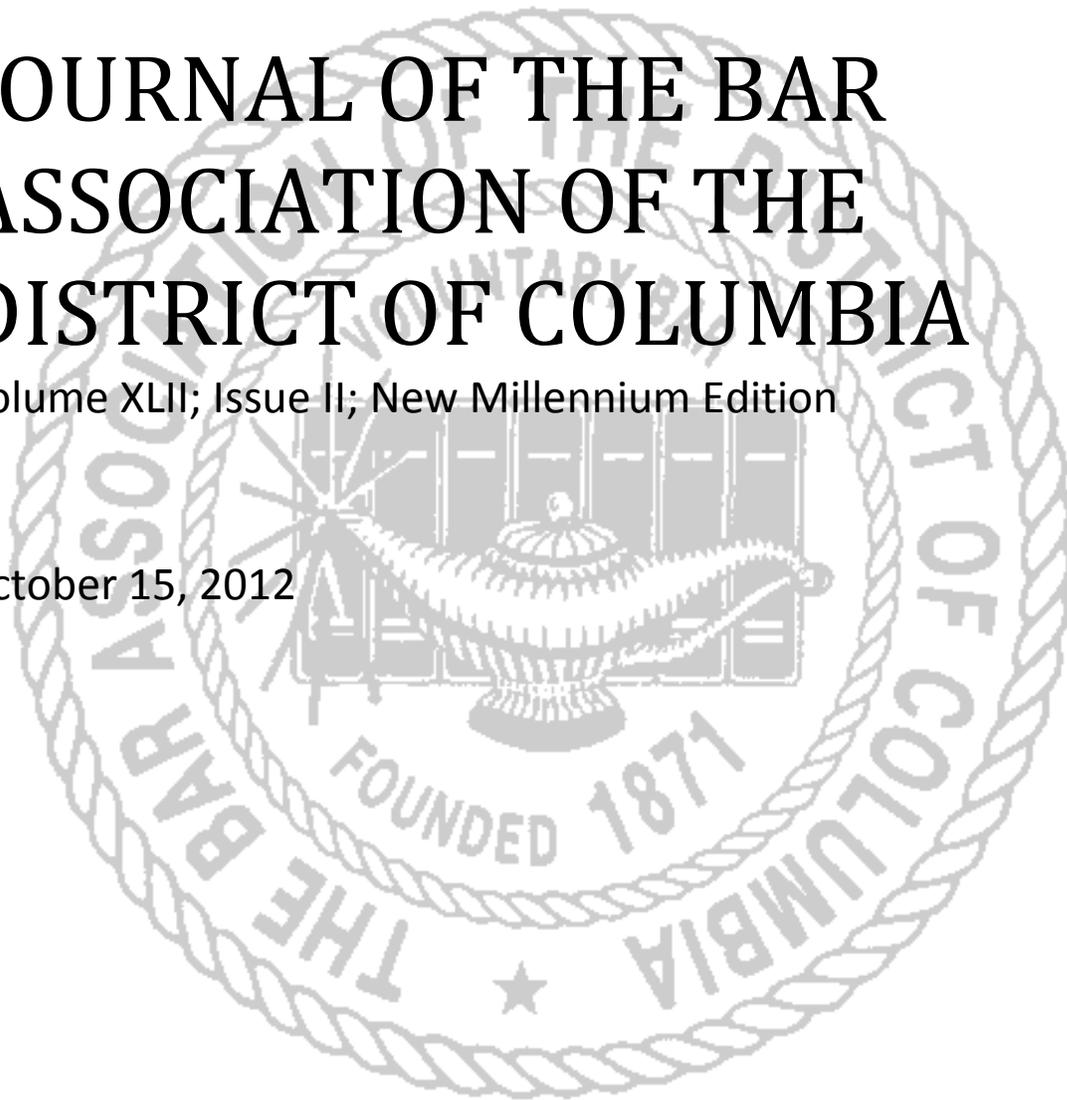


# JOURNAL OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

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# THE ROLE OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA IN THE CREATION OF THE DISTRICT OF COLUMBIA BAR

by S. White Rhyne<sup>1</sup>

This year, the 40th Anniversary of the birth in 1972 of the District of Columbia Bar, is an appropriate time for an article focused on the substantial role of the Bar Association of the District of Columbia (BADC) in the creation of that new bar entity. Facts recited in this article reflect the author's recollection of events and are consistent with numerous articles on the subject published in the *D.C. Bar Journal*, as the official publication of the BADC was then known.

From 1966-67, the author was Chair of the BADC Young Lawyers Section, then known as the Junior Bar Section but referred to in this article by the name and initials by which it has been known for the last four decades. Prior to taking office, the author consulted with recent predecessors for suggestions as to what the Section might do that it was not already doing to serve the public and the bar. George W. Shadoan, YLS Chair in 1964-65, had come to Washington from Kentucky. Like 27 other states, Kentucky had a "unified bar," one to which all lawyers belonged, with mandatory dues, self-governing but subject to regulation by the legislature and/or highest court of the state. George suggested that the BADC Young Lawyers Section look into the pros and cons of whether such an organization would be good for the District of Columbia. Taking his suggestion, the author added a "Unified Bar Committee" to the Section's then 33 active committees. Instructions to the new Committee were to study how unified bars had worked in jurisdictions that had them, and to consider and report on pros and

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<sup>1</sup> The author has been a member of the Bar Association of the District of Columbia (BADC) for 55 years. In 1966-67 he was Chair of the Young Lawyers Section of the BADC, then known as the Junior Bar Section. During the years 1967 to 2002 he served multiple terms on the Board of Directors of the BADC. He also served as Secretary of the Association, and as Vice-Chair of the BADC Foundation.

cons for lawyers, the courts and the public if such an organization were established in the District of Columbia.

The Chair of the Committee was George U. Carneal, an able young lawyer from the firm of Hogan & Hartson (now Hogan Lovells). Another member of that Committee was James A. Hourihan, also of the Hogan firm, who several years later succeeded Carneal as Chair of the Unified Bar Committee. The Committee did a prodigious amount of work, conferring with bar leaders and judges in states that had unified bars, putting on programs at the monthly meetings of the Bar Association at which such persons from unified bar states were participants, and consulting with leaders of other voluntary bar organizations in the District of Columbia and with lawyers in states where voluntary bar associations co-existed with mandatory unified bars.

By the end of the 1966-67 year, the YLS Committee had concluded that the creation of “one official organization of all attorneys engaged in the practice of law in the District of Columbia” would be in the public interest<sup>2</sup>. The Sept.-Oct. 1967 issue of the *D.C. Bar Journal* contained twelve pages of text described as “a condensed version” of a report by the Section “setting forth the arguments for and against a unified bar.” It went on to say that “[t]he issue will be debated at the September 12 Bar Association meeting and then submitted by referendum to the entire membership.”

The report began by describing the characteristics of a unified or “integrated” bar<sup>3</sup> as “the official organization of all attorneys engaged in practice in a state or other jurisdiction,” with “payment of annual dues and continued conformity to regulation” as a “prerequisite to the

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<sup>2</sup> *DC Bar Journal*, June-July-Aug. 1967 issue, p.12.

<sup>3</sup> It said that the term “integrated bar” was sometimes used interchangeably with “unified bar” but acknowledged the term “often creates confusion due to its racial connotation.”

privilege of practicing law in the jurisdiction.” It went on to describe the “structure” of the typical unified bar as not differing markedly from the organization of the Bar Association, with substantive work carried on through committees and sections, with the membership as a whole meeting annually, and with the officers and policy making body being elected by the membership. It described the “Unified Bar Movement” in the United States as having reached a point where twenty-eight states as well as the Virgin Islands and Puerto Rico had unified bars. It also noted that three states, Virginia, West Virginia, and North Carolina, had statewide voluntary bar associations as well as unified bars. The report said that committees of the Bar Association of the District of Columbia had “considered the issue of a consolidated bar a number of times during the past thirty years and recommended its establishment. However, the full Bar Association ha[d] never voted on the merits of the issue.” It noted, though, that the 1956 Judicial Conference had recommended establishment of a unified bar in the District. It went on to discuss “Arguments Usually Advanced For and Against Bar Unification,” saying it would summarize “the broad lines of these arguments.” The arguments have been further condensed for this article, but for those interested in greater detail they are available as printed in the September-October 1967 issue of the *D.C. Bar Journal*, in the report entitled “The Unified Bar Controversy” beginning on page 17<sup>4</sup>.

The first argument cited in favor of creation of a Unified Bar in the District was the enthusiasm of attorneys and judges in states that had such bar organizations, and the fact that in no state with a unified bar had there been a return to a solely voluntary form of bar organization.

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<sup>4</sup> Copies of the *D.C. Bar Journal* for years 1967 to 1973, often cited throughout this article, can be found in the law libraries of the law schools of Catholic University, Georgetown University, Howard University, and the University of the District of Columbia; as well as at the Office of the Bar Association of the District of Columbia. However, not all issues are available at all locations.

The report cited the greater influence that unified bars had with the judiciary and other agencies of government by reason of their official status. It also argued that a unified bar would bring more lawyers into active bar work and make more funds available for such work, to the benefit of the public, the courts, and the legal profession. It said that a unified bar would increase the diversity of lawyers in the principal bar organization as to types of practice, location of offices (including lawyers with offices outside the District), governmental or private employment, and otherwise. It would also provide a device for rendering the composite judgment of all lawyers in significant areas of interest such as proposed legislation and judicial appointments. It saw benefits in an effective disciplinary machinery with paid staff, meaningful sanctions, and efficient enforcement of unauthorized practice of law prosecutions. Also, all attorneys would receive the bar journal and other publications, as well as access to bar educational programs.

The above is a partial list only of arguments for bar unification spelled out in a page-and-a-half of the *D.C. Bar Journal*. It was followed by arguments against bar unification, the first of which was that there is “a general objection, in principle, to coercion and regimentation--to the idea that lawyers should be compelled to join an organization and pay dues.” Second was an objection to compulsory membership in and dues payment to an organization that could use the dues to sponsor legislation and official positions contrary to the interests and beliefs of some members. Members of a unified bar could not resign in protest, as they would be free to do if a voluntary bar association took an official position to which they strongly objected.

The view was expressed that voluntary bar associations can perform the same functions more effectively than unified bars, that unified bars should be proposed only as panaceas for poorly organized voluntary bars, and that after unification remaining voluntary bar associations would degenerate into mere social clubs. There was also an argument that unified bars, being

subject to the general supervision of the court, would necessarily have to be restrained in criticizing actions of the judiciary. Objection was expressed to giving unwilling holdouts from participation in voluntary bar association activities, and persons holding law degrees though not actually performing legal services, an equal voice in the affairs of a unified bar organization with members who actually practice law and have been active in voluntary bar organizations. The view was also expressed that centralized controls in a unified bar would prevent adequate attention to problems of members with special interests.

The YLS Committee proceeded to state its reasons for favoring creation of a Unified Bar in the District of Columbia, while acknowledging that the District is different from most states that have unified bars because of its relatively small geographical area, the high density of attorneys many of whom represent clients only before certain administrative agencies, and others who are primarily lobbyists, a good many of whom practice law in Maryland and/or Virginia as well as in the District and may live in those states, and many of whom are members of voluntary bar associations with special interests. But the Committee said that it nonetheless “fe[lt] that most of the salutary achievements contributing to the success of the state integrated bars would also be accomplished were the D.C. Bar to be integrated.”

It cited as perhaps the “premier reason” for creating a unified bar the “need for improvement in grievance and disciplinary procedures.” It cited criticism “in the press and on Capitol Hill” that the Bar and courts in the District were not doing an effective job of policing the legal profession. The BADC Committee on Ethics and Grievances had no jurisdiction over attorneys practicing in the District who were not members of the Association. And the Committee on Admissions and Grievances of the U. S. District Court, it said, though composed of “able members of the Bar who perform conscientiously their voluntary and tremendously

time-consuming task,” were unpaid and operated with a paid staff of only two, who also had other responsibilities. Reference was made also to an “anomalous situation” where an attorney could “be disbarred from [practice in] some courts in the District yet free to practice in others.”

