The Genocide of the Iraqi Kurds and Trial of Saddam Hussein

Judgments, Precedents, Federalism and Same-Sex Marriage

The First Step in the Nomination of a Justice is a Vacancy on the Court

FALL 2005
Feature Stories

10 The Genocide of the Iraqi Kurds and Trial of Saddam Hussein
As Saddam Hussein awaits trial in Baghdad before the Iraqi Special Tribunal, Michael Kelly, associate professor of law, explores the charge against him of committing genocide against the Kurdish people and provides readers with an in-depth look at the challenges prosecutors will face in proving Hussein’s involvement in that particular crime.

22 Judgments, Precedents, Federalism and Same-Sex Marriage: A Well-Known, but Often Forgotten, Secret of the Judicial System Revealed
Ralph U. Whitten, professor of law, uses the example of *Citizens for Equal Protection, Inc. v. Bruning* to explore the effect in state courts of lower federal court decisions of federal law.

28 The First Step in the Nomination of a Justice is a Vacancy on the Court
The most important thing a president can do outside of managing a war or national tragedy is to nominate a Supreme Court justice. G. Michael Fenner, professor of law, takes a historical look at the Supreme Court — noting some justices who stayed on the Court too long as well as those who have served well into their later years — while offering his thoughts on why justices stay on the court so long and some “courty” advice to President George W. Bush.

4 Lawyer News
34 Alumni Briefs
39 The Last Word

Front Cover:
Saddam Hussein is led into a courtroom in chains on July 1, 2004, at Camp Victory, a former Hussein palace on the outskirts of Baghdad.
AP Photo/Karen Ballard
A Message from the Dean

The School of Law remains committed to providing a high quality education in the Jesuit tradition of service and justice.

The times are changing, and so is Creighton University.

The law school turned a century old, and we celebrated the school’s birthday at a centennial gala held last fall that featured U.S. Supreme Court Justice Clarence Thomas and was attended by nearly 700 alumni and friends.

As we begin a new academic year and a new century of legal education, Creighton’s School of Law will inaugurate the Werner Institute for Negotiation and Dispute Resolution on Oct. 4. The Werner Institute will make us a national leader in alternative dispute resolution. Edward Morse, professor of law, has been named the holder of the McGrath, North, Mullin & Kratz Endowed Chair in Business Law. An installation ceremony will be held in March 2006. Ronald Volkmer, professor of law, is now the holder of the Frank J. Kellegher Professorship in Trusts and Estates. We also awarded a record amount of scholarship aid to our students for 2005-06.

For this fall’s entering class, we had nearly 1,500 applications — nearly 10 applications for every one seat in the class. Not surprisingly this has produced a very talented and diverse entering class.

All around the University things are changing. The campus is growing both across and up with new buildings. Things are abuzz with life and energy that comes with being part of a University that’s on the move in the right direction. It is a great time to be part of Creighton.

But some things have not changed and should not. The School of Law remains committed to providing a high quality education in the Jesuit tradition of service and justice.

Now in my seventh year as dean, I am every bit as excited to be part of the law school and the University as I was the day I started. One of the most fulfilling aspects of the job is being part of this community to which you, our alumni and friends, are such an important part. It remains an extraordinary honor to serve as dean of your law school.

Sincerely,

Patrick J. Borchers
Dean and Professor of Law
Macdonald Receives Law School Alumni Merit Award

Deborah A. Macdonald, BA’72, JD’80, received the School of Law’s Alumni Merit Award on Sept. 9.

Macdonald is president of Natural Gas Pipelines for Kinder Morgan, Inc., and Kinder Morgan Energy Partners, L.P., in Houston. She has held numerous management and legal positions for more than 20 years in the energy industry, including president of Transwestern Pipeline Company and senior vice president of legal affairs for Aquila Energy Company.

Macdonald is described as a “pioneer” as the first woman ever to head up a major U.S. natural gas pipeline in the traditionally male dominated energy industry. She oversees all commercial and operational aspects of the 15,000-mile system that comprises the natural gas pipeline network of Kinder Morgan Energy Partners, L.P.

Kinder Morgan Energy Partners is the largest publicly traded pipeline limited partnership in the U.S. in terms of market capitalization and the largest independent refined petroleum products pipeline system in the U.S. in terms of volumes delivered.

Werner Institute Sponsors Lecture on Alternative Dispute Resolution in Health Care

The Werner Institute for Negotiation and Dispute Resolution Program on Health Care Collaboration and Conflict Resolution will present “From Adversity to Opportunity: The Promise of ADR in Health Care” on Oct. 6 from 4 to 5:30 p.m. in the Hixson-Lied Science Building, Room G04, on the Creighton campus.

Phyllis Beck Kritek, Ph.D., a pioneer in the field of health care dispute resolution, will present the lecture. Kritek will provide a roadmap through the terrain of Alternative Dispute Resolution (ADR) within health care communities.

The high costs associated with health care related conflicts are well accepted, but the benefits of managing conflict are not as well-known. Kritek will emphasize the cost-effective, environment-enhancing potential of ADR in addressing persistent practice and policy dilemmas in contemporary health care environments and provide insight into the future of the field of health care dispute resolution.

For more information or to RSVP (Oct. 1 deadline), please contact Julie Zabrowski at (402) 280-3852 or jzabrow@creighton.edu. The lecture is free.

Red Mass to be Celebrated Oct. 3

The annual School of Law Red Mass will be held Oct. 3 at 5 p.m. at St. John’s Church on campus. People of all faiths are welcome to attend the Red Mass.

The appellation “Red Mass” refers to the annual Catholic Mass that commences the new term of the judicial court. Its history dates to 13th century Europe when it was celebrated prior to opening the Ecclesiastical Courts, to invoke divine guidance upon those responsible for administering laws and justice. The name of the Mass is derived from the red vestments worn by the priests, to signify the fire of the Holy Spirit, and by the scarlet robes worn then by judges and doctors of law.

The first Red Mass in the United States was in New York City in 1928. Today it is celebrated in cities across the nation. It provides an opportunity for attending members of the legal community — judges, attorneys, law school professors, law enforcement and governmental agencies — to reflect on the God-given power attached to their office. Participants ask God to imbue all members of the legal community with the virtues and gifts of the Holy Spirit — wisdom, understanding, counsel and fortitude — for the right and just administration of their respective offices.
CU Law Ranked 51st with Judges & Lawyers in U.S. News & World Report

In the 2006 U.S. News & World Report America’s Best Graduate Schools edition, Creighton University’s School of Law received a score of 3.0 from judges and practicing lawyers tying for 51st in the nation. Overall, Creighton University was ranked 103rd out of 179 law schools. Creighton has leaped from number 128 in 2002, 116 in 2003, and 110 last year to its current ranking.

“As we continue to increase our faculty resources, incoming student scores and placement services, we see Creighton gaining the recognition it deserves,” said Patrick Borchers, dean of the School of Law.

Volkmer Receives RFK Award

Ronald R. Volkmer, BA’66, JD’68, was this year’s recipient of the Robert F. Kennedy Memorial Award for Teaching Achievement. The award is presented annually by the Creighton Students Union at May commencement.

Volkmer, professor of law, has taught at Creighton for 36 years. His passion for the law and teaching has inspired and transformed students, instilling in them a respect and love for their profession and a desire to be lifelong learners.

Outside the classroom, Volkmer is a member of the Nebraska State Bar Association House of Delegates and a board member for the Concord Center for Community Mediation.

He is an Academic Fellow of the American College of Trust and Estate Counsel, and authors a column in their Estate Planning Magazine.

Sieberson, Takahashi Visiting Professors

Stephen C. Sieberson and Hideharu Takahashi are serving as visiting faculty members at the School of Law.

Sieberson practiced international business law for 25 years in Seattle, with two years as an in-house commercial finance attorney at a major bank in the Netherlands. His practice involved international financing and other transactions in Europe, Asia and South America. Sieberson has taught a variety of international and comparative law courses at the University of Washington, the University of Oregon, Erasmus University in Rotterdam and the University of the Netherlands Antilles in Curaçao. At Creighton, he is teaching courses on business associations, international human rights, international trade law and professional responsibility.

Takahashi is professor of law at Mie University in Tsu City, Japan. As a visiting research scholar at the Creighton law school, Takahashi is researching a project entitled “Research on Motivation Problems in Legal Studies and on Teaching Methods in Law Toward Its Solution.” His research project is funded by the Japanese Ministry of Education, Culture, Sports, Science and Technology through the Overseas Advanced Educational Research Practice Support Program.
In Macy, Neb. — where nearly half of its 956 citizens live below poverty — jobs are as scarce as the prairie is plentiful. Walking down the town’s main street, two Creighton University law students and their professor remark on the stark absence of businesses. No hardware or grocery stores, no restaurants or movie theaters — just public housing and a couple of forlorn government buildings.

Creighton’s new Community Economic Development (CED) Legal Clinic is tackling the poverty endemic in towns like Macy and throughout Nebraska by empowering nonprofits, minority groups, neighborhood associations and low-income entrepreneurs to revitalize their distressed communities. The CED clinic delivers pro bono legal services to disadvantaged populations across the state.

The program, which joined the Creighton School of Law’s Milton R. Abrahams Legal Clinic last January, operates as a full-service public interest law firm and provides Creighton law students with roll-up-your-sleeves, hands-on experience in transactional law. The CED clinic is funded by a three-year grant from the U.S. Department of Justice.

“Thanks to Sen. Ben Nelson’s (D-Neb.) support, we received the federal funding necessary to launch this important initiative,” said Creighton law professor Catherine Mahern. “The CED program is the only one of its kind in the country which extends its services statewide and into rural areas,” she said. Mahern, who holds the Connie Kearney Endowed Chair in Clinical Legal Education, directs the Abrahams Legal Clinic.

The Abrahams clinic offers marginalized populations free legal assistance on civil matters such as child support and child custody, wills and trusts, real estate and tenant-landlord disputes, and public benefits. Taking Creighton’s service-driven mission to a new level, the CED clinic also responds to the needs and aspirations of low-income, of color and immigrant communities, but with a focus on troubled rural areas and through community economic development efforts.

According to the director of the CED clinic and supervising attorney Steven Virgil, “The need in our state is severe. Nebraska has the three lowest income counties in the nation and nearly 10,000 nonprofit corporations, many of which serve low-income people and lack access to legal services.” Virgil, who recently left private practice, brings to Creighton a wealth of experience in community economic development law.

