WILLIAM H. REHNQUIST
Reflections on the Practice of Law (1953-1999)

ALSO
Mission to Northern Ireland
The Wages of Welfare Reform
Domestic Legal Issues Concerning the Helms-Burton Act
OF NOTE

ANNUAL MEETING OF THE ASSOCIATION: PRESIDENT’S ADDRESS 398
by Michael A. Cooper

CONFERRAL OF HONORARY MEMBERSHIP ON CHIEF JUSTICE WILLIAM H. REHNQUIST 406

REFLECTIONS ON THE PRACTICE OF LAW (1953-1999) 410
by William H. Rehnquist

HENRY L. STIMSON AWARD CEREMONY: REMARKS 420
by Lewis A. Kaplan

NORTHERN IRELAND: A REPORT TO THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK FROM A MISSION OF THE COMMITTEE ON INTERNATIONAL HUMAN RIGHTS 426
by Peter G. Eikenberry, Gerald P. Conroy, Barbara S. Jones, Barbara Paul Robinson, and Sidney H. Stein

THE WAGES OF WELFARE REFORM: A REPORT ON NEW YORK CITY’S JOB CENTERS 472
by the Committee on Social Welfare Law

DETERMINING A DEFENDANT’S ELIGIBILITY FOR ASSIGNED COUNSEL SERVICES 493
by the Committee on Criminal Justice Operations and Budget

DOMESTIC LEGAL ISSUES CONCERNING THE HELMS-BURTON ACT 515
by the Committee on Inter-American Affairs

NEW MEMBERS

LIBEL AND SLANDER: A SELECTIVE BIBLIOGRAPHY 552
by Ronald I. Mirvis and Eva S. Wolf
Of Note

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* * *


The Executive Committee has elected Carol Sherman Chair and Barry A. Cozier Secretary for 1999-2000.
OF NOTE

IN JUNE, THE ASSOCIATION ANNOUNCED THE FORMATION OF A BLUE Ribbon Commission to examine the Future of the City University of New York (“CUNY”). The Commission consists of leaders in the field of education, eminent lawyers, civic leaders and former public officials representing a balance of perspectives who have demonstrated their concern for the improvement of CUNY.

Stanley M. Grossman has been selected to chair the Commission, and Isabelle Katz Pinzler will serve as Special Counsel.

The Commission, funded by a grant from the New York Community Trust, will examine the critical and highly charged issues of admission standards and remediation, among other things. The experience and diversity of the Commission’s members will assure that the issues are analyzed on an objective and experienced basis. The Commission will develop concrete proposals for meaningful improvements and support meaningful proposals of others where appropriate.

THE TENTH ANNUAL LEGAL SERVICES AWARDS WERE PRESENTED TO honor attorneys who provide crucial civil legal assistance to New York’s poor. John McKay, President of the Legal Services Corporation, presented the awards at a reception on May 12 at the Association.

This year’s recipients are: Christopher Bowes, Executive Director of the Center for Disability Advocacy Rights (CeDAR); Edward Josephson, Director of the Housing Unit, South Brooklyn Legal Services; Dorchen Anne Leidholdt, Legal Director of the Center for Battered Women’s Legal Services, Sanctuary for Families; Barbara Samuels, Senior Staff Attorney, Brooklyn Legal Services Corp. A; Coordinating Attorney for SSI/SSD, Legal Support Unit, Legal Services for New York; and Warren Scharf, Attorney in Charge of the Brooklyn Neighborhood Office of The Legal Aid Society.

The awards are administered by the Special Committee on the Legal Services Awards (Allan L. Gropper, Chair).

THE SEVENTH ANNUAL PRESENTATION OF THE HENRY L. STIMSON MEDAL to outstanding Assistant United States Attorneys in the Southern District
and in the Eastern District of New York, was held on June 1 at the Association. Hon. Lewis A. Kaplan, United States District Judge, Southern District of New York, presented the awards to: Sung-Hee Suh, Eastern District, Criminal Division; Susan L. Riley, Eastern District, Civil Division; Deborah E. Landis, Southern District, Criminal Division; and James L. Cott, Southern District, Civil Division.

The Stimson Medal, made possible by the firm of Winthrop, Stimson, Putnam and Roberts, honors Mr. Stimson, who served as United States Attorney for the Southern District from 1906-1909 during a career of distinguished public service. (For the full text of Judge Kaplan’s remarks, see p. 420).

The awards are sponsored by the Committee on the Stimson Medal (Stephen A. Weiner, Chair) and the Committee on Federal Courts (Guy M. Struve, Chair).

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THREE OUTSTANDING MINORITY STUDENTS AT NEW YORK AREA LAW schools have been awarded Thurgood Marshall Fellowships for the 1999-2000 academic year. These students will have the opportunity to work with the Association to advance the goals of civil rights and equal justice. Fellowships were awarded to: Ann Cammett, CUNY Law School; Bayron Gilchrist, Columbia University School of Law; and Sophia Goring, Fordham University School of Law.

The fellowships are funded by the Orison S. Marden Lecture Fund and are open to second and third year minority law students from New York area law schools. Fellows were nominated by their schools and selected by the Association’s Committee on the Thurgood Marshall Fellowship Program (Lowell D. Johnson, Chair).

* 

HON. DAVID TRAGER, UNITED STATES DISTRICT JUDGE FOR THE EASTERN District of New York, presented the Association’s annual Municipal Affairs Awards on June 16. The Awards are given to lawyers from the New York Law Department who have demonstrated outstanding performance in public service. This year’s recipients are Lisa Bova-Hiatt, Tax & Condemnation Division; David Farber, Economic Development Division; Nina Pirotti, Family Court Division; and Sharyn Rootenberg, Appeals Division.

The awards are sponsored by the Committee on New York City Affairs (Alan J. Rothstein, Chair).
AT THE MAY ANNUAL MEETING, THE ASSOCIATION CREATED A SEPARATE membership category for law students. For years, law students have been involved with the Association through the work of the Committee on Law Student Perspectives, and varied programs, including “What It’s (Really) Like to Practice Law in NYC as a Woman,” an annual program on judicial clerkships, and career-oriented networking receptions. Now, annual dues of $20 will entitle student members to many membership services, including the right to use the Association’s Library and Technology Center, to receive 44th Street Notes, The Record and The Yearbook, and to apply for appointments to Association committees.

THE FOLLOWING NEW COMMITTEE CHAIRS AND DELEGATES HAVE RECENTLY been appointed for terms beginning September 1, 1999:

Andrew H. Braiterman (Taxation of Corporations); Martin D. Edel (Sports Law); Joseph Geoghan (Corporate Law Departments); Kimberly A. Hawkins (Sex and Law); Richard Kestenbaum (Small Law Firm Management); Joan B. Lobis (Encourage Judicial Service); Andrea Masley (Vice Chair, Women in the Courts); Robert Marino (Housing Court); Thomas A. McGrath III (Vice Chair, Citybar Public Service Network); Harold Novikoff (Bankruptcy and Corporate Reorganization); Mary Jean M. Potenzone (Recruitment and Retention of Lawyers); Patrick C. Reed (International Trade); and L. Stanton Towne (Real Property Law).
Recent Committee Reports

**AIDS**
Letter Commenting on Draft Guidelines for HIV Case Surveillance

Letter Supporting Legislation to Create a Managed Care Ombudsprogram

**Banking Law**

**Council on Children**
Letter Urging the Legislature to Preserve the Pre-Kindergarten Program

**Civil Rights**
Letter Commenting on the Proposed Rules for Press Conferences, Demonstrations, and Similar Activities in the Immediate Vicinity of City Hall

**Consumer Affairs**
Report on Legislation A.2026, An Act to Amend the General Business Law, in Relation to Extending the Time for Termination of Membership in a Private Club

**Corrections**
Letter Commenting on Proposed Legislation to Curtail “Frivolous” Prisoner Litigation

Letter to Governor in Support of Funding for Defense and Inmate Legal Service Programs

**Criminal Justice Operations and Budget**
Proposal Regarding Guidelines for Determining a Defendant’s Eligibility for Assigned Counsel in Criminal Cases

**Criminal Law**
Letter Supporting S. 5635/A.8373, Which Extends for Two Years the Provisions Which Authorize A Court to Permit a Deliberating Jury to Separate Temporarily

**Energy**
Legislative and NRC Rule Change to Facilitate the Transfer of Nuclear Power Plants
Environmental Law
Proposal Requiring the Use of Recycled Paper for All Court Filings

Letter and Comments Regarding Proposed New York State Superfund Reform

Government Ethics
Letter Commenting on ABA’s Draft Report and Recommendation Relating to the Acceptance of Campaign Contributions by Judicial Candidates

Health Law
Legal Issues Affecting People with Disabilities


Council on Judicial Administration
Report on Courtroom Computer Technology

Letter to Mayor Regarding the Price WaterHouse Study

Recommendations for Judges Dealing with Pro Se Litigants

Juvenile Justice/Council on Children

Legal Issues Affecting People with Disabilities
Rights of People with Disabilities, 2nd edition

Legal Issues Pertaining to Animals

Legal Problems of the Aging
Letter Regarding Proposed Amendment to Section 366(3) of the Social Services Law that would Eliminate the Doctrine of “Spousal Refusal” with Respect to Medicaid Home-Based Care

Litigation
Letter Regarding ABA Civil Discovery Standards

Mental Health Law
Report Commenting on the Human Subject Research Involving the Protected Classes
RECENT COMMITTEE REPORTS

Pro Bono and Legal Services
Letter to Mayor Regarding the Elimination of Emergency Assistance to Families (EAF) Victims Prevention Program

State and Local Taxation
Report Commenting on Proposed Amendments to the New York City Rules Relating to the Unincorporated Business Tax

Trusts, Estates & Surrogate’s Courts
Report on Senate Bill 709, An Act to Amend the Surrogate’s Court Procedure Act, in Relation to Computations of the Commissions of Fiduciaries


Uniform State Laws
Proposed Article 5 of the Uniform Commercial Code

Copies of any of the above reports are available to members by calling (212) 382-6658, or by e-mail, at lyuen@abcny.org.

THE RECORD 398
President’s Address

Annual Meeting
of the Association

Michael A. Cooper

This report was delivered at the Annual Meeting of the Association, held on May 18, 1999.

The report I am now called on to deliver can be likened to an annual medical checkup. I can say that I have taken the Association’s pulse, as expressed in its committee reports and programs; I’ve monitored its other vital signs, including the success of Great Hall programs and the strength of our relationships with the judiciary and with other bar associations; and I’ve tested the Association’s internal organs, ranging from the Treasurer’s Office to Meeting Services. I am prepared to pronounce the Association in excellent health, but remaining so will require constant exercise and attention to our diet.

The Association has responsibilities that are both inward-looking (to our 21,000 members) and outward-looking (to the judicial system, to law reform and to society at large). Let me tell you first about recent developments within the Association relating to the former, the inward-looking responsibilities.
Since the beginning of this year, as a condition of remaining in good standing as members of the New York bar, all attorneys have been required to take 24 credit hours of continuing legal education (or “CLE,” as it is commonly called). Under the superb stewardship of Leo Milonas, Chair of our CLE Committee, and with the guiding hands of Joyce Adolfsen and Anna Nichols, Director and Assistant Director, respectively, of our CLE Department, the Association is both increasing the number and enriching the content of its CLE programs. This month we will put on eight programs ranging in length from two hours to four days and covering such diverse subjects as naturalization, divorce mediation and hedge funds. It is no longer productive to debate the merits of CLE; it is with us and, from all signs, will become a permanent fixture of the landscape of the profession. Our responsibility is to assist our members and other lawyers by offering programs and written materials that will not only give them the requisite CLE credits, but also make them better lawyers.

We have acknowledged a separate responsibility to those of our membership who practice alone or in small firms. On the recommendation of both the Committee on Small Law Firm Management and a subcommittee of the Executive Committee, we have decided to establish a Small Law Firm Center, which will, among other things, provide information and assistance to sole practitioners and lawyers in small firms, help them identify and procure computer hardware, software and other informational tools responsive to their needs, publish a separate directory of lawyers in this part of the profession and provide networking opportunities. I look forward to giving you a future report on our progress as we undertake this important initiative.

Yet another membership service we have started this year is a program for lawyers who suffer from alcoholism or some other form of substance abuse. With encouragement from former Presiding Justice Alfred Lerner of the Appellate Division, First Department, and with the help of both our Committee on Alcoholism and Substance Abuse and Ray Lopez, who provides a similar service to members of the New York State Bar Association, we have created a Lawyer Assistance Program and hired as its director Eileen Travis, who has been running an outpatient alcoholism and substance abuse clinic at Queens Hospital. Eileen, would you please stand so that everyone can see and greet you. I urge each of you to publicize this program and to encourage lawyers who need help in this area to call Eileen, for whom we have a dedicated hot line phone number: 302-5787. I want to assure you, and anyone whom you may refer to Eileen,
that the identity of any lawyer consulting Eileen in this program will be kept in the strictest confidence, even from the officers and staff of the Association.

Much has been said and written about a widespread malaise in the profession: a diminishing sense of personal and professional satisfaction even as lawyer incomes rise, and a sense of loss of individuality and even humanity under incessant demands to work more and more billable hours. We are addressing this very troubling phenomenon in two ways. First, we are conducting a survey of law firm associates seeking their views on this subject. Two thousand survey responses have already been received and are being compiled by Arthur Andersen. Second, for the past twelve months, Jeremy Epstein has chaired a Lawyers’ Quality of Life Committee, which has been examining the causes of this malaise and plans to publish its findings by the end of the year and to recommend steps that law firms and other legal employers can take to restore the sense of professional and personal satisfaction that every lawyer ought to feel.

A final word on the Association’s responsibilities to the profession. The MacCrate Commission appointed by the American Bar Association roughly a decade ago issued a seminal report that characterized the lawyer’s life as a continuum from law school to retirement. The Association has programs directed to all but one of the segments of that continuum. We have a membership category for recent law graduates not yet admitted to the bar; we have many programs and services (CLE programs and various forms of insurance, for example) for lawyers in active practice; and we have designed programs for retired lawyers, such as the Public Service Network, which matches senior lawyers with public interest organizations that can use their talents and experience. We have now taken the final step in acknowledging that legal practice is, indeed, a continuum by creating a membership category for law students. With the approval of the necessary by-law amendments earlier at the Annual Meeting, we will shortly begin publicizing that membership category to the thousands of law students at the 13 accredited law schools in the Metropolitan New York area.

Let me now turn to what I call the Association’s outward-looking responsibilities. One of those responsibilities is contributing to law reform, by which I refer to the Association’s efforts (i) to encourage the passage of wise legislation and to oppose legislation that is not in the public interest as we see it, and (ii) to suggest changes in the administration of legislative and regulatory schemes. Let me give you a few examples of our law reform efforts at each of the levels of government. They are
illustrative, but only hint at the enormous breadth of the Association’s law reform efforts.

At the municipal level, we have called on the Mayor to restore a provision for emergency assistance to families, which was cut in this year’s Executive Budget. Our Municipal Affairs Committee, chaired by the Association’s General Counsel, Alan Rothstein, criticized last year’s New York City Charter Revision Commission process and opposed its proposal that inadequately addressed the issue of campaign finance reform. Our Committee on Social Welfare Law, chaired by Cathleen Clements, has been critical of efforts to convert welfare centers into so-called “job centers” without supporting mothers who are required to hold these jobs.

Turning to the state level, I accompanied several Association members and key staff on a trip to Albany in early March to advocate the Association’s legislative agenda. We have been working tirelessly on behalf of permanent funding for civil legal services to the poor. We opposed the enactment of a bill that was purportedly designed to comply with requirements imposed by the Federal Adoption and Safe Families Act, but which in fact went far beyond compliance in ways we considered inappropriate. And we called on Governor Pataki (and Mayor Giuliani) to support the so-called “New York/New York II” proposal to provide housing for homeless and mentally ill New Yorkers.

At the federal level, at an early stage of the recent impeachment proceedings we submitted to members of Congress a report entitled Alternatives to Impeachment: What May Congress Do?, which had been prepared by the Committee on Federal Legislation. That report was cited in a lead editorial in The New York Times. The Committee on Securities Regulation has issued three major reports, two on proposed amendments to SEC Rules and Regulations that would effect sweeping changes in the treatment of mergers, acquisitions, corporate control contests and the issuance of securities, and a third report that examined current practices on forward-looking statements and cautionary language after the Securities Litigation Reform Act of 1995. The Committee on Federal Courts has also been unusually prolific in commenting on proposed changes in Federal Rules and other matters. A vivid example of the respect with which our committee reports are received can be found in a letter to the Judicial Conference Civil Rules Advisory Committee from the reporter to that committee. After noting that our committee had opposed a change in the rule governing the scope of discovery in civil cases in Federal Court, the reporter cautioned that such opposition, “with that Association’s reputation for careful analysis,
should make us hesitate long before concluding that we have it right.” Letter dated April 14, 1999 from Professor Thomas D. Rowe, Jr. to Advisory Committee on Civil Rules at 4.

The Association’s standing in the international arena also is remarkably high. When the Criminal Justice Review Group that is redesigning the criminal justice system in Northern Ireland sought information regarding methods of judicial selection in the United States, they asked to meet with representatives of this Association, as did a judge of the High Court in Northern Ireland, who was pursuing a similar inquiry. Those requests to this Association were presumably prompted, at least in part, by the fact that we had sent a five-member mission, including two federal judges and our former President, Barbara Paul Robinson, to Northern Ireland last fall to observe conditions following the Good Friday peace agreement. (See page 426 for the Report).

Mention of Northern Ireland prompts me to tell you of three extraordinary events held at the Association during the past six months. On December 10, we conferred honorary membership on former Senator George S. Mitchell, who played a pivotal role in achieving the Northern Ireland peace accord. The patience and perseverance, the reasonableness and good will, that enabled George Mitchell to achieve what no one had been able to do for three decades mark him as one of the great statesmen of our time.

The second of this trio of remarkable events was the Cardozo Lecture, delivered in March by Supreme Court Justice Ruth Bader Ginsburg. The Meeting Hall was filled to overflowing—quite literally, for scores of members who could not squeeze into the Meeting Hall listened to the lecture in the adjacent reception area. The feeling of respect and warmth was almost palpable. Justice Ginsburg has been a member of the Association for nearly forty years and has served on several committees, including the Executive Committee, so her delivery of the Cardozo Lecture was very much a homecoming for her and for us.

The third memorable event was the luncheon we held last month in honor of Chief Justice William H. Rehnquist, upon whom we conferred honorary membership, the sixth Chief Justice to be so honored. Chief Justice Rehnquist was no stranger to this House. He had spoken here in 1973, shortly after his appointment to the Supreme Court; he presided at the National Moot Court final round the following year; and he presided at the mock trial of Thomas Jefferson in 1994. Nevertheless, he honored us by his attendance last month and was gracious enough to say that this Association “has long occupied a high place in the hierarchy of bar asso-
ciations in this country,” and that he “consider[ed] it a privilege to hold an honorary membership in it.” (See the Presentation of Honorary Membership and Justice Rehnquist’s remarks at pages 406 and 410, respectively, of this Record.)

I have spoken for several minutes without mentioning perhaps the most valuable of this Association’s relationships, namely, our relationships with the state and federal judiciary. As to the former, Chief Judge Kaye, Chief Administrative Judge Lippman and other members of the state judiciary, including—but by no means limited to—Appellate Division Presiding Justice Betty Weinberg Ellerin and Supreme Court Justice Steven Crane, have always listened thoughtfully to the Association’s views on a variety of issues related to the state’s judicial system and the legal profession. This Association can claim credit for the fact that the Administrative Board is currently considering proposed rules designed to eliminate, or at least discourage, the pernicious practice of “pay to play.” The closeness of our relationship with the state judiciary has undoubtedly been enhanced by having two justices, Rick Andrias and Barry Cozier, on our Executive Committee, and also by the bench/bar programs organized by the Committee on State Courts of Superior Jurisdiction, whose chair, Beth Kaufman, is retiring after three years of distinguished service to the Association.

We have also enjoyed excellent relations with the federal judiciary. Chief Judge Ralph Winter of the Second Circuit and other judges of that Court and of the District Courts for the Southern and Eastern Districts of New York have addressed our Federal Courts Committee, and I have been serving ex officio on the Second Circuit Judicial Conference Planning and Program Committee. We in turn have been pleased to assist the federal judiciary on such matters as resisting an exorbitant increase in life insurance premiums and advocating prompt construction of the long overdue new federal courthouse in Brooklyn.

As you know from the agenda, we have a speaker to come and an award ceremony, and I do not wish to tax your patience. But I would be remiss if I did not mention the extraordinary contributions made by the public service programs run by the City Bar Fund under the inspired and inspiring leadership of Maria Imperial. We live in a time of paradoxes: there are more and more millionaires, but also more and more poor people. The need of the poor for civil legal services grows yearly, yet the governmental funds appropriated for programs serving the poor are declining. In this environment, legal services providers must find new ways to deliver service more efficiently. The Association is at the center of the effort
to develop LawHelp, an internet-based referral system that can be used by both legal and social services providers to expedite referrals to low-income people needing legal assistance. In addition, we are planning an international conference, to be held next spring, that will examine different modalities used in different countries around the world to deliver civil legal services to the poor.

It has been a great privilege to work this past year with the Executive Committee, chaired by Richard Cashman. Richard is wise, thoughtful and reasonable, and he has been a very effective leader of that Committee. Richard and the other members of the Executive Committee are as capable and conscientious a group as any governing body to which I have belonged. I also want to acknowledge the many contributions made by the Association’s three vice-presidents, Eleanor Jackson Piel, Steven Rosenfeld and Michael Gerrard. I told them when their terms began that I did not consider the position of vice-president to be a ceremonial one and that I would call on them from time to time to help wrestle with a particularly difficult subject. I have done so, and they have met the call every time.

What can I say about Barbara Berger Opotowsky, Alan Rothstein, my assistant, Monique La-Touche, the Presidential Fellow, Kate Cox, Robin Gorsline, Carol Rosenbaum and the other staff members with whom I have worked this past year? If I named all of them and told you of the contributions they have made to the Association, we would be here far longer than you would like to remain. Barbara oversees not only the current operations of the Association, but also leads our planning for the future, grappling with such challenges as satisfying our space needs and bringing our library into the next century (and millennium). Alan is everywhere; he does the work of five people and does it very well; without him the Association would implode. Let me just say that working with the staff has made this year not just stimulating, but a joy. However trite it may sound, the occupants of 42 West 44th Street are truly a family.

I said at the outset of these remarks that they could be likened to a physician’s report on a medical checkup. I will revert to that simile by pronouncing the Association in excellent health. But, as I also said, remaining in good health requires constant exercise. The reform of legal institutions and practices is not for the short-winded. We must continue to speak out on issues like court restructuring and legal services funding until the Governor and the Legislature heed what we have to say. I also said that we must control our diet. We cannot cure, or even contribute
usefully to the cure of, all of society's ills. We must focus on those issues relating to the administration of justice to the solution of which an association of lawyers can make a real, useful contribution. I thank you for giving me the privilege of leading the Association in making that contribution this past year.
Conferral of Honorary Membership on Chief Justice William H. Rehnquist

Michael A. Cooper

On April 13, 1999, the Association bestowed on Hon. William H. Rehnquist honorary membership in the Association "in recognition of his contributions to the law and social justice, including his lengthy service as both Associate Justice and Chief Justice of the Supreme Court of the United States, and in further recognition of his integrity, his high sense of justice, his commitment to the principle of an independent judiciary, and his exemplification of efficiency, fairness and civility."

One of the great joys of serving as President of this Association is that it gives one an opportunity not just to attend, but to participate in, those rare occasions, such as today, when the Association honors an individual who has made extraordinary contributions to the law and the administration of justice.

This is by no means the first time that Chief Justice William H. Rehnquist has honored this Association with his presence. In June 1994 he presided over a mock trial of Thomas Jefferson, whose actions at times have been thought by some to be inconsistent with the ideas he expounded. Twenty-one years earlier, shortly after having been appointed an Associate Justice of the Supreme Court of the United States, Justice Rehnquist spoke here...
on the subject of judicial disqualification. His remarks, entitled “Sense and Nonsense About Judicial Ethics,” stressed that it is as much the duty of a judge to continue presiding in the face of a groundless motion to disqualify as it is the judge’s duty to recuse him- or herself when a statutory ground for disqualification has been established. The following year, 1974, Justice Rehnquist presided at the final round argument of the national moot court competition.

But in the end it does not matter whether this is Chief Justice Rehnquist’s first or fourth (or fourteenth) visit to the House of the Association; for he has unquestionably demonstrated “pre-eminent distinction” as Chief Justice, and before that Associate Justice, of this nation’s highest court to a degree that made it quite easy for the Committee on Honors to recommend unanimously, and for the Executive Committee to conclude, again unanimously, that we should confer honorary membership on him. Why was it so easy to reach unanimity on the subject, which by the way we decided before the recent impeachment trial?

For one thing, Chief Justice Rehnquist has been an outstanding leader of and spokesman for the federal judiciary, and I am not speaking exclusively or even primarily about his administrative leadership of the Supreme Court. We all recall the decision in 1996 by District Court Judge Harold Baer to exclude evidence in a drug prosecution on the ground that the evidence had been obtained by an illegal search and seizure, and we recall the ensuing calls for his impeachment from, among others, Senator Dole, the leading Republican presidential candidate, and a White House report that the President was contemplating asking Judge Baer to resign. Chief Justice Rehnquist responded to that outcry, not directly, but by reminding his audience during an address at American University that judicial independence is “one of the crown jewels of our system of government” and stressing the necessity that federal judges be free to discharge their responsibilities “with the assurance that their judicial acts—their rulings from the bench—would not be a basis for removal from office.” He has more than once called for the filling of judicial vacancies and adequate funding for the judiciary and adequate judicial salaries. Just this past month he called for the uncoupling of judiciary funding from the debate over the proper means of conducting the 2000 census. “The judicial branch,” he wrote in a letter to the congressional leadership, “should not, and does not, have any role in this debate, as the resolution of this issue very properly rests with the political branches of government.”

Commentators have frequently remarked on the deference paid by
Chief Justice Rehnquist’s constitutional beliefs to the rightful powers of state and local governments. But it is sometimes forgotten that this constitutional theory justifies not only state and local government intrusions on the rights of individuals and businesses, but also (in his words) “the authority of the state to exercise its...sovereign right to adopt, in its own constitution individual liberties more expansive than those conferred by the federal Constitution.” PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980).

Justice Rehnquist’s reading of the Constitution and of the roles it assigns to state and local governments and his view of the federal court system as “a resource which is both precious and exhaustible” have led him to call for the elimination, or at least curtailment, of diversity jurisdiction and to deplore the increasing federalization of the criminal law.

As austere and imposing a presence he is on the Bench, Chief Justice Rehnquist is approachable and likable in other settings. When he was nominated to succeed Chief Justice Burger in 1986, the lawyer who interviewed the other justices for the American Bar Association Committee on the Federal Judiciary reported to the Senate Judiciary Committee that the nomination was met with “genuine enthusiasm on the part of not only his colleagues on the Court but others who served the Court in a staff capacity.... There was almost a unanimous feeling of joy.”

Somehow, notwithstanding his awesome responsibilities, Chief Justice Rehnquist has found, or I should properly say “made,” the time to author two books, a portrait of “The Supreme Court: How it was, how it is,” and “Grand Inquests,” a study of the impeachments of Justice Samuel Chase and President Andrew Johnson. His books, like his opinions, have been called “clear,” “lucid” and “mercifully free of bureaucratese.”

This occasion follows so closely the impeachment and trial of the President that a failure to say anything about the Chief Justice’s role in those proceedings would be to act like the proverbial ostrich. I for one, and I do not think I was alone, was struck by the partisanship and the theatricality of the impeachment proceedings. “In the midst of this constitutional circus,” Professor Jeffrey Rosen has said, Chief Justice Rehnquist was “a bastion of dignity.” How appropriate it was, at the end of the proceedings, for the Senate Majority Leader to thank the Chief Justice for lending the proceedings “a gentle dignity and an unfailing sense of purpose and sometimes a sense of humor.”

Chief Justice Rehnquist, I would be grateful if you would join me at the podium as I read the citation on this certificate awarding you honorary membership in this Association.
Having found him, by unanimous vote of the Executive Committee, to be of pre-eminent distinction in the legal community.

In recognition of his contributions to the law and society, including his lengthy and distinguished service as both Associate Justice and Chief Justice of the Supreme Court of the United States, and in further recognition of his integrity, his leadership, his commitment to the principle of an independent judiciary, and his exemplification of judicial efficiency, fairness and civility, we welcome him as an Honorary Member of this Association on this 13th day of April 1999.
Reflections on the Practice of Law (1953-1999)

William H. Rehnquist

Good afternoon, ladies and gentlemen. Let me first express my gratitude for your decision to make me an honorary member of the Association of the Bar of the City of New York. This Association has long occupied a high place in the hierarchy of bar associations in this country, and I consider it a privilege to hold an honorary membership in it.

When one reaches the age that I have, and is called upon to speak to a group of lawyers, there is a temptation to reminisce about the good old days when one started to practice law. I have at least partially yielded to that temptation this noon; I would like to tell you something about the practice of law which I found in Phoenix in the 1950s and 60s, and then have a look at the changes which have taken place since then. I hasten to advance several disclaimers. I have been away from the practice of law for 30 years, though I have kept in touch with it through two of my children who are lawyers, a number of friends who are still practicing, and a number of former law clerks who now number more than 80, most of whom are in private practice. It must also be quite clear that any one person’s
musings on this subject are bound to be anecdotal and parochial to a great extent, though with the advent of legal newspapers there is much more shared news today about the practice of large firms in large cities.

