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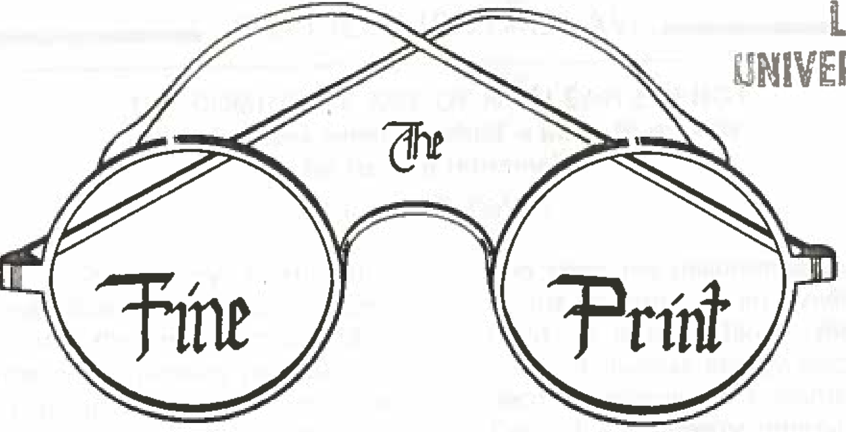

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SERVING THE PRESIDENT

Charles H. Kirbo, Esq.

My relationship with President Carter has developed over nearly a 20 year period and a variety of events, including victories and defeats. As I was always a volunteer and in varying roles, I never earned a title. After he was elected President, the media adopted the title of "presidential advisor" because they never fully understood my role.

Mainly it is a personal relationship growing out of the confidence we have in each other. The President's aspirations for the people of Georgia and later the nation were in keeping with my views, but it was beyond my dreams that I would have any part or service in fulfilling these aspirations.

My duties were never described but I did what the President asked me to do or what I felt I should do in any area. Often it had to do with personnel and usually on a high level. I had learned early the scarcity of competent people who were willing or able to make financial sacrifices and serve in the government on tough problems. I constantly looked for and noted such people.

Mainly I worked with the staff in many different ways and tried to help solve problems or conclude matters without troubling the President.

The relationship is much like the attorney-client relationship as much of the duties

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A BALANCING OF INTERESTS

The Lifting of National Barriers to Trade

David Schneider, Esq.

One of the agreements signed in April 1979 after the Tokyo Round of Multilateral Trade Negotiations (MTN) was the Agreement on Technical Barriers to Trade. This Agreement, also called the Standards Code, provides for advance notice and publication of proposals for standardization and that product standards should not discriminate against imports.

Once standard setting regulations are propelled into the international arena, the trade of an individual country should not suffer (at least, not alone) as was the case when the absence of multilateral action meant that the standards of an individual country could ultimately inhibit not only imports but the exports of its own manufacturers. Through the Standards Code and the procedures laid down under the General Agreement on Tariffs and Trade (GATT), countries may now seek redress against barriers to trade, not only to manufactured goods but also for service industries (such as insurance banking and data).

Whilst it is true that the United States occupies a dominant position in the international services industry, it is equally true, U.S. vested interests notwithstanding, that barriers to service industries through national restrictions on

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MUSING IN FINE PRINT

Reflections on Some Jaded Public Images

Professor Richard V. Wellman

Complexity in human affairs and in the processes of conflict resolution generates work for lawyers. Hence, we like complexity. Some would say we foster it.

There are moments, of course, when we hunger for simpler times and methods. Some occur at moments of personal confrontation with legal complexity, as students struggle to master the points of a law course or practitioners face the tax collector. And we are gnawed from time to time by concerns about our ignorance, obsolesence and other shortcomings, most of which are rooted in our inability to know or do all that is needed of us.

But, we plunge on, enjoying our captive markets built around old dilemmas and using our skills in analytical techniques to protect real or imagined clients from almost any rule or procedure.

A danger of our calling is that few outside the profession understand our doings. Further, we are likely to ignore other impressions of our work as largely ill-informed. In consequence, our public image is not good. Indeed, it seems that our general reputation as leeches and troublemakers has grown in recent decades, though perhaps by no more than can be expected from our increased numbers and the power and inclinations of the media.

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THE COMING OF AGE OF NUCLEAR ENERGY

What happens when the child is made to provide for its own retirement?

Samuel E. Collier

Nuclear industry is in its infancy. During this stage the government has found it necessary to provide for the young industry through direct subsidies and the statutory limitation on liability provided by the Price-Anderson Act. Another grace permitted the industry is the lack of pressure upon it to confront the problems and costs associated with the decommissioning of nuclear plants.

