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★ Carter Strang from Turker Ellis was selected as Board Chair of The Center for Community Solutions, which is a non partisan health and human services think tank. He was also selected to be a Cleveland-Marshall College of Law Leadership-in-Residence, and as such He will be involved with the C-M leadership training program.

**PRESIDENT'S PODIUM**

**Federal Lawyers Empowering Victims of Domestic Violence**

Our chapter is teaming up with Chief Judge Patricia Gaughan and the Legal Aid Society of Cleveland to help empower victims of domestic violence through pro bono legal assistance. Will you join us?



Rebecca J. Bennett  
FBA-NDOH President  
Ogletree Deakins Nash Smoak & Stewart PC  
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Late last year, Congress passed the POWER Act of 2018, which stands for Pro Bono Work to Empower and Represent, to help victims of domestic violence gain access to pro bono legal services. The law requires the chief judge in each judicial district of the federal courts to host an annual event to promote free legal services to empower victims of domestic violence, dating violence, sexual assault, and stalking.

To meet this obligation, we will conduct brief advice clinics for victims of domestic violence. We are targeting late May for our first evening clinic.

The legal needs of the people we will service include:

- Obtaining and enforcing protection orders
- Housing, such as landlord/tenant and eviction
- Child custody and other family law issues
- Employment law issues
- Welfare, benefits, and access to government assistance issues
- School issues
- Cutting through red tape

The benefit of partnering with Legal Aid is that their brief advice model allows any lawyer, regardless of your area of practice, to help. You do not need prior experience in any of the above areas in order to make an impact at a pro bono clinic. Subject matter experts will be available at each clinic.

What we need from you are the skills that all good lawyers have: Listening, reasoning, reviewing and analyzing forms, documents, and legal pleadings, and giving advice on what the next best action is. If you are a problem solver, you can do this.

Can you help us?

Please email me at [rebecca.bennett@ogletree.com](mailto:rebecca.bennett@ogletree.com) and I will follow up with you on more details.

## THE CONSTITUTIONAL CHALLENGE TO THE NEW TARIFFS ON STEEL AND ALUMINUM IMPORTS

BY Jonathan L. Entin\*

On March 8, 2018, President Trump imposed tariffs of 25 percent on steel imports and 10 percent on most aluminum imports. The President justified this action as necessary to protect national security and invoked his authority under Section 232 of the Trade Expansion Act of 1962 (TEA).<sup>1</sup> The tariffs applied to imports from many traditional U.S. allies and trading partners, causing no little controversy at home and abroad while provoking retaliatory tariffs against American products.

The tariffs also have generated multiple lawsuits. The most significant challenge to the tariffs' legality is *American Institute for International Steel, Inc. v. United States*, a case pending in the Court of International Trade. The complaint alleges that TEA Section 232 represents an unconstitutional delegation of congressional power to the President. The constitutional challenge faces an uphill struggle. Except for two 1935 cases, the Supreme Court has never invalidated a federal law under that doctrine.<sup>2</sup> But even if the legal challenge fails, opponents of the U.S. tariffs might persuade Congress to limit presidential discretion to act unilaterally.

This article proceeds as follows. First, it examines the provisions of TEA Section 232 and the promulgation of the tariffs. Next, it reviews the Supreme Court's approach to the nondelegation doctrine, along with a couple of influential lower court decisions on the subject. Finally, it assesses the prospects of success for the plaintiffs in *American Institute for International Steel*.

### TEA Section 232 Tariffs

**Statutory Provisions.** TEA Section 232 establishes procedural requirements for the imposition of tariffs to protect national security. The Secretary of Commerce, on the request of any department or agency head, at the behest of "an interested party," or on his own initiative, must begin an investigation "to determine the effects on the national security" of the imports in question. The commerce secretary also must immediately notify the Secretary of Defense of the initiation of such an investigation and consult with the defense secretary in the course of the investigation.

The Secretary of Commerce must, within 270 days of beginning an investigation, submit a report to the President containing findings and a recommendation about whether further action is necessary to protect national security. And within 90 days of the Secretary of Commerce's report, the President must determine what action, if any, should be taken to protect national security. The chief executive must implement any action within 15 days.

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<sup>1</sup>19 U.S.C. § 1862.

<sup>2</sup>A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935). See also *Carter v. Carter Coal Co.*, 298 U.S. 238, 311–12 (1936) (invalidating one provision of a statute under the nondelegation doctrine while striking down the rest of the law on other grounds).

The statute contains a lengthy but not exhaustive list of factors for the Secretary of Commerce to consider in conducting an investigation and the President to assess in determining whether to take action under TEA Section 232. The list includes consideration of domestic production needed for defense requirements; the capacity of domestic producers to meet those requirements; current and projected availability of workers, materials, and other essential supplies and services; and the requirements of growth in relevant industries, supplies, and services. The very next sentence emphasizes the connection between the country's economic welfare and national security, requiring the Secretary of Commerce and the President to consider the impact of foreign competition on domestic workers and industries.

### **Imposing the Steel and Aluminum Tariffs.**

The administration seems to have complied with TEA Section 232's procedural requirements in imposing the tariffs. Secretary of Commerce Wilbur Ross completed his investigations into steel and aluminum within the 270-day statutory window, and President Trump acted on Ross's reports within the 90-day statutory deadline for action.

Even if the government complied with applicable procedural requirements, challengers still might want to assert substantive objections, such as that the record supporting the imposition of tariffs was insufficient. They might point out that TEA Section 232 tariffs have been used only rarely, and investigations typically addressed specific products rather than substances like steel and aluminum that are widely used in manufacturing. And Secretary of Defense James Mattis told Secretary Ross that the Pentagon was not facing difficulties in obtaining steel or aluminum to protect national security; he also warned of the potentially adverse implications of imposing tariffs or other trade sanctions on American allies. All of these facts might have supported an effort to obtain judicial review of the steel and aluminum tariffs.<sup>3</sup>

But no one has asserted either procedural or substantive challenges to those tariffs. In light of the large number of objecting parties, it might seem puzzling that no one has invoked the provisions of the Administrative Procedure Act to contest them. But this should not come as a surprise. The Supreme Court has made clear that the President is not an agency under the APA and therefore his decisions are not subject to review under the traditional arbitrary-and-capricious standard.<sup>4</sup> To be sure, the Secretary of Commerce does fall within the APA's definition of agency, but the secretary's report and recommendation to the President do not represent final agency action and therefore are not subject to judicial review under the APA either.<sup>5</sup>

The inability to obtain judicial review under the APA limits objectors to constitutional challenges. For this reason, the plaintiffs in *American Institute for International Steel* have asserted that TEA Section 232 is unconstitutional because it violates the nondelegation doctrine.

### **The Nondelegation Doctrine**

The Constitution confers "[a]ll legislative Powers" on Congress.<sup>6</sup> For two centuries, the Supreme Court has repeatedly said that Congress may not delegate its legislative authority. And for two centuries, the Court has rejected almost every non-delegation claim that it has encountered.

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<sup>3</sup>Challengers also might have contested the President's expansive definition of national security as the rationale for imposing the steel and aluminum tariffs. That approach views national security in terms of our ability to compete internationally, but it is supported by language in TEA §232 that directs the Secretary of Commerce and the President to consider "the close relation of the economic welfare of our Nation to our national security."

<sup>4</sup>See *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

<sup>5</sup>See *Dalton v. Specter*, 511 U.S. 462, 469–70 (1994); *Franklin*, 505 U.S. at 797.

<sup>6</sup>U.S. Const. art. I, § 1.

### Supreme Court Decisions.

An early example of the Court's reluctance to draw sharp lines in this area came in its 1813 ruling in *The Brig Aurora*,<sup>7</sup> which upheld an embargo statute originally enacted in 1809 and extended in 1810 that banned imports from Great Britain and France. The statute authorized the President to terminate the embargo against these nations when they "cease[d] to violate the neutral commerce of the United States." The Court's brief opinion did not articulate a specific legal test for assessing that provision, but it did uphold the seizure of cargo from a British ship over the buyer's specific objection that Congress could not delegate its power to the chief executive in the embargo statute.