In 1953, having finished a clerkship in Washington, I put my worldly goods in my 1941 Studebaker Champion Coupe and drove to Phoenix, by way of my hometown in Milwaukee. I was to be married that summer, and between us my wife and I knew one other couple in Phoenix. I had visited the city one other time in May, when the weather was warm but pleasant. That visit had not prepared me for what Phoenix was like on the first day of July. As I came out of the mountains to the northeast and descended to the Salt River Valley, I saw a thermometer on a bank which registered 110 degrees. I was reminded of a story that my great uncle had
told me about Arizona. He said that in the territorial days—Arizona of course was one of the last two states in the forty-eight to be admitted, in 1912—the Episcopal bishop in San Francisco sent out a priest to Southern Arizona to try and start a missionary congregation. The priest came back after about a year and told the bishop, “I don’t think there is any hope for the Episcopal religion, I don’t think there is any hope for the Christian religion in Southern Arizona.” And the bishop said, “What are you talking about?” And the priest said that the people who have lived there in the winter have no need of heaven and the people who have lived there in the summer have no fear of hell.

I became the ninth lawyer in one of the then two largest firms in the city. Maricopa County, which embraced all of the Phoenix metropolitan area and more, then had a population of a little over 300,000. There were somewhere around 400 lawyers practicing law there, and the great majority of them had offices within three or four blocks of the state and federal courthouses.

Lawyers were not nearly so conscious in those days of the maxim that time is money, and almost all of us who wished to file a lawsuit walked to the courthouse ourselves with the necessary papers. If there was a big trial going on before one of the superior court judges, other lawyers might look in on it for a little while.

Most of the motions in civil cases pending in any of the nine divisions of the superior court were heard before one “motions” judge on Friday morning. This was a rather wasteful practice, since one was required to sit through other people’s arguments before getting to be heard in one’s own case, but it also had substantial benefits for a newcomer like me. It was a very good chance to get to know the 20 or 30 lawyers who would be sitting around waiting their turn, and it was also a very interesting introduction to the varying styles of argument that one finds among lawyers.

Even in walking back and forth to the courthouse, one might run into a lawyer who was on the other side of a case that you had, and a settlement discussion might ensue over a cup of coffee. There was something of a community of lawyers revolving around the two courthouses which led to a feeling of congeniality and camaraderie among all but the most confirmed loners. Certainly we did not maximize the number of hours devoted to the business of a client during a workday, but by the same token most of us did not feel the breath of Mammon breathing down our neck every time we took a break.

Because there were only one hundred lawyers who practiced regularly
in the courts, the much-lamented virtue of civility was not simply a matter of altruism, but of self-interest. When opposing counsel asked a scheduling favor which didn’t hurt your client, you acceded because you knew that in some case in the not too far distant future you would be asking him to return the favor.

The structure of the profession made for far more stability among the firms, with the resulting self-satisfaction that might be expected. Clients were attached to one particular firm, and did not generally shop their business around. Lawyers tended to stay where they were, because the great majority of associates eventually made partner if they were with a firm. I moved twice during my 16 years of practice, and was regarded as something of an iconoclast for doing so.

There was certainly a dark side to all of this. Law firms tended to take their clients for granted, and there was very little competition between firms for any particular client. The number of minorities and women practicing at the Phoenix bar could be numbered on the fingers of two hands, with several fingers left over. The state courts had a system for appointing counsel for a criminal defendant charged with a felony, but it was a somewhat haphazard procedure which paid very little.

In the federal court, there was no compensation for lawyers appointed to represent a criminal defendant, and the local federal judge would appoint you as an attorney for an indigent defendant very shortly after you were admitted to practice in the federal court. This was not necessarily a great boon to the client whom you were representing, but it gave you a very good chance to get some courtroom experience.

Shortly after I had left my first firm and hung out my own shingle with a friend, I volunteered to represent an indigent defendant before this judge had actually requested me to do so. I figured that uncompensated courtroom work was better than uncompensated office time counting the cracks in the ceiling of my office. As a result he assigned me not just one criminal defendant, but four or five over a period of a couple of years. I was largely unsuccessful in my efforts—indeed, the Assistant U.S. Attorney who prosecuted most of the cases suggested that I had a whole cell block at Leavenworth named after me. After about the fourth guilty verdict, I was walking down the stairs with the judge about 9:30 PM, rather disillusioned, and asked him when he was going to stop assigning me these cases. He turned and looked at me and said with a twinkle in his eye, “when you finally get one of them off.”

That time arrived rather inauspiciously. I was defending a man charged with a Dyer Act violation for having transported a stolen car from Texas
to Arizona. My parents were visiting from Wisconsin at the time, and so
my wife, my mother, and my father came down to watch the trial. It had
not taken me long to ascertain that my client was certainly guilty in fact
as charged, and so my only hope would be for some failure of the
government's proof. The government was relying on a codefendant who
had already been sentenced in accordance with a guilty plea, and had
been brought back from Leavenworth to testify against my client. The
codefendant was a balky and hostile witness—he admitted remembering
stealing the car in the company of my client, and heading west out of
Dallas with it, but claimed that he had had a lot to drink and passed out
and didn’t remember anything more until the waking up a day or two
later in Arizona. Apparently he had earlier told the Assistant United States
Attorney a different story, and that worthy over my strong objections
began to impeach the witness. The codefendant, after some badgering,
nonchalantly replied, “Look, they’ve already gotten me for this. I don’t
remember anything more.”

Whereupon the judge looked over to him and said slowly and care-
fully, “They haven’t gotten you yet for perjury, have they?”

In those days, the constitutional and decisional limitations on how
federal trial judges should conduct criminal trials were much less strict
than they are today. But this witness was not intimidated even by the
judge’s stern admonition, and at the close of his testimony the judge
granted my motion to dismiss for failure to lay venue in the district of
Arizona. I was thanked by my client, and walked to the back of the court-
room to what I had expected would be the congratulations of my family.
Quite the contrary, they sensed exactly what had happened and asked me
if I really thought justice had been done.

That, then, is a thumbnail sketch of the practice of law in Phoenix
four decades ago. Phoenix began to change during the time I was there,
with the firms growing much larger by the standards of that city, and
more emphasis being put on billable hours. I was a member of the state
bar committee on the Economics of Law Practice, and remember that the
American Bar Association did a survey sometime in the early 1960s of the
average number of hours billed per year by lawyers throughout the coun-
try. That figure, as I recall, was something like 1450 hours a year. I remem-
ber discussing it with other lawyers at that time, and thinking that that
probably was about the average for the Phoenix bar, too.

During my years of practice in Phoenix, I found time to participate
in a number of outside activities. I was active in the Maricopa County Bar
Association and worked my way up through the usual musical chairs to
be president for a year. The president of the bar association was ex officio president of the Legal Aid Society and oversaw the activities of that agency and its funding. I was also a member of the grievance committee of the state bar association which heard complaints against lawyers. I was a member of the National Conference of Commissioners on State Laws for six or seven years, and a lawyer delegate to the Judicial Conference of the Ninth Circuit for about the same period of time. I was active in local and state politics, and in the church to which I belonged.

When I left Phoenix in 1969, I felt that I had been a citizen of the community and not just a lawyer who had practiced there. I certainly did not get rich, but I made a decent living for myself and my family. When I was not trying a case or out of town, I was generally home by 6 o’clock in the evening with my wife and three growing children.

What of the profession today? Again, disclaimers are very much in order. My practice was mostly litigation, and so that is the side of the practice that I knew. I know that the practice of law in Phoenix has changed greatly in the years since I left, and what may have been true then in Phoenix, or is true now, there, may not be the case in larger or smaller cities. Some of these changes have been for the better—there are, for example, more women and minorities in the practice of law today. The practice of law is surely more “market-oriented” than it was, and in some respects this is a good development. But the downside of “market-orientation” is that acquisition of wealth—to put it more bluntly, the desire for money—has become a much larger element in the practice today than it was 30 or 40 years ago. Law firms grew in the 1950s and 1960s in Phoenix, as I daresay they did elsewhere; clients grew in size, and more lawyers were needed to do their work. New businesses moved in or started up and needed legal representation. But essentially the growth of the firms was passive, based on the idea of a firm located in a single city.

But eventually this growth became more aggressive, spreading from the New York firms to other large firms in large cities, and fueled by a desire to make more money. Anyone studying the economics of law practice could see that the way a firm made money was to have a lot of its work done by associates, which was billed to a client at an hourly rate that made a net profit for the firm. More business must be brought in to justify hiring more associates, and associates must turn out more billable hours to increase the profit. This principle of “leveraging” was the philosopher’s stone that turned legal work into gold for the profession.

Only a small fraction of the American bar practices in large firms in large cities. Most lawyers in the United States practice alone or in small
firms in smaller cities, and many lawyers today work as house counsel, prosecutors, public defenders, and lawyers for the federal, state, and municipal governments. But large firms set the trends that are followed by sizable firms in sizable cities elsewhere.

If it worked well for a firm headquartered in one of the larger cities, why not have the firm open branches in other cities and get still more business to justify still more associates?

So the practice of law began to nationalize in a way that it hadn’t before. This trend was accentuated by several parallel developments in the law.

The federal government’s role in regulation of business greatly increased under Franklin Roosevelt’s New Deal, and has continued to increase ever since. This has made applicable federal law govern far more transactions and more lawsuits than was formerly the case, and enabled lawyers from one state to handle matters in another state without necessarily being familiar with the laws of the second state. The development of the class-action lawsuit and high stakes product liability lawsuits meant that the outcome of a given lawsuit could have far more ramifications for the client than previously. Discovery was multiplied many fold, with ever more opportunities for “leveraging.”

Partly because of increased overhead, and partly in order to earn more money, lawyers raised their hourly rates out of all proportion to inflation.

The reaction of many major clients was to beef up their general counsel’s office, which in turn scrutinized clients’ bills more carefully, and insisted on more participation in litigation tactical decisions. Today it is not uncommon for a client to shop around for representation, and to put a project out to bid among several law firms. The stability of the lawyer-client relationship which once prevailed is rapidly disappearing. I would not say this is a bad thing, because certainly when I practiced in Phoenix there was a rather static, not to say smug, assumption that clients were attached to a particular firm.

Just as clients now move around, individual lawyers and practice groups within a firm are more likely to move to another firm which offers greater financial rewards. This development, like the increased choice of firms among clients, would doubtless please Adam Smith. The result of all this is that lawyers today make more money even after adjustment for inflation than they did 30 years ago.

But there is a downside to all of this too. It is summarized in the phrase that the practice of law has changed from being a “profession” to
a “business.” Now this statement is by no means self-explanatory; when lawyers began to advertise, many of the old guard said that this was the end of the law as a profession—it was now just another business. I don’t think that advertising has changed the practice that much, and certainly not the practice in large firms in large cities. The general counsel of Texaco does not thumb through the yellow pages of the telephone book to locate outside counsel. But if we mean by a professional someone whose goal in working is not only to make money—who exercises his own expert independent judgment in recommending a course of action—I think there has been a shift away from that sort of professionalism in the three decades since I left the practice. Some of that downside is reflected in the work done by lawyers. In litigation, the determination to exhaust by discovery, and the greater adverse consequences from losing a lawsuit, have made large firms and large clients very much risk averse. Fewer cases go to trial. This means that much of the time put in by those in the litigation department is not in court, but in protracted discovery. Time in court is not always interesting and stimulating, but it is surely more interesting and stimulating than poring over documents or reading depositions.

Legal research can be stimulating and interesting, but junior members of a litigating team may be assigned only a small part of the problem, and exercise very little judgment themselves. The demand for leveraging means that only business clients, who can treat legal fees as a business expense for tax purposes, can afford to retain a large law firm. This, in turn, I suspect means that most matters handled by large law firms are “team” efforts, with the work assigned to the juniors on the team often uninteresting.

The “leveraging” principle also means that most of the lawyers in the firm will put in a great number of hours every week.

When I was in the military service in the Second World War, I was sent briefly to Denison University in Ohio. I can still remember that on the wall by the gate through which you entered the campus, there was this quotation from Longfellow’s poem The Building of the Ship:

The heights by great men reached and kept
Were not achieved by sudden flight
But they while their companions slept
Were toiling upwards in the night.

Certainly Longfellow could not have had in mind the plight of associates in large law firms in large cities, but he might have. One is reminded
of the comment of Lewis Auchincloss, who before he became a well-known author worked for one of the large New York law firms. He had as an office a small cubicle which looked out only on a ventilation shaft. When he was asked whether he did a lot of his work at night, he responded “I don’t know.”

The life of an associate or junior partner in a large law firm can be very interesting, but I sense that this is the exception, rather than the rule. These lawyers put in a tremendous number of hours, and the work that they do is often uninteresting. I had thought that perhaps when one made equity partner in a large firm, a lawyer could then take it easier, but I sense this is not the case. If the firm is to continue to expand, more business must be brought in, and more associates hired in order that their work may be leveraged. The partners must continue to go full throttle in order to keep the machine going. To borrow a phrase from the ancient Romans, the firm has the wolf by the ears—it is very difficult to hang on, but it cannot let go.

Another part of the downside of the changes in the practice is the change in the relationship between large clients and their lawyers. The general counsel can have an almost adversary relationship with the outside retained firm, and is the filter through which the top management of the client receives advice from the firm. A friend of mine who is a partner in a large firm in a large city told me several years ago that one of the firm’s large clients explained to the firm that it was asking all of its “vendors” to reduce their charges by about 25%. The most distressing element of this request, it seems to me, is not that it wished to cut the fees that sharply, but that the law firm would be lumped together with the supplier of pencils and janitorial services as just another “vendor.”

For several summers while going to college, I worked on assembly line jobs in factories. The whistle blew at 7:30 in the morning, and you were expected to have punched in by then. Another whistle blew at 10 o’clock in the morning, and it was time for the morning break which lasted 10 minutes. Another whistle blew at noon, signaling the half-hour lunch break, and at 4 o’clock the last whistle blew signaling the end of the work day.

When I settled into my first job practicing law, handling quite insignificant matters, I nonetheless thought it was a great way to make a living. What a contrast to working on the assembly line! You had to render legal services for clients if you were to earn a living, but the work you did was often quite interesting. Best of all, you were not at the beck and call of any one master.

Surely some of the sense of being in control of one’s own life is lack-
ing in large law firms today. The demanding hours required leave little
time for family or outside activities. The financial rewards are enticing,
but some of the professional independence, some of the lawyer's role as
an active citizen—things that seem to me, at any rate, to be part of the
reason for being a lawyer—have been totally lost or greatly diluted in
exchange for the financial rewards.

For all these changes in the practice of law, however, I don't know
that lawyers themselves have changed a great deal. Harrison Tweed, former
President of this Association, delivered an encomium to the profession
more than half a century ago which I think it still deserves:

I have a high opinion of lawyers. With all their faults, they
stack up well against those in every other profession. They are
better to work with or play with or fight with or drink with,
than most other varieties of mankind.
Remarks

Henry L. Stimson Award Ceremony

Lewis A. Kaplan

Hon. Lewis A. Kaplan, United States District Judge, Southern District of New York, presented the Henry L. Stimson Award to outstanding Assistant United States Attorneys in the Southern District and in the Eastern District of New York, June 1, at the Association.

We are gathered this evening to recognize outstanding achievement by Assistant United States Attorneys. The award is in the name of Henry L. Stimson, United States Attorney for the Southern District of New York from 1906 through 1909, and it is fitting that it be so.

Prior to Stimson’s appointment in 1906, United States Attorneys engaged in the private practice of law during their tenures in office. They were compensated for their services as United States Attorneys on a contingent fee basis. Some made fortunes, and the system created a propensity to prosecute only those violations of federal law that promised the largest fees. The hiring of assistants usually was firmly part of the patronage system.

President Theodore Roosevelt wanted to change the system. He offered the Southern District to Stimson on the condition that he accept a fixed salary of $10,000 per year and abandon the contingent fee system.
Stimson’s new broom swept clean. He refused to hire patronage candidates as assistants, rejecting candidates of congressmen and the son of Admiral Alfred Mahan, one of the great figures in American naval history. Instead, he recruited top-ranked, recent graduates of the best law schools. Among those he brought into the office were Felix Frankfurter, later, of course, a Justice of the United States Supreme Court; Thomas Thacher, later Solicitor General of the United States and a judge of the New York Court of Appeals; and Emory Buckner, himself later United States Attorney and mentor of a whole generation of legal luminaries, including Justice John Marshall Harlan.

The United States Attorney’s office under Stimson brought and won major cases against wealthy and powerful adversaries. For example, it exposed long term corruption of the customs house by the American Sugar Refining Company. And it obtained the conviction of the New York Central Railroad for violation of the anti-rebate provisions of the Elkins Act.

In short, Henry L. Stimson changed the office of United States Attorney. He created the model of competence, integrity and professionalism that has set the standard for prosecutors ever since. But Stimson did far more than transform the United States Attorney’s office. As candidate for Governor of New York in 1910, Governor General of the Philippines, Secretary of War under President Taft, Secretary of State under President Hoover, and again as Secretary of War under President Franklin D. Roosevelt, Henry L. Stimson was an exemplar of the citizen-lawyer. He was a man who understood that a law license does not simply confer a right to practice a rewarding profession. It carries with it a responsibility to do one’s part for the public interest. And it is that which I want to speak about for just a few minutes this evening.

There never have been more lawyers in our society and in our city than there are right now. The number is growing. Yet a substantial proportion of the cases commenced in our Court is brought by lay people without lawyers. In most recent years, about 2,300 civil cases have been filed pro se each year, although there was a downturn in 1998 as the restrictions on habeas petitions by state prisoners enacted in 1996 first were in effect for a full year. That is over 20 percent of all civil cases commenced in the Court. The questions are why that is so and what if anything ought to be done about it.

The logical starting point is to ask why people are bringing these cases. Of the total number of pro se cases filed, about 70 percent are prisoner cases, divided about equally between habeas corpus petitions and Section 1983 claims challenging prison conditions. The two largest cat-
categories in the remaining 30 percent are employment discrimination and social security cases, although immigration cases are on the increase. So the pro se docket consists overwhelmingly of complaints by the poor, the uneducated and the powerless against the government and employers. But the pro se docket cannot be considered as an undifferentiated mass because the different categories of pro se lawsuits have quite different characteristics.

Two groups of these cases—Section 1983 and employment discrimination claims—differ from most of the others in that Congress has enacted legislation permitting an award of counsel fees to a successful litigant. One would think, therefore, that lawyers would be willing to take on cases in which there is a good prospect for success in the expectation that they will earn a fee at least as often as not. But in my observation, it frequently doesn't work that way.

To begin with, prisoners with complaints about excessive use of force, inadequate medical attention, and other aspects of prison life have no practical means of gaining access to lawyers who might be willing to take their cases and vice versa. Their only route to counsel is by filing pro se and then moving for the appointment of counsel by the Court. But that route usually is unsuccessful as well. We have all too few lawyers willing to take such cases, so we cannot routinely grant these requests. In view of the scarcity of lawyers available for such assignments, the Circuit has made clear that such requests should not be granted unless the case appears to be meritorious. Not surprisingly, most complaints by uneducated prison inmates are not well prepared and bear no indicia of merit, even in those cases which at bottom are well founded. Hence, most of those applications are denied. And even when we find likely merit and grant an application, we frequently find that no one at the Bar is willing to take the case. Thus, the prisoner cases are a constant problem for the Court. They tend to languish on the docket because pretrial preparation by the plaintiff, who has neither education nor liberty, is almost impossible. And those that are not eventually disposed of on motion are tried before juries, often with the prisoner representing himself, certainly not usually a productive exercise.

The employment cases, in theory, are horses of another color. People with grievances of this sort are not physically prevented from searching out lawyers. One therefore might assume that the failure of so many employment plaintiffs to find counsel is no more than the expected outcome of an efficient marketplace. The expectation is that the plaintiffs with good cases will find lawyers, while those with poor cases will not.
And that is no loss, the efficient market purists would argue, because the poor cases should not be brought. The decision of the marketplace for legal services, they would say, is that those cases are not worth the resources.

The problem with this argument is that the economic model on which it is based is flawed. It assumes perfect information on the part of buyers and sellers of legal services—prospective plaintiffs and lawyers. While that assumption probably is not wildly inaccurate as regards plaintiffs who are educated, middle management types, it is not accurate in the cases of the poor and uneducated. People who did not make it through high school are unlikely to know the first thing about how to find a lawyer appropriate for a given case. All too often, they probably go to lawyers simply because they happen to pass their offices on their way to the bus stop. The lawyers they serendipitously find frequently may lack experience with employment discrimination cases. The safe response for them is to turn down the case unless the plaintiff pays money up front, which most cannot do. So some proportion of meritorious cases falls through the cracks because of the imperfections of the legal profession.

The social security cases present yet another picture. Under Social Security Administration regulations, 25 percent of a successful adult claimant’s retroactive benefits are used to create a fund from which the attorney can be paid. While this usually is not enough to support large attorney’s fees, it at least is something, and I have not seen any appreciable number of applications by adult social security claimants for the appointment of pro bono counsel. But there is a serious problem with respect to social security claimants who have not reached adulthood, and the problem has two dimensions.

First, unlike the situation with adult claimants, the Social Security Administration does not withhold any portion of the retroactive benefits awarded to successful infant claimants. So there is no fund from which to pay counsel. The lawyer must extract a fee directly from the client, which often is impossible. In consequence, even lawyers who take social security cases on behalf of adult claimants often are very reluctant to represent minors.

Second, while Social Security Administration regulations permit the parents of minor social security claimants to represent their children pro se during the administrative proceedings, the Second Circuit in Wenger v. Canastota Central School District held that they may not do so in the district courts. It reasoned that the interests of the child are best served by representation by lawyers, that the parents’ interests do not always coincide with the child’s, and that the child is legally incapable of giving informed consent to parental representation.
Wenger has created a crisis with respect to social security cases brought on behalf of children. The parents have been disabled from acting on behalf of their children. The result, absent some change, will be that Social Security Administration rejections of children’s benefit claims will be unreviewable, as a practical matter, in the district courts.

There is, I suppose, nothing new about the fact that there are real problems in ensuring access to the courts for the disadvantaged members of our society, although the precise nature of the problem changes over time. But we really have to ask ourselves whether the current situation is tolerable as we approach a new century. We are a nation that lionizes individualism, that rightly values self reliance and initiative. But we pride ourselves as well on the idea that there is one place where one’s fame and the size of one’s bank balance do not matter, and that is at the Bar of justice. The legend inscribed over the door of the Supreme Court—Equal Justice Under Law—is an article of civic faith in this country. Indeed, we ask the less fortunate in our society to accept the legitimacy of our legal system because we hold out the promise that they will receive the same treatment from that system as the rich and powerful. Yet that is not true in all too many situations.

We have made important strides over the years. Gideon established the right to counsel in serious criminal cases, although the situation on the criminal side is far from perfect in an era in which the federal government pays Criminal Justice Act attorneys no more than $75 per hour and the State of New York is resisting paying lead defense counsel in death penalty cases more than $125 per hour. The availability of statutory awards of attorney’s fees to prevailing plaintiffs in civil rights cases certainly helps. But we tolerate a situation in which many of the poorest and least educated members of our society are denied effective access to the courts in meritorious cases.

I do not, I hasten to add, advocate anything like a Gideon rule for civil cases. Anyone who has observed the pro se filings in our Court would have to admit, in absolute frankness, that some are absolutely frivolous, despite often genuine feelings of aggrievement. Certainly there is very little to suggest that either the government or the Bar should make a bad situation worse by assigning lawyers to pursue cases that never should be brought in the first place. But the Bar does have a responsibility here.

We live in a time of unparalleled prosperity. The New York Bar is doing remarkably well. Our greatest law firms are becoming national and multinational enterprises. Our great and even not so great firms are earning huge fees and paying the most inexperienced new associates very large
salaries. Their partners are earning incomes that, even on an inflation adjusted basis, were not even dreamed of when I was in law school. Yet we are saying to poor children with bona fide claims for vital disability benefits that their social security cases must be dismissed because there are no lawyers to handle them and their parents will not even be permitted to do the best they can. We are saying to prison inmates with bona fide claims of brutality or wilful neglect that they must represent themselves in court, if indeed they show that last bit of faith in our institutions that the filing of a lawsuit represents. Even viewing the matter from a purely selfish point of view, this does not make sense. How can we reasonably expect people whom we treat this way to respect our government, our laws, and our legal system?

The same sense of obligation that led Henry L. Stimson to devote years to serving his country should lead members of the New York Bar to do more than they are now doing to deal with this problem. Not every member of the Bar can serve, as did Stimson, in the president's cabinet. But every one can help a poor blind child pursue social security benefits. Every one can help insure that genuine victims of employment discrimination have their day in court. Every one, in short, can do his or her part to help ensure that Equal Justice Under Law applies to the disadvantaged as well as to the well off.
Northern Ireland: A Report to the Association of the Bar of the City of New York from a Mission of the Committee on International Human Rights

Peter G. Eikenberry, Gerald P. Conroy, Barbara S. Jones, Barbara Paul Robinson and Sidney H. Stein

INTRODUCTION

In April 1998, the world celebrated the signing of the “Good Friday Agreement” between the Republic of Ireland and the United Kingdom of Great Britain and Northern Ireland. With its promise of peace, the Good Friday Agreement brought to a close a conflict that had lasted nearly three decades and left a legacy of violence and suffering.

1. The members of the mission were Judges Barbara Jones and Sidney H. Stein of the United States District Court for the Southern District of New York; Barbara Paul Robinson, partner in the law firm of Debevoise & Plimpton and former president of The Association of the Bar of the City of New York; Assistant District Attorney Gerald P. Conroy of the New York County District Attorney’s Office and New York City attorney Peter Eikenberry. A list of those who so generously took the time to meet with us and make this report possible is set forth in Appendix A; we are grateful to each of them. We also thank David Nachman, Chair of the Committee on International Human Rights and Scott Greathead, a former member of that Committee, for their support and fundraising for the mission and Paul Shechtman for his editorial assistance. We thank The Spingold Foundation and The Reebok Foundation for their generous support.
Agreement affirmed the parties’ commitment to “the civil rights and the religious liberties of everyone in the community,” and called upon those in authority to pledge to “serve all the people of Northern Ireland equally.”

The Agreement incorporates international human rights standards and contemplates the establishment of two important commissions: a Policing Commission to consider reforms in the Northern Ireland police force, and a Criminal Justice Review Body to consider reforms in the criminal justice system.

At this historic juncture, the Committee on International Human Rights of the Association of the Bar of the City of New York sponsored a mission to Northern Ireland to examine the administration of criminal justice there. One purpose of the October 1998 mission was to follow up on an earlier Committee report (the “1987 Report”) issued during a time of open hostilities and terrorism. With the promise of the Good Friday Agreement and the two already constituted Commissions, the 1998 mission went to Belfast and Dublin in the hope of formulating recommendations in accordance with international norms that might help promote a lasting peace.

In contrast to the conditions described in the 1987 Report, the 1998 mission encountered a growing sense of optimism among the people we formally interviewed, as well as the “people in the street.” Those we met—Catholic and Protestant, Unionist and Nationalist—were scarred and weary, but hopeful about the future. The mission returned to New York with an abiding respect for the people of Northern Ireland and their leaders, who were able to reach a peace accord after centuries of strife.

Gracious contributions which made the mission possible. This report is dedicated to the many lawyers and judges in Northern Ireland who have devoted their energies—often at tragic cost—to the defense of individual liberty and the fair administration of justice in their native land.

2. Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (the “Good Friday Agreement”), at Strand Three; Rights, Safeguards and Equality of Opportunity; Human Rights, at 1. A list of the documents reviewed by us is attached as Appendix B.

3. Id. at Strand One; Democratic Institutions in Northern Ireland; Annex A: Pledge of Office, at 4.

4. See id. at Strand Three; Policing and Justice; Annex A: Commission on Policing for Northern Ireland and Annex B: Review of the Criminal Justice System.

As American lawyers, we recognize that our recommendations derive from our experiences with our own criminal justice culture, which has evolved over two centuries in a relatively peaceful environment. We have tried to be mindful of Northern Ireland’s far different experience. Above all, this report reflects our firm belief that if well-intentioned people enact laws and build institutions that nurture human rights, the peace process is likely to succeed.

A. A BRIEF HISTORY

At the time of the Association’s first mission to Northern Ireland in May 1987, there were open hostilities. Two weeks before that mission arrived in Belfast, Lord Justice Gibson and his wife were killed by a bomb while riding in their car. The 1987 Report described portions of Belfast as a divided city:

[P]arts of the city, the Falls Road and Shankill Districts in West Belfast, exist as armed camps with homes and shopping areas bombed out or blackened by recurrent fires. Meanwhile, in the hate ridden areas of the city, and in the central shopping district (where permits are needed for automobiles to cross military check points), local authorities and the ... Army patrol the streets in armored vehicles, make use of broad emergency powers of arrest and detention, and on occasion resort to the firing of plastic bullets into crowds of protestors deemed unruly. 6

The 1987 Report then asked this question: “How could this be in a corner of the United Kingdom, a presumed bastion of democracy and civility?”

Political and religious strife have been at the heart of the last four centuries of civil wars between and among Irish inhabitants and the government. Four hundred years ago, the northernmost of Ireland’s four ancient provinces was the most fiercely militant Catholic and Celtic region. In 1603, however, Queen Elizabeth defeated certain Irish earls, and her successor, James I, encouraged Scottish Presbyterians to settle in the northern region, where they eventually suppressed the Catholic population. On July 12, 1690, the Protestant Prince, William of Orange, defeated deposed Catholic monarch James II, cementing Protestant English rule and

6. Id. at 115.
7. Id.
Catholic subjugation for centuries to come. (To this day, thousands of Protestant Unionists march on July 12, often provocatively in Catholic areas, to celebrate Prince William's victory.) The Act of Union of 1800 formally incorporated Ireland into the United Kingdom.

