BIRMINGHAM SCHOOL of LAW

Fall 2016
Edition 2

Judge Hugh Locke Honor Society Newsletter

231 22nd Street South, Birmingham, Alabama 35233

WELCOME

By Sharon Waltz,
Chair, Newsletter Committee

Welcome to the Second Annual Edition of the Birmingham School of Law Newsletter! Many thanks to the faculty, students and advisors who contributed to this edition. Our purpose was to give fellow students and advisors an opportunity to share articles and opinions pertaining to national, state and local legal issues. I am proud of the accomplishments of the team and continue to be impressed with the talent that I have encountered at BSOL. We hope you will enjoy this edition! I also want to wish you all the best of luck in your endeavors! Along your journey, don't forget to stop and smell the roses. Carve out time for yourself to relax and to spend with your loved ones. Cherish the new friendships you make and memories you create while in law school. The experience will be over before you know it!

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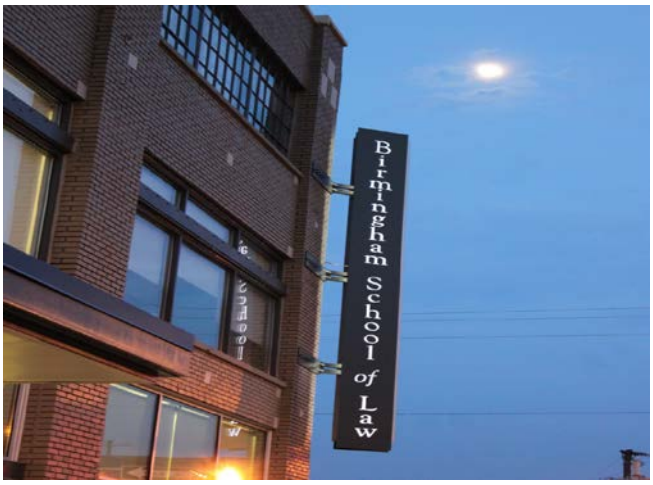


From the President

By Anthony Coleman

To all new students and existing students alike, I want you to be successful in your legal education and careers. A lot of people will tell you that you need to stay motivated to do so. Those people are wrong. Motivation is when action is conditioned on feelings. Discipline is when you sever the association between feelings and actions, and do it anyway. Productivity requires no requisite state of mind. For consistent long-term results, discipline will trump motivation. Waiting for the right mood or trying to drum up enthusiasm (a.k.a., getting motivated) is literally a form of deliberate mental and spiritual self-harm, an intentional psychosis if you will. It is often a fatal error to approach work in terms of motivation or lack thereof. The solution is discipline, not motivation.

Motivation is often why people start a race, but discipline is always why they cross the finish line – especially those at the front of the pack. Find what works for you and if you stay disciplined enough to do it consistently, then you will be successful.

From the Vice President

By Payton Garner

To be eligible for membership of the Judge Hugh Locke Honor Society, the prospective initiate shall be those students in good standing at the Birmingham School of Law, and shall have completed at least 10 semester hours with a minimum grade point average of 3.0 on a 4.0 scale. A student in good standing is regarded as having complied with his or her explicit obligations to Birmingham School of Law. Students with outstanding tuition payments will not be considered in good standing.

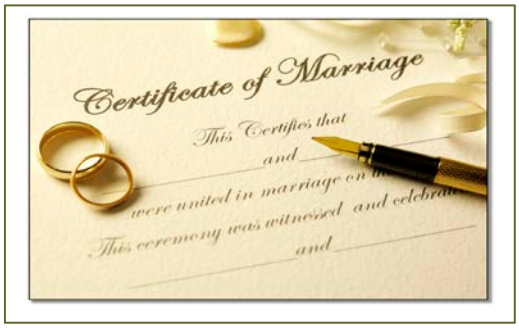
To maintain active status as an JHL member, the bylaws require that all members maintain a 3.0 or higher cumulative grade point average. Failure to maintain the minimum grade point average will result in the member being placed on probation for one semester. If, at the end of the probationary semester, the member has failed to raise their cumulative grade point average to the required minimum, their membership will be terminated.

