Federal Bar Association

Advocate

Fall Edition — New Orleans Chapter — Vol. 12, No. 4

Message From The President

BY DON K. HAYCRAFT

The New Orleans Chapter of the Federal Bar Association boasts nearly 1,100 members. We are the second largest Chapter in the nation. We enjoy our many events held throughout the year that enable our members to get to know each other better and to foster good relations between the bar and federal judges. But we must also recognize our responsibility as a Chapter to speak out about two issues that threaten to undermine the soundness of our treasured federal judicial system.

We must press our state's congressional delegation to support equitable compensation for the federal judiciary, with periodic pay adjustments that reflect inflation's effect on judicial salaries. Currently, a statutory linkage binds judicial salaries to salaries of members of Congress. Judges' pay consequently has been held hostage to Congress' unwillingness to take heat for granting itself pay raises. This unfair linkage has resulted in a nearly 15 percent decline in real pay for judges since 1993. Write your congressional and senatorial representatives to urge them to delink congressional and judicial salaries.

The second issue that affects the quality of our federal judiciary is the serious problem of judicial vacancies. As all of us know, each party blames the other for holding up confirmations of judges whose need is apparent. This has been a constant problem since Judge Robert Bork's nomination to the Supreme Court, and each party subsequently feels aggrieved that its president's nominees were delayed or not confirmed. But all we ask for is prompt, dispositive action on any nominee. Vote against a nominee in your "advice and consent" role, Senator, but let's have a vote and move on.

As an active member
of the
Federal Bar Association,
you are cordially invited to attend a luncheon with the newest additions to the Eastern District of Louisiana's bench.

Judge Jay Zainey on
September 19, 2002

Judge Kurt Englehardt on
October 3, 2002

Judge Lance Africk on
October 31, 2002

Please R.S.V.P.
to Inge Hamidjaja at 589-7990
ASAP as space is limited.

There is no charge for participating in the luncheon.

Lunch begins at noon
in the judges' chambers.

The Bar Association of the Fifth Federal Circuit
The Baton Rouge Bar Association
The Federal Bar Association Baton Rouge Chapter
The Federal Bar Association New Orleans Chapter and
The New Orleans Bar Association

Invite you to drinks, dinner and conversation
About the workings of the Fifth Circuit with

Honorable Jacques L. Wiener, Jr., Circuit Judge
Honorable James L. Dennis, Circuit Judge
Honorable Edith Brown Clement, Circuit Judge, and
Charles R. "Fritz" Fulbruge, III, Clerk of Court
United States Court of Appeals for the Fifth Circuit

Wednesday, September 4, 2002
Le Meridien Hotel Ballroom, 614 Canal St.
New Orleans, LA 70130
Cash Bar at 6pm • Dinner at 7pm

Space is Limited

Reservations made before August 21 – $40.00
Reservations made after August 21 - $50.00

Please make your check payable to
Bar Association of the Fifth Federal Circuit
600 Camp St., Room 206 • New Orleans, LA 70130
504-586-8185 • Email: bar5fed@i-55.com

RESERVATION FORM
THE WORKINGS OF THE FIFTH CIRCUIT
Wednesday, September 4, 2002

Yes, please reserve _____ spaces:

Name:______________________________

Firm Name__________________________

Address____________________________

City____________________ State__________

Phone:______________ Email:______________

IN MEMORIAM

Henry A. Politz

Fifth Circuit Court of Appeals Judge Henry A. Politz died on May 25, 2002, at his home in Shreveport, Louisiana. His funeral mass was celebrated in Shreveport, Louisiana. His lifetime friend Robert Pugh and Fifth Circuit Judge Robert Parker delivered cogent remarks chronicling his significant contributions to the judicial system and his community. Friends and associates who were unable to attend the service in Shreveport gathered for a memorial mass at St. Patrick's Church on Camp Street in his honor on May 30th. At the request of Chief Judge Ginger Berrigan, Judge Adrian Duplantier detailed Judge Politz's countless accomplishments and noted his dedication to and love of the law. Thereafter, those in attendance shared personal recollections of his kindness to others and wonderful sense of humor.

Judge Politz will be remembered for his incisive mind and gentle heart. He had an abiding faith that the ordinary working person, given a choice, would do what was right, and that respect for people, together with a deep sense of equity, suffused his judgeship. "Check your moral barometer," he would tell his law clerks. At his funeral, Father Murray Clayton recalled when he told the Judge about the Catholic concept of tempering justice with mercy. "We have the same thing," Judge Politz said of the temporal law. Judge Politz leaves behind a legacy of doing justice, and knowing when a little mercy was due.