In 1922, after nationalist uprisings, the United Kingdom granted the 26 southern counties of Ireland “free state” status, and they became completely independent in 1949. Northern Ireland was established by partition that same year, with its government dominated by a Protestant majority. Religious discrimination in employment, housing and education was commonplace and led to heightened Catholic frustration.

In 1968, after what began as peaceful civil rights demonstrations by the Catholic minority, violence erupted, and the army was called in to intervene. In response to the army’s presence, Catholic nationalists increasingly supported their own more violent factions, and paramilitary groups grew in strength in the Protestant and Catholic communities. After four years of violence, the government of the United Kingdom suspended the Northern Ireland Parliament and imposed direct rule. As stated in the 1987 Report:

The Catholic/Protestant dispute dominates political life in Northern Ireland, even as it does other aspects of national life. The insistence by unionists on merger with Britain and abhorrence of a united Ireland is matched by nationalist opposition to continued unionist domination.8

In response to the historic pattern of discrimination, the militant nationalists viewed piecemeal reforms as contrary to their objective of Irish reunification. They discouraged members of the Catholic community from participating in the country’s civil service, police force and judiciary, thereby further excluding Catholics from positions of influence.9

B. PRESENT CONDITION

It is not difficult to understand why the last three decades of violence—let alone the centuries of unrest that preceded them—have had a debilitating effect on the humaneness of the criminal justice system in Northern Ireland. The reminders of the hostilities are starkly apparent.

8. Id. at 118.
9. See id. at 119.
The most arresting moments of our visit to Belfast were spent on a tour of West Belfast. An ugly, 30-foot-high “peace wall” towers over the rubble of what used to be housing, and divides the streets which once ran through two adjacent residential neighborhoods. In those neighborhoods and on their shopping streets, elaborate murals on brick walls depict hooded paramilitary figures with submachine guns or pictures of nationalist hunger strike martyrs.

From the top of one steep hill, as a reminder of the army’s presence, a huge fort hovered menacingly over rows of houses. Looming from the top of another hill, the “neighborhood” police station was housed inside a walled fortress. Hard work and a sustained effort over many years will be needed to eradicate fully the deep divisions still so physically evident in these communities. We believe this can be achieved, but only if sorely needed reforms are made to the institutions of justice and the police regain the confidence and respect of all.

By the time we arrived in October 1998, the Good Friday Agreement had been ratified by 71 percent of the Northern Ireland people, followed by the election of a new Northern Ireland assembly. In the period ending just before our arrival in Belfast, we were told that the police traveled the city in armored vans, usually surrounded by foot soldiers carrying loaded rifles. We saw only two armored police vans during our visit; the army was invisible; and the police were in ordinary cars or on foot. One member of our mission jogged for an hour on the evening of our arrival without encountering a single police officer. During the week of our visit, the closing of the army fort in West Belfast was announced, we saw fresh peace graffiti scrawled over older hate messages, and peace themes had replaced paramilitary images on some of the large wall murals. Most significantly, the army was in the process of withdrawing from Northern Ireland.

C. THE EMERGENCY LAWS

As a result of the pervasive culture of violence, some form of “emergency laws” have been in effect in Northern Ireland since the early 1920s, with increasingly harsher laws enacted as the violence increased. Many observers have argued that these laws fail to comply with the international human rights conventions which the United Kingdom has signed.

In its defense, the Government has relied on derogations made under human rights conventions for periods of emergency. The conditions we observed during our visit lead us to conclude that an emergency no longer exists in Northern Ireland that might justify departures from international standards. Although the peace is newly achieved and fragile, it is a fact of daily life.


At the same time, the Government has warned that widespread and sustained terrorist activity reoccur in Northern Ireland, it is prepared to introduce a limited range of temporary emergency provisions. Included among those measures would be a continuation of the non-jury Diplock courts for trials of terrorist offenses, restrictions on bail, and lessened standards for the admission of confession evidence. The Government also has recommended the retention and incorporation into ordinary (i.e. non-“emergency”) law of the current PTA provisions that entitle the police to hold a suspected terrorist for 48 hours before granting him access to a solicitor and has invited comments on whether to retain the provision that entitles the police to hold such a person for 7 days before lodging charges or releasing him. In doing so, the Government has relied on derogations made under human rights conventions for periods of emergency. The conditions we observed during our visit lead us to conclude that an emergency no longer exists in Northern Ireland that might justify departures from international standards. Although the peace is newly achieved and fragile, it is a fact of daily life.

11. Article 2 of the United Nations International Covenant on Civil and Political Rights opened for signature Dec. 19, 1966, 14688 U.N.T.S. 999, to which the United Kingdom is a party and which entered into force in 1976, provides that each state “undertakes to respect and to ensure to all individuals … the rights recognized in the … Covenant.” Under Article 4.1, states may deviate from their obligations in “time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed…”


13. Id. at ¶ 1.3-1.4.

14. See id. at Ch. 13. The Diplock courts were named for the Commission chaired by Lord Diplock which recommended the abolition of jury trials for specified offenses out of concern for juror intimidation and perverse verdicts. Most of the Commission’s recommendations were enacted by the U.K. Parliament in the Northern Ireland (Emergency Provisions) Act 1973. See infra at 53.

15. Id. at ¶ 8.33.

16. See id. at ¶ 8.24.
ment has rejected the argument that the ordinary criminal law, as it now exists, is sufficient to cope with terrorism. 17

While the 1998 White Paper may represent genuine progress, we are troubled by the continuing distinction between the rights accorded to suspected terrorists and those accorded to other suspected criminals. A commitment to equal treatment is an important structural guarantee of liberty. Where laws apply equally to mainstream and radical constiuencies, unwarranted incursions on civil liberties are far less likely to occur. We believe that this principle of equality is the surest safeguard of fundamental freedoms.

D. THE 1998 HUMAN RIGHTS ACT

The enactment of the 1998 Human Rights Act gives us considerable hope. 18 The Act incorporates the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “Convention”) 19 into the domestic law of the United Kingdom. When the 1998 Human Rights Act becomes fully effective next year, courts in the United Kingdom will play a new and more active role in insuring compliance with international human rights standards. Although the courts will not be able to void an act of Parliament, they will be empowered to determine whether the Government’s proposed terrorism legislation is compatible with the Convention. 20 All other statutes and criminal practices will come under scrutiny as well, with courts empowered, in these instances, immediately to reform practices illegal under the Convention. 21

E. THE NORTHERN IRELAND CRIMINAL JUSTICE SYSTEM

The 1987 Report emphasized the importance of pre-trial procedures to the fair administration of the criminal law:

Because arrest and detention are the points at which the security interests of the government conflict directly with the lib-

17. Id. at ¶ 8.5.
21. Id at §§ 10(2)–(3).
erty interests of the individual, it is not remarkable that police
authority in these spheres is a point of substantial tension, and
one which has drawn, and continues to warrant, close scruti-
tiny. The same can be said of the interrogation process as au-
thorized by law and as conducted by the police. As is true of
any criminal justice system, what transpires in one or more of
these preliminary phases of the criminal process can also affect
seriously the fairness and integrity of the trial process once the
decision is made to prosecute an arrested individual.22

We went to Northern Ireland knowing that throughout “The Troubles,”
there had been widespread criticism of human rights abuses, particularly in
connection with arrest, detention and interrogation procedures. The percep-
tion of widespread abuses in Northern Ireland has been focused heavily,
but by no means exclusively on, the Royal Ulster Constabulary (the “RUC”)
which has been given enormous powers under the emergency laws. The
RUC has had, and continues to have, virtually unfettered discretion in con-
nection with the arrest, detention and interrogation of suspected terrorists.

1. Arrest

Section 14(l)(b) of the PTA empowers the police to arrest without a
warrant anyone whom there is reasonable grounds to suspect is, or has
been, “concerned” in the commission, preparation or instigation of acts
of terrorism. This power runs afoul of Article 5.l.c of the Convention,
which requires “reasonable suspicion of having committed an offence” as
the predicate for a lawful arrest. Being “concerned in the commission of
acts of terrorism” is not an offense under United Kingdom law and seems
too vague a standard to state an offense.

Nonetheless, in drafting proposed new terrorism legislation, the Gov-
ernment makes plain its intention to maintain the 14(1)(b) arrest power.
It writes: “Given the nature of the continuing terrorist threat, and mind-
ful that the police consider the 14(1)(b) power of arrest of particular im-
portance in countering terrorism, the Government, while recognising the
concerns surrounding a section 14(l)(b) type power of arrest, is inclined
to the view that a similar power should be included in the proposed new
legislation.”23 The Government believes that 14(1)(b) is consistent with
the Convention. It points to the decision in Brogan v. United Kingdom, in

which the European Court of Human Rights (the “European Court”) found that an arrest made under 14(1)(b) did not contravene Article 5.1.c.24 In Brogan, however, the Court emphasized that the detainees were suspected of specific acts of terrorism, each of which was an offense under the laws of Northern Ireland.25 Brogan does not support the Government’s position that 14(1)(b) is good law in all instances.

We believe that adopting a more objective standard for arrests would enhance public confidence in the police. The current 14(1)(b) arrest power, unlimited by specific offense conduct, gives police officers free rein to detain and interrogate people. Although the Government states that the arrest power has not been abused,26 this perception is not universally shared. Indeed, statistics suggest that the RUC “over arrests.” Sir Louis Blom-Cooper, the Independent Commissioner for the Northern Ireland Holding Centers, has reported that “seventy-five percent of all detainees [charged with terrorist offenses] are discharged from custody without being charged at all.”27 In 1997, “of the 525 terrorist suspects detained [in holding centers only] 141 (27%) were subsequently charged with criminal offences.”28 The comparable numbers in 1998 were 566 arrested and 131 charged (23%).29

The fact that such a small percentage of detainees are subsequently charged with crimes casts doubt on the propriety of most of these arrests. A widespread practice of arrests without charges, which enables the police to detain and interrogate individuals without any significant judicial oversight, is a violation of Articles 5.1.c, 5.2, 5.3 and 6.3.a of the Convention. Adoption of an objective standard for terrorist arrests would itself serve to enhance public confidence in the police.

2. Detention and Delay of Access to Counsel
Following arrest, persons suspected of terrorism continue to be treated

25. Id. at ¶ 50-51.
differently than persons suspected of other crimes. Suspected terrorists may be detained longer than others before judicial authorization is required, may be held incommunicado, and may be denied access to counsel for longer periods.

Under current law, a suspected terrorist may be detained without access to counsel for forty-eight hours without being charged with an offense. If the police wish to detain a person for a longer period, they must apply to the Secretary of State who is empowered to extend the detention period by up to five more days. The Secretary of State appears to uniformly grant the request. In 1998, there were 125 requests, all of which were granted. During the seven-day detention period, the police need not justify a detention to a judicial officer. In contrast, the average time spent in detention before a remand hearing by a person arrested for a non-terrorist offense is six hours.

Under Article 5.3 of the Convention, arrested defendants must be brought promptly before a judge or other officer authorized by law to exercise judicial power. Although the Convention does not define “promptly,” judicial decisions give content to the term. In 1988, the European Court found that detention for four days and six hours without judicial authorization was in contravention of the Article.

In the newly proposed anti-terrorism legislation, the police would retain the right to detain a suspect on their own authority for 48 hours. In deference to the Convention’s requirement of judicial authorization, however, the Government has proposed various models for replacing executive with judicial authorization for extensions of the detention-without-charges period beyond the 48-hour mark. The Government’s pre-

30. PTA at § 14(4). Although the Convention posits a right to legal representation, it is not clear when that right attaches. The Government proposes to recognize the right to counsel beginning with the first appearance before a judicial officer to review police requests for extension of detention—i.e., after 48 hours. (See 1998 White Paper at ¶8.33). This appears to satisfy the Convention. Neither the Convention nor the Government’s proposal contemplates a right to counsel during the initial period of detention and interrogation.

31. Id. at ¶ 14(5).


36. Id. at ¶¶ 8.7-8.18.
ferred model is an independent commission constituted by some combination of sitting and retired judges and magistrates. Such a commission, we believe, could comply with the Convention. We disagree, however, with the Government's view that the police should be entitled to 48 hours before the commission's review must take place. Since this period equates with the amount of time a detainee may be held incommunicado, we believe the ordinary criminal law limit of 36 hours is preferable.

During the initial detention period, not only are the police free from judicial oversight, they are unchecked by the presence of defense counsel. For the first 48 hours, the police may refuse the suspect access to a solicitor, and two officers (who will be permitted later to corroborate each other's testimony) can interrogate him. So lengthy a period of incommunicado detention seems unnecessary. Statistics demonstrate that access to a solicitor is rarely denied in the rest of the United Kingdom; in fact, the power to delay has not been exercised in the past two years outside of Northern Ireland. Even in Northern Ireland, the power is now used sparingly. Government figures show that in 1997, access was denied in only 33 of the 512 cases where a request was made. These statistics undercut the purported necessity to treat suspected terrorists differently than other suspects.

Finally, we commend the Government for the proposed removal of one significant disparity between the treatment of suspected terrorists in Northern Ireland and those elsewhere. Currently under the EPA, the police may restrict a detainee's access to his solicitor for an additional 48

37. Id. at ¶ 8.11. Membership might include retired solicitors and barristers should their participation be necessary to create a large enough pool of qualified commissioners.
38. Under the EPA, a detainee is entitled to have a solicitor and a named person notified of his detention without delay. See EPA §§ 46(1)-(4), 47(1)-(4). These rights of notification and access may be delayed, however, for 48 hours on the authority of a police superintendent. Id at §§ 46(6), 47(6).
39. See EPA at § 47(6).
41. Id.
42. Id.
43. If the extraordinary practice of denying access to counsel is warranted in particular circumstances, it should be justified on a case-by-case basis. The Government also wishes to retain the 7-day time period for detention despite its own admission that in international cases detainees have either been released, charged or the decision taken to deport them within [a] 4-day period. 1998 White Paper at ¶ 8.22. We urge the Government to reduce this time period so that suspected terrorists are brought more promptly before a magistrate.
hours after the initial period. Moreover, the detainee has no right to have his solicitor present during police interviews, even after the two 48-hour periods have passed. The Government proposal would repeal these EPA provisions and thereby promote adequate legal representation and the protection against self-incrimination that it affords.

3. Detention Centers

There have been ongoing calls to close the now infamous special detention centers at Castlereagh and Armagh, where those detained for terrorist activity have been held. These facilities were originally police offices and were not intended to house prisoners. In his First Annual Report (1993), Sir Louis Blom-Cooper, the Special Commissioner for the Holding Centers described the physical conditions in these holding centers:

Being for the most part without access to daylight or natural ventilation, the physical conditions at Castlereagh and Armagh are, to employ moderate language, austere and forbidding. The size of each unit of cellular accommodation for holding centre detainees is altogether too confined a space.

And in July 1995, the U.N. Human Rights Committee commented as follows:

Note is taken of the Government's own admission that conditions at the Castlereagh detention centre in Northern Ireland are unacceptable and concern is therefore expressed at the Government's admission that it has not decided definitively to close the facility. . . . The Committee further recommends that the Castlereagh detention centre be closed as a matter of urgency. (Emphasis supplied.)

Even during times of emergency, international law prohibits inhumane
treatment of those detained for suspected criminal activity. With the peace process underway, the time has come for the detention centers to be closed. Given their ignoble role throughout The Troubles, the closing of the centers would be an important symbol to the Northern Ireland people.

4. The Remand Hearing
After arrest, the detainee must either be released or brought before a magistrate within seven days for a remand hearing at which the charges against him must be presented. This is not a bail hearing, but is intended to permit the magistrate to determine whether the suspect’s continued detention is lawful. We have previously noted our concerns about the ability to retain people for suspicion of non-offense conduct and the time limits for detention of suspected terrorists before a remand hearing is required. The concern addressed here relates to the inadequacy of the facts that must be provided to the magistrate at a remand hearing, in order to justify continued detention. In our view, the quantum of evidence deemed acceptable for this purpose is insufficient and violates the requirements of the Convention. Under present practice, judicial review does not even focus on the sufficiency of the evidence to warrant continued detention, but rather on whether the police need additional time to investigate their suspicions before bringing charges. This standard has the unacceptable effect of permitting lengthy detentions in numerous cases where the police simply lack sufficient evidence to prosecute a suspect for a crime.

Article 5.3 of the Convention, as previously mentioned, requires that an arrestee be brought promptly before a judge, and Article 5.4 entitles him to “take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.” Implicit in these provisions is the fundamental notion that sufficient facts must be presented to the judicial officer for him to make a neutral analysis concerning the legality of continued detention. In practice and decisional law, however, the amount of information sufficient to remand a suspected terrorist in Northern Ireland falls far short of this standard.

In In Re Valente’s and Baker’s Applications, the High Court of Justice of Northern Ireland ruled that at a remand hearing, a police officer need

49. See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3; International Covenant on Civil and Political Rights, Arts. 7, 10.
50. See PTA § 14(5).
only swear under oath "that he believes that he can connect the accused with the crime with which he is charged." If the police officer makes this conclusory statement, the detainee can be remanded until the preliminary inquiry where he must be provided with at least some evidence against him. The accused has no right to cross-examine the officer or otherwise look behind his averment. The Court explained its decision this way:

[The real object of [the applicants' solicitor] in attempting to cross-examine the investigating officer was to ascertain the nature and details of the evidence against the applicants. We held in In Re Kerr's Application [1997] NI 225 that the solicitors for an accused person were not entitled at remand stage to require the Crown to furnish particulars of the nature and details of the charges against him. It is a matter for the discretion of the magistrate conducting a remand hearing to decide in any given case whether he is satisfied with the standard evidence that the investigating officer believes that he can connect the accused with the charge or charges against him. If he is so satisfied, he is not bound to permit a solicitor appearing for an accused to cross-examine the officer on the nature of the evidence. Indeed, to allow this would be to stultify the rule in In Re Kerr's Application and the court should generally refuse to permit it to continue.

The decision in In Re Valente's and Baker's Application renders the remand hearing a mere formality. Indeed, without an evidentiary review, the Government can avoid ever having to demonstrate a basis for an arrest if it eventually elects not to prosecute the suspect. Two examples illustrate the potential for abuse: Robert Kerr, the applicant in In Re Kerr's Application, was released without a preliminary inquiry after being incarcerated for more than eight months, and Colin Duffy has spent, cumulatively, over five years in detention since 1989. Though convicted and incarcerated from 1994 through 1996, Duffy was acquitted on appeal. His last arrest was in June 1997, and he was released in early October 1997 without having had a preliminary hearing.

An independent public inquiry into the evidentiary basis for arrest and continued detention is a necessary component of a fair system of criminal justice. Even an in camera submission of evidence to a magistrate

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51. 1998 N. Ir. 341 (Q.B.).
52. 1997 N. Ir. 225 (Q.B.).
would be a marked improvement over current practice; it would strengthen judicial review and protect a suspect’s liberty interest without forcing the Government to share its evidence at an early stage in the case. Such an in camera review should be reserved for cases where the Director of Public Prosecution (the “DPP”) can specifically demonstrate a need for confidentiality.

Notably, there is reason to hope that the proposed judicial commission may provide more meaningful review of detention decisions. The very fact that the commission would be independent of executive authority may result in a less deferential review. Moreover, Section 8.14 of the 1998 White Paper proposes that the detainee “be given a summary of the case against him” at the hearing and presented with the “police’s reasons for seeking an extension of detention in his case.” While it is not clear how much evidence the police would be required to disclose, the commitment to present a “summary of the case” represents progress in this area.

5. The Preliminary Inquiry

Should the Government elect to prosecute the detainee, a preliminary inquiry must be held. The inquiry is often the first occasion for the suspect and his solicitor to obtain information about the Government’s case. Approximately one week in advance, the solicitor receives a notice of the preliminary inquiry, which includes some details concerning the evidence against her client. Under current practice, however, the scheduling of the preliminary inquiry itself is largely a function of when the RUC deems its investigation complete. Six to eight months may elapse between the remand hearing and the preliminary inquiry, and while the magistrate may set an earlier date, that power is rarely invoked. Given the importance of this proceeding, the lack of any time limit within which the preliminary inquiry must occur is cause for serious concern.

6. Trials in Diplock Courts

In 1972, the Parliament established a commission, chaired by Lord Diplock, to consider the administration of criminal justice in Northern Ireland for persons accused of terrorist activities. The Diplock Commission submitted its report to Parliament in December of that year. The report recommended that a vast array of crimes “which are commonly committed at the present time by members of terrorist organizations” be tried by a judge without a jury.53 The commission cited two concerns—

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pervasive verdicts and juror intimidations—in support of its recommendation, although it acknowledged that instances of either were relatively rare. The report also noted that then-existing property qualifications for jury service resulted in Protestants being present on juries in numbers greater than their proportion of the population.54

The Diplock Commission’s recommendations were enacted in the Northern Ireland (Emergency Provisions) Act 1973. Since then, non-jury trials of specified offenses have occurred in Northern Ireland, with judges obliged to articulate the reasons for their factual findings on the record. This much-criticized provision has been modified slightly since 1973. Most notably, certain crimes, including murder, manslaughter and robbery, may now be “certified out” of non-jury Diplock courts for trial by jury, but only at the discretion of the Attorney General.

In 1984, Sir George Baker was appointed by the Parliament to review the Diplock Courts and reported that the “time [was] not ripe for the return of jury trial for scheduled cases.”55 Citing practical considerations, he rejected alternative fact-finding procedures, such as trial by multi-judge panels or by a judge assisted by lay assessors.56 More recent reports have been more optimistic about the prospect for restoration of a jury trial right. Writing in 1996, Lord Lloyd foresaw a time when it would be possible to bring the justice system in Northern Ireland into line with that in the rest of the United Kingdom.57 His report recommended transitional measures, such as a presumption in favor of jury trials that would still permit the Attorney General to certify a case for a non-jury trial on application of the prosecution or defense.58 Lord Lloyd also suggested the possibility of trial by jury for all offenses with special safeguards for jurors in terrorist-related cases.59 More recently, the Government’s 1998 White Paper announced a commitment to move as rapidly as circumstances allow to jury trial for all offenses.60

54. Id. at 17. The Diplock Commission also recommended that a defendant’s statement should be admitted at trial unless he proved “on a balance of probabilities, [it] was obtained by subjecting [him] to torture or to inhuman or degrading treatment.” Id. at 32.
56. Id. at 33-38; for a discussion of the Baker Report, see the 1987 Report at 151-55.
58. Id. at ¶ 16.16.
59. Id. at ¶ 16.18.
Many creative ideas have been advanced to safeguard jurors in terrorist cases. In 1986, for example, Professors Greer and White proposed a detailed scheme to protect the identities of jurors. Jury panels would be drawn from throughout Northern Ireland; panelist’s names would be kept secret; and jurors would be concealed from the public in the courtroom. To reduce the risk that jurors might be recognized leaving the courthouse, a mini-van would transport them to a random site selected by a court officer other than the driver. Other possibilities for juror protection include sequestration of jurors or a change of venue in appropriate cases. Plainly, it is better to employ such protection measures when necessary than to abolish altogether the right to a jury trial in specified-offense cases. Presumably, only a handful of cases would generally require the jury protection devices. We advocate an immediate return to the jury trial, a right enjoyed by all citizens of the United Kingdom not being tried for alleged terrorist offenses in Northern Ireland.

7. Right Against Self-Incrimination

Among the rights recognized by human rights conventions is the privilege against self-incrimination. The right is set forth in the International Covenant on Civil and Political Rights as well as in decisional authority interpreting the Convention. In John Murray v. United Kingdom, for example, the European Court announced that the right to silence was a “generally recognised international standard [ ] which lie[s] at the heart of the notion of a fair procedure . . . .” Two legislative acts in the United Kingdom arguably conflict with this fundamental right: (I) the Criminal Evidence (Northern Ireland) Order 1988, which allows the court or jury to draw an adverse inference from a suspect’s failure to answer police inquiries or testify at trial; and (ii) the EPA, which admits a defendant’s confession in certain circumstances unless he presents prima facie evidence that it was obtained by torture, inhuman treatment, or degrading treatment or by any violence or threat of violence.

Of the two provisions, the adverse inference rule has withstood judicial challenge. In Murray, the European Court upheld a Diplock judge’s
drawing an adverse inference from the defendant’s silence. The majority, however, limited its holding to the specific facts of the case: the defendant had been cautioned that his silence might be used against him; the evidence showed he understood the caution; he was not punished by conviction or contempt of court for choosing to remain silent; the trier of fact, an experienced judge, had specified his reasons for drawing an adverse inference; and the weight attached to the defendant’s silence had been articulated and was subject to review.

In our view, current law and practice show too little regard for a suspect’s self-incrimination right. A 1983 study, for example, found that 89 percent of those convicted in Diplock court cases had confessed to their crimes. That percentage is remarkably high by any standard and suggests that suspects are routinely being subjected to undue coercive pressure. Others who have studied the Northern Ireland system have expressed this concern, pointing to the “institutionalized use in Northern Ireland of strong psychological pressure on suspects in order to induce them to confess” that appears to violate international norms. Moreover, Diplock Courts are prone to give more weight to a suspect’s silence than is fairly warranted in the circumstances.

The 1998 White Paper voices concern about a proposal that would require a Diplock Court to accept as proven the possession of guns and explosives in certain circumstances unless the defendant can establish that he had no knowledge or control of the items. The White Paper concludes that it is not “right to contemplate a requirement on the defendant to prove his or her innocence [which would] depart from the fundamental presumption of innocence in our law.” It also notes that “any change to the law would need to comply with the [Convention] and, in particular, the requirement for a fair trial in any particular case.” Similarly, the White Paper acknowledges “serious [Convention] constraints”

66. Murray, at ¶ 57.
67. Murray, at ¶¶ 47-54.
70. (See, e.g., discussion of the Casement Park cases infra, at F.N. 78.)
73. It is at ¶ 14.5.
with respect to a proposal to create a new substantive offense of refusing to answer questions in defined circumstances. Given these welcome acknowledgments by the Government, there is reason to hope that standards protecting the right against self-incrimination will form an essential part of the criminal law reforms in Northern Ireland.

8. Appeals

Appeals are considered in the first instance by a panel of the Court of Appeal. A defendant may seek further review by the House of Lords, but only on questions of law and with permission of the Court of Appeal or the House of Lords itself. Once this process is exhausted, a defendant may appeal to the European Court in Strasbourg. At present, domestic courts do not have the power to adjudicate a defendant’s claim that his or her rights were denied under international law by enforcement of a statute passed by Parliament. To obtain review, the defendant must pursue an appeal to the European Court, where he or she is likely to face lengthy delay due to the European Court’s backlog of cases. This limitation on domestic review will end in 2000 when the 1998 Human Rights Act takes effect, to the extent that a court in the United Kingdom will be empowered to make a finding of incompatibility between a statute and a Convention standard.

F. TWO CASE STUDIES

Two case studies reveal the workings of the Northern Ireland criminal justice system during the Troubles and underscore the need for reforms.

1. Robert Kerr’s Case

Robert Kerr was arrested on November 7, 1996, upon suspicion of being “concerned in the commission, preparation or instigation of acts of terrorism.” A search of his house allegedly revealed information on computer disks that “might form material for the planning and execution of terrorist attacks or the [ ] training of terrorists.” Kerr was taken to the notorious Castlereagh detention facility, where he was “interviewed at length” for seven days. He remained silent despite being cautioned that an adverse inference could be drawn from his unwillingness to cooperate. On November 14, 1996, he was charged with possession of material useful to terrorists and conspiring to collect such material.

74. Id. at ¶ 14.3(iii).
On November 20, 1996, Kerr’s solicitor wrote to the prosecutor requesting details supporting the charges. The letter emphasized that: “[a]t the first remand, the Officer in charge declined to give details of the evidence he was relying on to connect the accused to the charges [but said only] that he was relying on ‘physical evidence, documentary evidence, forensic evidence and circumstantial evidence.’” One week later, the authorities responded:

[The police believe] it would be inappropriate at this very early stage of their lengthy enquiries to indicate the nature of the available evidence, other than to confirm that it includes information stored on computer. Whilst you undoubtedly are anxious to have as full a picture as possible in order to advise your client, the sensitive nature of the type of information of which he is alleged to be in possession means that at present police are reluctant to divulge any details which might compromise their investigation. I hope that this assists you.

On January 29, 1997, Kerr’s solicitors again wrote seeking details and received a similar response. A Detective Chief Inspector later explained: “The investigation during the course of which [Kerr] was arrested was a sensitive one and has continued since his arrest. . . . [T]here was reluctance on the part of the police to disclose in undue detail the nature of the evidence upon which the charges preferred against [him] were based.” On February 12, 1997, Kerr was re-interviewed by the police and was shown computer printouts of material seized from him, but he remained silent as before.

In July 1997, the High Court reviewed Kerr’s detention, which was then still ongoing. It wrote:

On being arrested a suspect is entitled to be told the grounds for his arrest, and it is not in dispute that the arresting officer discharged this duty in the present case. After he is charged he must be brought before the magistrates’ court. It will be the duty of the court in due course to hold a preliminary inquiry or preliminary investigation into the offence or offences with which he is charged, and if satisfied that there is a prima facie case on any charge to commit him for trial on that charge. Inevitably in cases of any substance the police investigations may not be complete and materials constituting the case on which it is sought to commit the accused for trial may not be ready for presentation. In the large majority of cases, accordingly, the prosecu-
tion will ask the court to adjourn the case and the court on doing so will remand the accused... [W]hen it remands an accused the court does not have to take evidence connecting him with the offence. It will normally satisfy itself that there is sufficient reason for it to remand him... In practice this is generally done by the investigating officer informing the court on oath that his inquiries are continuing and that he believes that he can connect the accused with the offence.

