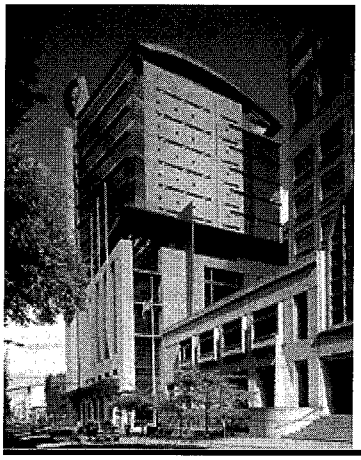

A Quarterly Newsletter of the Oregon Chapter of the Federal Bar Association

FOR THE DISTRICT OF OREGON

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IN THIS ISSUE

TRIALS ARE NOT PASSE

By Linda Meng, Portland City Attorney's Office

Linda Meng's remarks reprinted here were presented to the Federal Bar Association membership on May 15, 2008 at its monthly luncheon.

I thought of calling this talk "In Defense of Trials," and it surprised me that I would think of defending litigation. I did litigation for seven years in private practice and continued to litigate after going to the City Attorney's office. I know how time-consuming and expensive and what a morass it can be. I had learned what we all do—that litigation is a civilized way to resolve conflict—better than bashing each other's heads in. But I remember in one big case I was involved in thinking that it would be faster, easier, cheaper and probably just as likely to get to a just result if the two CEOs just went out to a field somewhere and slugged it out.

So I was surprised at my response to the article by Judge Kristena LaMar in the January 2007 *Oregon Bar Bulletin* called "Are Trials Passe?" For those of you who don't practice in state court, Judge LaMar has headed the Multnomah County Court's settlement program for many years. In the article, she recounted her desire to go to law school "to help people solve problems." That was why I went to law school, too. She quoted Chief Justice Warren Burger from 1984 saying that we have forgotten that lawyers should be healers of conflict and opining that "trials by adversarial contest must in time go the way of the ancient trial by battle and blood." I would have thought I would have agreed with her. But I don't.

So, today I want to talk about the importance of trials. First, let me articulate what you probably already understand from hearing what my job is. The City Attorney's office represents the city of Portland—an entity that is deeply involved in litigation.

Judge LaMar argues that no one *wants* to go to trial. They don't want to go through the hassles of it. They don't want to be "interrogated" by a "tyrannical" attorney. According to Judge LaMar, people—litigants—"simply don't have the time to participate in our rather quaint and archaic rituals preceding and including trial." They just want to settle without having to even file a lawsuit. It may be that every plaintiff would like to get what they believe they have coming to them without filing a lawsuit, and maybe they should. Maybe the situation is clear-cut and it's apparent that one party ought to reimburse or compensate the other. That happens a lot. Insurance companies, for instance, decide whether their insured was at fault and pay up. The city of Portland is self-insured and our Risk Department serves the

THE PRESIDENT'S COLUMN

By Katherine Heekin, Board President of the Oregon Chapter of the Federal Bar Association

It has been a great year and it was my pleasure to serve as your president. We had terrific speakers at the monthly luncheons: Judge Mark Clarke, Judge Pat Sullivan, Judge Ann Aiken, Judge Michael Mosman, Chief Judge Ancer Haggerty, crime novelist and attorney Phil Margolin, Portland City Attorney Linda Meng and Judge Garr King.

We had a terrific young lawyers event titled "Surviving Motion Practice in Federal Court" primarily put together by board member Kristin Olson. We started a new tradition in the newsletter with a "Tips from the Bench" column. We updated our listserv thanks to board member Chelsea Grimmius. We began the legwork for a new and improved website, which we hope to roll out next fall, thanks to board members Johnathan Mansfield and Chelsea Grimmius. We put together another successful Haggerty Essay Contest; this time the topic was the U.S. Constitution's natural born citizen requirement to become president. Thanks to Clarence Belnavis, Hwa Go and Todd Hanchett for their hard work in putting the contest together. Thanks as well to Corbett Gordon and Judge John Acosta for reviewing the essays and selecting the winners. The winning essays are printed in this edition of the newsletter for your enjoyment.

Thanks to board member Tim Snyder for another great year in putting together the newsletter. The Judge Ashmanskas tribute in the last newsletter is one for the ages. Thank you to past president and board member Helle Rode for instituting a new practice of welcoming new admittees to U.S. District Court for the District of Oregon on behalf of the FBA and encouraging them to attend the FBA's monthly luncheons and other events. Thank you to Susan Pitchford and Courtney Angeli and their secretaries for another outstanding annual dinner. Thank you to board members Melissa Aubin and Gosia Fonberg for helping to find speakers for the monthly luncheons and for lining up Judge Mary Schroeder as our keynote speaker at the annual dinner. Thank you to board members Tom Johnson and Courtney Angeli for putting together the Hot Topics in Federal Practice CLE co-sponsored by the Oregon Law Institute.

Thank you to board members Peter Richter and David Angeli in gathering a list of potential speakers to kick off the Judge Helen J. Frye Lecture Series. We hope to have the inaugural Judge Frye Lecture Series take place next spring. Thank you to board members Richard Vangelisti and Kelly Zusman as board members and Ninth Circuit representatives who worked with Judge Aiken to present the well-attended and highly regarded U.S. District Court Conference in Eugene last fall.