Judge Politz was born on May 9, 1932, in Napoleonville, Louisiana,

(cont'd on page 3)

IN MEMORIAM

(cont'd from page 2)

the 10th of 11 children. He married Jane Marie Simoneaux in 1952 and had 11 children himself. After completing a tour of active duty in the United States Air Force (1951-55), he graduated Order of the Coif from Louisiana State University School of Law in 1959. There he was the Editor of the Law Review. He was an Associate, then Partner at the firm of Booth, Lockard, Jack, Pleasant and LeSage from 1959-79 in Shreveport, Louisiana. He was appointed to the Fifth Circuit Court of Appeals by President Jimmy Carter in 1979.

NEED A LEGAL PUBLICATION ?

CALL THE FBA!
(202) 638-0252

We'll send you a free catalog!

MALCOLM W. MONROE FEDERAL PRACTICE SEMINAR TO BE HELD

The Chapter will host its annual Malcolm W. Monroe Federal Practice Seminar on Friday, November 15, 2002, at the W Hotel from 8:30 a.m. to 4:30 p.m. The seminar has been approved for 6.6 hours of MCLE credit, including 1 hour each of ethics and professionalism.

The Malcolm W. Monroe Federal Practice Seminar is designed to introduce newly-admitted Louisiana attorneys to the federal courts and to provide experienced attorneys with a refresher course on federal court practice. The seminar provides participants with the practical knowledge of judges and experienced lawyers necessary for the effective efficient and successful representation of clients in federal courts. All three district courts, as well as the U.S. Fifth Circuit, will be represented at the seminar.

Through the cooperation of the judges and clerks of the Fifth Circuit and the Eastern, Middle, and Western Districts of Louisiana, seminar participants can be admitted simultaneously to practice before all four courts. This seminar presents a unique opportunity to hear from a judge and clerk of court for each district court, as well as the Fifth Circuit, concerning the various procedures of each court.

For further information, contact Inge Hamidjaja at 589-7990.

RESERVATION FORM
MALCOLM W. MONROE FEDERAL PRACTICE SEMINAR

Name: ____

# of persons attending: __________

Address: ____

____

Please return this form and remittance to:

Inge Hamidjaja
Federal Bar Association/New Orleans Chapter
501 Magazine Street, Room 364
New Orleans, Louisiana 70130
(504) 589-7990

IN MEMORIAM

Edward J. Boyle, Sr.

Senior United States District Judge Edward J. Boyle, Sr., Eastern District of Louisiana, died on July 24, 2002. Judge Boyle was nominated for appointment on August 15, 1966 by President Lyndon B. Johnson(D) and he took Senior Status in 1981. Born October 11, 1913, in McDonoghville (now Gretna), Louisiana. Married January 29, 1936, to Edith and they have two children.

Judge Boyle graduated from the University of Richmond School of Law (VA) in 1934, and completed his LL.B. at Loyola University College of Law, Chicago, Illinois. Before being nominated to the bench, he was engaged in the private practice of law and served as an Assistant United States Attorney in the Eastern District of Louisiana.

EULOGY FOR HON. EDWARD J. BOYLE, SR.
by GREG GRIMSAL
27 JULY 2002

"The law is no respecter of persons." These words come from the old Fifth Circuit Pattern Jury Instructions. They may now strike some ears as archaic, and may even have gone the way of the Latin Mass.

I recall them now not only because I often heard Judge Boyle speak them to juries, but also because I saw with my own eyes, and must now bear witness to, how deeply he believed them.

They were a kind of aesthetic principle for the Judge, who had a sharp distaste for pretense and ostentation. I myself have a taste for purple prose, which I would from time to time insert in a draft opinion. Whenever I did that, Judge Boyle would call me to his office. We would share a quiet chuckle. Then he would say, "Son, you have some beautiful language here on page 12 of this draft opinion. Take it out." The funny thing is, I always knew what language he was talking about without his having to point it out.

But the formula, "The law is no respecter of persons," is meant to remind the jury that all people are equal at the court of justice. I encountered this passion for dispassion early on in my clerkship, when I drew the assignment of handling all habeas corpus appeals to our section from the magistrates. On this occasion, Judge Boyle walked back to my office. He said: "Son, a man has no right more precious than his freedom. You will review every habeas appeal with attention and care. You may find most of them unmeritorious. You may even find that many of them are frivolous. But you will always be alert for the one that deserves to be granted."

