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From the desk of the Editor-in-Chief.


All articles that appear in this volume of the *Mustang Journal of Law and Legal Studies* have been recommended for publication by the Reviewers/Advisory Editors, using a double, blind peer review process. A personal thanks is extended to the Reviewers/Advisory Editors for all their hard work and dedication to the Journal. Without their work, the publication of this Journal would be impossible.

This is my second year as Editor-in-Chief, and I wish to express my sincere thanks and appreciation for all the support, encouragement, assistance and advice throughout this year. I would like to further express appreciation to Marty Ludlum of the University of Central Oklahoma, for his efforts in coordinating the entire process. The publishing of this journal is an intense educational experience which I continue to enjoy.

Congratulations to all our authors. I extend a hearty invitation to submit your manuscripts for the future issues of *Mustang Journals*.

To further the objectives of Mustang Journals, Inc., all comments, critiques, or criticisms would be greatly appreciated.

Again, thanks to all the authors for allowing me the opportunity to serve you as editor-in-chief of the Journal.

William Mawer
Editor-in-Chief
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Abstract

This research investigated the strengths of potential relationships between reported incidents of U.S. cybercrime versus recorded U.S. border crossing transactions for the state of California. The period examined encompassed 2001 through 2011. The Pearson Correlation Coefficient method of analysis was the tool through which strengths of potential relationships were investigated. The Pearson outcomes were as follows: buses \((r = -0.83)\), loaded truck containers \((r = 0.70)\), trains \((r = -0.05)\), personal vehicles \((r = -0.68)\), pedestrians \((r = -0.92)\), and trucks \((r = 0.40)\).

Introduction

The U.S. border with Mexico has a history of criminal activity that encompasses centuries. Curtis, Gibbs, and Miro (2004) acknowledge the contemporary continuance and existence of such crime, and indicate that organized crime and terrorist organizations find solace among the environments of nations whose economies are failing. Further, because of the penetrable U.S.-Mexican border, Curtis, Gibbs, and Miro (2004) indicate that criminal activities, impacting both the U.S. and Mexico, have the potential of increasing. Because of globalism and integration of mutual national interests among countries, Huey and Rosenberg (2004) advocate the sharing of information, across national borders, as a method of combating and deterring international crime.

However, despite various international attempts to diminish such criminal activity, a relatively new form of international crime exists: cybercrime. According to Brenner (2007), this type of crime often transcends national borders, and is difficult to investigate given its virtual presence and characteristics. Therefore, the commissions of such crimes, and the security considerations of cybercrime, are significant.
Brenner (2007, p. 418) indicates that such crime does not observe the "physical constraints" that are normally affiliated with physical crime or terrorism, and may be perpetrated "anonymously from any point connected to the Internet" with a frequency that is impossible to mimic within the physical world. Because of the characteristics of cyberspace, the limitations of "physical proximity," between criminals and victims, are immaterial, and the opportunity for the commission of such crimes increases significantly (Brenner, 2007, p. 414). Jones (2007, p. 604) confirms this notion through the observation that modern technology facilitates the commission of "crimes anonymously against victims thousands of miles away."

According to Swartz (2002), early 2002 decade estimates of U.S. cybercrime indicated a significant increase in financial losses among corporate environments, and increased from $35 million to $50 million between 2001 and 2002. Segura (2009) indicates that a 2008 survey showed that ten percent of Mexican fraud incidents, including incidents of cybercrime, exceeded five million pesos. Given these considerations, and the arguments of Brenner (2007) and Huey and Rosenberg (2004), it is evident that cybercrime has a significant growth potential that may affect both the U.S. and Mexican nations.

The U.S.-Mexican border has a long history of criminal activity. Historically, before the development and proliferation of modern electronic technologies and networking, such crimes were physical. However, given the development and manifestation of cyberspace, a new environment exists, that may facilitate a different genre of criminal activities and security issues between the nations of the U.S. and Mexico, which transcends the traditional concepts of physical border boundaries. Given the genesis and newness of cybercrime, with respect to the traditional limitations of tangible, physical proximity associated with historical border crime and national security, little research exists that considers the intangible characteristics of cybercrime versus the tangible activities of the U.S.-Mexican border. Therefore, it is the intent of this research to investigate the potential strengths of relationships between reported incidents of U.S. cybercrime versus physical U.S.-Mexican border crossing activities.

Literature Review

A brief review of contemporary literature provides some interesting discussions regarding cyber-crime. The impacts of cyber-crime are prevalent among private and governmental settings. Based on the outcomes of a study that investigated security breaches among commercial and government organizations, Swartz (2002) indicates that 80 percent of companies endured financial losses that were attributed to some variety of cybercrime. Although such instances of criminal activity are expected among corporate settings, Granville (2003) acknowledges the potential of modern technologies, as tools of cyber-terrorism, through which national security interests may be compromised militarily or economically.

The legal considerations of cyber-crime vary according to national boundaries and legislations. The arguments of Weber (2003) are commensurate with the writings of Brenner (2007) regarding the transcending of national borders affiliated with cyber-crime and with respect to the difficulties of legal perspectives and laws governing criminal activities occurring among virtual environments. Based on the writings of Weber (2003), there exists no uniform, global consensus regarding neither legislative acts defining cyber-crime attributes nor punitive measures affiliated with the commission of cyber-crimes. According to Moitra (2005), such disagreement and disputes are manifested because policies and legislation are in their infancy. Moitra (2005) indicates that because rendered judgments are derived from individual cases, that technology is constantly changing, and that criminal applications of technology are constantly changing, governments and organizations must react and respond appropriate in response to
emerging forms of identified cybercrime. As a result, the centuries-old system of criminal justice, which predominantly is concerned with crimes of a tangible nature, must demonstrate reform to encapsulate and manifest the requirements of modern crimes of technology (Wall, 2008).

Given these observations, virtual activities that may be permissible within the boundaries of one nation may be illegal within the boundaries of another nation. Because of such variance among national perspectives, the apprehension of potential offenders becomes difficult. This notion is confirmed by the writings of Weber (2003) regarding the difficulties associated with countering the actions of groups or individuals that perpetrate cyber-crime. Mendez (2005) discusses salient legislative and regulatory differences that impact the cyber-crime policies of the United States and the European Union, and emphasizes the different perspectives affiliated with both entities. Malibiran (2008) also considers the differences among nations, with respect to legislation and enforcement, and considers the case of the adopting electronic commerce legislation within the Philippines. Based on the writings of Malibiran (2008), it is evident that the strength of laws, affiliated with cyber-crime, may require adjustments to ensure strong efficiency and effectiveness. Therefore, such irregularities and differences among national laws pertain to border security issues because of the disputed statements of law that facilitate impediments among enforcement activities.

Characteristics associated with the commission of crimes, among virtual environments, are similar to the motivations of offenders that exist within the physical world. Such observations are contemplated with respect to crime defined as a "deviation from group norms or laws (McMullan and Perrier, 160).” McMullan and Perrier (2003) compare and contrast criminal organizations with legitimate organizations, and examine cyber-crime from the perspective of virtual gambling entities. Based on the writings of McMullan and Perrier (2003), the motivations for committing fraud, among virtual gambling environments, are manifested within the supply and demand characteristics of black market economies. Therefore, similar to physical crime, cyber-crime is influenced through the limitations and illegal benefits of attempting to satisfy the wants and needs of black market economies.

Because black market economic factors exist, that contribute toward the motivation to commit offenses among virtual settings, various arguments are associated with the monitoring of virtual environments. Huey and Rosenberg (2004, p.1) examine various benefits and detrimental characteristics of the 2001 Convention on Cybercrime that facilitated cooperation, among nations, with respect to the "investigation and prosecution of crimes committed through the Internet.” Although this mutual cooperation provides benefit with respect to the potentials of diminishing and countering instances of cyber-crime, national issues of sovereignty and privacy are debated with respect to the authorities and powers of governments and law enforcement agencies (Huey and Rosenberg, 2004). Therefore, actions and activities, associated with the monitoring of virtual environments, may be legal, restricted, or illegal depending on the national laws and constraints that govern the domain of crime. Hence, the monitoring of individuals, actions, or activities, associated with cyber-crime, that transcend national borders, have the potential of instigating disputes among nations regarding legalities, sovereignty, privacy, and punitive measures.

Upon an inspection of the writings of McMullan and Perrier (2003) and the writings of Huey and Rosenberg (2004), an interesting concept may be recognized: physical attributes of crime may be mimicked, expressed, and repeated among virtual environments. This notion is corroborated, through the writings of McMullan and Perrier (2003) regarding the traditional
characteristics of crime (e.g., fraud, theft, organized crime, money laundering, etc.), which were
affiliated with historical gambling environments, and were later found among virtual gambling
enterprises. Later writings of McMullan and Perrier (2007a; 2007b; 2007c) again emphasize
these concepts of cyber-crime regarding virtual endeavors. Based on these cumulative
observations, it is evident that cyber-crime demonstrates similar organizational structuring,
activities, and motivations that are innate among the traditional forms of physical crime.

Based on the aforementioned arguments, it is evident that cyber-crime represents a
virtual instantiation of the illegal activities, that are performed by physical criminal entities, and
that such criminal activities are neither limited nor constrained among national boundaries and
borders. Therefore, it is evident that cyber-crime may impact any nation whose governmental,
commercial, or social infrastructures demonstrates the capacity of implementing and applying
integrated electronic technologies.

The ability of criminals to infiltrate, to impede, to disable, or alter national,
commercial, and social infrastructures is greatly increased through the use of cybercrime events
involving such infrastructures. According to Alexander (2007, p.50), examples of the
magnitudes of such crimes include the 1981 infiltration of AT&T computer systems to “allow
customers to have discounted rates during normal business hours;” the 1986 Pakistani Brain
Virus; the 1988 release of malicious worms that “crippled the Internet;” the 1995 thefts of
approximately 20,000 credit card numbers perpetrated by Mitnick; the 1999 vandalism defacing
the White House Internet presence; and the 2000 denial-of-service attack that either impaired or
disabled electronic commerce sites (e.g., E-Bay, Yahoo, Amazon, etc.).

These considerations also demonstrate three themes: 1) the ability of criminals to
cause mass damage and crime anonymously during the perpetration of their activities; 2) the
ability of criminals to perpetrate mass damage that transcends national borders; and 3) these
cybercrimes represent virtual events that have manual event counterparts within physical reality.
Given such considerations, it is evident that cybercrime represents a significant, dangerous threat
to the national security infrastructures (e.g., economically; governmentally; etc.), of the United
States.

This consideration of U.S. national security must neither be underestimated nor be
understated. Because of the capacity of criminals to impose significant damage among the
electronic infrastructures of modern society, attention must be given to the potential of criminal
acts which could be unleashed against and among the American populace. Such acts could
originate from a source, external to the domestic national boundaries of the U.S., which could be
perpetrated by terrorist organizations or organized crime entities.

According to Curtis, Gibbs, and Miro (2004), the nation of Mexico demonstrates the
capacity of becoming a significant source of such terrorist organizations or organized crime
entities. According to Curtis, Gibbs, and Miro (2004, p. 13) the characteristics of the Mexican
country entice “transnational criminal and terrorist groups” because of its “geographic proximity
and ease of access to the United States; the presence of extra-regional immigrant communities;
the volume and sophistication of domestic commercial activity; the volume and ease of trans-
border movements of goods, persons and cash; the presence of an established criminal
infrastructure; the regulatory environment, transparency, and corruptibility of Mexican
institutions; and the capabilities of local law enforcement agencies.” Further attractiveness is
manifested through the Mexican national characteristics of “opportunities for the clandestine
movement of persons; fundraising and money laundering opportunities; and the existence,
vulnerability, and perceived value of potential targets in Mexico.”
Given the discussions of Curtis, Gibbs, and Miro (2004), the nation of Mexico demonstrates the environmental characteristics that are necessary for hosting criminal elements. Although such criminal entities may demonstrate the capacity for committing physical crimes, the potential of cybercrime acts exists within the Mexican environment. For example, Froehling (1997) indicates that the Internet was leveraged as a tool through which the Zapatistas reacted and responded to the Mexican government during periods of aggression and ideological disputes between these two factions.

According to the U.S. Embassy in Mexico (U.S. Embassy, 2006), during 2006, the Internet was leveraged as a medium for human trafficking between the U.S. and Mexico. According to the U.S. Department of Justice (USDOJ, 2009), cybercrime activities, between the U.S. and Mexico, also include money laundering, fraud, and real property Ponzi investment crimes. A review of the U.S. Department of Justice (USDOJ, 2009) materials includes a myriad of other crimes, between the U.S. and Mexico, which were perpetuated and committed using electronic technologies. According to Segura (2009), the proposed 2009 Mexican national budget incorporated a 30 percent increase in security expenditures as a method of countering potential, virtual crimes affiliated with technology. Therefore, the U.S. security impacts of cybercrime, between the U.S. and Mexico, are considerations that must not be ignored.

Given the discussions of Froehling (1997), Curtis, Gibbs, and Miro (2004), and Segura (2009), the nation of Mexico demonstrates the capacity to originate a variety of crimes that are hazardous and detrimental to the national security interests of the U.S. Therefore, the national boundary between the U.S. and Mexico demonstrates a potential portal through which individuals or electronic materials, which may be affiliated with acts of cybercrime, may be transported. Hence, a question of border security is manifested with respect to the border crossing events that are associated with the U.S.-Mexican border.

Although the literature cites numerous examples of both historical and contemporary criminal issues that are associated with the U.S.-Mexican border (e.g., smuggling; drugs; illegal aliens; murder; organized crime; etc.), these authors were unable to discover any studies that investigated the potential strengths of relationships between U.S.-Mexican border crossing events versus reported incidents of U.S. cybercrime. Therefore, it is the purpose of this paper to investigate these potential strengths of relationships as a method of providing a unique, original contribution to the current body of literature.

Research Questions

The literature review presents a myriad of criminal activities and categories that affect the U.S.-Mexican border. Despite the discussions presented that highlight the saliency of border crime with respect to issues of national security, one discussion is blatantly absent: the potential relationship between cybercrime incidents and border crossing transactions. Given such an absence within contemporary and historical literature, this research poses a cumulative question, regarding such a potential relationship, between reported incidents of cybercrime and border crossing transactions. Therefore, simply, the cumulative query, posed by this research, is expressed as follows: what is the potential strength of relationship between the reported U.S. incidents of cybercrime and U.S. border crossing transactions?

This cumulative inquiry may be further delineated into border state categories along the U.S.-Mexican border. Therefore, a primary sub-question may query the potential strength of relationship between the reported incidents of cybercrime and border crossing transactions with respect to California. Hence, a sub-question is identified. Specifically, it is expressed as
follows: what is the potential strength of relationship between the reported incidents of California cybercrime versus California border crossing transactions?

Scope, Limitations, and Bias

Only data sets pertaining to the state of California were considered within this study. Data sets were obtained from the United States Bureau of Transportation with respect to annual U.S.-Mexican border crossing transactions, and were obtained from the U.S. Federal Bureau of Investigation, regarding annually reported U.S. domestic cybercrime events within the state of California. Therefore, a limitation exists with respect to the examination of only one of the four states that exist along the U.S.-Mexico border.

The scope of this study considered only the years of 2001 through 2011. No data was available regarding known cybercrime events before the year of 2001 despite the availability of border crossing data before the year of 2001. Government data sets neither segregated border crossings into categories of entities leaving the domestic U.S. or entities entering the domestic U.S. nor did they indicate a specific time of each border crossing.

The scope and magnitude of this study was limited to the categories of cybercrime versus bus crossings, cybercrime versus loaded truck container (LTC) crossings, cybercrime versus train crossings, cybercrime versus personal vehicle (PV) crossings, cybercrime versus pedestrian (Peds) crossings, and cybercrime versus truck crossings. Therefore, this study did not consider the potentials of cybercrime versus aerospace or cybercrime versus aviation categories.

An additional limitation is the characteristics of the reported incidents of cybercrime. Because the data sets contained cumulative values of reported incidents, no delineation of specific technologies (e.g., computers, cell phones, credit cards, etc.) was indicated with respect to the commission of cybercrimes. The cybercrime data sets only contained reported incidents, per state, of known cybercrimes that were reported within the U.S. Therefore, only reported incidents of known cybercrime are considered. Hence, no consideration of unknown cybercrime quantities or unknown cybercrime types was possible.

Methodology

Data sets were obtained from the United States Bureau of Transportation with respect to annual U.S.-Mexican border crossing transactions, during the period between 2001 through 2011, for California. Data sets were obtained from the U.S. Federal Bureau of Investigation (FBI), regarding annually reported cybercrime events, during the period between 2001 through 2011, for California. These FBI data sets consisted of the annual IFCC Internet Fraud Reports. Both of these data sets were stored using a Microsoft Excel format. Microsoft Excel was the spreadsheet through which the Pearson Correlation Coefficient analysis was completed. The use of the Pearson method is commensurate with the writings of Cooper and Schindler (2003) regarding correlation analysis and interpretation.

The Pearson Correlation Coefficient method of analysis was implemented to determine and judge the strength of relationships between reported incidents of cybercrime versus border bus crossings, cybercrime versus loaded truck container (LTC) crossings, cybercrime versus train crossings, cybercrime versus personal vehicle (PV) crossings, cybercrime versus pedestrian (Peds) crossings, and cybercrime versus truck crossings. The data sets concerning reported cybercrime, within the separate border state (i.e., California), were separately evaluated and compared with each of these categories, per state, to determine potential strengths of relationships. Therefore, reported incidents of California cybercrime were compared only with reported California border transactions (e.g., buses, trains, etc).
The considered border was the U.S.-Mexican border, and the period encompassed data sets among the years of 2001 through 2011. Annual quantities of events, representing both cybercrime and border transactions, were considered during the duration of this cumulative period. The annual year was the measurement unit used within the Pearson Correlation Coefficient calculations.

Findings

Based on the outcomes of the Pearson Correlation Coefficient calculations, a variety of strengths of relationships among the considered variables were manifested. The analysis involved the testing of the strength of relationships between reported incidents of cybercrime versus border bus crossings, cybercrime versus loaded truck container (LTC) crossings, cybercrime versus train crossings, cybercrime versus personal vehicle (PV) crossings, cybercrime versus pedestrian (Peds) crossings, and cybercrime versus truck crossings. The following table shows the outcomes of these calculations:

Table 1 – Pearson Correlation Coefficient Calculation Outcomes

<table>
<thead>
<tr>
<th>State</th>
<th>Buses</th>
<th>LTCs</th>
<th>Trains</th>
<th>PVs</th>
<th>Peds</th>
<th>Trucks</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>-0.83</td>
<td>0.70</td>
<td>-0.05</td>
<td>-0.68</td>
<td>-0.92</td>
<td>0.40</td>
</tr>
</tbody>
</table>

The Pearson outcomes may be judged according to their indicated strengths of relationships. Outcome values of the Pearson calculations, may range between -1.0 and 1.0. With respect to the interpretation of correlation relationship strengths between the compared variables, larger Pearson outcome values indicate a potentially high strength of relationship whereas smaller Pearson outcome values indicate a potentially low strength of relationship. Values closer to -1.0 represent a strongly negative strength of relationship whereas values closer to 1.0 represent a strongly positive strength of relationship. However, regardless of the outcome value, it is important to note that such outcomes are only indicative of the potential strength of relationship between the considered variables, and is not indicative of any form of causation between the considered variables (Cooper and Schindler, 2003).

Conclusions and Recommendations

The case of reported CA cybercrime incidents versus CA bus border crossings manifests a Pearson outcome of -0.83. Therefore, it is the conclusion of these authors that a very high, negative potential strength of relationship exists between reported incidents of CA cybercrime and CA bus border crossings exists with respect to the designated CA border crossing points.

The case of reported CA cybercrime incidents versus LTC border crossings manifests a Pearson outcome of 0.70. Therefore, it is the conclusion of these authors that a very strong potential strength of relationship exists between reported incidents of CA cybercrime and CA LTC border crossings exists with respect to the designated California border crossing points.

The case of reported CA cybercrime incidents versus train border crossings manifests a Pearson outcome of -0.05. Therefore, it is the conclusion of these authors that little, if any, negative strength of relationship exists between reported incidents of CA cybercrime and CA train border crossings exists with respect to the designated California border crossing points.
The case of reported CA cybercrime incidents versus personal vehicle border crossings manifests a Pearson outcome of -0.68. Therefore, it is the conclusion of these authors that a strong, negative potential strength of relationship exists between reported incidents of CA cybercrime and CA personal vehicle border crossings exists with respect to the designated California border crossing points.

The case of reported CA cybercrime incidents versus pedestrian border crossings manifests a Pearson outcome of -0.92. Therefore, it is the conclusion of these authors that a very strong, negative potential strength of relationship exists between reported incidents of CA cybercrime and CA pedestrian crossings exists with respect to the designated California border crossing points.

The case of reported CA cybercrime incidents versus truck border crossings manifests a Pearson outcome of 0.40. Therefore, it is the conclusion of these authors that a strong potential strength of relationship exists between reported incidents of CA cybercrime and CA truck border crossings exists with respect to the designated California border crossing points.

Given these observations and conclusions, it is the conclusion of these authors that the events of border crossings, along the Mexican borders of California, merit further examination and investigation. Although these Pearson outcomes are not representative of causation between the compared variables, it is the conclusion of these authors that the strength of potentially strong and very strong relationships must not be ignored. Given the writings of Brenner (2007) that express the significance and importance of national security, with respect to the U.S. border with Mexico, it is the conclusion of these authors that any strong Pearson outcomes may signify national security hazards and dangers concerning the U.S.

Despite these outcomes, it is the conclusion of these authors that unknown variables may contribute toward the manifestation of such outcomes. Examples of such unknown variables may include whether computer systems, entering the U.S., were pre-installed with static IP addresses that denote a foreign origin or whether computer systems, leaving the U.S., were pre-installed with static IP addresses that denote the U.S. as the country of origin. In this instance, regardless of the physical location of the machine itself with respect to the border, the static IP address would represent its pre-programmed nationality. Therefore, crimes committed in Mexico may demonstrate a U.S. origin, and vice-versa, because of such pre-programming.

Other technological factors may include whether perpetrators implemented any form of software that would generate a false IP address when committing crimes. For example, the TOR software allows individuals Internet anonymity by masking the actual IP address of a computer system and masking the actual IP address with one that represents a completely different set of numbers and geographic location.

Another consideration is the direction of travel across the border and the time of day when such travel occurred. Government data sets did not segregate border crossings into categories of entities leaving the domestic U.S. or entities entering the domestic U.S. These data sets did not indicate a specific time of each border crossing. Therefore, when coupled with the concerns associated with IP addresses of computer systems, it is the conclusion of these authors that such unknown values may impact the outcomes of this study because of the potential difficulty with identifying accurately the position of computing devices used to commit cybercrimes.

An additional consideration is the technology involved with the reported incidents of cybercrime. Because the data sets contained cumulative values of reported incidents, no delineation of specific technologies (e.g., computers, cell phones, credit cards, etc.) was available. The portability of such technologies may influence the reporting of data used within this study. For example, if a credit card was stolen within the U.S., from a U.S. citizen or residence, it may be used within Mexico before the reporting of the crime occurred. Similarly, if
a credit card was stolen within Mexico, from a U.S. citizen, and then used within Mexico, individuals may report the crime upon their arrival within the U.S. Therefore, given these considerations, it is the conclusion of these authors that such unknown variable values may impact the outcomes of this study.

Although other conclusions may be offered regarding the outcomes of the Pearson calculations, it is the opinion and conclusion of these authors that sufficient arguments are provided to merit additional investigation of this topic. Therefore, it is the recommendation of these authors that additional studies should be performed, which consider the border states of Arizona, New Mexico, and Texas, with respect to the same conceptual research question and sub-question.

An additional consideration is the use of Microsoft Excel as the tool through which the processing of data occurred. Because of budgetary limitations, SPSS was unavailable for the purposes of data analysis. Although this spreadsheet program demonstrates the capacity to perform correlation analysis data processing, it is recommended that this study be repeated using SPSS or other statistical software.

It is also recommended that future studies incorporate the direction of travel (if it can be determined) across the border, with respect to the incidents of reported U.S. cybercrimes. Further, depending on the direction of border travel with respect to the potential relationship with cybercrime reports, it is recommended that further studies investigate whether these reported cybercrimes were committed against any Department of Defense entities, state military departments, or other government systems as a consideration of homeland security and national security.

The authors acknowledge the potential of spurious correlation outcomes regarding this limited study. It is recommended that any additional studies accommodate a greater depth and magnitude of analysis with respect to identifying the impacts of spurious correlations. This study did not investigate any potential queries regarding causation. Therefore, it is recommended that any future studies examine facets of potentially causative factors regarding the examined border data sets.

Based on the outcomes of the Pearson calculations, it is the conclusion of these authors that these outcomes must be considered from the perspectives of both corporate and government security. According to Brenner (2007), a variety of cybercrimes exist that impact government and corporate environments and infrastructures. Because of the high Pearson correlation values discovered, it is the conclusion of these authors that certain border crossing events be considered as a potential avenue through which the security of both private and government infrastructures may be compromised. Therefore, it is recommended that future research endeavors investigate the potential of border crossing activities with respect to national security, corporate, and government implications.
References


I. The Origins and Power of Judicial Review

The term “judicial review”\(^1\) has come to mean that the judicial branch of government is the final interpreter of the meaning and application of the U.S. Constitution allowing it to oversee the activity of all branches of government, including itself, to determine if such conduct is in accord with constitutional dictates. This principle relates to the idea of separation of powers and provides for check and balance within the U.S. government system. Today, federal and state courts are able to review executive, legislative and judicial actions to determine if such actions are constitutional.

The term judicial review, referring to the power to review the conduct of government to assure compliance with the U.S. Constitution, is nowhere mentioned in the U.S. Constitution. Absence of the term does not mean that no such power exists for the judiciary, or any of the three branches of government. Accordingly, much has been attributed to Alexander Hamilton’s description of the judiciary as the least dangerous branch of government. But despite all the machinations of this description over the course of centuries, that is not exactly what Hamilton meant. He opined that the operations of the judiciary were such that, by its very nature, it lacked the inherent power to intrude on rights protected by the Constitution and thus it is the least dangerous branch. For this very reason, the framers impliedly recognized that the judiciary was the branch most suitable to wield the power of judicial review.\(^2\)

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1 The discussion herein does not address the broader and more modern use to describe appellate power to review a greater variety of issues arising from rulings of inferior adjudicatory tribunals.

2 In The Federalist No. 78, Hamilton wrote, “Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution what ever. It may truly be said to have neither force nor will, but
When reviewing the topic of judicial review, it is of significance to revisit the writings of those individuals instrumental in the creation and implementation of the U.S. Constitution. In The Federalist No. 78, Hamilton wrote:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, that it shall pass no bills of attainder, ex-post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.  

These expressed principles laid the foundation for the courts to exercise the power of judicial review. The concepts were not lost on Chief Justice John Marshall when the Supreme Court was confronted with the case of *Marbury v. Madison* which involved an act of Congress permitting the U.S. Supreme Court to exercise its power of original jurisdiction in matters seeking a writ of mandamus. Marshall acknowledged that Marbury was entitled to a remedy but questioned whether the remedy could originate from the Supreme Court. In resolving this question Marshall quoted the Constitution, “the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which the states shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction.”

Marshall rejected the argument that the legislature could, by a mere legislative enactment, assign original jurisdiction to the court in cases other than those specified in the Constitution and he affirmed that “the will of the legislature that a mandamus should be used … must be obeyed… yet the jurisdiction must be appellate, not original…. and it becomes necessary to inquire whether [original] jurisdiction, so conferred [by the legislature], can be exercised.” The primary question for the Court became “…whether an act [of Congress] repugnant to the constitution, can become the law of the land.” In other words, may the legislature alter the content of the U.S. Constitution by an ordinary statute? To this Marshall gave the answer that, “a legislative act contrary to the constitution is not law.” Thus, that section of the law which served to increase the original jurisdiction of the Supreme Court so as to allow it to be the first court to hear a merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.”

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3 *Id.*
5 *U.S. Const.* art. III.
6 *Supra note* 4, at 175-176. (Marbury)
7 *Supra note* 4, at 176. (Marbury)
8 *Supra note* 4, at 177. (Marbury)
matter requesting a writ of mandamus absent any exercise of appellate review, operated essentially to amend Article III of the U.S. Constitution by legislative fiat. The Supreme Court ruled the statute to be unconstitutional. The words of Hamilton resonated with the chief justice.\(^9\)

Chief Justice John Marshall concluded in that the Constitution must govern any ordinary legislative act and then, echoing the words of Hamilton, Marshall stated that “[i]t is emphatically the province and duty of the judicial department to say what the law is, ...[and] if then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.”\(^{10}\) With this pronouncement, Marshall acknowledged the judicial power to declare acts of Congress unconstitutional. So there we have it, the pronouncement of the power of judicial review by judicial fiat. Such power is nowhere mentioned in the U.S. Constitution and thus has been the subject matter of debate since its pronouncement in the \textit{Marbury} case. The Supreme Court chastised Congress for overstepping its bounds and then boldly proceeded to proclaim its own unchartered bounds. It was the pot calling the kettle black.

II. The Exercise of Judicial Review Over all Three Branches of Government

A. Judicial Review of Executive Acts

Since the early pronouncement of the power of judicial review, courts have exercised the power over each branch of government. Judicial review was utilized in earlier matters before the court. In the \textit{Hayden’s Case}\(^{11}\) the justices, sitting as Circuit judges, held that Congress had no power to require courts to provide advisory opinions to the executive. A few years later, in the case of \textit{Little v. Barreme},\(^{12}\) the Supreme Court invalidated the 1799 order of President John Adams who had authorized the seizure of ships bound for French ports. Later, in 1952, President Harry Truman, in time of war and in the interest of national security, used executive power to seize the privately owned steel mills so as to order the workers back to work. In \textit{Youngston v. Sawyer},\(^{13}\) the U.S. Supreme Court held Truman’s executive action to be unconstitutional. Currently, in \textit{U.S. v. Jones},\(^{14}\) the court addressed the actions of law enforcement officials functioning under the executive branch who had conducted surveillance of certain suspected individuals by installed GPS devices onto cars without benefit of search warrants, so as to gain evidence for arrests and convictions. In \textit{Jones}, the U.S. Supreme Court held such warrantless search procedures

\(^9\) In The Federalist No. 78, Hamilton had stated, “The interpretation of the law is the proper and peculiar province of the courts. A Constitution is, in fact, and must be regarded by the judges, as fundamental law. It therefor belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.” Alexander Hamilton, \textit{The Federalist} No. 78 (1st ed. 1788), Jacob E. Cooke ed., (1961).

\(^{10}\) \textit{Supra note} 4, at 177. (Marbury)

\(^{11}\) Hayden’s Case, 2 U.S. 409 (1792).


unconstitutional under the Fourth Amendment of the U.S. Constitution. The Jones case is simply the latest in a long string of cases addressing the constitutionality of various types of law enforcement conduct functioning under the executive branch.

B. Judicial Review of Legislative Acts

The federal legislative branch has often felt the hand of judicial review. This fact was recently acknowledged by U.S. Attorney General Eric Holder in his April 5, 2012 letter to the Fifth Circuit Court of Appeals responding to questions posed by the Appellate Court at oral argument in the case of Physician Hospitals of America v. Sebelius. The Court ordered the Justice Department to provide views of the President regarding judicial review of the constitutionality of Acts of Congress. In his letter Holder responded that, “At no point has the government suggested that the Court would lack authority to review plaintiffs constitutional claim. …The power of the court to review the constitutionality of legislation is beyond dispute.” He referenced two cases, Free Enterprise Fund v. Public Co. Accounting Oversight Board and F.C.C. v. Beach Communications Inc., and instructed the court that, “Where a plaintiff properly invokes the jurisdiction of a court and presents a justiciable challenge, there is no dispute that courts properly review the constitutionality of Acts of Congress.”

The most extensive use of the power of judicial review over federal legislative conduct is found in the era of the New Deal when the U.S. Supreme Court continuously held that Congressional enactments were unconstitutional. For example, the Agricultural Adjustment Act was invalidated in the case of U.S. v. Butler; the Railroad Retirement Act was invalidated in the case of Railroad Retirement Board v. Alton Railroad Co.; and the National Industrial Recovery Act was invalidated in the case of Schechter Bros. v. U.S. Some 50 years later, in 1990, Congress enacted the Gun-Free Schools Zone Act so as to prevent possession of certain firearms within a specified parameter of schools. The U.S. Supreme Court invalidated the federal statute in Lopez v. U.S., holding that the federal statute was an unconstitutional extension of the legislative power to regulate interstate commerce found in the U.S. Constitution. The following year, in United States v. Morrison, the Court invalidated a portion of the Violence Against Women Act which gave victims of gender-based violence the right to sue in federal court; the court held that Congress lacked power under the Commerce Clause or the Fourteenth Amendment to enact

18 Eric Holder, U.S. Attorney General Letter dated April 5, 2012, to the Fifth Circuit Court of Appeals responding to questions posed by the U.S. Supreme Court in the case of Physician Hospitals of America v. Sebelius, supra, note 15.
such a provision. Most recently, the District of Columbia enacted a local ordinance prohibiting
the possession of any handgun within the district; the U.S. Supreme Court held in District of
Columbia v. Heller, 26 that the ordinance was in violation of the Second Amendment to the U.S.
Constitution.

Most recently, two Congressional acts were the subject matter for judicial review. The Patient
Protection and Affordable Care Act, often referred to as Obamacare, was before the Supreme
Court for determination of its constitutionality. After extensive speculation and controversy, the
Court, in a 5-4 ruling, upheld the Act in its entirety despite the constitutional challenges raised.27
The Court upheld the Act not on the basis of the Commerce Clause, but within the Constitutional
power of the legislature to tax. Simply put, the Court used the power of judicial review to
uphold the statute. At the same time, the court acknowledged the principle of federalism by
holding that it is the right of each state to determine the extent of its participation in the
expansion of the Medicaid provisions contained in the statute. In U.S. v. Alvarez,28 the Court
held that the Stolen Valor Act,29 which made it a crime to falsely claim receipt of a military
medal, is an unconstitutional intrusion on free speech.

State legislative bodies have also experienced the brunt of judicial review when the high court
has held various state constitutions and statutes unconstitutional under the U.S. Constitution. For
example, Colorado amended its Constitution to prohibit any government preferential treatment
based on sexual orientation; the U.S. Supreme Court, in Romer v. Evans,30 invalidated the state
constitutional amendment as a violation of the equal protection clause of the Fourteenth
Amendment to the U.S. Constitution. Recently, challenges to state constitutional amendments
that prohibit preferential treatment in public education, public employment, and public contracts
have been addressed by federal courts of appeal with differing decisions The Supreme Court will
most assuredly be called upon to resolve the matter if there is a conflict among the circuits.31
Constitutional amendments in many states that pronounce marriage must be between a man and a
woman may meet a similar fate if challenges reach the courts.

State statutes have suffered a similar fate. In the very recent case of Arizona et al. v. United
States,32 the Supreme Court held that most of the Arizona statute33 was unconstitutional under the
Supremacy clause of the Constitution because power over immigration and naturalization rests
with the federal government to “establish an uniform Rule of Naturalization.”34 And in the cases

27 Supra, note 15.
31 See, Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997) and Coalition to
Defend Affirmative Action v. Regents of University of Michigan, Nos. 08-1387, et al.(2009);
rehearing en banc, order filed 9/9/11.
33 The Arizona statute is referred to as the Support Our Law Enforcement and Safe
34 Supra, note 32 at 3.
of *Miller v. Alabama*,\(^{35}\) and *Roper, Superintendent, Potosi Correctional Center v. Simmons*,\(^{36}\) the Court held that state statutes and sentencing procedures providing mandatory life imprisonment\(^{37}\) and capital punishment\(^{38}\) for juveniles under the age of 17 are unconstitutional in violation of the Eighth Amendment which prohibits cruel and unusual punishment.

State statutes prohibiting inter-racial marriage were struck down by the U.S. Supreme Court as a violation of the equal protection clause in *Loving v. Virginia*.\(^{39}\) About forty years ago, state legislative bodies had enacted statutes requiring prayer and bible readings in public schools; in *Engel v. Vitale* (1962)\(^{40}\) and *District of Abington Co. v. Schempp*,\(^{41}\) the Supreme Court held such statutes unconstitutional in violation of the First Amendment to the U.S. Constitution. In another situation, Nebraska enacted a statute to prevent partial birth abortions. In *Sternberg v. Carhart*,\(^{42}\) the U.S. Supreme Court held that the Nebraska statute, as written, was unconstitutional in violation of the right to privacy as protected by the Constitution because it failed to provide an exception to save the life of the mother. Also, see many older cases such as *Strauder v. West Virginia*,\(^{43}\) wherein the U.S. Supreme Court held that the state statute excluding jurors solely on racial grounds violated the due process and equal protection clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution. In *Harper v. Virginia Board of Elections*,\(^{44}\) the holding was that state statute imposing a poll tax in order to vote violated Fourteenth Amendment’s equal protection guarantees and in the case of *Browder v. Gayle*,\(^{45}\) the Supreme Court affirmed the lower court opinion that state statutes mandating separate but equal facilities in public accommodations violated the equal protection guarantees of the Fourteenth Amendment. In the case of *Cleveland v. LaFleur*,\(^{46}\) the Court held that the school district’s arbitrary cut-off dates for mandatory maternity termination violated the Fourteenth Amendment’s procedural due process guarantees. As demonstrated by these cases, legislative acts are subject to judicial review to assure constitutionality.