In summary, after arrest on November 7, 1996 Robert Kerr was held in the Castlereagh detention center and interrogated without a warrant for seven days before he was brought before a magistrate for a remand hearing. At the remand hearing he was remanded without an examination of the legality of the case against him. As of July 8, 1997—the date of the Kerr opinion—Kerr had been in custody exactly eight months and, according to the opinion, had yet to have a preliminary inquiry. Nor was Kerr ever given a preliminary inquiry before his release.

Although Robert Kerr apparently relied on common law rights, in the 1998 case, In Re Valente's and Baker's Application, the applicants relied upon international law standards. Nevertheless, in In Re Valente's and Baker's Application the court denied the applicants' relief, finding that the court was bound to follow the precedent of In Re Kerr's Application.

In examining the holdings of In Re Kerr's Application and In Re Valente's and Baker's Application, it seems apparent that the detainees' rights under the Convention were violated in several respects. Article 5.1 requires a person arrested to be informed clearly of the reason for arrest and no one is to be arrested or detained without the “purpose” of bringing him before a legal authority on reasonable suspicion of having committed a crime or being about to commit one.76 (See also Articles 9 and 14 of the International Covenant on Civil and Political Rights.) (Under the 1998 Human Rights Act, the Convention is mandated to take precedence over any judicial precedent such as In Re Kerr's Application.) The prosecutor's passive role at the remand hearing, as revealed in the Kerr decision, appears to be violative of the affirmative duties of prosecutors as found in UN Guidelines on the Role of Prosecutors.77

76. Art 5.1.c.

2. The Casement Park Murder Cases

On March 19, 1988, two United Kingdom soldiers were murdered in West Belfast. The incident began when the soldiers, wearing plain clothes, drove into a funeral cortege in Casement Park that was taking place for a man who had been killed in a Loyalist attack on a funeral three days earlier. The two soldiers were seized from their car, beaten by the crowd, and thrown over a wall to the road below. From there, the soldiers were forced into a taxi and driven to a deserted lot. There the beatings continued, and two men took turns shooting the officers; neither man was apprehended.

Three men—Kane, Timmons and Kelly—were among those arrested and charged with the murders. The Diplock Court judge found that Kane, who was partially deaf and allegedly mentally deficient, had been in Casement Park and had kicked one of the soldiers. Timmons was also found to have kicked one of the soldiers in the park and encouraged others to participate. Kelly was found to have helped send the soldiers off in the taxi after they were pushed over the park wall. Although Kelly denied being in the park, the court drew an adverse inference from his failure to testify to support the weak identification testimony against him. None of the three men was found to have left the park area.

On these facts, the three men each were found guilty of murder and sentenced to life imprisonment. The Diplock judge relied upon “the law of common purpose” to support his verdict. A defendant may be found guilty under this theory in one of two ways:

First, the defendant might have given assistance to a joint enterprise, the purpose of which was to commit murder. Alternatively, if the purpose of the joint enterprise was not to commit murder, the defendant might have foreseen that one of his co-planners could commit murder while pursuing their common purpose.

None of the accused were even alleged to have conspired with the actual killers. Kane and Timmons made confessional statements that they later retracted, but which were admitted in evidence against them. The

79. Id. at 16.
Diplock court found Kane, Timmons and Kelly to have been in Casement Park and to have aided in the grievous bodily harm to the soldiers, further reasoning that those accused must have contemplated the soldiers’ murder as one possible outcome of their joint enterprise. Since murder did result, the judge found Kane, Timmons, and Kelly guilty of that crime. The rest of the United Kingdom population, not arrested in Northern Ireland under emergency laws, is entitled to at least the safeguard of a jury. It is doubtful that a fairly constituted jury would have reached the same verdict.

G. IMPLEMENTATION OF THE GOOD FRIDAY AGREEMENT AND RECOMMENDATIONS

1. Background

As noted above, the Good Friday Agreement calls for studies of policing and the criminal justice system. The Policing Commission is scheduled to report in the summer of 1999 and the Criminal Justice Review Body in the autumn. We were advised that the Review Body is considering proposals to modify the system on judicial selection and to redefine the role of the prosecutor, among other reforms.

2. The 1998 Human Rights Act

Under the Good Friday Agreement, direct rule by Parliament will cease and matters will “devolve” to local authorities in Northern Ireland, but the 1998 Human Rights Act “will take precedence over” any acts of the Northern Ireland legislature (or any common law right); that is to say, no court will be able to “act in a way which is incompatible with a Convention right.”

When the 1998 Act becomes effective in 2000, courts will have the power in criminal trials “to stay a prosecution as an abuse of process, to recognise new defences, to quash an indictment, to direct a jury that [it] should not draw adverse inferences from a defendant’s silence, [or] to exclude evidence. . . .”

The Act does not permit a judge to void a law of Parliament on the ground that it conflicts with the Convention, but it does require a court to interpret a law to be compatible with the Convention “[s]o far as it is possible to do so” and authorizes it to make a finding of “incompatibil-
ity” when an irreconcilable conflict exists. Such a finding is designed to provide impetus to remedial action. Thus, the Act provides a “fast track” route for amending legislation when a finding of incompatibility has issued.

The significance of the 1998 Act cannot be understated. As regards the criminal law, for the first time:

[defence lawyers will ... be able to argue that particular offences breach Convention rights such as the right to privacy (Article 8), or the rights to freedom of expression (Article 10), or assembly and association (Article 11). They will also be able to argue that a reverse onus clause breaches the presumption of innocence in Article 6(2); or that the ingredients of a common law offence were insufficiently clear and specific to enable the accused to know, at the time he committed the offence, that his conduct was in breach of the criminal law (contrary to Article 7).]

Most importantly, the courts must test current arrest and pre-trial procedures against international norms and reconstruct them if they fall short of those standards. The courts may also reconstruct legislation, including using such extreme devices as the “jettisoning” of a word, if so doing permits interpretation of a statute in line with the Convention.

The Northern Ireland judiciary has made clear that it welcomes the 1998 Act. Addressing a judicial training session, Lord Chief Justice Carswell stated:

[The central purpose of the Bill is to allow people to enforce their rights under the European Convention on Human Rights in all our domestic courts and tribunals, rather than having to take their cases to Strasbourg—in other words, it brings rights home. Over time we will see a culture of human rights develop at the heart of our systems of government and law. The primary purpose of the Convention is to protect the citi-

83. Emerson lecture at 4.
84. Id.
85. The Northern Ireland judiciary played a leading role in the development of the 1998 Act. Lord Chief Justice Carswell chaired the cabinet committee that developed the theory incorporating the Act into the United Kingdom’s parliamentary government.
zen against the power of the State. We wanted to allow the Convention rights to be relied upon, and adjudicated on, in cases against public authorities in the United Kingdom's courts.86

In sum, the 1998 Act is a key pillar in the program to reform criminal law procedures in Northern Ireland and to promote renewed respect for the law.

3. The Judiciary

The judiciary in Northern Ireland deserves credit for its courage and dedication. During The Troubles, several judges have been killed, and many have grown accustomed to living under armed guard. Nonetheless, there is a need to reform the system for the selection of judges so that it is more open and produces a more diverse bench. Especially with the expanded role of the judiciary under the 1998 Human Rights Act, it is imperative that the public have confidence in judicial appointments.

The criminal courts in Northern Ireland are now divided between the Crown Court, which presides over indictable offenses, and the County Courts and Magistrate Courts, which hear lesser offenses. Trials before the Crown Court are heard by a judge and jury, except for “scheduled offenses” under the emergency laws which are heard by a “Diplock Judge” without a jury. (For civil cases, the High Court is the superior trial court.) As noted, appeals from the Crown Court are taken to the Court of Appeal, which is comprised of the same judges who sit on the Crown and High Courts. A three-judge panel hears the appeal. Thus, the findings of a Crown Court judge (including those in Diplock cases) are reviewed by a panel of his peers.

Judges of the Crown Court, the High Court, and the County Court are currently appointed by the Queen upon the recommendation of the Lord Chancellor of the United Kingdom following advice from the Lord Chief Justice of the High Court in Northern Ireland. Generally, only barristers who have ten years practical experience are eligible for appointment, and only those who have been Queen’s Counsel are considered. Solicitors or resident magistrates may be appointed to the County Court in certain circumstances. Women judges are rare. We were informed by the Lord Chief Justice that of the 26 justices on the High Court and Crown

86. Lord Chief Justice Canswell, Judicial Studies Board of Northern Ireland, Address at ¶¶ 3, 7, 10 (Feb. 20, 1998).
Court, none are women; of the 15 judges on the County Court, only one is a woman; and of the 17 magistrate judges only three are women.

In practice, the Lord Chief Justice consults with selected members of the bar before arriving at his advice for appointments to the bench. The process would be more credible if there were more openness and public participation. A nominating commission, such as that used in New York State in connection with appointments to our Court of Appeals, would allow for greater public participation without compromising quality. If established, such a commission should include lawyers and non-lawyers and represent a broad spectrum of the community. By actively soliciting applications from a variety of sources, checking references, and interviewing leading candidates, the commission would help ensure that talented women and men of diverse backgrounds are given full consideration for appointment. Transparency and public accountability can be achieved through statistical reporting in which the need for confidentiality is respected.

Whether such a commission would have the power of appointment or merely of recommendation to an appointing authority, the commission would substantially enhance the credibility of the process. To broaden the pool of applicants, the current requirements for appointment should be re-examined. Is the current prerequisite of 10 years practice experience necessary? Should only barristers who are Queen’s Counsel be eligible to serve? These requirements should be reconsidered so that artificial barriers do not prevent otherwise qualified candidates from being chosen.

2. The Police

To arrive at a fundamentally fair criminal justice system, Northern Ireland will need to overcome the deeply-ingrained heritage of deference to the police in cases concerning accusations of terrorism. This will not happen quickly or easily. The substantial authority of the police and their practices have not been questioned by the DPP or the courts. Historically, the DPP has played a very passive role in pretrial criminal justice procedures where much of the harm to the rights of the accused takes place. As noted above, most of those arrested and detained never come to trial. Judges accept the allegations of the police without scrutiny. If the 1998 Human Rights Act is to fulfill its promise, all of the participants in the criminal justice system—police, prosecutors and judges—will have to give up attitudes and practices long harmful to the rights of criminal suspects, and regulate their conduct in accordance with the rules of law set forth in
the Convention and the other conventions to which the United Kingdom is party.

There are now nearly 8,500 regular members of the RUC and an additional 3,200 full-time and 1,800 part-time reserve members. This police force serves approximately 1.5 million people. The only larger force in the United Kingdom is the Metropolitan London Police, which serves a population of more than 7.6 million. Until recently, the RUC has operated in conjunction with the armed forces, patrolling in armored vans accompanied by rifle-bearing soldiers. More than 90 percent of its members are Protestant. Clearly, in adjusting to peacetime status, the RUC will face conflicting objectives: it must be "downsized" at the same time that more Catholics are added as members.

Because the police have functioned much like an occupying army, they have often abandoned their more traditional community policing function in many neighborhoods, sometimes in self-defense. In the void, paramilitary groups have become cruel enforcers of their own rules against members of their own community. Vigilante beatings of suspected thieves and kneecap shootings have been common occurrences. If public order is to be restored, the RUC must resume a more normal police function.

The broad discretion afforded the RUC in combating terrorism has resulted in numerous civilian complaints. In 1997, approximately 5,600 public complaints were lodged against the police, of which only 14 resulted in formal charges, and only one in a finding of guilt. Plainly, these statistics underscore the need for an adequate mechanism to resolve such complaints. The task is a difficult one, as experience in our own city has demonstrated. Whatever the difficulties, however, a culture of administrative and criminal responsibility for police misconduct is essential. The 1998 Annual Report of the Police Federation reveals that only two out of the approximately 13,500 officers were dismissed from duty in 1998, the same number that were dismissed in 1997.

Because the civilian complaint process has not been successful, complainants have resorted to the courts, bringing suits for assault, false arrest, and other abusive tactics. In 1997, the Police Authority paid £1.4 million to sat-

88. Id.
89. See id.
90. See id. at 19
isfy claims of police wrongdoing. One recent case is illustrative: in February 1998, in Adams v. Chief Constable of the RUC, the plaintiff was awarded £30,000 for injuries suffered at the hands of the police. The four constables who effectuated his arrest kicked and punched him and banged his face against a wall. He was hospitalized for three weeks, walked with crutches for weeks more, and suffered recurring headaches from the beatings.

Reforms are underway to prevent actual and perceived abuses from occurring. Among them is the audio-recording of police interrogation of detained suspects. That practice, which has been commonplace in England and Wales for some time, has previously been resisted in Northern Ireland for fear that it would inhibit detainees from speaking against terrorist groups. Another salutary development is the establishment of a police ombudsman.

That office is scheduled to be in place this summer, and has been allocated a £3 million budget for its operations. The budget appears much too small. The activities it replaces, which themselves were ineffective, were supported by a budget approximating £7 million. An adequately funded ombudsman is essential to permit the investigation of police misconduct complaints without reliance on police investigators whose independence would be in question. In our view, no reasonable expense should be spared to ensure a police force that the public has confidence is faithfully enforcing the laws.

3. The Prosecution

The role of the prosecutor in Northern Ireland is dramatically different from that in New York City. During the early phases of a case, the DPP is passive in its relationship to the RUC; it does not promptly review charges for probable cause before an arrestee is presented to a magistrate, let alone involve itself in the decision to arrest in the first instance. As a result, most of what occurs during arrest, interrogation and detention takes place outside the DPP’s scrutiny. Nor is the prosecutor’s role at the remand hearing an active one; like the judge, he makes no independent assessment of the evidence at that stage.

For less serious crimes, particularly outside Belfast, the DPP does not even conduct the prosecution; that responsibility is left to the supervising

95. Id
constable. And for more serious offenses, including terrorist crimes, the DPP does not involve itself in investigative efforts. Rather, it views its role as that of reviewing the facts objectively and sending the police back for more evidence when it finds a case wanting. The DPP may consider that interacting earlier and more frequently with the police will challenge its cherished image of independence. Yet we believe it is the DPP’s responsibility. Broadening the prosecutor’s role may well be an essential ingredient to building public confidence in the justice system.

Comparing prosecutorial practice in Northern Ireland with that in our city is instructive. Our prosecutors’ offices involve themselves at the earliest stages of important investigations being conducted by the police. In many instances, the officer will review the facts of a case with a prosecutor before making a warrantless arrest. To obtain a warrant, the officer must consult with a prosecutor who usually drafts the officer’s sworn complaint which is then taken to a reviewing magistrate for issuance of the warrant. This complaint must set forth facts that demonstrate probable cause to believe that the crime for which a warrant is sought has been committed by the defendant.

In New York City, the police must produce the arrestee for arraignment before a judge within 24 hours. Before arraignment can occur, the charges against the person are reviewed by a prosecutor who has interviewed the officer and assessed what charges, if any, are appropriate. The prosecutor reviews the charges for both probable cause and prosecutorial merit. Frequently, prosecutors downgrade the arrest charges from felonies to misdemeanors or disapprove some or all of the arrest charges. At arraignment, the magistrate reviews the complaint for probable cause and conducts a bail hearing.

On occasion, New York City judges have released unarraigned prisoners whom they determine have been held too long beyond the presumptive 24-hour period. Obviously, a charge review system modeled on this one would greatly expand the current role of the DPP while providing guidance and supervision for the newly constituted police force in Northern Ireland. For all serious crimes the DPP would become a partner with the police, taking joint responsibility for the charges being lodged against the defendant.

For less serious crimes, where currently the police constable is the prosecutor, a system modeled on our “desk appearance ticket” system could serve this purpose. Under this system, the arrestee would not be detained, but rather would be given a summons with a future date for a court appearance. This summons would contain a section where the officer would write out the charges and the facts supporting probable cause for the arrest. These arrests would then be reviewed by prosecutors who could,
where warranted, decline to prosecute at the first appearance. Removing the RUC from the prosecution of minor offenses would require an increase in the staff of the DPP and the creation of some additional regional offices outside Belfast. The reduction in friction between police and misdemeanor arrestees, who constitute the vast majority of defendants, would translate into increased credibility for the police and the criminal justice system and would be well worth the cost.

A screening system such as that described above would greatly expand the role of the DPP in assisting in investigations and guiding the police. With the incorporation of the Convention into domestic law, having prosecutors who have been trained in international norms at work early on a case will take on added importance.

4. Defense Lawyers

a. Status and Abuse of Solicitors:

Patrick Finucane and Rosemary Nelson

The legal profession in Northern Ireland, as in the rest of the United Kingdom, is divided into two sections: the solicitors who counsel clients, and the barristers who appear in court. Since the barristers become involved later in the criminal justice process, they are more removed from confrontation with the RUC. Given the deference paid the RUC by the courts and the prosecutors, it should come as no surprise that few solicitors are willing to represent suspects detained under the terrorist legislation, and that those who do are repeatedly harassed, threatened with death, and even murdered. Solicitors are virtually the only actors in the criminal justice system who, in representing their clients, directly oppose the RUC during pretrial procedures.

Shortly before our mission, the United Nations Special Rapporteur on the Independence of Judges and Lawyers presented a report to the United Nations Human Rights Commission.96 It found that the RUC had engaged in a pattern of intimidation and harassment of solicitors with clients accused of terrorist offenses.97 In essence, some members of the RUC have identified defense solicitors with their clients and have been guilty of abuses toward both the accused and their lawyers.


97. Id. at ¶ 38.
The Special Rapporteur also addressed the murder of solicitor Patrick Finucane, a defense lawyer for many individuals detained under the emergency laws. We interviewed law partners of Mr. Finucane, as well as other solicitors and barristers. Mr. Finucane was murdered by two masked gunmen in his home in front of his wife and children on February 12, 1989. He had been a successful lawyer, effective in his representation of terrorist detainees. In addition to condemning the intimidation of solicitors in Northern Ireland, the Special Rapporteur called for an independent judicial inquiry into questions surrounding the murder of Mr. Finucane, particularly the evidence of government collusion in the murder.98

Four weeks before Mr. Finucane's murder (for which a Protestant paramilitary organization claimed responsibility), a prominent member of Parliament had publicly complained of solicitors who were too sympathetic to the IRA. Mr. Finucane was also threatened by RUC officers during interrogation of his clients, who then reported those threats to Mr. Finucane. (The three high-ranking RUC officials whom we interviewed confirmed to us, as the RUC has previously confirmed to others, that there is no evidence that Mr. Finucane was associated with any paramilitary group.) To date, no one has been charged with the murder; the DPP has issued a direction of “no prosecution.”

In the ten years since Patrick Finucane's death, many individuals and groups throughout the world, including the Association of the Bar, have called for an independent judicial inquiry into the circumstances of his murder. In response, some have argued that there has been sufficient investigation, pointing to the two inquiries by the English police official John Stevens, who investigated allegations of collusion between the military and the RUC and paramilitary organizations, including allegations of such collusion in the Finucane matter. The Stevens reports, however, were not focused solely on the Finucane case. Only the first of the two reports was made public, and it in summary form. It is time to release the records of the Stevens reports on government collusion with paramilitary groups, including records dealing with the case of Pat Finucane.99

Because the role of solicitors is central to the protection of the rights of those accused, it is critically important that there be no harassment or intimidation that deters their vigorous defense of their clients. Ongoing

98. Id. at ¶ 73.
99. We understand that recently Stevens has been asked to conduct a third investigation, this one focused on the Finucane murder. Given the history of the Stevens reports, we believe it is time for an independent judicial inquiry.
doubts about the Finucane murder will continue to cast a shadow on those willing to assume that role today. For that reason, we believe it important that the Association continue to press for a full and open judicial inquiry into the Finucane case.

On March 15, 1999, Rosemary Nelson, a well-known criminal defense solicitor, was brutally murdered when a car bomb exploded after she drove away from her home in Lurgan. The Red Hand Defenders, a loyalist paramilitary group, claimed responsibility. When we met with Mrs. Nelson, she told us of the many threats on her life and showed us, as an example, an anonymous letter with a June 1998 postmark. She also reported to us and to others police threats made through her clients to her. Not only had she advocated for the rights of those accused of terrorist crimes, both nationalists and loyalists, she had also been a representative of the Garvaghy Road Residents Coalition in their grievances against the marches through that neighborhood, especially the Drumcree parade.

There has been a worldwide outcry against this despicable act, along with calls to bring the guilty to justice. Although a full-scale investigation has begun, it will be indispensable to an effective investigation to retain outside investigators independent of the RUC. It may be that the murder is solely the act of the paramilitary group that has already claimed responsibility, a group that would like to derail the peace process, and that the police were not involved. If so, the police should welcome the call for an independent investigation so that the results will have credibility. It would also be difficult to imagine how an RUC investigation can be effective in securing the cooperation of witnesses in view of the past allegations of police threats against Mrs. Nelson.

A judicial inquiry into the murder of Mr. Finucane and a completely independent investigation of the murder of Mrs. Nelson are both necessary to change the climate of lawyer intimidation and to recognize officially the importance of an independent bar and its integral role in the criminal justice system of Northern Ireland. Mrs. Nelson’s murder starkly demonstrates, if Mr. Finucane’s murder already had not, that the inquiry must include an investigation into ongoing threats against lawyers. In a system so hardened to the acceptance of abuse of individual rights, the advocacy of lawyers is critically important. Responsible, independent advocacy offers the best hope for reversing the patterns of abuse of human rights that has been endemic in Northern Ireland. The judicial inquiry and the independent investigation are necessary to break the habit of tolerance of the abuse of lawyers as well as of the abuse of the rights of their clients.

The greatest hope for bringing about the necessary cultural change
towards recognition of the legal rights of the accused is the vigorous advocacy that must come from lawyers free of intimidation and with prompt access to those accused. Although barristers are critical to rights of those on trial and on appeal, it is the solicitors that play the most substantial role in defending the rights of those accused. They comprise the only group of lawyers fully involved with critical pretrial procedures where the rights of the accused have been largely ignored when the charge includes terrorism. Accountability for the murders of the two solicitors is crucial. In addition, there needs to be a realistic appraisal of what can be done to right the damage resulting from a sustained period of extreme violence.

b. The Legal Societies

All solicitors in Northern Ireland are required to belong to the Law Society and all barristers to the Bar Council. Both organizations have come under criticism for their lack of support for beleaguered criminal defense solicitors, including Mr. Finucane and Mrs. Nelson. Because solicitors are most often subject to intimidation, one would expect the Law Society to have spoken out most forcefully, for example, in favor of a judicial inquiry into Mr. Finucane’s death. At least until May of 1999, these expectations had not been realized. The news of the recent decision by the over seven hundred members in attendance at a special meeting of the Society—calling for by acclamation, a judicial inquiry into the death of Mr. Finucane and an independent investigation into the death of Rosemary Nelson—100—is heartening news.

The Bar Council, too, had until recently been reluctant to address the issue of intimidation of lawyers, apparently fearing that “a political question would be involved” that might polarize its membership. The Council is justifiably proud that its Protestant and Catholic members have worked cooperatively throughout the years of The Troubles. Now that the Good Friday Agreement has been ratified, however, there is reason to hope that the Bar Council will become more outspoken on human rights matters. During our visit, its leaders expressed that expectation. Since our return it has established a Human Rights Committee, a salutary development, and called for a judicial inquiry into the death of Patrick Finucane.

These positive steps by the Bar Council and Law Society can bear fruit only with concrete and continuing action by both organizations. The Society has established a “hot line” for complaints of harassment, and the effort is welcome, but it is too soon to judge its effectiveness. The

Law Society's very recent decision on the Finucane issue encourages expectations that the Society will now demonstrate a greater tendency to back its beleaguered criminal practitioners.

The leadership of the two professional associations (ideally with the support of their members, law professors, judges and government officials) must work jointly to give a public and continuing priority to the problems of the solicitors who are in the front lines in the effort to make human rights a reality in Northern Ireland. The professional societies should be the main voice for the independence and security of their lawyer colleagues who are an integral and indispensable part of the criminal justice system. We hope that in the wake of the ratification of the Good Friday Agreement and the adoption of the 1998 Human Rights Act by Parliament, the professional associations will be encouraged to follow their promising early steps with strengthened commitment.

We suggest that, to promote human rights education and advocacy, a human rights desk book be developed containing human rights treaty provisions, and references to relevant statutory, constitutional and criminal laws and procedures, annotated by important court and commission decisions, for use by all. The desk book might be in a looseleaf form capable of periodic additions, or, if in hard cover, with an annual supplement. Such a book would best be compiled by a collaboration of the Bar Council, the Law Society, law schools, law professors and human rights organizations. The availability of such a desk book to lawyers, judges and prosecutors would in turn encourage human rights issues to be more effectively monitored or raised during criminal procedures, with a direct impact on the rights of the accused.

There should also be joint human rights training of judges, prosecutors, lawyers and police utilizing the proposed human rights desk book. A curriculum should be developed for seminars which includes role-playing where lawyers, judges, prosecutors and police shift roles in mock pretrial and trial situations, thereby illustrating relevant human rights issues that regularly arise in these contents. Such seminars would give recognition to each institution’s critical role in the criminal justice system, and could be video-taped for future training.

As members of one of the oldest bar associations in our country, we have come to expect the Association to be a strong and loud voice in support of the rule of law and the administration of justice in the public interest. The reports and advocacy efforts carried out over nearly 130 years by the Association’s committees have been widely respected and effective. In particular, the reports of the Committee on International Human Rights are ex-
amples of the kind of outspokenness we have in mind. Other efforts include the Association’s extensive participation in the selection of highly qualified judges, consistent defense of judicial independence, continuing education and training programs for all sectors of the profession in legal developments and professional ethics, and ongoing efforts to reform and improve the laws.

We recognize that our Association members join voluntarily, not as a requirement of their professional standing. Further, we have been spared the widespread turbulence and violence suffered in Northern Ireland. But we call upon the Bar Council and the Law Society to rise to the challenge of this promising moment. The Bar Council and Law Society can play an important role in the needed re-education and training to implement the 1998 Human Rights Act and the call of the Good Friday Agreement for equal rights for all the diverse communities of Northern Ireland. Both can and should be important forces in the effort to restore public confidence in a society ruled by laws which are fair and fairly applied to all. To the extent that our City Bar can be helpful to that effort, we extend our hand.

June 1999

Committee on International Human Rights

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Lee A. Schneider, Secretary

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Bertrand B. Pogrebin
Robert Polstein
Edwin B. Rekosh
Laurence A. Silverman
Jennifer Trahan
Robert O. Weiner
Alicia E. Yamin
Alicia L. Young
APPENDIX A

CHRONOLOGY OF MEETINGS DURING
OCTOBER 1998 MISSION TO NORTHERN IRELAND

We received invaluable advice and guidance from many with whom we met in New York in advance of our visit to Northern Ireland, including Prof. Martin Flaherty of Fordham University Law School; Julia Hall, Counsel of the Europe and Central Asia Division, Human Rights Watch; Michael Posner and Tessa Robinson of the Lawyers Committee for Human Rights and William F. Kuntz, II, member of the New York City Civilian Complaint Review Board. We also benefited from a presentation in New York by the Honorable Mo Molam, M.P., Secretary of State for Northern Ireland, First Minister Designate David Trimble and Deputy First Minister Designate Seamus Mallon of the Northern Ireland Assembly. Other persons were interviewed, as follows:

Saturday, October 23, 1998, London
Jane Winter
British Irish Rights Watch

Monday, October 25, 1998, Belfast
Paul Mageean
Martin O’Brien
Committee on the Administration of Justice

Peter Madden
Eamon McManamon, and certain of their colleagues
Madden & Finucane, Solicitors

Rosemary Nelson
Solicitor

Sir Robert Carswell
Lord Chief Justice
Royal Courts of Justice

Gareth Johnston
Chief Secretary

Professor John Jackson, Head of Law School

Professor S. Livingstone, School of Human Rights
Queens University of Belfast
Eugene Grant
Past Chairperson, The Bar Council of Northern Ireland, Founder and Secretary of the Criminal Bar Association of Northern Ireland and Member of the Criminal Justice Review Board

Barristers
Paddy O’Hanlon
John Larkin

Tuesday, October 26, 1998, Belfast
Dr. William Lockhart, Director
EXTERN

Sir Louis Blom-Cooper, Q.C.
Independent Commissioner for the Holding Centers

Daniel McClurg
Secretary of the Police Federation for Northern Ireland

Michael Lavery, Q.C., Chairperson
Standing Advisory Commission on Human Rights (and several other members of the Commission, including Robin Wilson, Paul Donaghy, Clodagh McGrory and Les Allenby)

Barra McGrory,
Chair, Human Rights Committee,
Belfast Law Society

Wednesday, October 27, 1998, Belfast
Justice Brian Kerr, Q.C.
Royal Courts of Justice
(We met again with Justice Kerr in New York City in March 1999)

Peter May
Head of the Criminal Justice Secretariat
(with his colleagues, Simon Rogers, Sarah Todd, Rosemary Carson and John Mills)

Patrick Armstrong
Chairperson
Police Authority (along with several of his colleagues on the Police Authority, including Rev. Robert Coulter, Rosemary Peters-Gallagher, Francesca Reid, Francis Rocks and Trevor Wilson).
Northern Ireland

Brian Fee, Q.C.
Chairperson of the Bar Council

John Cushinan—Vice Chair
Brendan Garland—Chief Executive

Thursday, October 28, 1998, Belfast
Jerry Sillery—Executive Assistant to the Chief Constable for Northern Ireland
Alan McQuillan—Assistant Chief Constable for Northern Ireland
Samuel Kincaid—Detective Superintendent
Alasdair McLeod Fraser
Director of Public Prosecutions
Royal Courts of Justice (along with several of his colleagues, including Roy Gunbett, Deputy, James Scoles, Raymond Kitson and others)

Friday, October 30, 1998, Dublin
Michael Farrell and Siobhan Ni Chulachain, Co-Chairpersons
Irish Counsel for Civil Liberties
(with Judy Walsh and Michael Finucane)

David Byrne, S.C.
Attorney General, Republic of Ireland
(along with several of his colleagues)

Patrick Gageby, S.C.