This spirit of equal justice suffused Judge Boyle's work. I ran a Westlaw search yesterday. I punched in "opinion by Boyle." The computer spat out 105 reported opinions, including a handful from the Fifth Circuit where Judge Boyle sat by designation. All of these opinions are marked by craftsmanship, attention to detail, and sheer hard work. Judge Boyle believed the law to be a high calling, and he imposed high standards on himself, on his law clerks, and on the lawyers appearing before him.

But there is more. Judge Boyle held himself to high standards not only in law, but also in life. I saw with my own eyes, and must now bear witness to, the courage and grace with which Judge Boyle confronted the infirmities that began to bedevil him in 1989, the last year of my clerkship. The last memorandum I did for him, he asked to be blown up to as large a magnification as the copy machine was able. And even at that, the Judge used a magnifying glass to read the material.

He never complained about this, and he was very much not interested in pity. He even kept a lively sense of humor. The last time I got him to go out to lunch was St. Patrick's day. There's a surprise. The Judge negotiated his way gingerly through the restaurant. We sat down. The waiter handed us menus. The Judge glanced perfunctorily at his, and then closed it. He smiled and said, wryly, "Son why don't you tell me what's good here. I'm not familiar with this restaurant."

So today I am grieving but grateful for the life of this splendid man.

Mrs. Boyle, I extend my deepest sympathy to you and your family.

I pray for the repose of his soul.

I owe Judge Boyle more than I can ever recount, let alone repay.

He will always be my hero.

FEDERAL BAR ASSOCIATION - NEW ORLEANS CHAPTER ANNUAL FEDERAL JUDGES' RECEPTION AT D-DAY MUSEUM

Thursday, November 14, 2002
National D-Day Museum • 6:00 - 9:00 p.m.
$45.00 per person
Parking will be available next door

Name: ________________________________

# of persons attending: ______

Address: ________________________________

____

Please return this form and remittance to:

Inge Hamidjaja
Federal Bar Association/New Orleans Chapter
501 Magazine Street, Room 364 • New Orleans, Louisiana 70130
(504) 589-7990

2002-2003 OFFICERS OF THE FBA, YOUNGER LAWYERS' DIVISION

Don Paul Landry
Chair

Eric Nowak
Vice-Chair

Barry Cooper
Secretary

Wendy Hickock Robinson
Treasurer

Bryan J. DeTray
Immediate Past Chair

BOARD OF DIRECTORS

Norman "Skeet" Anseman
Melissia Buckhalter
Rose Hager
Tracey Knight
Anne Medo
Jennifer Neil
Thomas Porteous
Davis Ready
Wendy Hickock Robinson
Nathalie Simon
Michael Vincenzo

FEDERAL BAR ASSOCIATION'S ANNUAL LUNCHEON MEETING ~ JULY 18, 2002

The Federal Bar Association's New Orleans Chapter held its Annual Luncheon Meeting at Arnaud's Restaurant on July 18, 2002. As usual, the luncheon was well attended. Andy Lee, current President, gave opening remarks reflecting on his term as President. Following Andy Lee's opening remarks, the Chief Judge, Honorable Ginger Berrigan, gave welcoming remarks to all those in attendance. Judge Berrigan focused on recent developments in the Eastern District. She paid particular attention to a recent immigration case in which Judge Fallon authored a courageous decision prohibiting the indefinite detention of resident aliens whose countries refused to grant them entry after being ordered deported by the United States. Judge Fallon's ruling was ultimately affirmed by the United States Supreme Court. See Zadvydas v. Caplinger, 986 F.Supp. 1011 (E.D.La. 1997). Judge Berrigan applauded the Federal Public Defender's undertaking of the representation of difficult or unpopular issues.

After Judge Berrigan spoke, Andy Lee gave a state of the Chapter address. He recognized members of the Chapter for 25 or more years. They were:

Harold Lamy - 1959

Louis Merhige - 1965

Joseph Gowan - 1967

Donald King - 1967

Antonio Papale - 1967

Jack Benjamin - 1966

William Porteous, III - 1965

(see photo)

Mr. Lee noted the past accomplishments of the New Orleans Chapter this past year, as well as some of the continuing legal education programs sponsored by the Chapter which were an enormous success. After Andy Lee's brief remarks concerning the state of the Chapter, the names were read for the Nominating Committee's slate of officers and Board of Directors for 2002-2003. In accordance with Chapter bylaws, Don K. Haycraft, the current President-Elect, automatically succeeded as President of the Chapter. Other Chapter officers nominated and affirmed by voice vote were as follows:

