Federal Bar Association
Northern District of Ohio Chapter

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President's Podium

Phil Calabrese
Porter Wright
President, Federal Bar Association Northern District of Ohio Chapter

As we head into the final days of summer and we look forward to another season of playoff baseball and perhaps a victory or (dare we hope?) two on the gridiron, our Chapter of the FBA has two signature programs coming up that you should not miss.

1

Following another Supreme Court term that ended with major decisions, the announcement of Justice Anthony Kennedy's retirement, and the nomination of Judge Brett Kavanaugh to replace him, the eyes of the nation are on the Supreme Court. Similarly, our Chapter of the Federal Bar Association is focused on the Supreme Court, but for different reasons.

On August 21, members of our Chapter will have the opportunity to be sworn in and admitted to practice before the United States Supreme Court at a special ceremony to be held in Cleveland. The current Clerk of the U.S. Supreme Court, Scott Harris, will swear in lawyers to practice before the Court, then speak at a special lunch immediately following.

To mark the special occasion of this rare opportunity, and the visit of the Clerk of the U.S. Supreme Court to Cleveland, our Chapter is also hosting a special CLE program focused on the Supreme Court's recently concluded term. The Court's rulings included a host of decisions that will have lasting impact on free speech, the free exercise of religion, and voting rights, among many other issues. To discuss the key rulings of the term, our Chapter has assembled panels of leading scholars, including Professor Jonathan Enin, Professor Jonathan Adler, and Jessie Hill, Associate Dean, from Case Western Reserve University's School of Law, and C.J. Peters, Dean of the University of Akron School of Law. In particular, the program will address the Court's gerrymandering rulings and other political rulings, including the *Husted v. A. Philip Randolph Institute* case out of Ohio, and feature the Ohio legislators involved in these issues and decisions who will speak to their meanings and how they affect the State.

It is not too late to be a part of this special day by attending the CLE program or the lunch with the Clerk of the U.S. Supreme Court on August 21. Mr. Harris has served in various capacities at the Supreme Court for over 15 years, giving him a unique vantage point at this important moment. You can register here: http://www.fba-ndohio.org/event-2980953.

2

On October 9, the thirteenth annual State of the Court of the luncheon will take place. This event has become one of those events that any lawyer who practices in federal court in the Northern District must attend and that we all look forward to every year. This year, the State of the Court will show off the new Hilton in downtown Cleveland. This year, Chief Judge Patricia Gaughan will update the bar about the State of the District Court, and Chief Judge Russ Kendig will address the State of the Bankruptcy Court.

Following the program, our Chapter will present an afternoon of CLE programs that will educate and inform. After the CLE programs, we will adjourn to Bar 32 on the Hilton's rooftop with breathtaking views of Lake Erie and downtown Cleveland for a happy hour.

Be sure to mark your calendars for the State of the Court and to register here: http://www.fba-ndohio.org/event-2944498.

Regards,

Phil Calabrese

Members in the News

Justin J. Roberts founded J. Roberts, LLC, a law practice focused on government investigations and white collar criminal matters. Prior to founding the firm, Justin was a Partner at Vorys, Sater, Seymour and Pease LLP where he headed the Government Investigations and White Collar Defense practices. Justin also served over a decade as an Assistant United States Attorney in the Major Fraud & Corruption Unit of the Northern District of Ohio. The firm's website is: www.jrobertslegal.com<http://www.jrobertslegal.com>. Justin can be reached at: justin.roberts@jrobertslegal.com<mailto:justin.roberts@jrobertslegal.com>.

Tim L. Collins, partner with Collins & Scanlon LLP, was elected President of the Board of the Dunham Tavern Museum, which is located on Euclid Avenue in Midtown Cleveland, Ohio.

Past FBA-NDOC president and Tucker Ellis LLP partner Carter Strang was a panel member in a CLE titled "The Kent State Shootings and its Legal Aftermath" which was presented to the Manos Inn of Court and featured in an article published in The Bencher Magazine. Carter — a Master Bencher in the Manos Inn — was a student at Kent State and witness to many of the events surrounding the May 4, 1970 shooting of 13 students.

On May 8th, Former FBA-NDOC Chapter President (2002-2003) and past FBA National Circuit Vice President for the Sixth Circuit (2010-2016), James W. Satola, was elected in the Cuyahoga County Democratic Primary as the Democratic nominee for Judge of the Cuyahoga County Court of Common Pleas for the term commencing on January 7, 2019. In November, he will face incumbent Judge Kathleen A. Sutula (also a past Chapter President, of the then Cleveland Chapter, from 1982-1983).

Stephen H. Jett, Partner with Ulmer & Berne LLP, was elected to the Board of Directors of Rose Mary, which provides free housing and other services to physically and mentally challenged children and young adults in Cleveland. Rose Mary is a non-profit organization and part of the Diocese of Cleveland.

CARTER STRANG NAMED TO CLEVELAND COUNCIL ON WORLD AFFAIRS BOARD OF DIRECTORS

Carter Strang has been named to the Cleveland Council on World Affairs (CCWA) Board of Directors.

Mr. Strang, a partner in the Tucker Ellis Trial Department, created and coordinates the firm's award-winning Pipeline Diversity Program. A past president of the Cleveland Metropolitan Bar Association, he established the nationally recognized Louis Stokes Scholars Program, which provides paid summer legal internships for college students who are graduates of Cleveland and East Cleveland urban public high schools.