C. Judicial Review of Judicial Acts

The judicial branch has also fallen prey to the exercise of judicial review. In *Powell v. Alabama*,\(^{47}\) (known as the *Scottsboro Boys Case*) the U.S. Supreme Court held that it was a denial of the Fourteenth Amendment’s due process guarantees when the trial court denied defendants the right to competent counsel of one’s choosing as well as a fair and impartial jury.

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\(^{36}\) Roper, Superintendent, Potosi Correctional Center v. Simmons, 543 U.S. 551 (2005).

\(^{37}\) *Supra*, note 35.

\(^{38}\) *Supra*, note 36.


\(^{43}\) Strauder v. West Virginia, 100 U.S. 303 (1880).


\(^{46}\) Cleveland v. LaFleur, 414 U.S. 632 (1974).

In the cases of *Gideon v. Wainwright*, and *Turner v. Rogers*, the Court again held that it was a denial of the Sixth Amendment rights when one is denied assistance of counsel in a criminal proceeding. In *Sheppard v. Maxwell*, the U.S. Supreme Court held that defendant was denied a fair trial in violation of the Sixth Amendment when the trial court allowed a circus-like atmosphere with massive, pervasive, and prejudicial publicity to join in the prosecution. In *BMW of North America v. Gore*, the U.S. Supreme Court held that lower court’s approval of punitive damage awards, characterized as “grossly excessive,” violated the Fourteenth Amendment substantive due process guarantees. In *Presley v. Georgia*, the Court reversed a conviction because the trial court had excluded an observer. And in the recent companion cases of *Lafleur v. Cooper* and *Missouri v. Frye*, the U.S. Supreme Court held that any plea bargains made or rejected without assistance of competent counsel violate the Sixth Amendment of the U.S. Constitution. In these and other case, the Supreme Court in exercising its power of judicial review has chastised its very own lower courts for constitutional violations in conducting judicial proceedings.

No unit or branch of government is free from the oversight of the judiciary exercising its power of judicial review to determine the constitutionality of government actions.

III. Checks on the Power of Judicial Review

The power of judicial review is not without limitations and therefore the courts historically have exercised discretion in its use. It was not until the latter part of the nineteenth and into the twentieth century that the power became a major focal point. Courts are not unaware of these checks and in fact have acknowledged them in opinions. History reflects the following eight checks on the exercise of the judicial power.

A. Check #1: Constitutional Amendments and Statutory Revisions

1. Constitutional Amendments

Justice Marshall acknowledged that the U.S. Constitution declared, “This Constitution …. shall be the supreme Law of the Land.” Thus, the original seven articles, along with the amendments, control all government pronouncements. Consequently, a constitutional amendment will supersede any lower law or court opinion that contradicts the Constitution, be it a legislative act, an executive order, an administrative rule or a judicial opinion. An example of this in operation is the opinion in *Dred Scott v. Sanford* wherein the U.S. Supreme Court.

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56 *Supra*, note 4. (Marbury)
57 Dred Scott v. Sanford, 60 U.S. 393 (1857).
interpreted the Constitution to uphold the legality of slavery. The passage of the Thirteenth and Fourteenth Amendments to the U.S. Constitution invalidated the decision. Later, in Minor v. Happersett, the Court interpreted the Constitution and held that women did not have the constitutional right to vote. This holding was over-ridden by the Nineteenth Amendment (1920) giving women the right to vote. In the Supreme Court opinion of Pollock v. Farmers’ Loan and Trust Co., the Court interpreted the Constitution to hold that the federal legislature had no power to impose individual income taxes on citizens. This decision was over-ridden by the Sixteenth Amendment (1913), which gave Congress the right to levy personal income taxes.

More recently, in Kelo v. City of New London Connecticut, the Supreme Court interpreted the Fifth Amendment to permit local government, utilizing the governmental power of eminent domain, to take property from private owners so as to return it to private ownership. Over 13 states have amended their constitutions to prohibit such a use of government power in their states. Constitutional amendments are a check on the power of judicial review.

2. Proposed Constitutional Amendments

Thus, it is evident that a major check on the power of judicial review by the courts is the force of a constitutional amendment. There have been numerous proposals for Constitutional Amendments to over-ride Supreme Court opinions. A circumstance that invited consideration of a constitutional amendment occurred when the New Deal legislation, sponsored by the President, was ultimately invalidated by the Supreme Court; the Roosevelt administration envisioned an amendment providing a mechanism to override judicial decisions but such was never introduced to Congress. There have been other Supreme Court decisions that have resulted in proposals for constitutional amendments. For example, in Roe v. Wade the Supreme Court held that the Constitutional right to privacy prohibited states from enacting statutes totally banning abortions. Those opposed to the Court’s constitutional interpretation regarding abortions have sponsored a constitutional amendment stating that life begins at conception.

Later, in the case of Johnson v. Texas, the Supreme Court invalidated a Texas statute which criminalized burning the American flag. Those opposed to the Court’s constitutional interpretation of free speech rights have sponsored a constitutional amendment making it a crime to desecrate the United States flag. In the cases of Engel v. Vitale and School District of Abington Co. v. Schempp (1963), the Supreme Court held that under the First Amendment there could be no prayer or bible readings in public schools. Those who opposed the Court’s interpretation of the First Amendment have sponsored a constitutional amendment allowing for public prayer. Those who opposed the court decisions allowing for marriages between same sex

58 U.S. CONST. amend. XIII (1865).
59 U.S. CONST. amend. XIV (1868).
couples\textsuperscript{67} have sponsored a constitutional amendment stating that marriage is between a man and a woman. And on we march enjoying a constant awareness that the U.S. Constitution is a law higher than the U.S. Supreme Court and, by virtue of a constitutional amendment, can operate as a check on the power of judicial review.

3. Statutory Revisions and Amendments

Just as a constitutional amendment can override a Supreme Court constitutional interpretation so too can the legislative body override a Supreme Court constitutional interpretation invalidating a statute by enacting a revision or amendment to that statute so as to eliminate the constitutional impediment. For example, in the \textit{Civil Rights Cases} (1883), the Supreme Court invalidated the Civil Rights Act of 1875 on the basis that Congress had no power under the newly adopted Thirteenth and Fourteenth Amendments to enact a statute prohibiting private discriminatory activity. Although it took almost 80 years, Congress overruled that decision by enacting the Civil Rights Act (1964) changing the source of the congressional power to that of the interstate commerce powers of the Constitution. The Supreme Court then upheld the statute in \textit{Heart of Atlanta Motel v. U.S.}\textsuperscript{68}

After the Supreme Court announced its decision in \textit{Sternberg v. Carhart},\textsuperscript{69} invalidating a Nebraska statute as unconstitutional, Congress essentially rewrote the state statute and enacted it as Federal Partial-Birth Abortion Act of 2003.\textsuperscript{70} The Supreme Court upheld this federal statute in the case of \textit{Gonzales v. Carhart}.\textsuperscript{71}

When there is not a constitutional impediment, Congress can more easily override a Supreme Court statutory interpretation by amending the statute. In the recent and somewhat notorious case of \textit{Ledbetter v. Goodyear Tire and Rubber},\textsuperscript{72} the Supreme Court held that the statute of limitations barred recovery on a pay discrimination claim. Congress quickly amended the statute to remove the time bar on such claims.\textsuperscript{73} In the case of \textit{EEOC v. Aranco},\textsuperscript{74} the Supreme Court held that the civil rights statute did not have extra-territorial jurisdiction. Congress then amended the statute to provide for such extra-territorial jurisdiction (Civil Rights Act of 1991). Although these cases were not invalidated on constitutional grounds, the cases illustrate that Congress can and often should, override the U.S. Supreme Court’s statutory interpretations especially if the interpretation results in infringement of constitutional rights. This activity serves as another check on the power of judicial review.


\textsuperscript{72} \textit{Ledbetter v. Goodyear Tire and Rubber}, 550 U.S. 618 (2007).


\textsuperscript{74} \textit{EEOC v. Aranco}, 499 U.S. 244 (1991).
B. Check #2: Limitations on Appellate Jurisdiction by Congressional Acts

The U.S. Constitution states that “the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions, and under such regulations as the Congress shall make” (Article III § 2). The ability of Congress to limit appellate jurisdiction is not an empty threat for the courts. Throughout the history of this country, Congress has considered jurisdiction-stripping legislation, sometimes successfully limiting the courts’ appellate review. The cases of *Ex parte McCardle*75 and *Ex parte Yerger*,76 dealt with legislation77 targeting and limiting appellate review of *habeas corpus* petitions. The Supreme Court acknowledged the legislative limitation, and by dismissing McCardle’s petition, the Court affirmed that Congress had the power to specify and limit the appellate jurisdiction of courts. The Court stated:

We are not at liberty to inquire into the motives of the legislature. We can only examine into its powers under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words… It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and the judicial duty is not less fully performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.78

However, the Supreme Court was quick to point out in *McCardle* that even though the act limited appellate review of *habeas corpus* petitions, the act did not limit the Supreme Court’s original jurisdiction made available under the Judiciary Act of 1789.79

Again, when Congress enacted the Antiterrorism and Effective Death Penalty Act limiting appellate review of *habeas corpus* petitions, the Supreme Court in *Felker v. Turpin*,80 acknowledged the limitation on appellate review but stated that the statute did not limit its review of original *habeas corpus* petitions addressed directly to the Supreme Court.

Restrictions on *habeas corpus* petitions reappear throughout the years. Recently, the Military Commission Act of 2006 stated that, “No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of *habeas corpus* filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”81 The U.S. Supreme Court invalidated this statute as unconstitutional on the basis of its jurisdiction stripping limitation.82

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75 Supra, note 55. (McCardle)
76 Ex parte Yerger, 75 U.S. 85 (1869).
77 An Act to Amend the Judiciary Act of 1789; 40th Congress, 2nd session, 2094 (1868).
78 Supra, note 55 at 289–90. (McCardle)
79 Supra, note 55, at 513. (McCardle)
Matters other than *habeas corpus* review have resulted in jurisdiction stripping legislation. The Norris-LaGuardia Act\(^{83}\) limited the jurisdiction of the courts to order labor injunctions. No Supreme Court decision has invalidated this legislation and no constitutional amendment was ever proposed to override the Act.

Numerous other bills have been introduced in Congress to strip the courts of jurisdiction in particular matters and thereby limit judicial review. “In 1981 and 1982 alone, thirty jurisdiction-stripping bills were introduced in Congress.”\(^{84}\) After the U.S. Supreme Court’s constitutional interpretation invalidating prayer in public schools, and after the cases allowing busing to accomplish desegregation in public schools, and then after the Reagan Administration’s attempt to amend the Constitution regarding these cases, various senators introduced jurisdiction stripping legislation aimed at prohibiting courts from cases involving school prayer, busing or even marriage between man and women. Senator Jesse Helms stated, “‘There is more than one way to skin a cat, and there is more than one way for Congress to provide a check on arrogant Supreme Court Justices who routinely distort the Constitution to suit their own notions of public policy.’\(^{85}\)” Thereupon, Senator Helms introduced legislation to accomplish this end. This proposed law stated that, “[T]he Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any case arising out of any State statute, ordinance, rule, regulation, or any part thereof, or arising out of any Act, interpreting, applying, or enforcing a State statute, ordinance, rule, or regulation, which relates to voluntary prayers in public schools and public buildings. . .” and in section 1364, “[T]he district courts shall not have jurisdiction of any case or question which the Supreme Court does not have jurisdiction to review under section 1259 of this title.”\(^{86}\) The bill introduced by Senator Helms was never actually approved by Congress.

Of course, the concern regarding court-stripping legislation has always been whether Congress has the power to limit the jurisdiction of the court over issues concerning the constitution.\(^{87}\) But, the question is currently moot; none of these proposed bills was enacted and, they all reached the congressional graveyard.

Where limitation of appellate review is concerned, a most persuasive argument has been made that “the Federal judiciary is not (as many scholars have previously assumed) at the mercy of Congress. Supporters of the judiciary have repeatedly used the structural tools of Article I to protect the Article III judiciary.”\(^{88}\) Grove further states,

> The federal judicial power is primarily protected not by the provisions defining the courts’ authority, but instead by the structural provisions controlling the


\(^{87}\) *Supra*, note 85 at 998-999. (Baucus)

authority of Congress. The constitutional process for enacting legislation, which requires all legislative proposals to pass through two chambers of Congress and be presented to the President (or in the event of a presidential veto, to survive supermajority votes in the House and Senate), provides considerable protection for federal jurisdiction. These bicameral and presentment requirements allow political minorities to vet, or restrict the content of, any legislation… [But] When courts issue controversial and unpopular decisions, political leaders may forget the long-term benefits of an independent judiciary and attempt to strip federal jurisdiction. 89

The judicial branch is cognizant that a strong presumption of validity attaches to Congressional Acts thereby encouraging discretion by the Court in the exercise of judicial review. It may have been this awareness that prompted Judge Jerry Edwin Smith of the Fifth Circuit Court of Appeals to issue a somewhat testy order from the bench at the time of oral argument to the Department of Justice:

I would like to have from you by noon on Thursday… a letter stating what is the position of the attorney general and the Department of Justice, in regard to the recent statements by the president, stating specifically and in detail in reference to those statements what the authority is of the federal courts in this regard in terms of judicial review. That letter needs to be at least three-page, single-spaced, no less, and it needs to be specific. It needs to make specific reference to the president’s statements and again to the position of the attorney general and the Department of Justice.” 90

Accordingly, Attorney General Eric Holder, in a three-page letter, responded to the order of the Fifth Circuit urging the court’s respect for legislative enactments by citing FCC v. Beach Communications, 91 “Respect for a coordinate branch of Government forbids striking down an Act of Congress except upon a clear showing of unconstitutionality.” 92 Holder continued:


89 Id., 871-872.
90 Supra, note 15, Justice Smith, Fifth Circuit Court of Appeals in hearing in the case.
92 Supra, note 18 at 2. (Holder)
Democratic National Committee, 412 U.S. 94, 102 (1973)). These principles of deference are fully applicable when Congress legislates in the commercial sphere. The court accords particular deference when evaluating the appropriateness of the means Congress has chosen to exercise its enumerated powers, including the Commerce Clause, to accomplish constitutional ends. See, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 32 (1937); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 408 (1819). See also Thomas More Law Center v. Obama, 651 F.3d 529, 566 (6th Cir. 2011) (Opinion of Sutton, J.); Seven Sky v. Holder, 661 F.3d 1, 18-19 (D.C. Cir. 2011) (Opinion of Silberman, J.).

The points made by the U.S. Attorney General in his letter had been pronounced in earlier times by the judiciary. In 1827, Justice Bushrod Washington wrote “It is but a decent respect to the wisdom, integrity, and patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond a reasonable doubt.” The Supreme Court has often reaffirmed its deference to legislation on economic matters presuming that such legislation rests on “some rational basis within the knowledge and experience of the legislator.”

There is one last important observation to make concerning limits on judicial review - that point is this – the Supreme Court itself is limiting the involvement of courts in civil disputes by its embrace of the process of arbitration. As will be discussed more extensively in Part IV, recent interpretations of the Federal Arbitration Act (FAA) appear to preclude court review of arbitration agreements because, as the Supreme Court has opined, these agreements are valid contracts between private parties which must be enforced as written. The end result is a limitation on litigation and thereby a limitation on judicial review of policy questions often involving constitutional protections.

C. Check #3: Executive Enforcement of Judicial Decisions

An important check on the power of judicial review is that courts lack the power to enforce their own decisions. As stated by Alexander Hamilton in the Federalist Papers, the executive branch “holds the swords of the community.” It is the constitutional oath of office for the President to solemnly swear to “faithfully execute the office of the President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.” This language suggests that it is the duty of the President to take care that the Constitution is safeguarded and protected from any attempts to undermine or contradict its provisions – including conduct from any branch of government. In this regard, one must be mindful of the fact that orders and decisions of courts are not self-executing, but rather are dependent on the manpower of the executive branch to be enforced. And so, what if the President and his subordinates simply prefer not to do as the court orders?

93 Supra, note 18. (Holder)
97 The Federalist No. 78.
98 Const. art III.
For example, Andrew Jackson was unhappy with the Supreme Court’s decision in *Worcester v. Georgia*, wherein the U.S. Supreme Court held that a state statute prohibiting non-Indians from their presence on reservations without a license was unconstitutional. Jackson allegedly said, “John Marshall has made his decision; now let him enforce it!” (Burner, 2000). And so, President Jackson did nothing.

Abraham Lincoln, in the midst of the Civil War, relying on executive emergency powers, suspended the right to habeas corpus. This action was challenged in the court case of *Ex parte Merryman*, which was heard by Chief Justice Roger Taney. The judge expressed outrage at the President’s conduct and stated persuasively that only Congress, under the powers provided to it in Article I, § 9 of the Constitution, could suspend the privilege of habeas corpus. Justice Taney had good authority for this position as Justice John Marshall had stated that:

> If at any time the public safety should require the suspensions of the powers vested by this act (the *Habeas Corpus act*) in the Courts of the United States, it is for the Legislature to say so. This question depends on political considerations, on which the Legislature is to decide: Till the Legislative will be expressed, this Court can only see its duties, and must obey the law.

Taney then ordered that the *writ* be served on the commanding general of the U.S. Army who oversaw Merryman’s imprisonment in Fort McHenry. But, the general, who was a subordinate of the President, refused to accept the *writ* and/or to follow the court’s order, and relied instead on Lincoln’s order. President Lincoln did nothing to enforce the court’s order despite the fact that the Constitution directed that the President take care that the laws are “faithfully executed” including the law stemming from orders of the courts. History suggests that Taney was correct and to date, the privilege of a writ of habeas corpus is seen as under the control of Congress alone.

In the case of *U.S. v. Nixon*, the Supreme Court reviewed a lower court subpoena to the President ordering that he turn over certain recorded tape conversations that were arguably pertinent to a criminal case. President Nixon claimed that, in the interest of national security, the President’s right of “executive privilege” protected the confidentiality of recorded presidential conversations and over-rode a court order. Nixon lost the argument that “executive privilege” over-rode judicial review chiefly because of the nature of the claims made in the matter; but, had the facts been different, had the national security truly been threatened by revelations of recorded confidential conversations, the argument of executive privilege could well have carried the day and created a major chink in the Supreme Court’s armor of being the sole interpreter of the U.S. Constitution.

101 *Ex parte Merryman*, 17 Federal Cases 144, (C.C.D. Md. 1861) (No. 9,487).
102 Combined cases of Ex Parte Bollman and Ex Parte Swartwout, 8 U.S. 75; 4 Cranch 95, 101 (1807).
The fact that the executive branch has the power, duty and authority to enforce judicial decisions places onto the courts a definite caution with the knowledge that at some point the executive branch could simply say “no” or if not an absolute refusal, the President could implement enforcement by doing it “my way.” For example, President Reagan’s way to limit or prevent enforcement of civil rights decisions was simply to reduce manpower to government agencies.

There have been somewhat persuasive arguments that the President should be empowered with the ability to review court decisions - especially those concerning high priority public policy concerns. The idea of “executive review” dates back to the time of Lincoln when Lincoln argued that his responsibilities included the obligation not to enforce an unconstitutional judicial policy. Scholars have supported this position fearing judicial tyranny without some check on the power of judicial review. The concept of executive review has resulted in a flurry of articles on the subject in the recent years supporting what has come to be called the “Merryman Power.”

Lincoln argued that if all political branches submitted to Supreme Court judgments regarding their actions, democratic self-government would cease, and the people would no longer have self-rule, and instead would acquiesce government to the dictates of the Supreme Court. Numerous scholars have voiced similar concerns arguing that, “If the President is truly coequal, he may not be controlled in the exercise of his constitutional responsibilities by the opinion of the judges.” The fear was that the judiciary would become a “despotic branch.” “By far, the great problem today is not the too-forceful exercise of presidential power to interpret law, but the too-feeble acquiescence of the executive branch in the court’s assertion of dominant interpretative power.” James Madison stated that the design of the division of powers was understood to create tension among the three branches, necessary to protect and preserve liberty (Federalist Paper No. 49). Thus it has been stated that:

The power to interpret and apply the Constitution is a great and awesome power – just as is the power to govern through legislation. The same consideration that made the founding generation leery, and that ought to make the present generation leery, of placing all legislative power in the hands of one institution also counsel in favor of dividing the power of interpretation among many different actors, with no one holding absolute sway over the others. If the result is some chaos and conflict, that, along with eternal vigilance, is the price of liberty.

Therefore the power of the court to exercise judicial review can be checked by the executive branch that holds the sword to enforce the law including judicial decisions.

105 Id.
106 Id.
D. Check #4: Requirement That There be a Case and Controversy

Courts can only operate when there is a case or controversy presented to them for resolution. In his letter to the court, (see above) Attorney General Holder again quoted, “'If a dispute is not a proper case of controversy, the courts have no business deciding it, or expounding the law in the course of doing so.' Daimler Chrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006); see e.g. Weinberger v. Salfi, 422 U.S. 749, 763-766 (1975).”

In civil matters, every student of business recognizes the benefits of settlement and the notion of “keep it out of courts.” No matter how anxious a court is to “get its hands on this issue,” that can be denied them if the parties do not bring the case to the courts. A good example of this is the case of Taxman v. Board of Education of Piscataway, dealing with voluntary employment affirmative action policies. The Supreme Court had rendered decisions in two earlier and notorious cases, United Steelworkers of America v. Weber; Johnson v. Transportation Agency, in which the court held that employers would not violate the civil rights statute if they adopted a narrowly drafted voluntary affirmative action program for employment of minorities. These two cases were not well received by industry or unions and raised considerable consternation and constitutional concerns regarding judicially supported preferential treatment in the employment arena.

The Taxman case presented issues that could have served to curtail or even end such constitutionally controversial preferential treatment affirmative action rulings making the matter ripe for Supreme Court review. But the night preceding oral argument before the U.S. Supreme Court, the parties settled (plaintiff was paid close to one-half million dollars to do so); the settlement agreement denied to the court the opportunity to have its final say in the matter of preferential affirmative action as there was no longer a case and controversy. To date, no other case involving the issue of voluntary affirmative action programs in employment has reached the U.S. Supreme Court and thus the two controversial decisions stand. Recently the case of Coalition For Fair Lumber Imports Executive Comm. v. U.S., presented important questions regarding the constitutionality of issues of jurisdiction and non-arbitrability, but the case never reached the Supreme Court because the parties settled the matter.

There is one final note regarding the case and controversy requirement. As will be discussed more fully in Part IV, the Supreme Court itself has removed matters from judicial consideration by its embracement of the practice of arbitration in civil disputes and by its decisions limiting litigation.

E. Check #5: Supreme Court Reversal of Prior Decision

109 Supra, note 18 at 2. (Holder)
113 Supra, note 110.
Of course, Supreme Court reversals of previous decisions are instruments in checking the power of judicial review. For example, in *Plessy v. Ferguson*, the U.S. Supreme Court upheld state-sponsored segregation stating that such did not violate the equal protection guarantees of the Fourteenth Amendment to the U.S. Constitution. *Plessy* was overruled by *Brown v. Board of Education*, which declared that state laws creating separate but equal schools based on race violated the Fourteenth Amendment and were unconstitutional. This ruling paved the way for integration and the civil rights movement. The court then reaffirmed the reversal of *Plessy* in *Browder v. Gayle*, which invalidated all state racial segregation laws known as Jim Crow laws or Black Codes.

Even before the *Plessy* decision, the high court had invalidated the 1883 Civil Rights Statute in the *Civil Rights Cases*, holding that Congress had no power under the U.S. Constitution to enact a statute controlling private discriminatory conduct. The court reversed itself in *Heart of Atlanta Motel v. U.S.*, and held that Congress did have the constitutional power to enact a Civil Rights Statute to regulate private discriminatory conduct that affected interstate commerce.

In the case of *Erie Railroad v Tompkins*, the U.S. Supreme Court overruled one of its previously decided cases. In the *Swift* case, the Court held that a federal court exercising jurisdiction over a controversy based upon diversity of citizenship needed only to apply state statutory law but not state common law to resolve the underlying disputes. In *Swift* the Court stated that the decisions of courts hardly constitute laws; they are at most only evidence of what laws are. The laws of the state were understood to mean the rules and enactments promulgated by the legislative authority, or long established by local customs having the force of law. In *Erie*, the Court reversed itself by holding that federal courts do not have the power to create federal common law as this gives federal courts powers not granted in the Constitution. The principle of states’ rights was thereby reinforced.

In the cases of *Hammer v. Dagenhart* and *Adkins v. Children’s Hospital*, the Supreme Court invalidated a federal child labor law and a minimum wage law as violations of the due process clause of the Fifth Amendment. After extensive judicial jockeying on the issue concerning these types of social regulations at both the state and federal levels, Congress enacted the Fair Labor Standard Act imposing minimum wage provisions, and the Court upheld *U.S. v. Darby*. The U.S. Supreme Court held in *Bowers v. Hardwick*, that a state statute criminalizing sodomy was not unconstitutional. The Court reversed itself in *Lawrence et al. v. Texas*, and held that

118 *Civil Rights Cases*, 109 U.S. 3 (1883).
119 *Supra*, note 70. (Heart of Atlanta)
120 *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).
121 *Swift v. Tyson*, 41 U.S. 1 (1842).
125 *U.S. v. Darby*, 310 U.S. 100 (1941).
state statutes making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violate the due process clause of the Fourteenth Amendment of the U.S. Constitution.

The U.S. Supreme Court held in the cases of Austin v. Michigan Chamber of Commerce128 and McConnell v. Federal Election Commission,129 that a federal statute (Bipartisan Campaign Reform Act) which prohibited corporations and unions from funding “electioneering” and “advocacy candidate” speech, was not unconstitutional. The Court reversed itself in Citizens United v. FEC,130 and overruled Austin and the part of the McConnell decisions regarding corporate expenditures, and held that the First Amendment of the U.S. Constitution prohibited such a statutory ban on free speech.

It is evident from the selected cases that an important check on the power of judicial review is the ability of the U.S. Supreme Court to reverse itself involving constitutional interpretation. Indeed, in Burnet v. Coronado Oil & Gas Co.,131 Justice Brandeis listed fifty occasions in which the Court had as of 1932 overturned its own precedents in order to support his dissenting opinion, stating that, “But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function. The reasons why this court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting the Constitution.”132

F. Check #6: Presidential Appointments

The U.S. Constitution states that the President shall have the power to “nominate, and by and with the advice and consent of the Senate, shall appoint … judges of the Supreme Court……”133 A study of federal judicial appointments, with the growing political nature of such appointments, confirms that the ability of the President to appoint federal judges serves as a check on judicial power. The appointment process provides certain guarantees that the judiciary will to some degree be in accord with certain political group. In return, the process gives the other political group rationale to support the judiciary that it put into place. In order for judicial review to remain robust, there needs to be this correlating assurance that the judiciary will provide decisions that reflect the policies of those who put them in office.134

Furthermore, in the absence of a uniform coalition among political factions, it is often prudent for elected officials to allow the judiciary to decide public policy because “the establishment and

131 Burnet Coronado Oil & Gas Co., 285 U.S. 393 (1932).
132 Id., Brandeis dissent.
133 CONST. art III.
134 Keith E. Whittington, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY, 18 (2007).
maintenance of judicial review is a way of delegating some kinds of political decisions to a relatively politically insulated institution.”

At times when political parties are in unison regarding political agendas, the appointment of federal judges allows a judiciary more amenable to the economic or liberal policies of a particular faction so that the decisions of the Supreme Court will provide the structure within which lower courts will function.

However, appointments made during the tenure of one political party often work to disadvantage the agendas of an opposing party when it assumes political offices. When this happens, there have been movements by President’s to increase the number of Supreme Court justices. Court packing schemes have failed, yet the day may come when such succeed.

Opposition to judicial appointments occurred early in our country’s history. After the 1800 Presidential election, President John Adams as a lame-duck president of the Federalist party stacked the courts by the appointment of John Marshall as chief judge, and the Federalist Congress enacted the 1801 Judiciary Act thereby creating lower courts with numerous positions for the lame-duck President to fill. The newly elected President Thomas Jefferson loathed the entire situation and orchestrated “impeachment strategy” of Supreme Court justices and successfully sponsored legislation to negate the 1801 Judiciary Act. This historical jostling for power resulted in an affirmation of the concept of judicial review but established a caveat regarding judicial appointments.

The current make-up of the Supreme Court, with its conservative bent and the cases it has recently addressed, illustrates the influence of executive appointments in the policies established by the courts. And thus, the pendulum swings. For all of these reasons, the power of presidential appointment of federal judges serves as a check on the power of judicial review. In addition, there is nothing magic about the number 9 for justices on the U.S. Supreme. The number as been set by Congressional enactments and has been changed by statute six times throughout history. In 1789, the number of justices was set at 6; in 1807, it was set at 7; in 1837, it was set at 9; in 1863, changed to 10; in 1866, again changed to 7; and in 1869, changed to the current number of justices which is 9. It could be changed again.

G. Check #7: Congressional Funding

In general, Congress and state legislative bodies have been generous in their support of the judicial branch of government. Congress enacted legislation to create inferior federal courts (Circuit Court of Appeals Act of 1891). “This legislation was designed to give the federal judiciary sufficient personnel and resources to handle the additional duties…” created by it and earlier legislation.

137 Supra, note 4, and Mark A. Graber & Michael Perhac, Marbury Versus Madison: Documents and Commentary (2002).
138 Supra, note 888 at 897. (Grove)
Only recently have state courts begun to curtail the budgets of the judicial branch, by eliminating the number of state judges. At the federal level, the mere fact that so many lower federal court vacancies continue to exist suggests a fiscal savings. However, to date, there is no evidence that Congress or any state legislative body has cut judicial funding solely for the purpose of restricting the operations of the courts. But, if ever such were to happen, it certainly would operate as a check on the power of the judiciary.

H. Check #8: Public Opinion

We speak; courts hear us; courts listen and then, courts react. The U.S. Supreme Court chambers are not hermetically sealed … the building is porous and the voices come through, sometimes loud and clear. Public opinion serves as a check on the power of judicial review.

No better recent example can be given than when the Ninth Circuit Court of Appeals in the case of Newdow v. U.S. Congress,139 declared that the words, “under God” inserted into the Pledge of Allegiance (by a 1954 Congressional Act) made any mandatory recitation of the pledge unconstitutional in violation of the First Amendment. The Country exploded. Congress condemned the ruling. The Supreme Court heard the clamor. Thus, when the case reached the Supreme Court, the court defused the issue by holding that the plaintiff lacked standing to sue. Chief Justice William Rehnquist, in his concurring opinion observed that the court relied on a “standing principal in order to avoid reaching the merits of the Constitutional claim.”140 The reality is that the people cried out, and the Supreme Court justices heard the public outcry. They listened and reacted.

History reflects numerous examples of when public opinion affects judicial opinions. During Franklin Delano Roosevelt’s [FDR] reign as President, the executive branch sponsored and Congress enacted what came to be called the New Deal. But, as of 1936, “of the ten new deal laws that had come before the Supreme Court, the justices had overturned eight.”141 So FDR sponsored legislation, which he referred to as “judicial reorganization,” but which commonly came to be known as “the court packing scheme.” But FDR’s hope of affecting the power of judicial review by enlarging the court and appointing “his justices” backfired. Many in the country reacted to what appeared to be an attempt to erode judicial power. The reaction among the vocal forces was not really a check on the power of judicial review but rather a reinforcement of the power. “Asinine… liar… treason…rubber stamp,” were descriptions ascribed toward the scheme by the elite, the educated, the wealthy and the professionals who wrote their comments on linen stationary with embossed letter heads.142 To them, the scheme was considered an assault on the judiciary.

On the other hand, the common man who would most benefit from the New Deal legislation and who blamed the Supreme Court for invalidating it, supported the President in his scheme. The multitude of letters received at the White House expressed the sentiment that “Any thing you do

140 Id.
142 Id. at 123.
for the poor and laboring class man will be apreated. (sic) I don’t no (sic) what people would off [sic] done if it had not been for Franklin D. Roosevelt.”\textsuperscript{143} Pollsters, such as George Gallup and Elmo Roper compiled data demonstrating the growing public support for the scheme and the growing resentment towards the court.

Congress did not enact the “judicial reorganization” act. On July 22, 1937, in a vote before Congress, the President lost, maybe. But the U.S. Supreme Court, by that time, had become superbly aware of the mood of the country. The Court recognized that the court-packing scheme, though defeated at this point, could someday become a reality. The New Deal legislation was eventually approved by the court beginning with validation of the Wagner Act, in \textit{NLRB v. Jones and Laughlin Steel Corp.}\textsuperscript{144} followed by approval of the Social Security Act in \textit{Steward Machine Co. v. Davis, Collector of Internal Revenue Service}.\textsuperscript{145} “The unelected court was remote from the people, but it was not beyond their reach.”\textsuperscript{146} Public opinion had mattered. The people had been heard. Judicial review had seen its eighth check.

IV. Limitation on Litigation Resulting in Abrogation of Judicial Review

The above recitation leads to discussion of a development unique in the annals of jurisprudence, namely the limitation on litigation initiated by the Supreme Court itself. At present, “justices’ views on major constitutional issues such as state sovereignty and substantive due process, give way to the Justices’ desire to curb litigation.”\textsuperscript{147} The troublesome issue about the court’s newest position is, as Justice Stone stated in his dissent in the \textit{U.S. v. Butler} case, “the only check upon our exercise of power is our own sense of self restraint.”\textsuperscript{148} What then are the options when the Supreme Court itself pronounces principles and statutory interpretations that arguable infringe on constitutional guarantees?

The U.S. Constitution, Seventh Amendment states, “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved….“\textsuperscript{149} The right to jury trial applies to historic common law actions and to statutory actions having a common law base.\textsuperscript{150} In addition, the Fifth and Fourteenth Amendments are guarantees of the due process of law when court proceedings are afforded to litigants. “A legal cause of action has traditionally been construed as a property right that is protected by the due process clause.”\textsuperscript{151} In

\begin{itemize}
\item \textsuperscript{143} \textit{Id.} at 114.
\item \textsuperscript{144} \textit{NLRB v. Jones and Laughlin Steel Corp.}, 301 U.S. 1 (1935).
\item \textsuperscript{145} \textit{Steward Machine v. Davis, Collector of Internal Revenue Service}, 301 U.S. 548 (1937).
\item \textsuperscript{146} \textit{Supra}, note 141 at 83. (Solomon)
\item \textsuperscript{147} Scott A. Moss, \textit{Judicial Hostility to Litigation and How it Impairs Legal Accountability for Corporations and Other Defendants}, \textit{American Constitutional Society} (2010), available at www.acslaw.org/notes/16026.
\item \textsuperscript{148} \textit{Supra}, note 19 at 78-79. (Butler)
\item \textsuperscript{149} U.S. Const. amend. VII.
\item \textsuperscript{150} See, Teamsters and Helpers Local no. 391 v. Terry, 494 U.S. 558 (1990).
\end{itemize}
Logan v. Zimmerman Brush Co., the Supreme Court stated that “the hallmark of property is an individual entitlement grounded in state law, which cannot be removed except for cause.” Furthermore, the Supreme Court has held that the litigation of private rights requires a jury trial and a judge protected by Article III. Litigants have a right under the due process guarantees to have access to court. The Court recently stated that litigation provides “informed public participation that is a cornerstone of democratic society” as protected under the first amendment petition clause.

If such constitutional guarantees are solidly in place as pronounced by courts, then serious issues are raised by limitation on litigation that denies access to courts. And yet, it appears that the Supreme Court has adopted an agenda to limit litigation and thereby limit judicial review of many matters. The abrogation of the power of judicial review can best be seen in the expansion and enforcement of contractual arbitration clauses by courts, particularly the U.S. Supreme Court, relying primarily on the position that all of these protected rights are waived by parties when they voluntarily enter into agreements to avoid litigation and pursue private arbitration. Arbitration clauses in contracts are enforced through private arbitration processes and are not to be confused with court ordered arbitration that is a process that remains under the umbrella of the court.

Historically, the court was reluctant to enforce arbitration clauses and developed a “non-arbitrability doctrine,” which essentially opposed “jurisdictional ouster” on the basis that arbitration agreements were contrary to public policy. In Wilko v. Swan, the U.S. Supreme Court raised the concern that arbitrators’ awards “may be made without explanation of reasons and without a complete record of their proceedings,” thereby denying all public participation and examination of proffered evidence, finding of facts, statutory interpretation, precedents, and public policy considerations.

The right to sue in court is a constitutional guarantee of the Seventh Amendment. Public courts provide the best forum to challenge public illegality. Such lawsuits brought into public view allow a litigant to serve as a “private attorney general,” vindicating a policy that Congress considered of the highest priority.

153 Id.
159 Id. at 436.
160 Because of these expressed concerns, the Court early on held in Alexander v. Gardner-Denver Co., 415 U.S. 36, 99 (1974) that employers could not use arbitration agreements so as to avoid federal court discrimination lawsuits. In that case, the Court opined that court actions provide “the private litigant not only to redress his own injury but also vindicates the important congressional policy against discriminatory practices.”
Constitutional right to a jury trial in common law claim and the First Amendment right for open judicial proceedings and judicial documents.

None of these protections are available in the absence of open judicial processes. Arbitration undermines access to a judicial forum guaranteed by Article III to the U.S. Constitution.