Thank you to Kelly Zusman, Tom Johnson and Erin Lagesen for organizing the Ninth Circuit Appellate CLE at the Pioneer Courthouse on July 10, 2008. Ninth Circuit Judges Ronald Gould, Susan Graber and Mary Schroeder and Oregon Supreme Court Justices Tom Balmer and Rives Kistler graciously agreed to participate as mock judges and gave sage advice about oral argument and brief writing. University of Oregon President Dave Frohnmayer and Janet Metcalfe of Oregon's Attorney General's office engaged in mock argument. The judges deliberated openly after the mock argument and then there was a question-and-answer period. It was the first such event in Oregon. We are fortunate to have so many judges and lawyers who care deeply about educating and improving the bar.

Thank you to board member Seth Row for continuing to update the Federal Practice Handbook. Thank you to board member Edward Tylicki for taking flawless notes at our meetings. Thank you to board member Jeff Bowersox for his commitment to the federal bar. Thank you to board member Jackie Tommas for her umpteenth year as the board's treasurer. Most important, thank you to Judge Anna Brown for her dedicated service as the judge liaison between the bench and the FBA's board of directors. Judge Brown's commitment and contributions are invaluable.

This year would not have been nearly as rewarding or as productive without all of these contributions from judges and board members. Next year, the board will be in great hands with Courtney Angeli as president, Kelly Zusman as president-elect, Edward Tylicki as vice president, Susan Pitchford as secretary and Jackie Tommas as treasurer. New board members for next year are Jolie Russo, Frank Langfitt, Liani Jean Heh Reeves, Scott Hunt, Robert Calo, Suzanne Bratis, and Megan Annand. Thank you again for the privilege and honor of serving as your president.

TRIALS ARE NOT PASSE

Continued from page 1

same function. They evaluate and frequently pay claims that never get to litigation.

But, of course, we can't pay just because there is a claim made (although some people seem to think that's the way it works). We've had a couple of cases in the last year or so where pro se litigants demanded to talk to me because the trial attorney handling the case in our office refused to pay them what they wanted. They argued to me that they had filed their lawsuit and they didn't want to go through all those court procedures; they just wanted their money. But, litigation happens because the parties have different views of who is at fault or what the appropriate compensation is. That is the "dispute" part about dispute resolution.

According to Judge LaMar, not only do the parties not want to go to trial, but "many lawyers view trial as a personal failure of their ability to solve problems." That is not a sentiment I have heard expressed by trial lawyers, but that may be Judge LaMar's experience. That is the idea that I disagree with most, I think. Despite the fact that most cases do not go to trial, trial remains a way to solve problems. There may be some who would say that trial is to resolving legal disputes as war is to resolving diplomatic disputes. But I don't think that is the case, and it certainly doesn't have to be the case. Trials can have value in and of themselves.

Judge LaMar, who was clearly trying to provoke discussion, argued that because only about 10 percent of any type of case is tried "that means preparation for trial is a waste of time in 90 percent of all filed cases." (She did say "arguably," but since I think she was trying to provoke discussion, let's leave that aside.)

I'd like to give some numbers here because I found them interesting. Although I had been thinking about this issue for some time, I hadn't done any research on it. When I did, lo and behold, it turns out other people have been talking about this issue for quite some time. If you are interested in seeing a lot of data (pages and pages of charts and graphs) take a look at "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts," by Marc Galanter, in the *Journal of Empirical Legal Studies*, November 2004. Perhaps the most dramatic statistic is that, between 1962 and 2002, the total number of "dispositions" in civil cases in Federal district courts around the country increased from 50,000 to 258,000, but the number of trials went from 5802 in 1962 to 4569 in 2002. That is a drop from 11.5 percent in 1962 to 1.8 percent in 2002. That is giving a fairly broad definition to "trial" as "a contested proceeding at which evidence is introduced." And it includes both jury and bench trials. The decline is similar in state courts, where most cases are filed.

So, if trials have declined so drastically, should they just disappear? A couple of lawyers responded to Judge LaMar's article in letters to the *Bar Bulletin*, but not as many as you might have expected. They pointed out, and I think rightly so, that it is the prospect of trial that makes settlement possible. As much as we might try to encourage them to think about it before, it often takes the fast approaching actuality of trial to get clients thinking about settlement. I started practice as a litigation associate in a medium-size firm. It didn't take me long to see that most cases settled. I thought that I had come onto something. If I could just explain to clients in the beginning that they were ultimately very likely to settle in the end, it would save them lots of time and money. But what I found was that many, if not most, clients didn't want to hear that. They were going to fight this case to the Supreme Court. It was a matter of principle and, by God, they didn't care what it cost.

That is not true of everyone and is ordinarily not the attitude of those clients who are involved in litigation on a regular basis. However, even for those who are often involved in litigation, it is often the focus that trial brings. I finally concluded then that what Judge LaMar called "our rather quaint and archaic rituals" were exactly the processes that led clients to start thinking about settlement. And it was, finally, the prospect of an actual trial on a specific date that focused their minds on whether they really wanted to go for the winner-take-all approach. As Tom Christ said in response to Judge LaMar's article, "Trial, then, is what makes mediation possible. Without it, mediation would just be lawyers and parties posturing endlessly." Not a pretty prospect.

