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Remembering Former Law Dean Steven Frankino

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Academic Pioneering

In a Feb. 19, 2006, editorial, the Omaha World-Herald described the School of Law’s new Werner Institute for Negotiation and Dispute Resolution as being comprised of “academic pioneers.”

I think that phrase is particularly apt. Next fall, the Institute will inaugurate a new Master of Science Program in Dispute Resolution. The students in this new program will be pioneers, as will the J.D. students whose courses will be enriched in this area.

This pioneering spirit permeates other parts of the law school, as well. A good example is international law. A grant from the United States Agency for International Development (USAID) to study property claims in a post-Castro Cuba will allow for pioneering opportunities for both our faculty and students. Helping Cuba make what we all hope will be a just and successful transition to democracy is likely to be one of the most important issues of the early 21st century, and Creighton’s School of Law will play a leading role.

Or consider for a moment the pioneering work that the McGrath North Mullin & Kratz Endowed Chair in Business Law is helping to promote. Our new chairholder, Professor Edward Morse, has co-authored a book to be published by the University of Michigan Press on the social, legal and economic impacts of casino gambling. This often-overlooked and complicated subject will benefit greatly from Creighton’s pioneering spirit.

Of course, not all pioneering is of the recent vintage. Founding a university and then a law school more than a century ago on the edge of the American West required a pioneer’s faith and resilience. And many of our graduates have shown that same faith and resilience by managing to fit law school around major wars, economic downturns, child-rearing obligations and other life-changing events.

For all of the changes that have been wrought, however, in many ways the school has not changed and I hope never will change. We are still a school committed to quality legal education in the Jesuit, Catholic tradition, just as in the pioneer days.

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Patrick J. Borchers, J.D.
Dean and Professor of Law
Morse First Holder of McGrath North Chair

Creighton University law professor Edward A. Morse was installed as the first holder of the McGrath North Mullin & Kratz Endowed Chair in Business Law in the Creighton University School of Law on Feb. 15.

“As a University, Creighton must constantly renew itself so that we can prepare students to better serve the fluctuating needs of society. One way we are able to fulfill this mission is through endowed chairs,” Fr. Schlegel said at the ceremony. “I want to offer my heartfelt thanks to the members of the McGrath North Mullin & Kratz law firm. We note your gift with immense gratitude and unmitigated pride and thank the firm for its ongoing partnership with Creighton University.”

The Omaha-based law firm McGrath North Mullin & Kratz pledged $1 million to fund the new endowed chair. The McGrath North law firm has been a long-time supporter of the University, establishing the largest scholarship fund for Creighton law students and the McGrath North Mullin & Kratz Legal Research Center at the law school. Today the scholarship fund stands at nearly $900,000 and provides support to 10 to 12 students per year.

“The creation of this chair is a testament to the tremendous relationship that the McGrath North law firm and the Creighton law school have enjoyed over the course of almost six decades,” said Patrick Borchers, J.D., dean of the Creighton University School of Law. “McGrath North has helped Creighton students with scholarships; they have helped us with our facilities with their gift to the law library renovations; and now, the firm is helping us with our faculty with the creation of the endowed chair. The firm understands the importance that all three areas — students, faculty and facilities — play in providing quality education. We are grateful for the overwhelming support we continue to receive from our friends at the McGrath North law firm.”

According to David Hefflinger, BA’69, JD’72, president of McGrath North Mullin & Kratz, P.C., the chair was a logical step in the firm’s commitment to the Creighton law school.

“The scholarship fund benefits students. The legal research center involves bricks and mortar and books. The endowed chair recognizes the importance of law school faculty,” Hefflinger said. “The majority of our attorneys are Creighton law graduates. Many of them can tell you stories of how a particular law school professor positively impacted their legal education and their legal career. The endowed chair is our way of thanking the past and current law school faculty. The Business Law Chair also reflects our firm’s practice, and Ed Morse is an excellent choice as the first chairholder.”

Morse has served as associate dean for academic affairs for the law school. He is noted for his expertise on taxation and business issues, and is the author of many papers and studies that have appeared in various state and national publications.

“Our law school is privileged to have loyal and dedicated alumni who devote time, treasure and talent for the benefit of our students. In this sense, the Jesuit message of becoming ‘men and women for others’ is alive and well,” Morse said during his inaugural address. “The McGrath North law firm gift reflects an optimistic and enthusiastic vision about the future of legal education and the kind of law school that we are to become. I am grateful to the McGrath North law firm for their support.”
Law School Admissions Trends

In recent years, competition for law school students has been on the rise due to a smaller number of applicants who are casting the net a little wider and applying to more law schools. Law school admissions offices that are filling fall 2006 classes have continued to notice this trend and Creighton’s School of Law is no exception.

“The number of applications has dropped nationwide for a variety of reasons which may include a stronger economy for college graduates who are entering the job market with an undergraduate degree alone,” said Andrea D. Bashara, assistant dean for admissions and financial aid at the School of Law. “This trend is not specific to Creighton; it is a nationwide trend.”

According to the Law School Admission Council (LSAC), fewer prospective law students are applying to more law schools. In January 2002, at the national level, 4.8 applications were submitted per applicant. Last year at this time the number had grown to 5.7, and this year it is at 6.1. Last year, Creighton law had 1,500 applications. This year that number appears to be closer to 1,400.

“We still have an excellent pool of applicants. However, because they are so strong academically, they have several options open to them. We work hard to try to point out the advantages of a Creighton education,” Bashara said.

To address the impact of this application trend, Creighton’s law school Admissions Office has taken a proactive stance to ensure that the law school continues to enroll dedicated students of character who will make excellent lawyers.

“If you ask most of our current students, they would tell you that the Creighton law school already has a personal touch like no other of our competitors,” Bashara said. “Many have noted that Creighton kept in touch with them even after they were accepted. We are known for keeping them ‘in the loop’ by sending out information to them every two to three weeks.”

Bashara also noted that Creighton has always done an excellent job of keeping candidates aware of their application status.

In addition to the personal touch, the Admissions Office has done a few new things this recruiting season, including hosting a Scholars Weekend in February:

“We invited prospective students who had been admitted by the first or second week in January and had been awarded scholarships of $6,000 or more for fall 2006 to spend the weekend in Omaha and meet with our faculty, students and alumni,” Bashara said.

Weekend activities included attending a Constitutional Law class taught by Professor Mike Fenner, taking a student-led tour, gathering information from Career Services and Financial Aid, having lunch with faculty and current students, and attending a Creighton men’s basketball game. In addition, a reception and dinner were held, and prospective students met with Dean Patrick Borchers, members of the Admissions Committee and Creighton alumni.

“This group of applicants invited to Scholars Weekend is very strong academically. They could go to law school anywhere,” Bashara said. “What is so important about hosting a weekend like this and our Accepted Student Days is the contact that prospective students have with current students. Our law students are our best asset, and they can tell these applicants what it is like to be a Creighton law student.”
Moot Court Teams Perform Well at Spring Competitions

Several of the Creighton University School of Law’s Moot Court teams have competed well this semester.

Creighton’s Saul Lefkowitz Moot Court Team won the Midwest Regional Championship in February. Creighton’s team of second-year law students beat out 19 other teams from 14 schools and advanced to the National Finals in Washington, D.C., held in mid-March. They met teams from New York University, the University of California-Berkeley and the University of Tennessee. The Creighton team took second place as top oralist at the National Finals and placed third in the nation overall.

The Jessup International Moot Court Team won the Midwest Regional Championship in February. Creighton advanced to the International Finals and competed against other regional U.S. champions and foreign national champions for the Shearman & Sterling Cup in Washington, D.C., held March 26-April 1 (at print time, the results were not known).

Creighton law students Tom Freeman and Amy Lawrenson competed in March at the Pace Law School Environmental Moot Court Tournament in White Plains, N.Y., arguing a very complex environmental law problem. Lawrenson was designated best oralist in the second round and Freeman received the honor in the third round.

Renowned Scholar, Teacher Delivers TePoel Lecture

“The Role of Religion in Supreme Court Selection” was the topic of the TePoel Lecture held at the Creighton law school on Feb. 1. Michael J. Gerhardt, Samuel Ashe Distinguished Professor of Law at the University of North Carolina Law School in Chapel Hill, N.C., presented the lecture.

Gerhardt has consulted with members of Congress on a number of constitutional issues and has testified before the House and Senate. He was the only joint witness in the House Judiciary Committee’s 1998 hearing on the history of the federal impeachment process.

Most recently, he defended the constitutionality of the filibuster before the Senate Rules and Judiciary Committees.

Gerhardt has consulted extensively with the national media, and he served as CNN’s full-time impeachment expert throughout the impeachment proceedings against President Clinton.

The TePoel Lecture Series is named in honor of Louis TePoel — teacher, scholar and academic administrator — who served on the Creighton School of Law faculty from 1907 to 1947 and as dean from 1920 to 1947.

Law School’s Public Interest Forum Hosts Showing of After Innocence

Creighton University School of Law’s Public Interest Law Forum hosted a showing of the award-winning documentary After Innocence on March 22.

The documentary, which won the 2005 Sundance Film Festival’s Special Jury Prize, tells the dramatic and compelling story of seven exonerated innocent men wrongfully imprisoned for decades and then released after DNA evidence proved their innocence. The film focuses on the gripping story of the men and their emotional journey back into society and efforts to rebuild their lives.

After the screening, Keith Findley, co-director and co-founder of the Wisconsin Innocence Project, talked about his work with the wrongfully convicted and new legislation to compensate those who have been exonerated.
Werner Institute Launches Graduate Program in Conflict Resolution

One of the nation’s fastest growing professional fields is conflict resolution, and Creighton University will be offering a new interdisciplinary graduate program leading to master’s degrees and graduate certificates in negotiation and dispute resolution.

The program, spearheaded by Creighton’s Werner Institute for Negotiation and Dispute Resolution, is designed to attract students from a variety of disciplines and professions from across the nation and around the world. Though housed at the law school, the program will include courses from Creighton’s College of Business Administration, Graduate School, College of Arts and Sciences, as well as Health Sciences schools. Applications for enrollment in fall classes are currently being accepted.

Two renowned conflict resolution specialists have recently accepted appointments with the Werner Institute’s interdisciplinary graduate program. Bernie Mayer, Ph.D., joined the Institute as a resident professor of conflict resolution. With more than 25 years of experience in the field, he was a founding partner at CDR Associates, the internationally recognized mediation and conflict resolution organization. Jacqueline Font-Guzmán, a lawyer, health care administrator and leader in mediation and dispute resolution in Puerto Rico, has joined the Institute as associate director and assistant professor. Font-Guzmán has been involved in the training of third party neutrals and co-founded and developed Conflict Resolution Center, Inc., a certified provider of mediation and training services in Puerto Rico.