Arbitration carries few procedural protections. Despite this quality, the result of the dispute – the arbitration award – carries with it a high degree of judicial enforceability. Indeed, this presumption of enforceability and the limited degree of judicial review representing some of the defining features of arbitration. Arbitral awards are subject to far less judicial scrutiny than a civil court judgment or an administrative determination, despite the greater degree of procedural protections in those forms of dispute resolution.162

Yet, what was once the court’s hostility towards arbitration has now become the court’s hostility to litigation. Focusing first on the issue of arbitration, recent decisions demonstrate a swing from the Supreme Court’s original opposition to arbitration to a position of total embracement of the practice.163 Thus, a public forum to air disputes can be avoided by forcing parties to present such claims in private arbitration processes. Constitutional guarantees are ignored with this changed view toward limitation of litigation relying on the basis that parties, by agreeing to arbitration, have waived their personal right to a judicial forum guaranteed by Article III even though this article says nothing about a “personal” right. The Court determined that the FAA abrogated any state legislative or judicial hostility towards arbitration.164

164 In Southland Corp. v. Keating, 465 U.S. 1 (1984), the Court concluded that the FAA abrogated any state legislative or judicial hostility towards arbitration. Relying on its own interpretation of the Constitutional principles of the commerce clause and supremacy clauses, the Court invoked the preemption doctrine in its interpretation and application of the FAA. See, Lawrence Waddington, Federalizing Arbitration, Sept. Los Angeles Lawyer 30-36 (2003). No longer could a state mandate that the courts resolve disputes regarding enforceability of arbitration clauses. The Supreme Court stated that arbitration “offered an equally valid alternative to litigation in state and federal courts.” “By forcing claims out of the courts, Businesses have successfully opted out of the reams of case law protecting plaintiffs’ rights to various litigation procedures that arbitration disallows, such as the right to question key witnesses at pretrial depositions, common law and constitutional rights to public hearings and court filings, and statutory and constitutional rights to jury trials.” Supra, note 147 at 15.
Where constitutional rights are involved, the tilt towards arbitration and the limitation of litigation denies to courts the power of judicial review.

History reflects that “in 1985, the court had rejected ‘the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims … (Dean Witter Reynolds v. Byrd, 1985). But, by 2011, the Court read bilateral arbitration’s perceived advantages over adjudication to have been part of the 1925 statute agenda. Arbitration’s attributed utilities – speed, low cost, and informality – became more important as the Court lost interest in power balances and in the idea that enforcement required negotiation and actual consent.”165 Today, arbitration clauses are the norm in employment and consumer contracts.

In the recent U.S. Supreme Court case of *AT&T Mobility LLC v. Concepcion*,166 the Court struck down a California state Supreme Court decision that ruled an arbitration clause barring class actions was unconscionable under state law.167 The dissent in *AT&T Mobility* identified an important principle missed by the majority opinion, i.e. the constitutional principle of state sovereignty.

By using the words “save upon such grounds as exist at law or in equity for the revocation of any contract,” *Congress reiterated a basic federal idea that has long informed the nature of this Nation’s laws. * * * Here, recognition of that federalist ideal, embodied in specific language in this particular statute, should lead us to uphold California’s law, not to strike it down. We do not honor federalist principles in their breach.168

It would seem that the *AT&T Mobility* case has now removed the courts from conducting review of arbitration clauses for unconscionability and has essentially made ineffective the earlier case

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[167] The Court held that under the FAA, California must enforce arbitration agreements even if the agreement requires that consumer complaints be arbitrated individually, not as a part of a class action lawsuit.167 It held that California’s test to determine the unconscionability of an arbitration clause was preempted by the Federal Arbitration Act even if the underlying contract was potentially fraudulent or was related to false advertising. The Court found that the FAA preempted the state law because the state law singled out arbitration agreements and state courts were more likely to find an arbitration agreement unconscionable versus other contracts. The Court reasoned, “[a]rbitration is a matter of contract, and the FAA requires courts to honor parties’ expectations.” Continuing in its reasoning, “[t]he overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” The Court reasoned that California’s statute that contained the no-class-waiver rule does not apply to "any contract" because, even if it does apply to any contract, it impedes the purpose of the FAA.

[168] *Supra, note 167*, Breyer dissent.
Buckeye Check Cashing v. Cardenga,\textsuperscript{169} which held that if a question arose as to the validity of an arbitration clause in a contract a court be empowered to resolve the issue of validity of the arbitration agreement.\textsuperscript{170}

Left unchecked, arbitration will morph into universal, private and confidential dispute resolution processes such as has occurred in the Delaware Chancery Court with the adoption of Chancery Rules 96, 97 and 98 ordered by the court on January 5, 2010. By virtue of these court orders, Delaware state Chancery judges are allowed to serve as private arbiters with fees assessed by the register in Chancery. “Arbitration hearings are private proceedings that only parties and their representatives may attend, unless all parties agree otherwise.”\textsuperscript{171}

The process has been challenged in a lawsuit pending in the Pennsylvania Federal District Court, Delaware Coalition for Open Government Inc. v. The Honorable Leo E. Stine, et. al, The Delaware Court of Chancery and the State of Delaware, before U.S. District Court Judge Mary A. McLaughlin.\textsuperscript{172} The plaintiffs argue that the process violates the First and Fourteenth Amendments and the Civil Rights Act of 1871, because of its secret and confidential nature. The


\textsuperscript{170} See, Brown v. Genesis Healthcare, ___ S.E.2d ___ (W. Va. 2011), Since this latest federal arbitration case, lower state courts have distinguished the Court’s opinion in \textit{AT&T Mobility} in order basically to ignore it. As recently as June of 2011, the West Virginia Supreme Court of Appeals cited West Virginia’s state Constitution, which preserves the right of the people to a jury trial with language identical to that of the Seventh Amendment of the Constitution. The State Court also criticized the "tendentious reasoning" used by the U.S. Supreme Court in its rulings to turn the FAA into a substantive law that preempts most state law and precludes litigation. The West Virginia court stated that “Congress did not intend for arbitration agreement, adopted prior to an occurrence of negligence that results in personal injury or wrongful death, and which require questions about the negligence be submitted to arbitration, to be governed by the [FAA]. In essence, our Constitution recognizes that factual disputes should be decided by juries of law citizens rather than by paid, professional fact-finders (arbitrators) who may be more interested in their fees than the disputes at hand.”

However, in \textit{Marmet Health Care Center, Inc. v. Brown}, 565 U.S. ___ (2012), the U.S. Supreme Court overruled the West Virginia court decisions and reinforced its earlier decision that state and federal courts must enforce the FAA with respect to all arbitration agreements. The Court held that the West Virginia courts disregarded precedent in this area. It further held that there were no exceptions for personal injury or wrongful death claims, “[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA” (Marmet, 2012). In other words, arbitration replaces and precludes litigation. The Supreme Court remanded the combined cases back to the West Virginia courts to consider whether the arbitration clauses at issue are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA (\textit{Brown v. Genesis Health}). The court concluded that there was not enough evidence to determine the unconscionability of the agreement so it was remanded to the state Circuit Court for the taking of evidence on this issue.

\textsuperscript{171} \textit{Del. Chan. Ct. R.} 98.

\textsuperscript{172} Delaware Coalition for Open Government Inc. v. The Honorable Leo E. Stine, et. al, The Delaware Court of Chancery and the State of Delaware, No.11-1015 (Penn. 2011).
complaint states that the newly adopted court rules “deny plaintiffs, and the general public, their right of access to judicial proceedings and records. Although the statute and rules call the procedure ‘arbitration,’ it is really litigation under another name.”173 Defense argues that the process generates revenue for the state and if the order is overturned then disputants will simply go elsewhere for private arbitration.

The Reporters Committee for Freedom of the Press and five news organizations filed an *amicus curiae* brief in support of plaintiffs’ complaint. It states that “amici have a strong interest in upholding the public’s right to access, monitor and report on the proceedings of this nation’s court system” and that the newly adopted court rules raise a significant concern “to which the first amendment or common law right of access attaches.” In addition, “Public access to court proceedings and records reassures the public that its government systems are working properly and correctly and enhances public knowledge and understanding of the court system.”174 As stated by the Seventh Circuit Court of Appeals:

> Judicial proceedings are public rather than private *property* (*emphasis added*), and the third-party effects that justify the subsidy of the judicial system also justify making records and decisions as open as possible. What happens in the halls of government is presumptively public business, Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision more like fiat.”175

As U.S. District Court Judge McLaughlin said of the matter, “You have a judge, a Chancery judge, paid for by the taxpayers in a closed courtroom dealing with these things… It’s difficult for me.”176 Arguments were heard in February of 2012 and no decision has been reached at the time of this article.

V. Conclusion

The *AT&T Mobility v. Concepcion*177 case and its predecessors and the Delaware Chancery Rules fly in the face of the power of judicial review. The Supreme Court, in pronouncing these opinions, and the state Chancery Courts in promulgating these court rules, have essentially violated the U.S. Constitutional guarantees found in the supremacy clause, Tenth Amendment, Seventh Amendment and due process guarantees of the Fifth and Fourteenth Amendments. Congress must address this constitutional quagmire.

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173 *Id.* complaint.
177 *Supra, note 167.*
What are the options when the Supreme Court itself pronounces principles and statutory interpretations that arguably infringe on constitutional guarantees? What should be done about a trail of Supreme Court cases that appear to have an unconstitutional bent either by limiting litigation or in some other fashion denying constitutional guarantees such as First and Fourteenth Amendments protections?

Where a court decision involves an arguably unconstitutional statutory interpretation, such as the recent decision regarding the FAA, the quickest solution is found in the check on the power of judicial review by seeking legislative action for statutory revisions. Recently, members of Congress have sponsored the Arbitration Fairness Act, which would amend the FAA by including a provision prohibiting pre-dispute arbitration clauses in consumer and employment contracts. If this bill were to be enacted, the concerns regarding contracts of adhesion would be eliminated and we would return to arbitration being a voluntary process entered into by the parties only after a dispute had arisen. Along with this possibility, the newly enacted Dodd-Frank Wall Street Reform and Consumer Protection Act, could lead to regulations promulgated by the Consumer Financial Protection Bureau (the administrative agency created by the statute) which would curb arbitration practices adversely affecting consumers. If such legislation were enacted, the effect of the recent Supreme Court’s interpretation of the FAA would be reduced. Until such time, AT&T Mobility and its prodigies that limit court oversight, appear to remain intact.

There is much at stake in the matter of limitation on litigation resulting in abrogation of judicial review as acknowledged in the following insight:

> If eighteenth-century constitutional entitlements to open courts are to remain relevant to ordinary litigants, the question is not whether to aggregate, subsidize, and reconfigure process but how to do so “fairly” in terms of what groups, which claims, by means of which procedures, and off erring of remedies. But without public disclosures and oversight of dispute resolution – in and out of court, single file and aggregated – one has no way to know whether fairness is either a goal or a result.  

The greater concern arises when a court decision provides a questionable constitutional interpretation or which arguably infringes on constitutional guarantees; in such a case, options to override court use of power appear limited to a constitutional amendment. Throughout the course of history there have been attempts to curtail the courts’ power of judicial review. Thomas Jefferson sought to exert executive influence over courts and currently numerous scholars have enlivened his “impeachment strategy.” It has been noted that the Constitution states, “The judges, both of the supreme and inferior Courts, shall hold their offices during good Behavior.” Thomas Jefferson opined that if the courts were left unchecked, then the

180 Supra, note 167.
181 Supra, note 166 at 79-80. (Resnick)
182 U.S. Const. art III, §1.
Constitution would become “a mere thing of wax in the hands of the judiciary which they may twist and shape into any form they please.”\(^{183}\)

Allowing the Court to enlarge its own sphere of power beyond what the constitution authorizes, permitting the Court to usurp the powers of Congress, and tolerating the Court’s disregard of constitutional separation of powers moves America further form being a representative republic and ever closer towards the oligarchy against which Jefferson warned…. As citizens, we need to educate ourselves on the proper use of judicial impeachment, and then we need to educate our representatives, reminding them of the need for judicial reform and alerting them to those judges showing a pattern of abuse, the time for encouraging judicial accountability is once again ripe.\(^{184}\)

However, there has been forceful reaction to the impeachment strategy from national and state Bar Associations, from law schools, from Congressmen and from justices. In response to that reaction, it was pointed out by the impeachment theorists that they never “… advocated impeaching judges because they believe that the judge’s opinion was politically unpopular or because they personally disagreed with them. What they have advocated is impeaching judges for rendering unconstitutional opinions, usurping legislative authority and introducing arbitrary power.”\(^{185}\)

Implementation of an “impeachment strategy” would become the ninth check on the power of judicial review. As stated by the Supreme Court itself, “Our Constitution is a covenant running from the first generation of Americans to us and then to future generations.”\(^{186}\) As such, we the people should expect nothing less than that courts follow the covenant and adhere to constitutional guarantees on our behalf.


\(^{184}\) Id. at 4-5. (Barton)


RARE SIMULTANEOUS BUBBLE COLLAPSES AND SARBANES-OXLEY: FRAUD, TECHNOLOGICAL OBsolescence AND HERD MENTALITY, A RECIPE FOR ECONOMIC DISASTER

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ABSTRACT

This paper is a critical analysis and review of the conditions and practices of the late 20th century that resulted in a spectacular end of the millennium financial meltdown and lead to the Sarbanes-Oxley Act [SOX]. This paper is not a detail breakdown and discussion of the elements of SOX as there are literally thousands of papers which do this in detail. Rather this paper looks at SOX as a continuation of a practice in this country of establishing federal corporate regulations in response to a period of very specific business activities that usually ended in an economic market crash amid cries of fraud and uncontrolled capitalism.

A. INTRODUCTION

This paper is a critical analysis and review of the conditions and practices of the late 20th century that resulted in a spectacular end of the millennium financial meltdown and lead to the Sarbanes-Oxley Act [SOX]. This paper is not a breakdown or discussion of the elements of SOX as there are literally thousands of papers which do this in detail. Rather this paper looks at SOX as a continuation of a practice in this country of establishing federal corporate regulations in response to a period of very specific business activities that usually ended in an economic market crash amid cries of fraud and uncontrolled capitalism. This paper first looks at the history of prior Federal corporate regulation under comparable circumstances, and then in this light, exams the events which lead to the passage of SOX with a critical eye on the underlying conditions that lead to SOX. Finally the paper raises critical questions as to the necessity of the law as compared to earlier legislation.

SOX was passed to regulate the financial and accounting reporting practices of public corporations. It was enacted as a result of a wave of financial irregularities that occurred in the late 1990s. These irregularities reinvigorated the debate in this country as to the level and proper scope of federal regulations of corporations which has been ongoing in the United States [U.S.] since the latter half of the 19th century, and starting at time when there were almost no corporate regulation at the national level. However, the depressions and scandals of the late 19th century Robber Barons began a trend in which negative events gave the federal government the support it needed to pass legislation aimed at the perceived corporate causes of the contemporary problems of the time.

The market collapse which culminated at the beginning of the current millennium ultimately focused on the accounting profession, but there were multiple causes for this collapse that went far beyond just crooked accounting. The first was the premature and unexpected collapse of both the fiber optics market and the telecommunication industry which was caused in large part by optimistic
overbuilding at the very time that wireless technology, free cell phone calling and email became dominate; and finally by the market realization that it had grossly overvalued the true market value of the booming dotcom industry. All of which occurred at about the same time and lead to a very rare and simultaneous bubble collapse in all of these areas, leaving investors and markets both stunned and shocked at having to deal with massive financial loses in securities which lost much and sometimes all of their total value, seemingly overnight. Investor concerns and the resulting loss of confidence are commonly cited as major factors in the stock market slump in 2002.

B. Background

There have been at least five major identifiable periods in the failure of corporate governance that have negatively affected the economic markets in U.S. financial history. The first was the era of the robber barons, a period when great monopolies controlled prices and production under such figures as Jay Gould, Andrew Carnegie, John Rockefeller, or Gustavus Swift. This period ran from the end of the Civil War until 1893, and ended as a result of a combination of scandal, and the stock market crash of 1893. This finally lead to the enforcement of the Sherman act, and to the passage of the Clayton act.

The second period began when the stock markets exploded during the 1920s and the buying of stock became as much of a cultural fad as hot jazz or the Charleston. Companies started to use holding companies to sell shares to a stock hungry general public, with company profits coming primarily from the sale of the stock, often with no real assets or earnings. Such practices allowed the creation of paper


2 Id.

3 M. Josephson, ROBBER BARRONS, at 387-388 (1932).

4 Id. at 121-141.

5 Id. at 368-72.

6 Id. at 45-50.

7 Id. at 284-5.

8 Id. at 449-50.


12 Id.
empires by such figures as Samuel Insull of Chicago, Mantis Van Sweregen and his brother Oris of Cleveland and A. P. Gianini of California. This kind of corporate misreporting of assets and their values help lead to a mountain of oversold securities to the public, and contributed greatly to the crash of 1929. The governmental response to these and similarly style information and valuation stock frauds was the enactment of the Securities Acts of 1933 and 1934.

The third period began following World War II when business schools began to teach the advantages of the conglomerate or corporate diversification. This was a popular business school theory that had fallen into disuse. The concept was to aid companies subject to regular periodic business cycles. The theory was that if a company expanded into an area with a stable or a different business cycle, it could use this difference to offset and protect their cash flow during the low point of their primary business cycle. Crafty business owners quickly realized that such combinations did not come under the strong antitrust laws of the time as there was no concentration of power or market share in any one field. This lead to a wave of none monopolistic takeovers. Beginning in the early 1950s, this

13 Id. at 36-43.
14 Id. at 43-48.
15 Id. at 48-79.
16 Id. at 130-136.
17 Id. at 80-105.
19 Securities and Exchange Act of 1934, 15 U.S.C. sec. 78 et seq. Also see supra note 11 at 173-176, this Act was modeled on the provisions of the old British Companies Act.
21 Id.
22 Id.
23 Id.
24 Josephson, supra note 11 at p. 347-8.
practice reached its zenith in the 1960s.\textsuperscript{26} The only rule governing this period of expansion was never to seize more than one company in any specific field.\textsuperscript{27}

During this period, a practice developed of buying a company with the stock of the raiding company. This soon began to cause problems as unscrupulous raiders would tender shares that were greatly and sometimes fraudulently inflated in value.\textsuperscript{28} The takeover usually began with an offer to buy shares of the target company, called a tender offer, and usually was on very short notice, for a limited time, and only for a limited number of shares, i.e. enough shares to gain control of the company. \textsuperscript{29} These were bought at what appeared to be a very high price. This forced shareholders to decide quickly whether to sell for the premium stock price, or risk being left out of the deal altogether when the raider stopped buying after acquiring control of the company. \textsuperscript{30} This left little time for the targeted company shareholders to investigate the value of the raiders stock being used to buy their stock or the integrity of the raider making the tender offer. This often resulted in excellent companies with solid stock being sold for bad or very weak stock, \textsuperscript{31} and sometimes caused a good company to be taken over by a thorough fraud or an incompetent. \textsuperscript{32}

These structural defects in the takeover process were apparent and the federal government responded by passing the Williams Act in 1968. \textsuperscript{33} This act provided shareholders with both information about the purchaser, and time to consider the offer. \textsuperscript{34} This prevented pressure on shareholders to sell their stock quickly rather than exam what was being offered in exchange for their shares. \textsuperscript{35} Still this was not enough to prevent the stock market crash of 1970.\textsuperscript{36}

\textsuperscript{26} J. Brooks, THE GO-GO YEARS, (1973) at 127-149.

\textsuperscript{27} Id. at 150-181. Thus a small nondescript auto parts company under Charles Bludhorn grew into the sprawling Gulf-Western corporation composed of companies ranging from auto parts to motion pictures.

\textsuperscript{28} Johnson, supra note 25 at 306.

\textsuperscript{29} Booth, supra note 20 at 1640-2.

\textsuperscript{30} Id.


\textsuperscript{32} Brooks, supra note 26 at 165-81.

\textsuperscript{33} Williams Act. Securities Exchange Act of 1934, Secs. 13(d)(1), 14(d)(1,5-7), (e) as amended 15 U.S.C.A. Secs. 78m(d)(1),78n(d)(1, 5-7),(e).

\textsuperscript{34} Baysinger supra note 31, at 1261; Johnson, supra note 10 at 305: George C. Hook, What is Wrong With Takeover Legislation, 8 N. ILL. U. L. REV. 293 (1988) at 296.

\textsuperscript{35} Id.

\textsuperscript{36} Brooks, supra note 26 at 34.
The fourth period started in the 1970s and lasted into the late 1980s. It began when the expansion of international trade within the U.S. caused a rethinking of the U.S. monopoly laws. With competing products arriving from all over the world, the fact that there might be only one U.S. company in a particular industry, no longer automatically lead to monopoly prices. The government’s new position was that the U.S. would have just as much market competition with one or two large companies as with a large number of artificially small ones as a result of the new international competitors in the markets. Thus began a new period of company consolidation not seen since the 1880s. The problems of this period did not come from a rise in takeovers, but from the financing mechanism of those takeovers. This was the period of the high yield-high risk bonds, or “junk bonds”. This lead to the same critical flaw which had plagued and then help doom the market speculations of the 1920s and 1960s, that is, the buying of a corporation essentially on overblown credit. Initially, the deals were successful, but each later deal became progressively riskier as the consolidations got larger and more speculative. This occurred at the very same time that the cash flow of many of these newly formed companies proved to be insufficient to meet their obligations. The shift in regulatory policy by the Reagan administration represented not just conservative philosophy, but a major shift in economic thinking. After 90 years, even liberal scholars criticized U.S. antitrust regulation. Lester Thurow, a liberal and famed MIT economist suggested that in the world of international business, the U.S. abandon antitrust regulation altogether. Antitrust Grow Unpopular, BUS. WK. Jan 12, 1987 at 90.

Id. W. Proxmire, Whats Right And Wrong About Hostile Takeovers? 88 WIS. L. REV 353, (1988) at 357. Mergers in 1986 set an all time U.S. record which was then easily broken the very next year. High yield-high risk bonds or junk bonds, were historically used by small companies unable to raise capital any other way. The rewards were great, but the risk made them unsuitable for cautious investors. Blue-chip companies had neither a reason nor a need for them as money was available from traditional sources. Michael Milken, while a student, became a disciple of the obscure economist W. B. Hickman who wrote "Corporate Bonds Quality and Investor Experience", a book which sold 934 copies. It argued that investors obtained better returns on low-grade issues than high grade. Milken, during the mid-1980's at Drexel Burnham, developed this instrument to its full potential. As the eighties had no recession, one of the two weaknesses of this instrument, its popularity grew and attracted many who ordinarily would have never considered such an investment. The other weakness was the tendency of issuers to continually increase the size and risk of each new issue until the borrower could not maintain the debt service. Both weaknesses were struck in the latter part of the eighties and many of the largest bond issuers developed major debt repayment problems. See WSJ Sept 21, 1989 at B1 col 3; WSJ Nov 3, 1989 C1 at col 3; WSJ Dec. 1, 1989 at A2 col 2; WSJ Dec. 22, 1989 at C16 col 5; WSJ Jan. 11, 1990, at A1 col 6; WSJ Jan 29, 1990 at A3 col 1; WSJ Jan 30, 1990 at C1 col. 4, Time Vol. 135 No. 9 Feb 26, 1990 P46; WSJ Nov 20, 1990 at A1 col 6.

Josephson, supra note 11 at p. 82.

be incapable of supporting the level of debt which these purchase bonds represented which help lead to the market crash of 1987. 43 This destroyed much of the paper value that these companies had created.44

However, unlike the past, the concerns for these problems during this period were less national in scope.45 Instead of nationwide price gouging of the consumer,46 the major damage from these takeovers had been at the local level,47 that is, in the loss of corporate headquarters, civic leaders, charitable contributors, and local jobs.48 Hence for one of the few times since the U.S. began to exert its federal authority in corporate governance, it was the states with their antitakeover statutes that took the lead in regulating the scandals and governance matters of the era.49

C. Pre-Sarbanes Oxley: Prelude to A Millennium Meltdown

As the second millennium came to its close, the market and economic harvest of the financial practices of the 1990s came crashing down. Businesses and investors, large and small had concluded toward the end of the last century that a new age had dawn and they not only adopted the mantra of the times that one must “accept change”, they aggressively pursued it, especially in the areas called the new economy. In many ways it made sense at the the time. Computer technology had matured to the point that they were becoming a part of all thing, much as electricity became a part of all things at the end of the 19th century. The internet had grown into an all-powerful, almost irresistible force, while cell phones

43In 1986, the year before the crash, corporate debt reach $263 billion, the first time in U.S. history that corporate debt exceeded the amount spent on plants and equipment. Proxmire, supra note 39 at 358-9. Also see, supra note 40. see WSJ Ap 20, 1990, A-1, col 6, William Farley built an empire using junk bonds to buy such companies as Fruit of the Loom Co. and Arrow. However a $2.5 billion deal for West Point Pepperel lead to the collapse of his empire as the sale of target assets could not pay the debts incurred. See WSJ, Jan. 11, 1990, A-1, col 6, The collapse of the Cameau Stores was directly attributed to the ease of borrowing through junk bonds, which was not justified by the cash flow of target companies. Also see WSJ, Jl 11, 1990, A-1 col 6, the Interco Co. was brought to collapse after it recapitalized using debt to escape a takeover. See WSJ, Aug., 28, 1990, A-1, col 1, After the largest takeover in airline history, U.S. Air went from being profitability to languishing under a crushing debt load after buying Pacific Southwest Airlines and Piedmont Airlines. Also note WSJ Aug, 27, 1990, A-1, col 1, The nations leading clothier, Hartmarx saw its business drop drastically as many of its wealthy executive customers were no longer spending because of job lost associated with takeovers.


45 Johnson, supra note 25 at 364, Coffee, supra note 25 at 447.

46 Josephson, supra note 11 at 282-4.

47 Barry Baysinger and Henry Butler, Race for the Bottom v. Climb to the Top ALI Project and Uniformity in Corporate Law, 10 J. CORP. L. 431(1985) at 446.


49 Id.
were replacing hard wired telephones. New age, a term being used for the music of the time, quickly came to refer to the new economy, and businesses were being urged to look for ways to profit in this new business age.50

There were no guidepost as to the actual direction in which this new business age would go except the belief that, in the popular saying of the 1990s, “It’s all good”. But bitter experience, would show that what many believed was the way of the future was in reality a deadly illusion, and that these beliefs, ultimately as naive as the “Children’s Crusade”, lead to business and investment practices that had all of the stability of mixing nitrogen and glycerin.

The first of these was a practice that initially made sense, but was later to show obvious flaws, and this was the expansion of the use of performance based compensation for corporate officers.51 This included giving senior officers options to buys large blocks of stock at bargain prices which allowed them to collect dividends in good quarters, and to be sold when share values went up.52 Large and powerful shareholders saw this as a way to encourage management to increase shareholder value because as the manager profited, so too did all investors.53

The presence of the internet added a new element to this investment mixture, momentum investors54 and day traders.55 While the language of investing gives the impression that investors were thoughtful business and financial experts who sought good companies in which to invest capital for both short term and long term gain, this description only loosely applied to momentum players and day traders.56 Casino gamblers would be a far better comparison.57 Long term or even short term gain meant little to them.58 They bet almost exclusively on the number.59 The number was a company’s predicted profit for the next business quarter as reported to the markets and to the SEC as required by the SEC act of 1934.60 If the company hit their number or exceeded it, if only by a penny, the stock soared, shareholders were happy and management was rewarded.61 The momentum players generally cashed in their winnings; i.e. sold these shares and moved to the stocks that were next in line to report. A company


51 Id at 80.

52 Lawrence Mishel, CEO Pay 231 Times Greater Than the Average Worker, Economic Policy Institute, May 3, 2012.

See Appendix 1 for graph showing spike in officer stock options.

53 Lerach supra note 50 at 80.

54 Id.


56 Id.

57 Id.

58 Id.

59 Lerach supra note 50 at 97-99.

60 Id. Also see supra note 19.

61 Id.
that missed its projected number was punished with a sudden and vicious market drop in its share price which had little to do with the actual condition of the company, but reflected the fact that the shareholders were unhappy and thus managers were not rewarded.\textsuperscript{62}

To this market frenzy, the dot.coms were added.\textsuperscript{63} No stocks were more loved or oversold by the market of this era than the dot.coms.\textsuperscript{64} The business and none business world by then knew that computers had arrived as a force and that the internet was the communication media of the future. Dot.com companies brought the two elements together and the “zeitgeist” of the era held that this was the equal to striking gold and this lead investors to excessive risk taking.\textsuperscript{65} “How could you loose?” was the attitude and thus anyone with a website was considered to have found the gateway to the wealth of this new age. Except that no one quite understood how this was to be done, but like the Emperor in the “Emperor’s New Clothes”, no one wanted to show their stupidity by admitting that they had no idea how these companies could ever make money.\textsuperscript{66} So on the blind faith that everyone could not be wrong, they made dot.com companies, any dotcom company, the sought after investment of the age.\textsuperscript{67}

The final and most destructive element added to this toxic brew leading to the end of the millennium market disaster was fiber optics and broadband, universally held at the time to be the future of modern communication. The fiber optics vision proved to be as deadly and irresistible as the song of the sirens and took down or totally destroyed hundreds of companies and governmental entities across the United States with Enron, World Com and Global Crossing as its marquee victims.\textsuperscript{68} At the time, fiber optics was believed to be the tool that would revolutionize communications with its ability to send messages at light speed through cables made of glass fibers.\textsuperscript{69} This not only ensured much faster transmission speeds than possible with normal co-axial copper wire but it had the special added advantage of minimal speed deterioration over distance, unlike copper wire where speed fell away quickly.\textsuperscript{70} Added to these advantages, because fibre optics run under ground or under the ocean, it was not subject to the disruption or destruction from coronal mass ejection from the sun\textsuperscript{71}; collision with

\textsuperscript{62} Id.
\textsuperscript{63} Id at 116.
\textsuperscript{64} Id at 87.
\textsuperscript{66} Lerach supra note 50 at 87.
\textsuperscript{67} Id.
\textsuperscript{68} See Appendix 2 and 3 for a random sample of the thousands of companies both foreign and domestic that were negatively affected by the fiber optics bubble but which did not make major headlines. The news of the time gives the impression that a few large companies collapse solely because of corruption. Not discounting fraud, corruption alone does not cause an entire industry to collapse. This occurs when there is also a systematic flaw, either through a cultural fade or an obsolescence. The fiber optics bubble represented both.
\textsuperscript{69} Fiber Optics Broadband, http://www.fibreopticbroadband.co.uk.
\textsuperscript{70} Id.
\textsuperscript{71} Damon Tabor, Are We Prepared for a Catastrophic Storm? Popular Science http://www.popsci.com/science/article/2011-05/are-we-prepared-catastrophic-solar-stormDuring the so-called Carrington Event in 1859, electrical discharges in the U.S. shocked telegraph operators and set their machines on fire. A CME in 1921 disrupted radio across the East Coast and telephone operations
space debris or asteroids; or human sabotage as are satellites which are the heart of modern wireless communication. The logic of being involved in fiber optics was so clear and obvious that it caused a rush into this area by companies large and small that can only be compared to an early U.S. gold rush. In anticipation for this demand beyond measure, fiber optics networks were built by the millions of miles over land and under the sea.

It was truly a brave new business world not fully understood by even the most knowledgeable business or academic experts, but the unstated assumption was that the market could only go up. Companies stopped following the old business rules and guidelines in the belief that they no longer applied. Financial reporting anomalies were considered acceptable, as the old ways were by then considered not sufficiently modern enough to adequately describe the new economic variables. None realized that they were riding an economic Titanic.

Soon everyone that could get into the act did. Investment bankers were taking public anyone with a website and any tech startup found no lack of investor. Accountants quickly learned that the real money in the new age was not in audits but in other more glamorous services and since no one really understood the new economy anyway, why loose a big fee by being a stickler about antiquated

in most of Europe. In a 2008 National Academy of Sciences report, scientists estimated that a 1921 level storm could knock out 350 transformers on the American grid, leaving 130 million people without electricity. Replacing broken transformers would take a long time because most require up to two years to manufacture.

75 Id, 100 Million miles of cable were laid at a cost of $35 Billion dollars.
76 During the 1990s, 80 year’s worth of material was put into the ground. The Washington Post May 2, 2002 at A1.
78 Id at 30
79 Lerach, supra note 50 at 79, “Over 9,000 new public companies were created by the IPO bom of the 1980s-1990s. Many...were smaller, high tech or bio-tech companies...”.
80 Id.
Audits then became a loss leader, so if the accountant could find a creative way to help the company meet its number, that was considered to be okay. But the pipe dreams of the 1990s collided with the iceberg of reality and it quickly became apparent that the underlying truths of the new economy were the same as the old. Dot.coms made no money, while fiber optics and its sister telecommunications had few customers. Fiber Optics golden age never came, and land wired telecommunications heyday had come and gone. Obsolescence is obsolescence. The stock market lost $7 trillion between 2000-2002, and the IPO boom came to a screeching halt. It was like owning a buggy manufacturing company next to Henry Ford’s new auto company. Regardless of how well, poorly, or fraudulently you kept your books, if your produce became obsolete for whatever reason, you were going bankrupt. All of which lead to the market collapse of 2000.

D. Conclusions: Sarbanes-Oxley: Real Medicine or Placebo?

Congress passed SOX in July of 2002 in the wake of the 2000 market crash. SOX’ stated aim was to improve corporate governance by enhancing the quality of financial reports, promoting audit effectiveness, and the creation of a watchdog agency, the creation of the Public Company Accounting

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82 Lerach, supra note 50 at 100.

83 Id at 111, Between 2000-2002 Companies paid $909 million for audits and $2.65 billion for other services. E.g. Sprint paid Ernst and Young $2.5 million for audit and $63.8 million for other services. G.E. paid KPMG $23.9 million for audit and $79.7 million for other services. J.P. Morgan paid PricewaterhouseCoopers $21.3 million for audit and $84.2 million for other services.

84 Ed & Molly Smith, SARBANES-OXLEY: The Evidence Regarding The Impact Of SOX 404, 29 CARDOZO L. REV. 703 (2007) at 727. Also see; Brian Bergstein, Everything in telecom available for cheap; Fire-sale: Assets can be bought at ridiculous prices, Telegraph Herald at D11, September 22, 2002.

85 Enron is truly the poster child for this era. In December 1999 Enron was the seventh largest corporation in the U.S., it had won multiple awards for its management and innovations. In January 2000, its highly respected CEO Ken Lay announced that Enron was getting into fiber optics. A year later his Empire was in ruins. In spite of the enormous debts incurred by fiber optics, it never brought in a profit. Of Enrons $100 billion dollars of income, fiber optics which was suppose to be a gold mine of equal proportios, help generate $40 billion dollars in debt but only produce $409 million dollars in income. The Washington Post Dec. 2, 2001 at A1, The Washington Post Nov. 12, 2001 Pg. D8. Also see Ribstein, supra note 77 at 10.

86 Smith, supra note 84.


89 Ribstein, supra note 77, Lawmakers and regulators to argue that “Securities markets cannot be trusted to work on their own without strong regulatory support and that new regulation was needed to restore investor confidence”.

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Oversight Board (PCAOB) to regulate the auditing profession, while increasing criminal and civil liability for violations of Securities laws.\textsuperscript{90} It’s most tangible result however was to take over the accounting profession, federalizing the conduct and professionalism of those who produce, certify, audit, analyze, and use public financial information.\textsuperscript{91}

SOX can be summarized as requiring public companies to identify and to monitor conflicts of interest; and in providing incentives and opportunities for those involved with public financial information to become more vigilant and transparent in reporting financial information.\textsuperscript{92}

However, the Act has received mixed responses from the financial community as well as the accounting profession\textsuperscript{93} and has been challenged in court.\textsuperscript{94} Critics say the Act is a patchwork and codified response by Congress which appears to correct a widely publicized scandal but in reality imposes substantial costs on public companies with little if any direct impact on improving corporate governance and financial disclosures beyond that of existing law.\textsuperscript{95}

The critics may well be right. Unlike the previous eras where practices arose for which there were few or no laws, such that the resulting market crashes prompted new federal regulation that provided guidance for behavior and punishment for none compliance, here there were more than enough and adequate laws already on the books to deal with every situation that happened as manifested by the fact that all the major offenders of the period were subject to massive agency penalties, fines, prosecutions, and convictions for extremely long prison terms.\textsuperscript{96} By the time SOX was passed, the bad actors were out of business, in jail, or duly admonished. Indeed, many of the supposed frauds of the era were technically not fraud as the numbers and facts fooled few people as the numbers were often plainly stated in corporate filings and documents.\textsuperscript{97} Except that this information was ignored or minimized by investors in the manner and delusions of the times.\textsuperscript{98}

\textsuperscript{90} Id.


\textsuperscript{92}Id at 91-95. SOX is different from the Securities Acts of 1933 and 1934 in several respects: (1) there was considerable evidence of financial statement fraud by high profile companies (Enron, Global Crossing, WorldCom, Tyco, \textit{et al}) that encouraged Congress to pass SOX; (2) there was evidence of the lack of transparency of financial reports prior to SOX (e.g., excessive off-balance-sheet transactions, special purpose entities); (3) the PSLRA of 1995 limited the extent of investor litigation.

\textsuperscript{93} Lawrence Cunningham, The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (It just might work), 35 U CONN. L. REV 917 (2003); and Ribstein \textit{supra} note 60 for in-depth critiques of the Act, and the discussion of market versus regulatory responses to financial scandals.


\textsuperscript{95} Cunningham, \textit{supra} note 92.

\textsuperscript{96} Stephen Labaton, Bush Doctrine: Lock ’Em Up, NYT, Je 16, 2002 Sec 3, col 1.

