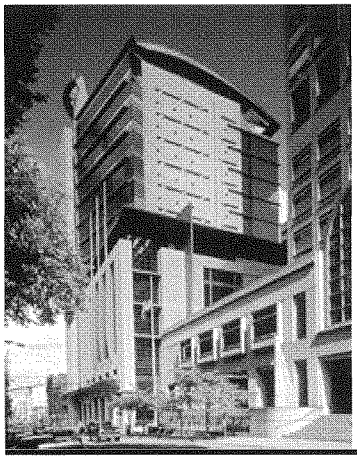


A Quarterly Newsletter of the Oregon Chapter of the Federal Bar Association

FOR THE DISTRICT OF OREGON

Volume XIV, No. 1 *Summer 2009*

IN THIS ISSUE

REPORT ON COURT'S REVISED PRO BONO PANEL

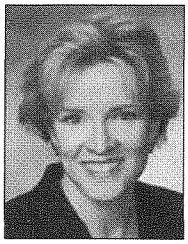
By The Honorable Janice M. Stewart, U.S. Magistrate Judge

The U.S. District Court for the District of Oregon first established the Pro Bono Representation Panel in 1989 to assist *pro se* litigants who were unable to obtain the services of an attorney and to assist the Court in deciphering those litigants' claims. Over the past 20 years, the need for this type of assistance has dramatically increased.

In 2007, 24% of the total civil filings in the District of Oregon were by *pro se* litigants. Two-thirds of those filings were filed by prisoners and one-third were filed by nonprisoners. The majority of cases filed by prisoners are petitions for *habeas corpus* attacking their convictions or sentences. In those cases, the court generally appoints the Federal Public Defender. In addition, prisoners also file civil rights claims attacking the conditions of their confinement, medical treatment, or other constitutional violations. *Pro se* nonprisoners file claims including, but not limited to, alleged violations of their civil rights, employment discrimination, and denial of federal benefits.

A few years ago, it became apparent that the pro bono program was no longer serving its intended purpose of finding counsel to accept pro bono representation in a timely manner. While several factors led to the inefficiency of the program, the most pressing problem was the amount of time that lapsed while the court awaited responses to requests for appointment, which were often ignored. Other problems included the lack of follow-up by case managers and the lack of an effective litigant/attorney screening mechanism. In addition, no training was offered, educational materials and sample forms were not provided, and mentoring was not available. At that time, attorneys also tended to not accept cases based on the fact that out-of-pocket expense reimbursement (by the Attorney Admission Fund) was limited to only $100 per case.

As a result of the delay in responses from panel members and lack of acceptances, judges were reduced to recruiting counsel, usually without success, by sending mass emails through the FBA and OWLS list servers. Finding myself in this situation more than once, I began trying to determine how to provide better judicial access for *pro se* litigants by increasing pro bono representation by the



THE PRESIDENT'S COLUMN

By Courtney Angeli,
Buchanan Angeli Altschul & Sullivan LLP
Federal Bar Association President

It has been an honor to serve as President for the 2008-2009 term. I am excited to be handing off this role to the new President, Assistant U.S. Attorney Kelly Zusman. For years she has worked hard for the organization, particularly to ensure top-notch FBA CLEs and programming. She has excellent relationships with the federal bench, and I will be excited to see the organization continue to develop and thrive under her leadership.

A highlight of this year was the recent 2009 Judge's Dinner. Tom Johnson of Perkins Coie LLP and Jolie Russo did an extraordinary job of bringing the dinner together and making it so memorable. The weather was also quite cooperative! A number of our members commented on what a special evening it was and what a perfect setting the courthouse provided. I am so glad that our new Chief Judge Ann Aiken encouraged us to hold the dinner there and to think about it in a new way.

Our chapter's board is a hardworking bunch, and it is hard to list everyone's contributions. Continued praise goes to Tim Snider at Stoel Rives LLP for editing the newsletter, which is a big job. Our newsletter has continually received recognition from the national organization, and we are so lucky that our judges are so willing to provide content! Gosia Fonberg, Jolie Russo, and Richard Vangelisti (of Vangelisti Kocher LLP) all participated in putting together excellent monthly lunch programs that had consistently high attendance and helped to foster a sense of community in our organization. Hwa Go was the chair of the Judge Ancer L. Haggerty Civil Rights Essay Contest, which was a lot of work and yielded an impressive set of essays. Seth Row has worked on the new supplement to the Federal Judges' Handbook, which is extremely helpful to have in place.

We are excited to announce that John Mansfield of Schwabe Williamson & Wyatt has gotten our chapter's website up and running. It can be found at http://oregonfba.org/. (Thanks to Vangelisti Kocher LLP for hosting our website for several years in the interim!) The website is still a work in progress, but is a significant step forward in terms of making communication possible. And, Chelsea Grimmius has helped with regular ongoing communications by making sure that the listserv communications get out. I cannot detail everything that our board members have done, but I think this list shows at least in part what an active year we have had!

I also want to mention that, since I have been on the board, Judge Anna Brown has been serving in an advisory capacity to assist our chapter in our planning and decision-making. Judge Brown has been invaluable in this role and has an infectious enthusiasm for any activities that make the District of Oregon a more professional and pleasant place to practice. We are pleased that Magistrate Judge John Acosta has also agreed to join her on the board in an advisory capacity; hopefully this will help ease the burden on Judge Brown somewhat. I feel so grateful to practice law in a jurisdiction where the judges are so willing to be part of our professional organization. Thanks to all of you who have participated in our activities and made the past year such a success.

