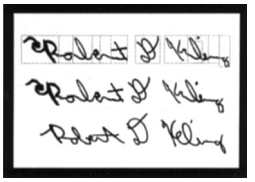


➤ *One of the nine floor plans showing the building layout and the area destroyed.*

Some of the most powerful visual evidence used during the trial was taken from television footage. The video was edited from nearly four hours of news footage covering the disaster. The video used in trial had to communicate the scope of the explosion, the carnage that was wrought and footage of hysterical relatives searching for loved ones, yet it had to be factual, without being unduly sensational or prejudicial. It was a major task to review all the existing footage and edit it into a compelling five-minute segment that could be displayed in court.

The prosecution's case centered on the April 17 rental of a Ryder truck by "Robert Kling" from Elliott's Body Shop in Junction City, Kansas. That vehicle was identified as the truck carrying the bomb, and the body shop owner identified McVeigh as Kling. In order to prove McVeigh blew up the building, it was necessary for prosecutors to prove that McVeigh was Robert Kling, the person who signed the Ryder rental contract in Kansas. We designed two exhibit boards that graphically made the link between McVeigh and Kling.

McVeigh's signature on the contract was compared letter by letter with that of Robert Kling on an exhibit board. In order to create this visual comparison, Kling's name was scanned along with handwriting from McVeigh. Comparable letters from McVeigh's known handwriting were assembled to create the signature of "Robert Kling" and displayed above the actual signature used on the Ryder Truck Rental contract. The likeness was remarkable.Additional "alias" boards played an important role, since McVeigh used several aliases during the course of planning the bombing. One board showed McVeigh at the Firestone store during the same time frame in which "Robert Kling" rented the Ryder truck from a nearby pay phone. Another showed McVeigh had used his own name to register at the Dreamland Motel, yet he ordered Chinese food delivered to Robert Kling in the same room at that motel. During closing argument, computer graphic technology was used to compare McVeigh's handwriting letter-by-letter to handwriting from aliases he had signed on receipts.

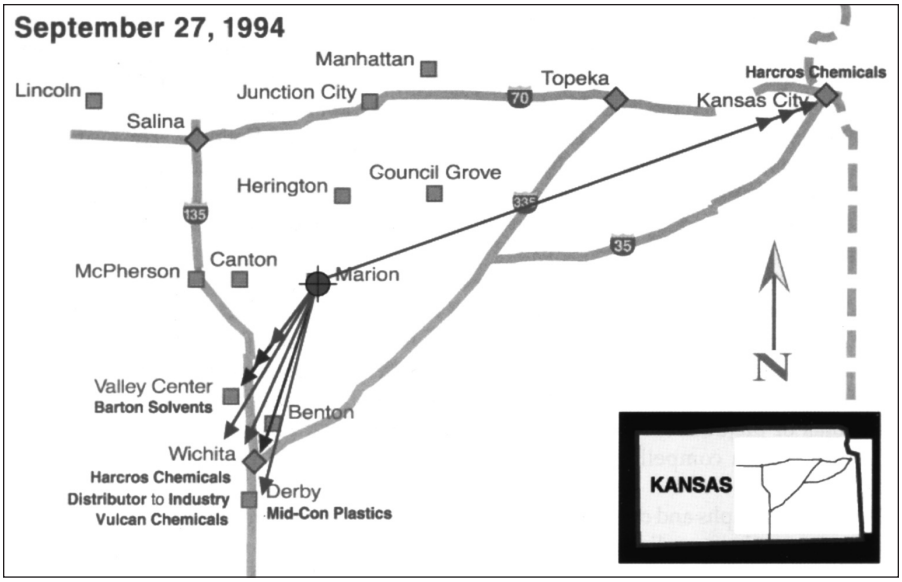


➤ *Exhibit board: Handwriting analysis*

A major challenge was the telephone records: how to effectively tell a story that lay buried in hundreds of phone records. The records were entered as evidence, yet their meaning needed to be made understandable and interesting. The phone records suggested that McVeigh made incriminating calls while planning the bombing. The summary of calls was a synthesis of data provided by the FBI, culled from several separate computer systems. A telephone card was purchased in the name of Daryl Bridges and was allegedly used to make calls to chemical companies, explosives manufacturers, and Ryder Truck Rental offices.

The phone records were instrumental in showing how McVeigh planned the bombing, but in their original state they were cumbersome and almost impossible to follow. It was necessary to summarize these documents in a manner that could be easily understood. A format was designed that displayed all calls made with the calling card. It showed where each call was made, the destination of the call, its length, and the time and date. This chronology laid the path that investigators followed in determining how the bombing was ultimately executed. Initially we focused on designing exhibit boards for this portion of the testimony. These exhibits were then imported into VuPoint and displayed on courtroom monitors, because they could be shown more quickly.

In addition to these hundreds of phone records, there were many photographs and other documents, such as motel and fertilizer receipts, displayed during the testimony of the numerous witnesses. Since the prosecution's approach was to present the case concisely, they needed to introduce evidence



➤ *VuPoint exhibit showing one day's phone calls made to chemical companies using phone card.*

with maximum efficiency. The VuPoint system enabled them to display the information instantly, without pauses or distractions. At one point the prosecution was able to present 40 exhibits in 30 minutes. Witnesses moved on and off the stand quickly and without delay; in one morning session prosecutors called 27 witnesses in less than three hours. During the course of the trial the news media made reference to the seamless choreography of witnesses and evidence against the defendant, and the prosecution was praised for its effectiveness in paring down countless details and communicating the important points with clarity and impact. The pace of the trial was fast, the drama compelling, the stakes monumental. The trial, which was expected to take as long as half a year, lasted approximately one month. The government's case lasted 19 days and covered 137 witnesses. There was enough information to overwhelm a jury, but government lawyers presented the material in a terse, gripping tale that often left jurors breathless, or in tears.

After twenty-three hours of deliberations over four days, the jury found Timothy J. McVeigh guilty on all eleven federal counts for planning and executing the bombing of the Alfred P. Murrah Federal Building on April 19, 1995.

THE CASE FOR MERIT SELECTION AND RETENTION

Gerald F. Richman*

In 1972 Florida amended its state constitution and eliminated the direct election of appellate judges in favor of a merit selection and retention system. This occurred against a background in which one of the early presidents of the Barristers Society, my former law partner, William S. Frates, described the Florida Supreme Court as the most corrupt high court in the United States. Within four years, after a scandal involving extensive investigations, public exposure, and threats of impeachment, four out of seven justices on that court left office through resignation or retirement. Through merit selection, the Florida Supreme Court then became one of the finest in the nation.

Meanwhile, trial court problems continued. In the late 1960s a notorious circuit judge, who had been a Miami Beach motorcycle policeman and then a congressman, had required lawyers to walk the gauntlet past his bailiff and make an appropriate campaign contribution before they could present their arguments at his motion calendar. Members of the Dade County Bar Association, wanting to address the problems of direct elections at the trial level and wanting, ideally, to provide support for good judges while eliminating the appearance of impropriety arising from direct campaign contributions by lawyers to judges (or judges' campaign committees), tried a new idea: the Dade Judicial Trust Fund.

Experience with the Dade Judicial Trust Fund

In essence, the Fund was created to "eliminate the one-to-one financial relationship between attorney and candidate; prevent direct solicitation by judges or candidates; prevent direct contribution by attorneys to candidates; afford financial assistance to qualified candidates; and provide the public with a maximum benefit of the practicing attorneys' opinions of the candidates through widespread publication of the Bar-conducted Judicial Poll and biographies of the various candidates."[1] The Fund was designed to give effect to this then-existing Ethical Consideration 8-6 of the ABA Code of Ethics: ". . . [L]awyers are qualified, by personal observation or investigation, to evaluate the qualifications

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[1] *See* Richman, *New Solution to an Old Problem: The Dade Judicial Trust Fund*, 50 Fla. B.J. 478 (1976).

of persons seeking or being considered for such public offices. For this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges." Recognizing that the ethical consideration did not deal with the "appearance of evil" from lawyers contributing to the campaign of a judge or judicial candidate before whom they have or are likely to have a pending case, the Fund had an independent group of trustees who would receive lawyers' campaign contributions ranging from $50 to $150, depending on the length of practice, with the funds then being distributed pro rata to all judges or judicial candidates voted "qualified" by at least sixty percent of those voting in a secret ballot poll conducted among the members of the County Bar Association. The lawyers contributing were required to pledge that they would make contributions to judges or judicial candidates only through the Fund, and all judicial candidates and judges who wanted to receive monies from the Fund were required to pledge that they would accept money from lawyers only through the Fund. Some of the funds received would be used to publicize the results of the bar poll and the names of the judges who were voluntarily participating in the poll, thus helping to eliminate the appearance of impropriety. In uncontested races, funds could be used to pay the qualifying fees of the judges who were voted qualified.