\textsuperscript{97} Ribstein \textit{supra} note 77 at p 8.

“[T]he disclosures were disconcerting enough to lead an adequately inquisitive market to check further and get to the facts. Even more striking is the fact that Enron’s ninety dollar share price in 2000
It is true that after SOX, there was a measurable increase in shareholder wealth \(^9\) and the markets did recover after the passage of SOX. \(^{100}\) But the same occurred after every previous market crash. Was it SOX or had a generation of market investors been duly punished by the markets and thus relearned that the old rules and regulation still had value and applications even in the new digital world, thus forcing a new generation of management to follow these rules and a chastised generation of investors to look for legal and transparent compliance in making investment decisions about companies. It appears that this recovery after SOX was more *Post hoc ergo propter hoc* than causal. \(^{101}\) The reality is that most of the requirement of SOX were already established as best practices at public corporations for decades including at Enron, except that during this high flying period they were widely ignored. \(^{102}\)

The conclusion is that to fully understand the kind market loses of the millennial market crash and hopefully to avoid something of this magnitude in the future, it is necessary to understand all that went wrong. To simply blame everything on fraud and greed without taking into consideration how society unrealistically responded to the stunning new technologies that exploded on the cultural scene during the 1990s is to take an overly narrow and legalistic view of what happened and leaves us vulnerable to repeat these same mistakes in the future as the discoveries of the last decade are but a harbinger and the tip of the iceberg of scientific and technological developments to come. Therefore it is important not to let the scope and the brilliance of novelties deceive us into thinking that humanity has evolved past the need to just tell the truth in business transactions and be cautious in business investing. Because in the end these novelties will quickly become old and/or obsolete and all that will remain is the truth. It is ironic that at the core of this massive financial disaster was a simple failure to tell the whole truth, a practice that had prevented this level of fraud for over 70 years \(^{103}\) with just the Securities laws already in place. \(^{104}\) That is until that moment during the 1990s when society believed that it was too advanced to follow the simple rules.

could be justified only by some very unrealistic assumptions, such as a twenty-five percent return on equity forever... And apparently few people stopped to wonder whether Enron’s not paying federal taxes for four of the five tax years through 2001 indicated that it was really not making any money.”

\(^9\) *Id.*


\(^{101}\) Latin "after this, therefore because of this".


\(^{103}\) Ribstein, *supra* note 77 at 3.

APPENDIX 1


HTTP://WWW.EPI.ORG/PUBLICATION/CEO-PAY-231-TIMES-GREATER-AVERAGE-WORKER/

Note: *Options granted* compensation series includes salary, bonus, restricted stock grants, options granted, and long-term incentive payouts for CEOs at the top 350 firms ranked by sales. *Options exercised* compensation series includes salary, bonus, restricted stock grants, options exercised, and long-term incentive payouts for CEOs at the top 350 firms ranked by sales.

## APPENDIX 2

<table>
<thead>
<tr>
<th>Citation Number</th>
<th>Company</th>
<th>Action</th>
<th>Value or Investment</th>
<th>Final Value</th>
<th>Share</th>
<th>State</th>
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<td>BANKRUPT</td>
<td>$2 billion</td>
<td>$60 million</td>
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<td>Delaware</td>
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</table>
OTHER FINANCIALLY TROUBLED DSL COMPANIES

Other Financially troubled DSL companies representing hundreds that were too small to make the national attention but are representative of the age that filed for bankruptcy, shut down, cut staff or had other problems. However, by concentrating on a few large well known companies, it is easy to blame the failures on a few bad actors without considering the total market environment.

-- FastPoint, San Jose
-- Zyan Communications, Los Angeles
-- Relay Point, Los Angeles
-- FlashCom, Huntington Beach
-- Digital Broadband Communications, Waltham, Mass.
-- Jato Communications, Denver
-- Bazillion.com, Seattle
-- Covad Communications, Santa Clara, Ca.
-- Englewood, Colo.
-- AtLink Networks, Louisville, Ky.
-- Copper Mountain Networks, Palo Alto.
-- Netopia, Alameda, Ca.
-- Jato, Alameda, Ca.
-- Networks

Read more: http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2001/01/21/BU104711.DTL&ao=all#ixzz1vFYRRHe5
PRESIDENTIAL TRADE PROMOTION AUTHORITY

By

Richard J. Hunter, Jr.*

John Shannon**

Hector Lozada***

ABSTRACT

This commentary traces the historical origin and nature of presidential trade promotion authority in the context of the GATT and later through the aegis of the WTO and its relationship to congressional authority under the Commerce Clause. The paper looks at issues relating to “fast track authority” [so-called “Fast Track I”] in the context of NAFTA and the use of “Fast Track II” authority in conjunction with other trade agreements. The paper analyzes TPA/Fast Track procedures and focus on the 2007 Congressional “grand Bargain” under which authority which had technically expired, was used in some recent trade negotiations.

1. INTRODUCTION

On October 30, 1947, delegates from twenty-three countries signed a monumental international trade agreement, The General Agreement on Tariffs and Trade, known as the GATT. The actual agreement came into force on January 1, 1948. The drafters of GATT primarily addressed five types of border barriers to imports: tariffs, quotas, subsidies, “state” trading, and customs procedures. The GATT was intended to operate as a provisional agreement—in effect, a bridge between the immediate period following World War II and a date in the future in which the Charter for the International Trade Organization or ITO would be adopted. Because the framework negotiations for the creation of the ITO were concluded in Havana, Cuba, that document is often referred to

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1 General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. Negotiations for the original GATT involved 45,000 tariff concessions and $10 billion of trade, measured by pre-war 1938 prices. But for the fact that the Soviet Union withdrew from the GATT for ideological reasons, there would have been 24 original contracting parties.
as the “Havana Charter.” The GATT itself had been negotiated in two separate sets of meetings which took place in 1946-1947. These meetings included:

- The First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, held in London, from October 15 to November 2, 1946, also known as the London Preparatory Conference;
- The Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, held in Geneva, from April 10 to October 30, 1947, also known as the Geneva Preparatory Conference.

From the outset, presidential leadership in the United States—or sometimes a lack of it—has been evident in international trade matters. The ITO never came into existence, “largely because President Harry S. Truman elected not to submit it to the Senate for advice and consent.” Professor Raj Bhala notes that adherents to a view of a more limited role of the United States in world affairs “had little interest in, and considerable suspicion of, committing America to yet another international organization (in addition to the Bretton Woods institutions, the International Monetary Fund, and the World Bank).” Thus, from the outset of the

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3 RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE 6 (2008). In fact, by the end of 1950, President Truman had announced that he would no longer seek congressional approval of the ITO, even though the United States had been the leading country in taking the initiative to develop the ITO, as well as the GATT. See generally SUSAN A. AARONSON, TRADE AND THE AMERICAN DREAM: A SOCIAL HISTORY OF POSTWAR TRADE POLICY (1996).

4 BHALA, supra note 3. The Bretton Woods Agreement itself was negotiated in July of 1944 in Bretton Woods, New Hampshire, and came into effect on December 27, 1945. The GATT itself was not formed at the Bretton Woods Conference, however, “the participants at the conference nevertheless contemplated the necessity of an international trade organization, or ITO.” JOHN H. JACKSON, The Bretton Woods System and Its Context, in THE WORLD TRADING SYSTEM 31 (3d ed. 1997).

Concerning the issue of presidential authority in international trade matters, it is interesting to note that in 1936, the United States Supreme Court propounded a theory that the President of the United States possessed certain “inherent powers” over foreign affairs that do not depend on the Constitution. “A significant question that arises in the affairs arena is whether the President has powers as head of state that are independent of those powers derived from the Constitution.” See RUSSELL L. WEAVER, ET AL., CONSTITUTIONAL LAW: CASES, MATERIALS, & PROBLEMS 283 (3d ed. 2011). See also United States v. Curtiss Wright Exp. Co., 299 U.S. 304 (1936) (concluding that there was a distinction where the President was acting, stating that the President’s role in foreign affairs was both plenary and inherent, with the President serving as the representative of the entire nation). This view, however, is not universally appreciated. See Raoul Berger, The Presidential Monopoly of Foreign Relations, 71 MICH. L. REV. 1 (1972). For example, in 1953, the Fourth Circuit Court of Appeals held that the Executive Branch had exceeded presidential authority in entering into an agreement with Canada concerning the importation of potatoes into the United States. United States v. Guy Capps, Inc., 204 F.2d 655 (4th Cir. 1953). The United States Supreme Court affirmed the decision, but did so on other grounds. Professor Bernard Schwartz suggests that there is historical evidence that the Supreme Court intended to avoid taking a direct position on the issue of presidential power in the context of this case. See BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—JUDICIAL BIOGRAPHY 165-66 (1983).
creation of the GATT, international trade has often been embroiled in a sometimes toxic mixture of economic and domestic political concerns.

Under the United States Constitution, found in Article I, Section 3, Clause 8, Congress has the power to regulate foreign trade. Because of the practicalities of negotiating a detailed bilateral or multilateral trade agreement, Congress has delegated this authority to the President of the United States. As noted by Theresa Wilson:

Congress has explicit power regarding foreign commerce under Article I, Section 8 of the Constitution. The President's authority in this area, constitutionally speaking, is limited to treaty making and the execution of laws relating to foreign commerce. Yet Presidents throughout the nation's history have exercised some powers within the area of foreign commerce, thanks to the delegation of foreign commerce power by Congress and the sympathetic ears of the Supreme Court.

As a result, the process of negotiating international trade agreements with the United States as a participant involves a delicate balancing of the prerogatives of both the Executive and Legislative branches of the United States government. Professor Jackson states it in this way: “The power struggle between the branches of the U.S. government, however is precisely what the Founding Fathers contemplated. They viewed it as a system of ‘checks and balances’ that would prevent any one branch from becoming too powerful.” In typical fashion, the authority to negotiate a bilateral or a multilateral trade agreement is constrained by a finite time limit, and by specific negotiating objectives or conditions set by the legislative branch. In return for this delegation of the authority to negotiate trade agreements to the President, the President receives a binding commitment from the Congress that it will consider the outcome of any such negotiations under special procedural rules.

Trade Promotion Authority

Trade Promotion Authority, also known as TPA, is the construct under which trade agreements have been negotiated. Trade Promotion Authority is also called “fast track” authority. The statutory authority for the creation of “fast track” may be found in sections 151 through 154 of the Trade Act of 1974, as amended. Congress first

5 This provision is referred to as the Foreign Commerce Clause or the Interstate Commerce Clause. It gives Congress the power "To regulate Commerce with foreign Nations, and among the several States, [and with the Indian Tribes]." U.S. Const. art III, § 8.


7 Jackson, supra note 4, at 81.

enacted a variant of fast track authority in the Trade Act of 1974. Pursuant to this grant of authority, Congress then enacted implementing legislation for the Trade Agreements Act of 1979, the United States-Israel Free Trade Area, the United States-Canada Free Trade Agreement, the North American Free Trade Agreement (NAFTA), and the Uruguay Round Agreements Act (URAA).\(^9\) Congress used the Trade and Tariff Act of

9 The Uruguay Round was perhaps one of more critical series of negotiations. Broadly speaking, the Uruguay Round tackled four priority subjects: trade in services; trade-related intellectual property measures (TRIPS); trade-related investment measures; and trade in agricultural goods. The Uruguay Round involved 118 contracting parties and covered $3.7 trillion in trade. It was launched in 1986 and the last day of substantial negotiations took place on December 15, 1993. These negotiations led directly to the creation of the World Trade Organization or WTO. The following are the main points of the Uruguay Round:

- All developed countries met the overall target percentage reduction of 33 1/3 percent, and some developed countries exceeded this target;
- Developed countries cut tariffs on industrial products from all sources [developed, developing, or least developed countries] by 40 percent, from a pre-Uruguay Round trade-weighted average of 6.3 percent to a post-Round trade-weighted average of 3.8 percent;
- Industrial products imported by developed countries from developing countries would be cut by 37 percent, from a pre-Uruguay Round trade-weighted average of 6.8 percent to a post-Round 4.3 percent;
- For such products from least developed countries, the cut was 25 percent, from a pre-Uruguay Round average of 6.8 percent to a post-Round average of 5.1 percent;
- Developed countries reduced tariffs on clothing and textiles, fish, and fish products—all exports from developing and least developed countries—by lower average amount than on other products;
- Developed contracting parties extended the scope of duty-free treatment for industrial products from 20 percent of these goods to 44 percent of these goods;
- Developed contracting parties agreed to reduce, but not to eliminate, tariff peaks above 15 percent; [In a tariff schedule, a single tariff or a small group of tariffs that are particularly high, often defined as greater than three times the average nominal tariff];
- Developing countries agreed to increase the scope of product categories subject to ceiling bindings [upper limitations] in key sectors such as clothing and textiles, and to narrow the gaps between bound [scheduled] and applied rates;
- Specifically, developing countries increased from 21 to 73 percent the number of industrial tariff lines subject to bound rates [maximum tariff rates], and transition economies agreed to increase this number from 73 to 98 percent.


The World Bank notes:

For operational and analytical purposes, the World Bank’s main criterion for classifying economies is gross national income (GNI) per capita. In previous editions of our publications, this term was referred to as gross national product, or GNP. Based on its GNI per capita, every economy is classified as low income, middle income (subdivided into lower middle and upper middle), or high income. Other analytical groups based on geographic regions are also used.

See World Bank, How We Classify Countries, http://data.worldbank.org/about/country-classifications (last visited Dec. 20, 2011). According to the World Bank, countries are classified as follows: low income; middle income (lower middle income and upper middle income); law and middle income; and high income.
1984\textsuperscript{10} to revisit fast track. The fast-track procedures were amended to include the House Ways and Means Committee and the Senate Finance Committee, effectively as “gatekeeper committees.”\textsuperscript{11} The change required the President to provide notice to these committees of jurisdiction and to consult with them sixty days prior to entering into any free trade agreement.\textsuperscript{12} Congress modified fast-track procedures yet again with the Omnibus Trade and Competitiveness Act of 1988.\textsuperscript{13} The 1988 Act allowed Congress to “manipulate” extensions of fast track and to terminate fast-track procedures once they were already underway.\textsuperscript{14}

The authority granted to the President was permitted to expire in 1994. Congress had extended the authority during the critical Uruguay Round of Trade negotiations, conducted under the aegis of the GATT\textsuperscript{15} until December 15, 1993. President Clinton, who successfully championed NAFTA\textsuperscript{16} in the face of substantial opposition from within


\textsuperscript{11} Id. § 401(a).

\textsuperscript{12} Professor Harold Koh argues that the 1984 Act significantly increased Congress's control over foreign commerce in three ways.

First, either committee could take trade agreements off fast track or, in the alternative, kill the agreement, so the President had ‘incentives to consult with the committee's members at each step of the process.’ Second, the President was virtually required to keep the committees informed throughout the process, lest they should become unhappy with the final product. Finally, either chamber could vote down the agreement regardless of the committees' positions.


\textsuperscript{14} Koh, supra note 12, at 151.


\textsuperscript{16} The North American Free Trade Agreement or NAFTA is an agreement signed by the governments of Canada, Mexico, and the United States, creating a trilateral trade bloc in North America. The agreement came into force on January 1, 1994. NAFTA replaced the Canada–United States Free Trade Agreement between the U.S. and Canada. The stated goal of NAFTA was to eliminate barriers to both trade and investment between the US, Canada, and Mexico. The implementation of NAFTA brought the immediate elimination of tariffs on more than one half of U.S. imports from Mexico and more than one third of U.S. exports to Mexico. The agreement provided that within 10 years of the implementation of the agreement, all US-Mexico tariffs would be eliminated, except for some U.S. agricultural exports to Mexico that were to be phased out in 15 years. At the time NAFTA was enacted, most US-Canada trade was already duty free. NAFTA also sought the elimination of non-tariff trade barriers relating to product standards and purported environmental concerns. Non-tariff barriers include quotas, licenses, registration requirements, restrictive technical and sanitary standards, restrictive trading rights, restrictive distribution rights, and investment restrictions. For a full discussion of issues surrounding tariff and non tariff barriers,
his own Democratic Party (led, most especially, by Rep. Marcy Kaptur of Toledo, Ohio), and other “skeptics” of “free trade,” tried unsuccessfully to win the renewal of trade negotiating authority in 1997 with Senate Bill 1269 and House Resolution 2621. In 1998, Senate Bill 2400 once again failed to secure passage.

“Fast track” authority became quite controversial in the decade of the 1990s—most especially after the passage of NAFTA. It quite literally became the “bête noire” of American trade unions and many environmental groups and agricultural organizations. However, presidential candidate George W. Bush highlighted “fast track” as an important part of his campaign platform in 2000. In May 2001, as then President, Bush argued strenuously that it was vital that the authority be renewed.

The passage of the renewal legislation in 2002 resulted from high political drama. Under extreme pressure from the Republican leadership in the House of Representatives, at 3:30 am on the morning of July 27, 2002, the House of Representatives narrowly passed the Trade Act of 2002 by a 215 to 212 vote, with 190 Republicans and 27 Democrats making up the majority. The bill passed a more-friendly United States Senate by a vote of 64 to 34 on August 1, 2002.\(^\text{17}\)

2. FAST TRACK II

Under the second iteration of fast-track authority, Congress enacted implementing legislation for the United States-Chile Free Trade Agreement, the United States-Singapore Free Trade Agreement, the United States-Australia Free Trade Agreement, the United States-Morocco Free Trade Agreement, the Dominican Republic-Central America-United States Free Trade Agreement, the United States-Bahrain Free Trade Agreement, and the United States-Oman Free Trade Agreement. Ironically, even though fast track authority no longer exists, several other agreements have or may come to Congress under fast track under prior statutory authority, including the Peru Trade Promotion Agreement (Peru ratified on 28 June 2006), the Colombia Trade Promotion Agreement (President Bush notified Congress of his intent to ratify this agreement on 24 August 2006), a potential agreement with South Korea (the fourth round of talks is scheduled for Oct. 23-27, 2011), a potential agreement with Malaysia (the first round of talks were held in June 2006), and the US-Thailand Free Trade Agreement (on which negotiations have been on hold since January 2006).\(^\text{18}\)


\(^{18}\) The authority to consider legislation will cover any implementing bills with respect to trade agreements entered into before July 1, 2007. See 19 U.S.C. § 3803(c)(1)(B). FTAs In Force: Australia,
Fast track authority again expired on July 1, 2007, without being renewed by Congress. A wide variety of groups joined in a pointed critique of fast track renewal. These groups included a collection of 713 environmental, farm and labor groups (most prominently, the AFL-CIO).

Fast Track Procedures

What were the main points of the now-defunct trade promotion authority authorized under the 2002 renewed legislation? The President, or more aptly his Trade Negotiator or Trade Representative, 19 negotiates a bilateral trade agreement. The Bahrain, Chile, Colombia, DR-CAFTA, Israel, Jordan, Korea, Morocco, NAFTA, Oman, Panama, Peru, and Singapore.

Colombia’s Congress approved the agreement and a protocol of amendment in 2007. Colombia’s Constitutional Court completed its review in July 2008, and concluded that the Agreement conforms to Colombia’s Constitution. The United States Congress then passed it on October 12, 2011. The agreement went into effect on May 15, 2012.

The United States-Korea Free Trade Agreement entered into force on March 15, 2012. At that point, nearly 80 percent of U.S. industrial goods exports to Korea are duty-free. These include aerospace equipment, agricultural equipment, auto parts, building products, chemicals, consumer goods, electrical equipment, environmental goods, travel goods, paper products, scientific equipment and shipping and transportation equipment. The United States sees benefits to it from the following:

- Nearly two-thirds of U.S. agricultural exports products will be duty-free including wheat, corn, soybeans for crushing, whey for feed use, hides and skins, cotton, cherries, pistachios, almonds, orange juice, grape juice and wine.
- Stronger protection and enforcement of intellectual property rights in Korea.
- Increased access to Korea’s $580 billion services market for highly competitive American companies.

19 The key agency in this regard, the Office of the U.S. Trade Representative [USTR], is one attached to the Executive Office of the President. Originally created in the 1962 Trade Expansion Act, the Office was upgraded to cabinet status in 1974. The office of USTR chairs many of the important intergovernmental committees and working groups which are responsible for formulating U.S. trade policy and for negotiating positions for the United States. These include the Trade Staff Committee and the cabinet-level Trade Policy Committee. The Office of the Special Trade Representative was created by Congress in the Trade Expansion Act of 1962 (19 U.S.C. § 1801) and implemented by President John F. Kennedy in Executive Order No. 11,075 on January 15, 1963 (28 Fed. Reg. 473). The Office of the USTR is authorized to negotiate all trade agreements under the Tariff Act of 1930 (19 U.S.C. § 1351) and the Trade Expansion Act of 1962. In 1980 the Office of the Special Trade Representative was renamed the Office of the U.S. Trade Representative [USTR]. As a general rule, the term USTR refers both to the agency and to the agency's head, who is designated as the U.S. trade representative. See also Executive Order No. 12,188 of January 4, 1980 (45 Fed. Reg. 989) (authorizing the USTR to set and administer overall trade policy and designating the USTR as the nation's chief trade negotiator and as the representative of the United States in major international trade organizations).

See also John H. Jackson, Jean-Victor Louis & Mitsu Matsushita, Implementing the Tokyo Round 172-73 (1984). Under the 1974 Trade Act, the USTR was charged with the responsibility
President must decide on the most opportune time to present any agreement to the Congress. If the President transmits a trade agreement to the Congress, then the majority leaders of the House and Senate or their designees or obligated by statute to introduce the implementing bill submitted by the President on the first day on which their House is in session. The bill, however, as introduced, is not open to any change or amendment either in the relevant committee of jurisdiction or on the floor of the Senate or House.

The committees of jurisdiction to which the bill has been referred have 45 days after its introduction to report the bill, or the committee will be automatically discharged. Both the House and the Senate must vote within 15 days after the bill is reported or discharged. Since most trade legislation implicates tariffs or other revenue matters, the bill will be considered as a revenue bill. Thus, the bill must originate in the House of Representatives under the United States Constitution. As such, the bill will be referred to the House Committee on Ways and Means.

Assuming that the implementing legislation originated in the House of Representatives, and after the Senate received the House-passed bill, the important Senate Finance Committee—the Senate committee of jurisdiction—has another 15 days to report the bill or be discharged. At that point, the Senate would have another 15 days to pass the bill. The bill is debatable on the floors of both the House of Representatives and Senate floors for no more than 20 hours. As result, the bill is not subject to a filibuster in the United States Senate. The bill is subject to a simple majority vote on its final passage. Thus, the entire period of consideration by the Congress should take no longer than 90 days.

3. THE MAY 2007 AGREEMENT

In May of 2007, a deal was struck between Democrats and Republicans in Congress—not on the core issue of renewal of TPA—but on several collateral matters: bilateral free trade agreements (FTAs) would be considered with Panama and Peru—but

of investigating allegations that U.S. commercial interests had been harmed by illegal or unfair actions of foreign governments, trying to obtain redress for U.S. citizens, and in the last instance, recommending any retaliatory actions to the president that were authorized by the statute. The 1974 statute was amended by the 1979 Trade Agreements Act, the 1984 Tariff and Trade Act, and the 1988 Omnibus Trade and Competitiveness Act.

20 19 U.S.C. § 2191(c).
25 19 U.S.C. §§ 2191(f)-(g).
not necessarily with Columbia or South Korea. The agreement is sometimes called the Bipartisan Agreement on Trade Policy.  

In addition, Congressional leaders agreed to include the following terms in the core text of all trade agreements:

- A commitment by each signatory to a FTA to “adopt, maintain, and enforce” in its domestic law the five International Labor Organization [ILO] core labor standards set forth in the 1998 ILO Declaration on Fundamental Principles and Rights at Work, which include: (1) the freedom of association (including the right to organize); (2) the right to bargain collectively; (3) elimination of all forms of compulsory or forced labor; (4) effective elimination of child labor; and (5) elimination of employment and occupational discrimination.

- Authorization for a FTA party to condition central or sub-central government procurement contracts on adherence to the ILO Declaration.

- A commitment by each FTA party to “adopt, implement, and enforce” in its domestic laws the obligations contained in seven major multinational environmental agreements, including the Convention on International Trade in Endangered Species (CITES) and the International Whaling Convention of 2nd December 1946.

- Enforcement of labor and environmental obligations through governmental action under regularized FTA dispute settlement provisions. In such cases, the burden of proof will be placed on a complaining government to demonstrate that the respondent has engaged in a “substantial or recurring course of action

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or inaction”\textsuperscript{30} with respect to any labor or environmental obligation having an impact on trade or investment.\textsuperscript{31}

- A prohibition against any FTA party using inadequate resources or alternative priorities as a defense in a case in which it has been accused of failing to enforce labor laws relating to the core ILO Declaration.

- A “conflict of laws” provision that bars an FTA party from using as a defense an FTA provision in order to undermine any Multilateral Environmental Agreement (MEA) obligations, in a case in which an MEA affects performance of an FTA obligation.

- A prohibition against any FTA party lowering labor or environmental laws.

- Use of penalties for violations of labor or environmental obligations that are the same as for breaches of other FTA duties.

- Allowing for faster access to certain generic medicines, especially for residents of poor or developing countries which are parties to an FTA.\textsuperscript{32} This will be accomplished by:

  1. modifying data exclusivity period, defined as the period during which the manufacturer of a generic drug is barred from using clinical test data from the innovating company, to five years in most cases;

  2. ensuring data exclusivity rules do not prevent a party from taking a measure to protect public health, or to invoke relevant WTO authorizations;

  3. eliminating any requirement that a drug regulatory agency withhold approval of a generic drug until it certifies marketing of the generic would not violate any existing patent; and


\textsuperscript{31} For example, the Office of the United States Trade Representative (USTR) provided notice that on July 30, 2010, pursuant to the Labor Chapter (Chapter 16) of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), the United States requested consultations with the Government of Guatemala to discuss Guatemala’s apparent failure to meet its obligation under Article 16.2.1(a) to effectively enforce its labor laws. See Letter from Ron Kirk, U.S. Trade Rep., to Erick Haroldo Coyoy Echeverria, Guatemala Minister of Economy (July 30, 2010), available at \url{http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america- fta/kirk-solis-le}. See also Notices, 75 Fed. Reg. 51869-70 (Aug. 23, 2010).

4. removing any rules that obligate any FTA party to extend the term of a patent on a pharmaceutical product to account to delays in the process of approving the patent.

- Clarification that the United States has the full authority to bar a foreign company from operating an American port, based on national security considerations, and that the exercise of this authority may not be challenged under any FTA.\textsuperscript{33}

It should also be noted that the deal struck between Congressional Democrats and Republicans included a substantial and detailed Strategic Worker Assistance and Training (SWAT) Initiative. SWAT extends beyond Trade Adjustment Assistance\textsuperscript{34} and encourages education, training, and the portability of health and pension benefits for communities who have been injured by the effects of trade liberalization, trade agreements, and advances in technologies which have resulted in major employment dysfunctions for American workers.

IV. SOME TENTATIVE OBSERVATIONS

The May 2007 “deal” between Republican and Democratic members of Congress, enacted in the last two years of the Bush Administration, indicated that Congress clearly intended to reassert its Constitutional duty to regulate significant aspects of foreign trade. The agreement also referenced the declining authority of the Executive Branch over such matters. President Obama has indicated that he will not submit several important FTAs to the Congress unless his administration can certify compliance with the elements of the 2007 “Grand Bargain” struck in the Congress. With the great emphasis on international trade, it will be most instructive to see whether the delicate balance between the Executive and the Legislative branches will tip in favor of one side in the future. It is interesting to note that the issue of international trade was hardly mentioned during the presidential campaign of 2012.


\textsuperscript{34} As found on the Department of Labor website: “Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) help trade-affected workers who have lost their jobs as a result of increased imports or shifts in production out of the United States. Certified individuals may be eligible to receive one or more program benefits and services depending on what is needed to return them to employment.” See \textit{Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) Services and Benefits}, U.S. Dep’T Lab. (Apr. 25, 2011), www.doleta.gov/tradeact/benefits.cfm. Benefits under TAA include: Rapid Response Assistance; Reemployment Services; Job Search Allowances; Relocation Allowances; Training; Training Waivers; and Health Coverage Tax Credits. Benefits under ATAA include: Rapid Response Assistance; Reemployment Services; Wage Subsidies for certain workers over age 50; and Health Coverage Tax Credits.
SOCIAL MEDIA POLICIES: MANAGING RISKS IN A RAPIDLY DEVELOPING TECHNOLOGICAL ENVIRONMENT

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I. INTRODUCTION

With ubiquitous social media and corporate websites as integral components of our professional and personal lives, businesses large and small leave themselves vulnerable to issues related to reputational risk, employer liability for intellectual property infringement, false advertising, regulatory breaches, defamation, unfair competition, NLRB complaints, employment law, public policy, harassment and disclosure of trade secrets. Enterprises ranging from local restaurants to large multinational corporations are susceptible to a wide spectrum of time-consuming and potentially expensive legal and management problems without having developed and implemented detailed and thoughtful policies regarding the use of and participation in social media by employees. These policies must then be incorporated into the fabric of the enterprise, regularly updated and communicated as part of a consistent program of training and compliance.

II. SIGNIFICANCE OF A SOCIAL MEDIA POLICY

A. Social Media Are Ubiquitous And Growing In Importance Among Individuals

58% of executives agree that social networking issues and the accompanying reputational risk should be a boardroom issue.1 However, barely 15% of those executives surveyed report that they are dealing with these issues in the boardroom.2 In fact, only 22% of the respondents reported that their company has formal policies that govern the use of internet social networking by employees.3 And therein resides the great risk to managing businesses that fail to adapt to a rapidly developing technological environment.

Why the concern? What is the institutional risk that derives from this boardroom indifference? It’s possible that the boardroom torpor is partly a function of demographics. Of those regularly engaged in social media activities, 48% are between the ages of 18-35.4 And even offering a more charitable characterization than torpor, the disinterested posture of senior management generally could well be a failure to perceive the size and scope of the problem, as well as the opportunity.

Traditional media outlets such as newspapers, magazines, radio, motion pictures and television form a relationship with their consumers by creating engaging or informative content and pushing it through established distribution channels. Other than feedback loops such as letters to the editor, the traffic in those channels moves in one direction. They are the content creators and providers, and we are the consumers.

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2 Id.
3 Id.
With the internet age, the new distribution channels are both vastly more diverse and ephemeral. They are also interactive. It is a far more egalitarian matrix of creators and consumers worldwide, unrestricted by national boundaries, with vectors of communication simultaneously radiating in all directions without regard to distance or time. Unlike the Euclidian vectors of the traditional media coordinate systems that can be classically described in terms of magnitude and direction, this world of interactive platforms more closely resembles Poynting vectors whose propagating characteristics of energy flux density are unbounded and often curled upon themselves.  

Due to social platforms such as Facebook, LinkedIn, MySpace, blog facilities such as WordPress and TypePad, microblogs such as Tumblr and Twitter, as well as a multitude of photo and video sharing sites that include SlideShare, Shutterfly and YouTube, we are all now content creators as well as consumers. The essential element that characterizes social media is that not only are we all consumers, we are participants. Each of us, and our commercial ventures, can convert the platforms to our own use and for our own purposes in communicating with the world at large and building our brands. The dimensions of time and space are irrelevant. One party to a text iMessage can see that the other party is preparing a text before it is even sent and can thereby alter the content of that which was to follow. No relationship is official unless it is displayed on a Facebook page. The immutable nature of electronic archives can turn photos of drunken college parties into a disqualifying event years later when hiring decisions are made.

A manufacturer can create an appealing and persuasive “small but tough” television campaign for their automobile brand only to find a parody of it on YouTube that has gone viral. Even though the parody has captured the flavor of the essential selling point of the original ads, the company has lost control of the message. If a very good, well-intentioned and loyal employee of a company can incur liability on behalf of a company by making assurances to a complaining customer that the complaints will be satisfactorily resolved, it is not much of a leap to extend that legal liability theory to similar gratuitous promises made by an employee on an internet forum in response to a customer in a post complaining about a product or service of that employee’s company. A situation where there might be no commercial liability has been inadvertently converted to liability perhaps for hundreds or thousands of similarly unhappy, dissatisfied, or opportunistic customers who have relied upon the promise. Senior management had better begin to grasp the scope of the problem.

There are currently one billion users of Facebook worldwide which is a 25% increase year-over-year. Facebook reports that 82% of their users are outside the United States. Twitter currently has over 253 million unique visitors which represents an 85% increase year-over-year. Social gaming activities such as Zynga’s FarmVille and CityVille have over 16 million users daily.

To put the power and reach of these media in perspective, the New York Times currently has an average Monday through Friday print and digital daily circulation of 1.6 million which is third behind the combined print and digital circulation of USA Today (1.7 million) and The Wall Street Journal (2.3 million) on an average weekday. The highest rated television evening newscast is NBC Nightly News With Brian Williams, and on average each night of the November 2012 sweeps period, had 9.1 million viewers.

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6 See http://www.youtube.com/watch?v=nCyUVy8TKq8 (last visited April 2, 2013).
7 See, e.g. Barnes v. Yahoo!, Inc., 570 F.3d 1096 (2009). Under a theory of promissory estoppel, Barnes recovered from Yahoo!, Inc. following an employee’s promise that Barnes’ complaint would be satisfactorily resolved.
11 Id.
So, with that in mind, let’s return to Facebook. Of its one billion active users, Facebook reports that more than 50% log in on any given day. Close to 60% of American adults use at least one social networking website of which Facebook is the most popular. 31% use the site several times a day. A quarter of the daily Facebook users comment on the content posted by other users. The Facebook page that ranks 2,393 in popularity has over 2.1 million fans and adds over 18,000 new fans a month. The owner of that community page is identified with the user ID “Trust Me, I’m an “Engineer””. That anonymous former consumer of traditionally vectored media now arguably has the circulation reach of the New York Times. And to compound that information distribution power by orders of magnitude, readers can post comments to that community page at will. In fact, every post on that user’s wall typically draws hundreds of comments that are themselves read and discussed by tens of thousands of users.

Facebook may be the most popular platform, but it has rapidly growing competitors. Google Plus, a new social networking site, launched in June 2011, and in one month had over 20 million users. As of December 2012, there were over 500 million registered users and over 135 million monthly active users. In June, 2012, the volume of Twitter microblog posts reached 400 million Tweets per day worldwide which is double the volume in June 2011. Immediately after the earthquake in Japan on March 11, 2011, the volume of messages into and out of Japan reached more than 5,000 Tweets per second.

B. Businesses Increasingly Turn To Social Media As Well

Creating a relevant community for their products and services, businesses large and small have frequently fully embraced social media in order to achieve their legitimate business objectives. By posting photographs and product data, reporting new stocking information, announcing sales, interacting with customers and potential customers using promotional materials designed to develop consumer loyalty, business routinely use social media to build their market share inexpensively. It is also a convenient platform for managing investor relations as well as gathering intelligence from targeted groups to gain insight into product or service improvements and managing other aspects of the business.

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14 Facebook Statistics, supra note 9.
15 Rainie, supra note 4.
17 Id.
25 Id. at June 29, 2011. Note, particularly the embedded video supplied by Twitter that graphically portrays the volume of Twitter activity into and out of Japan in the 16 minutes just prior to the earthquake and after.
26 “In 140-character bites, the story unfolded: the shock and terror; the sense of human frailty mixed with lifesaving information; the messages of those seeking comfort and those seeing some kind of divine retribution, all mixing at hyper-speed.”
In a spring 2012 survey of 184 senior corporate executives and directors, over three-quarters of the respondents reported that their companies use social media to support business activities. However, 90.7% of them stated that they do not have a committee of their respective boards that have oversight responsibility for the use of social media in connection with their business activities. Moreover, 75% say that their companies do not have social media policies or participation guidelines for board members, and 52% either didn’t know or reported that they had no social media policies in place for their employees.

When Disney released their Diamond Edition Blu-Ray DVD of the animation classic Snow White and the Seven Dwarfs, they built their promotion around a Facebook page for each of the dwarfs and Snow White with highly developed interactive content that ultimately linked hundreds of thousands of fans to the marketing plan on each user’s own profile and in Twitter streams. An entire segment of the marketing community has developed to assist businesses in creating powerful and cost-effective viral campaigns in promoting their goods and services. One such marketing company proclaims that compared to advertising, close to 80% of consumers trust peer-based reviews when making purchase decisions. In fact, market survey results support that proposition. 70% of us “have some degree of trust” in the opinions of strangers posted online in locations such as review sections of Amazon, or Yelp or when making decisions about hotels and restaurants or other products.

Similarly, small and local businesses take advantage of the promotional advantages of social media. Twitter has a page with Tweets about and from main street businesses. The osso buco at a farmer’s market in Cary, NC, the “NEW special for the week…Beef and Vegetable Wrap to die for…Only $8.45” at Martin’s Curry Rice in Morrisville, NC, the schedule of a motivational speaker and coach in St. Louis, or a blog and related tweets from The Meathouse complete with recipes and purchase suggestions for National Sandwich Day. Tribeca Tavern posts regular Facebook photos and tweets about their menu “with no entrée over $15.”

