UTAH BAR JOURNAL

Vol. 4, No. 6 June/July 1991

Bill of Rights BICENTENNIAL ISSUE

MONROC, INC.
Employee Stock Ownership Plan
("ESOP")

has completed its
annual ESOP valuation of

MONROC, INC.

We rendered an independent opinion as to the fair market value of Monroc, Inc. common stock.

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EDITORIAL NOTE

The United States Constitution has been characterized, perhaps hyperbolically, as the most important and sublime document in the history of democratic institutions, and the Bill of Rights as the fountainhead of humankind's aspiration for basic freedoms. And yet few Americans can recite or even identify a majority of Bill of Rights' amendments. For this reason, the *Bar Journal* staff felt that it would be especially appropriate to set forth verbatim in this special issue the incomparable Bill of Rights.

Bill of Rights

AMENDMENTS

1 ***Freedom of Religion, Speech, Press, Assembly and to Petition the Government.***
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

2 ***Right to Keep and Bear Arms.***
A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

3 ***Quartering of Soldiers.***
No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

4 ***Search, Seizure and Arrest.***
The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

5 ***Grand Jury, Double Jeopardy, Witnessing Against Oneself, Due Process, Private Property.***
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

6 ***Right to Speedy Trial by Jury, to Confront Witnesses and to Have Assistance of Counsel.***
In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

7 ***Right to Trial by Jury in Civil Suits.***
In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

8 ***Excessive Bail, Fines, and Cruel and Unusual Punishment Prohibited***
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

9 ***Rights Retained by the People.***
The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

10 ***Powers Reserved to States or People.***
The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

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COVER: Our thanks for the cover illustration to T.J. Powell, design artist and illustrator.

Members of the Utah Bar who are interested in having their photographs on the cover of the *Utah Bar Journal* should contact Randall L. Romrell, Associate General Counsel, Huntsman Chemical Corporation, 2000 Eagle Gate Tower, Salt Lake City, UT 84111, 532-5200. Send both the transparency and a print of each photograph you want to be considered. Artists who are interested in doing illustrations are also invited to make themselves known.

The *Utah Bar Journal* is published monthly, except July and August, by the Utah State Bar. One copy of each issue is furnished to members as part of their State Bar dues. Subscription price to others, $25; single copies, $2.50; second-class postage paid at Salt Lake City, Utah. For information on advertising rates and space reservation, call or write Utah State Bar offices.

PRESIDENT'S MESSAGE

Reflections and Appreciation

By Hon. Pamela T. Greenwood

In preparing this final message of my term as president, I reread a similar message written a year ago by Hans Chamberlain, my predecessor. Hans wrote about his year being one encompassing both the best and worst of times, and his preoccupation with the financial difficulties of the Bar. This past year could be described in a similar manner, as we have continued to struggle with the financial condition of the Bar. However, we now seem to have finances under control and are operating in the black. As reported in previous *Bar Journals*, we have met and surpassed the financial goals set by the Supreme Court in its August minute entry and have been able to do budgetary planning in a timely manner, with opportunity for input from Bar members. I am confident that we are now in a solid financial mode, with the capacity to produce accurate, timely financial reports, avoid financial surprises and do responsible planning for the future.

Much of this year has also been devoted to working with the Supreme Court's Task Force on the future form and management of the Bar and the practice of law in Utah. Task Force members have labored long and diligently to gather information, assess that information and formulate recommendations to the Supreme Court. While that report is not yet completed as of the time I am writing this message, I believe that the process has been healthy and will produce a better system for the long-term future. The Task Force's deliberations have provided an opportunity for all of us, including Bar commissioners and officers, to reflect more deeply about the legitimate purposes of the Bar and responsibilities of those licensed to practice law. While most everyone seems to acknowledge the need to regulate the admission of persons to practice law and compliance with the Rules of Professional Responsibility, there is less unanimity about the Bar's involvement in activities which educate lawyers, provide forums for discussion of legal subjects, or inform the public about the legal system and how to access that system. While I recognize that others differ, I am convinced that the Bar can and should provide those latter services and an integrated Bar is the most effective vehicle to do so. It is interesting to note that the cost of engaging in such "non-regulatory" activities is minimal, primarily because of the outstanding donation of time and services by Bar members.

This year, for the first time, we endeavored to identify all indirect costs of Bar programs and services. This process entailed allocating Bar personnel time and overhead costs attributable to various personnel. It was not an exact calculation, and could not be, but gives us a more realistic picture of the costs of Bar activities and a better means of evaluating their continuation. All Bar members were provided with the cost breakdown, as well as a description of the programs and services, and given an opportunity to comment. As I prepare this article, those comments are being received. On or before June 5, the Bar Commission will file a petition with the Supreme Court, seeking permission to continue certain programs or services which are not regulatory and which are not financially self-sufficient. Determination of which programs or services to be included in the petition will be made after receipt of all comments. A copy of the petition will be available at the Bar offices and will be mailed to all local bar associations.

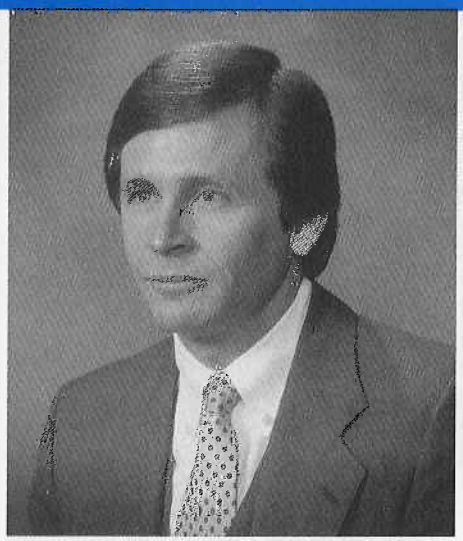
Our success in addressing fiscal issues and ongoing Bar operations is largely attributable to the efforts of Bar staff. I am extremely grateful to Bar staff who have worked so hard this year under trying circumstances. We reduced staff, hired new personnel, undertook gargantuan tasks,

and did not otherwise reduce demands on our staff. John Baldwin, our new Executive Director, walked into a hornets' nest, but has ably coped with his assignments. His job was made easier by the willingness of Brian Florence to serve as interim director. My heartfelt thanks to John, Brian and all staff members. You are the best!

One of the greatest attractions of becoming a "Bar junky" is the association with outstanding people, who are committed to the legal profession and to public service, and who enjoy lively, but friendly, debate. My life has been enriched by the individuals I've worked with in the Bar—all the present and former Bar commissioners, Bar staff, and countless others, including their spouses or best friends. My particular thanks to Bar Commissioners and Ex-Officio Commission members serving this year. As Mike Hansen pointed out in his Commissioners' Message last month, this is not a glamour job. The hours are long, the issues tough, and the opportunity lately for pleasurable colloquy limited. But everyone has served faithfully and provided valuable contributions for the present and future of the Utah Bar and Utah's citizenry. The present Bar Commissioners and Ex-Officio Commission members are talented, dedicated individuals who will continue to provide able leadership for the Bar.

Lastly, my thanks and love to my family: husband David, and my children, Christine and Nick. I look forward to renewing our relationships and spending more time together. I will also continue to be available to assist the Bar wherever I can be of service.

Utah B.J.



Unification of Utah's Judiciary—A Long Overdue Step in Modernizing the Courts

By Randy L. Dryer

1991 marks the beginning of the judiciary's struggle toward unification of the district, circuit, and juvenile courts into a single trial court of general jurisdiction. The concept of unification has not been without its critics and will undoubtedly continue to be controversial. Nonetheless, I believe unification, in the long term, represents the judiciary's best hope of continuing to provide high-quality justice at a cost the public can afford.

Two major events, both moving us toward unification of the courts, have and will reach fruition in 1991. The first, implementation of HB 436 (the Utah Trial Court Organization and Jurisdiction Act), will begin the process of merging the circuit into the district court over a period of four to six years. This legislation was the result of a study conducted by the courts at the direction of the Legislature. A report of the provisions of this bill appeared in the April issue of the *Bar Journal*. The second event will be adoption of the final report of the Utah Commission on Justice in the 21st Century, which will recommend the merger of the juvenile into the district court. The preliminary report of the Commission will be presented at public hearings throughout the state in April and May of this year.

THE ADVANTAGES OF UNIFICATION

Unification eliminates single-judge districts. Single-judge courthouses are expensive to build and maintain because of the high percentage of the facility cost associated with fixed overhead. The status of the law in a district will no longer reflect the philosophy of just one judge, but rather will develop through the exchange of ideas of several judges. Judges and practitioners alike can enjoy the relief of a "cooling off" period not available when every case of every lawyer is decided by just one judge.

Unification of the courts establishes one level of trial court judge with authority over all case types. One level of trial court judge can better manage the shifting growth in caseload based on the maturity of the population without significant increases in the number of judges or clerks. Several judges of identical authority means greater judicial availability. Emergency matters will not be delayed because the only judge with authority for the manner is conducting a hearing, at a committee meeting, or in another county.

Public access to the courts will also be improved through unification. By combining clerical operations, unification means one location in which to conduct all court business. No longer must one travel to the district courthouse for cases over $10,000 and to the circuit courthouse for cases under $10,000. Claims for relief at or near $10,000 will not be bounced between courts in search of a forum. By integrating jurisdiction, unification means one court, perhaps one judge, can resolve interrelated actions. This is especially important in the area of family, juvenile, and domestic law where the resolution of disputes may take a more holistic approach.

Unification will enhance the stature of the office of trial court judge. The model unified court structure developed by the Commission relies heavily on the use of commissioners, similar in purpose to the federal magistrate, for the conduct of preliminary civil and criminal matters and for the disposition of minor civil and criminal actions. By such reliance, unification recognizes the significant difference between the skills necessary for a commissioner in the management of a high volume caseload presenting routine issues and the skills necessary for a judge in the disposition of civil and criminal actions presenting significant issues of public policy. For the first time, the courts will have the opportunity simultaneously to recognize the efficiency of specialization—by commissioners—and the benefits of

generalization—by judges. The fullest use of commissioners should reduce the burden faced by lawyers, especially the criminal prosecution and defense bar, in trying to appear before several judges at the same time.

CREATING ADMINISTRATIVE FLEXIBILITY FOR THE FUTURE

Unification of the trial courts is the principal, but not the sole goal of either HB 436 or the Commission report.

HB 436 and the Commission report, if adopted, will provide needed flexibility in the manner in which the record is maintained. The use of videotape is now possible, under HB 436, although its use needs to be studied carefully before widespread implementation. In addition, HB 436 allows the Legislature through the funding process and the Judicial Council through the rule-making process to identify the location of courts based on workload and public convenience. This provides the flexibility to keep at least some types of cases geographically close to the litigants and their lawyers.

In the area of the criminal law, fees on fines are eliminated in favor of a uniform surcharge. This permits more predictability of result to prosecution and defense alike, enabling them to better advise clients and decide alternative courses of action. Fine revenue is distributed without regard to the level of court in which the case is prosecuted, the level of the offense charged, or the method of disposition. This should remove any cloud that prosecution decisions are based upon revenue considerations.

Under HB 436, the district courts (and in the interim, the remaining circuit courts) have county wide criminal venue. HB 436 repeals a provision that requires an offense be charged in the justice court if the justice court has subject matter and territorial jurisdiction. As a result of this now repealed provision, circuit court venue extended only to the city limits in class B misdemeanors and less. Under HB 436, prosecutors always have a court of record available in which to charge class B misdemeanors. This avoids the cost and time of a de novo trial in a court of record after trial in the justice court. This helps ensure a sound record for appeal in serious cases.

One of the lesser known aspects of HB 436 is the creation of a retirement incentive for judges who retire during the months of October, November and December 1992. This retirement incentive will result in several judicial vacancies being filled simultaneously, thus providing qualified and motivated lawyers with numerous opportunities for appointment to what soon will be a unified district court bench.

The Justice Commission report encourages judges in their professional development to broadly expand their knowledge rather than to narrow their focus on specialization. The report provides the courts with a framework for the continued development of technology as an aid in the timely and economic resolution of litigation. The report challenges the courts to integrate alternative dispute resolution into the mainstream of litigation management and sets forth guides for the courts in maintaining both physical and economic access to the courts.

CHALLENGES FOR THE FUTURE

The above are some of the provisions of HB 436 and the Justice Commission report that will profoundly affect the course of the administration of justice. But, as significant as this legislation and this report are, they represent only the first step. There are yet many complex issues to be resolved and many difficult tasks to be completed in giving full effect to HB 436. The report of the Commission remains only a report; it is not self-actuating.

The judiciary encouraged participation by the Bar in both the effort to draft HB 436 and the study and report of the Commission on Justice in the 21st Century. I have had the pleasure of serving as a member of the Justice Commission and as chair of one of its subcommittees. Continuing participation by lawyers is critical. The judiciary is forming both statewide and local committees to implement HB 436. These or similar committees likely will form the nucleus for implementation of the Commission report, as well. The statewide committee and each local committee will have representation by the Bar. I encourage anyone interested in participating in this exciting process to contact me or the presiding judge of the district court of your district and volunteer for service. Lawyer participation is critical because the legislation and the Commission report affect lawyers and their clients.

Unification carries with it both opportunity and obligation. The judiciary must deliver the clear, independent law necessary to the integrity of the law. The courts must provide equal access to the law without bias and an open forum for the just, honorable resolution of disputes. The judiciary of Utah, including judges, commissioners, administrators, clerks, and probation officers have long faced these obligations with courage and success. The steps now being taken provide even greater opportunity and hence even greater obligation to improve upon that success.

Utah B.J.

Establishes Annual Community Service Scholarships and Chooses First Recipients

Early in 1991, the Board of Trustees of the Utah Bar Foundation established two Community Service Scholarships in the amount of $3,000 to be awarded to one law student at the University of Utah College of Law and one law student at the Brigham Young University Law School. To qualify for the scholarship, a student must have participated in and made a significant contribution to the community by performing pro bono services in community organizations and agencies.

At the April meeting of the Board of Trustees two students were chosen to receive these scholarships.

University of Utah law student **HONG THI TRAN** will receive a $3,000 scholarship for her community volunteer service. Hong Thi Tran has volunteered her time and talents to Utah Legal Services, the Law School Service Day Project, and to the Praeder-Willi Program, renovating the spouse abuse shelter, CARE package for children, Habitat for Humanity, National Park Service and the Student Ambassador Program at the Lowell Bennion Center. She has also served on the United Way Campus Fund-Raising Committee and as a recruiter for the March of Dimes Walk-a-Thon and Metro Atlanta Hunger Walk.