Regular weekday scheduled meetings will be held the second Thursday of every month, beginning at 5:30 P.M. in the Trial Room. Weekend meetings will be held the second Saturday of every month, beginning at 8:30 A.M. in the Trial Room. An active member may be placed on inactive status upon missing 3 consecutive meetings or attending less than half the scheduled meetings in a semester. The member must submit a request in writing to the President to show good cause to restore active status. No member may maintain an inactive status for 2 consecutive semesters.

I encourage those who are eligible to apply for JHL to send me your application at the end of this semester. JHL is a great opportunity to get involved with our classmates and to give back to our community. Applications will be sent out after fall semester grades are submitted. For more information, please visit our website at www.jhlhs.org.

Alabama to End Common-Law Marriage – An Introduction

By Johnny Adams



MONTGOMERY, AL – Governor Robert Bentley signed legislation into law on May 3, 2016 that will bring an end to common-law marriage in the State of Alabama. The new law will go into effect on January 1, 2017. Anyone who is common law married prior to January 1, 2017 will be "grandfathered in." In other words, those who were common-law married prior to January 1, 2017 will remain married after the new law goes into effect. Rep. Michael Jones, R-Andalusia, sponsored the bill in the legislature. Under the new law all marriages must have a ceremony conducted by an authorized public or religious official and the couple must obtain a marriage License.

According to the Alabama Attorney General website, "A valid common-law marriage exists in Alabama when there is capacity to enter into a marriage, present agreement of consent to be husband and wife, public recognition of the existence of the marriage, and consummation."

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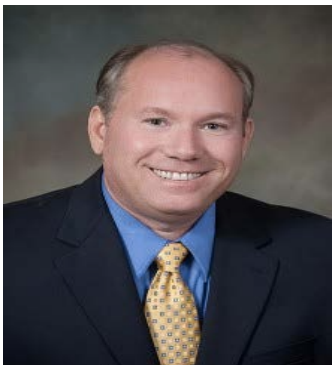
Waller v. Waller, 567 So.2d 869 (Ala. Civ. App. 1990). See also, *Hudson v. Hudson*, 404 So.2d 82 (Ala. Civ. App. 1981), and Attorney General's Opinion 1992-041.

In Alabama there is no such thing as a common-law divorce. Therefore, whether a couple is married during a ceremony and have a marriage license or a couple is married through common-law marriage, they must follow the legal steps of obtaining a divorce through a court of law if they desire to divorce. According to al.com, after Alabama's new law comes into effect only eight states will remain that allow common-law marriages.



Common-Law Marriage: The End of an Era

By Judson T. Sills

The end of an era of common-law marriages in the State of Alabama will be a thing of the past when House Bill 332 goes into effect on January 1, 2017. On February 25, 2016, Rep. Mike Jones, R-Andalusia, introduced House Bill 332, which would effectively abolish common-law marriages in the State of Alabama. The bill, signed by Governor Robert Bentley on May 3, 2016, will prohibit anyone from entering into a common-law marriage on or after January 1, 2017. However, common-law marriage entered into before January 1, 2017, will still be valid.

Common-law has been a major part of the framework of our laws in this state and across the country for many years. Black's Law Dictionary defines common -aw marriage as:

> "A marriage that takes legal effect, without license or ceremony, when two people capable of marrying live together as husband and wife, intend to be married, and hold themselves out to others as a married couple."[1]

Alabama courts have set clear guidelines as to what is required to constitute a valid common-law marriage. In *Hawkins v. Hawkins*, the Alabama Supreme Court held that a formal consent by plaintiff and defendant to be man and wife under a void statutory marriage ceremony, not consummated by cohabitation, was insufficient to establish a common-law marriage. Cohabitation is essential for a valid common-law marriage to exist.[2]

In *Lofton v. Estate of Weaver*, the Alabama Supreme Court held that the standard of review for common-law marriages required clear and convincing evidence.[3] In addition, The Court of Civil Appeals in *Gray v.* Bush, enumerated the following elements as proof that a common-law marriage exists: (1) capacity; (2) present mutual agreement or consent to permanently enter the marriage relationship to the exclusion of other relationships; and (3) public recognition of the relationship as a marriage and public assumption of marital duties and cohabitation.[4] Additional factors that judges use to determine whether a common-law marriage exist are whether the parties consider themselves married, share household duties and expenses, maintain joint accounts, file joint tax returns, use the same surname, refer to or introduce each other as spouse, listed themselves as married on documents or rear children together.