Eamonn M. Barnes
Director of Public Prosecutions,
Republic of Ireland

Thursday, April 1, 1998, New York City
Northern Ireland Criminal Justice Review Group:

Professor John Jackson
Head of the Law School, Queens University, Belfast

Eugene Grant, Q.C.
Former Chair of the Northern Ireland Bar Council

Jim Daniel
Director of Criminal Justice at the Northern Ireland Office and Chair of the Review Group
Glenn Thompson
Director of the Northern Ireland Court Service

David Seymour, Legal Secretary to the Law Officers

Ian Maye, Criminal Justice Policy Division of the Northern Ireland Office
and Secretary to the Review Group

Debbie Donnelly, Research Officer to the Review Group

Coleen Doak, Secretariat to the Review Group

Dr. Ray Raymond, Political Officer of the British Consulate in New York
coordinated the meeting.
APPENDIX B

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The Wages of Welfare Reform: A Report on New York City’s Job Centers

The Committee on Social Welfare Law

"Between the idea and the reality ... falls the shadow." 1

aving the banner of welfare reform, President Clinton signed historic legislation in August 1996 abolishing poor families’ federal entitlement to direct cash assistance and replacing it with a de-centralized system of conditional block grants to the states. To qualify for these grants, most states—including New York—overhauled their own welfare systems and added rigorous new welfare-to-work requirements (the most prominent of which is frequently called “workfare”), as well as other programs which became conditions of eligibility for assistance. Not surprisingly, New York City, with one of the largest and most concentrated welfare populations in the United States, has become a crucible for these momentous changes.

Even before the passage of federal legislation, the administration of Mayor Rudolph Giuliani had taken aggressive steps to place the City at the cutting edge of welfare reform by restructuring its public assistance system. In April 1995, the Mayor denounced the welfare system in New York City as too “user-friendly” and declared that “[i]t was a system say-

ing, please come and take the money.” In response to this alleged state of affairs, he introduced NYC-WAY (“Win, Accountability, You”), designed to tighten administrative procedures and move more public assistance recipients into workfare. In 1997, Mayor Giuliani brought Jason Turner to New York from Wisconsin, where he has been credited with dramatically reducing the welfare caseload, to become Commissioner of the Human Resources Administration (“HRA”) and announced a major initiative to transform the City’s “Income Support Centers,” which had provided primary access to a variety of welfare-related services, into “Job Centers,” designed to emphasize workfare requirements and drastically reduce public assistance rolls.

The Job Center initiative has caused widespread controversy and prompted federal litigation, Reynolds v. Giuliani. The Reynolds plaintiffs claimed that staff at the Job Centers were preventing the poor from applying for Medicaid, food stamps, cash assistance, and emergency assistance in violation of federal and state law and the federal Constitution. On February 29, 1999, a District Court judge agreed and enjoined the City’s program until such time as corrective measures could be implemented.

This report examines the Job Center initiative and surrounding litigation. Part I describe the background of welfare reform in New York City. Part II discusses the philosophy of welfare reform embraced by Mayor Giuliani and Commissioner Turner, the principal architect of the Job Centers, and briefly analyzes the Giuliani Administration’s earlier policies that laid the groundwork for the Job Center program. Part III lays out the operation of the Job Centers. Part IV describes the impact the Job Center conversion has had on applicants. Part V outlines the Reynolds litigation. Part VI contains concluding remarks.

3. HRA is the local social services agency responsible for administering New York’s cash assistance, food stamp, and Medicaid programs.
4. Lakisha Reynolds, Georgina Bonilla, April Smiley, Lu Garlick, Adriana Calabrese, Jenny Cuevas, and Elston Richards v. Rudolph Giuliani, as Mayor of the City of New York; Jason Turner, as Commissioner of the City of New York Human Resources Administration; Brian J. Nix, as Commissioner of the New York State Office of Temporary and Disability Assistance; and Barbara DeBuono, as Commissioner of the New York State Department of Health. 98 CIV 8877, S.D.N.Y. 1998.
I. BACKGROUND—WELFARE IN NEW YORK CITY

Public assistance (welfare) in New York has historically referred to two cash assistance programs, Aid to Families with Dependent Children (“AFDC”) and Home Relief (“HR”). AFDC was created by the federal government, funded jointly by state and federal governments, and offered assistance primarily to single parents and their children. HR was purely a creation of New York State under its constitutional mandate to care for the poor6 and served as a catchall for any needy person who was not eligible for other benefits, although most HR recipients were single adults and childless couples.

With the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”), the federal government abolished the AFDC program and replaced it with a block grant program, Temporary Assistance to Needy Families (“TANF”). Principles which are central to federal welfare reform are that federal welfare benefits will be time-limited and that the states will exercise considerably more discretion over rules governing the benefit programs and eligibility criteria.

One year after the federal enactment of PRWORA, New York enacted the Welfare Reform Act of 1997 (“WRA”). This law replaced AFDC with Family Assistance (New York’s TANF program), and replaced HR with Safety Net Assistance. In large measure, the State’s welfare overhaul tracks federal welfare reform, although it also provides that households that reach their designated time limit (five years for Family Assistance and two years for Safety Net Assistance) may still be eligible for a modified, but not time-limited benefit. The State agencies which oversee these programs are the Office of Temporary and Disability Assistance (cash assistance and food stamps) and the Department of Health (Medicaid).

In New York City, the Human Resources Administration administers Family Assistance and Safety Net Assistance, as well as the federal food stamp and Medicaid programs. These benefits are provided through neighborhood Income Support Centers, formerly known as Income Maintenance Centers.7 As discussed in detail below, Commissioner Turner has begun the process of converting these centers into Job Centers. The centers screen and process applications and generally manage the cases of public assistance applicants and recipients. Separate food-stamp-only and Medicaid-only centers handle the cases of recipients who are not eligible

7. Cases are distributed based on zip codes, so that each neighborhood center serves individuals who live in from three to six zip codes, depending on the concentration of poverty.
for or do not seek cash assistance.

The welfare cash benefit has two components: the basic allowance, which is uniform statewide, and the shelter allowance, which varies by county. Despite yearly increases in the cost of living, neither element of the public assistance grant has been modified since a 6% increase in 1990.8

Finally, it should be noted that while state and federal welfare reform have already had a profound impact on benefits for the needy, the New York City welfare initiatives that are the subject of this article were, to a significant degree, adopted independent of state and federal legislation. The PRWORA and the WRA block-granted welfare benefits imposed time limits on cash assistance and significantly reduced aid to legal, non-citizen immigrants. The New York City initiative focuses on administrative procedures, particularly the application process, and aggressively enforces the work rules, affording little latitude to recipients among the array of work activities allowable under federal and state law. Welfare reform legislation may have encouraged some of the features of the Job Center conversion, but it may be argued that national and state welfare reform most significantly affected the City's restructuring of public assistance by fostering an atmosphere that made a program of dramatic cuts in aid to the poor more politically acceptable.

II. WELFARE REFORM IN NEW YORK CITY

Since his election in November 1993, Mayor Giuliani has been an aggressive proponent of rigorous and extensive work requirements and time limits as a means of reducing welfare rolls. And since 1997, the Mayor's policies have been fueled by the equally-stringent mind set of Commissioner Turner.

A. The Giuliani Philosophy

At the core of the welfare philosophy articulated by the Mayor is the belief that poverty—and the need for public assistance—is largely the product of the failure of individual will, rather than a symptom of a flawed socio-economic system. In his view, it is appropriate to reduce the welfare caseload substantially by (1) making it much more difficult to apply for and ob-

8. The grant amount varies depending on household size. For example, the grant for a household of two in New York City is $468.50 ($250 for shelter costs and $218.50 for the family's remaining expenses); for a household of three, the grant increases to $577 per month ($286 for shelter costs and $291 for remaining expenses).
tain benefits and (2) conditioning receipt of benefits on work and other forms of obligation. The Mayor has pledged to end welfare in New York City by the year 2000 through caseload reduction and the universal adoption of a full-time workfare requirement. In his most recent State of the City address, Mayor Giuliani declared:

We’ve got to re-establish over and over again, the social contract: for every benefit an obligation.... We have got to be willing to treat social problems as if everyone is your child, everyone is your relative. You wouldn’t just want them to be dependent the rest of their lives. You would want to get them back to work.... HRA is going to turn into a big employment agency.

Mayor Giuliani’s decision to bring Jason Turner from Wisconsin to run HRA was equally crucial in defining the Administration’s position. Turner had established his reputation by helping to develop and implement the Wisconsin Works ("W-2") program, among the first welfare programs to incorporate universal work requirements, time-limited benefits, and diversion efforts to discourage people from applying for assistance. The W-2 program played a major role in causing a 71% drop in Wisconsin’s welfare caseload in less than three years. Commissioner Turner has been, if anything, a more outspoken proponent of workfare than Mayor Giuliani.

Commissioner Turner set forth his philosophy in stark detail in a November 1998 speech given at the State University of New York’s Rockefeller Institute. In that address, Turner denied the existence of any cause-and-effect relationship between poverty and either family dysfunction or negative outcomes for children, even though he acknowledged that there is a strong correlation in the incidence of these factors. Turner argued that merely “intervening directly to increase income” would not alleviate the social ills associated with poverty. Rather, he asserted that the welfare system

11. According to the United States Conference of Mayors’ Status Report on Hunger and Homelessness in America, released on February 18, 1999, 47% of former Wisconsin welfare recipients reported hunger in their households.
12. Address given by Commissioner Turner at the Rockefeller Institute of the State University of New York, New York City, November 17, 1998.
must also enforce behavioral and attitudinal change by creating a type of
Skinner box operating on the principle of punishment rather than re-
wards, in which “the consequences of non-work, or ineffective work, are
met with an immediate system response.”

While the Giuliani Administration has generally embraced the no-
tion of reciprocal social obligation in addressing these issues, a different,
much harsher principle has also shaped the Administration’s policies.
Commissioner Turner has declared that the welfare system should be used
as a stick to correct disfavored habits and behaviors:

Many individuals we try and help have had an absence of bound-
aries; they have had excess freedom. . . . What we need to create
is something that was not possible in the old entitlement sys-

tem—an urgency to take action. We need to create, if you will,
a personal crisis in individuals’ lives which can be [used] con-
structively as a tool for helping them.

Within this conceptual framework, an individual’s inability to work him-
self out of the system will, in most instances, represent a personal failure
to take action and overcome social maladaptations. As a consequence,
personal upheaval resulting from changes in welfare rules and require-
ments may reflect not systemic flaws, but a necessary stage in the salutary
personal crises that the system is designed to create.

An attitude such as this leads directly to the view that cutting the
welfare caseload is, in itself, not a budgeting tool but a valued objective,
with little regard for how it is accomplished or what happens to those
people who will not receive assistance. The extent to which this attitude
has dictated the Administration’s actual policies is central to the contro-
versy over the Job Center initiative.

B. Local Precursors of the Job Center Initiative
Well before Commissioner Turner’s appointment and the announce-
ment of the Job Center initiative, the Giuliani Administration had begun
to make fundamental changes in the City’s public assistance system. In
January 1995, the City introduced NYC-WAY, a two-pronged program de-
signed to (1) make the welfare application process much more rigorous
and (2) impose work-related requirements on greater numbers of recipi-
ents. In the words of then-mayoral adviser Richard Schwartz, the tighten-

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13. Id.  
14. Id.
ing of the application process was designed to “restore integrity” to the welfare system; the expansion of work requirements would help to “build a sense of reciprocity.” The program initially applied only to Home Relief clients—primarily unmarried individuals and childless couples—but was later expanded to include the AFDC population as well.

1. NYC-WAY Applications. To screen welfare applicants more aggressively for possible fraud, HRA developed a process called Eligibility Verification Review (“EVR”). In addition to completing the usual application process, with its range of interviews at the Income Support Center and production of a lengthy list of documents to verify eligibility, applicants were subjected to two additional requirements. First, all applicants, regardless of where they resided, were required to report to the EVR office in downtown Brooklyn, where they were questioned by one or two fraud investigators concerning the same eligibility documentation that was submitted at the Income Support Center. Second, one or more EVR fraud investigators would conduct an unannounced home visit, theoretically to confirm the applicant’s stated place of residence.

2. NYC-WAY Work Program. Between 1994 and 1995, federal and state law recognized a wide range of activities that could meet welfare-to-work participation requirements, including an array of educational and training programs. But the Mayor’s NYC-WAY initiative made it clear that workfare would be the primary activity, and that little allowance would be made for other work-related endeavors. Indeed, a Center Director Memorandum from the Deputy Commissioner of Income Support Operations to field managers and center directors noted that the only education and training programs for which recipients could request consideration as work activities would be those that involved “short-term vocational training of 90 days or less.” HRA began to articulate a goal of


16. The general tenor of this program is amply demonstrated by the fact that these investigators were known to wear badges which closely resembled those of the New York City Police. In addition, investigators would verbally identify themselves as “the FEDE,” an acronym for HRA’s “Front-End Detection System,” when attempting to gain entrance to an applicant’s home. McKean v. Giuliani, N.Y. Sup. Ct., December 31, 1995.


100 percent participation in work programs, particularly in workfare and job search activities.

In addition, the assignment of work activities began to occur much earlier in the process. As soon as clients filed an application, they were required to fulfill extensive job search assignments; failure to comply with any aspect of these requirements resulted in the rejection of the application. If and when their applications were accepted, they were promptly given workfare assignments.

The NYC-WAY initiative yielded immediate, dramatic results. By April 1995, the Mayor, in a celebratory press conference with Governor George Pataki, was able to declare that the denial rate for applications for Home Relief had risen from 20% in the first quarter of 1994 to 56% for the same period in 1995. Of course, interpretations of the statistics differed sharply, with the Mayor arguing that only the truly needy were now being accepted for assistance, and advocates claiming that many truly needy people were being driven away by the new procedural hurdles. Regardless of the analysis, the essential component of the Mayor's approach to welfare policy—the rapid and massive reduction of the rolls through aggressive new administrative and procedural measures—was in full swing.

As striking as the impact of NYC-WAY proved to be, its effects were modest compared to policies implemented following the appointment of Commissioner Turner in February 1997.

III. THE JOB CENTERS

Mayor Giuliani and Commissioner Turner began converting HRA's 31 Income Support Centers to Job Centers in April 1998. By December 1998, 15 of the 31 Income Support Centers had been converted. Although it was Commissioner Turner's intention to complete the conversion of all centers by the Spring of 1999, this plan was preliminarily enjoined by the Reynolds court. This lawsuit and the court's decision therein are discussed in Section V below.

A. The Job Center Application Process

Job Center procedures differ greatly from Income Support Center application procedures, which are still in place at those centers that have


20. This section describes the application process prior to modifications made pursuant to the Reynolds litigation. Those changes are discussed below.
not yet been converted. To advance the Mayor’s goal of reducing the number of persons receiving assistance, the job center staff focuses its efforts at every step on dissuading applicants from submitting an application for any assistance, despite federal mandates that prohibit such efforts.\(^{21}\) Applicants are required to complete a number of steps in the process before actually receiving an application form and must revisit the Job Center at least once before the application form is submitted. This procedure also fails to address emergencies such as hunger and imminent homelessness.

Furthermore, the newly converted Job Centers are allocated a prescribed funding level for their operating budgets commensurate with their budget for the previous year. Each is required to make efforts to reduce its caseload by 10% each year for three years and, to the extent it succeeds, is permitted to use the savings for a variety of uses, a troubling incentive for administrators to encourage the improper denial of welfare applications.\(^{22}\)

The following are the steps in the application process at Job Centers. Presumably, these three steps may be completed on the first visit to the center, after which the applicant may or may not receive an application form on which to request assistance. HRA has 30 days (45 for Safety Net applicants) to determine eligibility for ongoing benefits after the application form has been submitted with all necessary documentation.

1. **Step One: Receptionist**

An applicant for assistance at Job Centers is first required to see a Receptionist, one of whose primary duties is to screen the applicant to ensure that she is in the correct zip code catchment area and is seeking to apply for cash assistance, as opposed to food stamps or Medicaid alone; the procedure requires that applicants seeking only food stamps or Medicaid be directed to a different center. The Receptionist is also charged with explaining Job Center procedures and the myriad hurdles involved in the application process. Instead of merely describing the procedures, however, it appears that many Receptionists have been focusing on the obstacles in an effort to divert applicants from the process.\(^{23}\) Furthermore,

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\(^{21}\) 7 U.S.C. §2020(c) (2) (b) (III), 7 C.F.R. §273.2(c) (1) and (2) (households must be permitted and, in fact, encouraged, to file a food stamp application on the first day that they contact the local social services office); 42 U.S.C. §1396a(8), 42 C.F.R. §435.906 (an individual or household who wishes to make an application for Medicaid benefits must be given the opportunity to do so without delay).

\(^{22}\) Included in the initial plan was a provision allowing 10% of these savings to be used for worker bonuses, a measure which was not approved in the final plan.

Receptionists have routinely misinformed applicants by telling them, for example, that welfare, expedited food stamps, and emergency needs grants no longer exist, or that all assistance is subject to time-limits, when, in reality, food stamps and Medicaid are not time-limited. Receptionists have also improperly turned away applicants who arrive at Job Centers after 9:30 a.m., telling them that they are too late to apply that day. If the potential applicant has not yet been dissuaded from applying, the Receptionist will ask her to complete a Participant Job Profile ("PJP") form, which is not used in the Income Support Centers but is required of all individuals and families seeking any type of aid at a Job Center, including expedited food stamps and emergency rent assistance. The primary purpose for the PJP form is to identify potential alternative sources of support, such as friends or relatives. Once a person identifies any such source, she is often told to withdraw from the process and/or to return with proof that the relative or friend cannot support her and her family, regardless of status, legal obligation or ability to provide assistance. In addition, the PJP is used to elicit information that may be used for making workfare assignments during the application process.

Another deterrent procedure which violates both federal food stamp and Medicaid law mandates applicants to obtain documents from other agencies and outside sources, for instance the New York State Office of Employment Services or Family Court, as a condition of completing the PJP form.

The last page of the PJP has two signature lines: one for consent to be investigated for fraud as a condition of eligibility and, directly below it, a signature line for the applicant to consent to HRA’s withdrawal of the PJP. Efforts are made to persuade applicants to sign the withdrawal and, because of the proximity of the two signature lines and the fact that the

24. Id.
25. Id.
26. A significantly different version of this form called the "Application/Job Profile" has since been created as part of the City’s Revised Corrective Action Plan and was submitted to the Reynolds court on March 16, 1999; the court has not yet ruled as to whether the revisions are sufficient to address the legal violations. These revisions are discussed in Section V.
28. Id.
29. 7 C.F.R. §273.2(c)(2) (an application filed on day one by an individual or household seeking to apply for food stamps need only include the applicant’s name, address and signature, with documentation of eligibility, such as income and household composition, submitted at another time).
applicant is required to sign the first signature line in order to have the application process continue, some applicants sign the bottom line, inadvertently withdrawing from the application process.

2. Step Two: Financial Planner

An applicant who has completed the PJP form and has not thus far withdrawn her application is next referred to a Financial Planner who is responsible for processing all requests for emergency assistance, such as expedited food stamp and rental assistance grants when evictions and utility shut-offs are imminent. The Financial Planner reviews the PJP form with the applicant and discusses alternative sources of support. Financial Planners may suggest that the applicant instead seek non-governmental forms of charity, including family support networks outside of New York City and financial assistance from churches, foundations and community-based organizations.30

Although there is nothing wrong in theory with suggesting alternative sources of assistance, in reality, Financial Planners concentrate their efforts on attempting to dissuade applicants from continuing the application process and not working toward the applicant’s best interests or intent.31 For instance, Financial Planners have frequently referred families with inadequate or no food supplies to soup kitchens or food pantries rather than processing their emergency assistance applications; the families then leave the center, only to find that the food pantry has run out of food or closed for the day. Neither are Financial Planners eager to handle applicants’ other emergency needs. Those who lack crucial medications, such as insulin, are told they must wait until the entire application is approved in contravention of regulations requiring that emergent health needs be addressed immediately.32 Families facing eviction for non-payment of rent are told that no emergency grants exist or that they must wait until their application has been approved before receiving emergency grants that could keep them safely housed.33

30. Although this practice should change with the new Application/Job Profile form, described above, the PJP form is not an application form. Under the original procedure, the applicant was required to fill out the PJP form as a condition of receiving the actual application for benefits.
32. Id.
33. Id.; 42 C.F.R. §435.930 (the state agency and its delegate local agency must provide
3. Step Three: Employment Planner

After meeting with the Financial Planner, the applicant must be finger-imaged and video-imaged as part of the agency's fraud detection program and then interviewed by an Employment Planner. The Employment Planner gives the applicant a calendar covering about six weeks' worth of job-related appointments and reminds the applicant that her application will be denied if she misses any of the appointments, even for good cause. The applicant is also told that she must engage in job search activities at the Job Center from 9:30 AM until 4:30 PM on every day she does not have an employment-related appointment scheduled. After this meeting, the applicant is either given a blank application form or is told to return the next day to complete an application form, after which she will receive an interview some seven business days hence to submit the documentation of her eligibility.

IV. THE IMPACT OF THE JOB CENTER PROGRAM

Individuals and families compelled to navigate the Job Center process experience significant harm. Typical applicants for assistance are destitute. They have almost no food, have no cash whatsoever, and have been unemployed for some time. Many have had unemployment benefits which have long since run out. Parents may have received child support at some point in time, but this has generally ceased. The children are usually in need of medical care, which is likely to have been available only on an emergency basis at a public hospital. Families have inadequate clothing and furniture, are on the verge of eviction, and have exhausted all sources of family and community support.

In the autumn of 1998, the New York City Coalition Against Hunger announced that the demand for charity food among New York's needy was on the rise. On October 16, 1998, after an investigation of the problem, The New York Daily News reported that "[g]rowing hunger is no sur-

\*assistance for applicants to secure emergency medical care as needed; N.Y.C.R.R. §351.2(f)
\*categorical eligibility factors: special eligibility requirements of Emergency Assistance to Families (EAF) must be considered whenever there is a possibility of eligibility for one of these categories; when eligibility or presumptive eligibility is evident, full utilization of these categories must be made; 18 N.Y.C.R.R. §362.2 (predetermination grants must be made to families or individuals when all evidence secured supports a presumption of categorical eligibility but full documentation is lacking, a decision upon which must be made as soon as possible in the application process); 18 N.Y.C.R.R. §372.1 (EAF defined as all aid, care and services to deal with crisis situations threatening the family and urgent needs resulting from a sudden occurrence or set of circumstances demanding immediate attention).
prise given that the city closed over 163,000 food stamp cases and over 119,000 welfare cases with few of those terminated from benefits finding employment.” The following week, The Daily News reported that 388,000 people, many of them children, were suffering from hunger.

Receipt of expedited food stamps, emergency Medicaid, and a small predetermination cash grant, to which applicants are entitled under the law, could provide temporary relief while they juggle employment requirements, fraud detection interviews, and appearances in housing court. Yet the failure of Job Center staff to assist these applicants, described in exhaustive detail in the Reynolds complaint, is not only a matter of record, but is consistent with the Administration’s publicly-espoused method for reducing the welfare rolls.

If applicants with employment histories and families for whom they provide daily care are unable to access assistance in this system, persons with special needs are doomed from the start. The federal Americans with Disabilities Act (ADA), as well as numerous state statutes, afford handicapped individuals important protections both in the world of work and when applying for public benefits. State regulations mandate that the Job Center Receptionist, Financial Planner, Employment Planner, and all other employees inquire as to whether an applicant for benefits may have a mental or physical impairment that would limit her ability to participate in work activities. If either the applicant or the staff person believes an impairment exists, the applicant must be given ten days to return to the center with medical documentation. The Job Center worker may also refer the applicant to Health Services Systems (“HSS”), a City-contracted medical examiner, for an independent examination.

Recent Medicaid legislation has created the concept of “special needs plans” for, among other groups, people with mental disabilities. People qualifying for these special need plans are entitled to more comprehensive health services and are considered work-limited or unable to work.

Nonetheless, both the State Office of Temporary and Disability Assis-

36. 12 N.Y.C.R.R. §1300.2(c) (1) and (d).
37. Social Services Law §332-a.
tance and HRA have failed to implement these procedures. Rather, it is HRA's policy to assume that each person is able to participate in work activities unless they have received a disability determination by the Social Security Administration. This policy has been translated into practices which often fail to accommodate the impaired and disabled and, in many instances, divert them from the application process.

According to HRA's Job Center Operations Manual, the Financial Planner is instructed to review with the applicant questions concerning medical problems that could limit ability to work. But regardless of the response, the Financial Planner must also inform the applicant that, in order to be eligible for benefits, she or he must first complete 35-50 days of mandatory job search activities. Such information is overwhelming to those suffering from a debilitating mental or physical condition and is likely to divert these applicants from ever pursuing an application.

Disabilities typical among applicants for public assistance at Job Centers include high blood pressure, cardiac and circulatory illnesses, seizure disorders, memory lapses, anemia, pulmonary and respiratory disease, orthopedic disabilities, heart disease, and all forms of mental illness. With no access to regular health care and prescription drugs, these conditions have usually gone untreated for some time. Although the law provides that applicants shall receive emergency Medicaid to cover health crises, the Job Centers have generally failed to provide such information or assistance, requiring the completion of the entire application process before their medical needs can be met.

40. Social Services Law §364-j (m) (mental health special needs plan defined); 13 N.Y.C.R.R §302 (c) (11).
42. 42 C.F.R. §435.930 (the state agency and its local delegate agency must provide assistance for applicants to secure emergency medical care as needed). As part of the City’s response to the court’s January order in Reynolds, HRA issued Policy Directive 99-09, which requires that Job Centers distribute brochures about the ADA and assist applicants if they affirmatively notify the Receptionist that they are unable to complete the forms or wait on line to be interviewed due to their disabilities.
New York State policy mandates that homeless applicants and recipients be evaluated for employability in the same manner as the general population. The fact that homelessness may pose significant obstacles to compliance with work rules should be addressed, but such status is not, by itself, a basis for any exemption.43

 Nonetheless, homeless persons often travel long distances to obtain public shelter, usually without carfare, and few shelters are within walking distance of the Job Centers. Moreover, many of their belongings, such as extra clothing, are often in storage and unavailable for daily use. The opportunity to shower, do laundry, and prepare for job interviews is difficult to find, and mail service in the shelter system is precarious at best. Time and again, applications by the homeless are rejected, allegedly for failure to fully complete the application process and almost always without the receipt of written notice.

 Because inability to keep an appointment due to lack of carfare does not constitute good cause, even when no transportation money is provided, the litany of required interviews mandated by the process serves as a nearly insurmountable obstacle for homeless individuals and families. Despite such obvious pitfalls, the City plans to open a single, city-wide Job Center for all homeless applicants instead of accepting applications in neighborhood centers,44 multiplying transportation difficulties.

 Even more troubling are regulations which require that homeless families residing in City shelters be sanctioned if the head of household fails twice in a thirty-day period to fulfill, among other responsibilities, any Job Center or workfare requirements.45 The penalty for this failure is revocation of the entire family’s access to shelter for thirty days. In addition, HRA has not ruled out referring the sanctioned parent to the City’s Administration for Children’s Services on child neglect charges and placing the children in foster care if appropriate housing is not found.

 Victims of domestic violence are also more vulnerable under the Job Center application process. It is an HRA policy to ask applicants if they are victims of domestic abuse.46 However, any applicant so identified is required, as a condition of applying for benefits, to meet with a worker in

44. The injunction in Reynolds has delayed the implementation of this plan.
45. 18 N.Y.C.R.R. §352.35(e)(1) (homeless individuals and families who reside in City shelters must comply with requirements for participation in employment programs including looking for work and accepting work assignments).
the Domestic Violence Unit ("DVU"). This requirement is especially burdensome because many Job Centers do not have a DVU on site, which means victims are required to wait several days for an appointment at another location. It is only after she has attended this interview that the applicant is allowed to proceed with the application process.

V. THE REYNOLDS LITIGATION

In the fall of 1998, following escalating complaints by New York City advocates, the United States Department of Agriculture ("USDA") launched an investigation of HRA's application procedures. In November, State Commissioner Brian J. Wing announced, "We have struggled throughout the one-year life of the State Food Assistance Program to avert a disaster due to New York City's flagrant disregard of program rules. We were forced to set a precedent by sending our auditors into New York City to clean up the [program] . . . [a]nd we currently are doing all we can to hold off the arrival of the USDA Office of Inspector General, until we can get the mess in New York City cleaned up." 47

At the same time, the federal Health Care Financing Administration ("HCFA") began an investigation of reports that HRA was discouraging families from completing the Medicaid application process, also in conjunction with the Job Center program, prompting the State Department of Health to initiate its own investigation.