Hong Thi Tran

Brigham Young University law student **ROSEMOND V. BLAKELOCK** will also receive a $3,000 scholarship award for her service to the community with the Licensed Foster Family for the Department of Social Services, as a volunteer caseworker for abused children in Provo, and developing a program for making city services available to disadvantaged children in Canton, Ohio. She is currently serving as an Administrative Assistant/Caseworker for the Office of the Guardian ad Litem, Fourth District Juvenile Court in Provo, Utah.

Rosemond V. Blakelock

The Utah Bar Foundation congratulates both of these law students for their outstanding accomplishments and hopes that their interest in community service will continue. The purpose of these scholarships is to reward students who have participated in community service in a meaningful way and to encourage other students to do likewise.

Utah Bar Foundation Presents 1991 Ethics Awards

Mark T. Urban
Kerry Lee Chlarson

The Utah Bar Foundation, in cooperation with the J. Reuben Clark School of Law and the University of Utah College of Law, has established an Ethics Award to be awarded to a graduating student at each school. The Rules of Professional Conduct adopted by the Utah State Bar establish ethical standards for Utah lawyers, but encourage lawyers to strive for even higher ethical and professional excellence. As stated in the preamble to the Utah Rules of Professional Conduct:

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal professional ideal of public service.

In an effort to promote and encourage new members of the Bar to adopt high ethical standards, the Utah Bar Foundation, in cooperation with the Utah law schools, established the ethics awards. Each law school annually selects a graduating senior who embodies high ethical standards.

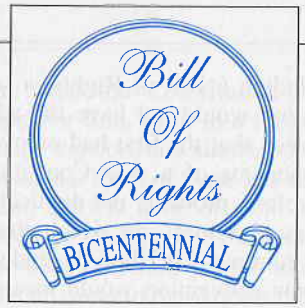
One of the Foundation's 1991 Ethics Awards was recently presented by the Honorable Norman H. Jackson, Vice President of the Utah Bar Foundation, to **MARK T. URBAN** at an awards assembly held at BYU in March.

Mr. Urban, April graduate from Brigham Young University, is a member of the Board of Advocates, of the Golden Key National Honor Society and of Phi Kappa Phi Honor Society, and a recipient of academic scholarships from 1988 through 1991. During his law school years he served a summer clerkship with Davis, Graham & Stubbs, worked as a Youth Corrections Coordinator and Assistant Director at the Provo Youth Detention Center, and researched and co-authored articles with Professor Robert E. Riggs for the *BYU Journal of Public Law*.

Bar Foundation President Richard C. Cahoon presented the other Foundation's 1991 Ethics Award to **KERRY LEE CHLARSON** at the University of Utah College of Law.

Mr. Chlarson, May graduate, is a member of the Natural Resources Law Forum, a staff writer for the *Western Energy Bulletin* in 1989-91, and filled a Judicial Externship with Justice I. Daniel Stewart at the Utah Supreme Court in 1990. He is a former Marine and a recipient of the Navy ROTC Marine scholarship, and filled various ROTC leadership positions. He has completed law school in spite of severe burns he received in a Jeep accident while in the Marines.

The Utah Bar Foundation congratulations Mark T. Urban and Kerry Lee Chlarson for their outstanding accomplishments and high ethical standards during law school.



Our Remarkable Constitution

By Rex E. Lee

Congress has officially designated the 15-year period from 1976 through the summer of 1991 as our bicentennial. Bicentennial! Over the past 15 years, this word has virtually acquired a secondary meaning. Viewed narrowly, it has been a ceremonial observance of the most remarkable period in the history of our nation, and perhaps in the history of the world. From a broader perspective, the bicentennial has symbolized patriotism and liberty, and has served as a valuable reminder that the unique blessings we enjoy as Americans are largely attributable to a document that has proven to be, notwithstanding some flaws, probably the most successful governmental undertaking in the history of civilized life on this planet.

The 200-year anniversary that we have been observing was a 15-year period that began with the Declaration of Independence and ended with the adoption of the Bill of Rights by the first Congress in the summer of 1791. The Constitution-making portions of that decade and a half lasted only four years, and consisted, in my view, of three basic phases. The first was the famous Philadelphia Convention in the summer of 1787. That story has been told several times and in several ways, but nowhere more interestingly nor more accurately than in Brigham Young University's film production, "A More Perfect Union." The convention was conducted in secret, and representing several struggles of epic proportions among the delegates, ultimately resolved by a series of compromises. Someday someone should make another movie like "A More Perfect Union," telling the story of the second and third phases, which were ratification and the adoption of the Bill of Rights. Chronologically, ratification and the Bill of Rights' adoption occurred in successive time periods, but they ended up being linked to each other. Their story is just as dramatic and the process came just as perilously close to failure as did the Constitutional Convention itself. Let me explain.

REX E. LEE is the 10th president of Brigham Young University, a position he has held since July 1989. Prior to his current position, he was a partner in the law firm of Sidley & Austin from June 1985. Before that, he served four years as Solicitor General of the United States. President Lee was the founding dean of the J. Reuben Clark Law School at Brigham Young University, in which capacity he served from 1971 through 1975.

The crucial time period for ratification lasted from late 1787 through the events of the summer of 1788. Formally and technically, the number of states required was nine, but everyone knew that if the new Republic was to have a chance, the Constitution would have to be ratified by certain key states, including New York, Massachusetts and Virginia. Very quickly, national leaders divided into two camps, the Federalists who supported the new Constitution, and the anti-Federalists who opposed it. The anti-Federalists included such luminaries as George Mason, Patrick Henry and Richard Henry Lee of Virginia, Samuel Adams and Eldridge Gerry of Massachusetts; and Luther Martin of Maryland. They were distressed over the fact that this secret convention, authorized only to modify the Articles of Confederation, had instead established an entirely new form of government. Worse yet, it was a national government—with some of the very centralizing features and powers that the Articles of Confederation just a few years before had been deliberately designed to avoid. Indeed, many felt that this new document would lead us back on a path to monarchy.

The Federalists' efforts to secure ratification were led principally by Madison and Hamilton, who, with some help from John Jay, published under the pseudonym "Publius," a series of 85 essays titled "The Federalist." Those essays are today not only the most authoritative sources for determining the original intent of the Founding Fathers; they are also part of our national literary treasure store.

The anti-Federalists rather quickly focused their attack on the lack of a "Bill of Rights." For both sides, the Bill of Rights issue was more tactical than substantive. All assumed that if the anti-Federalists succeeded in sending the entire Constitution into a second convention to consider

including a Bill of Rights, a second convention would not have the advantage of secrecy that the first had enjoyed, and the proponents of a new Constitution could, therefore, probably not duplicate the series of compromises on which their work of the summer 1787 had depended. In short, a new convention would mean no constitution at all, and both sides understood that the battle over a Bill of Rights was really a battle over the Constitution itself.

Once again, it was a compromise that carried the day, but this time a procedural one: Following the Massachusetts lead in early 1788, the crucial state conventions ratified the Constitution as it stood, but accompanied it with the addition of some proposed Bill of Rights amendments which Congress could consider *after* ratification. Given the closeness of the votes in Massachusetts, New York and Virginia, it is quite clear that without this ratification-now-Bill-of-Rights-later compromise, our Constitution would never have come into existence. And yet, when the first Congress convened in April 1789, most of its members were inclined to consider virtually any matter of business other than the Bill of Rights. If not for the constant pressure of one man, James Madison, then a member of the House of Representatives, the first Congress might never have enacted a Bill of Rights. (Ironically, Madison had been defeated for the Senate by Richard Henry Lee, who had opposed the Constitution.) In all three phases of our constitution-making, therefore—drafting, ratification and adding the Bill of Rights—Madison was the central figure. He truly deserves his title, the Father of our Constitution.

What, then, is this Constitution, which Madison and Hamilton and others labored so diligently and precariously to bring about, and whose bicentennial we have been celebrating over the past four years? In the most elementary sense, the answer is that it is a part of our American body of laws, and laws are the rules by which we govern ourselves. But out of all the rules of conduct that rise to the level of law in our society, the Constitution is different in several respects. I will mention just two, and they are interrelated.

First, the Constitution is supreme over all other law. That means that in the event there is any inconsistency between the provisions of the Constitution and law that stems from any other source, the other law is invalid for that reason alone. That is what we mean when we say that laws are "unconstitutional."

The second distinction is one that is not often talked about but is very important and is related to the first. As compared to any other kind of law, including statutory, regulatory or judge-made common law, constitutional law (at least by the formal processes specified by the Constitution itself) is very difficult to make or change. Consider this: In 200 years, we have added only 26 amendments. The first 10, which include a large share of our most important constitutional provisions, were enacted in just a little over two years. But since that time, of the literally thousands of constitutional amendments that have been proposed, only 16—an average of eight per century—have actually become part of our constitutional law. And of those 16, two have cancelled each other out, the majority have dealt with relatively unimportant matters, and only one, the 14th, has an importance comparable to some of the provisions that were adopted between 1787 and 1791.

"The central feature of the American Constitution is that with only one exception, it's provisions are confined to limiting the powers of government."

The central feature of the American Constitution is that with only one exception, its provisions are confined to limiting the powers of government. The single exception is the Thirteenth Amendment, which prohibits slavery and involuntary servitude, and therefore necessarily governs relationships between private, non-governmental people and entities. With that single exception, the Constitution leaves untouched those vast bodies of other law which regulate the rights and obligations that individuals, groups and institutions owe to and enjoy from each other. I suspect that the great majority of Americans don't know that. It follows that when we speak of our constitutional rights, we are necessarily speaking of rights that we enjoy vis-a-vis government, either national, state or local. The Constitution is silent with respect to rights that we might enjoy vis-a-vis our employer, our neighbor, or any other non-governmental person or entity who infringes on our interests in any way other than the imposition of slavery or involuntary servitude, neither of which has been a terribly pressing issue over the past century and a quarter.

The Constitution is, in short, a limitation on government. It accomplishes its governmental-authority-confining mission in two basic ways, and with the exception of the Thirteenth Amendment, every provision of the Constitution, in my opinion, falls into either one or the other of these two categories of limitations on governmental power.

The first category is the obvious one. The Constitution contains some fairly obvious, though not always specific, prohibitions concerning what government—federal, state or local—can do to its citizens. Some of the most prominent are protection for the criminally accused, such as the privilege against self-incrimination, protection against unreasonable searches and seizures, the right to counsel and jury trial. The best known of the non-criminal protections are contained in the First Amendment, most of whose guarantees pertain to some form of free expression, and include freedom of speech and press, freedom of assembly and the free exercise of religion. (Interestingly enough, the only non-expression right contained in the First Amendment is a structural provision, the so-called establishment clause, which deals with relationships between governments and religious organizations.) And although the original Constitution was criticized by the anti-Federalists for its lack of a bill of rights, it actually contained several important limitations on government designed solely to protect individual rights, such as the prohibitions against bills of attainder and ex post facto laws, the habeas corpus guarantee and the contracts clause.

The other way that the Constitution limits governmental powers is more subtle, not as well-known, but equally important and equally effective. It consists of a combination of two separate structural provisions. They are structural provisions in that they protect the individual against governmental power not by overtly prescribing what government cannot do, but rather by creating separate governmental units that compete for government power. By spreading the powers of government among several separate entities and by making each a competitor with the others, there is a lesser likelihood that any of those entities can ever acquire power in

sufficient measure to become oppressive. The Constitution accomplishes this division of power along two dimensions, one horizontal and one vertical.

First, it divides powers horizontally among three separate branches of the federal government. This breaking up of governmental authority among separate branches of the federal government was, in a very real sense, the first order of business for the 1787 Constitution-makers. Thus, in Article I, they created a Legislative Branch (Congress) and gave it the power to make laws; Article II created an Executive Branch (the President) who is charged with the responsibility "that the laws be faithfully executed"; and then Article III created the third branch (the federal courts), whose duty it is to interpret the laws.

The Constitution also divides power, in a quite different way, vertically, between the federal government on the one hand and the various state governments on the other. Moreover, it gives each of these competitors a power feature that the other does not have. That is, the law-making authority of the states is broader because the powers of the federal government are confined to those that the Constitution itself specifically authorizes any of the three branches to exercise, or powers that can be fairly implied by those specifically enumerated powers. But within its narrower sphere, federal law trumps state law whenever the two come into conflict. In summary, therefore, under this constitutional vertical division of authority, which we call federalism, the federal law is more potent and within its confined sphere prevails when, as frequently happens, the two come into conflict, but the total package of state powers is larger.

I believe that these interlocking structural features—separation of powers and federalism—lie at the core of why our constitutional system of government has survived and served us so well over two centuries. Both are simple in their basic precepts. But in their actual operation, they can only be described as genius features. The reason is that over the long run of our nation's history, they have managed to maintain a balance of power both within the federal government and also between our two systems of government that has effectively protected our individual liberties in ways that are more subtle, but in my view just as effective, as the better-known guarantees contained in the Bill of Rights.

And they do so in ways that affect all of us. For example, at the bottom of the tussle last January between Congress and the President, over the content of a Congressional resolution concerning our involvement in the Gulf conflict, was a rock-solid separation of powers issue. Among the powers that the Constitution splits up among different governmental entities are those that pertain to our ability to make war. In Iraq, Saddam Hussein called all the shots by himself. But in this country, it takes some cooperative effort between at least two governmental competitors. Iraq's system is more efficient, but ours is better designed to assure against arbitrary and tyrannical government. And that's why I conclude that these structural features really amount to a genius system.

One of the most important features of the American Constitution, both in theory and in practice, is the magnificent breadth of its most important provisions, notably the commerce clause, most of the Bill of Rights guarantees, and the Fourteenth Amendment's due process and equal protection clauses. The lack of specificity of these and other provisions has almost certainly been essential to the ability of this document drafted in 1787 to survive over 200 years of the largest and most unanticipated change that any country at any time has ever experienced.