According to Arthur Pearlstein, director of the Institute and professor of law, the new graduate program will emphasize opportunities for students to focus on substantive areas of concentration within conflict resolution: organizational/transactional, health care, and international negotiations and conflict resolution.

“Our goal is to make Creighton and Omaha a major national center for the study and advancement of conflict resolution, a field that is transforming the way businesses, governments, courts and other institutions manage disputes, reduce costs and improve morale.”
— Arthur Pearlstein

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“We are placing strong emphasis on linking applied studies in the field to specific career opportunities for students,” Pearlstein said.

The organizational concentration reflects what Pearlstein identifies as the “sweeping national trend” among corporations and institutions to develop internal systems for handling disputes within and among organizations. The health care concentration leverages the “enormous resources at Creighton and in Omaha” to help prepare students to meet the fast-growing need for conflict resolution involving clinical environments, patient-provider concerns, bioethics issues, technological advances and public health emergencies. And the international concentration works jointly with Creighton’s prominent international programs to focus on the skyrocketing demand for conflict resolution professionals in times of intense globalization of business and heightened risks in international relations.

Creighton University School of Law Dean Patrick Borchers said that the initiative offers an opportunity “unparalleled in the history of the school” to create a “nationally prominent graduate program” that cuts across academic and professional disciplines.

For more information, visit law.creighton.edu/wernerinstitute/ or call 402.280.3852.
Faculty Profile: Raneta Lawson Mack

With an outstanding repertoire of legal experience and erudition, Raneta Lawson Mack stands as a testament to the model teacher-practitioner-scholar.

Mack has been a professor of law at Creighton since 1991. The combination of Jesuit, Catholic values and Midwestern locale made Creighton an attractive choice, she said. Before joining the University, Mack was an associate with Davis, Graham & Stubbs in Denver. She received her Bachelor of Arts, cum laude, in 1985, and her Juris Doctor, cum laude, in 1988, from the University of Toledo.

A superior teacher as well as scholar, Mack teaches an array of courses, spanning criminal law, criminal procedure, white-collar crime and comparative criminal procedure.


With a sweeping perspective, Mack examines the contemporary legal landscape through the lens of history. In Equal Justice, for example, Mack — along with co-author Michael J. Kelly, an associate professor of law at Creighton — presents a compelling and detailed analysis of the U.S. government’s post-9/11 actions, all against the backdrop of the Civil War, Red Scare, World War II and other periods of national anxiety.

These issues are critical not only for history and today, but for the future of American jurisprudence. The treatment of detainees at Guantánamo, the secret military tribunals, the holding of suspected terrorists without access to lawyers, the use of wire-tapping without FISA court warrants and congressional reservations about new security policies all may have far-reaching repercussions for American constitutional and criminal law.

In further explorations of the government’s anti-terrorism response, Mack recently authored an op-ed piece on the JURIST website entitled “First Time Unlucky: The Jurisprudential Misadventures of the Foreign Intelligence Surveillance Court of Review.” She also presented an essay for a symposium on electronic document/digital signature verification, as well as a lecture entitled “Unequal Justice: A Comparative Study of the Lindh, Moussaoui and Padilla Cases” at a May 2003 conference on terrorism in Salzburg, Austria, sponsored by the Center for International Legal Studies.

Mack was recently approved for the prestigious Fulbright Senior Specialists Roster, and is eligible to receive a Fulbright award to collaborate with international academic institutions on curriculum and faculty development, present lectures, participate in or lead seminars and participate in specialized academic programs and conferences.

Mack is currently working on a comparative study of American and European criminal procedure, its history, processes and case studies.
Ushering Cuba Back into the Community of Nations

A team of Creighton academics and researchers led by Patrick Borchers, dean of the law school, is busily tackling a political, legal and economic puzzle worthy of the Rubik’s Cube. Their mission is to help usher Cuba back into the community of nations.

“There are an almost infinite number of variables involved,” said Borchers. “It’s like a giant bankruptcy. Our job is to be as equitable as possible while getting the debtor back on its feet.”

The problem began taking shape in 1959 when Fidel Castro came to power. Now, as Castro approaches his 80th birthday, studies are under way to examine what will happen in a post-Castro Cuba.

The United States Agency for International Development, a division of the U.S. Department of State, has asked the Creighton team to help prepare for post-Castro Cuba. Specifically, the Creighton team will design a computer model to be used to restore property confiscated after the revolution. The two-year project is funded by a $750,000 federal grant.

Michael Kelly, associate professor of law at Creighton, is a part of the team, and he said it’s going to be quite a task to track who owned what, who should get compensation and what form compensation should take. Whereas the Creighton team is not being asked to make those decisions, the model they devise will shape how the decisions are made. Fortunately, there are some examples to follow.

Kelly said the dissolution of the Soviet Union in 1991 and the consequent liberation of countries throughout Eastern Europe spawned different approaches to the problem of restoring private property to rightful owners. It is generally considered that things have not gone well in Poland, Kelly said, whereas Hungary has shown great creativity in awarding stock in companies about to be placed back in the private sector to eligible persons.

“Nobody in their right mind believes that you can just go back and put things back as they were in 1959,” he said. “People have to realize that a country emerging from what is essentially a bankruptcy will not be as well off as if it never went into insolvency.”

Although legal issues will obviously play a large role in resolving property disputes, political issues necessarily will play a large role, Kelly said.

Every nation that fell to communism during the 20th century spawned an émigré population, a diaspora usually fiercely hostile to the communist governments in their homelands.

Cuba is different in one major respect, Kelly said. The Cuban émigré population did not disperse over the world or even over America. They congregated, primarily in Miami, and unlike other émigré groups many Cubans are eager to return home once Castro and communism are removed from the scene.

Cuban émigrés will likely prove a valuable source of information as the Creighton team creates its computer model, Kelly said.

In addition to helping heal a great remaining Cold War wound, Borchers said the project is a big opportunity.

“The work project we are going to deliver will be worth every cent,” he said. “As someone who has spent his life teaching international law, the chance to put it into practice like this is really great. It’s the opportunity of a professional lifetime.”
Semper Reformanda:
A Primer on Tax Reform

By Edward A. Morse, Professor of Law and McGrath North Mullin & Kratz Endowed Chair in Business Law
Reform is an ongoing human activity. It proceeds from two potentially dissonant conditions: dissatisfaction and hope. Dissatisfaction can lead to despair. Thankfully, not all of us remain in that condition. Optimists among us believe that change is possible, that fault or error can be corrected, and that better days are ahead. The process of change is never complete, as something always needs improving; we are never satisfied that we have gotten it quite right.

Reform processes are fundamentally complex. We must first agree that a problem needs fixing. We must then discover the appropriate means to fix it. Some learning is advisable; after all, we don’t want to make the problem worse. We then face the further challenge of coming to agreement without starting a major conflagration. Since human nature is involved, the process is not always predictable.

This article discusses the ongoing process of federal tax reform, which continues to present challenges in the new millennium. It seems that we can only reach agreement at the level of dissatisfaction: Most people believe the tax system is too complex and inefficient. However, the prescription for improvement seems to elude us, as the Tax Code continues to grow more complex and specialized. Congress has tinkered frequently with the Tax Code. According to the President’s Advisory Panel on Federal Tax Reform, Congress has enacted nearly 15,000 changes in more than 100 different acts since 1986. However, formidable barriers favor the status quo, causing most changes to be modest and, in recent years, of only limited duration.

Federal Government Finance: The Big Picture

Republican victories in recent elections have given control of the legislative and executive branches of government to people known for a philosophical commitment to lower taxes and smaller government. They have generally delivered on the promise of lower tax rates, but a smaller government has not materialized. (Query whether the fact that some of our leaders are from Texas, where everything is supposed to be big, has contributed to this phenomenon.)

Government spending has been growing. Unfortunately, revenue growth has not kept pace with spending growth, leading to budget shortfalls. Figure 1 (left) gives us a picture of federal government receipts and outlays since 1986, with estimates for 2005-10.
Borrowing makes up the shortfall between outlays and receipts. Given the track record shown in Figure 2 (above), slowing spending growth appears difficult to accomplish. However, revenue growth has indeed occurred during this period of general economic expansion. Figure 2 provides another picture of the relationship of tax receipts to economic growth. Both trends are upward, though the percentage of tax receipts to Gross Domestic Product (GDP) has fallen somewhat since 2000. The tax cuts enacted in 2001 and 2003 are partly responsible for this decline. Also responsible, however, is the fact that GDP does not include capital gains, which are included in the tax base. Optimism about future growth reflected in capital appreciation thus affects tax receipts along with actual economic progress.

Of course these figures include all kinds of government receipts, including significant revenues from Social Security taxes. The breakdown of revenue sources can be seen in Figure 3 (below left) that covers federal budget receipts since 1990, with estimated figures for the years 2005-10. As illustrated, taxes on individuals fund most of the government and its programs. For fiscal year 2004, individual income taxes totaled $808 billion, about 43 percent of total receipts of $1.88 trillion. Social insurance and retirement receipts totaled about $733 billion, or about 39 percent of the total. (Although half of these taxes are nominally imposed on an employer, it is fair to say that the real burden of these taxes falls on the employee, who receives less for his or her services because of these taxes.) Corporate income taxes amounted to only $189 billion during this period, or about 10 percent of the total. Other sources round out the remaining 10 percent. As you will also note, these other sources are relatively stable over time; long-term growth occurs primarily from receipts from individuals.

Social insurance taxes fund Medicare and Social Security payments to older Americans, along with disability benefits to eligible beneficiaries. The current system for funding those benefits is
nearing a tipping point in 2017 where the cost of annual benefits will outstrip annual receipts from taxes. This is a matter for concern, as excess revenues currently fund other government spending. When these funds are no longer available, the government will have to seek other financing sources. A detailed analysis of Social Security financing is beyond the scope of this article, but it should be noted that these financing demands may also affect future policymaking regarding other tax sources.

The Income Tax: Who Pays, at What Rates?

Given the significance of the income tax to federal government finances, it is easy to see why so much attention is focused on this topic. One of the principal advantages of a tax focusing on annual income flows is the ability to tax those who, generally speaking, have the greatest ability to pay. However, a disadvantage is that those with the greatest ability to pay may also be the most productive citizens. As a result, an income tax can be viewed as a tax on productivity. There is an old saying that you should tax what you want less of, and this dimension of the income tax is a source of consternation.

Figure 4 (above) shows some key figures for tax returns filed in 2003, the most recent year for which specific data has been compiled by the IRS. As you can see, nearly half of all tax returns are filed by taxpayers with annual income of $25,000 or less. Many of these are not full-time earners, and students or retirees with part-time employment are included in this demographic group. These taxpayers earned about 11 percent of the total adjusted gross income, but they paid only 2.3 percent of the total taxes. Some in this group pay no income taxes at all, but instead receive refundable credits such as the Earned Income Credit. At the other extreme are those earning more than $1 million annually. This is a small group that constitutes only 0.14 percent of all returns, but they report 8.5 percent of the total income and pay 17.7 percent of the total income taxes.