“The availability of legal representation is often the primary element in an organization’s capacity to carry out its work. Our goal is to positively impact our region by equipping clients with the necessary legal tools,” said Virgil.

The clinic’s caseload includes a nonprofit housing agency dedicated to moving homeless people off the street into their

New Creighton Legal Clinic Serves Nebraskans

Steve Virgil, director of Creighton University’s Community Economic Development Clinic in the School of Law, leads a workshop in Omaha for neighborhood leaders, directors of nonprofits and board members of nonprofits. The workshop was on lobbying nonprofit corporations. About 45 people attended the training on Aug. 11. Virgil is leading workshops like this across the state.
A Teaching Clinic: Beyond the Lecture Hall

As a teaching program, the CED clinic pairs clients with third-year law students who are supervised by clinic faculty and staff attorneys. Each semester, up to 12 students have the opportunity to sharpen their skills while enriching their perspective on social, economic and legal justice issues.

The students who staff the clinic receive training in how lawyers as problem solvers might work with and in communities to create a more democratically inclusive, accountable society.

The cases the students undertake call upon diverse skills sets, as well as varied substantive areas of the law. When helping nonprofits formalize their organizations, for example, students may draft articles of incorporation, bylaws and contracts; apply for federal tax-exemption; and perform consulting and training for their boards of directors. When helping entrepreneurs get their micro-businesses off the ground, students may research tax, compensation and benefit matters; navigate contracting options and lease provisions; and prepare loan documents. In special cases, students may represent clients in litigation against predatory lending that strip the equity out of the homes of vulnerable and unsophisticated consumers.

Virgil went on to say, “These clients — whether they’re a community economic development corporation or a minority small business owner, whether they’re located in the Sandhills or downtown Omaha — they’re all striving to improve the quality of life in their communities, but they can’t afford or don’t know how to secure high-quality legal assistance.”

By serving those who serve the poor, the clinic reaches beyond individuals to bring about enduring and systemic change. The clinic helps clients plan and implement strategies which will create and protect assets, spur job growth and promote sustainable development in low-wealth areas.

In rural Nebraska with its capricious agricultural economy and shrinking population, helping someone start a small business can make a real difference to the entire area, Virgil explained. A micro-enterprise with just five employees could have the same impact as a 50-employee business in Omaha.

“We also represent family farmers working to form marketing cooperatives, Sudanese refugees committed to building community structures and Native communities engaged in creating education and employment opportunities,” Virgil said. “We aim to be a one-stop resource for these clients on any legal issue they may encounter including assistance with tax compliance for 501(c)(3) status, board trainings, real estate or contract issues, employment law and, in certain circumstances, litigation.”

For more information on the Community Economic Development Clinic, contact Steve Virgil at 402.280.3068 or stevevirgil@creighton.edu.
With the arrival of Arthur Pearlstein to the Creighton University School of Law in May, programs in the Werner Institute for Negotiation and Dispute Resolution are beginning to take shape.

The first major initiative that Pearlstein, director of the Werner Institute and professor of law, is working on is the Program on Health Care Collaboration and Conflict Resolution. Debra Gerardi, BS’84, BSN’87, JD’92, is the chair of the program. Gerardi is president and CEO of Health Care Mediations, Inc., in Kentfield, Calif., where she provides mediation/facilitations services, systems design and conflict management training programs for health care organizations. Gerardi, who grew up in Omaha, has been appointed as an adjunct professor of law as well as chair of the Program on Health Care and will guide development of the new program over the next two years.

“The concept of the Program on Health Care Collaboration and Conflict Resolution is to look at communication and conflict resolution in a broad sense as it applies to the health care industry,” Gerardi said. “Ideally, we will provide people with the tools and processes for preventing disputes from escalating to a level of litigation. We also want to work with the legal community to broaden their tool kit for managing disputes that clients may bring to them. This expands options for attorneys, enabling them to respond to client needs without relying solely on litigation or power-based negotiation.”

Although the Werner Institute will not act as a regular mediation provider, it will focus on offering education, training and development in the field of dispute systems design, conflict management, professional mediation, negotiation, teamwork and communication.

“There are some great opportunities for Creighton to really assume a leadership role in developing major cutting-edge initiatives in health care conflict resolution,” said Pearlstein. “In fact, the Program on Health Care at Creighton’s Werner Institute is going to be the first university-based center in the U.S. dedicated to training people in collaboration and conflict resolution in health care.”

According to Gerardi, using mediation and conflict resolution to resolve cases in health care is a relatively new concept. It’s a concept she feels is necessary to improve patient safety and help control escalating health care costs.

“It is an idea whose time has come because the current culture of health care delivery in this country is not sustainable,” Gerardi said. “We see some very complex problems that are not solvable with the current processes.”

Gerardi offered the example of patient safety.

“We need to focus on ways to change the health care culture by focusing on the work environment, the quality of care and how organizations respond when there has been harm to a patient. Currently,
there are barriers to reporting information that could prevent system breakdowns that lead to bad outcomes. One of those barriers is fear of litigation. It becomes a vicious cycle. A shift in how the legal community responds to medical error is what they are looking for; b) there was no breach of contract or standard of care; or c) the level of damages is too low to make the case financially viable for the attorney. Because of this, there are a large number of people who are living with disputes

“The Program on Health Care at Creighton’s Werner Institute is going to be the first university-based center in the U.S. dedicated to training people in collaboration and conflict resolution in health care.”

— Arthur Pearlstein

also needed to decrease the fear associated with reporting errors,” Gerardi said.

When Gerardi talks to practicing health lawyers, they often say they feel trapped. For example, a plaintiff’s lawyer may have clients come to her door and ask for help because they were treated badly by the health care system. Attorneys often find that they cannot help these clients because: a) litigation won’t get the client that have not been heard and who have to go back into that health care organization for care — an organization or system that they no longer trust. In-house attorneys also feel frustration. With litigation as the only option, patients are transformed into plaintiffs impacting the organization’s reputation with the community as well as disrupting the relationship with the patient.

“We find that attorneys are driven by the litigation model that focuses on a winner and a loser,” Gerardi said. “Frequently, the litigation process severs relationships, particularly in health care. Other options need to be available because oftentimes there are ongoing business relationships, patient-provider relationships that are key to quality of care.”

Programming through the Werner Institute can be designed for large hospitals, single-practitioner medical practices, insurance companies, nursing groups or attorneys.

“We will work with any group that wants more information about conflict resolution and mediation,” Pearlstein said.

For more information about the Werner Institute, please visit www.creighton.edu or e-mail arthurpearlstein@creighton.edu or debragerardi@creighton.edu.
There is a small palm tree in a garden surrounded by walls near the airport in Baghdad. An elderly bearded man who has turned to writing poetry and reading the words of God in recent weeks goes out to the garden for an hour and a half in the morning and an hour and a half in the afternoon.

He tends to the tree, putting stones around the base and making sure it has enough water to survive Iraq’s midsummer.

When his hour and a half is over, Saddam Hussein goes back to his cell. Once, he had dominion over all of Iraq. Now, he is stripped of all the riches and delusions; all he has left is a little time each day to cultivate a garden that isn’t even his.

— Chicago Tribune, July 27, 2004
Genocide

[Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

[a] Killing members of the group;
[b] Causing serious bodily or mental harm to members of the group;
[c] Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
[d] Imposing measures intended to prevent births within the group;
[e] Forcibly transferring children of the group to another group.

Sadaddam Hussein, the former Iraqi dictator, sits in solitary confinement under the care of U.S. military police awaiting trial by the newly minted Iraqi Special Tribunal (IST) for a laundry list of crimes committed during his 33 years in power. He was toppled by an American-led invasion in March 2003, and remained in hiding until discovered by U.S. forces in a six-foot underground “spider hole,” armed only with a pistol that he did not use. He gardens while he waits for his trial. The charges against Hussein include war crimes, crimes against humanity, aggression and genocide. While each of these international crimes requires varying levels of proof and assertion unique to the specific crime or its sub-component, genocide is perhaps the trickiest of the lot, requiring not mere intent, but specific intent to destroy an identifiable group of people. Although it has been called the “crime of crimes” since the experience of the Holocaust, genocide has traditionally been the most difficult crime for prosecutors to prove.

Formally outlawed in 1948, genocide has existed in practice from time immemorial. Indeed, it was known in the ancient world as a legitimate practice, used most famously by the Romans against Carthage. Throughout the Middle Ages and into the modern era, genocide was regularly practiced until the slaughter of the Armenians by the Ottoman Turks during World War I. International outrage at the atrocity moved world opinion toward condemning genocide, culminating in the adoption of the Genocide Convention in 1948 after World War II and the Holocaust.

The elasticity of the definition is deceptive. While many fact patterns may fit into the two required objective slots, a protected group (e.g., racial) and an act of destruction (e.g., killing), the definition is silent as to just how widespread the acts must be. Is just one killing enough? Furthermore, perpetrators can go free on the prosecution’s inability to prove the subjective element of intent. Judicial and legal authorities have interpreted the intent required for genocide to be specific rather than general. Varying rationales exist for this conclusion, but the higher threshold means more proof — proof that is almost invariably difficult to come by in the form of intercepted conversations, correspondence or documents that demonstrate the perpetrator’s state of mind at the time the genocide was carried out.

Not all genocidaires, as genocide perpetrators are known, meticulously catalogue, index and document their activities in excruciating detail as the Nazis did when carrying out Hitler’s Final Solution. However, the International Criminal Tribunal for Rwanda (ICTR) determined in the 1999 Akayesu case that specific intent to commit genocide can be successfully inferred through context, thereby easing burden for this showing somewhat: “[I]t is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others.”

Nevertheless, the genocide case against General Radislav Krstic at the International Criminal Tribunal for the Former Yugoslavia (ICTY) failed precisely because of the specific intent...
The genocide case against General Radislav Krstic failed precisely because of the specific intent requirement.

Chemical Ali

Known as “Chemical Ali,” Ali Hassan al-Majid has been linked to some of the most brutal acts under Saddam Hussein’s regime. He was the architect of the 1988 genocidal Anfal campaigns against the Iraqi Kurds. As the 1980-1988 Iran-Iraq War was winding down, al-Majid led the Anfal campaigns that resulted in the murder and disappearance of some 50,000 to 100,000 Kurds. The Kurds were accused of aiding Iranian forces during the last years of the Iran-Iraq War.