Mr. Strang is also a past president of the Federal Bar Association, Northern District of Ohio Chapter, and vice chair of The Center for Community Solutions.

About Cleveland Council on World Affairs

The mission of CCWA is to inspire engagement in international affairs and world cultures through education, citizen diplomacy, and public dialogue to create a region of globally-minded citizens. Developing global competence and awareness of foreign cultures, global issues, and international relations is more important than ever as Ohio residents are increasingly connected to the rest of the world and impacted by global issues. CCWA programs include the Model United Nations, Academic WorldQuest, CCWA's Speaker Series, and International Visitor Programs. For more information, visit www.ccwa.org.

Read it on line :

https://www.tuckerellis.com/news_publications/carter-strang-named-to-cleveland-council-on-world-affairs-board-of-directors

VOLUNTEERS NEEDED

On March 22, 2018, members of the Northern District of Ohio Chapter of the Federal Bar Association spoke with approximately 100 juniors and seniors enrolled at the Wayne County Schools Career Center. Marisa Darden, an Assistant United States Attorney for the Northern District of Ohio in the Organized Crime Drug Enforcement Task Force Unit, and Charles Fleming, an Assistant Federal Defender for the Northern District of Ohio, talked about their respective roles and their choice of a career in law. Special thanks to Marisa and Charles for volunteering to speak with the students!

Efforts like these are part of our Chapter's commitment to civics initiatives. Our Chapter's next civics program will be Teen Discourse and Decisions (TD Squared), aimed at teaching students how to engage in meaningful civil discourse through simulated arguments and jury deliberations. We are looking for judges and attorneys to serve as volunteers to guide the students through the program. The event will take place in October at the federal courthouse. Please stay tuned for an email with the exact date and additional information about the program. If you are interested in volunteering, please contact Sarah Cleves at scleves@calfee.com or Sean Kelly at attorneyseankelly@gmail.com.

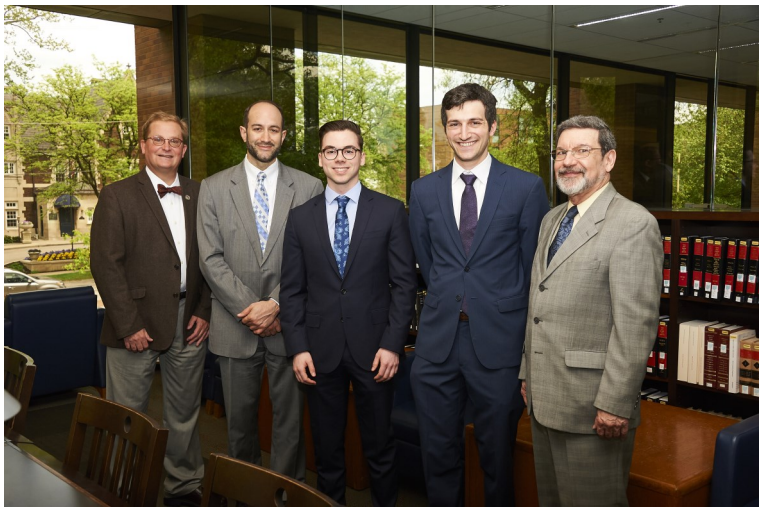
Awards and Events in the News

FBA AWARDS GIVEN TO CWRU STUDENTS

Jonathan L. Entin
CWRU Faculty Representative,
FBA-NDOC Board

Two students at Case Western Reserve University School of Law received the chapter-sponsored Federal Bar Association award for obtaining the top grades in Constitutional Law. Alex Howard and Michael Silverstein received their prizes at CWRU's awards ceremony on May 19. They received their J.D. degrees the following day.

Alex, from suburban Detroit, received his B.A. in political science from Michigan State University. He also studied in London and Edinburgh. As a law student, he received a prize for the top grade in Labor Law as well as the FBA award in Constitutional Law. He published a paper on whistleblower protection under the Dodd-Frank Act and was active in the Street Law program. Alex did his experiential capstone with an organization that promotes crowdfunding for commercial real estate syndication and interned for another entity in the real estate sector.



Michael, a native of Philadelphia, majored in political science and minored in theatre arts at the University of Pennsylvania. He entered law school after working at the Cleveland Public Theatre, the Cleveland Play House, and the Great Lakes Theater. As the Symposium Editor of the Law Review, he organized a very successful conference on "National Security, National Origin, and the Constitution 75 Years After Executive Order 9066," a program that explored the history and continuing significance of the Japanese internment during World War II. The symposium issue will come out this summer. Michael also published a very original Note on qualified immunity under the Fourth Amendment and did his experiential capstone with the legal department of the Chicago Board of Education, where he handled hearings in connection with the dismissal of school support staff. He will start as an associate at the Columbus office of Jones Day this fall.

(Pictured, left to right: James W. Satola, past FBA-NDOC Chapter President; J. Philip Calabrese, current FBA-NDOC Chapter President; Constitutional Law award winners Alex Howard and Michael Silverstein; Professor Jonathan L. Entin, FBA-NDOC Board Member.)

On May 30, 2018, the Federal Bar Association, Northern District of Ohio Chapter, co-sponsored a Jury Appreciation Luncheon in Toledo, Ohio. Invitations were sent to all jurors who had served as jurors for the Western Division of the Northern District in 2017. Ten jurors accepted the invitation and were featured at a luncheon where invited guests included the local Federal Bench and members of the bar.

