

International Society
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HAWAII WELCOME
David Fairbanks

THE HIGHEST COURT: SELECTING THE JUDGES
Sydney Kentridge

VOTING FLORIDA STYLE: A LAWYER'S ELECTION ODYSSEY
Gerald F. Richman

TERRORISM—LIFE AFTER SEPTEMBER 11, 2001
Christopher Whitcomb

THE HUMAN GENOME PROJECT
Huntington Willard

LAUGHTER TRULY IS THE BEST MEDICINE
Steve Wilson

YOU CAN'T MAKE UP STUFF LIKE THIS
Will Durst

INDEX TO VOLUME 37

Quarterly

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October 2002

Number 4

CONTENTS

Hawaii Welcome David Fairbanks	437
The Highest Court: Selecting the Judges. Sydney Kentridge	440
Voting Florida Style: A Lawyer's Election Odyssey . . . Gerald F. Richman	457
Terrorism—Life after September 11, 2001 Christopher Whitcomb	464
The Human Genome Project Huntington Willard	475
Laughter Truly Is the Best Medicine Steve Wilson	486
You Can't Make Up Stuff Like This Will Durst	489
Index to Volume 37	495

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HAWAII WELCOME[†]

David Fairbanks*

Good morning, everyone, and aloha. Welcome to, or back to, the Hualalai. It is the most beautiful, magical, and spiritual place on this island and maybe in the state—maybe anywhere. We were here three years ago, but this time it's somewhat different. Some of you are three years older. I'm not. In fact, I'm repeatedly told that I don't act any older than nineteen. John Reed doesn't look a day older. Actually, he and Dot seem to be reversing the process, but he refuses to tell me what they take. Con Keating doesn't look any older either; he has always looked old. Then, there are some who are not here in body; I confess to missing Joel Boyden and others a lot. Some of us are here in too much body. I'm one of those.

As your welcoming speaker, I am pinch-hitting. Your first choice was United States Senator Daniel Inouye, sometimes pronounced “in no way.” But the Senator couldn't make it because of the press of legislation—Enron, campaign funding, important things like that. Your second choice, Governor Ben Cayetano, the first governor in the United States of Filipino ancestry, couldn't be here because he has been traveling to Japan and all over the United States, trying to assure people that it is safe to travel to Hawaii. You see, our tourism industry, on which we are far too dependent, is down \$800 million since September 11, 2001. We desperately need to do something to fix that; \$800 million is quite a figure for a state with a population of just over a million. Desperate, you asked me, and, desperate, I accepted.

The aging process, the passing of people, sometimes untimely, and the abrupt changes in our lives are all part of the natural progression of life. Although these events are not welcome, at least they are understandable, even intellectually acceptable. Besides, they usually happen to somebody else. But it isn't those predictable, foreseeable events that make this meeting different. Life is different. I'm not smart enough to know precisely why it's different, and perhaps there are as many different reasons as there are people. Perhaps it depends in part how life has shaped you up to this point. Yet, there can be no doubt that what happened in September affected all of us and millions of people in every country in the world. Each of us knew someone who was lost

[†] Address delivered at the opening of the Annual Convention of the International Society of Barristers, Four Seasons Resort Hualalai, Kailua-Kona, Hawaii, March 4, 2002.

* Cronin Fried Sekiya Kekina & Fairbanks, Honolulu, Hawaii; Fellow, International Society of Barristers.

or injured there, or a relative, or a friend of a friend, or a colleague of someone who was there. We know someone who's lost a job or wasn't able to get a job because of the economic aftermath. In Hawaii, hotel occupancy immediately dropped by twenty-five percent. It is still not back to where it was on September 11. For the year we are down fifteen percent. Visitor-related businesses—restaurants, small businesses—are gone, bankrupt. Air travel is more difficult, more irritating, time consuming, confusing. (Actually, I look forward to the pat-downs.) But there's a cloud, a sense of unease.

For me, there have been several basic consequences. September 11 certainly underscored the slender hold we have on life, how fragile, precarious, unpredictable, unfair it can be. September 11 made more urgent the need to live a meaningful, full life each day. It certainly provided an indelible lesson in the awful and awesome power of hate. There have been other lessons for other generations, and maybe each generation needs something like this. It was a frightening example of the destruction wrought in the name of religion, misguided, twisted, corrupted, fanatic religion. It served as a compelling reminder to look inward, to wonder whether mankind has really advanced at all in his relations with each other, to ask, "How should I respond beyond the immediate sorrow, outrage, and desire for revenge in the name of justice? What can I do to live a more meaningful life and improve my relationships with others, personally and professionally? What can I do to make this a better place, without necessarily giving up wine or laughter or irreverent humor?" Most of all, September 11 was a reminder to put things in perspective and to focus on what is important in life.

So this meeting is different from the others. Perhaps it's one of the more important meetings this group has ever held because never have the principles and purposes of this group been more needed in our system of justice—"to encourage the retention of trial by jury . . . and to resist its usurpation by lay arbitrators and government tribunals which fail to guarantee the basic rights of citizens"; "to encourage and to demand the full discharge of the ethical relationships owed by all"; "to abolish any animosity between counsel"; "to encourage the maintenance of amicable relationships between counsel in their personal and professional relationships"; and "to take such other steps as shall be necessary for the protection of the rights of citizens, the independence of the judiciary, and stature of the Bar." Never have the principles of honesty, respect, ethics, amicable relations, and the protection of the rights of all citizens been more important or more needed. And never have we needed more the kinds of people who are in this group: people who live these principles every day and who lead by example; people of character, honesty, ethics, sensitivity, integrity, strength; people of kindness and generosity; people of good will, gentle people, humble people, rational peo-

ple; people of good humor and good heart. Are you really all of those things? I know you are.

Things do move forward. The question is, how do they move forward? You've made a difference before and you will make a difference now. Frankly, you really have no choice. It is in your nature. It is in your character. You've already started, whether you've thought about it or not. And what better place to be right now than this place—Hualalai, the place reserved for the elite, for royalty, in the not-too-ancient past. What better place to reflect, to contemplate, to turn inward, to turn to each other, to heal, to renew yourselves, to renew friendships, and to renew your sense of purpose and your dedication to the principles and purposes of this group.

So when you take some time between the scheduled events in the next few days, look out at the ocean for a few more moments than just a glance. Watch the water change colors and moods. Smell the fresh air scented with salt. Listen to the ocean's voice, particularly in the evening, at night, and in the early morning. Listen to the voice of the wind, *ka makani*, as the wind and the ocean speak to each other, telling each other where they've been, what they've done, and what they've seen. Take some time during the day at different times to look up at Hualalai, wife of Hawai'i Loa, mariner, and the mother of Kona, and from whom came all the people of Hawaii, according to legend. See her distant handmaidens, Mauna Loa, the long mountain, and Mauna Kea, the white mountain. Watch the light change them during the day, and the land below them. See, during the day, how the clouds visit her and then leave so that she can see the bright night sky. Listen to *ka makani* again, higher up—sometimes angry, sometimes lonely, sometimes sorrowful, sometimes comforting, but always saying something. Listen to the songs and conversations of the birds, the laughing of the Erckels, the haunting cry of the Kolea bird. Let this place surround you, embrace you, and give you some measure of tranquility and peace and renewal. There's much to do here, much to see, but nothing is more important than feeling the spirit of this place and being with good friends. So it is with great pleasure that I welcome you to Hualalai. This is a special place, even for me, and it is an honor for Sharon and for me to be among you again. Mahalo, aloha.

THE HIGHEST COURT: SELECTING THE JUDGES[†]

Sir Sydney Kentridge*

Great honor as it is, it is nonetheless daunting to deliver the Sir David Williams Lecture in the presence of Sir David himself, and on a subject close to his own interests. The ideal David Williams Lecture would obviously be a lecture given by David Williams. But that is not to be—at any rate not this evening. My lecture, by definition then not the ideal lecture, will, I hope, be received as at least a personal tribute to an inspiring constitutional lawyer.

The highest court of the United Kingdom is not, strictly, a court at all. It is merely a committee of the House of Lords, the Appellate Committee. It sits ordinarily in a committee room in the House. As it is a committee, and not a court, its members do not sit in judicial robes or on a raised judicial bench, but unrobed at a table. The members of the Appellate Committee are full members of the House of Lords who are entitled to participate in the legislative processes of that House. Nonetheless, the core members of the Appellate Committee are full-time salaried professional judges, with the tenure and other rights of English High Court judges. There are twelve of them, known as Lords of Appeal in Ordinary, or, less formally, Lords of Appeal or the Law Lords.¹ They are appointed by the Queen, on the advice of the Prime Minister, who will have had one or more names recommended to him or her by the Lord Chancellor. The Law Lords constitute the final court of appeal for the whole of the United Kingdom. Appeals come to them from the Court of Appeal in England, from the Inner House of the Court of Session in Scotland, and from the Court of Appeal of Northern Ireland.

Lord Justice Asquith, later himself a Law Lord, once described the qualities of an ideal trial judge. That judge, he said, was expected to be quick, courteous, and right. This did not mean, he added, that the Court of Appeal was to be slow, rude, and wrong, for that would be to usurp the function of the House of Lords. These days the House of Lords, judicially, is seldom slow and never rude. Appeals are heard and judgments given with reasonable

[†] The Second Sir David Williams Lecture, Cambridge, May 10, 2002, to be published also in the *Cambridge Law Journal*.

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¹ "Core" members, because retired Lords of Appeal in Ordinary may continue to sit on the Appellate Committee until the age of seventy-five. More rarely, a peer of the realm who has left "high judicial office" may be invited to sit. Lord Cooke of Thorndon, formerly President of the New Zealand Court of Appeal, is a recent and distinguished example.

dispatch. As to being right or wrong, views on individual decisions obviously differ, but on the whole the practicing profession is well-satisfied with the work of the Law Lords. Now and at least for many years past the Appellate Committee has been intellectually impressive, impartial, fair-minded and, I believe, open-minded. It would be too much to expect that every appointment of a Law Lord should receive a one hundred percent endorsement from the legal profession (in which I include judges, practitioners, and legal academics), but in my time at the English Bar no appointment has caused major controversy, still less scandal. No plainly, or even arguably, unqualified judge has been promoted to the Lords. Nor, whatever government has been in power, has there during this time been any suggestion of political bias or preference in the making of appointments.

Why, then, has there been in recent years a flow of books, articles, research papers, and speeches questioning and indeed radically challenging the present arrangements under which the judges of our highest court are appointed and do their judicial work? Writers and speakers question whether the present qualifications for appointment to the highest court are appropriate. Should candidates, they ask, be sought from a wider pool? Should the appointments remain in the hands of the executive? Should our highest court become solely a constitutional court? All these issues are being debated with different degrees of vehemence. Possibly my favorable assessment of the present performance of the Law Lords is wildly wrong. But if not, what has given rise to the calls for reform?

ISSUES FUELING THE DEBATE

There is at present a fashion for general criticism of the judiciary, not particularly directed at the House of Lords. It may have something to do with the Millennium. We are told that we must have judges fit for the twenty-first century. Our judges, it is pointed out, are mostly white, middle-class, middle-aged males. They are therefore said to be out of touch with ordinary life, and not representative of our diverse population. They are appointed by a secretive process lacking transparency and democratic legitimacy.

There are three particular issues which have, I believe, fueled the debate about the Law Lords. The first is the peculiar constitutional position of the Lord Chancellor. He is a cabinet minister in charge of a department, and a legislator in the House of Lords, where he propounds and defends government policy. At the same time he is a judge, indeed the head of the judiciary. He may, if he chooses, sit on the Appellate Committee in any appeal, and when he does so he presides. But, unlike other judges, he has no security of tenure: he may be at any time removed from office by the Prime Minister.

As a cabinet minister he appoints all English judges below the Court of Appeal. Court of Appeal judges and Law Lords are nominated by the Prime Minister for appointment by the monarch. In reality, therefore, the power of appointment is with the Prime Minister, and it may be assumed that he generally acts on the advice of the Lord Chancellor. The judicial aspect of the Lord Chancellor's office has been attacked as a departure from the constitutional doctrine of the separation of powers, and as possibly incompatible with the European Convention on Human Rights. The attack has come not only from the less exalted ranks of the profession, but also most recently and most powerfully from one of the sitting Law Lords.² The desirability of the Lord Chancellor's triple role is not my theme this evening. I content myself with saying that the arguments are by no means all on one side. At all events, the controversy has naturally led to an examination of the Lord Chancellor's position as the *de facto* selector of the Law Lords.

The second issue is the call to separate the highest court completely from the House of Lords and to transfer its judicial functions to a newly created Supreme Court of the United Kingdom. The arguments for the change are partly constitutional³—the separation of the judicial from the legislative power—and partly practical. The practical aspect is that the Law Lords are physically tucked away in the uncomfortable interstices of the House of Lords. It is said that when, a few years ago, an additional Law Lord was appointed, a lavatory had to be converted into an office for him. A Supreme Court of the United Kingdom would merit a dignified and commodious building of its own, comparable to the Supreme Court buildings in Washington, Ottawa, or Canberra. Whether it follows that the highest court should no longer be part of the House of Lords is another question which I shall leave unanswered. This issue too has concentrated attention on the position of the Law Lords.

The third issue is one which truly warrants a reconsideration of all aspects of the appointments to our highest court. This is the passage of the Human Rights Act of 1998, which made the European Convention on Human Rights an integral part of United Kingdom law, and thus gave us what is in effect if not in name a bill of rights. It has given to British judges a power which they have not previously claimed, and which permits and requires hitherto unknown judicial interventions not only in the sphere of executive action but also in the sphere of legislation. Indeed, it was this prospect which provided

² Lord Steyn in his Neill Lecture, given at All Souls College, Oxford, on March 1, 2002. *See also* DIANA WOODHOUSE, *THE OFFICE OF THE LORD CHANCELLOR* (2001).

³ *See*, for example, the written evidence presented to the Royal Commission on the Reform of the House of Lords by JUSTICE, May 1999. The Senior Lord of Appeal, Lord Bingham of Cornhill, has spoken publicly in favor of the establishment of such a court.

the principal argument for those who opposed the incorporation of the European Convention into our law. Thus, Lord Mackay of the Clashfern, when Lord Chancellor, said in a speech in 1996:

[Incorporation of the Convention] would inevitably draw judges into making decisions of a far more political nature. . . . The question which would then be asked . . . is whether the introduction of such a political element into the judicial function would require a change in the criteria for appointment of judges, making the political stance of each candidate a matter of importance. . . . Following on from that is the question . . . whether their appointment should be subjected to political scrutiny of the sort recently seen in the United States.⁴

I do not believe that the Human Rights Act has so far politicized our judiciary. Nor do I think that it is likely to do so in the manner feared by Lord Mackay. One must remember that even before the Human Rights Act judgments of English courts not infrequently had considerable political consequences or at least aroused acute political controversy. To mention only two, the decision of the Divisional Court restraining the government of the day from financing the building of the Pergau dam in Malaysia,⁵ and the decision of the House of Lords in the case of General Pinochet.⁶ But Lord Mackay was not by any means wrong in pointing out that the exercise of judicial power under an incorporated Convention could now have a more directly political element. Before the Human Rights Act courts intervened to set aside an executive decision only when they concluded that the decision was either illegal or so irrational as to be outside the range of reasonable decision making. Now a reviewing court may be required to decide whether the balance which a decision maker has struck between individual rights and a conflicting public interest was the correct one—a decision which may have a decided political element. The Human Rights Act does not give the courts the power to strike down acts of Parliament even if they are incompatible with the rights embodied in the Human Rights Act. Parliamentary sovereignty is thus preserved. But in introducing any bill into Parliament the responsible minister must now state that in his opinion the bill either is, or is not, compatible with the Human Rights Act. The negative option is likely to be rare. Consequently, while the court's power is merely to declare an act

⁴ Speech to the Citizenship Foundation, Saddlers' Hall, London, July 8, 1996.