A cousin of Hussein, al-Majid was widely known in Iraq for his repeated use of outlawed chemical warfare. It is reported that 5,000 Kurds died in a single cyanide attack on the border town of Halabja in March 1988. Documents captured from Iraqi intelligence services demonstrate that the mass killings, disappearances, forced displacement and other crimes were carried out in a coherent and highly centralized manner under al-Majid’s direct supervision. Al-Majid was captured in August 2003 by coalition forces.

Source: Human Rights Watch

The Kurdish Problem

As for Saddam Hussein, he will likely be found at least complicit in, if not guilty of, the genocide of the Kurds that occurred under his regime. Kurds, as a people, live in a divided world — some in Iraq, others in Iran, Syria and Turkey. The frontier between Iran and Iraq to a large extent reflects the 16th-century collision of the expanding Persian and Ottoman Empires. A subsequent treaty between Persians and Turks formalized a mountainous border region that indiscriminately split Kurdish populations on either side. By the time of the Iran-Iraq War, Kurds found themselves caught in the middle. In September 1980, Hussein’s army crossed into Iran, advancing to the outskirts of Abadan. Ayatollah Khomeini used the invasion to consolidate his own power and rally Iranians to defend their homeland. By 1982, Iran had reversed the Iraqi invasion, restoring the border region. By 1984, Iran had driven into Iraq itself, secured the desert around Basra in the south, and cut Iraq off from the Persian Gulf.

Desperate to stem the gradual Iranian advance, Hussein employed chemical weapons against Iranian forces. These proved an effective method of offsetting the advantage of Iran’s much larger troop numbers. However, by 1987, Iran was again making significant advances in the north, which Hussein correctly ascribed to assistance from Iraqi Kurds.

To deal with what was referred to in captured Iraqi documents as “the Kurdish
problem,” Hussein tasked his cousin Ali Hassan al-Majid (a.k.a. “Chemical Ali”) with the job of eradicating all resistance, and granted him emergency powers to do so.

Al-Majid then undertook a series of military campaigns against Kurdish “saboteurs” from 1987 to 1989, known as the Anfals. What began as a counterinsurgency during wartime ended in genocide. Al-Majid employed a variety of chemical weapons during the Anfal campaigns, including mustard gas (a blistering agent), and Sarin (a nerve agent). One survivor of al-Majid’s April 1987 chemical attacks on Kurdish villages in the Balisan valley described the effect of the pink, gray and yellow gasses drifting through the towns:

“It was like a fog. And then everyone became blind. Some vomited. Faces turned black; people experienced painful swellings under the arm, and women under their breasts. Later, a yellow watery discharge would ooze from the eyes and nose. Many of those who survived suffered severe vision disturbances, or total blindness for up to a month. … Some villagers ran into the mountains and died there. Others, who had been closer to the place of impact of the bombs, died where they stood.

All told, the Anfal campaigns against the Kurds claimed between 50,000 and 100,000 lives. However, no single action accounts for all the casualties. There were multiple mass murders, multiple mass disappearances, forced displacement of hundreds of thousands of noncombatants, destruction of 2,000 villages that were classified in Iraqi government documents as “burned,”

Radislav Krstic, former Bosnian Serb general, was found guilty of genocide in August 2001 by the Hague’s international war crimes tribunal and sentenced to 46 years in prison. Krstic was involved in the 1995 massacre in Srebrenica of more than 8,000 unarmed Muslim men and boys and is the first European ever convicted of genocide.

However, the Appellate Chamber overturned the genocide case against Krstic because of the specific intent requirement. His appeals judgment was handed down on April 19, 2004. He was sentenced to 35 years imprisonment for other crimes against humanity. He was transferred to the United Kingdom in December 2004 to serve his sentence.

Slobodan Milosevic was arrested in April 2001 and charged with corruption and stealing state funds during his 13-year rule. He was turned over to the United Nations in June 2001 and charged with committing crimes against humanity in Kosovo and Croatia. In November 2001, the U.N. war crimes tribunal charged him with genocide. The indictment stemmed from his alleged activity during the 1992-1995 Bosnian War. He is the first head of state to face an international war-crimes court. His trial is ongoing.
“destroyed,” “demolished” or “purified,” and the razing of a dozen larger Kurdish towns and administrative centers.

It is the deadly combination of methods employed against the Kurds during the eight Anfals that intertwine to form the most complete picture of genocide. Although the successive gassings were perhaps the starkest examples, conventional killing by shooting accounted for equal numbers of deaths. For instance, the vast majority of Kurdish “detainees” were sent to the Iraqi army base at Kirkuk known as Topzawa. Here, they were registered and segregated. Adult and teenage males were then loaded onto closed trucks and taken to the execution grounds where they were lined up next to large pits and shot. Once the trenches were full, they were covered over.

The elderly were mostly bused to a concentration camp at Nugra Salman in the Iraqi desert, where death rates averaged four to five per day from exposure and infection. The women and children went elsewhere. They were usually taken to Dibs, a camp close to the Kirkuk-Mosul highway, where many of the children succumbed to dysentery and malnutrition. About half of the women were taken to death pits like the one at Samawa.

Forced deportation, typically accompanied by the razing of villages, was also a common feature of the Anfals. By the end of the campaigns, 1.5 million Kurds had been forcibly “resettled.” This was part of an overall scheme by Hussein to rearrange Kurdistan in northern Iraq, placing more key areas under Arab control.

However, the gassing of Halabja was the single most horrific incident during this notorious campaign, accounting for about 5,000 of the Anfal deaths. Consequently, Halabja has become emblematic of the Kurdish genocide, much as Srebrenica has become so for...
the Bosnian genocide. Halabja had been captured in 1988 by rebel Iraqi Kurds with support from Iranian forces, and crushing the resistance there became an ultimate priority for Hussein.

Al-Majid’s coldly diabolical approach can be discerned from his methodology of extermination. Knowing that the gases he intended to use were heavier than air and would thus sink, he opened the March 16, 1988, attack on Halabja with a conventional artillery bombardment for several hours, setting off the air raid sirens. This drove the local Kurdish population down into tunnels, cellars and basements. Those underground shelters became gas chambers as al-Majid unleashed his bombardment of poison. Aboveground, animals died and birds dropped out of trees. Below ground, humans met their end, trapped. Those who managed to scramble to the surface emerged into thick clouds of chemical gas. As photos of dead children crumpled on steps or lying contorted and bleached in the streets reached the world, an outcry arose from the human rights community.

But the response from the international community of states was muted silence. None could offer much beyond platitudes, as they all had backed Hussein during the Iran-Iraq War with arms and financing. Indeed, Germany is widely considered to have been the industrial origin of the gas used by al-Majid during the Anfal campaigns, and Kurdish leaders have long accused France, Italy and the Netherlands of providing assistance to Hussein’s chemical weapons program. The United States was also implicated, as noted in a 1992 Senate Banking, Housing and Urban Affairs Committee staff report assessing the use of chemical weapons by Hussein against American troops in the first Gulf War:

\[\text{An inquiry was initiated by the Committee into the contributions that exports from the United States played in the weapons of mass destruction programs that have flourished under the direction of Iraqi President Saddam Hussein.}\]

\[\text{The Committee . . . held hearings that revealed that the United States had exported chemical, biological, nuclear and missile-system equipment to Iraq that was converted to military use in Iraq’s chemical, biological and nuclear weapons program.}\]

The Evidence

The physical evidence of genocide against the Kurds is ample. During 2004, U.S. Justice Department personnel began providing support to the new IST in the form of logistics and evidence collection. A Justice Department Regime Crimes Liaison Office was established in Baghdad to carry out this task. It was given a budget of $75 million. The chief challenge faced by the staff attempting to marshal incriminating evidence is the security situation. For example, to exhume a mass grave, earth-moving equipment must be transported to the site, locals wishing to search for relatives must be kept at bay, and a significant military contingent must be present around the clock, which draws them away from other patrols and duties.

More than 50 American advisors have trained hundreds of Iraqi investigators to speed this process along. The subsequent division of labor is for the Americans to provide forensic expertise and the Iraqis to move out into the country and collect corroborative witness testimony. For example, in September 2004, U.S. and
Iraqi investigators uncovered the mass grave in Hatra, about 200 miles north of Baghdad. It is one of many mass graves in Iraq from the Hussein era, but the first to be secured and systematically excavated for criminal evidence collection. It is also a key to proving the case for genocide by Hussein against the Kurds. The victims are all Kurdish.

The Hatra site is made up of a series of trenches at least eight feet deep. One contained the bodies of 150 men sprayed with automatic weapons fire. A dozen other trenches contain the remains of approximately 2,000 people. But perhaps the most poignant excavation uncovered the bodies of 300 women and children. An unexpected finding was the discovery of multiple clothing sets, household items and toys — indicating that the victims were told to collect their belongings for resettlement, only to be shot down at this burial pit.

Almost all of the 300 skulls had a .22 caliber pistol shot behind the ear and were unevenly stacked in multiple layers, indicating that the first to be executed were shot in the trench, while the others were murdered at the lip of the pit and then pushed in with a bulldozer. As Greg Kehoe, the U.S. coordinator, noted in a New York Times interview:

“What was found at Hatra shows how the Hussein leadership made a “business of killing people” — the scrape marks from the blade of the bulldozer that shoved victims into the trench, the point-blank shots to the backs of even the babies’ heads, the withered body of a 3- or 4-year-old boy, still clutching a red and white ball.

Proving Specific Intent to Commit Genocide

However, merely uncovering the bodies is not enough to succeed in the prosecution of Hussein. They must be connected to him. As with the Bosnian massacres, the bodies are the starting point, after which they and their immediate killers must be identified and orders to execute or knowledge of the atrocity must be followed back up the chain of command. The first dots in the investigative chain at Hatra are now being connected. Many of the women had identification cards folded in their layers of clothing when they were executed. Some of these cards are for children who escaped the Kurdish villages during the Anfal.

Investigators have tracked those children, who are now adults, up into remote mountainous areas of Kurdish northern Iraq.
Iraq and were able to corroborate the gassings and mass evacuations.