“Amongst those who do follow brands, products or companies on social networks, 80% indicate that Facebook is the network they use the most to connect with companies.” The consumer goods company with the largest Facebook following is Coca-Cola with over 62 million fans. That is up from 5.5 million fans in May 2010 and growing by 2.2 million fans monthly. Coca-Cola will permit anyone to post content on their lightly moderated wall...
subject to terms of service prominently displayed. Hundreds of such posts are added every day. In a commercial world where brand control is grasped tightly in the hands of the brand owners, it is surprising to learn that the Coca-Cola Facebook page was not created by Coca-Cola nor under its authority. The page was created by a couple of guys in Los Angeles who just liked the product. Ultimately, due to pressure from Facebook, Coca-Cola and the creators now jointly manage the page which is regarded among industry professionals as deeply engaged with their customers who, by word of wall posts marketing, create their own messages promoting the brand.

As a result, it shouldn’t be surprising to learn that small businesses have also seen the importance of engagement with their customers and the public. Small businesses doubled their Twitter usage in 2010. Nearly 20% of them use Twitter for local marketing and promotion. Almost half of small businesses have reported that they similarly use Facebook for these purposes in creating one-on-one cross-channel communications and interacting with engaged customers. In Fort Myers, Florida, the local newspaper has regularly run articles discussing the use of social media by local businesses in driving industry.

Social media no longer is an after-thought in Southwest Florida commerce. Indeed, some of the region's major companies have enlisted specialists who use sophisticated digital tools to blog, tweet and post - seemingly 24/7. It's become a must-do for the lifeblood tourism and hospitality industry that pumps more than $2.5 billion into Lee County's economy, alone.

Google Plus has recently released its much-awaited business profiles and analytics as well as sophisticated sharing options. In the first six months, over 1 million businesses and brand pages were created.

The key factors that businesses consider when using social media platforms are awareness, social impact of peer comments, customer engagement and driving traffic to make purchases. As part of this process, many businesses incorporate interactive forums and blogs in which employees participate creating engagement and learning more about their customers and potential customers. Twitter permits interactive Tweets that allow people to comment in response. Facebook pages are a source of routine interaction between the public and business employees.

A significant percent of companies with publicly traded securities use Facebook, Twitter, YouTube and SlideShare as well as blogs to amplify their investor communications and to promote engagement with the investing community. Twitter is the most frequently used IR platform often providing links to other material or to the company website. It is not uncommon to see live Tweeting of quarterly earnings conference calls. Many such companies have a Twitter account specifically deployed for IR use. There are also many examples of acquisitions or mergers in which companies place a volume of explanatory material on SlideShare simultaneous with a filing of regulatory documents and release to newswires.

45 Id.
46 Id.
47 Id.
50 Heaps & Joyce, supra note 26
51 Id.
52 See e.g. http://www.slideshare.net/hewlettpackard/hppalm-investor-presentation and http://www.slideshare.net/symantec/symc-acq-pgpguardianedge
C. Social Media Users Are Young

The considerations surrounding the issues arising from the ubiquity of social media in our lives must also include demographics. While the average age of adult social media users grew from 33 years old in 2008 to 38 years old in 2010, fully 48% of adult users are between 18 and 35. This demographic technological disparity is the topic of many scholarly works and well-researched business management treatises.

Millennials grew up with computers and cell phones the way baby boomer and Gen Xers grew up with typewriters and corded telephones. Baby boomers see technology as a tool, or even a toy, while younger workers see it as an extension of themselves.

It’s undoubtedly then no great revelation that the younger the user, the more adept and prolific that user is with respect to digital communication technology. For example, 95% of those between 18 and 29 years old send or receive an average of almost 88 text messages a day. Those between 18 and 24 send or receive an average of close to 110 text messages daily. This average figure is almost double the texting activities of those 25 to 34.

Business employees that are most valuable and adept in working with social media are also inevitably the least experienced in recognizing and reconciling complex business and legal issues.

While serving very worthwhile business goals, there are concomitant risks of which the management of businesses of any size must be aware and that they must address at the highest levels of management.

III. THE ENDOGENOUS LEGAL AND BUSINESS RISKS ASSOCIATED WITH SOCIAL NETWORKING ACTIVITIES

A. Human Relations

The issues arising from the use of social media sources by human relations in hiring and discharge decisions have been well covered in the media and law journals. The Equal Employment Opportunity Commission often guides us on questions that cannot be asked in employment interviews. Are these the same questions that cannot

53 Rainie supra, note 4.
54 W. Stanton Smith, Decoding Generational Differences: Fact, fiction... or should we just get back to work?, DELLOITTE DEVELOPMENT, LLC, (2008).
55 Id. at page 34. Smith describes Gen Xers as those born between 1965 and 1980 and Millennials are those born after 1980.
57 Id.
58 Id.
   (a) Employer practices. It shall be an unlawful employment practice for an employer--
      (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
      (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. (42 U.S.C.A. §2000e-2 (West, Westlaw through P.L. 112-54, (excluding P.L. 112-40)).
   Title I Americans with Disabilities Act, 42 U.S.C.A. §§12101-12213 (WEST, WESTLAW through P.L. 112-54, (excluding P.L. 112-40)).
   (2) Preemployment.
      (A) Prohibited examination or inquiry. Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability. (42 U.S.C.S. 12112(d)(2)(A)(Lexis through 2011)).
be answered by use of a social media background check in search of evidence of drug or alcohol use, sexual preference, family composition, religion, national origin, disability, racist remarks, sexually explicit photos, display of weapon use, medical conditions or credit issues? Services available to employers now include those that will monitor the internet for activities of employees such as Social Sentry and Social Intelligence. Employers are certainly constrained by the laws governing discriminatory decision-making no matter the source of the information. They are also obliged to refrain from haphazard and unequally applied search standards.

The Federal Trade Commission’s Division of Privacy and Identity Protection enforces the terms of the Fair Credit Reporting Act (“FCRA”) and has determined that Social Intelligence does not violate the requirements of the FCRA. That doesn’t absolve any employer of using credit information fairly or with the permission of the applicant or without advising the applicant that adverse information has been developed.

Nonetheless, 70% of human relations professionals in the US have reported that they have rejected candidate applications based on information acquired in online searches. Such searches include search engines, social networking sites, photo and video sharing sites, professional networking sites, personal web pages, blogs, news sharing sites such as Twitter, forums, virtual world sites, gaming sites, professional background checking services and classified ads. Of those surveyed, 86% of the HR professionals reported that they informed the candidate of the reasons for the rejection.

B. Labor

In November 2009, the American Medical Response of Connecticut fired a Teamsters Local represented employee after she had posted negative and crude statements about her supervisor on a Facebook page read by fellow employees, supervisors and those not affiliated with the company. The NLRB Division of Advice concluded in October 2010 that the employee’s public comments were protected activities under the organizing provisions of the National Labor Relations Act and she had been illegally fired. In addition, the Division of Advice declared that the written company “Standards-of-Conduct Policy” that prohibited the use of “language or action that is inappropriate…or of a general offensive nature” and the additional written policy that prohibited “rude or discourteous behavior to a client or coworker” violated the organizing provisions of the Act in accordance with past NLRB decisions. The Division of Advice also asserted that the written company policies regarding “Blogging and Internet Policy” that stated that “employees are prohibited from posting pictures of themselves in any media…which depicts the Company in any way, including but not limited to a Company uniform, corporate logo, or an ambulance” and prohibited employees from “making disparaging…comments when discussing the Company or the employee’s superiors, co-workers, and/or competitors” similarly restricted organizing rights under the Act because the policies


FTC Facts for Consumers http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre36.shtm Nov. 28, 2012; See also WEST’S ANN. CAL. LAB. CODE §1024.5 (WEST, WESTLAW through 2011 Reg. Sess.).


Id.


29 U.S.C.A. §158(a)(1) and (3) (WEST, WESTLAW through P.L. 112-54, (excluding P.L. 112-40)).

Honda of America Manufacturing, Inc., 334 N.L.R.B. 746, 747-748 (2001); University Medical Center, 335 NLRB 1318, 1320-1322 (2001); Tradesman International, 348 N.L.R.B. 460, 462 (2002).
did not expressly contain any “limiting language to inform employees that it does not apply to Section 7 activity”.  

Since American Medical, there have been a number of similar cases arising under the Act with similar determinations. The issue is not limited to unionized workers. By the terms of the Act, the organizing protections of §157 apply equally to non-unionized workers. As a result, in September 2011, a NLRB Administrative Law Judge released an opinion in the case of five unrepresented employees fired by a not-for-profit corporation which renders social services including housing, domestic violence advocacy, food support, employment assistance and language translation to low income clients in Buffalo, New York. One of the fired employees had posted a series of comments on her Facebook page saying that a part-time fellow employee was critical of the degree to which they provided services to their clients. The other four of the subsequently fired employees participated in the discussion on the Facebook page and were not particularly pleased.

The part-time employee complained about the postings to the Executive Director who met individually with each of the participating employees and fired them saying that the posts constituted bullying and harassment which violated the organization’s policy and caused the part-time employee to have a heart attack.

The ALJ determined that the firings violated the organizing provisions of the Act even inasmuch as the Facebook postings were “concerted activities for the purpose of collective bargaining or other mutual aid or protection” writing in the opinion that their “discussions about criticisms of their job performance” were protected. This was true even though the employer had a written policy that stated that it would not “tolerate any form of harassment, joking remarks or other abusive conduct…that demeans or shows hostility…[or] that creates an intimidating, hostile or offensive work environment…..” The ALJ took into account that the Facebook postings were made after work hours and not from the organization’s computers.

Given the broad sweep that the NLRB has generally taken in favor of the employee in advice to regional offices and in decisions of Administrative Law Judges in spite of the harsh nature of the language used by the employee in internet postings in comments about the employer and supervisors, management of a business could be induced to believe that there is no useful purpose to be served in creating policies governing such conduct. However, an entirely permissive non-policy approach could easily lead to far worse problems than entanglements with the NLRB. For example, professional organizations, financial institutions, healthcare providers, and governmental agencies have obligations to protect confidential information. All enterprises are obliged to prohibit sexual harassment and discriminatory behavior against protected classes. Employers can incur liability for libel, harassment, bullying and other torts arising from the conduct of employees. Trade secrets must be guarded, both those of the employer and those of vendors and customers. All of these risks should be key motivation for the careful crafting of employer policies with respect to employee conduct on the internet. The challenge, though, is to create policies that do not prohibit legal activity such as those broadly tolerated by the NLRB as Section 7 organizing “concerted activities”.

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70 “Employees shall have the right…to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C.A. §157 (WEST, WESTLAW through P.L. 112-54, (excluding P.L. 112-40)).
72 29 U.S.C §152(3) (WEST, WESTLAW through P.L. 112-54, 2011, (excluding P.L. 112-40)).
73 Hispanics United of Buffalo, Inc. v. Carlos Ortiz, U.S. NLRB Case No. 3-CA-278972 (2011) at p. 11.
74 Id. at p. 10.
75 There are some guideposts in the NLRB decisions. In Hispanics United of Buffalo, the not-for-profit employer was obliged to post a “Notice To Employees” stating that the employer would “NOT in any like or related manner interfere with, restrain or coerce” the employee in the “exercise of the rights guaranteed you by Section 7 of the Act.” Id. at Appendix. The Notice also included the following language:

“WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activity, including discussing amongst yourselves your wages, hours and other terms and conditions of your employment including criticisms by coworkers of your work performance.”
C. Network Risks

52% of IT professionals have reported network attacks on their employer due to employee use of social media. This often arises from employees downloading applications or widgets from social media sites. 63% of IT professionals agree that employee use of social media puts their network security at risk, and yet, only 29% report that they have the necessary security apparatus in place to control those risks.

Those security risks include “viruses and malware, brand hijacking, lack of control over content, unrealistic customer expectations of “internet speed” service and non-compliance with record management regulations.” While there is considerable internal systemic risk that is evident due to data theft, network downtime, bandwidth absorption and use of resources to repair breaches, there is also reputational risk, customer backlash and loss of control over company information that are important factors of concern to management.

IT professionals report that employee downloading of video consumes network bandwidth and increases the likelihood of embedded web threats and inappropriate content.

D. Productivity and Reputation

Employees access social media during the workday both for business and personal purposes. Most of this is for personal uses. This can have a dramatic impact upon employee productivity. 59% of employees use social media for business purposes no more than 30 minutes a day. However, 60% use it for personal reasons at least 30 minutes a day. 63% of employees, according to IT professionals, access social media during the work day for non-business reasons one-third of the time.

Employees are very aware of the unprecedented power they have both to act as ambassadors of the company and its products and the associated influence they have, due to the vast reach of the internet, to negatively affect the company’s image and reputation. 74% of employees agree that it is “easy to damage a company’s reputation on social media”. However, even without intending harm, the reputational risks associated with excruciatingly bad judgment can be far more serious than the legal risks. In 2009, a Bozeman, Montana police officer resigned after a citizen sued the city on the claim that his civil and constitutional rights were violated when he was wrongly taken into custody. As evidence, he cited the Facebook page of one of the arresting officers who had posted that the police should be permitted to jail people for being “stupid” and that he liked to “mess with people”.

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76 Ponemon Institute Global Survey on Social Media Risks, September 2011. A survey of 4,640 IT & IT Security Practitioners around the world with an average of 10 years of experience in the field available at http://tinyurl.com/cvbhn7o.
77 Id.
79 Id.
80 Id.
81 Id.
82 Id.
83 Deloitte 2009 Ethics & Workplace Survey. supra note 2
84 Bozeman police officer resigns after Facebook post about arresting "stupid" people, MISSOULIAN, September 9, 2009 available at http://missoulian.com/news/state-and-regional/article_2aba551a-98f1-11de-8726-001cc4c03286.html. The officer’s post included the following text:
"I think there should be a law saying police can take people to jail for being stupid. Ask a cop a question like, 'Don't you have anything better to do?' and you get a free ride in a cop car. If I had something better to do, I would be off doing that, and not messing with you. Speaking of messing with people ... I like messing with people. Just being in a patrol car looking at people while parked at a red light is fun. Make eye contact, squint your eyes like you know what they just did and watch them squirm and avoid all further eye contact. It makes my day fun.
"I'm always amazed at what people will tell a police officer. I think people assume we are like priests and it is all in confidence. It's not. We go back to the office and talk about everything we saw and heard. Then
In Brooklyn, New York, a man on trial accused of carrying a loaded gun was acquitted after the defense argued that the arresting officer and his partner beat him and then planted the gun in justification for breaking three of his ribs. In support, the evidence showed that the officer had described his mood on his MySpace page as “devious” and that he was brushing up on proper police procedure by watching the movie, *Training Day.*

These are clearly examples of egregious mistakes of employees in their private activities on social media. But they serve to highlight the permanent nature of online postings that persevere long after similar comments that might have been made one night in a bar between a couple of friends or grousing about work over lunch. Ill-considered comments that might only be heard by a small number of friends, associates or family and then quickly forgotten are now memorialized for eternity in the echo chamber of the ether and potentially read by many thousands, if not millions, of others.

IV. THE EXOGENOUS LEGAL AND BUSINESS RISKS ASSOCIATED WITH SOCIAL NETWORKING ACTIVITIES

A. Defamation, Invasion of Privacy, Harassment and Other Torts: Infringement of Intellectual Property

 Most of the external problems that can arise in the context of social media engagement by private ventures and their employees can be analyzed by examining the source of the offending material. If the source is an employee or other affiliated party, the question then turns on the classic vicarious liability determination of whether or not the employee or affiliated party was acting within the scope of his or her employment. If the source of the offending material was not an employee or affiliated party, then it must be resolved by reference to legislation.

1. Employee or Affiliated Party Source of Tortious Content and Infringing Material

While there are other theories of liability, the most common basis is vicarious liability under the doctrine of *respondeat superior.* For the most part, the doctrine of *respondeat superior* has well-developed jurisprudence in determining employer liability for civil torts and infringement of intellectual property. Such claims asserted by third parties turn on the existence of an employer-employee relationship in which the employee was acting within the scope of the employment or in furtherance of the employer’s interest at the time of the wrongful act.

we laugh at people. Usually it is all on audio as well so we listen to stupid things over and over. If we are lucky, it happened in front of a patrol car with its camera on. Then we get to watch it over and over,”

85 Jim Dwyer, The Officer Who Posted Too Much on MySpace, NY TIMES, March 10, 2009, available at http://www.nytimes.com/2009/03/11/nyregion/11about.html. The defense attorney had also discovered other internet posts by the officer commenting on online video clips of police arrests in which they were shown punching a man in handcuffs. “If he wanted to tune him up some, he should have delayed cuffing him. If you were going to hit a cuffed suspect, at least get your money’s worth “cause now he’s going to get disciplined for” a relatively light punch. Id. See also Erica Goode, Police Lesson: Social Network Tools Have Two Edges, NY TIMES, April 6, 2011, available at http://www.nytimes.com/2011/04/07/us/07police.html?pagewanted=all.  

87 See New York Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 495 (1909); United States v. Route 2, Box 472, 136 Acres More or Less, 60 F.3d 1523, 1528 (1995).
88 RESTATEMENT (THIRD) OF AGENCY §7.07 (2006)

(1) An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.

(2) An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.

(3) For purposes of this section,

(a) an employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work, and
It is beyond the purpose of this paper to illuminate the technical subtleties of “scope of employment” analysis. However, it is significant that the evolution of this issue as reflected in the contrast of the articulation of the principle in the Restatement (Second) of Agency §228 with the Restatement (Third) of Agency §7.07 reveals that the breadth of employment that “occurs substantially within the authorized time and space limits”98 has been removed as a limitation on vicarious liability. The commentary in the Restatement (Third) specifically addresses the reality that the work of many employees “is not so readily cabined by temporal or spatial limitations.”99 Another significant development in the standard is the change from the requirement that the act “is actuated, at least in part, by a purpose to serve the master”91 to a formulation that the act “occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer”. 92

An eager young employee who has blended his or her personal life with hi or her work in a social media setting can, without intending to do so, put the employer in a difficult position with respect to third parties in the event of a wrongful act, either by accident or intentionally.

2. Third Party Source of Tortious Content

It is well-established that the Communications Decency Act of 1996 (“CDA”) provides a reasonably robust immunity in § 230(c)(1) to “providers” and “users” of an interactive computer service from any state or federal civil claims that would ordinarily arise from a showing that a putative defendant had been a “publisher or speaker or any information provided by another information content provider.”93 The CDA goes on to say that “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”94

In the leading case deciding the scope of § 230(c)(1),95 the plaintiff asserted that, despite having been given notice repeatedly, AOL had refused to remove malicious and defamatory material on their interactive computer service posted by another unidentified user. The court determined that the federal statute provides immunity, not only for the publisher of common law defamation, it also provides immunity for the distributor as well.96 The Supreme Court of California was reluctantly obliged to agree.97 Immunity has also been found to exist against assertions of liability for allegations of third party user conduct of cyberstalking98 securities fraud under state law,99 dilution of trade name under state law,100 rape of a minor,101 appropriation of right of publicity,102 violation of

(b) the fact that work is performed gratuitously does not relieve a principal of liability.

89 RESTATEMENT (SECOND) OF AGENCY §228(1)(b) (1958).
90 RESTATEMENT (THIRD) OF AGENCY §7.07 cmt. b (2006). "Many employees in contemporary workforces interact on an employer’s behalf with third parties although the employee is neither situated on the employer’s premises nor continuously or exclusively engaged in performing assigned work.”
91 RESTATEMENT (SECOND) OF AGENCY §228(1)(c) (1958).
93 47 U.S.C.A. §230 (WEST, WESTLAW through P.L. 112-54, (excluding P.L. 112-40)).
96 Zeran supra. at 332. Under traditional common law defamation, distributors such as booksellers or newsvendors “cannot be held liable for defamatory statements contained in the materials they distribute unless it is proven at a minimum that they have actual knowledge of the defamatory statements upon which liability is predicated.” Id. at 331.
97 Barrett v. Rosenthal, 40 Cal. 4th 33, 40 (2006). “We acknowledge that recognizing broad immunity for defamatory republications on the Internet has some troubling consequences. Until Congress chooses to revise the settled law in this area, however, plaintiffs who contend they were defamed in an Internet posting may only seek recovery from the original source of the statement.”
99 Id.
100 Id.
101 Doe v. MySpace Inc., 528 F.3d 413 (2008), cert. denied, 2008 U.S. LEXIS 8516 (U.S., Nov. 17, 2008). Suit for negligence and gross negligence when 13 year old girl created a MySpace profile and represented she was 18. She met a 19 year old male online who sexually assaulted her when they later met.
consumer protection statute, interference with business relationships, third parties paid for their content by the computer service, waste of public funds and unfair competition. However, the CDA offers no protection for infringement of intellectual property.

3. Intellectual Property Infringement By Third Party

Another source of a form of immunity for service providers is the Digital Millennium Copyright Act of 1998 (“DMCA”). Provided that the service provider has not played an active role in “transmitting, routing, or providing connections for” material that infringes the copyright of other parties or has received no direct financial benefit from the infringement, the service provider will not be found liable for damages or subject to equitable relief so long as the service provider has no “actual knowledge” of the infringement.

However, the DCMA only provides a carefully subscribed safe harbor for copyright infringements subject to certain obligations of the service provider. The service provider must designate an agent to receive notifications of claimed infringements and prominently provide the name, address, phone number and email address of the agent both on the website and to the copyright office. Upon notification of claimed infringement, the service provider must “[act] expeditiously to remove, or disable access to” the infringing material. The service provider must also “timely establish a detailed copyright compliance policy.”

There is also protection from recourse, under certain conditions, for taking down material in good faith “regardless of whether the material or activity is ultimately determined to be infringing.” However, there is no immunity under the DMCA for infringement of trademarks. Service providers generally have no liability for

104 Id.
105 Blumenthal v. Drudge, 992 F. Supp. 44, 52 (1998). Writer, Matt Drudge, was engaged by AOL for $3,000/month for the right to publish Drudge’s gossip and rumor columns. The licensing agreement provided that AOL reserved the “right to remove, or direct [Drudge] to remove, any content which, as reasonably determined by AOL . . . violates AOL’s then-standard Terms of Service. . . .” Nonetheless, AOL was shielded from liability as a publisher of Drudge’s defamation that Blumenthal had a history of “spousal abuse.”
110 17 U.S.C. §512(c)(1)(B) (WEST, WESTLAW through P.L. 112-54, (excluding P.L. 112-40)).
111 17 U.S.C. §512(a) (WEST, WESTLAW through P.L. 112-54, (excluding P.L. 112-40)).
113 17 U.S.C. §512(c)(2) (WEST, WESTLAW through P.L. 112-54, (excluding P.L. 112-40)).
114 17 U.S.C. §512(c)(1)(C) (WEST, WESTLAW through P.L. 112-54, (excluding P.L. 112-40)).
116 17 U.S.C. §512(g)(1) (WEST, WESTLAW through P.L. 112-54, (excluding P.L. 112-40)).
117 See Tiffany Inc. v. eBay, Inc., 600 F.3d 93 (2010, cert. denied, Tiffany (NJ) Inc. v. eBay Inc., 131 S. Ct. 647 (2010); Louis Vuitton Malletier, S.A. v. Akonoe Solutions, Inc., 658 F.3d 936 (2011). These cases do not expressly rule on the question of the DMCA application to trademark infringement, however, the inapplicability of the statute is evident in the extensive and detailed analysis of trademark infringement and contributory infringement. In particular, the court in Tiffany detailed the elaborate efforts of eBay to scour its site for such infringements and to warn users of the proliferation of counterfeit goods often sold by unscrupulous vendors. Additionally, the court highlighted the dramatically different holdings by courts outside of the United States with respect to such matters. Tiffany supra at p. 105, n. 8.
displaying Uniform Resource Locator (URL) links to sites hosting material that infringes copyright except in very limited cases and under specified conditions.

B. Unfair Competition, False or Misleading Advertising and Anti-Trust

Many states have enacted the Uniform Deceptive Trade Practices Act proscribing a range of commercial misconduct from trademark issues to misleading advertising. Some states have their own specific requirements, including California, which has codified its version of the proposal in many parts of the California Code. In addition to state regulations, there are federal statutes as well. There are a multitude of ways in which an overly eager young employee can run afoul of the provisions of these many codes and regulations on the internet, with or without intent, and the only insulating barrier to employer liability is the fuzzy terrain that separates conduct within or outside of the scope of employment.

Similarly, in any online contact with competitors, employees need to be aware that they must avoid any appearance of price collusion, collaboration or dividing up customers or territories.

C. Regulatory Compliance

Companies with publicly-traded securities are obligated to adhere to strict requirements with respect to the release of financial results and the timing of public statements on their websites in connection with those results. Moreover, publicly-traded companies must comply with the SEC rule governing fair disclosure of material non-public information, selective disclosure of such information and insider trading.

Such financial and business information can easily be accidentally disclosed by employees unfamiliar with the regulatory requirements but who know (or have heard) about new product development or previously undisclosed sales pipeline data or a potential acquisition or merger. Informed senior executives and investor relations personnel Tweeting about company activities have to follow the rules and procedures that attend the release of any material non-public information across a range of reporting obligations and regulations with the same attention to detail, completeness and with all appropriate disclaimers even in 140 characters.

If a Current Report on Form 8-K containing material information is released to the newswires, it is not Reg FD compliant to Tweet about it at the same time when there is generally an 80 second to 3 minute latency period on the wires before the release appears on Bloomberg or Yahoo. That’s more than enough time for someone to trade on information that the rest of the public has yet to learn. Similarly, from a compliance standpoint, an executive

126 “In order to make information public, it must be disseminated in a manner calculated to reach the securities market place in general through recognized channels of distribution, and public investors must be afforded a reasonable waiting period to react to the information.” Faberge, Inc., (1973) 45 S.E.C. 249, 255.
cannot repost an analyst’s report, absent all of the typical disclaimers, without the company having “adopted” or become “entangled” with the report.\textsuperscript{127}

All employees of publicly-traded companies must be aware of the quiet periods prior to earnings releases or other major announcements.\textsuperscript{128} It is one thing to Tweet about guidance given during the traditional quarterly analyst conference call, but it is something quite different to repeat the Tweet toward the end of the quarter when presumably there is more visibility about actual performance, and the Tweet may very well be a material event of selective disclosure. Moreover, all of the traditional safe harbor disclaimers for forward-looking statements apply equally to Tweets by company employees.

The SEC had earlier issued some guidance to companies with respect to these regulatory matters and employee conduct in social media settings.\textsuperscript{129} This guidance was marginally helpful in setting policies for employee statements in social media in order to comply with the requirements of regulations in an information channel that is broadly accepted by investors and regulators for purposes of ensuring fair disclosure.

On April 2, 2013, the SEC released its report in connection with an investigation into a July 2012 Facebook posting by the CEO of Netflix, on his personal page, who announced that the company had over 1 billion hours of video streaming content to its customers in June 2012. The company had never used the CEO’s personal Facebook page to make such announcements, and his post was not accompanied by the filing of a Current Report on Form 8-K. Nor had the company announced to shareholders of Netflix that it would make such releases of company metrics in this fashion. Nonetheless, the Division of Enforcement determined not to pursue an enforcement action in the matter.\textsuperscript{130} In making the report, the SEC acknowledged that "An increasing number of public companies are using social media to communicate with their shareholders and the market generally."\textsuperscript{131} Indeed, in a survey of executives and board members, The Conference Board reported that 14.4% of their companies use social media to communicate with shareholders.\textsuperscript{132}

In its April 2, 2013 report, the SEC clarified and amplified its previous guidance in 2008 by making two clear points. An issuer communicating through social media requires compliance with Regulation FD “comparable to communications through more traditional channels”, and the investing public should be “alerted to the channels of distribution a company will use to disseminate material information.”\textsuperscript{133} And regardless of the forum, all employee statements must comply with the anti-fraud provisions of the Exchange Act with respect to material misstatements or omissions.\textsuperscript{134}

\textit{D. Customer And User Privacy}

Privacy concerns are a growing political and legal issue.\textsuperscript{135} Companies with websites and an interactive social media presence must be aware of and be responsible for complying with a dizzying array of legislation in each state,

\begin{itemize}
  \item \textsuperscript{128} While not expressly an SEC rule, there are provisions in securities laws that give cause for concern about what can be said during the period of approximately four weeks prior to earnings announcement, registrations and other important events. The SEC has published a discussion about the Quiet Period that is \textit{available at} http://www.sec.gov/answers/quiet.htm.
  \item \textsuperscript{131} \textit{Id.}
  \item \textsuperscript{132} Larker, Larker and Tayan \textit{supra}, note 27 at p. 7.
  \item \textsuperscript{133} SEC Release \textit{supra}, note 130 at p 5.
  \item \textsuperscript{134} 17 C.F.R. §240.10b-5 (WEST, WESTLAW through December 15, 2011).
\end{itemize}
federal requirements and, if applicable, aggressive and conflicting legal protections internationally. Particularly volatile are issues surrounding the collection of personal information from children such as email addresses and ages when registering for user access to a site. In general, companies must be vigilant to safeguard personal information and to take certain steps if there are any data breaches. In their January 2013 revisions to the Federal Trade Commission’s Rules regarding children’s online privacy, online operators of websites and services that are direct to children under the age of 13 must obtain verifiable parental consent before collecting and using personal information about the child. And the Rule enlarges the category of information deemed “personal information” to include, among many other categories, geolocation information, photographs, videos and audio files that contain a child’s voice, image or name and other “persistent identifiers” that would include cookies, email addresses or online user names.

Employees participating in social media activities, whether personal or as part of a corporate social media marketing strategy, must take particular care with personal information of customers, vendors and other social media participants. Certain professions such as those in the health care industry have very specific obligations with respect to the privacy of patients and their health records. A couple of nursing school cases in the last 2 years illustrates both the privacy and the conduct issues. In one instance, 4 nursing students posted on Facebook photographs they took in a hospital of a recently delivered placenta. While not identifying the name of the patient, enough data was revealed that in combination with other available information, the identity could likely be established. In the other, a nursing student posted on MySpace her observations about a birth she has just witnessed. She described it in unusually unkind, crude and unprofessional language with snide commentary that included a wealth of private information about the patient. It is significant that in the Yoder case, the trial court was not persuaded that the honor code document and the confidentiality agreement were written with enough clarity to justify the expulsion of the student.

With respect to third party users, it is essential that any company hosting or controlling an interactive website must have a well-planned and clearly stated Terms of Service (“TOS”) that includes the requirements for acceptable behavior and the posting content of those third parties as well as a clear statement of the company privacy policies. It is an effective legal practice to require users to affirmatively “accept” the TOS. If a company uses data supplied by consumers or acquired through the use of “cookies”, that use must be specified in the TOS and the company practices in that regard must be consistently applied in accordance with that which is outlined in the TOS. It is of vital importance that any business that has an interactive relationship with users of a webpage knows precisely what information is being requested and collected by cookies, either those supplied by the company website or any other subcontractors and vendors on the site or advertisers. Such information collection and the use of such information

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must be disclosed in a regularly updated privacy policy. Of particular interest must be so-called flash cookies or Local Stored objects that use the Adobe Flash plug-in that are installed in the vast majority of computers, and such objects are not filtered through the user’s browser preferences.

E. Other Issues and Risks

In consideration of the great many issues presented by an enterprise presence in social media and the engagement by employees with third parties, both personally and in the service of the enterprise, careful thought must be given to the business of the enterprise and its corporate culture inasmuch as the risks will obviously vary. Still, there are predictable additional questions of document retention policies that require archiving of website material, litigation holds, data breaches that raise privacy and trade secret alarms, risks associated with ill-conceived contests, sweepstakes and promotions, endorsements or reviews without revealing any benefits received, zip code requests, and laws related to employee texting while driving.

V. THE REQUIREMENTS OF A COMPANY POLICY

By now, it must be clear that there are debilitating risks associated with failing to develop and implement a Social Media Policy (“Policy”). It is critical that every company have a Policy in place and one that it is effectively communicated to employees, followed by ongoing monitoring for compliance. In order to develop a Policy, a company must first consider its objectives. Is the company trying to develop a social media presence for the purpose of marketing its products in collaboration with their employees? Then the decision path will lead to a program of training and monitoring how employees assist in that development. Or is the company only concerned about what employees are posting on their private pages that may pose a risk to the company? In which case, the policy becomes an enforcement mechanism.

Once the company has determined its objectives, it should consider its best path to achieve them. Depending upon the corporate culture, the Policy could emanate in the traditional fashion from the human relations and legal departments forming part of the employment handbook. In the alternative, the senior management of other companies has determined that their objectives can best be achieved by forming a cross-disciplinary Policy development committee consisting of representatives from stakeholder departments including legal and human resources, Marketing, Information Technology, Customer Service, Investor Relations and Corporate Communications departments. As part of the Policy development process, a program should be thoughtfully crafted to ensure that all employees understand the company objectives and what is expected of them. This program should include planning for additional training and discussion as well as monitoring for compliance. Development of this Policy should properly be monitored closely by senior management (if not a committee of the board of directors).

145 While there is no federal legislation as yet, see Cal. Civ. Code § 1798.83 (Lexis, current through 2012)
150 The various states regulate contests and sweepstakes in different ways. In general, entrants in a sweepstakes cannot be required to pay to enter. The rules of contests are often governed by the ages of the participants and the total value of the prizes to be awarded. Bonds are sometimes required and the promotions must be registered with the state as well as a wide array of disclosure requirements. Not to be overlooked are the published rules for such activities on various platforms such as Facebook and Google.
151 See FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255 (October 2009).
To assist with development of a policy, following is a sample policy that addresses some of the issues discussed above.

VI. SAMPLE SOCIAL MEDIA POLICY\textsuperscript{154}

The Internet is an important resource for both you and [company name] (the "Company"), but it must be used in a way that is consistent with the Company's objectives. We must maintain control of the integrity of our brand identity, and reputation. Consistent with the Company's Nondisclosure Agreement, we are obliged to protect the Company's confidential information (including current and potential products, and financial data), as well as matters concerning our employees, business partners,\textsuperscript{155} customers, and competitors. This Social Media Policy is to guide you in your use of social networking and blogging while you are an employee of the Company. This policy is in addition to the Company's Email Policy and Code of Conduct\textsuperscript{156}. All of our policies can be found on the Company's website at ______. We encourage you to refer to them from time to time to refresh yourself on their contents.\textsuperscript{157} If you have any questions regarding this policy, please speak with your supervisor or the Social Media Policy Manager ("SMP Manager").

A. The Company's use of Social Media

We understand the prevalence of social media and its value to Company. That is why we have a website and associated blog. We encourage you to comment on our blog, but remember that your comments are viewed by a very large number of people, so please make sure that you are making constructive comments. We must protect the image and integrity of the Company, so we actively moderate the blog and will make all final decisions regarding what content may appear there. If it is a part of your job responsibilities to assist in the management and moderation of the blog, keep in mind that those responsibilities will end when you leave the company and you must immediately cease the use of any password of which you have knowledge.

B. Employees' use of Social Media

1. Access during Company time

Participating in social media can be a time-consuming activity. Often we want to check "just one thing" and an hour has passed before we realize it. Please remember that while you are on Company time, your focus should be on the business of the Company and not on personal activities. Unless one of your job responsibilities is to participate in the Company's website, please conduct your social media activities after business hours. In addition, the Company’s computers and other Company-supplied electronic equipment is provided for use in connection with the business of the Company. Please do not use the Company’s equipment to engage in your own social media activities.

2. Identify yourself and be accurate.

If you have a blog where you discuss the Company, our products, services, customers, or competitors, be honest about who you are. You should note that you are an employee of the Company and that you are expressing your opinion, not the opinion of the Company. For example, you could include language such as "Any opinions that I express on this website are mine and do not represent the views of [the Company]. I do not have authority to speak on [the Company’s] behalf." Unless you receive written permission from your supervisor, you do not have authority

\textsuperscript{154} This policy is provided as a sample to offer guidance on what may be considered when developing such a policy. It should be adapted for the specific needs and risks of a particular company, and should be developed by a cross-functional team consisting of Legal, Human Resources, Marketing, Information Technology, Investor Relations and Corporate Communications.

\textsuperscript{155} If the Company is a healthcare provider, then issues regarding the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") will need to be addressed with respect to nondisclosure of protected health information.

\textsuperscript{156} The Company should have a Code of Conduct discussing a wide range of issues, from business ethics to regulatory and compliance issues that are specific to the Company’s business. The Code of Conduct should also cover how an employee should raise concerns or report violations of the Code of Conduct without fear of retaliation.

\textsuperscript{157} It is important that the Company have an ongoing program of education and reinforcement regarding use of social media and the terms of the Social Media Policy.
to speak for the Company or represent in any way that you are a spokesperson for the company. Even if you do not intend to speak on behalf of the Company, you may have identified yourself as a Company employee in your profile on your social media page. Therefore, comments you make while blogging may be misperceived as the views of the Company, so please use caution.

Consider carefully anything that you post in social media, particularly whether it is accurate and whether it will harm the company, its business partners, customers, or competitors. You are personally liable for what you post, which can result in legal action against you. Because of the instant nature of social media, it is very difficult to remove something once posted. It will be accessible by a wide variety of people for a very long time, so think twice before you represent yourself in a way that you might regret later. If you have any hesitation or question about whether or not you should post something, it is best not to post it.

In addition, there are some specific concerns of which you should be aware:

3. Confidential information

Do not discuss confidential information regarding the Company. For the definition of confidential information, please refer to the Company’s Confidentiality Agreement that you signed when you joined the Company. You may be very excited about a new product that is about to be introduced, but there is a time and a place for that disclosure by the Company. Until that disclosure has been made by the Company, you should not comment about it on your blog. There may be strict rules regarding financial disclosures that must be observed. We understand that you may be very excited that business has been good, or that profits are increasing, but you should not comment about those events. In addition, information regarding litigation, the Company’s trade secrets, and agreements with customers and suppliers are all confidential and may not be discussed by you in any forum.