And yet there is another edge to this generality. Someone has to be vested with the final authority to determine what the Constitution means when its provisions are applied to concrete practical facts, many of which were totally unanticipated at the time of the Constitutional Convention. For example, how, if at all, is the authority of the states to regulate the lengths and weights of trucks on interstate highways precluded by Congress constitutional authority "to regulate commerce . . . among the several states?" In 1787, few people were thinking about interstate highways or trucks. Similarly, the Constitution guarantees against infringements on free speech. What does that guarantee do, if anything, to state laws providing recovery for libel and slander? And what is speech? Any form of expression? Does it include flag burning? If so, is there a difference between burning flags and burning draft cards? Or sleeping in tents as a protest against homelessness? And what about the controversy over the refusal of the National Endowment for the Arts to give grants to projects or works that it considers obscene? Does the Constitution require that so long as NEA gives grants to anyone, it not exclude those that it considers objectionable?

You can read the Constitution very carefully, and not find, even in a footnote or an annotated version, any answer to any of those questions. Each of these is a form of expression, and yet none of them uses words. Speech or not? First Amendment-protected or not? Different people would give different answers to these questions.

And even where the test is more specific, questions of interpretation still remain. For example, how much could President Bush have done in the Persian Gulf without a formal Congressional declaration? In this case, Congress acted, but in other crucial instances, such as the Civil War, Korea and Vietnam, Congressional action was either absent or less decisive. The Constitution states unequivocally, and quite specifically, that "the Congress shall have power . . . to declare war . . . . " Yet in language that is equally unequivocal and equally precise, Article II states that "the President shall be Commander-in-Chief of the Army and Navy of the United States . . . . " Did Presidents Lincoln, Truman, Johnson and Nixon act unconstitutionally or were they within their Article II powers?

Nothing in the text of the Constitution, and nothing in its history, provides the answer to those and many other practical questions that arise every day. But if our nation is to survive as a functioning constitutional republic, someone has to say what these broad, general provisions of the Constitution really mean. Since the issue is one of interpretation, common sense tells us that the Constitution is among the laws that the courts interpret, and that common sense view is supported both by 187 years of actual practice and also by the most authoritative piece of constitutional history on this issue, No. 78 of the Federalist Papers, authored by Hamilton.

There are some consequences of this judicial power to interpret the Constitution that are a concern to many people. It means that five people—a majority of the Supreme Court—have the power not only to interpret the Constitution, but also effectively to amend it if they choose to do so, with little effective power by Congress, the President or the people to reverse what the Court does in any particular case.

As large and as real as that concern is, it needs to be tempered by two facts. The first is that it is fairly clear to me that this power of judicial review—the authority of the courts to have the last word on constitutionality—was intended by the 1787 framers, though they did not explicitly say so. By combining the power of

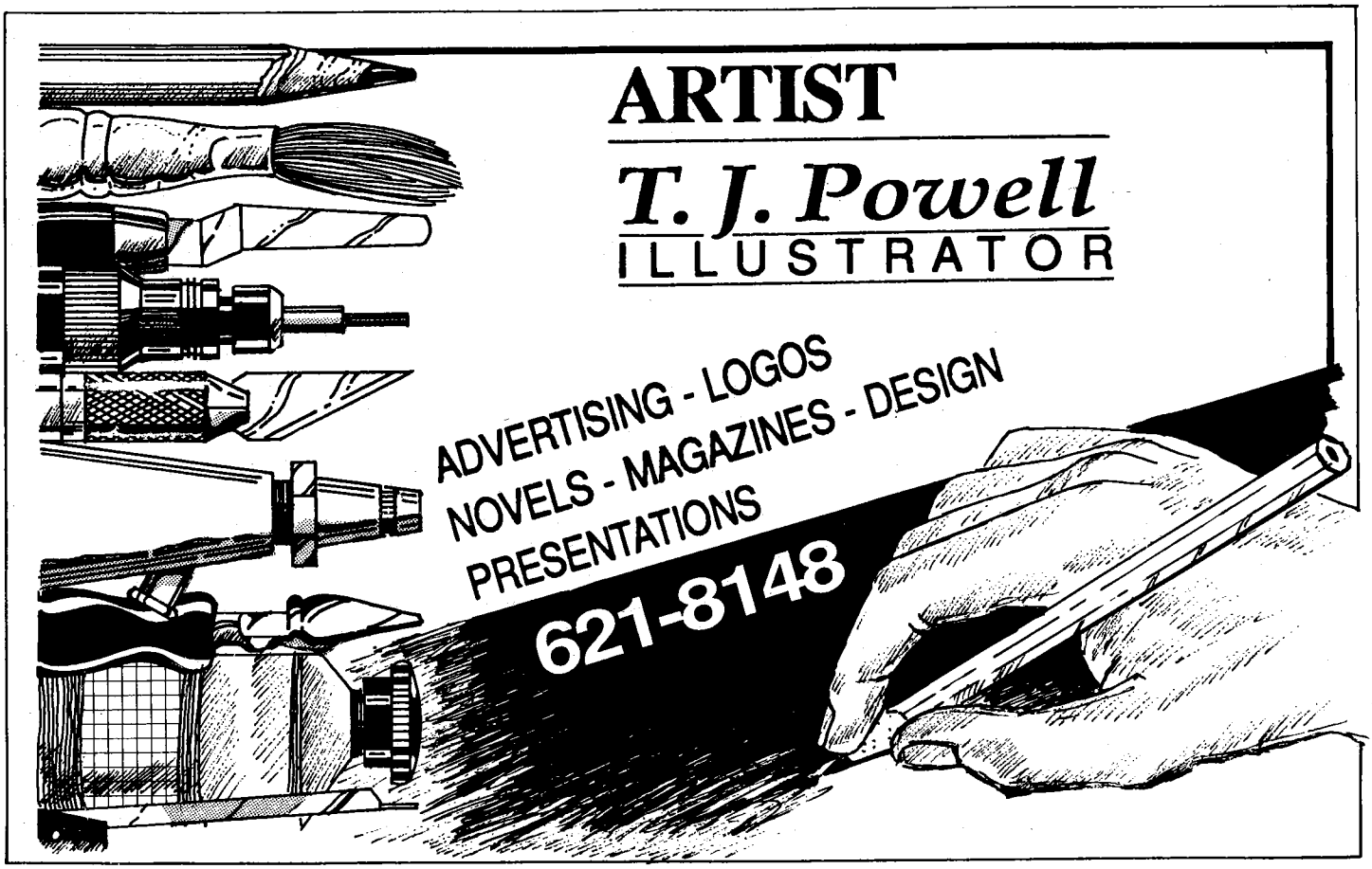
judicial review (which, as Hamilton says, they probably did intend) with the very broad language that the Founding Fathers used in the Constitution's most important provisions, the expansive judicial power that comes from judicial review was, in a sense, part of the "original intent" of the 1787 framers.

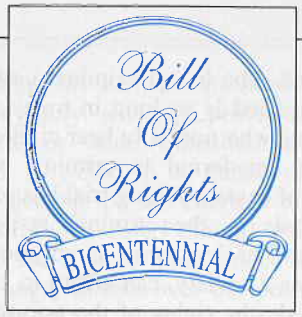
Second, there is, over the long run, a responsiveness between the will of the people and the content of our constitutional law. This comes about through the power of the President to appoint members of the federal judiciary. Indeed, as every recent President since Eisenhower has explicitly observed, one of the most important acts of any President—some have said, the most important—is to appoint members of the Supreme Court, whose average tenure has been several times that of our Presidents.

When we vote for a President, therefore, we are doing more than picking the person who will lead us in war and peace, and have access to Camp David and *Air Force One*. We are also in effect making a decision as to what kind of persons we want on the Supreme Court, and indeed, all federal courts. Our nation's history over the last half century demonstrates this fact. Particularly illustrative are the eight Roosevelt appointments in the late 1930s and early '40s, and Nixon's four appointments between 1969 and 1972. While both of these Presidents, and others, were probably disappointed in some of their appointees, as a group those appointed by Roosevelt and also Nixon reflected the views of the President who appointed them, and presumably the people who elected the President. Most important of all, both the Roosevelt and the Nixon appointees have had large effects on all of us that will last for decades, and in many instances, forever.

While I am of course not privy to the actual subjective views of the Founding Fathers, my guess is that if they could see what has resulted from their efforts, they would say that their work product of the summer of 1787 has succeeded far beyond not only their expectations, but even their hopes. Those of us who have been around to reap the benefits of those efforts are grateful to them. We now enter our third century of constitutional government. And though not too many of us will be around to observe the tricentennial of this most perfect and successful of all constitutions, we can be grateful that over our lifetimes, and the lives of generations of Americans to come, we will continue to enjoy its benefits.

Utah B.J.





The Attorney General, The Constitution, and You

By Attorney General Paul Van Dam

Exactly 204 years ago this May in 1787, the men we now reverently refer to as "the framers" convened our nation's Constitutional Convention in the City of Philadelphia. Five months later, the framers emerged from this convention with the most remarkable governmental charter in the history of humankind. But many of us forget that this document, which we acknowledge as a masterpiece of statesmanship and political craft, contained none of the protections that people most clearly associate with our Constitution. The constitutional document submitted to the states in September of 1787 contained no Bill of Rights.

In fact, the bill of rights proposed near the end of the convention was unanimously voted down, and statesmen of the stature of Alexander Hamilton and Roger Sherman vigorously argued that a Bill of Rights in the federal Constitution was an unnecessary limitation on the power of government because eight of 13 states already had some form of a bill of rights.

It was out of the vigorous, and oftentimes bitter, debates in the State Legislatures during the yearlong ratification process that the people's demand for a Bill of Rights came to be heard. The promise of such a bill became tantamount to a condition of ratification of the Constitution itself. Congress and the States fulfilled that promise three years after ratification of the Constitution. As a result, this year on December 15, we can celebrate the 200th Anniversary of the ratification of the first 10 amendments to our federal Constitution—the Bill of Rights.

However, today, just as it was 200 years ago, the Bill of Rights is not always that popular. As those of us in law enforcement are keenly aware, the Bill of Rights protects bad people as well as good. This can cause problems, as illustrated by the following thought-provoking discussion from the American Bar Association:

ATTORNEY GENERAL PAUL VAN DAM was elected in 1988. He served as Salt Lake County Attorney from 1974 to 1978. Attorney General Van Dam has 12 years of prosecution experience and 10 years of civil litigation experience. He received his law degree in 1966 from the University of Utah.

At the beginning of his term, Attorney General Van Dam restructured the office to include new programs and to strongly emphasize enforcement in environmental cleanup, investor fraud, and consumer protection. His successful appeal to the Legislature for significant funding of new lawyers, new programs, and dramatic salary increases has made the office a leader among public law offices in Utah and the Rocky Mountain area.

Attorney General Van Dam is married to Randi Wagner, a nationally recognized artist. He is also an accomplished musician and is principal singer and guitarist in a band of long standing in Salt Lake County.

"We've all seen headlines: "Released Murderer Kills Again"; "Drug Kingpin Released on Technicality." Many people complain that our jails are equipped with revolving doors. They claim that prisoners are released too soon—that they are back on the streets committing new crimes (almost as quickly as we put them in jail). As numerous news reports indicate, our jails are more crowded than ever. The construction of new prison facilities is proceeding at a record pace and yet, in some places, the new jail will be overcrowded almost as soon as it is completed. The incarceration rate of individuals in this country is higher today than in any other western nation. Recidivism rates—the rates at which released prisoners commit new crimes—are disturbingly high.

Drug-related killings on the streets of Washington, D.C. have earned it the title, "The Murder Capitol of America." Popular support for capital punishment is greater now than at any time in recent history. Although strong law enforcement measures have failed to deter drug-related crime, frequent calls are heard for new harsher measures to crack down on drug offenders. Proposals abound to speed up the process of removing alleged offenders from the streets and putting them in jail. "Preventive detention" is a new term in our national vocabulary. It describes the incarceration of an individual awaiting trial in order to prevent offenses from being com-

mitted. The list of criminal cases waiting to be tried is so long in many states that judges who normally hear civil cases have been transferred to criminal court. The glut of cases awaiting trial has precipitated a crisis in the criminal justice system which has led some to question whether we, as a society, can afford to continue to provide the rights of the accused guaranteed by the Bill of Rights. There is a price to pay for processing these cases. Although the cost of maintaining the judicial system is substantial, both civil and criminal justice activities amount to less than 3 percent of all government spending in the United States. A few years ago, this compared with 20.8 percent for social insurance payments, 18.3 percent for national defense and foreign relations, and 10.9 percent for interest on government debt.

Yet there is no doubt that a significant portion of the American people feel that the system "coddles criminals." They are concerned that so-called "technicalities" allow the guilty to go free and inflict further violence on the general public. They fear that restrictions on police conduct such as the *Miranda* warnings, requiring police to caution defendants about their right to counsel and to remain silent, undermine law enforcement. They express outrage that an individual caught "red-handed" with illicit drugs or a weapon used in a crime is freed by the courts because the search which produced the evidence was illegal. They are unhappy that admitted criminals are freed too soon because their lawyers succeed in plea bargaining. A newspaper columnist recently described the plea negotiation process as "one of the great abominations of the American criminal justice system."

The American public may be surprised to learn that their views generally conflict with those of criminal justice professionals. Both law enforcement and defense advocates share the opinion that basic constitutional protections do not in any significant way diminish the effective operation of the criminal justice system. In 1986, the American Bar Association Criminal Justice Section formed a Special Committee on Criminal Justice in a Free Society to hold hearings and survey criminal justice professionals. The Committee, chaired by former prosecutor Samuel Dash, focused on the problems of the system and the extent to which the need to observe constitutional protections impedes its operation. Parenthetically, lack of sufficient resources was identified by all of the survey respondents as the major problem facing the criminal justice system. The Committee stated that, "The entire system is starved: police, prosecution, criminal defense, courts and corrections."

The broad standard applied by our constitutional system in judging whether or not our criminal justice apparatus is working properly is one of "fundamental fairness." This concept is embodied in the Fourteenth Amendment requirement that no individual be deprived of life, liberty or property without due process of law. The due process clause incorporates certain fundamental requirements: freedom from unreasonable searches, the right to adequate representation by counsel, a fair and speedy trial, the right to be free from self-incrimination and the freedom from cruel and unusual punishment. A denial of any of these rights is deemed to be a violation of "fundamental fairness" as required by contemporary civilized standards of justice. Are these standards too strict? Are we releasing too many guilty people? Is the promise of fundamental fairness an illusion for the poor of our nation? These are questions with which our judges and other public officials must wrestle constantly. Benjamin Franklin once said, "He who would surrender freedom for a little bit of security deserves neither freedom nor security. Where should we draw the line?"

"Both law enforcement and defense advocates share the opinion that basic constitutional protections do not in any significant way diminish the effective operation of the criminal justice system."