⁵ *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Limited*, [1995] 1 WLR 386.

⁶ *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147.

of Parliament to be incompatible with the Human Rights Act, such a declaration may have adverse political repercussions for the responsible minister and his government. The devolution of powers to Scotland is also likely to give rise to disputes which, under the relevant legislation, may end up in the Judicial Committee of the Privy Council. As that Committee is largely (although not entirely) made up of Law Lords or former Law Lords, there is further scope for judgments which may have a direct political effect.

QUALIFICATIONS AND QUALITIES

These considerations have led some legal commentators to ask whether the qualities and qualifications hitherto looked for in a Law Lord are still the right ones. The formal qualifications are simple—*either* two years experience of high judicial office *or* a qualification to appear as an advocate in any of the three high courts of the United Kingdom, held for at least fifteen years. Of course, in reality rather higher qualifications are needed. All the present Law Lords have been promoted from one or other of the three courts of appeal in the United Kingdom. All of them had been practicing barristers before their first appointments as judges. While the minimal statutory qualifications are the only legal fetters on the Prime Minister's choice of new Law Lords, there is a firmly established convention that there should be two Scottish Law Lords. And since 1988 there has always been a Law Lord from Northern Ireland. (The Law Lords at present include three graduates of universities in or near Cape Town, but that has not as yet crystallized into a constitutional convention.)

So much for the qualifications. What are the qualities hitherto looked for in a Lord of Appeal? The only publicly stated criterion is merit. When a vacancy occurs, the Lord Chancellor will recommend to the Prime Minister the person who appears to him the best qualified, regardless of gender, sexual orientation, ethnic origin or religion, and, of course, regardless of political affiliation. That tells us what is not relevant. To define merit is more difficult. In this context it must surely include outstanding intellectual ability as a lawyer, a judicial temperament, a sense of fairness, and considerable experience of the law in practice. I believe that those are the qualities that recent Lord Chancellors have looked for and, allowing for human error, have largely found.

It must at once be conceded to the critics that the Appellate Committee which merit in this sense has provided for us can hardly be said to be in any general sense representative. All its members stem from the practicing profession, and all had served for many years as judges. They are all white men and, if "middle-class" today means anything, I suppose they are all middle-

class. They would, I think, confess to being middle-aged, some more cheerfully than others. For my part I do not understand the call for a court to be representative. We are never told what sort of representation is contemplated or how it is to be achieved. Presumably no one in this country wants judges to be elected.⁷ On the United States Supreme Court, I understand, it is essential to have a spread of justices from different regions of the country. There is also now said to be a woman's slot on the Court, a Jewish slot, an Afro-American slot, and an Italian-American slot. It is said too that President Bush is now looking to appoint an Hispanic-American when the next vacancy occurs. I do not believe that anyone here could seriously advocate that type of representation.⁸

The concept of representativeness may be quickly discarded. A more fruitful concept is diversity. Diversity in a court of final appeal is in my view a good in itself. This does not mean that a woman judge on the panel, or a judge from a different ethnic background will necessarily decide a case differently from a white male judge. But their presence could enrich the court. The case for diversity was put this way in a recent article by Lady Justice Hale (one of only three women who have so far reached the English Court of Appeal):

. . . a generally more diverse bench, with a wider range of backgrounds, experience and perspectives on life, might well be expected to bring about some collective change in empathy and understanding for the diverse backgrounds, experience and perspectives of those whose cases come before them.⁹

I am certain that this is true. I speak from my experience as an acting justice of the South African Constitutional Court. It was a court the like of which had, needless to say, never before been seen in South Africa, and I doubt whether such a court has been seen anywhere else. Of the eleven judges on the court there were six white men, three black men, one black woman, and one white woman. Five had been high court judges, some had come directly

⁷ Dame Brenda Hale (Lady Justice Hale) has written that "judges should be no less representative of the people than the politicians and civil servants who govern us," but she nonetheless disavows any suggestion that judges should be elected. *Equality and Judiciary*, 2001 PUBLIC LAW 489, 503.

⁸ I once heard the argument for representativeness pressed to its limits. I was in Washington, D.C., when Judge Carswell, a Florida judge, was nominated for appointment to the Supreme Court by President Nixon. The American Bar Association, which assesses all candidates for federal judicial office, had reported that Carswell was "mediocre." A western senator, riding to his rescue, said to the committee that there were a great many mediocre people in the United States, and that they too were entitled to their representative on the Court. (Carswell was not confirmed.)

⁹ *Equality and Judiciary*, *supra* note 7, at 501.

from the Bar, at least four had at some time been academics, as well as having practiced as either advocates or attorneys. One had been a political exile. They were all good lawyers. But what I found overwhelming was the depth and variety of their experiences of law and of life. This diversity illuminated our conferences, especially when competing interests—individual, governmental, and social—had to be weighed. I have no doubt that this diversity gave the court as a whole a maturity of judgment it would not otherwise have had. Yet no one, black, white, male, or female was representing any constituency. The South African Constitution states only that the need for the judiciary to reflect broadly the racial and gender composition of the country must be considered when judicial officers are appointed.¹⁰ That was achieved.

The South African Constitutional Court was an entirely new court, established under a constitution that was a deliberate break with the past. Bringing an element of diversity into our highest court in the United Kingdom is a different problem. For practical purposes the immediate issue is the absence of women on the court. In the nature of things, the judiciary is chosen from senior practitioners, among whom the proportion of women is still small. There are no more than a dozen women among the approximately 120 judges of the High Court in England and Wales. Three out of thirty-six members of the Court of Appeal are women. One of those three is the respected President of the Family Division. The other two, while also respected, are comparatively junior on that court. There are three women among the thirty-two judges of the Court of Session in Scotland, none as yet in the Inner House, which is the appellate court. As far as I know there are no women in the higher courts of Northern Ireland. How long are we to wait for women judges to make their way up to the House of Lords? Can what has been called the trickle-up process be accelerated? Perhaps it can. Affirmative action is a distasteful expedient, if it means appointing a person not really up to the job, on grounds of gender or race. Among other things it is humiliating for the person so appointed. But, if there is a choice to be made between a number of well-qualified candidates, to give deliberate preference to a woman among them is surely justifiable in the public interest, and would be for the long-term benefit of the court. It could theoretically fall foul of the jurisprudence of the European Court of Justice¹¹—but choice of the best candidate has in any event an inescapable subjective element, and the selection of a well-qualified Lady of Appeal would, I hope, be applauded.

¹⁰ The Constitution of the Republic of South Africa Act, No. 108 of 1996, sec. 174(2).

¹¹ See *Kalanke v. Freie Hansestadt Bremen*, [1995] ECR I-3051; [1995] IRLR 660; *Marschall v. Land Nordrhein Westfalen*, [1997] ECR I-6363; [1998] IRLR 39.

Given that the major task of a final court of appeal is to decide important questions of law, some writers have suggested that some diversity could be achieved by appointing senior legal academics direct to the highest court.¹² There is precedent for this in the United States. Justice Felix Frankfurter, who was transplanted by President Roosevelt straight from the Harvard Law School to the Supreme Court of the United States, had had no judicial experience. He subsequently gave a public lecture, celebrated or notorious in its time, which was in effect a defense of his own appointment.¹³ His theme was that the work of the U.S. Supreme Court was so different from that of other courts that prior judicial experience was an irrelevance. It is not for me to say that the eminent justice was wrong, but his words certainly have no application to the House of Lords. The Appellate Committee, unlike the U.S. Supreme Court, has to deal with the whole field of private as well as public law. Nor is its work merely to solve legal conundrums. There are few appeals which do not entail a careful study of the facts and, often, an understanding of the processes and strains of litigation. A Law Lord with neither prior judicial experience nor long years in practice would be at a considerable and possibly incurable disadvantage. Besides, judicial qualities are best assessed through performance on the bench in the lower courts. Of course, there have been notable exceptions. English Law Lords have occasionally been appointed directly from the Bar. The last of these, Lord Radcliffe, was so appointed by Mr. Atlee in 1949—but Lord Radcliffe was a Q.C. of great experience and exceptional brilliance.¹⁴

I must make it clear that I am certainly not against the appointment of academics to the bench. But I believe that they should come to judicial office by the same route as practicing barristers or solicitors. Some academics have become recorders and in appropriate cases sit as deputy High Court judges. I hope and expect that some of these appointments will lead to a full-time judicial career, with every prospect of promotion on merit to higher courts.

Wherever the Law Lords come from, whatever their gender, the question remains—in the era of the Human Rights Act, should we look for different qualities in our top judges? Sensitivity to social issues, and an appreciation of the importance of individual rights would be desirable qualities—if only there were some way of discerning them. Perhaps the best we can hope for is that a marked absence of those qualities will disqualify. About two years

¹² See, e.g., Le Sueur & Cornes, *The Future of the United Kingdom's Highest Courts* 115 (2001) (research paper, School of Public Policy, UCL).

¹³ Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, first Owen J. Roberts Memorial Lecture, given at the University of Pennsylvania Law School, 1957. Justice Frankfurter said that “the correlation between prior judicial experience and fitness for the functions of the Supreme Court is zero.”

¹⁴ I shall refer below to the political exceptions.

ago a Scottish judge was engaged in an appeal in which the appellants had invoked their rights under the European Convention. Before the conclusion of the appeal the judge published articles in the press roundly attacking the incorporation of the Convention into United Kingdom law. He suggested that the Convention would provide “a field-day for crackpots, a pain in the neck for judges and legislators and a goldmine for lawyers.”¹⁵ I have no reason to think that the learned judge aspired to the House of Lords, but one would hope that such views would be a positive disqualification for highest judicial office. Affirmatively, I would suggest that experience of public law should count more heavily. Broad jurisprudential interests will be more desirable than ever.

Some suggestions have gone further. Sir Thomas Legg, Q.C., the former Permanent Secretary in the Lord Chancellor’s Department, whose knowledge of the judicial appointment process, and of the judiciary, is unequalled, has written that with the “advent of the new era” (i.e., the human rights era) there was a case for “enlarging the courts’ political understanding and horizons” by appointing some lawyers, whether academics or practitioners “with experience of public life.”¹⁶ Professors Le Sueur and Cornes in their indispensable research paper, “The Future of the United Kingdom’s Highest Courts,”¹⁷ speak of the desirability of judges at the highest level having political astuteness, and the “requisite political skill,” in a “broad, non-partisan sense.” They say: “There is an argument that the process of wringing politics out of the appointments process in the last twenty years or so [I would say the last forty years or so] has left the senior judiciary over-insulated from the political world.”¹⁸

It is difficult to disagree with those views in the abstract. But the problem is to define political astuteness even, or especially, in the “broad, non-partisan sense,” and to identify those who have it. As far as I am aware, none of the present High Court judges has been a Member of Parliament. And it is now rare for leading lawyers to enter the House of Commons.

It was not always so. In the nineteenth century, and well into the twentieth century, judicial appointment was a well-recognized reward for party political services. Research carried out by Professor Harold Laski, for his 1932 essay “The Technique of Judicial Appointment,”¹⁹ established that between 1832 and 1906, out of the 139 judges appointed in the period,

¹⁵ See *Hoekstra v. H.M. Advocate* (No. 3), [2000] HRLR 410, in which another Scottish appellate court set aside the decision of the court of which that judge had been a member.

¹⁶ Legg, *Judges for the New Century*, 2001 PUBLIC LAW 62, 68.

¹⁷ LeSueur & Cornes, *supra* note 12.

¹⁸ *Id.* at 113.

¹⁹ Laski, *The Technique of Judicial Appointment*, in *STUDIES IN LAW AND POLITICS* (1932).

eighty were Members of Parliament at the time of their appointment, and another eleven had stood as candidates for Parliament. Up to the time of the second world war the Attorney-General and Solicitor-General of the day had by convention the reversion of the highest judicial offices, as vacancies came up. In that era the convention was accepted. It led indeed to the appointment of some of our most eminent judges. The formidable nineteenth century Master of the Rolls, Sir George Jessel, was Solicitor-General when appointed. Lord Macnaghten, elevated to the House of Lords in 1887 from the unpromising springboard of Attorney-General for Ireland, was possibly the most brilliant Law Lord of his time. But these political appointments came to be questioned. When, in 1923, Sir Ernest Pollack, a not particularly impressive Solicitor-General, was appointed Master of the Rolls there were protests in the press and from the legal profession. I must, however, add that after he had sat in his first appeal, counsel who had been in his court was eagerly asked by his colleagues for his impression of the new Master of the Rolls. "Disappointingly good," he reported. No such story palliates the appointment of his contemporary Lord Hewart, the Attorney-General who was made up to Lord Chief Justice in 1922, and held that office until 1940. Mr. R.F.V. Heuston, that most learned and critical historian of the judiciary, expressed the considered opinion that Hewart was the worst Chief Justice England had had since the end of the seventeenth century.²⁰

In the 1940s and 1950s a few politicians were appointed to the bench and ultimately reached the House of Lords. Their ability and impartiality could not be questioned.²¹ In Scotland, for reasons relating to the nature of the Scottish legal profession, Lord Advocates (in effect the Scottish equivalents of the Attorney-General) have continued to be directly appointed to the higher judiciary, including the House of Lords. One of them was Lord Reid, one of the truly great judges of his time. But I have no doubt that the time has passed for transfers from politics to the bench. Something may indeed have been lost, but more has been gained. To try to re-introduce undefined political experience as a qualification would be a step backwards on a slippery slope. Lord Salisbury, Conservative Prime Minister at the turn of the nineteenth and twentieth centuries, (as reported by his daughter) said that within certain limits of intelligence, honesty, and knowledge of law one man would make as good a judge as another, and a Tory mentality was ipso facto more trustworthy than a Liberal one.²² Ours is a more fastidious age. We do not want to slide back in that direction.

²⁰ R.F.V. HEUSTON, *LIVES OF THE LORD CHANCELLORS, 1885–1940*, at 603 (1964).

²¹ I have in mind Lord Somervell of Harrow, Lord Donovan and Lord Simon of Glaisdale. There may have been others whom I have overlooked.

²² Quoted in HEUSTON, *supra* note 20, at 37.

A related question which has been raised by the Human Rights Act is whether our highest court ought to become solely a constitutional court, like the constitutional courts of Germany and some other European countries and, more recently, South Africa. For my part I see no need for such a court in the United Kingdom. There were reasons of history, in both Germany and South Africa, not entirely dissimilar, for a separate constitutional court under a new constitution which was intended to be a complete break with an oppressive past. Significant as the Human Rights Act is, it does not constitute the same sort of revolution. On a practical level, cases on human rights in the United Kingdom can seldom be categorized as purely constitutional cases. They usually entail consideration of the common law, both civil and criminal.²³

The Law Lords, in my respectful opinion, have shown themselves fully capable of handling the jurisprudence which has developed from the European Convention on Human Rights, and have already demonstrated that human rights cases in this country do not call for a separate panel of human rights specialists. I should like to emphasize what is sometimes forgotten when we speak of the need for judicial sensitivity to human rights issues. A culture of rights does not mean that the individual must always win against the state, or that every individual right must be extended to its furthest limit. Human rights adjudication requires above all a sense of proportion and balance.