Another reason for creating a unified bar cited by the YLS Committee was the likelihood of involving more attorneys in activities through the organized bar that would improve the administration of justice, effect substantive and procedural reforms in many areas of the law, and otherwise serve the public interest. It predicted also that a unified bar association would be able to have a more meaningful voice than a voluntary association in matters of interest to lawyers such as the selection of judges and legislative proposals regulating the unauthorized practice of law.

The YLS Committee Report discussed certain issues raised by the creation of a unified bar organization, such as its effect on existing voluntary bar associations. It also discussed whether membership in the unified bar would be required of members of the bars of other states who practice before federal agencies in the District, but do not live or maintain an office in the District. Other issues discussed were whether attorneys employed fulltime by the District or the federal government who appear before courts and agencies in the District only in an official capacity would have to belong to the unified bar; and whether attorneys admitted to practice by the United States Court of Appeals for the D.C. Circuit prior to the creation of a unified bar should be allowed to continue to appear in that Court without joining the unified bar if the attorney does not maintain an office in the District or hold himself or herself out as a lawyer there.

In the final section of the report of the Unified Bar Committee of the Bar Association's Young Lawyer Section, it stated the "personal conviction" of its members that "substantial beneficial effects would result from integration of the D.C. Bar and that this objective should be pursued with diligence." It decried the fact that the membership of the Bar Association had never had "an opportunity to vote on the issue after adequate dissemination and discussion." And it stated the view of the Committee that a Unified Bar for D. C. "probably will not be accepted by the membership of the D.C. Bar Association if the question is presented for resolution prior to a full airing of the relevant considerations involved in the decision."

By the time that the YLS Committee Report appeared in the D.C. Bar Journal, the Bar Association had already scheduled a full airing of the pros and cons of a unified bar in a debate to be held at the Association's monthly meeting on September 12, 1967, at the Mayflower Hotel. The November-December 1967 issue of the *D.C. Bar Journal* contained a report on that debate written by Charles Effinger Smoot, a respected senior member of the Bar Association. Participants in the debate included Glenn R. Winters, Executive Director of the American Judicature Society, and the Honorable J. DeWeese Carter, Chief Judge of the Second Judicial Circuit of Maryland, both speaking in favor of bar unification. Speaking in opposition to bar unification was Frank J. Whalen, Jr., Esq., of the law firm Spencer & Whalen. He was active in the BADC, had served on its Board of Directors, and was then Vice-President of its Research Foundation.

In addition to Charles Effinger Smoot's two page summary of the remarks of Judge Carter and Messrs. Winters and Whalen, the same issue of the D.C. Bar Journal contained twenty-two pages of pro and con writings by three practicing lawyers in the District. All three articles were thoroughly researched. In a nine page article, Frank Whalen explained in some

detail his reasons for opposing creation of a unified bar. In an eight page article, George Carneal responded to arguments that had been raised against the proposal of his YLS Committee that there be a unified bar. There was also a five page article by E. Riley Casey of the law firm Counihan, Casey & Loomis, who was a former U.S. Attorney and had served as a Special Assistant to the U.S. Attorney General. He favored Bar unification.

The next issue of the *D.C. Bar Journal*, for Jan.-Feb. 1968, reported that the Board of Directors of the Bar Association on Dec. 15, 1967, had adopted a resolution “that the matter of the Unified Bar be submitted to the Association by referendum;” and that the Board had “recommended a vote in favor of the principle of unification.” The Mar.-Apr. 1968 issue of the *D.C. Bar Journal* reported that in the referendum the membership of the Association had supported the creation of a Unified Bar by a vote of 924 to 552. Bar Association President John E. Powell said in his President’s Page that Albert E. Brault had accepted appointment as Chairman of a newly-formed Bar Association Committee on Unification of the Bar.

By the Aug. – Sept. – Oct. 1968 issue of the *D.C. Bar Journal*, Jacob A. Stein had assumed the Presidency of the BADC. There was a listing of all committees of the Association, their mission, officers and membership. These included a Unified Bar Committee, “organized for the purpose of drafting enabling legislation for the Unified Bar of the District of Columbia and to work with the courts of the District of Columbia in drafting procedures under such enabling legislation.” The officers of the BADC Committee appeared as Albert E. Brault, Chairman; George U. Carneal, Vice Chairman; and S. White Rhyne, Secretary. Among the other eleven Committee members were John E. Powell, the immediate past President of the Bar Association, and George E. Monk, the Vice President of the Bar Association. The following year, Frank Whalen was added as a member of the Committee.

Progress on creation of a Unified Bar in the District of Columbia was slow during the next few years because it involved working with the courts and Congress which, during that time, were considering legislation for what was commonly referred to as “District of Columbia Court Reorganization.” As ultimately enacted in July 1970, that legislation created a new local trial court which it named the Superior Court; it increased the size of the local appellate court the District of Columbia Court of Appeals, and gave that court responsibilities in regulation of the bar that had previously been exercised by the United States District Court for the District of Columbia. The provisions relating to attorneys were made effective as of April 1, 1972.

In the *D.C. Bar Journal* for Jan.-Jun. 1971, then President Herbert J. Miller, Jr., of the BADC referred to the Association’s endorsement by referendum of the “concept” of a Unified Bar for the District of Columbia. He said that Albert E. Brault, Chairman of the Unified Bar Committee, had reported to him that the District of Columbia Court of Appeals was “sympathetic to the concept.” He also said that a brief drafted by the Unified Bar Committee had been filed with the Court in support of the proposition that the Court could unify the bar by court rule; and that the Court had requested that the Association provide it with a proposed rule that would accomplish the unification. President Miller said he was “firmly convinced that a unified bar can bring about dynamic improvements in the area of grievance problems, as well as resulting in a stronger and more efficient organization that can better serve the entire community within the District of Columbia.”

The Jul.-Oct. 1971 issue of the *D.C. Bar Journal* was full of information about the Unified Bar. New BADC President Fred M. Vinson, Jr., said in his first President’s Page that the “Unified Bar may come into existence next spring; and if it does, it will be as a result of the

wisdom of our D.C. Court of Appeals aided by the enormous work product of our Committee on the Unified Bar.”

A report from Chairman Brault of the Association’s Unified Bar Committee said that, at the request of Judge Fickling of the D.C. Court of Appeals who had been charged by the Court with responsibility for preparation of proposed new Rules for the Bar, the BADC’s Committee had prepared and submitted proposed Rules. Because of the importance of the task and the amount of work involved, the Committee had been enlarged to twenty-nine members, all of whom he said had “participated in the preparation and review and adoption” of the Rules. After that the Rules were submitted to the Board of Directors of the Association at a special meeting, where Chairman Brault said they were “carefully reviewed” by the Board and adopted with some revisions, and then submitted to the Court. The proposed Rules included “the creation of a Unified Bar” as well as “establishing of a client security fund, grievance and disciplinary procedures, and [for] admissions to the Bar.” He said the Committee also anticipated preparing proposed Bylaws to implement the Rules.

In addition to the reference to the Unified Bar in the President’s Page of the Jul.-Oct. 1971 issue of the *D.C. Bar Journal*, and the report in that same issue by Chairman Brault of the Bar Association’s Unified Bar Committee, the issue contained a nineteen page in-depth article on the Unified Bar written by James A. Hourihan. Hourihan had been a member of the BADC’s YLS Unified Bar Committee since its inception in 1966, and had succeeded George Carneal as Chair of the Committee. His article was scholarly, historical, and carefully researched. It was a timely resource at a time when all indications were that D.C., through his efforts and those of many others, was headed to what became and is now a Unified Bar organization with required membership by all lawyers wishing to practice their profession in the jurisdiction.

Upon adoption by the D. C. Court of Appeals of its Rules that included creation of the Unified Bar, the Court appointed Albert E. Brault as Chair of its special committee to implement creation of the new Bar. It was in that capacity that he chaired the organizational meeting of the Unified Bar, the purpose of which was to select a nominating committee to choose candidates for election to offices in the new Bar.

The meeting on April 6, 1972, filled the ballroom of the Mayflower Hotel. It was described in the Editor's Page of the Jan.-Apr. 1972 *D.C. Bar Journal* by Lawrence S. Margolis, then Editor of the Journal and now a Senior Judge of the United States Court of Federal Claims. Notwithstanding the meeting involved more lawyers, more politicking, and more excitement than that to which the rather staid BADC had been accustomed, it chose a good nominating committee and the nominating committee in turn chose an able slate of candidates for office. The elected first President of the D. C. Bar, the name given to the Unified Bar, was Barrett Prettyman, Jr., and the first President-Elect was Charles T. Duncan.

When the D. C. Bar was created it had no office, no Executive Director or other staff, and no means to hire staff or even to send out dues notices. The BADC Board voted to provide a loan to the Bar to enable it to begin business, and it released its longtime, much valued Executive Director, Raymond F. Garraty, from a multi-year contract to enable him to accept an offer from the District of Columbia Bar to become its first Executive Director. An elected delegate from the BADC to the House of Delegates of the American Bar Association resigned his seat so the President-Elect of the District of Columbia Bar could join its President as a delegate.

At the Annual Meeting of the American Bar Association in August 1972, as reported in the May-Sept. 1972 *D.C. Bar Journal*, the BADC was presented with the American Bar

Association's "Award of Merit" for its overall program "and for its effort in providing organization, financial aid and staff assistance to the District of Columbia Court of Appeals in order to create a unified bar in the District of Columbia."

Albert E. Brault was honored by the BADC as its 1972 "Lawyer of the Year" for his work leading to the creation and organization of the District of Columbia Bar.

### **AUTHOR'S BIO**



The following Bio contains information as to some of the author's organizational affiliations in addition to those with the BADC, which are listed in Footnote 1 because of their relevance to historical information in the article:

**S. White Rhyne** practiced law in the District of Columbia from 1957 until his retirement in 2005. He was also a Graduate Fellow at Georgetown University Law Center and later taught at Georgetown as an adjunct professor.

During his first year in law practice he became a volunteer staff attorney with the Legal Aid Society of DC, and continued to volunteer for years thereafter. He later served on the Board of Trustees of the Society, and from 1976 to 1978 as President. At the Society's 75<sup>th</sup> Anniversary Celebration in 2007, he was one of two recipients of its "Servant of Justice Award." The other recipient was the first President of the D.C. Bar.

Mr. Rhyne has also served on the Executive Committee of the Federal Communications Bar Association (FCBA), including a term as Treasurer of the Association. In 1992, he received a "Distinguished Service Award" from the FCBA. In 1994-95 he was President of the FCBA.

## The Sky is Falling! (Or is it?): The Detention of U.S. Citizens in the “War with Al Qaeda”

By Mason C. Clutter

*It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.*

- Justice Sandra Day O’Connor

*Hamdi v. Rumsfeld*, 542 U.S. 507, 32 (2004).

### I. Introduction

On December 31, 2011, shaded by the pending New Year, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2012 (NDAA).<sup>1</sup> The swipe of his pen was followed by the issuance of a presidential signing statement in which the President stated, “I want to clarify that my Administration will not authorize the indefinite military detention without trial of American citizens. Indeed, I believe that doing so would break with our most important traditions and values as a Nation.”<sup>2</sup> Why was this statement even necessary? Well, just one month prior to enactment of the 2012 NDAA, during the floor debate over the bill in the Senate, many senators claimed that the NDAA would allow the indefinite military detention, without charge or trial, of U.S. citizens suspected of terrorist activity and captured within the United States. In fact, some senators went as far as to state that the United States is

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<sup>1</sup> The National Defense Authorization Act (NDAA) is a precursor to a Defense Appropriations bill. The NDAA establishes the terms and conditions under which agencies and programs can operate, i.e. how they can use the appropriations that are later passed by Congress. The NDAA specifically authorizes appropriations for a fiscal year “for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.” National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011).

<sup>2</sup> Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, 2011 Daily Comp. Pres. Doc. 201100978 (Dec. 31, 2011) [hereinafter *Signing Statement*].

part of the “battlefield” in our conflict with al Qaeda. Other senators argued that the final version of the NDAA did nothing to affect the law of detention as it existed prior to the enactment of the NDAA and, therefore, the bill did not authorize the indefinite detention of citizens suspected of terrorist activity captured in the homeland. This tangled rhetoric continues today. So, what did the 2012 NDAA actually authorize?