Almost 80 years later, in *Field v. Clark*,<sup>8</sup> the Court identified a legal test that also supported the result in *The Brig Aurora*. As it happens, *Field* was a tariff case that challenged the validity of duties on imported clothing. The 1890 tariff act contained another provision authorizing the President to suspend duty-free importation of sugar, molasses, coffee, tea, and hides from nations that did not accord reciprocally free access to similar American products. The Court rejected a nondelegation challenge to this provision, explaining that Congress had authorized the President to suspend duty-free imports of those products on the occurrence of a "named contingency": the failure of the country of origin to provide duty-free access to the same products from the United States. Similarly, the *Aurora* case involved an analogous statute that authorized the President to lift the embargo against a nation that respected American neutrality in the years before the War of 1812.

Just over a decade later, in 1904, the Court faced another nondelegation challenge in circumstances where the named-contingency test could not be satisfied. The issue in *Buttfield v. Stranahan*<sup>9</sup> concerned a statute that authorized the Secretary of the Treasury to establish uniform standards for imported tea. Instead of rejecting this measure because it did not identify the contingency that would authorize executive action, the Court concluded that Congress had legislated "as far as was reasonably practicable" and had left to the discretion of executive officials "the duty of bringing about the result pointed out by the statute."

*Buttfield* might have anticipated the analysis in the 1911 case of *United States v. Grimaud*.<sup>10</sup> At issue in *Grimaud* was the validity of preservation regulations that required a permit to graze livestock on public lands. An 1891 statute authorized the President to designate and protect public forest areas, and an 1897 law authorized the Secretary of Agriculture to make rules and regulations for the use of those forest areas the violation of which were criminal offenses. The latter measure did not represent an unconstitutional delegation of legislative power. Congress could not address the myriad details of each of the forest areas, so it was permissible for the legislative branch to pass a general law that authorized the executive "to fill up the details." That is essentially what happened in *Buttfield*, where Congress authorized the Secretary of the Treasury to establish standards for imported tea but left it to that official to fill up the details.

The Court took a different tack in *Mahler v. Eby*,<sup>11</sup> a 1924 case that also rejected a nondelegation challenge. The government sought to deport, as undesirable residents, several aliens who were lawfully in the United States but had failed to register for the draft during World War I. By the time of the deportation order, the draft law under which the men were convicted had been repealed. They argued that this deprived the government of power to deport them. But a unanimous Court, in an opinion by Chief Justice Taft, found no impermissible delegation in the statutory provision that authorized the deportation of undesirables: the term "undesirable residents" took its meaning from the "common understanding" that was reflected in numerous statutes, so Congress had established a legislative standard that was sufficient to satisfy the nondelegation doctrine.

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<sup>7</sup>11 U.S. (7 Cranch) 382 (1813).

<sup>8</sup>143 U.S. 649 (1892).

<sup>9</sup>192 U.S. 470 (1904).

<sup>10</sup>220 U.S. 506 (1911).

<sup>11</sup>264 U.S. 32 (1924).

Another Taft opinion for a unanimous Court four years later articulated the test for nondelegation challenges that remains in effect. *J.W. Hampton, Jr. & Co. v. United States*<sup>12</sup> reviewed the cases in this area and announced the so-called “intelligible principle” test: “If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [make a decision] is directed to conform, such legislative action is not a forbidden delegation of legislative power.” *Hampton* was a tariff case. Section 315 of the Tariff Act of 1922 authorized the President to adjust tariff rates to compensate for differences in the cost of production of foreign and domestic products. The Court emphasized that it would be “a breach of the fundamental national law if Congress [gave] up its legislative power and transfer[red] it to the President,” but no such impermissible delegation had occurred. Congress clearly intended that tariffs equalize the cost of production of foreign and domestic goods but regarded itself as institutionally incapable of making the numerous determinations necessary to implement that goal. Accordingly, the legislative branch articulated its policy “with clearness” and authorized the executive branch to implement that policy. Moreover, the statute specified several factors to be considered in determining whether to adjust tariffs. Accordingly, Section 315 of the Tariff Act was valid.

The Supreme Court has consistently relied on the intelligible-principle test in subsequent cases. The only rulings that found an unconstitutional delegation of legislative power invoked the *Hampton* approach. Other modern cases involving unsuccessful challenges based on the nondelegation doctrine also have relied on the intelligible-principle test. For example, Congress satisfied the *Hampton* test by providing sufficiently intelligible guidance to the United States Sentencing Commission when authorizing that agency to formulate sentencing guidelines for federal criminal cases.<sup>13</sup> Nor did Congress impermissibly delegate its legislative power when it authorized the Attorney General to classify drugs as controlled substances temporarily while the formal process for scheduling drugs went forward; the challengers conceded that the statute contained an intelligible principle, and the Court concluded that the nondelegation doctrine did not require anything more.<sup>14</sup> And the provision of the Clean Air Act authorizing the Administrator of the Environmental Protection Agency to promulgate national ambient air quality standards embodied an intelligible principle by requiring that those standards be “requisite to protect the public health” while “allowing an adequate margin of safety.”<sup>15</sup>

### Two Notable Lower Court Rulings.

Before concluding this discussion, we should consider two significant decisions by three-judge district courts that provide some additional perspective on the nondelegation doctrine. The first of these is *Amalgamated Meat Cutters v. Connally*,<sup>16</sup> a 1971 case that rejected a nondelegation challenge to President Nixon’s imposition of wage and price controls. The relevant statute authorized the chief executive “to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 26, 1970.”

In rejecting the nondelegation challenge, the district court specifically invoked *Hampton*’s intelligible principle test and emphasized the importance of “control and accountability” to define the scope of permissible delegations. Although the statute authorizing wage and price controls did not contain an explicit standard, the court emphasized the “historical context” of that statute, including analogous legislation that was passed in connection with World War II and the Korean War. The availability of “meaningful judicial review” also served as an important check on executive overreaching.

The other district court ruling came in *Synar v. United States*,<sup>17</sup> which challenged the assignment of spending-reduction authority to the Comptroller General in the event that Congress failed to adopt a budget that complied with statutory requirements. The plaintiffs argued that Congress could not delegate its core power over government spending, but the court, in an opinion that is widely believed to have been written by then-Judge Antonin Scalia, rejected this argument as unsupported by precedent and unsound in principle. The Supreme Court ultimately affirmed the district court’s conclusion that Congress could not assign spending-reduction authority to the Comptroller General for other reasons without addressing the nondelegation issue.

<sup>12</sup>276 U.S. 394 (1928).

<sup>13</sup>*Mistretta v. United States*, 488 U.S. 361, 371–80 (1988).

<sup>14</sup>*United States v. Touby*, 500 U.S. 160, 165–67 (1991).

<sup>15</sup>*Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472–76 (2001).

<sup>16</sup>337 F. Supp. 737 (D.D.C. 1971) (three-judge court).

<sup>17</sup>626 F. Supp. 1374 (D.D.C.) (three-judge court), *aff’d sub nom.* *Bowsher v. Synar*, 478 U.S. 714 (1986).

### The Nondelegation Challenge to TEA Section 232

In light of the doctrinal evolution described in the previous paragraphs, it should come as no surprise that the plaintiffs in *American Institute for International Steel* have based their claim on the *Hampton* test. They contend that TEA Section 232 unconstitutionally delegates legislative power to the executive because it contains no intelligible principle to constrain presidential discretion in deciding whether to impose tariffs in the name of national security. Although this is the most promising approach under current law, the plaintiffs face several daunting obstacles to success.

First, as noted earlier, TEA Section 232(d) contains a detailed list of factors that the Secretary of Commerce and the President should consider in deciding whether to impose tariffs. That list is longer than the one contained in the tariff act that the Supreme Court found to provide an intelligible principle in *Hampton*.

The plaintiffs emphasize that the list contained in TEA Section 232(d) is not exhaustive: the list of factors explicitly states that the Secretary of Commerce and the President should consider the listed items “without excluding other factors.” As a result, the argument goes, the executive branch has unbridled discretion, which in turn means that the statute contains no intelligible principle.

But the inclusion of a residual factor in the list of items does not necessarily vitiate an intelligible principle. The tariff statute at issue in *Hampton* contained a shorter list of specific factors, the last of which was “any other advantages or disadvantages in competition.” The Court did not refer to that open-ended item in concluding that the statute was sufficiently specific to survive a nondelegation challenge.