After establishment in 1972, the Judicial Trust Fund underwent a number of growing pains. Shortly after it was established, close to 300 lawyers contributed in excess of $30,000, resulting in the distribution of more than $26,000 to twenty-two candidates. During the next four years, both contributions and credibility increased. The Fund was faced with problems such as the discovery that a candidate, in direct violation of the rules, had marked a ballot for another attorney. This called into question the integrity of the poll. There also were active solicitation violations with regard to the poll. The Trust Fund Committee had to express opinions on questions such as whether an attorney who had signed the pledge could support a particular candidate by sending out letters of endorsement or recommendations at the attorney's expense and whether an attorney who had signed the pledge could attend a cocktail party in support of a particular candidate where attendance involved the purchase of a ticket obviously intended to raise additional funds for that candidate. The Committee answered the those two questions in the negative, and over a four year period both the poll and the Trust Fund gained public credibility and acceptance, to a point where many states were contacting the Dade County Bar for information.[2]

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[2] *See Detroit Bar May Break Judge-Lawyer Election Links*, BAR LEADER, vol. 2, no. 1, at 4 (1976):

> When a lawyer contributes to a judicial candidate's election campaign, the man in the street can't help but wonder whether it reflects a desire to improve the courts or the attorney's

Unfortunately, the Fund stumbled on what proved to be an insurmountable obstacle. Florida election law provided that a "political committee" was precluded from contributing more than $1,000 to any political candidate. A disgruntled judicial candidate, who had signed the pledge card but was not voted qualified in the bar poll and therefore did not receive funds from the Trust Fund, lost an election and complained to the Florida Elections Commission that the Fund was a political committee contributing in excess of the $1,000 allowed by law to an individual candidate.

The Florida Elections Commission launched a secret investigation. Upon learning of the investigation from one of the trustees of the Fund, whom I had appointed in my capacity as then-president of the Dade County Bar Association, I inquired about the status of the investigation. Told that I could not learn anything of the status unless I was a defendant, I said, "Make me a defendant." They did.

At a subsequent weekly luncheon meeting of my law firm, I mentioned to my partners, who included William S. Frates, that I had vouched myself in as a defendant. I commented that if I went to jail, I would be in good company, since the trustees included the executive director of the Chamber of Commerce, the president of a bank, and two former Florida Bar presidents. Frates responded, "That's exactly what John Erlichman said."

I then hired, pro bono, Talbot (Sandy) D'Alemberte, who later became Dean of the Florida State University Law School and President of the American Bar Association, and now serves as President of Florida State University. He filed a declaratory action against the Elections Commission, the local State Prosecutor, and the Attorney General of Florida. The case, ultimately, went to the Florida Supreme Court,[3] which ruled unanimously that while the Fund had a

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> standing in a court. . . .
>
> In Detroit, as in many other areas, these suspicions have existed. But all this may change soon.
>
> The reason is the Fair Plan, an innovative program of the Detroit Bar Association that would put a disinterested group of trustees between lawyer contributors and judicial candidates, so that those running won't know who contributed how much.

This plan could not work in Florida where the state election law requires full disclosure of the identity of all contributors. The article on the Detroit Bar went on to say:

> [Judge Victor J.] Baum gives a lot of credit for influencing the committee to the Dade County (Florida) Bar Association.
>
> The Dade County trust fund, in operation since 1972, also has as its goal the removal of a one-to-one relationship between lawyers and judicial candidates, but it goes about it differently, explains President Gerald F. Richman.
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> . . . .
>
> The Dade County effort may influence many other such plans in the near future, Richman says. He spoke on the trust fund at a National Conference of Bar Presidents program during the February midyear meeting in Philadelphia. As a result, he received inquiries since then from bars in Alabama, Baltimore, Georgia, Oregon and Puerto Rico.

[3] Richman v. Shevin, 354 So. 2d 1200 (Fla. 1977).

"laudable purpose," that "does not alone justify exemption from the statutory definition of 'political committee.'"[4] The court decided that while each contributor's share of the contribution to each candidate was reported separately, this was insufficient to remove the Fund from the definition of a political committee. The only way for the Fund to avoid treatment as a political committee was to establish a separate account for each contributor—a practical impossibility.

The Fund was disbanded, and two attempts to obtain an exemption from the State Election Law, including one attempt given top priority by the Florida Bar, were unsuccessful. The second attempt, in 1978, failed by a single vote in the State House of Representatives on the last day of the legislative session after having passed the State Senate by a single vote. The Florida Bar elected not to use its limited resources again for a purpose that largely benefited the few large, populous Florida counties where the problem was most acute.

EXAMPLES OF ISSUES STEMMING FROM JUDICIAL ELECTIONS

Not surprisingly, issues related to judicial campaign contributions, both financial and through endorsements and campaign assistance, have continued to plague the Florida courts, again particularly in the more populous south Florida area, where the judges and candidates are numerous and the cost of campaigning in large geographic counties with a diverse population is both extensive and expensive.

Five Florida decisions illustrate the problem. In *Caleffe v. Vitale*,[5] the Fourth District Court of Appeal of Florida, in an opinion by then District Court Judge Harry Anstead, now a justice of the Florida Supreme Court, reversed the refusal of a trial judge to recuse herself where "[a party's] attorney is actually running the judge's ongoing reelection campaign. Common sense tells us that this alone would give rise to a reasonable fear on the petitioner's part that a conflict of interest may exist."[6]

In its decision, the court reviewed two earlier cases, stating first:

> In *Raybon v. Burnette*, 135 So.2d 228 (Fla. 2d DCA 1961), the plaintiff's attorney had previously campaigned for a law partner who ran against the trial judge in a primary election. The defendant's attorney had publicly endorsed and supported the trial judge in the same election. 135 So.2d at 228-29. The district court upheld the trial judge's refusal to recuse himself, relying on an ABA sponsored report supporting active bar participation in judicial elections. *Id.* at 230.[7]

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[4] *Id.* at 1204.
[5] 488 So. 2d 627 (Fla. Dist. Ct. App. 1986).
[6] *Id.* at 629.
[7] *Id.* at 628-29.

The court then discussed another "troubling decision," that of *Parsons v. Motor Homes of America, Inc.*,[8] in which the plaintiff had sought the recusal of the trial judge against whom the plaintiff was running for office. The appellate court in that case upheld the lower court's decision to deny the motion on technical grounds relating to legal insufficiency of the petition, although the court went on to suggest that "the preferred course for the judge would have been to recuse himself."[9]

Before the issuance of the *Caleffe* opinion, the author of this article became involved in a case before the same Judge Vitale who was the subject of the *Caleffe* decision. This case was set for a nonjury trial at a time when the judge was facing a reelection campaign against a background of weak support in the bar poll. I had previously tried a jury case before her and felt that she did a reasonable job. As is typical in Florida judicial campaigns, I received a mail solicitation to endorse the judge. This was during the year following my term as president of the Florida Bar. Since I felt that the judge was at least qualified to serve, I signed the endorsement and forwarded it to her campaign committee.

Approximately four days before the trial (on the Thursday before a Monday trial), I received a telephone call from someone on the judge's campaign committee requesting a contribution to the trial judge's campaign. I did not return the call or send any contribution. Instead, I called opposing counsel the following day, informed him that I had signed an endorsement card and had not made a campaign contribution but had been solicited for one, and suggested, in what I thought was the highest tradition of the profession, that opposing counsel might also want to endorse the judge so that we would both be on the same footing before the judge. I added that, if he felt it appropriate, we could make equal campaign contributions. Opposing counsel thanked me and said that he would get back to me.