## **II. U.S. Detention Law Prior to the Enactment of the 2012 NDAA**

Seven days after the 9/11 terror attacks, President George W. Bush signed into law the 2001 Authorization for Use of Military Force (AUMF), which authorized the president “to use all necessary and appropriate [military] force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”<sup>3</sup> While the AUMF is silent with regard to detention authority, the Bush Administration relied on the AUMF and its understanding of the president’s Article II commander in chief powers to militarily detain “enemy combatants” without charge or trial.<sup>4</sup>

Challenges to the Bush Administration’s claims of detention authority made their way to the Supreme Court and, in 2004, in a plurality decision in *Hamdi v. Rumsfeld*, drafted by Justice Sandra Day O’Connor, the Court found that the AUMF “clearly and unmistakably authorized

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<sup>3</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

<sup>4</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 516-17 (2004). “Enemy Combatant” is a term used by the George W. Bush Administration to identify individuals it claimed could be militarily detained or tried by military commission. The term “enemy combatant” is not defined in international humanitarian law, nor is it previously defined by U.S. domestic law.

detention in the narrow circumstances considered [in the case].”<sup>5</sup> The Court stated that “detention of individuals . . . for the duration of the particular conflict in which they are captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”<sup>6</sup> The Court cautioned, however, that “[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.”<sup>7</sup>

#### **A. *Hamdi v. Rumsfeld*: Detention of a U.S. Citizen Captured Abroad**

The *Hamdi* Court specifically addressed the legality of the Bush Administration’s detention of a U.S. citizen, captured in Afghanistan on the battlefield, and held in the United States as an “enemy combatant,” and what constitutional process, if any, was to be afforded such a detainee to challenge his designation as an “enemy combatant.”<sup>8</sup> The plurality made clear that it was only deciding the narrow question of whether the detention of citizens falling within the definition of “enemy combatant” provided by the Government in the *Hamdi* case was authorized.<sup>9</sup> The Court noted that, as of the date of the opinion, the Government had not provided the full criteria it used to classify someone as an “enemy combatant.”<sup>10</sup> The Government did, however, make clear that it alleged that Hamdi was an “enemy combatant” because he was “an individual who . . . was ‘part of or supporting forces hostile to the United States or coalition partners’ in Afghanistan and who ‘engaged in an armed conflict against the

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<sup>5</sup> *Id.* at 519. The Court did not consider President George W. Bush’s claim that his Article II powers also authorized Hamdi’s detention. *Id.* at 517.

<sup>6</sup> *Id.* at 518.

<sup>7</sup> *Id.* at 521.

<sup>8</sup> *Id.* at 509.

<sup>9</sup> *Id.* at 516.

<sup>10</sup> *Id.* at 516.

United States’ there.”<sup>11</sup> The Court held that “the AUMF is explicit congressional authorization for the detention of individuals in the narrow category [] describe[d],” and that “[t]here can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for [the 9/11] attacks, are individuals Congress sought to target in passing the AUMF.”<sup>12</sup>

While the Court did not directly address the question of whether or not the Government can militarily detain a U.S. citizen captured on American soil, the plurality did mention, in dicta, that “there is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”<sup>13</sup> Citing the Court’s decision in a World War II case, *Ex Parte Quirin*, the plurality mentioned that while the *Quirin* Court held that citizens, such as Herbert Haupt, the U.S. citizen in the *Quirin* case, can be tried before a military tribunal for violations of the law of war, “nothing in *Quirin* suggests that [Haupt’s] citizenship would have precluded his mere detention for the duration of the relevant hostilities.”<sup>14</sup> The *Hamdi* Court’s discussion—again in dicta—of whether or not Haupt could have been detained instead of tried before a military commission was the basis of much of the confusion during the Senate debate over the 2012 NDAA and is discussed below.

### **B. *Padilla v. Hanft*: Detention of a U.S. Citizen Captured Domestically**

Following the Supreme Court’s decision in *Hamdi*, the Bush Administration continued to rely on the 2001 AUMF to detain “enemy combatants” captured abroad, those held at the detention facility at Guantanamo Bay, Cuba, and even two individuals captured within the United States—including a U.S. citizen. In fact, on May 8, 2002, Jose Padilla, a U.S. citizen,

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<sup>11</sup> *Id.* at 516.

<sup>12</sup> *Id.* at 517-18.

<sup>13</sup> *Id.* at 519.

<sup>14</sup> *Id.*

was arrested by the FBI at the O'Hare International Airport in Chicago, Illinois, pursuant to a material witness warrant in conjunction with a New York grand jury investigation into the 9/11 attacks.<sup>15</sup> Padilla was held in civilian custody in New York until June 9, 2002, when President George W. Bush designated him an "enemy combatant" and ordered him moved into military custody based on allegations that Padilla had joined al Qaeda and planned to blow up apartment buildings in the United States.<sup>16</sup> Padilla was then transferred to a South Carolina naval brig and filed a petition for a writ of habeas corpus in the District of South Carolina.<sup>17</sup>

The District Court held that Padilla's detention was unconstitutional and that he must either be criminally charged or released.<sup>18</sup> The Fourth Circuit disagreed and held that the President could militarily detain Padilla without charge or trial pursuant to the AUMF.<sup>19</sup> The Fourth Circuit broadly interpreted *Hamdi* and found the Supreme Court's reasoning to be "that the AUMF authorizes the President to detain all those who qualify as 'enemy combatants' within the meaning of the laws of war . . . ."<sup>20</sup> Padilla argued that his case did not fall within the

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<sup>15</sup> *Padilla v. Hanft*, 423 F.3d 386, 390 (4th Cir. 2005).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* Padilla first filed a petition for a writ of habeas corpus in the Southern District of New York. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002). The court held that the President had constitutional and statutory authority to detain Padilla as an enemy combatant. *Id.* at 569-70. The Second Circuit reversed this ruling, and held that the Non-Detention Act, passed in 1971 in light of Japanese-American internment during World War II, required "clear congressional authorization [ ] for detentions of American citizens on American soil." *Padilla v. Rumsfeld*, 352 F.3d 695, 699 (2d Cir. 2003) (citing 18 U.S.C. § 4001(a) (2000)). The court found that the 2001 AUMF did not specifically authorize Padilla's detention. *Id.* at . The Supreme Court granted the Government's petition for a writ of certiorari. *Id.* at XX. The Supreme Court held that Secretary Rumsfeld was not the proper party against whom the petition for a writ of habeas corpus should have been filed, and the Southern District of New York did not have personal jurisdiction over the proper party, the Commander of the South Carolina brig where Padilla was being held. *Rumsfeld v. Padilla*, 542 U.S. 426, (2004). Padilla's petition was dismissed without prejudice and refiled in the District of South Carolina.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 389.

<sup>20</sup> *Id.* at 392.

‘narrow circumstances’ considered by the Court in *Hamdi* because he was arrested within the United States, not on a battlefield in Afghanistan.<sup>21</sup> The Fourth Circuit concluded that the Supreme Court did not rely on “locus of capture” when it defined and answered the narrow question before it.<sup>22</sup> Instead, the Fourth Circuit noted, the *Hamdi* Court relied on *Quirin* and “went to lengths to observe that Haupt, *who had been captured domestically*, could instead have been permissibly *detained* for the duration of hostilities.”<sup>23</sup>

Padilla petitioned the Supreme Court for a writ of certiorari. While the certiorari petition was pending, the Bush Administration transferred him into the civilian criminal justice system to face prosecution. The Administration argued that certiorari should be denied because the case was now moot. A majority of the Court agreed and Padilla’s petition was denied on April 3, 2006.<sup>24</sup> The Court, however, did not vacate the Fourth Circuit’s opinion and, therefore, the *Padilla* decision remains “good law” in the Fourth Circuit.

### **C. *Al-Marri v. Spagone*: Detention of Non-Citizen Captured Domestically**

There is only one other instance of the United States Government arresting someone in the United States, designating them an “enemy combatant,” and holding them in military detention without charge or trial. Although not a U.S. citizen, Ali Saleh Kahlah al-Marri, who was lawfully in the United States on a student visa, was arrested by the FBI in Peoria, Illinois, on December 12, 2001, pursuant to a material witness warrant in conjunction with the investigations

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<sup>21</sup> *Id.* at 393.

<sup>22</sup> *Id.* at 393

<sup>23</sup> *Id.* at 393-94 (citing *Hamdi*, 542 U.S. 507 at 519).

<sup>24</sup> *Padilla v. Hanft*, 547 U.S. 1062 (2006).

of 9/11.<sup>25</sup> He was first held in a civilian jail pending trial in Illinois and was later transferred to a civilian jail in New York.<sup>26</sup> Then, on June 23, 2003 President George W. Bush signed an order designating al-Marri an “enemy combatant” and transferring him to military custody to be held at a brig in South Carolina.<sup>27</sup>

Like Padilla, al-Marri filed a petition for a writ of habeas corpus in the District of South Carolina, he was denied relief and appealed to the Fourth Circuit.<sup>28</sup> In a three paragraph majority opinion, the Circuit Court held that “if the Government's allegations about al-Marri are true, Congress has empowered the President to detain him as an enemy combatant; and [] that, assuming Congress has empowered the President to detain al-Marri as an enemy combatant provided the Government's allegations against him are true, al-Marri has not been afforded sufficient process to challenge his designation as an enemy combatant.”<sup>29</sup> The Fourth Circuit reversed the district court’s decision and remanded the case, but al-Marri petitioned the Supreme Court for a writ of certiorari. The Supreme Court granted certiorari on December 5, 2008.<sup>30</sup> Three months later, under the new Obama Administration, the Supreme Court granted the Solicitor General’s request to transfer al-Marri into civilian custody and ordered the Fourth

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<sup>25</sup> *al-Marri v. Pucciarelli*, 534 F.3d 213, 219 (4th Cir. 2008) (Motz, J., concurring).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> In light of Padilla’s outcome in the Fourth Circuit, al-Marri initially filed his petition for a writ of habeas corpus in the Central District of Illinois and that court dismissed for lack of venue. *al-Marri v. Bush*, 274 F. Supp. 2d 1003, 1010 (C.D. Ill. 2003); the Seventh Circuit affirmed, *al-Marri v. Rumsfeld*, 360 F.3d 707 (7th Cir. 2004); and the Supreme Court denied certiorari, *al-Marri v. Rumsfeld*, 543 U.S. 809 (2004).

<sup>29</sup> *Id.* at 216.

<sup>30</sup> *al-Marri v. Pucciarelli*, 555 U.S. 1066 (2008).

Circuit to dismiss the appeal as moot. Unlike in *Padilla*, the Court vacated the Fourth Circuit’s judgment.<sup>31</sup>

Padilla was held in military custody for approximately three years and ten months, and al-Marri was held for approximately five years and eight months. Since President Obama took office, it has been the policy of his Administration to take into civilian custody and prosecute in the traditional criminal justice system any suspected terrorist—citizen or otherwise—arrested in the United States.<sup>32</sup> Like the previous administration, however, President Obama maintains that the 2001 AUMF authorizes the continued detention of detainees held at the detention facility at Guantanamo Bay, Cuba.<sup>33</sup> To date, the Supreme Court has not addressed the specific question of whether or not the United States government can militarily detain, without charge or trial, a U.S. citizen, or anyone else, apprehended in the United States. Some continue to argue, however, that *Hamdi* allows such detention.

#### **D. Guantanamo Detention Standard**

In March 2009, in its first legal filing in a Guantanamo habeas case, the Obama Administration filed a response claiming the authority to detain persons pursuant to the 2001 AUMF, including those “who were part of or substantially supported Taliban or al-Qaida forces

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<sup>31</sup> *al-Marri v. Spagone*, 555 U.S. 1220 (2009).