METHOD OF SELECTION

What remains to be considered is the manner in which the judges of the highest court are selected. It is in this context that we hear the words “transparency” and “democratic legitimacy.” As I have said, there are no formal constraints on either the Prime Minister or the Lord Chancellor in selecting Law Lords. Needless to say, in recent times the Lord Chancellor has consulted very widely before making any recommendation. This is and has been his practice before making any judicial appointment. Again, Sir Thomas Legg is the invaluable source. For appointments at High Court level and above, the Lord Chancellor consults a small group of what Sir Thomas calls “top judges.”²⁴ There is also informal consultation, in some cases, with other branches of the legal profession. A report by Sir Lionel Peach, the former Public Appointments Commissioner, has concluded that the Lord Chancellor’s system was as good as any he had seen in the public sector—

²³ As Mr. Justice David Steel remarked in a recent (unreported) case, “The tentacles of the Human Rights Act reach into some unexpected places. The Commercial Court, even when exercising its supervisory role as regards arbitration, is not immune.”

²⁴ Legg, *supra* note 16, at 64.

which I assume was intended as a compliment. I would agree with Sir Thomas's conclusion:

Like any system, this one should be judged by its results. Many, including most of its critics, accept that it has produced a judiciary of high overall quality. There is no serious suggestion that the power of appointment has been abused for political or other improper purposes.²⁵

As long as this system remains, its democratic legitimacy comes from the democratic accountability of the Prime Minister and the Lord Chancellor. As to transparency, the system itself is well known. And the appointments themselves are open to the judgment of the public. I can see only disadvantages in disclosing the reasons why the Lord Chancellor and the Prime Minister have preferred Lord Justice *A* to Lord Justice *B* for a vacancy in the House of Lords. Mr. Marcel Berlins of *The Guardian* has extracted from the Public Records Office an entertaining account of the appointment of two new Law Lords by Mr. Atlee in 1949. One name put up for consideration was Lord Merriman, then the President of the Probate, Divorce and Admiralty Division of the High Court. "Soundings" were taken by the Lord Chancellor and his permanent secretary, and their report was that:

Lord Merriman would be most unsuitable for promotion; that he has not the requisite capacity; and furthermore, that if he were appointed he would soon put up the backs of his colleagues and they would all be at sixes and sevens. So strongly does the Master of the Rolls [Lord Greene] take this view that if Lord Merriman were appointed, he (the Master of the Rolls) would be unwilling to accept a lordship of appeal and would prefer to stay where he is. By contrast both the Lord Chief Justice and the Master of the Rolls agree that Cyril Radcliffe would make an admirable lord of appeal.²⁶

So Merriman was not appointed, and Greene and Radcliffe were. What possible good would it have done either for Merriman or the appointment system if, in the name of transparency, the reasons for the Prime Minister's choice had had to be made public?

When I had reached this stage in the preparation of this lecture I began to feel qualms, if not dismay. It seemed that in a lecture given in honor of so

²⁵ *Id.* at 65.

²⁶ *The Guardian*, March 20, 2002.

creative and original a legal thinker as Sir David Williams, I was doing no more than defend the status quo. I fear that that has turned out to be largely true, but not entirely. The present system of selecting the higher judiciary, and especially the Law Lords, has a potential flaw, notwithstanding its successful outcomes in recent years. The flaw is that it depends so heavily on the judgment and integrity of the Lord Chancellor of the day. Lords Hailsham, Elwyn-Jones, Mackay, and Irvine, to name the four most recent Lord Chancellors who have made appointments to the Lords, have been impeccable in avoiding any hint of political favoritism or any basis of appointment other than merit. But that is no guarantee for the future, especially as it is not inconceivable that the role of the Lord Chancellor in government will change. If his judicial role were one day to disappear, a future Lord Chancellor might not even be a lawyer.

I firmly believe that the appointment of judges, including those of the highest court, should remain the responsibility of the executive branch of government. In some European countries, such as Germany, Spain, and Italy, the judges of the highest court, the constitutional court, are elected by the legislature according to varying procedures, which usually require a special majority vote. Those countries no doubt have good reasons for choosing that system, and it presumably works to their satisfaction,²⁷ but I do not think that election of judges by Parliament is a serious runner in this country. It would make judicial appointments the subject of political conflict or, no more creditably, of political deals.

Very much the same objections would apply to any attempt to introduce a parliamentary confirmation process akin to the American system (commanded by their Constitution) of requiring executive appointments of federal judges, including justices of the Supreme Court, to be subject to confirmation by the Senate. The bitter public conflicts over the nominations of Judge Robert Bork (who was rejected) and Justice Clarence Thomas (who was confirmed) have diminished whatever attraction that system might otherwise have had for us.²⁸ The American system must have its advantages—I have been told that the process gives a certain confidence to the judges who have survived it—but again I do not think there is any real belief here that it is an exportable system.

²⁷ I cannot refrain, however, from quoting a news item which I saw last month in an Italian newspaper: Not enough members of parliament showed up on Thursday afternoon to allow for a binding vote on the appointment of two judges to the Constitutional Court. The vacancies have remained unfilled for almost two years due to political bickering.

Italy Daily (Milan), April 12, 2002.

²⁸ One may perhaps apply to nominees to the Supreme Court the current dictum on candidates for the U.S. Presidency—"Presumed innocent until nominated."

A more promising suggestion is a judicial appointments commission. There are different models for such commissions, to be found in some European countries, in some states of the United States, in the Commonwealth, and now in Scotland. In some models it is the commission which actually makes the appointments, taking it out of the hands of the executive. In others, including Scotland, it merely makes recommendations to the executive. Another model is the Judicial Services Commission established by the new South African Constitution.

The political background to the South African Commission is essential to its understanding. At the time of the political changeover there was only one black judge and one woman judge. Moreover, during the forty-five years of apartheid government the standing of the South African Supreme Court had been diminished by far too many appointments of judges whose only apparent qualification for the bench was their adherence to the party in power. The object of the Judicial Services Commission under the new constitution was twofold. One was to prevent unmeritorious candidates being appointed on political or other improper grounds. The second was to encourage the transformation of the judiciary by the appointment of suitable black lawyers and women lawyers. Accordingly, the executive power of appointment has been fettered.²⁹ Where a vacancy occurs in any of the courts, including the Constitutional Court, judicial aspirants must apply to the Judicial Services Commission (or allow their names to be put forward by others). They must then appear before the Commission to be interviewed. It follows that the applicants are in open competition with one another. The sessions are open to the public and the press but are not televised. At the end of the process the Commission is expected to send up a shortlist of approved candidates for each vacancy. The President of South Africa may appoint any of those on the list or reject them all, but he may not appoint anyone not put up by the Commission.

The first requirement of any workable judicial service commission must be a composition which inspires confidence, and which is itself not solely in the hands of the executive. The South African Constitution makes elaborate provision to this end. The members include the Chief Justice (who presides); a Judge President of one of the provincial divisions of the High Court, designated by the other Judges President; two practicing advocates (barristers) nominated by their profession; two practicing attorneys (solicitors) similarly nominated; a teacher of law designated by teachers of law at South African

²⁹ The statutory provisions governing the functions of the Commission are to be found in the Constitution of the Republic of South Africa Act, No. 108 of 1996, sections 174 and 178. The Commission has established its own procedures.

universities; ten parliamentary representatives chosen by the two houses of parliament in a way which ensures that opposition parties have equal representation; and four designated by the President as head of the executive after consulting all leaders of parties in the lower house of Parliament. Thus, while only seven members have to be lawyers or judges, one sees a genuine attempt to avoid government domination of the Commission.

Whether the Commission has fulfilled all expectations is debatable. I can only give my impression. I would say that it has succeeded in eliminating some poorly qualified candidates who might otherwise have hoped for political favor. It has not, in my opinion, been sufficiently rigorous in ensuring that legal knowledge and experience accompany the other qualities needed for the transformation of the judiciary. It is my opinion too that the non-legal members of the Commission have contributed little to the Commission's expertise. Yet, in general I have no doubt at all that the Judicial Services Commission is in South African terms a huge advance on the old system of unfettered executive appointment.

Notwithstanding the reservations which I have expressed, the South African experience convinces me that an independent commission would be a valuable addition to the process of selecting the judges of our highest court. I do not, however, think that we need a commission to select or nominate the judges on the South African model. Unlike South Africa, the United Kingdom does not face the problem of changing a system which was riddled with racial inequality and political and other forms of favoritism. Here the objective would be to ensure as far as humanly possible that non-political appointment on merit will continue to be the rule. What I suggest is a relatively small committee, whose sole function would be to consider any appointment of a Law Lord proposed by the Lord Chancellor. The committee would receive in confidence all the material on which the Lord Chancellor had based his provisional choice, and would, if necessary, question him on why, for example, he prefers candidate *A* to candidate *B*. The committee should have the right to be consulted and to give advice and should have the power for good reason to veto a proposed appointment. I would suggest that the majority of members be drawn from the active profession, by which I mean judges, barristers, solicitors, and legal academics, together perhaps with a recently retired Law Lord. There should be room for a senior civil servant, not in the Lord Chancellor's department, or another layman with experience of appointment processes in other contexts.³⁰

³⁰ The possibility of a commission to scrutinize all judicial appointments (which would be an enormous task) raises issues beyond the scope of this lecture. There is already an independent Judicial Appointments Commissioner who has no role in making appointments but has power to scrutinize the processes of the Lord Chancellor's department.

I would avoid public hearings of any kind. The South African experience shows that public hearings, however courteously conducted, may be humiliating for rejected candidates, especially those who are already judges and have aspired to promotion. Competitive candidacy between judges is in itself distasteful and diminishes respect for the judiciary. In the light of calls for a public process, in the name of "transparency," it is perhaps worth looking at some of the questions which have been put to candidates appearing before the South African Commission. There are sometimes searching questions about the candidate's activities and attitudes in both the old South Africa, and the new. In one case a judge of very long experience who sought promotion was closely questioned about his previous membership in a secret society devoted to promoting Afrikaner nationalism and its ideology. In another case an application by a candidate who had been an industrial arbitrator was opposed by a party which had appeared before him in that capacity. The objection to his appointment was based on the allegation that his conduct of the arbitration had shown a disparaging attitude to women employees. He was interrogated in detail about his questions to witnesses and his findings. One may also recall the questioning of Robert Bork in the United States Senate Judicial Committee. He was called on to defend a decision he had given as a federal circuit judge holding that a chemical company was entitled to require women employees to undergo sterilization if they wished to continue in certain jobs. He was also asked whether he would, if appointed, vote to overrule the Supreme Court's decisions on abortion and contraception. He was questioned about his part in dismissing the Watergate special prosecutor, Archibald Cox, fourteen years earlier.

It is not for me to say that in the contexts of South Africa and the United States such questioning was improper or unnecessary. What these examples do show, I suggest, is how inappropriate, if not pointless, interrogation by a commission, even in private, would be in our judicial context. I would ask those who advocate the interrogation of candidates for high judicial office what sort of questions could usefully and properly be put to them. I cannot think of any. Although some judges including Law Lords may be popularly regarded as liberal and others as conservative, their views are not derived from party allegiance, if indeed they have any, nor from extreme ideologies, nor even from what Lord Mackay called a political stance. In this country issues like abortion or the penalties for murder are not electoral issues and do not arouse the ferocious political debate that they do in the United States. When a new Law Lord is appointed there is no speculation on what his views will be on any issue likely to come before him. In England, unlike the United States, the judges of the highest court are not selected in order to satisfy particular political constituencies. Nor is there any equivalent here to the

understandable South African sensitivity about a judge's pro-apartheid past. Naturally, a judge's ability as evidenced by his or her judgments would be taken into account in any selection process. But that judges should be called on to defend their judgments, even in committee, is not only distasteful but is, surely, incompatible with the independence of the judiciary. It cannot be justified by words like "transparency" or "accountability."

This is a long path by which to have reached so modest a conclusion—Lords of Appeal to be appointed much as they are now, subject only to scrutiny and possible veto in extreme cases by an independent commission. This is not to disparage the research and thought of the observers of the House of Lords who have advocated more radical change. It is right that the court which is the ultimate protector of our liberties should be critically observed and appraised. But we should also keep in mind the limitations of institutional safeguards, whether simple or elaborate. In the end we shall still have to rely on the wisdom, integrity, and good sense of the judges who sit in our highest court.

VOTING FLORIDA STYLE: A LAWYER'S ELECTION ODYSSEY

Gerald F. Richman*

On November 7, 2000, I cast my vote in Palm Beach County on the now infamous butterfly ballot. On the left page George W. Bush was listed first and immediately below his name was my intended candidate, Al Gore. Fortunately, before punching the second hole I realized that would have been a vote for Pat Buchanan whose name was on the opposing page along with other names, such as those of the candidates for the Socialist and Workers parties. This placement was in direct violation of Florida Election law¹ and unquestionably served to confuse the voter.

That night, I watched with the rest of the world as Gore was declared the winner in Florida shortly after the polls closed, based on exit polls, only later to be declared the loser, and still later to be declared in limbo because the vote was “too close to call.”

On November 8, at noon, I received a call from a reporter who put me in touch with a Democratic voting website, which was seeking assistance compiling affidavits of voters who were extremely upset that they had been misled by the confusing ballot and had voted for Pat Buchanan. By 4:00 p.m. I had been contacted by lawyers for plaintiffs who wanted to file lawsuits challenging the butterfly ballot in Palm Beach County, and I was specifically asked if I could have a complaint filed by 4:30 p.m. I said I could; in fact, I had already drafted federal and state complaints, ready for filing. At 4:15 p.m. I was told to stop because the Democrats wanted to rethink their position.

On November 9 I participated in a conference call with eighteen other lawyers, including the general counsel for the Democratic National Committee. This was an hour-and-a-half-long discussion of strategy. I was asked if I believed the butterfly ballot challenge would be successful, and I

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¹ Florida law required that a machine ballot “shall as nearly as practicable conform to the requirements of the form of the paper ballot for that election.” Fla. Stat. § 101.27(3). The general election ballot statute specified that the voter was to “place a cross (x) mark in the blank space *at the right* of the name of the candidate for whom you desire to vote.” Fla. Stat. § 101.151(3)(a) (emphasis added). Further, the ballot instructed the voter to “vote all pages,” which necessarily would result in an overvote because there were presidential candidates on two separate pages. Not surprisingly, there were more than 19,000 overvotes in Palm Beach County alone, and Pat Buchanan received 3,407 votes—many from overwhelmingly democratic precincts such as Century Village—even though he received only 561 votes in far more populous Miami-Dade County. The illegal ballot design and placement and the contradictory instructions easily explain why many voters had their ballots disqualified or voted for the wrong candidate.

responded “yes.”² Unfortunately, by the next day I was “out of the loop”; some top Gore strategists had decided to put all of their eggs in the “recount basket,” seeking to rely on mandatory recount challenges that are permitted under Florida law where a candidate wins by less than one half percent of the vote.

While we then proceeded to assist in compiling affidavits, I was no longer involved in the core election challenge activity until November 20, when I received a phone call from the DNC general counsel telling me that a major contributor to the Democratic Party, lawyer Harry Jacobs in Seminole County, had filed an absentee ballot challenge that was scheduled to be tried one week later. If successful, the case could win the election for Gore. I was told that the Democratic Party could not support or be involved in the action, but it was seeking volunteer counsel for Harry Jacobs because of his party loyalty, and he needed strong lead counsel to try the case. Figuring this would be a one-week commitment over the long Thanksgiving weekend, I called Harry Jacobs and, doing what you are not supposed to do in the army, volunteered.

On November 21 I arrived in Seminole County, was in court that afternoon, and began working with other volunteer lawyers from New York, Washington, D.C., Seminole County, and Miami.

On November 22 we were pushing for a fast track deposition schedule. The Republicans succeeded in having the trial postponed to November 29. The judge agreed to let us take numerous depositions but would not allow us to depose the county election supervisor’s employees over the Thanksgiving weekend. On Monday, November 27, after we learned that the judge’s own campaign staff had violated the absentee ballot election law, apparently without her knowledge, by illegally filling in voter identification numbers that had been left off of absentee ballots in her re-election campaign, we agreed to the Republican Party’s motion to have the case transferred to Leon County, home of the state capital, where it should have been filed in the first place.