On the following Monday morning, as the trial began, I was met with a motion to recuse the judge based upon this assertion of the plaintiff: "[T]he trial judge's 'favoritism' of soliciting political support from opposing counsel but not from Marexcelso's counsel created a well-founded fear that Marexcelso would not receive a fair trial before the trial judge."[10]

The court denied the motion for disqualification on the basis of the insufficiency of the motion's allegations, and the trial proceeded. During the trial I moved for a mistrial on the basis of certain improper comments of the judge concerning issues relating to possible settlement. Plaintiff's counsel did not

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[8] 465 So. 2d 1285 (Fla. Dist. Ct. App. 1985).
[9] 488 So. 2d at 629.
[10] *See* Marexcelso Compania Naviera, S.A. v. Florida Nat'l Bank, 533 So. 2d 805, 806 (Fla. Dist. Ct. App. 1988).

join in the motion and the motion for mistrial was denied. At the conclusion of the trial, the judge ruled in favor of my clients, and the plaintiff moved for rehearing in an extensive motion but one which neither renewed the motion for disqualification nor challenged the fairness of the trial or the judge's impartiality. And then came the rub: "Marexcelso's motion for rehearing was heard on September 2, 1986, and the court there verbally announced its denial. However, the next day, the court *sua sponte* entered an order of recusal and order granting a new trial to Marexcelso."[11] The basis of the recusal was the *Caleffe* opinion.

Almost two years later, the Fourth District Court of Appeal reversed and reinstated the trial court's original decision in my clients' favor, distinguishing the *Caleffe* opinion:

> In *Caleffe*, this court noted that the trial judge had a specific and substantial political relationship with counsel for Mrs. Caleffe, the wife, who was opposing the motion to disqualify. Not only was Mrs. Caleffe's counsel actually running the trial judge's ongoing reelection campaign, but he had directly communicated with the trial judge about the Caleffe case . . . .
>
> However, the *Caleffe* court did recognize the fact that attorneys are generally encouraged to support candidates for judicial office and do so. In the instant case, Marexcelso moved to disqualify the trial judge because its attorney had not been asked to endorse the trial judge or contribute to her campaign whereas the attorney for the Bank and the Developers had been so requested. In our view, these facts do not rise to the level of a specific and substantial political relationship such as was expressly disapproved of in *Caleffe*. Rather, these facts exhibit the type of endorsements and financial support that lawyers are generally encouraged to give judicial candidates.[12]

So we lost two years because of the confusion and awkwardness of financial contributions to judicial election campaigns. And the debate continued.

The argument reached a crescendo in the case of *MacKenzie v. Super Kids Bargain Store, Inc.*,[13] in which the Supreme Court of Florida sought (unsuccessfully) to put the issues to rest. In *MacKenzie*, the Supreme Court reviewed motions filed in two cases to disqualify the same trial judge, because counsel for the plaintiff in each case had contributed $500 to the political campaign of the judge's husband, and the defendants feared that they would not receive fair and impartial trials. The trial judge's husband was a candidate in a contested election for the office of circuit judge.

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[11] *Id.*
[12] *Id.* at 807.
[13] 565 So. 2d 1332 (Fla. 1990).

In an extensive opinion in which the Florida Supreme Court noted that the state constitution had been amended with regard to justices of the supreme court and judges of the district courts of appeal, but that general elections remained in effect with regard to circuit judges and county court judges, the court noted:

> [T]he citizens of Florida have chosen to retain the power to elect county and circuit judges and the power to remove by vote judges of the district courts of appeal and justices of the Supreme Court. As with other elections, judicial elections involve campaigns. As with other campaigns, judicial campaigns require funds. Judicial campaigns and the resultant contributions to those campaigns, therefore, are necessary components of our judicial system.
>
> This is not to say that contributions to judicial campaigns may never be cause for reasonable concern. Experience tells us otherwise. As this Court noted in *Richman v. Shevin*, 354 So.2d 1200, 1203 (Fla. 1977), cert. denied, 439 U.S. 953, 99 S. Ct. 348, 58 L.Ed.2d 343 (1978), the United States Supreme Court has articulated two concerns raised by contributions to campaigns for public office: "1. The tendency or possibility to create a quid pro quo relationship and, 2. The creation of an appearance of influence or corruption."[14]

In reaching its decision that the portion of the lower court's decision holding "that a trial judge is required to disqualify herself or himself on motion where counsel for a litigant has given a $500 campaign contribution to the political campaign of the trial judge's spouse" was to be quashed,[15] the court stated that the legislative contribution limitation "does not conclusively mandate a finding that no reasonably prudent person would fear they would not receive a fair and impartial trial because of a contribution within the statutorily allowed limit," but that the limit "does, however, reduce the possibility of a quid pro quo arrangement between the candidate and the contributor and also acts to eliminate any appearance of impropriety."[16] The court went on to note:

> In Florida, as in Nevada, "leading members of the state bar play important and active roles in guiding the public's selection of qualified jurists. Under these circumstances, it would be highly anomalous if an attorney's prior participation in a justice's campaign could create a disqualifying interest, an appearance of impropriety or a violation of due process sufficient to require the justice's recusal from all cases in which that attorney might be involved."[17]

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[14] *Id.* at 1335.
[15] *Id.* at 1340.
[16] *Id.* at 1337.
[17] *Id.* at 1337-38 (quoting Ainsworth v. Combined Ins. Co. of America, 774 P.2d 1003, 1020 (Nev.), *cert. denied*, 493 U.S. 958 (1989)).

In his concurring opinion Justice (now Chief Justice) Kogan stated:

> I concur in the majority's opinion because I believe it endorses the lesser of the evils from which we must choose. And in so concluding, I have many regrets.
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> I have absolutely no doubt that the present system of electing judges spawns distrust of the judiciary and creates opportunities for abuse. This in itself merits much soul-searching. As a general rule, attorneys contribute the bulk of judges' campaign money. Later, many of these same attorneys appear in the courts of the judges to whom they have donated. At first blush, this appears to be a system that allows judges to reward the attorneys who have contributed to their election campaigns.
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> . . . .
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> . . . Attorneys who wished to steer their cases away from a particular judge need do no more than contribute a large sum to that judge's campaign. While appearing to support the judge, these attorneys in actuality would be buying "insurance" that the judge could never hear their cases. The paradoxical result might be that the most disliked judges would receive large campaign contributions while the better judges would receive none at all from lawyers. In the meantime, attorneys could "shop" for the judges they want simply by cutting a check at election time. The result clearly would violate the policy against allowing forum shopping by attorneys.[18]

Justice Kogan then added in apparent frustration at the system:

> . . . I cannot help but note that the problems presented by this case more readily might be resolved by action of the legislature and electorate of Florida. A merit-retention system for trial-level judges, for instance, could eliminate the bulk of the problem, since most merit-retention elections are uncontested. Likewise, some type of public financing of judicial campaigns also would help prevent the use of contributions to influence official action. So long as judicial seats can be filled by elections financed by private campaign contributions, we in Florida must live with a system that opens the door to some type of abuse.[19]

Shortly after issuing this opinion, the Florida Supreme Court dealt with the issue of contributions other than financial ones. In *Nathanson v. Korvick*,[20] the court was faced with reviewing a motion to disqualify based upon the fact that a judge's ex-husband's attorney had both contributed to the judge's political campaign and served on her campaign committee. The judge had denied the motion, finding it insufficient on its face. In upholding the decision of the trial judge, the Florida Supreme Court stated:

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[18] *Id.* at 1340 (Kogan, J., concurring).
[19] *Id.* at 1341.
[20] 577 So. 2d 943 (Fla. 1991).

> In *MacKenzie*, we held that judges are not required to disqualify themselves based solely upon the allegation that an attorney or litigant has made a campaign contribution to the political campaign of the judge or the judge's spouse. As long as the citizens of Florida require judges to face the electorate, either through election or retention, "the resultant contributions to those campaigns . . . are necessary components of our judicial system." *Id.* at 1335. We do not find that "contributions" are limited to financial ones, and thus do not distinguish between financial contributions and services on a campaign committee.[21]

In his dissent, Acting Chief Justice Overton stated:

> Here, the adversary's attorney not only made a contribution but was on the judge's campaign committee and listed on his letterhead. It stretches common sense and reason to say that it is unreasonable for a citizen to question the impartiality of a judge under these circumstances.[22]

FURTHER ACTION IN FLORIDA

Ironically, while these two Supreme Court decisions were in progress, the Florida Bar, in 1989, decided to deal with the same issue. One of our members, Rutledge R. Liles, who was then serving as president of the Florida Bar, on January 20, 1989, appointed a "Commission on Merit Selection and Retention of Trial Judges." I served as vice-chair of the commission, which held hearings throughout the state. The commission included members of the Board of Governors of the Bar, judges, state legislators, the Governor's general counsel, and other prominent Florida lawyers. The commission recommended "merit selection and retention of trial judges on a statewide basis," or a "local option merit selection and retention on an opt-out Circuit-wide basis" if the Florida Bar Board of Governors did not believe it could get a constitutional amendment passed without the opt-out procedure. The commission further recommended "establishment of a citizen's judicial evaluation program, similar in concept to the Colorado plan, regardless of passage of a merit retention system."