Jurors were encouraged to share their experiences, and each of them enthusiastically did so. Attendees were able to observe the bond jurors share after having completed their service. Although they acknowledge the initial disappointment in receiving a jury summons, they universally also acknowledged the good feeling and positive experience of having served.

Jurors were able to make suggestions as to what they did and did not like about the process and the performance of the lawyers they observed. Jurors were also invited to make suggestions about how to improve the jury experience for others, and about what physical changes could be made, either in the jury room or courtroom, to improve the juror experience.

(To the right is a picture of the jurors who attended, along with District Court Judges Helmick (far left) and Zouhary (far right))

SOME LESSONS LEARNED: 33 YEARS AS A TRIAL LAWYER, AND 3 YEARS ON PANELS FOR THE BOARD OF PROFESSIONAL CONDUCT

By Tim L. Collins, Esq.
Collins & Scanlon LLP

After hundreds of proceedings, including jury and bench trials, and court annexed and private arbitrations, during more than three decades of civil trial practice for numerous business and individual clients, I have, for the past 3 years, been privileged to also serve as both a member and chair of hearing panels for the Board of Professional Conduct for the Supreme Court of Ohio. That experience, as a deliberative panel member, and serving as the chair and report writing member of those panels, in a quasi-judicial setting, has been eye opening as to my own advocacy in several ways. This article summarizes a few. Sitting on the other side of the table, as trier of fact, and author of reports impacting the ability of fellow lawyers to practice, is a new perspective for a career long advocate. It has taken time to know my role, and leave counsel for the parties to theirs. Several recent experiences as a panel chair, and numerous as a panel member, have caused me to consider how to better undertake advocacy beyond presenting my best case, limiting or blunting the scope of claims, and defenses, and the scope and effect of damaging evidence being submitted against my client. In sum, good advocacy requires delivering my client's case in the most usable form possible to the trier of fact, especially if that is a person or a panel who will use my materials and presentation to formulate a report and recommendation, or an opinion.

Complaint, Petition or Arbitration Demand

Let's begin at the beginning: every form of civil litigation begins with an initializing statement or complaint. The Federal and Ohio Rules of Civil Procedure do not require specificity of pleadings, except in limited situations. Civil Rules 8-9, Federal and Ohio Rules of Civil Procedure. Likewise, an arbitration demand does not require more than a brief description of the dispute. See, e.g., American Arbitration Association Commercial Arbitration Rules Demand for Arbitration, www.ADR.org. In the case of the Board of Professional Conduct ("BPC"), complaints are to include more specifics then most civil complaints, e.g. allegations of specific misconduct including citations to rule violations, the nature and amount of restitution sought, a list of prior discipline, etc. Rule V, Section 10, E(1), Supreme Court Rules for the Government of the Bar of Ohio. Insofar as the matters before the BPC, the better Rule V is observed, the more useful the complaint is to the panel. With regard to civil litigation, sooner or later a judge, arbitrator or hearing panel member will want to reach into his or her file, extract a document that comprehensively sets out the claims, including the elements, and a rough description of how they are going to be factually demonstrated, to know what to look for as evidence is adduced during the course of the evidentiary hearing. If your case is not succinctly yet sufficiently set out, you have just forced the trier of fact to do your job for you on behalf of your client. Your initial pleading should be readily converted to a chart so as to allow the trier of fact to keep score. My father's favorite saying applies here: "If you want the job done right, you better do it yourself." "You" here should be counsel for the parties, not the trier of fact. While the Civil Rules do not require more than notice of the claims and defense to the opposing party, please consider the trier of fact in your initial pleadings or statement of the issues, and how useful your pleading, petition or demand will be through discovery and at trial.

Exhibits and Stipulations

At the conclusion of discovery and motion practice (where allowed), both parties will be intensely focused on the issues in play, and the evidence which tends to prove properly provable propositions. There will be volumes of information counsel for the parties will gather in discovery. Resist the urge to dump all of it on the trier of fact without sifting, probing the usefulness and attempting to organize it in a useful manner from the quantity you have assembled in discovery. I urge you to make every effort in consultation with opposing counsel as far as possible to arrive at a common set of exhibits. The trier of fact cannot possibly be as knowledgeable or focused as counsel for the parties on the universe of evidence which exists in a case. Similarly, counsel is in the best position to cull out poorly communicated, duplicative and irrelevant information to present a clean and persuasive record. To be certain that your evidence is making its way in its most crystallized form to the trier of fact, it is incumbent upon counsel to actively work with opposing counsel to, e.g., negotiate joint exhibit lists, exhibits and stipulated facts. Otherwise, the record created at trial could be so disaggregated as to leave the proofs you need to prevail as hard for the trier of fact to find as the proverbial needle in a haystack. In large document cases, hundreds of documents or lines of email make the hearing and the conclusions to be reached difficult if not overwhelming for a trier of fact, which is not necessary or helpful to your case. Of course, there is a transcript, which the trier of fact will read, but you may leave your best facts buried for the trier of fact to find. You cannot possibly think that is a plus for your client.