REPORT ON COURT'S REVISED PRO BONO PANEL

By The Honorable Janice M. Stewart, U.S. Magistrate Judge

Continued from page 1

bar. This effort started in December 2006, by meeting with the Indigent Representation Supervisory Committee (Greg Mowe, Rick Martson, and Marc Blackman). That initial meeting and review led to a meeting in February 2007 with representatives of the major law firms, legal organizations, and other individuals with a stake in providing service to the public and the courts where various changes were proposed to improve the program. The Clerk's office, *pro se* law clerks, FBA, and Oregon State Bar's Federal Bar and Practice Committee also provided feedback and input.

In March 2008, the Court introduced the "new and improved" Pro Bono Representation Program. The focus of the revision was to appoint an attorney (or a law firm that will be responsible for finding a volunteer) to review and investigate a *pro se* plaintiff's claims and decide, in a timely fashion, whether to continue the representation. Following a similar procedure used by the District of Idaho, the burden is placed on the attorney to notify the Court of any conflicts and to electronically file his or her responses through the Case Management/Electronic Case

Filing system (CM/ECF). The Pro Bono Representation Program procedures require that the Court rule on motions for appointment of pro bono counsel by issuing an order appointing counsel for a limited purpose (e.g., review and report of claim), for all purposes, or for the specific purposes of mediation or settlement. If the Court sees fit, appointment of counsel may also be ordered *sua sponte.*

When an order appointing counsel is entered by the Court, the attorney or firm will be notified electronically via CM/ECF and will also receive notification conventionally. In addition to the order appointing counsel, a response form is sent to the appointed attorney for completion and submission via CM/ECF. The response form, *which is due within 12 days of the date of the order appointing pro bono counsel,* contains the following choices:

1. Due to a conflict of interest, termination of the appointment is requested.
2. After conducting a review and appropriate investigation of the plaintiff's claims, further representation of the plaintiff is declined. A written explanation has been provided to the plaintiff.
3. After conducting a review and appropriate investigation of the plaintiff's claims, further representation of the plaintiff is accepted.

If a conflict of interest exists, the Court terminates the appointment and notes the termination on the docket sheet, and the process is repeated until the case is accepted by a panel attorney or firm. One of the great benefits to this procedure is that once the order appointing pro bono counsel is entered in the record, the appointed attorney is added to the case docket as counsel of record, has immediate access to all pleadings in the case file, and will receive all future filings electronically through CM/ECF. This eliminates the need for the Court to copy entire case files to mail to attorneys and allows attorneys to review the cases and file their responses (conflict or not) in a much more timely and efficient manner. If not timely filed, the case manager contacts the attorney or firm and requests that the response form be filed as soon as possible.

If appointed counsel has no conflict of interest, he or she then has an additional 30 days past the response deadline (total of 42 days from the date of the order of appointment) to review and investigate the plaintiff's claims. The Court expects that the appointed attorney will review the court file, contact the plaintiff, and, as appropriate, obtain and review available discovery materials and interview key witnesses. If more than 30 days is needed, the appointed attorney must file a status report and motion requesting additional time. After the review and investigation is completed, the appointed attorney is to file a response indicating whether he or she declines or accepts further representation of the plaintiff. Since this response is filed with the Court and is part of the public record, no reason for accepting or declining representation is to be included in the response. The Court expects that representation will be accepted if the plaintiff has a factual and legal basis to prevail on any claim. If representation is declined, the Court will issue an order terminating appointment of counsel and advise the plaintiff to proceed *pro se.*

At the conclusion of the case, an appointed attorney may file an Application for Reimbursement of Out of Pocket Expenses for up to $3,000. Once approved by the judge, the application is forwarded to the Attorney Admissions Fund for payment.

The revised program procedures, sample forms, and contact information are now posted on the Court's website at http://www.ord.uscourts.gov/ProBono/ProBono.html. The District's Pro Bono Panel Administrator is Nicole Munoz with the Portland Division Clerk's Office. Nicole serves as the point of contact for members of the panel and for the Court as orders appointing a pro bono counsel are entered, monitors the pro bono deadlines, and maintains the panel member list.

To date, the revisions made to the program have produced very positive results. In the Portland Metro area, 10 firms and 51 individual attorneys have volunteered to participate. Counsel from Eugene, Medford, Pendleton, Salem, Klamath Falls, Bend, LaGrande, Independence, and Newberg have also volunteered to actively participate in the program.

Of 50 appointments since April 2008, appointed pro bono attorneys have continued representation of the plaintiff in 10 cases, including one Social Security appeal; 13 have investigated and declined further representation; and seven are pending review. Better yet, the response time for conflicts of interest has declined dramatically.

The Court is also instituting other improvements to the program. We are in the process of seeking certification by the Oregon State Bar, after which we intend to apply for PLF coverage, which is fairly routine after bar certification. Obtaining PLF coverage for the program will enable corporate and retired attorneys to volunteer

their services. In addition, the Oregon State Bar's Federal Practice and Procedure Committee is helping to develop a list of community resources for *pro se* litigants, training for pro bono counsel, a handbook with tips for dealing with prisoners, a rudimentary overview for representing nonprisoner *pro se* plaintiffs, and public acknowledgment of appreciation to volunteer attorneys.

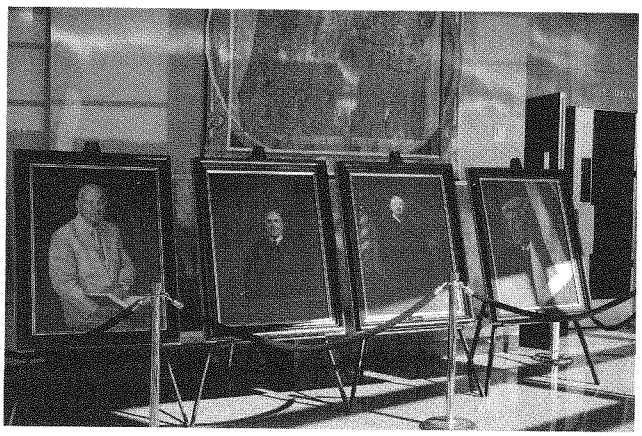
So, are you wondering how can you help? If you haven't done so already, please take this opportunity to add your name to the pro bono volunteer list by sending an email to Nicole_Munoz@ord.uscourts.gov.