<sup>32</sup> See John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, *Strengthening Our Security by Adhering to Our Values and Laws*, Remarks at Harvard Law School (Sept. 16, 2011), available at <http://whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (“[I]t is the firm position of the Obama Administration that suspected terrorists arrested inside the United States will—in keeping with long-standing tradition—be processed through our Article III courts. As they should be. Our military does not patrol our streets or enforce our laws—nor should it.”).

<sup>33</sup> Resp’ts Mem. Regarding Government’s Detention Authority Relating to Detainees Held at Guantanamo Bay 3, ECF No. 1689, Mar. 13, 2009.

or associated forced that are engaged in hostilities against the United States or its coalition partners . . . .”<sup>34</sup> To date, the Obama Administration . . . relies on this definition to identify those it has authority to indefinitely detain at Guantanamo Bay, Cuba. The Administration qualifies this definition by saying the authority is “informed” by the law of war rules governing international armed conflicts.<sup>35</sup> This definition became the basis of the central piece of the 2012 NDAA language when Congress codified similar language to define who could be subject to AUMF detention authority.<sup>36</sup>

### **III. The 2012 National Defense Authorization Act**

In 2011, several members of Congress became concerned that the 2001 AUMF may become outdated and that with the changing framework of the current conflict the Government may be forced to release some detainees currently held pursuant to the 2001 AUMF. There was a strong push to “reauthorize” the 2001 AUMF and broaden its scope to cover al Qaeda, the Taliban, and “associated forces,” and to divorce the authorization from 9/11, instead creating a de facto “war on terror” authorized by Congress.<sup>37</sup> As part of that effort, members of Congress sought to clarify that Congress intended the 2001 AUMF to not only authorize the use of force against, but to also authorize the detention of, individuals covered by the authorization (even though the courts had already so held). Congress basically adopted the Obama Administration’s definition from its March 2009 Guantanamo habeas filing as the new 2012 NDAA detention

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<sup>34</sup> *Id.* In this filing, the Obama Administration also did away with use of the term “enemy combatant,” and instead began using the term “unprivileged enemy belligerent.”

<sup>35</sup> *Id.* at 2.

<sup>36</sup> National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (2011).

<sup>37</sup> *See* National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1034 (as passed by House, May 26, 2011).

standard. The new AUMF authorization failed, due in large part to push back from civil liberties groups, but the Obama Administration’s definition remained and became a part of the 2012 NDAA. The Obama Administration’s definition does not mention citizens, so why all the confusion over citizens?

### **A. Original Draft Language of the 2012 NDAA**

The original bill that was passed out of the Senate Armed Services Committee included Section 1031, which provided for the authority of the Armed Forces of the United States to “detain covered persons captured in the course of hostilities authorized by the [AUMF] as unprivileged enemy belligerents pending disposition under the law of war.”<sup>38</sup> Covered persons included anyone covered by the AUMF—those who committed 9/11 or harbored those responsible for 9/11—and a new category of individuals who could be detained under subsection (b)(2). Subsection 1031(b)(2) provided that anyone who “was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces” could also be held pending disposition under the law of war. Subsection (c) provided for four categories of “disposition under the law of war,” including long term detention without charge or trial until the end of hostilities, trial by military commission, trial by other “competent tribunal,” and transfer to the individual’s home country or third-party country.<sup>39</sup>

The bill also included a provision, Subsection 1031(d), entitled, “Constitutional Limitation on Applicability to United States Persons,” which provided: “The authority to detain a

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<sup>38</sup> S. 1253, 112th Cong. § 1031 (as reported by S. Comm. on Armed Services, June 22, 2011).

<sup>39</sup> *Id* at § 1031 (b)-(c).

person under this section does not extend to the detention of citizens or lawful resident aliens of the United States on the basis of conduct taking place within the United States *except to the extent permitted by the Constitution of the United States.*”<sup>40</sup> This provision created much confusion and many, including many in the civil liberties community, believed it could be interpreted to allow the indefinite detention of citizens and legal permanent residents (LPRs) arrested in the United States. And, so began the dialogue on the 2012 NDAA and detention of United States citizens.

### **B. Second Draft of the 2012 NDAA**

Following several months of debate on the debt ceiling crisis, the Senate Armed Services Committee released a revised version of the 2012 NDAA in light of required changes to defense spending agreed to in the debt compromise. S.1867 amended Section 1031 by striking subsection (d) from the previous version and instead inserting a new subsection (d) entitled, “Construction” that stated: “Nothing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force.”<sup>41</sup> It was this language, in addition to the carried-over language from the previous bill, that began the debates on the Senate floor that the NDAA did (or did not) provide for the authority to indefinitely detain U.S. citizens captured in the United States. Instead of striking “to the extent permitted by the Constitution of the United States” from the original bill’s limitation of applicability subsection, which would have made clear that the authority to detain did not extend to the detention of citizens or lawful resident aliens within the United States, the Senate Armed Services Committee replaced that entire “limitation” subsection with the new “construction” subsection.

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<sup>40</sup> *Id.* at § 1031(d) (emphasis added).

<sup>41</sup> S. 1867, 112th Cong. § 1031(d) (as reported by the S. Comm. on Armed Services, Nov. 15, 2011).

Given that the Supreme Court had only ruled on the detention of citizens captured on the battlefield, it is fair to say, even in light of the new subsection (d) language, that S.1867 maintained the status quo regarding detention of persons captured in the United States. However, given that *Hamdi* is broadly read by some to imply indefinite detention authority for all citizens designated “enemy combatants,” many senators began to argue that by striking the previous language from the bill, the new bill provided for detention of citizens within the United States. In fact, those senators argued that *Padilla* was “the law of the land,”<sup>42</sup> and that, because the United States is “part of the battlefield,” *Hamdi* allowed for the detention of U.S. citizens within the United States.<sup>43</sup>

Following introduction of the revised Senate Armed Services Committee version of the 2012 NDAA, S.1867, the Obama Administration issued a Statement of Administration Policy (SAP) threatening to veto the bill if certain provisions of the bill were not amended to address the Administration’s concerns. With regard to Section 1031, the SAP said that “[b]ecause the authorities codified in this section already exist, the Administration does not believe codification is necessary and poses some risk. After a decade of settled jurisprudence on detention authority, Congress must be careful not to open a whole new series of legal questions that will distract from our efforts to protect the country.”<sup>44</sup> Interestingly, the SAP says nothing about concerns that this provision would allow detention of U.S. citizens captured in the United States. Senators argued that it was the Administration who requested that the limiting language of the original 1031(d) be

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<sup>42</sup> See 157 Cong. Rec. S7674 (daily ed. Nov. 17, 2011) (statement of Sen. Lindsey Graham).

<sup>43</sup> *Id.* at S7668.

<sup>44</sup> Statement of Administration Policy, S. 1867, Nov. 17, 2011, [http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s\\_20111117.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s_20111117.pdf).

stricken from the bill and often cited this “fact” to senators who complained that the bill would allow detention of U.S. citizens captured in the United States.<sup>45</sup>

### C. Senate Floor Debate and Amendments—November to December 2011

Prior to voting on passage of the 2012 NDAA, the Senate held several hours of floor debate on the Act. The debate was primarily focused on the detention provisions of the bill. Many senators took to the floor—with *Hamdi* in hand—claiming that either the Supreme Court *did* authorize the detention of U.S. citizens captured in the United States, or that the Supreme Court *did not* authorize the detention of U.S. citizens captured in the United States. For instance, Senator Carl Levin (D-MI), Chairman of the Armed Services Committee, continually quoted the following line from the Court’s dicta in *Hamdi*: “There is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”<sup>46</sup> Senator Lindsay Graham (R-SC) said:

The law of the land is pretty clear—unequivocal, in my view—that an American citizen captured overseas can be held as an enemy combatant, and every enemy combatant held at Guantanamo Bay or captured in the United States has habeas rights. The *Padilla* case involves an individual who was captured in the United States suspected of being an al Qaeda operative, and was held for four years. He appealed to the Fourth Circuit, and the Fourth Circuit said: . . . You can be held as an enemy combatant, and they can gather intelligence for an indefinite period. That is the law of the land.<sup>47</sup>

Is the “law of the land” what the Fourth Circuit says or what the Supreme Court says (or what Congress says)?

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<sup>45</sup> See 157 Cong. Rec. S7657 (daily ed. Nov. 17, 2011) (statement of Sen. Carl Levin) [hereinafter *Nov. 17 Floor Debate*].

<sup>46</sup> 157 Cong. Rec. S8038 (daily ed. Nov. 30, 2011) (statement of Sen. Carl Levin) [hereinafter *Nov. 30 Floor Debate*].

<sup>47</sup> *Nov. 17 Floor Debate*, *supra* note, at S7674 (statement of Sen. Lindsey Graham).

Senators Feinstein (D-CA) and Durbin (D-IL) countered that *Hamdi* was limited to its facts. Senator Durbin said, “when it comes to the *Hamdi* case, Hamdi was captured in Afghanistan. He was captured on the battlefield in Afghanistan, not the United States. And Justice O’Connor, in that opinion, was very careful to say the *Hamdi* decision was limited to ‘individuals who fought against the United States in Afghanistan as part of the Taliban.’ She was not talking about American citizens and their rights, she was talking about this specific situation.”<sup>48</sup> Senator Feinstein added that while the Supreme Court in *Hamdi* did cite to the *Ex Parte Quirin* case, Justice Scalia in his dissent said: “The government argues that our more recent jurisprudence ratifies its indefinite imprisonment of a citizen within the territorial jurisdiction of Federal Courts. It places primary reliance on *Ex Parte Quirin*, a World War II case upholding the trial by military commission of eight German saboteurs, one of whom, Hans Haupt, was a U.S. citizen. This case was not this Court’s finest hour.”<sup>49</sup>

The debate lasted several hours across several weeks and resulted in Senator Feinstein proposing two amendments to Section 1031. The first, amendment number 1126, would have added a new subsection (e) to Section 1031 entitled, “Applicability to Citizens,” providing that: “The authority described in this section for the Armed Forces of the United States to detain a person does not include the authority to detain a citizen of the United States without trial until the end of hostilities.”<sup>50</sup> Senator Graham correctly noted that this amendment would stand for the proposition that no American citizen, regardless of their place of capture, could be held in

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<sup>48</sup> *Nov. 30 Floor Debate, supra note* , at S8041 (statement of Sen. Richard Durbin).

<sup>49</sup> *Id.* at S8040 (statement of Sen. Dianne Feinstein) (quoting *Hamdi*, 542 U.S. 507 at 569 (Scalia, J., dissenting)).

<sup>50</sup> S. Amdt.1126 to S. 1867 (as reported by the S. Comm. on Armed Services, Nov. 15, 2011); 157 Cong. Rec. S7685 (daily ed. Nov. 17, 2011).

military detention without charge or trial.<sup>51</sup> This amendment would have overruled the Supreme Court's holding in *Hamdi*. The amendment failed by a vote of 45-55.<sup>52</sup>

Two weeks later, Senator Feinstein introduced her second amendment to Section 1031. This amendment, number 1456, became subsection (e) of Section 1031 and provides that: “Nothing in this section shall be construed to affect existing law or authorities, relating to the detention of United States citizens, lawful resident aliens of the United States or any other persons who are captured or arrested in the United States.”<sup>53</sup> This amendment passed by a vote of 99-1.<sup>54</sup> During consideration of the conference bill, Senator Durbin, a co-sponsor of Senator Feinstein's second amendment said:

I was very concerned that the original version of the legislation would, for the first time in history, authorize indefinite detention in the United States. But we have agreed, on a bipartisan basis, to include language in the bill offered by Senator Feinstein that makes it clear this bill does not change existing detention authority in any way. What it means is, the Supreme Court will make the decision who can and cannot be detained indefinitely without trial, not the Senate.<sup>55</sup>

The Senate passed the conference version of the bill, which was eventually signed by President Obama, by a vote of 86-13.<sup>56</sup> Section 1031 of the Senate bill became Section 1021 in the final version of the 2012 NDAA.

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<sup>51</sup> *Nov. 30 Floor Debate, supra* note at S8044 (statement of Sen. Lindsey Graham).