The progressive nature of our income tax system can be seen by comparing the percentage of income (the yellow bar) with the percentage of taxes (the black bar) in each category in Figure 4. Those earning more than $100,000 comprise about 8.8 percent of all returns, and they report about 40 percent of all income. They also pay nearly 64 percent of all taxes. In contrast, those earning below $100,000 reported 60 percent of all income, but paid only 36 percent of all taxes.

Progressivity can also be seen in the tax rates applied to income. Every tax is the product of a rate times a base. For an income tax, the base is taxable income, and rates are graduated based on income amounts. The nominal rate structure for a married couple in 2005 can be seen in Figure 5 (left).

However, this structure is deceptively simple. First, it omits the effects of so-called “phase-out” provisions that raise the marginal tax rate (i.e., the tax rate imposed
on the last dollar earned) by removing other tax benefits. To illustrate, suppose that a married couple earning $110,000 is otherwise eligible for a $1,000 credit for their dependent child. Based on the rate schedule in Figure 5, that taxpayer would be in the 25 percent bracket for each dollar earned up to $119,950. However, this taxpayer faces an effective rate of 30 percent on their next thousand dollars of income due to a phase-out of the child credit. (To be precise, the tax would be $50 on the next dollar of income after $110,000, as the Tax Code prescribes a limitation by reducing the allowable credit by $50 for each $1,000 or fraction thereof in excess of the prescribed threshold.)

Second, the rates in Figure 5 also don’t reflect preferential treatment given to taxpayers with income from equity investments, such as mutual funds or stocks. Long term capital gains and qualified dividends are now taxed at a maximum rate of only 15 percent. This preferential rate compensates for the fact that capital income is potentially subject to multiple levels of tax by other taxpayers. However, receipt of this income may well push the taxpayer into a higher tax bracket for other income, thus effectively reducing the benefits of the preferred rate. Moreover, this rate structure will expire in 2009, unless Congress works out a compromise to extend it.

And there is one more dimension not included in these rates: the Alternative Minimum Tax (AMT). This tax is a separate system with a completely different tax base at nominal rates ranging from 26 to 28 percent. (Even these rates are deceptively simple, due to phase-out provisions operating like those previously described.) The AMT base is broader than the income tax base because it eliminates certain tax benefits, like state and local tax deductions, that are otherwise available to reduce the regular tax burden. Though originally designed to prevent the very rich from paying too little tax, Congress has failed to index this tax to take into account inflationary effects. As a result, more than 2 million taxpayers owed this tax in 2002, and the Congressional Budget Office estimates that the affected population will grow to 30 million taxpayers by 2010 if changes are not made. An even greater number must compute their income taxes under both regular and AMT methodologies, thereby increasing compliance costs. Fixing this will be costly, however. The President’s Advisory Panel estimates that $1.2 trillion will be raised by the AMT over the next 10 years.

What is the Proper Income Tax Base?

As noted previously, rates are only one dimension of an income tax. The other is the base: the amount of taxable income. Congress can expand or contract the base by providing additional deductions in computing taxable income. It can also affect the amount due by allowing for credits that directly reduce tax liability.

The nature and extent of these deductions and credits presents another matter of complexity which goes to a fundamental question: What is the purpose of the income tax system? If your answer to that question is, “Of course, it should be used to raise revenue to fund government programs,” then you get only partial credit. Perhaps that should be the answer, but it has gotten much more complex than this.

The Tax Code is used to accomplish many social and economic goals apart from raising revenue. To name just a few, it facilitates a social welfare program that provides payments to eligible citizens through the Earned Income Credit, incentivizes the purchase of hybrid vehicles through deduction and credit provisions, stimulates capital investment through credits and special deductions, and subsidizes health and welfare benefits for employees by exempting them from taxation. All of these functions may be desirable or good, but they add complexity and they significantly reduce the tax base. As a result, rates have to be much higher to accomplish the same revenue stream. Stated differently, we could have much lower rates with an expanded base. The President’s Advisory Panel has indicated that a flat rate of 15 percent would generate the same revenue if the base was broadened to eliminate the most significant of the current base reductions. Alternatively, graduated tax rates could range from 6.6 to 23 percent, instead of 10 to 35 percent under the current system.

The concept of “tax expenditures” describes the items that could legitimately be included in the base of an income tax, but which instead are excluded from the tax base to accomplish other policy goals. The term reflects the view that these items are akin to expenditures of federal tax revenues that are not collected. Figure 6 (right) lists several of the largest categories for tax expenditures outlined in the 2006 Federal Budget.

Provisions favoring home ownership top the list, with total lost revenue of more than $760 billion over the next five years. Employer provided health benefits follow closely behind with a comparable cost. But other items also provide large holes in the government’s revenue collecting net, which reflect benefits to targeted groups. Such benefits are effectively paid for by less favored groups. For example, deductions for state and local taxes provide an effective
### Selected Tax Expenditure Estimates
(Ranked By 2006-10 Total in $ Millions)

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<thead>
<tr>
<th><strong>Home Ownership Provisions:</strong></th>
<th>2006</th>
<th>2006-10</th>
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<tr>
<td>Deduction of mortgage interest</td>
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<td>Deduction for property taxes on homes</td>
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<td>Capital gains exclusion on home sales</td>
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<td><strong>Total Home Ownership Benefits</strong></td>
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<td>Exclusion of employer contributions for medical benefits</td>
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<td>9,980</td>
<td>58,670</td>
</tr>
<tr>
<td>Exclusions re: IRA</td>
<td>7,310</td>
<td>32,850</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>116,480</td>
<td>615,960</td>
</tr>
</tbody>
</table>

<table>
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<tr>
<th><strong>Deductions for Charitable Contributions:</strong></th>
<th>2006</th>
<th>2006-10</th>
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<tr>
<td>Charitable contributions other than education and health</td>
<td>32,550</td>
<td>185,460</td>
</tr>
<tr>
<td>Charitable contributions: education</td>
<td>3,680</td>
<td>21,390</td>
</tr>
<tr>
<td>Charitable contributions: health</td>
<td>3,670</td>
<td>20,930</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>39,900</td>
<td>227,780</td>
</tr>
</tbody>
</table>

| **Excluded capital gains due to step-up in basis at death** | 28,760 | 164,420 |
| **Child credit** | 32,810 | 164,030 |
| Deduction of state and local taxes other than property taxes on homes | 34,620 | 163,240 |
| **Capital gains preference** | 28,370 | 144,190 |
| Excluded interest on life insurance savings | 24,070 | 143,610 |
| Exclusion of interest on tax exempt bonds | 26,610 | 136,840 |
| **Exclusion for Social Security benefits** | 19,770 | 106,120 |
| Deduction of medical expenses | 9,140 | 54,770 |
| Deduction for U.S. production activities (§ 199) | 5,420 | 52,930 |
| **HOPE scholarship credit** | 3,220 | 16,890 |

*Figure 6: Selected Tax Expenditure Estimates*  
(Source: Budget of the United States, FY 2006, Table 19-3)
subsidy for those living in high-tax states, which are not enjoyed by those living in states with parsimonious legislatures providing low taxes and presumably low public services.

The matter of home ownership is a particularly striking example of a targeted benefit, which nevertheless enjoys broad appeal. A mortgage interest deduction provides an effective federal subsidy that is unavailable to an individual who chooses instead to rent his dwelling. In this sense, the mortgage deduction distorts investment decisions away from other assets and toward home ownership. A citizen who lives in an apartment and chooses to invest in stock is worse off, tax-wise, than if he or she made a comparable investment to become a homeowner.

By structuring this benefit as a deduction (rather than a credit), the value of the subsidy increases depending on one’s marginal tax rates. A deduction of $10,000 in mortgage interest receives a subsidy of only $1,500 to a taxpayer in the 15 percent bracket, but up to $3,500 for a taxpayer in the highest income bracket. (As noted previously, phase-outs affect higher income taxpayers, making it difficult to state the precise benefit with precision.) Lower income taxpayers, who are not eligible to itemize their deductions, effectively get no subsidy. The deduction is limited to $1 million of purchase-related indebtedness, which limits the scope of this benefit for higher-income taxpayers, but these income differences remain.

Geographical differences also exist, which affect the equity of deduction limits. A $1 million debt limit in Nebraska allows a taxpayer to own a large and spacious home, whereas a similar amount in Manhattan might purchase only a small space. The current Tax Code ignores these geographical differences, which also impact the related benefit of an exclusion of up to $500,000 in capital gains by a married couple selling their home.

The President’s Advisory Panel offered several proposals in the area of home ownership, including limits on deductibility of mortgage interest that varied by geographic region and an alternative credit provision for mortgage interest. Oddly, however, it also argued for increasing the exclusion for capital gains on home sales, thus adding to the tax expenditures in this category.

As for employer-provided health care benefits, their payment with pretax dollars may be contributing to the growth in health care costs. The Panel recommended a cap on the exclusion of benefits per employee, thus making excess expenditures taxable compensation for employees.

Tax Benefits as Entitlements: Barriers to Change

It is easy to recognize that our tax system could be simplified. It is also easy to see how simplifying changes would affect different interest groups, particularly when those changes might expand the tax base by eliminating preferences for particular groups or activities. Complexity is itself an enemy of change, as it requires considerable effort to understand the status quo and the effects of adopting a different approach. This may explain why incremental changes, as opposed to more radical proposals such as consumption-based tax systems, have been enacted. Legislators have a hard time understanding tax changes even with the aid of expert staffs; how much more the citizens they represent, who must occupy themselves with the business of earning a living and paying their taxes.

Complexity is itself an enemy of change, as it requires considerable effort to understand the status quo and the effects of adopting a different approach. This may explain why incremental changes, as opposed to more radical proposals such as consumption-based tax systems, have been enacted. The self-interest that we wish to harness through a market-based economy also works in the market for tax benefits. Once a benefit is granted, it is hard to take it away without producing a negative economic impact of some kind. The home mortgage interest deduction is a case in point. Let’s assume a taxpayer in the 25 percent bracket is eligible to benefit from a mortgage interest deduction. My own calculations show that this taxpayer may receive tax benefits with a present value of as much as $18,000 per $100,000
borrowed over the life of a 30-year, 6 percent mortgage. Stated differently, this means she can afford to buy a bigger house, or alternatively that she can pay more for the same house. Reducing the tax benefits from mortgage interest would probably reduce real estate values, which are likely to reflect this tax subsidy. Change may thus affect more than future tax bills; laws of unintended consequences also operate in this environment.