So it seems clear that the *prospect* of trial serves a purpose. But is there a need for actual trials? I believe that despite all the pressure to settle—and it is significant in terms of time and cost and inconvenience and perhaps unpleasantness—some cases can't and maybe shouldn't settle. But before I talk about why cases may need to be tried, let me review some of the reasons they settle. Galanter suggests a number of reasons that fewer cases are tried, including (1) the cost of trial, (2) a lack of court resources, (3) what he calls "managerial judging" that has enlarged the discretion of trial judges to make discretionary decisions that are not subject to appellate review, but have a substantial impact on whether a case goes to trial and (4) the lack of both lawyers and judges with trial experience.

Cost is certainly a very evident incentive to settle cases. As the cost of trying cases goes up, so does the evaluation of the value of the case, if you are looking at it from

a purely economic standpoint. Discovery can be an extremely expensive process and e-discovery may make it worse instead of better. I read recently that at least 93 percent of all information produced each year is stored electronically and that about 2.2 million email messages are sent daily. That must not include spam because city of Portland employees alone receive over 1 million spam emails a day. About 30,000 (mostly) non-spam emails a day come into the city, and that does not include email sent and received within the city or sent from city computers to the outside.

I have been involved in litigation where there were rooms full of discovery documents. But the volume of potential documents has expanded beyond anything I can comprehend. Apparently a CD-ROM contains about 325,000 pages of typewritten documents. Data is now being measured in terms of terabytes—approximately 500 million pages. Whether a case is going to settle or go to trial, we need to figure out how to handle the potentially massive amounts of electronic data. The result of that should *not* be that we make it so expensive to litigate that settlement becomes mandatory.

Galanter dismisses the idea that the courts lack resources. According to him, federal courts had many fewer judges and personnel and less money 20 years ago, but were conducting more trials. The issue of "managerial judging" is not one I have a very good handle on. Galanter suggests that there is more emphasis as well as training now for judges to be problem solvers and mediators. And that may be a good thing.

I do worry about the lack of civil trial experience in the bench and bar. This issue was recently noted by Thom Brown, an appellate lawyer and the current MBA president in an article in the *Multnomah Lawyer*. Thom's monthly column for February 2008 was entitled "The Vanishing Civil Jury Trial and Experienced Judge." As Thom pointed out, the fact that there are so few trials means that both lawyers and judges don't get trial experience. He says—and although I haven't verified this, I trust Thom—that "the vast majority of trial judges taking the bench don't have any civil litigation background." I assume he was talking about state court and not federal court. But for lawyers who are supposed to be litigators in either state or federal court, it may be hard to actually try a case. When I was getting close to becoming a partner in my old firm—a *litigation* partner—I had never tried a case. My first three trials were Senior Law Project and Volunteer Lawyers Project cases. Law firms are sending young attorneys to work in the DA's office, and I saw an article in which it was reported that a large East Coast law firm volunteered to handle all of the court's prisoner litigation so its litigation attorneys could get trial practice. But criminal trials are not the same as civil trials and the experience, though better than nothing, is not enough.

Senior litigation partners then and now find that they haven't tried a case in years. I remember a trial practice CLE I went to when I was first starting practice—I think it was James McElherney—and he said that we should always remember that the primary goal of everyone involved in a trial—the parties, the witnesses, the lawyers, the jurors and the judge—is not to look foolish. I think about that in relation to senior partners who haven't tried a case in many years. The chances are the cases they are involved in are the big ones. There has to be a serious, if unconscious, pressure to settle a case if you are looking at being in front of a jury for the first time in five or seven or more years.

The lack of trial experience not only results in what Galanter calls "an atrophy of advocacy skills," but may also distort settlements as lawyers without trial experience may be less able to evaluate cases accurately.

So this leads me to why cases may need to be tried. As an attorney for an entity that is a visible target for lawsuits, I believe I have to advise my client that over the long term, trying some cases is a way to both give and receive information. We can give information by letting people know that we are not going to settle for nuisance value or for inflated values just to make cases go away. We can counter what seems sometimes to [be] becoming common knowledge that people routinely sue and recover huge verdicts for even minor injuries. Media coverage plays up the large verdicts and the anomalous or even mythical verdicts, such as the burglar who sues a homeowner because he trips on a toy and recovers big bucks. We see all the time in my office that our losses often get media coverage and our wins mostly do not. But by trying cases, we do convey information.

We also can get information by hearing what juries are saying about their current expectations for public employees and public bodies. As a public body, the city has to weigh competing interests. Frequently those interests clash. Hearing what juries say about their expectations can be an important factor in balancing those interests over time. We can also find out how juries value the injuries that may have occurred. Without trials, we are often guessing on the basis of verdicts from other jurisdictions that may be quite different from our own, or that involve facts that are not analogous. Getting information from jury verdicts helps us evaluate our policies and our actions.

That is the small-scale version of a larger issue, which is that when civil cases don't go to trial, we lose the development of case law that provides guidance for future action. Not only do we not hear back from juries on societal expectations, we don't get guidance from appellate courts for future action. The development of case law in our

judicial system has been the way our law—including the Constitution—has been fleshed out to provide a guide for behavior. The application of principles to specific fact situations that happens through case law has, I believe, provided a beneficial basis for our legal system. If we do not try civil cases, we will cut off the development of that case law over time.

Galanter points out that there is no dearth of appeals, but that there are fewer appeals that review full cases. Appellate decisions tend to be about parts of cases rather than a full-blown application of the law and facts to an entire case. In areas such as securities class action litigation—what he calls "a world where all cases settle"—it is not even possible to base settlement on the merits because there is not reliable information about expected trial outcomes.