Second, the Supreme Court rejected an earlier nondelegation challenge to TEA Section 232 in *Federal Energy Administration v. Algonquin SNG, Inc.*<sup>18</sup> That 1976 case upheld the imposition of license fees for petroleum importers. In so doing, the Court found that TEA Section 232 “easily fulfills [the intelligible-principle] test.” Specifically, the list of factors in TEA Section 232(d) meant that there was “no looming problem of improper delegation.”

The *American Institute for International Steel* plaintiffs seek to blunt the impact of *Algonquin* by describing that case as not directly challenging the validity of TEA Section 232, whereas they are launching a facial challenge to the statute. There are a couple of potential problems with trying to finesse *Algonquin* in this way. For one thing, whatever weight we might attach to the Court’s discussion of nondelegation there—and the plaintiffs dismiss it as dictum because the *Algonquin* Court ultimately concluded that the license fees at issue were authorized by TEA Section 232—the Court did devote more than two full pages to the subject and did so because the parties challenging the license fees raised the issue. At a minimum, therefore, this puts the plaintiffs a bit on the defensive if only from a rhetorical perspective. Moreover, the Supreme Court has expressed skepticism about facial challenges and has indicated a strong preference for as-applied cases.<sup>19</sup> This could be a significant obstacle because the plaintiffs would be remitted to an as-applied challenge instead of a facial challenge to TEA Section 232. But the prospects for an as-applied challenge depend on the availability of judicial review of the imposition of a TEA Section 232 tariff against a particular item. That question turns out to be more complex than one might think.

Third, perhaps judicial review must be available for as-applied challenges under TEA Section 232 in order to avoid the nondelegation doctrine. As noted earlier, *Meat Cutters* emphasized the importance of judicial review as a means of promoting administrative accountability. For reasons explained above, judicial review might not be available under TEA Section 232: The Secretary of Commerce’s report and recommendations do not constitute final agency action, and the President is not an agency for purposes of the Administrative Procedure Act’s provisions for judicial review.

But it is not clear that the inability to obtain judicial review under TEA Section 232 makes that provision an impermissible delegation of legislative power to the executive. The Supreme Court has never said that, even in with regard to statutes that provide for criminal sanctions. TEA Section 232 does not carry criminal sanctions, so the absence of judicial review should not affect the nondelegation argument.

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<sup>18</sup>426 U.S. 548 (1976).

<sup>19</sup>See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 167–68 (2007); *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Finally, we might note that the plaintiffs have not contended that the details of international trade are too important for Congress to delegate to the executive. The Supreme Court has suggested that the judiciary should not defer to administrative interpretations in important cases where it seems unlikely that Congress intended to leave the resolution of ambiguities to an agency.<sup>20</sup> But those cases involve the application of the *Chevron* doctrine, and the President is not an agency for *Chevron* purposes under TEA Section 232. Alternatively, it might be contended that tariff rates must be set by the legislative branch. But cases like *Field* and *Hampton*, which were decided at a time when the federal government relied far more heavily on tariffs as a revenue source than is true today, rejected nondelegation arguments in tariff cases. And this position is consistent with the district court ruling in *Synar* that rejected the argument that the details of federal spending are not delegable.

### Conclusion

The plaintiffs in *American Institute for International Steel* face a difficult challenge in their claim that TEA Section 232 violates the nondelegation doctrine. Even if their lawsuit fails, however, they and others who object to the administration's steel and aluminum tariffs have another possible remedy: the political process. Congress has the power to "regulate Commerce with foreign Nations."<sup>21</sup> Under this authority, the legislative branch could assert its authority either to set tariff rates for steel and aluminum imports or to define more clearly the key term "national security" in TEA Section 232 to reduce presidential discretion to act unilaterally. Whether the political process will be more congenial than the judiciary is likely to be, there are ample grounds to believe that greater congressional engagement will lead to more governmental accountability regardless of the soundness of the policy changes that might result.

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<sup>20</sup>See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000).

<sup>21</sup>U.S. Const. art. I, § 8, cl. 3.

## USING PUBLIC INFORMATION TO DEFEND AGAINST PATENT TROLLS

BY Tracy Scott Johnson<sup>1</sup>

Recently, two separate patent trolls filed patent infringement complaints here in the Northern District of Ohio against two local businesses. The actions are captioned *Zavala Licensing LLC v. Winncom Technologies Corp.*, Case No. 1:19-cv-229 (Judge Boyko) (filed Jan. 30, 2019) and *Landmark Technology A, LLC v. U.S. SafetyGear, Inc.*, Case No. 4:19-cv-270 (Judge Pearson) (filed Feb. 5, 2019). These filings may indicate a change in the recent trend of troll litigation. Further, because of recent changes to patent law, to the extent that patent trolls become more active, we are likely to see more patent troll litigation filed in our District.

There is a wealth of publicly available information that can inform a defendant regarding the relative seriousness of a patent troll's infringement claims and the likelihood that a troll will follow through on a threat of litigation. Since we are likely to see more such threats being made into this District, a review of that information and what can be gleaned from it is in order.

### Background on Troll Activity.

Prior to 2014, patent trolls were very active in this country using the threat of litigation, and its associated high cost, to coerce large royalty payments from target licensees sometimes on the basis of very questionable allegations of patent infringement.<sup>2</sup> However, starting in 2014, a series of United States Supreme Court decisions, in combination with changes in patent practice and procedure at the United States Patent and Trademark Office ("USPTO"), made it materially easier and less costly for defendants to challenge a patent troll's questionable allegations of infringement. Also, a pair of United States Supreme Court decisions created a real risk that defendants could recover their attorney's fees should they prevail in the defense of a patent troll's claims.<sup>3</sup> As a result of these changes, the filing of patent infringement actions generally, including those initiated by patent trolls, have significantly declined since 2014.<sup>4</sup>

Although patent troll activity has diminished, it has not completely evaporated. Patent trolls still exist. But, in 2017, another United States Supreme Court decision materially changed their business model. Historically, patent trolls sought to bring their patent infringement actions in a select few jurisdictions viewed as particularly friendly to their claims using long arm jurisdiction principals. The Eastern District of Texas was one such jurisdiction. Any company doing any business anywhere in the District was at risk of having to defend a patent troll's claims there.

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<sup>1</sup>Tracy Scott Johnson is a Partner with Calfee, Halter & Griswold LLP in its Intellectual Property Litigation and Complex Commercial Litigation Groups. He has over 24 years of litigation practice experience and represents numerous Northeast Ohio clients in prosecuting and defending intellectual property litigation claims. Mr. Johnson has particular experience in defending claims asserted by patent trolls, having represented both KeyCorp and FirstEnergy against many such claims in the Eastern District of Texas and other venues.

<sup>2</sup>"Patent Troll" is a term that has been adopted in the intellectual property law community to describe non-practicing entities that acquire patent rights with the aim of monetizing them using litigation or the threat of litigation. See e.g. Adam Smith, Note, *Patent Trolls—An Overview of Proposed Legislation and a Solution that Benefits Small Businesses and Entrepreneurs*, 9 Ohio St. Bus. L.J. 201, 206 (2014) (discussing the extortion-like tactics used by patent trolls to obtain settlements or licenses).

<sup>3</sup>*Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 550, 134 S. Ct. 1749 (2014); *Highmark Inc. v. Allcare Health Mgmt. Sys.*, 572 U.S. 559, 563, 134 S. Ct. 1744 (2014).

<sup>4</sup>Since 2014, the number of new patent litigation matters filed, including those filed by patent trolls, has declined. Jay W. Belle Isle, *Lex Machina's Annual Patent Litigation Report: Decline in Case Filings*, LegalReader.com, <https://www.legalreader.com/lex-machinas-annual-patent-report/> (last visited Feb. 25, 2019) (patent case filings in 2018 declined for the third straight year).