On January 25, 1990, the Florida Bar Board of Governors, after extensive debate, endorsed the concept of merit selection and retention for trial judges by a forty to six vote. The state legislature, however, failed to approve submission of a constitutional amendment to the voters.

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21. *Id.* at 944.
22. *Id.* (Overton, J., dissenting).

Now, in 1998, the Florida Constitution Revision Commission, which is convened every twenty years in Florida to hold public hearings and make recommendations on changes in Florida's constitution, has, once again, considered the same issue. It has recommended, by a twenty-four to seven vote, after extensive debate, that the Florida constitution be amended to allow merit selection and retention on a county-by-county local option basis. As reported in the April 1, 1998, edition of the *Florida Bar News*:

> The merit selection amendment would create an opt-in and opt-out system for the trial courts. If approved in November, voters in a circuit or county wanting to switch to merit selection could petition for a second election, where local voters would decide whether to change to the appointive system. Once a circuit or county had switched to merit selection and retention, voters would be free, again by petition, to seek referendum to switch back to elections.

Stay tuned.

Meanwhile, I had one more "experience" bolstering my determination to change the system. In a case in which my law firm itself was a plaintiff, involving issues of fraud and breach of contract where the defendant filed counterclaims, my firm eliminated the counterclaims on a successful motion for summary judgment. Subsequent to entry of the summary judgment, the defendants/counterclaimants "discovered" the fact that one of my law partners, Herman J. Russomanno, another ISOB member and a former president of the Dade County Bar Association, had been listed as one of *eighty* lawyers "serving" on the judge's reelection committee.

The judge had no opposition, and Russomanno had simply responded to a phone call without even knowing that this was the judge sitting on the firm's case, a case in which he had no direct involvement and of which he had little knowledge. Without even granting a hearing or awaiting argument, the judge recused herself. This permitted the defendants/counterclaimants to move for reconsideration before the judge to whom the case was transferred. That judge reversed his predecessor in part, denying portions of the motion for summary judgment. Approximately a year was lost in the progress of the case; the judge's recusal is not appealable; and these questions arise: How can one safely endorse a judge or even nominally serve on the judge's campaign committee if one's firm has any matters pending before that judge? How does one carry out the ethical obligation to support good judges or candidates and avoid the appearance of impropriety? Perhaps Alice in Wonderland, looking through the looking glass, can answer the questions. I cannot.

FINAL ANALYSIS

That is not to say that a merit selection and retention system is a panacea. It has many deficiencies—for example, the possibility that judicial nominating commissions may be subject to political influences and may be just as imperfect as the electorate. However, in Florida at least, the statistics compiled show that there is a significantly higher rate of disciplinary problems attributed to elected judges than to those who go through merit selection. Further, at least all judges in a merit retention system must face the voters every six years, whereas in a judicial election system, the judges may never face the voters again since, in a large county with many judgeships, most do not draw opposition, particularly if they have raised war chests and obtained the endorsements of many attorneys. Except in the most egregious circumstances, that is not a daunting task for a judge's campaign committee, given the difficulty of most lawyers faced with a Hobson's choice of refusing to endorse or contribute to a judge before whom the lawyer has or likely will have a case.

Merit retention and judicial election share a problem: how to inform the electorate to vote intelligently on a judicial race, whether in a direct election or on retention. Information is wholly lacking, particularly in a populous area with twenty-five to a hundred or more sitting judges. Even trial lawyers who regularly practice have difficulty evaluating judges before whom they have not had any recent cases. The partial solution to that problem, again fraught with the possibility of improper political influence, is the creation of an evaluation commission composed of nonlawyer citizens and some lawyers that applies carefully established criteria. An adjunct is a secret bar poll, which, in Dade County and in many areas throughout Florida, experience has shown to be imperfect but in most cases relatively reliable. Most lawyers who vote in the polls do so conscientiously and with good judgment.

In conclusion, the jury—or at least the jury of my peers and associates—is not out: Jacksonian democratic election of judges is not the best way. Merit selection and retention is simply a better process overall.

PERSPECTIVES FROM AN AMERICAN DIPLOMAT ABROAD†

Edward E. Elson*

I would like to begin by telling you what it's like to be an ambassador, and then give you some insight into the role of the United States in Europe today, at least from my perspective.

The Role of Ambassador

The job, or the process of getting the job, started when I got a telephone call from the President. I had just returned home from three board meetings in three days—it was unusual to have them fall on three consecutive days like that—when the phone rang and a woman said, "The President would like to speak to you." I said, "Which one?" I was thinking of the companies whose meetings I had just attended. She said, "President Clinton," and I said "Oh!" The President came on the phone and said he would like me to be his ambassador to Denmark. I said, "Yes, sir," and I thought, "Where is Denmark?" He previously had spoken to me about France, England, Austria, and Spain, but never Denmark. The next day I picked up the *New York Times* and saw a picture of the Prime Minister of Denmark, Poul Rasmussen, in the Oval Office. When I finally arrived in Denmark, the Prime Minister said, "Do you know how you got this job? I was sitting with the President, and I said, 'How come American presidents don't send friends of theirs to Denmark?' And he reached over and picked up the phone and called you." I said, "Thanks a lot. I could have been at the Court of St. James, but here I am."

Going through the appointment process is a strange experience. The investigation takes almost eight months—it's ridiculous that it takes so long—and there are thousands, literally thousands, of questions to answer. For example, you have to account for every cent you've earned and everyone you've ever worked for since you were eighteen years old. They keep adding questions, too, so each year another fifty or hundred questions go on the list. Then you get the questions of the decade. A question of the 1950s, for example, was this: "Have you or any member of your family ever been involved in an organization that sought to overthrow the government of the United States of Amer-

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* At the time of his address Mr. Elson was United States Ambassador to Denmark.

ica?" I answered, "Of course." They said, "Of course?" I said, "Yes, my great grandfather was a captain in the Confederate Army." It's true. Then they got to the 1960s questions, such as this: "Have you ever used any illegal substances?" I said, "No, sir, I never have. In fact, I'll tell you a story. In the 1960s Susie and I were at a party where people were passing around marijuana, and when it came to me, and I said 'Nope.' And my friends said, 'Why not?' And I said. 'Well, I have three sons, and when they ask me whether I ever did drugs, I will be able to say, 'No.'" I thought that was a pretty nice story, but the agent just said, "Where was the party?" The 1970s question was the best: "Have you ever been accused of having an illicit affair?" You want to say, "That's a stupid question. Why don't you just ask?" Then you realize that that's why they phrased the question that way; they don't want to know the answer.

Mine is an interesting job to go to as a person who is not a career diplomat. You've had no training in the business, and yet you've had a lifetime of training, because everything in which you've been involved, whether it's the academy or commerce or cultural activities or dealing with governments, has given you experience which you can then focus on one job. You are a salesman, an advocate, and your client is the United States of America. That gives you great pride.

One of the difficult aspects of the job is being surrounded constantly by security. I walk around with Arnold Schwartzeneggers all day long. When I started the job, I said, "I can't take this," and my wife said, "It's too intrusive; get rid of them." So I called PET, which is the Danish FBI, and I said, "Do I really need these guys?" They said, "No. We'll call them off." Shortly thereafter, I learned that there is at least one nice benefit of having the security people. When I went to the airport with them, the seas parted and I ran right through. This time I went to the airport alone. I was wearing slacks and a sweater, and I was standing in line at Delta when an airline security man came over and said, "Excuse me, sir. Are these your bags?" I said "Yes." He said, "Did you pack them yourself?" "Yes, sir." He said, "Have they been with you since you left home?" "Yes, sir." "Are you carrying any presents?" "No, sir." "Did anybody give you a package?" "No, sir." "Anything electrical in there?" "No, sir." "Do you have a camera?" "Yes, sir." "A camera is electrical." I said, "Put the cuffs on, you've got me." He said, "Oh, a wise guy, huh? What are you doing in Denmark?" I said, "I work here." He said, "Where do you work?" I said, "I work at the American Embassy." He said, "What do you do?" I said, "I'm the ambassador." He said, "No, you're not." That got straightened out, but the problem would never have arisen if I had had the security coverage.