<sup>52</sup> 157 Cong. Rec. S8125 (daily ed. Dec. 1, 2011) [hereinafter *Dec. 1 Floor Debate*].

<sup>53</sup> National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1021(e) (as passed by both House and Senate, Dec. 15, 2011).

<sup>54</sup> *Dec. 1 Floor Debate, supra* note at S8125.

<sup>55</sup> 157 Cong. Rec. S8656 (daily ed. Dec. 15, 2011) (statements of Sen. Richard Durbin).

<sup>56</sup> *Id.* at 8664.

As mentioned previously, when he signed the 2012 NDAA into law, President Obama said that his “Administration will not authorize the indefinite military detention without trial of American citizens.”<sup>57</sup> In light of *Hamdi*, this statement seems to disregard existing law; however, the signing statement neither affirms nor denies the authority of the President, under the AUMF, to detain citizens captured within the United States. Unfortunately, many members of Congress continue to claim that the 2012 NDAA allows for the indefinite detention, without charge or trial, of U.S. citizens captured in the United States. The Supreme Court has not yet ruled on this specific question, but it could one day get the chance in light of a case decided by an district court judge, appointed by President Obama, in the Southern District of New York.

#### **IV. Legal Challenge to Section 1021**

In January 2012, a group of writers, journalists, and activists brought a suit in the Southern District of New York seeking an injunction against Section 1021, alleging that it facially violates the First and Fifth Amendments to the United States Constitution.<sup>58</sup> The plaintiffs argued that Section 1021 is “vague to such an extent that it provokes fear that certain of their associational and expressive activities could subject them to indefinite or prolonged military detention.”<sup>59</sup> The Government countered that the plaintiffs lacked standing, or, in the alternative, “failed to demonstrate an imminent threat” of indefinite detention, and that Section 1021 simply ‘reaffirms’ the powers authorized in the 2001 AUMF.<sup>60</sup> Because Section 1021 only affirms existing authorities, the Government argued, the types of activities that the plaintiffs currently

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<sup>57</sup> *Signing Statement, supra note*

<sup>58</sup> *Hedges v. Obama*, No. 12-331, 2012 U.S. Dist. WL 1721124, at \*1 (S.D.N.Y. May 16, 2012).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

engaged in were not pursued under the AUMF—in light of previous court cases interpreting the 2001 AUMF—and, therefore, would not likely be pursued now.<sup>61</sup> *Id.*

The court held that Section 1021 “is not merely an ‘affirmation’ of the AUMF” because so holding would require the court “to find that Section 1021 is a mere redundancy—that is, that it has no independent meaning and adds absolutely nothing to the Government’s enforcement powers.”<sup>62</sup> The AUMF was tied to the events of 9/11; instead, the court said, Section 1021 is tied to “covered persons” who are “part of or substantially supporting” al Qaeda, the Taliban, and “associated forces” “engaged in hostilities” with the United States. The court read Section 1021 in the “present progressive tense, not the past tense relating to 9/11.”<sup>63</sup> The court further held that “Section 1021 tries to do too much with too little—it lacks the minimal requirements of definition and scienter that could easily have been added, or could be added, to allow it to pass Constitutional muster.”<sup>64</sup> Additionally, Judge Forrest found that the plaintiffs had standing to challenge the statute and, therefore, enjoined enforcement of Section 1021 “pending further proceedings in this Court or remedial action by Congress mooting the need for such further proceedings.”<sup>65</sup> Judge Forrest noted several times that she gave the Government the opportunity to assert that the conduct that plaintiffs intended to engage in was not encompassed by Section 1021, effectively doing away with the plaintiffs’ standing, but the Government failed to make this assertion.<sup>66</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 2

<sup>63</sup> *Id.* at 26.

<sup>64</sup> *Id.* at 2.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 14, 16, 17, 18, 19, 20, 21, 22, 24.

Specifically, Judge Forrest found that “[Section] 1021 has in fact chilled [plaintiffs’] expressive and associational activities; the Government will not represent that such activities are not covered by § 1021; [and] plaintiffs’ activities are constitutionally protected.”<sup>67</sup> Therefore, the Judge held, “plaintiffs [showed] a likelihood of succeeding on the merits of a facial challenge to § 1021.”<sup>68</sup> Also, the Judge found that Section 1021 included a number of “sufficiently vague” terms, including “covered persons,” “associated forces,” and “directly” and “substantially” “supporting” such forces.<sup>69</sup> The Government argued that “associated forces” “is understood to be ‘individuals who, in analogous circumstances in a traditional international armed conflict between the armed forces of opposing governments, would be detainable under principles of co-belligerency.’”<sup>70</sup> The court, however, found that the Government’s definition did not satisfy due process concerns because the plaintiffs’ testified that they had been involved with “associated forces” in one way or another, even if not themselves bearing arms.<sup>71</sup> Interestingly, because the court had already found that the plaintiffs showed a likelihood of success on First Amendment grounds, Judge Forrest did not decide whether or not the plaintiffs could show a likelihood of success on due process grounds.<sup>72</sup>

Nine days later, the Government moved for reconsideration of the Judge’s order. The Government contended that the court’s order enjoined enforcement of section 1021 against the named plaintiffs only, and that the injunction only related to section 1021(b)(2) of the 2012

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<sup>67</sup> *Id.* at 22.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 23.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 24.

NDAA.<sup>73</sup> The court agreed that the injunction only applied to 1021(b)(2) and, therefore, left in place detention authority pursuant to the AUMF—of those who committed, planned, and/or authorized 9/11.<sup>74</sup> The court, however, made it clear that the injunction applies generally, to all possible third-parties, not just the named plaintiffs.<sup>75</sup> Judge Forrest said, “the injunction in this action is intentionally expansive because a ‘person[] whose expression is constitutionally protected [and not party to the instant litigation] may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.’”<sup>76</sup> The Government has not yet appealed this decision to the Second Circuit, but it is really just a matter of when, not if, the Government makes its appeal.

#### **V. The 2013 National Defense Authorization Act**

Following passage of the 2012 NDAA, several members of Congress wanted to be the one who “fixed” the NDAA. In December 2011, Senator Feinstein and Congressman Garamendi (D-CA) introduced companion legislation in the Senate and House entitled, “The Due Process Guarantee Act of 2011.” The bills would amend the Non-Detention Act, enacted in 1971 as a response to Japanese-American internment during World War II, to provide that no “authorization to use military force, a declaration of war, or any similar authority shall [ ] authorize the detention without charge or trial of a citizen or lawful permanent resident of the United States apprehended in the United States, unless an Act of Congress expressly authorizes such detention.”<sup>77</sup> This language, standing alone, seems to address the problem with the 2012 NDAA—that Congress was not clear *if* it intended to authorize the military detention without

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<sup>73</sup> *Hedges v. Obama*, No. 12-331, 2012 U.S. Dist. WL 2044565, at 1 (S.D.N.Y. June 6, 2012).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 3 (quoting *New York v. Ferber*, 458 U.S. 747, 768 (1982)).

<sup>77</sup> Due Process Guarantee Act of 2011, H.R. 3702 (XXXX); S. 2003, 112th Cong. (2011).

charge or trial of U.S. citizens or lawful permanent residents arrested in the United States. This bill would simply reiterate the original intent of the Non-Detention Act: that if Congress intends to allow indefinite detention of citizens this intent must be clearly stated. This bill is a bit problematic because it *could* be read to imply that all other individuals—who are not U.S. citizens or lawful permanent residents—may be detained in the United States pursuant to an AUMF, declaration of war, or other similar authority. In other words, it does not satisfy the question of what the government’s detention powers *should* be over individuals captured within the United States—citizen or not. It just says that Congress must be clear if it intends to authorize such detention.

Following their lead, Congressman Adam Smith (D-WA) and Senator Mark Udall (D-CO) introduced companion legislation entitled, “Due Process and Military Detention Amendments Act” to amend Section 1021 of the 2012 NDAA “to provide for the trial of covered persons detained in the United States pursuant to the Authorization for Use of Military Force . . . .”<sup>78</sup> This bill would provide that the only disposition under the law of war, as provided for in Section 1021(c) of the 2012 NDAA, for persons captured in the United States, would be by way of trial before an Article III court or an appropriate state court, not indefinite detention without charge or trial.<sup>79</sup> Congressman Smith amended the language of his base bill, and along with Congressman Justin Amash (R-MI) introduced the bill as an amendment to the House version of the 2013 NDAA. Their efforts failed by a vote of 182-238.<sup>80</sup>

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<sup>78</sup>Due Process and Military Detention Amendments Act, H.R. 4192, Congress; S. 2175, 112th Cong. (2012).

<sup>79</sup>*Id.* at § 2.

<sup>80</sup> 157 Cong. Rec. H3109 (daily ed. May 18, 2012).

Senator Udall's bill remains pending. As currently drafted, the bill is troubling because, like Section 1033 of the House NDAA discussed below, it would assert that there is AUMF detention authority within the United States. It is unlikely that it was the intention of Senator Udall to assert such authority, but, until the language is amended, it does carry with it this implication. As discussed above, the 2012 version of the NDAA, because of the Feinstein amendment, expresses the intent of Congress to wait for the Supreme Court, not Congress, to decide if the military can indefinitely detain anyone captured within the United States. It remains unclear if Senators Udall and Feinstein intend to introduce their bills as amendments to the Senate version of the 2013 NDAA. The Senate Armed Services Committee passed its version of the bill on May 24, 2012, by unanimous vote.

The House version of the 2013 NDAA was passed on May 18, 2012, by a vote of 299-120.<sup>81</sup> While Section 1021 of the 2012 NDAA was not amended and remains in full force and effect, although its enforcement is currently enjoined by Judge Forrest's ruling, the House included new findings on detention pursuant to the 2001 AUMF and findings regarding habeas corpus rights.<sup>82</sup> The House maintains that the 2012 NDAA had no effect on habeas corpus rights of individuals who are *lawfully* present in the United States and detained pursuant to the AUMF, even though the 2012 NDAA said absolutely nothing about habeas corpus rights.<sup>83</sup>

For the first time ever, in Section 1033 of the 2013 NDAA, the House stated that AUMF detention authority exists within the United States. "A person who is *lawfully in the United States when detained pursuant to the Authorization for Use of Military Force* (Public Law 107-9

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<sup>81</sup> *Id.* at H3141.

<sup>82</sup> National Defense Authorization Act for Fiscal Year 2013, H.R. 4310, 112th Cong. §§ 1031-1033 (as passed by House, May 18, 2012).

<sup>83</sup> *Id.* (emphasis added).

40; 50 U.S.C. 1541 note) shall be allowed to file an application for habeas corpus relief in an appropriate district court not later than 30 days after the date on which such person is placed in military custody.”<sup>84</sup> The inclusion of this language is noteworthy because in the “detention findings” section of the same bill, Section 1031, the House reiterated that Section 1021(e) of the 2012 NDAA provided that nothing in that section should be construed to affect existing law regarding the detention of citizens, lawful residents, or anyone else captured or arrested in the United States.<sup>85</sup> If this language passes both chambers, it would be the first time Congress has acknowledged the power of the military to indefinitely detain individuals arrested in the United States. Currently, there is no similar language in the Senate Armed Services Committee version of the bill.

Even though the 2012 NDAA clearly said nothing about habeas corpus rights, sponsors of the provisions that are included in the final House bill claimed that there is no need to worry about indefinite detention authority within the United States because people detained have the right to habeas corpus. These assertions demonstrate a blatant misunderstanding of what habeas is and how it works. It can take years before one’s habeas case is completed and, in the meantime, that individual would remain in military detention.<sup>86</sup>

## **VI. Conclusion**

In light of the Feinstein amendment and several hours of Senate floor debate on the meaning of *Hamdi* and *Padilla*, it is clear that members of Congress were in one of two camps

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<sup>84</sup> *Id.* at § 1033 (c) (emphasis added).

<sup>85</sup> *Id.* at § 1031(9).