However, in December 2017, the United States Supreme Court narrowly interpreted the patent venue statute as requiring patent infringement claims be brought either in a defendant's state of incorporation or a venue in which the defendant maintains a "regular and established place of business."<sup>5</sup> As a result of *TC Heartland*, patent trolls are now required to litigate any claims of patent infringement in their target defendant's "home turf" particularly where the target is a small business that is both situated and incorporated in the same state.<sup>6</sup>

In light of *TC Heartland*, there has been some speculation regarding whether patent trolls will be willing to venture, when necessary, into their target defendant's jurisdiction in order to assert their patent infringement claims. That question has been partially answered here in the Northern District of Ohio by the filings identified above. It is possible that these two filings are nothing more than isolated chance filings in the District. However, it is also possible that these filings are the start of a new trend that will see even more filings by patent trolls here.

#### **Available Public Information and its Uses.**

To the extent that the two filings identified above are indicative of an increasing trend of patent troll activity in the District, counsel retained by future patent troll targets in Northeast Ohio should be mindful of the valuable information which can be obtained from a review of publicly available records. Among the public sources of information readily available to quickly and efficiently research the relative strength of a patent troll's infringement claim are:

1. PACER
2. PTAB E2E
3. PatFT (USPTO Patent Search Tool)
4. USPTO Patent Assignment Database
5. USPTO Pair
6. Internet

In combination, these resources can be useful in deriving answers to certain key questions regarding the patent troll's past practices in enforcing its patents. These answers provide a reasoned basis for an assessment of how likely that patent troll is to resort to litigation to enforce its rights against a new defendant (if litigation has not already commenced). These answers also provide insight into what the patent troll may be prepared to accept as a royalty payment in exchange for a license of its patent (before litigation is started) or settlement of its infringement claim (after litigation has commenced).

Here is what can be learned and some examples of how it can be useful:

- Whether the patent has been litigated before, and if so, how many times.
- Have any of the patent's litigations resulted in rulings or judgments (e.g. claim construction rulings, summary judgement, trial judgments).

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<sup>5</sup>*TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017).

<sup>6</sup>Many larger and more sophisticated companies still choose to incorporate in Delaware and, as a result, may be compelled to defend patent infringement claims in the District of Delaware under *TC Heartland*. Some commentators have speculated that the District of Delaware will replace the Eastern District of Texas as a preferred jurisdiction for patent trolls to bring their claims, although there are several reasons to believe that the District of Delaware will not be as friendly to patent trolls as the Eastern District of Texas has historically been. Ofer Eldar and Neel U. Sukhatme, *Will Delaware be Different? An Empirical Study of TC Heartland and the Shift to Different Choice of Venue*, 104 Cornell L. Rev. 103 (2018).

This is the most basic information regarding the relative strength of the patent and the likelihood that a patent troll is likely to follow through on any threat of litigation. Obviously, a patent that has been repeatedly enforced successfully in litigation is a greater threat to any defendant. That said, there are reasons why a patent that was previously enforced successfully may not be a threat because of intervening changes in the patent law. Patents that have never been the subject of litigation are likely lesser threats although there is no guarantee that your client will not be the first defendant to face an infringement claim. If a patent has been the subject of a claim construction ruling, the definitions applied to the claim terms could be an important source of non-infringement positions in the case of your defendant. Similarly, any summary judgement order that has been issued in connection with the patent could also give rise to invalidity or non-infringement defenses particular to your defendant.

- In what jurisdictions has the patent been previously litigated.

Until recently, it was not unusual to see a patent litigated exclusively in a single jurisdiction, such as the Eastern District of Texas. If the patent has only been litigated in a single district, it may be an indication that the patent troll is reluctant to initiate a claim in another venue for cost or other reasons. In contrast, if the patent troll has a demonstrated history of litigating the patent in a variety of venues, one should expect that it is prepared to enforce its rights in whatever venue is required, including the Northern District of Ohio, if necessary.

- Whether this particular patent troll has litigated other patents, how many times, and in what jurisdictions.

The patent troll's past practices in connection with other patents can give important insight to the troll's overall willingness to litigate in the absence of specific information concerning the patent that is being asserted. A patent troll that has never litigated any patent is certainly less of a threat than a patent troll that has a robust history of litigation with respect to other patents. If the patent is newly issued and the patent troll has a long history of enforcement actions with other patents, then perhaps the patent troll's threat of enforcement actions should be taken very seriously. That said, if the patent troll has a history of enforcement litigation but has never litigated this patent (even though it has been issued for a long time), that behavior might suggest a reluctance on the part of the troll to aggressively enforce this particular patent.

- How many of the patent's litigations have been terminated and how long after filing.
- The identity of the defendants in the terminated litigations (likely parties to settlement/licensing agreements to be investigated).

A patent troll's past practices in resolving cases by settlement can give important insight into the value that should be assigned to any licensing agreement. Where a patent troll has a history of quick settlements after filing, the conduct suggests a willingness to accept royalty payments well below the expected cost of litigation. A target defendant should, as a part of the negotiation of any royalty payment, seek discovery of the terms of the prior licensing agreements. Simply asking for the terms of the prior licensing agreements by naming the prior defendants can improve your negotiating position. In very extreme cases, such a request may cause a patent troll that is reluctant to share that information to cease seeking a royalty payment from your client.

- Whether the same patent troll has held the rights to and litigated the patent throughout time (has the same patent troll initiated all of the litigations).
- Which law firms have represented the patent troll in each of the litigations.
- The patent's history of assignments.

All things being equal, one would expect that the rights of a strong and enforceable patent would remain with the same party. Changes in assignments mid-litigation can only increase the expense to the patent troll in the defense of the patent and create opportunities for defendants to conduct additional discovery into the overall value of the patent rights. Thus, if the patent's rights have been transferred by subsequent assignments, this may be an indication of problems with the patent. Similarly, all things being equal, one would expect a patent troll would engage the same counsel in the enforcement of the patent. Thus, if a series of different counsel have been engaged, particularly if the changes indicate a reduction in the caliber of firms willing to take on the representation, this also may be an indication of general weakness in the patent or the patent troll's lack of resolve to litigate aggressively.

- Whether other patents in the asserted patent's family have been the subject of litigation, and if so, the results of those actions.

Depending upon the language of the claims being asserted against your defendant, the results of prior litigation of patents in the same patent family may have a bearing on the relative strength of the patent troll's infringement claim. Knowledge of any adverse results in such litigation can be used to good effect in defending the claims and, potentially, negotiating a reduced royalty for your client. As with knowledge of the likely counterparties to prior settlements, in extreme cases, knowledge of adverse results in the enforcement of patent family members may cause a patent troll to abandon its licensing efforts altogether. The patent troll might make this choice rather than accept a greatly reduced royalty payment that it will have to disclose in litigation to other target defendants.

- Whether the scope of the patent's claims asserted against your defendant were narrowed in prosecution.

If the patent has recently issued, the complete prosecution history may be available on-line via the USPTO website. If that is the case, it is very easy to isolate the office actions and responses that might give weight to an argument that the patent owner narrowed a claim term's interpretation to overcome a prior art rejection. Such arguments may give rise to a non-infringement defense thereby greatly reducing (or eliminating) the reasonable royalty that a patent troll should expect to receive for a license.

- Has the patent (or any patent in the asserted patent's family) been the subject of a petition for post-grant review.
- If the patent has been the subject of such a petition, the petitioner's basis for claiming that the patent was invalid.
- Whether the proceeding terminated before the petition was ruled upon (suggesting a possible settlement).
- Whether the PTAB instituted a review and, if so, the basis for the PTAB's preliminary determination that the patent was likely invalid.
- Whether the proceeding terminated after the review was instituted (again, suggesting a possible settlement).
- If the review went to trial, the PTAB's conclusions regarding the grounds raised for challenging the validity of the patent.

Post-grant review information is, potentially, the most useful information available to a target defendant in warding off claims from a patent troll. Many patent trolls have been forced to defend the validity of their patents through such proceedings since their inception in 2012. The Patent Trial and Appeal Board (PTAB) has invalidated a large number of patents in these proceedings. Further, a large number of these proceedings have been terminated after the PTAB's preliminary decision that a patent was likely invalid but before a final decision was rendered invalidating the patent.

Where a patent has been the subject of a petition for review, the petition itself can be a wealth of information regarding the best available prior art and the best available arguments against the validity of the patent. Further, if the PTAB instituted a review in response to the petition, the initiating order will contain an analysis of the PTAB's conclusion that the patent is likely invalid. If such a finding has been made, and the review was terminated prior to trial, this is a strong indication of a settlement, probably on very favorable economic terms to the licensee (which terms you might argue should bear on the reasonable royalty that your defendant should pay).