There are more serious reasons for having the security. Since I've been at Embassy Copenhagen, we've been firebombed twice, and we've had masked

men on our roof on two occasions. One time I was standing outside the embassy, and a man with an axe came running up looking for the ambassador. I said, "He's over there." The worst incident occurred when I was addressing 20,000 people at a celebration of our Fourth of July. (Denmark celebrates our Fourth of July.) A man walked up while I was speaking, took out a pistol, and fired four shots. My security detail jumped on me; I was more worried about dying of suffocation than I was about the bullets. (They turned out to be blanks.) Then I became afraid the gunman would be killed; somebody was shooting at him. He was not killed, and the Danish system of justice did something amazing to him—they fined him $200.

Two anecdotes will help you understand what ambassadors do on a daily basis. The first pertains to how you handle the business of the United States of America and involves the motion picture industry. Jack Valenti of the Motion Picture Association informed me that Denmark was imposing a tax on blank videotapes. That meant that every time you got a videotape to tape a movie, you had to pay a fee through the tax on the tape. That fee was supposed to be divided among all producers, directors, actors, and writers worldwide in accordance with a very sophisticated formula. It was called a reciprocal tax, which meant that we divided up what we collected in the United States and gave their share to them, and they divided what they collected in Denmark and gave us our share. Since we have ninety-nine percent of the films around the world, we got the biggest chunk. The Danes, however, were saying, "No, this is a national tax," which meant that they could keep all of the money they collected. The Motion Picture Association was worried, of course, that every other country would do the same thing, and the United States wouldn't get any revenues for its films.

Mr. Valenti asked me, "Can you handle it?" I said, "If you'll back me, I can do it." I went to see the Minister of Culture, who would not see me because she knew why I was coming. Of course, she could not refuse to see the American ambassador, but she would make an appointment and break it, make another appointment and break it. Finally I just went and sat in her office. She came walking out, and I said, "Hello, Minister Hilden." She responded, "Oooh, I've been wanting to get together with you, Ambassador. Come in." We sat in her office, and she asked what I wanted. I said, "First of all, let me ask you a question. Do you know what hardball is?" She did not but she found an aide who was able to explain it to her. Then I said, "Hardball is what the motion picture industry plays. Do you know what our largest export from America is? It's airplanes. And do you know what our second largest export is? It's films. Who do you think has the toughest lobby? The film industry. Do you know what's going to happen if you keep this tax? One morning the people in Denmark are going to wake up and turn on their televisions, and they're

going to see a test pattern, and they'll see that test pattern twenty-four hours a day, seven days a week, fifty-two weeks a year because you won't get any more movies." They got rid of the blank tape tax. That established a relationship, and the Motion Picture Association generously gave the Danish nation $2 million of the $3 million they were putting into Europe to foster European film development. Denmark then went into the EU and single-handedly blocked the French film quota initiative, which would have limited the number of American films that could be sent to Europe. All of that is part of the day-to-day business of the embassy.

The second anecdote has to do with the AMRAAM missile we were trying to sell to Denmark. The AMRAAM is an incredibly effective air-to-air missile; it doesn't miss. Our NATO allies wouldn't buy it because the French had a similar missile on the drawing board. My mission was to get Denmark to buy it and break the lock. First, I went to see the Minister of Defense, who told me no. So then I went around to all the universities and to the Rotary Clubs giving speeches. During those speeches, I said, "How many folks here have family in the military?" I knew a lot of hands would go up. Next I asked, "How many of them are flying?" Not as many hands went up. I continued, "How about F-16 pilots, any brothers, uncles, friends, sons?" I got a couple of hands. I said, "Now, if the Danes were going to fly missions to Bosnia and I gave your son or brother a ninety-nine percent chance of survival, as opposed to a seventy percent chance, which would you take?" The answer to that was obvious, of course, but I added, "Wait, don't answer that quickly. Suppose I told you it cost six hundred crowns more, one hundred thousand dollars more to bring them back. Is it worth that much? That's a lot of money." And they said, "Of course." I said, "That's the difference between the French missile and the American one—a hundred thousand dollars for a ninety-nine percent kill rate. Which would you rather have on your son's airplane?" I concluded, "Write the Prime Minister." Denmark became the first nation in Europe to buy the American missile and break the lock that the French had. That, too, is the type of thing that an ambassador does on a day-to-day basis.

THE ROLE OF THE UNITED STATES

In 1830, after two trips to the United States, the French historian and lawyer, Alexis de Tocqueville, published his magnificent classic, *Democracy in America.* Although the book is more than 150 years old, readers are still amazed that de Tocqueville's profound and perceptive understanding of America is as accurate today as when he penned his masterwork a century and a half ago. His book is still used as a primer for anyone seeking to understand the American character.

I am constantly reminded of de Tocqueville, for, like him, I am now a foreign observer, and in more ways than one would think. As United States Ambassador to the Kingdom of Denmark, I have been immersed in the Old World for five years. Even though this certainly has not made me a European, it has in many ways compelled me to reorient my personal compass toward a European point of view, in order better to understand European attitudes. The surprising thing is that not only has this allowed me a privileged approach to European affairs, but it also has given me a new perspective on America—the perspective of an Alexis de Tocqueville. The truth is that through being an American observer of Denmark and Europe, I have gained a fresh outlook on the United States and see it in sharper focus than I would have been able to had I remained at home.

My introduction to Denmark came in 1943, but I didn't fully appreciate it. America was in the middle of its second war in Europe in less than twenty-five years. My family moved into a new home in Norfolk, Virginia. Our new home had a lovely, though uninspired, garden. My mother and father worked every day to restore its luster. They were helped by an elderly Dane who had come to our shores many years before, a Mr. Christensen. Once a week, Mr. Christensen, lined face, pipe in mouth, rode his bicycle to our home. He lovingly helped my parents create the little garden in which they had such enormous pride. I remember Mr. Christensen and how remarkable and thorough he was about our garden. But only after I arrived in Denmark did I truly understand his innate, natural, and special feelings toward a garden. For, I found that he came from a country which not only reflected its people's passion for gardening but was in reality itself a garden.

A garden seems a short-range project. You plant in the fall or the spring and the flowers bloom the same year. But gardeners know that it takes many years to create a garden; and a garden, like a poem, is never finished. A garden is an allegory of life's fragility and grace. It is a place that invites conversation and contemplation, peace rather than anger or frustration, reconciliation rather than conflict. For over five years, my wife and I have enjoyed the fruits of a Danish garden, a garden of serenity and tranquility that centuries of sophistication and tolerance have created.

Denmark is a unique society, for Denmark truly has its priorities in order. I have been particularly taken by the safety of a nation in which its Queen can go among her people with the minimum of security, a country in which violent crime is almost nonexistent, a country in which there is a social welfare network that secures the public against poverty and ill health.

Gardens are planted when the immediate pressures of survival are less felt, when there is time for the luxury of the aesthetic and space for that which is not vital. Most of the world now shares the peace and stability that the Danes

have known for generations in their Danish garden. Indeed, with peace existing virtually throughout the entire globe, the new reality of security is providing us all a window of opportunity heretofore unknown in human history.

When I arrived in Copenhagen five years ago, I was unencumbered by any intellectual prejudices or baggage as to my role in representing the United States of America in Denmark. I was like a newspaper editor, walking in in the morning and facing sixty blank pages that I had to fill. That was an advantage because I was able to approach my role and view their system with a fresh, clean, and unbiased mind.

There is one thing I learned quickly. I went to see a Danish philosopher and asked him how one explains the difference between the Danish outlook on life and that of the Germans, when but an invisible line separates the two peoples. He answered, "We are a seafaring people." I immediately knew what he meant. The Danes always look outward, not inward. They are a global people, neither Nordic nor European. They see the world as their neighbor, the entire earth as their backyard.

Denmark is the fifth most productive nation in the world and the fourth richest country per capita, has the third freest economy, and is the least corrupt. The average income is higher than that in the United States. The Danes are certainly doing something right.

But the special position they have reached is due in part to the extraordinary protective umbrella that the United States has thrown above them and their European brethren. America's strength has become Europe's safety net. The basic philosophy of America as a nation and as a people embraces self-reliance, independence, and individualism. We are a swashbuckling people. We are innovative, we are ice breakers. We are descended from gamblers and risk takers. America is largely comprised of people who left the rest of the world to seek their fortunes.