<sup>86</sup> *See Padilla* and *al-Marri*, *supra* .

when they voted in favor of the 2012 NDAA: (1) that the legislation *did* authorize the detention of U.S. citizens captured in the United States, or (2) that the legislation *did not* authorize the detention of U.S. citizens captured in the United States. Based on the legislative history of the Act, there is a strong argument in favor of Senator Durbin’s conclusion of what the Feinstein amendment did and, therefore, what the 2012 NDAA did not do. Congress could not agree on the status of current law regarding domestic authority to detain U.S. citizens and other individuals arrested in the United States; therefore, Congress agreed to leave this decision up to the Supreme Court and abstain from making a clear congressional statement on the issue. While Judge Forrest disagrees with Congress’ assessment, it is clear that the Obama Administration sees things differently and will likely seek an alternative outcome in the near future. Unfortunately, neither this article nor the Senate floor debate, nor Judge Forrest’s opinions, address the real question Americans should be asking: *Should* the Federal Government even have the power to use the military to detain anyone captured in the United States?

#### **AUTHOR’S BIO**



Mason C. Clutter is National Security Counsel to the National Association of Criminal Defense Lawyers. Her portfolio includes detention and trial of terrorism suspects, and the Fourth Amendment. She is a member of the BADC.

## LEGAL MALPRACTICE IN SETTLING CASES

by Christopher G. Hoge

In civil litigation, it is a truism that settlements are highly encouraged, so much so that there is a maxim: “a bad settlement is preferable to a good trial result.” That is because of the expense, duration, and stress of litigation; the utter unpredictability of the outcome; and the possibility of an appeal. Courts have designed and required the use of Alternative Dispute Resolution (“ADR”) programs as a critical component of their case management systems.

Any lawyer who has litigated a civil case in the District of Columbia knows that pressure to settle is exerted at various points along the road from initial complaint to trial, and even during the appellate process.<sup>1</sup> Discussions about settlement are encouraged to the point that there is a sacrosanct rule of evidence prohibiting mention at trial of statements made during negotiations.<sup>2</sup> Announcement of a settlement almost always earns praise from the presiding judge, who is happy to close a case on her or his crowded docket without the time and stress of a trial.

A settlement also lessens the likelihood of a legal malpractice claim by a disgruntled litigant. It is far more likely that an unfavorable verdict will lead to such a claim than a settlement that has left a party vaguely dissatisfied but can be justified as a reasonable compromise of a disputed claim. It is one thing to spend a great deal of time, effort, and money

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<sup>1</sup> In the District of Columbia, the Multi-Door Dispute Resolution Program (“Multi-Door”) was created by statute and began operating in January 1985

<sup>2</sup> Fed. R. Evidence 408; *see also Pyne v. Jamaica Nutrition Holdings Ltd.*, 497 A.2d 118, 128 (D.C. 1985) (quoting S. Graae, District of Columbia Statutory and Case Law Annotated to the Federal Rules of Evidence ¶ 4.37 (1976)).

to achieve something less than originally envisioned; it is quite another to spend even more time, effort, and money to come away empty-handed.

That does not mean, however, that a lawyer who works out a settlement that the client ultimately accepts is immune from liability. In virtually every jurisdiction, courts have found that lawyers must exercise “reasonable care” in working up a case and recommending a settlement to the client.<sup>3</sup> Failure to achieve an objectively reasonable result under the circumstances of the case can lead to relitigation of the claim as the “case within the case” component of a legal malpractice trial.

This article will address various examples of situations where attorneys have been found liable for malpractice in settling cases, followed by a discussion of how such claims are litigated and practical measures that an attorney can take to avoid them. .

## **I. Examples of Settlements Gone Wrong**

One of the first legal malpractice cases this author handled was *Prande v. Bell*<sup>4</sup>. As reported by the Maryland Court of Special Appeals, Luisa Prande was injured in two motor vehicle accidents, neither her fault, about six months apart. She retained the same lawyer to handle both claims. Following the second accident, Ms. Prande had significant back injuries requiring multiple surgeries. There was no question that she had been severely injured; the critical issue was which accident was primarily responsible for her injuries.

The same law firm filed two lawsuits on behalf of Ms. Prande, against the drivers responsible for each of the accidents. In each suit, it was alleged that the accident in question

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<sup>3</sup> See, Mallen & Smith, *Legal Malpractice* (4<sup>th</sup> Ed., West, 2011), at § 32:41, *et seq.* for a detailed discussion of malpractice claims centering on settlement issues.

<sup>4</sup> 660 A.2d 1055 (1995).

was the sole and exclusive cause of the plaintiff's injuries. Close to the trial date for the case against the driver in the first accident, the attorney advised his client to settle her claim for \$7,500. The liability in the first accident was clear, and Ms. Prande's medical bills were over \$20,000 at the time of the settlement. Nevertheless, Ms. Prande's lawyer advised her that if the case went to trial the medical expert was going to testify that the second accident caused most of her back problems. Ms. Prande accepted the settlement and proceeded toward trial for the second accident. However, shortly before the trial for the second accident the lawyer advised her to settle for \$3,500. Her lawyer noted that at her deposition regarding the first accident, she had testified that the second accident had not significantly worsened her symptoms. Ms. Prande reluctantly accepted her attorney's advice and agreed to settle for the \$3500, despite medical bills at the time exceeding \$30,000, but she later balked and sued her attorneys for malpractice.

The suit was dismissed at the trial level on the theory of nonmutual collateral estoppel. Ms. Prande had signed releases in settling both cases that effectively stated she was accepting these amounts in full and final settlement of all claims against the named defendants. The trial court ruled that these releases precluded relitigation of the issue of whether the plaintiff had received full compensation for her injuries. In a widely-cited opinion, the Court of Special Appeals disagreed and reversed, finding that the issues in a legal malpractice case are entirely different from those in an accident case.<sup>5</sup>

The more significant aspect of the *Prande* decision, however, was to confirm for the first time in Maryland that a client who was unhappy with the settlement of her case could subsequently sue his or her lawyer for malpractice. As explained by the Court of Special Appeals, this issue had been debated by courts of other jurisdictions, and at least one jurisdiction,

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<sup>5</sup> 660 A.2d at 1063.

Pennsylvania, had decided that such claims could not be countenanced as violating public policy encouraging settlements.<sup>6</sup> The Court of Special Appeals adopted the majority view, that such claims can be countenanced under appropriate circumstances. However, in order to protect against 20-20 hindsight and revisionist history, the Court adopted a heightened standard of care for attorneys accused of mishandling a settlement. The plaintiff's burden would be to establish by a preponderance of the evidence that:

The attorney's recommendation in regard to settlement was one that no reasonable attorney, having undertaken a reasonable investigation into the facts and law as would be appropriate under the circumstances, and with knowledge of the same facts, would have made.<sup>7</sup>

When the *Prande* case was remanded, this author presented the case to a jury and had an expert in personal injury litigation testify as to the standard of care for personal injury lawyers handling cases similar to Ms. Prande's. Among other things, the expert testified that each case had a *range of values* far beyond the settlement amounts.<sup>8</sup> The jury concluded that the settlements had been negligently handled and made an award to Ms. Prande which, unfortunately for Ms. Prande, was small enough that the defense chose not to appeal.

The true significance of *Prande*, however, is that it led directly to the Maryland Court of Appeals decision in *Thomas v. Betha*<sup>9</sup> three years later. In *Thomas*, the defendant's lawyer

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<sup>6</sup> *Muhammad v. Strassburger*, 587 A.2d 1346 (Pa. 1991). The *Muhammad* ruling, however, was subsequently modified by *McMahon v. Shea*, 688 A.2d 1179, 1180 (1997).

<sup>7</sup> 660 A.2d at 1065.

<sup>8</sup> The use of expert testimony to establish the value of the "case within the case" is controversial, and no firm rule has yet been established. In the District of Columbia, at least one federal judge has allowed an expert to testify to such matters. *Smith v. Haden*, 872 F. Supp. 1040, 1047 (D.D.C. 1994). In that case, Judge Friedman noted the conflict in cases from other jurisdictions.

<sup>9</sup> 718 A.2d 1187 (1998).

settled a Baltimore lead paint exposure claim against three landlords, one of whom he was having difficulty serving with process, for \$2,500. A jury subsequently found that the value of the plaintiff's claim was \$125,000 and found against the attorney in that amount. The plaintiff's expert testified that the settlement was one that "no reasonable attorney should have entered into," referring to the heightened standard of care required by *Prande*. Cross appeals were filed, and the Maryland Court of Appeals granted *certiorari* to reconsider the Court of Special Appeals holding in *Prande*. The Maryland Court of Appeals reaffirmed the decision on non-mutual collateral estoppel, but went a step further in deciding that in malpractice actions involving recommendation to settle there was no need for a heightened burden of proof regarding the standard of care. Rather, henceforth the standard applicable to a claim against an attorney for improperly settling a client's case would be that of ordinary professional negligence. The Court quoted with approval from a New Jersey case: "[A]fter all, the negotiation of settlements is one of the most basic and most frequently undertaken tasks that lawyers perform."<sup>10</sup>

In order to establish negligence, expert testimony as to the standard of care, and the breach thereof, is necessary. However, the Maryland Court recognized, as have the courts of virtually every jurisdiction, that attorneys are allowed a broad measure of latitude in evaluating cases and recommending settlements; otherwise, chaos would reign as disgruntled clients would inundate the courts with malpractice claims.<sup>11</sup>

According to *Thomas*, the proper measure of damages, assuming liability, is established via the "trial within a trial" methodology. The majority found that proving a case may have had a higher settlement value is very difficult, given the difficulty of predicting what the adverse

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<sup>10</sup> 718 A.2d at 1193 (quoting *Ziegelheim v. Apollo*, 607 A.2d 1298 (1992)).

<sup>11</sup> See, *Mallen & Smith, supra*, at §32:43.

party might have offered under different circumstances. The most reliable indicator of the value of a case is what a jury decides it is worth upon hearing the “trial within the trial.”<sup>12</sup> However, in a spirited concurrence and dissent, Judge Chasanow noted how unreliable the “trial within the trial” method could be. The same jury deciding the value of the lead paint exposure claim would also see such things as the *ad damnum* clause in the complaint and the settlement demand letter drawn up by the defendant’s attorney, things which would never come into evidence in simple injury litigation. Nevertheless, despite these reservations, in Maryland “trial within the trial” is the approved process for determining the value of a negligently settled case.

## **II. Negligent Settlement Cases in the District of Columbia**

The District of Columbia courts have produced no seminal decisions on the subject of legal malpractice in settling cases. There are, however, a few cases which touch upon issues relating to the settlement process. Some of the most frequently cited cases in the legal malpractice area are: *Niosi v. Aiello*, 69 A.2d 57 (D.C. Oct. 21, 1949); *O’Neal v. Bergan*, 452 A.2d 337 (D.C. 1982); *Waldman v. Levine*, 544 A.2d 683 (D.C. 1988); and *Smith v. Haden*, 868 F. Supp. 1 (D.D.C. 1994).

*Niosi* stands for the fundamental proposition, discussed extensively in *Mallen & Smith*, that in order to prevail in a legal malpractice claim, the plaintiff has to prove that he had a meritorious cause of action in the underlying case. Otherwise, the plaintiff “loses nothing by the conduct of his attorney even though the latter [was] guilty of gross negligence.”<sup>13</sup> In *O’Neal*, the Court of Appeals clarified that it is normally essential for a malpractice plaintiff to support his claim with expert testimony, unless the error is so obvious that it would be apparent to a lay

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<sup>12</sup> 781 A.2d at 1197.

<sup>13</sup> 69 A.2d at 60.

juror, such as a missed statute of limitations. The court in *Waldman* instructed that evidence of violation of the Code of Professional Responsibility may constitute proof of a violation of the standard of care, but not necessarily. Ethical violations and legal malpractice liability are two different things, and while there may be some overlap, there are also significant distinctions as to the burden of proof.