Also, even if the claims being asserted against your defendant were not a subject of the post-grant review, a final determination regarding the invalidity of any claims in the patent, or another patent in the asserted patent's family, may have some bearing on the validity of the claims that are asserted against your defendant. The same reasoning that was used by the PTAB to invalidate the challenged claims may apply with greater force and effect to the claims asserted against your defendant because of the claim language and scope. Accordingly, the PTAB's final order still may be a powerful indicator of the strength of potential invalidity defenses available to your defendant and knowledge of the order may be used effectively in any licensing or settlement negotiations with the patent troll.

In summary, patent trolls have not disappeared. They continue to target companies for royalty payments using the explicit or implied threat of litigation. Changes in the law make it more likely that patent trolls will initiate their patent infringement lawsuits against Northeast Ohio companies in the Northern District of Ohio. As we prepare to defend our local clients against these claims, there is a wealth of information available from public sources that can be useful in evaluating a patent troll's infringement claims and the real risk of litigation.

## JUST THE FACTS: AV LEGISLATION IS NECESSARY, BUT IT CAN'T HAPPEN WITHOUT RESEARCH

BY Tod Northman and Zachary Adams

The unfortunate string of Boeing 737 Max 8 accidents underscore that the complexity arising from autonomy comes with profound risk. As suggested by the name of Tesla's Autopilot feature,<sup>1</sup> there are strong similarities between the way aircraft autopilot functions autonomously and how autonomous vehicles will operate, once the technology catches up.<sup>2</sup> Yet the aviation industry is regulated rigorously but the Department of Transportation has adopted a wait-and-see approach to regulated autonomous vehicles (AV).

In Ralph Nader's 1965 book *Unsafe at Any Speed*, the consumer advocate argued that the automobile industry's focus on style over safety was responsible for the unnecessary deaths of thousands of people each year. Nader's claims helped provoke Congress to create the National Highway Traffic Safety Administration (NHTSA), the federal agency charged with enforcing the Federal Motor Vehicle Safety Standards (FMVSS), a comprehensive set of regulations on vehicle design, construction, and performance.<sup>3</sup>

Now, more than 50 years after FMVSS became effective, the rise of AV technology has led Nader and other safety advocates to again voice concern about automotive safety regulations in the United States. In an article in the *Wall Street Journal*, Nader decried proposed driverless car legislation that he — along with various consumer and public-interest groups commenting on the topic — believes would go too far in exempting the AV industry from regulation.<sup>4</sup>

Safety advocates' concerns about the direction in which AV regulation is headed are understandable but ill-considered. Their premise is that manufacturers will soon roll out fully autonomous vehicles for purchase— thereby imperiling us — and that the federal government must put a stop to it. That misapprehends the most likely present danger from self-driving vehicle oversight: underpowered state regulation.

AV testing is conducted pursuant to state laws, which have widely varied levels of administrative oversight. For example, California has adopted rigorous oversight, requiring permits and annual reports.<sup>5</sup> By contrast, testing in Arizona is conducted under less rigorous supervision, pursuant to an executive order that was promulgated with the direction “to eliminate unnecessary regulations and hurdles to the new technology.”<sup>6</sup>

More important, Nader's alarm ignores the looming problem of inadequate technical expertise by federal regulators. The federal-state regulatory collaboration reflects the traditional distinction between regulating automotive hardware — the province of NHTSA — and regulating driver behavior — the states' responsibility. As long as AV companies remain in the testing phase, retaining that structure makes sense. Manufacturers will continue to produce vehicles with increasingly robust safety equipment and will gradually introduce vehicles with higher levels of autonomy in geofenced areas. States can appropriately determine how best to regulate AV testing within their borders.

<sup>1</sup>Incorrectly, ironically, since Tesla's autopilot is not autonomous in the industry's understanding of the term. See, for example, “Billions of miles needed to make Tesla autopilot feature work,” News.com.au (March 11, 2019) <https://www.news.com.au/technology/innovation/motoring/hitech/billions-of-miles-needed-to-make-tesla-autopilot-feature-work/news-story/7ade1e08c2ca1821bf52cd0113f695e1>

<sup>2</sup>Grabar, Henry, “The Crash of the Boeing 737 Max Is a Warning to Drivers, Too”, Slate (March 12, 2019), <https://slate.com/technology/2019/03/boeing-737-max-crashes-automation-self-driving-cars-surprise.html>

<sup>3</sup>The Volpe Report concluded that there are 12 equipment requirements that potentially conflict with the implementation of autonomous vehicles. “Review of Federal Motor Vehicle Safety Standards (FMVSS) for Automated Vehicles, Preliminary Report — March 2016,” <https://rosap.ntl.bts.gov/view/dot/12260>; see also “The Ongoing Transformation of the Global Transportation System,” DOT VNTSC-1804, February 2018, <https://www.volpe.dot.gov/sites/volpe.dot.gov/files/docs/events/62316/transforming-transportation-series-final-report.pdf>. For the time being, manufacturers are invited to apply for exemptions. See, for example, NHTSA's response to Waymo (then Google) at <https://isearch.nhtsa.gov/files/Google%20-%20compiled%20response%20to%2012%20Nov%20%2015%20interp%20request%20-%204%20Feb%2016%20final.htm>.

<sup>4</sup>Nadar, Ralph, Driverless Car Legislation is Unsafe at this Speed, Aug. 22, 2018, <https://wsj.com/articles/driverless-car-legislation-is-unsafe-at-this-speed-1534973755>.

<sup>6</sup><https://www.dmv.ca.gov/portal/dmv/detail/vr/autonomous/bkgd>.

<sup>7</sup><https://azgovernor.gov/governor/news/2018/03/governor-ducey-updates-autonomous-vehicle-executive-order>.

The AV industry understandably wants a unified system of rules and regulations so that they aren't burdened by local variations. There is also a risk of "rogue" states cutting safety corners in order to attract their share of the economic boom from the burgeoning AV industry; however, the desire for uniformity and protection against risk-tolerant states is not a regulatory hole best plugged by federal regulation.

NHTSA already has the authority to address safety issues arising from self-driving cars, notwithstanding the traditional federal-state division. "Motor Vehicle Safety" is defined in the Motor Vehicle Safety Act as "the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes nonoperational safety of a motor vehicle."<sup>7</sup> In other words, NHTSA's authority is plenary where motor vehicle safety is at issue.

Preparing for necessary federal regulation once self-driving cars are commercially available is advisable. The AV industry has the urgently needed opportunity – which existing and proposed legislation misses – to gather information. As vehicles reach full autonomy, the "driver" will become the vehicle's processing unit; the sensors and cameras on AVs are already vacuuming up and sending information back to the car manufacturers. AV test vehicles and vehicles with enhanced safety features are a potential source of data, and with machine learning, data is gold. It can and should be used to better understand such questions as how self-driving cars best function, how they interact with other vehicles and the environment, what forms of AV training are best, and in which situations full autonomy is safe; the questions that could be investigated are endless.

Our proposal is simple: Instead of wringing our hands over the gradual proliferation of autonomous vehicles and expecting Congress to regulate the unknowable future of autonomous vehicles, Congress should require autonomous vehicle developers operating in the United States to share aggregated, anonymized information from high-tech driving systems (from automation levels 2 through 5 as defined by the Society of Automation Engineers). This data should be made available for study by NHTSA, academics, and industry professionals, and Congress should give NHTSA the authority and budget necessary to use those learnings to develop regulations that will tap the benefits of autonomy as effectively and safely as possible.

### **The Uncertain Status of Current AV Regulation**

Since 1966, vehicle miles driven in the United States have increased from 51 billion to 322 billion. But while the number of miles driven has increased over sixfold, the number of traffic fatalities over that timespan has actually decreased — from approximately 51,000 in 1966 to just over 40,100 in 2017. Stated in other terms, fatalities per million vehicles driven have dropped from 5.50 fatalities to 1.18 fatalities.