But proving that Hussein had specific intent to commit genocide against the Kurds remains a difficult task. It depends on the prosecution's ability to marshal its documentary and testimonial evidence. Perhaps such intent can be established if eyewitness testimony like the following can stand up to cross-examination:

[W]e monitored … radio communications between the political and military leadership … Saddam Hussein briefed the assembled commanders that there would be a chemical attack on Halabja and that soldiers should wear protective clothing … I heard a telephone conversation between Saddam Hussein and Ali Hassan al-Majid. Saddam ordered him to form a working group … After the meeting Ali Hassan al-Majid returned to the area HQ … Aerial pictures of Halabja after the attack were shown to Saddam Hussein and other members of the Revolutionary Command Council.

One of Hussein's bodyguards brought 30 prisoners out. They were Kurds. The President himself shot them one after another with a Browning pistol. Another 30 prisoners were brought and the process was repeated. Saddam was laughing and obviously enjoying himself. There was blood everywhere — it was like an abattoir … Those who were still alive were eventually finished off by the security officers.

Saddam’s Defense
At the end of June 2004, Hussein was stripped of his POW status, transferred to the new Iraqi government, and accorded the status of Iraqi criminal...
detainee. As such, he was able to hire counsel before he underwent a formal arraignment hearing, although his counsel was not present for the initial charging proceedings.

Jacques Verges, a 78-year-old French criminal defense lawyer who famously represented Carlos the Jackal 20 years ago is one of several foreign attorneys seeking to help fashion Hussein's defense. Asked as to whether he would base a defense of Hussein on the complicity of western countries, Verges responded:

"During the Reagan administration ... [Donald] Rumsfeld himself was in charge of some key relations with the Iraqi authorities ... Western countries sold weapons to Saddam. Western countries encouraged the war against Iran. Western countries were present in Iraq through diplomatic delegations. They weren't blind ... Obviously, in the course of a trial, the fundamental element will be: "you treat me like a pariah, but I was your friend. What we did, we did together. I fired the bullet, but you're the one who gave me the gun — you even pointed out the enemy."

Hussein's lawyers may even admit that he is a monster and seek to pin accomplice liability on the West. They will also try to slip through the prosecution's case to show specific intent for the genocide against the Kurds by arguing that Hussein instead had alternative multiple intents. They will say that it was never his intent to destroy them. Rather, his primary intent was to impose greater central control over the oilfields underlying traditionally populated Kurdish areas in the north, and his secondary intent was to combat Kurdish forces assisting Iran during the Iran-Iraq War.

For proof of the primary intent, Hussein will point to national security concerns associated with allowing a restive, potentially breakaway population to remain in control of the country’s
largest oil reserves. He will argue that his draconian forced-migration policies were geared to this end, and that to the extent that large numbers of Kurds died, it was because they resisted. To break this resistance, harsh methods like use of concentration camps and gas had to be employed — but not to kill them as a group, only to frighten them into compliance. If the defense attorneys can convince the judge that Hussein's intent was to secure Iraq's economic wealth by depopulating the Kurdish areas thereby securing the oilfields, then the prosecution's showing of intent becomes much harder. The prosecutor has to not only show the requisite evil intent, but also demonstrate that the alternative intent is not plausible.

For proof of the secondary intent, namely, the intent to combat Kurdish forces assisting Iran in its war against Iraq, Hussein will produce evidence of collusion between Kurdish and Iranian forces during the Iran-Iraq War. He will argue that fighting the Iranians and fighting the Iraqi Kurds were one and the same thing from Baghdad’s perspective. That Kurdish forces took Halabja in 1988 with support from Iranian forces as they crossed into northern Iraq legitimized the attack by Iraqi forces on that city as a military necessity. Hussein will contend that while it was unfortunate that 5,000 Iraqi Kurds died during combat, his intent was not to kill civilians outright but to retake a strategically important area.

The prosecution must blunt these alternative intent theories. Geography helps them to undermine the secondary alternative intent theory for the Anfal campaign — that Hussein was combating Kurds colluding with Iranian forces during wartime. The majority of Kurdish villages gassed or destroyed during the Anfals were either on the border with Turkey, not Iran, or some distance inland from the Iranian border where most of the military incursions were taking place. Moreover, those targeted by the Anfals were civilians, not military forces or armed Kurds.

Indeed, one may be the instrument used to consummate the other.

The economic rationale of the primary alternative intent theory is harder to attack, but with some reverse engineering the prosecution may be able to undermine it as well. For example, in a

Donald Rumsfeld meets Saddam Hussein in 1983 (taken from video file).

If fired the bullet, but you’re the one who gave me the gun — you even pointed out the enemy.”

The prosecution may choose to admit the logic of counterinsurgency as the underlying idea for creation of the Anfal and to argue that the counterinsurgency nonetheless evolved into genocide. As one genocide researcher for Human Rights Watch notes, "the fact that Anfal was, by the narrowest definition, a counterinsurgency, does nothing to diminish the fact that it was also an act of genocide. There is nothing mutually exclusive about counterinsurgency and genocide.

[T]ell him I will strike. I will strike with chemicals and kill them all. What is the international community going to say? The hell with them and the hell with any other country in the world that objects.
If that evident genocidal intent can be imputed back up the chain to Hussein, then Hussein’s alternative explanations may collapse.

The prosecution will be helped considerably by the fact that so many survivors of Hussein’s genocidal policies are volunteering to present evidence against him. In relation to the attack on Halabja, a female student at that time was rounded up with other students and paraded before Hussein at military headquarters in Suleimaniyah. She saw him on a green telephone and heard him distinctly give the order to bombard the city:

[I] would like to testify that I saw him make that phone call that day. I think the matter has come alive again, and now we will see justice.

An Arab Iraqi from Baghdad who witnessed planes loaded with “unusual” weapons at the Arbil airfield that morning wants to tell his story in court as well.

Lack of knowledge is another defense Hussein will raise — which also goes to the establishment of specific intent. Hussein will claim that he was unaware of the activities of his subordinates. This defense may fail, however, if the
prosecution properly asserts the command responsibility doctrine that imputes knowledge up the chain of command to leaders who reasonably should have known what was happening. The *tu quoque* ("you too") defense was rejected at the Nuremberg trials of Nazi war leaders. To the extent that this defense is raised to a genocide charge, it will involve the West’s supplying him the means and assistance to carry out his actions. It will lose its force on a domestic tribunal, however, and an argument that Iran used chemical weapons first — which is itself disputed — would similarly be lost on an Iraqi court.

Hussein’s attorneys have also indicated their intention to raise the sovereign immunity defense. Even though it has eroded significantly in international law, it may yet retain some salience in domestic law. To succeed, however, his attorneys acknowledge that they would have to show that the American-led invasion of Iraq was illegal under international law, and therefore, by extension, Hussein is still legally the head of state. This strategy is of course based on political bias and rather murky assertions. Putting the American-led invasion on trial is certainly a clever approach, and could distract the proceedings, but such a politically charged position is an uphill battle and it is unlikely to establish that Hussein is the current legal president of Iraq even though the method used to depose him was illegal.

Hussein’s trial is expected to get under way in the winter of 2005 or early spring of 2006. Many more witnesses must be interviewed and evidence analyzed. If convicted, Hussein could face the death penalty, which was temporarily suspended during the U.S.-led occupation. The justice he faces before his own Iraqi countrymen on the Special Tribunal will be more than he offered the thousands who were slaughtered by his hand or on his orders. And while some Iraqi politicians are impatient for quick retributive justice against him, allowing Hussein’s trial to proceed at an even pace to ensure that the full story is told and that the truth emerges is vital. Those who survived such atrocities as the Kurdish genocide deserve no less. As do the memories of those who perished.

Allowing Hussein’s trial to proceed at an even pace to ensure that the full story is told and that the truth emerges is vital.

Judgments, Precedents, Federalism and Same-Sex Marriage: A Well-Known, but Often Forgotten, Secret of the Judicial System Revealed

By Ralph U. Whitten, Professor of Law

Lawyers know many things. More importantly, lawyers know that many things non-lawyers believe, or assume, about the judicial system, “just ain’t so.”¹ I was reminded of this by a few casual conversations that I recently had with non-lawyer friends about the decision of the United States District Court for the District of Nebraska in *Citizens for Equal Protection, Inc. v. Bruning*.²

In *Bruning*, the court held Article I, Section 29, of the Nebraska Constitution (Section 29) unconstitutional on several grounds. (The specific grounds and their correctness or incorrectness are irrelevant here.) Section 29, adopted by referendum in 2000, provides: “Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.”³

1. “It ain’t what you don’t know that gets you into trouble. It’s what you know for sure that just ain’t so.” — Mark Twain
My non-lawyer friends assume that the district court’s decision has settled the constitutionality of Section 29 unless and until it is reversed by a higher court (the case now being on appeal). Although not conversant with any technical rules governing the effect of federal and state judgments, the effect of lower federal court decisions as precedents in state courts on federal issues, or the relationships between the federal and state courts in general, they assume everyone has to “obey” the Bruning decision until a higher court reviews it. This, however, just ain’t so.

What lawyers understand that laymen do not is the difference between the binding effect of a judgment and the effect of a decision as precedent. When a judgment is rendered in a civil action, the judgment has two kinds of effects on the parties. One kind of effect is called “claim preclusion.” Without being unduly technical, this means that the claim asserted in the action cannot be raised again in a future action. If the plaintiff has lost the first action, the plaintiff is barred from bringing a subsequent action on the same claim or any part thereof. If the plaintiff has won the action, as in Bruning, the defendant must obey the judgment unless and until it is overturned by a higher court. If the plaintiff wins a judgment for money and the defendant refuses to pay the judgment, the defendant’s assets may be seized under the authority of the judgment to satisfy the debt. If the plaintiff has obtained some other sort of judgment — in Bruning a judgment for a declaration of unconstitutionality and an injunction against certain Nebraska officials — those judgments can also be enforced by appropriate process or future relief against a recalcitrant defendant.

The second kind of effect on the parties is called “issue preclusion.” This simply means that any issues of fact or law decided in the case cannot be relitigated by the losing party in any future case. The loser must appeal to a higher court to obtain relief from any perceived error in deciding the issues. The bottom line is that the claim and issue preclusive, or res judicata, effect of the judgment is to render the judgment enforceable in one way or another against the parties to an action, wholly apart from the effect that the judgment has as a precedent on the points of law it decides in other courts in cases between other parties. (There are several other preclusion doctrines that affect parties, but these are irrelevant to the discussion here.)