On December 16, 1998, as a result of barriers established by the Giuliani Administration to applications for public benefits at Job Centers, a group of applicants represented by The Legal Aid Society, the Welfare Law Center, New York Legal Assistance Group, and Northern Manhattan Improvement Corporation filed a federal class action lawsuit against the City of New York and New York State claiming that the City, and the State as its supervisory agency, were discouraging and deterring thousands of needy applicants from applying for food stamps, Medicaid, cash benefits, and emergency assistance, and that the State was failing to enforce applicable statutes and regulations. The complaint alleged that the City's practices denied individuals and families necessary food, medical care and cash to meet emergency needs.

The complaint further alleged that the violations were the direct result of the conversion of Income Support Centers to Job Centers. Plaintiffs maintained that, in furtherance of Mayor Giuliani's avowed goal of

diverting individuals and families from receiving public assistance, Job Center workers routinely and wrongfully denied individuals and families emergency food stamp and cash benefits, denied them the opportunity to apply for assistance on their first visit to a Job Center, pressured them into withdrawing their applications, and failed to provide notices of application denials and hearing rights.

At a hearing on December 16, 1998, U.S. District Court Judge William J. Pauley issued a temporary restraining order requiring the City to provide food stamps and emergency assistance to meet the needs of the named plaintiffs and ordered an expedited hearing regarding the plaintiffs' systemic allegations.

On January 20, 1999, one day before a hearing on plaintiffs' request that the court enjoin the implementation of the Job Center program, the USDA released its draft audit report with the following findings:

1. The Centers reviewed do not permit households to apply for the Food Stamp Program on the same day the household contacts them; do not encourage households to file an application the same day they contact the centers; do not make applications readily accessible to potentially eligible households; encourage households to withdraw their “job profiles” (applications for temporary cash assistance) and treat this as a withdrawal of their application for Food Stamp Assistance, and do not tell households of their right to apply for food stamp benefits independent of other program choices.

2. Applicants are inadequately screened for expedited (emergency) service.

3. The Centers reviewed impose eligibility requirements that exceed the standards set by the Food Stamp Act and regulations.

4. When public assistance was denied at the Job Centers reviewed, applicants were required to file a new application for food stamps at a different center.

5. Substantial non-compliance with the Food Stamp Administration and regulations has gone undetected and unaddressed at the local level.\(^\text{48}\)

On January 25, 1999, following a three-day preliminary injunction hearing which was held after settlement discussions broke down, Judge Pauley issued a forty-nine page decision

(a) finding that New York City Job Centers illegally discourage destitute individuals and families from applying for Food Stamps, Medicaid and cash assistance and deny them such assistance; (b) enjoining the City from converting any more Income Support Centers to Job Centers; and (c) ordering City officials to develop a corrective action plan, to comply with the law, and to continue an informal process to address individual cases of urgent need.49

Based on the extensive record presented at the preliminary injunction hearing, the court concluded that plaintiffs had shown a systemic violation of law, rejected the City's argument that the problems were isolated incidents, and ordered the above relief.50 In granting plaintiffs' request for an injunction, the court concluded that plaintiffs faced the risk of irreparable harm and had shown a likelihood of success on the merits of their legal claims. The court rejected defendants' argument that plaintiffs had not stated a cause of action under 42 U.S.C. §1983 and held that food stamp and Medicaid statutes and regulations gave plaintiffs an enforceable legal right, that plaintiffs had an overarching property interest in receiving food stamps, Medicaid and cash assistance, and had asserted a viable due process right.

On March 16, 1999, following negotiations with plaintiffs over an initial plan for correcting the program's deficiencies, the City submitted to the court a Revised Corrective Action Plan which responded to plaintiffs' suggestions regarding the retraining of agency workers and mechanisms to ensure the effective implementation of corrective actions.

The revised policies and procedures make it clear that prospective applicants have the right to submit an application form on their first visit to the center and have their emergency needs addressed at the same time, a significant improvement in the process. The new form resembles the form used at Income Support Centers and is completed before the PJP. In addition, the request for benefits is featured more prominently than the employment assessment, the request to withdraw the application has

50. Id.
been moved to the last page, and the form has been modified so that the request for cash benefits can be withdrawn while continuing the request for food stamps and Medicaid.

New signs have been posted which inform applicants of their right to apply for ongoing benefits and emergency assistance on the first day they visit the Job Center and center staff have been retrained regarding these rights. The City has retrained more than 3,300 welfare case workers and suspended 6 others without pay for turning away applicants during business hours.

On May 24, 1999, Judge Pauley agreed that HRA had made sufficient modifications in its application procedures to proceed with the conversion of three of the remaining six Income Support Centers. According to the Judge, conversion of the remaining three may go forward when HRA demonstrates that the plan has resulted in concrete improvements. According to Judge Pauley, “While the...defendants’ corrective action plan represents a significant step, it remains to be seen whether the plan’s numerous policy directives will yield salutary results at job center.”

VI. CONCLUDING REMARKS

While the City’s modifications in its policies and procedures have been drafted so as to ensure that Job Centers do not impede the rights of the poor to seek assistance when it is needed, effective implementation of the plan may be more difficult to attain. Young children are the population most vulnerable to the consequences of deep poverty, and poor mothers with very young children are among the least able to support themselves through work in the labor market. Yet access to transitional benefits and programs can help these fragile families to move from dependency to self-sufficiency.

An editorial in The New York Times correctly asserts: “If the burden is on the welfare applicant to find other support or to do the most menial private or public jobs to receive welfare, the burden is on the city to make certain that the poor and their 420,000 children currently on welfare are not neglected. Drug addicts, the disabled and new mothers must have help converting to the mayor’s work-for-welfare system. Decent child care must also be available for those taking jobs to get their public checks, and

52. Id.
some kind of training is needed to shift those on workfare to real jobs. If Mayor Giuliani wants to boast on the national political circuit about ending welfare in New York City, he must be careful not to create a beggar class in the process."\(^{53}\)

June 1999

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A Proposal to Establish Standards, Guidelines and a Screening Procedure Throughout the New York City Criminal Court

Determining A Defendant’s Eligibility for Assigned Counsel Services

The Committee on Criminal Justice Operations and Budget

INTRODUCTION

Under our Constitution, indigent criminal defendants are entitled to the assistance of counsel. US Const. Amend VI and XI. Under New York County Law Section 722, the standard used for determining a defendant’s eligibility for assignment of counsel is based not on a finding of indigency but on an inability to afford counsel. As this is a broader interpretation of the federal mandate, some defendants who do not fall at or below the federal poverty guidelines are entitled nevertheless under state law to assignment of publicly funded counsel provided by The Legal Aid Society, the defender services or private attorneys compensated pursuant to the County Law.

While federal and state law require the appointment of counsel, there are no established uniform procedures or guidelines for the New York City Criminal Court to apply in deciding whether a defendant is without suf-
In the absence of a formal screening procedure, defendants are represented routinely by assigned counsel at the initial arraignment and such representation continues without any scrutiny for the duration of the case. Consequently, in the absence of any screening process, public funds are used to provide free counsel for many defendants who would not qualify under state or federal law for assignment of counsel.

The appointment of attorneys to serve indigent defendants is governed by Article 18-B of the County Law, McKinney's Book 11, which serves as the statutory foundation for compensating assigned counsel. (Sec. 722-c). The administration of these professional services is overseen by the four appellate divisions, which provide oversight for quality and fiscal control; e.g., 22 NYCRR sec. 606 [rules of the First Department].

The threshold question of eligibility is determined by authority of court rule, which—for example—in the First Department is contained in 22 NYCRR sec. 606.4 at p. 365:

> [t]he appointment of counsel to represent a person who does not have legal representation and who states that he is not financially able to obtain counsel, shall be made upon a finding of inability based either upon such person's affidavit or upon oral testimony in court under oath or by affirmation, or by such other proof as the court may direct.

Despite this clear mandate for an affirmative showing of eligibility by the defendant, in the absence of an established procedure for determining eligibility, many judges continue to assign attorneys by default as the most expeditious way to “process cases” and achieve efficiency in the criminal justice system.

As evidenced by the forum held by this committee at The Association...
of the Bar, the scope of divergent views on this topic is broad indeed, ranging at one pole from those who hold that every person against whom the government lodges a criminal complaint should be provided with counsel at public expense, to those at the other extreme, who believe that only those with demonstrated need should be given a free lawyer. Some attorneys who labor in the criminal court are convinced that the abuse of assigned counsel services throughout is relatively insignificant; while other attorneys can recite stories of criminal defendants who deferred hiring private counsel until they were dissatisfied with their assigned attorney.

The Committee on Criminal Justice Operations and Budget has examined the current method of assigning counsel and proposes the implementation of the following screening process to achieve a more uniform and responsible method of determining eligibility. In developing this proposal, the committee has reviewed numerous reports, proposals and guidelines developed in this and other jurisdictions, including a report prepared by the Office of Projects Development for the Appellate Division, First Department and a study conducted in Queens County in 1993 [see Appendix “C”] which established eligibility guidelines.

While many studies have called for the establishment of a screening process, the only screening procedure in effect at present is a pilot project in Kings County Supreme Court created by Hon. Michael L. Pesce, Supervising Judge, Supreme Court, Kings and Richmond Counties and Acting Supreme Court Justice Joseph F. Bruno [See Appendix “D”]. The success of this pilot project shows that the courts can examine a defendant’s eligibility for assigned counsel services without unduly delaying the defendant’s trial or infringing on the defendant’s right to counsel.


3. This report indicated that in determining the amount a person can afford for counsel, the courts must first and foremost deduct expenses for the “necessities of life,” including day-to-day personal and family expenses such as housing, clothing, food, transportation and medical care. At the time the report was prepared, any such detailed inquiry would have to be conducted by the trial court, clearly not practical at that time. Now, a judicial hearing officer can consider the individual matters affecting a defendant’s financial resources without undermining the efficiency of the court process.

4. In 1990, The Association of the Bar of the City of New York called for the creation of standards and procedures for the assignment of counsel in response to a request to review this issue by the Deputy Chief Administrative Judge of the New York City Courts.
PRESENT APPROACH TO DETERMINING ELIGIBILITY

As noted, in the absence of an established city-wide procedure for determining the financial eligibility of a defendant for assigned counsel services, such decisions are made on an ad hoc basis. The practices and criteria for determining whether to assign free counsel vary from county to county and judge to judge. Consequently, the decision as to whether a defendant must retain private counsel may rest upon the particular policy of the judge presiding over the defendant’s arraignment and/or the defense attorney assigned to the case.

On occasion, defendants who are deemed eligible for assigned counsel by one judge have their personal finances questioned again by another judge. Such continued questioning can be demeaning for a defendant and have a “chilling effect” on assigned counsel’s relationship with the defendant by questioning the continuity of such representation.

This committee believes that the New York City Criminal Court has the responsibility to ensure that only eligible defendants receive the benefits of assigned counsel services. While the court system has deferred traditionally to defense counsel’s assessment of a defendant’s eligibility, the courts must be responsible ultimately for the assignment of counsel. As public funds are used to finance assigned counsel services, the courts have an obligation to ensure that these funds are administered properly. County Law Section 722-d provides:

[w]hen ever it appears that the defendant is financially able to obtain counsel or to make partial payment for the representa-

5. The committee acknowledges that the deferral to defense counsel of the eligibility determination is supported by Matter of Legal Aid Society of Nassau County v. Alfred Semanga, A Judge of the District Court of Nassau County, 39 AD2d 912, 913 (1972). In this case, Judge Semanga held that the courts had an inherent power to terminate defendant’s representation by the Legal Aid Society. In reversing this decision, the Appellate Division, Second Department held that once defense counsel was assigned by the District Court, any termination of that representation could be made at the instance of defense counsel only. The court noted that the Society was contractually obligated to represent indigent defendants and any issue with their representation of nonindigent defendants should be taken up with the municipality that makes funds available to the society.

The committee believes that the courts have an obligation to establish guidelines for eligibility for assigned counsel services and, as an arm of the government, the courts represent the municipality which contracts with the defender services. Furthermore, the screening process will occur at an early stage in the proceedings with assigned counsel provided to the defendant from the arraignment stage through the eligibility determination. The committee believes that the court’s duty to be fiscally responsible is paramount and the objections put forth in Semanga should not prevent the wholesale implementation of a screening process.
ELIGIBILITY FOR ASSIGNED COUNSEL SERVICES

In any action or other services, counsel may report this fact to the court and the court may terminate the assignment of counsel or authorize payment, as the interests of justice may dictate, to the public defender, private legal aid bureau or society, private attorney, or otherwise.

Uniform guidelines would serve as a standard for each court’s decision and bring a sense of uniformity, fairness and predictability to these determinations throughout the New York City Criminal Court. The decision as to whether a particular defendant should be required to retain counsel or should be provided with an attorney at taxpayer expense is an important step in every criminal case, and the implementation of a recognized standard will assist in reviewing an individual court’s determination. The committee believes that the failure to establish and implement a formal procedure for screening each defendant is a violation of the public trust.

RECOMMENDED POLICY

The implementation of these guidelines will be consistent with the goal of ensuring effective representation for each defendant while requiring those defendants to retain counsel who are financially able to do so. The purpose of these rules is not to penalize a defendant who is unable to afford counsel or to exert undue pressure on a defendant to enter a plea of guilty rather than bear the additional expense of retaining counsel for a trial. The goal is to make appropriate defendants responsible financially for their own representation.

Each defendant will be presumed to be able to afford counsel and the burden of proof will be placed on the defendant to show that he or she cannot afford to retain counsel. Therefore, to be entitled to assigned counsel, the defendant will have the burden of persuading the court that he or she is eligible.

To ensure that examining each defendant’s financial resources does not delay the defendant’s initial arraignment or diminish the efficiency of the court process, all defendants will be entitled to assigned counsel representation at the Criminal Court arraignment. Such representation by assigned counsel will continue unless and until private counsel files a Notice of Appearance on the case.

For misdemeanor cases not resolved at the initial court appearance, the arraignment court will make a determination as to the eligibility of
the defendant for assigned counsel services or order a hearing, if appropriate. For felony cases arraigned in Criminal Court, inquiry into the defendant’s eligibility will be deferred to the presiding Justice at the Supreme Court arraignment or upon reduction of the case to a misdemeanor. This will ensure that the eligibility screening will not disrupt the attorney-client relationship at the critical pre-indictment stage.

This policy recognizes that eligibility determinations must be made on a case-by-case basis and that some defendants who may appear to be ineligible for assignment of counsel in fact may not be able to afford an attorney. It is specifically recommended that where the eligibility determination is a close issue, the hearing court should err on the side of providing counsel to ensure that each defendant’s Sixth Amendment Right to Counsel is preserved and that the accused is not foregoing the right to a trial because the expense of retaining private counsel would be too burdensome.

**UNIFORM GUIDELINES TO BE USED IN DETERMINING ELIGIBILITY**

The committee proposes that the courts use a multiple of the Federal Income Poverty Guidelines as an initial standard in determining whether a defendant can afford to retain counsel [the use of this economic indicator is recommended by the American Bar Association Standards for Criminal Justice, Providing Defense Services 5-7.1 (Commentary 1990)].

The Federal Income Poverty Guidelines [$8,240 per person with increments of $2,820 for each dependent, effective March 18, 1999] are updated annually by the United States Department of Health and Human Services. To adjust for the cost of living and retaining counsel in New York City, each court would apply the following criteria in determining a defendant’s eligibility for assigned counsel:

- a defendant who is charged with a **misdemeanor** or a **violation** and whose gross income exceeds the current federal poverty guideline by two and one quarter times [225%] shall be presumed to be financially able to retain counsel. (currently: $18,540 for a single person with no dependents).

- a defendant who is charged with a **felony** and whose gross income exceeds the current federal poverty guideline by two and three quarters times [275%] shall be presumed to be financially able to retain counsel. (currently: $22,660 for a single person with no dependents).
For each dependent supported by the defendant, the guideline would be increased by $2,820. For example, a person with one child would be presumed to qualify for assigned counsel services if he or she earned less than $21,360 if charged with a misdemeanor and $25,480 if facing felony charges.

SUMMARY EVALUATION—SCREENING PROCESS

The first step in the screening process will be a comparison by the Criminal Justice Agency ["CJA"] of a defendant’s gross annual income adjusted for the number of dependents with the above guidelines. Based solely on a defendant’s income, a summary evaluation will be made as to the defendant’s eligibility. The summary evaluation should be easy to determine with the aid of a chart and will be reflected on the CJA Sheet as an indication that the defendant’s income is above the eligibility guidelines or within the eligibility guidelines.

To assist the court in making any final evaluation, the CJA sheet will be expanded slightly to provide more detailed information to the court. [See, Appendix “A” for proposed CJA sheet]. The additional information will include the defendant’s ownership of a home(s), automobile(s), bank account(s) and/or other assets (i.e., stocks, bonds and certificates of deposit). This is similar to the financial information requested in federal court where the defendant files a request for assignment of counsel and certifies the information to be correct. [See, Appendix “B”]. While obtaining this information would require the CJA counselors to ask a few additional questions in the interview, the information will not have to be verified and would not cause any appreciable delay in the arraignment process.

The use of the Criminal Justice Agency to obtain and report this information comports with the committee’s view that the courts are responsible for assignment of counsel rather than defense counsel. In addition, by having the initial eligibility determination made prior to arraignment, assigned counsel at a defendant’s initial interview will not be placed in an adversarial position regarding a defendant’s eligibility for representation. The role of assigned counsel will be to confer with the defendant as to the accuracy of the information reported by CJA, advise the defendant as to the other factors which a judicial hearing officer would consider and determine whether the defendant wishes to challenge the CJA summary evaluation at a hearing conducted by a judicial hearing officer.

At the Criminal Court arraignment, if the case is not resolved, the
arraignment court may review the financial information reported and any information given by the prosecution or defense counsel. Where a defendant has been found by the CJA summary evaluation to not qualify for assigned counsel services and the defendant does not contest this finding, the defendant will be directed to obtain counsel.6 Where the defendant’s income falls within the guidelines and the court, considering any other assets reported by CJA and information from counsel, finds that the defendant cannot afford to retain an attorney, counsel will be appointed for the duration of the case. Where the defendant contests the CJA finding and the court determines that a hearing would be appropriate to resolve this issue, a hearing may be held as follows:

• for defendants arraigned in Criminal Court where the top charge is a misdemeanor or a violation, the court may evaluate a defendant’s eligibility for publicly funded counsel and, if appropriate, require that the defendant establish his or her eligibility for assigned counsel at a hearing conducted by a judicial hearing officer. In scheduling the hearing, the court may consider whether judicial resources would best be served by foregoing the hearing and allowing assigned counsel to continue representing the defendant.

• for defendants arraigned in Criminal Court where the top charge is a felony, any inquiry into the defendant’s eligibility should be deferred until arraignment on an indictment in Supreme Court or reduction of the top charge to a misdemeanor or violation in Criminal Court.

• for defendants who appear pursuant to a Desk Appearance Ticket [DAT], each defendant requesting assigned counsel will be required to complete a questionnaire requesting financial information similar to the CJA sheet prior to the arraignment. This information will become part of the court record. The arraignment judge will review the completed questionnaire and determine whether the defendant qualifies for assigned counsel services. If the defendant does not qualify for public counsel

6. Obviously, the defendant may make an informed decision to proceed pro se. In this situation, the court may find it appropriate to appoint advisory counsel for the defendant as a constitutional safeguard.
and the case is not resolved at the arraignment, the court may order the defendant to retain private counsel or schedule an eligibility hearing. It is important to have a procedure for screening defendants who appear pursuant to a DAT as many of these defendants would not be eligible for assigned counsel. [See, Appendix “C,” Study Conducted by the Criminal Justice Agency].

- for defendants charged in Supreme Court on an indictment, any hearing ordered by Supreme Court should be conducted generally after arraignment on the indictment and prior to the next court date. The court will have the information provided by CJA in deciding whether the defendant should be required to obtain counsel, allowed to continue with assigned counsel or whether a hearing should be held to resolve the eligibility issue.

Where a defendant is incarcerated at the Criminal Court arraignment, any eligibility hearing should not be held prior to the Criminal Procedure Law “180.80” date for a felony charge or “170.70” date for a misdemeanor. If the defendant remains incarcerated, the defendant’s inability to post bail will be a significant factor in establishing eligibility for assigned counsel [see, Posting of Bail] and the presiding court [Supreme Court, Criminal Term or Criminal Court] may determine that judicial resources would best be served by allowing assigned counsel to remain on the case.

POWERS OF JUDICIAL HEARING OFFICERS

Pursuant to Judiciary Law Article 22, Section 851[2], judicial hearing officers may be assigned as required by judicial or administrative need of the court in conformance with law and such rules as are promulgated by the Chief Administrator. Under the New York City Rules and Regulations [NYCRR], the administrative judge may assign a judicial hearing officer

7. Judiciary Law Section 851[2] provides:

   2. Assignments to a pending matter or to a part of court shall be made from each such panel as required by the judicial or administrative needs of the courts and in conformance with law and such rules as the chief administrator may promulgate.

8. 22 NYCRR 122.6 states, in pertinent part:

   (a) A judge or justice of any court for which a panel of judicial hearing officers
to preside over a part of the court as permitted by law for a specified period. The assignment shall be in writing and set forth whether the administrative judge is to decide the issue or report on the facts and make a recommendation as to the appropriate outcome. Where pre-trial motions are being litigated, Criminal Procedure Law Section 255.20[4] specifically limits the role of the hearing officer to reporting and making a recommendation, with a judge issuing the final decision.

The committee believes that judicial hearing officers should be utilized to preside over eligibility determinations. As the powers of a hearing officer are not limited in this area by statute, hearing officers may be authorized to determine whether a defendant qualifies for assignment of public counsel. Addressing the power which may be granted to hearing officers, the court in People v. Kade, 152 Misc2d 453, 455 (Francis X. Egitto, J., 1991) noted:

> Under the Judiciary Law, reference of a pending matter to a JHO is authorized if: (a) required by the judicial or administrative needs of the court; and (b) done in conformance with the law; and (c) done in conformance with any rules promulgated by the Chief Administrator.

To ensure that the trial judge retains complete control of any eligibility determination delegated to a judicial hearing officer, as required by
People v. Scalza, 76 NY2d 604, 608-609 (1990), the trial judge should be authorized sua sponte or on application to cancel the referral for the eligibility hearing and bring the entire matter back before itself if deemed necessary, or even to redo any proceedings de novo. See also, Matter of Heather J., 244 AD2d 762 (3d Dept, 1997)

Using hearing officers to determine eligibility would allow the courts to ensure that public funds are spent responsibly without affecting the efficiency of the court system or delaying a defendant’s trial. Finally, as per the results of the Kings County Pilot Project, employing hearing officers in this role would be cost-effective. [See, Appendix “D”].

THE ELIGIBILITY HEARING

Standard Used to Determine Eligibility

A defendant will be considered eligible for assigned counsel if he or she cannot obtain legal representation without impairing the ability to provide his or her family with the necessities of food, clothing, shelter and essential services. Each eligibility determination will require a thorough and careful review of each defendant’s assets and specific financial obligations. Defense counsel can assist the defendant by presenting the appropriate financial information to the court. Recipients of public assistance shall be considered eligible for appointment of counsel.

In deciding whether assignment of counsel is appropriate, the hearing officer should consider also the nature of the charges and whether ordering the defendant to retain counsel will result in coercing the defendant to waive his or her constitutional rights.

9. This reflects the concern of the Office of Projects Development Proposal, [Hon.] Richard C. Failla, Director, that any decision as to a defendant’s available financial resources must consider the specific needs of the defendant and his or her family and must proceed on a case-by-case basis.

10. The standard used by the Los Angeles Public Defenders Office is whether the defendant is unable to obtain adequate representation without financial hardship to the defendant or the defendant’s family. The basic test to be applied is whether an experienced competent private attorney would be interested in representing the defendant in the defendant’s financial condition.

In their guidelines, this office gives examples of defendants who may forego constitutional rights if required to retain counsel. The guidelines note that a defendant may be able to retain an attorney for a non-jury trial but not a jury trial; a defendant may plead guilty to drunk driving and pay a fine of $300 rather than hire an attorney for a minimum of $500; and finally, a defendant may require some time to accumulate the money to pay counsel, thereby foregoing the right to a speedy trial.
Parties Present at the Hearing/Procedure

The proceeding before the judicial hearing officer will be a sealed hearing with the defendant, defense counsel assigned at arraignment and any defense witnesses present. The People will not be permitted to be present but may submit any information relevant to the determination for the court's consideration prior to the hearing.

The hearing will be conducted on an informal basis. Therefore, formal evidentiary rules may be waived by the court. The hearing will be recorded by a court stenographer, however, the transcript will not be considered a public record and will only be available to a court with the power to review the decision of the judicial hearing officer pursuant to a motion to review as discussed below.

As per the statutory authority designating certain powers to judicial hearing officers, a defendant may apply to the trial court to cancel the referral and return the matter to the trial court.

Presentation of Evidence

The hearing court will make a case-by-case determination of a defendant's eligibility with consideration given to the total assets and liabilities of the defendant, the seriousness of the charge, the number of cases pending against the defendant, the complexity of the case and the anticipated cost of retaining counsel.

The defendant should be prepared to present evidence to meet the defendant's burden of establishing an inability to retain counsel. Such evidence may include documentary evidence such as tax returns, W-2 forms, paycheck stubs, bank statements, etc. While it is not required that the defendant or any other witness testify, such testimonial evidence may be presented.

Where a defendant demonstrates that his or her income falls below the guidelines, the court shall consider, nevertheless, the defendant's available assets in evaluating eligibility for assigned counsel such as bank accounts, stock and bonds, any interest in real property, significant personal property, certificates of deposit and assets in a safety deposit box. In considering non-liquid assets such as real property, the court may consider that these assets are not convertible immediately to funds to hire counsel.

While some of this information may serve to incriminate the defendant on the present or future charges, it is the defendant who is claiming an inability to afford counsel and requesting the assignment of counsel, counsel is present and can advise the defendant at the hearing, the defendant is not required to testify and the possibility of future use of any
information is limited by the unavailability of the hearing to the prosecution.

Posting of Bail
The posting of bail shall not automatically disqualify a defendant from assignment of counsel, but is a factor for the hearing court to consider in determining eligibility. The ability of a defendant's friends or relatives to post bail should not preclude automatically the defendant's eligibility for assigned counsel. Moreover, a defendant should not be forced to choose between raising money for bail or retaining counsel.

However, the posting of a significant amount of bail ($5,000 or more bail bond or cash), may initiate an inquiry by the court into the circumstances surrounding the posting of such bail. While the defendant will not be required to respond to such inquiry, such failure to respond may result in a determination that the defendant has failed to establish his or her eligibility for assigned counsel.

Contribution of Spouse/Partner/Parent(s) or Legal Guardians
Where a defendant is married and resides with a spouse, or a partner pursuant to a domestic partnership, the court should, if appropriate given the nature of the charge, consider the spouse or partner's income in determining the defendant's eligibility for assigned counsel. However, where it appears that the defendant's spouse or partner may be a witness for the prosecution at the defendant's trial [i.e., in a domestic violence case or charge of endangering the welfare of a child], the income of the potential witness should not be considered.

Where a defendant is under the age of 18, the court must consider the ability of the defendant's parent(s) or legal guardian(s) to retain counsel in determining the defendant's eligibility for assigned counsel. The court will make every effort to require the parents(s) or legal guardian(s) to retain private counsel or make partial payment for assigned counsel fees.

Hearing Officer Finding and Trial Court Review
At the conclusion of the hearing, or within a reasonable time thereafter, the judicial hearing officer will make a determination as to the defendant's eligibility for assignment of counsel. The defendant may file a motion for review of the judicial hearing officer's decision by filing a motion along with the sealed transcript in the referring court. The motion for review should be served on the court and the District Attorney, but any affidavit in support of the motion and the minutes of the hear-
ing would be furnished to the court ex parte. The prosecution would be permitted to submit any supplemental information to the reviewing court. The court will decide if review is appropriate and may issue a decision or take further testimony as needed.

If the defendant is ordered by the hearing officer to retain counsel, he or she must be given a reasonable opportunity to do so. Any determination requiring the defendant to retain counsel should not preclude any future requests for court-funded investigative and ancillary expenses such as the retention of expert witnesses, minutes and administrative fees.

The determination of the judicial hearing officer may require a defendant to make partial payment to the city for assigned counsel services rendered. Where partial payment is required, the defendant will be entitled to an automatic review of the hearing officer's finding. If the reviewing court finds that partial payment is appropriate, the defendant will be advised that if he or she fails to make this payment, a civil judgment will be entered by the court at the conclusion of the case.

If a defendant fails to comply with the order to retain counsel and the defendant does not choose [or is not permitted] to represent himself or herself, the case will continue with assigned counsel, and the defendant will be advised that at the conclusion of the case, the court will enter a judgment for the cost of assigned counsel. The cost of this representation will be the 18-B attorney fee paid to counsel or, if the defendant is represented by a defense organization, a calculation of the approximate in and out-of-court time spent by counsel and assessed at the 18-B rates. The defendant will be offered the option of signing a "So Ordered" confession of judgment or seeking a review/ hearing concerning the amount due. If the defendant seeks a hearing, the trial court may conduct the hearing or defer the issue to a hearing officer to determine the amount due for recoupment of the cost of representation and a judgment shall be entered.

The Clerk of the Court will ensure that the City (Corporation Counsel) receives all such judgments to permit the City to engage in proper collection activities. This forwarding of the judgment by the Clerk of the Court would terminate the court's involvement in the issue of recoupment for any case.

In all cases where a defendant has been directed to retain counsel, the attorney assigned to represent the defendant must remain on the case until relieved formally by private counsel filing notice on the case. This will ensure that each defendant receives adequate representation on the criminal charges at all times.
ELIGIBILITY FOR ASSIGNED COUNSEL SERVICES

Changes in Financial Condition
At any time during the pendency of a case, a court may review the defendant’s eligibility for assigned counsel on application by either side or sua sponte. For example, the posting of a significant amount of bail may initiate a review of the defendant’s eligibility for assigned counsel [supra, Posting of Bail].