If you believe, as I've argued, that the real possibility of a trial is essential to the litigation system, then we should try to improve the system for trying civil cases rather than getting rid of trials. Or maybe the answer is to come up with an alternative end game to trials. But there has to be an alternative to settling, and it should be an alternative that does not subtly force settlement because the alternative is too costly. And I don't believe that alternative is arbitration, at least as it is now configured.

I understand the impetus of the use of arbitration is to take some of the burden off of the court system—to provide a faster and cheaper alternative. However, after that period when everyone put arbitration clauses in all of their contracts, I believe there has been a pull back. At the city, we no longer routinely put arbitration clauses in our contracts, and we look hard at the particular situation when people want to put them in. I've considered what the problem is, and to my mind, arbitration has the risks of court litigation but with none of the safeguards. At least in my experience, attorneys going into arbitration generally feel they are obligated to their clients to do discovery and prepare in a way very similar to going to trial. With no evidence rules and no appeal, you are at the mercy of the arbitrator. Maybe they get it all right; but if they don't, you have no recourse.

And, at the risk of offending arbitrators everywhere—and likely many of you in this room—I think arbitrators tend to split the baby. That encourages the parties to take extreme positions to push the middle in their direction. I'm not saying that it does not have its place, but particularly where there are significant legal issues to be decided, arbitration should not be the only alternative to settlement.

Litigants should certainly be encouraged to settle, if that makes sense for them, and opportunities should be abundant, which I believe they are. If you look in the *Bar Bulletin* or any other legal publication, it looks like nearly everyone who used to try cases now wants to be an arbitrator or mediator, so there are plenty of people out there ready to help resolve cases outside of trial. But the option of trial should be respected as an important part of our legal system. There is apparently a Spanish gypsy curse that says: "May you have a lawsuit in which you know you are right." I believe that if you are in that position, you should be able to vindicate that position.

Thanks for having me and—although she's not responsible for anything I've said—I want to thank Gosia Fonberg for helping me with research for this talk.

TIPS FROM THE BENCH

By The Honorable Owen M. Panner, U.S. District Judge

So often attorneys mishandle depositions. Depositions can be used for either impeachment or for substantive evidence under some circumstances. If used for impeachment, it is important to know that you have material in the deposition that is true impeachment of some testimony that the witness has previously given. If it is, you should state to the witness the date the deposition was taken, and then ask whether he or she recalls that they were under oath and that they gave testimony at that time. You should then give the page number to opposing counsel and ask the witness if on that date he or she was asked the following questions and gave the following answers. Then state the word "question" and state the full question. Then state the word "answer" and state the full answer. Then ask if that was the answer or those were the answers that the witness gave to the questions.

If a deposition is to be used in part for substantive evidence, it is necessary to make a showing. For example, you cannot use it for substantive evidence if the witness who gave the deposition is available to testify, unless it is a significant admission under the Rules.

The exciting things about practicing in Federal court is that different judges have different ideas about different things! Study the Local Rules, the Federal Rules of Civil Procedure and the cases on the issues I've discussed with you. Remember: You are very fortunate to be a lawyer. It's an exciting and wonderful profession and you should enjoy it—as well as suffer on occasions. Maintain a pleasant attitude toward both the court and opposing counsel when you are presenting the issues and discussing matters.

RETALIATION CASES REVEAL SUPREME COURT'S VIEW ON STARE DECISIS

By Amy Angel, Barran Liebman LLP

In a pair of decisions released in May, the U.S. Supreme Court ruled that employees who suffer retaliation for complaining about race or age discrimination may pursue claims under federal law. In *CBOCS West, Inc. (Cracker Barrel) v. Humphries*, the Court ruled 7-2 that 42 U.S.C. § 1981, originally a provision of the Civil Rights Act of 1866, encompasses retaliation claims that follow complaints about discrimination on the basis of race. That same day the Court ruled 6-3 in *Gomez-Perez v. Potter* that the federal Age Discrimination in Employment Act of 1967 (ADEA) protects federal government employees from retaliation after complaining about age discrimination.

The decision in *Cracker Barrel* did not create new law, as the lower federal courts who had addressed this issue, including the Ninth Circuit, already recognized § 1981 retaliation claims. As there was no split in the circuits, Court watchers were surprised that the Supreme Court would address this issue only to affirm the lower courts. Accordingly, what is noteworthy about the *Cracker Barrel* decision (and *Gomez-Perez*) is not just the holdings that discrimination encompasses retaliation but this Court's view of stare decisis.

The relevant text of § 1981 simply states: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts. . . as is enjoyed by white citizens." Thus, while § 1981 does not contain any mention of retaliation, the majority stated in *Cracker Barrel* that previous Supreme Court decisions and congressional action make clear that retaliation is prohibited by § 1981.

Notably, while § 1981 does not contain a provision prohibiting retaliation, it also does not even provide for a private right of action to enforce the statute in the first instance. Despite this defect, the Court has long implied a right of action to enforce § 1981. To take this one step further, as succinctly stated by Justice Breyer in oral argument, "if [the courts are] implying a right of action from the statute, why wouldn't courts also imply those rights of action necessary to make the statute effective?" That is, to have any teeth, § 1981 must include not only a private right of action, but must also address retaliation. Indeed, § 1981 would be largely ineffective if it could only address discrimination and not retaliation claims as studies show that nearly half of § 1981 claims involve allegations of retaliation.