In *Smith v. Haden*, United States District Judge Paul Friedman rendered an opinion that touches on several interesting aspects of legal malpractice claims. While not binding, it has been cited widely as persuasive. Plaintiff Smith, the victim of an assault in Alaska, contacted Washington Attorney Haden. Smith asked Haden to help her pursue a claim against the Alaska Victims' Compensation Fund, which had been established to assist crime victims such as Smith. Haden entered into a written retainer agreement with Smith in which only the claim against the fund was mentioned. Haden successfully collected the maximum amount available from the fund, but she never took steps to help Smith initiate a civil lawsuit against the assaulter in Alaska. Specifically, Smith alleged that Haden had agreed to find her an attorney in Alaska to pursue the claim but failed to do so, and the statute of limitations had passed. Indeed, Haden did contact an acquaintance of hers licensed in Alaska, but Smith ultimately did not retain that attorney.

Prior to trial, Judge Friedman denied a motion by the defense asking that the burden of proof be placed on Plaintiff Smith to establish that, had the lawsuit been timely filed and won, she could have found resources from which to collect against the assaulter. In a widely cited decision Judge Friedman, reviewing cases from other jurisdictions, held that there is a rebuttable presumption that a judgment is collectable, and the burden is on the defendant's attorney to

prove that in this particular case it was not collectable. This is of major significance in legal malpractice cases arising from failed claims against uninsured individuals or small businesses.

At trial, Haden argued that the scope of her representation of Smith had been limited to helping her with the claim against the fund, and she presented expert testimony to that effect. Going further, the expert, a well-known trial lawyer named John Gill, gave his opinion as to the value of the civil claim had it been correctly pursued. Despite a defense challenge to this type of expert testimony, Judge Friedman allowed it. While, ultimately, the value of a case may be the jury's decision, after hearing the "trial within the trial," the court did not object to hearing Mr. Gill's opinion on the subject. Ultimately, Judge Friedman based his ruling on the plain language of the retainer agreement, which clearly limited the scope of Haden's representation and, in his view, absolved her from liability for the missed statute of limitations deadline.

In *Berkeley Ltd. Ptshp. v. Arnold, White & Durkee*,<sup>14</sup> a Maryland decision based on District of Columbia law, the court focused on the interplay between the Rules of Professional Conduct and common law professional negligence principles in a legal malpractice context. The defendant's attorneys had undisclosed conflicts of interest while representing Berkeley in patent infringement litigation against IBM. The conflict was that the same firm was representing two other computer manufacturers which had also infringed on Berkeley's patent. Berkeley claimed in its malpractice suit that the Arnold firm "should have gotten more out of IBM as a result of their 1988 settlement."<sup>15</sup> In evaluating this claim, the court found as a matter of law that Arnold had violated District of Columbia Bar Rule 1.7(b)(2) prohibiting undisclosed conflicts of interest.

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<sup>14</sup> 118 F. Supp. 2d 668 (D. Md. 2006).

<sup>15</sup> *Id.* at 671.

The court then concluded that whether Berkeley had incurred damages as a result of the conflict was the proper subject of expert testimony.

More recently the District of Columbia Court of Appeals addressed a similar issue in *Crawford v. Katz*<sup>16</sup>. Crawford, the former Chief Financial Officer (“CFO”) of BET Services, Inc., initially retained Bernabei & Katz, PLLC (“Bernabei firm”) to negotiate a severance agreement with BET. Failing that, Crawford was fired and, using the firm, filed suit against BET for wrongful discharge in violation of public policy, alleging that he had been terminated because he was “blowing a whistle” on unlawful conduct by BET officers and staff. BET’s aggressive law firm, Skadden & Arps, promptly filed a motion for sanctions under Rule 11 of the Civil Rules of the District of Columbia against both Crawford and his counsel, alleging that the allegations were scurrilous and untrue and that counsel had not done due diligence in investigating them prior to filing.

The case proceeded through an initial period of discovery, at the end of which it went to private mediation with retired United States District Judge Stanley Sporkin. The matter was settled for \$750,000. Subsequently, Crawford sued the Bernabei firm for legal malpractice, claiming that a significant error had been made during the initial negotiations with BET and that the firm had failed to advise him of the conflict of interest caused by the Rule 11 filing. The alleged conflict was that the firm became more interested in protecting itself against sanctions than vigorously prosecuting Crawford’s claim. As a result, the complaint stated, after enthusiastically supporting the claim and billing Crawford for a lot of work, the Bernabei firm did an about face and strongly recommended settlement for a fraction of the amount of damages calculated by Crawford’s economist experts.

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<sup>16</sup> 32 A.3d 418 (D.C. 2011).

In support of his claim Crawford proffered the opinion of Professor Geoffrey Hazard, Jr., a prominent professor of civil practice and ethics, who reported that the potential conflict of interest created by the Rule 11 motion led to an unsatisfactory compromise of Crawford's claim. The defense lawyers moved for summary judgment, arguing that Professor Hazard was not a specialist in employment law, that no actual conflict existed, and that Crawford's settlement was a significant success. The trial judge agreed and granted summary judgment. However, the District of Columbia Court of Appeals did not agree, holding that the stated opinions of Professor Hazard were sufficient to survive summary judgment. The case is now on remand, where three other defense motions for summary judgment are currently pending. One of those motions is based on the so-called "judgmental immunity doctrine"<sup>17</sup> which has been recognized in this jurisdiction and is similar to the rulings in *Prande v. Bell* and *Thomas v. Bethea* that matters of attorney judgment, as long as that judgment is reasonably informed, cannot serve as the bases for malpractice liability.<sup>18</sup>

In 1996 the District of Columbia Court of Appeals exonerated a lawyer who had been found liable for malpractice for refusing to name certain real estate brokers as defendants in a case arising from a real estate transaction.<sup>19</sup> Cooter had advised his client that there was not a good faith basis for pursuing a claim against the brokers. However, an expert in real estate law proffered by Mill's expert Charles Acker, Esq., opined that "Cooter had deviated from accepted legal standards (which standards Acker did not, however, define) in failing to pursue relief."<sup>20</sup> After the jury returned a verdict of \$119,000 for Mills, the trial judge entered a judgment not

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<sup>17</sup> See D.C. Code § 11-2502.

<sup>18</sup> The author currently represents Crawford in the remand proceedings.

<sup>19</sup> *Mills v. Cooter*, 647 A.2d 1118 (D.C. 1994).

<sup>20</sup> 647 A.2d at 1121.

withstanding the verdict, explaining that the expert had not established an applicable standard of care or that such a standard had been violated by Cooter. The Court of Appeals agreed, finding that Cooter's only obligation was to advise Mills to seek the advice of another lawyer. In so ruling, the Court also pointed out that "[a]n attorney is not liable for an error of judgment on an unsettled proposition of law."<sup>21</sup>

In *Breezevale, Ltd. v. Dickinson*,<sup>22</sup> the court approved use of the "trial within the trial" process to determine whether the firm of Gibson, Dunn & Crutcher LLP ("Gibson firm") had committed malpractice by effectively abandoning its corporate client after learning that a key employee had forged some of the documents upon which its claim was based. The Gibson firm was pursuing claims against Bridgestone-Firestone, Inc. and Firestone Export Sales Corp. in connection with large contracts for the sale of tires in Iraq and Nigeria, and immediately prior to the deposition of a key employee, that employee advised a Gibson partner that she had forged some of the documents on which the case was based. The Gibson firm went on to settle the claim for a paltry \$100,000. Breezevale sued for malpractice, arguing that Gibson could have postponed the deposition, affording Breezevale's principals an opportunity to investigate the employee's allegations, which it contended were false. Breezevale's expert opined that a conflict of interest developed when the Gibson partner learned of the employee's intention to speak about the forgery, and he should have advised her to seek separate counsel. This was enough to get the case to a jury, which found that Breezevale had forged the critical papers, but that this fact was not significant in the larger scheme of things. The jury awarded Breezevale \$3,430,000.

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<sup>21</sup> *Id.* at 1122.

<sup>22</sup> 759 A.2d 627 (D.C. 2000) ("*Breezevale I*").

In a stunningly bad turn of events for Breezevale, however, the trial judge entered a judgment notwithstanding the verdict on the basis that it had acted in bad faith by instituting a lawsuit premised on forged papers. The court then went further by awarding the Gibson firm sanctions in the amount of \$5,300,000. The District of Columbia Court of Appeals reversed, holding that based on the facts of the case the question of whether malpractice cause a low settlement of the suit should have been decided by a jury, the lower courts decision to grant judgment as a matter of law was erroneous. Therefore, the District of Columbia Court of Appeals vacated the awarded sanctions. This reprieve was only temporary, however, because on remand the trial court granted the Gibson firm's motion to dismiss, based on the forged documents.

In *Boynton v. Lopez*,<sup>23</sup> the Court of Appeals affirmed a \$7,500 verdict against a lawyer for failing to properly advise his client about who would be responsible for payment of a settlement in that amount. The client sued an insurance company for water damage to his residence, and the lawyer advised him that the company had agreed to pay \$10,000 in settlement of the claim. The client expected the amount to be paid within a month or two. In actuality, however, the insurer had only agreed to pay \$1,500; the balance was to come in the form of a reduction in the lawyer's fee and a payment from another lawyer who had represented the plaintiff. The other lawyer failed to pay, and the client sued the settling attorney for malpractice. He was awarded \$7,500 in compensatory damages and \$2,500 in punitive damages. The appellate court affirmed the compensatory award, but reversed the punitive damages award because the defendant's attorney had not financially benefited from the misrepresentation.

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<sup>23</sup> 473 A.2d 375 (D.C. 1984).

Finally, the case of *Mavity v. Fraas*,<sup>24</sup> is notable not because it made any law on legal malpractice arising from negligent settlements, but because of a truly memorable quote from the trial judge, Judge Urbina. The suit was filed by a *pro se* plaintiff against the firm of Hogan & Hartson, alleging various professional transgressions in the way the firm handled her claim for gender bias that was filed against the United States Department of Agriculture. Before granting summary judgment against the plaintiff for failure to designate an expert witness, Judge Urbina decried the massive number of motions papers emanating from the defense, stating that he “notes with displeasure the defendants' practice of bombarding the court with multiple motions (and supplements to motions) requesting essentially the same relief. Though the motions may carry different titles, “at the end of the day, even if you put a calico dress on it and call it Florence, a pig is still a pig.”<sup>25</sup>

### **3. A Cautionary Word of Advice**

The essential ingredient in winning a legal malpractice case based on negligence in settling a case is being able to show that the lawyer made a reasonable, *informed* judgment in making his or her recommendation. This necessitates establishing that the lawyer did his or her homework, investigating the facts and analyzing the relevant law, before giving advice whether, and for how much, to settle. If the work was done, it will be almost impossible for the client to succeed in bringing a claim. My first legal malpractice case involved a divorce attorney who advised his client to settle with her husband without doing any investigation or discovery into the husband’s complex finances.<sup>26</sup> The wife’s lawyer had worked for the husband’s lawyer as a law

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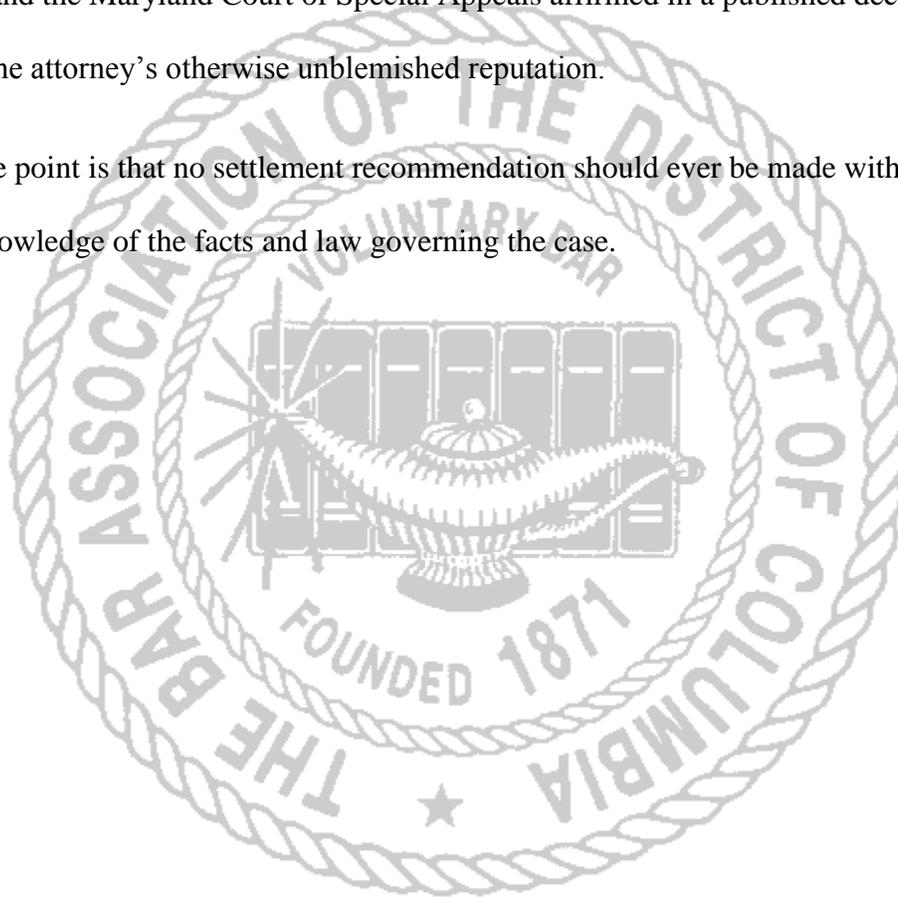
<sup>24</sup> 456 F. Supp. 2d 29 (D.D.C. 2006).