However, where a hearing has been held and a court has made a finding as to a defendant’s eligibility, further inquiry should only be made upon information indicating a change in the defendant’s financial condition. In deciding whether to review a defendant’s eligibility, a court should give due consideration to the importance of continuity of representation by assigned counsel.

CONCLUSION
The absence of uniform eligibility standards throughout New York City has resulted in the routine assignment of counsel to many defendants who can afford to retain counsel. At present, any inquiries into a defendant’s financial eligibility are made on an ad hoc basis with no appearance of consistency or fairness and no standard for review by another court.

This proposal establishes a screening process utilizing recognized guidelines and standards which would balance a defendant’s right to counsel with the public’s right to proper monitoring of the expenditure of public funds. It is the court’s responsibility and obligation to ensure that the public money used to fund assigned counsel services is truly spent on those defendants who cannot afford to retain their own attorney.

June 1999
Criminal Justice Operations and Budget Committee

Alex M. Calabrese, Chair
Jaewon Chung, Secretary

Richard N. Allman
Michael Barsky*
Michael Bowen
William J. Clark
Jethro Mark Eisenstein
Dawn M. Florio
Debra A. Guarnieri*
Mariana J. Hogan
David C. Holland
Beth D. Jacob
Shawn Kerby
Stephen Kline*
Laurie Korenbaum
Katharine J. Law+

Paul McDonnell
James M. McQueeny
Anne Marie Paglia*
Ilan K. Reich
Lawrence Schneider
Eric Sears
Margaret Mary Shalley
Peter B. Sobol*
Lawrence S. Spiegel
Sanford N. Talkin
Jay Ukryn
Marc Robert Weiner
Judith E. White

+ Abstains
* Concurs except for the provision excluding the District Attorney from being present at the eligibility hearing before the judicial hearing officer.
ELIGIBILITY FOR ASSIGNED COUNSEL SERVICES

APPENDIX A
CURRENT INTERVIEW REPORT OF THE CRIMINAL JUSTICE AGENCY
AND PROPOSED INTERVIEW REPORT —“CJA SHEET”
APPENDIX B
FEDERAL FINANCIAL AFFIDAVIT IN SUPPORT
OF REQUEST FOR AN ATTORNEY
APPENDIX C
STUDY CONDUCTED BY THE CRIMINAL JUSTICE AGENCY

In 1993, a project was undertaken under the auspices of the Committee to Establish Standards for the Assignment of Counsel in Criminal Cases created by Justice Guy J. Mangano, Presiding Justice of the Appellate Division, Second Department and Judge Robert G. M. Keating, the Administrative Judge, New York City Criminal Court. Implementation of the project involved establishing eligibility guidelines and applying these guidelines during a two-month period from June 15 to August 15, 1993. The final report was issued in May of 1997.

To analyze the effect of implementing eligibility standards, the Criminal Justice Agency administered the ACES [Assigned Counsel Eligibility Screening] Questionnaire to defendants. This interview obtained the financial information to be used in determining a defendant's eligibility for assigned counsel services. The Criminal Justice Agency also conducted research to determine:

a) whether the availability of more detailed financial information and application of eligibility guidelines produced any changes in the courts' decisions on eligibility;

b) the extent to which court orders to obtain counsel were complied with; and

c) whether a screening process by the arraignment court produced any meaningful changes in the relationship between defendant income characteristics and the distribution of attorney type.

To make these comparisons, a baseline sample of defendants arraigned before the ACES program was compared with defendants arraigned during implementation of the program to determine the effectiveness of this eligibility project. Assigned Counsel Eligibility Screening Project, Final Report, May, 1997, page 2 [hereinafter CJA].

Eligibility Standards and Guidelines

The committee decided that each defendant should be presumed in general to be able to afford counsel. A defendant was to be considered financially unable to retain counsel if he or she could not obtain legal representation without impairing his or her ability to provide their family with the necessaries of food, clothing, shelter and essential services. The standards permitted a defendant to show the court that he or she had incurred emergency expenses rendering the defendant unable to afford counsel.

In analyzing a defendant’s finances, any defendant charged with a
misdemeanor whose annual gross income was less than 250% [$16,580 at that time] of the federal poverty guideline, or a defendant charged with a felony whose income was less than 350% [$23,170] of the federal poverty guideline would be presumed to be unable to retain private counsel. In applying the financial guidelines, the minimum income level would be raised $2,500 for each dependent supported by the defendant.

Where the defendant was married and resided with the spouse, the committee recommended that the spouse's income be considered by the court in the eligibility determination. For defendants under the age of 21, the income of the parents was to be considered by the court.

Finally, the ACES questionnaire provided the court with information concerning other assets of the defendant such as automobile ownership, bank accounts, spouse's assets and parental assets for defendants under 21 years old. This information was provided to the court to assist the judge in making the determination. The assets are not reflected in the financial computation.

Conclusion of the Report

The proportion of defendants ordered to retain private counsel were identical for those screened by ACES and the baseline defendants. [CJA, page 25]. The report found that even without formal screening, the attorney assignment decisions reflected generally the defendants' economic status.

About half of the defendants who were ordered to retain counsel appeared with private counsel at the second appearance. [CJA, page 26]. Those defendants that did not hire private counsel were re-instructed to do so and 38% of these defendants returned with retained counsel at the third appearance.

A comparison of the defendants screened by ACES with the baseline defendants indicated a 7% increase in the retention of private attorneys by those defendants ordered to retain counsel (approximately 50 attorneys retained 800 cases).

For defendants who appeared pursuant to a Desk Appearance Ticket [DAT], the ACES screening led to a significant increase in the number of defendants ordered to retain counsel. Prior to the implementation of the screening, approximately 21% of these defendants were ordered to retain counsel. Using ACES, 31% of these defendants were found ineligible for assigned counsel.

Effect on Current Proposal

Since this study was conducted, there has been greater attention paid...
to arrest to arraignment time and the use of judicial hearing officers to increase the efficiency of the courts. Therefore, requiring the Criminal Justice Agency to gather a significant amount of financial data prior to the defendant’s arraignment would be unworkable given the current high priority of an expeditious arraignment for each defendant. The procedure recommended by this committee requires the CJA interviewer to ask the defendant a few additional questions regarding home ownership and other assets to gather information for court review. There will be no requirement that this information be verified by the interviewer.

Furthermore, rather than requiring the arraignment court to make a complete determination of a defendant’s eligibility—thereby delaying the arraignment process—the instant proposal provides for a full hearing by a judicial hearing officer. The focus of the eligibility hearing is similar—as in the Queens study, the procedure recommended by this committee places the burden of proof on the defendant and both the CJA study guidelines and this proposal use a multiple of the federal poverty guidelines to determine the standard.

Finally, a separate hearing before a judicial hearing officer allows for the full presentation of evidence with “relaxed” evidentiary standards. The hearing officer will be granted wide discretion in reviewing the defendant’s financial status, the nature of the charges and whether a third-party’s income should be considered in determining eligibility so that the interests of the public and of each individual defendant can be safeguarded.

The committee believes that the courts are obligated to conduct such eligibility inquiry and the use of hearing officers to conduct the inquiry will be appropriate and cost-effective. [See Appendix “D”, Kings County Supreme Court Pilot Program].
This pilot program was initiated by Hon. Michael L. Pesce, Supervising Judge, Supreme Court, Kings and Richmond Counties and Acting Supreme Court Justice, Joseph F. Bruno.

From 1996 to November, 1998, the project reviewed 735 cases to determine a defendant's financial eligibility for assigned counsel. Of these 735 cases, 51% [377/735] were found ineligible for assigned counsel and ordered to retain private counsel. Of these 377 cases, 48% [153/377] did retain their own attorney. Of the remaining 224 cases, after claiming an inability to retain private counsel, 48% [187/224] were reassigned counsel and the remaining 37 cases were pending compliance with the court's order to retain.

To summarize: of the 735 cases reviewed, approximately 20% of the defendants [187/735] retained counsel with 37 cases pending compliance.

Assuming an average cost per case of $2,500 (i.e., the average compensation requested by 18-B counsel on a felony matter), the 187 cases where the defendant retained counsel after screening represents a savings of $467,500. The 37 cases pending compliance represent an additional $92,500.

The committee believes that this project shows that eligibility hearings may be conducted efficiently by judicial hearing officers throughout the New York City Criminal Court without burdening the court system. Furthermore, while additional court personnel would be required to conduct the hearings, the statistics indicate that the hearings would be cost-effective.
Domestic Legal Issues Concerning the Helms-Burton Act

The Committee on Inter-American Affairs

INTRODUCTION

The Cuban Liberty and Democratic Solidarity Act (also known as the LIBERTAD or Helms-Burton Act (“Helms-Burton” or the “Act”)) was signed into law on March 12, 1996 by President Clinton. The passage of the Act and its signing into law came after the Cuban Government’s shooting down of two unarmed civilian aircraft. The purposes of Helms-Burton are to increase economic pressure on the Cuban Government and to discourage foreign investment in expropriated properties in Cuba which are claimed to be owned by United States nationals. Since its enactment, Helms-Burton has been the focus of much controversy concerning its legality under international law. However, less attention has been devoted to the do-

mestic legal consequences of Helms-Burton. This Report examines some of the salient U.S. legal issues arising under Helms-Burton, concentrating on those involving procedural due process, the Act of State doctrine, separation of powers concerns and presidential actions arising under the Act. The Report concludes that while the Act raises serious procedural due process concerns which may allow certain defendants to avoid claims brought under the Act, in general it satisfies the constitutional requirements imposed pursuant to the Act of State doctrine and the separation of powers between the legislative and executive branches. The Report also questions the validity of President Clinton’s current suspension of the ability to bring claims under the Act.

I. SUMMARY OF THE ACT

Helms-Burton expands the already broad United States sanctions in place against Cuba. In 1992, the United States extended the pre-existing embargo against Cuba by applying the embargo to foreign affiliates of United States companies. Helms-Burton further extends the extra-territorial reach of United States legislation to include all foreigners regardless of their affiliation with the United States. This extension is to be achieved, by, inter alia:

i. Providing a private right of action to United States nationals to bring treble damage suits in United States courts against foreign nationals who, after November 1, 1996, “traffic” in property confiscated by the Castro regime (Title III of Helms-Burton);

ii. Denying visas to foreigners, including officers and directors of companies, who “traffic” in confiscated property after March 12, 1996 (Title IV of Helms-Burton); and

iii. Prohibiting United States nationals or permanent resident aliens from knowingly extending loans, credits or other forms of financing to any person in order to finance transactions involving confiscated property, the claim to which was owned

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3. See definition of “trafficking” on page 6 infra.
4. See definition of “trafficking” for purposes of Title IV on page 11 infra.
Title I–Strengthening International Sanctions Against The Castro Government

Prohibition Against Indirect Financing of Cuba. Effective as of March 12, 1996, Section 103 of Helms-Burton prohibits United States nationals and governmental agencies from knowingly extending, directly or indirectly, any loan, credit or other form of financing for the purposes of financing a transaction involving any confiscated Cuban property in which a United States national has a claim. The only exception to this prohibition is when the United States national providing the financing owns the claim, and enters into a transaction that is permitted under United States law.

Enforcement of the Economic Embargo of Cuba. Section 102 (d) of the Act includes a provision that removes certain Cuba-related activities—including the transmission of information and informational materials between the United States and Cuba—from the list of activities that were previously excluded from being penalized under the Trading With the Enemy Act (the “TWEA”). However, the new law does not repeal the so-called Berman Amendment (Public Law 103-236, § 525(b)(1), Fiscal Year 1994-95 Foreign Relations Authorization Act), which denies the President authority under the TWEA to regulate or prohibit the transmission of information and informational materials between Cuba and the United States.

Clarification and Reporting on Permitted Telecommunications Activity. Section 102(g) of Helms-Burton clarifies that the authority under the Cuban Democracy Act of 1992 to provide telecommunications services between the United States and Cuba does not include the authority to invest in Cuba’s domestic telecommunications network by such acts as the contribution of funds, loans or “anything of value.” This section also requires the President to submit to Congress semiannual reports that detail payments made by any United States person to Cuba for the provision of telecommunications services.

Assistance by the Independent States of the Former Soviet Union for the Cuban Government. In addition to the effects of the legislation on United States and foreign persons, Helms-Burton requires the United States to make ineligible for certain types of United States assistance any country of the former Soviet Union that provides Cuba with assistance in the form of “non-market-based trade.” Section 106 of the Act also requires the United States to reduce its assistance to any country of the former Soviet Union if the President determines that such country has provided...
Cuba with assistance in building either of two specified Cuban intelligence facilities.

United States Opposition to Cuban Membership in International Financial Institutions. Section 104(a) of the Act ensures that the United States executive director for each international financial institution “use[s] the voice and vote” to oppose Cuban membership in that institution. However, the Act would allow the United States to support financial assistance for Cuba by these institutions once a Cuban transition government is in place, and to approve Cuban membership in such an institution effective after a democratically elected government takes power.

Reports on Commerce with, and Assistance to, Cuba from other Foreign Countries. Section 108 of Helms-Burton requires the President to submit to Congress a series of reports on foreign commerce with, and investment in, Cuba for the 12-month period that precedes each report. These reports may provide ammunition to potential claimants with private rights of action under the provisions of Title III (discussed below) and may also serve as a basis for the United States Government’s exclusion of certain aliens under Title IV (discussed below).

The President is required to submit the report on January 1 of each year. The President’s reporting obligation terminates only when the President determines that a “transition” government is in place in Cuba. Each report must be submitted to the House Committees on Appropriations

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5. The reports must contain descriptions of:

(i) joint ventures, either completed or under consideration, by foreign nationals and businesses involving “facilities in Cuba.” These descriptions would include the location of the facilities, the names of the parties involved and the terms of the joint venture agreement. Also, each report must determine whether any of these joint ventures involve a facility that is subject to a claim by a United States national;

(ii) Cuba’s foreign commerce, including the identification of Cuba’s trading partners and the extent of Cuba’s trade with each country; and

(iii) All bilateral assistance (including humanitarian) given to Cuba by other foreign countries.

Each report also must include:

(a) A determination of the amount of the Cuban government’s debt to other foreign countries;

(b) A description of United States efforts to assure that Cuban raw materials do not enter the United States market; and

(c) An identification of countries that have entered into agreements with Cuba to purchase arms or other military-related products.
and International Relations and the Senate Committees on Appropriations and Foreign Relations, and will become a matter of public record.

**HELM'S-BURTON ACT**

**Title III—Protection of Property Rights of United States Nationals**

Liability for Trafficking in Confiscated Property. Title III, which came into effect on August 1, 1996, accords a private right of action to United States citizens to bring treble damage suits in United States courts against foreigners who knowingly “traffic” in property confiscated from United States nationals by the regime of Fidel Castro on or after January 1, 1959. Under pressure from Canada, Mexico and the European Union, in 1996 President Clinton exercised the prerogatives given to him under the Act to suspend the right to bring an action under Title III (Section 306(c)). The suspension is renewable on a six-month basis. Since the initial suspension, the President has continually suspended the right to bring action.6

The definition of “trafficking” includes a broad range of activities from selling or distributing confiscated property to profiting from or participating in trafficking by another person.7 Thus, trafficking encompasses

6. In addition, traffickers were given a three-month “grace period” to cease their trafficking such that those disposing of their interests in confiscated property before November 1, 1996 would not be subject to liability under Title III. Thus, although Title III came into effect on August 1, 1996 and liability began to accrue on November 1, 1996, United States claimants will not be able to bring their suits until the suspension is lifted.

7. A person will be considered to be trafficking in confiscated property where such person “knowingly” and “intentionally”, and without the authorization of any United States national who owns a claim to the property:

(i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property;

(ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or

(iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person.

The term “traffic” expressly does not include the following:

(i) the delivery of international telecommunication signals to Cuba;

(ii) the trading or holding of securities publicly traded or held, unless the trading is with or by a person determined by the Secretary of the Treasury to be a specially designated national;

(iii) transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel; or

(iv) transactions and uses of property by a person who is both a citizen of Cuba and a
not only direct dealings in confiscated property, but also the conduct of business with the owner of such property, for example, purchasing from or selling to Cuban entities trafficking in confiscated property. Furthermore, the meaning of trafficking contains no limitation on successive transactions, meaning that a person who engages in an indirect chain of transactions that ultimately result in a use of expropriated property can be liable for trafficking. However, it should be noted that the definition of trafficking requires that the person “knowingly” and “intentionally” engage in the proscribed activity.

Treble Damage Awards. Helms-Burton also provides for the availability of treble damage awards to claimants under Title III. Specifically, any person found to be trafficking after November 1, 1996, in confiscated property, a claim to which has been certified by the United States Foreign Claims Settlement Commission (“FCSC”), will be subject to treble damages. With respect to non-certified claims, foreign persons will be liable for treble damages if they continue to traffic in confiscated property after receiving written notice of a suit 30 days before its initiation.

Discretionary Enforcement. The enforcement of Title III is subject to the discretion of the United States administration, which has taken the view that the President has the authority to renew the current suspension of the right of United States nationals to bring suits under Title III on a country-by-country basis. For example, if the United States is satisfied that French companies have withdrawn from economic relations with Cuba in compliance with Helms-Burton, but that Canadian companies have not, then the United States President may continue the Title III suspension in respect of French businesses while permitting suits to be brought against Canadians.

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8. The FCSC is responsible for certifying claims of United States nationals whose assets have been expropriated by foreign governments without fair compensation. 5,911 claims against Cuba by corporations and individuals have been certified by the Commission since October 16, 1964; their current value has been estimated at almost $6 billion: Background Information, Foreign Claims Settlement Commission of the United States, United States Department of Justice (June 24, 1996).

9. Claims that have not been certified by the FCSC become eligible to serve as the basis of a suit on March 12, 1998. See Section 302(a)(4)(c).

10. Section 302(a)(3).

position with respect to the advancement of Title III suits, it has not permitted any suits to be brought under the Act, as will be discussed later.

Certification of Claims. Prior to March 12, 1998, only claims that had already been certified by the Foreign Claims Settlement Commission (FCSC) could furnish the basis for a suit.\textsuperscript{12} After August 1, 1998, uncertified claims may serve as the basis for a suit.

Who May Bring Claims? Under Section 302 (a), United States nationals are barred from filing a claim under Title III if they acquired ownership of such claim after the March 12, 1996 date of enactment of Helms-Burton. They are also barred under this section from filing a Title III claim if they were eligible to file with the FCSC and failed to avail themselves of their right to do so, or if they timely filed with the FCSC, but the FCSC rejected their claim.\textsuperscript{13} However, these claimants will include individuals who are now United States citizens but who were Cuban nationals at the time their properties were confiscated.

In a Title III action for confiscated property, a court shall accept a certified FCSC claim on the same confiscated property as conclusive proof of ownership of the property.\textsuperscript{14} In the event no certified FCSC claim exists, a court is granted the authority under this section to appoint a special master to determine whether a claimant owns an interest in the relevant confiscated property, and if so, to calculate the value of the property.

Procedural Requirements. Two procedural requirements are also imposed on all Title III claims. First, Section 302 (b) stipulates that an action may be brought under Title III of the Act only if the amount in controversy exceeds $50,000, exclusive of interest, costs, and attorneys' fees. Second, all claims are subject to a two-year limitations period. Specifically, an action may not be brought more than two years after the trafficking has ceased to occur.

Definition of Damages. A person found liable under Title III shall pay damages "in an amount equal to the sum of" the amount which is the greater of:

\textsuperscript{12} Supra , note 9.

\textsuperscript{13} It is interesting to note that the filing fees for claims brought under Helms-Burton are much higher than for other actions brought in federal court. The filing fees for claims under Title III of the Act are $4,180 as opposed to the standard fee of $150. 28 U.S.C.A. sec. 1914, Judicial Conference Schedule of Fees , note 15. This fee was determined on the basis of the additional cost to the federal court system of processing such claims. House Report No. 104-202, p. 45 (1996).

\textsuperscript{14} Section 303 (a).
(i) the amount, if any, certified to the claimant by the FCSC under the International Claims Settlement Act of 1949, plus interest;

(ii) the amount established by a special master's determination, in the event no certified FCSC claim exists, plus interest; or

(iii) the fair market value of that property, calculated as being either the current value of the property, or the value of the property when confiscated plus interest, whichever is greater; and

(iv) court costs and reasonable attorneys' fees.

However, under Section 302(a) there is a presumption that the appropriate measure of damages is the amount determined according to clause (i), the amount certified by the FCSC. This presumption may be rebutted, but only by clear and convincing evidence that the amounts calculated under clauses (ii) and (iii) are the appropriate measure of damages. The damages may also be trebled (plus court costs, reasonable attorneys' fees and interest) if an action is brought based on a claim certified with the FCSC, or if the accused person traffics in the confiscated property after having received 30 days' written notice prior to the commencement of a Title III action. It is important to emphasize that, notwithstanding the present difficulty of searching for certified claims with the FCSC, a foreign company is charged with knowledge of such claims for purposes of the treble damages provisions.

Title IV—Exclusion of Certain Foreign Nationals

Exclusion from Entry into the United States. Title IV, which came into effect on March 12, 1996, provides for the exclusion from entry into the United States of any foreign national who has converted confiscated property for personal gain or who traffics in confiscated Cuban property a claim to which is owned by a United States national. Officers, principals or controlling shareholders of companies that have been involved in the confiscation of property or trafficking in confiscated property, as well as their spouses, minor children and agents, will also be excluded from the United States. The definition of trafficking for purposes of Title IV also

15. Section 401(a)(i), (ii).
16. Section 401(a)(iii), (iv).
requires knowing and intentional action, which is similar to the definition in Title III.\textsuperscript{17}

Notification of Foreign Nationals to be Denied Entry. On July 10, 1996, the United States State Department made its first notification under Title IV. On that date, certain officers and shareholders of Toronto-based Sherritt International Corp. were informed that they would be banned from the United States if Sherritt did not pull out of its nickel cobalt operations in Cuba over the next 45 days. The State Department then investigated other companies in Canada, the European Union and Mexico.\textsuperscript{18}

Issuance of Determination Letters. On November 13, 1997, the Department of State sent out determination letters to corporate officers of B.M. Group a.k.a. Grupo B.M., an Israeli-owned citrus company, to inform them that their activities involving confiscated U.S.-claimed properties in Cuba were within the purview of Title IV of the Act.\textsuperscript{19} To date, companies that

\textsuperscript{17} Section 401(b)(ii)(A) provides that for the purposes of Title IV, a person “traffics” in confiscated property if that person knowingly and intentionally:

(i) transfers, distributes, dispenses, brokers, or otherwise disposes of confiscated property,

(ii) purchases, receives, obtains control of, or otherwise acquires confiscated property, or

(iii) improves (other than for routine maintenance), invests in (by contribution of funds or anything of value, other than for routine maintenance), or begins after the date of the enactment of this Act to manage, lease, possess, use, or hold an interest in confiscated property,

(ii) enters into a commercial arrangement using or otherwise benefiting from confiscated property, or

(iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person,

without the authorization of any United States national who owns a claim to the property.

Under Section 401(2)(B) of the Act, persons are not deemed to be trafficking if they engage in one of the following activities: (1) the delivery of telecommunications signals to Cuba, (2) the use of property incident to lawful travel in Cuba, (3) the public trading of securities (unless with specially designated nationals) and (4) transactions and uses of property by a citizen and resident of Cuba (other than government officials or Communist Party members). These exemptions are identical to those in effect elsewhere in the bill.

\textsuperscript{18} Supra, note 10. Guidelines for implementing the provisions of Title IV provide that, once the United States State Department has determined that the denial of visas sanction will apply, the Department will provide 45 days advance notice of a revocation of a visa, or a denial of a visa application, unless new information is provided or the individual ceases the sanctionable activities.

\textsuperscript{19} Press Statement (Implementation of Title IV of the Cuban Liberty and Democratic Solidarity Act of 1996) by Lee McClenney/Acting Spokesman, Department of State, November 17, 1997. The determination letters notify the corporate officers, together with their spouses and minor
have made public announcements of their divestiture of Cuban operations include Paradores Nacionales of Spain, Cemex of Mexico, Redpath of Canada, and ING of the Netherlands. In addition, Telecom Italia paid millions to ITT Corporation, whose Cuban Telephone Company was expropriated by the Cuban government, for a license to use its Cuban telephone lines basically in order to avoid treble damages claims under Title III.

Title IV is not subject to the Presidential suspension authority applicable to Title III. Furthermore, under Section 401(c), a foreign national who is excludable under this Title may be allowed into the United States only to receive necessary medical care or to participate in a legal action brought against him or her under Title III. In addition, the President has formally recorded his understanding that the visa restriction and exclusion provisions do not prohibit the entry of persons engaging in diplomatic or UN business.

II. EXTRATERRITORIAL APPLICATION OF HELMS-BURTON FROM A PROCEDURAL DUE PROCESS PERSPECTIVE

Title III of Helms-Burton was designed to protect property rights of U.S. nationals in Cuba. It states, in part, that any person who “traffics” in confiscated property which once belonged to a U.S. national can be pursued in U.S. courts for damages. Potential plaintiffs include not only individuals who were nationals at the time of the confiscation, but also foreigners who subsequently became U.S. citizens.

The breadth of Title III’s provisions has sparked concern in the international community because, among other things, the exercise of extraterritorial jurisdiction allows the U.S. to impose economic sanctions on foreign defendants based on claims that arose in a foreign country over a quarter century ago causing certain commentators to argue that Title III may violate the U.S. Constitution.
This section focuses on one potential constitutional hurdle which may halt certain Helms-Burton cases from the inception—the threshold question of whether U.S. courts have the ability to exercise jurisdiction over alleged traffickers. In short, U.S. courts must have the power to adjudicate the subject matter of Helms-Burton claims, and they cannot disregard the Constitutional due process protections afforded foreign, non-resident defendants. If Title III actions are ultimately litigated in U.S. courts, foreign defendants will undoubtedly test the courts’ power to adjudicate such claims. As set forth below, the success of these challenges will largely depend on the nature and quality of the alleged traffickers’ contacts with the United States.

A. Subject Matter Jurisdiction

Helms-Burton targets foreigners who traffic in property confiscated from American citizens by the Cuban government. As such, there can be no dispute that this statute has broad extraterritorial scope, since it attempts to regulate the activity of foreign nationals occurring outside the territorial boundaries of the United States. This alone, however, should not pose a problem in Helms-Burton litigation because federal courts are free to apply U.S. law extraterritorially, so long as Congress intended that they do so.24 Specifically, an act of Congress will not apply to conduct occurring outside of the United States unless the affirmative intention of Congress is clearly expressed in the statute.25 With respect to Helms-Burton, Congress’s intention is clear: “[t]he United States Government has an obligation to its citizens to provide protection against wrongful confiscations by foreign nations and their citizens, including the provision of private remedies.” Moreover, the statute states: “[t]o deter trafficking in wrongfully confiscated property, United States nationals who were the victims of these confiscations should be endowed with a judicial remedy in the courts of the United States that would deny traffickers any profits from economically exploiting Castro’s wrongful seizures.”26

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26. See Helms-Burton Act, §§ 6081(10) and (11). Congress also addressed the “effects doctrine,” which would allow the U.S. to pass legislation that would restrict foreign conduct, provided that the foreign conduct has, or is intended to have, a substantial effect within the territory of the United States. See id. § 6081(11).
Given that Congress's intent is clearly set forth in the statute, it will
difficult perhaps impossible—for defendants to successfully challenge a
U.S. court's ability to exercise subject matter jurisdiction over a Helms-
Burton claim by arguing that it is extraterritorial.

B. Personal Jurisdiction
The fight over personal jurisdiction may not be so easily won, how-
ever. Even if subject matter jurisdiction exists, a foreign defendant brought
into a U.S. court is entitled to the same due process protections extended
to U.S. citizens.27 It has been well-settled since the Supreme Court's 1945
decision in International Shoe v. Washington that a nondomiciliary who is
not served with legal process within the forum state must have "mini-
mum contacts" with the forum.28 To meet this standard, the Court must
be satisfied that the exercise of jurisdiction is "reasonable" in terms of the
nature and quality of the defendant's contacts with the forum, and that
there is a sufficient connection between the cause of action and the
defendant's contacts.29

The Reasonableness Standard
In International Shoe, the Supreme Court stated what was then a novel
concept—that jurisdiction is reasonable only if the foreign defendant has
"minimum contacts" with the forum state."30 Other than providing this
general standard, however, the Supreme Court offered little guidance as
to how a court should determine whether the exercise of jurisdiction over
a particular defendant is reasonable. Indeed, since International Shoe courts
have struggled to determine what constitutes minimum contacts and to
determine when the exercise of jurisdiction is consistent with constitu-
tional requirements of reasonableness. In the many cases applying the
minimum contacts analysis, a multitude of factual circumstances have
been considered. But a definitive universally applicable standard still does
not exist.

Some guidance was provided by the Court in Asahi Metal Industry Co.