Where do we draw the line? This is an important question for me personally because, in 1988 when I was elected Attorney General of the state of Utah, I took an oath to "support, obey and defend the Constitution of the United States and the Constitution of this state." While that oath is brief and simple in its wording, it is in fact a complex task in everyday reality. Much is required of the Attorney General to fulfill the promise to support and defend our Constitutions. I can give several examples.

Last year the Salt Lake County Attorney asked our office to give an opinion of the constitutionality of a law that automatically excluded from their own homes, for up to four days, anyone cited or arrested for domestic violence. We said the law deprived accused persons of their liberty and property without due process of law and so violated the protections of both the Federal and State Constitutions. Although we helped develop a compromise bill this year which accomplished largely the same protection for victims of domestic violence, in the meantime, our opinion and our office were loudly criticized for protecting the rights of abusers at the expense of the safety of women.

In another case last year, schools in Salt Lake and Utah counties were sued for allowing prayer at graduation exercises and other school activities in alleged violation of the First Amendment prohibitions against establishment of religion. At the same time, a school in Washington County was sued for *not* allowing prayer at graduation in alleged violation of the First Amendment's protection for the free exercise of religion. Our office filed a brief *amicus curiae* with the U.S. Supreme Court describing for that Court the real-life predicament faced by our school system brought on by the unresolved tension between two clauses in the First Amendment of the Bill of Rights and their application to school graduation prayer. Without taking a position on the issue of graduation prayer, our brief asked the Court to resolve the constitutional dilemma. This last month we were sued for our trouble and accused of violating the State constitutional protections against expenditures of public monies for religious worship or education purposes. This suit raised the question of whether the Utah State Attorney General can *ever* go to court to litigate a First Amendment establishment clause case without violating the State Constitution.

In addition, our office represents the State Board of Pardons. Three months ago our courts ruled for the first time that inmates are entitled to due process rights, including rights to counsel and appeal, at hearings before the Board of Pardons. (*Foote v. Board of Pardons*, 156 Ut Adv Rptr 3 (Utah 1990). Like the rulings out of the Warren Court expanding the rights of the criminally accused to counsel, this ruling of the Utah courts found heretofore unknown rights in our Constitution which benefit the despised of our society and which will undoubtedly need to be financed at great cost and expense to middle

and upper class citizens. The question of how the Legislature will respond to this new demand for the financing to secure these new rights is yet to be resolved.

In each of the above-described real-life cases, the tension between what the government wants to do and what the Federal and State Constitutions will let them do is evident. The support of our people for the Bill of Rights in each of these cases is sometimes less evident, sometimes clear, and sometimes shifting. At times it appears that the public will would favor "suspending" one or another of the clauses of the Bill of Rights to secure a particular short-term objective. It is at those times that an elected official like the Attorney General, charged by his oath and by law to defend the Constitution, can find himself in a particularly uncomfortable position. I have felt this discomfort on more than one occasion during my term in office.

Nevertheless, I believe that this constitutionally created tension is not only inevitable but necessary and healthy in a democratic government. I believe that each of the Amendments in the Bill of Rights which embody our most precious freedoms are not any more susceptible of rote interpretation or automatic application today than they were 200 years ago when they were adopted only after impassioned and vigorous debate. Those debates captured and focused the attention of our young nation on some of the most difficult problems of democracy. Those debates were necessary then and even the Federalists had to admit that they resulted in a better Bill of Rights than was originally drafted.

Those debates need to be held now and in the future so that each new generation can redecide for themselves the troubling and difficult questions of how best to preserve liberty without sacrificing all dignity or security. As wisely noted by Justice Jackson: "There's no such thing as an achieved liberty; like electricity, there can be no substantial storage and it must be generated as it is enjoyed, or the lights go out." ("The Task of Maintaining Our Liberties: The Role of the Judiciary," Robert H. Jackson 39 American Bar Association Journal, 961, 962 (1953).

And likewise, the question of the cost and value of providing the rights in our Constitution to all in our society needs to be answered again by each new generation of taxpayers. It is for each citizen, as a part of their own education about liberty, its cost and its true meaning, to judge the truth of the statement by Justice Felix Frankfurter:

"It is not only under Nazi rule that police excesses are inimical to freedom. It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. . . .History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly, at first, then stealthily, and brazenly in the end."

Davis v. United States, 328 U.S. 582, 66 S. Ct. 1256, 90 L.Ed 1453 (1946).

In fulfilling my oath as Attorney General it is my duty, when the provisions of our Federal or State Constitutions are challenged, to weigh in on behalf of the people in defense of the charters of our government. In that role I can tell you that I have felt the heat of impassioned argument and angry debate over our constitutional rights in the courts of our land. I have seen and been a part of the ongoing battle to redefine or reconfirm the meaning of the words that set out our constitutional rights. I can tell you that it is a monumental struggle which is fought in your name and in your interest and goes on every day. It is a struggle that is not limited to courts or capitols, but is waged mightily in PTA meetings, city councils, and wherever we discuss taxes, rules and matters of civic governance.

It is a struggle that is worthy of your time and attention and that of your children. Whether any of us like it or not, the Constitution is a living document that is subject to reinterpretation by our courts and amendment by Congress and our State Legislatures. And the decisions finally made in those lofty forums are pre-figured by the many smaller struggles waged in homes and communities throughout our country.

It is my belief that the more of us that participate fully in those struggles the better for our freedom, the better for our government and the better off we all will be.

The Bill Of Rights Permits Graduation Prayers

By Oscar W. McConkie

Thank God for the blessing of celebrating the Bicentennial of the Bill of Rights.

During each of these 200 years we have been protected in our public prayers in:

1. Our Federal Courts' "God save . . . this Honorable Court" (*Marsh v. Chambers*, U.S. 783, 786 (1983));

2. Our Legislative branch of government in opening each session of Congress with prayers (*Marsh*, supra.);

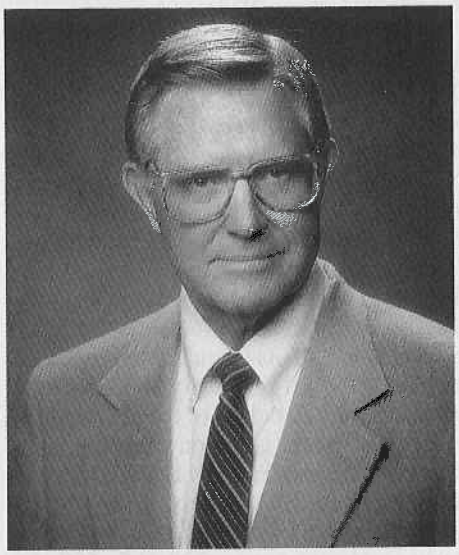
3. Our Executive branch of government with its repeated proclamations of thanksgiving and requests for other special prayers and its many prayerful ceremonies—presidential inaugurations, for example (*Lynch v. Donnelly*, 465 U.S. 668, 675 (1984); 36 U.S.C. 169.);

4. Our Armed Services and prisons (*Engel v. Vitale*, 370 U.S. 481 (1962) Stewart dissent footnote 4); and

5. At least in the Fifth and Sixth Circuits, our prayers in public high school graduation exercises. (Jones v. Clear Creek Independent School Dist., 930 F. 2d 416 (18Apr., 1991) *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (1987)).

Will the present U.S. Supreme Court stay the course and allow senior students in high school to choose one of their peers to act as mouth for them in expressing gratitude to God, in prayer, at voluntary public high school graduation exercises? I think it will.

With all the high school graduation prayers throughout the country each year there has never been a case brought to the Supreme Court dealing with this issue. Perhaps a 17-year-old's prayer has not risen to a Constitutional crisis. The Court recently granted certiorari in a Rhode Island case having to do with a Rabbi praying at a graduation exercise in a public school for children not yet old enough to go to high school. (*Robert E. Lee, individually and as principal . . . v. Daniel Weisman, etc.*, U.S. Sup. Ct. Oct. Term, 1990). In that case the Court may say something about young adults attending high schools. The Court has treated pre-high school children differently than young adults in high school as far as constitutional rights are concerned. (*Tinker v. Des Moines*, 393 U.S. 503 (1969)).



OSCAR W. McCONKIE, JR. is president of Kirton, McConkie & Poelman, P.C. He is a former president of the Utah State Senate and Chairman of the Utah State Board of Education. He has served as co-chairman of the Liaison Committee of the Utah State Board of Regents and State Board of Education, and chaired the governor's School Finance Incentives Committee from 1987 to 1989. He has been on a number of other government and civic committees and was a county attorney. He received his BS and JD degrees from the University of Utah. His law practice includes national and international representation of religious organizations as well as general litigation. He has written several books and articles. Mr. McConkie's firm represents the Alpine School District in the graduation prayer litigation.

We are a religious people. A 1991 national poll shows that "86.5 percent of Americans identified with Christian denominations."

(*Salt Lake Tribune*, 22 April 1991). The article and poll do not mention the many other persons identifying with other religious faiths.

Our federal papers accept the existence of God. "In the name of God, Amen" commences the Mayflower Compact. The Declaration of Independence is premised upon the concepts that we, our equalities, and our liberty, are dependent upon God. Mr. Justice Douglas, speaking for the High Court said it best.

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who

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Graduation Prayer Violates the Bill of Rights

By Michele A. Parish

Of all the issues the ACLU takes on—reproductive rights, discrimination, jail and prison conditions, abuse of kids in the public schools, police brutality, to name a few—by far the most volatile issue is that of school prayer. Aside from our efforts to abolish the death penalty, it is the only issue that elicits death threats.

As the director of the ACLU and a non-lawyer, I am in the legal world but not exactly of it. I spend much of my time interpreting constitutional principles and court decisions to other civilians through speeches to the Rotary, television debates with cynical government officials, marathon talk radio sessions and quixotic efforts in the echoing halls of the Legislature. Best of all, though, are conversations with kids in the schools, clubs and church groups.

At least one student always asks why they can't vote on whether to have prayers in the schools—and, perhaps rightly, most students do not distinguish classroom and activities prayers from graduation prayers. To pray is to pray is to pray. "And if some students don't like it, they can leave."

The issue for them is, "The majority rules." While the democratic principle is certainly one of two great foundational principles of American government, unfortunately the second, balancing principle, i.e., the libertarian principle, is neither widely understood nor accepted: "The majority rules, but not always." I try to explain to students that the principles mainly enshrined in the Bill of Rights were considered so bedrock by the founders as needing to be protected from the transient whims of the opinion polls or "majority rules."

This, I tell the students, is just as true with the two parts of Freedom of Religion as it is for whether or not accused persons should get a fair trial. They simply are not matters to be voted on. In short, freedom of religion is for everyone or it is for no one.

MICHELE A. PARISH graduated from the University of Iowa in 1973 with a B.A. in English. She did graduate work in theology and pastoral counseling at the School of Theology at Claremont in 1975.

Michele joined the ACLU of Utah in 1987 as the Staff Associate. After a year and a half she was appointed to replace the Executive Director who transferred to the Florida ACLU.

In 1990, the Utah NOW (National Organization for Women) presented Michele with their Women of Courageous Action Award for her leadership in opposing censorship, improving jail and prison conditions, and keeping abortion safe and legal.

The Utah Women's Political Caucus has announced that it will present the 1991 Susa Young Gates Award to Michele Parish for her work on behalf of women at its June 15 awards ceremony.

Michele is the mother of two daughters, ages 9 and 12.

They also do not understand the crucial distinction of state action, that what they are free to do in their own churches, the state is not free to endorse and/or coerce. Just as the government cannot prohibit them from praying in their churches, it cannot force people to pray in state-run schools.

The Lemon Test: A Case, Not a Curse

The unfortunately named three-pronged Lemon test (*Lemon v. Kurtzman*, 1971) is still the law of the land, despite much wishful thinking by those who wish to re-institute prayer (and Bible reading and moral instruction and proselytizing and on and on) in the public schools.

In a nutshell, the criteria to be answered are:

—Does the practice have a secular purpose?

—Does it have a neutral effect on religion?

—Does it unnecessarily entangle the government with religion?

The practice has only to fail one prong to be declared an unconstitutional violation of Freedom of Religion.

Does prayer in the classroom, at school activities or during graduation exercises have a secular purpose?

By definition, it is not credible to say praying has a secular purpose. To create a solemn tone or quiet a crowd, one could ring a bell, say the Pledge of Allegiance or play a flute. And goodness knows, there are mountains of bad poetry written for just such a purpose. To say that it is meaningless exercise in ceremony should be offensive to every person who is engaged in religion.

_Pass ✓Fail

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do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education, nor use secular institutions to force one or some religion on a person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects.

(*Zorach v. Clausen*, 343 U.S. 306, 313-14 (1952)).

This landmark case has become one of the most cited authorities in the annals of the Supreme Court interpretations of the Establishment of Religion Clause. It is the law of the land.

In a 1987 case unsuccessfully argued by the Utah ACLU, a unanimous U.S. Supreme Court held:

"This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." (*Hobbie v. Unemployment Appeals Comm'n of Fla.* 480 , , (1987) (footnote omitted). It is well established, too, that '[t]he limits of permissible state accommodation to religion are by no means co- extensive with the non-interference mandated by the Free Exercise Clause.' *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970). There is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'" (*Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987)).

Apparently the first case to address the constitutionality of graduation prayer was *Wood v. Mt. Lebanon Township School Dist.*, 342 F. Supp. 1293 (D.Pa. 1972). The court held that the prayer did not violate Establishment Clause standards. This court said:

Graduation ceremonies are purely voluntary; there is absolutely no compulsion attached to attending the graduation to be eligible to receive a diploma . . . [G]raduation ceremonies . . . are just that, i.e., they are ceremonial and are in fact not a part of the formal, day-to-day routine of the school curriculum to which is attached compulsory attendance. *Id.* at 1294.

In *Grossberg v. Deusebio*, 380 F. Supp 285 (D. Va. 1974) another federal court reached the same result reasoning that a high school graduation ceremony was "a public school event" distinguishable from daily classroom instruction. The court acknowledged that while "some may be offended by what is said, (the court) is not convinced that the Constitution protects individuals from this type of offense." *Id.* at 290.

More recently, in *Stein*, supra, a federal appeals court upheld the constitutionality of graduation prayer:

To prohibit entirely the tradition of invocations at graduation exercises while sanctioning the tradition of invocations for judges, legislators and public officials does not appear to be consistent application of the principle of equal liberty of conscience. (*Id.* at 1409).