The effective, catastrophy-free life of a nuclear energy plant is approximately 30 to 40 years. It must then be "decommissioned." In this process the contents are removed for disposal, and the radioactive structure itself might be dismantled and removed. Whether or not the structure is removed, the site must be guarded and the surrounding environment monitored to try to guarantee safety.

The cost of decommissioning is not presently ascertainable. However, estimates for the decommissioning of several Federal Ene gy Research and Development Administrative facilities has been estimated by the Government Accounting Office to run into the billions of dollars.

The Nuclear Regulatory Commission has been slow in requiring decommissioning planning to be done at the initial licensing stage, and only in the last two years has decommissioning been a consideration in the drafting of an Environmental Impact Statement. It is quite likely, therefore, that the present price of nuclear energy does not include the cost of decommissioning the plants producing that energy. Even if a company internalizes the cost of decommissioning the original reactor through rates charged for energy produced from the *replacement* reactor, where a company defaults on its duty to decommission or becomes insolvent, the burden of decommissioning will fall on the government, i.e., the taxpayers at large. Indemnity bonds and other methods of assurance will prevent such default or insolvency only to the extent that the complete cost can be estimated. Underestimation of nuclear energy costs has already become a major problem in the area of nuclear facility accidents. But underestimation of decommissioning costs could be even more critical, since decommissioning, unlike a nuclear accident, is a certainty.

It is thus apparent that decommissioning is a certain and costly stage in the life of a nuclear power plant. These costs will inevitably become included in electricity rates. At that time, an industry with proven environmental dangers could lose its main defense of economic viability.

Sam Collier is a second year law student.

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FILARTIGA v. *PENA-IRALA*
United States jurisdiction over torture committed in other countries

Terry Gramoglia

In a case recently decided, the Second Circuit Court of Appeals has stated that torture is a violation of customary international law. The court applied a little-used federal statute (28 U.S.C. § 1350) to grant United States district court jurisdiction over alien tort actions which allege torture.

Plaintiffs in *Filartiga* v. *Pena-Irala,* No. 79-6090 (2d Cir. June 30, 1980) claim that defendant, a Paraguayan police official, fatally tortured Joelito Filartiga, a Paraguayan citizen. Filartiga's sister, and her father, brought this action against Pena while she and Pena were in the United States, relying on the "Alien Tort Statute." This statute provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

The district court found no jurisdiction and Pena was subsequently deported for an expired visa. On June 30, 1980, the Second Circuit reversed and remanded the case for a hearing on the merits. The court's rationale for granting jurisdiction under 28 U.S.C. § 1350 rested on its finding that torture violates customary international law.

Filartiga v. *Pena-Irala* has international implications in that the United States, in trying to further the protection of human rights, risks encroaching on other nations' sovereignty. The United States also risks appearing hypocritical, since it has not yet ratified any of the international human rights documents which the Second Circuit cites in support of its opinion that torture violates customary international law. The Second Circuit did not address these factors and, as they could significantly affect United States foreign policy, courts should weigh them more carefully in any future application of 28 U.S.C. § 1350.

A Comment on this case, by Terry Gramoglia, a second year student, will be published in Volume 15:2, Winter, 1981, of the *Georgia Law Review.*

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Moreover, the public has been led by the over zealous among us to believe that law and government can be used to correct a vast array of social and economic problems. The next phase—disillusionment, growing cynicism about the motives of those in all levels of government, including the lawyers, and massive disinterest in our elections—may be upon us. After all, only a few over 50% of those eligible bothered to vote in the recent election.

Though lawyers are only partly to blame for this malaise, we may be more vulnerable than others to radical changes that may be expected if public disenchantment grows. Both selfish and altruistic considerations tell us that we should become more serious about the public's regard for the legal system.

There is much that lawyers can do to contribute to a rebirth of public support for the legal system. For starters, we could strive to uncomplicate vast areas of private law by working harder to achieve uniformity of law among the states. The law of succession to property at death, division of property upon divorce and transfer and hypothecation of real estate, provide examples. Present rules in these areas need not be diverse. Each state's different rules work and so a well-considered uniform law would work. An important difference would be that people, aided by high school and college courses in family law that would flourish if a single code applied to all parts of the country, could do without lawyers and courts for most family law problems. Surely, the public cries out for clear guidelines on these matters are of concern to all families. A gradual reduction in the forced role for lawyers in these areas would greatly reduce the frequency with which lawyers are criticized for perpetuating complexity for their own sake.

Perhaps the law schools and bar examiners should lead the way by concentrating on model and uniform law perspectives of some of the old basics. Perhaps legal education, with its intense, albeit unofficial, concentration on Mr. Gilbert's offerings and various nutshells has already moved out on this front. If so, all that remains is to shake the practicing bar, the courts, and assorted financial institutions loose from their holds on probate, divorce and land title matters. It may never happen, but if it did, one result would be a stronger legal profession. Another would be a closer relationship between people affected by law and their governments.