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Judges face the difficult task of determining if, in fact, a valid common-law marriage existed. Trial court judges are the ones who weigh the evidence with the credibility of the witnesses and the totality of the circumstances to determine if a common-law marriage existed beyond clear and convincing evidence. Whether the essential elements of a common-law marriage exist is a question of fact.[5] *Stringer,* supra, citing *Johnson v. Johnson* and *Arrow Trucking Lines v. Robinson*. Whether the parties had the intent, or the mutual assent, to enter the marriage relationship is also a question of fact which the trial court is in the best position to determine. In addition, the Alabama Courts have recognized the ore tenus rule, wherein a trial court's conclusion from all the evidence will not be set aside if it is supported by the evidence.

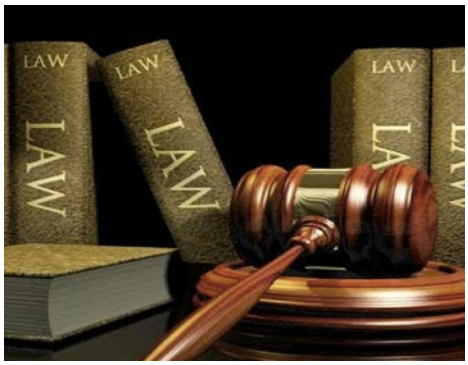
Why the major change with common-law marriage now? One of the major issues cited with common-law marriages are when conflicting evidence coupled with the ore tenus rule-leads to inconsistent rulings on these types of cases.

As each state reexamines the validity of their existing common-law marriages, Alabama has already determined the fate of theirs. A common-law union established prior to the law going into effect, would still be recognized upon proper order and proof. On the contrary, any "common-law marriage" subsequent to implementation of the new law, would be invalid.

In the history of our country, only thirteen states have never recognized common-law marriages. Once the law here takes effect, only Colorado, Iowa, Kansas, Montana, New Hampshire, South Carolina, Texas, and Utah will be the only states left that recognize some form of common-law marriage.

The end of an era in Alabama takes effect on January 1, 2017. It will be interesting to see what State(s), if any, continue Alabama's trend.

1 *Black's Law Dictionary* 813 (8th ed. 2005)
2 *Hawkins v. Hawkins*, 142 Ala. 571 (1904)
3 *Lofton v. Estate of Weaver,* 611 So.2d 335, 336 (Ala.1992)
4 *Gray v. Bush*, 835 So. 2d 192 (Ala. Civ. App. 2001)
5 *Stringer,* supra, citing *Johnson v. Johnson,* 270 Ala. 587, 120 So.2d 739 (1960), and *Arrow Trucking Lines v. Robinson,* 507 So.2d 1332 (Ala.Civ.App.1987)



Free Legal Work Pays off Big for New Attorneys

By Laura Kirby

Commonly referred to as "pro bono," the Latin phrase "pro bono publico" -- "for the public good" denotes work that is undertaken for the public without charge. Although pro bono work can be found across several professions, it has long been associated almost exclusively with the legal community. The Alabama Bar Association recognizes that all lawyers, regardless of status, workload, or professional associations, have a responsibility to provide legal services to those people who cannot otherwise afford counsel.

Though it comes as no surprise that the poor and indigent lack the monetary resources to afford legal counsel, many people do not realize that the inability to secure legal representation also extends into the middle class. The unfortunate fact is that the people occupying these two economic classes are often the people who need legal counsel the most. While it is true that the Constitution provides certain criminal defendants be provided an attorney if they are indigent, this does not absolve members of the legal profession from providing assistance to other members of the public who are just as desperate and deserving. Whether it is a large family facing wrongful eviction, or a single mother suddenly in need of disability benefits, the simple truth is that a lack of resources and a need for legal assistance creates insurmountable issues which usually prolong the negative situations people may find themselves in. What seems an impossible task for several members of our community is sometimes easily rectified by attorneys who can simply provide time and certain resources, which are most likely already at their disposal.