Much of this decrease can likely be attributed to federal regulations, including FMVSS. When it comes to self-driving technology, however, NHTSA has taken a surprisingly hands-off approach to regulation, preferring instead to allow self-regulation at the state level. NHTSA has explained its perspective in various speeches to the industry,<sup>10</sup> as well as in its regulatory guidance, "Preparing for the Future of Transportation: Automated Vehicle 3.0"<sup>10</sup> and "Automated Driving Systems 2.0, A Vision for Safety," a set of guidelines developed to facilitate the integration of AV technology.<sup>11</sup>

In deciding to engage in a supervisory as opposed to a law-promulgating role, NHTSA explained its belief that (1) autonomous vehicle technology is changing too rapidly for NHTSA to effectively regulate self-driving cars, and (2) it needs to support industry innovators while working to safely introduce automation technologies. In short, NHTSA believes that its regulatory guidelines should encourage rather than hamper the safe development, testing, and deployment of AV technology.<sup>12</sup>

<sup>7</sup>49 U.S. code § 30102(a)(9).

<sup>8</sup>Cf. Urmson, Chris, "The Fuzzy Numbers for Tracking AV Progress," Sept. 21, 2018, <https://www.axios.com/the-fuzzy-numbers-for-tracking-av-progress-8a06c0f6-027b-49bc-b82a-9622c77bf5ec.html>.

<sup>9</sup>See, for example, the speech by Secretary of Transportation Elaine Chao on Aug. 8, 2018. Mulero, Eugene, "Transportation Secretary Elaine Chao Touts Department's Approach to Autonomous Policy," Transport Topics, <https://www.ttnews.com/articles/transportation-secretary-elaine-chao-touts-departments-approach-autonomous-policy> (last visited March 11, 2019).

<sup>10</sup><https://www.transportation.gov/av/3/preparing-future-transportation-automated-vehicles-3>.

<sup>11</sup>[https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/13069a-ads2.0\\_090617\\_v9a\\_tag.pdf](https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/13069a-ads2.0_090617_v9a_tag.pdf).

<sup>12</sup>Id.

But as the technology continues to develop, questions such as those posed by Nader challenge the federal government's laissez-faire approach. Once the computer becomes the driver, a different regulatory approach will be needed. Filling that gap will require deep knowledge about AV operations – knowledge that can be gained only through sustained study.

The current lack of federal oversight is not for lack of trying. On Sept. 7, 2017, the United States House of Representatives passed the Safely Ensuring Lives Future Deployment and Research in Vehicle Evolution Act (SELF DRIVE Act).<sup>13</sup> This bill encourages the testing and deployment of autonomous vehicles by preempting states from enacting laws related to the design, construction, or performance of highly automated vehicles or driving systems. And on Sept. 28, 2017, Senator John Thune, R-S.D., introduced the AV START Act. This bill allows federal preemption for AV design and safety.<sup>14</sup> Both bills, however, have faced strong opposition in their respective chambers due to safety concerns, and it does not appear that any resolution or the passing of either bill is on the near horizon.<sup>15</sup>

### **Unintended Consequences of NHTSA's Hands-Off Approach**

Unless action is taken to give federal regulators the knowledge they will require to regulate the self-driving "driver," these objections will have the unintended consequence of leaving autonomous vehicles void of any federal regulatory framework for the foreseeable future. Self-driving vehicles are under regulated or unregulated in most states. Even where there is some semblance of state-level regulation, the rules are inconsistent.

Some states, such as New York<sup>16</sup> and California, have chosen to regulate the testing of self-driving vehicles. Many have elected not to. Either way, the difficulty is in determining what to regulate. Federal preemption precludes states from regulating the hardware of automobiles, except for limited instances when FMVSS establishes a minimum standard. FMVSS conflicts in a number of areas with anticipated features of autonomous vehicles, such as requiring a rear-view mirror or a steering wheel. For testing purposes, AV manufacturers have worked around such limitations through the exemption process.

Thus, while Nader is right to express concern over the speed with which AV technology is being integrated, his premise that lawmaking is moving too fast is flawed. The real issue is that lawmaking is not moving at all. As self-driving technology matures to the point of full autonomy, the federal government likewise needs to take more control – at least *some* level of control – over the regulatory framework.

### **What Should NHTSA Regulate?**

When it comes to autonomous vehicles, NHTSA should vary its traditional approach to regulating automobiles. Instead of focusing on the hardware facilitating autonomy, NHTSA should focus its attention more generally on the ramifications of a computer having complete autonomy over vehicle operations. That is, NHTSA should focus its attention on regulating how the autonomous vehicle performs its driving function, instead of focusing on regulating the hardware components of the vehicle, such as sensors and steering and braking systems.

As it currently stands, NHTSA permits AV manufacturers to assess the safety of their own vehicles and make decisions on recall when they deem it appropriate. Such a framework may work in a mature industry where changes are iterative and generally well understood. But in the fast-evolving field of self-driving cars, such a deliberative process does not adequately protect the public.<sup>17</sup>

<sup>13</sup>See The Library of Congress, H.R.3388-SELF DRIVE Act, <https://www.congress.gov/bill/115th-congress/senate-bill/3388>.

<sup>14</sup>See The Library of Congress, S.1885-AV START Act, <https://www.congress.gov/bill/115th-congress/senate-bill/1885> (last visited March 11, 2019).

<sup>15</sup>See, e.g., Kulisch, Eric, "Lobbying Push Targets Holdouts on Autonomous Vehicle Bill," March 16, 2018, <http://www.autonews.com/article/20180316/MOBILITY/180319765/lobbying-senate-holdouts-av-start-act>; John McKinnon, Self-Driving Car Safety Legislation Stalls in the Senate, Feb. 12, 2018, <https://www.wsj.com/articles/self-driving-car-safety-legislation-stalls-in-the-senate-1518436800>.

<sup>16</sup>New York has the most restrictive regulations. In fact, the regulations are so burdensome that GM Cruise's announced plans to begin testing have been delayed more than eight months with no end in sight. "What Happened to GM Testing Self-Driving Cars in New York City?," Sept. 13, 2018, <https://transportationvoice.com/what-happened-to-gm-testing-self-driving-cars-in-new-york-city/> (GM Cruise officials stated that its AV testing application process is ongoing and noted the "complex regulatory environment").

<sup>17</sup>A Tesla accident resulted in an NHTSA investigation, which took eight months and cleared Tesla of responsibility for the accident, because the vehicle's manual had instructed drivers not to rely on the autopilot and to remain in command of the vehicle. <https://static.nhtsa.gov/odi/inv/2016/INCLA-PE16007-7876.PDF>.

Autonomous vehicles are equipped with high-tech sensors, computer vision, sophisticated onboard computers, artificial neural networks containing advanced decision-making algorithms, and black boxes that relay information back to a central processing center. Regulating AV technology and its public integration requires the kind of expertise and resources that are available only at the federal governing level.

Beyond the typical safety concerns associated with human-operated passenger vehicles, AV technology raises nontraditional safety issues that require federal standardization. For instance, given their complex and evolving computer systems, autonomous vehicles are subject to cybersecurity concerns. One can only imagine the potential terror wrought by computer hackers taking over control of an autonomous vehicle's operating system, let alone an entire fleet of autonomous vehicles traveling on public roadways. While NHTSA emphasized the importance of the issue in its "Automated Driving Systems 2.0," it offered no solutions. The AV industry would no doubt benefit from a comprehensive regulatory approach that mandated, at minimum, a system designed to immediately communicate threats and the implementation of a set of agreed-upon best industry practices.

In 2017, continuing its pattern of recognizing potential issues, NHTSA called for industry participants to submit voluntary safety self-assessments. But without legal weight behind this request, many companies have yet to follow through. For instance, of the 62 companies<sup>18</sup> in California that hold a permit to test autonomous vehicles, only 13 have voluntarily filed reports.<sup>19</sup> Moreover, with no concrete guidance on what information must be provided, the 13 reports are of limited value.<sup>20</sup> Thus, our proposal: As the AV industry is learning, its would-be regulators must remain abreast of the technology's limits and capabilities in order to promulgate effective rules.