Pro bono representation provides an excellent opportunity to gain valuable experience, provide a much needed service, and gain a sense of personal satisfaction. By each of us giving a relatively small amount of our time, we can make a significant contribution to our community and truly make a difference in peoples' lives.

JUDGES APPRECIATION DINNER 2009

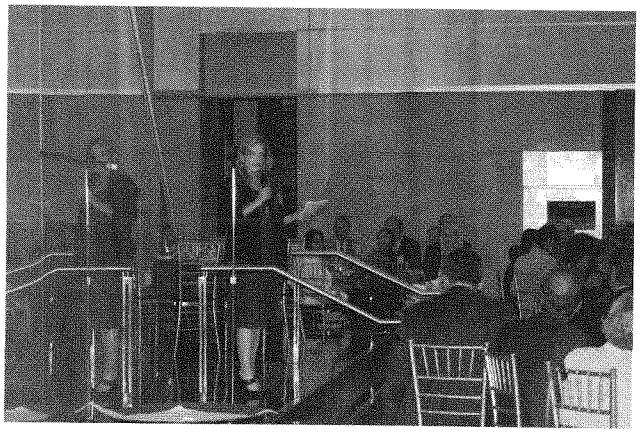
The Oregon Chapter of the Federal Bar Association held its annual judges appreciation dinner and cocktail hour on May 28, 2009. This year's dinner was even more special because Chief Judge Ann Aiken invited the FBA to hold the dinner in the beautiful Mark O. Hatfield federal courthouse.

The event flowed perfectly. Warm and clear weather allowed the attendees to enjoy the cocktail hour on the 16th floor terrace. During the cocktail hour lawyers and judges mingled while enjoying sweeping views of Portland, delicious drinks and appetizers, and live music from the Tabor Jazz Trio.



The event then moved to the lobby of the 16th floor, where the U.S. District Court Historical Society of Oregon unveiled portraits of following retired magistrate judges: The Honorable Donald Ashmanskas (Portland), The Honorable Stephen Bloom (Pendleton), The Honorable John Cooney (Medford), The Honorable William Dale (Portland), The Honorable John Jelderks (Portland), and the Honorable George Juba (Portland).

David Landrum, the president of the U.S. District Court historical society, introduced Judge Michael Hogan who gave a brief history of Oregon's federal magistrate system. Judge Hogan (who started his judicial career as a federal magistrate) explained that prior to the appointment of Judge George Juba as a magistrate in 1971, the work of magistrates was extremely limited in scope, consisting mostly of issuing warrants and setting bail or, if the parties consented, trying petty and misdemeanor offenses. Judges Gus Solomon, Otto Skopil, Robert Belloni, and James Burns, the district court judges at the time, decided to expand that scope and allow magistrates to make decisions about anything the law would allow. Magistrate Judge Juba became the leader of a new system in Oregon, which was later recognized and followed by districts nationwide. The unveiling of the portraits was to honor the important work of Judge Juba and succeeding Oregon magistrate judges.



After the unveiling of the magistrate portraits, attendees moved to the lobby of the federal court house for dinner. The waterfall in the lobby provided a dramatic back drop for the dinner program. Several awards were presented during the dinner. First, Hwa Go of Harrang Long Gary Rudnick PC and Judge Ancer L. Haggerty presented high school students Jennifer Nguyen, Peter Landgren, and Harish Vemuri with awards for winning the Judge Ancer

L. Haggerty Civil Rights Essay Contest. This year, the topic of the essay was whether the students agreed with the United States Supreme Court's decision in *Morse v. Frederick,* commonly known as the "Bong Hits 4 Jesus" case.

Next, the Judge James M. Burns Federal Practice Award was presented to United States Attorney Karin Immergut by Judge Michael Mosman, and to Richard Vangelisti of Vangelisti Kocher by Judge John Acosta. The Judge James M. Burns Federal Practice Award honors lawyers who have improved the practice of law before the U.S. District Court of Oregon.

Judge Mosman complimented Ms. Immergut, who has served under numerous administrations and regime changes, for keeping her office free of polarizing politics. He also noted that her office has maintained a cordial and professional relationship with the Federal Public Defenders' office. Judge Mosman concluded that he is confident that Ms. Immergut will bring the same professionalism, intelligence and diligence to her new position as a Circuit Court Judge for Multnomah County.

In presenting the award to Mr. Vangelisti, Judge Acosta commended Mr. Vangelisti for his exceptional professionalism and civility. Mr. Vangelisti, who is a founding partner of Vangelisti Kocher, represents individuals and their families in all areas of personal injury. When accepting his award, Mr. Vangelisti noted the attendance of Judge Burns's family, and read them a poem that he wrote about Judge Burns for the occasion. Judge Burns's wife and daughter were moved to tears by the poem and thanked Mr. Vangelisti for his kind words.

Judge Haggerty and Courtney Angeli were recognized as well. Judge Haggerty was presented with a gift to honor his years of service as Chief Judge. He was delighted with the variety of University of Oregon regalia he received, which included a football helmet signed by his colleagues. FBA president Courtney Angeli was surprised by a plaque from the FBA to thank her for her exceptional leadership of the association.