But why must § 1981 address retaliation? After all, Title VII of the Civil Rights Act of 1964 expressly provides a cause of action for retaliation. The answer is that Title VII imposes limits. Employees must first satisfy certain administrative requirements prior to filing a Title VII claim (such as filing an administrative complaint with BOLI or the EEOC), resulting in a shorter time in which to file suit. Additionally, Title VII claims are subject to a damages cap, limiting the amount of money a successful plaintiff may recover, and Title VII only applies to employers with 15 or more employees. In contrast, § 1981 claims do not need to be preceded by any administrative action, have no damages cap, and can be asserted against an employer of any size. Further, § 1981 claims are not limited to the employment context (although this is where the majority arise) as the statute broadly seeks to enforce equality in any form of contract.

In arriving at the conclusion that § 1981 encompasses retaliation claims, Justice Breyer, writing for the majority, maintained that stare decisis compelled the decision. He began his analysis with *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), in which the Court interpreted § 1982, which prohibits racial discrimination with respect to ownership of property, to also prohibit retaliation. As the Court has long interpreted § 1981 and § 1982 similarly, given their common language, origin and purposes, the Court found this to be a compelling factor to interpret § 1981 broadly as also prohibiting retaliation. Next, he turned to the Court's decision in 1989 in *Patterson v. McLean Credit Union*, 491 U.S. 164, which severely narrowed § 1981 as not applying to conduct by an employer after the employment relationship had begun. While *Patterson* did not expressly address retaliation claims, the effect was to foreclose such claims as most retaliatory conduct occurred after the formation of the employment relationship. However, in 1991, Congress passed the Civil Rights Act of 1991, to undo *Patterson* and ensure that § 1981 prevented discrimination in all benefits, privileges, terms and conditions of employment. The Court read the congressional legislative history of the 1991 act to restore the ability to pursue a claim for retaliation according to pre-*Patterson* law. On the basis of this history, the Court affirmed that § 1981 indeed prohibits an employer from retaliating against an employee for complaining about race discrimination.

The Court employed a similar analysis in *Gomez-Perez* in finding that the ADEA protects federal government employees from retaliation after complaining about age discrimination. Just as with § 1981, the ADEA does not expressly prohibit retaliation against federal employees who complain about age discrimination. However, to

complicate the analysis, the ADEA *does* specifically ban such retaliation with respect to private sector employees. In dismissing this seemingly obvious inconsistency, Justice Alito, writing for the majority, noted that the two provisions were written seven years apart and based on different models, couching their prohibitions against "discrimination" in different ways. Thus the absence of a prohibition against retaliation in the federal sector provision is not evidence that Congress did intend to permit retaliation. Instead, the analysis again focused on other similar cases, specifically *Sullivan* and *Cracker Barrel*. The Court also relied heavily on its decision in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), which (relying on *Sullivan*) found that Title IX, which prohibits discrimination on the basis of sex in any education program or activity, also prohibits retaliation because retaliating against a person who complains of sex discrimination is a form of "intentional discrimination" "on the basis of sex."

Cracker Barrel and *Gomez-Perez* clearly articulate the Supreme Court's position on retaliation: Even if the express language of the statute does not prohibit retaliation, retaliation is still prohibited and actionable as it is a form of discrimination. However, more importantly, these cases are a statement on how this Court approaches the doctrine of stare decisis. Had *Cracker Barrel* and *Gomez-Perez* been presented to the Court without the backdrop of *Sullivan*, *Jackson* and the passage of the Civil Rights Act of 1991, the result would likely have been very different. Indeed, the majority opinion in *Cracker Barrel* goes out of its way to emphasize that its decision is driven by stare decisis and not the actual text of the statute. However, as Court watchers have noted, the notion of stare decisis creates a tension between the need to reach consistent results in closely related cases and the desire to apply a consistent interpretive methodology across decisions. In these cases, stare decisis was used to reach consistent results, even in light of the fact that recent Supreme Court cases have adhered to a stricter approach to statutory interpretation. The majority in *Cracker Barrel* specifically addressed this tension, noting that changes in interpretive approach should not justify reexamination of well-established prior law: "Principles of stare decisis, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same."

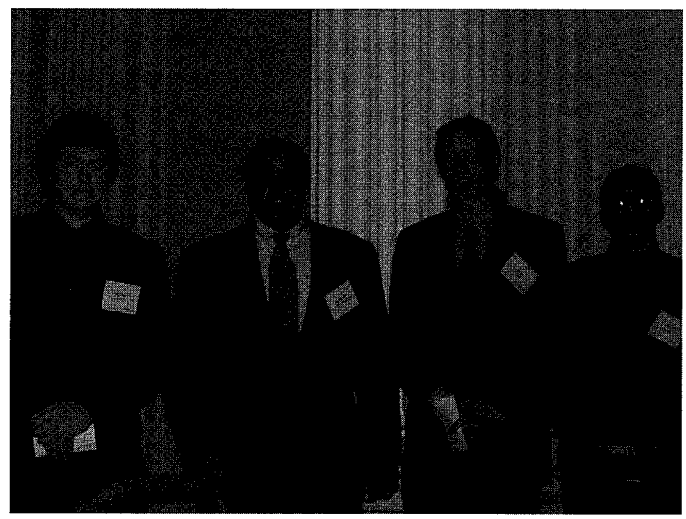
THE ANCER L. HAGGERTY CIVIL RIGHTS ESSAY CONTEST

Four years ago, the Oregon Chapter of the Federal Bar Association created a civil rights essay contest in honor of Judge Ancer L. Haggerty, Chief Judge of the U.S. District Court for the District of Oregon. Judge Haggerty is the first and only African American to serve as a federal judge in Oregon. He has been an avid and long time supporter of civic education programs in Oregon schools, and in furtherance of this interest, it was his desire that the essay contest focus on high school students.