## Conclusion

Autonomous vehicles offer exciting and welcomed changes to the way passenger vehicle transportation occurs in the United States. Along with affording a new structure of personal transportation to groups of consumers currently devoid of such fundamental mobility, the safety advances associated with AV technology cannot be ignored. But without prompt and adequate federal regulation aimed at empowering NHTSA to collect and analyze the myriad data generated by this evolving technology, the promise of autonomous vehicles may never be fully realized.

Tod Northman is a partner at Tucker Ellis LLP. His practice focuses on corporate and emerging tech law and transactions. Tod is co-chair of the firm's Autonomous Vehicles & Artificial Intelligence Technologies Group.

Zachary Adams is an associate at Tucker Ellis LLP. Zach is a litigator whose practice involves commercial disputes and products liability defense. He co-founded the firm's Autonomous Vehicles & Artificial Intelligence Technologies Group and is the host of the firm's podcast is, "Driverless", which covers the legal and regulatory aspects of the AV industry.

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<sup>18</sup>As of January 28, 2019, permit holders. <https://www.dmv.ca.gov/portal/dmv/detail/vr/autonomous/permit>.

<sup>19</sup><https://www.nhtsa.gov/automated-driving-systems/voluntary-safety-self-assessment>. (The number represents a significant increase from years prior; when only four companies had filed.)

<sup>20</sup>Keith Laing, "Few carmakers submit self-driving car safety reports," Sept. 10, 2018, <https://www.detroitnews.com/story/business/autos/mobility/2018/09/10/few-carmakers-submit-self-driving-safety-assessments/1076691002/> ("The result of that is the three we have seen are much more like slick marketing brochures than anything that shows what kinds of tests have been passed or what these things can do").



## Federal Bar Association

Northern District of Ohio Chapter

### INTRODUCTION TO FEDERAL PRACTICE SEMINAR

Friday, May 17, 2019

Carl B. Stokes U.S. Court House, Courtroom 19A  
801 West Superior Avenue, Cleveland, OH

2.25 Hours of Ohio CLE Credit

(This seminar satisfies Local Rule 83.5)

CLE program approval pending by the Supreme Court of Ohio.

Immediately following this program, participants will be sworn-in to practice before the Northern District of Ohio. Please visit the Court's Web site, [www.ohnd.uscourts.gov](http://www.ohnd.uscourts.gov), to obtain a copy of the Application for Admission to Practice.

#### SEMINAR AGENDA

##### 8:30 a.m. Registration

9:00 Welcome and Introduction  
Chief Judge Patricia A. Gaughan  
U.S. District Court, ND Ohio

9:20 Role of the Magistrate Judge  
Magistrate Judge David A. Ruiz  
U.S. District Court, ND Ohio

*Magistrate Judge Ruiz will review the role of the Magistrate Judge in the federal system and the benefits to the parties and the Court of consenting to the jurisdiction of the Magistrate Judge in civil cases.*

9:40 Court Programs, Accessing Court Information and Electronic Filing  
Vicky R. Mizell  
Chief Deputy Clerk

*The Chief Deputy Clerk will provide an overview of the Court, comment on recent developments, and describe the Court programs of interest to attorneys (the Civil Pro Bono Program, the Criminal Justice Act Plan, the Federal Court Panel of ADR Neutrals and the Northern Ohio Advisory Group). She will also provide an introduction to the Court's Web site and describe the electronic filing system through which all attorneys must file and receive notice of filings.*

10:30 Break

10:45 Local Rules and Practice  
Sarah Nintcheff  
Career Law Clerk to Chief Judge Patricia A. Gaughan  
Ellen Siebensschuh  
Career Law Clerk to Magistrate Judge Jonathan D. Greenberg

##### Local Rules and Practice Continued

*The law clerks will review key Local Rules related to attorney admissions, case assignments, discovery, motion practice and Alternative Dispute Resolution, with an emphasis upon the Differentiated Case Management Plan by which the Court manages its civil docket.*

11:30 Electronic Courtrooms  
David J. Zendo  
Automation Supervisor  
U.S. District Court, ND Ohio

*The Court strives to provide litigants with the best facilities to conduct hearings and trials. Most courtrooms are now outfitted with electronic evidence presentation systems, video-conferencing capability, infrared head phones for hearing assistance and translation, real-time court reporting, telephone interpreting and "smart" counsel tables. This section of the program provides an overview and demonstration of these features.*

11:50 Swearing-in Ceremony by  
Vicky R. Mizell  
Chief Deputy Clerk

*Participants who have completed the course and otherwise met the requirements of Local Rule 83.5, will be sworn in to practice in the Northern District of Ohio.*

12:00 Mini Court House Tour  
Jody Wilson  
Operations Specialist

*A short tour of the Carl B. Stokes U.S. Court House including a District Judge and a Magistrate Judge's courtroom and chambers, the 7th floor attorney lounge, the auditorium, the cafeteria, the court reporter offices, the Clerk's Office intake department and records room on the 1st floor and the jury/naturalization assembly area on Lower Level 1.*

#### REGISTRATION FEES

FBA Member: \$95 Non-member: \$125

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Cancellations received by 5:00 p.m., three business days prior to the seminar will receive a full refund; less than three business days prior to the seminar will be refunded less a \$25 administrative fee; no shows will not receive a refund.

All cancellations need to be in writing via email sent to [admin@fba-ndohio.org](mailto:admin@fba-ndohio.org)

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Phone: (440) 226-4402 E-mail: [admin@fba-ndohio.org](mailto:admin@fba-ndohio.org)

#### COMMITTEE MEMBERS

Seminar Co-Chair: Lori Riga, Federal Public Defender &  
Vicky R. Mizell, Chief Deputy Clerk, U.S. District Court, ND Ohio



# Federal Bar Association

Northern District of Ohio Chapter

**The FBA Younger Lawyers Committee is hosting a Summer Happy Hour!**

**Come enjoy drinks and complimentary appetizers with the Younger Lawyers Committee at**



**When:** Thursday, June 6, 2019

**Where:** JUKEBOX

1404 W 29th St., Cleveland

**Time:** 5:30-7:30 pm

**Law student FBA members- \$5**

**FBA members-\$10**

**Non-members-\$15**

FBA members and prospective FBA members of all ages are welcome to attend!

Payment can be made at the link below or at the door.

Feel free to contact

Eleanor Hagan at [eleanor.hagan@squirepb.com](mailto:eleanor.hagan@squirepb.com),

Marisa Darden at [Marisa.Darden@gmail.com](mailto:Marisa.Darden@gmail.com) or

Brendan Heil at [BHeil@Calfree.com](mailto:BHeil@Calfree.com) with any questions.

We look forward to seeing you there!

All paid registrations are non-refundable.

FBA, Northern District of Ohio Chapter

Phone: (440) 226-4402 or E-mail: [admin@fba-ndohio.org](mailto:admin@fba-ndohio.org)

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# Federal Bar Association

Northern District of Ohio Chapter



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**1:00 PM - 5:00 PM**

**Registration begins at 12:30 PM**

**Jones Day-Cleveland**

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Speakers include:

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Dean Emeritus Steven Steinglass (Cleveland-Marshall College of Law)  
Magistrate Judge Evelyn Furse (D. Utah)  
Ohio Supreme Court Justices Melody Stewart and Michael Donnelly  
Deputy Chief Public Defender for Cuyahoga County Cullen Sweeney

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**Register by June 12, 2019**

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# Federal Bar Association

Northern District of Ohio Chapter

## SAVE THE DATE AND JOIN US FOR OUR ANNUAL SUMMER ASSOCIATE RECEPTION

For Summer Associates and Legal Interns  
from Law Firms, Federal and  
State Courts, and Government Offices  
and for Federal Law Clerks

### WHEN:

*Thursday, July 18, 2019 - 5:00 p.m. - 8:00 p.m.*

### WHERE:

*House of Blues*

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*FBA, Northern District of Ohio Chapter*



**Federal Bar  
Association**  
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**Save the Date and Join us for the Fourteenth Annual  
State of the Court Luncheon**

**Friday, September 20, 2019**

12:00 — 1:30 p.m.

Registration begins at 11:30 a.m.