The event concluded with the closing remarks of Chief Judge Aiken. Judge Aiken deemed the dinner in the courthouse a resounding success and stated that she hoped that more events would be held in the federal courthouse.

A special thank you to the event co-chairs, Courtney Angeli of Buchanan Angeli Altschul & Sullivan LLP, Tom Johnson of Perkins Coie LLP and Jolie Russo of the U.S. District Court, for organizing a terrific event.

Q&A WITH PROFESSOR ROBERT L. TSAI, AUTHOR OF *ELOQUENCE AND REASON: CREATING A FIRST AMENDMENT CULTURE*

By Laura Salerno, K&L Gates LLP

On May 8, 2009, members of the Oregon Chapter of the FBA attended Professor Robert L. Tsai's discussion of his new book, *Eloquence and Reason: Creating a First Amendment Culture.* At the talk, Professor Tsai explained how language, especially the language of lawyers, judges, and legal activists, has made the First Amendment an instrument for social progress and a facilitator of a common language of rights.

The event was sponsored by the Oregon Chapter of the FBA, as well as the Oregon Chapter of the American Civil Liberties Union and the Oregon Chapter of the American Constitution Society. Kaitlan Monroe of Larkins Vacura LLP and Laura Salerno of K&L Gates LLP, who are both former students of Professor Tsai, organized the book talk. The event was very well attended, with over 40 people present, including a few judges from the Oregon Supreme Court and Court of Appeals.

After the book event, Professor Tsai graciously agreed to answer a few questions about his new book.

I understand that this book was written entirely during your time as a professor at the University of Oregon.

Some authors say that the location of where they write a book affects its content. Did your experience in Oregon affect your conclusions or perspectives in this book?

Without a doubt. While some of the major themes in the book are ones with which I have long been fascinated (the posture of the individual to the community, grass-roots mobilization, political theory), contemporary events were never really that far from my mind. While I was writing, committed gays and lesbians were spilling out in the streets of Portland and other cities asserting a right to be married. While the book doesn't take up gay marriage, it does take up the question of how social movements relate to courts. Chapter four juxtaposes the African-American civil rights movement with the organizing efforts of religious conservatives over the last two decades.

Additionally, the country's mood was changing quite a bit from an immediate post-9/11 receptivity to presidential leadership to one of deep skepticism towards such leadership. I have a chapter in the book that argues that the FDR administration played a role in encouraging the U.S. Supreme Court to adopt a stronger pro-rights perspective on the right of conscience. Without denying that presidential power has been exercised to inflict cruelty and death, that chapter suggests that, when the right stars align, a president can have a major impact in advancing individual liberty. And I argue that by rhetorically making the Constitution a priority, presidents have helped to create an environment which is hospitable to rights. So the search for leadership and rejuvenation, and the bases of community were all definitely on my mind.

Who is your intended audience? Do you intend this book to be more academic? Or do you hope it will be read and used by judges? What about lawyers?

The book is aimed at an educated audience. It's a theory book that uses historical examples with which many people will have some familiarity. The last chapter engages the question of judicial review, and has a message for judges. It argues that judges play a mediating role in political and legal discourse, in addition to resolving disputes. The lesson in part is that however a judge rules on the proper interpretation of the Constitution, he or she will necessarily affirm, endorse, reject, or suppress some popular beliefs and modes of debate. This fact is hopefully reassuring. The serious question then becomes how does a jurist confront this reality while promoting rule-of-law virtues, and without causing demoralization or winner-takes-all scenarios. One's use of language matters. I do hope some nonacademics and lawyers will be interested in *Eloquence and Reason.*

What do you think a federal practitioner could learn from this book?

I hope that a practitioner (I was one!) takes away at least two practical conclusions. One, the importance of framing legal arguments. But this goes well beyond things like being faithful to a case's "holding" and into matters such as leveraging ascending institutional and political concerns, as well as broader ways of debating public questions. Doing so involves being highly attentive to micro and macro trends in, say, the USSC's [U.S. Supreme Court] jurisprudence as well as shifting priorities in the political domain. As just one example, a rising skepticism about executive authority runs across many late-Rehnquist Court early-Roberts Court rulings across some surprising areas (including the Oregon assisted suicide case, which is formally a statutory interpretation case).

Two, I hope the practicing lawyer takes away the idea that, as important as a legal victory is for one's immediate client, on matters of constitutional law a decision is important only insofar as it can be useful in a broader conversation about enduring values. Only if a court's reading of the Constitution can gain the assent of a critical mass of citizens and institutions will it even have a chance of having a lasting impact. Resistance of constitutional ideas, for instance, is the norm, and must be confronted seriously in any rule-of-law system.

What was the process of writing this book? Was it more a collection of articles, or written chronologically?

Excellent question, for the writers out there. The book started out as a nagging hunch as to the state of our legal culture, which manifested itself in a few articles, long and short. The longer treatment of First Amendment language attracted a bit of attention, since if you accept my reading of 20th century cases, different patterns in the law emerge from what many theorists and observers had accepted. Inspired by this feedback, I hunkered down to lay out what a more extensive treatment might look like. I shopped the book idea around, had a few nibbles, and much to my delight, Yale University Press took a chance on a first-time author. Then the real work began. If I remember correctly, I wrote chapter three first, then one to two, then four to six. I then junked chapter one and reworked the preface and conclusion.

How will the experience of writing this book affect writing your next book? Will you do some things differently or some things the same?

As for the practical stuff such as securing a book contract, I will more or less do the same, which is to write a few chapters and then try to drum up some interest in the project. The only difference this time will be that I have a firmer sense of what is going in the not-yet-written parts of the book. The first time I made some noises about what would come, but it was highly speculative!