This year students were asked to address the question of whether Article II, Section 1 of the U.S. Constitution should be amended to allow naturalized American citizens to serve as President of the United States and to explain the reasoning supporting their positions.

We received more than 45 submissions from students around the State and are pleased to present the top three essays from first-place winner, Kian Flynn (Taft High School, Lincoln City); second-place winner Cory Gaddis (Reynolds High School, Troutdale) and third-place winner Tony Peralta (Taft High School, Lincoln City). In addition to receiving certificates and cash awards, Kian, Cory and Tony were recognized at the FBA's annual dinner this past April, and they also met with Judge Haggerty.

The Board wishes to give a special thanks to the Honorable John V. Acosta and attorney Corbett Gordon for generously serving on this year's essay evaluation panel.



First Place Civil Rights Essay

By Kian Flynn, Taft High School, Lincoln City, Oregon

America's cultures, traditions, and general way of life have been shaped by the strong flow of immigrants into the United States throughout the last centuries and continuing

into the present day. Though foreign-born individuals and their ideas have richly influenced America since its inception as a nation in the 18th century, the United States Constitution still discriminates against foreign-born citizens from holding our nation's highest office. In order for America to truly elect the most capable individuals for president, our Constitution should be amended to permit naturalized Americans to run for president.

Under our constitution the president is the only elected official who must be a natural born citizen. Our senators, representatives, and governors are all constitutionally allowed to be naturalized citizens, and this hasn't once been the cause of a problem. Currently, the most populated state in the Union, California, has entrusted Austrian-born Arnold Schwarzenegger with their governorship. Schwarzenegger's success in California helped spark talks of a constitutional amendment to permit naturalized citizens to run for the presidency. Schwarzenegger is just one of many immigrants who could be quality presidents and, at the very least, deserve the constitutional right to run for president.

At the very core of American democracy is the belief that if a citizen is unhappy with their leaders or the direction the country is taking they can stand up and either vote them out of office or run for office themselves. The current constitution allows for naturalized citizens to participate in everything from casting their vote in American elections to holding an elected office in our nation's senate chambers, but prohibits them from reaching the ultimate American dream of being the President of the United States.

Those who argue against permitting naturalized Americans to run for president feel that someone who was born in a foreign country is not capable of possessing a necessary amount of patriotism and will always hold a deep, perhaps unconscious, affiliation for their country of birth. But it is silly to think that where someone is born, or spends the first few years of their life, has a major impact on that person's patriotism or would effect [sic] their ability to do what is right for the United States.

If the Constitution were to be amended to allow naturalized Americans to run for president, the potential candidates would still have to undergo a long election process where their beliefs and loyalty to America would be vetted and questioned thoroughly. Changing the constitution to allow immigrants to run for president would not effect [sic] other stipulations to become president. A presidential candidate would still have to be a resident of the United States for 14 years and be 35 years of age. This, I believe, would be ample time for an immigrant to be assimilated in American culture. If an immigrant was to eventually receive a majority of the American population's vote even after a brutal campaign season, there is no reason to believe they wouldn't be a quality president.

Throughout our history we've depended on leading immigrants, who were unquestionable American patriots as well, to positively influence our nation. Alexander Hamilton, our nation's first Secretary of the Treasury, was born in the Caribbean, but that didn't stop him from serving in the Revolutionary War and setting the foundations for a strong federal government that has kept our nation healthy and powerful into the present day. Thomas Paine, the author of the pamphlet *Common Sense*, was born in Great Britain and didn't migrate to the American colonies until he was in his late thirties. Thomas Paine not only didn't harbor any secret allegiances with his birth country of Great Britain, he supported open revolution against Britain because he felt it was for the best of America. His pamphlet influenced many people's decision[s] to support war with Britain. Both of these individuals show that true patriotism can run just as deep in naturalized citizens as it does in natural born citizens.

Another problem with the current writing in our Constitution is that it is vague and, therefore, open to interpretation and controversy. Some interpret the "natural born citizen" requirement to include individuals who were born in a United States overseas territory or born to United States citizens living abroad. Others promote a more literal and strict interpretation of the meaning and feel that the wording in the Constitution was meant to only include individuals born in the states. The gray area on what the founders originally intended only goes to show that patriotism or a person's ability to lead cannot be defined by simple political or geographical boundaries. Whether someone was born in Russia, Mexico, or any other foreign nation, the idea of America, I believe, is universal and ingrained in anyone who makes their home in this country.

The founders of our country had enough foresight to see that there would be times when certain parts of the Constitution would need to be amended if they became outdated. The clause stipulating that only natural born citizens can run for president has become such and is a relic of an era that was intent on denying rights to different sections of our population. Throughout our history we've used the amendment process to strip away discriminatory sections from our Constitution and further extend rights to all Americans. From the trio of Reconstruction amendments that extended rights to African Americans in the 19th century to women's suffrage in 1920 to the lowering of the voting age to 18 in 1971, we have a proud track record as a nation of using our amendments to become more inclusive over time. We should once again add a new amendment to our constitution and allow naturalized citizens to run for our nation's presidency.