Political rhetoric can also obfuscate the benefits from tax reform. It is profitable to serve the interests who have been successful in reaching the status quo. By benchmarking the distributional analysis of tax changes to the current system, changes that result in lower rates or incentives for productivity are subject to criticism on the ground that they favor the “rich.” To the extent that a large number of citizens in lower income brackets pay no income taxes at all, or even receive money from the income tax system as a result of refundable credits, it is a foregone conclusion that the dollar value of tax reductions will accrue to those in higher economic strata, as they are paying the bulk of all current taxes. Though equity issues need to be considered, benchmarking to the status quo is a political reality that obfuscates potential merits of tax reform proposals, which can include achieving economic growth or removing distortions in economic choices under the current system.

Growing the economy is perhaps the most politically popular way to raise revenues and to benefit citizens of all income levels. Evidence is mounting that lower taxes are conducive to economic growth, but that growth takes time. Personal income tax receipts have nearly returned to levels achieved in 2000, prior to tax cuts enacted after the devastating blows of the terrorist attacks in September 2001. Growth also requires stability. Uncertainties generated by expiring tax benefits enacted earlier in this decade mean that longer-term incentives for investment prove unrealized. We can do better.

Finally, we face real challenges from international competition, which will continue to influence domestic tax policies, particularly in the area of business taxes. A recent study by the Organization of Economic Cooperation and Development (OECD) found that U.S. effective tax rates on business income was higher than in many of our foreign competitors. Modern capital mobility cannot be ignored.

There is more to be said about tax reform, and you will continue to hear about it in the days and years to come. For those who want to know more, I recommend the President’s Advisory Panel report, which is entitled “Simple, Fair and Pro-Growth: Proposals to Fix America’s Tax System.” It is available at: www.taxreformpanel.gov/index.shtml. From time to time, I also comment on tax reform issues on a web log (blog) shared with colleagues from economics and political science, located at: www.economictrends.blogspot.com. You are welcome to join the conversation.

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About the Author: Edward A. Morse is professor of law at Creighton University. He was recently appointed as the inaugural holder of the McGrath North Mullin & Kratz Endowed Chair in Business Law. Morse’s scholarship and teaching focuses on business and taxation issues. His articles have appeared in the Florida Tax Review, the Cornell Journal of Law and Public Policy, the De Paul Law Review, the Dickinson Law Review, the Creighton Law Review and the Journal of Taxation of Investments. Most recently, he has been working with colleague Ernie Goss, Ph.D., holder of the McAllister Chair in Economics in the College of Business Administration at Creighton, in research on the casino gaming industry. Their book, Governing Fortune: Casino Gambling in America, is to be published this fall by the University of Michigan Press. He can be reached at morse@creighton.edu.
Remembering Former Law Dean
Steven Frankino

By Richard E. Shugrue, Professor of Law

When the saga of the Creighton University law school is told to our grandchildren, the names of great and fabled educators will be mentioned and tales will be recounted of how they dreamed of an enduring foundation on which to help shape this nation’s lawyers.

The Moot Court Room in the old law school building.
Steven P. Frankino, the former dean of Creighton University’s School of Law, died Sept. 26, 2005, at age 69. He suffered from lung cancer. Frankino, a native of Butte, Mont., was dean of the school from 1971-77. He later served as dean of two other law schools, the Catholic University of America and Villanova. He received his law degree from Catholic University in 1962. After leaving Creighton, he joined what is now Kutak Rock in Omaha, before returning to his first love, legal education. A member of the American Law Institute, he was active in the American Bar Association’s Section of Legal Education and Admissions to the Bar. Frankino is survived by his wife of 40 years, Rosemarie Leonardo Frankino, of Wayne, Pa.; three children, Christina Marie Frankino, Alleen Marie Frankino-Lint and Sean Frankino; a brother and two granddaughters.

Integrity, Dreams Characterized Life

No one worked more closely with Dean Frankino than Rodney Shkolnick, now the senior member of the Creighton law school faculty, who served as associate dean during the Frankino years. The men contrasted in many ways: Shkolnick is modest, reflective and low-key, whereas Frankino was regarded as bold, flamboyant and visionary.

Yet the late dean demanded integrity in legal education and a high degree of independence in the conduct of affairs for the professional schools, Shkolnick recalled. Frankino trusted the judgment of those with whom he worked and reveled in their achievements, he added.

Professor Ed Birmingham, who had been recruited to the Creighton law faculty by Dean Doyle in 1970, had gone to law school at Catholic University of America where a young Steve Frankino had been teaching.

Doyle had announced his retirement as dean, and a national search was under way for a leader for the Creighton law school. Birmingham, who joined the Creighton faculty permanently after teaching for two years at the University of South Dakota, had vivid recollections of the enthusiasm Frankino brought to the classroom and the ideals he had shared with his students about legal education, so he naturally nominated his former teacher for the Creighton position.

“Frankino was, first of all, a great teacher who understood much about the world of legal education. He believed that Creighton could thrive, that it could attract a dynamic young faculty, and that it could start drawing students from throughout America,” Birmingham said.

High on the new dean’s list of priorities was a new building which could serve as a model of legal education and an attractive focal point for lawyers and judges, the longtime Creighton veteran said of his old
Musician Frankino shared his dream that Creighton could become an institution with a national reputation for excellence.

“He believed that Creighton should reach out as a top legal educational institution and be proud of teachers with ambition and talent. He immediately looked to great graduate schools, honors government programs and top firms to recruit new teachers,” Birmingham said of the recruiting trips made by Frankino and Shkolnick in those early days.

Anderson and Fenner agreed that Frankino had a sense of style about him, an air of a man who knew precisely what he was doing.

Even though he was just in his first year as dean and no formal plans had been made for constructing a new school, his view of legal education sounded positive, both Fenner and Anderson recalled. Fenner indicated.

Over the years, Frankino gave personal encouragement to Anderson in his career development plans. “He told me to dream large, and to open my mind to new opportunities,” Anderson said.

The new teacher started his career as a public law specialist, emphasizing courses such as poverty and criminal law, “but Frankino encouraged my branching out into business areas, such as contracts and secured transactions and insurance law.”

In just two years the new dean added nine new faculty members to the three picked by Doyle in his last year as administrator. Two professional librarians were recruited for the task of designing and building a collection for the new facility.

By the time the new dean started on the job, in the late summer of 1971, Creighton’s law school showed signs of bursting at the seams. In his first years in Omaha, the enrollment mushroomed, the number of graduates shot up to more than 120 by the spring of 1973, and the following year, when construction was finally under way on the Ahmanson Law Center, the number of new alums had risen dramatically to more than 150 in the combined commencements of the law school.

This was in a building which, while substantial for its post World War I size, was built to accommodate a mere 150 students in all three classes.

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Frankino served as dean of the Creighton law school from 1971-77.

Faculty Built, Building Planned

Terry Anderson and Mike Fenner were in the first “class” recruited by Frankino for the Creighton faculty. Anderson, a University of North Dakota graduate who was finishing his Master of Laws degree at Harvard University, and Fenner, a University of Missouri-Kansas City graduate who was working at the Justice Department Honors Program in Washington, D.C., met the dean and Shkolnick at the Association of American Law Schools Faculty Recruitment conference.

“Frankino exuded such an upbeat vision of Creighton that you couldn’t resist being part of his plans,” Anderson said.

Fenner echoed the infectious enthusiasm of the dean at their first meeting. He had such a positive attitude and was surrounded “by such a sense of momentum that you just wanted to be part of what he was doing and had planned for the law school,” Fenner indicated.

Anderson and Fenner agreed that Frankino had a sense of style about him, an air of a man who knew precisely what he was doing.

Even though he was just in his first year as dean and no formal plans had been made for constructing a new school, his view of legal education sounded positive, both Fenner and Anderson recalled. Fenner added that his new dean “was the kind of human you liked to be around. His laughter was contagious, he was urbane, and he was blessed with a talented and lovely wife.”

“By the time I got to Omaha for my campus visit, it was obvious the old school was inadequate. But he had a dream of a new place, whether it was going to be in downtown Omaha, or somewhere else in the community. I really didn’t care, because he was so assuring,” Anderson said.

Over the years, Frankino gave personal encouragement to Anderson in his career development plans. “He told me to dream large, and to open my mind to new opportunities,” Anderson said.

The new teacher started his career as a public law specialist, emphasizing courses such as poverty and criminal law, “but Frankino encouraged my branching out into business areas, such as contracts and secured transactions and insurance law.”

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Fond Memories of Frankino Celebrations

For half a century, two spaces dominated the old law school: the moot court room on the first floor, with the territorial bench before which generations of students have honed their skills as advocates — and the library. The library had commanded the second level of the building housing a collection that, while not of Oxonian proportions, was adequate to scores of years of students. The patrons of the library had slid comfortably into the classic wooden chairs behind sturdy tables, which gave a patina of stability to the large room.

As twilight descended on the southwest face of the venerable red brick building, a warm glow comforted the library where students and lawyers tackled research problems that would consume them for hours into the night.

To Dean Frankino, who had not hesitated to start redesigning the three floors of the building to reflect the needs of a growing faculty and an exploding student body, the library was the perfect place to hold a grand and elegant dinner to celebrate a new era of legal education.

Not one to be slowed by conventional use of space — he had, in the first couple of months on the job, gutted classroom space on the third floor to make room for new faculty offices and fashioned an administrative suite in the east wing of the building — Frankino planned a banquet at which Count John Creighton might have feted Grover Cleveland or Buffalo Bill. The furniture in the library was strategically moved, thousands of books were temporarily stored in the halls, catering stations were set up, silver candelabra were installed on damask napery, and a sumptuous feast was laid out for the awed guests.

The evening celebrated promise and success for the recently hired faculty and extended the new dean’s welcome to his Creighton family. The sophistication of the dean impressed everyone who may have tasted their first goblet of Pouilly Fuisse (a distinct white wine from the Maconnais region of France) and Chateauneuf du Pape (a Cotes du Rhone red wine), but not their last at celebrations this man with a taste of a sommelier served over the years.

Every faculty member must have felt that this was a special place, that it had great promise. The event accomplished what it set out to do, in that people returned to work with a feeling that Creighton was the right place to be.

Frankino cajoled space in the old dental school and in the then-new Rigge Science Building for classes and installed trailers outside the moot court room to house the law review. Law students could view dental patients waiting to see clinicians, undergraduate students squeezing by them in lab hallways, and even ballet classes across the hall from torts classes as new uses were constantly being found for displaced Creighton programs.

Detailed Attention to Use and Design

But all the time his eyes were set on a new facility. Frankino dreamed “outside of the box,” envisioning, first, acquisition of the old First National Bank Building at 16th and Farnam streets, and, later, a building on the Mutual of Omaha campus at 33rd and Farnam streets as potential homes for the school.

He gleefully told lawyers and judges that the bank building would be perfect.
Remembering Steven Frankino

The trust offices on the mezzanine level could house the faculty, the main banking floor would be a perfect library, and the vault could be a club and tavern for Omaha attorneys. The upper floors could be leased to practitioners eager to be near a fine library and a mere block from the courthouse.