First Vice-President
and President-Elect
A. Gregory Grimsal

Second Vice-President
Hon. Sally A. Shushan

Treasurer
Thomas M. Flanagan

Recording Secretary
M. Nan Alessandra

National Council Delegate
Hon. Carl J. Barbier

Membership Chair
Patrick E. O'Keefe

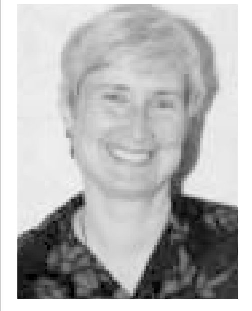
The honor of installation of the officers and the other Board of Directors was made by Kent Hofmeister, President-Elect of the Federal Bar Association (see photo). The gavel of the presidency was then passed to Don Haycraft, who made brief introductory remarks. Don also made congratulatory remarks to the immediate past President, Andy Lee. Andy Lee was then presented with a chair for the Board's appreciation for his outstanding service (see photo).

Don Haycraft then introduced the keynote speaker, Judge Edith Brown Clement, Judge on the United States Fifth Circuit Court of Appeals. Judge Clement gave a cogent discussion concerning the workings of the Fifth Circuit's appeal process concerning numbers of appeals, the workings of the staff attorneys, per curium opinions, numbers of criminal versus civil appeals, etc. (see chart). After Judge Clement's presentation, Don Haycraft also presented Judge Clement a Waterford Crystal clock on behalf of the Federal Bar Association (see photo). He then delivered closing remarks to those in attendance.

FEDERAL BAR ASSOCIATION'S ANNUAL LUNCHEON MEETING ~ JULY 18, 2002

Greg Grimsal presents outgoing president Andy Lee with gift in recognition

Installation of Officers and Board of Directors



Chief Judge Ginger Berrigan

L-R:
Donald King, Harold Lamy, William Porteous, III, and Joseph Gowan

Fifth Circuit Judge Edith Brown Clement

United States District Court Judges Kurt Engelhardt and Jay Zainey were presented with honorary lifetime memberships in the Federal Bar Association by Greg Grimsal.

Kent Hofmeister, President-Elect of The Federal Bar Association

SUPREME COURT RULINGS IN EASTERN DISTRICT OF LOUISIANA CASES

The United States Supreme Court has granted writs of certiorari in six cases from the Eastern District of Louisiana since January 1, 2000:

Zadvydas v. Davis, 533 U.S. 678 (2001) raised the dilemma of resident immigrants subject to a deportation order that cannot be effectuated. The INS interpreted applicable law to permit indefinite detention, potentially for life. The Supreme Court disagreed. To avoid a serious due process problem, the Court interpreted the statute to require release after six months if the INS could not rebut the deportee's showing of no significant likelihood of removal in the reasonably foreseeable future.

Tyler v. Cain, 533 U.S. 656 (2001), involves application of the Antiterrorism and Effective Death Penalty Act (AEDPA) to a prisoner's second habeas petition, complaining that his jury had received the same defective "reasonable doubt" instruction invalidated in Cage v. Louisiana, 498 U.S. 39 (1990). AEDPA prohibits the filing of a second petition for habeas relief unless the petition "relies on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court." Although the Court previously had decided in Sullivan v. Louisiana, 508 U.S. 275 (1993), that a Cage error is structural and hence will always invalidate a conviction without resort to harmless error review, and the prisoner argued that the reasoning of Sullivan effectively compelled a finding that Cage was retroactive, the Court said no. Sullivan meant merely that it *should* find Cage retroactive, not that it had already done so. Moreover, the Court declined to decide the issue because a finding of retroactivity would not give Mr. Tyler relief.

Campbell v. St. Tammany School Board, 533 U.S. 913 (2001), involved a first amendment challenge to St. Tammany School District's policy prohibiting after-hours use of school district buildings for religious activities, while allowing use for other purposes. The Fifth Circuit upheld the policy, but the Supreme Court granted cert and vacated for reconsideration in light of Good News Club v. Milford Central School, 533 U.S. 98 (2001), where the Court invalidated a similar policy by a New York school . The Court found that the policy constituted viewpoint discrimination, in violation of the Free Speech Clause of the First Amendment, because the denial was based on the religious content of the activity. It rejected the school's Establishment Clause defense, finding no realistic danger that the community would think the school was endorsing religion because the activity was after school hours, was not sponsored by the school, and was open to any student who obtained parental consent. The St. Tammany case has yet to be decided on remand.