Although pro bono work is designed to extend legal services to a client who lacks monetary resources, the attorney performing the work may reap their own benefits from the free legal services they provide. Established attorneys may view pro bono work as a way to give back to people in their community or provide benefits certain charitable organizations. In this way, pro bono work can be personally fulfilling and may satisfy those with a philanthropic spirit. However, it is not only the established attorney that can benefit from volunteering legal services, but new attorneys may be able to reap benefits that extend beyond the concept of charity.

Consider the value of volunteering at a legal services center if you have not secured employment prior to graduation, or even if you have! Several local centers offer training to new attorneys who agree to work under seasoned lawyers who are also volunteering their time to these organizations. While most legal services centers will train new attorneys on specific aspects of legal work, the benefit does not stop there. As the new attorney volunteers his time, he is also presented with opportunities for continual learning as he applies legal skills and knowledge gained in law school to real life fact patters and scenarios. The educational benefit is especially valuable for new attorneys while they seek out full-time paying positions. Not only will you be able to add experience to your resume, you can also build confidence when you begin putting your knowledge to work.

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Pro bono work can also help new lawyers explore various career options and different fields of law. Several attorneys pass the bar each year still unsure about which field of law they would prefer to follow. Also, there are situations where attorneys find themselves practicing certain types of law that leave them feeling unfulfilled. When doing pro bono work, new lawyers can work with various types of clients in virtually any field of law. They can ascertain what they like and what they do not prefer. While narrowing down career paths and finding that perfect fit, the attorney is providing a valuable service to the public.

Volunteering time and engaging in pro bono work can also assist new attorneys in developing professional contacts and building a solid network. Lawyers fresh out of law school seldom have a solid social network, which is invaluable in the practice of law especially when you find yourself in need of a favor or some helpful advice. Volunteering your services for pro bono work can assist you in creating new contacts as you meet other lawyers, argue cases in front of judges, and find your way around the courthouse.

The benefits of performing pro bono work are numerous and law school students can start engaging in pro bono work now, as it is not limited to those who have graduated law school. Whether it be a solo practitioner, or an attorney who accepts cases on behalf of a non-profit organization or a public charity, there are several places that law school students can make a difference. Most lawyers working a pro bono case are usually doing so without the support of an assistant in order to reduce their own costs and expenditures. Law school students who volunteer to support these attorneys not only allow the attorney to take on additional clients in need, but set themselves up to reap their own personal benefits in the future.

The Alabama Bar Association recognizes October as National Pro Bono Month. For more information you can visit https://www.alabar.org/for-the-public/pro-bono-month/.

A Salute to Anthony Coleman

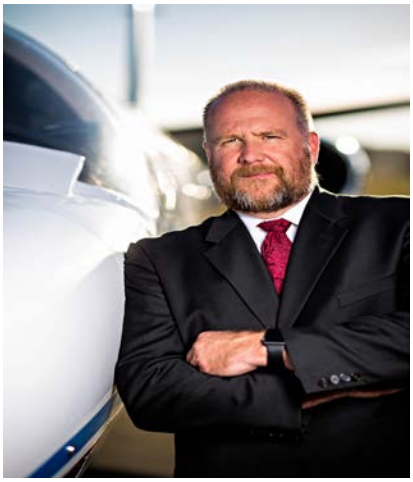
Judge Hugh Locke Honor Society President

2016-2017

Thank you for your dedication and service.

Aviation Law – A Personal Perspective

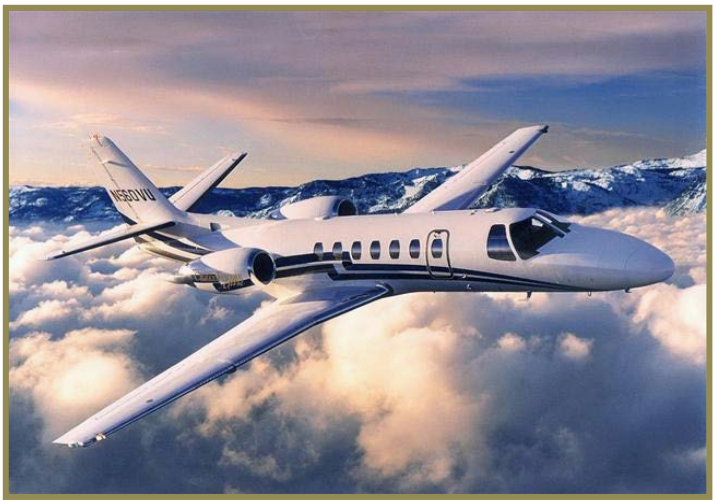
By James B. Andrews, Jr.