<sup>25</sup> *Id.* at 31 (citation omitted).

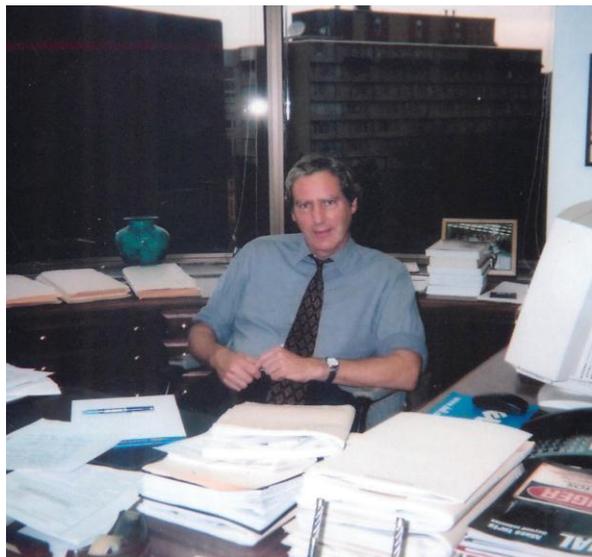
<sup>26</sup> *Pickett, Houlton & Berman v. Haislip*, 533 A.2d 273 (1987).

clerk and trusted him when he was told that the husband, a lawyer, bank president, and real estate investor, did not have many assets to divide with his wife. In what was probably an honorable attempt to save Mrs. Haislip money associated with discovery, the lawyer dispensed with paper discovery, depositions, and hiring an accountant and simply recommended a settlement based on what his mentor had told him. This turned out to be a bad idea. A jury found the lawyer negligent and the Maryland Court of Special Appeals affirmed in a published decision, causing a blight on the attorney's otherwise unblemished reputation.

The point is that no settlement recommendation should ever be made without full and reliable knowledge of the facts and law governing the case.



## AUTHOR'S BIO



Chris Hoge is a civil and criminal litigation lawyer for a four lawyer firm, Crowley, Hoge, and Fein, P.C. in downtown Washington, D.C. He has been in practice for over 30 years and has handled a wide variety of cases in local and federal courts in the Washington area.

After graduating from American University, Washington College of Law in 1974, Mr. Hoge served as a law clerk to the Hon. George H. Revercomb, Superior Court of the District of Columbia. He has remained in the same small firm since 1975. In the beginning of this career, Mr. Hoge handled a large number of court-appointed criminal cases, including such high profile matters as the Hanfi Muslim case in 1977, the murder of WMAL radio executive Kathleen Boyden in 1981. In the early 1980's Mr. Hoge's practice evolved into a mostly civil one, and he currently handles a wide variety of civil litigation. Mr. Hoge has also been appointed by the Superior Court to handle numerous estate and fiduciary cases. One of his major practice areas since the late 1980's has been professional malpractice, and particularly legal malpractice. He has handled well over 100 legal malpractice cases and has taught courses for the D.C. Bar on how to avoid malpractice claims, as well as written an article on the subject for the D.C. Bar Website. Mr. Hoge has also been profiled in Lawyer's Weekly – a national periodical – for his malpractice work.

Mr. Hoge has served as president of the Bar Association of the District of Columbia (1998-1999) and the George Washington American Inn of Court (1966-1997). He is currently chair of the D.C. Bar Practice Management Service Committee and the Bench Bar Committee of the Bar Association. He is also president of the Foundation of the Bar Association of the District of Columbia and a fellow of the American Bar Foundation. He is a member of the District of Columbia and Maryland Bars.

## **REMARKS**

by the Editor in Chief of the Journal, Christopher A. Zampogna

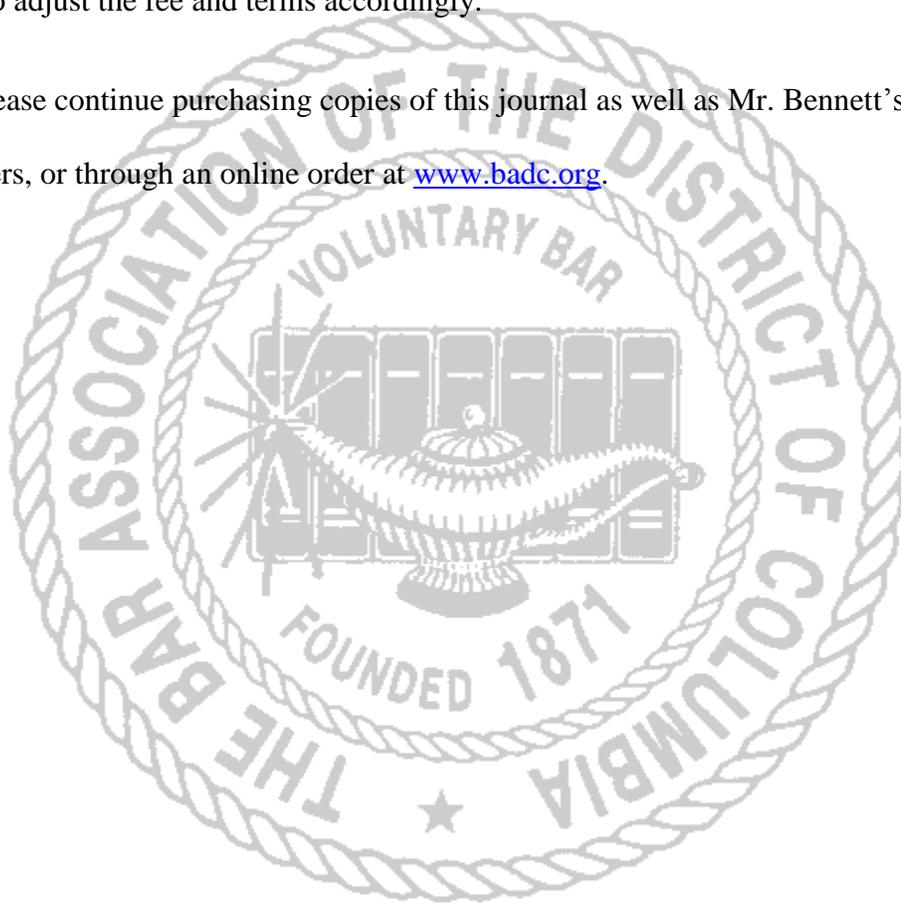
Thank you for reading the second new millennium edition of the Journal of the Bar Association of the District of Columbia. In this edition, we have an historical, a practical, and a timely article on personal liberty, each written by a leader in the legal community and our organization. In addition to an online version, this year we have provided you the opportunity to purchase a hard copy at the BADC headquarters.

The remainder of this portion of my remarks discusses the recent release of an excellent practice aid and very useful article on *How to Start and Build a Law Practice in the District of Columbia*, by Joel P. Bennett. Given our recent turbulent economic and legal times, and the particular practice hurdles in DC, it provides a wealth of knowledge about launching a successful practice in DC. Mr. Bennett wrote and released the first edition in 1980, and it immediately won an award from the ABA Young Lawyers Division. This, its fourth edition, is again award-worthy.

It provides excellent advice on beginning your practice. For instance, he writes about the details of finding office space, and contains practical appendices with form letters and pleadings specific to DC practice. In all sections the reader gains insights into the practice of law drawn from the author's wealth of experience. By reviewing his opinions and pearls of wisdom, combined with your own experience, it will improve your practice exponentially.

For instance he comments on the retainer, and wisely states that if you do not know your client you should obtain, up front, several hours of payment for work<sup>27</sup>. My addition to this point is to know your clients' means and understand the legal market they live in. This knowledge will determine the method or amount appropriate to charge for a retainer. We are fortunate to practice in DC, but upon obtaining a client from another state, we need to be prepared to adjust the fee and terms accordingly.

Please continue purchasing copies of this journal as well as Mr. Bennett's article at headquarters, or through an online order at [www.badc.org](http://www.badc.org).



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<sup>27</sup> Joel Bennett, *How to Start and Build a Law Practice*, 19, (4<sup>th</sup> ed. 2012).

## ACKNOWLEDGMENTS and COPYRIGHT INFORMATION

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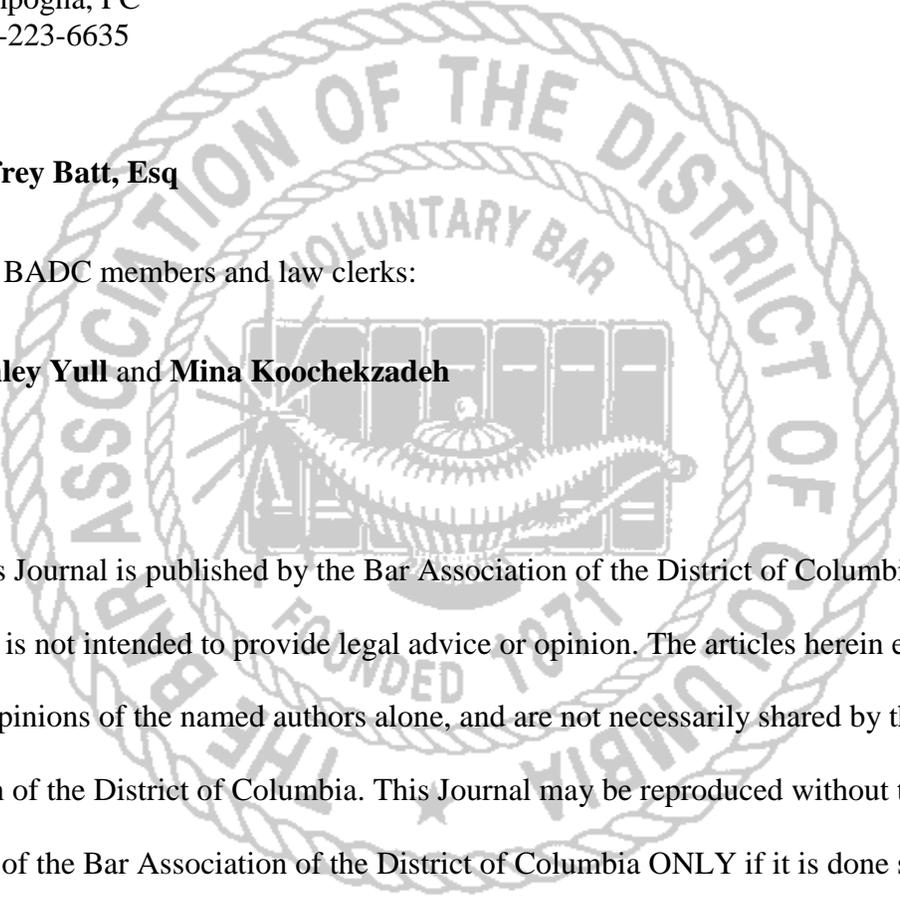
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