But what Frankino really had in mind was a building which would be an architectural icon, attracting educators and practitioners from all over America.

Frankino shaped every inch of the Ahmanson Law Center. Probably no other dean in America was so intimately involved in the construction and furnishing of a new home for teaching and learning as he was. From the decision on the wood and glass that gave the school its unique modernism, to the outfitting of the classrooms, offices and common area, Frankino's deft imagination was present. The aggregate stone that characterized the halls and the Schneider Commons (named in honor of Creighton academic vice president the Rev. Clement J. Schneider, S.J., who worked hand-in-hand with the dean to realize the building) was Frankino's innovation.

The easy access to faculty offices, the dean believed, would set apart Creighton's student-centered approach to education from the isolated, bunker-like quarters found in many traditional law schools. He insisted on a warm, welcoming common area where students could mingle with lawyers and judges.

Frankino exuded such an upbeat vision of Creighton that you couldn't resist being part of his plans.” – Terry Anderson

Steven Frankino shaped every inch of the Ahmanson Law Center, pictured above, which was completed in 1974.
Remembering Steven Frankino

From the brick walls to the copious built-in bookcases that adorn faculty offices, to the windows that open throughout faculty row (rarities and luxuries in 1970s architecture), a special skill was brought to the project. Years later, Fenner said, with a twinkle in his voice, “One beautiful spring day, I opened my window and breathed in the fresh air … and jotted a note to Steve Frankino thanking him for thinking about windows that open!”

Even the visiting professors’ suite (which is now the Milton Abrahams Legal Clinic) was a Frankino innovation in 1970s design. He foresaw the day when distinguished visitors could be housed near the students, but in comfort and elegance. The suite became temporary home to international scholars, recruits for teaching positions and such all-University guests as former President Jimmy Carter.

The newly expanded school with the multiple purpose classrooms meant that Frankino could inaugurate another of his dreams for enhancing Creighton’s national reputation. Distinguished speakers would be invited to address the students, University and legal communities and asked to expand on their remarks for major articles in the Creighton Law Review.

Renowned speakers such as Harvard’s Lawrence Tribe, Michigan’s Yale Kamisar and Judge Robert Bork accepted the invitations. In Frankino’s magnanimous style, they were feted to banquets with the faculty and introduced to the community with generous receptions in the commons areas following the addresses.

For the first time, Creighton hosted actual cases by the appellate courts serving the Omaha area. This began a tradition that continues now for the United States Court of Appeals for the Eighth Circuit and the Nebraska Supreme Court, which argue cases at the school. Other tribunals, such as the Nebraska Workers Compensation Court, started conducting hearings in the Doyle Trial Court Room.

Frankino, a devout Catholic, appreciated and celebrated the religious identity of the Jesuit tradition. Not long after he arrived in Omaha, he marshaled the full cooperation of the Jesuits, local judges and lawyers for celebration of the Red Mass. The venerable custom began in medieval Europe in the 13th century to honor the Holy Spirit at the beginning of the judicial term. It received its name from the fact that the celebrant was vested in red and, in England, the high justices wore scarlet robes.

Frankino left Creighton to participate in the dream of another giant in American law, Bob Kutak, co-founder of the national firm that carries his name. The dean’s talents as planner and educator helped his new colleagues shape their vision of the practice in an exquisite setting. When he was done with that challenge, Frankino went on to even newer tasks. His life was as full as the memories of those who worked closely with him to fashion a place for 21st century professional education.

About the Author: Richard E. Shugrue is professor of law at Creighton University. He joined the Creighton faculty as associate professor and chair of the Department of Political Science in 1966 and as associate professor of law in 1971. He has written articles for the Creighton Law Review, The Prairie Barrister, Trial Lawyers Forum and the Nebraska Law Review. He has been elected to the chair of the House of Delegates of the Nebraska State Bar Association. Shugrue is a former member of the board of directors of the American Judicature Society. He teaches Constitutional Law, Criminal Procedure, Municipal Corporations and Post-Conviction Relief courses at Creighton. He can be reached at shugrue@creighton.edu.

Editor’s Note: The Ahmanson Law Center is named in honor of the late Hayden W. Ahmanson, JD’23. Ahmanson was born and raised in Omaha. He was president of the National Fire Insurance Company and also served as president of the Omaha Chamber of Commerce. He died in 1980. A gift of $2 million from the Ahmanson Foundation of Los Angeles was designated for the construction of the Ahmanson Law Center in 1973.
Over the last decade there has been a wave of mergers among large law firms, creating national (and increasingly international) behemoths. Many firms cite client demand and the necessity of achieving a “national platform” and “credible mass” to justify this trend. But could the fear of losing clients to the competition be as big a driving force behind these mergers as the lure of new business opportunities?

The last two decades have witnessed many changes in the operating environments of law firms that have led to a more competitive market for legal services. The scope of clients’ business activities has expanded, with transactions becoming larger and more complex, often cross-border in nature, and increasingly time-sensitive. Industries have consolidated, and some important clients have disappeared. The relationship between law firms and clients with sophisticated in-house legal departments has become more complex and less certain, as epitomized by the “beauty contest” to win new assignments. There is also increased availability of market information on law firms, including partner compensation.
Many law firms and their attorneys have responded in dramatic fashion to these changes in clients’ businesses and expectations with significant changes of their own. There is a new emphasis on profitability and productivity, increased lawyer mobility which emphasizes the importance of “portable business,” tying compensation to productivity, with a corresponding growth in “non-equity” partners and the concentration of internal power in a more “corporatized” form of firm management. These changes have led to the oft-heard criticism that the practice of law has transformed from a “profession” to a “business.”

One of the biggest changes, of course, is the continuing rapid growth of law firms. While throughout the 1980s, any law firm with more than 200 lawyers was considered a “large” firm, today 19 U.S. law firms have more than 1,000 attorneys and the 100th largest firm boasts 400 lawyers. In 1985, five U.S. law firms had revenue exceeding $100 million. Today it is exactly five firms which have revenue over $1 billion.

But the most striking change in law firms is the continuing trend of rapid growth over the past decade by means of mergers. Whereas 30 years ago a New York firm might open a west coast office to service the needs of a particular client, today firms, often with the assistance of a law firm consultant, consciously adopt expansionist strategies unrelated to existing clients or known law firms. A firm will often decide the desirable characteristics in a merger partner, go down the list of firm rankings to identify likely candidates and approach a number of different firms before achieving a merger.

Why This Merger Phenomenon?

Although rapid law firm growth has been with us since the 1980s, the acceleration of this trend by means of mergers is puzzling. Mergers involve significant risk. They are hard to accomplish, often due to issues of client conflicts and partner compensation, and the post-merger integration of firms faces similar obstacles. They are highly disruptive, and lawyers may leave the firm. The literature on corporate mergers suggests they are often unsuccessful in adding value for shareholders, and law firm mergers involve no significant economies of scale. As in corporate mergers, a true merger of equals among law firms is rare; typically one of the firms is acquired and disappears. In addition, lawyers and large law firms generally tend to be risk-averse compared with corporate managers. Why would normally conservative law firms embark on a merger strategy which appears to encompass significant risk and uncertain benefits?

The explanations offered for the merger phenomenon are plausible, but may not tell the whole story. The law firms themselves cite client demand for specialized knowledge, geographical reach and the ability to assemble large teams of lawyers on short notice — i.e., “one-stop shopping.” However, there is no real data to back up this presumption of client demand, and one can find both large corporations and law firm consultants who claim it is unfounded. In fact, compared to other “businesses,” law firms devote relatively little systematic effort to finding out what clients want. Another explanation involves comparing law firms to accounting firms, with the implication of an “inevitable” industry consolidation. However, law is local and there is no compelling need, as in accounting, to utilize similar principles and treatment throughout the national and international operations of a single business organization.

If much of the change at law firms is a result of increased competition in the market for legal services, asking some questions about the nature of such competition may also provide clues to a more complete explanation of law firm mergers: For what do law firms compete? How? With whom? Firms obviously compete for client business, but that includes not only retaining and expanding business from existing clients, but also competing for business with new clients. Law firms are also simultaneously competing for quality attorneys, both new associates (i.e., law school students) and lateral partners and associates.

Increased Competition Through Reputation

The key factor is how firms compete: through reputation. Many businesses compete on the basis of price, but that is not the primary consideration for large corporate law firms. Rather, both firms and clients would say that their main concern is a firm’s work quality (followed by responsiveness and cost). But “quality” is difficult to measure in any case, and many of the important constituencies of a law firm have no direct contact with either a firm or its attorneys. How can they judge a firm’s quality? The same way we judge most service providers (including law schools!) — by their reputations for quality.

Increasingly competitive conditions in the market for legal services have “raised
the stakes” for firms, rewarding those who adapt and punishing those who do not. “Punishment” may include acquisition by another firm, or, in a number of recent, well-publicized examples, even the breakup of well-established firms. Given the higher stakes and fast-moving market, firms have become desperate to find ways to send signals of their credibility and reputation to their core constituencies — clients and potential clients, other law firms (potential laterals) and law students (potential associates). The most effective way to send these “reputational signals” is, in fact, to emphasize successes with one of these constituencies — obtaining a prestigious new client, new laterals or new associates from prestigious law schools.

It is also obvious with whom law firms are competing: other law firms. This leads to the importance of reputation signaling being reinforced by “herd behavior.” If it is difficult for clients to judge law firm quality, it is also difficult for law firms to be confident of what clients truly want. Under such circumstances of uncertainty and incomplete information, it is unsurprising that law firms are strongly influenced by the actions of other firms. This is particularly true for mergers, which result in dramatic attention-grabbing headlines and the promise of a “larger platform,” which is intended to increase a firm’s ability to retain and attract desirable clients, lateral attorneys and new associates.

It is also useful to ask more specifically which large law firms engage in mergers. There is a group of the most prominent Wall Street firms, sometimes dubbed “first-tier” firms by law firm consultants, who do not engage in mergers. These firms seek to maintain their highly profitable niches at the upper end of the market (focusing on “high value-added” services such as M&A, capital markets and significant commercial litigation, i.e., the “bet the firm” deals which are not price sensitive) and do not pursue a strategy of rapid growth with numerous offices and areas of expertise. Their strategy appears to be successful. A comparison of firm reputation (by surveys such as the Vault 100) and the various law firm rankings in the American Lawyer and other publications indicates that firm reputation correlates closely with profitability, not with size.

It is the other large corporate law firms that are likely to compete through the pursuit of growth, both in terms of geographic area and areas of expertise, and to pursue mergers. This may be a plausible business strategy — an attempt to capture the wide “middle” of the market in the hope of maintaining their client relationships and volume of work, while at the same time eventually increasing their proportion of profitable, high value-added services at the top of the market (think of Toyota’s strategy for penetrating the American car market). But it is also an attempt to compete with the first-tier firms (and each other) in terms of reputation and ability to appeal to core constituencies.