Have you ever thought about taking flying lessons as a hobby or to just get away and relax somewhere? Then think no more and go watch the movie *Sully*! Aviation is one of the most highly regulated industries in the country. Becoming a pilot is a demanding venture that requires annual training, as well as passing mental and physical health evaluations.

If you do want to become a pilot, your law degree will come in handy! Aviation law is one of the more complex specialties, with volumes of federal regulations. Pilots must be able to think on their feet and make sound decisions in sometime as little as a few seconds. The decisions range from, *"What does the law say that I need to do?"* to *"What do I do to keep my passengers alive and safe?"* Yes, your passengers' lives are much more important than yours as the captain of a flight.

You must consider the legal ramifications of every decision while in the cockpit. The captain is liable for any incident that may occur while flying. Pilot error and poor preflight planning are the two most common causes of aviation accidents. As a result, it is not uncommon for a seasoned pilot to try to expand his profit margin and lower his exposure by simply owning several aircraft and hiring other pilots to fly them. He may also opt for offering flight instruction through his flight instruction corporation, but several other challenges arrive for that aircraft owner and operator.



Historically, many states held owners liable for air crashes on the theory that an aircraft was a "dangerous instrumentality". The belief was that the law should hold the owner responsible for whatever harm was created by their aircraft. Modern laws usually do not impute liability to owners unless they have some personal negligence or are the employer of the party who was personally negligent. The current trend in the law, *Brown v. Astron Enterprises & NAFTA et al, 989 F. Supp. 1399 (1997),* is to protect innocent owners against liability exposure for the negligence of others who are using their aircraft. However, businesses and commercial operations that have an FAA certification and employ pilots to fly for them while under their operational control usually cannot avoid liability for their negligence or the negligence of their pilots.

Becoming a pilot is a dream of many, but a reality of few. Do your homework if you intend to undertake this adventure. Make sure you understand your liability exposure. Also consider that if anything were to occur, the owner-operator will be looking for a good attorney! As the pilot in command of a flight that goes awry, you will need a good attorney too! So, if you do want to relax and take to the skies, be informed and be safe!

Address from Professor Scott Garrett
JHL Faculty Advisor

I hesitate to venture to guess how many of you are familiar with the show, but in the early eighties, Showtime aired a weekly dramatic series entitled *The Paper Chase.* The series, based on a book published in 1970 and a motion picture adaptation produced in 1973, revolved around the struggles and relationships of a Harvard law student named Hart. Young Mr. Hart is a humble, intelligent, and brand new student of the Law. Hart's primary (if not sole) antagonist is an aged, humorless Contracts professor named Kingsfield (Law is the Field of Kings, get it?), a character impeccably played in both the movie and the series by the late British actor John Houseman. Both the series and the movie begin in Kingsfield's class on Hart's first day of law school. Tardy, disorganized, and unprepared, Hart receives the grilling of a lifetime from Kingsfield for not having read *Hawkins v McGee*, the first assignment (at one point Kingsfield asks a standing Hart, "You are on your feet?" as though he is convinced that Hart is unsure of his own verticality). After granting the stricken Hart permission to retake his seat, Kingsfield holds up a piece of imaginary cloth by the fingertips of each hand and says, "You see this? This is a shroud, Mr. Hart. A burial garment...a winding sheet…for the dead. This is for you, Mr. Hart…the late Mr. Hart." Kingsfield then pretends to lay the invisible shroud over the corpse of Mr. Hart's legal career. Before the midpoint of his very first class in law school, Hart is declared dead and buried by Kingsfield, the embodiment of the Law. Thus, Hart's pursuit of his law degree, his "paper chase," becomes more than an exceptionally difficult rite of passage to a rewarding and lucrative legal career, but a metaphorical struggle to once again be considered relevant and vital in the eyes of what he values most, the Law. In other words, Hart's struggle for the succeeding three years is not with Kingsfield the man, but with the Law itself.