What lawyers understand that laymen do not is the difference between the binding effect of a judgment (i.e., the res judicata effect of the decision) and the effect of a decision as precedent — the latter usually being referred to as the stare decisis effect of a decision. Lawyers also understand many valuable things about the structure of the judicial system, including the matters concerning the constitutional and statutory relationships existing between the state and federal courts. These things that lawyers understand allow them to know that while Bruning is binding on the parties to the case as a matter of res judicata (the effect of the judgment as claim and issue preclusive), it is not binding on non-parties or on the Nebraska state courts in future cases unrelated to Bruning.

Citizens for Equal Protection v. Bruning

In Citizens for Equal Protection, Inc. v. Bruning, the plaintiffs, certain non-profit corporations whose stated mission is to eliminate discrimination based on sexual orientation, challenged the federal constitutionality of Article I, § 29 of the Nebraska Constitution, which provides that: “[o]nly marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.” In response to the plaintiffs’ action, the United States District Court for the District of Nebraska declared Section 29 to be unconstitutional on several grounds and permanently enjoined the attorney general and governor of Nebraska from enforcing the provision. The case is on appeal with the Eighth Circuit Court of Appeals.
As stated previously, the effect of a judgment as precedent is usually called the *stare decisis* effect. Broadly speaking, the effect of a judgment as precedent can either be a binding effect or an effect as "persuasive authority."

When the precedent has a binding effect, it must be followed in all future cases that are not significantly different. When the precedent has an effect as persuasive authority, it can be followed by other courts, but need not be; its force depends entirely on the degree to which other courts find it convincing on the point of law it decides.

Thus, if the United States Supreme Court decides an issue of federal law in a case, every other court in the judicial system is bound to follow the decision in indistinguishable cases. If the Nebraska Supreme Court decides an issue of Nebraska law in a case, every other court dealing with the same point of Nebraska law is obligated to follow the decision as binding authority. However, if the Nebraska Supreme Court decides an issue of federal law, that decision will bind lower state courts in Nebraska as a matter of precedent, but will not be binding authority in the federal courts in Nebraska or anywhere else. It will be only persuasive authority in the federal courts. The same is true of a decision by a lower federal court on a point of federal law. The lower federal court's decision is only persuasive authority in state courts or other federal courts, not binding authority.

This last point deserves some further explanation. It might be thought that because Article VI of the U.S. Constitution makes federal law supreme and binding on the state courts, those courts would be bound to follow lower federal court decisions on the meaning of that law rather than consider those decisions merely persuasive authority. This, however, does not follow. There is a difference between the obligation of a state court to consider federal law supreme and the process of determining what the content of federal law is.

At the Constitutional Convention in 1787, some delegates wanted to mandate that there be both a federal Supreme Court and lower federal courts. Others wanted only a Supreme Court with cases arising under federal law to originate in the state courts. James Madison suggested the compromise that was eventually embodied in Article III of the Constitution: Article III mandates...
that there be a Supreme Court, but leaves it to Congress to decide whether to create lower federal courts and what their structure should be.

The Constitution thus assumes that Congress may leave issues of federal law to be litigated originally in the state courts, and it follows that the state courts must have authority (at least if Congress does not take it away from them) to determine for themselves the meaning and content of federal law, including federal constitutional law, until the U.S. Supreme Court tells them they are wrong. True, it is that Congress arguably has the constitutional power to grant review of state decisions on federal matters to the lower federal courts, or to make federal lower court decisions absolutely binding on state courts, but it has never done so and is not likely to do so in the future. Nor, for reasons explained below, can the lower federal courts, except in extremely rare cases, force the state courts to abide by their view of federal law.

To clarify the previous points, we may consider a simple example of a case that might arise in Nebraska state court involving the constitutionality of Section 29, but in which the doctrines of claim and issue preclusion would not operate.

Assume that S-1 and S-2 are same-sex partners living in Massachusetts, where same-sex marriage is legal. S-1 and S-2 enter into a valid marriage in Massachusetts and later move to Nebraska, where S-2 tragically dies intestate. S-1 seeks to probate S-2’s estate in Nebraska state court and claims intestate inheritance rights under Nebraska law as the surviving spouse of S-1. The relatives of S-2 who would inherit if S-2 is not married challenge this claim, asserting that the Massachusetts marriage is invalid in Nebraska under Section 29. S-1 replies that Section 29 is unconstitutional, citing Bruning (which we will assume has not yet been affirmed or reversed on appeal). Note first that Bruning can have no claim
or issue preclusion effect on this case because neither the claim nor the parties are the same in the state proceeding.

Furthermore, under the existing structure of the judicial system, the Nebraska state courts are not bound to follow *Bruning*, though they may do so if they find it persuasive. They may, in other words, find Section 29 constitutional and refuse to recognize the Massachusetts marriage.

The same would be true if the Eighth Circuit Court of Appeals has reviewed and affirmed the judgment in *Bruning*, but the case has not yet been reviewed by the Supreme Court. The Eighth Circuit, although an exceedingly distinguished court, is still a lower federal court, and it is, therefore, not the final authority on the meaning and content of federal law. Thus, only the U.S. Supreme Court can authoritatively tell the Nebraska courts that their view of the federal constitutional issues concerning Section 29 is wrong.

Note also that the hypothetical situation described is not a fit case for federal subject-matter jurisdiction, so that it could not originally be brought in U.S. District Court or removed to that court. The mere fact that an issue of federal law is present in a case does not make the case a proper “federal question” case. When the presence of federal law is the basis of federal subject-matter jurisdiction, the federal law must (in one of a couple of ways) contribute to the plaintiff’s claim. The plaintiff’s claim is a state claim asserted in a probate proceeding. Nor can the case be removed to federal court on the basis of diversity of citizenship of the parties, even should S-1 and the relatives of S-2 be citizens of different states: There is an exception to the federal diversity jurisdiction in probate cases that prohibits such cases from being brought originally in or removed to federal court. Likewise, S-1 cannot bring a federal action to enjoin the state proceeding or otherwise force the state courts to follow *Bruning*. Federal actions to enjoin state court proceedings are possible only under rare circumstances. The rules governing equitable relief against pending state actions require that the plaintiff show unconstitutional action (normally on the part of state officials, who are not parties here) taken in bad faith or for purposes of harassment, or show that some other unusual circumstances are present. These equitable rules are not satisfied simply because a party or state court takes a different view of the content of federal law than a lower federal court has taken in an unrelated action.

In summary, under the rules regulating the effect of judgments and precedent, the Nebraska courts are free in the hypothetical situation described, as well as many others that might be described, to adopt a view of the U.S. Constitution different from the one taken by the U.S. District Court for the District of Nebraska.

Of course, it is also true that to the extent that the U.S. District Court engaged in interpretations of Section 29 for the purposes of making its decision, the Nebraska courts are free also to disagree with those interpretations. Should the Nebraska Supreme Court interpret Section 29 in a manner different from the U.S. District Court, the latter court and all other courts considering the meaning of Section 29 would be bound to follow the Nebraska decision, because the Nebraska Supreme Court is the highest and final authority on the meaning and interpretation of Nebraska law.

This last point might be important if the interpretation that the federal court placed on Section 29 was erroneous in a manner that affected the court’s application of the federal constitution. Under such circumstances, a different interpretation by the Nebraska Supreme Court might render Section 29 constitutional.

Recently, the Nebraska Supreme Court had occasion to acknowledge these principles in two cases decided on June 24, 2005.

In *Strong v. Omaha Construction Industry*
the court confronted an issue under the Employee Retirement Income Security Act of 1974 (ERISA) upon which the lower federal courts are divided and the Supreme Court of the United States has not spoken. The court acknowledged that some of its earlier decisions had stated that lower federal court decisions on issues of federal law were binding on Nebraska courts, but observed that those decisions had been rejected by later cases. The court further noted that in the absence of a U.S. Supreme Court decision on a matter of federal law, it was not bound to follow lower federal court decisions on the issue. In *State of Nebraska v. Senters,* a case decided the same day as *Strong,* the court further observed that while it was not bound to follow the decisions of the Eighth Circuit Court of Appeals, it would do so in the case before it because it found those decisions persuasive on the federal issue involved in the case.

As both *Strong* and *Senters* illustrate, today, more than 200 years after the U.S. Constitution was framed and ratified, the “Madisonian Compromise” continues to govern relations between state and federal courts.

This is one of many things that lawyers know that non-lawyers do not.

The justice (not a current justice) was in declining mental health. Once brilliant, he became forgetful. Once tireless, he became lethargic. Once a workhorse on the Court, he was no longer physically or mentally able to pull his share of the load. One Term of Court, he wrote only four opinions and the next he did not write any. The other justices finally sent one from among them to deliver a message urging him to retire. The delivering justice found the other in the robing room, apparently unaware of his surroundings, aroused him from a stupor, and began down an indirect route to the point. The receiving justice deflected the conversation; it never reached the point; he stayed on the Court.

The justice was not fond of one president and then the next, and then the first president was re-elected and the justice still was not fond of him. He did not want either man to nominate his replacement. Furthermore, he had his sights set on the Supreme Court longevity record of 34 years, five months and two days (then held by Chief Justice John Marshall). Finally, he had a much younger wife who was quite fond of the
social benefits of being Mrs. Justice; she opposed his retirement. Eventually he did submit a letter of resignation, to take effect on his 34th year, 8th month and 20th day on the Court. Thus did Justice Stephen J. Field become — for a time — the longest serving justice in the history of the Supreme Court.

The first step toward the confirmation of a justice of the United States Supreme Court is the creation of a vacancy. In this regard, the current Supreme Court comes very near to holding the group longevity record. The last previous appointment to the Court was Justice Stephen G. Breyer, who took the oath of office on Aug. 3, 1994. Aug. 3, 2005, is, then, the 11th anniversary of this group of nine. The record for the longest time between one justice's judicial oath and the next one's is 11 years, seven months and two days. The record was set between 1812 and 1823, back in the days when the Court had only six members. It began with the confirmation of Justice Joseph Story, who was nominated by President James Madison (who had been the defendant in *Marbury v. Madison*). Story took the oath of office on Feb. 3, 1812. The end date on the record is Sept. 1, 1823, when Justice Smith Thompson took the oath.