A recent experience in a multi-day hearing illustrates this problem. The hearing was held in Columbus involving tens of fact and expert witnesses, thousands of pages of emails and documents, and hotly contested issues with serious long-term consequences for the Respondent. The parties filed literally dozens of pretrial motions contesting every legal and factual matter possible, including dispositive motions, motions asking for orders requiring production of documents, demands for production of expert reports, notices of deposition of ten experts listed on preliminary witness lists (but who had not yet supplied expert reports) and motions in limine as to many of the fact and expert witnesses on both sides. Additionally, exhibit lists from both sides identified hundreds of documents, mainly emails, many of which were redundant upon further study, yet no effort was made to stipulate or agree on a list of joint exhibits. Ultimately, at trial the vast majority of the facts, while voluminous, proved to be essentially not at issue in the case. The parties, during the hearing, twice stipulated to major "liability" issues after several witnesses testified, and vigorous cross examination occurred. Instead, the legal consequences, and mitigation evidence as to the effect of the basic facts, became the focus of the remaining evidence which was the subject of dispute. The inability of counsel to meaningfully meet, confer, and seek to sift the disputed facts from the undisputed before the hearing, resulted in the expenditure of hundreds of hours of time not only by counsel, but also by the three panel members preparing to hear the facts of the case, and attending the hearing. Please talk among yourselves to find a scenario where either side benefitted from this lack of meaningful preparation in the delivery of the case to the trier of fact before the hearing commenced.

Trial Evidence and Argument

Every case has at least two sides, or there wouldn't be a trial or hearing. However, when presenting your case, the tendency of erring on the side of spreading everything on the record you have for your client's case must be balanced against overfilling the record, and the attention of the trier of fact, with too much back story and redundancy, including efforts exerted to introduce evidence that is just not relevant if thought through before trial. For example, if the subject of the claim has been in the public eye, indeed covered by news media, would the trier of fact need to read every article or transcript of every interview ever taken on the subject? Probably not. I suggest that counsel for the parties must learn their audience, focus on what is at issue in the case, provide facts cogent to those issues, and keep your presentation succinct, while still making your points at trial, as well as making, where necessary, your appellate record. You are not recreating news coverage; you are proving properly provable propositions.

Findings of Fact and Conclusions of Law

When a matter is heard by a non-jury trier of fact, whether a federal or state judge, a hearing officer or a hearing panel, a typical product at conclusion is an opinion, a report and recommendation, or a judgment entry. Rule 52 of the Federal Rules of Civil Procedure (Bench Trial) requires that findings of fact and conclusions of law be stated separately in an opinion, report or judgment entry. Rule 52 of the Ohio Rules of Civil Procedure differs in that findings of fact and conclusions of law are only required if one of the parties provides a written request, otherwise judgment may be general for the prevailing party. Further, under Rule 53 of the Federal and Ohio Rules of Civil Procedure, a magistrate's factual findings and conclusions of law must be reviewed and adopted by the court in order to be effective. That opinion, report or judgment entry rely on concisely presented and summarized evidence, and on well drafted findings of fact and conclusions of law from the parties. Extending the notion that a clear statement of claims, as comprehensive as possible set of stipulations and joint exhibits, and succinct live testimony focused on the nuts and bolts of the case best serve your client, the preparation of record supported, accurate findings of fact and conclusions of law are a must.

A recent hearing is an example of what not to do. The case presentation was of three live fact witnesses, hundreds of exhibits, including several important ones which had never before been surfaced by the proponent until trial. Further, the parties had stipulated to very little in the pre-hearing or hearing phases of the case. Despite propounding almost identical exhibits, of which only three were subject to objections when moved into evidence, the parties each submitted different exhibit lists amounting to different iterations of the same exhibits. Following the hearing, the panel chair (your author) was required to do the work for counsel of analyzing, collecting and identifying the differences, and similarities, of the parties' evidence. Lists were created, and exhibits were compared and indexed. The hearing transcript was then read, re-read, indexed and charted on each of the points required to prove the claims, the defenses, and mitigation by the panel chair. From those materials a comprehensive report was drafted, albeit with very little help from the submissions by counsel to the parties. While the trier of fact is required to sort through and decide which version of "the truth" is better supported by the evidence, advocacy for each party would be far more effective if that information were properly summarized and presented to the trier of fact by counsel for the parties, rather than making the trier of fact create its ruling from the shambles of an ever-changing set of exhibits and trial record out of whole cloth.

The Three Scotch Rule

An easy way to summarize the efforts counsel should undertake in aiding a trier of fact is to borrow the rule of Prof. J. Patrick Browne, late of the faculty of the Cleveland-Marshall College of Law, famously dubbed by him as the "Three Scotch Rule". Prof. Browne asserted that when a judge packs up a brief case at the end of a case, or when deciding a motion, with everything she/he needs to decide a case at home, she/he will invariably find the most comfortable spot in her/his residence to review those materials, and unpack the materials brought home. Solely for illustration purposes, Prof. Browne posited that the honorable trier of fact might then position three glasses of

Scotch next to the unpacked materials, perhaps next to a couch, perhaps at the dining room table, to begin work. The rule holds that, while the trier of fact is reviewing the materials toward arriving at a decision, she/he should not be required to move from the designated location until (1) a decision has been reached, or (2) the Scotch runs out.

It should be clear to all that the need to locate and plumb through additional materials, whether old fashioned paper, or new fashioned electronic materials of any description, only stands in the way of the trier of fact expeditiously reaching her/his conclusion. Put another way, please find one good reason why your client is better served by you failing to aid the trier of fact to arrive at and then report on a verdict in your case, by forcing that person to search for and find claims and proof thereof which you did not point out in readily available materials? If you take into account the Three Scotch Rule at every step of your case, even if the trier of fact is a teetotaler, your client will be better served. Prof. Browne, rest in peace.