The question presented is whether government accommodation of religion in civil life violates the Establishment Clause, absent some form of government coercion.

If the American ideal of consistent application of equal liberty of conscience is to continue to prevail, the answer must be a resounding "No!" Otherwise, seniors in high school would be denied the same liberty of conscience enjoyed by others in suitable rites of passage like a graduation where those present wish to give deeply felt thanks.

The presence of religion in public life was not considered offensive at the time of the framing of the Constitution. Indeed, it was welcomed so long as that presence was not coercive and not part of an establishment of an official church. For instance, in addressing concerns that a prayer opening the session of the First Continental Congress would be divisive, Samuel Adams stated that "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend of his country." Quoted in *Marsh*, supra at 791-792.

Many of the Nation's founders thought that it was not merely permissible to recognize the role of religion in the Nation's life but necessary to the very preservation of the Nation. George Washington expressly addressed the issue in his farewell address, itself, like high school graduation, a ceremonial occasion:

Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in Courts of Justice? And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle." (Fitzpatrick, *The Writings of George Washington from the Original Manuscript Sources,* 1748-1799, Farewell Address at 214, 229).

Space permits only a sampling of a few of our National leaders and our Nation's best political thinkers.

On March 4, 1797, President John Adams said:

And may that Being who is supreme over all, the Patron and Order, the Fountain of Justice, and the Protector in all ages of the world of virtuous liberty, continue His blessings upon this nation and its Government and give it all possible success and duration consistent with the ends of His providence. (*Vitale,* supra. Stewart dissent, notes p. 617).

On March 4, 1805, President Thomas Jefferson said:

. . . I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of your servants, guide their councils, and prosper their measures that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations." (Ibid.)

On March 4, 1809, President James Madison said:

. . . We have all been encouraged to feel in the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future. (Ibid.)

On March 4, 1865, President Abraham Lincoln said:

Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away. Yet, if God wills . . .

with malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to

finish the work we are in . . . (Ibid.)

On March 4, 1885, President Grover Cleveland said:

. . . And let us not trust to human effort alone, but humbly acknowledging the power and goodness of Almighty God, who presides over the destiny of nations, and who has at all times been revealed in our country's history, let us involve His aid and His blessings upon our labors. (Ibid. at 618).

On March 5, 1917, President Woodrow Wilson said:

. . . I pray God I may be given the wisdom and the prudence to do my duty in the true spirit of this great people. (Ibid.)

On March 4, 1933, President Franklin D. Roosevelt said:

In this dedication of a Nation we humbly ask the blessing of God. May He protect each and every one of us. May He guide me in the days to come. (Ibid.)

I sat on the capitol steps at the inauguration ceremonies on a cold and snowy January 20, 1961, as **President John F. Kennedy said:**

. . . the rights of men come not from the generosity of the state but from the hand of God . . . . Let us go forth to lead the land we love, asking His blessing and His help, but knowing that here on earth God's work must truly be our own.

Consistent application of the principle of equal liberty of conscience? Our presidents in solemn governmental ceremonial rites of passage can thus inspire; and, the ACLU says that young adult citizens cannot emulate the government leaders as the citizens enjoy their commencement exercises?

We are aware of the local ACLU's failed attempts to persuade the courts to treat Utahns with a different Constitutional standard than that which applies throughout the other states. In *Amos*, supra, it unsuccessfully argued that in Utah there must not be government accommodation for religious practices, and certainly there should be no benevolent neutrality which would permit religious exercise to exist without sponsorship. In *Lanner v. Wimmer*, 662 F.2d 1349 (1981), coming out of Logan, Utah, and not withstanding the clear mandate of *Zorach*, supra, it unsuccessfully attempted to get the courts to change the measuring rod for Utahns and disallow released time for our high school seminary students. This is not surprising, coming from those who advertise: "In Utah, they know how to punish a woman who has an abortion. Shoot her." (*New York Times*, 17 March 1991, reported in *Deseret News* editorial 27 March 1991).

Most Utahns believe in pluralism. With competing views, we are grateful that the Bill of Rights provides an even playing field. It protects us all in our public prayers.

Utah B.J.

Does it have a neutral effect, neither advancing nor hindering religion?

I suppose it could be argued that school prayer has a negative effect on religion, in that the experience of having religion crammed down one's throat often leads to anti-religious tendencies on the part of the unwilling victims, but that hardly seems the intent of those well-meaning government employees doing the cramming, who generally feel it will do the students good. Evidently these officials do not have eyes to see nor ears to hear the pain they inflict on students whose religious views differ from their own. Or perhaps, I hesitate to suggest, they simply don't care.

_*Pass* ✓*Fail*

Does it unnecessarily entangle the government with religion?

Officially endorsed and practiced school prayer unavoidably entangles the government with religion, not just threatening the wall of separation, but essentially establishing religion. In some districts the schools actively promote one religion over others as "tradition." Teacher-led prayer unavoidably gives the appearance of official endorsement. Student-given prayer involves choosing students to pray and generally includes guidelines (censorship) of their prayers. Clergy bring their own baggage. At the least, they imply government endorsement of religion over non-religion.

Attempts to neutralize establishment questions with "flavor-of- the-month" rotation of clergy or denominations bring not only endorsement v. non-endorsement problems, but tempt the court to use the standard of acceptability to be a generic American Civil Religion, a bone-chilling concept for those of us who oppose the establishment of religion.

And, of course, the government is entangled with religion in the use of state funds, employees and property for the delivery of these religious activities.

_*Pass* ✓*Fail*

Anti-Theocracy Provisions of the Utah Constitution

This brings us to the Utah State Constitution, which has more specific anti-establishment protections from Freedom of Religion than the Federal: "No state funds or property shall be used for religious worship, exercise or instruction. . ."

Given the current standards and state of the law, the ACLU of Utah felt on very solid ground in requesting a preliminary injunction against prayers in the schools against the Alpine and Granite School Districts.

I know, these two districts are not the only culprits by any means. However, between Alpine and Granite School Districts all of the issues of concern to us were covered, including prayer in the classrooms, at activities and during graduation exercises, as well as the use of state funds for a purely religious baccalaureate service, which teachers were required to produce and attend. Also, in those districts a number of courageous students, teachers and parents contacted us about becoming plaintiffs.

Granite School District utilizes a variety of approaches toward prayer in activities and at graduation. Alpine School District has had sectarian Mormon prayers for over 40 years, calls it tradition and sees no reason to change now.

Curiously, both districts, intent on preserving prayer in school, argue that prayer is not a religious activity, but is simply free speech. If there is one thing upon which theologians and believers of most faiths agree, it is that prayer is the most pure form of worship.

The question is not, "Should students, parents and teachers be forced to listen to offensive speech?" (I would note, however, that the school districts otherwise seem to go out of their way not to deliberately inflame and inflict pain on the school community simply as a matter of courtesy.) The pertinent question is, "Should the State force students, parents and teachers to participate in religious *acts*?"

Even if one conceded that prayers were simply noise devoid of meaning, content or power and not an act of worship (which, please understand, I am not conceding), corporate prayer, even if rendered in a "purely" ceremonial fashion, is a religious *exercise*, specifically prohibited by the Utah Constitution.

_*Pass* ✓*Fail*

Freedom of Conscience

I think many people are happily blessed with a broad tolerance for a variety of religious practices, and they do not understand why something that isn't a problem for them might be a defilement and gross violation of freedom of conscience for someone else. I believe it is because the common practice in the schools of praying to Heavenly Father in the name of Jesus Christ simply is for many familiar, comfortable, non-offensive and well within their comfort zone. However, others, including many Unitarians, Jews, Muslims, Quakers, Catholics and Protestants, yes, and Mormons as well, are moved not only beyond their comfort level but well over the pain threshold.

I think if students, parents and teachers were asked at school activities (even the so-called "optional" graduation exercises) to lie down on the floor and pray toward Mecca, or sit cross-legged, burn incense and chant, or possibly sacrifice small animals and recite the Lord's Prayer, backwards, the comfort zone of the "tolerant" majority might be exceeded as their personal blasphemy meters hit the red. Or perhaps Utahns could return to their roots and require graduating seniors to attend a sweat lodge ceremony before diplomas would be presented—an alternative form of baccalaureate.

_*Pass* ✓*Fail*

In summary, based on fairness, tolerance and civility, school boards should simply drop religious worship, exercise and instruction from our public schools. Failing that voluntary act, the ACLU claims for Utah teachers, parents and students their constitutional right of Freedom of Religion as guaranteed by the United States and Utah Constitutions.

Utah B.J

Commission Highlights

During its regularly scheduled meeting of April 26, 1991, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Before proceeding with the scheduled agenda, John Baldwin introduced J. Arnold Birrell to the Commission. Mr. Baldwin reported that Mr. Birrell has been hired as the Bar's new Staff Accountant and during the few weeks that Mr. Birrell has been working for the Bar, he has done an excellent job in the financial department.
2. The minutes of the March 15, 1991, meeting were reviewed and minor changes were made.
3. President-Elect Davis distributed the budget worksheet for FY- 92.
4. The Commission voted to confirm that President-Elect Davis has been authorized to negotiate mortgage loan refinancing and John Baldwin has been authorized to execute closing documents.
5. The Commission also reviewed the Deloitte & Touche audit reports.
6. President Greenwood reported on the most recent Task Force meeting.
7. During the March meeting, the Commission voted to review the following programs: LEXIS, Public Information, the Utah Bar Directory, Lawyer Referral Service, Legal/Medical Committee and Legal Economics Committee. President Greenwood indicated that a mailing would be sent out to Bar members soliciting their response to regulatory and non-regulatory functions in order to petition the Supreme Court by June 5, 1991.
8. The Commission voted six to three to continue the LEXIS Program, only if the program could be self-supporting.
9. The Commission voted unanimously to retain the Public Information Program.
10. The Commission voted to continue the Utah Bar Directory.
11. The Commission voted to terminate the Lawyer Referral Service at the end of the fiscal year, unless the Commission voted otherwise based on options to make the service self-supporting. President Greenwood appointed Commissioners Hansen, Morton and Howard to study the options in the interim.
12. After completing further study of the Lawyer Referral Service, the Commission determined to solicit lawyers to sign up for a flat $150 annual membership fee and to discontinue the $15 per referral charge. The $150 charge would be billed in conjunction with the next licensing cycle with the understanding that if there is insufficient participation by attorneys to cover costs, the money would be refunded and the service discontinued.
13. The Commission voted to retain the Legal/Medical Committee.
14. The Commission voted to discontinue the Legal Economics Committee until interest is shown by Bar members to reactivate the Committee.
15. President Greenwood distributed a current account report of the Client Security Fund for the Commission's review. She indicated that due to the amount currently in the account, Bar members would have to be assessed on the next dues statement.
16. President Greenwood reported that the Annual Meeting Awards Committee met on April 23, 1991, to make recommendations for recipients of this year's awards. After discussing the recommendations, the Commission voted to approve all but one of the recommendations made by the Awards Committee, and that approval should be deferred until the next meeting.
17. The Commission voted to make staff salaries available by position, to Bar members upon request.
18. Bar Counsel Trost indicated that upon Commission approval, he would file 501C-6 incorporation papers. The Commission authorized Mr. Trost to file the papers.
19. The Commission reviewed the current case load in the Office of Bar Counsel and the Litigation report.
20. Darla Murphy, Admissions Administrator, indicated that the examination and grading process ran smoothly and that several reappraisals were done.
21. The Commission voted to confirm that the applicants whose combined score on the full Bar examination falls in the 130 to 129 range would have their essay answer reappraised.
22. The Commission voted to adopt the new rules for the examination review and appeal procedure.
23. The Commission approved the listing of applicants indicated as passing for admittance to the Bar.
24. The Commission adopted the policy and guideline for testing disabled applicants, except the provision for English as a second language accommodation.
25. Mr. Baldwin updated the Commission on the licensing and pledge billings for the Law and Justice Center and informed the Commission that he is in regular contact with Grant Thornton and is sending the auditors financial information on a regular basis.

A full text of the minutes of this and other meetings of the Bar Commission are available for inspection at the office of the Executive Director.

Discipline Corner
MAY 1991

ADMONITIONS

An attorney was admonished for violating Rule 1.14(a) by failing to respond to his client's requests for information concerning the status of the action. The attorney was retained to pursue collection and failed to respond to his client's inquiries for a period of approximately two months.

PROBATIONS

On March 29, 1991, Richard A. Higgins was placed on probation for a period of thirty-six (36) months on condition that he pay $315,430 as restitution, that he not sell unregistered securities and that he not violate any other state or federal securities laws. On May 17, 1988, Mr. Higgins pled guilty to three counts of the offer for sale of an unregistered security in violation of 61-1- 7 U.C.A. Mr. Higgins was placed on probation under the supervision of the Adult Probation and Parole Department of the State of Utah on May 17, 1988, for a period of thirty-six (36) months. The disciplinary probation runs concurrent with that of the criminal probation. The offense was mitigated in that all of the securities work was performed by a law firm in Denver, Colorado, which was experienced in securities law. Mr. Higgins relied upon the legal opinion of that firm which declared that the securities in question could be sold without violating Utah law. Because Mr. Higgins was an attorney and president of the company, however, it was contended that he should have known that the sale of the securities was wrongful. The offense was considered more in the nature of absolute civil liability rather than a criminal offense. Further, in accepting Mr. Higgins' guilty plea, the Court ordered that the probation order should not be construed to interfere with, or cause to be revoked, Mr. Higgins' license to practice law. In addition, the events occurred in 1981 and 1982 and Respondent has no prior or subsequent discipline history.

Alternate Trial Court Judicial Nominating Commission Applicants Sought

The Board of Bar Commissioners is seeking applications from Bar members for the Bar appointments of two alternate commissioners to the Trial Court Judicial Nominating Commissions for each geographical division of the trial courts. Alternate commissioners were added to the Judicial Nominating Commissions in the 1991 legislative session, and will serve in the place of commissioners appointed by the Bar of the same political party who may become unable to serve as a result of disability, disqualification or otherwise.

Alternate commissioners shall be residents of the geographic division served by the Trial Court Nominating Commission to which they are appointed.

These nominating commissions are for the district courts, juvenile courts and the circuit courts within their geographical division. Bar appointees must be of different political parties.