Second Place Civil Rights Essay

By Cory Gaddis, Reynolds High School, Troutdale, Oregon

Who is a real American? Many answers have been given to this question, and many are of heated debate today. This country was originally nothing but immigrants to a strange and new land. The original Americans immigrated from Britain, as well as other countries, and formed the "New World." If this is true, and America is the final work from a foundation of immigrants, then what is more American then [sic] coming from a foreign country, and through sweat and labor, becoming the next leader of the free world? Under Article II, section 1 of the United States Constitution: "No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the officer of President . . . ." If an American is someone who escapes the tyranny of another country, to be safe in his liberties in America, then is this not the most un-American piece of the Constitution? Naturalized citizens are allowed to vote, serve on juries, run for governor of one of the fifty states of the union, and even to serve in the armed forces. Why should they not also be allowed to run for the most prestigious office in America, and be the symbol of the [sic] Freedom? Why should they not be allowed to run for the office of the President of the United States of America?

Well over 10 percent of the American populace cannot run for the office of President due to the effects of Article II, section 1 of the Constitution. It is argued that this section of the Constitution was written to prevent an England [sic] loyalist from overturning the country back to England, or any other country. By now, America is self-sufficient and doesn't need to worry about the country being handed over to England, or any other government of the world. Using a system of checks and balances, Congress suppresses the president from exercising total control over Americans, and doing simply as he/she sees fit; why should we live in fear that a naturalized president is going to backstab and sell out the American population? President Bush has reached an all-time low approval rating of only 24 percent as of October 17. If a naturalized president would fix all of Bush's mistakes, bring new jobs to America, improve the economy, and withdraw troops from Iraq, albeit is a foreign-born citizen, would Americans really complain about his/her country of origin?

Naturalized citizens have already proven themselves capable of holding an office of extreme responsibility. David Wu for example is a member of the U.S. House of Representatives of Oregon's 1st district. He was born in Hsinchu, Taiwan, and immigrated to the United States with his family in 1961. Wu received a Bachelor of Science degree from Stanford University in 1977, and received a Juris Doctor's degree from Yale law school five years later. Wu has served as a member of the House since January 6th, 1999. If Wu can come from a place outside of America, and become one of the members of the House of Representatives, then he should be able to make it to the office of President. Many foreign-born citizens have held very prestigious and respectable offices in our government. In addition to David Wu, there is also John Deutch, the 17th Director of Central Intelligence, born in Belgium; Madeline Albright, the 64th Secretary of State, born in Czechoslovakia; Madeleine Kunin, the 77th Governor of Vermont, born in Switzerland; Elaine Chao, the 24th Secretary of Labor, born in Taiwan; Antonia Novello, the 14th Surgeon General, born in Puerto Rico; and so many more.

One of the greatest justifications for naturalized citizens to run for president is that they can be just as capable to lead as the next person; to say any different is prejudicial and slanderous. There are foreign-born citizens who fight for us in the armed forces. They sweat, breathe, and bleed for America and her people. If a soldier can fight for it, he/she can lead it. Most service men will say that they are proud to be fighting for, and serving America. Most Congressmen, or Governors, or Presidents do not go into situations were they are at risk of taking a bullet for America, but to enlist in the U.S. armed forces is to enter a job where "taking a bullet" is not only a risk, it's a job description. Even in this age of political correctness and equal opportunities, we still continue to deny the title of U.S. president to people who were not born on its soil. Immigrants who move here and decide to pursue American citizenship are obliged to take the Oath of Allegiance which is as follows: "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely without any mental reservation or purpose of evasion; so help me God." Most people want to start over, have their slate wiped clean. America is the land of opportunity and clean slates. We have already given immigrants a clean slate; it is now time that we give them opportunity. Immigrants have waited long enough; it is now the time for them to be allowed to run for the officer of U.S. President.

Third Place Civil Rights Essay

By Tony Peralta, Taft High School, Lincoln City, Oregon

To amend or not to amend? That has been the question to one the most controversial articles of the U.S. Constitution. Under Article II, Section 1 of the Constitution, only natural born citizens of the U.S. are eligible to the office of President. What many are proposing, and I at first supported, was to amend this article so that naturalized Americans, not just natural born, can qualify to become president. I've heard this argument throughout many sources, with answers ranging everywhere from "yes," to "no," to even some who say only under "certain circumstances. " I've heard about it on the television, through the radio, and even had discussions with my friends about it. And why shouldn't everyone who lives in this country legally get a shot at becoming president, regardless of where they where born? I mean, think of all the ideas some of these men and women have and the power they could wield as president to change the chaotic ways that most Americans have succumbed to. And as I kept on thinking, I started to see flaws in this belief. A person who would want to be the leader of the U.S. must be loyal to one country and one country only. He/she must know and have lived in this country most, if not all their life. Most people who were born somewhere other than the U.S. I believe, cannot fulfill this.

A person wishing to lead any nation must be loyal to one country and one country only. Someone who is born here has no allegiance to any other country. Some people from countries that oppress them will probably gladly give up any loyalty to their home country. Maybe they were wronged by that country, maybe they just love America more. And yet there are those who, as ardent patriots they may be to America and its way of life, still love their own home country more. They can be the most Americanized person in the U.S., who has lived in the U.S. for 10, 20 years and yet they will still proudly boast "I'm from Ireland" or "I'm from Mexico." But how may this affect someone who becomes president and is from another country, you may ask? Well, I could think of many examples and scenarios that could happen. But let me tell you of just one person who fits this example: General Robert E. Lee. Lee was a man who was actually born in the U.S., but would fight against it in the American Civil War. And why would he do that? Because he was loyal to his home state of Virginia, which had seceded to the Confederacy. He fought for a "nation" that he himself ridiculed and who saw secession as "revolution. " Now place that same example on someone who is born in a different country and becomes president of the U.S. Sure, he may love America and be loyal to this nation, but what if his own homeland declares war on the very country he swore to protect and has the responsibility to lead it against the other nation? What would happen then?