U.S. It did so by reciting that: "International law recognizes that a nation has the ability to
provide for rules of law with respect to conduct outside its territory that has or is intended to
have substantial effect within its territory." See Helms-Burton Act, § 6081(9).
29. Id. at 318.
30. Id. at 316.
v. Superior Court of California, Solano City. 31 In Asahi, the Supreme Court unanimously reversed a California court’s exercise of jurisdiction over a foreign defendant, holding that the mere placement of a product into the stream of commerce is not sufficient to establish “minimum contacts” with the state where the product was purchased. Instead, the defendant must “purposefully avail” itself of the forum for the assertion of jurisdiction to be reasonable. 32

The Asahi Court further set forth the following five factors to determine whether the exercise of jurisdiction is reasonable and fair: (1) the burden on the defendant in litigating in the forum state; (2) the interests of the forum state; (3) the plaintiff’s interest in obtaining relief; (4) the U.S. judicial system’s interest in promoting judicial economy; and (5) the common interest of the states in furthering fundamental substantive social policies. 33 Of these five factors, the first three are particularly relevant to Helms-Burton litigation.

1. Burden on Defendant

In Asahi, the court noted that: “[T]he unique burden placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.” 34 Here, since most Helms-Burton defendants will reside outside the forum, it is to be expected that most, if not all, will stress the logistical burden on them of defending a lawsuit in the U.S. However, in light of the strong U.S. interest in litigating Helms-Burton suits, as well as the plaintiff’s interest in obtaining relief (both of which are discussed in more detail below), the fact that the defendant resides outside the United States should not alone be dispositive.

Some foreign defendants may also point to the existence of “blocking statutes” in their countries as further evidence of the burden of liti-
gating Helms-Burton claims in the U.S. Specifically, in response to the extraterritoriality of Helms-Burton, some countries have adopted laws blocking their citizens from complying with the Act. Violating these blocking statutes usually subjects the foreign citizen to penalties and monetary fines in their country. Thus, foreign defendants may ask U.S. courts to decline jurisdiction on the basis of international comity because the foreign blocking statutes place significant burdens on these defendants.

It is unlikely, however, that the international comity implications created by foreign blocking legislation will alone persuade a court to dismiss a Helms-Burton lawsuit on jurisdictional grounds. In Asahi, the Supreme Court indicated that comity may be relevant in determining the reasonableness of personal jurisdiction over a defendant. Comity, however, is only one of several factors to be considered in determining reasonableness of personal jurisdiction over a defendant.

Since Asahi there have been at least two federal cases in which the principal of comity was considered relevant to personal jurisdiction. In General Motors Corp. v. Ignacio Lopez de Arriortua, 984 Supp. 656, 668 (E.D. Mich. 1996), the court evaluated the substantive policies of Germany in deciding whether jurisdiction over a German defendant was reasonable. Because the applicable domestic law (RICO) was not contrary to German policy, the court saw no problem in asserting personal jurisdiction. In Aerogroup International, Inc. v. Marlboro Footworks Ltd., 956 F. Supp. 427, 438 (S.D.N.Y. 1996), the court stated that a decision to exercise personal jurisdiction over a Canadian defendant "requires a consideration of the foreign nation's interest in furthering the substantive policies implicated by this litigation. Indeed, in analyzing the competing state policies, a court should bear in mind the comity traditionally afforded foreign courts by American Courts."
ablleness, and is never conclusive. 38 This fact is stressed in Hartford Fire
Insurance v. California, 39 where the Supreme Court held that comity should
only influence a court’s decision to exercise jurisdiction if the foreign
activity does not have a substantial direct effect within the United States
or when a “true conflict” exists between the laws of a foreign state and
the United States’ laws. A true conflict arises only if the defendant is
unable to simultaneously comply with both laws, as opposed to choosing
to comply with one or the other. 40

While requiring a defendant to violate a foreign blocking statute may
be considered a burden upon the foreign defendant, it may be deemed to
be not such a remarkable or unreasonable one. Moreover, U.S. courts will
look to see if the blocking statute is founded solely on hostility to the
U.S. law, as opposed to a specific interest warranting accommodation.
This concern is set forth in the Restatement (Third) of the Foreign Relations
Law which states, in pertinent part, that when a court has jurisdiction:
“adjudication should . . . take place on the basis of the best information
available . . . [blocking] statutes that frustrate this goal need not be given
the same deference by courts of the United States as substantive rules of
law at variance with the law of the United States.” 41

2. Interests of the U.S. and the Plaintiff

In order to pass muster under Asahi’s second and third factors, a
court must examine both the interest of the U.S. in hearing the suit, and
the plaintiff’s interest in obtaining relief. 42 Plaintiffs should be able to
argue easily that the express language of Helms-Burton demonstrates a
strong U.S. interest, since this language unequivocally states a congres-
sional intention both to protect U.S. citizens’ property rights and to ad-
vance U.S. foreign policy goals towards Cuba. The potential plaintiff’s
interest in obtaining relief is just as strong, because without a domestic
forum, his ability to do so will be restricted.

But even if Helms-Burton plaintiffs are able to persuade courts that
jurisdiction is reasonable, that will not be the end of the matter. Courts
will still have to consider the second prong of the minimum contacts test,

38. Hilton v. Guoyot, 159 U.S. 113, 163 (1895) (“Comity in the legal sense is neither a matter
of absolute obligation on the one hand, nor of mere courtesy and good will upon the other.”)
40. Id. at 799.
42. See Asahi, supra note 31, at 113.
namely, the connection between the cause of action and the defendant's contacts with the forum.43

**Sufficiency of Contacts**

As set forth above, when the Supreme Court first created the minimum contacts test, it did not specify the nature and extent of a defendant's contacts that would satisfy the test. The Supreme Court clarified matters somewhat in *Worldwide Volkswagen Corporation v. Woodson*.44 In that case, the plaintiffs, an Oklahoma couple, were injured on a road trip to Arizona. When the couple attempted to sue the automobile retailer and wholesaler, both New York corporations that did not do business in Oklahoma, the defendants resisted being sued in Oklahoma state courts on jurisdictional grounds. While the Oklahoma state courts found personal jurisdiction to exist, the Supreme Court reversed, finding that the defendants “carry on no activity whatsoever in Oklahoma” and that they had “avail[ed] themselves of none of the privileges and benefits of Oklahoma law.”45 This language injected a new element into the minimum contacts analysis, requiring that the defendant's “conduct and connection with the forum [be] such that he should reasonably anticipate being hauled into court there.”46

Under the *Woodson* standard, foreign defendants often did not have sufficient contacts with the forum to support jurisdiction. However, in 1984, the Supreme Court in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, broadened the concept of minimum contacts by recognizing two distinct types of personal jurisdiction: “specific jurisdiction” and “general jurisdiction.”47 Specific jurisdiction fits within the mold first announced in *International Shoe*—it exists in all cases where the cause of action arises out of the defendant's contacts with the forum, and is proper even if those contacts were isolated or sporadic.48 General jurisdiction, by contrast, exists even if the cause of action does not arise out of the defendants' forum contacts,49 so long as the defendant has contacts with the

45. Id. at 295.
46. Id. at 297.
48. See Id. at 414, n.9.
49. See Id. at 414, n.9.
forum that are "sufficiently continuous and systematic to justify hauling
the defendant into court" in that forum.\(^{50}\) Given that most, if not all, defen-
dants in Helms-Burton cases will reside outside of the U.S., most plaintiffs
will likely assert that general jurisdiction exists over the defendants.

The persuasiveness of this argument remains to be seen. As a general
matter, foreign companies are often deemed to be subject to general per-
sonal jurisdiction if they have a place of business or other significant
assets within the U.S.\(^ {51}\)

The facts in Helicopteros, however, suggest that a defendant’s con-
tacts with the U.S. must be fairly substantial before general jurisdiction
will be found. That case arose out of the crash of a helicopter carrying
Texans in Peru. When the decedents’ estates attempted to sue in Texas the
Colombian company that operated the helicopter, the defendant chal-
 lenged the propriety of jurisdiction given the company’s limited contacts
with Texas. The Supreme Court agreed, finding that the defendants’ con-
tacts did not constitute continuous and systematic activity. Significantly,
the court found that the defendants’ regular purchases of helicopters,
over a period of years, from a company located in Fort Worth, Texas and
its actions in sending its personnel to Texas each year for training did not
constitute sufficient contact with the forum state.\(^ {52}\) This finding, as well
as the Court’s decision not to aggregate these contacts, suggest that a
defendants’ contacts with the forum must be substantial to support a
finding of a general jurisdiction.

As set forth above, plaintiffs should be able to get over the hurdle of
subject matter jurisdiction rather easily. Obtaining personal jurisdiction
over foreign defendants, however, may be more difficult. For example, in
a Helms-Burton case, if the contacts of the foreign defendant are remote
and not directly related to expropriated property—as in a subsidiary or
affiliate involved in indirect “trafficking” violations—it may be able to
defeat personal jurisdiction (whether it be specific or general) by stressing
the insufficiency of contacts with the U.S.\(^ {53}\)

The ultimate success of jurisdictional arguments in Helms-Burton cases

\(50\) See International Shoe, supra note 28, at 320.


\(52\) See Helicopteros, supra note 47, at 418.

\(53\) Special jurisdictional rules apply when a foreign corporation is related to another entity.
Courts analyze whether there are sufficient ties between the two entities so that it would be
reasonable to exercise jurisdiction over the parent corporation. See generally, Mylan Labs v.
Akzo, N.V., 2 F.3d 56 (4th Cir. 1993).
will turn on the nature and quantity of the foreign defendant’s contacts with the U.S. And whereas it is impossible to predict how many cases will be impacted by a U.S. court’s jurisdictional limitations, it is safe to say that it will be in these trenches that some defendants may be able to avoid Helms-Burton liability.

III. SEPARATION OF POWERS

An important provision of the Act is the codification of the Cuban embargo which effectively takes the continuation of the embargo out of the hands of the Executive Branch and places it under the control of Congress. This is a modification to the terms of the Cuban embargo, which since its imposition in 1962 had been applied pursuant to presidential action. This reversal with respect to the implementation of foreign policy raises the issue of whether Congress has usurped the powers of the Executive Branch thereby violating the doctrine of separation of powers.

Professor A. Michael Froomkin has analyzed the ability of Congress to affect the powers of the other branches of government (especially the Executive Branch) and arrived at the conclusion that such ability depends primarily on whether the power in question is specifically enumerated in the Constitution as pertaining to either the Executive Branch or to Congress:

Congress's power to limit the President’s enumerated powers is relatively slight. It exists only when Congress can assert a directly relevant enumerated power of its own. But Congress's power to check other, unenumerated, presidential powers is somewhat greater...Congress cannot constitutionally diminish the President's enumerated powers...unless Congress can point to a relevant enumerated power of its own. Other executive powers, however, are less well insulated from Congress's power to structure the executive branch. In those cases, where the President's authority is only implied from the enumerated powers, Congress may have countervailing enumerated or implied powers.

54. Title I, Section 102(h).
Such an analysis is particularly relevant to those provisions of Helms-Burton relating to U.S. foreign affairs. The presidential power to conduct foreign affairs unhampered by Congress falls into a gray area between the enumerated and unenumerated powers. Article II of the Constitution vests the executive power in the President; provides him the “Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls...”; and makes him the Commander in Chief of the military. The presidential power as Commander in Chief has a strong effect on foreign affairs by providing the President the power to commit U.S. troops overseas unilaterally for limited periods of time. However, Article I of the Constitution vests in Congress the powers “[t]o regulate Commerce with foreign Nations...”; “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;” and “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.” Thus both Congress and the President have specifically enumerated powers which affect foreign affairs. 

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57. See Title II setting forth conditions which must be satisfied before the Cuban embargo can be lifted; Title III providing for lawsuits against foreign parties trafficking in expropriated property; and Title IV providing for the denial of visas to officers (and their immediate families) of foreign companies that traffic in expropriated properties. The question of whether such provisions of Helms-Burton violate any prior treaties with foreign nations such as the GATT, NAFTA or WTO is outside of the scope of this article. It should be noted, however, that as a matter of U.S. law, where treaties and statutes conflict, the later in time is controlling. See Head Money Cases, 112 U.S. 580, 597-99 (1884); Whitney v. Robertson, 124 U.S. 190, 194 (1888); The Chinese Exclusion Case, 130 U.S. 581, 602-03 (1889); cited in Harry A. Blackmun, The Supreme Court and the Law of Nations, 104 Yale L.J. 39, 40 (Oct. 1994).


60. Art. II, § 2, cl. 1.

61. See War Powers Resolution, Pub. L. 93-148, 87 Stat. 555, Nov. 7, 1973, which in the absence of a declaration of war allows the President to send military forces into battle for a period not to exceed 60 days without requiring congressional approval.

62. Art. I, § 8, cl. 3.

63. Art. I, § 8, cl. 10.

64. Art. I, § 8, cl. 11.

65. A possible question is whether any violation of existing treaties brought about by Helms-Burton constitutes an impermissible limitation on Congress’s own powers with respect to
The issue is further complicated by cases which seem to take conflicting positions with respect to primacy concerning foreign policy. There are cases which seem to assert that the conduct of foreign affairs rests solely in the Executive Branch. However, the courts have also held that the power to regulate commerce is vested in Congress, not in the Executive Branch and have interpreted “commerce” quite broadly. Part of this confusion concerning primacy may arise due to the intermingling of powers in the practical implementation of foreign policy, which often “occur[s] on a level of responsive interaction and cue-following by the executive and Congress, not strict delegation.”

Thus while in practice the Executive often appears to be acting unilaterally in the foreign policy arena, many of those actions are deemed to occur pursuant to congressional approval. For example, the Supreme Court in Dames & Moore v. Regan described the different ways in which con-
gressional approval in settling foreign claims can be inferred. This case, which dealt with the ability of the President to suspend claims of U.S. nationals arising from the Iranian revolution in 1979, required congressional approval for the suspensions but allowed such approval to be inferred where there existed: (1) specific congressional authorization for the action, (2) a history of congressional acquiescence in the area, (3) a longstanding practice of executive activity in the area without congressional advice or consent or (4) congressional acceptance of the President's authority in the area. As such it has come to stand for the proposition that presidential power in foreign affairs is subject to regulation by Congress. When the courts infer congressional approval of otherwise seemingly unilateral presidential actions, they limit executive power. According to Professor Steven G. Calabresi:

one of the best ways to determine, for example, how far “the executive Power” reaches is by knowing that, whatever else may be said, the executive power ends where exercises of the legislative power and of the judicial power begin. Thus, by definition, if something...requires legislative approval, it cannot also be an executive act.

This analysis was first set forth by the Supreme Court in Youngstown Sheet & Tube Co. v. Sawyer. In Youngstown, President Truman seized steel mills where production had stopped as a result of a labor strike. He claimed that the seizure was authorized pursuant to his power as Commander in Chief in order to insure supplies during the Korean War. The Court disagreed and held that this action required express congressional authorization. In arriving at this conclusion, the Court noted that Congress had delegated to the President the power to control strikes but not to seize steel mills. There was no legislation prohibiting the President from seizing the mills, but the Court inferred a congressional intent to deny the President such power. Because the President acted pursuant to pow-

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71. Abner S. Greene, Checks and Balances, 61 Univ. of Chicago L. Rev. 123, 191 (Winter 1994).
73. 343 U.S. 579 (1952).
74. Id. at 585.
75. See Greene, supra note 71, at 188, for a description of Youngstown.
ers delegated by Congress, his actions were subject to congressional control.

The Cuban embargo was initiated and maintained pursuant to Congress's specifically enumerated Article I power to regulate commerce with foreign nations (discussed above) which was in turn delegated by Congress to the President. The embargo was imposed by executive order pursuant to the authority conferred on the President by Congress in the Foreign Assistance Act of 1961, which provided that "no assistance would be furnished to the Cuban Government, and authorized the President to establish and maintain a total embargo on all trade between the United States and Cuba." The embargo was later authorized under the Trading with the Enemy Act of 1917, as amended in 1933, which allowed the President to impose an economic embargo during "periods of national emergency." In 1963 Congress enacted the Cuban Assets Control Regulations to prohibit trade between U.S. citizens and companies and Cuba. Congress in 1964 also amended the International Settlement Act of 1948 to permit U.S. citizens to bring claims against the Cuban government for expropriated property. Then in 1977, Congress limited the ability of the President to impose embargoes to times of war, but specifically grandfathered the Cuban embargo.

The question of separation of powers in foreign policy is not unique to Helms-Burton; it has previously been an issue in other legislation regarding Cuba. As discussed further in Section IV, in the aftermath of the Supreme Court's decision in Banco Nacional de Cuba v. Sabbatino, which promulgated the Act of State doctrine, Congress passed the "Hickenlooper" Amendment, which among other things limited the application of the

77. Id., cited in Note, The Helms-Burton Controversy, supra note 1, at 609.
84. See infra, p. 31 for a description of the Act of State doctrine.
Act of State doctrine except in cases where the President determined the doctrine was necessary for foreign policy reasons. 85

In Banco Nacional de Cuba v. Farr, 86 which was the District Court case on remand from Sabbatino, the Cuban government argued that the Hickenlooper Amendment impinged upon the power of the President over foreign affairs and thus violated the doctrine of separation of powers. 87 The Court rejected this argument, noting that while President Johnson had initially opposed the Amendment, he evidenced his approval of the Amendment by nevertheless signing it into law. In addition, the Court stressed that Congress often passed legislation which affected foreign affairs and that it was aware of no instances where actions taken pursuant to Congress’s power to regulate commerce been held to violate the doctrine of separation of powers. 88 In the end, the Court held that “Congress is not restricted from exercising its enumerated powers because foreign relations are affected.” 89

In many ways, Helms-Burton is similar to the Hickenlooper Amendment. Both were passed to prevent trading in property expropriated from U.S. citizens. 90 And both were signed into law by Presidents who initially opposed their passage. 91 As in the case of the Hickenlooper Amendment, by signing Helms-Burton into law, President Clinton evidenced his acceptance of the provisions of Act. This Presidential approval is one of the factors listed in Farr as evidence that legislation does not violate the doctrine of separation of powers.

In addition, as noted above, the President has exercised his authority in Cuban foreign policy through executive orders approved by Congress, confirming that the Executive’s implementation of Cuban foreign policy has been treated as falling not within the enumerated powers of the President but rather within the enumerated powers of Congress. Since existing Cuban foreign policy was created pursuant to the powers granted to Con-
gress, the assertion of congressional control over the continued formulation of Cuban foreign policy is not an unwarranted usurpation of power.

IV. WAIVER OF THE ACT OF STATE DOCTRINE

Helms-Burton provides that the Act of State doctrine does not apply to lawsuits brought under the Act.92 The Act of State doctrine provides that

the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.93

Under the Act of State doctrine, U.S. citizens would effectively be precluded from prevailing in any suit against the Cuban government for expropriation of property because in judging these actions U.S. courts would apply local (i.e. Cuban) law under which the expropriations would presumably be valid.94 Sabbatino dealt with the Cuban nationalization of assets owned by U.S. citizens and in denying jurisdiction focused on the necessity of avoiding embarrassment to the United States in the conduct of its foreign relations by having citizens bring lawsuits against nations with which the United States was conducting foreign relations.95 The waiver of the Act of State doctrine is a crucial element to the effectiveness of

92. Title III, § 322(a)(8).
93. Sabbatino, supra note 84, at 428.
94. See Clagett, 90 AJIL, supra note 1, at 643. The Committee on International Law of The Association of the Bar of the City of New York in its amicus brief filed in Sabbatino argued against the Act of State doctrine stating:

In choosing the law to be applied in adjudicating the issue as to the effect to be given within the territorial jurisdiction of the United States to a foreign state taking, our courts should not be obliged, as language in some earlier cases might suggest, automatically to apply the domestic law of the taking state (the lex situs) as “a rule for their decision”...Under traditional choice of law rules, our courts would be free to refuse effect to the lex situs in so far as it is consistent with the minimum standards embodied in international law. This Court should not, without constitutional or statutory authority, impose upon the courts of the country an exceptional requirement that they give unquestioned effect to the lex situs whenever it is a so-called “act of state.” p. 5.
Helms-Burton. Commentators have asserted that it is the most important provision in Helms-Burton because on the basis of the waiver alone, U.S. citizens would be able to bring suit in U.S. courts against traffickers (assuming there is jurisdiction as discussed in Section II). Therefore, it is important to determine whether Congress has the authority to waive the Act of State doctrine.

As noted above, almost immediately after Sabbatino Congress attempted to overrule the decision by passing the Hickenlooper Amendment to the Foreign Assistance Act of 1965 which provided that “courts in the United States shall not decline, on the ground of the Act of State doctrine, to apply international law to the merits of a case ‘in which a claim of title or other property’ is based upon a taking by a state in violation of international law.” By passing the Hickenlooper Amendment, Congress provided a mechanism by which the implementation of the Act of State doctrine could be avoided. The court in Farr upheld the validity of the Hickenlooper Amendment and in doing so, it not only reviewed separation of powers issues but also the Amendment’s status in light of the Sabbatino decision. It held that Congress had the ability to legislatively overturn Sabbatino, stating that:

When a determination is made by the political branches charged with the responsibility for foreign relations as to where the interests of the United States lie, it is not for the courts to say them nay. The basic reason for the application of the act of state doctrine disappears. To require that the doctrine be applied despite the express directions of the political branches on the subject would be to place the court in the position of having the last word in matters affecting foreign affairs, the determination of which is committed to other branches of the Government. This would be wholly inconsistent with the doctrine of separation of powers and with the very rationale of the act of state doctrine...In any event Congress does not lack power to direct that the act of state doctrine be eliminated as an instrument of judicial decision.

96. Id.
98. Dellapenna, supra note 95, at 298-299.
99. Farr, supra note 86, at 975.
At the time of passage of the Hickenlooper Amendment, there were numerous cases pending which involved expropriated Cuban property. Farr held that the relief under the Amendment was available to those cases.\textsuperscript{100} Since that date the Hickenlooper Amendment has not been invalidated by the courts.\textsuperscript{101} In 1988, Congress further eroded the Act of State doctrine by allowing federal district courts to exercise jurisdiction over foreign states in nonjury civil actions in which property is taken in a foreign nation and that nation is engaged in commercial activity in the United States.\textsuperscript{102} In addition, Congress has waived the Act of State doctrine in other areas. For example, the Act of State doctrine does not apply to the enforcement of arbitration agreements or to the confirmation of arbitral awards under the Federal Arbitration Act.\textsuperscript{103}

While the Act of State doctrine is still effective,\textsuperscript{104} in those instances in which the United States government has clearly expressed its intent to avoid the doctrine, the courts have allowed its limitation.\textsuperscript{105} Therefore, with regard to Helms-Burton, Congress has the authority to waive the Act of State doctrine.

V. PRESIDENTIAL SUSPENSION OF LAWSUITS UNDER THE ACT

The Act allows U.S. citizens to bring suit in federal district court against companies or individuals "trafficking" in property expropriated from them by the Cuban government.\textsuperscript{106} However, the President is authorized to suspend the right to bring action under the Act for six-month periods if he determines that "the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba."\textsuperscript{107}

\begin{itemize}
  \item \textsuperscript{100} Id. at 966.
  \item \textsuperscript{101} Dellapenna, supra note 93, at 299. See Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984), vacated and remanded on other grounds, 471 U.S. 1113 (1985); Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976); Banco National de Cuba v. First National City Bank, 431 F.2d 394 (2d Cir. 1970), rev’d on other grounds, 406 U.S. 759 (limiting application of the Act of State doctrine); cited in Clagett, 90 AJIL, supra note 1, at 440, n.30; and Reisman, Tilting at Reality, 74 Tx. L. Rev. 1261, at 1264, n. 24 (May 1996).
  \item \textsuperscript{102} 28 U.S.C. sections 1330, 1605 (1988), cited in Reisman, supra note 101, at 1265.
  \item \textsuperscript{103} 9 U.S.C. §15, cited in Clagett, 90 AJIL, supra note 1, at 440, n. 30.
  \item \textsuperscript{104} Clagett, 90 AJIL, supra note 1, at 643.
  \item \textsuperscript{105} See Farr, supra note 86; First National City Bank, supra note 101; Ramirez de Arellano, supra note 101; Alfred Dunhill, supra note 101.
  \item \textsuperscript{106} 22 U.S.C.A. sec. 6082.
  \item \textsuperscript{107} Id. at 6085(c), emphasis added.
\end{itemize}
In the legislative history to the Act, the Conference Committee stated that the determination that the suspension of lawsuits will expedite a transition to democracy in Cuba “should be the central element” in this distinct two-part formula for suspending the right to bring lawsuits. The Committee further went on to state that:

under current circumstances the President could not in good faith determine that suspension of the right to action is either “necessary to the national interests of the United States” or “will expedite a transition to democracy in Cuba.” In particular, the committee believes that it is demonstrably not the case that suspending the right of action will expedite a transition to democracy in Cuba, inasmuch as suspension would remove a significant deterrent to foreign investment in Cuba, thereby helping prolong Castro’s grip on power.

Since passage of the Act the ability to bring suits under Title III has been suspended by the President. The President has cited different reasons for suspending the lawsuits. For example, in January 3, 1997, the suspension was justified by citing Europe’s new commitment to link trade and political ties with Cuba to expanded freedom on the island. However, the Act did not produce these new commitments. Rather, they were the result of initiatives begun by Spain’s conservative Prime Minister, Jose Maria Aznar, prior to the Act becoming a factor. In addition, since 1996 there has been little evidence of a transition to a democratic form of government in Cuba. On January 5, 1999, President Clinton eased some of the provisions of the Cuban embargo to allow for increased U.S. aid and contacts with nongovernmental groups in Cuba. The Cuban government responded that this was part of the United States’ “systemic aggression” against Cuba and on February 9, 1999, passed legislation creating a new class of “counterrevolutionary crimes” with sentences of up to 20 years in prison aimed at dissidents who promote U.S. sanctions against

109. Id. at 580-581.
111. Id.
112. Juan O. Tamayo, Crackdown on dissent raises questions about Castro’s motives, Miami Herald, February 19, 1999, 16A.
Cuba.\textsuperscript{113} In addition, the Cuban government has recently brought to trial
dissident journalists on charges of sedition for having called for an end
to Cuba's one-party system.\textsuperscript{114} Therefore, since the objective standards for
suspension of the lawsuits have not been satisfied, in light of the con-
gressional opposition to the suspension of the lawsuits, the question arises
whether such suspension continues to be justified.

The Supreme Court in Youngstown also considered the question of
presidential actions taken in contravention of the intent of Congress. In
his concurring opinion, Justice Jackson stated that presidential actions
lacking congressional authorization occur “in a zone of twilight”\textsuperscript{115} in
which “the validity of the President’s act...hinges on consideration of all
the circumstances which might shed light on the views of the Legislative
Branch towards such action.”\textsuperscript{116} Justice Jackson further stated that when
the President’s actions violate the intent of Congress “his power is at its
lowest ebb” and can be sustained “only by disabling the Congress from
acting upon the subject.”\textsuperscript{117}

It can be argued that the President’s suspension of the lawsuits vio-
lates the will of Congress because the tests required for such suspensions
set forth within the Act and pursuant to the legislative history have not
been satisfied. As noted in Dames & Moore, the Supreme Court grants the
President substantial discretion with respect to issues relating to foreign
affairs where there is presumed to be congressional consent. Such discre-
ction, however, should not apply in light of explicit congressional prohi-
bitions relating to situations which Congress has analyzed in detail.\textsuperscript{118}
The President's executive authority under the Constitution does not al-
low him to nullify legislative acts or ignore statutory directives.\textsuperscript{119}

In the past the courts have invalidated presidential actions taken in
opposition to the will of Congress. In U.S. v. Guy W. Capps, Inc.,\textsuperscript{120} the

\begin{footnotes}
\item \textsuperscript{113} Id.; Anita Snow, 4 Cuban dissidents go on trial today, A.P. cited in Miami Herald, Mar.
1, 1999, 10A.
\item \textsuperscript{114} Larry Rohter, Cuba: 4 Dissidents Face Trial, N.Y. Times, Feb. 27, 1999, A4.
\item \textsuperscript{115} Youngstown, supra note 73, at 637.
\item \textsuperscript{116} Dames & Moore, supra note 70, at 668 (interpreting Youngstown, supra note 73, at 637).
\item \textsuperscript{117} Youngstown, supra note 73, at 637-638.
\item \textsuperscript{118} Dames & Moore, supra note 70, at 669 (discussing the limitations of Justice Jackson's
opinion in Youngstown, supra at note 73).
\item \textsuperscript{119} See Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 411-413 (1970),
\item \textsuperscript{120} Supra, note 67.
\end{footnotes}
Fourth Circuit denied a claim of damages for breach of contract brought by the United States against a potato importer. To protect the domestic potato market, Congress had passed legislation which prohibited the importation of foreign potatoes. The legislation required the President to investigate any evidence of violations of the legislation and to take measures to stop them. Instead, the President entered into an executive agreement with Canada allowing potato imports as long as they were to be used solely to feed livestock. The defendant entered into a contract with the U.S. pursuant to this agreement and then proceeded to sell its potatoes for public consumption. The Court held that although there was a clear breach of contract, the President’s agreement with Canada was invalid because it violated the statute in allowing this importation of potatoes. The Court then held that “the executive agreement was void because it was not authorized by Congress and contravened the provisions of a statute dealing with the very matter to with it related...”

Since the conditions set forth in the legislative history of the Act for suspension of the lawsuits have not been satisfied, it is questionable whether the continued suspension of lawsuits is warranted under the Act.

VI. CONCLUSION

Helms-Burton has yet to face any serious domestic legal challenges, primarily because no lawsuits have been brought under it. If the analysis set forth in Section V hereof is applied by the courts and the suspension of the ability to bring lawsuits under Title III of the Act is removed, the resulting cases will have to contend with the procedural due process concerns set forth in Section II. However, any lawsuits that eventually are brought under the Act should not experience significant difficulties as a result of issues arising with respect to the separation of powers described in Section III or the waiver of the Act of State doctrine described in Section IV.

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### JUDICIAL

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<th>Kim G. Allen</th>
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A Selective Bibliography

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