The Big Mergers of 2005

According to a Jan. 31, 2006, article in The National Law Journal, the biggest law firm merger in 2005 was Piper Rudnick’s combination with London-based DLA and with Gray Cary Ware & Freidenrich to create a 3,000-attorney firm. The second-largest merger was between Pillsbury Winthrop and Shaw Pittman, a deal that formed a 900-lawyer outfit.

Other large couplings included:

- Kirkpatrick & Lockhart with London’s Nicholson Graham & Jones, resulting in a 1,012-lawyer firm.
- Edwards & Angell, in Boston, with Palmer & Dodge, also in Boston, which formed a 520-lawyer firm.
- Squire, Sanders & Dempsey with Steel Hector & Davis, resulting in an 804-lawyer firm.
- Ropes & Gray, in Boston, with New York’s Fish & Neave, creating a 716-lawyer firm.

An International Comparison

How about other countries? Are law firm mergers a peculiar American (or Anglo-American) phenomenon driven by a large number of lawyers and aggressive management of law firms as big businesses? In an international comparison of law firm mergers in selected developed countries, I found a similar merger trend in all countries studied. In federal systems like Germany and Australia, regional firms combined in the 1990s to form national firms (to give
one example, the Australian equivalent of a New York-Los Angeles merger is a Sydney-Melbourne combination), creating two-tier systems between national and regional firms. Even in Japan, a unitary system with a small firm presence in the relevant market. As in the United States, I suspect that the law firm explanations tell only part of the story. As large corporations everywhere have increasingly become multinational enterprises, there has been

A given the higher stakes and fast-moving market, firms have become desperate to find ways to send signals of their credibility and reputation to their core constituencies.

number of lawyers, all of the top four firms engaged in mergers during the period from 2000-2005. The explanations offered by law firms in these various jurisdictions are strikingly similar: Mergers are carried out in response to client needs for “one-stop shopping” and a greater law firm presence in the relevant market.

As in the United States, I suspect that the law firm explanations tell only part of the story. As large corporations everywhere have increasingly become multinational enterprises, there has been

a corresponding increase in fluidity and competition in markets for legal services. Law firms everywhere are seeking to adapt successfully to these new conditions. In doing so, they try to compete in terms of credibility and reputation to improve their chances of obtaining desirable clients and attorneys. In the absence of complete information, many firms will accept what has become the conventional wisdom on the need for “credible mass” and “one-stop shopping” in the hope of qualifying for the short lists of important clients.

Is There Any End in Sight?
The current conventional wisdom is that a “major” law firm with significant clients now needs a national (or, increasingly, an international) “platform” and “credible mass” (with the law firm size required to achieve this nebulous goal increasing very rapidly over the last decade). Given uncertainty and incomplete information, it may well appear to law firms to be “risky” to stand pat and face the possibility of losing existing clients to more aggressive competitors who capture headlines through substantial mergers. If this is even partially true, mergers are not the result of any clear view as to what is the most “efficient” or “best” size for a law firm. Rather, an aversion to being perceived as “falling behind” the competition may continue to act as a spur to law firm mergers.

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Intelligent Design — The Origins of Intelligent Design
(As I See Them)

In so far as I can tell, here is what intelligent design is. Once human beings got brains that could think beyond procreation and food, they began to be arrogant. They were, after all, so much smarter than the rocks, plants and other animals. They began to figure they were so smart that they knew it all, they had all of the answers, they knew everything that could be known.

The fallout from that is the following belief: If what we know about nature cannot explain an event, then it must be supernatural.

Volcanoes erupted and we could not explain this fire exploding from the mountain. We did not have the scientific knowledge needed to explain it and so we decided that it could not be explained scientifically. It had to be the result of the direct intervention of an angry God. We sacrificed virgins to appease this angry God, and the volcanoes stopped exploding.
The sun slowly began to disappear right in the middle of a cloudless day — as though some round thing was covering it. Maybe it was some kind of lid. What we knew about the natural world could not explain it, and so we fell to our knees and prayed and what we saw was that God removed the lid, just as slowly as he had placed it on. Because our knowledge of the natural world could not explain it, it had to be supernatural. This eclipse had to be the result of the direct intervention of God (or, at least, we could not take the chance that it was otherwise because, after all, the sun was disappearing). And, I don’t know, I suppose we were so thankful that God showed mercy on us by removing that lid that we sacrificed virgins.

There is too much of this: If science has not explained it, then it cannot be explained by science, and it must be intelligent design. Because we cannot wrap our minds around any other explanation, there cannot be any other explanation.

**Bacterial Flagellum**

The latest poster child for intelligent design is the bacterial flagellum. It is a tiny propeller attached to some bacteria. It is like a very small and very fast-moving outboard motor. It spins at more than 20,000 revolutions per minute, propelling its bacterium through the water. It is made up of roughly 30 different proteins, all arranged in the precise way that makes the flagellum work.¹

The proponents of intelligent design state that a gradual process of natural selection could not build something like a flagellum. It is just too complex to have happened by evolutionary chance. Just as the volcano was too complex, just as the eclipse of the sun was too complex, the bacterial flagellum is too complex for any other explanation.

**Arrogance, Pride, Self-Glorification**

My own belief is that this is arrogance on our part. Unbecoming and unjustified arrogance — if there are other kinds. The belief that because our science cannot explain it now, science will not be able to explain it ever is a prideful belief. This is the self-glorifying, false logic: “I don’t get it. Those around me don’t get it. Therefore, it cannot be gotten.”

But of course intelligent design is not based on logic, but on faith and, faith-based as it is, it is not science.

**Unable to Ask the Right Questions**

We never have known it all. We do not now know it all. Historically, we haven’t even known how to ask the right questions. Our knowledge of the natural world could not explain the volcano or the eclipse in large part because at that stage of our knowledge we could not ask the right questions. I have no reason to believe that we know the right questions today.

If we cannot explain the bacterial flagellum, it may well be because there is not and never will be any explanation other than that it is the direct result of the intervention of a creator,² of an intelligent designer. It may also be because we just don’t know yet how to ask the right scientific question — we have not gotten it all figured out. There is a lot of scientific evidence of evolution. For me, there is no scientific reason to believe that, because we cannot demonstrate how the flagellum evolved, it is valid — let alone valid science — to say that it did not evolve.

I do have reason to believe that others take it on faith that there is an intelligent designer who, among other things, designed the flagellum. I also know that we once took it on faith that an intelligent designer erupted the volcanoes and put a lid on the sun. But I see no reason to call any of that science.

Yesterday afternoon (as I type the first draft of this piece), I was driving to an appointment in West Omaha. I turned on AM radio and tuned in to one of the Christian radio stations. The preacher was talking about this very topic: intelligent design versus evolution.³ He said that “DNA precludes the theory of evolution.” He said that the scientist who discovered DNA was an atheist and that he — the scientist — knew that DNA could not have been a result of evolution. But, he was an atheist and he refused to believe in God. So this scientist was stuck, said

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² The bacterial flagellum was first used as evidence of creationism. *Kitzmiller*, 2005 U.S. Dist. LEXIS at *44. Now it is used as evidence of intelligent design.
³ I know this much about the program. It was on KLNG 1560 AM on the local radio dial. The program in question was heard on Thursday, Jan. 19, 2006, sometime between 2:30 p.m. and 3:30 p.m.
this preacher: Evolution could not explain DNA and, since, for him, there was no God, the existence of God could not explain it either. So the scientist came up with a third theory. That third theory, according to the preacher, is what has become the current theory of evolution. I’ll quote the preacher: “The current theory of evolution is that the planet was seeded with sperm from outer space.” (Evolution is not pretty.)

I don’t think we yet have enough knowledge to even ask the right questions.

The Solution to the Controversy Surrounding the Teaching of Intelligent Design in Science Class

There is, of course, currently a controversy — and some litigation — over the teaching of intelligent design in science classes in elementary and secondary schools. To my way of thinking, the solution to this problem is so simple.

Me: In some other class, you teach that there is a controversy. In a civics class, for example, you teach about the controversy between evolutionary theory and intelligent design. Or teach it in a philosophy class.

Don’t teach it as science, because it is not science.

Judge John E. Jones III: I agree with Judge John E. Jones III from the United States District Court for the Western District of Pennsylvania. In his opinion regarding the Dover Area School District mandate that intelligent design (referred to therein as “ID”) be a part of ninth grade biology classes, he took all the evidence either side wished to present and he said this: “After a searching review of the record and applicable caselaw [sic], we find that while ID arguments may be true, a proposition on which the Court takes no position, ID is not science.”

True or not true, that is not the point. The point is this: Is it science?

The Vatican: And look who else seems to agree — the Vatican. “The official Vatican newspaper published an article this week labeling as ‘correct’ the recent decision by a judge in Pennsylvania that intelligent design should not be taught as a scientific alternative to evolution.”

This makes perfect sense to me: Mixing religion in with science dilutes the science. And it is just as true that mixing science in with religion dilutes the religion.

I do not say that there is not an intelligent designer. I do not say that I know that the flagellum was not designed by an intelligent designer. Or that the fire on the mountain and the “lid” over the sun are not the result of the direct intervention of an intelligent designer. I just say it is not science.

I just say that it is no more science than the theory “that the planet was seeded with sperm from outer space.”

I take it that Pat Robertson believes in intelligent design. When Israeli Prime Minister Ariel Sharon had his massive stroke and went into his coma, Pat Robertson said that God did it. In an effort to bring peace to the Palestinians and the Jews, Sharon gave the Palestinians some land. In an effort to preserve a majority Jewish democracy in that area of the world, Sharon gave the Palestinians some land. Robertson said that because Sharon gave up some of God’s land, God struck him down.

I’ve seen Ariel Sharon on television. I mean no disrespect to the Prime Minister, but he must have weighed 300 pounds. I am not sure it was God who brought him down.

I think it may have been the shwarma, falafel and Matzah Kugel.

Pat Robertson believes in an interventionist God — intelligent design purposefully carried out each and every day in the design of bacterial flagellum and Prime Minister Sharon’s coma.

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6. “It only creates confusion between the scientific plane and those that are philosophical or religious.” The New York Times, supra (quoting L’Osservatore Romano).
7. I do not mean that ID necessarily argues that God intervened and, to punish Sharon or to stop him, flung stroke-lightning at him. Many Christian leaders have stepped forward to criticize what Robertson said. And credit to President Bush; he condemned Robertson’s statement.
Fred Phelps’ View of Intelligent Design

Pat Robertson’s view of the work of the Lord is not as extreme as that of the Rev. Fred Phelps. He is a disbarred lawyer who is a reverend with a small congregation in Topeka, Kan. Almost every member of his small congregation is either a blood relative or married to one.

He used to picket the funerals of homosexuals. He and his small band of followers were outside the Matthew Shepard funeral, for example.