4. Copyrights/Trademarks

Do not use the Company’s intellectual property, which includes our logo, trademarks, or copyrighted material, without written permission of the Company. If you have a reason for using the logo or trademarks, please ask your supervisor how to secure written permission for their use. Any questions regarding what materials may have copyrights should be discussed with your supervisor who will further direct you to the SMP Manager, if necessary. Respect for intellectual property rights extends beyond the company, to other companies and individuals. Do not copy someone else’s written, musical or visual work and post it as your own, and do not use the trademarks of any customer, competitor or other party without consent. A trademark is a distinctive word, phrase, symbol or design that helps us distinguish products of one party from another. They are often identified by TM or ©.

5. Colleagues

The business of the Company should not be discussed by you with your colleagues in social media. With respect to personal relationships with colleagues, please consider the privacy rights of your fellow employees before commenting about them or issues related to them on your website, or posting photos of them. If you and another employee attended a Company function about which you want to publicly comment, or at which you took photos that you want to post, ask their permission before discussing such activity or posting photos of them on your social media page. Just as you should not disparage, harass, or discriminate against any fellow employee in our workplace, do not do so in social media. If you see something posted by a colleague that raises concerns for you, either personally, or on behalf of the Company, please contact the SMP Manager to discuss those concerns.

158 Be sure to expressly note that nothing in this Policy is intended to infringe any employee’s rights under Section 7 of the National Labor Relations Act regarding concerted activity. Complaints about working conditions at a company may be protected by the NLRA, so any restrictions regarding such complaints should be narrowly tailored. This applies to discussions of both union and non-union working conditions which may constitute protected concerted activity. The NLRB’s Division of Advice has distinguished statements about working conditions (which could be classified as protected concerted activity) from complaints that are personal to the employee (which would not be classified as protected concerted activity), even if other employees make comments of support to an employee’s posting of a personal complaint.

159 Publicly traded companies should have additional guidance in their social media policies regarding SEC regulations with respect to the nature and timing of financial disclosures.
6. Unfair Competition and Promises

The law regarding unfair competition regulates the nature and manner that promotional statements may be made about our products. In your excitement about a product that we have in development, you may make a statement that says too much about the performance of a product or that may be later construed as inaccurate. That is why it is important that you clearly identify yourself and make it clear that your opinions are your own, and not those of the Company. The success of this Company is advanced by the willingness of its employees to participate in engaging the public about our products and services. We will all prosper if everyone is aware that they have a stake in our joint success. However, it’s important to understand that there are complexities of commerce and the law of which you may not be aware. Do not make representations or offer assurances. For example, if a customer publicly expresses unhappiness with some aspect of our business, you may direct them to contact the Company directly, but do not make any promises about how their complaint will be resolved. In addition, while the Company greatly values the loyalty of its employees, please do not get into flame wars with others who make unflattering comments online about the Company or our products or services. The most effective strategy is to maintain a friendly, dignified reserve.

7. Customers, Vendors, or Competitors

Our customers are the lifeblood of our business and our vendors are critical to our success. Therefore, any disparaging remarks you make about them can harm our business. In addition, we constantly strive to improve our products and service and will rival our competitors in that way. We do not want to see you making disparaging remarks about our competitors in order to hurt them and improve our business. Social media is also not the place to conduct business. You should not negotiate transactions on a social media platform. Such negotiations are confidential and should not take place in an open forum. You should not try to create any promotional activities or encourage any type of contest. While you may think that you are just increasing business, you may not be aware of the laws related to the activity you are encouraging, and you may incur liability for yourself or the Company.

8. Media

If any member of the media contacts you for further information on a post that you have made, either on your own social media page, website, or blog, or on the Company’s website, please contact the SMP Manager for guidance on how to respond the media inquiry.

C. Supervisors and managers

1. “Friending”

Give careful consideration to whether you want to “friend” an employee who reports to you. Often this can blur the line between the professional and personal relationship and encourage too much familiarity. In the event that you do friend an employee, and you see activity that concerns you, please do not comment on the employee’s page. Instead, contact the SMP Manager to discuss your concerns.

2. Regulating employee’s use of social media

It is not your duty to actively supervise your employees’ use of social media that does not include the use of Company equipment or is not conducted on Company time. If you become aware of activity that is inconsistent with the policies or goals of the Company, please share any concerns with the SMP Manager. However, do not take affirmative steps to obtain a password to an employee’s password protected website or blog under false pretenses for the purpose of viewing that website.

3. Employment decisions

Before surveying social media activities of a job candidate, please consult with the SMP Manager and the Human Resources department. In addition, if you see social media activity of a current employee that is in conflict with the Company’s policies and/or the employee’s job performance, please do not take any action without first speaking with the SMP Manager and the Human Resources department.

160 The Company may want to make a specific reference here to customer service contact information, investor relations, community relations, or whatever the relevant department may be.

161 Among other things, the Fair Credit Reporting Act may be implicated.
Violations of this policy may result in disciplinary action, up to and including termination. You may also be directed to withdraw certain posts if the Company believes that compliance with applicable laws requires such action.

By signing below, you acknowledge that you have received, read, understand, and agree to comply with this Social Media Policy.

Signature: ____________________________

Print name: ___________________________

Date: ________________________________
YES, THE POOR ARE CORPORATE STAKEHOLDERS

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Abstract: As religion is increasingly expressed in the corporate world, business leaders professing Christianity must seriously consider the biblical concerns for the poor. This article asserts that the poor are indeed corporate stakeholders. Legal attempts to make the poor and homeless disappear from business and tourism areas of the city by restricting individuals from distributing food or prohibiting the homeless from sitting or sleeping in public are inconsistent with the concept of stakeholder status. Furthermore, constitutional principles narrow permissible governmental action. Inclusive capitalism and shared value theory point the way for the poor to be recognized as stakeholders within a capitalistic economic system.

Key Words: Stakeholder, Poor, Bible, Homeless, Christianity, U.S. Constitution, Eighth Amendment, inclusive capitalism, shared value.

Introduction

Christian, among many religious beliefs, are increasingly present in the business community and among business leaders. Numerous examples of Christian business leaders’ organizations exist (Christian Businessmen Connect, 2012). However, with the name “Christian” comes a responsibility to act compassionately toward the poor.

For professing Christians the biblical parable of the rich man and Lazarus (Luke 16:19-31) is a frightening indictment of indifference to the poor. The word “poor” occurs 176 times in the New International Version of the Bible and “homeless” is the Apostle Paul’s description of himself in I Corinthians 4:11. Contrast these word counts with “murder” (80), “marriage” (47), “adultery” (45), “steal” (31), “theft” (4), and it is clear that the Bible places great emphasis on the poor. Even discarding sixty of the 176 references as related to spiritual poverty, etc., there are still over 100 Biblical references addressing treatment of and justice for the poor.

In the contemporary U.S., many wish the poor would just vanish from their communities as many city ordinances regulate panhandling, sleeping outside, and feeding the homeless. There is a legal tension between U.S. Constitutional rights granted both givers and recipients of charity and the classic “police powers” governmental regulation for the public health, safety, and well being. Responsible corporate governance requires a consideration of the poor as “stakeholders” worthy of attention. Business leaders and their entities should consider the impact of their policies on the poor.

This article explores biblical, legal, and corporate theory that may result in the poor becoming corporate stakeholders. It includes quotations from excellent position papers.
advocating governmental and corporate consideration of the poor. All that is needed is recognition that the poor are indeed stakeholders and a willingness to act accordingly.

Biblical Passages Addressing Concern for the Poor

While the Bible says much concerning generosity toward the poor, there are, in fairness, some parameters to this charity. The Old Testament states not to “show favoritism to a poor person in a lawsuit” (Exodus 23:3). The New Testament states “the one who is unwilling to work shall not eat” (II Thessalonians 3:10). These passages have over the centuries given rise to endless speculation concerning identifying the so called deserving poor and undeserving poor. How much of this speculation rationalizes inaction, indifference, and callous behavior?

The fact is many modern U.S. business leaders and business entities are extremely wealthy by global standards. Is the conscience of professed Christian business executives satisfied with tax deductible gifts to their churches and organized charities? Should not business decisions consider the poor as stakeholders? The true art of creative strategic planning involves win-win policies such as Cemex has undertaken to provide housing to the poor (Cemex, 2012).

The topics of charity and social justice have been so frequently commented upon that there is no need to restate this familiar conversation. For Christians, it is impossible to dodge the numerous Bible passages addressing poverty and and be true to the text. One might argue that the charitable demands only apply to members of our exclusively Christian fellowship (the “poor brother” of Lev. 25:35) but Jesus in the famous Good Samaritan teaching (Luke 10) clearly extends charity to the outsider. The second greatest command is to love your neighbor as yourself. Jesus is said to have become poor so that we could be rich (II Cor. 8:9) and his ministry was physical as well as spiritual.

Numerous passages indicate that Christians do not own themselves being “bought with a price” (I Cor. 6:20) and hospitality is demanded as good stewards (I Peter 4:9-10). Jesus himself financed his ministry through the charity of women such as Mary Magdalene, Joanna the wife of Chuza, Herod’s steward, and Susanna and many others (Luke 8:2-3). The Bible states that Christians should not send away those who lack clothing and food (James 2:13-16). This text is familiar to all Christians. Some Christian prosperity televangelists argue that charity is “seed sowing” and that Christians are blessed to the extent that they sow (Proverbs 11:24-25 and Proverbs 28:27 in the Old Testament and II Cor. 9:6-8 in the New Testament). Again, the Bible passages are numerous.

Christians are to “weep with those who weep” (Romans 12:15) and “love one another” (John 13:34). One with two coats is to give to him that has none (Luke 3:11). In the Old Testament, Nabal denied charity to David on the grounds that he did not know him and those who were with him (I Sam. 25: 10-11). Abigail condemned this attitude and God punished Nabal (I Sam. 25). In the New Testament, Christians are told to entertain strangers as some may be angels (Heb. 13:2).

When one asserts that there are undeserving poor, what does that mean? Some poor individuals lack abilities or may have overlooked physical and mental problems. Christians are to
forgive others as Christ has forgiven. Even if the individual continues to act in self-destructive ways, what is an appropriate Christian response to their innocent families? To argue that there are non-profit and publically funded agencies is to repeat the famous “Christmas Carol” line: “Are there no workhouses?” (Dickens, 1843).

Like it or not, Christian business leaders must acknowledge that we humans are tied together by social and spiritual bonds as we are all created by God. Christians cannot attempt to remove themselves from society and pretend that what happens to the poor does not impact them.

Someone took care of these business leaders when they were infants. If they were left alone as babies, they would have died. Society creates the rules and expectations that protect business leaders from being killed and everything they have been taken. To say otherwise is to repeat the mistakes of the wealthy described in the Old Testament book of Amos. It is a powerful judgment. “Hear this word, you cows of Bashan on Mount Samaria, you women who oppress the poor and crush the needy and say to your husbands, “Bring us some drinks!”” (Amos 4:1)…. “Therefore, though you have built stone mansions, you will not live in them….“(Amos 5:11).

The poor are stakeholders in our society. Christians are to notice and care for them. The Bible clearly teaches that to do otherwise will ultimately result in great condemnation by God on both society and the individuals who have neglected their social and religious responsibilities.

Additionally, on First Amendment grounds, those who feel a religious obligation toward the homeless should be able to exercise that right (Fifth Ave. Presbyterian Church, 2002). A detailed discussion of constitutionally protected religious practices is beyond the scope of this article but is a connector to a discussion of legal responses to the poor.

**Legal Responses to the Poor**

Some communities wish the poor would just vanish. These cities have enacted ordinances to prohibit feeding the poor without having a licensed kitchen and prohibit the poor from sitting or camping on public property. Consider the significant federal Court of Appeals for the Ninth Circuit 2006 decision in Jones v. Los Angeles. The City of the Angels criminalized sitting, lying, or sleeping on public streets and sidewalks at all times and places within Los Angeles’s city limits. The Ninth Circuit court in a divided 2:1 opinion stated that ordinance violated the Eight Amendment right to be free of cruel and unusual punishment. Subsequently an out-of-court settlement was reached and the opinion was vacated. Other cities such as Las Vegas, Portland, Seattle, Tuscan, Houston, and Philadelphia have similar ordinances but not as sweeping and comprehensive.

The concluding language of the Jones v. Los Angeles opinion states:

“Homelessness is not an innate or immutable characteristic, nor is it a disease, such as drug addiction or alcoholism. But generally one cannot become a drug addict or alcoholic, as those terms are commonly used, without engaging in at least some voluntary acts (taking drugs, drinking alcohol). Similarly, an individual may become homeless based on factors both within and beyond his immediate control, especially in consideration of the
composition of the homeless as a group: the mentally ill, addicts, victims of domestic violence, the unemployed, and the unemployable. That Appellants may obtain shelter on some nights and may eventually escape from homelessness does not render their status at the time of arrest any less worthy of protection than a drug addict’s or an alcoholic’s.

Undisputed evidence in the record establishes that at the time they were cited or arrested, Appellants had no choice other than to be on the streets. Even if Appellants’ past volitional acts contributed to their current need to sit, lie, and sleep on public sidewalks at night, those acts are not sufficiently proximate to the conduct at issue here for the imposition of penal sanctions to be permissible. See Powell v. Texas, 392 U.S. 514, 550 n.2, 88 S. Ct. 2145, 20 L. Ed. 2d 1254 (1968) (White, J., concurring in the judgment). In contrast, we find no Eighth Amendment protection for conduct that a person makes unavoidable based on their own immediately proximate voluntary acts, for example, driving while drunk, harassing others, or camping or building shelters that interfere with pedestrian or automobile traffic.

Our holding is a limited one. We do not hold that the Eighth Amendment includes a mens rea requirement, or that it prevents the state from criminalizing conduct that is not an unavoidable consequence of being homeless, such as panhandling or obstructing public thoroughfares. Cf. United States v. Black, 116 F.3d 198, 201 (7th Cir. 1997) (rejecting convicted pedophile’s Eighth Amendment challenge to his prosecution for receiving, distributing, and possessing child pornography because, inter alia, defendant "did not show that [the] charged conduct was involuntary or uncontrollable").

We are not confronted here with a facial challenge to a statute, cf. Roulette v. City of Seattle, 97 F.3d 300, 302 (9th Cir. 1996) (rejecting a facial challenge to a municipal ordinance that prohibited sitting or lying on public sidewalks); Tohe v. City of Santa Ana, 9 Cal. 4th 1069, 1080, 40 Cal. Rptr. 2d 402, 892 P.2d 1145 (1995) (finding a municipal ordinance that banned camping in designated public areas to be facially valid); nor a statute that criminalizes public drunkenness or camping, cf. Joyce v. City and County of San Francisco, 846 F. Supp. 843, 846 (N.D. Cal. 1994) (program at issue targeted public drunkenness and camping in public parks); or sitting, lying, or sleeping only at certain times or in certain places within the city. And we are not called upon to decide the constitutionality of punishment when there are beds available for the homeless in shelters. Cf. Joel v. City of Orlando, 232 F.3d 1353, 1357 (11th Cir. 2000) (affirming summary judgment for the City where "the shelter has never reached its maximum capacity and no individual has been turned lack of space or for inability to pay the one dollar fee").

We hold only that, just as the Eighth Amendment prohibits the infliction of criminal punishment on an individual for being a drug addict, Robinson, 370 U.S. at 667; or for involuntary public drunkenness that is an unavoidable consequence of being a chronic alcoholic without a home, Powell, 392 U.S. at 551 (White, J., concurring in the judgment); id. at 568 n.31 (Fortas, J., dissenting); the Eighth Amendment prohibits the City from punishing involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter in the City of Los Angeles. We do not suggest that Los Angeles adopt any particular social policy, plan, or law to care for the homeless. See Johnson v. City of Dallas, 860 F. Supp. 344, 350-51 (N.D. Tex. 1994), rev’d on standing grounds, 61 F.3d 442 (5th Cir. 1995). We do not desire to encroach on the
legislative and executive functions reserved to the City Council and the Mayor of Los Angeles. There is obviously a "homeless problem" in the City of Los Angeles, which the City is free to address in any way that it sees fit, consistent with the constitutional principles we have articulated. See id. By our decision, we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets of Los Angeles at any time and at any place within the City. All we hold is that, so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds, the City may not enforce Section 41.18(d) at all times and places throughout the City against homeless individuals for involuntarily sitting, lying, and sleeping in public. Appellants are entitled at a minimum to a narrowly tailored injunction against the City's enforcement of section 41.18(d) at certain times and/or places.”

It is true that this judicial reliance on the Eighth Amendment is unprecedented in expanding it to encompass conduct caused by the status of being homeless and the failure of government to provide sufficient shelter. Concern about this judicial remedy was the thrust of Judge Rymer’s dissent in Jones. One may also argue that the majority engaged in judicial overreaching and that a slippery slope exists. However, could a city under both legal and humane considerations prohibit panhandling if the individual beggar has no source of funds with which to purchase food? Are individuals not personally responsible for their use of drugs and the resulting consequences? Is it impermissible judicial interference in local representative government to overturn an ordinance based upon concerns about public health or safety?

Some may asset that many of the individuals living on the street are mentally ill and point to decisions by the Supreme Court describing civil commitment as a “massive curtailment of liberty” (Vitek v. Jones, 1980 quoting Humphrey v. Cady, 1972). As was stated in the early 1970s, “the state must bear the burden of proving that there is an extreme likelihood that if the person is not confined he will do immediate harm to himself or others” (Lessard v. Schmidt, 1972). To administer medication over the objection of an individual requires both an “overriding justification” for such treatment and “a determination of medical appropriateness” for an individual (Riggins v. Colorado, 1992).

“Least restrictive alternative” analysis opened the doors of mental institutions to community treatment facilities that were nonexistent, underfunded, or lacked the resources to prevent individuals from simply walking away. However, as the West Virginia Supreme Court wrote in 1974: “Society abounds with persons who should be hospitalized, either for gallbladder surgery, back operations, corrective orthopedic surgery or other reasons; yet in these areas society would not contemplate involuntary hospitalization for treatment!” (State ex rel. Hawkins v. Lazaro, 1974). Justice Cardozo famously wrote: “Every human being of adult years and sound mind has a right to determine what shall be done with his own body” (Schloendorff v. Society of New York Hospital, 1914). Yet the Supreme Court has upheld mandatory smallpox vaccinations (Jacobson v. Massachusetts, 1905). In a landmark 1966 decision, “least restrictive alternative” language was first used in the context of an opinion that stated that “deprivations of liberty solely because of dangers to the ill persons themselves should not go beyond what is necessary for their protection” (Lake v. Cameron, 1966).
There are many excellent on-line resources addressing the legal and social issues of homelessness such as those materials created by the National Coalition for the Homeless and the Homeless Law Blog. The homeless population is not just the mentally ill. It includes children, families, victims of domestic violence, and veterans, as well as the mentally ill and substance abusers. According to the Homeless Law Blog, in 2008 about 28% of sheltered homeless were mentally ill and about 5-7% of the homeless mentally ill require institutionalization. This is a minority of the population one encounters living without shelter.

In 2012 the United States Interagency Council on Homelessness published a report entitled “Searching Out Solutions: Constructive Alternatives to the Criminalization of Homelessness.” This 53 page paper suggests three broad solutions: (1) Comprehensive and seamless Systems of Care, (2) Collaboration among law enforcement, behavioral health and social service providers, and (3) Alternative justice system strategies. The Executive Summary of the Interagency Council report is important enough to be reproduced in part:

“In recent years, the United States has seen the proliferation of local measures to criminalize “acts of living” with laws that prohibit sleeping, eating, sitting, or panhandling in public spaces. City, town, and county officials are turning to criminalization measures in an effort to broadcast a zero-tolerance approach to street homelessness and to temporarily reduce the visibility of homelessness in their communities. Although individuals experiencing homelessness should be afforded the same dignity, compassion, and support provided to others, criminalization policies further marginalize men and women who are experiencing homelessness, fuel inflammatory attitudes, and may even unduly restrict constitutionally protected liberties. Moreover, there is ample evidence that alternatives to criminalization policies can adequately balance the needs of all parties. Community residents, government agencies, businesses, and men and women who are experiencing homelessness are better served by solutions that do not marginalize people experiencing homelessness, but rather strike at the core factors contributing to homelessness.

Criminalization policies are costly and consume substantial state and local resources. In today’s economic climate, it is important for state, county, and local entities to invest in programs that work rather than spend money on activities that are unlikely to achieve the desired result and which may, in some cases, open the jurisdiction to liability. In addition to the increase in public resources used to carry out these criminalization measures, individuals who are arrested or fined for “acts of living” crimes in public spaces now have a criminal record; resulting in barriers to work, and difficulty in receiving mainstream services and housing that often bar individuals with criminal histories. These policies are a temporary solution to street homelessness and create greater barriers for these individuals to exit homelessness successfully, providing neither a permanent or sustainable solution to homelessness. …

The alternatives to criminalization policies identified in this report have been effective in reducing and preventing homelessness in several cities around the country. These solutions can be relatively inexpensive to implement, result in overall cost-savings, and have a lasting positive impact on the quality of life for individuals experiencing homelessness and the larger community. …
[Public forums] resulted in several recommended alternatives to criminalization, characterized by three overarching themes:

I. Creation of Comprehensive and Seamless Systems of Care  
II. Collaboration among Law Enforcement and Behavioral Health and Social Service Providers  
III. Alternative Justice System Strategies …

Many successful strategies were identified, … but communitywide engagement emerged as a common thread among all of them. The needs of all parties must be considered in the development of solutions for individuals experiencing homelessness. …

Solution I: The creation of comprehensive and seamless systems of care that combine housing with behavioral health and social service supports have been shown to prevent and end homelessness. [Discussion omitted]…

Solution II: Collaboration between law enforcement and behavioral health and social service providers results in tailored interventions that connect people with housing, services, and treatment and meet the community’s goal of reducing the number of people inhabiting public spaces. [Discussion omitted] …

Solution III: Implementation of alternative justice system strategies can reduce homeless involvement with the criminal justice system, decrease recidivism, and facilitate connection with other systems of care. [Discussion omitted] …”

These proposals do not use the term “stakeholder” but approach the concept when stating that “the needs of all parties must be considered” (Searching Out Solutions, 2012). The proposed solutions appear to be a reasoned and humane approach worthy of serious governmental consideration and implementation.

**Proposed Corporate Responses to the Poor**

In recent years in nations such as India, there has been widespread discussion of inclusive capitalism (India Knowledge, 2008). The theory of inclusive capitalism combines cooperative and for-profit elements. Some of these concepts involve artisans and so called fair trade shops in the U.S. A sometimes unstated concern is that if capitalism does not provide opportunities for inclusion, social unrest will occur.

In other contexts, the poor are described as stakeholders in global climate policy (Serranto, 2009). This approach notes that one billion people live in unsanitary slums and many environmental projects only serve the rich and may be contrary to the interest of the poor. Others argue that it is possible to deliver high returns to investors and address unmet social needs since “no society can thrive if its citizens are not qualified for the jobs it creates; if small businessmen and businesswomen cannot keep their heads above water; if large companies are not managed for the long term and guided by independent boards of directors; and if business as a whole is not driven by a spirit of conscience” (Henry Jackson Initiative for Inclusive Capitalism, 2012).
In 2012 the Henry Jackson Initiative for Inclusive Capitalism published a 31 page paper entitled “Towards a More Inclusive Capitalism.” The executive summary in part reads as follows:

“…Three pathways
We believe the ideal response is for companies to ensure that everyone—all stakeholders, not just shareholders—derive benefits from business. The three crucial areas we have identified in which companies and institutions can make, and are making, positive progress are (a) education for employment, (b) support for small and medium-sized enterprises (SMEs), and (c) improvements in corporate management and governance for the long term. …

As many business leaders have noted, corporate governance failed dramatically in a number of cases in the recent crisis. Executives managed their companies to a short-term notion of shareholder value rather than to the businesses’ long-term health, and boards of directors did not remedy the problem. Today’s focus on short-term performance must be replaced by long-term thinking on everybody’s part. Companies need not offer quarterly earnings guidance. They should seek ways to reward investors who hold their shares for the long term. Large investors should create portfolios of larger shares of fewer companies so that they can be more active owners of those companies. Directors must spend more time on strategy. …”

The concept of “shared value” is an unfolding concept. The following quotations are some highlights from a January-February 2011 Harvard Business Review “Big Idea” entitled “Creating Shared Value” authored by Michael Porter and Mark Kramer:

“The concept of shared value can be defined as policies and operating practices that enhance the competitiveness of a company while simultaneously advancing the economic and social conditions in the communities in which it operates. Shared value creation focuses on identifying and expanding the connections between societal and economic progress. …

The concept rests on the premise that both economic and social progress must be address using value principles. Value is defined as benefits relative to costs, not just benefits alone. Value creation is an idea that has long been recognized in business, where profit is revenues earned from customers minus the costs incurred. However, businesses have rarely approached societal issues from a value perspective but have treated them as peripheral matters. This has obscured the connections between economic and social concerns. In the social sector, thinking in value terms is even less common. …

In the social sector, thinking in value terms is even less common. Social organizations and government entities often see success solely in terms of the benefits achieved or the money expended. As governments and NGOs begin to think more in value terms, their interest in collaborating with business will inevitably grow…. The concept of shared value blurs the line between for-profit and nonprofit organizations. New kinds of hybrid enterprises are rapidly appearing…. Creating shared value (CSV) should supersede corporate social responsibility (CSR) in guiding the investments of companies in their communities. CSR programs focus mostly on reputation and have only a limited connection to the business, making them hard to justify and maintain
over the long run. In contrast, CSV is integral to a company’s profitability and competitive
game. It leverages the unique resources and expertise of the company to create economic
value by creating social value” (Porter & Kramer, 2011).

Shared value is a stakeholder inclusive concept involving all members of the community
including the poor. While it may take some years for business leaders to fully embrace the
concept, it is consistent with the thesis of this article.

**Conclusion**

Stakeholder theory should advance toward affirmative inclusion of the poor in corporate
decision making. The Bible, contemporary legal doctrine, and the management theories of
inclusive capitalism and shared value theory, indicate that the old narrow ways of thinking about
quarterly profits and stock prices (to create executive bonuses) are not sustainable. To fail to see
this is to repeat the mistakes of the wealthy in ancient Israel and to earn the condemnation of the
Old Testament prophets and their contemporary equivalents.

It is imperative to consider the poor as well as customers, employees, and suppliers when
conducting responsible decision making. As the Old Testament prophet Amos thundered: “They
do not know how to do right, declares the Lord, who store up in their fortresses what they have
plundered and looted. Therefore this is what the Sovereign Lord says: an enemy will overrun
your land, pull down your strongholds and plunder your fortress” (Amos 3: 10-11).

Contemporary Christian businessmen and businesswomen may say that we are not like
“them,” whatever historical or contemporary example is cited. The rationale all too often is that
we are blessed by God and therefore must be doing good. However, this may also be an excuse
not to conduct self-examination. When Christian business leaders are not distinguishable from
non-Christians, has the “salt lost its savor?” (Matthew 5:13). Yes, the poor are corporate
stakeholders.

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EFFECT OF BANKRUPTCY LAW ON ENTREPRENEURIAL ACTIVITY

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Abstract

We develop a model of entrepreneurship in which an individual allocates time between salaried work (which pays a certain income) and entrepreneurial activity (which yields an uncertain income). Exogenous variables include the probability of success of the entrepreneurial venture, the wage earned in the steady job, and a productivity parameter. The theoretical model yields the optimal allocation of time on the two alternatives confronting the individual—viz., how much time to spend on the steady job and how much to devote to the entrepreneurial activity. We incorporate bankruptcy laws in the model by considering the magnitude of the loss incurred in the event of the failure of the uncertain venture: under a strict bankruptcy regime, the loss can be substantial; under a more forgiving regime, the amount of the loss is curtailed. We describe how the “amount” of entrepreneurial activity is affected by the particular bankruptcy regime.

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1. Introduction

Since the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 became law, the interest in understanding the impact of bankruptcy regulation on the momentum of entrepreneurial activity has grown. The importance of encouraging entrepreneurial impetus has been recognized for nearly six decades. Schumpeter (1942) extolled the virtues of entrepreneurship and its concomitant, creative destruction. His premise was that the forces of entrepreneurial activity would give rise to innovation, destroy old business models, and create new industries—all of which would lead to a more dynamic economy. Since then studies have explored how barriers of entry to the entrepreneurial enterprise affect this momentum and the opportunity to realize Schumpeter’s premise of an expanded and vibrant economy (Djankov et al, 2002).

More recently, attention has been paid to potential barriers to exiting from an entrepreneurial enterprise in the event of insolvency. Armour and Cumming (2008) analyze an empirical model on self employment in 15 European Union and North American countries over the period 1990-2005 and conclude that rigid bankruptcy laws have a negative impact on entrepreneurial growth. Others have used different models to arrive at much the same conclusion. For example, Lee, Peng and Barney (2007) use a real options perspective while Fan and White (2003) establish a link between personal bankruptcy and entrepreneurial activity.

Entrepreneurial activity is inherently risky because of the likelihood of failure (Iyigun and Owen, 1998). Individuals who engage in entrepreneurial pursuits take into account the probability of the activity’s success as well as the returns on their investment. In addition, they consider the returns from alternative uses of their time (income provided by a salaried job) and capital.

The degree of risk aversion is an important factor. Van Pragg (1996), for instance, notes that individuals who are more risk averse are less likely to engage in entrepreneurial activities. In societies with strong uncertainty avoidance, an increase in prosperity (better job opportunities) may lead to a larger shift toward wage employment. Lucas (1978) and Iyigun and Owen (1998) argue that at higher levels of economic development, the increased availability of “safe” professional earnings may reduce the allure of

**Bankruptcy Laws**

Changes in personal bankruptcy laws could also affect the decision to engage in entrepreneurship by altering the entrepreneur’s loss in case of failure. Since many entrepreneurs use personal resources (or, alternatively use personal assets to secure a loan) to fund start-up costs, bankruptcy protection becomes a factor in assessing risk. When a venture becomes insolvent and is unable to pay their bills as they regularly come due, its principals have five choices in dealing with the venture’s debt: (1) Non-statutory out of existence (so called “lights out” option) where the venture simply ceases operations without paying creditors and the debt is not substantial enough to make legal methods to collect economically viable for creditors; (2) Non-statutory accord and satisfaction with the creditors in which a legal contract is created between debtor and creditor whereby the creditor agrees to accept a sum less than owed in exchange for releasing the debtor from all legal liability; (3) Statutory re-organization which allows the debtor to receive protection from creditors while the venture’s principals craft a financial and strategic plan to re-emerge from bankruptcy (known in the U.S. as Chapter 11 of the Bankruptcy Code); (4) Statutory liquidation and discharge of substantially all debts (known in the U.S. as Chapter 7); and (5) Statutory liquidation with discharge of some debts and repayment of most debts (known in the U.S. as Chapter 13) (Melvin, 1995). Each option has its advantages and disadvantages and in the case of the statutory options, petitioners must meet certain eligibility requirements prescribed by the Bankruptcy Code. While U.S. policy makers have made it more difficult to pursue statutory exits from insolvency, across the Atlantic policymakers have done just the opposite and have expanded protection by making it easier to discharge most debts and limiting the government’s ability to put tax debt as a priority of commercial debt.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 revised existing federal bankruptcy statutes in several major areas that Congress found were subject to abuse by those seeking bankruptcy protection. The Act contains an exemption for small businesses. However, since the overwhelming majority of entrepreneurs provide personal guarantees to creditors (such as pledging personal assets to secure a business loan) or use personal credit cards to finance operations, the provisions of the Act that govern individual bankruptcy are still of primary importance to small business owners. In terms of risk for the entrepreneurial venture, the most severe change was an increase in the statutory requirements for eligibility under Chapter 7 straight liquidation. Under this change, individuals are subject to a “means test” that compares the applicant’s current monthly income to the median income for the relevant state. If the applicant’s income is more than the median, the applicant would not be eligible for Chapter 7. Thus a substantial number of bankruptcy applicants who previously would have been eligible for a discharge of substantially all of their debts must now repay them under a Chapter 13 filing, which requires debtors to enter into a five-year repayment plan based on a strict expenses-to-income formula (Resnick and Sommer, 2007).

Changes in bankruptcy law can affect lending behavior. Haselman, Pistor and Vig (2010) analyze banking behavior in twelve transition economies and find that the supply of credit is affected by legal changes. We incorporate this effect when modeling the supply of credit to entrepreneurs.

If bankruptcy laws become more strict, i.e, they punish entrepreneurs for going bankrupt, they may avoid engaging in risky entrepreneurial ventures. Lee et al (2011) use data from 29 countries over the 1990-2008 period to show that entrepreneur-friendly bankruptcy laws encourage more entrepreneurship.

In this paper we seek to expand the literature on the relationship between the nature of bankruptcy regimes and entrepreneurship. We consider two (extreme) alternative bankruptcy regimes—a “strict” one and a “generous” one—with varying degrees of debt forgiveness in the event of failure of the entrepreneurial venture, and seek to establish the extent of entrepreneurial activity under each regime.

We develop a model of entrepreneurship in which an individual allocates time between a salaried job and entrepreneurial activity. The output of the latter also depends on capital stock which is financed by borrowing. This borrowing provides a link between entrepreneurship and bankruptcy laws. The individual’s optimal choices yield a demand for (entrepreneurial) capital. We derive a supply of capital from the decision of profit-maximizing lenders, and show how the resulting equilibrium in the market is affected by changes in bankruptcy laws.
The remainder of the paper is organized as follows. Section 2 describes the demand side of the model. Section 3 describes the supply side and the market equilibrium. Section 4 offers concluding remarks.

2. Model

We develop a framework of endogenous entrepreneurial activity, an integral component of which is the use of debt to finance such activity. The link between entrepreneurial activity and borrowing allows us to explore the effects of changes in bankruptcy laws on the extent of entrepreneurship. We will derive a market for entrepreneur-driven loans and show how changes in the strictness or laxity of bankruptcy laws affect the extent of entrepreneurship.

Consider an individual with a time endowment of unity. She spends part of her time on a salaried job \((T)\) and the remainder \((t)\) engaged in entrepreneurial activity. So,
\[
T + t = 1. 
\]

Her income from the salaried job \(y_s\) is the product of the wage rate \((w)\) and time spent on the salaried job:
\[
y_s = wT. 
\]

Income from the entrepreneurial activity is uncertain. Let \(y_e\) denote the income earned from the activity if it succeeds. If the activity fails, the entrepreneurial income is zero. We denote the probability of success of the entrepreneurial activity by \(p\); the probability of failure is \((1-p)\).

In the case of entrepreneurial success, income from the venture \((y_e)\) is a function of time \((t)\) and an entrepreneurial input \((k)\). The individual buys the input by taking out a loan of \(qk\), where \(q\) is the price of a unit of the input. The repayment of the loan on the success of the venture and the bankruptcy regime. We assume that \(q = 1\).

The production function is assumed to meet the usual conditions: the function is concave, the marginal product of each input is positive and diminishing, and increased use of one input enhances the marginal product of the other. Thus,
\[
y_e = f(t,k), \quad f_1 > 0, f_2 > 0, f_{11} < 0, f_{12} < 0, f_{22} > 0, f_1f_{22} > f_1f_{21}. 
\]

We consider two different bankruptcy regimes. Under the first regime—Case G, the “generous” case—if the entrepreneurial activity is unsuccessful, i.e. no income is generated from the activity, the individual is not required to repay the loan. In a more realistic setting, income from the salaried job could be used to repay the loan. We purposely consider this extreme case of generous bankruptcy laws to determine the maximum extent of entrepreneurial activity. Under the second regime—Case S, the “strict” case—repayment of the loan is mandatory regardless of the success or failure of the entrepreneurial activity. The terms “generous” and “strict” are simply used to distinguish between two bankruptcy regimes—they are devoid of any normative content.

Case G: No repayment in case of failure

The total income earned by the individual is the sum of income from the salaried job and that from the entrepreneurial venture. If the entrepreneurial activity succeeds, the individual will always repay the loan. Her income in this case will be \(w(l-t) + f(t,k) - (1+r)k\), where \(r\) is the interest rate on the loan. The initial loan is not included in the income, since it is used to acquire the entrepreneurial input. If the entrepreneurial activity fails, the individual pays neither the interest nor the principal, and her income is \(w(l-t)\).

As indicated earlier, a strand of the literature identifies the importance of risk aversion in entrepreneurial decision-making. Here, in order to focus on the effect of the bankruptcy regime, we assume that the individual is risk-neutral. Adding the element of risk-aversion will not materially alter our conclusions, however.