I would like to put this in another perspective, if only to justify my stance on this issue. I wasn't born in the U.S. I am a full-blooded Mexican and I'm quite proud of it. I'm not some blue-collar conservative who dislikes change or someone who believes that whites or natural born Americans are superior to others. Far from it. I love my adopted home of the U.S. and my birth home of Mexico. And yet, when it comes down to it, for all its faults and all its screw-ups, I love Mexico more. And I would not want some Brazilian, some German, or some American to rule it. I would want someone who is a full Mexican, someone who was born there and can only swear allegiance to one country and one country only. Mexico. It's this love that makes it difficult for me to support an amendment to change the Constitution of another country that I love. How can I advocate the election of someone who wasn't born here to become president when I would object to some foreigner to take over my home country? I don't mean to say this as for you, the reader, to question my loyalty to this country. If the U.S. were to rise up in arms against any country for a *righteous* reason, then I would be there in the recruitment center, against my mother's wishes to see her eldest son go to war, against all my beliefs of peace, ready to stand and fight and die for the U.S. And yet, if this country were to ever declare war on Mexico, regardless of who was at fault, I would join my fellow Mexican comrades against all those who wish to attack my homeland. I would follow in the footsteps of General Lee. Not because I would want to, or because I hate the U.S., but because it is my duty to my homeland.

I love this country and I believe in it. I believe in change and the principle that the people should control the government, not big business. I believe that this government must change to progress into the future. I believe in Barack Obama and that he will make a great president if elected. And yet, I cannot believe in changing the U.S. Constitution to allow foreigners to become president of this great country. If anything, I must insist that this principle be explained better, and that those whose eligibility is being questioned, like John McCain's for being born in the *American-controlled* Panama Canal Zone at the time, be allowed without controversy to continue their bid. I don't mean to say that this is the feeling of all those out there, that they would betray this country for their own homeland. But those who think this way, we still exist. And I wouldn't want someone like that to lead this great nation.

2007-2008 FBA OREGON CHAPTER OFFICERS AND DIRECTORS

President:
Katherine Heekin
katherine@heekinlawoffice.com

President-Elect:
Courtney Angeli
cwangeli@baaslaw.com

Vice President:
Kelly Zusman
kelly.zusman@usdoj.gov

Secretary:
Ed Tylicki
etylicki@lindsayhart.com

Treasurer:
Jacqueline Tommas
503-631-2660

Immediate Past President:
Helle Rode
helle.rode@comcast.net

Directors:
David Angeli
david@hoffmanangeli.com

Melissa Aubin
melissa_aubin@ord.uscourts.gov

Clarence Belnavis
cbelnavis@laborlawyers.com

Benjamin Bloom
bmb@roguelaw.com

Jeffrey Bowersox
jeffrey@blfpc.com

Judge Anna Brown
anna_brown@ord.uscourts.gov

Gosia Fonberg
gosia1@gmail.com

Hwa Go
hwa.go@harrang.com

Chelsea Grimmius
chelseagrimmius@yahoo.com

Todd Hanchett
thanchett@barran.com

Tom Johnson
trjohnson@perkinscoie.com

Erin Lagesen
erin.c.lagesen@doj.state.or.us

Matt Levin
mattlevin@mhgm.com

Johnathan Mansfield
jmansfield@schwabe.com

Kristin Olson
kristin.olson@bullivant.com

Susan Pitchford
sdp@chernofflaw.com

Peter Richter
peter.richter@millernash.com

Seth Row
seth.row@hklaw.com

Owen Schmidt
oschmidt@att.net

Timothy Snider
twsnider@stoel.com

Richard Vangelisti
richard@vangelisti.com

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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, 2008; and December 1, 2008; and March 15, 2009. We ask only that you inform us in advance if you are preparing a submission. Please direct inquiries to Timothy Snider, 503-294-9557, 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 several 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.

Monthly FBA Luncheon— Mark Your Calendar

Please join the FBA Oregon Chapter for our monthly luncheons. On September 18, the FBA is pleased to have the Honorable John V. Acosta as our speaker. On October 16, the Honorable Paul Papak will address the FBA. The luncheons are held at the University Club, 1225 SW Sixth Avenue, Portland, starting at noon.

Please RSVP to Ann Fallihee, afallihee@barran.com, or 503 276 2129. Make sure to indicate if the person attending will need a vegetarian lunch. It is *very important* that you RSVP by 5 p.m. on Tuesday before the luncheon (September 16 and October 14), so that we can ensure having enough lunches. The cost is $15 for FBA members and $20 for nonmembers. Please send your check, payable to the FBA Oregon Chapter, c/o Ann Fallihee, Barran Liebman, 601 SW Second Avenue, Portland, Oregon 97204, or pay at the door.

OREGON CHAPTER
FEDERAL BAR ASSOCIATION
1001 SW 5TH AVENUE, SUITE 1900
PORTLAND, OR 97204

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