Now Phelps is picketing the funerals of American soldiers killed in Iraq. Here is his “logic.” Our soldiers deserve to die because this country is so tolerant of homosexuals.

On his website, he states that his church — and, just to make sure the attribution is not missed, I am now quoting his website — “engages in daily peaceful sidewalk demonstrations opposing the homosexual lifestyle of soul-damning, nation-destroying filth. We display large, colorful signs containing Bible words and sentiments, including: God hates fags, fags hate God, AIDS cures fags, thank God for AIDS, Fags burn in Hell … [et cetera, ad nauseam].”9 Bible words and sentiments: Anything that starts with a screaming “GOD HATES” loses me as a Bible sentiment, no matter what follows.

I guess that the Rev. Fred Phelps believes in an interventionist intelligent designer who sends our young fighting men and women to their death because, as a country, we are tolerant of homosexuals.

Pat Robertson actually makes me feel sorry for the intelligent proponents of intelligent design. They have to be inevitably linked with men like Robertson.

As regards to Fred Phelps, I am unaware of anyone who links him with anything. It seems that the main way he gets church members to reproduce them. I don’t know Fred Phelps. I could be wrong about this, and there probably are people who would disagree with me, but he seems like a man at war with his own sexuality, a war he is not winning.

Evolution occurs in the natural world. It also occurs in the world of constitutional law. The most significant evolution in constitutional law has been the 200-year increase in federal power.

Presidential Power in Time of War

Evolution in the World of Constitutional Law

Evolution occurs in the natural world. It also occurs in the world of constitutional law. The most significant evolution in constitutional law has been the 200-year increase in federal power.

In the news these days is the evolution of executive branch power. We began as a country rebelling against a king. We began as a country afraid of too much executive power. We began with an executive branch of very limited powers.

No longer. Today the president’s powers are far greater than anything the
framers of the Constitution ever would have imagined.

The first step in this evolution, I think, was taken by President Thomas Jefferson. There was a man who believed in limited federal power, limited power for all three branches. He famously believed in limited executive powers. He spent much of his career battling the Federalists, including John Marshall’s Supreme Court, on this very point. And then one day France offered to sell him the Louisiana Territory. By all accounts, he did not believe that the executive had the power, on his own, without congressional authorization, to do this sort of thing. It was a legislative function.

But the land was offered and he purchased it. And he did so without seeking congressional approval.

The second large step was taken by President Abraham Lincoln. During the Civil War, Lincoln took it upon himself to suspend the writ of habeas corpus.\(^9\) By executive act, he suspended individuals’ access to federal courts.

The third large expansion of executive power came about as a result of our attempt to get the country out of the Great Depression. FDR and the New Deal brought us government by administrative agencies under the control of the executive branch. The president is at the head of and in charge of this sea of agencies that today make many of the important domestic policy decisions — decisions that to many of us seem to be legislative in nature.

The fourth period of great growth in executive power came during the Cold War (including Korea and Vietnam), when we saw a tremendous expansion of the president’s military powers.

This brings us to today, and the fifth era of expansion — the post-9/11 era. In response to the war on terrorism, President Bush has asserted greatly expanded executive branch powers:

- **Enemy Combatants**: President Bush has asserted the right to arrest American citizens, classify them as “enemy combatants,” and detain them without trial or access to counsel.

- **Domestic Wiretaps**: President Bush has asserted inherent executive branch power to wiretap American citizens within the United States. He has not gone to Congress to get its legislative power behind what he is doing. He has not gone before a court with probable cause for a warrant to get judicial power behind what he is doing.

- **Interrogation Techniques**: President Bush has asserted the right to authorize executive branch agents to use interrogation techniques that some consider torture or at least cruel and inhumane. Sen. John McCain (R-Ariz.) — who, of course, is a former prisoner of war — recently got a statute passed that bans cruel, inhumane or degrading treatment of prisoners in American custody.\(^11\) President Bush signed the bill into law and then, later that same day, followed up with a “signing statement.”

The president’s signing statement said that the administration would interpret this statute “in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch and as commander in chief and consistent with the constitutional limitations on judicial power.”\(^12\)

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10. There was so much opposition to this suspension that Lincoln did, in the end, seek and receive congressional approval. Act of March 3, 1863, § 1, 12 Stat. 755.
12. Andrew Sullivan, “We Don’t Need a New King George: How Can the President Interpret the Law as if it Didn’t Apply to Him?” *Time* (Jan. 23, 2006) (“If the President believes torture is warranted to protect the country, he’ll violate the law and authorize torture. If the courts try to stop him, he’ll ignore them too.”)
I do not recall such a statement of defiance of the judicial branch since President Richard M. Nixon sent out word that if the court ordered him to turn over the Watergate tapes, he would not do so. Of course, the court did order him to turn them over, and he did so. He did not have the option to secretly ignore the court’s order. He had to comply or face the consequences. If President Bush chose to ignore a court order on “cruel, inhumane or degrading treatment,” we might never know about it.

These three examples — enemy combatants held without access to the outside world, executive agents secretly listening in on confidential conversations of American citizens and secret interrogations by unknown means of American citizens and others — are tremendous expansions of executive power and many of them are secret expansions of executive power.

The question for me is twofold. First, do you trust this current president enough to want him to have this kind of power and to be able to exercise so much of it in secret? I have my own answer to that question. You may disagree with me. You may say, as Harriet Miers did, that he is the most intelligent man you’ve ever met.

Whatever your answer to that first question, there is still this second question: Even if you do trust this president to use this power wisely and judiciously, he won’t always be president. Once the power is expanded, it is rarely contracted. Do you trust the next president with this kind of unilateral secret domestic power?

I do not deny that a strong president is necessary in today’s world — necessary, among other things, to respond to the threat of terrorism. I understand Cicero’s comment, from the first century B.C.: “During war, the laws are silent.”

Nonetheless, it is self-evidently extraordinary for our president to have the power to secretly designate people enemy combatants and to secretly hold them until either he decides to release them or the war on terror is over (i.e., the power to hold them forever) and to do so without even letting anyone on the outside know they are being held, let alone granting them access to an attorney or a judicial hearing. And it seems almost self-evidently unconstitutional at least in the case of citizens arrested or held within the United States.13

Likewise, I do not see any reason why domestic wiretaps of American citizens cannot be reviewed by a judge, even if it is a judge on the secret FISA court. The FISA court is a creature of the Foreign Intelligence Surveillance Act (FISA).14 It is made up of 11 Article III judges from around the country and it operates in secret.

This court has the benefit of having been authorized by Congress and it requires annual reports to Congress. The president’s use of this court would

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13. And the Supreme Court agrees: *Rasul v. Bush*, 542 U.S. 466 (2004) (federal courts have jurisdiction to hear *habeas corpus* petitions from Guantanamo detainees “imprisoned in territory over which the United States exercises exclusive jurisdiction and control” who allege that they are being detained unlawfully); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (“[D]ue process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”) (plurality opinion).

have behind it not only the executive branch’s own powers but also those of the legislative branch. In addition, it brings into the mix the judicial branch.

If FISA is too slow, if its procedures are too cumbersome, if there is something wrong with FISA and it leaves us vulnerable to terrorists, then go to Congress and get it fixed.

The separation of powers is a large part of the genius of our system. It is one of our core principles. Like the framers of the Constitution, I worry about having too much power concentrated in any one branch and particularly about having it secretly concentrated in any one branch.15

Furthermore, I am troubled by the president’s statement the day he signed Sen. McCain’s legislation limiting interrogation techniques. He will, he said, interpret the statute “in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch and as commander in chief and consistent with the constitutional limitations on judicial power.” This says to me that he is prepared to ignore — secretly ignore — what Congress has said when it is inconsistent with his view of his constitutional authority and, if it should be discovered and a lawsuit filed, he is prepared to ignore — secretly, again — any judicial judgment interfering with his acts. His view of separation of powers is that so long as he has declared that we are at war with terrorism, his powers as commander in chief and his authority “to supervise the unitary executive branch” vest in him all power to combat terrorism.16

There is also the matter of due process. The most disingenuous defense of these executive powers is this: “But they are terrorists. They’d just as soon blow us to bits as look at us. What’s wrong with secretly locking up terrorists and secretly tapping the phones of terrorists and secretly torturing terrorists to get information that will save lives?” Let us say, for the moment, that there is nothing wrong with that statement. Here is what is wrong with what actually is being done. It skips right over due process of law.

Saying that someone is an enemy combatant, an innocent-civilian-killing terrorist, or that someone is on the phone with al Qaeda does not make it so. That particular defense depends on this logic: We can designate a person an enemy combatant because he is an enemy combatant; we can secretly tap a citizen’s phone to see if he is talking with al Qaeda because he is talking with al Qaeda; and we can torture someone to see if he or she has lifesaving information because he or she has lifesaving information.

Phones are not being tapped because the conversation is with al Qaeda. They are tapped to see if the conversation is with al Qaeda. Phones are tapped every day to see if there is a drug deal in the works, if there is a bookmaking operation in the house, if there is a fire being planned by environmental extremists or white supremacists — and it is all done on the authority of a warrant presented to a judge and executed upon a showing of probable cause.

This is what separation of powers is all about: This power is supposed to be dispersed; it is not supposed to be lodged entirely with one branch, let alone one man. This is an extraordinary concentration of power for a system built on separation of powers.

15. FISA operates in secret, but with the authorization of Congress, annual reports to Congress, and the participation of the Federal Courts. At least it is not one branch secretly flying all alone out at the edge of its powers.
16. Could not a president claim the same kind of extraordinary power to combat the war on drugs, a war against an enemy that has taken more American lives than the war on terror?
17. 50 U.S.C. § 1801, et seq.
As for due process, there is none here. There is none unless you count the act of the single man, the commander in chief and the head of the unitary executive branch, as due process of law. In the enemy combatant case, before the Court stepped in, the only process was secret executive branch designation.

On Jan. 31, 2006, in his State of the Union address, President Bush said: “It is a privilege to serve the values that gave us birth.” Our birthright includes separation of powers and due process. It is these core values that I wish were being better served.

The legislative branch makes the law. The president executes the law. The judicial branch interprets the law. The president has taken on the power to make, execute and interpret the law. For purposes of the perhaps never-ending war on terror, he becomes the executive-legislative-judicial branch.

I do not trust this president to exercise this kind of secret power wisely. But that is not my point. I do not trust any president to exercise this kind of secret power wisely. I do not care if it is Eisenhower, Kennedy, Johnson, Nixon, Ford, Carter, Reagan, Bush, Clinton or Bush. I do not want a president to have this power.

Conclusion

What I hope for — and what I personally do not find enough of — is that behind all of these exercises of this new executive power there is some kind of intelligent design.

Here is my solution to both these problems: Let’s take intelligent design out of science class and put it into the White House.