The individual seeks to maximize expected income, given by

\[
w(l-t) + p[f(t,k) - (1+r)k]. 
\]

The first-order conditions for a maximum are:
\[
(4) \quad pf_1(t,k) = w; \quad \text{and} \quad f_1(t,k) = 1 + r. 
\]

Equation (4) indicates that at the optimal point, the expected return from allotting an additional unit of time to the entrepreneurial activity equals the wage obtained from the salaried job. Equation (5) equates the marginal product of the entrepreneurial input to the cost of borrowing. By virtue of the assumptions about the production function made earlier, the second-order conditions for a maximum are satisfied.
**Demand for loans**

We use equations (4) and (5) to derive the demand for loans by the entrepreneur. Differentiating the two equations totally yields

\[(4.1)\quad f_{11}dt + f_{12}dk = dw/p - (w/p^2)dp,\]

\[(5.1)\quad f_{21}dt + f_{22}dk = dr.\]

Let \(A = f_{12}f_{22} - f_{12}f_{21} > 0\). From equations (4.1) and (5.1), we obtain the effects of changes in the parameters on the optimal values of \(t\) and \(k\). The demand curve for loans in the generous case is thus:

\[(6)\quad k^*_G = \pi(r, w, p), \quad \pi_1 = f_{11}/A < 0, \quad \pi_2 = -f_{21}/(pA) < 0, \quad \pi_3 = -wf_{21}/(p^2A) > 0.\]

Similarly, we obtain the effects of changes in \(r, w\) and \(p\) on time spent on the entrepreneurial activity:

\[\frac{\partial t}{\partial r} = -f_{12}/A < 0, \quad \frac{\partial t}{\partial w} = f_{22}/(pA) < 0, \quad \frac{\partial t}{\partial p} = -wf_{22}/(p^2A) > 0.\]

The signs of the partial derivatives support the following conclusions: An increase in the interest rate raises the cost of borrowing and encourages the individual to use less capital and spend less time on the entrepreneurial activity. An increase in the wage rate induces similar effects on entrepreneurial activity by making the salaried option more attractive. An increase in \(p\), the probability of success of the entrepreneurial activity, encourages more of the entrepreneurial activity.

**Case S: Repayment in case of failure**

We now consider the effect of tightening the bankruptcy laws on entrepreneurial activity. Under this “strict” regime, even if the entrepreneurial activity fails, the individual is required to repay the loan in full (along with interest). Her income in the event of success is the same as in the previous case, viz.

\[w(1-t) + f(t,k) - (1+r)k.\]

However, if the entrepreneurial activity fails, the individual repays her loan with interest, leaving her with an income of \(w(1-t) - (1+r)k\).

The individual’s expected income is therefore

\[w(1-t) + p(f(t,k) - (1+r)k),\]

and the first-order conditions for a maximum are:

\[(7)\quad p f_1(t,k) = w,\]  
\[p f_2(t,k) = 1 + r.\]

Equation (7) is the same as equation (4) from Case G: it equates the expected return from allotting an additional unit of time to the entrepreneurial activity to the wage. Equation (8) equates the expected marginal product of the entrepreneurial input to the cost of borrowing.

**Demand for loans**

Equations (7) and (8) enable us to derive a demand curve for loans in the strict case. Totally differentiating the two equations, we obtain

\[(7.1)\quad f_{11}dt + f_{12}dk = dw/p - (w/p^2)dp,\]  
\[f_{21}dt + f_{22}dk = dr/p - [(1+r)/p]dp.\]

Denoting \(B = f_{12}f_{22} - f_{12}f_{21} > 0\), we obtain the demand for loans as

\[(9)\quad k^*_S = \phi(r, w, p), \quad \phi_1 = f_{11}/(pB) < 0, \quad \phi_2 = -f_{21}/(pB) < 0, \quad \phi_3 = -wf_{21}/(p^2B) > 0.\]

The loans demand curve in the strict case, as depicted in Figure 1, is negatively sloped and will shift to the right if the wage rate falls or the probability of success of the entrepreneurial activity rises. A lower \(w\) or a higher \(p\) makes the entrepreneurial activity more attractive.

The loans demand curve in Case G, from (6), has a negative slope of \(f_{11}/A\). Since there is no repayment in the case of failure in Case G, the demand for loans is greater than in Case S; accordingly, the \(k^*_G\) curve lies to the right of the \(k^*_S\) curve.

**3. Supply of loans**

We model the supply curve as arising from the profit maximization problem of risk-neutral lenders (banks) in a competitive market. Lenders raise funds at a cost of \(C(k)\). The cost function includes the return on a riskless asset such as Treasury bills—the higher the T-bill yield, greater is the cost of attracting deposits from customers. The cost function may be written as \(C(k) = k + g(k)\), so that the amount of the loan is now separated from the cost of raising it. We assume that \(g’(k) > 0\) and \(g''(k) > 0\). The convexity of \(C(k)\) ensures that the second-order condition for profit-maximization is met.
Case G: The “generous” case
Since borrowers are not required to repay their loans when their entrepreneurial activity fails, the firm’s (bank’s) expected revenue is \( p(1+r)k \) and its expected profit is \( \pi = p(1+r)k - C(k) \). The bank maximizes profit by setting the expected marginal revenue from making a loan equal to the marginal cost of raising funds:

\[
(10) \quad p(1+r) = C'(k),
\]

whence, since \( pdr + (1+r)dp = C''(k)dk \), we obtain the supply of capital in the generous case as:

\[
(11) \quad k^*_G = \psi(r, p), \quad \psi_1 = p/C''(k) > 0, \quad \psi_2 = (1+r)/C''(k) > 0.
\]

The supply curve is positively-sloped, as shown in Figure 1. This supply curve will shift right in response to an increase in \( p \): a higher probability of success of the entrepreneurial activity increases the likelihood of repayment of the loan and encourages greater lending by the banks.

Case S: The “strict” case
In this case, borrowers are required to repay their loans regardless of the outcome of the entrepreneurial activity. The revenue for the lender is the repaid loan, i.e. \( (1+r)k \), and the profit is \( (1+r)k - C(k) \). The firm maximizes profit by setting the marginal revenue from making a loan equal to the marginal cost of raising funds:

\[
(12) \quad 1+r = C'(k),
\]

whence, since \( dr = C''(k)dk \), we obtain the supply of capital in the strict case as an increasing function of \( k \):

\[
(13) \quad k^*_S = \mu(r), \quad \partial \mu/\partial r = 1/C''(k) > 0.
\]

The slope of the \( k^*_S \) curve in Figure 1 is \( C''(k) \), while that of the \( k^*_G \) curve is \( C''(k)/p \). Since \( p < 1 \), the \( k^*_G \) curve is steeper than the \( k^*_S \) curve. Further, comparing equations (10) and (12), we note that for a given interest rate, \( k \) must be greater in the strict case than in the generous case. Accordingly, the \( k^*_G \) curve lies above the \( k^*_S \) curve.

Intuitively, the supply of loans is greater in Case S than in Case G. Since repayment of the loan is assured in the former case, banks are more willing to make loans under the strict regime.

Equilibrium
The equilibrium interest rate and amount of capital depend on the demand and supply of loans, both of which are affected by the bankruptcy regime. The demand for loans is greater in Case G, the generous regime, than in the strict regime. However, the opposite is true for the supply of loans: the supply of loans is greater under a strict regime, where repayment is assured, than in the generous regime, where repayment is uncertain.

Figure 1 shows the equilibrium interest rate and borrowing by the entrepreneur. Recent changes in U.S. bankruptcy laws may be perceived as a shift from a generous regime to a strict regime. In our model, such a regime change will result in a reduced demand for loans by entrepreneurs and an increased supply of loans by banks, leading to an unambiguous decrease in interest rates.

The effect of the regime change on the equilibrium amount of capital, however, is less clear. A reduced demand for loans is somewhat offset by the fall in interest rates brought about the increased willingness of lenders to make loans; therefore, the equilibrium \( k \) could increase, decrease, or stay the same. In Figure 1, we depict the case where entrepreneurial activity in the economy declines (\( k \) is smaller), but the decline is smaller than would have been if supply had not responded to the change in the bankruptcy laws.

Given the complementary nature of the inputs \( t \) and \( k \) in the production function for the entrepreneurial activity, the effect of the bankruptcy regime change on the time spent on entrepreneurship is ambiguous. The situation illustrated in Figure 1 corresponds to the case where the change from a generous regime to a strict regime leads to a greater decline in demand for loans than the increase in supply of loans, causing \( k \), and also \( t \), to fall. Entrepreneurial activity is reduced as a result of the change in the bankruptcy regime.

4. Conclusions
In a model of endogenous entrepreneurship, we examine the effect of bankruptcy laws on an individual’s decision to engage in entrepreneurial activity. We show that the market for entrepreneurial capital is influenced by the opportunity cost of labor, the probability of success of the entrepreneurial venture and the
nature of the bankruptcy regime. The extent of entrepreneurship is enhanced by a decrease in the wage paid by the salaried job and increased probability of success of the entrepreneurial venture.

The effect of a change in the bankruptcy regime on entrepreneurial activity is ambiguous. If the regimes becomes stricter—i.e. if borrowers are required to repay their debt no matter what the circumstances—the demand for loans will fall, but, since lenders are assured of repayment, the supply of capital will rise. The net change in entrepreneurial capital depends on which of the two effects dominates.

An extension of the research involves incorporating an intertemporal element in the model. The probability of success of an entrepreneurial venture, in the current model, is exogenous; however, it could be a function of past entrepreneurial activities—both successes and failures—and the effects of changes in bankruptcy laws could then be analyzed in a dynamic context.

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A change from a generous bankruptcy regime to a strict one will cause the demand for loans to fall and the supply of loans to rise. The result is a lower interest rate, but the effect on entrepreneurial capital is ambiguous. In the case depicted above, $k$ falls.
ABSTRACT

In the past few years, the attention of the legal system has been drawn to the potential for ethical and tactical problems arising during negotiations or discovery as a result of opposing counsel’s accessing “hidden” information, called “metadata,” or electronically stored information (ESI), which is produced during the creation of every electronic text file. Metadata can reveal the timing, author and often the content of the creation, and revisions or edits of the document. This can lead to the potential embarrassment or even malpractice liability of the disclosing counsel. Metadata is a creation of computer programmers that is intended to provide for efficient editing, indexing and retrieval of the documents in question, but it can also reveal information best kept confidential. One application of principles relating to inadvertent disclosure seems to be the current trend in dealing with this issue, but the notion of what constitutes “inadvertence” in this area deserves examination and development. We discuss the question of whether failing to remove, or “strip,” metadata constitutes inadvertent disclosure possibly leading to malpractice liability, or whether counsel may be obligated to strip all documents, and suggest policies and procedures which, if adopted and consistently followed, might eliminate or at least mitigate the problem. Another recent concern is that when metadata is a part of public records it must be maintained and disclosed under public records laws. Purposely removing metadata could fall under the penalties of unauthorized destruction of or tampering with public records. The differing requirements of maintaining public and non-public records creates an ethical and possibly a legal quandary in that while trying to strip metadata to prevent later discovery one may run afoul of public records laws with the result in possible criminal sanctions for stripping the metadata from the records.

INTRODUCTION

The “paperless office” promised back in the 1970’s hasn’t happened. In fact, it now appears there may be more paper around than ever before. (Sellen & Harper, 2001) This does not, however, mean that there is any shortage of electronic filing that needs to be expanded in scope and practice. But, using electronic formats raises a problem that did not exist in the days of carbon paper and file folders. With a paper document we can be reasonably certain that the computer programmer’s WYSIWYG rule (What You See Is What You Get) will apply. All the information carried by that physical document appears on the paper, including (hopefully) the information necessary to store it in a filing cabinet, locate it when it’s needed and retrieve it for future use. Contrary to reasonable expectations, however, this procedure is not as easy to accomplish in electronic documents as it is for paper documents. The simple task of observing the name, mentally alphabetizing it and placing it in the right place in the right drawer is far easier for human beings than machines. As a result, the designers of software packages that create the electronic files have tried to eliminate these expectations for the machines to make these judgments. To accomplish this, electronic files
are designed to contain more information than many authors realize they contain which is crucial information that has the potential to become problematical in the future.

This hidden information has uses that are often not obvious to the creator or eventual user of the document but which, in a modern document control system, perform absolutely essential functions. Additionally, this information also may contain sensitive data that should not be revealed – especially when the firm is faced with a demand for production of documents pursuant to litigation. This article discusses some of the ramifications of the existence of such buried information and how it must or should be handled responsibly and ethically.

DOCUMENT CONTROL

First, it would be appropriate to examine the concept of document control in general in order to establish the context of the “secret bits” that can become troublesome. “Document control” involves answering the questions of what to keep, how to keep it, and for how long. These issues have long been of concern to the professional governing bodies of accountants, auditors and attorneys (on a procedural basis) and to the firms engaging them from a substantive (liability) viewpoint. Resolving such questions concerning the proper management of paper documents is relatively straightforward – if you need to keep them, store them in a file! When you no longer need to keep it, throw it away! The only time judgment needs to be applied is determining whether it needs to be kept or discarded, and for that we have rules. (Ries, 2007) & (IRS PUB 583, 2007).

ELECTRONIC DOCUMENT CONTROL AND RETENTION

The rise of computer systems, distributed processing and other technological advances made indexing, archiving and retrieval much faster, more accurate and, often, possible for the first time. The easiest, and therefore the first, records to be stored electronically by firms were those related to repetitive processes of accounting with a high volume of similar inputs thus the cost of “computerizing”. Computers continued to get faster, smarter, smaller and most importantly, cheaper until, by the early 1990s, most government and business producers of paperwork utilized electronic capture for most of their transactions and for storage and reporting of the data. Paper, needless to say, has not been eliminated, or even reduced. But indexing and retrieval using electronic systems is so far advanced from the “open the drawer and thumb through the files” technique to assure that, as a practical matter, most document retrieval today, perhaps as much as 90%, appears to be done electronically, and at least in part, by everybody. (Ries, 2007, n. 2)

The design of various document storage and retrieval (“archiving”) systems, whether involving file cabinets or computers, requires the performance of a series of actions, which are essential to the final result. In the unknown origins of the file cabinet, these questions were asked and answered (perhaps without being verbalized, certainly without being recorded for history) by the adoption of file folders, alphabetizing schemes and so on. By their very nature computers are unable to learn from experience and must be “told” everything they “know” so each required step must be specifically itemized by programmers. The data used to make decisions in each area must be acquired in some manner. Every document storage and retrieval system must have a place to exist, whether it is a file cabinet or a “memory stick” storage device. A decision must be made as to what will be preserved – which physical documents or which items of digital data are to be preserved. Retrieval methods and the identifying data must be worked out and adopted. Security, in the form of a lock on the cabinet or encryption of the file must be provided. Establishing a retention period and a method of removing or erasing expired documents must also be determined. Among several considerations, which did not previously warrant consideration, two stand out today that never drew much attention in the past: disaster recovery and authentication.

For physical documents, the only way to prevent catastrophic loss was (and is) to maintain duplicates, either a separate identical archive of more and more paper or a replica, either on microfilm or electronically or, as in the case of real estate records, an “official” copy. Following the English example, real estate records in the United States have always existed in the form of official copies which, by statute, are used to prove ownership and liens in preference to the actual original documents. For example, this rule has been the case in Pennsylvania since 1715, under the Act of May 28, 1715. This additional cost was at least
somewhat offset by the fact that the physical destruction and total loss of vast numbers of documents was a relatively rare, and often preventable, occurrence. For electronically stored documents, however, while obliteration can occur in an instant as a result of power surges, interruptions or simply pressing the wrong key, maintaining absolutely identical duplicates is relatively easy. Disaster recovery is a somewhat different concern for the protector of electronic archives than it was for those in charge of the filing cabinets. Suffice it to say this particular area is a commercially significant one. A “Google” search of the phrase “disaster recovery systems” returns in excess of 15 million “hits,” and beyond the scope of this paper. Similarly, the question of authentication is a quite different concern for physical records as opposed to electronic documents which can be created, modified, counterfeited or forged virtually without a trace. Moreover, the existence of “hackers,” computer viruses and other “malware” and hazards yet to be revealed raises concerns about digital security that never existed in the days of strong locks and night watchmen. Both of these issues will be left for future consideration.

Turning, then, to the question of how long such documents, electronic or physical, should be retained, we find a wealth of information detailing requirements of the Internal Revenue Service, SEC and other state and federal regulators, (IRS Pub 583, 2011). Recent rulings regarding metadata as being a part of public records, with a duty to preserve and make available to the public on request, will also change retention requirements. A full treatment of these rules and requirements is outside the scope of this paper, but it is important to note that retrieval capability (and therefore storage and archiving, as discussed below) is absolutely essential to satisfy retention requirements, as well as the ordinary needs of business. If nothing else, a manager’s ability to refer to prior problems met and solutions tried is absolutely essential to the success or failure of the firm (Gruman, 2004). The “paperless office” was touted to be the salvation of the the rigors of doing business by providing a way to store and retrieve such information in an instant. Even the legal profession recognized the growing significance of electronic data in the rules providing for the discovery of documents in litigation, specifically providing for the discovery of electronic documents and the hidden information they contain. FEDERAL RULES OF CIVIL PROCEDURE (FRCP), §34(b), provides that a requesting party may “. . . designate the form or forms in which it wants electronically stored information produced, although there appears to be quite a bit of controversy as to just what this rule means.( ABA Legal Technology Resource Center, 2009) Even rules of procedure have been adopted to ease the use of electronic communications. In Texas the Supreme Court of Texas: Publication of Statewide Rules Concerning the Electronic Filing and Service of Documents in Participating Justice of the Peace Courts states a legislative finding that “electronic access to eligibility information will reduce the amount of time and resources spent on administrative functions, prevent abuse and fraud, streamline and simplify processing of insurance claims, and increase transparency.”

The Supreme Courts of Arizona and Washington have recently affirmed that metadata is a public record and discoverable,(O’Neil 2010), (Lake, 2009) What is the correct path to take regarding metadata? Should it be stripped in private records to remove the possibility of inadvertent disclosure or possible discovery in a later court proceeding or should it be retained since it is part of a public record? This latest finding regarding metadata being part of a public record may lead to entirely new requirements as the interrelation among record keeping requirements promulgated by government agencies’ regulations are furthered explored through statutory changes and litigation processes.

Accounting is the language of business with its own grammar and syntax; financial statements, reports and the like are its vocabulary. To speak this language, an adequate vocabulary is essential and that means records must be not only kept, but must also be retrievable. To assure this, various requirements have been established by, among others, the American Institute of Certified Public Accountants (AICPA) which has promulgated rules concerning record-keeping as part of the Generally Accepted Accounting Standards (GAAP) that govern the practice of accountants. Compliance with the standards is necessary for tax accounting as well as regulatory compliance and financial reporting. Without compliance, an audit according to AICPA principles would not be possible. The AICPA’s standards of fieldwork, for example, specify that "the auditor must obtain sufficient appropriate audit evidence by performing audit procedures to afford a reasonable basis for an opinion regarding the financial statements under audit." (AU Section 150.02, (3), p. 43, 2008). In addition, the Sarbanes-Oxley Act of 2002 states that reporting requirements must be based on accurate records which, as a practical matter, must be retrievable.

To be effective, an electronic storage and retrieval system must make use of the absolute minimum of human input. Scanning and optical character recognition (OCR) can even eliminate the need for what was once a tedious, grueling and often thankless task euphemistically referred to as “data entry” or more
accurately “keypunch operating.” Many records are created electronically by direct screen input and can then be stored without any need for manipulation. In some cases, data entry in some form or another is still required, but the technology to do so has soared far beyond the days of the IBM Type 029 Key Punch, a technological typewriter that “wrote” machine-readable holes in pieces of thick paper called, reasonably enough, “IBM cards.” If you are young enough not to have understood that last reference, consider yourself lucky. A photo of one of these workhorses can be found at: http://www.columbia.edu/acis/history/029.html.

However, this does not answer the question as to how and where the actual information is stored. To retrieve the contents of a paper document one must physically access its location, extract the appropriate item and visually observe what is there. To the casual user, it seems even easier to extract the same information from an electronic version. All that has to be done is to open the appropriate program, such as a database management system (DBMS), enter the appropriate query and observe the information on the screen. Mission accomplished. It is far too easy, however, to ignore the unspoken question – how did it get there?

While a file clerk can readily store or locate a document by reading the appropriate parts of it, computers have not reached the level of artificial intelligence to make this possible within reasonable cost. The options were to (1) increase computer power and intelligence (which was probably not possible in the early days, anyway), or (2) use a longstanding programmer trick of invisibly marking the document files themselves with the required information (i.e., inserting a “label”). The trade-off was effectively resolved in favor of the latter.

TRACKING CHANGES WITH METADATA

Programmers have, since the beginning of their profession, included comments as well as bits of code called programming “hooks” (program instructions that are not currently active, but which make future modifications easier by providing a metaphorical hook to hang new code on) and other such information directly in the computer code, the programs, that are run by the computers and only read by the computers. It was readily apparent, when needing to identify, classify and archive electronic documents arose, that it would be easiest to provide the appropriate keys among these “hidden” computer instructions. Since the debut of the very first software packages for word processing, spreadsheet operations and the like, the files produced by the programs have universally included “hidden” information which allows completion of the archiving functions and many other functions. This is accomplished without distracting the user or reader by making this information invisible. These bits and bytes which, among other things, serve the purpose of the labels on the filing cabinets or the file folders, are called “metadata.”

Like the name or number appearing on the tab of the file folder, metadata provide the information that gives effect to the document retrieval system in which the File is to reside. While the term literally means “data about data” (National Information Stds. Org., 2004) this simple definition is not very helpful. Moreover, there is no set standard or body of rules regarding what may be included or omitted in the metadata accompanying every file. (National Information Stds. Org., 2004) The only thing certain is that the metadata must be there in order to allow various document management functions discussed above. In the absence of a file clerk to read the tab on the folder, the information on that tab (in the form of what is known as “descriptive metadata”) will be embedded in the digital document for access by either the software alone, or by the savvy reviewer who knows how to bring it to light.

Metadata can be classified into functional groups describing the purpose of the particular pieces of information. Thus, “descriptive metadata” will describe the contents of the digital file – type, file name, date of creation, creator; “structural metadata” specify such things as the length of the file, chapter or section divisions; “technical metadata” identify the database system used to create the file, character set, encryption type and other such information which might be needed in the future to resurrect a by-then-obsolete record; and “administrative metadata” that provide information regarding the use and management of resources. (National Information Stds. Org., 2004) Many, though not all, of these pieces of information are placed directly into the binary (machine-readable) part of the file and are rarely, if ever, observed by the user of the file, unless, of course, it’s a computer. The identification and translation of these metadata is impossible without the use of sophisticated tools or technical knowledge (Reinmuth, 2007) however that does not mean the information is not available. Some additional terms may occasionally be seen in discussions of the technical aspects of metadata: Scheme, or schema, the items of information (variables) to be recorded; semantics which determine the meaning of each variable; content which is the recorded
value of each variable; grammar or rules for creating content; and, syntax which establishes how the content is represented.

PROBLEMS CREATED BY TRACKING CHANGES

The editing process, whether for paper or electronic stored documents, almost always involves a series of proposals and changes – interim drafts – that can reveal strategies and assumptions as well as goals of the drafting parties. This information clearly could harm a party’s position if revealed at the wrong time. When changes are made on the screen, and the next time the file is retrieved the changes remain in place, a document’s creator thereafter may feel there is no need to worry about deleted information – it’s gone. However, in typical software packages (such as Microsoft Word), not only will the system save the identity of the creator, relevant dates such as the dates of creation or access and so forth to ease the locating, opening and continued editing of the file (Microsoft Office Online, 2009). Microsoft Word also marks additions and saves the full text of deletions, comments and other editorial changes that supposedly were deleted and that appear to the drafter to have disappeared. They have – but only from the screen. This “track changes” function permits a “markup” process which allows multiple editors or commenters to see previous work. Fortunately, in Microsoft Word and, presumably, in other such packages in the “default” state for the “track changes” feature is “off.” It doesn’t hurt, however, to check. This is particularly true since the use of this feature is especially helpful when a number of reviewers must assess each other’s work, and therefore will occasionally be desired. If not removed it would also permit any recipient of the document to follow the thought patterns and strategies so revealed. In a paper file it’s usually easy to see which documents or drafts and which represents the final product. Electronic files, however, conceal that information from those who don’t know to look for it. Herein lie the dangers of something, which has become as common place as e-mail, being a source of potential danger. (Why an Email Could Soon Become a Letterbomb, 2008), (Rodier, 2007).

The potential for litigation is a reality that every business must face. Besides providing the vocabulary for accountants, in litigation the archives of a firm provide the means for justifying its actions, or for those seeking redress, to prove their claims. Efficient retrieval of records is essential both to plaintiffs and defendants. The problems of litigants regarding access to information in the hands – or files – of another party apply equally to paper and electronic documents, but in the case of the latter there is a feature (or flaw, depending on which side one is on) not shared by physical files – the WYSIWYG rule may not apply.

POTENTIAL DISCOVERY ISSUES

The process of judicially searching another party’s databanks is part of “discovery” feature of civil litigation which permits the parties to have access to testimony, evidence and other information in the possession of the opposing party. Ostensibly intended to reduce the cost and burden (to the courts) of litigation, wide latitude is granted to parties to prevent surprise at the time of trial. Obviously this skill and experience of counsel are essential elements and discovery since information need not be provided unless it is properly requested.

Federal Rules of Civil Procedure (FRCP) 26(b) is an example of a typical discovery rule. The rule establishes the types of requests and information gathering activities that may be utilized, the targets at which these tools may be directed and it lists the relatively small class of subject matter which are excluded from discovery. Among the many forms of discovery, such as depositions, motions to produce physical evidence, motions to require mental or physical examination of parties and the like are two of significance in the subject at hand. These are “request for admission” and requests and motions for “production.” The former requires a party to admit, under oath, the truth of assertions made by the discovering party as to the existence of certain facts and the genuineness or identity of documents or things. (FRCP 26) Faced with such a request, the recipient may be required to authenticate documents obtained other than directly from the party and would not be able to properly admit, under oath, the genuineness of documents that do not contain metadata originally included in the native files. Requests or motions to produce documents, under Rule 34, may require the inclusion of metadata by specifying the production of native files or files with specified metadata included. FRCP 34(a)(1)(A)(2) provides for the scope of such discovery, broadly including “any designated documents or electronically stored information-including writings, drawings,
graphs, charts, photographs, sound recordings, images, or other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form: or…”. In other words, anything. (Seward, 2004) The rule further provides that a party may not object to discovery on the grounds that the information, even if discovered, would not be admissible at the time of trial or involves statements of opinion rather than fact.

Thus is created the basic tension caused by the automatic addition of metadata by the software packages: even though the creator may not wish or desire information to be made available, the software will keep track of discoverable facts that a party may not wish to be discovered. Annotating files, writing information in margins and other types of intentional recording of extraneous facts are visible and therefore more easily controlled. When the software sneaks in surprises, the blame for failure to “catch the slip” is not easily assessed. Removing such information as a matter of course, however, can make it difficult to acquire it for other purposes.

In order to make the discovery rights defective, the courts provide sanctions—even criminal penalties for the intentional distraction of discoverable information after an order has been issued—that can be substantial. In the case of Vela v. Wagner and Brown, Ltd. (2006), for example, holding that sanctions are intended to assure compliance, deter misconduct by other litigants and to punish violators, the court granted a $75,000 sanctions award against a winning defendant—that is, the plaintiff's claim for damages was denied but an award of $75,000 to punish the defendant’s abuse of discovery was given. Within a pattern of abuse found by the court, the principal misconduct was failure to properly preserve and produce “lost” data. Metadata that have been “lost” after the delivery of a proper discovery order could well produce similar results. It appears quite likely that “stripping” (removing metadata from existing files) after an order requiring discovery of electronically recorded data has been received would be at least a civil violation, if not a criminal one. Many sources exist for software to perform this function. See, e.g., Ann Bednarz, Software Cleanses Sensitive Documents, 23 NETWORK WORLD 23 (2006), Randall Farrar and Susan McClellan, Esquire Innovations, Inc. White Paper, Metadata Management in Microsoft Office: How Firms Can Protect Themselves Against Unintentional Disclosure and Misuse of Metadata, retrieved 11/6/2008

SELF PROTECTION

If existing metadata are removed from non-public record files prior to any potential litigation, there would appear to be little problem. Going a step further, if the metadata are stripped at the time the files are created and a firm practice is established of never retaining the metadata except for public records, the question of whether the information was improperly removed would not be given a chance to arise.

In fact, a number of sources make that specific recommendation. All metadata not required for proper archiving at the time the documents are created should be stripped as a matter of course. Most importantly, a consistent process for taking the steps required by the particular word processing or other software package to remove all “change tracking” data should be established, even where there is no specific intent to incorporate change tracking in the revision process. Like an unloaded gun, the assumption that the change tracking has been disabled is dangerous. A final copy of any discoverable documents that does not contain any residual information from previous drafts should be required to be placed in every file. Previous drafts should be discarded, keeping in mind that if the drafts are retained for reference purposes they may well be discoverable.

Simply stated, a record management program, or process, should be established by written policy, providing for the disabling of change tracking functions in software packages or, where convenient, providing for the consistent removal of such information manually or by use of metadata removal programs. In addition, specific “stripped” formats for archived information should be standardized to assure that an additional check on each document is performed.

CONCLUSION

In the ever-growing litigation environment it is essential that every document required by management, contract and trade agreements, governmental oversight agencies, taxing authorities and accountants be maintained in useable formats to support reporting requirements. For entities subject to
public record laws the documents should be stored including the metadata which is part of a public record. For non-public entities, however, once the final document is derived and all required supporting information is identified, the electronic files should be stripped of superfluous information. This will not only ensure that data files are of a manageable size and format for enhanced storage, but will also protect the entity from possible future unexpected consequences by containing sensitive information. An awareness of complications that may arise from imbedded metadata, which was not stripped before a document is forwarded or stored, will minimize possible future complications and potential damaging situations caused by improper data handling. The advent of new technology and the expansion of Rule 34, which includes all information or data captured or stored on electronic media, will greatly expand the litigation in this area and new Court decisions will expand or contract “discoverable” information in litigation.
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A COMPARISON AND ANALYSIS OF THE ALIEN TORT STATUTE AND THE TORTURE VICTIM PROTECTION ACT

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ABSTRACT

The Alien Tort Statute ("ATS") is a section of the United States Code which is notable for allowing United States courts to hear human rights cases brought by foreign citizens relating to conduct committed outside the territorial boundaries of the United States. The ATS was first enacted in 1789 primarily to address matters involving piracy and its impact upon United States citizens. Around 1980, public interest groups began utilizing the ATS to enable victims of foreign regimes to seek redress in United States courts. The current analysis examines the basic principles of the ATS, some leading cases which interpret its analysis, and the basic burdens of proof required under the statute.

The Torture Victim Protection Act ("TVPA"), passed in 1992, provides a cause of action for both United States nationals and aliens for extrajudicial killing and for torture. A majority of United States courts have determined that claims for torture and extrajudicial killing can be brought under both the ATS and the TVPA simultaneously.

A COMPARISON AND ANALYSIS OF THE ALIEN TORT STATUTE AND THE TORTURE VICTIM PROTECTION ACT

A. HISTORY OF BOTH THE ALIEN TORT STATUTE AND THE TORTURE VICTIM PROTECTION ACT

The ATS is essentially a United States federal law which was initially adopted in 1789 which provides federal courts jurisdiction to hear lawsuits filed by non-United States citizens pertaining to torts or crimes committed in violation of international law. When the ATS was enacted in 1789, the primary elements of international law dealt substantially with such subject matters as regulating diplomatic relations between States and enforcing crimes such as piracy. However, in today’s world, international law has expanded to include the protection of human rights. Presently, the ATS provides to the survivors of terrible human rights abuses, wherever committed, the right to sue the violators in the United States.

For the past thirty (30) years, the ATS has been utilized successfully in factual scenarios involving torture, state-sponsored sexual violence, extrajudicial killing, crimes against humanity, war crimes and arbitrary detention. The TVPA was initially introduced in Congress in 1986 and was formally passed into law in March of 1992. The TVPA was passed in both houses and clearly demonstrated the unquestionable commitment of the United States to aggressively protect human rights world-wide by providing a means within which for victims of torture and extrajudicial killings to bring their cases to court.

The United States’ steadfast commitment to the international policy of protection of human rights was strengthened with the decision in Filartiga v. Pena-Irala, a case which utilized the mechanisms of the ATS to attempt to provide compensation to the family of a young boy who was tortured to death by a Paraguayan police officer. In Filartiga, the father telephoned the offices of the Immigration and Naturalization Service, who then proceeded to arrest the former Paraguayan police officer for overstaying

1 28 U.S.C. Section 1350.
3 630 F. 2d 876, 884-885 (2d Cir. 1980).
his visitor’s visa. The father and sister then filed an ATS complaint against the officer, alleging the offense of extrajudicial killing. In 1980, the federal court in New York upheld the claim filed by the father and sister, thus paving the way for further claims under the ATS. In finding for the Filartiga family, the court determined that “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, Section 1350 provides federal jurisdiction”. Soon after the Filartiga decision, Congress reacted by codifying the case holding in Filartiga by introducing the TVPA in 1986 and passing the Act in 1992. A clear comparison of the utilization of the mechanism of the ATS in Filartiga with the statutory language in the TVPA unquestionably reveals the logical connection between the two statutes as well as Congress’ intent to provide a more fluid means within which for victims of torture to achieve meaningful civil redress.

B. CASE DECISIONS INVOLVING THE ATS AND TVPA

Another case brought under the auspices of the ATS involved atrocities committed under the regime of General Augusto Pinochet in Chile in October of 1973. The factual circumstances of the atrocities demonstrated that General Sergio Arelano Stark, under the direct orders of General Pinochet, led a self-styled “military delegation” on a voyage from southern to northern Chile. This “voyage” was actually referred to as the “Caravan of Death” and was, in fact, a death squad. As the Caravan landed at local military bases, the Caravan proceeded to inspect the garrisons, often testing for suspicions of disloyalty, and ordered and carried out the torture, abuse and extrajudicial killing of at least seventy-five (75) political prisoners. Winston Cabello happened to be a twenty-eight year-old economist and regional planner for the former government of President Salvador Allende at the time of the coup in September, 1973. Cabello was also a highly regarded public official and a star soccer player in Copiapó, the northern city in which he lived and worked. On September 12, 1973, the day after the coup, Cabello was arrested in a dragnet of perceived political opponents at the military garrison in Copiapó. On October 16, 1973, defendant Armando Larios and sixteen (16) other members of the “Caravan of Death” arrived at the Copiapó military garrison. As set forth within the context of the ATS complaint, the squad selected thirteen (13) prisoners for execution and among them was Winston Cabello. Later on that night, all thirteen (13) prisoners were put to death in a secluded area off a highway approximately ten (10) minutes outside of Copiapó. Subsequently, in 1990, defendant Larios had “retired” to the United States. While situated in the U.S., Larios freely admitted that he has accompanied General Stark on the “Caravan of Death” to the town of Copiapó. However, a Chilean amnesty law barred any prosecution of Larios in Chile, and United States criminal law did not permit prosecution for extrajudicial killings committed abroad, or for torture committed abroad before 1994. Therefore, a civil suit was the Cabello’s only legal remedy against Fernandez Larios. On October 15, 2003, a Miami jury found Larios liable for torture, crimes against humanity, and extrajudicial killing and awarded four million dollars in compensatory and punitive damages to the plaintiffs.

Another significant case brought under the provisions of the ATS involved the murder of Oscar Arnulfo Romero y Galdamez, Archbishop of San Salvador and a leading figure in the struggle for human rights in that country. On March 24, 1980, Archbishop Romero was assassinated while he celebrated mass in the Chapel of the Hospital of Divine Providence. In May 1980, the government uncovered documents implicating members of the Salvadoran military and, in particular, it’s chief of security, Alvaro Saravia, in the assassination of Archbishop Romero. In September 2003, suit was filed against Alvaro Saravia, under the provisions of the ATS, for his role in the assassination of Archbishop Romero. The suit was filed on behalf of a relative of the Archbishop, whose name was withheld for security reasons. The provisions of the ATS were applicable because Alvaro Saravia had found safe haven in Modesto, California, where he operated a used car dealership. After being served with the complaint, Saravia went into hiding. In 2004, a federal judge issued a default judgment finding Saravia liable for extrajudicial killing and crimes against

4 Filartiga, 630 F. 2d at 878.  
6 Cabello v. Fernandez-Larios, 402 F. 3d 1148 (11th Cir. 2005).  
humanity. Saravia was ordered to pay $10 million to the relative client of Archbishop Romero. Saravia remains on the Department of Homeland Security’s most wanted list.

Another important case brought under the provisions of the ATS involved torture and ethnic cleansing committed by Serb forces in Bosnia in 1992.8 On April 17, 1992, Serb forces seized control of the Bosnian town of Bosanski and nearly immediately instituted a purposeful policy of ethnic cleansing. The Serb forces subjected non-Serb males to wholesale detention and forcibly expelled hundreds of Croat and Muslim women, children, and the elderly. One very innocent and unlucky individual, Kemal Mehinovic, a Bosnian Muslim baker, was one of the victims of this ethnic cleansing campaign. On May 27, 1992, Mehinovic was resting at his home when Serb police and soldiers arrested him without a warrant, beat him in front of his family, then drove him to a police station for interrogation. For the next six (6) months, Mehinovic endured brutal torture at the hands of a former neighbor, now turned prison guard, a Serb soldier named Nikola Vuckovic. In August 1998, a lawsuit was filed on behalf of Kemal Mehinovic against Nikola Vuckovic, who had since relocated to the state of Georgia. The suit sought damages under the ATS for torture and other atrocities which Vuckovic committed during the Bosnian War in 1992. The Court handed down its judgment on April 29, 2002. Vuckovic was found liable for torture, arbitrary detention, war crimes and crimes against humanity. Mehinovic was awarded $10 million in compensatory damages and $25 million in punitive damages.