Story, of course, is famous. Smith Thompson, though he served on the Court for 22 years, is almost entirely forgotten. He did nothing much of note as a justice. Among the reasons: (1) He devoted much of his time on the Court to opposing John Marshall, and that did not work out so well for him. (2) While sitting on the Supreme Court, he ran for governor of New York and lost. (3) He stayed on the Court until his death in 1843, at the age of 75, but for the last 10 months of his tenure he simply left D.C., went home to New York and refused either to hear any more cases or to retire.

He died in office. Thus did Justice Smith Thompson go quietly into obscurity.

The current holder of the longevity record for an individual justice is William O. Douglas. He took it away from Justice Field. Like Field and Thompson before him, Douglas' tenure on the Court outlasted his usefulness. He kept his seat after suffering a stroke that left him frail, fragile, without the considerable energy he'd had before. In time, he began calling other justices by the wrong names, mistaking one's office for another's and uttering non sequiturs. He was confined to a wheelchair and incontinent. He is quoted as saying, "I won't resign while there is a breath in my body — until we get a Democratic president." He stayed on the Court 20 months — almost two years — as his condition worsened.

Douglas finally retired and then, a month later, came to the Court intending to vote on a case that had been submitted before the date of his retirement. He was told he could not do so. He wrote on the case anyway, and his former colleagues ignored what he had written.

One thing Justices Field, Thompson and Douglas have in common — and one huge difference between each of them and Justice Sandra Day O'Connor — is that all overstayed their welcome and none brought himself any honor by the way he left the Court.

As everyone knows, Justice Sandra Day O'Connor has announced her retirement, effective upon the confirmation of her successor. As I write this on a Saturday in July, the president has not yet nominated

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1. Many of these facts are taken from David N. Atkinson's book *Leaving the Bench: Supreme Court Justices at the End*, 68-70 (1999) (hereinafter *Leaving the Bench*).
2. Justice Field was nominated by President Abraham Lincoln. He took the oath of office on May 20, 1863.
3. Justice Breyer was nominated by President Bill Clinton.
4. Justice Thompson was nominated by President James Monroe. The Court that is in third place for having sat the longest without a new member — there have been a few times when the Court has gone almost six years without a new member — is not even close to the top two.
5. Some of these facts are taken from *Leaving the Bench*, at 32.
6. Justice Douglas was nominated by President Franklin Delano Roosevelt. He took the oath of office on April 17, 1939.
8. Many of these facts are taken from *Leaving the Bench*, at 146-49.
her replacement. Also, as I write, Bob Novak reported yesterday that Chief Justice Rehnquist was going to announce his retirement that day. Since it was Bob Novak, I put little stock on the report either way, thinking perhaps it was accidentally true, perhaps not. (When my wife and I lived in Washington, D.C., Bob Novak still had a newspaper column with Rowland Evans. The popular name of the column was “Evans and No-Fact.”) Yesterday has come and gone and there has been no such announcement. It may well be, however, that by the time you are reading this there is more than one announced retirement.

Justice John Paul Stevens is 85. Chief Justice Rehnquist is 80 and has what is reported to be a particularly aggressive kind of thyroid cancer. Justice Ruth Bader Ginsburg is 72.

It is not that reaching 80, let alone 70, is a milepost for end of service. In fact, the Supreme Court seems to be a great place to grow old. The great Justice Oliver Wendell Holmes Jr. sat into his 90s, brilliant and effective until very near the end of his tenure. (When, at the age of 91, his brethren suggested that it was time for him to leave the Court, he did so immediately and graciously.) Louis Brandeis was 83 when he retired. Felix Frankfurter resigned at age 80 and Hugo Black at age 85.

The great Chief Justice John Marshall — best known for his opinions in Marbury v. Madison and McCulloch v. Maryland — served as chief justice until the age of 76. The controversial Chief Justice Roger Taney — best known for his infamous opinion in Dred Scot v. Sandford — did his job well until he died at the age of 88. The first Justice John Marshall Harlan — well known for his beautiful dissenting opinion in Plessey v. Ferguson — was a great justice up until the age of 78. Marshall went on the Court in 1801, Taney in 1836 and Harlan in 1877, back when the mid-to-late 70s really was old.

Between 1969 and the retirement of Justice O’Connor, the average age of justices who left the Court was 77. Four were 80 or older. There are, I am sure, many reasons why some justices stay on the Court so far into old age. Here is the short list of reasons as I see them:

1) They live long enough to do so. They get good medical care. The job keeps their minds alert and, as there is not a lot of heavy lifting, it does not wear out their bodies. If you want to grow old on the Court, the first thing you have to do is to grow old.

2) Some don’t know what else to do. There are justices who leave the Court to take other jobs or for family reasons or to run for elective office. Historically, however, many justices outlive their friends and family and they have not developed many interests outside of the job. For some it is the socialization that both keeps them at it and helps keep them sharp enough to do it.

3) As Justices, they tend to live long and productive lives. After they leave the Court, they tend to die — and soon. They stay on the Court to stay alive. This is important work and it gives a life great meaning. It helps keep the mind alert. And, referring back to the second point, it provides the socialization that can contribute so greatly to the physical and mental health of a person any age, but particularly that age. Giving that up can be, well, deadly.

4) Some feel indispensable. No one else will vote just the way I do. No one else has the experience with constitutional law that I do. No one else is as compassionate, or everyone else is too compassionate.

9. None died while on the Court. All resigned or retired. Many of these facts are taken from Leaving the Bench, at 138-39. Justice O’Connor is 75. Her retirement will not have much affect on the average.


11. Justice Tom C. Clark left so that his son could become attorney general and there would be no father (Supreme Court justice) son (attorney general) conflict of interest.

12. Chief Justice Charles Evan Hughes left to run for president.
They stay for the good of the country. One of Chief Justice Salmon P. Chase’s good friends said: “Chase is a good man, but his theology is unsound. He thinks there is a fourth person in the Trinity.”

5) Some stay on because they do not want the current president to nominate their replacement. This can come from spite for a president the justice does not like personally. It can come from ideological differences between the president and the justice. (Even a justice who likes the current president personally and politically may have in mind how often justices disappoint the presidents who nominated them.)

6) And sometimes a justice becomes addicted to the power and the prestige. (Or, as with Justice Field, the spouse does.)

7) For some, there is a seventh reason: the record books. Justice Field stayed on the Court long after he was of much use as a justice in part so he could break John Marshall’s record and become the longest serving justice in the history of the Court.

8) There used to be an eighth reason: poverty. They needed the salary. Some justices had not saved much money or had lost what they had saved in bad investments or, for whatever reason, just did not have much money to fall back on, and, until 1937 there was no automatic pension plan for Supreme Court justices. But they did have lifetime tenure in a job where the paymaster (Congress) is forbidden by the Constitution from reducing their salary while they are on the bench. Some could not afford to leave the Court.

The first step in the nomination process is the creation of the vacancy. This has not always happened with the great dignity that has accompanied Justice Sandra Day O’Connor’s submission of her letter of retirement.

I have told of other justices who have stayed on the Court too long and done so for reasons straight from their ego: Justice Field, for example, who stayed on out of his dislike of the longevity record, his dislike of two presidents and a young socialite wife — reasons that do not seem to outweigh the fact that, at the end, he sat on the Court in a stupor.

For reasons straight from her humanity, from her heart, Justice O’Connor has decided to leave the Court while at the peak of her powers. Her husband is ill. It has been reported that one reason for her retirement now is that she wants to spend more time with her family. What most government officials seem to mean when they say that is that they need to spend more time with their lawyers. When she says it, she means it. Throughout her service, she has been the kind of person worthy of the honor of being a justice of the Supreme Court of the United States.

The president soon will (“soon will” as I write; presumably “already has,” as you read) nominate someone to hold Justice O’Connor’s seat on the Court. Perhaps, by the time this is published, there will be more than one nomination. After the nomination there will, of course, be confirmation hearings.

The fact that it has been so long between nominations means a number of things. First, the Senate, which must confirm the president’s nominee, is crawling with men and women — Senators and staffers — who have not been through this before. The New York Times reports that 56 members of the Senate have never participated in a Supreme Court confirmation.

Perhaps it makes no difference that over half of the Senate has never participated in such a confirmation. I think, however, that it does make a difference. There are lessons to be learned by having been through these things before. Look at the Terry Schiavo matter and how Congress handled its first attempt to deal with an individual end-of-life decision. It strikes me that Congress would handle this issue differently were it to come up

13. mrlincolnandfreedom.org/content_inside.asp?ID=68&subjectID=4. Chief Justice Salmon P. Chase was nominated by President Lincoln.
14. As with Justice Field, as discussed above.
15. As with Justice Douglas, as discussed above.
16. This is discussed, around footnote 27.
17. The first automatic pension for retiring justices is found in Pub. Law No. 10 (1937), 28 U.S.C. 375. Before that, a retiring justice could ask Congress to appropriate some money for the post-retirement support of the justice and his wife. Sometimes some money was appropriated. Sometimes not.
19. See Leaving the Bench, at 7-9.
20. The last time there were two vacancies at the same time was in 1971 when Justices Hugo Black and John Marshall Harlan announced their retirements within six days of one another. Their replacements, nominated on the same day and confirmed four days apart, were Justice Lewis Powell and then-Justice William Rehnquist.
21. Sheryl Gay Stolberg, “Out of Practice, Senate Crams for Battle Over Court Nominee” The New York Times (July 8, 2005). Sen. Arlen Specter, who chairs the Judiciary Committee, has been on that Committee for nearly 25 years and “has participated in nine Supreme Court nominations, though this will be his first as chairman.” Id.
again in front of a majority of the same men and women. In any event, I wonder what hope the nominee has before a body led by a doctor who looks at a few minutes of videotape of a patient in a coma and comes onto the floor of the Senate with a diagnosis in an attempt to control the outcome of a piece of proposed legislation.

Second, cable TV and the Internet. This will be the first nomination spun on the “No Spin Zone.” Information, true and false, will fly around the country faster than a speeding bullet. The proliferation of broadcast and cable television stations, newspapers (with instantly updated websites), Internet news sites and bloggers, increases the pressure on each to distinguish itself from all others — preferably by being first. The rush to broadcast means we can expect more revelations of the sort that led to Dan Rather’s early retirement from the “Evening News.” What’s true and what’s false will become blurred. Some damaging true information will be popularly considered false. Some damaging false information will be popularly considered true. The country will become more polarized. (Is that possible? Yes, it is!)