About the Author: G. Michael Fenner is the James L. Koley, ’54 Professor of Constitutional 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.
In her 16 years with the FBI, Kimberly K. Mertz, BSBA ’86, JD ’89, has investigated vicious drug gangs, supervised public corruption probes and inspected FBI field offices, so the violence and corruption she may encounter as Connecticut’s new head of FBI operations won’t be anything she hasn’t seen before.

Mertz is the 19th Special Agent in Charge (SAC) of the FBI’s Connecticut office. When she took over the job last Christmas Eve, she made history as the first woman to head an FBI office in New England.

The focus on being the first woman to head this office in New England has actually been a bit of a surprise to Mertz. “The first female SAC in the Bureau occurred 14 years ago, so this really isn’t that novel of an appointment from my perspective,” she said. “I just want to do the best job that I can, rather than concern myself with making a particular mark as a woman. Obviously there aren’t as many female agents as male within the Bureau, but it’s the only career I’ve known.”

As the SAC, Mertz heads the investigative and administrative operations of the field office in New Haven. She supervises about 100 agents, and as many support staff, while serving as liaison with the state’s local police departments and other federal and state law enforcement agencies.

Mertz’s career aspirations began during her childhood in Perry, Iowa. She remembers being fascinated to learn that a former FBI agent had established a law practice in her hometown. “I never had an extensive conversation with him,” recalls Mertz. “But, I remember thinking what a fascinating job that would be.”

Later, as an undergrad at Creighton, Mertz majored in accounting, one of the career areas the FBI focuses on for recruitment. She went on to the Creighton law school and worked in a local Omaha law firm during her second and third years as a student. While Mertz says she enjoyed her work at the time, a career with the FBI still lingered in the back of her mind.

“It was a lifelong dream for me, but so few people ever actually get hired by the FBI,” Mertz explained. “I just had to put in my application and hope I made it through.”

Sixteen years later, Mertz still believes she has the best job in the world, but concedes that a career in the FBI is not for everyone. “It’s really important to be flexible and open to change because you’ll continually be taking on new assignments and living in different cities,” said Mertz. “I love the fact that, since the start of my career, no two days have ever been alike. I’m fortunate to have found a place in a career I love.”

Mertz credits her Creighton education for reinforcing the importance of public service and her desire to make a difference. “If you’re working for the government, it’s not about how much money you earn. You’re here because you’re trying to make a difference,” she said. “At Creighton, everyone reinforced and supported my goals to pursue a career in the FBI. I chose a non-traditional career path, but no one ever tried to dissuade me.”
For young lawyer Christian W. Clinger, JD’99, the past few months have been a whirlwind, with both the Utah State Bar and Utah Business Magazine honoring the Creighton alumnus with their most prestigious awards. First, the Utah State Bar named Clinger as its 2005 Young Lawyer of the Year. Then in January, Utah Business Magazine named Clinger, who has only been a member of the bar for six years, as one of Utah’s 2006 Legal Elite.

“These awards came as a complete surprise to me and I am humbled by the responsibility that comes with this recognition,” said Clinger. “It is a privilege to be a member of the Bar and to serve the legal community and the public at large. However, with the privilege of being a lawyer come certain responsibilities. I believe lawyers not only have an inherent responsibility to help others understand the rule of law and respect our legal system, we also have a duty to ensure that all people have access to it.”

Clinger’s philosophy and commitment to community service have certainly played a large part in the recognition he has received. During the past five years, Clinger has served as an active member of the Utah State Bar Young Lawyers Division and as its president. Currently, he is a member of the Utah State Bar’s Governmental Relations Committee and is the co-chair of the Bar’s Annual Convention.

During his tenure as a Young Lawyer, Clinger helped to raise more than $30,000 to fund pro bono community legal programs, oversaw clothing drives to clothe more than 100 disadvantaged people for job interviews and coordinated landscaping for several Children’s Justice Centers throughout Salt Lake City. He also taught K-12 students about the importance of the rule of law and the legal system, mentored law students and served on continuing legal education committees. Currently, Clinger also serves as a volunteer community mediator for Utah Dispute Resolution.

Prior to founding Clinger Lee Clinger with his wife, Suzanne, Christian was an attorney with Callister Nebeker & McCullough in Salt Lake City. From 2000-2001, he was a judicial law clerk to then-Presiding Judge Frank G. Noel, Judge David S. Young and Judge Roger A. Livingston of the Third District Court, state of Utah. Before attending law school, Clinger served as a special assistant in California State Treasurer Matt Fong’s administration.

At Creighton, Clinger excelled in moot court and negotiation competitions — an experience he credits with providing the practical background that has contributed to his success. In 1997, Clinger won the Creighton Law School Moot Court competition with his teammate Maureen Ambrose, JD’99. He was also the 1997 recipient of the prestigious McGrath North Mullin & Kratz scholarship.

Of his Creighton education, Clinger said, “What distinguished Creighton for me — and why I ultimately chose it over other law schools — is its focus on the practical. You can sit in any classroom and learn the theory and the rule of law, but Creighton really focuses on putting those skills into practice. I will be forever indebted to Creighton University and Creighton Law School for my education, not just in the law, but also in helping me to become a better person.”
While many Americans may have little awareness of what the Financial Crimes Enforcement Network (FinCEN) does in the fight against terrorism, FinCEN is definitely a key player. The department administers the Bank Secrecy Act (BSA), which authorizes the collection, analysis and dissemination of financial information important to the prevention of money laundering and terrorist financing. In August 2005, Creighton alumnus Brian L. Ferrell, BA ’85, JD’88, was appointed by the Treasury general counsel to serve as FinCEN’s chief counsel.

“It’s a wide net that we cast, working closely with both law enforcement and financial institutions to balance what both need to operate effectively,” explained Ferrell. “The challenge is making sure that, in our fight against terrorism, we don’t overstep the bounds of privacy to attack what we may perceive as a threat.”

In his new role, Ferrell supervises the attorneys and support staff that provide legal advice to FinCEN officials across the full range of their responsibilities, including issues relating to the administration of the BSA, domestic and international aspects of information law, inter-agency information-sharing, the use of information in enforcement operations and proceedings, international law relating to counter-money laundering efforts and administrative law.

Before becoming chief counsel at FinCEN, Ferrell served as chief counsel of the Bureau of the Public Debt. Prior to that, he served as the U.S. Treasury's senior counsel for litigation. Before joining the Treasury in July 2001, Ferrell spent nearly eight years as a trial attorney at the U.S. Department of Justice where, among other awards, he received the John Marshall Award for Participation in Litigation, the Department of Justice's highest award for litigation.

Maintaining strong ties to his alma mater, Ferrell not only earned both his bachelor's degree and law degree from Creighton, but also served for two years as an assistant dean at the University.

Having now returned to government service, Ferrell still enjoys the many calls he receives from Creighton students seeking career advice. “What I was fortunate enough to have, coming out of Creighton law school, were people who believed that I had what it took to go places,” said Ferrell. “Creighton students need to know that their degree is just as good as anyone else's and to take advantage of the close-knit network of alumni who would like nothing more than to help them achieve their career goals.”

Ferrell’s devotion to Creighton continues to this day — a devotion that he has passed on to the next generation.

“One of the reasons I love Creighton so much is for the set of values that everyone at the University seems to live by,” said Ferrell. “For example, this past fall, when the Creighton men's soccer team was playing at Clemson, my sons and I drove down from D.C. to watch the team play, staying in the same hotel as the team. Head Coach Bob Warming not only recognized us from his soccer camps, but made a big deal about the boys coming all that way. The coaches made sure that all of the players signed the boys' T-shirts and, without exception, each player thanked the boys for coming to see the team play. My boys just thought the world of it and you better believe that they both want to go to Creighton. To me, that really sums up the essence of the environment and values of Creighton — that no matter what happens you always look out for and show kindness to others as best you can.”
Student Reflects on International Experience

By Asja Zujo, Creighton University School of Law Third-Year Student

From July until December 2004, I worked as an intern at the Office of the Prosecutor (OTP) of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Hague (the Netherlands). As the first international criminal tribunal since Nuremberg, the ICTY has been entrusted not only with the prosecution of those who committed war crimes in the territory of the former Yugoslavia, but also with the interpretation of international law and the setting of important international precedent, to be followed by subsequent tribunals such as the International Criminal Court, also situated in the Hague. I found the six months at the ICTY to be a valuable and enriching experience for two very distinct reasons.

First, having studied the tribunal closely in my second year of law school (in International Criminal Law), I was excited at the opportunity to see firsthand how this complex organization functions internally. As an intern at the OTP, I worked with a team of lawyers and political and military analysts on an indictment that was issued in early 2005. I closely analyzed former Yugoslav law, as well as the theory of command responsibility, on which we hoped to base the indictment. I presented my findings to the chief prosecutor as part of a team presentation. Because of my involvement in the preparation process, I gained a stronger and broader understanding of the ICTY and its mission.

My experience at the ICTY was also meaningful on a more personal level. Having lived through the recent war in Bosnia and Herzegovina, I saw my internship as an opportunity to directly contribute to the process of reconciliation in my country. The prosecution of those who are responsible for the atrocities committed between 1992-1995 is a crucial aspect of the reconstruction in Bosnia and Herzegovina. As part of this process, a special war crimes department was established at the new State Court in Bosnia and Herzegovina. Some of the cases to be prosecuted by this department will be transferred directly from the ICTY. Thus, following my six months at the ICTY, I decided to do an internship at the State Court of BiH in Sarajevo.

This experience gave me a different perspective on war crimes prosecutions — this time in a domestic setting. The War Crimes Department at Court of BiH is faced with certain challenges that the ICTY was able to avoid by virtue of being an international body. First, despite the presence of international judges and prosecutors, the Court will have to work hard to assert itself as an independent and un-biased judicial body, prepared to prosecute all war criminals regardless of their allegiance.

Moreover, many of the cases will be referred to district and cantonal courts in the two entities created by the Dayton Accord. The very existence of one of those entities, the Serb Republic, can be said to have legitimized the results of the aggression on Bosnia and Herzegovina. Thus, it is not difficult to predict that the prosecution of war criminals by the courts of this entity will be subject to skepticism among the members of the public.

Finally, the Bosnian judicial system is still undergoing significant procedural and substantive changes. In addition to embracing the new system, Bosnian judges and lawyers are forced to learn how to conduct war crimes prosecutions in a very short period of time. Needless to say that the 10 years of experience of the ICTY will provide an important foundation for the work of the War Crimes Department. Yet, the Court of BiH will have to stand on its own as it fulfills its obligations toward the BiH public and the generations to come.

Through my experiences at these institutions, I was able to see firsthand the difficulties and challenges related to war crimes prosecutions. Working at the War Crimes Department at its inception gave me valuable insight into the complexities of transitional justice — something that countries other than Bosnia and Herzegovina are currently experiencing and will experience in the future.