Conclusion

If asked why trial lawyers come up short in ways like those described herein, I, upon reflection, think it is because we tend to focus on learning the scope of our own role as an advocate: plaintiff's lawyer, defense lawyer, relator's counsel, or respondent's counsel. Our job in those roles is to make our own case as fully as possible, limit the scope of issues being presented by our opponent, limit the evidence our opponent introduces, or blunt it, and introduce our best evidence and arguments to support our client's claims or defenses to claims. We often consider we have served our role if we have executed on these tasks. However, to successfully complete the cycle of advocacy, I submit, also requires taking off the hat of the advocate, at least periodically donning the hat of trier of fact, and contemplating how the evidence and arguments are being delivered to and received by the trier of fact. If the trier of fact is inclined to find for your client, isn't it best to present your case in a complete yet concise statement of the claims or defenses, and in stipulated evidence including relevant exhibits? If done correctly, and if you win, you want the trier of fact to virtually drop your legal and factual positions into the body of a recommendation and report, or findings of fact and conclusions of law. The factual and legal issues that are genuinely in dispute in many cases are mostly modest in size. If you are focused in your presentation, and have stipulated the uncontested issues and facts, the trier of fact will have the contested, big factual and legal issues adequately isolated so as to spend time where it belongs, on those real disputes, to make a fair and reasoned decision. Then, be sure the trier of fact can, with little effort, find the record basis to reach your result. Thirty-three years as a civil trial lawyer, and, now, three years as a member and chair of hearing panels helping decide the professional fate of fellow lawyers, leads me to say, yes, you, and I, can do better in our presentations to aid the trier of fact in deciding cases, hopefully in favor of our clients.

Tim L. Collins is a litigation partner of Collins & Scanlon LLP. The firm is a general business practice involved in civil litigation and business transactions. Mr. Collins' practice has included business litigation, class action litigation, and acting in receivership matters. Clients have included real estate, hotel franchise relations, computer hardware and software, manufacturing, title insurance and other industries. He has handled cases in State and Federal Courts in Ohio, Pennsylvania, Michigan, Indiana, Texas, Massachusetts and California, among others. He has served as a Commissioner of the Ohio Board of Professional Conduct since 2015 through the present, where he serves on the Board's Probable Cause Committee, and on hearing panels. Mr. Collins may be reached at tcollins@collins-scanlon.com or (216) 696-0022.

NATIONAL SECURITY, NATIONAL ORIGIN, AND THE CONSTITUTION: 75 YEARS AFTER EXECUTIVE ORDER 9066

Jonathan L. Entin
David L. Brennan Professor Emeritus of Law, Case Western Reserve University

This is a slightly revised version of the introduction to a symposium in the Case Western Reserve Law Review *(Volume 68, Issue 4) that was published in June 2018 and is available online at* https://scholarlycommons.law.case.edu/caselrev/*. The issue contains papers that were presented on November 17, 2017. Shortly after the issue appeared, the Supreme Court decided* Trump v. Hawaii*, 138 S. Ct. 2392 (2018), upholding the executive order that banned the entry of most persons from several predominantly Muslim nations. In doing so, however, the Court overruled its notorious decision in* Korematsu v. United States*, 323 U.S. 214 (1944), the leading case upholding the Japanese internments during World War II. All citations below reflect the facts as they existed when the symposium issue went to press. A video recording of the program is available at* https://law.case.edu/Lectures-Events/EventId/324/e/national-security-national-origin-and-the-constitution-75-years-after-executive-order-9066-17-nov-2017 [https://perma.cc**/V7US-LUCY].** ***This version of the introduction appears here with the permission of the*** **Case Western Reserve Law Review.**

On February 19, 1942, just over two months after the attack on Pearl Harbor, President Franklin D. Roosevelt issued Executive Order 9066.[1] That order provided the legal authority for the internment of Japanese American residents of the West Coast during World War II.[2] Four cases involving these events reached the Supreme Court: *Hirabayashi v. United States*,[3] *Yasui v. United States*[4], *Korematsu v. United States*[5], and *Ex parte Endo*.[6] The Court did not question the legality of the executive order in any of those cases.[7]

But the treatment of Japanese Americans was controversial even at the time. Justice Black's law clerk began his bench memo in *Korematsu* as follows: "This is a damned Fascist outrage."[8] And Professor Eugene Rostow of the Yale Law School published a withering contemporaneous critique of these decisions.[9] More recently, the cases arising from Executive Order 9066—especially *Korematsu*—have fallen into extraordinary judicial and scholarly disrepute.[10]