That same afternoon, we flew from Orlando to Tallahassee, filed an amended complaint at 4:45 p.m., and waited anxiously as the clerk’s office computer randomly selected a judge. The judge selected, Nikki Ann Clark, an African-American woman who had been involved in the civil rights movement and had been appointed by a Democratic governor, was probably the best draw of the pool of five judges.

We immediately requested a hearing from the judge’s assistant and were told that the judge wanted a formal motion and would not hear us until the

² The issue of the butterfly ballot was never fully or properly decided. For a full discussion of the butterfly ballot issue, as well as other election law issues, see Berger & Tobin, *Election 2000: The Law of Tied Presidential Elections*, 26 NOVA L. REV. 647, 702 (2002).

next day. On November 28 she set a fast track schedule, and the case was to be tried early in the week of December 4. We spent the next several days assembling an instant law firm of sixteen volunteer lawyers, complete with rented word processors and research facilities, in donated space at the headquarters of the Tallahassee Federation of Teachers. We were deluged with a flurry of paperwork and legal maneuvers by six defense firms. On one Saturday, three other lawyers and I took seventeen hours of depositions on a double track while other lawyers on our team, some of whom were flying back and forth between New York, Washington, Miami, and Orlando, wrote briefs, researched the law, sought out witnesses, and analyzed absentee ballot request forms, with the aid of a team of paralegals and a handwriting expert. Everyone pitched in and left their egos at the door, while I had the unique honor of being the quarterback for an outstanding assemblage of legal trial talent.³

We quickly established through stipulation and discovery several salient facts: To obtain an absentee ballot in Florida, the elector must sign the absentee ballot request form and must include among other things the elector's voter identification number. When the Republican Party did a mass mailing to register Republicans, it used a printed form that did not include a space for the voter identification number, and there were no instructions to the voter to insert that number. When the forms were submitted to the office of the Seminole County Supervisor of Elections, the forms were rejected as void, as required by law. Upon discovering the mistake, the Republican Party contacted the Elections Supervisor, Sandra Goard (who happened to be a Republican who was herself running for re-election), and asked to obtain and correct the void forms. The Elections Supervisor agreed to allow a Republican operative (at one time three operatives) to come to her office and add the voter identification numbers to the forms.

This was not disclosed publicly until a radio reporter discovered it about a week before the election. The Democratic Party Chairman then protested to the Elections Supervisor, but she minimized the issue, leading him to believe that it was a minor matter—not disclosing that more than 2,000 absentee ballot request forms had been altered. Out of a feeling that two wrongs don't make a right, Democrats did not request a similar opportunity or take any further action before the election. Harry Jacobs learned of this improper procedure at the canvassing on November 8 and filed a protest, as did a lifelong Republican who was appalled that the election supervisor's office was being used to favor one party. The Elections Supervisor initially admitted that

³ On our team were John R. Whittles, Alan G. Greer, Scott Perwin, Pamela I. Perry, Kent Spriggs, Robert D. Lenhard, John Cuti, Jonathan S. Abady, Ilann M. Maazel, William C. Hearon, Eric Seiler, Katherine Pringle, Glenn M. Klausman, and Joseph M. Taraska.

someone might have been there for “one to two days”—but when her deposition was taken, she admitted that a Republican operative had been there *nine to ten days*. Then the Republican’s lead operative admitted to being there for *fifteen days*, while a staff member noted that someone had been there for as long as *twenty-one days*. In what we asserted was a cover-up, the Elections Supervisor could not “recall” the names of two of the three operatives who had come to her office. Nor did she recall the name of the Republican official who had sent the operatives to Seminole County from Tallahassee. Her staff members, however, had far better memories; they recalled her talking to the operatives, whom she knew personally, by their first names. Further, the vice-chair of the State Republican Party admitted that on November 8 the Elections Supervisor had acknowledged the name of the Republican Party official who had sent the operatives. At trial it was stipulated that 2,126 absentee ballot request forms had been altered and 1,932 of those persons had subsequently voted by absentee ballot. Of course, there was no way to determine which way these votes, in the absentee ballot pool of approximately 15,000 votes, were cast.

From day one, we knew that the law had been violated, both by failure of the voter to have the identification number on the absentee ballot request form when signing the form and by the fact that the Republican Party (but not Democrats or independents) received special help from the Elections Supervisor’s office. It was further proved that there was no security within the Elections Supervisor’s office, and the Republican operatives had free access throughout the office; the actual absentee ballots were not even kept under lock and key. The Republican operatives had free rein in what is supposed to be neutral territory where the public is not permitted. In short, we had a direct violation of the absentee ballot law and disparate treatment of Republicans compared to the rest of the voters.

Despite these clear improprieties, we knew we had three problems: First, the statute did not address the remedy to be afforded when the requirements of the absentee ballot request law were not met. Second, there was no way we could prove that “fraud” had occurred with regard to the absentee ballots themselves; instead, we had to argue the “fruit of the poisoned tree” doctrine—i.e., that you can’t have a valid absentee ballot if you have an illegal absentee ballot request form and that the fraud is as to the integrity of the voting process. Third, the only remedy previously used in Florida when an absentee ballot pool was tainted was to throw out all of the ballots, which in our case would result in throwing out 15,000 ballots because of just under 2,000 tainted ones.

Accordingly, we had to argue in the first instance that all of the ballots had to be thrown out since the pool was tainted by the disparate treatment, which

is a third degree felony in Florida. However, we also needed to give the court an alternate, less harsh remedy under its general equitable power under the election law. For that purpose we argued that since George W. Bush had garnered approximately two-thirds of the absentee ballot votes overall, and there were 1,932 absentee ballots that resulted from illegally altered absentee ballot request forms, at the very least Mr. Bush should lose approximately 640 votes, or one-third of the votes resulting from the illegally altered forms. Alternatively, we produced expert testimony from Professor J. Bradford DeLong of the University of California at Berkeley, who opined that since the absentee ballots in question had been cast by registered Republicans and the vast majority of them would have voted for the Republican candidate, it was reasonable to impose a net loss of between 1,500 and 1,700 votes out of the 1,932 cast.

In the surreal atmosphere of the trial, we never met our expert until the morning of trial; he had never testified before, and we had no opportunity to prepare him for the rigors of cross-examination by six sets of defense lawyers. We, of course, were faced with a defense presented by six major law firms, each having staff of a few hundred to several hundred lawyers.

On December 5 we had extensive legal arguments and essentially won most of them. On December 7 the trial began, and on a compressed basis with stipulated testimony and deposition excerpts, we finished as scheduled and gave closing arguments late in the afternoon. The judge had originally indicated she was going to decide the case that evening, then indicated it would be the following day instead—and then we found out that she had conferred with another more conservative judge who was trying a similar absentee ballot case from Martin County, Florida, where the absentee ballot request forms were actually taken out of the supervisor's office and altered by Republican operatives. The judges apparently wanted to conform their opinions and issue them at the same time—a highly unusual procedure, but in this case nothing was usual.

On December 8, at 2:00 p.m., to our disappointment, the court found wrongdoing and faulty judgment but no fraud or intentional wrongdoing and no disparate treatment, so no relief was awarded. Both sides had already written appellate briefs covering all the possibilities, knowing that the side that lost would appeal as quickly as possible. The decision came down at 2:00 p.m.; by 2:45 p.m. we had filed a notice of appeal; by 4:00 p.m. the First District Court of Appeal had passed the case through to the Florida Supreme Court as a question of great public interest; by 5:00 p.m. the Florida Supreme Court set a briefing schedule requiring that our briefs be filed by 9:00 a.m. Monday morning, December 11. We knew we had to have the case decided by the safe harbor date of December 12.

Meanwhile, at 4:00 p.m. on December 8, the Florida Supreme Court had ordered a recount. At that point we viewed our position as providing insurance for Gore. We believed that we had an excellent chance of reversal by the Florida Supreme Court, and an excellent chance to get at least some relief, because the trial court had made at least one critical error: It had found no disparate treatment despite the fact that the evidence showed that at least thirty-four Democrats had failed to include their voter identification numbers and had lost the opportunity to vote. We felt that after a publicly televised argument before the Florida Supreme Court, the court would be hard pressed not to acknowledge that there had been disparate treatment and to fashion some equitable remedy. I still strongly believe that.

Unfortunately, to the surprise of most lawyers and the media, on December 9 at approximately 4:00 p.m. the United States Supreme Court intervened, suspending the recount and setting a December 11 hearing on the recount issue. Suddenly we ceased to be merely additional insurance for Gore. As a lawyer friend in the Gore camp, who was prohibited from providing assistance to us because the Gore camp had decided to rely exclusively on the recount and did not want to support a case that was seeking to invalidate votes, said, "You're back to ground zero. You are the only hope Gore has left."

I flew back to Tallahassee Sunday night and on Monday morning anxiously awaited an opportunity to argue before the Florida Supreme Court. Thanks to the U.S. Supreme Court, that opportunity never came. At 11:00 a.m. the position of the Florida Supreme Court was being demolished in the oral argument before the U.S. Supreme Court, and it was clear from the questioning of the justices that the recount was dead. As the day wore on and the Florida Supreme Court did not call us for oral argument either on that day or for the morning of December 12, we knew it was all over.

Also on December 11, as we still awaited oral argument and as hope was fading, we received a call from an intermediary for Bill Daley urging us to drop our appeal. We later learned that this supposedly was because there was a deal in the works between Republicans and Democrats, who did not want the election to be thrown into the House of Representatives; as long as there was a chance of Gore winning because of our case, the Republicans would insist on having a Republican slate of electors from Florida, but if our case were dropped, they might rely on the recount. Similarly, a Republican state senator contacted our client to ask him to drop the case to save the Republican-controlled state senate from the embarrassment of having to select a Republican slate of electors and have the election thrown into the House of Representatives because of the existence of two slates of electors, which would deeply offend many Floridians if indeed Gore won the recount. After careful deliber-

ation, and even though we felt we could win the appeal but knew that hope was dimming as to whether we would have a chance to argue, we turned down both the Republicans and Democrats and did not drop the case.

Late in the afternoon of December 12, even before the U.S. Supreme Court announced its ruling but when the handwriting was clearly on the wall, the Florida Supreme Court unanimously affirmed the trial judge in our case. The court said that what had occurred was “troubling” and they did not “condone it” but would afford no relief.⁴ We briefly considered filing for certiorari to the U.S. Supreme Court, but because of the way the Florida opinion was written as well as the inhospitable climate at the U. S. Supreme Court, and finally because of Gore’s concession, we decided to stop. Our valiant effort, for which I retain a poster that says “Seminole V.O.T.E. (Victim Of Tampered Election),” is our “footnote”⁵ in history. I believe that had the shoe been on the other foot, Republicans would be just as disappointed at what happened to our voting system as the Democrats are today. I now believe that we need a constitutional amendment establishing a uniform election system, that we must make the necessary expenditures to install uniform, updated voting equipment nationwide, and that we must overhaul our laws nationwide to prevent voting fraud and to restore the confidence of the American electorate.

⁴ *Jacobs v. Seminole County Canvassing Board*, 773 So. 2d 519 (Fla. 2000).

⁵ See J. TAPPER, *DOWN AND DIRTY: THE PLOT TO STEAL THE PRESIDENCY* 395–97, 405–07, 415–21, 460 (2001); DEADLOCK. *THE INSIDE STORY OF AMERICA’S CLOSEST ELECTION* 175–78, 182, 185–86 (2001) (by the political staff of *The Washington Post*).

TERRORISM—LIFE AFTER SEPTEMBER 11, 2001[†]

Christopher Whitcomb*

The first point I want to address in talking about terrorism post-September-11 is something I have heard so many times from people all over the country: that September 11 resulted from the single greatest intelligence failure in the history of the U.S. government. I suspect many of you have heard that yourselves, or perhaps even said that. To counter it, I want to relate a story about what you don't see in the newspapers or on television about the war against terrorism.

PERSONAL EXPERIENCES RELATED TO TERRORISM

About a year and half ago, in October of 2000, I got put on a plane at Andrews Air Force Base. The Hostage Rescue Team, with which I worked, traveled in military transportation. We had all seen on television that the USS Cole had been bombed in Aden Harbor, Aden, Yemen, near the southern tip of the Saudi peninsula, and we got called into action. The members of the Team wore beepers, and when we got "888" on our beepers, it meant "go right now; don't call home; don't stop and collect some clothing; get on the plane and go." So I raced to Andrews Air Force Base and got on a plane. We flew to Ramstein, Germany, where we, along with some of my fellow FBI agents who were not part of the Hostage Rescue Team, interviewed survivors of the Aden bombing. These were U.S. Navy sailors who had been grievously injured. One young sailor who came to me to be interviewed had a lip that was split (and stitched up) all the way to the bottom of his chin, his eyes were still swollen shut, and he walked on crutches. I asked him why he came to talk to me then; he could have continued to recuperate, and we would have interviewed him later. He replied that he wanted to give us his information as soon as possible so that we could use it to try to solve this crime.

He told me this story: He was standing on the deck of the Cole. It was a beautiful, sunny morning, and the temperature was about ninety degrees. The ship had just gotten into the harbor for refueling, on the way down to the Indian Ocean from the Mediterranean. This was a routine stop. A launch

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came out toward the boat, which seemed routine; launches would come out to remove garbage or deliver supplies. He looked down at the launch from the deck of the ship, and saw three men looking up at him. They were smiling and waving at him, close enough that he could see their faces. Then the launch ran into the ship and exploded. All of you saw pictures of the hole in the side of the USS Cole. You saw reports of the damage, and of the lives lost.

We went from Ramstein, Germany, to Aden, Yemen. We flew down in a C-5 Galaxy, which is a very large plane. We had been invited by the Yemeni government to come in to do this investigation, but as we flew into Aden airport, surface-to-air-missile radar made by the Russians locked onto our plane. We had to do a combat landing, which anyone with military experience knows is quite a ride. You pop electronic and physical countermeasures, and basically just drop out of the sky. We waited about two hours before they finally let us get out of the plane. When we did get out, we found the plane completely surrounded by Yemeni military forces. They had jeeps with belt-fed, mounted machine guns and troops with AK-47s. This was the government that had supposedly invited us into the country to work. Our team included members of the Hostage Rescue Team, members of the CIA, members of the NSA, members of the State Department, and sixty-five FBI agents. We were heavily armed, and this was sort of my game. (I will tell you something about my background later.) Without going into detail, I can tell you that we did get away from the plane. Then they escorted us to the Aden Hotel downtown. Downtown Aden is probably not a place you would want to visit, but the hotel was fine. As soon as we got to the hotel, they surrounded it with the same jeeps and machine guns and wouldn't let us leave.

So we sat in this fairly nice European-style hotel, unable to conduct any investigation. We jogged, we worked out. We read books, talked, and did what we could to occupy ourselves. At night we'd go down to the bar and drink Yemeni beer, which is an experience. This went on day after day after day. One evening, when I went downstairs to the bar, the owner of the bar came up to me and asked, "Have you ever seen a Russian belly dancer?" I had not, and I understood that it was quite poetic, so I decided to go and see what it was all about. He took me to another bar, which I didn't even know was in the hotel. It was huge. There we found a seven-piece Arabic band and a Russian belly dancer, undoubtedly hired by the hotel in better times, and we went in to watch. As you might imagine, I was bored, and I like to play the guitar, so I asked the manager if I could sit in with the band. He said that would be fantastic. I went up to join the band and found that no one in the seven-piece group spoke English. I couldn't speak Arabic; I couldn't even find out what key they were in—but we somehow found a way to play the

songs. I ended up playing with them for quite awhile, which showed wonderfully that people from different countries often get along very well, even if their governments don't.