Professor Wellman practiced law in Ohio from 1949-1954 prior to joining the University of Michigan Law School faculty, where he taught for 19 years. Since joining the University of Georgia faculty in 1973, he has served as one of Georgia's four delegates to the National Conference of Commissioners on Uniform State Laws.

U.S. SUPREME COURT

The following three cases are among those docketed for the Court's October 1980 term:

Kissinger v. *Halperin* (No. 79-880)

Issue: Whether former President Nixon and three high officials of his administration, Henry Kissinger, John Mitchell and H. R. Haldeman, have absolute immunity from personal damages liability arising from harm caused Halperin by a warrantless wiretap of his home while a staff member of the National Security Council.

Upjohn Co. v. *United States* (No. 79-886)

Issue: Whether the "subject matter" test or the "control group" test applies to the attorney-client privilege claim of a multinational corporation in response to an IRS summons upon it for material prepared by house counsel concerning corporate payments to foreign officials.

Kirchberg v. *Feenstra* (No. 79-1388)

Issue: Whether a Louisiana statute making every husband the "head and master" of his household and allowing him to dispose of community property without his wife's consent violates the equal protection clause of the Fourteenth Amendment.

LAWYER TALK

When an ordinary man wants to give an orange to another, he would merely say, "I give you this orange." But when a lawyer does it, he says it this way.

"Know all men by these presents that I hereby give, grant, bargain, sell, release, convey, transfer, and quitclaim all my right, title, interest, benefit,and use whatever in, of, and concerning this chattel, otherwise known as an orange, or citrus orantium, together with all the appurtenances thereto of skin, pulp, pip, rind, seeds, and juice, to have and to hold the said orange together with its skin, pulp, pip, rind, seeds, and juice for his own use and behoof, to himself and his heirs in fee simple forever, free from all liens, encumbrances, easements, limitations, restraints, or conditions whatsoever, any and all prior deeds, transfers or other documents whatsoever, now or anywhere made to the contrary notwithstanding, with full power to bit, cut, suck, or otherwise eat the said orange or to give away the same, with or without its skin, pulp, pip, rind, seeds, or juice."

Robert H. Mundheim, general counsel of the U.S. Treasury Department, in a memo to senior Treasury officials—
Wall Street Journal, 11/10/78; 24:4-5

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BY KELLY & LEVINE

REAGAN AND THE SUPREME COURT
Will Past Be Prologue?

Mike Nixon

Humorist Finley Peter Dunne once observed, "No matter whether th' constitution follows th' flag or not, th' supreme coort follows th' iliction returns." Considering the most recent election returns, many American liberals would not be amused by Dunne's observation. Although Ronald Reagan's victory will have no direct effect on the present Supreme Court, liberals look to the future with concern. Columnist Carl Rowan laments that the Reagan presidency, combined with the new Republican majority in the U.S. Senate, guarantees a "reactionary" Supreme Court. Although Rowan's fears might be extreme, President Reagan will almost surely have an impact on the Court, and that impact will not be liberal.

The facts are simple. Five of the nine justices of the Supreme Court are over seventy, and among those five are the Court's only genuine liberals, William Brennan, 74, and Thurgood Marshall, 72. Although advanced age is no guarantee of impending retirement (the five elder justices are not much older than Reagan himself), Reagan nonetheless is in an excellent position to influence the Court's direction into the next century. Given the chance, what kind of men and women would he appoint to the nation's highest court? The best clues presently available lie in Reagan's record as governor of California.

In his eight years as governor, Reagan appointed 645 judges. According to Preble Stolz, a law professor at the University of California, Berkeley, Reagan avoided patronage and "pretty much appointed from within [the judicial system] and did it on merit." Reagan's record on minorities and women was at best fair. Of his appointees, 5% were minorities and 2% were women. No one from either group was appointed to the state court of appeals or the state supreme court.

Reagan made his appointments in two distinct phases. During the first phase, candidates for judicial appointments were not closely screened. Many were not interviewed by Reagan or his staff and others did not know they were under consideration until they were actually appointed.

This informal selection process yielded several surprises, chief among them Donald R. Wright, Reagan's choice for chief justice of the California Supreme Court. Once appointed, Wright consistently voted with the court's liberal majority, and in 1972 he committed conservative heresy by authoring an opinion abolishing capital punishment in California. Conservative writer Charles D. Hobbs described Wright as a "tragic disappointment" who had "changed colors overnight." Others, however, observed that Wright's liberal leanings were evident in his record as an appeals court judge.