I'm working on a book on forgotten and failed American constitutions. This book will take up some of the questions bracketed in *Eloquence and Reason,* which was concerned with how parochial and everyday understandings of the Constitution can become "authoritative." My new project will explore why Americans are moved to write liberation documents, even when there might be no realistic hope for their enactment or approval by a majority of the people.

President Obama recently commented at the White House Correspondents' Association dinner on the financial struggles that have affected the newspaper industry and that the "ultimate success [of the newspaper] industry is essential to the success of our democracy—it's what makes this thing work." Do you think the closure of many newspapers affects the First Amendment and our democracy?

I do think it's a sad thing. The *Seattle P.I.,* which I grew up reading religiously as a kid living in a small town, apparently has succumbed to these trends. That paper was my first connection with the outside world, well before I knew anything about the *New York Times.* And well before my family owned a computer.

I haven't followed things closely enough to be able to reach any conclusions about whether these closures are on the margins, or whether they signify something more ominous for public deliberation. Just like downsizing may be just a sign of enhanced efficiency, it's possible that some of these things are part of a broader decentralization of news gathering and reporting. What I worry about is what I mentioned earlier: the losses that are harder to document. One of the things about something tangible like a newspaper is that once someone finishes reading it, it is easily and cheaply passed on to others. As a kid, I was a kind of scavenger of news, grabbing various copies of the paper at restaurants, coffee shops, dentist's offices, and so forth. When the newspaper disappears from these places, I have my doubts that these establishments will be able to fire up a computer for patrons to skim the news over their pancakes and eggs.

Robert Tsai is professor of law at American University, Washington College of Law. He is a prize-winning essayist on constitutional law and history. Prior to joining the faculty at American University, Professor Tsai taught constitutional law at the University of Oregon School of Law. You can follow the book's life at www.eloquenceandreason.blogspot.com and let Professor Tsai know what you think about the book's arguments and conclusions.

THE ANCER L. HAGGERTY CIVIL RIGHTS ESSAY CONTEST

The Ancer L. Haggerty Civil Rights Essay Contest was created by the Oregon Chapter of the FBA in honor of Judge Ancer L. Haggerty. Judge Haggerty is the first and only African-American to serve as a federal judge in Oregon, and to serve as Chief Judge of the District Court of Oregon. He is a dedicated and long-time supporter of civic education programs in Oregon schools, and it was his desire that the essay contest give high school students an opportunity to further explore and write about civil rights.

This year's essay topic focused on a recent United States Supreme Court decision, *Morse v. Frederick,* and asked students to discuss whether students' free speech rights should be equal in scope to those of adults in other settings.

We received many fine entries from students around the State, but of special note is the fact that we received about a dozen essays from Westview High School. Teacher Bert Stafford made the essay contest part of his Advanced Law class curriculum and all three of the winners were Mr. Stafford's students. The First Place Winner was Jennifer Nguyen, the Second Place Winner was Peter Landgren, and the Third Place Winner was Harish Vemuri. The students received certificates and cash awards and were recognized at the FBA's annual dinner this past May, where they also had the opportunity to meet with Judge Haggerty at that time.

The Board extends its thanks to Judge Paul Papak for generously joining a half dozen of the FBA Board members in evaluating this year's essays, and a special

thanks to Judge Haggerty for his continuing support of the essay contest and the students.

First Place Civil Rights Essay

By Jennifer Nguyen, Westview High School, Beaverton, Oregon

In *Morse v. Frederick,* the Supreme Court ruled that the constitutional rights of students in public schools are not equal to those of adults in other settings. The Court found that high school principal Deborah Morse acted reasonably when she confiscated a banner belonging to high school senior Joseph Frederick that read, "BONG HiTs 4 Jesus." She later suspended him for displaying the banner at a "school supervised" event. The Court disregarded Frederick's constitutional rights to free speech and peaceful protest as a legal adult because he was a still a student. The Court erred by endorsing the school's actions because Frederick was an 18-year-old adult at the time and did not break any laws by peacefully protesting off school grounds.

Though the Court paid little attention to the fact, 18-year-olds in any other setting than high school are free to exercise the full extent of their First Amendment rights, so long as they do not disturb the peace. Frederick was deliberately late to school and stood across the street, off school property when he and his friends displayed the banner. Moreover, he was a member of a general public audience – watching the running of the Olympic Torch. It is a considerable stretch to call this participation in a "school sanctioned" event, as the Court does. If an adult stranger or an 18-year-old student from a different school had been across the street that day displaying the same banner, the principal would not have had the authority to confiscate the banner and suspend the person.

Morse and the school district claimed that Frederick's displaying the banner was a violation of the school's existing policy of strongly discouraging illegal drug use. The Court found that it was reasonable for Morse to interpret the ambiguous message on the banner as one that promoted the illegal use of marijuana. Justice Roberts, writing for the majority, concluded that the cryptic message was undeniably a "reference to illegal drugs." On this basis, Morse was justified in punishing Frederick. Frederick asserted that the phrase was meaningless. He displayed the banner simply in an attempt to appear on television. Justice Stevens, dissenting, also found no message, arguing that phrase was "silly." Yet another "reasonable" interpretation of the banner might be that Frederick was exercising his freedom of religion. The message on his banner referred to "Jesus," a fact which the courts at all stages chose to overlook. The point is, given its cryptic ambiguity, it might be just as "reasonable" to interpret the message as making a religious or political point on the issue of marijuana legalization. In *Tinker v. Des Moines Independent Community School District* the Supreme Court specifically extended First Amendment protection to students' political speech (subject to disruption).