In Goodson v. United States, 531 U.S. 987 (2000), the Supreme Court vacated and remanded in light of Cleveland v. United States, 531 U.S. 12 (2000), where the Supreme Court held that state and municipal licenses were not property for purposes of the mail fraud statute, 18 U.S.C. § 1341.

In Mitchell v. Helms, 530 U.S. 793 (2000), the Supreme Court held that Jefferson Parish's distribution of federally financed educational materials and equipment to private schools, most of which are religiously affiliated, does not violate the Establishment Clause.

In a strongly worded per curiam opinion, in Sao Paulo State of the Federative Republic of Brazil v. American Tobacco Co., Inc., et al, ___ U.S. ___, 122 S.Ct. 1290 (2002), the Supreme Court found that the Fifth Circuit had made a mistake in ordering recusal of Judge Carl Barbier in a tobacco suit because his name appeared by mistake on an amicus pleading filed in another suit with some of the same parties years earlier.

STATISTICAL SNAPSHOT*

For the 12 month period which ended March 31, 2002

Cases Commenced	Procedural Terminations	Total Merits Terminations	Merits Terminations After Oral Hearing	Merits Terminations on Briefs	% Placed On Oral Argument Calendar	
Criminal	2,159	514	1,683	316	1,367	18.7%
U.S. Prisoner Petition	819	548	167	17	150	10.1%
Other U.S. Civil	313	130	180	63	117	35%
Private Prisoner Petitions	2,351	1,780	535	80	455	14.9%
Other Private Civil	1,713	660	865	427	438	49.4%
Bankruptcy	129	52	57	35	22	61.4%
Administrative Agency	282	182	130	35	95	26.9%

Original Proceedings (including successive habeas corpus and pro se mandamus petitions) 875

* reprinted from www.ca5.uscourts.gov

THE DEATH PENALTY IN AN EVOLVING SOCIETY

BY VIRGINIA LAUGHLIN SCHLUETER AND ROBIN DVORKIN*

Two recent United States Supreme Court decisions are reshaping the administration of capital punishment and have altered death sentences for hundreds of inmates. The Court's decisions in Ring v. Arizona and Atkins v. Virginia[1] begin a new era for capital punishment that sharply diverges from our nation's past imposition of the death penalty.

Early laws in America varied from colony to colony permitting execution for offenses such as denying the "true God" or striking one's mother or father.[2] In 1608, the first recorded execution in America was that of Captain George Kendall in the Jamestown colony of Virginia.[3] He was sentenced to death for spying. The federal death penalty was first used on June 25, 1790 when Thomas Bird was hanged for murder.[4]

In the mid-1800's, a growing movement decried the death penalty, causing state officials to begin reform. Some states responded by abolishing the death penalty.[5] Other states responded by moving executions out of the public arena and into correctional facilities[6] with only certain witnesses being invited to observe.[7]

However, the greatest reform was yet to come. Originally, state laws imposed mandatory death sentences for specific crimes, but during the twentieth century, state legislatures began to phase out compulsory death sentences.[8]

In the 1900's, even though most states limited the number of crimes mandating compulsory death sentences, the number of executions increased.[9] An average of 167 people were executed in state and federal executions each year during the 1930's — the greatest number of executions ever experienced by our nation. Public opposition to the death penalty continued to increase. As opposition grew, the number of executions declined.

Year	Number of Executions (federal and state)[10]
1940-1949	1,289
1950-1959	715
1960-1976	191

In the 1960's, as executions waned, public support for the death penalty was at an all-time low of 42 percent.[11] State legislatures responded to public opinion by abolishing mandatory death sentences.[12]

The Supreme Court also recognized the change in public sentiment, and interpreted the Eighth Amendment to reflect evolving societal standards in Trop v. Dulles.[13] In this non-capital case, the Court suggested that which was not cruel and unusual punishment yesterday may in fact be cruel and unusual punishment today (1958). The Court reasoned that the Eighth Amendment was not static and must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[14] This case established that the Eighth Amendment must reflect society's current attitudes. Embracing this reasoning, death penalty opponents applied its logic to capital cases, pointing out that the United States had evolved and 1958 "standards of decency" precluded the death penalty. Capital punishment was ripe for reform.

However, in 1971, a Fourteenth Amendment due process challenge in McGautha v. California[15] still failed to persuade the Supreme Court that the death penalty was unconstitutional. Petitioners argued their rights were violated by allowing the jury to impose the death penalty without standards and by holding a single proceeding determining both guilt and sentence.[16] The Court rejected the argument and held, "[i]n light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."[17] The Court also decided that the Constitution did not compel a bifurcated trial.[18] This decision found the application of the death penalty not arbitrary and capricious, and thus constitutional under the Fourteenth Amendment.