I vividly recall one scene in particular. We were standing on the stage playing to a huge room that was empty, except for a few of my friends. We finished one song, and the leader of the band turned to me with a big smile and said, "Hotel California." I replied, "Okay, I know that one." We started playing and he started singing; he knew every word of the song phonetically, without understanding any of it. All of a sudden, the Russian belly dancer came out and started doing a routine to "Hotel California." So we had a Russian belly dancer dancing to an American song being sung phonetically by a Yemeni national who did not understand a word of English but probably did know the soldiers who had the hotel surrounded with machine guns so that the U.S. agents—including one member of the band—could not investigate a terrorist act against a U.S. warship. It was wonderful in a way, but it was quickly degenerating into the "Twilight Zone."

Although it was a very odd occasion, I thought it ended nicely when we all shook hands and parted company for the evening. I got on the elevator and went to the sixth floor of the hotel, where all of the U.S. personnel were staying. When I stepped off the elevator into the sixth-floor foyer, I encountered a stark reminder of what we were really there to do. I faced a Marine Corps FAST Team, with M-16s locked and loaded, standing just inside the door to protect the personnel on the sixth floor, which diverged in a *Y* shape. The left side of the *Y* contained the FBI command post, a CIA station, a de facto embassy because the ambassador had gone to Yemen to start an embassy, an NSA presence, and a number of military "offices" as well. The bedrooms were down the right side. The sixth-floor foyer was always a very energetic spot, I can tell you, even at 1:30 in the morning.

As I walked down the hall that particular night, however, I realized that it did not have the energy that it usually did. Something was odd; something was very wrong. So I went to the FBI command post and asked a friend on duty what had happened, what was wrong. He handed me a piece of paper, which I still have and which I will always have. On this piece of paper, among other things, were these statements: "Don't read this out loud, because the hotel is bugged. [We had known that.] Intelligence assets have uncovered a credible and immediate threat to U.S. personnel in the Aden Hotel." In the language of the spy community, that means, "They're coming for you right now."

We knew they had used 400 pounds of explosive to blow up the Cole, and we knew from prior investigations that they had another 400 pounds of the same explosive that they hadn't used. We also knew that it was in Aden. We

didn't like the fact that we didn't know exactly where it was. That was one of the reasons we wanted to get out of the hotel. When I saw this note, I realized that someone knew and was telling us that they were coming to blow up the hotel that night. We were surrounded by the Yemeni military. Even though we had machine guns and all the weapons of war that we carried when we traveled, we couldn't get out of the hotel. My only options at that point seemed to be going to the top floor and trying to ride the hotel down when it collapsed, or going down to the lobby and trying to get a couple of shots off before the guy actually pulled the trigger on the bomb. Those were pretty stark options at 1:30 in the morning 8000 miles away from home.

Just then, it hit me that I hadn't said goodbye to my wife or children or told them where I was, although they probably had been able to figure that out from watching the news. Actually, we probably never would have discussed the mission. When I was at home, I was at home, and when I went away, I was away; that is the way we dealt with my work. But *this time* I realized that I wasn't going to get to say goodbye, *and* that I wasn't coming home. So I went down the hall to the last room on the left, where we had set up what's called a SCIF, a Secured Compartmentalized Information Facility. This is where we had some satellite telephones. I figured that the FBI couldn't discipline me if I was dead, and I had to take a chance. I called my wife. Just before she answered the phone, I realized that I couldn't say goodbye to her because I couldn't tell her what was going on over the phone lines, and because I didn't want to scare her. So my career and the fight against terrorism at this point came down to me using the phone just to hear my wife's voice one last time, because that meant something to me when everything else was falling apart. When she answered, I did not say a lot. I asked how she and the kids were doing, ordinary questions of that type. Then I said I had to go because I didn't have much time on the phone, and I hung up. I walked down the hall, and as odd as it sounds, I went back to my room, laid down on my bed, and eventually fell asleep, fully expecting to die before morning.

So how am I here today? The answer is that members of the NSA and the CIA and the FBI who *weren't* in that hotel prevented the people who intended to blow us up that night from doing just that. They saved my life. So when people say that the attack on September 11 reflected a breakdown in intelligence, I bristle. Those same intelligence gatherers, those same investigators, those same operatives who regularly risk their lives, and often lose them, saved mine that night—*my* life, not the life of somebody I read about in a book, or hear about on television. It was and is very personal. That made me realize that terrorism is very personal. It affects each and every one of us. The attacks of September 11 were horrific. But those were far from

the first attacks and attempts directed against the United States, and they certainly won't be the last. We have to deal with terrorism in those terms.

With us in Aden were members of the New York City field office of the FBI's Counterterrorism Task Force. John O'Neil of that Task Force ran the USS Cole investigation. He was the nation's foremost expert on Al Qaeda and on Osama bin Laden, who was not a household name in those days. A while after our return from Aden, O'Neil decided to retire from the FBI. He took a job that finally paid him some money, as director of security at the World Trade Center. September 11 was John O'Neil's second day on his new job. I heard reports that he made it out of the building when the first plane struck and called his son to say that he was all right, but then he went back into the building to try to save other people. That's when the building came down. In one of the great ironies that life sometimes deals us, John O'Neil ended up dying at Osama bin Laden's hands even after he left the FBI. John O'Neil was a friend of mine, and once again, terrorism became personal in my life.

Terrorism is something we must confront, but I want to reemphasize my point. We have been acutely aware of terrorism since the early 1970s, when the Munich Olympic Games ended in tragedy. In the thirty years since then, in the United States we've been hit twice by international terrorists—the 1993 attempt at the World Trade Center, and September 11, 2001. We are a nation of nearly 300 million people. We have open borders. We are the freest, most democratic nation on the face of the earth. As horrific as the September 11 tragedy was, we've suffered only two terrorist attacks on American soil in thirty years. Some people are protecting us very well.

MY FBI BACKGROUND

I said earlier that I would tell you something about my background, which I can do now that I have left the FBI. As Fred Mayer pointed out in introducing me, I spent a lot of my life with a gun in my hand, which does not make me proud. I became a sniper on the Hostage Rescue Team, which had a motto, "To save lives." The team consists of fifty men based out of Quantico, Virginia, and was originally put together in 1983 as a United States counterterrorism asset at the instigation of William Webster. When Webster was Attorney General, he confronted the issue of airline hijackings because several had happened around the world. He went around to various agencies and asked who would handle something like that if the United States confronted a terrorist threat. The military said they would handle it, so Webster asked what personnel and training they had. They mentioned Task Force Delta, a special forces group at Fort Bragg, North Carolina, and

Seal Team 6 at Dam Neck, Virginia; those two teams of men had the counterterrorism mission. Webster went to Fort Bragg, where Delta did a big dog-and-pony show for him, using helicopters, fast strobes, sniper shots. They staged a “dynamic entry” with explosives, where they went into a room, shot the bad guys, and brought out the good guys—an extraordinary thing to see. Webster walked up to the operators afterward and looked over their gear, which was very high tech for the late 1970s. After congratulating the men on their fine demonstration, he turned to one and asked, “Son, where are your handcuffs?” This operator looked up at him and replied, “Handcuffs? We don’t use handcuffs. They all get two shots.”

That story reminds me of an incident in London in 1980, when I was spending my junior year of college there. The Iranian Embassy right by Hyde Park had been occupied. The British SAS, which is the grandfather of counterterrorism teams, went into that embassy and saved the hostages. The SAS shot and killed all of the bad guys—except for one who sneaked out of the building with the hostages. The released hostages turned this guy in as soon as they were outside. The British SAS realized that there was nothing they could do with this man, so they took him back inside to kill him. That didn’t fly in Great Britain (they got caught before they actually killed the man), and it certainly wouldn’t fly in the United States.

That was the problem with the military demonstration performed for William Webster. The personnel on the military teams are extraordinary warriors. They’re brave, talented, well-trained, highly motivated, exceptional individuals. But they don’t have powers of arrest, and they don’t have training in rules of evidentiary procedure or crime scene processing. All of those are necessary if the counterterrorism team is to be able to bring terrorists to justice in a court of law. So the Hostage Rescue Team was formed in 1983 to do just that. The members of the team had the same clothing, the same mentality, and the same equipment as the military team, and worked in close cooperation with the military units, but they all carried FBI badges and credentials which gave them the power to arrest people.

That’s the group I joined in 1991, a team that very few people had heard about until recently. (By the way, this team has always been referred to by its initials, HRT; and the newer common usage of “HRT” for something quite feminine—hormone replacement therapy—has upset fifty big, tough guys in Quantico, Virginia, more than you can imagine!) As I already mentioned, I became a sniper on the HRT.

To give you a better understanding of this team, I want to tell you a little more about the guys on it. The first time I met the fellow who became my sniper partner, he showed up wearing an eighteen-karat Rolex President on his arm; he was an accountant, the comptroller for a small corporation

before joining the FBI. That wasn't exactly what I expected of a sniper partner, but he actually was fairly typical. The people on this team are not thugs or knuckle-draggers. I myself had been an English teacher, journalist, and speech writer. The team includes attorneys and CPAs, people who could have ended up in this room today. But they chose another line of work because, as you believe in the nobility of your profession, they believe in the nobility of theirs. They are willing to risk their lives, and they do risk their lives on a daily basis, to try to keep terrorism from becoming a personal issue in your lives.

I could go on and on with stories about these people and their deeds, mainly because I think so highly of them but also because I have a tendency to ramble. (Perhaps you already suspected that.) What might be more effective would be for me to answer some of your questions. I now work for NBC News, and I write a monthly article for a national magazine. I travel and talk to people a great deal and have a keen sense, I think, of the national tenor regarding terrorism. I went to Afghanistan last fall, and I've spent a lot of time in Central Asia and around the world, from Nairobi and Dar es Salaam and Kosovo and Bosnia, to Yemen and Pakistan, and on and on, so I hope I have the information to respond to your questions.

QUESTIONS AND ANSWERS

Q: How do you deal with people who operate from or hide out in places such as Southeast Asia, places that are problematic for the United States and for all of the civilized world? Do you "disappear" people?

A: The FBI has done one thing in the past with some success. As you know, the FBI is an investigative agency that tries to prosecute and jail people who commit crimes against the United States. For some time, when the FBI has determined that people wanted for prosecution are in other countries, the agency has done things called "renditions." (The term "rendition" came from the State Department; I don't know the etymology of the term in this context.) Two or three members of the Hostage Rescue Team will get beeped, and they will get on a G-4 (Gulfstream private jet). They'll fly to Gander, Newfoundland, from there to Shannon, Ireland, from there to Luxembourg, and from there to wherever else they are going. They fly into a country, usually with the cooperation of that country, but not always. They work with other intelligence agencies from the United States or from other countries, locating someone who has already been indicted in the United States. Then they snatch the person out of the country and fly him back to the United States for prosecution. It has happened more than fifteen times in the last decade—and most of those incidents occurred in the last three years.

One example involved a guy named Fawaz Yunis. He was an airline hijacker who moved back to Lebanon and became a drug dealer when his hijacking days ended. The FBI lured him offshore under the pretense of a dope deal with bikini-clad FBI agents on a yacht in the Mediterranean. The HRT members swam in using rebreathers that give off no bubbles, climbed up over the side of the boat, threw Yunis down, and handcuffed him. Fast-moving cigarette boats came over the horizon. They threw him on a cigarette boat, took him to an aircraft carrier, and launched him from the deck of the aircraft carrier, back to the United States, before he knew what was going on. Very few have ever heard that story. We do that sort of operation a lot, but people don't hear of those successes. As I've often said, the FBI, the CIA, and the NSA are excellent investigative, intelligence-gathering agencies, but they are extraordinarily poor at public relations. You don't know about the successes. You don't know about the terrorist incidents that have been prevented because these people have done their jobs.

To return to the question, I have described the main type of action we have taken. The second part of the question was whether we can "disappear" such people. This actually is the topic of my second book; lots of stories can never get told. I'm not saying that U.S. agents have ever "disappeared" anyone, but there are some people in the world who never *want* to appear again. Osama bin Laden might be one of them. Certainly various high-ranking members of Al Qaeda and of the Tamil Tigers are among them. Many terrorist organizations have people that don't ever want to surface again. If the U.S. found these people, we do have the capability of making sure that they could not surface again. The United States public would benefit, and the terrorist organizations would not complain because they would not want to acknowledge that the United States or another government could have that kind of impact on them. The people just "go away."

For those of you who are appalled by that, I offer this as food for thought. On two occasions while I was on the Hostage Rescue Team, we were prepared to go and get Osama bin Laden. We knew where he was within acceptable parameters. We trained to operate in the environments where we could get him. We had worked out a great deal of the logistics. And both times on the eve of our departure, the plans were canceled. I'm not blaming this on the Clinton administration, which was then in office, but the political will of the United States at that time did not support assassination or even the kind of high-risk snatch that we were prepared to do. It was a very different world, and we couldn't go after bin Laden for those reasons. At the same time, however, the Clinton administration did send cruise missiles, at more than a million dollars apiece, over the horizon into Afghanistan and into an aspirin factory in Sudan, and we killed a lot of people. We didn't kill the

people we wanted to kill, and we didn't bring back to prosecution the people we wanted to prosecute—and most of the people we did kill probably didn't have much to do with any of our problems. My argument or my question is this: How do we, as a rational, just, peace-loving nation, justify sending missiles that indiscriminately kill numerous civilians, at a cost of millions and millions of dollars and at great operational risk, when we can't send in a single team of four well-trained snipers to excise the one root of all of that trouble? In civilized conversation, when someone mentions assassination, you immediately draw a deep breath and say that we just can't go there. I agree that it is a slippery slope, but I also have to ask whether it is more just to sit back in the name of righteousness and allow huge numbers of innocent deaths.

You gain a different perspective when you go to Afghanistan. When I was there, for example, I saw one little boy crossing the border to leave Afghanistan with no clothing on at all, and with blood running out of his ears because the concussions from the bombing in Kandahar had broken his eardrums. I talked to the officer who ran the border crossing. He was a grown man, a hard man, in a military uniform. For forty-five minutes, I talked to him about what he saw at the border crossing every day—and he cried the entire time. The toll on the lives of innocent people imposed by these spineless, so-called terrorists is staggering. To answer your question about “disappearing” people, then, it wouldn't bother me a bit if we went after the people behind these attacks and made sure that they couldn't cause any more.

Q: Can you comment on the role of the media in our country and how that affects the type of work you and your colleagues do?

A: That might be hard for me to answer since I am part of the media now. This is duplicitous for me to say, but it's the truth: I strongly believe that terrorism would not exist without modern media and the broad dissemination of pictures. If they blew up a ship in Aden, Yemen, and there were no pictures on televisions all over the world, how much impact would the terrorist act have? Newspaper stories, even those with a photograph or two, do not have the same effect. When you see planes flying into buildings in New York City and you see a plane flying into the Pentagon, it changes your perspective entirely. In my view, Osama bin Laden is a creation of the western media. I understand that he is a bad man; I do not dispute that. But he is just a man, and a man who lives in a cave, in a war-torn country called Afghanistan. Only because we talk about him endlessly in the media has he seemed to become the root of all evil in the world. That is not the case. I could name half a dozen other terrorist organizations off the top of my head

that pose as great a threat as Al Qaeda. But Al Qaeda and Osama bin Laden are easy to pronounce and easy to remember, and we don't have to deal with all the others and the complications they raise.