When the school board supported Morse, Frederick took his case to federal court, losing in the district court, but winning on appeal to the Ninth Circuit. The appellate court held that Morse had violated Frederick's student speech rights. The Ninth Circuit conceded that students' free speech rights are more restricted than those of adults, but only when it came to sexually offensive or suggestive speech, or speech that was disruptive of the school's educational mission. Finding Frederick's banner neither crude or sexually offensive nor potentially disruptive of school activities (no one complained to Morse prior to the confiscation) the court held that the school could not lawfully censor Frederick.

The true issue at hand, however, is not how Morse interpreted Frederick's message, but whether or not the principal had authority to punish him for his actions while he was off school property. Even assuming the banner violated an established school policy Frederick was not actually at school when he displayed the banner. He had not come to school that day, and he opened the banner across the street from the school. A particularly unsatisfactory part of Justice Robert's majority opinion is the finding that a public event the school neither organized nor participated in is deemed a "school sponsored" event for purposes of extending the school's authority over one of its students. Morse simply did not have the authority to confiscate a banner of a nonparticipating party displayed off campus during the public event. Only through rank casuistry could the Supreme Court find otherwise. School policy did not, and could not, apply to Frederick under these circumstances.

The Supreme Court's decision in *Morse v. Frederick* was another divided one (5 – 4) in the line of cases dealing with student rights. It also was another that restricted those rights in favor of recognizing the ever-expanding authority of school officials. Note how lax the standard of review

has become since the Court's first student free speech decision in *Tinker* and its bold pronouncement: "students do not shed their constitutional rights at the school house gate." *Tinker* held that student speech could not be restricted unless it substantially disrupted the educational process. In *Bethel* a school's authority to punish students using crude sexual metaphors at school sanctioned events was upheld. However proper the school's action in that case, it retreated from the "disruption" standard that had helped clarify student free speech rights. In *Hazelwood* the Court upheld official license to censor school newspaper articles that reflected badly on the school or its fundamental educational mission. Was this new standard a matter of "taste"?

Now in *Morse* the Court has retreated further from the relatively objective standard of "disruption of the educational process" to a "reasonableness standard" for official conduct that is too indistinct to be effective because it does not define any objective limits on official discretion. Certainly in this case the new standard did not work. The Court allowed officials too much discretion 1) as to how the school construed Frederick's banner, 2) how the school construed a "school-sanctioned" event, and 3) how the school construed the physical limits of its jurisdiction. In light of this case, it is clear that students' rights have been unnecessarily restricted. They should be expanded: for those underage to at least the *Tinker* standard; for those students who are of legal adult age, to adult standards.

In the Declaration of Independence, our forefathers stated that "all men are created equal" and this was the foundation of our country. It is unjust to have the Supreme Court go against this principle by differentiating between an 18-year-old adult's free speech rights, and by considering an off-campus action at a public event to fall within the disciplinary authority of a school. If an 18-year-old student is considered old enough to enlist in the military and old enough to vote in a general election, the student should share in the constitutional right to express his or her beliefs peacefully while attending public school.

Second Place Civil Rights Essay

By Peter Landgren, Westview High School, Beaverton, Oregon

The schoolhouse is a unique environment that requires special treatment and consideration. It is necessary to balance a student's right to free speech with the duty of a school to promote a positive learning environment. However, students still are protected by their first amendment rights to freedom of expression. As decided in *Tinker v. Des Moines,* if the action does not directly infringe upon or disturb the learning environment, then it cannot be restricted.

However, over the years since the *Tinker* ruling was handed down, the rights of students have been restricted even further. This is constitutionally unjust, and the Supreme Court needs to move from a standard of what "could" disturb the school environment to what will directly and definitively disturb the school environment. There must be a direct connection between the action and a disturbance. The Court should revert to the "substantial interference" standard that was established in *Tinker v. Des Moines* in 1969. This standard would include topics such as lewd or sexual speech, as these would clearly disturb the educational environment. However, this test would allow signs such as those held by Frederick and the newspaper articles referenced in *Kuhlmeier* to be permitted under the student's constitutional rights. These actions did not prompt a directly foreseeable disruption, and the basis for their being denied by the supreme court was fairly shallow.

As the law stands, school administrators have too much discretion as to what can and cannot be allowed. The current standard of "reasonableness" is simply too broad and allows far too much discretion on the part of school officials. In the case of a school search and seizure, as discussed in *T.L.O. v. New Jersey,* the new test opens the door to wide interpretation. Even a prior history with drug use or a particular racial background could potentially qualify for the reasonableness benchmark. This new standard is not specific enough for practical use, and allows school officials to justify almost any action that can be perceived as invasive to education.

A basic tenet of the issue of freedom of speech is that speech cannot be restricted simply because it goes against opinion of the majority or ruling body. Speech is a method by which a minority body can safely express its opinion and make its voice heard. It is a vital democratic tool and is key to the operation of our government. With the broad implications of the reasonableness standard, the rights of the minority in the school setting are put in danger. The point has been reached where it may be "reasonable" for a school official to remove an article or sign that criticizes school policy, as this may be construed as a disruption.

Clearly this is on the wrong side of what the Constitution intended. If students truly do not "shed their constitutional rights at the schoolhouse gate," then the reasonableness standard is unconstitutional in that it opens the door for a violation of the student's constitutional privileges under the 1st, 4th, and 14th amendments.

It is particularly notable in *Morse v. Frederick* that the actions of the student did not directly disturb the "learning environment." Frederick presented his sign at a Olympic torch relay ceremony, and admitted that his stunt was an attempt to get on television. While it was a school activity, he did not disturb any classes or inhibit anyone else's learning experience. He did not meet the primary criteria for restriction of freedom of expression in a school setting.