Bar members who wish to be considered for these appointments must submit a letter of application, including resume and designation of political affiliation. Applications are to be mailed to John C. Baldwin, Executive Director, Utah State Bar, 645 S. 200 E., Salt Lake City, UT 84111, and must be received no later than 5:00 p.m. on August 1, 1991.

1991 Judicial Conference Of The Tenth Circuit

Come to the 1991 Judicial Conference of the Tenth Circuit in beautiful Sedona, Arizona, on July 17, 18 and 19, 1991, at the Los Abrigados Hotel. The first general session is at 1:30 p.m. on Wednesday, July 17, and the last event is a dinner dance on Friday evening, July 19, with optional tours to Grand Canyon on the following day.

The Bill of Rights and the Quality of Life of Lawyers are the two themes of the Conference. Justices Byron R. White and Sandra Day O'Connor, best-selling author Rabbi Harold Kushner *(When Bad Things Happen to Good People) and (When All You Ever Wanted Isn't Enough)*, Clarence Darrow (with actor James Lawless), Solicitor General Kenneth Starr, and leading scholars, deans and judges will capture your imagination and attention. Besides, you will receive a minimum of 10 hours of CLE credits, including ethics credits.

Bring the whole family for a vacation. Enjoy the spectacular sights of Arizona (Grand Canyon, Lake Powell, Canyon de Chelly, Petrified Forest). En route go through Utah (Bryce Canyon, Zion National Park), Colorado (Mesa Verde, Black Canyon of the Gunnison, Great Rocky Mountain National Park), New Mexico (Santa Fe, Albuquerque, Indian pueblos), continue to Las Vegas, Disneyland or San Diego's Sea World and Zoo.

A newly-featured Children's Program on Thursday morning, July 18, begins with a continental breakfast followed by a 2-hour participatory learning program on the Bill of Rights adapted for various age groups (3 to 6, 7 to 11, 12 to 17) and coordinated by experts in adolescent and children's peer interactive learning.

Lawyers and their spouses will enjoy the Wednesday evening casual outdoor reception under the trees along Oak Creek, followed by "The Art of Sedona" (brief talks and a display by local artists and galleries) a few steps away in the Las Abrigados ballroom. Thursday brings the Spouses' Breakfast at the Creek featuring a colorful account of the unique features and history of Sedona, the Conference Luncheon featuring Justice O'Connor, and a free afternoon and evening for golf, tennis and recreation. Friday's State Luncheons give you a chance to break bread with the lawyers and federal judges of your state. Climax of the Conference is the reception and dinner dance featuring a presentation by the famous Clarence Darrow and a broad array of danceable music.

Don't miss this opportunity in a single trip to combine legal learning, CLE credit, travel beauty, family togetherness, fun for your youngsters, culture, relaxation, mixing with your friends and peers and meeting new friends, and meeting and hearing from two Supreme Court Justices and some of the nation's top deans, law professors, and federal and state judges.

Summer On-Site Blood Drive

The Summer on-site blood drive of the Young Lawyers Section of the Utah State Bar will be held on Tuesday, July 2, 1991, from 10:00 a.m. until 3:00 p.m. on the ground floor of the Newhouse Building, 10 Exchange Place (360 S. State Street) in the former thrift office space.

This on-site blood drive will kick off the Summer Blood Drive of the Young Lawyer Section and targets the major law firms in the south half of downtown Salt Lake City. If unable to donate on July 2, members of the legal community are encouraged to donate during that week as part of the Young Lawyers Section's Annual Blood Drive.

"The Young Lawyers Section's first on-site blood drive this winter was very successful. In July, we hope to match the 55 units of blood that were donated in January," stated Brian M. Barnard, Blood Drive Committee Member.

Each major law firm in Salt Lake City will have a representative contacting staff and attorneys to answer questions and to sign up donors for specific donation times.

If you are interested in serving as the contact person in your law firm, or interested in signing up to donate, please contact a blood drive committee member, Jim Haisley at 328-6000, Brian Barnard at 328-9532, or Cy Castle at 532-1234.

Utah Code of Judicial Administration Rule 4-504(6)

Rule 4-504(6), Utah Code of Judicial Administration, specifies that "Except where otherwise ordered, all judgments and decrees shall contain the address of the last known address of the judgment debtor and the social security number of the judgment debtor if known." The courts request cooperation from members of the Bar in complying with this rule to assist in the effective operation of post-judgment activities and records management.

Celebrating the Bill of Rights Bicentennial in Utah

By Keith A. Kelly

The Utah State Bar has been active in commemorating the Bill of Rights ratification. Coordinating with many community organizations, the Bar has focused on raising public awareness about the Bill of Rights. The following are examples of ongoing commemoration efforts:

School Education Programs. With a major grant from the Utah Bar Foundation, the Young Lawyers Section has assisted in bringing Bill of Rights education to the classroom. Under the leadership of Michelle Mitchell, a committee has prepared and presented packets of teaching materials to over 300 intermediate and secondary social studies teachers throughout the state. The materials create hypothetical town meetings, school board meetings and trials in which participants discuss issues related to the Bill of Rights. The Committee has trained teachers to use the materials through a statewide closed-circuit television broadcast and through a training video. The Young Lawyers' Law Related Education Committee has assisted teachers in implementing this program in the classroom.

Coordinating with the Utah Lawyers for the Arts, the Attorney General, the Utah Legal Clinic and the ACLU, the Young Lawyers' Section has sponsored an essay and poster contest. For children from elementary, intermediate and secondary schools, the contest sought essays and posters on the theme: "America Without the Bill of Rights." At the same time, the Law Related Education Committee produced this year's mock trial competition, which featured litigation concerning Bill of Rights issues. The winners of these competitions received their awards at a May 1 ceremony.

Post-Secondary and Community Education. Working with the Utah Humanities Council and the Governor's Council on the Bill of Rights, the Young Lawyers Sections produced a major conference for community leaders and educators about Bicentennial programs and projects. Held on February 1, the conference featured columnist Jack Anderson as a keynote speaker, along with a panel discussion on the Bill of Rights consisting of President Rex Lee, Judge Monroe McKay, Judge Judith Billings, U.S. Attorney Dee Benson and Professor Michael Gerhardt. Another conference is being planned for this fall.

With support from the Utah Humanities Council and the American Bar Association, the Young Lawyers Section is sponsoring a speakers' bureau featuring distinguished lawyers, professors and judges who are willing to speak to community groups about the Bill of Rights.

Commemorative Activities. The Bar had a role in securing the passage of a legislative resolution commemorating the Bicentennial. In addition, the Young Lawyers Section has been working with the Utah Symphony to present a special Bicentennial concert in early December celebrating the Bill of Rights. A special commemorative symphony is being composed for the occasion.

Other activities are being planned for this fall in conjunction with press, political and community organizations. If you are interested in participating in any of these activities, please call Keith Kelly, Chairperson of the Young Lawyers Bill of Rights Bicentennial Committee, at (801) 532-1500. In addition, educational and resource materials dealing with the Bicentennial can be obtained through the Utah Humanities Council at (801) 531-7868 or from the Commission on the Bicentennial of the United States Constitution at (202) USA-1787.

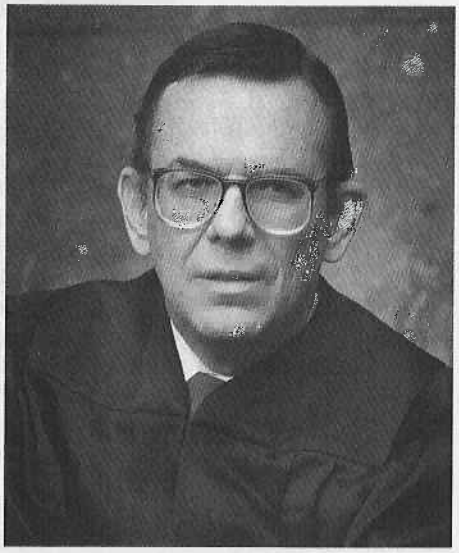
Bill Of Rights BICENTENNIAL

The Bill of Rights: A Promise Fulfilled in the 20th Century

*By Justice I. Daniel Stewart**

Although 1991 marks the 200th anniversary of the adoption of the Bill of Rights, the application of those rights to governmental action, both state and federal is a relatively recent phenomenon. Adopted by the states in the 18th century as amendments to the United States Constitution, the Bill of Rights had little effect in the lives of most Americans until well into the 20th century. After ratification in 1791, the provisions of the first eight amendments were all but irrelevant to the ordinary citizen and to society generally for the next century and more. Today, as a nation, we are preoccupied by such issues as freedom of speech, search and seizure, abortion and separation of church and state. The underlying principles on which such issues turn are now widely accepted as vital to our way of life and to our concept of freedom. Indeed, it can be said that to a significant extent, the Bill of Rights has come to symbolize throughout the world what this nation stands for.

That, however, has not always been the case. How is it that it was not until almost the middle of the 20th century that the Bill of Rights became a vital part of our law, limiting all governmental action, both state and federal? To answer this question, we must begin with the events of the Revolution and the Constitutional Convention in 1787, and then turn to the Civil War and the decisions of the United States Supreme Court in the 20th century. As with most major developments in constitutional law, the ultimate victory for civil liberties was accomplished with considerable controversy, a controversy that still continues today, but in a much abated form.[1]



JUSTICE I. DANIEL STEWART was appointed to the Utah Supreme Court in January 1979 by Gov. Scott M. Matheson. he served as Associate Chief Justice from 1986 to 1988. Prior to his appointment to the bench, Justice Stewart was a partner in the law firm of Jones, Waldo, Holbrook & McDonough in Salt Lake City. From 1965 to 1970 he was an associate professor of law at the University of Utah. He is a liaison to the Supreme Court Committee on Rules of Evidence. He was named Appellate Court Judge of the Year in 1986 by the Utah State Bar and Alumnus of the Year in 1989 by the University of Utah College of Law.

In words that have inspired people the world over, the Declaration of Independence articulated the basic concepts of inalienable liberties and the proper relationship of government to the people. Those propositions are essential philosophical underpinnings of the Bill of Rights: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights . . . That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." The blazing words of the Declaration were not propaganda, although they served as a banner for the Revolution. More importantly, they encapsulated basic truths about the nature of man and his proper relationship to the state and have inspired people to lay their lives on the line for freedom, not only in the 18th century, but also since then.

The Declaration is not, however, a legal document; it established no legal rights and did not purport to limit the power of any government. The transformation from a philosophical statement of beliefs about the nature of man and the state into law was a long, arduous, and highly problematic task.

Curiously, the Constitutional Convention of 1787 did not seek to guarantee any fundamental rights or liberties, even though there were many that had established roots in English common law, except to the extent that the Constitution banned bills of attainder and *ex post facto* laws and preserved the Great Writ—the writ of habeas corpus. The framers believed that individual rights and liberties would be adequately protected by state constitutions and the concept of limited, delegated powers in the Federal Constitution.

At the onset of revolution, a number of former colonies adopted written constitutions, South Carolina being the first. Virginia, in 1776, was the first state to adopt a declaration of rights, and it was written almost entirely by George Mason. Later, in

the Federal Constitutional Convention, his proposal to adopt a declaration of rights as part of the proposed Constitution failed to garner the vote of a single state delegation, not even his home state of Virginia.[2]

From today's perspective, if not from the perspective of 1787, it is acutely ironic that the Constitutional Convention of 1787 did not adopt a declaration of rights in the proposed constitution. The rights that the people of that time deemed essential were generally a matter of widespread acceptance. After all, British violations of the legal rights that the colonists claimed under the common law as Englishmen had been the source of much revolutionary ferment. Other rights rested on a consensus that grew out of common disapprobation of perceived British abuses in the colonies since 1760.

After the convention proposed the Constitution for ratification by the states, a number of the leading participants in the convention, in arguing for ratification, contended that a bill of rights was not necessary, and was even quite inappropriate. Alexander Hamilton, James Wilson, Roger Sherman and others declared that a bill of rights was unnecessary. Dr. Benjamin Rush told the Pennsylvania convention for ratification that he "considered it an honor to the late convention that this system has not been disgraced with the Bill of Rights. Would it not be absurd to frame a formal declaration that our natural rights are acquired from ourselves?"[3] A more startling justification for the omission was offered by General Charles Cotesworth Pinckney of South Carolina, when he told that state's legislature that bills of rights "generally begin with declaring that all men are, by nature, born free. Now, we should make that declaration with a very bad grace, when a large part of our property consists in men who are actually born slaves."[4] Alexander Hamilton even argued against a bill of rights on the grounds that it could be the basis for expanding the powers of the federal government because the limitations of power in a bill of rights could be argued to presuppose the existence of an affirmative power in the government.

The framers apparently thought that the confinement of federal powers to those expressly delegated, and the further limitation of governmental power by the doctrine of separation of powers, would make it impossible for the national government to transgress the rights of the people. According to Catherine Drinker Bowen, "The framers looked upon the Constitution as a bill of rights in itself; all its provisions were for a free people and a people responsible. Why, therefore, enumerate the things that Congress must not do?"[5]

Thomas Jefferson and the anti-Federalists certainly thought otherwise, as did the people of the states and those who represented them in the state conventions that ratified the proposed Constitution. Indeed, the people were adamant that a bill of rights be added to the Constitution, and the people prevailed.

The new government was built squarely on a paradox. On the one hand, government—by the consent of the people—essentially meant representative democracy and rested on the principle of majoritarian rule, although limited in certain respects. On the other, the concept of "inalienable rights" presupposed rights rooted in the very nature of mankind and not subject to majoritarian rule. Without the limitations of a bill of rights on majoritarian rule, the power of the majority would have been irresistible, and individual liberties would have almost inevitably receded before the "greater good" of majoritarian interests. Therein lie the seeds of the ominous "tyranny of the majority."

"From today's perspective, . . .it is acutely ironic that the Constitutional Convention of 1787 did not adopt a declaration of rights. . ."

In retrospect, the conclusion is inescapable that the absence of a bill of rights limiting the power of the federal government would have been a singularly unfortunate omission of truly historic dimensions for the protection of civil liberties in this nation and for the cause of human rights throughout the world. The notion that the liberties of the people would have been adequately protected from violation by the federal government by the principles of limited government and delegated powers was an illusion. The provisions of the Constitution delegating powers to Congress and the President were intended to allow the government to adapt to changing times, and no one could have foreseen that in the succeeding two centuries, federal power would grow to such an extent that the absence of a bill of rights limiting federal power would be all but unthinkable.