In a sense we, like Europe, have an aristocratic history, but ours is quite different in origin, for we have created a new aristocracy, a natural aristocracy, an aristocracy not of birth or privilege, but an aristocracy of talent and merit and virtue. We have created a society where individuals are free to pursue their own goals as high as their God-given abilities can take them.

So America's success should not be a surprise. Our great adventure was begun and continues to be pursued by a free, committed, and courageous people. And this is the essential element that has framed the American character; Americans are a new people whose forebears' courage is reflected today in their children's imperative not only to effect the ideal of democracy but to export it, to proselytize others, so that the blessings of liberty we have enjoyed will spread around the globe and will take firm root behind our protective shield.

Yesterday I flew back to the United States from Copenhagen. As the airplane crossed Europe and the Atlantic, in seconds it passed over battlefields where millions had struggled and died; in minutes it traced the migration of humankind over thousands of years; in a few hours it passed over oceans and countries that have been crucibles of human history. I was afforded a revealing perspective on how ephemeral time and space and place really are, and it gave me renewed appreciation of our country, and its role today. America has been and is today the only country on the face of this globe which always stands ready to bring the purifying air of freedom to those who have yet to fully taste its sweetness. You may feel that that statement is a bit flowery or hyperbolic, but those were the very words used by the ambassadors of Estonia, Latvia, and Lithuania at a dinner just a few weeks ago. A source of great pride, reinforced by my time in Europe, is that I'm an American. I am a citizen of the greatest country on the face of the earth, and am proud to have the opportunity to serve as its representative to another nation, where I'm often seen as the personification of our nation. It's an awesome responsibility, and it has caused me to become extraordinarily reflective on the nature and character of the society I represent. And I've come to a very important realization.

In the eighteenth century, Tom Paine is reputed to have said that every man had two countries, his own and France. In the twentieth century, every European has two countries, his own and the United States. And to our great credit, the world now not only recognizes but appreciates that America and its ideal of freedom are the indispensable keystones in world affairs, and that the United States as a nation has assumed the fundamental obligation of strengthening and assuring constitutional democracies and the cause of human rights throughout the world, on all continents. Denmark's famed nineteenth century philosopher, Søren Kierkegaard, tells us that life must be understood backward. But he also warns us against forgetting the other proposition, that it must be lived forward. It is with this perspective, I believe, that we should view our country, our system, and our future, and determine what we must do to sustain and nurture it.

As a student at a New England boarding school, I lived in a house where a century and a half before another young student sat down at his desk and wrote the lyrics for what has become one of America's greatest anthems:

My country, 'tis of thee, sweet land of liberty,
Of thee I sing.
Land where my fathers died,
Land of the pilgrims' pride,
From every mountainside
Let freedom ring!

And today freedom rings throughout the globe as never before in the history of mankind—because of America's mission, because of America's might, and because of America's will! This is America's time and that is our duty.

But there is a further injunction. It has always been America's mission to encourage and sponsor those who seek a new life—those who choose the future over the present, those who are willing to make sacrifices today to secure a better tomorrow. That is the strength of our people which assures the continued vitality of our land of liberty.

Today, as we approach the end of the century, we may reflect on the cataclysmic events at the beginning of the century which brought the United States into Europe and began a historic union between two continents, heretofore not only separate, but often hostile. The year 1917 signalled the emergence of the United States as a European power, indeed a world power. George M. Cohan, the songwriter, at that time wrote a song whose prescient refrain moves us even today:

> Over there, over there,
> Send the word, send the word, over there,
> That the Yanks are coming,
> The Yanks are coming,
> The drums rum-tumming everywhere.
> . . . .
> We'll be over, we're coming over,
> And we won't come back till it's over, over there.

But after five wars in this century in the defense of freedom, indeed, two of them fought on the continent of Europe, over 615,843 Americans never came back from "over there." They are still "over there"—young Americans buried in Flanders fields, in countless cemeteries and churchyards across the continent, indeed, many in nameless graves in forests deep and dark, on rugged mountain sides, in steaming jungles, around the globe, on nearly every continent in the world.

Today I would like to tell you about one of those Americans who went "over there" and never came back. I would like to tell you about an incident that had a profound effect on me, and served to reinforce my extraordinary pride in our country and our people and our ideals. Four years ago I was on the island of Bornholm to consecrate the grave of a young American flyer, Sgt. Harry Ambrosini, who was buried there. Bornholm is a little island in the Baltic Sea, halfway between Poland and Sweden, owned by Denmark. It was a raw, wet, wild Bornholm day. I was on that wind-swept island, in the graveyard of a thirteenth-century whitewashed church askew from age, and I was standing above the grave of this young flyer. Suddenly I thought, fifty years ago to the very day, the people on Bornholm heard the humming of airplane

engines. They looked up and saw an American bomber returning from a mission over Germany, off course, its engines aflame. Suddenly, a door pushed out and ten young men leaped from the airplane. One parachute didn't open, and I was standing above the grave where that young man was buried, at twenty-four years of age. He will always be twenty-four years of age. His family never saw him again, and for years they did not even know where he was buried. Poignant, sad, but majestic, when you ask the real question: Why was he there? Why was he ten thousand miles from his home? Why was he on an island whose name he had never heard? Why was he on this speck of land in the middle of a sea dark and deep? How had he come here to die? Because he saw his duty and he did his duty. His country called and he answered its call. He chose to offer his life because his sense of right demanded it. He died to free you and me, our children, and our children's children, from the curse of Nazism and totalitarianism. I am often told by my Danish friends that there is a lot of Danish blood in America. Let no man say that there is no American blood in Danish soil, in European soil.

War is brutish, inglorious, and a terrible waste. It leaves an indelible, tragic mark, and until countries cease trying to enslave one another, it will be continually necessary for us to accept our responsibility, and to do our duty, as did so many American men and women before us, as did Harry Ambrosini.

You here, members of the legal profession, officers of our courts, represent those core qualities, those signal ideals which have sustained and nurtured the growth of the greatest nation in the history of mankind. Americans have an ardent love of their country, an unquenchable thirst for liberty, and a profound reverence for the value of human life. "Freedom" remains a word that engenders feelings of patriotism and reverence. Perhaps more than any other concept, freedom encapsulates for most Americans the essence of what makes the United States so special—the "shining city on a hill" so often described in literature.

Today, the backbone of America's freedom remains the law and our legal system. We vote in free, fair elections. We worship according to our own faith. We associate freely with whomever we choose. And we are able to express our disagreement with our government freely and openly. Without the protection offered by our system of law, Americans might be subjected to tyranny by government or forced to live in a society ruled by mayhem and violence. Without law and due process, without you, America might be just another place where might makes right. Thanks to the genius of our constitutional system, Americans have been able to live in almost uninterrupted domestic tranquility, have seen the growth of an economy unrivaled in the world, and have watched the steady march of progress toward an open, just, and inclusive society.

America has fulfilled its commitment, not only to itself but to the rest of the world. America has given its time, its talent, and its treasure—none more valuable than its children—to assure that the winds of liberty that we unleashed in 1776 continue to blow inexorably around the globe. Pursuing the cause of freedom is our mission, our obligation, and our destiny.

In the wave of democratization that has swept the world in the last twenty-five years, more than thirty nations of widely different cultures and locales became democratic. Many of these transformations would once have been unimaginable. Democracy has sunk its roots deeply and appears to be settling in for a long stay. The United States played the central, indeed indispensable part in spurring and supporting this global transition. In the absence of American exhortation, these broad historical trends could easily have been cut short. Instead, they were seized upon by local leader after leader, from Corazon Aquino and José Napoleón Duarte to Lech Walesa and Boris Yeltsin, each of whom was favored with American support at crucial turning points. And this was done because of our commitment, our time, our organizations, such as NATO and OSCE (the Organization for Security and Cooperation in Europe).

In Europe, the role of NATO has changed dramatically from that of deterrence based on threat of mutual assured destruction to that of peacekeeping on a continent still unsure of where it is heading. The move toward crisis prevention and political rather than military solutions has been further strengthened by the emergence of OSCE, an important new institution working to assure European stability. Both are organizations created by the United States. Our government is constantly looking for ways in which we can provide added value to the very successful cooperation that already exists. And we must continue to bring American political will and leadership to this effort.