Admittedly, Frederick's sign could be construed to be seen as supporting illegal drug use, namely marijuana. Yet, as Justice Stevens states in the dissent for *Morse*, "It would be a strange constitutional doctrine that would allow the prohibition of only the narrowest category of speech advocating unlawful conduct." The content of Frederick's sign in and of itself was not unlawful and in another setting would have been allowed. This means that in order for the school to confiscate the sign it must show how the display inhibited the learning environment or violated the rights of other individuals. However, Justice Stevens once again asserts that "There is absolutely no evidence that Frederick's banner's reference to drug paraphernalia willfully infringed on anyone's rights or interfered with any of the school's educational programs."

The court's decision bypasses these checks and relies upon the idea that "deterring drug use by schoolchildren is an important – indeed, perhaps compelling interest." The court thus asserts that Frederick's banner will "stand a meaningful chance of making otherwise-abstemious students try marijuana." Nonetheless, Frederick's message of "BONG HiTS 4 JESUS" was sufficiently vague as to not be a direct danger to any other students. This was not an instructional poster on how to use illegal drugs, but rather a highly ambiguous statement. Even using the "reasonable" standard, Frederick's message would not influence others to use drugs.

The "reasonableness" doctrine that the court currently employs is much too far-reaching and ambiguous to be an adequate standard by which to judge freedom of expression cases. This can be seen in *Morse v. Frederick,* where the punishment of the the school was upheld against Frederick on the basis that his speech promoted illegal drug use. However, Frederick's speech was well within his constitutional rights, even as a student. A reversal of doctrine to the old standard presented in *Tinker v. Des Moines* is the correct constitutional move.

Under this standard, the *Morse v. Frederick* decision would have been reversed. Frederick's banner, while possibly promoting the use of illegal drugs, did not "materially [disrupt] classwork or involve substantial disorder or invasion of the rights of others," as stated in *Tinker.* This criterion is a legitimate basis for infringing upon a student's rights, and strikes the right balance between education and the protection of constitutional rights. The reasonableness doctrine simply provides too much room for overzealous restriction of student expression.

Third Place Civil Rights Essay

By Harish Vemuri, Westview High School, Beaverton, Oregon

Every morning thousands of children recite the pledge of allegiance to start the school day. Excepting the usage of "God," it is largely non-controversial and introduces children to some of our core beliefs, especially those in the last line "with liberty and justice for all." In *West Virginia State Board of Education v. Barnette,* the Supreme Court ruled that students had the liberty to choose whether or not they would recite the pledge. Rather than diminish the power of the pledge of allegiance the Court strengthened it, by demonstrating belief in the idea that everyone is free. This trend continued in the famous *Tinker* case, wherein Justice Fortas, writing for the majority, stated, "students do not shed their constitutional rights at the schoolhouse gate."

The Court has recently retreated from these sentiments, restricting student freedom in a series of cases. The special responsibilities of school officials have long been embodied in the doctrine *in loco parentis.* Essentially, when children are at school, school officials become their parents both in terms of responsibility and authority. In *Morse v. Frederick,* the court didn't specifically reactivate *in loco parentis,* but it certainly deferred to that doctrine by significantly expanding the scope of schools to control and discipline students for what they say.

In this case, a school principal, Morse, told her student, Frederick, to take down a banner proclaiming "Bong Hits 4 Jesus." Morse thought it sent the wrong message,

promoting the use of marijuana. When Frederick refused, Morse confiscated the banners and suspended Frederick. What Morse did was indefensible for three reasons: Frederick's intent, his location, and his age. When the Supreme Court found Morse's actions to be "reasonable" it made it clear that, whatever their first amendment rights, students could no longer feel free to advocate for whatever they wish. While restricting students' rights is arguably useful and necessary under some circumstances, in the case of *Morse v. Frederick* those circumstances were not present. It is demeaning to our country, people, students, and our values to subordinate constitutional rights to school rules.

By precedent "vulgar and offensive" speech is not allowed in public discourse. The Court properly applied this standard to students in *Bethel School District v. Fraser* when it upheld the suspension of students using graphic sexual metaphors in an election speech. But is "BONG HiTS 4 JESUS" vulgar or offensive? Even if it were viewed as "promoting the use of illegal drugs," as the majority found (the dissent called it "ambiguous" and "cryptic") could the phrase be taken any way other than as an expression of one's opinion? Such restrictions exceed anything necessary to protect a school's educational mission, and instead lessen free expression among students, making them afraid to speak: the word "bong" could result in suspension. This is unvarnished discrimination, comparable to jailing any middle easterner who says "terrorist." Frederick himself said it had no message – he just saw it on a snowboard. There was no harmful intent, additionally Frederick was eighteen, hadn't been to class that day, and wasn't on school property. Regardless of *in loco parentis* powers no school official should be able to control the behavior, much less the opinion, of an adult not on school property. The Court was unduly influenced by the reference to drugs and ceded too much discretion to school authorities.

Frederick should never have been subject to the school's discretionary authority, but what about students under eighteen? Schools are supposed to prepare their students for the world, for improving our society with new and innovative ideas. Students must have the opportunity to express and debate their views, the world has more than one idea therefore why shouldn't students hear them? Whatever it meant, Frederick's sign was neither obscene nor vulgar; high school students can handle it. Instead, the Court allowed censorship and suspension by schools for something that *may* be against school rules.

In fact Frederick claimed his sign was just a way to get on TV; not terribly bright but nobody ever succeeds without first failing. If students don't have the autonomy to express their views, or try something new, then they will never create anything on their own. The Court's endorsement of Morse's authoritarian approach creates followers, not leaders – do what's said and don't think for yourself. Undoubtedly that is not the Court's intent, but by diminishing student freedoms we teach them to follow others, and diminish their capacity to lead. Students will only understand their positions by being permitted to think for themselves, as a parent would do, rather than being commanded, as principal Morse did.