As BSL students, your struggle with the Law is similar to Hart's in many ways. You endeavor to memorize volumes full of Black Letter Law and to comprehend the reasoning behind it. You strive to make cogent, logical arguments on cue with varying degrees of success. You cram for exams and fret over what you may have missed or misunderstood. Like all other law students in every other law school in the country, you work to develop an understanding of the material with which you are presented. Like Hart, you work not to let the Law (or me) bury you.

The struggle for most of you, however, differs from Hart's in that yours is intensified by the demands of your lives as working adults. Most students at the Birmingham School of Law live harried, strained existences rife with obligations other than your studies. Unlike Hart, you do not have the luxury to sit in undisturbed meditation of the Law in the abstract, for there are things that must be done – bosses to obey, errands to run, children to feed and transport. Almost on a daily basis, your struggle is not necessarily to properly address the Law in all of its imposing majesty, but to find the opportunity to address the Law *at all*.

Now, there are those that hasten to point to this fact and denounce BSL students as lesser students of the Law. In doing so they not only belittle our institution and our ability, more importantly they minimize our effort. In fact, the only thing that disappoints me more than such assertions from outside the school is to understand that any BSL students, overtly or tacitly, consciously or unconsciously, accept them as true. In fact, I often assert the opposite. I assert that whatever we might lose to a paucity of time is more than compensated for by desire. In a program like ours, the Law does not come to us. By necessity, you *must* have more tenacity than the traditional law school student. You must have the will to chase the Law down for yourselves. That tenacity is not to be denigrated, but *respected and admired*.

My affection for this program and students that come here to better themselves is no secret. I and others on the faculty are dedicated to this program and to your success. I am sure you have all heard that, in a program such as ours (and I often say this), you get out what you put into it. I am proud of my role as Faculty Advisor to the JHLHS, and even more proud to be one of your instructors. You should be proud of your struggle to become a BSL graduate and a *lawyer*, because by the time you finish (and speaking of the late John Houseman), you will truly have *earned* it.

Is Eight the New Nine?

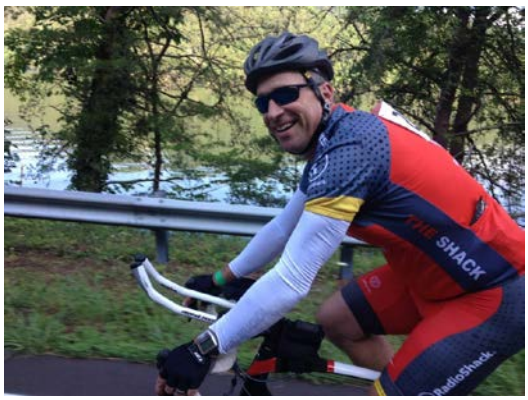
By Doug Tinkham

"Convenience and efficiency," we have repeatedly recognized, "are not the primary objectives" of our constitutional framework, *N.L.R.B. v. Noel Canning*. Conflict over the meaning of certain excerpts of the Constitution, as well as their appropriate and proper application, are as old as the document itself. Nothing in today's political climate exemplifies this more than the conflict regarding the current Supreme Court vacancy. The Judiciary Act of 1789 codified that the Court be comprised of six members, one chief justice and five associate justices. Congressional allotment of Justices has vacillated over the years, finally settling at nine in 1869. Both Presidents Andrew Johnson and Franklin Roosevelt were denied by Congressional action when they attempted to sway the court through additional appointments. While the Court established its immense power of Judicial Review in the landmark case of *Marbury v. Madison, 1803*, such power offers little remedy as to the political posturing between the Executive and Legislative branches regarding Court size; "…*and he [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments*…"U.S. Const. art. II, § 2, cl. 2. Such language leaves little room for debate as to any applicable power vested in the Court regarding the number of justices; but, once again, leaves open the door of interpretation between the powers vested in the Executive and Legislative branches. More appropriately, in the current environment, between Democrats and Republicans. The nomination of Chief Judge Merrick Garland to the Supreme Court once again put Constitutional interpretation to the test, pitting the President against Congress.