When we flew Fawaz Yunis back to the United States, we had to fly him around South America in what at the time was the longest non-stop flight ever from a U.S. aircraft carrier because countries would not allow us to fly over them with him in the plane; they feared that it might somehow make them a target of a terrorist attack. Without the media, that issue would not have arisen.

I think public information is good. I think public discourse is good. I think that getting ideas out for consideration and discussion is wonderful. But when I see still another cover story on *Time* or *Newsweek* or whatever magazine it is this week about "the next 9/11," I get really discouraged. I have sat in the newsrooms and done all the shows; they realize that terrorism has drawn in audience and ratings are up. They know they've gotten all of us to a point where we have to go to our televisions to get the news, and of course they want to continue that. It's not a *bad* thing; it's the *easy* thing. Unfortunately, that contributes a lot to what we will have to face in the future, I think.

Q: Is human intelligence necessary? Given the sophisticated technology we have today, do we need to risk lives in intelligence-gathering?

A: The intelligence community divides intelligence into three categories: imagery, which includes things that they can see from satellites in the sky; signals intelligence, which is stuff they intercept over telephones or computers; and human intelligence, which includes conversations and other human observations. There truly is no substitute for human intelligence, somebody with eyes and ears on the ground. You can get information that way that you cannot get through any other means.

I will acknowledge, though, that it can be very tough to get into certain countries and gather information, because the only thing an American intelligence agent has to offer is dollar bills; I can pay money for information, but it is very difficult to come up with any other incentive. As attorneys who have prosecuted or defended cases in court, you know how hard it can be to get someone to tell you the truth. You know how hard it can be to get somebody to tell you *anything* when you are building a case; and you have some leverage because there is an up or down side in your case. When a U.S. agent is dealing with somebody in Ethiopia or Malaysia or Columbia or Pakistan, that person usually doesn't have any reason to give the desired information. Occasionally, items other than money are useful. Pakistan is an Islamic country. They don't smoke for the most part, and they are not supposed to

drink. I went there during Ramadan and I bought a substantial amount of information, and a visa extension, with bottles of Johnnie Walker Scotch that I got from the U.S. embassy. It took a combination of my personal background in working in that world and a human weakness to get vital information.

THE HUMAN GENOME PROJECT[†]

Huntington Willard*

As I planned what I would say to you, I sought advice from a couple of people. One of them, my father, said, “You don’t tell lawyers anything.” Then I spoke to an attorney in Cleveland who does some work for the hospital. (Unfortunately, when one is in medicine these days, one spends a lot of time in meetings with lawyers.) We are constantly challenging him to write in plain English, to which he replies, “I can write in plain English; I just have to charge extra for it.” So, of course, when I asked him what I should say to you today, he told me to speak in plain English.

I do want to share with you some of the excitement in my field, and I am going to try to speak in plain English because I recognize that some of the most profound breakthroughs in genetics, and in the field of genomics, matter not a bit unless we figure out a way of communicating them to people around the world who don’t have a background in genetics. Genetics is a remarkably young field, so almost by definition most people don’t have a background in it. Yet the implications of what we are working on and striving toward are almost without parallel in the history of medicine and in social science generally. What I would like to do this morning is to talk about different aspects of the Human Genome Project, what it has taught us, and how it has changed most profoundly our view of the world in which we live and our view of who we are.

THE GENETIC CODE IN CONTEXT

As you know, I am sure, the Human Genome Project and the complete sequencing of the human genome reached the completion stage about thirteen or fourteen months ago. The much ballyhooed announcements from the White House and from Number Ten Downing Street, as well as from the capitals of a number of other countries that participated in the Project, likened the human genome sequence to a number of the other codes in human history, that when written or discovered revealed much about ourselves, who we were, and how we fit in with the rest of the creatures with whom we share this planet. The Rosetta Stone was remarkable for beginning to give us

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glimpses into the development and importance of language and how humans corresponded and communicated with each other. The Magna Carta, familiar to all of you, is a different kind of code, attempting to put man, including the King, in his place, if you will, safely beneath God but also establishing laws that would govern how men would behave thereafter. Our new code, the genetic code, of some three billion units is a remarkably profound code that actually determines who we are and what we do and what we might become. This is the most fundamental code for humans; there is no level below this. It is the job of those of us involved in the Project to make sure that first of all, we get it right, and then that we understand to what degree the code actually does determine who we are and what we do and how we behave.

The genome also gives us a different perspective on human kind. As a poem by T. S. Eliot that has been quoted numerous times in the last year says:

[T]he end of all our exploring
Will be to arrive where we started
And know the place for the first time.¹

The change in perspective seems similar to what astronauts describe when they first get into space and look back on earth; they see the earth and our role on it in a profoundly different way. It is similar, too, to the dramatic changes that occurred in the mid-1600's when a scientist from the Netherlands developed the first microscope. He peered into the microscope and saw a different world that no one had ever seen before. We began to see the red blood cells that moved through our blood vessels. We began to see the world of bacteria, which at that point had been suggested but never actually seen. A fundamentally different view of the world came about because of that discovery 350 years ago. The genome mapping gives us much the same kind of different view of life. We're seeing things we have never seen before, and seeing them at a fundamental level beneath which we cannot ever go.

There were two major publications about a year ago, one in the international journal *Nature*, and one in the American journal *Science*. As some of you may be aware, there was a bit of competition between the publicly funded Genome Project and the private research by a company outside of Washington, D.C., Celera. It has been an interesting battle that became highly personalized, but it is very clear that because of the competition between the public and the private groups, the human genome sequence became apparent much more quickly than it otherwise would have.

¹ T. S. ELIOT, *Little Gidding* pt. V, lines 240–42, in *FOUR QUARTETS* (1943).

SOME OF THE BASIC FINDINGS

Let me give you just a glimpse of some of the facts and figures of the human genome and what they mean. As I said before, the genome is a three-billion-unit code; but it consists of just four chemical bases, *As*, *Gs*, *Cs*, and *Ts*, appearing over and over again in different combinations. One of the most remarkable facts about our species is how much variation there is among us. Even more remarkably, we discovered that, to the extent the tremendous variation is biologically determined, the differences reside in, at most, a few million units out of the three billion. Within those few million units are all of the secrets of our biologically determined differences, including those having to do with health and disease. In the field of medicine, of course, the great excitement is to pinpoint those few million differences and to distinguish those that actually do affect whether somebody gets diabetes or doesn't get diabetes, whether somebody has muscular dystrophy or doesn't have muscular dystrophy, or any of the whole range of other ailments. Obviously, many of the million or so simply are the factors that make us different but have no substantive importance—blond hair or dark hair, light skin or dark, tall or short, male or female.

The business end of the genome focuses on a much smaller number of units—the thirty to forty thousand genes and their immediate products, which are the proteins that reside in our cells and actually determine what our cells do, and therefore what our organs do, and ultimately what each of us as an organism does. It has been somewhat unsettling from a philosophical point of view to learn that the end game is only thirty to forty thousand genes, which is half to a third the number that the wisest geneticists had predicted we humans would have. The lowly fruit fly has fifteen thousand genes. The earthworm has about twelve thousand genes. We assumed that if those creatures had twelve to fifteen thousand, we must do a bit better than twice as many. But, search as we may, we can find only about thirty or forty thousand. Now we have to figure out how nature did this: How did it use twice as many genes and make the difference between a fruit fly and a human being? That in itself is a remarkable challenge that probably will require decades of additional research.

Another perhaps unsettling realization is that we are not as “hard-wired” as we might have thought, even in our physical characteristics. Who we are and what we do and even our physical selves are determined not just by this code of three billion units but also by an almost infinite variation in other factors. Our experiences as individuals and our experiences and exposures as organisms, in terms of where we live, what germs and other factors we encounter, what kinds of environments we live in—to a great extent a series

of chance events—have a significant impact. Many of the key events occur early in development, and the most important ones, the ones having the greatest impact, are those in the first few days following fertilization. Certainly, most of those events are governed by chance. A variation that is determined by chance then sets the stage for a whole host of different genetic and biological potentialities as the organism develops. That is a remarkably profound lesson—and one that is quite unsettling to some—that we've already learned through the Project.

IMPLICATIONS OF THE GENOME PROJECT

Partially because I have been urged to speak in plain English, I'm not going to talk a lot about the impact of the Human Genome Project on medicine. In any event, I think most of the impact on medicine lies in the future; and because the medical breakthroughs are going to be so important to all of us, we will learn about them as they occur. My other reason for not talking about medical implications is this: I feel that if biologists and scientists have a failing, it is that we have a tendency to talk in hype, and the Genome Project is an area that is extremely easy to oversell, especially in relation to its medical possibilities. To be honest, the Genome Project is not going to result in fundamental changes in your lives soon. I do believe that it *will* fundamentally change all of our lives at some point but probably not for at least ten years—perhaps twenty or thirty. So instead of looking at the frequently trumpeted medical implications, I want to focus most of the remainder of my talk on a couple of aspects of what we've learned from the Genome Project about who we are, where we came from, and how we as an organism relate to the world around us.

Who We Are

Here I have to give you a five-million-year tour in just a few minutes. The trail of evidence on the beginnings of our species goes back only about five million years. Modern man—that is, what we might recognize anatomically as modern man—dates back only about 1.5 to 1.8 million years. That's a remarkably short portion of the history of this earth. Our development as a species took what has been called "the great leap forward" no more than a hundred thousand years ago. That's just a blink of an eye in the earth's history.

This "great leap forward" was quite remarkable. What could have triggered such a sudden and dramatic change? Did external events precipitate it, or was it just a sudden genetic change? What kinds of changes must have happened in our genomes? Scientists have debated this at great length. One of the arguments has to do with cranial capacity; we as an organism devel-

oped the space to house a much larger and more complex brain, which allowed much higher cortical processing and thought processes. Larger cranial capacity cannot be the complete explanation, though, because the Neanderthal had a much bigger head than we do, and we know what happened to the Neanderthals. Another thought is that certain genes that allowed us to communicate evolved or appeared. These gave us linguistic abilities, one of the unique capacities of humans compared to any of the other organisms on earth. Whatever it was, something happened about a hundred thousand years ago to enable our species to take its great leap forward.

No humans got to the Americas until about twelve or thirteen thousand years ago. They came over the Bering Straits when that was a land bridge, and then began to move down through the Americas. Humans first recognized that certain traits seemed to be genetic only about two thousand years ago. DNA was discovered as genetic material less than sixty years ago. Watson and Crick developed their model of the double helix less than fifty years ago. Only a year ago we completed the basic map of the full sequence of the human genome. This represents a remarkably rapid transition from knowing absolutely nothing about the human genome to knowing essentially everything.

What is most intriguing to evolutionary biologists and geneticists is the ability to use the genome as a molecular clock. Because changes generally are introduced as a function of time over millions and millions of years, one can use the amount of difference that exists between different organisms as a measure of when those different organisms diverged from each other or began to follow different tracks. (I do want to point out that nothing I am saying necessarily requires that the evolution model as it is often taught in schools is correct. However, if all of the creatures on this earth were created separately by an intelligent being, that intelligent being knew a lot about genetics and used the genome in a way that allows us to track genetic events as a function of time. These numbers apply, whether one is a firm believer in evolution or instead in creationism. The data are the data, as I like to say.) If you look at the genome of a monkey and the genome of a human, you will see only about a five-percent difference between us. A few hundred genes differ, but everything is recognizable in its place. You can look at our genes and find the corresponding genes in monkeys, with only a five-percent difference in the code. Great apes are even closer. There's only a one- or one-and-a-half-percent difference between our genomes and those of chimps and gorillas.

Within our species the difference is much less than that. It's about a tenth of one percent. How much is a tenth of a percent? I will try to give you some glimpse of this. The entire three-billion-unit code would fill a library of about three thousand books, each four hundred pages long, with each letter in those

books being one unit of code. The differences that exist among us translate into two or three changes per page of that three thousand volume library. Some of those changes, as in any other book you read, are mere typos that don't make any difference at all in your understanding of what you're reading. Others, however, make a lot of difference—substantial words that are missing, extra words that are added, words that are reversed in their order and therefore have a fundamentally different meaning. In sum, there are relatively few “typos” (differences among humans), some of which matter more than others.

One of the facts that we do like to broadcast loud and clear is a finding that was predicted by most geneticists but not by most social scientists: The amount of difference *between* racial groups in our species is precisely the same as the amount of difference *within* racial groups. Genetically speaking, or genomically speaking, there is absolutely no basis for thinking of ourselves as being organized into different racial groups. Racial groupings focus on the most superficial characteristics, the relatively few genes that determine skin color, facial morphology, hair texture, etc. Those superficial characteristics led, pre-Genome Project, to the construct of “races” that has affected so much of our thinking; but, genetically speaking, there is absolutely no basis for racial distinctions.

There are specific variations in certain population groups around the world, especially in groups that have tended to be more isolated over a substantial period of time, either for geographic reasons or as a result of their social patterns. Thus, the Ashkenazi Jewish community has certain clear genes belonging to that community; even though they have dispersed around the world now, they have specific genes and therefore specific diseases that often come from some of those genes that no other population group around the globe shares. Finland, as a whole, has a population that was isolated over time. People who emigrated from Finland share specific diseases that we call Finnish diseases, because they have such an unusual pattern of variation. They don't have *more* variation than the rest of us, but they have an identifiable pattern of variation that is specific to Finland. French Canada provides another example, and there are many other genetically identifiable pockets of populations around the world.

One of the important points to understand is that we all carry deleterious genes. In fact, each of us has several dozen bad genes. Some of us know which bad genes we have and some of us don't know which bad genes we have. Some bad genes don't raise their ugly heads until there's a chance meeting and mating of two individuals who happen to have the same bad genes. But we all have some bad genes, and that is the basis for the anti-genetic-discrimination legislation with which I'm sure many of you are

familiar. You don't have a choice about your genes; you get what you get. Therefore, discrimination on the basis of genetic content should be and is increasingly, at least at the state level, illegal. Most states—around forty-four—do have anti-genetic-discrimination laws. What we're lacking is federal legislation to make the laws more uniform.

How do we get these bad genes? Most of us assume that we got our bad genes from our parents, and that's probably true for most of the bad genes that we have. But new bad genes have to come from somewhere, and there is, in fact, a steady introduction of new bad (and good) genes each and every time a new individual is conceived. That's the stuff of genetic variation. That's where a lot of non-disease variation comes from. Every time a new individual is conceived, there are an estimated 175 new mutations that were not there in the genomes of either of the parents. (So our genetic makeup comes mostly from mom and dad, but we also contain a hodgepodge of new wild-card genes in various combinations.) A few of those 175 mutations are likely to be bad genes from a medical standpoint. In other words, sexual reproduction is, in fact, truly Russian roulette. Every single time that two individuals procreate, new genes are born, new combinations are put together, and you take what you get.

Where We Originated

It is clear from the use of genetic tracking that the modern human population came in its entirety from Africa and expanded out of northeast Africa with that great leap forward about a hundred thousand years ago. This has actually led to an interesting cottage industry. A geneticist colleague of mine, Rick Kittles, will take DNA samples, blood samples, from individuals and track their genes back to where they came from in Africa, which is possible because people in different parts of Africa have different genetic combinations. That is of particular value and interest to many members of the African-American population in the United States or African populations elsewhere around the globe who want to know where they originated. By tracking the tenth-of-a-percent difference that exists between all of us, we can actually begin to track our origins genetically.

The migration of modern humans a hundred thousand years ago moved out of northeast Africa across Saudi Arabia, and then probably followed the coastal route around India and into Southeast Asia. Toward the end of the great leap forward, about fifty thousand years ago, modern men reached Australia. They got to New Guinea a little more recently than that, and then to the islands in the immediate vicinity of New Guinea about thirty thousand years ago. Then the trail grows cold. It is as if the great leap forward suddenly hit a snag. Except for the relatively minor migration across the Bering

Straits to the Americas that I mentioned earlier, nothing interesting happened for about thirty thousand years, as far as we can tell. The population groups that existed at that time stayed where they were, for the most part. There was much less migration and certainly no further migration eastward across the expanse of the Pacific.