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1. 7 Fed. Reg. 1407 (Feb. 25, 1942), 3 C.F.R. 1092 (Cum. Supp. 1943).
2. One of the most enthusiastic proponents of the internment program was California Attorney General Earl Warren, who would be elected governor later that year. *See* ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 114–23 (1997); BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 14–17 (1983); G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 69–72, 74–75 (1982); Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren,* Brown*, and a Theory of Racial Redemption*, 40 B.C. L. REV./19 B.C. THIRD WORLD L.J. 73, 89–94, 99–105 (1998).
3. 320 U.S. 81 (1943).
4. 320 U.S. 115 (1943).
5. 323 U.S. 214 (1944).
6. 323 U.S. 283 (1944).
7. The *Endo* Court held that Executive Order 9066 and its implementing orders and legislation did not authorize the detention of a "concededly loyal" citizen of Japanese descent. *Id.* at 297. The Court upheld the government's position in the other three cases. Gordon Hirabayashi and Minoru Yasui had been arrested for violating a military curfew in designated areas on the West Coast. *Hirabayashi*, 320 U.S. at 83–84; *Yasui*, 320 U.S. at 116–17. Fred Korematsu remained in his home in defiance of an evacuation order. *Korematsu*, 323 U.S. at 215–16. Mitsuye Endo had gone to an internment camp but sought permission to return to her home. *Endo*, 323 U.S. at 284–85, 293–94.
8. John P. Frank, *The Shelf Life of Justice Hugo L. Black*, 1997 WIS. L. REV. 1, 14. Not that this assessment had any impact: Justice Black wrote the majority opinion upholding the government's action. *Korematsu*, 323 U.S. at 215.
9. Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).
10. Virtually all recent Supreme Court justices have denounced *Korematsu*. *See* David A. Harris, *On the Contemporary Meaning of* Korematsu*: "Liberty Lies in the Hearts of Men and Women,"* 76 MO. L. REV. 1, 10 n.42 (2011) (citing examples); Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571, 586 n.75 (2002) (citing other examples). On the scholarly view of *Korematsu*, see Harris, *supra*, at 9 n.40 (collecting examples).

The tension between national security and civil liberties was not confined to World War II. We have seen similar issues throughout American history. For example, President Lincoln suspended habeas corpus during the Civil War,[11] and federal authorities imposed restrictions on the press and brought critics and Confederate sympathizers before military commissions.[12]

The federal government likewise showed little sympathy for opponents of American involvement in World War I. Rejecting an effort to prevent the mailing of a left-wing magazine, Learned Hand warned against "the suppression of all hostile criticism, and of all opinion except what encouraged and supported the existing policies," [13] but he was promptly reversed by a higher court. [14] And the Supreme Court upheld convictions of war critics whether prominent or obscure. In *Schenck v. United States*,[15] Justice Holmes explained: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and . . . no Court could regard them as protected by any constitutional right."[16] A week later, in *Debs v. United States*,[17] Holmes wrote an even briefer opinion that gave short shrift to the First Amendment.[18] To be sure, Justice Holmes soon came to take a more speech-protective view, starting with his dissent in *Abrams v. United States*.[19] And the Court eventually recognized, in *Dennis v. United States*,[20] that this view had essentially prevailed.[21]

Nevertheless, *Dennis* rejected a First Amendment defense to conspiracy charges against a dozen leaders of the Communist Party.[22] And during the first decade of the Cold War, the Court generally deferred to the government in cases challenging aggressive loyalty-security programs.[23] But beginning in 1957, the Court narrowly construed the statute under which the government prosecuted members of the Communist Party to require a showing that members knew of an organization's advocacy of violent revolution and had the specific intent to promote that goal.[24]

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11. MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 4–11, 32, 37, 51–65, 68–74, 90–91 (1991); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME—FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 85, 88, 120–21 (2004).
12. NEELY, *supra* note 11, at 14–18, 26–29, 65–68, 104; STONE, *supra* note 11, at 82, 124–28. After the Civil War, the Supreme Court held that civilians could not be tried before military tribunals if the civil courts remained available. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866). But *Milligan* had only limited impact in later years. NEELY, *supra* note 11, at 178–84.
13. Masses Publ'g Co. v. Patten, 244 F. 535, 539 (S.D.N.Y. 1917).
14. Masses Publ'g Co. v. Patten, 246 F. 24 (2d Cir. 1917).
15. 249 U.S. 47 (1919).
16. *Id.* at 52.
17. 249 U.S. 211 (1919).
18. For detailed discussion of this case, see Melvin I. Urofsky, *The Trial of Eugene V. Debs, 1918*, *in* JUSTICE AND LEGAL CHANGE ON THE SHORES OF LAKE ERIE: A HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO 97 (Paul Finkelman & Roberta Sue Alexander eds., 2012).
19. 250 U.S. 616, 624 (1919) (Holmes, J., joined by Brandeis, J., dissenting).
20. 341 U.S. 494 (1951).
21. *Id.* at 507 (observing that "there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale").
22. *Id.* at 517.
23. *See* STONE, *supra* note 11, at 411–13; *see also* Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950) (rejecting a federal employee's due process challenge to her dismissal under a loyalty-security program), *aff'd by an equally divided Court*, 341 U.S. 918 (1951).
24. *See* Scales v. United States, 367 U.S. 203 (1961); Yates v. United States, 354 U.S. 298 (1957); *see also* Stone, *supra* note 11, at 415–16.

During the Vietnam War, the Supreme Court upheld a statute prohibiting the destruction of draft cards in a case involving a young man who burned his draft card to protest the war.[25] But the Court also ruled that the federal government could not enjoin the publication of the Pentagon Papers, a classified Defense Department study of U.S. involvement in Southeast Asia;[26] that public school students had a First Amendment right to protest the war so long as their actions did not substantially disrupt the educational process;[27] and that an opponent of the war could not be prosecuted merely for bringing a jacket emblazoned with "Fuck the Draft" into a courtroom.[28]

The attacks on September 11, 2001, followed by U.S. military intervention in both Afghanistan and Iraq, have raised additional concerns about the relationship between national security and civil liberties.[29] Those events have generated widespread litigation and numerous judicial rulings.[30] More recently, President Trump's proposed ban on travel to this country from several predominantly Muslim nations as part of a policy designed to protect against further acts of terrorism has generated widespread controversy and litigation.[31]