But only one year later, the Supreme Court found the death penalty to be unconstitutional under the Eighth Amendment. Furman v. Georgia.[19] This decision invalidated 40 additional state death penalty statutes, as well as the federal statute. The 629 state and federal death row inmates had their sentences commuted.[20] In this one hundred page opinion, the Court ruled that the death penalty as it was then being imposed was arbitrary and capricious. "These discretionary [death penalty] statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishment."[21] Importing reasoning from Trop, the Court held that society had evolved and would no longer tolerate this arbitrary application of the death penalty.[22]

The Furman decision caused state legislatures and Congress to re-write arbitrary death penalty statutes. In 1976, when the Court reviewed new death penalty statutes in Gregg v. Georgia, Jurek v. Texas, and Proffitt v. Florida[23] those three state statutes were held constitutional, and the death penalty was reinstated.

(cont'd on page 10)

*Virginia Laughlin Schlueter is the Federal Public Defender in the Eastern District of Louisiana and a board member of the New Orleans Chapter of the Federal Bar Association. Robin Dvorkin is a Tulane law student.

THE DEATH PENALTY IN AN EVOLVING SOCIETY (cont'd from page 9)

Based on the number of states that had enacted new statutes, the Court found it "evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction."[24] The fact that a number of states had enacted new statutes demonstrated to the Court that "evolving standards of decency" supported the death penalty. Thus, the death penalty no longer violated the Eighth Amendment. The Furman reforms mandated sentencing guidelines, aggravating and mitigating factors, bifurcated trials, automatic appellate review and proportionality review for sentencing disparities, effectively imposing a moratorium on the death penalty.[25]

The 1972 moratorium ended on January 17, 1977 when Gary Gilmore was executed under Utah's revised statute.[26] His case sped through the judicial system. Arrested in July for two murders, Gilmore was tried, convicted, and sentenced to death by October of the same year. Refusing to appeal his convictions, six months later Gilmore was executed by firing squad.[27]

While many state legislatures introduced revised death penalty statutes shortly after Furman, Congress waited until 1988 to pass the Anti-Drug Abuse Act (also known as the drug kingpin statute), allowing for the imposition of the death penalty.[28] In 1994, the Federal Death Penalty Act added a death sentence for federal crimes such as espionage[29] and murder related to the smuggling of aliens[30] to the list of capital crimes.[31]

Additionally, when introduced in 1988, the federal statute differed from most state statutes by prohibiting the imposition of a death sentence on anyone mentally retarded or who committed the offense while less than 18 years of age.[32] However, state death penalty statutes still permitted the execution of juveniles and mentally retarded people. This limited use of the death penalty was not binding on states until Thompson v. Oklahoma[33] prohibited the execution of juveniles under age 16 in 1988. Today, juveniles aged 16 and 17 may be executed under state law, but not under federal law.[34] A few states continued to execute mentally retarded people until 2002, although the federal death penalty statute banned their execution in 1988.[35]

On June 20, 2002, the Supreme Court ruled the execution of mentally retarded offenders unconstitutional. Atkins v. Virginia.[36] Echoing Trop, the Court repeated that in light of "evolving standards of decency" such punishment was excessive and prohibited under the Eighth Amendment.[37] The Court recognized "evolving standards of decency" based on the review of state death penalty statutes, many of which outlawed executing mentally retarded. The legislative changes proved to the Court that the execution of mentally retarded was no longer acceptable to society because societal values held people with diminished capacities to a lower standard of culpability.

Four days later, the Court clarified the process required for finding aggravating factors necessary for the imposition of a death sentence. The Supreme Court invalidated any sentencing procedure which allowed judges, not juries, to find aggravating factors in capital cases. Ring v. Arizona.[38] The Court concluded that since the jury is required to decide an element of the crime which enhances the length of a sentence, then the jury surely must also be given the life or death decision making authority.[39] Underlying the Justices' decision is the Sixth Amendment guarantee to a jury trial, applicable to the states through the Fourteenth Amendment.[40] This holding affects nine states and 800 prisoners. The Court immediately vacated federal and state death sentences in seven cases.[41] Additionally, U.S. Attorneys and District Attorneys began redrafting indictments to allege aggravating factors in order to comply with Ring.

One month after Ring and Atkins, a federal judge in the Southern District of New York held the federal death penalty unconstitutional. The judge reasoned that the federal death penalty violates substantive and procedural due process by eliminating a defendant's opportunity to establish innocence. "In enforcing the death penalty a meaningful number of innocent people will be executed who otherwise would eventually be able to prove their innocence."[42] Because of the risk of executing innocent people, the court held that the death penalty violates the Fifth Amendment.