The present moment is one of relative safety and therefore offers special opportunities. It would be a timeless human tragedy if out of boredom, laziness, carelessness, or unfounded gloom, we failed to seize them. Today, almost a decade after the end of the Cold War, mankind has a chance to rid itself of the ideological, political, and military confrontation among states. There is a new world to be won.

Our goal has not been the conquering of lands but securing peace and stability. The American commitment to NATO exemplifies that. It provides the nations of Europe with a guarantee of their existing borders against aggression, which is what Europe has long sought.

Ironically, the role of the United States in Europe has become even more important since the end of the Cold War. We see that in Bosnia, in Kosovo. And not just in Europe but in every corner of the world, we see that the United States is the indispensable country. That role came to us not because we wanted it but because the world wanted it to happen, needed it to happen.

But the future does not belong to those who are content with today, apathetic both toward common problems and their fellow men, timid and fearful in the face of new ideas and bold projects. Rather, it will belong to those who can blend passion and courage in a personal commitment to the ideals and great enterprises of human society. This is the American dream. In achieving this dream, you, we, have literally changed the world.

Europeans always ask, "Where did your family come from?" I was aboard the George Washington, one of our great warships, an aircraft carrier in the Adriatic, with a group of Danish opinion makers. One of them asked one of the young sailors where he was from. The young sailor answered, "I'm from Ohio." "No, I mean, where is your family from?" He said, "Well, sir, they're from Ohio." "But where were your grandparents from?" The sailor said, "Sir, they're all Americans." And this innocent, thoughtful young man had the answer.

I think of my granddaughter, who is brilliant, beautiful, and talented, and she is four years old. She is a marvelous metaphor for the American nation and this new people we have created. Through her veins flows the blood of a signer of the Declaration of Independence who came to the United States from England, a captain in the Confederate army who came to the United States from Germany, and an ordinary soldier in the army of the Tsar who came to the United States from Lithuania. She is America! And as she grows up, it will fall upon her and her generation to sustain the role and obligation of our country to encourage, enhance, and protect liberty around the globe. In the words of Henry Wadsworth Longfellow:

> Sail on, O ship of State!
> Sail on, O Union, strong and great!
> Humanity with all its fears,
> With all the hopes of future years,
> Is hanging breathless on thy fate!

I know my granddaughter will be up to the challenge. I know we all are.

"AIN'T IT AWFUL" AIN'T GOOD ENOUGH!†

James W. Jeans*

Forgetting Who We Are

Today, I am going to share with you some random ideas about our profession, and I hope that you can jump with me from one thought to another. I'd like to begin with what in my mind was one of the most dramatic events in history, the story of the Israelites in Egypt. You all know the story: Joseph, victimized by sibling rivalry, being sold into slavery and sent to Egypt; the unsuccessful seduction attempts by Potiphar's wife; the false accusations; the imprisonment. Then through his power of divination and dream interpretation, he won the attention of the Pharaoh and was able to avert the tragedy of a seven-year drought. For this, he was vaulted to the position of prime minister of what was then the most powerful dynasty in the world. His brothers, his aged father, their handmaidens, their menservants, their flocks, and their herds were all brought down to Egypt, and they were assigned the land of Goshen, which was the most fertile part of a very fertile Nile delta. There they enjoyed all the perks that one might expect the family of the prime minister to have.

The next we hear of their descendants, however, they are no longer enjoying social and economic benefits, for they have been reduced to abject slavery. A single sentence explains this dramatic turnabout: "There arose in Egypt a king who knew not Joseph." He had forgotten the role that Joseph had played, and because of that forgetfulness, the fate of the Israelites was sealed. It is tragic when people in power forget who we are. It is even more tragic when *we* forget who we are. And I would suggest that that is one of the crises that our profession faces: I think to a large extent we have forgotten who we are. We have forgotten that we are a service institution and not a business. I am reminded of a notice that appeared in the *Kansas City Star*. Like most of our daily newspapers, the *Star* carries a column of "corrections and clarifications from the previous edition" and this correction appeared one day: "Because of editor error, an ingredient was omitted from the white bean purée recipe that appeared Wednesday in the food section. The missing ingredient was one-half

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pound of white beans." It wasn't a dash of paprika, or a quarter teaspoon of salt; it was the very essence of the recipe. And so often when I attend meetings about lawyering, I think sometimes we are missing the white beans of who we are and what the recipe should be.

The fact is that ours is a profession which demands ethical conduct, morality, and I even dare to say spirituality. Without this moral quality we are nothing. It is our defining quality, just as in the surgical arena the defining quality is cleanliness. If anyone brings a contaminating germ into the surgical arena, there will be sepsis, there will be infection, there may be death, despite the skill of the surgeon. Similarly, if anyone in the trial process introduces a contaminating germ—the germ of tyrannical attitude on the part of the judge, mendacity on the part of a witness, lack of self-restraint on the part of the jurors, greed on the part of the lawyers—then our efforts are spoiled. The whole process is tainted. We must continually remind ourselves that morality is the essence of our profession.

All of us want to deal with moral people, but some aspects of morality may not affect certain jobs. We would like to think that our automobile mechanic is a good man, but if he beats his wife, that doesn't mean he can't tune the carburetor. If our dentist cheats on Medicare that does not affect his or her ability to fill our cavities. But if we lawyers are immoral, it corrupts our whole profession. That's what we have to remember, and that's where we have fallen short.

I think each of us in our individual specialties fails that same challenge. Plaintiffs' lawyers to a large extent have forgotten who they are. When I was beginning the practice back in the early 1950s, plaintiffs' lawyers for the most part were individual practitioners, perhaps pairs of partners, with modest practices, imbued with the sense that their purpose was to speak up for those who could not speak for themselves, to defend the rights of the poor and the dispossessed. That purpose drove them in their tasks. Tom Lambert used to say that we must comfort the afflicted and afflict the comfortable. There was a sense of crusade. Some members of the current plaintiffs' bar, by contrast, seem to think that self-aggrandizement and economic success should be the measure of their professionalism. I find them to be one-dimensional cardboard caricatures of the altruistic crusaders who preceded them in our profession.

Many members of the defendants' bar too, in my judgment, have forgotten who they were and who they are. I'm sure that you're familiar with the case of *Williams v. General Motors*.[1] Let me read from the court's opinion:

[1] Williams v. General Motors Corp., 158 F.R.D. 510 (M.D. Ga. 1993).

> Defendants' counsel is asking the court to sanction Plaintiff's counsel for canceling a scheduled deposition so that he could be with his seriously ill father, after receiving a phone call in the dead of the night imploring him to come immediately. It appears that the only reason these sanctions are sought is because the Defendants, General Motors Corp. and Delco Remy, requested that their counsel do so.
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> The law has reached a sad state when one lawyer will take advantage of the personal crisis of his brother lawyer merely because his client tells him to do it.[2]

Corporate clients, unfettered by any sense of professional courtesy, of professional ethics and collegiality, dictated to their lawyers; and those lawyers, described as nationally prominent, succumbed to the direction of their clients.

When I read that case my thoughts turned to a defense lawyer in St. Louis, Wilbur Schwartz. I have to describe a brief vignette involving Wilbur to give you the flavor of what kind of person he was. Wilbur was a big man with a florid face and craggy features. He always chomped on the end of a fat cigar, and he had a gruff and growling voice. As a smooth-faced youngster, I was pitted against him in a trial. At various times when I was conducting direct examination, Wilbur would stand up and say, "Your Honor, I object. Aw, go ahead, Jimmy." I would go ahead, but all the while I was wondering what he was leading up to—and I found out in the closing argument. He stood up then and said, "Jimmy Jeans here, he's part of the firm of Hullverson & Richardson, the best plaintiffs' firm in St. Louis. When they have good cases in their office, Everett Hullverson comes and tries them, or Orville Richardson comes and tries them. When they've got a bad case, they send their fine young lads. Jimmy, you've done a good job, and don't worry, one of these days, you'll get to try some good cases." My intuition was to object, but I didn't know what to say. That was my introduction, and yours, to Wilbur Schwartz.