One of the questions that we, as geneticists, wrestle with is why nothing happened for twenty-five or thirty thousand years. Is it because nothing happened genetically, that some new genetic evolution was necessary? Or were technological breakthroughs the necessary link? Did further movement have to await the development of the outrigger canoe and maritime skills? Recall that much of the movement of people prior to that time occurred during periods of the great Ice Age when the water level in the world was much lower, which meant that the land masses were much more apparent. In fact, one could almost walk to Australia from Southeast Asia, so it is not surprising that we got to Australia at that point in time. But after the Ice Age, as the oceans rose, further migration clearly required the development of maritime skills—maritime skills and an enormous degree of courage. Those who did eventually move further east had to get into outrigger canoes and head into the ocean without being able to see land or even know that there was land out there somewhere.

The Importance of Senses

Let me move to another area, the development of our senses and how we sense who we are and where we are in the world. This has been another area of great surprise in the Genome Project. Fully ten percent of all of our genes are involved in our senses—in our perception of either external stimuli or our sense of self, particularly the immune system and how we respond immunologically to what's around us. These sensory systems are among the most complex of the systems in our bodies. The development of the heart, which certainly is one of the most fundamental organs that we have, was pretty straightforward. The heart is simply a pump. The sensory organs and systems are much more complicated.

One especially interesting study is trying to identify some of the genes linked to the senses. One of these is a gene involved in absolute pitch, which is the ability to identify musical notes instantaneously without a reference pitch. When someone with absolute pitch hears a sound, whether it's a musical sound or something like a car honking, that person can say, "That's a B-flat" or whatever the pitch is. Apparently, we all have the ability to hear the sounds, and we hear them the same; but some people have a higher level of wiring, if you will, that allows their brains to recognize the absolute sound. This ability is extremely rare in the general population—the estimate is that

somewhere between one in a few thousand to one in ten thousand have it—but the incidence, not surprisingly, is much higher among trained musicians. For a study at the University of California at San Francisco, you can go to the website and take a test to determine whether you have absolute pitch. (They play sounds, and you enter the pitch you think each sound is.) If you have absolute pitch, they will incorporate you into the study. It is clear that absolute pitch runs in families, but it is also clear that there are two key components to this. One is genetic, and the other is environmental. It requires musical training to know that a particular note is called an *A* or a *B* or a *G*. Because absolute pitch has these two components, this is being used as a model for a whole host of conditions, many of which are medical, that have both genetic and environmental components—conditions such as blood pressure, diabetes, and psychiatric diseases.

An especially important sense, apparently, is our sense of smell. This involves our ability to smell and recognize what we smell, either by recognizing exactly what it is or at least by recognizing whether it's good or bad, pleasant or unpleasant. A total of three to five percent of all of our genes are involved in this, which testifies to the importance of smell evolutionarily for recognizing food, for sensing predators, and for selecting a mate. So our noses are incredibly powerful. They can detect thousands of chemicals over tremendous ranges of concentrations. The remarkable fact is that each of the neurons that ends in the epithelium (the lining) inside your nose expresses only one odorant receptor that can recognize one particular smell. Each neuron, hence each odor, then tracks all the way back into the olfactory center in your brain. Each of these is governed by a different gene.

Another interesting fact regarding the sense of smell is that humans actually have fewer of these genes than any other organism that has been studied. You can figure out why that is. The mouse, for example, has about one and a half times as many odorant receptor genes as we do. Why? Because a mouse still relies on those genes. We humans, for thousands and thousands of years, have not had to rely as much on our sense of smell, so these genes are degrading over time. This will not affect us in our lifetimes, but many generations from now, people will have a much less refined nose for wine than we do.

Learning from Other Species

Speaking of other animals reminds me that I want to move on to another genome. The dog species is absolutely remarkable. It is the species that has the greatest morphological range on earth. Think of the smallest Chihuahua and the largest Great Dane or Newfoundland. Another interesting fact, genetically speaking, is that there are more than 300 breeds of dogs, and there are

very diverse gene pools between breeds but virtually no genetic diversity within a breed. Dogs are being studied because they have the most acutely developed sets of behavioral differences; different breeds do different things. We have dogs that are bred for their ability to run, dogs that can track, dogs that can retrieve, dogs that can herd. It has been interesting to see what happens when you take the herding gene from a border collie and move it into other breeds. Now there actually are beagles that can herd, which is a sight. This has allowed geneticists to pinpoint exactly which gene is responsible for herding.

Why do we care about the herding gene? This gives us a model for how behaviors are under genetic control and how genes and the environment may have come together to give us human behaviors, both normal behaviors and pathological behaviors. So dogs are being used extensively as models for psychiatric disorders. We all recognize the different personalities that different breeds of dogs have. I think we are actually going to be able to find, for example, what genes cause certain dogs to be high-strung. Then we can move to humans and look for a correlative gene, and determine whether it is variable in the human population and whether it has relevance to psychiatric disease or to other diseases. This is one of the most intriguing and potentially productive areas of genetic science, I think.

Population of Hawaii

For my final point before I conclude, I'd like to return to Hawaii, where we are meeting. As I said earlier, the trail of human migration grew cold twenty-five to thirty thousand years ago. It appeared again about six thousand years ago. Humans began to move out into the Polynesian Islands, reaching Fiji about three thousand years ago. They moved on to Samoa and Tonga a little bit later, and then to eastern Polynesia in the last fifteen hundred years. There are still some mysteries to be solved here; there are remarkable differences between the Polynesian appearance and languages, and the appearance and languages of the Melanesians a little further to the west.

Humans still did not reach Hawaii, however. There is no evidence of a single human being on this island or any of the Hawaiian islands until about 500 A.D. The question for a long time was this: Who was in the first canoe that landed on Hawaiian shores? Did they come from Southeast Asia, from New Guinea and other islands or from Australia? The archeological record and linguistic studies suggested that the people from Taiwan might have traveled straight east to Hawaii, but genetically that doesn't make sense. Ultimately, DNA tells the tale. It is very clear that the Taiwan genes are not the ones that turned up here in Hawaii. In fact, humans moved down in an arc and eventually into the Polynesian islands, leaving genes and picking up genes as they

went. Then they moved from Cook Island up into Hawaii sometime around 500 A.D.

There are some other interesting genetic facts about the part of the world we've just been discussing. The gene pool in Australia and the southern part of New Guinea is as if that part of the world was locked away genetically from everyone else. Probably because of the highlands that extend east and west across New Guinea, the genes on the north side of New Guinea are completely different from the genes on the south side. There were two groups of people living on that island, but they didn't communicate with each other at all. So you have a pool of genes in southern New Guinea that never went further than Australia. The other pool of genes on the north side of the island is the one that continued out into Oceania and Polynesia.

CONCLUSION: THE OVERRIDING LESSON

The lesson from DNA and the Genome Project is that we as a human species are all one. If you look at our DNA, you see that we have infinitely more in common with each other than differences that set us apart. We share a dramatic history that dates back millions of years and that got a great boost only in the last hundred thousand years. So we are all one, and that is the most profound lesson we have learned from the human genome. It has given us a totally different way of looking at ourselves and how we fit into this world, and what good we can make of the genome information for the improvement of the human condition.

LAUGHTER TRULY IS THE BEST MEDICINE[†]

Steve Wilson*

Editor's note: Mr. Wilson's presentation consisted primarily of a demonstration of how "laughter clubs" operate, but he interspersed the demonstration with information about the value of laughter, which we have summarized here. His presentation provided not only a healthy dose of laughter for all present but also an excellent "warm-up" for Mr. Durst, whose humorous observations follow.

Humor is terrific for us; laughter *is* the best medicine. I have been in many workplaces, because I am concerned about the quality of life at work, and employers are willing to bring me in to help them improve that quality. I have seen that a lot of people have special desk drawers full of things such as antacids and pain relievers and tranquilizers. These are chemical remedies for the ill effects of stress. What we now know, because of the studies of humor and laughter, is that you can push those chemical remedies aside and put some things in that desk drawer that *amuse* you. You can create your own "laughter first-aid kit" to pull out at times of stress. That should be quite useful for trial lawyers, and for spouses of trial lawyers.

Today is a special day for us, so I want to introduce my wife, Pam. As of today, we have been married 6,653 days. That's true. We count every day, as part of a philosophy of life called "don't postpone joy." Certain things that have happened in our lives, and that happen in everyone's life—sudden losses of people we loved and the like—led us to this philosophy. You don't know how much time you have, so you have to make every day count. For that purpose, we count every day.

For many years, I was a marriage counselor, and I had the privilege of seeing inside many marriages (including some of my own), so I got to see some patterns of things that worked and things that did not work. I will share with you some tips for a happy marriage. These work for us: First, I don't try to run her life. (Actually, I don't try to run mine, either, and that works really well!) Second, and probably most important, we compromise without resentment. This is true compromise, so that there are no leftover bad feelings.

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Third, we go out twice a week. In these stress-filled times, it is especially important to get out and do something you really enjoy. Fourth, you have to have a sense of humor about yourself; learn to take yourself lightly. Take your job seriously, take your responsibilities seriously, take your values and beliefs seriously, but lighten up about yourself.

I came upon the research on the value of laughter in 1984, and it transformed my practice as a clinical psychologist. Physicians and other healers have observed the benefits of laughter for thousands of years; “laughter is the best medicine” essentially comes from the book of *Proverbs*: “A merry heart doeth good like a medicine; but a broken spirit drieth the bones.”¹ In the last twenty-five years, these observations have been substantiated by medical research on how good laughter is for us. It is quite a gift. Neurologists have found that the ability to laugh and smile is virtually mature at birth in human infants. And laughter has survival value. Your laughter strengthens your immune system. Your laughter normalizes your blood pressure. Your laughter helps your digestion. Your laughter helps you sleep better. Your laughter relaxes your muscles, and muscular tension is part of emotional tension and stress. Laughter oxygenates your whole body, and oxygen nourishes every organ of your body. It particularly nourishes the brain, so you think better and solve problems better. When you laugh to the point of crying, you actually wash toxins out of your body. After I came across the research, I realized that this was a mission for me, that I needed to teach people how to laugh more.

Here, I need to distinguish laughter from humor. Laughter is the key. That is what produces the positive physical and emotional reactions that I mentioned. Humor is different. Humor does not necessarily produce laughter, and different people find different things humorous. Humor is subjective and personal. I do not denigrate humor; it is terrific because it does shift your perspective, and new perspective is valuable. But humor does not do what laughter does, and if we rely on humor to produce laughter, we are in trouble.

We also have learned that laughter is universal. All human beings laugh, and all human beings laugh in almost exactly the same way, regardless of language and cultural differences. Also, we can laugh without hearing or thinking of a joke; techniques have been developed for stimulating laughter without jokes, so we can avoid reliance on subjective humor. Finally, sharing laughter creates bonds among people. Through universal laughter, we have a way of connecting the world.

In 1998, I was invited to India, to lecture on business concepts of creating positive work environments and of using humor in those environments. While there, I met a physician who was gaining notoriety in India by prescribing

¹ *Proverbs* 17:22.

laughter for patients, and he was doing it without jokes. His method involved “laughter clubs.” These were similar to informal aerobics or yoga clubs; groups of people would get together with a leader and go through a series of laughter exercises. The participants were enjoying tremendous health benefits, and they were happier. At that time, there were about 300 laughter clubs all over India.

This solidified my mission. I teamed up with this doctor and returned to the United States, to begin the World Laughter Tour. We are teaching people about the value of laughter and creating a network of laughter clubs. Our goal is to lead people all over the world to health and happiness and peace through laughter; and we truly believe that this is one path to world peace. I have now retired from my practice of clinical psychology just to spread this message.

I have met several of you over the last few days, and you may have noticed that, when someone asks me how I am, my answer always is, “I’m incredible!” I have learned the secret to feeling and being incredible every day: Have lower standards. What I mean by that is that we measure ourselves by the wrong yardsticks. What makes us incredible is the fact that we have a thing called life. We are alive. That is incredible. That’s all you need. Everything else is about having a better day or a worse day, but you are always incredible. Watch what happens if you start telling people that you’re incredible when they ask that routine, “How are you?” Watch how they respond, and notice how you feel if you say to yourself, “I’m incredible.”

We close every laughter club session by reminding the participants that it is not enough to get the physical benefits of laughter at our sessions; they also have to change their general attitudes. Toward that end, we teach practices called “sensible living.” We do this day by day. On Monday, laughter club members are encouraged to be mindful of paying compliments. Instead of being critical and judgmental, look for the good and say something good. Tuesdays are for being open to new ideas, Wednesdays are for appreciation and gratitude, Thursdays are for acts of kindness, and Fridays are for forgiveness. These actions and attitudes remove the emotional obstacles to laughter and create a heart of compassion, which is our path to world peace. Weekends are for chocolate.

The single greatest thought I have ever come across for peace of mind is the “Serenity Prayer.” The long version, which most of us know, goes this way: “God grant me the serenity to accept the things I cannot change, the courage to change the things I can, and the wisdom to know the difference.” My short version is this: “Lighten up!”

YOU CAN'T MAKE UP STUFF LIKE THIS[†]

Will Durst*

As Will Rogers said, it's easy to be a humorist when you have the whole government working for you. I had Clinton for eight years, which was heaven for a political comedian. I didn't have to write material; I got it delivered to me at 7:00 a.m. every morning. All I had to do was rip and read. It was slam dunking from a step ladder. But that actually is the problem with being a political comedian; you are wafted on the drafts of history. Sometimes there's nothing going on and you have no material. Fortunately for me (but perhaps unfortunately for the country), I do not face that difficulty now.

I must say that not only are the Taliban bloodthirsty and vicious, they are also stupid. If they wanted to throw off America's financial stability, all they had to do was take out the IRS building. The entire country's response would have been, "Oh, darn. Oh, those bad guys. They better not try that again, or we'll be forced to respond." Of course, we did respond by bombing Afghanistan back to the Stone Age, which I think was a big mistake, because for them it is an evolutionary leap forward. Think about it—bombing Afghanistan. It has so been done. It's redundant. All we are doing is rearranging rocks. It's like dropping ice on Antarctica. The other day the general who was giving the Pentagon briefing on the bombing could not tell the difference between the before picture and the after picture.

Then, because they live in caves, we came up with burrowing bombs. Doesn't that mean we are just creating more caves? In some parts of that country, this must be considered a redevelopment project. For them, this is Habitat for Humanity. There are probably guys trying to attract air strikes. "Don't worry, honey, we're going to get your mom that extra room she wants."

We're so good at war now that we have even gotten politically correct. Now we're dropping food at the same time we are dropping bombs, which sends a bit of a mixed message, if you ask me. I think it's a bad precedent, because *everyone* is going to want their war with room service. I can hear it now: "They catered our war much better. We had rumaki." And does anybody eat the food? We have just bombed the village. "Oh, dear, Uncle Achmed is dead. Hey, look, cookies." At least we're not sending them pork, which I

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would have expected from my government. “We’ve got a warehouse full of wieners. Give them those.” But we are sending peanut butter as part of the MREs, the Meals Ready to Eat. Peanut butter? They’re totally unfamiliar with peanut butter. Do you know what peanut butter looks like if you’ve never seen it before? Especially chunky peanut butter? And we dropped five million Pop-Tarts. They don’t have running water; now they need toasters?