Judge Rakoff's opinion echos recent sentiments articulated by Supreme Court Justices Sandra Day O'Connor and Ruth Bader Ginsberg. "If statistics are any indication, the system may well be allowing some innocent defendants to be executed," said Justice O'Connor in a speech to the Minnesota Women Lawyers group in July 2001. Justice Ginsberg has also publicly noted the flaws in the imposition of the death penalty.[43] The decisions of these Justices to express publicly their doubts about the death penalty have prompted speculation that the Supreme Court again may be considering abolition.[44]

These concerns are particularly notable in light of the 101 people on death row who have been exonerated since 1973, in part because of DNA evidence.[45]

Additionally, the pace of federal executions has slowed. Only two people have been executed under the federal death penalty statute in the last forty years.[46] Both executions took place in 2001. There are 3,700 inmates still awaiting state and federal execution.

The recent decisions and the number of exonerations are a sign that flaws exist in the administration of capital punishment. As a result, the American Bar Association has urged President Bush to impose a moratorium on the death penalty. At least nine state moratorium resolutions have been introduced, including Illinois and Maryland where the governors have halted executions. Further, Congress is working on the Innocence Protection Act, a criminal justice reform package

(cont'd on page 11)

THE DEATH PENALTY IN AN EVOLVING SOCIETY (cont'd from page 10)

intended to decrease the risk of executing innocent people. The legislation, supported by the ABA, includes providing access to DNA testing for death row inmates, implementing standards for legal representation in capital cases, and raising the amount of just compensation awarded to those wrongfully convicted and imprisoned.

While the judicial and legislative branches are examining the status of capital punishment, the executive branch is proceeding with death penalty prosecutions. Under the statute, the Attorney General reviews all death penalty eligible cases. The Attorney General has overruled his own prosecutors' recommendations, ordering them to seek the death penalty 12 times.[47] In nearly half the eligible cases, the Attorney General has approved capital punishment for one or more defendants.[48]

Given society's evolving standards, capital punishment procedures are now receiving closer scrutiny. Whether the Court's recent decisions foreshadow the departure of the death penalty or simply represent a refinement of the process has yet to be determined.

ENDNOTES

1 Ring v. Arizona, 536 U.S. ___, 122 S.Ct. 2428 (2002); Atkins v. Virginia, 536 U.S. ___, 122 S.Ct. 2242 (2002).
2 Death Penalty Information Center, History of the Death Penalty at http:// www.deathpenaltyinfo.org/history2.html (last modified March 19, 2002) [hereinafter History of the Death Penalty].
3 Michael A. Cokley, Whatever Happened to that Old Saying "Thou Shall Not Kill?": A Plea for the Abolition of the Death Penalty, 2 Loy. J. Pub. Int. L. 67, 82 (2001).
4 Death Penalty Information Center, Federal Death Penalty at http:// www.deathpenaltyinfo.org/feddp.html (last modified March 19, 2002) [hereinafter Federal Death Penalty].
5 History of the Death Penalty.
6 Burk Foster, Death and Deterrence, The Angolite Magazine (March 2001).
7 Id.
8 Douglas A. Berman, Foreword: Addressing Capital Punishment Through Statutory Reform, 63 Ohio St. L.J. 1, 2 (2002).
9 History of the Death Penalty.
10 Id.
11 Michael A. Cokley, Whatever Happened to that Old Saying "Thou Shall Not Kill?": A Plea for the Abolition of the Death Penalty, 2 Loy. J. Pub. Int. L. 67, 89 (2001).
12 History of the Death Penalty.
13 Trop v. Dulles,356 U.S. 86 (1958).
14 Id. at 101.
15 McGautha v. California,402 U.S. 183 (1971).
16 Id.
17 Id. at 207.
18 Id. at 210.
19 Furman v. Georgia, 408 U.S. 238 (1972).
20 History of the Death Penalty.
21 Furman, 408 US 256-57.
22 Id. at 242.
23 Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); and Proffitt v. Florida, 428 U.S. 242 (1976).
24 Gregg v. Georgia, 428 U.S. 153, 179 (1976).
25 Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).
26 Michael A. Cokley, Whatever Happened to that Old Saying "Thou Shall Not Kill?": A Plea for the Abolition of the Death Penalty, 2 Loy. J. Pub. Int. L. 67, 89 (2001).
27 Id. at 111-13.
28 21 United States Code 848 (1988).
29 18 United States Code 794 (1948).
30 18 United States Code 1342 (1948).
31 18 United States Code 3591-3598 (1994).
32 United States Code 848(a) (1988); 21 United States Code 848(l) (1988).
33 Thompson v. Oklahoma, 487 U.S. 815 (1988).
34 21 United States Code 848(a) (1988).
35 21 United States Code 848(l) (1988).
36 Atkins v. Virginia, 536 U.S. ___ (2002).
37 Id.
38 Ring v. Arizona, 536 U.S. ___(2002).
39 Id. at 44.
40 Id.
41 Perkins v. Alabama, 536 U.S. ___ (June 28, 2002); Harrod v. Arizona, 536 U.S. ___ (June 28, 2002); Allen v. US, 536 U.S. ___ (June 28, 2002); Pandeli v. Arizona, 536 U.S. ___ (June 28, 2002); Sansing v. Arizona, 536 U.S. ___ (June 28, 2002); Bell v. Cockrell, 536 U.S. ___ (June 28, 2002); and Modden v. Texas, 536 U.S. ___ (June 28, 2002).
42 United States v. Quinones, ___ F.Supp.2d ___, 2002 WL 1415648.
43 Justice Ginsberg made these comments during a speech in Washington D.C. in April 2001.
44 Victoria Ashley, Death Penalty Redux: Justice Sandra Day O'Connor's Role on the Rehnquist Court and the Future of the Death Penalty in America, 54 Baylor L. Rev 407, 409 (2002).
45 Death Penalty Information Center, What's New at http:// www.deathpenaltyinfo.org/whatsnew.html (last modified March 19, 2002) [hereinafter What's New].
46 Timothy McVeigh executed on June 11, 2001. Juan Raul Garza executed on June 19, 2001.
47 Dan Eggen, Ashcroft Aggressively Pursues the Death Penalty, Washington Post, page A1 (July 1, 2002).
48 Id.