Some months later I was trying another case against him, and it had gone on for about a day. We had a recess. The claims manager had been sitting in the courtroom, and within my earshot Wilbur was conferring with him. Wilbur said, "I think the case ought to be settled. The demand is reasonable and we ought to settle." The claims man responded, "No, I don't think so. I think we ought to keep on trying this lawsuit and wait for a jury verdict." Wilbur looked him straight in the eye and said, "I'm your lawyer. I'm giving you advice. If you're not going to follow it, get yourself another boy." How I wish that the lawyers in *Williams v. General Motors* had said, "Go get yourself another boy,"

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[2] *Id.* at 511.

when the clients told them to bring sanctions against a fellow lawyer who had to postpone a deposition to go to the bedside of his dying father.

All segments of our profession carry some blame. Many prosecutors, for example, fulfill the role of truncating the whole criminal legal system, finessing the precious presumption of innocence, and finessing the role of the jury; they call a press conference, stand before a battery of microphones, and say, "The public need worry no more. We have caught the serial killer, the proof is very strong, and I am assured we will get a conviction, and he will be executed." They completely ignore the complications of the criminal system and all of its guarantees. Similarly, there are defense lawyers who become overnight mavens and give their learned evaluations or appraisals of what has just happened in court, despite the fact that they have not attended the trial or otherwise been privy to it. We all have our share of the blame for forgetting who we are.

Doing Something

Something has to be done about this crisis. We all say, "Ain't it awful?" and we wring our hands. That is not enough. Something has to be done, but there is a lot of resistance to doing anything.

We have been victimized by certain cultural evolutions that are occurring. Sometimes people compare cultural evolution with the maturation that goes on in the plant world: Cultures start off young and vigorous, then come to fruition, and then rot. I've always been impressed with the way in which earlier cultures have manifested this type of evolution. When Rome was in its relative infancy, the writings of Virgil created its national hero, Aeneas. The characteristic that is always attributed to Aeneas is virtue; he is the pious Aeneas, the good Aeneas, the virtuous Aeneas. Greece had evolved a little further, and the national hero there was Odysseus. Odysseus was never described as good or virtuous. It was the crafty Odysseus. In our own country, who are our heroes? If you say "George Washington," the knee-jerk response is "cherry tree, never told a lie." Abraham Lincoln? The knee-jerk response is "Honest Abe." We began with a pious persona. Yet in 1988 one of the candidates said, "It's not a matter of character, it's a matter of competence." Four years later the cry was, "Character is irrelevant." That's the cultural evolution through which we are going.

We as a profession are going through a similar type of evolution that can best be analogized to the evolution of certain arts and sciences. First comes the primitive stage, such as the drawings in the caves of southern France, etched by some early artist, always in profile, always with a single outline, nothing more. That is the primitive stage—simple, direct. We in American

law had a primitive stage. Read what Abraham Lincoln did when he was in practice; lawyers then would ride the circuits, meet their clients on one occasion, make a few notes, then return two weeks later and try the case. Pretty primitive.

From the primitive, we move to the classical. In the arts, we think of the Greek temples—their beauty of proportion, the fluted columns, the Doric caps—and we say they were so aesthetic, so pure. We too went through that stage in the law, in the latter part of the 1800s. We started getting a little bit organized. We started having law schools. We started having bar associations. We had codes of civil procedure. And you might say that that was our classical era.

What's the next step? It's the baroque. Whenever I think of baroque, I think of Victorian architecture, with scallops on the porch and turrets. In the parlor were tassels and doo-dads and knick-knacks and other clutter. No longer aesthetic, no longer functional, just excessive decoration. Does that have anything to do with the practice of law today? Think of the three- and four-day depositions, the scores and scores of interrogatories, the discovery process that consumes so much time and so much effort and so much cost.

Then, of course, the next stage in art is the surreal, defined by the dictionary as bizarre and phantasmagoric. Does that describe the O. J. Simpson case? Have we evolved into the surreal with some of our forms?

Thus, we are in the position of having to stop cultural evolution, professional evolution. That is a big job, and we shy away from it. We have the Hamlet complex: "The time is out of joint. O cursèd spite, That ever I was born to set it right!"[3] Let somebody else do it-—a typical human response to a major challenge.

We see it again and again in the Old Testament, such a repository of knowledge about the human spirit. First, we return to the time when the children of Israel were being held in slavery, and we find Moses, who had been reared in the Pharaoh's household but had fled after killing one of the Egyptian taskmasters, tending sheep on a hilltop in Midian. God appeared to him and said, "Moses, I want you to go back to Egypt and lead the children of Israel out of bondage and into the promised land." Wouldn't you expect him to say, "Oh, I'm so honored, God, that you've chosen me"? But you know what he did say: "I'm not a good speaker." God said, "Don't worry. I'll tell you what to say." And how did Moses respond? "Please send someone else."

Similarly, God appeared before Jeremiah and said, "Jeremiah, I need a prophet, and I've picked you. From your mother's womb I've had my eye on you. I want you to be my mouthpiece." Jeremiah's first response was, "I'm too young."

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[3] W. SHAKESPEARE, HAMLET, act I, scene 5, line 188.

Saul was perhaps the saddest example of all. He was one of the few men in the Bible who was described by his physical characteristics. He was head and shoulders above all the rest, tall and handsome. Samuel came to him and anointed him and said, "You're going to be the first king of Israel." Saul's response: "I don't think you understand. I'm from the tribe of Benjamin, the least important tribe. I'm from the family of Kish, the humblest family in the tribe. I don't have the credentials."

One final story, the story of Elijah. As you may remember, he had a face-off with the priests of Ba'al. He humiliated them in front of the whole assembly of people and then killed them. You would think that Elijah would be pretty much in his cups, knowing that he worshiped the true, powerful God; but Jezebel sent him a note saying, "Tomorrow at this time, you're going to be dead meat, just like my priests whom you killed," and Elijah fled. He went far into the wilderness and hid in a cave. God came to him and said, "Elijah, what are you doing here?" And he said, "I'm the only one, God. I'm the only one that's on your side." And God said, "No, there are 7,000 who have not bowed their knee to Ba'al."

We use all of these excuses—lack of talent, lack of experience, lack of credentials, lack of numbers—to justify not doing anything about our professional crisis. As I travel around, every time I see a graybeard I ask, "How do you like the practice now?" And there hasn't been a single one who hasn't responded, "It ain't no fun any more." Who is going to put the fun back in it? It's you and I, those of us who have positions within the bar and within the community to remind ourselves and to remind the public who we really are.

First of all, we have to have the right attitude, the belief that it can be done—and indeed it can. One of the most inspirational writers is St. Paul. If anybody faced dark days, it was St. Paul, who suffered imprisonment, torture, and other afflictions. He wrote, "We are pressed about on every side but not crushed, we are perplexed but not in despair, we have been persecuted but not abandoned, we have been cast down but not destroyed." Those could be words of comfort for us. The situation is not looking good, but we have the background and the wherewithal to summon a positive attitude.

I am reminded of a story about the Spartans at the battle of Thermopylae. About three hundred Spartans were facing thousands of Persians. They were in a narrow defile from which they could not escape and in which they could not maneuver. They knew they were going to be defeated, but they had a council of war, and someone reported, "The Persians are so numerous that when they throw their spears, they blot out the sun." A Spartan leader responded, "Good, we can fight in the shade." *That* is a positive attitude.

We need to cultivate that kind of spirit, and I firmly believe that change can be effected. This organization, which has demonstrated strong concern about professionalism, is well suited to lead the way. One element of what we need to do was addressed by Alan Greer in a recent article in your journal;[4] he advocated spending more time with our families, more time on civic activities, and more time developing ourselves outside of our practices.

Let me suggest that we adopt as a patron saint a character immortalized by Tennyson in his *Idylls of the King*, about King Arthur. The character is Gareth. In the offering entitled "Gareth and Lynette," Gareth is described as a young lad who grew up amidst all of the pomp and circumstance of a good castle life. He had nothing to do but chase the deer and engage in tournaments. One day he came before his mother and told her he was going to leave and go to join King Arthur's knights. His mother tried to persuade him to remain where he would be comfortable and safe, but Gareth replied, "O Mother, [h]ow can ye keep me tether'd to you—Shame. Man am I grown, a man's work I must do. Follow the deer? follow the Christ, the King, [l]ive pure, speak true, right wrong, follow the King—Else, wherefore born?"[5] What a wonderful motto for us all!

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[4] Greer, *The Ghost of Law Practices Past, Present, and Future*, 32 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 460 (1997).

[5] TENNYSON, *Gareth and Lynette* line 113, in IDYLLS OF THE KING (J. Gray ed. 1983).