Third, this group of nine has been together so long they tell jokes by number. Eleven years is longer than any starting-nine professional baseball players stay together, it is as long as the Beatles and it is longer than many marriages. It is almost a third of the life expectancy of a child born in 2005 in Sierra Leone. On the one hand, it should be healthy to throw someone new into the mix. On the other, achieving full membership in a group that tells jokes by number might require some adjustment on both sides.

There is at least one vacancy, maybe, by the time you read this, more than one. Whom the president nominates is extraordinarily important. We all know that. I believe that outside of time of war or national tragedy, such as the Great Depression, Supreme Court nomination is the most important thing a president does. Sometimes even in a time of war it is the most important thing a president does.

As president, the most important thing John Adams did to determine the future of this country was to nominate John Marshall to be chief justice. The most important thing Dwight David Eisenhower did as president was to nominate Earl Warren and Bill Brennan. The most lasting impact from Gerald Ford’s brief presidency comes from his nomination of John Paul Stevens to the Court. I believe that more than anything else the presidency of the first President Bush will be remembered by the impact his nominee Clarence Thomas has on the country.

22. I know that after the autopsy showed that Schiavo’s brain had shrunk to half its normal size and that she was in fact in a persistent vegetative state, Senate Majority Leader Bill Frist (R-Tenn.) said, “I never made a diagnosis.” I also know that during the debate of Public Law No. 109-3 (March 21, 2005), an act entitled “An Act for the relief of the parents of Therese Marie Schiavo,” Frist took to the floor of the Senate, stated that he had watched videotape of Schiavo and spoken with her brother and one of several neurologists who had evaluated Ms. Schiavo, and concluded “That [meaning Ms. Schiavo] is not someone in a persistent vegetative state.” See, for example, Charles Babington, The Washington Post A17 (June 17, 2005). You can conclude for yourself whether that is a diagnosis. As for myself, if I need medical care, I will go elsewhere.

23. This could be avoided if the president would nominate a person who is popular with the members of the United States Senate and whose position on abortion is not known, but, while I know why I might want to do that, I do not see why President Bush would want to.

24. The Beatles was founded in 1959; Paul McCartney left the group in 1970. Though the group officially disbanded in 1971, they were no longer together when McCartney left.

25. According to the United Nations Common Database, the life expectancy of a child born in Sierra Leone in 2005 is 34.2 years. This information was found on the July 8, 2005, posting at globalsis.gyu.edu/indicator_detail.cfm?country=SL&indicatorid=18.
Justice Douglas served almost 37 years: 36+ years of constitutional rulings; 36+ years of saying what the law is; 36+ years of finding and enforcing individual rights; 36+ years of saying who has the power and who does not.

From the president’s standpoint, he needs to take care to nominate someone who has the intellect and the ability to use that intellect effectively — particularly the ability to write well. These are the things that a justice needs to do if he or she is to direct the course of history. Also, from the president’s perspective, he needs to take care to nominate someone who will, in the end, remain a good conservative.

Hanging over the head of the selection process is the fact that the president doesn’t always get it right. Presidents are often disappointed by the positions their nominees take as justices. Theodore Roosevelt nominated Oliver Wendell Holmes, in part, for how the former believed the latter would vote in antitrust cases. When Holmes recorded a vote contrary to Roosevelt’s trust-busting philosophy, the president stopped inviting Justice and Mrs. Holmes to the White House for dinner.

In modern times, the presidents who have been disappointed by the votes of their nominees are all Republicans. President Eisenhower nominated Earl Warren and later called it “the biggest damn fool thing I ever did.” 26 President Nixon nominated Harry Blackmun, who went on to write the majority opinion in Roe v. Wade. President Ford nominated John Paul Stevens, the most liberal justice on the current Court.

President Reagan nominated Sandra Day O’Connor and Anthony Kennedy, both of whom were part of a five-to-four majority that reaffirmed the right to an abortion. 27 O’Connor wrote the majority opinion that upheld the University of Michigan Law School’s racial affirmative action plan. 28 Kennedy wrote the majority opinion that found it was unconstitutional for the state of Texas to criminalize adult, private, consensual, same-sex sodomy. 29

James Dodson’s Focus on the Family Action Newsletter for April of 2005 includes the following: “Justice Anthony Kennedy, whom I consider to be the most dangerous man in America … .” 30 George H. Bush nominated David Souter, who is a solid member of what passes for the liberal wing of the current court.

Presumably George W. Bush would like to avoid nominating someone who will fill the perceived hole in the Court’s middle — a replacement swing vote. That is not what he was elected to do.

I do hope, however, that he nominates someone with the kind of character Justice O’Connor has shown in leaving. I hope he nominates someone who will have what it takes to retire from the Court when the time is right: before she is no longer able or willing to do the work. And someone who will retire for all of the right reasons, including, perhaps, her love for a good husband.


G. Michael Fenner is the James L. Koley, ’54 Professor of Constitutional Law and professor of law at Creighton University. He is a member of the Nebraska Supreme Court Committee on Practice and Procedure and the House of Delegates of the Nebraska Bar Association, and past chairperson of the Evidence section of the Association of American Law Schools. He is a frequent speaker at continuing education programs for lawyers, judges and their support staffs, and is the author of the treatise The Hearsay Rule. He teaches Constitutional Law, Evidence and First Amendment Freedom of Speech at Creighton. He can be reached at fenner@creighton.edu.

Editor’s Note: After Sandra Day O’Connor announced her retirement from the U.S. Supreme Court on July 1, Michael Fenner wrote this article to share his thoughts on the justices of the Court and the importance of choosing nominees for vacancies on the court. Fenner wrote his story in mid-July. Since then, Chief Justice William Rehnquist has died. John Roberts, who initially was named to replace Justice O’Connor, has been nominated by President George W. Bush as the nation’s 17th Supreme Court chief justice. At print time, Roberts was undergoing Senate confirmation hearings, and President Bush had not yet named a nominee for O’Connor’s position.
Crisman, Smith, Nelson Find Success at Top Law Firms

As the Creighton University School of Law enters a new century of educating and inspiring future generations of lawyers, Creighton Lawyer offers its readers a glimpse at three Creighton alumni who have used their law school educations to embark on successful careers at some of the nation’s top law firms.

C. Benjamin Crisman: Serving the Public Interest

How does one prepare to be a partner at one of the top global law firms in the country? Ask Ben Crisman Jr., JD’75, a partner at Skadden, Arps, Slate, Meagher & Flom LLP in Washington, D.C., and he will tell you that the intense, trial-by-fire training he received at Creighton was an important first step.

“By receiving my legal education at a small law school, I quickly learned that one can never hide,” Crisman explained. “Creighton taught me the benefits of thorough preparation and academic rigor. It gave me confidence in myself, because I practiced presenting arguments every day in a challenging environment. The real life practice of law, whether at the Department of Justice or in private practice, was simply the next logical step that my Creighton law school education prepared me for.”

Crisman recalled Steve Frankino, a former dean of the Creighton School of Law, as having a significant impact on his career.

“Dean Frankino energized the school by importing a large group of young professors and mixing them effectively with a group of seasoned faculty to create a lively and vibrant learning environment,” Crisman said. “I was lucky enough to work as Dean Frankino’s research assistant. He is an intellectual heavyweight and his integrity inspires excellence in all who come in contact with him. He was a mentor to me and I draw upon both the legal and life lessons he taught me every day in my legal practice.”

On the topic of public interest work, Crisman says that one of the most rewarding aspects of his career has been legal services to the underprivileged around the country.

“An important part of being a lawyer is serving the public interest, and Creighton does a great job of instilling that in students,” said Crisman. “The faculty really believe in the young people who go through the University and in fostering an atmosphere of public service, which is one of the real beauties of the school.”

According to Crisman, one of his biggest career challenges has been to constantly evolve his practice in this rapidly changing world.

“A important part of being a lawyer is serving the public interest, and Creighton does a great job of instilling that in students.” — Ben Crisman

serving on the Skadden Fellowship Advisory Board since its inception in 1988. It is through the Skadden Fellowship grants that the firm selects and funds 25 outstanding graduating law students each year to provide

“When I began my antitrust practice in 1975, its scope was entirely U.S. domestic in its orientation,” he explained. “Today, over 100 countries have competition laws and many have instituted criminal
sanctions for violations of the antitrust laws that involve price fixing, bid rigging and market allocation. This trend means that my practice today is an international one that requires me to travel often to Europe, Australia and the UK. This globalization of my client base and the governmental regulatory schemes bring with it new challenges and ever-changing regulations that must be taken into account when advising multi-national clients.”

In conclusion, Crisman had this to say about the rewards of his chosen profession: “What I love about practicing law is that it offers me a unique opportunity to impact my community in countless different ways — to hopefully improve it — one person or one case at a time. By careful advocacy, a single lawyer can influence the outcome of any controversy. The law truly is a most powerful tool that can be used for the public good in so many private ways.”

About Crisman: C. Benjamin Crisman Jr. focuses on antitrust, trade regulation and white-collar crime matters. He was selected for inclusion in Chambers USA: America’s Leading Business Lawyers 2005. In Crisman’s antitrust practice, he has obtained Department of Justice and Federal Trade Commission approval for a number of high profile and complex mergers and acquisitions and represents corporations in international cartel investigations.

Crisman received his J.D. from Creighton University School of Law in 1975, where he served on the Creighton Law Review. Following graduation, he was selected to join the Honors Program of the Department of Justice as a prosecutor in the Antitrust Division and as a special assistant U.S. Attorney for the Eastern District of Virginia, before joining the Washington, D.C., office of Skadden, Arps, Slate, Meagher & Flom LLP.

For more than 55 years, Skadden’s diversified practice has covered virtually every area of corporate law. The firm also holds an equally strong commitment to public interest work. With approximately 1,700 attorneys in 22 offices worldwide, Skadden represents a broad spectrum of clients including nearly 50 percent of the Fortune 250 industrial and service corporations, as well as leading financial institutions, high technology companies and cultural, educational and charitable institutions.

Walter Smith: A Change in Direction
When asked why he became a lawyer, Walter J. Smith, JD’72, credits both a love of the law and the war in Vietnam.

In a story that is now infamous in his family, Smith called up his wife (then fiancée) and told her he was going to become either a dentist, a lawyer or a doctor, depending on which school he got into first.