Here’s one that really frustrates me. The CIA said that until August they had been tracking bin Laden through his use of his cell phone. He lives in a cave in Afghanistan. He’s getting service? I can’t even get two bars here, and he’s running up minutes in the Khyber Pass. I want *his* service.

This is such an unusual war because we have no idea what’s going on. The press isn’t allowed to follow, which makes sense because the enemy is watching CNN. You don’t want to jeopardize the troops. But CNN still tries to cover a war that it can’t cover; they have “exclusive night vision coverage of America’s war”—and it’s just a green screen. Every once in a while you see a flash of light, and the commentator says, “Ah, that’s the coalition forces bombing the advance positions. . . . Oops, no, it’s a security guard lighting a cigarette in the building next door.”

What’s happening in the Afghanistan war isn’t the only thing we don’t know. We don’t even know how much we don’t know. We still don’t know why aspirin works. We don’t know why they still make strawberry Quik; nobody buys it twice. We don’t know why macramé has competing trade journals. We don’t know why you can’t buy *TV Guide* the week you need it: “No, not next week’s. I need this week’s.” “Oh, I’m sorry, my friend, we sold this week’s last week.”

Even the stuff we do know turns out to be wrong. When I was a kid, Russians were the enemy. Red meat was our friend. Now it’s all turned around. When we grew up, they pounded it into our heads that milk was good for you. Then, for awhile, it was bad. Now, they don’t know. Did you read this the other day? Scientists now say that sunblock causes cancer.

Then they tell us stuff we don’t need to know and certainly don’t want other people to know. On September 12, a structural engineer appeared on CNN and explained that the terrorists made a huge mistake by slamming into the outside of the Pentagon. “What they should have done was crash into the courtyard. Then the jet fuel would have sprayed all around and the whole thing would have gone.” Get him off the air! I also heard this: “Our nuclear plants are awfully vulnerable. All it would take is a single pilot and one crop duster to hit the base of one of the cooling towers. . . .” Why would they broadcast that?! Why don’t they just put the blueprints on the Internet?—Oh, they did.

Our mayor in San Francisco is Willie Brown. I love Willie Brown. He’s the only politician I know who can enter a revolving door behind you and

come out first. I always wondered what happened when Willie met Bill Clinton. Did they just slide right past each other? Willie walked around for a week after September 11 with a bad case of disaster envy. He kept making comments like these: "I don't know why they didn't hit us. We have the Golden Gate Bridge. We have the Pyramid building." Someone needed to tell him that it was not a Chamber of Commerce moment. Besides, I could have told him why they didn't come; they couldn't park. "How about over there?" "No, that's a white zone. That's for loading and unloading only." "Well, what about there?" "No, that's street cleaning on Tuesdays, Thursdays and Saturdays." "Well, pull into a garage." "It's twenty-five dollars for every twenty minutes!" "All right, turn around. We'll go down to San José and decimate Silicon Valley." "Too late!"

And flying is now such a pain. Obviously, we all had to fly here. How many people had to take off their shoes? Isn't that ridiculous? Because one idiot on a Paris-to-Miami flight had exploding shoes, everybody in the world has to take off their shoes. Paris to Miami? Everybody on that flight should have been a suspect. Who leaves Paris voluntarily to go to Florida? Of course, the guy with the explosive shoes looked innocent enough. He was like a cartoon terrorist or a figment of *Mad Magazine*. I wouldn't be surprised to find out that he was wearing a t-shirt imprinted "terrorist" with an arrow pointing up to his face. And how soon before some lunatic on a Kona to Tulsa flight shows up with exploding underwear? Imagine the security lines then!

We also aren't allowed to take nail clippers on board, because . . . I don't know why. Is it because I might threaten to disfigure the earlobes of one of the space waitresses? Yes, "space waitresses." I'm sorry; I've had it. I'm not a CEO, and I'm not a former quarterback, so they treat me like a disobedient houseplant. First they were stewardesses, then they were flight attendants. Then they wanted to be on-board customer relations engineers. To me, they're space waitresses. "I'm sorry, but the FAA says that we can't take off until you move your seatback from its eighth-of-an-inch reclining position." On my last transcontinental flight, I heard her say, "In the event of a water landing . . ." Is there water in Kansas now? The rest of her sentence was, "use your seat cushion as a floatation device." Oh, sure, and let's also pretend that our bread sticks are actually laser weapons, and our air-sickness bags are actually hand-held parachutes!

I almost forgot about the security questions. You would have expected them to put a little more thought into those. "Have your bags been in your possession at all times?" You want to be honest, but you're afraid to say, "They were in the trunk of my car while I went back in to lock the house." And then, the key question: "Has anyone unknown to you asked you to carry anything aboard?" What answer do they expect to elicit with this precise

query? “Why, yes, Osama has asked me to . . . Damn you, you Yankee infidels, with your piercing questions. You have foiled me again!” Meanwhile, there are guys going to flight school who aren’t interested in take-offs or landings, and no one asks them a single thing! “We don’t need no stinky take-offs. Just left turns. Teach me those.” And, where did this happen? Where was the flight school? Florida, again!

That’s it for Florida! I’ve had it with Florida. If baseball can contract, so can the United States. We can cut down to forty-nine states. It’ll work on the flag—seven rows of seven stars. I’ve had it with Florida. We’ll cut Florida off right at the Georgia border, kick it to the Caribbean, and rename it North Cuba. Remember the election? An entire community of retired Jews accidentally voted for a Nazi. Even Pat Buchanan said, “Hey, these are not my people.” I know they were confused. Of course they were confused. You can see the melanomas in the air. You hit the freeway in your rental car, and you’re stuck behind eight thousand Chryslers doing thirty in the fast lane with their left blinkers on going to the early bird dinner. You never see a head, or even a hat. Just two gnarled hands on each steering wheel.

Everybody asks how Bush won the election. I can tell you. It was the incendiary power of Al Gore’s charisma. Al the-human-dial-tone Gore, the only living product of reverse taxidermy. People say, “Now we’re in a war. How could it be worse?” Here’s how. President Gore: “I think the problem is that we have yet to convince the Taliban that they are fellow passengers on Spaceship Earth.” President Buchanan: “What’s flat, green, and glows? Afghanistan, tomorrow!” President Clinton: “Hey, Osama, how you doin’, buddy? Listen, I was just curious. My staff tells me that you have five wives. Can that be right? How does that work?”

Many people I talk to say, “Bush is doing a great job. He’s surprising the hell out of me.” “You voted for him.” “I know, but I wasn’t even sure he could spell Afghanistan.” Personally, I wish he would learn how to pronounce terrorism. “We’re going to eradicate terrorism as we know it.” Terrorism? Mission accomplished! And remember the choking story? He choked on a pretzel? Give me a break! Even Gerald Ford could chew! And did you see Bush? He looked like he was attacked by a pack of cave weasels. “He slipped off the couch and skinned his cheek.” Are they covering the White House couches with cheese graters now? You see, I don’t think that’s what happened because I don’t think his staff would allow him to look that ridiculous unless what really happened was even more ridiculous or crazy. Here’s what I think happened: He was taunting his dad for how much better his war was going, and his mom hit him with an empty gin bottle.

I am worried about George W.’s safety. On September 11, where was Cheney? “Ah, we don’t know.” “You don’t know where the Vice President

is?” “No, we have no idea. The Secret Service took him to an undisclosed location. He’s in a bunker somewhere. If we knew, we wouldn’t tell you, but we don’t know.” “All right. Where’s the President?” “He’s in Florida, and he’s on his way to Louisiana. He’s going to be at an Air Force base right outside of Baton Rouge, just off Highway 10. Then he’s going to head up to Omaha to refuel before coming back to D.C. From Omaha, he will head due east on the 40th parallel. Big 747, ‘Air Force One’ on the side.” “All right. Now, where’s Cheney?” “We don’t know.” Then on the day we started bombing, October 18, Cheney had been on a morning news show, after which the Secret Service whisked him to a secure bunker in the northeast corner of Wyoming. Meanwhile, Bush was giving a speech at the White House in front of a window. Why don’t they just tie him to the gate as bait? You just know that during the whole anthrax thing, they had Bush opening Cheney’s mail.

Just as a quick aside, the anthrax scare gave me one of my clues that my mother is running the government. Did you see the government’s advice in case you think you have anthrax in the mail? “Wash your hands.” My mother is running the government. Then there was the President’s idea to get America rolling again: “Go shopping.” My mother’s running the government. My wife has hypnotized the President. “I’m shopping for America. If you don’t let me go to Nordstrom’s and get those shoes, the terrorists will have won.”

Now, back to our Vice President. I love Dick Cheney. He reminds me of a villain in a James Bond movie. I keep expecting to see him stroking a white cat. He looks like a sleepy lizard in search of a warm rock. I saw him being interviewed by Sam Donaldson and kept expecting him to detach his jaw and swallow Sam Donaldson whole. And I love how Cheney got his job; Bush appointed him to head up the Vice Presidential search committee, and he gets the gig. That is so cool. That is so Republican. “I want that. Give it to me. It’s mine.” The Democrats sure wouldn’t do it that way. “First, we have to form a tripartisan committee to study the impact on the albino, midget, lesbian unwed mother, and whether or not the redwoods would be empowered.” But the Republicans say, “Screw you, that’s mine.” That is so American. That’s how we got this country. “Yeah, nice loin cloth, now move to a reservation in the desert. We’ll give you some dice and see what you can do with those.”

The other important point about Cheney is that he has a heart attack about every three days. He shouldn’t be in an undisclosed location; there should be a 24-7 webcam welded to his head. He’s got a pacemaker the size of a garage door opener. Think about it: The Speaker of the House, Dennis Hastert, is one pretzel and a functioning microwave away from being President.

There’s another guy who got his job in an interesting way—Ashcroft. You know, Mr. Considerate, Compassionate Ashcroft. He got his job in the administration because he *lost* his Senate seat in Missouri to a dead guy. He

lost to Mel Carnahan, who died in October. It isn't even as if Carnahan died on the eve of the election. Voters had plenty of time to weigh the options. "Ashcroft or dead guy. I'll go for the dead guy. How much harm can he do?" Even though Ashcroft is the Attorney General, people still walk up to him and say, "Hey, I know you. You're the guy who couldn't win on the 'I'm alive' ticket." I can see it now. Cheney will drop dead of a heart attack, and Ashcroft will think Cheney's mocking him. "Get up, you S.O.B."

You have been the best audience a comedian could ever hope for. My bio always says, "Comedy for people who read or know someone who does"—and clearly you do. I want to be a little serious in closing. I'm a baby boomer; I grew up in the '60s. (Well, not really. I grew up in Milwaukee, and we didn't get the '60s until about 1974.) We came of age during the Vietnam War, and we lost JFK and Bobby and Martin. The generation before grew up during a massive depression. Then they faced Pearl Harbor and a world war. I know everybody's feeling vulnerable because we've never been attacked like this in our homeland. But America is so strong. We made it through all those things I already mentioned. And we survived two terms of Reagan and eight years of Clinton. We're a very resilient country. And, more importantly, we're not just a nation. America is a notion, an idea, the American Dream. I have no doubt that we will make it through this, with the Dream intact—and finding the humor in events along the way helps to make the process more bearable.

VOLUME 37

AUTHOR INDEX

	page
BROMBERG, MYRON J. How To Choose and Manage Litigators—NOT!	370
BUEL, SARAH M. Twenty-Four Years of Spousal Abuse— Victim Advocate, Prosecutor, Professor	358
COUGHENOUR, JOHN C. (The) Collapse of Bogle and Gates	413
DURST, WILL You Can't Make Up Stuff Like This	489
EILER, LORI UROGDY Creating Star Players for Our Democracies: The Power of Law-Related Education	417
ERICKSON, WILLIAM H. In Appreciation: Our Administrative Secretary	389
FAIRBANKS, DAVID Hawaii Welcome	437
GREER, ALAN G. Billing, Our Profession's Not So Hidden Shame	385
JEANS, JAMES W., SR. Fifty Years at the Trial Bar	391
KENTRIDGE, SIR SYDNEY (The) Highest Court: Selecting the Judges	440

LODISH, RICHARD	
(The) Essence of Good Teaching	425
NECKERS, BRUCE W.	
Lawyers on Trial	432
REED, JOHN W.	
It Never Ends	378
RICHMAN, GERALD F.	
Voting Florida Style: A Lawyer's Election Odyssey	457
WHITCOMB, CHRISTOPHER	
Terrorism—Life After September 11, 2001	464
WIGAND, JEFFREY S.	
Behind the Smokescreen: Inside <i>The Insider</i>	343
WILLARD, HUNTINGTON	
(The) Human Genome Project	475
WILSON, STEVE	
Laughter Truly Is the Best Medicine	486

VOLUME 37**SUBJECT INDEX**

	page
CIVICS	
Creating Star Players for Our Democracies: The Power of Law-Related Education, Lori Urogdy Eiler	417
Voting Florida Style: A Lawyer's Election Odyssey, Gerald F. Richman	457
COMPLEX LITIGATION	
Behind the Smokescreen: Inside <i>The Insider</i> , Jeffrey S. Wigand	343
EDUCATION	
Creating Star Players for Our Democracies: The Power of Law-Related Education, Lori Urogdy Eiler	417
(The) Essence of Good Teaching, Richard Lodish	425
ELECTION LAW	
Voting Florida Style: A Lawyer's Election Odyssey, Gerald F. Richman	457
ETHICS	
Behind the Smokescreen: Inside <i>The Insider</i> , Jeffrey S. Wigand	343
Billing, Our Profession's Not So Hidden Shame, Alan G. Greer	385
Voting Florida Style: A Lawyer's Election Odyssey, Gerald F. Richman	457
GENETICS	
(The) Human Genome Project, Huntington Willard	475

HUMOR

- Laughter Truly Is the Best Medicine,
Steve Wilson 486
- You Can't Make Up Stuff Like This, Will Durst 489

JUDGES

- (The) Highest Court: Selecting the Judges,
Sir Sydney Kentridge 440

JURY

- Lawyers on Trial, Bruce W. Neckers 432

JUSTICE SYSTEM

- Behind the Smokescreen: Inside *The Insider*,
Jeffrey S. Wigand 343
- It Never Ends, John W. Reed 378
- Lawyers on Trial, Bruce W. Neckers 432

LAW ENFORCEMENT

- Twenty-Four Years of Spousal Abuse—
Victim Advocate, Prosecutor, Professor,
Sarah M. Buel 358

LAWYERS

- Fifty Years at the Trial Bar, James W. Jeans, Sr. 391
- How To Choose and Manage Litigators—NOT!,
Myron J. Bromberg 370

LEGAL HISTORY

- (The) Highest Court: Selecting the Judges,
Sir Sydney Kentridge 440

LEGAL PROFESSION

- Billing, Our Profession's Not So Hidden Shame,
Alan G. Greer 385
- (The) Collapse of Bogle and Gates,
John C. Coughenour 413
- Lawyers on Trial, Bruce W. Neckers 432
- Twenty-Four Years of Spousal Abuse—
Victim Advocate, Prosecutor, Professor,
Sarah M. Buel 358

LEGAL SYSTEMS

- (The) Highest Court: Selecting the Judges,
Sir Sydney Kentridge 440

PROFESSIONAL LIFE

- Fifty Years at the Trial Bar, James W. Jeans, Sr. 391
Hawaii Welcome, David Fairbanks 437
Laughter Truly Is the Best Medicine, Steve Wilson 486

SETTLEMENT

- Behind the Smokescreen: Inside *The Insider*,
Jeffrey S. Wigand 343

TERRORISM

- It Never Ends, John W. Reed 378
Terrorism—Life After September 11, 2001,
Christopher Whitcomb 464

TRIBUTES

- In Appreciation: Our Administrative Secretary,
William H. Erickson 389