**Cleveland Hilton Downtown  
100 Lakeside Ave.  
Cleveland, Ohio 44114**

*MORE INFORMATION TO FOLLOW*

Federal Bar Association Northern District of Ohio Chapter  
P.O. Box 14760 Cleveland, OH 44114  
Phone: 440-226-4402 E-mail: [admin@fba-ndohio.org](mailto:admin@fba-ndohio.org)



**Federal Bar  
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**2019 BANKRUPTCY BENCH-BAR RETREAT  
SAVE THE DATE**

The Attorney Constituent Group of the United States Bankruptcy Court for the Northern District of Ohio invites you to its ninth biennial Bench-Bar Retreat on October 11, 2019. The event will be held at The Lodge & Conference Center at Geneva State Park in Geneva-on-the-Lake, Ohio. Breakout sessions, judges' panels, and town hall meetings will provide opportunities for industry updates, legal education, and engaging exchanges among practitioners and judges.

The rate for Deluxe Double rooms is \$99/night, plus tax and applicable fees. Reservations must be made by August 25, 2019.

Additional details will be forthcoming.



## Federal Bar Association

Northern District of Ohio Chapter



### SAVE THE DATE

#### Are you looking for more stand-up courtroom experience?

Do you find yourself lacking confidence or experience in the courtroom? Not sure how to improve your skills in a high-stakes setting without presenting a case? Sharpen your skills at the **Trial Academy** hosted by the Northern District of Ohio Chapter of the Federal Bar Association, September 25 to 27, 2019.

In today's judicial system, most cases are settled in litigation before they reach a trial. As a result, new attorneys have few chances to present a case to a judge and jury, missing out on valuable experience. In this three-day event, participants will practice with live witnesses, engage in hands-on "stand-up" experience and receive feedback from experienced judges and practitioners. Register soon, as only 24 spots are available for participants!

Plan on attending this event to improve your trial skills and gain confidence in the courtroom!

**Who:** Attorneys eager to improve their courtroom skills

**What:** Trial Skills Training

with feedback from experienced judges and attorneys

**Where:** Carl B. Stokes, U.S. Court House, Cleveland

**When:** September 25 to 27, 2019

Registration Fees are as follows:

**FBA Member - \$650 Non-member - \$775**

Scholarships are available for students and public service students.

**How many:** 24 participants

**More information and registration to follow.**

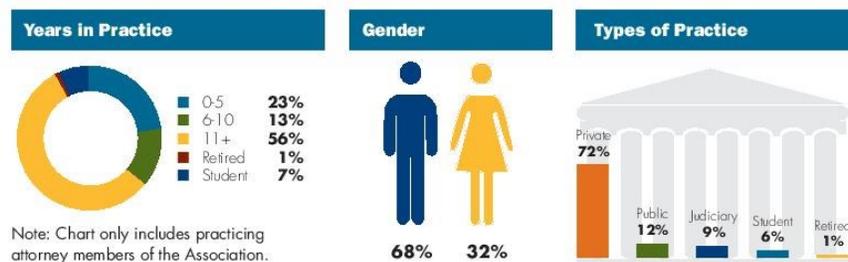
FBA, Northern District of Ohio Chapter  
 Phone: (440) 226-4402 or E-mail: [admin@fba-ndohio.org](mailto:admin@fba-ndohio.org)  
 PO Box 14760, Cleveland, Ohio 44114

# Federal Bar Association

## Benefits of Membership

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.

### You're in Good Company



Note: Chart only includes practicing attorney members of the Association.

#### Advocacy

The organization's headquarters are located outside of Washington, D.C., in Arlington, Va., giving it the proximity necessary to remain engaged on behalf of its members.

- government relations efforts as defined by the FBA Issues Agenda
- annual Capitol Hill Day
- monthly updates on recent government relations developments

#### Networking and Leadership

The FBA is large enough to have an impact on the federal legal profession, but small enough to provide opportunities for networking and leadership. The FBA is governed by a 15-member, elected, Board of Directors and numerous volunteer members.

- more than 95 chapters across all federal circuits
- 22 practice area sections
- five career divisions
- volunteer leadership opportunities within each chapter, section, and division

#### Education

The FBA offers more than 700 credit hours of continuing legal education (CLE) at both the national and local level throughout the year.

- national CLE conferences
- bimonthly CLE webinars
- local chapter-sponsored CLE events

#### Publications and Communication

As part of your membership, you will receive and have access to:

- FBA website ([www.fedbar.org](http://www.fedbar.org))
- The Federal Lawyer magazine (10x per year)
- bimonthly eNewsletter
- section, division, and chapter newsletters (printed)
- Judicial Profile Index (archived)

#### Legal Career Center

The Legal Career Center is an online resource for both employers looking to hire and job seekers looking for a position within the federal legal community. Employers have the option of posting jobs available to the FBA Legal Career Center only, or to the Legal Job Exchange Network that reaches thousands of potential candidates through the network of partner job boards. Job seekers have free access and can use the Legal Career Center to post resumes, search for jobs, and prepare for interviews, as they launch their careers.

#### Member-Only Advantages

- Member Plus affinity program
- online membership directory
- optional public directory listing
- online specialty items catalog
- discounted rates for CLE, networking events, publications, and other services

## Become a Sustaining Member

### Support

Sixty dollars of every sustaining membership is used to support educational programs and publications of the FBA.

### Save

Sustaining members save five percent on national event registrations and publications orders, and are recognized annually in *The Federal Lawyer* and at FBA events.

Sustaining Members also receive one free CLE webinar per year—a \$99 value!



**Federal Bar Association**

**Make your mark within the federal legal community.**

**Sign up for membership today at [www.fedbar.org/join](http://www.fedbar.org/join).**

Contact the FBA at (571) 481-9100 or [membership@fedbar.org](mailto:membership@fedbar.org) for more information.

**Calendar of Events:****May 15, 2019** *FBA-NDOH Board Meeting***May 17, 2019** *Introduction to Federal Practice Seminar***May 23, 2019** *Reach Out Legal Assistance Seminar and Clinic***June 18, 2019** *Laboratories of Democracy:  
Restoring the Forgotten Constitutions Northern District of Ohio  
Bench/Bar Symposium***June 19, 2019** *FBA-NDOC Board Meeting**We add events to our calendar often so please check our website  
for upcoming events that may not be listed here.**Editor for the Winter 2019 Newsletter:*

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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 than  
June 1, 2019.

Next publication is scheduled for Spring 2019.

**We' have a new look on the web check  
us out!**

**[fba-ndohio.org](http://fba-ndohio.org)**



**Federal Bar  
Association**

Northern District of Ohio Chapter

**Save The Date  
2019 Annual Meeting and  
Convention  
Hilton Tampa Downtown  
September 5-7, 2019**

A discounted block of rooms has been reserved for conference  
attendees at the Hilton Tampa Downtown (211 N Tampa Street,  
Tampa FL 33602) at the following rates (plus state and local taxes).  
Check-in time is 3:00 p.m. and check-out is 12:00 p.m.

\$159/night - Single/Double  
\$169/night - Triple  
\$189/night - Quad

Reservations must be made by 5:00 p.m. ET on **August 20,  
2019**. Any reservations received after the above date or until the  
block is full, whichever is sooner, will be accepted based on a  
room-type and rate-available basis.



**Federal Bar  
Association**

**STATEMENT OF THE FEDERAL BAR ASSOCIATION  
BOARD OF DIRECTORS ON JUDICIAL INDEPENDENCE**

Judicial independence, free of external pressure or political intimidation, lies at the foundation of our constitutional democracy. An independent judiciary needs to remain free of undue influence from the legislative and executive branches and to remain beholden only to the maintenance of the rule of law and the protection of individual rights and personal liberties. We affirm the right to challenge a judge's ruling for reasons based in fact, law or policy. However, when robust criticism of the federal judiciary crosses into personal attacks or intimidation, it threatens to undermine public confidence in the fairness of our courts, the constitutional checks and balances underlying our government and the preservation of liberty.

*The Federal Bar Association is comprised of over 19,000 public and private sector lawyers practicing in our federal courts, hailing from all fifty states and the U.S. Territories. The Federal Bar Association is a non-partisan professional organization created to promote the sound administration of justice and integrity, quality and independence of the judiciary.*

**FBA-NDOC Officers**

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Rebecca J. Bennett, Ogletree Deakins Nash Smoak & Stewart PC

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