Interested in becoming a member of the Federal Bar Association?

Contact:

Federal Bar Association
1815 H Street, N.W., Suite 408
Washington, D.C. 20006-3697
(202) 638-0252

or

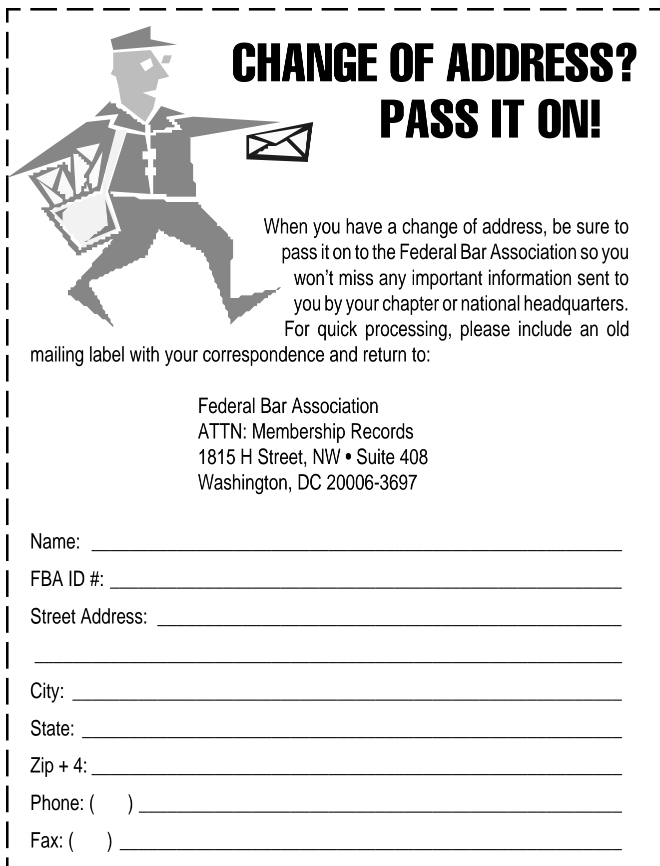
Membership Committee
c/o Patrick O'Keefe
1100 Poydras St., Suite 3200
New Orleans, LA 70163
(504) 585-3200

Membership in the F.B.A. entitles both national and charter membership

Federal Bar Association
New Orleans Chapter

c/o Don Haycraft
Chapter President
501 Magazine St., Room 364
New Orleans, LA 70130

PRSRT STD
U. S. POSTAGE
PAID
PERMIT NO. 365
New Orleans, LA



EDITORIAL BOARD: James M. Garner and Virginia Laughlin Schlueter