When the Supreme Court rules against free speech for what was at best a "vague" promotion of drug usage, we must look at the larger picture, the cause of such censorship. Modern American students, even when not silenced forcefully seem to have accepted defeat on this front. We no longer broadcast our grievances: gone are the news-making peace marches, the raucous rallies for political heroes like the late Robert Kennedy, and the public counter-culture. Instead students have turned to the place they are free, the Internet, to express their true thoughts. Unless students are encouraged to share their views my generation won't be valued until we are the adults. We must restore trust in the basic decency of people, even teenagers, and take an innocent until proven guilty method rather than aggressively enforcing a policy of political correctness for both teachers and students. If their role models refuse to take a stance on anything, why should the students? In my experience the class in which students feel most free is the government class taught by my fiercely Republican teacher. Having an opposing viewpoint encourages active participation and lively debate, advancing our education. "Liberty and Justice for all" requires freedom for all to speak their minds, teacher or student, to give true meaning to these words. If we continue the legacy set by *Morse v. Frederick* we risk forever losing our values to a culture of silence.

ANNOUNCEMENTS

The U.S District Court of Oregon Historical Society Annual Picnic at Judge Leavy's Family Hops Farm Is August 16, 2009.

Please mark your calendar for the U.S. District Court of Oregon Historical Society Annual Picnic on August 16, 2009, from 1:00 p.m. to sundown at Judge Leavy's family hops farm in Butteville, Oregon. This annual event is an opportunity for you and your family to interact with members of the legal community, including fellow members of the bar and the judiciary. This year's theme is a celebration of the Native American Tribes and Federal Courts. The picnic will be preceded by a signing ceremony between the Confederated Tribes of the Warm Springs Reservation and the U.S. government, ending a dispute concerning the management of the trust assets on the reservation. The signing ceremony is at 11:00 a.m.

As in past years, the picnic will feature family-friendly games and entertainment, including pony rides, inflatable jumps, and a crafts table. An old-fashioned barbeque begins at 1:00 p.m. At 3:30 p.m., games and hay rides begin. Please RSVP to 503-326-8150 or mary_ellis@ca9.uscourts.gov by August 7 with the number of adults and children in your party.

The Leavy Farm is located at 22675 Butteville Road NE. Take I-5 South to Exit 278 (Donald/Aurora/Champoeg). After exiting, go west on Ehlen Road 1.6 miles. Turn right at the first crossroads—Butteville Road. The farm is 1.2 miles south on Butteville Road.

U.S. Attorney Karin Immergut Resigns as U.S. Attorney for the District of Oregon to Accept Appointment as Multnomah County Circuit Judge

Effective July 9, 2009, Karin J. Immergut has resigned as the U.S. Attorney for the District of Oregon. She has been appointed by Governor Ted Kulongoski to take the bench as a judge in Multnomah County Circuit Court. Judge Immergut will assume her new duties in September. Long-time federal prosecutor and First Assistant Kent S. Robinson has assumed the leadership of the U.S. Attorney's Office and will continue to serve as the Acting U.S. Attorney until President Obama names a replacement.

FBA Announces New Slate of Officers for 2009-2010

The FBA board is pleased to announce its new officers for the upcoming year. Kelly Zusman of the U.S. Attorney's Office will assume the role of president in August 2009. Edward Tylicki is the new president-elect. Susan Pitchford and Tom Johnson will assume the duties of vice president and secretary respectively. And special thanks to Jackie Tommas, who will continue on as treasurer.

The FBA board thanks Courtney Angeli for her efforts and contributions to another outstanding year for the organization.

New FBA Website Is Up and Running

The new FBA website is up and running at http://oregonfba.org. The new website is a work-in-progress but will include the following features in the near future: a calendar of events and links to sign up and pay for monthly luncheons, CLEs, and the like; a payment system for purchasing FBA publications, handbooks, and other materials; helpful links to websites of interest to federal practitioners; and other information about the organization. We are also open to suggestions for website content. Please contact Johnathan Mansfield (jmansfield@schwabe.com) with comments or suggestions.

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Missing Electronic Notices and Change of Address?

We have been sending the electronic notices via our listserv. Although we have made every effort to obtain our members' email addresses, we need your help to keep our list accurate and current. For those members without email, we are providing the electronic notices by fax. If you have an email address or fax number and have *not* been receiving electronic notices, or if your email address changes, please contact our listmaster: **Chelsea Grimmius**, chelseagrimmius@yahoo.com. For a change in physical address, please notify **Tim Snider**, twsnider@stoel.com, to ensure you continue to receive mailings from the Oregon Chapter of the Federal Bar Association. All address changes will be forwarded to the national Federal Bar Association.

Call for Submissions/Publication Schedule

For the District of Oregon **welcomes submissions from everyone as well as our regular contributors. The deadlines are September 15, 2009, December 1, 2009, March 15, 2010, and June 15, 2010. We ask only that you advise us in advance if you are preparing a submission. Please direct inquiries to Timothy Snider, telephone: 503-294-9557; email: twsnider@stoel.com.**

New FBA Members Welcome

Membership Eligibility. FBA membership is open to any person admitted to the practice of law before a federal court or a court of record in any of the states, commonwealths, territories, or possessions of the United States or in the District of Columbia, provided you are or have been an officer or employee of the United States or the District of Columbia, or you have a substantial interest or participate in the area of federal law. Foreign Associate Status is open to any person admitted to practice law before a court or administrative tribunal of a country other than the United States. Law Student Associate Status is open to any law student enrolled at an accredited law school. If you wish to join, please visit www.fedbar.org and click on the "Join Now" link.

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