In the seventy-fifth anniversary year of Executive Order 9066, the editors of the *Case Western Reserve Law Review* organized a symposium to explore the perennial tensions between national security and civil liberties. The symposium took place on November 17, 2017, and brought together speakers from several disciplines and a wide range of viewpoints. This issue contains papers that were presented on that occasion.[32]

Geoffrey Stone, a leading scholar of the Constitution and author of a panoramic chronicle of civil liberties and national security,[33] provides a broad overview to open this symposium issue.[34] He examines the background that led to the promulgation of Executive Order 9066, including the debate within the Roosevelt Administration over the wisdom and propriety of moving against Japanese Americans, followed by an account of *Hirabayashi* and *Korematsu*, focusing particularly on what we know about the Supreme Court's internal consideration of those cases. He goes on to address the aftermath of the internment, from the ending of that program to the long process that culminated in belated compensation to internees.[35] Finally, he comes full circle by noting that the federal courts eventually vacated the convictions of Gordon Hirabayashi and Fred Korematsu.[36] But the story does not end there—Professor Stone concludes with an account of how he came to submit an *amicus curiae* brief on behalf of Korematsu to the Supreme Court in one of the post-September 11 cases.

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25. United States v. O'Brien, 391 U.S. 367 (1968).
26. N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (per curiam).
27. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
28. Cohen v. California, 403 U.S. 15 (1971).
29. The first Persian Gulf War did not last long enough to generate as much in the way of case law, at least at the federal level. *But see* State v. Lessin, 620 N.E.2d 72 (Ohio 1993) (overturning the conviction of a demonstrator who burned an American flag to protest the war).
30. *See, e.g.,* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Boumediene v. Bush, 553 U.S. 723 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004).
31. *See, e.g.,* Trump v. Hawaii, 138 S. Ct. 377 (2017); Trump v. Int'l Refugee Assistance, 138 S. Ct. 353 (2017); Int'l Refugee Assistance Project v. Trump, 883 F.3d 233 (4th Cir. 2018) (en banc), *petition for cert. filed*, No. 17–1194 (U.S. Feb. 23, 2018); Hawaii v. Trump, 878 F.3d 662 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 923 (2018) (No. 17–965).
32. Video recordings of the program are available at *National Security, National Origin, and the Constitution: 75 Years After Executive Order 9066*, Case W. Res. U. Sch. L., https://law.case.edu/Lectures-Events/EventId/324/e/national-security-national-origin-and-the-constitution-75-years-after-executive-order-9066-17-nov-2017 [https://perma.cc/**V7US-LUCY**] **(last visited Apr. 18, 2018)**.
33. *See* STONE, *supra* note 11.
34. Geoffrey R. Stone, *National Security, National Origin, and the Constitution: 75 Years After EO9066*, 68 CASE W. RES. L. REV. 1067 (2018).
35. Act of Aug. 10, 1988, Pub. L. No. 100–383, 102 Stat. 903 (codified at 50 U.S.C. app. §§ 1989–1989d (2012)).
36. Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); *see also* Yasui v. United States, 772 F.2d 1496, 1498 (9th Cir. 1985) (noting that a district court had granted the government's motion to vacate the conviction of Minoru Yasui).

Professor Stone's personal conclusion sets the stage for the paper by documentary producer and film-maker Frank Abe, who was born in Cleveland because the government moved his parents here in the wake of *Endo*.[37] Eventually his family moved to California, where his parents had been born and raised. But only when he got to college did he come to understand that his parents had been interned during World War II. It turns out that his experience was typical: Nisei parents generally did not tell their Sansei children much about what had happened to them in the camps.[38] This belated discovery of his parents' story and that of thousands of others motivated him to learn more about the internment and to document the experience of the people who went through it.

The next paper broadens the time frame by focusing on World War I. Specifically, David Forte examines the case of Eugene V. Debs, who was convicted of obstructing the military in connection with an antiwar speech that he gave in Canton, Ohio, in June 1918.[39] Professor Forte focuses on the details of the case, but he also considers the strikingly different approaches taken by President Woodrow Wilson, whose administration vigorously prosecuted Debs, and President Warren G. Harding, who commuted Debs' ten-year prison sentence.[40]

Peter Margulies brings the focus to the present, addressing the relief available to victims of governmental overreach in national security cases.[41] This issue arose only obliquely in the World War II internment cases; only many years later did the federal government compensate some of those whose rights had been violated.[42] But it has taken on greater significance in the period after September 11, as the federal government has taken more aggressive actions to prevent further acts of domestic terrorism. Professor Margulies criticizes the Supreme Court's recent decision in *Ziglar v. Abbasi*, which rejected a constitutional tort claim brought by immigration detainees who had been placed in high-security detention facilities despite any meaningful evidence that they had ties to terrorism. That decision strengthened the barriers to constitutional claims against high-level executive officials that were announced in *Iqbal v. Ashcroft*.[44] He recognizes that the plaintiffs in *Abbasi*[43] and *Iqbal* generally were not legally in the country and therefore were subject to immigration enforcement action, whereas the parties who challenged the World War II internment were either U.S. citizens or lawful residents, but he emphasizes that the Constitution applies to all persons physically present in the country regardless of their citizenship or immigration status. He argues that damages are an appropriate remedy for constitutional violations and that the *Abbasi* Court proceeded from an erroneous presumption against remedies in concluding that damage actions for constitutional violations were not available except in very limited circumstances.