Another case, brought under the auspices of the ATS, involved atrocities committed by military personnel in El Salvador in December 1980.9 On December 12, 1980, Dr. Juan Romagoza Arce was caring for patients at a church clinic in the small town of Danta Anita, El Salvador, when two (2) vehicles arrived transporting Salvadoran National Guardsmen and paramilitary soldiers. Sitting atop the military trucks, the soldiers and Guardsmen opened fire on the clinic. The soldiers and guardsmen later arrested Dr. Arce on the grounds that he was a “subversive leader”, apparently mistaking his surgical equipment for some form of Soviet technology. For the next three (3) weeks, Dr. Arce was illegally detained at Salvadoran National Guard headquarters in San Salvador, where he was interrogated and subjected to brutal beatings, electrical shocks, water torture, and various other torments. On at least two (2) occasions, defendant Vides Casanova was physically present and assisted in regard to the torture of Dr. Arce. Defendant Vides Casanova eventually “retired” to the United States in August 1989. In May 1999, a lawsuit was filed in the United States District Court for the Southern District of Florida against Eugenio Carlos Vides-Casonova, the director of El Salvador’s National Guard during the period from 1979-1983 for torture, unlawful detention, and various other counts of human rights violations. On July 23, 2002, following a four-week trial, a federal jury in West Palm Beach, Florida, returned a verdict of $54.6 million against Vides-Casanova.

Another critical case brought under the provisions of the ATS detailed numerous atrocities committed by the Somalian Armed Forces during the 1980s.10 In particular, during the 1980s, former General Mohamed Ali Samantar presided over an increasingly repressive military which committed horrific atrocities in the northern part of Somalia, and more specifically against people who were of Isaaq heritage. During this period of time, defendant Mohamed Ali Samantar served as Vice-President and Minister of Defense (1980-1986) and Prime Minister of Somalia (1987-1990). In the early 1980s, Bashe Abdi Yousuf, a young businessman in the northern Somali city of Hargeisa, had volunteered his time and donated money to improve education and health care. In November 1981, Yousuf was abducted by government agents, accused of being part of a subversive organization, taken to a detention center, and tortured repeatedly over a period of several months. Eventually convicted of membership in an illegal organization in a trial that lacked any basic due process, Yousuf spent the next six (6) years of his life in prison, almost entirely in solitary confinement. Fleeing Somalia after his release from prison, Yousuf arrived in the United States in 1991, and later became a naturalized United States citizen. On November 10, 2004, a lawsuit was filed in the Eastern District of Virginia against defendant Mohamed Ali Samantar, who at the time had relocated to Fairfax, Virginia. The complaint, filed under the provisions of the ATS, alleged that Samantar had command responsibility for arbitrary detention, torture and cruel, inhumane or degrading treatment, crimes

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9 434 F. 3d 1254 (11th Cir. 2006).
against humanity, and war crimes carried out by his subordinates during this period. The Court eventually ruled in favor of plaintiff and granted an award of $21 million in damages.

Another important case brought under the provisions of the ATS center upon atrocities committed in Haiti during the time that President Jean-Bertrand Aristide was overthrown. During the period in 1991 when President Aristide was overthrown by elements of the Haitian Armed Forces, the de facto military regime proceeded to preside over one of the bloodiest periods in modern Haitian history. An estimated four thousand (4,000) civilians were killed and several thousand more were tortured, imprisoned, or forced into exile by the Haitian Armed Forces. One such individual was Michel Pierre. On April 22, 1994, military and paramilitary forces gunned down Pierre in the impoverished seaside neighborhood of Raboteau in an area called Gonaives. On January 24, 2003, a lawsuit was filed under the provisions of the ATS against Colonel Carl Dorelien in the United States District Court for the Southern District of Florida. It was proven that Colonel Dorelein had command responsibility for human rights abuses committed under the 1991-1994 dictatorship in Haiti. Colonel Dorelein had also relocated to Florida at the time of the filing of the suit. On February 23, 2007, a federal jury in Miami found Dorelien culpable of torture, extrajudicial killing, arbitrary detention, and crimes against humanity. Dorelien was ordered to pay $4.3 million in damages.

C. BURDENS TO SUCCESS UNDER THE ATS AND TVPA

There happen to be several distinct domestic obstacles to successfully utilizing or otherwise invoking the provisions of the ATS and the TVPA against those who violate the law of nations. All of these particular obstacles result from current interpretations of United States law.

1. Jurisdictional Requirements

Personal jurisdiction as well as subject matter jurisdiction represents the primary hurdle to finding liability under the provisions of the ATS and the TVPA. For example, in the case of An v. Chun, Young-Kae An brought suit against General Doo-Whan Chun, General Tae Woo Roh, and several other military leaders of Korea, alleging that they had tortured his father to death. The case, though factually similar to Filartiga, was dismissed due to lack of personal jurisdiction over the defendants. In An, though the defendants did occasionally visit the United States, their visits were not sufficient to trigger general jurisdiction. One defendant did visit the United States at least once on vacation but that was not considered a sufficient “minimum contact” for specific jurisdiction.

2. Exhaustion

Exhaustion represents the second hurdle to a plaintiff’s ATS/TVPA claim. This basically means that plaintiffs who assert causes of action under the ATS or TVPA must have first exhausted their local remedies. In actual practice, requiring litigating plaintiffs to seek redress by or through lawless regimes of foreign governments renders this hurdle easy to overcome.

3. Comity

Comity represents the third obstacle that a plaintiff is likely to face in regard to either an ATS or a TVPA complaint. International comity has been understood to mean “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation”. Comity has also been referred to as a discretionary doctrine, often invoked by the forum jurisdiction upon its concluding

13 Id. at *1.
14 Id.
15 Id. at n. 12.
that principles of fairness or judicial economy indicate that a foreign court would be a more appropriate forum for the cause of action.\textsuperscript{18}

4. Political Question Doctrine

As part of the domestic United States law, the political question doctrine may also present a significant hurdle to the plaintiff in terms of proving his/her case under either the ATS or the TVPA. In \textit{Kadic v. Karadzic},\textsuperscript{19} Radovan Karadzic, purported head of state of the Republic of Srpska, resisted trial in the United States based on head of state immunity; he also asserted that his presence in the United States was incidental to his political functions,\textsuperscript{20} and that the trial was thus political rather than legal. In other words, Karadzic invoked the “political question” doctrine as his last defense against standing trial in the United States. In \textit{Kadic}, the court was unable to adequately address the issue of “political question”, instead finding that Srpska was not recognized as a valid state.\textsuperscript{21}

5. Immunity

While it is generally recognized that the political question doctrine in and of itself does not present an insurmountable burden to the plaintiff, the related issue of immunity may, in fact, pose the greatest hurdle to a plaintiff with respect to both ATS and TVPA litigation. The historical foundation of sovereign immunity was in principles of “grace and comity”, as opposed to the Constitution.\textsuperscript{22} It is generally recognized that ministers and heads of state are entitled to absolute immunity during their terms of office.\textsuperscript{23}

D. CONCLUSION

Enacted in 1789, partly with the Barbary pirates in mind, the Alien Tort Statute was reinvented and utilized much more extensively in the early 1980s by public interest lawyers as a long-arm “Trojan horse” to seek redress for human rights in United States courts. The act was initially perfected as a unique weapon to be utilized against individual transgressors, such as Salvadoran military machines and Bosnian war criminals. The ATS has, in applicable settings, served to be an extremely useful legal tool to enable victims of atrocities in countries where no redress is available, to find justice in the United States. As a result of the holding in \textit{Filartiga}, Congress envisioned a need to enact a separate piece of legislation which, when combined with the ATS, would provide a more effective mechanism to combat the effects of world-wide torture. Accordingly, the Torture Victim Protection Act was passed in 1992.

\textsuperscript{18} Bigio v. Coca-Cola Co., 239 F.3d 440, 453-54 (2d Cir. 2001).
\textsuperscript{20} Id. at 245-47.
\textsuperscript{21} Id. at 250.
\textsuperscript{22} Sampson v. Federal Republic of Germany, 250 F. 3d 1145, 1149 n.3 (7th Cir. 2001) (implying that comity was one justification for the grant of immunity to Germany).
WAIT, YOU CAN’T SHRED THAT! ISSUES OF SPOLIATION OF EVIDENCE

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How often have you turned your home inside out searching for something you just held in your hand an hour previously? Losing personal items is an inescapable fact of life – no one is immune. It happens to each of us from time to time. Similarly, business enterprises often misplace, damage or inadvertently dispose of information in the form of e-mails, electronic files and even hard copies of documents. Unfortunately, the inability to locate and produce information that later becomes relevant to a lawsuit can be devastating.¹

The term “spoliation of evidence” usually refers to the loss, destruction, or alteration of evidence.² Destruction may be defined as “rendering evidence permanently unavailable to the court and the opposing party.”³ By its nature, spoliation is often invisible, particularly where the evidence is known only to the spoliator.⁴ Depending upon the jurisdiction, this tort may qualify as an independent cause of action based either on intentional or negligent conduct.⁵ It may also be a cause of action under existing negligence law.⁶

It is impossible to determine exactly how widespread spoliation may be. Surveys of litigators suggest it is pervasive. For example, one half of litigators believe that “unfair and inadequate disclosure of material information prior to trial [is] a ‘regular or frequent’ problem

…[and] 69% of surveyed antitrust attorneys [have] encountered unethical practices,” including, most commonly, destruction of evidence.7

The duty to preserve evidence can be created by agreement, contract, statute, special circumstance, or affirmative conduct by the defendant.8 This duty exists if a reasonable person in the defendant’s position should have foreseen that the evidence was material to a potential civil action.9 The lost or destroyed evidence must have impaired the plaintiff’s ability to prove the underlying lawsuit.10 The extent of impairment that a plaintiff must prove varies between jurisdictions.

A. Dangers Of Spoiled Evidence

Damages for spoliation of evidence can be significant, resulting in discovery sanctions such as barring a party from introducing evidence or asserting a theory of defense, or an adverse jury instruction in which the jury is told that it can draw a negative inference against the party that lost the evidence.11 In fact, the majority of states that have examined this issue have preferred to remedy spoliation of evidence and the resulting damage to a party’s case or defense through sanctions or by giving adverse inference instructions to juries.12 Sanctions can include the dismissal of claims or defenses, preclusion of evidence, and the granting of summary judgment for the innocent party.13 In some jurisdictions, damages can constitute the full amount of what the plaintiff would have recovered in the underlying lawsuit, while in other jurisdictions, damages are calculated as the amount the plaintiff would have obtained multiplied by the probability that the plaintiff would have won the underlying suit had no spoliation occurred.14 Some jurisdictions even allow an award of punitive damages.15

B. Prevention Strategy

To prevent spoliation of evidence from giving rise to litigation, attorneys and clients are well advised to identify all “key evidence” that may be relevant to pending or future litigation at the earliest opportunity.16 Once this “key evidence” is identified, it should immediately be secured, documented, and preserved so it is available for inspection and production. The preservation should last, at least, until the applicable statute of limitations runs. All interested

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9 Id.
10 Id.
12 Id.
13 Id.
14 Id.
parties should be placed on notice at the earliest opportunity that the evidence has been preserved and is available for inspection.17 Finally, the possessor of the key evidence should provide all interested parties with timely and meaningful access to the evidence for the purpose of inspection.18 Further, before any destructive testing is undertaken, or before any such potential “key evidence” is destroyed, all insurance carriers and all potential parties should be notified.19 A release should be obtained from all parties or a court order obtaining giving notice and permission for any such testing or destruction.20

In cases where a potential party or an adverse party is in control of “key evidence,” that party must be placed on notice of: (1) possible future litigation, (2) the fact that the evidence they possess is key evidence in pending or possible future litigation, and (3) the fact that they have an obligation to preserve that key evidence and make it available for inspection.21

C. Examples of Evidence To Preserve

1. Premises Incidents

For incidents occurring on the insured’s premises, the material or product the plaintiff allegedly slipped on or otherwise came into contact with needs to be secured at the earliest chance possible. These items can include debris on the floor, fixtures in the store, or products that are routinely sold.

In addition, all surveillance videotapes should be secured immediately. Be sure to include all tapes for the date of the incident. Tapes prior to the incident are important as they may show inspections of the area and any merchandise stocking that occurred. Investigators should also take and preserve all photographs, making sure to properly label them with the photographer's name, date, and time. In addition, all timecards and timesheets of employees working on the date of the incident need to be copied and preserved as these employees make up the employee witness pool.

2. Product Incidents

With incidents involving a specific product, the product should be put into secure storage for the entirety of the case. It should be labeled and warnings or instructions should be placed on the evidence to prevent destruction by uninvolved third parties. If the nature of evidence is such that it cannot be adequately preserved, investigators should attempt to make a record of the evidence through photos or other means and document why the evidence could not be preserved.

When in possession of evidence that may be material to a present or future lawsuit, the entire product as well as any other evidence in the adjacent area should be preserved even if such

17 Id.
18 Id.
20 Id.
21 Id.
objects were not a part of the original product at issue. Before testing evidence (especially destructive testing that materially alters the evidence), all potentially interested parties should be notified, even if suit has not yet been filed. This should include any possible co-defendants and/or third parties.

D. Common Examples Of Spoliation Of Evidence

Delays in investigating accidents, incomplete investigations, failure to train employees to properly investigate accidents and the failure to establish and follow proper risk management procedures are common causes of spoliation of evidence. Common examples of spoliation include:

- Pictures taken after an incident are lost.
- Video surveillance tapes are lost or taped over.
- Incident reports are lost or not filled out completely.
- Store fixtures such as chairs or shopping carts are lost or thrown away.
- Products are tested without giving notice to other parties.
- Products involved in an injury are returned to manufacturer for credit.
- Products involved in an injury are thrown away.\(^{22}\)

E. Case Law on Spoliation

1. New York Law

In New York, the duty of a party to preserve evidence, and the exposure of that party to statutory sanctions (CPLR § 3126) or common law sanctions for failing to do so is well established.\(^{23}\) Penalties for a refusal to comply with disclosure requests are provided for in section CPLR § 3126 which provide for such sanctions as:

a) resolving the matter against the party who destroyed or failed to preserve the evidence;
b) prohibiting the opposing party from supporting or opposing claims based on such spoliated evidence;
c) striking the pleadings of the disobedient party.

Determination of the appropriate sanction for spoliation is confined to the sound discretion of the court and the statute’s proposed penalties are not intended to be exhaustive.\(^{24}\) Even if the evidence in question is altered or destroyed before the alleged spoliator became a


party, sanctions may be appropriate if the spoliator was on notice that the evidence in question might be needed for future litigation.  

Furthermore, spoliation sanctions are not limited to cases where evidence is altered or destroyed willfully or in bad faith since a party’s negligent loss, destruction, or alteration can be just as damaging to another party’s ability to present a case or defense. The key test courts use to determine whether spoliation sanctions are warranted is whether the lost or missing evidence “deprives the moving party of the ability to establish his or her defense or case.” Where the moving party fails to meet this test, the courts have held that an adverse inference charge at the time of trial is an appropriate remedy.  

Thus, the New York jurisprudence has been summarized as follows:

First, it is axiomatic that control of the spoiled evidence prior to its destruction is a prerequisite to any claim alleging that a party destroyed evidence. It follows that if a party did not possess, control, or was otherwise in a position to prevent said evidence's destruction, no spoliation sanction can be had. Second, a spoliation sanction is always appropriate when evidence is destroyed thereby precluding an examination by an adverse party. Third, a spoliation sanction is available regardless of whether the evidence was destroyed through negligence or with specific intent. Fourth, the most drastic penalty for spoliation, the striking or dismissing of pleadings is only reserved for the cases where the evidence destroyed (key and crucial evidence) effectively prevents a party from completely prosecuting or defending its claim. Fifth, in cases where the evidence destroyed does not completely prevent a party from prosecuting or defending its claim, the appropriate remedy is a preclusion Order, precluding the offending party from offering evidence with respect to the evidence previously destroyed. Lastly, the fact that the evidence previously destroyed was not requested prior to its destruction, is not an excuse when the party who destroyed the evidence was on notice that said evidence would be needed for future litigation and as such, should have been preserved.  

2. New Jersey Law

New Jersey courts first identify the spoliator as this impacts the available and appropriate remedies. For example, if the spoliator as a defendant, courts are empowered to permit the plaintiff to pursue a separate claim for fraudulent concealment of evidence. A separate claim

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28 Id.


may also be appropriate if the spoliator is not a party to the litigation, as when an attorney’s
recklessness acts caused the loss of evidence.32 Other remedies available to courts dealing with
spoliating defendants include the use of discovery sanctions, adverse inferences, and employing
a bifurcated trial to address spoliation.33 Courts also may use more than one such remedy if
circumstances warrant.34

Other hand, if the spoliator is the plaintiff, New Jersey courts recognize the remedy of a
separate cause of action for fraudulent concealment will not necessarily serve any purpose.35 In
this circumstance, the courts turn to preclusion of plaintiff’s evidence that had been, or could
have been, derived from the spoliated material or item as the appropriate sanction.36 This
remedy is predicated upon the premise that the plaintiff’s opportunity to evaluate or test the
underlying material or item prior to its destruction gave it an unfair advantage that could not be
duplicated.37

New Jersey courts have also considered the timing of when the act of spoliation is
discovered.38 Spoliation that becomes apparent during discovery or trial often can be addressed
effectively through the use of ordinary discovery sanctions, such as preclusion, or through
adverse inferences.39 However, spoliation that is not discovered until there has been a verdict in
the case in chief will generally result in a “cause of action for the fraudulent concealment [that]
will be entirely separate and, depending on the outcome of the original trial, may include both
consideration of the substantive counts as well as the further spoliation-based damages.”40

Selecting the appropriate remedy under the circumstances must be guided by the essential
purposes that all of the sanctions are designed to achieve. According to the New Jersey courts,
the sanction serves three goals: “to make whole, as nearly as possible, the litigant whose cause of
action has been impaired by the absence of crucial evidence; to punish the wrongdoer; and to
deter others from such conduct.”41

3. Texas Law

There are several threshold questions to be answered once an allegation of spoliation is
made under Texas law — all of which are legal questions for the trial court.42 These questions

defendant’s effort to pursue third-party claim against plaintiff’s attorney who discarded can of spinach claimed to
have contained insect), certif. denied, 736 A.2d 528 (1999).
34 *Tartaglia*, 961 A.2d at 1167.
litigant’s interest [through] a prospective cause of action” does not apply when spoliation interferes with defendant’s
ability to defend lawsuit).
36 *Id.* at 257.
37 *Id.*
38 *See Tartaglia*, 961 A.2d at 1167; *Rosenblit*, 766 A.2d at 749.
39 *Rosenblit*, 766 A.2d at 749.
40 *Tartaglia*, 961 A.2d at 1167.
41 *Rosenblit*, 766 A.2d at 749.
are: (1) whether there was a duty to preserve evidence; (2) whether the alleged spoliator breached that duty; and (3) whether the spoliation prejudiced the non-spoliator’s ability to present its case or defense.  

a. Does A Duty To Preserve Exist And, If So, What Must be Preserved?

The duty to preserve evidence pre-litigation is a separate duty inquiry. Such a duty arises only when a party knows, or reasonably should know, that there is a substantial chance that a claim will be filed and that evidence in its possession or control has potential materiality and relevancy to that claim. However, the duty is not so encompassing as to require a litigant to keep or retain every document in its possession. Basically, the trial court must determine whether evidence was destroyed pre-filing of suit where the alleged spoliator knew or should have known or it was reasonably foreseeable that litigation would ensue.

The second part of the duty inquiry is what evidence must a party preserve. The answer is that a party is under a duty to preserve what it knows or reasonably should know is relevant to the case, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, or is the subject of a pending discovery sanction.

b. Was The Duty To Preserve Breached?

The next threshold question is whether the duty to preserve was breached. Parties need not take extraordinary measures to preserve evidence; however, they must exercise reasonable care in preserving evidence. Thus, parties are accountable both for negligent and intentional spoliation; the distinction between the two lies in the severity of the sanction. The alleged spoliator can defend against the charge of spoliation by providing other explanations for the destruction – e.g., it was beyond the spoliator’s control, or done in the ordinary course of business.

c. Was The Non-Spoliator Prejudiced By The Destruction Of Evidence?

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45 Trevino, 969 S.W.2d at 957 (Baker, J., concurring).
46 Trevino, 969 S.W.2d at 956 (Baker, J., concurring).
47 Trevino, 969 S.W.2d at 957 (Baker, J., concurring); Adobe Land Corp., 236 S.W.3d 351 (Tex. Ct. App.—Fort Worth 2007, pet. denied)(rejecting argument that defendant did not have duty to preserve allegedly contaminated chemical until plaintiff provided it with the “lot number” of the chemical that was applied to their fields; rather, duty arose when plaintiff filed its petition to preserve all samples of the chemical that were then in its possession and potentially relevant to the claims being asserted).
48 Trevino, 969 S.W.2d at 957 (Baker, J., concurring).
49 Id. at 957; Adobe Land Corp., 236 S.W.3d at 351 (finding a duty to preserve).
In order for the nonspoliator to be entitled to a remedy, he must establish prejudice to his case, i.e., the spoliation of evidence must hinder his ability to present his case or defense. The primary focus of the prejudice requisite for a spoliation instruction is the relevancy of the destroyed evidence. The more relevant the missing evidence, the more harm the spoliator should suffer from its destruction.

In determining prejudice, the trial court must consider whether the destroyed evidence was cumulative of other competent evidence the party can use and whether the evidence supports a key issue in the case.

In making the determination of harm or prejudice, the court should also look at the availability of other evidence to take the place of the missing information. For example, a party is not prejudiced if it has other evidence available to it that contains the same information as the evidence that was destroyed.

d. What Remedies Are Available?

Discovery sanctions may include: dismissal of the lawsuit, entry of a default judgment, disallowing discovery by the offending party, assessing discovery or court costs against the spoliating party or his attorney, striking part of the party’s pleadings, or holding the party in contempt. The choice of sanctions is within the trial court’s discretion -- with willful violations justifying severe sanctions. Important factors to weigh include the degree of the spoliator’s culpability and the prejudice the nonspoliator suffers.

50 Trevino, 969 S.W.2d at 957 (Baker, J., concurring); Brewer, 862 S.W.2d at 159-60 (spoliation instruction not justified in absence of evidence showing harmful nature of missing evidence and whether there was other evidence available that was cumulative of such proof).

51 Trevino, 969 S.W.2d at 958 (Baker, J., concurring); State v. Gonzalez, 82 S.W.3d 322, 330 (Tex. 2002)(“[w]e need not decide whether the spoliation instruction was erroneous. That is because Gonzalez produced no evidence showing that the missing logbook would have contained any information relevant to the ‘actual notice’ issue”); CapitalOne Bank v. Rollins, 106 S.W.3d 286, 297 (Tex. Ct. App.—Houston [1st Dist.] 2003, no pet.)(destruction of envelopes could not give rise to spoliation claim in context of suit to recover late fees because envelopes would not have demonstrated when defendant received customers’ payments); Armstrong v. Norris Cylinder Co., 922 S.W.2d 210, 212 (Tex. Ct. App.—Texarkana 1996, writ dism’d w.o.j.)(“master sheet” which listed names of employees who might be affected by reduction in workforce was irrelevant to plaintiff’s worker’s compensation retaliation claim; thus, no spoliation); Brewer, 862 S.W.2d at 159-60 (evidence was irrelevant and, thus, no prejudice resulted from its destruction).

52 Trevino, 969 S.W.2d at 958 (Baker, J., concurring); Offshore Pipelines, 984 S.W.2d at 666; Spector v. Norwegian Cruise Line Ltd., 2004 WL 637894 (Tex. Ct. App.—Houston [1st Dist.] Mar. 30, 2004, no pet.)(not designated for publication).

53 See Cresthaven Nursing Residence v. Freeman, 134 S.W.3d 214, 227 (Tex. Ct. App.—Amarillo 2003, no pet.)(no spoliation where verbatim hand-written copy of missing nurse’s notes available to plaintiffs at trial); Malone, 977 S.W.2d at 562 (no spoliation where available nursing report incorporated contents of destroyed incident report); But see Adobe Land Corp., 236 S.W.3d 351 (plaintiff did not have access to any other evidence which would provide them with the same information they sought to obtain by testing a sample of the chemical sprayed on their fields; therefore, the spoliation severely hindered their ability to present their case).

54 Trevino, 969 S.W.2d at 959 (Baker, J., concurring).


56 San Antonio Press, 852 S.W.2d at 67.
1. Exclusion of Evidence Or Testimony

Exclusion of evidence or testimony the spoliating party is attempting to admit adduced from the destroyed evidence is a remedy available to the nonspoliating party. In addition, the issue of whether evidence concerning the spoliation is admissible is within the trial court’s discretion.

2. Jury Charge Instruction On Presumption

A jury instruction on spoliation is another means of dealing with spoliation which is within the trial court’s discretion.

i. Intentional Destruction Of Evidence Warrants Burden-Shifting Instruction

Depending on the severity of the prejudice resulting from the destruction of the particular evidence at issue, one of two types of presumptions may arise. The more severe presumption is the presumption used when the nonspoiling party cannot prove its prima facie case without the destroyed evidence. This instruction shifts the burden of proof and includes a statement that the spoliating party has either negligently or intentionally destroyed evidence and therefore the jury should presume that the destroyed evidence was unfavorable to the spoliating party on the particular fact or issue the destroyed evidence might have supported. The instruction should also include a statement that the spoliating party bears the burden to disprove the presumed fact or issue. This means that when the spoliating party offers evidence rebutting the presumed fact or issue, the presumption does not automatically disappear. It is not overcome until the fact finder believes that the presumed fact has been overcome. This presumption is only applicable when there is deliberate destruction of evidence.

In H.E. Butt Grocery Co. v. Brunet, the plaintiff slipped and fell on an onion stalk. The court held because the defendant did not explain why the onion stalk was “gotten rid of” the unrebutted presumption that the evidence was not favorable arose. Such a presumption when unrebutted can establish a fact in issue -- i.e., that the stalk would have shown that it was

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57 Trevino, 969 S.W.2d at 960 (Baker, J., concurring).  
59 See Trevino, 969 S.W.2d at 960 (Baker, J., concurring)(when a trial court determines a party improperly destroyed evidence, it may submit a spoliation presumption instruction to the jury); Middleton, 982 S.W.2d at 470 (instruction shifts the burden of proof and includes a statement that the spoliating party has either negligently or intentionally destroyed evidence and therefore the jury should presume that the destroyed evidence was unfavorable to the spoliating party on the particular fact or issue the destroyed evidence might have supported); Watson v. Brazos Electric Power Co-op, Inc., 918 S.W.2d 639, 643 (Tex. Ct. App.—Waco 1996, writ denied)(error not to submit spoliation instruction where spoliation established).  
60 See Trevino, 969 S.W.2d at 960 (Baker, J., concurring); Felix v. Gonzalez, 87 S.W.3d 574, 580 (Tex. Ct. App.—San Antonio 2002, pet. denied); Middleton, 982 S.W.2d at 470.  
61 Trevino, 969 S.W.2d at 960-61 (Baker, J., concurring).  
62 Wal-Mart, 982 S.W.2d at 470.  
63 530 S.W.2d at 342.
sufficiently stepped on and mashed so as to lead to the conclusion that it had lain on the floor for a sufficient period of time that defendant should have discovered it and removed it.64

ii. Failure To Explain Non-Production of Evidence By Party Controlling Evidence Warrants Rebuttal Presumption

Under this circumstance, the presumption arises because the party controlling the missing evidence cannot explain its failure to produce it.65 “Failure to produce evidence within a party’s control raises the presumption that if produced it would operate against him, and every intention will be in favor of the opposite party.”66 This presumption is effected in the form of a jury instruction.67 This second presumption is less severe as it is a rebuttable presumption.68

This presumption does not apply where evidence is merely lost or done away with in the ordinary course of business.69 Courts will not infer spoliation or destruction of evidence, intentional or negligent, merely because it is missing.70

3. “Death Penalty” Sanctions

Both the United States Supreme Court and the Texas Supreme Court have made it clear that the imposition of case-determinative sanctions invoke constitutional due process considerations because they deprive a party of the right to have its case heard on the merits. Therefore, death penalty sanctions are a remedy of last resort to be employed only in the most egregious of circumstances.71

Although a trial court has broad discretion in imposing sanctions, when sanctions are so severe as to preclude presentation of the merits of the case, that discretion is limited by the requirement that the sanctions be “just.”72 The four factors to consider when determining whether the sanctions are just are: (1) the sanction must bear a direct relationship to the offensive conduct; (2) the sanction must not be excessive; (3) the trial court must first impose a less stringent sanction; and (4) the trial court should not deny a trial on the merits, unless it finds that the sanctioned party’s conduct “justifies a presumption that its claims or defenses lack merit” and

64 Id. at 344.
65 Watson, 918 S.W.2d at 643.
66 Brewer, 862 S.W.2d at 159.
68 Trevino, 969 S.W.2d at 960 (Baker, J., concurring).
69 Williford Energy, 895 S.W.2d at 390; Brewer, 862 S.W.2d at 160.
70 Brewer, 862 S.W.2d at 160; Ordonez, 984 S.W.2d at 274 (holding no abuse of discretion to refuse spoliation instruction where no evidence that log books were destroyed for the purpose of concealing them from plaintiff, but rather were destroyed in normal and routine course of business); Newton, 546 S.W.2d at 79 (Tex. Ct. App.—Corpus Christi 976, no writ)(no presumption because chicken blood wiped from floor in regular course of business was for safety of shoppers and there was no evidence of intent to destroy evidence).
that “it would be unjust to permit the party to present the substance of that position before the court.”

The court should apply sanctions on a case-by-case basis and be cognizant of constitutional due process considerations in order to avoid depriving a party of the right to have his case heard on the merits. Sanctions that, by their severity, prevent a decision on the merits of a case cannot be justified “absent a party’s flagrant bad faith or counsel’s callous disregard for the responsibilities of discovery.”

In Texas, the only reported death penalty sanction for spoliation of evidence that has been affirmed is found in the case of Daniel v. Kelley Oil Corp. Here the trial court found the plaintiff had manufactured evidence by way of a tape recording with the defendant employer, which had been altered. The majority in Daniel concluded that the striking of plaintiff’s pleadings and entry of a take-nothing judgment were “just” because the fabrication of physical evidence is a third degree felony. Accordingly, the court found that such intentionally egregious behavior warranted punishment that placed the guilty party in a worse position than she had been in. The lesser sanction of simply excluding the tape from evidence would not have punished the plaintiff because she would not have been placed in any worse position; therefore, death penalty sanctions were warranted. Id. Even in this egregious situation, the dissent, joined by three justices, would not have upheld the death penalty sanctions because the case was a hotly contested “swearing match” where the plaintiff denied altering the tape in any way.

e. Arguments To Defend Against A Spoliation Allegation

1. There Was No Duty To Preserve The Evidence

Central to the duty to preserve evidence is fact that the alleged spoliator has possession and control of the missing evidence. If he did not, there is no duty to preserve.

2. There Is A Reasonable Explanation For The Absence Of The Evidence

If provided a reasonable explanation for the absence of the evidence, appellate courts will refuse to indulge in the assumptions of intentional destruction offered by the opposing party. For instance, the Austin Court of Appeals has specifically refused to indulge in the speculative and lengthy chain of inferences and assumptions it would take to arrive at a conclusion of intentional destruction.

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74 TransAmerican, 811 S.W.2d at 959; San Antonio Press, 852 S.W.2d at 67 (important factors to weigh in spoliation case include the degree of the spoliator’s culpability and the prejudice the nonspoliator suffers).
75 TransAmerican, 811 S.W.2d at 918.
77 Id. at 235.
78 Id. at 236 (Mirabal, J., dissenting).
79 See Walker, 203 S.W.3d at 477 (utility pole at all times relevant to case was in the possession and control of another party, who had disposed of the pole during the ordinary course of business; therefore, trial court did not abuse its discretion by denying an instruction on the spoliation presumption).
or negligent destruction in the face of no circumstances or evidence that the evidence was destroyed. The court held the fact the evidence is missing is not the equivalent of “destruction” rather, the burden is on the party alleging spoliation to show destruction by the opposing party.80

3. Evidence Was Destroyed In Normal Course Of Business

One of the strongest and most reasonable explanations for the absence of evidence is that it was destroyed or depleted during the normal course of business. In Wal-Mart Stores, Inc. v. Johnson, a reindeer decoration that fell and injured the plaintiff had all been sold in the normal course of business.81 The court held Wal-Mart had no duty to preserve the reindeer because it had no notice it would be relevant to a future claim. Consequently, the trial court abused its discretion when it gave a spoliation instruction.82

This “normal course of business” explanation is particularly prevalent with regard to video surveillance tapes in a retail store where tapes are routinely taped over after a certain period of time. In Doe v. Mobile Video Tapes, Inc., the court held that videotapes recorded over in the normal course of business, and before notice of a claim was given, provided no basis for a spoliation presumption.83 However, note that destruction in the ordinary course of business or pursuant to a corporate policy will not rebut the presumption when the spoliator was put on notice of the claim before the “normal course of business” destruction took place.84

4. California Law

In 1984, California was the first state to recognize the tort of spoliation.85 Since, then, however, the California Supreme Court has overruled that precedent and held that there is no tort for “the intentional spoliation of evidence by a party to the cause of action to which the spoliated evidence is relevant [i.e., first-party spoliation], in cases in which ... the spoliation victim knows or should have known of the alleged spoliation before the trial or other decision on the merits of the underlying action.”86 Likewise, the California Supreme Court has also held that there was no cause of action for intentional spoliation of evidence by a third party.87 Based upon those decisions, the California Court of Appeal has held that California law precludes causes of action for negligent spoliation by first or third parties.88

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80 Bryan v. Zenith Insurance Co., No. 03-00-00563-CV, 2001 WL 617925, at *3 (Tex. App.—Austin June 7, 2001, no pet.) (not designated for publication); See also Lively, 51 S.W.3d at 642.

81 106 S.W.3d at 722.

82 Id. at 723.

83 43 S.W.3d 40, 56 (Tex. Ct. App.—Corpus Christi 2001, no pet.); See also Brumfield, 63 S.W.3d at 919-20 (Exxon had policy to tape over surveillance tapes after thirty days; thus, there was a reasonable explanation for the missing video, and the trial court did not abuse its discretion in refusing to give a spoliation instruction).

84 Adobe Land Corp., 236 S.W.3d at 351.


Generally, then, the independent tort of spoliation has been eliminated in California in favor of resolving such issues within the case itself as a discovery sanction.\textsuperscript{89} Although the Court in \textit{Cedars-Sinai} recognized a discovery sanction for spoliation in California, the exact nature, findings and procedures of that remedy await further guidance.\textsuperscript{90} Cedars-Sinai established that the remedy must be found within existing litigation rather than in a separate cause of action.\textsuperscript{91} It did not determine whether or what the tort elements must be established, what if any findings would be required, or whether punitive sanctions could be included.\textsuperscript{92}

Thus, the chief non-tort remedy for a party’s intentional spoliation of evidence under California jurisprudence is that they will face an evidentiary inference.\textsuperscript{93} The inference, as utilized by the courts, is that “evidence which one party has destroyed or rendered unavailable was unfavorable to that party.”\textsuperscript{94} Section 413 of the California Evidence Code sets forth this inference: “In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party’s . . . willful suppression of evidence relating thereto . . . .”\textsuperscript{95} The standard California jury instruction, moreover, includes an instruction concerning this inference as well: “If you find that a party willfully suppressed evidence in order to prevent its being presented in this trial, you may consider that fact in determining what inferences to draw from the evidence.”\textsuperscript{96}

For spoliation during the discovery process, both negligent and intentional spoliation have been held to constitute “misuses of the discovery process” warranting the imposition of sanctions.\textsuperscript{97} A court’s ability to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious, or whimsical action.\textsuperscript{98} There are only two prerequisites to the imposition of the sanction: there must be a failure to comply and the failure must be willful.\textsuperscript{99} Generally speaking, California jurisprudence provides little guidance to courts considering whether to impose sanctions and which sanctions may be appropriate under the circumstances.\textsuperscript{100} There is, however, a guiding principal that discovery sanctions may not “exceed that which is required to protect the interests of the party entitled to but denied discovery,” and terminating sanctions are a “drastic penalty which should be sparingly used.”\textsuperscript{101}

F. Conclusion

\textsuperscript{90} \textit{Cedars-Sinai Medical Ctr. v. Superior Court} (1998), 18 Cal.4th 1
\textsuperscript{91} \textit{Id.}
\textsuperscript{92} \textit{Id.}
\textsuperscript{94} \textit{Cedars-Sinai}, 954 P.2d at 517.
\textsuperscript{95} CAL. EVID. CODE § 413 (West 2008).
\textsuperscript{96} BAJI No. 2.03 (8th ed. 1994).
\textsuperscript{99} \textit{Id.}; CAL. CIV. PROC. CODE §2023.
\textsuperscript{100} Kandice J. Giurintano and Edgar M. Elliott, \textit{Spoliation of Evidence}, http://apps.americanbar.org/tips/commercial/ctlcspoliation.pdf
Although the bench, bar and public should be aware and concerned about the loss, alteration, damaging or destruction of evidence, the issue should not cause panic or the adoption of unnecessary or extreme internal procedures.\textsuperscript{102} Destruction of evidence is wrong and strikes at the heart of a legal system by un-leveling the playing field. In response, courts must protect the integrity of the system and provide a remedy for any injury. Any sanction imposed for spoliation, though, should be appropriate to remedy the harm and protect the integrity of the judicial system, no less and no more. And, importantly, honest people acting reasonably and in good faith are not required to engage in unrealistic heroic efforts to search for, preserve and produce every bit of evidence that ever existed.\textsuperscript{103}

\textsuperscript{102} Richard E. Best, \textit{E-DiscoveryPreservation Duty & Spoliation}; February, 2003
\textsuperscript{103} \textit{Id.}