“Of course that all depended on whether I got drafted, which I did, but I flunked the physical,” Smith said. “At the time, you could get into Creighton law school without an undergraduate degree if you had enough credits, so that’s what I did. I never did get an undergrad degree. In fact, I’d venture to say that I’m probably the only managing partner of a major law firm in this country without one.”

As for where Smith developed his love of the law, that credit goes both to his father, Walter — who graduated from Creighton in 1937, practiced law in Plattsmouth, Neb., and was a state district judge — and to his professors at Creighton.

Being a successful managing partner requires an in-depth understanding of what your partners are going through and the challenges that they face in practicing law. It also requires having an understanding and appreciation for what your firm is all about.” — Walter Smith

“I was at Creighton during the height of the Vietnam War and had intended to become an engineer. I’d taken pre-engineering classes my first two years at Creighton and had transferred to the University of Detroit before I dropped out,” Smith said.

“Creighton did a good job of teaching me how to think like a lawyer. It had a rigorous approach to the study of the law that proved useful as I became a practicing lawyer,” said Smith. “It also solidified my respect for the law. Even though it was a small school, the faculty
was extremely dedicated. They loved the law, and that came through to us students.”

Smith recalls his Creighton education as a fun and challenging time with a close-knit group of students and teachers from diverse backgrounds. Smith also recalls Dean Steve Frankino as having a significant impact on his career.

“Dean Frankino came to the school during my third year. He helped me get a clerking position with the U.S. Court of Appeals in D.C. after I graduated. That was hugely important to my career and opened up a new dimension for me, in terms of the law. Other influential people in my career were former Creighton law professor, Michael J. O’Reilly, and Ron Volkmer, who was just starting out as a young professor back then. Ron was an excellent teacher and I still consider him a friend.”

One of the biggest challenges in Smith’s career came just three years ago, when he shifted from practicing law to becoming the managing partner of Baker Botts, a top global law firm.

“Management requires a different set of skills from practicing law,” Smith said. “Being a successful managing partner requires an in-depth understanding of what your partners are going through and the challenges that they face in practicing law. It also requires having an understanding and appreciation for what your firm is all about.”

As managing partner of Baker Botts, Smith no longer practices law, but considers the intellectual stimulation of practicing law to be one of the most rewarding aspects of his career. “The law is a very challenging profession — and that continues throughout your career — every case, every transaction can present you with a new challenge.”

**About Smith:** Walter J. Smith is the managing partner of Baker Botts. Prior to becoming managing partner, his practice focused primarily on public offerings, specialized securities transactions, mergers and acquisitions, and venture capital investments. His clients included underwriters and issuers, publicly traded and private partnerships and corporations, and special committees of boards of directors. He represented Conoco on their initial public offering in 1998, which at the time was the largest IPO in U.S. history.

Smith received his J.D. (summa cum laude) from Creighton University School of Law in 1972, where he served as editor in chief of the Creighton Law Review. Following graduation from law school, Smith served as a law clerk to the Hon. E.A. Tamm of the U.S. Court of Appeals for the District of Columbia Circuit. He received his LL.M. from Harvard Law School in 1975 and has been listed in The Best Lawyers in America, 1995-2005.

Established in 1840, Baker Botts is an international law firm with approximately 700 lawyers and offices in Austin, Texas; Baku, Azerbaijan; Dallas; Dubai, United Arab Emirates; Houston; Hong Kong; London; Moscow; New York; Riyadh, Saudi Arabia; and Washington, D.C. The law firm is currently home to former U.S. Secretary of State James A. Baker III, who continues a family connection to the firm dating back to 1872.

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**Scott Nelson:**

| Attitude is Everything |

When asked what it takes to become a partner in a top international law firm, Scott Nelson, JD’96, a partner in the world’s largest law firm, Baker & McKenzie, believes it’s all about attitude.

“When I’m recruiting, I’ll take someone with a great attitude over what law school they went to or what kind of grades they had,” Nelson explained. “A student’s success after law school depends primarily on their attitude and determination. In any law career, you’re going to experience some setbacks — the key to success is to keep pressing on.”

Nelson also urges his fellow Creighton grads not to sell themselves short and to recognize how well their education has prepared them.

“Throughout my career, I’ve worked with many graduates of top law schools, including Harvard and Stanford,” Nelson said. “I’ve seen the quality of their work and attitude and have come to the conclusion that graduates of Creighton are as good or better. A Creighton education prepares you well. You can make it wherever you want to go with determination and the right attitude.”

Nelson credits Creighton’s combination of analytical thinking and practical application for preparing students so well for careers after law school.

“From what I’ve learned in recruiting over the years, some other schools aren’t using the Socratic method as much in the classroom anymore,” he said. “And, although that method is difficult for students, it really prepares them well. Creighton also puts a lot of focus on legal
writing, trial practice and other practical skills that students will use throughout their careers.”

What’s interesting is that Nelson himself ended up in law school almost by accident.

“I was actually a finance major at Creighton undergrad and even worked as a stockbroker,” he said. “I originally went to law school just as preparation to be an investment banker.”

In the end, Nelson credits his trial practice and employment law classes for finally making his decision to pursue a career in law.

“I really enjoyed being in the courtroom,” he explained. “And, I eventually figured out that I was better suited for arguing cases as a lawyer than for preparing spreadsheets as an investment banker.”

According to Nelson, one of the things that first attracted him to a specialization in employment law is how entertaining the work can be.

“It’s like a soap opera sometimes — except that these are real people doing things in the workplace that would just dumbfound you,” he said. “After the first couple of years, I thought I’d seen it all, but then someone would always come along and surprise me.”

Nelson also says he feels fortunate to work with such a great group of people.

“I love my work,” he said. “Baker & McKenzie is very family oriented, which might surprise a lot of people, considering it’s the world’s largest law firm. It’s also a very democratic environment — open to fostering people’s ideas and gathering input. The people are just phenomenal here, which is also one of the things I loved most about Creighton.”

According to Nelson, the best advice he can give anyone pursuing a law career is to focus on your goals and never give up.

“What I’ve learned in my career is that you must relentlessly pursue your dreams and never give up on them,” he said. “So many people give up or limit themselves — thinking they can’t do something or that it’s beyond the realm of possibility. What I’ve found is that when you make a determined effort, while you might not succeed right away, eventually you’ll have what you want.”

About Nelson: Scott M. Nelson is a litigator specializing in employment law. He is board certified in labor and employment law by the Texas Board of Legal Specialization. Nelson is a 1996 graduate of Creighton University where he was assistant editor of the Creighton Law Review and secretary of the International Moot Court Board.

Established in 1949, Baker & McKenzie, LLP currently has 620 partners and 3,200 qualified attorneys located in offices around the world. The Baker & McKenzie practice spans the full range of local and international corporate and commercial work, offering their clients a truly global service. The firm ranked 12th in the “Top 100 Law Firms for Diversity” by MultiCultural Law magazine (April 2005).

Nelson litigates a wide variety of claims, including: all major types of employment law claims; non-compete, non-solicitation, trade secret, confidential information, and inevitable disclosure cases; FLSA and FLSA collective action cases; Sabine Pilot claims; ERISA claims; breach of employment contract claims; employment-related tort claims; and employment-related class action defense. He also advises clients on legal compliance and strategy issues, including international employment law issues, and supervises internal company investigations.

A Creighton education prepares you well. You can make it wherever you want to go with determination and the right attitude.” — Scott Nelson
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Through the support of alumni and friends, the Creighton Law School has been able to position itself as a national leader in preparing students for professional distinction, ethical leadership and committed citizenship. The Office of Sustaining Gifts (formerly known as the Annual Fund) has combined the efforts of the student-run Phonathon, direct mail solicitations, Creighton Society and enhanced Reunion Giving Programs to supplement the operating budget at Creighton.

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When I was asked to write an article regarding “something on females in the legal profession,” I thought of the ideal world with the perfect female attorney harmoniously juggling career, family, children, meals, preschool, home responsibilities, errands and the like.

In reality, as I proceeded down my career path, the idea that as I gained more knowledge in my field and as my young children grew older, my balancing act would get easier and easier, became more and more distant. As I thought about this, I pondered what I was asked to write about next — whether I would recommend my daughter go into the profession. While I admit that the initial thought of my daughter doing anything other than playing dress-up with her pink, heart-shaped sunglasses, matching purse and my high heels was more than I could bear (after all, how dare anyone envision her as a grown-up when to me, she will always be my baby girl), the thought of her all grown contemplating joining the legal profession someday made me very proud.

Almost anyone involved in our profession would agree that whether you practice at a large law firm or practice solo, it is a difficult challenge to balance a lawyer’s professional and personal life. The competitive nature in me and in most lawyers craves the challenges, the workload and the prestige that come with our profession.

Yet, the maternal instinct in me wants time with my husband and children.

While I believe that our profession can make the balancing act difficult at times, I also believe that the legal profession has made great strides in accepting the fact that some women, as well as some men, can be dedicated and brilliant attorneys while at the same time be devoted family men and women.

I certainly want not only my daughter but also my son to aspire to do great things professionally as well as in their personal lives. The key will be for them to find the right balance. For now, the right balance for me includes a reduced work schedule. Although at times the frustration of not giving 100 percent to any one thing seems worse, the extra time that I get to spend with my husband and children is worth it for me.

Several law firms have implemented “family-lifestyle” policies that provide for reduced and more flexible hours with reduced responsibilities. While some law firms have also provided for non-partner track positions, most are acknowledging that reduced work schedules are not necessarily a detriment to partnership tracks. The professional hours necessary to maintain good client relationships remain high and there are still the same high expectations and challenges regardless of whether you are on a reduced schedule or a “normal” schedule. There are challenges in our profession, but there are also immense privileges of being a part of the profession.

So, while life as a female attorney may not be a bowl of cherries all of the time, and I won’t pretend to be equipped to say how others can achieve a perfect balance in professional life and personal life (or even that I have achieved such a perfect balance), I am optimistic that our profession will continue to make strides in creating a more comfortable atmosphere for men and women who desire to have a life outside of work. I’m also optimistic that by the time that my daughter is at an age to contemplate joining the legal profession, the ability to balance a professional life with a personal life will be one of the many privileges that come with our profession.

About the author: Lyn Rhoten is an attorney with Kutak Rock, LLP. She is married to Brian Rhoten, JD’96. They have two children: Major and Bailey.