Furthermore, the states were certainly not vigilant protectors of individual liberties. The cause of civil liberties lay largely moribund for the first hundred and more years of this history of the country. The 19th century and the first part of the 20th century are characterized far more by the abuse of civil liberties in the states than by their protection. In 1833, the Supreme Court ruled in *Barron v. Baltimore* that the first eight amendments to the Constitution were restrictions only on the federal government and not the states.[6] The protection of civil rights was left to state enforcement of state constitutional provisions, and the record of the 19th century is not a high point for individual liberties. The nation was, of course, preoccupied with the most profound denial of civil liberty of all—slavery. In the years preceding the Civil War, most southern states passed laws severely restricting anti-slavery speech.[7] With exception of Kentucky, every southern state passed laws during the 19th century which controlled speech, discussion and the press. In 1837, an Alabama court held that any person "who shall proclaim to our slaves the doctrine of universal emancipation . . . (is) subject to criminal justice." The Virginia Code of 1849 provided for imprisonment of up to one year and a fine of up to $500 for any person who "by speaking or writing maintains that owners have no right of property in salves." Louisiana provided a penalty of from 21 years at hard labor to death for any conversation "having a tendency to promote discontent among free colored people, or insubordination among slaves."[8]

According to one historian,

> From 1828 to 1855, and especially from 1833 to 1843, came a veritable mob era. The masses, charmed by this idea of the rule of the people, were convinced that it made small difference whether you downed the minority by ballots or by brick-bats, which they understood better. This form of tyranny by majority had not been anticipated by the statesmen who expected the colder process of voting down the minority to prevail over the warmer sport of killing them . . . There was an ardent "nativism," by citizens who had themselves but yesterday come from foreign shores. There was an almost

inexplicable dread of secret political or religious organizations, expressed in crusades against the Masons, Catholics and Mormons."[9]

Even well into the 20th century, mob lynchings, sham trials, especially of blacks, coerced confessions and other gross violations of procedural and substantive liberties were frequent occurrences.

Following the Civil War, the passage of the 13th, 14th, and 15th Amendments provided a new opportunity to address the place of "inalienable rights" in the life of the nation. The 14th Amendment provided, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." If the "privileges or immunities of citizens of the United States" included the rights protected by the Bill or Rights, those rights would be protected from state infringement. However, in the *Slaughter-House Cases*,[10] the Supreme Court held that the privileges and immunities clause did not incorporate the first eight amendments to the United States Constitution. As Justice Field stated in dissent, this interpretation made the passage of the privileges and immunities clause "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people."[11]

The Supreme Court eventually looked to the due process clause of the 14th Amendment to limit state abuses of fundamental liberties, but the change was not easily made. For example, in *Spies v. Illinois*,[12] eight anarchists were convicted of murder on the grounds that their speeches and publications had incited an unknown person to throw a bomb which killed eight policemen in Haymarket Square, Chicago. The Supreme Court dismissed a petition for writ of error in which the petitioners alleged that an Illinois aiding and abetting statute violated their due process rights (as well as their privileges and immunities) under the 14th Amendment. Of the eight convicted men, four were hanged, one committed suicide, and the other three were pardoned by the governor of Illinois three years later.[13]

The first cases finding violations of the 14th Amendment due process clause paradoxically dealt principally with economics. The Supreme Court ruled that state economic regulation interfering with an individual's liberty of contract was a violation of 14th Amendment due process.[14] These cases relied on general notions of "liberty" rather than on any provision in the Bill of Rights. In *Twining v. New Jersey*,[15] however, the Court conceded that "it is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process." This statement commenced an ongoing debate with respect to whether various provisions of the first eight Amendments should be incorporated into the due process clause of the 14th Amendment and be held enforceable against the states. Only those amendments "found to be implicit in the concept of ordered liberty" would be incorporated.

Although not commanding a majority position, some members of the Court disagreed with the notion of selective incorporation and argued for a total incorporation of the Bill of Rights into the 14th Amendment. Dissenting in *Adamson v. California*,[16] Justice Black stated:

> I cannot consider the Bill of Rights to be an outworn 18th century "straight jacket" as the Twining opinion did. Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgment, the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old as well as new devices and practices which might thwart those purposes. I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights.

"The Supreme Court has held that most of the provisions of the Bill of Rights . . .are enforceable against the states."

Arguing for "selective incorporation," Justice Frankfurter responded: "Some are in and some are out, but we are left in the dark as to which are in and which are out. Nor are we given the calculus for determining which go in and which stay out."[17] The test of incorporation became what is "fundamental to the American scheme of justice."[18] On this analysis, the Supreme Court has held that most of the provisions of the Bill of Rights have been incorporated into the due process clause of the 14th Amendment and are enforceable against the states. It has only been in recent years, then, that the promise of legal protection for inalienable liberties and fundamental rights has come to fruition. Now the law stands as a barrier to both state and federal abuse of those core elements of individual freedom.

The Bill of Rights has had a major impact on the quality of American life, more now than at any time in our nation's history. As Justice Brandeis stated:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.[19]

The experience of the centuries is that the fundamental rights and liberties of mankind are not well protected either by the grace of rulers or by unrestrained majorities. Judge Learned Hand has asserted that without a widespread commitment to liberty among the population as a whole, the rights of the people cannot be protected by the courts. He wrote:

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.[20]

Judge Hand was, I believe, correct. When the spirit of liberty truly does die in the hearts of men and women. In a more immediate sense, however, the law—and the Bill of Rights in particular—as enforced by the courts, has a great teaching function. The Bill of Rights informs, teaches and reminds the people that our society grew out of the commitment of our ancestors to individual liberties. Indeed, the Bill of Rights is itself instrumental in instilling liberty "in the hearts of men and women." I have no doubt that, but for the Bill of Rights, we, as a people, would be far less committed to upholding the liberties of others, especially when that is against our own immediate personal self-interest.

For the most part, we fight today not over fundamental principles, but rather over how far those principles should be extended. The mere existence of the dispute itself has an educational function. It causes those who engage in the argument to rethink and recommit to the basic principle involved and to assess again the appropriate meaning and application of that principle in a given circumstance. In doing so, we rekindle our dedication to the underlying principles of our society. A ruling that may be highly controversial and excite much contention in its day may become an excepted truism in a later generation. However, even if it does not, and it remains controversial, the cause of liberty still wins. Today we fight about whether prayer should be permitted at high school graduations, and whether burning the flag in protest to some policy should be protected. The arguments, although sharp, are not about whether there should be freedom of speech or religion. We, in fact, agree on the basic premises. That, I believe, is humble progress.

Perhaps the courts do not always reach the right or best results, but no one can reasonably deny that they provide a forum for making issues concerning the application of fundamental liberties a key part of our national agenda for us and every succeeding generation.

* Grateful appreciation is expressed by the author for the assistance of his law clerk, David E. Sloan, in the preparation of this article.

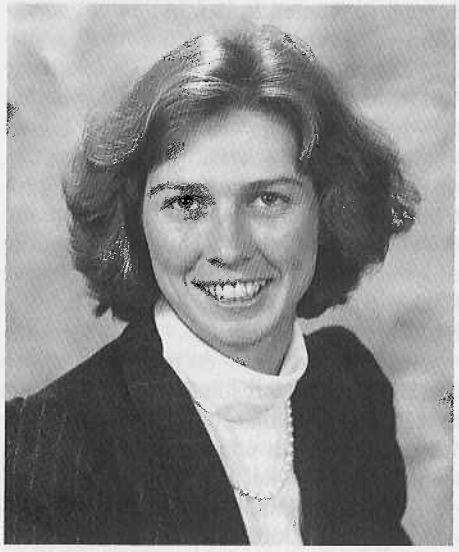
1. *See* Rice, *Book Review*, 1990 B.Y.U. L. Rev. 673 (reviewing R. Berger, *The Fourteenth Amendment and The Bill of Rights* (1989)).
2. C. Collier & J. Collier, *Decision in Philadelphia* 338-39 (1986).
3. C. Bowen, *Miracle at Philadelphia*, 247 (1966).
4. *Id.*
5. *Id.* at 248.
6. 7 Pet. 243, 8 L. Ed. 672 (1833).
7. Nye, *Fettered Freedom: Civil Liberties and the Slavery Controversy 1830-1860* 174-77 (rev. ed. 1963), *quoted in* T. Emerson, D. Haber and N. Dorsen, *Political and Civil Rights in the United States* 42 (1967).
8. *Id.*
9. Whipple, *The Story of Civil Liberty in the United States* 51 (1927), *quoted in* T. Emerson, D. Haber and N. Dorsen, *Political and Civil Rights in the United States* 40 (1967).
10. 83 U.S. (16 Wall.) 36, 21 L. Ed. 394 (1873).
11. 21 L. Ed. at 415.
12. 123 U.S. 131 (1887).
13. T. Emerson, D. Haber and N. Dorsen, *Political and Civil Rights in the United States* 49 n.1 (1967).
14. *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905); *Allgever v. Louisiana*, 65 U.S. 578 (1897).
15. 211 U.S. 78, 99 (1908).
16. 332 U.S. 46, 89 (1947).
17. *Id.* at 65 (Frankfurter, J., concurring).
18. *Cf. Duncan v. Louisiana*, 391 U.S. 145 (1968); *Palko v. Connecticut*, 302 U.S. 319 (1937).
19. *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting).
20. *The Spirit of Liberty, Papers and Addresses of Learned Hand*, 144 (I. Dilliard ed. 1959).

Be Positive About Your Profession

By Charlotte L. Miller, President-Elect
Young Lawyers Section

During the last several months, numerous young lawyers visited schools to talk about the Bill of Rights, drugs, the legal profession, capital punishment, school prayer, flag burning and a variety of other topics. Almost every, if not every, teacher's request to have a lawyer participate in a class was filled. The response of the teachers and students to the lawyers' contributions indicated that the lawyers did far more than show up. They provided projects, materials and lively discussions. Placing lawyers in the schools was one of the many Law Day projects. Young lawyers also appeared on radio programs and at shopping malls to answer questions about the legal system, they wrote articles for publications, participated in the State Mock Trial Program and organized a multitude of activities to celebrate Law Day.

One of the best aspects of Law Day is that it helps lawyers be more positive about their profession. We worry a lot these days about our public image. We are



told to do a variety of activities to improve our public image—public service, pro bono work, etc. We should probably do those things regardless of how it affects our public image. If we are doing something wrong in the profession that creates a negative public image, our good deeds will not erase the wrong to fix the public image.

Often, we are own worst enemies in creating a negative public image. We complain about lawyers, the practice of law, clients, judges, high billable hours or low pay, etc. We seem to have developed a mentality that it is not "cool" to like being a lawyer. Instead, it is something we suffer through. We often praise the other profession for which we yearn: business owner, teacher, journalist, doctor, scientist, ski instructor. Most lawyers came from another profession. Maybe we are the ultimate sufferers of the "grass is always greener" syndrome. Once in a while (preferably more than once a year, but of course not so often that it becomes habitual), we should think about and possibly even say aloud to someone else what we like about being lawyers. After all, we get to meet people, solve problems, read stories, write our own stories, strategize, philosophize, educate, act, create theories and advise people on how to deal with their family, friends, business associates, money, etc. It does not sound like such a bad job. Certainly many things about the legal system need to be improved, but if we enjoy nothing about the practice of law, it will be difficult to find the energy and desire to improve the profession.

We should thank all the lawyers who helped make Law Day a success, and we should not wait until the next Law Day to find something about our profession we like.

Young Lawyer Receives First Scott M. Matheson Award

Governor Bangerter presented the first Scott M. Matheson Award to Gregory G. Skordas in the Capitol Rotunda on Law Day, May 1, 1991. The award recognizes the contributions of a lawyer to education. Mr. Skordas' contributions include coaching, training and writing for the Utah State Mock Trial competition, presenting drug abuse workshops at various Utah public schools, serving as a mentor for over 20 high school interns and 80 law school interns over the past six years, and being named the Teacher of the Year at Salt Lake Community College. Mr. Skordas is a prosecutor at the Salt Lake County Attorney's Office and is active in the Young Lawyers and Criminal Law Sections of the Utah State Bar. He also serves as a Bar examiner and on a lawyer disciplinary panel.

Believing in the Bill of Rights

*By Keith A. Kelly**

A case in point. A few months ago, a lawyer met with some educators to present a Bill of Rights education program. The program encourages high school students to discuss differing personal views on issues like flag burning, "hate" speech, student locker searches and censorship.

When presented with the program, a skeptical educator remarked: "You'd really have to *believe* in the Bill of Rights to want to expose kids to that kind of program."

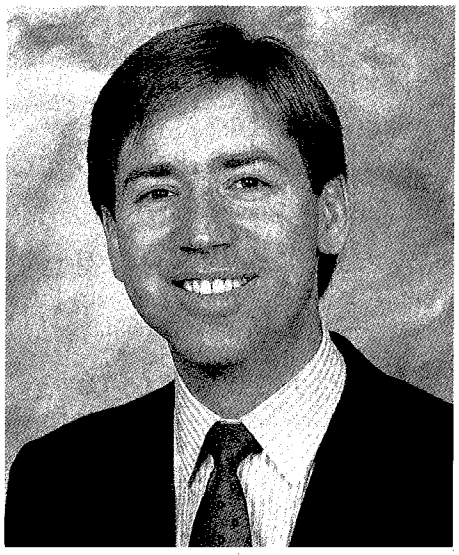
Another case in point. At last year's Salt Lake County Republican Convention, the delegates had passed a platform statement encouraging vigorous law enforcement and prosecution of drug dealers. A woman stood to offer an amendment to the statement qualifying that enforcement should occur with due "protection of constitutional rights.."

Despite support from me and many other delegates, the amendment was defeated on a voice vote.

Bicentennial focus. Both cases illustrate why public education has been a focus of the Bar's Bill of Rights Bicentennial programs. The skeptical educator probably *believed* in the Bill of Rights as much as the lawyer presenting the Bicentennial school program. The educator undoubtedly treasured his freedoms of speech, expression and religion. If reminded, he would recall that his ancestors were likely oppressed by the denial of those freedoms. But he may have forgotten that protection of those rights demands that people have the freedom to express disparate points of view and to seek redress in the courts.