Wright's supposed apostasy helped instigate Reagan's second phase of appointments. The selection process changed radically; all potential appointees were carefully screened. Each was required to answer a questionnaire containing twenty-seven detailed inquiries. Completed, the questionnaire usually exceeded twenty pages. According to Evelle Younger, state attorney general during Reagan's second term, the answers "revealed the current leanings and philosophies of the nominees." Potential appointees were also interviewed by Reagan's staff. Robert K. Puglia, an appointee to the state court of appeals, described the interviews as "general questions about a person's life philosophy and views on topical issues." But one nominee called the whole investigation process an "inquisition" and another who refused to answer a certain question was not appointed.

During this highly selective phase, Reagan appointed two more supreme court justices, William P. Clark Jr. and Frank K. Richardson. Clark was a long-time confidant who had served Reagan as cabinet secretary and chief of staff. He was also a law school dropout who had failed the bar exam on his first try. Richardson was a highly respected jurist whom Reagan had previously appointed to the state court of appeals.

Despite the scrutiny that went into their appointments, neither Richardson nor Clark has displayed a rigidly conservative bent while on the high court. Of the two, Richardson is more liberal. For example, the court recently overturned a conviction based on evidence found in the suspect's home in the course of a warrantless arrest. The police had acted on an informant's tip, and found the evidence, a stolen gun, when they followed the suspect from his doorway to another room. Richardson voted with the majority to overturn the conviction on Fourth Amendment grounds; Clark dissented. Clark, however, is not always at odds with the court's liberals. He has, for instance, voted to apply an implied warranty of habitability to residential leases, to allow discovery of complaints of police brutality, and, in a trap gun case, to prohibit deadly force to protect an empty home.

If Reagan's experience with his California appointees is prologue, as President his judicial appointees will be able conservatives. He will, however, want to know exactly what kind of jurist he is getting *before* he makes an appointment; Reagan and his staff will

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doubtlessly dig deeply and thoroughly into a nominee's background. And with Strom Thurmond chairing the Senate Judiciary Committee, any liberal taints that Reagan overlooks will surely come to light in the obligatory confirmation hearings. Thus, if Reagan makes any Supreme Court appointments, his appointees almost certainly will be conservative, the variable being the degree of liberalism Reagan will tolerate in a conservative.

Mike Nixon is a second year law student.

QUOTATION

As long ago as 1908 when I wrote *Harriman* v. *I.C.C.*, 211 U.S. 407 it seemed to me that we so long had enjoyed the advantages protected by bills of rights that we had forgotten . . . that they had to be fought for and could not be kept unless we were willing to fight for them.

Oliver Wendell Holmes

Kirbo, continued from page 1

involves understanding of the laws. As trustee of the President's property this very much involved the law. Likewise the relationship is confidential and this is a necessary element because there is much interest in the President's affairs.

When he was governor, I always felt I was doing a good job as he was in Atlanta and I was aware of the day-to-day operations. After he moved to Washington I found I was not as effective for many reasons, mostly geographical. You must be there daily to keep up and complete matters promptly.

On the other hand, I was available to people all over the nation who sought to give him advice and information. I have often been able to pass on to him and the staff much needed information not otherwise available.

My main reward was to see Jimmy Carter grow, mature and develop into one of our greatest presidents. It is not a good time to say this but time will prove me right. He always understood the nation's problems and was not afraid to tackle each one and to fight and come again when defeated. As a result many years of foot dragging have been overcome. We have identified our major problems and corrections should be forthcoming.

While it was courageous to tackle these problems, it was not easy or wise politically.

I was always with the President in his greatest tests, successes and disappointments. It was then he demonstrated most clearly his strength, patience and character. It was well worth the journey and I am sure it will continue to be so in the future.

Mr. Kirbo is a partner of King & Spalding.

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the free flow of data pose a serious threat to both global development and the international liberalization of trade. Thus it is that the United States Trade Representative (USTR), through GATT and other organizations such as the Organization for Economic Cooperation and Development (OECD) and the International Chamber of Commerce (ICC), has been active in endeavoring to ensure that the U.S. services sector is not affected by these barriers.

The problem, however, is that initiatives into the international arena are never easy, never quick and always beset with diplomatic and negotiating wrangles. Avoiding or minimizing wrangles involves superb judgment on the timing of those initiatives and a prescient understanding about the demands that other countries will make.

As law students in the early years of this decade you will look down on the arena of battling acronyms and wonder if you will ever sort out the names, the identifies and the loyalties of the players: you will. Those are skills of memory and perception and they are tough enough. But the timing of international initiatives and a balancing of the contentious interests—those are the really difficult issues that will confront us in the Eighties. U.S. lawyers should have a distinct advantage, as their training in Constitutional Law provides them with a mature understanding of the need to know, to understand and to balance the interests involved.

Mr. Schneider, an attorney with The Coca-Cola Company, is involved in international regulatory matters.