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37. Frank Abe, *Resistance, Resettlement, and Redress*, 68 CASE W. RES. L. REV. 1085 (2018).
38. Karen Korematsu learned of her father's experience only in her high school history class; her parents had never told her anything about what had happened. *See Karen Korematsu's Interview Answers*, Fred T. Korematsu Inst., http://www.korematsuinstitute.org/karen-korematsus-frequently-asked-questions/ [https://perma.cc/K7L6-BK59] (last visited Apr. 13, 2018).
39. *See supra* notes 17–18 and accompanying text.
40. David F. Forte, *Righting a Wrong: Warren G. Harding and the Espionage Act Prosecutions*, 68 CASE W. RES. L. REV. 1097 (2018).
41. Peter Margulies, *Curbing Remedies for Official Wrongs: The Need for* Bivens *Suits in National Security Cases*, 68 CASE W. RES. L. REV. 1153 (2018).
42. *See supra* note 35 and accompanying text.
43. 137 S. Ct. 1843 (2017).
44. 556 U.S. 662 (2009). *Iqbal* in turn built on the plausibility standard of pleading that the Supreme Court previously established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which has had broad ramifications for all civil litigation.

In the final article in this symposium, Robert Chang offers the broadest historical sweep in the issue.[45] He contends that the legal arguments supporting contemporary efforts to restrict entry of persons from certain countries into the United States can be traced to the *Chinese Exclusion Case*.[46] This case provides an important foundation for the so-called plenary power doctrine, which requires the judiciary to defer to immigration and naturalization decisions made by the political branches. And *Korematsu* and the other World War II internment cases suggest that the federal government has authority to single out citizens of a particular nation for disfavored treatment in the interest of national security. Professor Chang traces the development and evolution of the plenary power doctrine, which he characterizes as immigration exceptionalism, as well as judicial deference to the political branches in national security cases, which he refers to as national security exceptionalism. Although the arguments for national security exceptionalism ultimately rest on precedents such as the *Chinese Exclusion Case* and *Korematsu*, the government and other advocates of judicial deference rarely acknowledge the jurisprudential roots of their position, even when citing other precedents that do rely on those cases.

There is one more symposium-related item in this issue, an *amicus curiae* brief that was submitted to the Supreme Court in *Trump v. Hawaii*,[47] the latest round in the litigation over the president's travel ban.[48] Among the *amici* on whose behalf this brief was filed are Karen Korematsu, Jay Hirabayashi, and Holly Yasui, children of litigants who unsuccessfully challenged the Japanese internment during World War II.[49] The brief contends that the government's arguments supporting the travel ban echo those that succeeded in the internment cases and urges the Court to avoid repeating the judicial errors that gave rise to those rulings.[50]

Although the Court decided *Trump v. Hawaii* after this symposium issue went to press, the papers in the issue provide some important perspectives on questions that have confronted our nation for many years and that are likely to persist indefinitely. We hope that readers will find them valuable as they contemplate those enduring questions.

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45. Robert S. Chang, *Whitewashing Precedent: From the* Chinese Exclusion Case *to* Korematsu *to the Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183 (2018).
46. Chae Chan Ping v. United States, 130 U.S. 581 (1889).
47. 138 S. Ct. 923 (2018) (No. 17–965), *granting cert. to* 878 F.3d 662 (9th Cir. 2017).
48. *See supra* note 31 and accompanying text.
49. *See supra* note 7. This is not the first time that descendants of a litigant in leading civil rights cases have filed an amicus curiae brief. *See* Brief of the Family of Heman Sweatt as *Amicus Curiae* in Support of Respondents, Fisher v. Univ. of Tex., 570 U.S. 297 (2013) (No. 11–345) (filed on behalf of the daughter and nephews of Heman Marion Sweatt, the successful plaintiff in *Sweatt v. Painter*, 339 U.S. 629 (1950), which invalidated the whites-only admissions policy at the University of Texas Law School, in a case challenging the race-based affirmative action admissions policies of the University of Texas).
50. Brief of Karen Korematsu et al. as *Amici Curiae* in Support of Respondents, Trump v. Hawaii, No. 17–965, 68 CASE W. RES. L. REV. 1237 (2018).

Federal Bar Association
Northern District of Ohio Chapter

THE FEDERAL BAR ASSOCIATION

NORTHERN DISTRICT OF OHIO CHAPTER

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2018 State of the Court Luncheon

Tuesday, October 9, 2018

12:00 PM (Doors Open at 11:30 AM)

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Federal Bar Association

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Federal Bar Association

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Joining the FBA entitles you to membership within the national organization as well as within your local FBA chapter. Members receive a host of special benefits designed to uphold the mission of the FBA and support each member's career within the federal legal system. Association activities and member benefits are organized into five primary categories.

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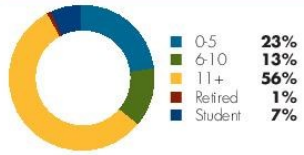

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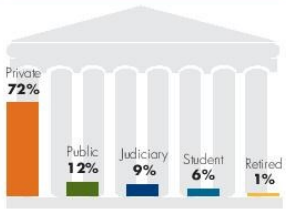
Gender

Types of Practice



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We add events to our calendar often so please check our website for upcoming events that may not be listed here.

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INTER ALIA is the official publication of the Northern District, Ohio Chapter of the Federal Bar Association.

If you are a FBA member and are interested in submitting content for our next publication please contact Stephen H. Jett no later then October 31, 2018.

Next publication is scheduled for Fall 2018.

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Northern District of Ohio Chapter

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New York Marriott Downtown

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