Likewise, I am sure the Republican delegates at the Salt Lake Convention treasured the Bill of Rights. As active participants in the political process, they were exercising rights of assembly and speech. The Salt Lake delegates had some love of freedom as delegates to the Constitution ratification conventions 200 years earlier, where a Bill of Rights was made an implicit condition for acceptance of the newly drafted Constitution. But for too many of the Salt Lake delegates, "protection of Constitutional rights" apparently connoted legal technicalities, delays in justice and unpunished criminals. So they rejected the statement calling for protection of constitutional rights.

As both cases illustrate, a love of the freedoms underlying the Bill of Rights does not always translate into an appreciation for how those freedoms are protected today.



KEITH A. KELLY is a shareholder of Ray, Quinney & Nebeker. He received his J.D. from Stanford Law School, where he was a note editor of the Stanford Law Review. *He received his B.A., summa cum laude, and M.A. in Economics from Brigham Young University. He served as a judicial clerk to the Honorable Monroe G. McKay. He is the Chairperson of the Bill of Rights Bicentennial Committee of the Young Lawyers Section of the Utah State Bar, and the Co-Chairperson of the Utah Council on the U.S. Constitution and the Bill of Rights. He is the 1991-92 president-elect of the Young Lawyers Section.*

This point was emphasized to me my first year out of law school. When people I met found out that I had just graduated, they often asked for my opinions about our legal system. They most commonly raised questions about the infamous Hi-Fi murder case, which by then had been in the courts for about a decade. Like those people, I was sickened by that crime. In response to their questions, I sympathized with their concerns about delays in the legal system and gave a general explanation about appellate review.

But a few months later, while clerking for a United States Tenth Circuit Court of Appeals judge, I found that he was called to rule on one of the Hi-Fi murder appeals. While I did not directly assist on that case, I became aware of some of the challenging legal issues involved and the important precedential effect that the case might have. My experience reinforced for me the delicate balance between protecting constitutional rights and obtaining speedy justice. I finished my clerkship with an enhanced appreciation of how the judicial system works to achieve that balance.

My experiences are not unique. The Utah State Bar is made up of people who carry a great weight of collective wisdom about the Bill of Rights. Through our representation of individuals, the principles enunciated in the Bill of Rights are shaped into decisions that affect our lives.

During the Bicentennial year, we as lawyers can help translate Utahns' inner belief in their rights into an appreciation for the judicial process that has attempted to preserve those rights for nearly 200 years. We can become involved in Bar-sponsored, community-sponsored or personally initiated Bicentennial educational efforts. Our efforts will not eliminate divisive points of view about issues like abortion, public prayer or even double bunking—nor should we attempt such an effort. But we can help Utahns understand the importance of having those issues fairly and rationally adjudicated. In the end, increased public understanding about our legal system will promote the freedoms stated in the Bill of Rights.

Biennial Judicial Performance Survey

The Utah Judicial Council announces its biennial judicial performance survey of the Bar. It will be conducted the middle of September this year and will include more than half of the attorneys in the state who have practiced before judges of courts of record at all levels during the past two years, including the appellate courts. The survey, conducted by Dan Jones and Associates, will include all judges as was done in 1989 and for the first time, will include Commissioners. Portions of the survey results will be used by the Judicial Council to determine the certification of 19 of these judges who will be standing for retention election in Nov. 1992. Look for more details in the next *Bar Journal.*

CLE CALENDAR

NOTE Now available, thanks to the incredible efforts of the Litigation Section, are draft copies of the new "Model Utah Jury Instructions," or MUJI. Copies of MUJI were given to the state judges who will begin using them. To order a copy for review and comments, please contact Kelli Suitter at the Bar at (801) 531- 9077. Copies are priced at $75 and are quite extensive.

1991 UTAH STATE BAR ANNUAL MEETING

This year's program provides an excellent opportunity for CLE combined with a scenic vacation and warm social gatherings. The keynote speakers for the meeting are Hon. J. Clifford Wallace, U.S. Court of Appeals, 9th Circuit, and Jack Anderson, syndicated columnist. In addition, a variety of other CLE topics will be offered, rounding out the program. For registration information, contact the Bar offices.

Date: July 3-6, 1991
Place: Sun Valley, Idaho

CLE BY THE SEA

This program is being sponsored by the State Bar of Arizona in conjunction with the Colorado, New Mexico and Utah State Bars and their respective Environmental and Natural Resource sections. This four-day program will run mornings only, leaving afternoons to enjoy the beauty of San Diego and the sea. The topics for this program will cover environmental law and trial practice. The site for this program is the Hotel Del Coronado, the last of the grand seaside resorts. More information will be forthcoming on this program. For further information now, contact Brenda McDaniels at (602) 252-4804.

CLE Credit: 15 Hours (approx.)
Date: July 17-21, 1991
Place: Hotel Del Coronado, San Diego, Calif.

THE WHITE AND CLARK ANNUAL REVIEW: REPRESENTING BANKS IN COMMERCIAL LAW CASES

A live via satellite seminar. This seminar is designed for attorneys who represent banks. It will also be helpful to lawyers who find themselves in commercial litigation representing other parties where liabilities are associated with the transfer of checks, electronic transfers, or bank setoff. In addition, the program will cover the related and equally troubling difficulties associated with setoff, with check kiting, and the new problems in commercial and standby letters of credit.

CLE Credit: 6.5 hours
Date: July 23, 1991
Place: Utah Law and Justice Center
Fee: $185 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 3:00 p.m.

PRACTICE SKILLS TO INCREASE BOTTOM LINE RESULTS USING TECHNOLOGY AND SYSTEMS TO IMPROVE LAW FIRM PRODUCTIVITY AND PROFITS IN A CHANGING WORLD

A live via satellite seminar. Any lawyer from any size firm with any type of practice can increase their personal, departmental and firm productivity and profit. A lawyer with any type of practice will benefit from attending and learning, and can take that information back to the firm to share with others, increasing their productivity, too.

CLE Credit: 6.5 hours
Date: August 20, 1991
Place: Utah Law and Justice Center
Fee: $185 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 3:00 p.m.

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A live via satellite seminar.
CLE Credit: 6.5 hours
Date: September 17, 1991
Place: Utah Law and Justice Center

COUNSELING SMALL BUSINESS OWNERS ON DEATH, DISABILITY, DIVORCE AND DISAGREEMENT

A live via satellite seminar.
CLE Credit: 6.5 hours
Date: September 24, 1991
Place: Utah Law and Justice Center

AUTOMATING THE DRAFTING OF WILLS AND TRUST AGREEMENTS

A live via satellite seminar.
CLE Credit: 6.5 hours
Date: September 25, 1991
Place: Utah Law and Justice Center

BUYING AND TRADING CLAIMS

A live via satellite seminar presented by the Commercial Law League.
CLE Credit: 6.5 hours
Date: October 8, 1991
Place: Utah Law and Justice Center

ENHANCING LAWYERING SKILLS —A CRITICAL PATH TO BUILDING YOUR PRACTICE AND CLIENT RELATIONS

A live via satellite seminar.
CLE Credit: 6.5 hours
Date: October 15, 1991
Place: Utah Law and Justice Center

ASSET PROTECTION PLANNING

A live via satellite seminar.
CLE Credit: 6.5 hours
Date: October 22, 1991
Place: Utah Law and Justice Center

DEVELOPMENTS IN TRUSTS AND ESTATES

A live via satellite seminar presented by New York University.
CLE Credit: 6.5 hours
Date: October 15, 1991
Place: Utah Law and Justice Center

THE MILD TO MODERATE BRAIN INJURY CASE: WHAT THE ATTORNEY NEEDS TO KNOW

Date: November 7-8, 1991
Place: Utah Law and Justice Center

CLE REGISTRATION FORM

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Please send in your registration with payment to: Utah State Bar, CLE Department, 645 S. 200 E., Salt Lake City, UT 84111.

The Bar and the Continuing Legal Education Department are working with Sections to provide a full complement of live seminars in 1991. Watch for future mailings.

Registration and Cancellation Policies: Please register in advance, as registrations are taken on a space-available basis. Those who register at the door are welcome but cannot always be guaranteed entrance or materials on the seminar day. If you cannot attend a seminar for which you have registered, please contact the Bar as far in advance as possible. No refunds will be made for live programs unless notification of cancellation is received at least 48 hours in advance.

NOTE: It is the responsibility of each attorney to maintain records of his or her attendance at seminars for purposes of the two-year CLE reporting period required by the Utah Mandatory CLE Board.

CLASSIFIED ADS

For information regarding classified advertising, please contact Kelli Suitter at 531-9095.

BOOKS FOR SALE

ALR, ALR 2nd, ALR 3rd, ALR 4th, ALR Federal, U.S.C.A., Words and Phrases, C.J.S., Am Jur 2nd, Am Jur Pleading and Practice Forms, Am Jur POF, Am Jur POF 2nd, Pacific Reporter, Pacific Reporter 2nd, West's Pacific Digest, Shepard's Citations (Pacific, Utah), Bender's Federal Practice Forms, Moore's Federal Practice, Current Legal Forms, Utah Law Review, Brady on Bank Checks, UCC Reporting Service, The Law of Letters of Credit, Summary of Utah Real Property Law, Federal Banking Law Reporter, Modern Banking Forms. Contact Chou Chou Collins at (801) 532-1234.

INFORMATION NEEDED

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Small Salt Lake City firm with general commercial and corporate practice seeking one or two attorneys with experience and client base in the areas of domestic relations, tax, real estate, estate planning, or commercial law to associate in office sharing or more formal arrangement. Located in attractive downtown space. Office equipment, reception and secretarial services available. Send inquiries to Utah State Bar, Box K, 645 S. 200 E., Salt Lake City, UT 84111.

Deluxe office space for one attorney and secretary. 4212 Highland Drive. Office share with two attorneys. Conference room and convenient parking. Call (801) 272-1013.

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Beautiful office space available within suite occupied by existing law firm in the Brickyard Tower (3130 S. 1245 E.). Support available including reception, secretarial, copy, FAX, telephone and library. Ten minutes from State and Federal Courts. For more information, contact Mary at (801) 484-3000.

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Staff attorney interested in advancing the rights of people with disabilities. Litigation experience preferred. Submit resume and brief narrative or personal motivation for seeking the position to: Legal Center for People with Disabilities, 455 E. 400 S., Suite 201, Salt Lake City, UT 84111. An equal opportunity employer.

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Experienced litigator and bankruptcy attorney (specifically Chapter 11, business reorganizations) seeking similar practice with a Salt Lake City law firm. Plethora of experience in business litigation, bankruptcy litigation, bankruptcy appeals and bankruptcy reorganizations. Also experienced in environmental and administrative law. Contact Mr. Drake at P.O. Box 3825, Phoenix, AZ 85030 or (818) 713-0102, (602) 864-0058 or digital pager (602) 498-6389. Member of Utah, Arizona and Idaho Bar Associations.

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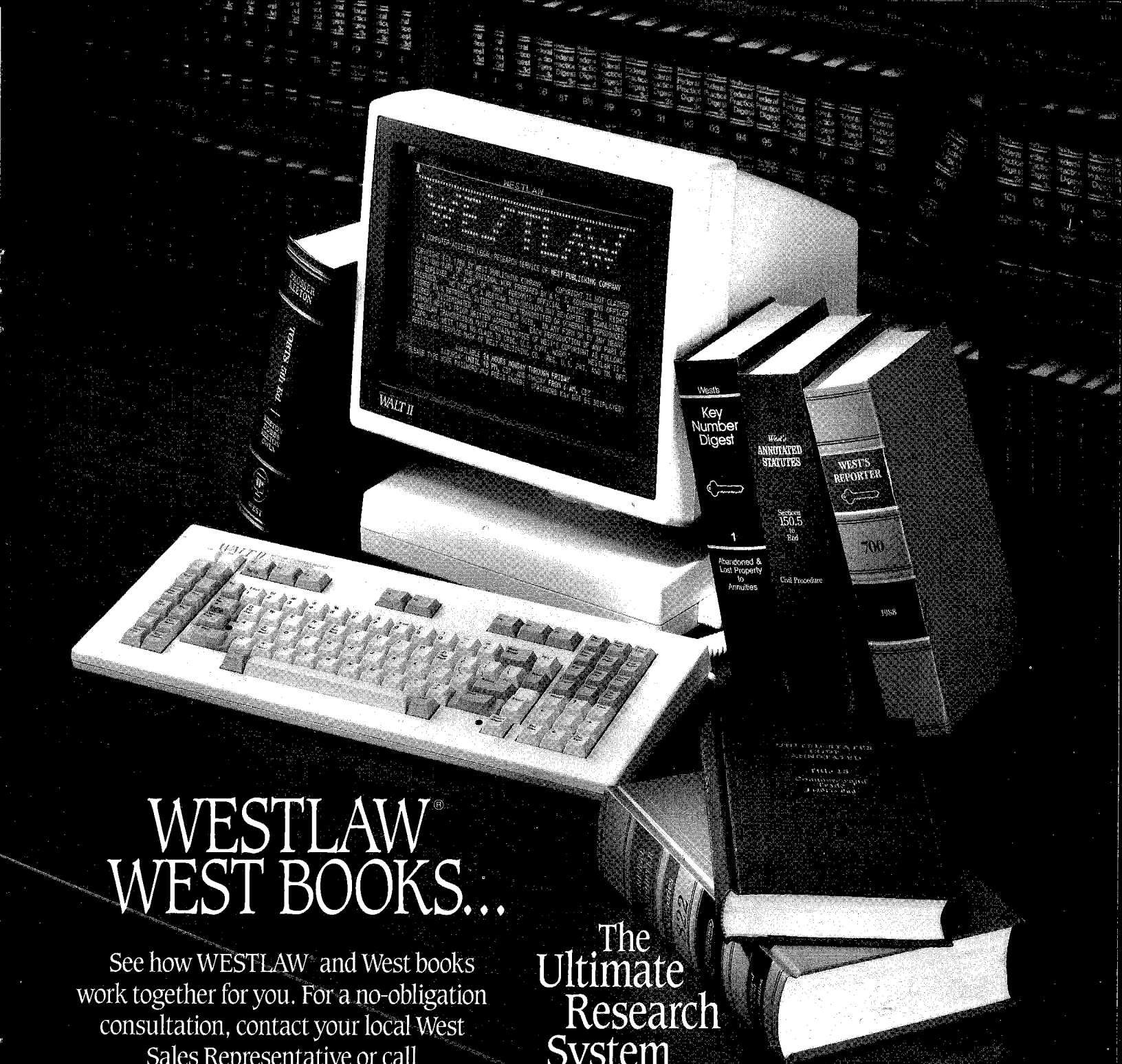

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