Ironically, the late Justice Antonin Scalia's concurring opinion in *National Labor Relations Board v. Noel Canning* reaffirms the Constitutional balance of power between the President and Senate, regarding the very type of vacancy created by his death. "When there is inter-branch disagreement that cannot be resolved through the political process, no nominee can be confirmed," *NLRB*. Opinions as well as arguments generally follow party lines, with Republicans asserting that the Senate has no duty to affirm or even vote on a nominee, while Democrats are merely demanding that the Senate fulfill its Constitutional duty of appointing the Judges of the Supreme Court.

The increase in partisan politics has exacerbated tensions between the parties regarding the trajectory of the United States creating excessive gridlock in many aspects of governance. Currently, Mitch McConnell argues that the "American people should have a voice in the selection of their next Supreme Court Justice,". However, when Democrats held the Senate, McConnell spoke out regarding such majority action on many occasions. It must also be noted that President Ronald Regan's nominee, Justice Anthony Kennedy, was confirmed during the 1988 election year. McConnell's demand for a simple up or down vote is well documented: "Even if one strongly disagrees with the nomination, the proper course of action under the Senate norms and traditions, as they have been consistently understood and applied, is not to filibuster the nominee but to vote against him or her", and "Article II Section 2 of the Constitution clearly provides that the President, and the President alone, nominates judges. It then adds that the Senate is to provide its advice and consent to the nominations that the President has made. By tradition, the President may consult with the Senators. But the tradition of "consultation" does not transform Senators into co-presidents. We have elections for that and President Bush won the last two".

But my friend from Illinois is probably suspicious that there will be success if up-or-down votes are granted because all of the judges who have been pending have bipartisan majority support. Will they refuse to accept any nominee put forward to fill the shoes of the great Antonin Scalia? Will they accept a shifting of the Court in the direction of progressive politics, or will eight become the new nine?



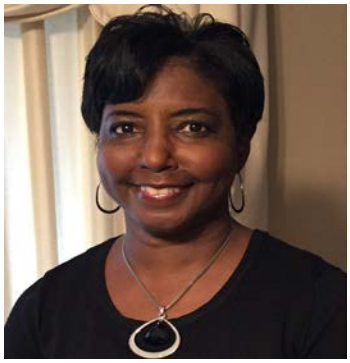
Alabama Supreme Court Upholds the Constitutionality of the Death Penalty

By: Daphne A. Hoyt

On March 3, 2016, an Alabama Circuit Judge barred the death penalty in four cases on the grounds that Alabama's sentencing scheme was violative of the Sixth Amendment and therefore unconstitutional. The judge's decision was based in part on a recent United States Supreme Court decision in *Hurst v. Florida*.[1] In that case, the court held Florida's sentencing scheme that required the trial judge alone to find the existence of aggravating circumstances was unconstitutional. The court's decision was based on the U.S. Supreme Court ruling in *Apprendi v. New Jersey*, holding that "any fact that exposes the defendant to a greater punishment than that authorized by the jury's verdict is an 'element' that must be submitted to a jury." [2]

Until recently, Alabama, Florida and Delaware were the only three states in the U.S. that statutorily allowed a trial judge to override a jury's verdict and impose the death penalty in capital murder cases.[3] However, Alabama is now an outlier because both Florida and Delaware sentencing schemes were invalidated by the court's decision in *Hurst.*[4]

"In accordance with the Alabama capital offense statue, after a defendant is unanimously convicted of a capital offense by a jury of her peers, the court conducts a sentencing hearing before a jury that decides whether a defendant should be sentenced to life imprisonment without the possibility of parole or death. Once the jury has rendered an advisory verdict, the statue requires the judge to conduct a separate sentencing hearing without a jury. At this hearing, the State is allowed to present additional evidence including aggravating or mitigating circumstances that had not been previously admitted during the trial or initial sentencing hearing. The judge also reviews a pre-sentence report prepared by the State of Board of Pardons and Paroles. This report is not made privy to the jury. After considering the evidence, the judge may override a jury verdict of life or death." [5]



The Circuit Court Judge opined that Alabama's sentencing scheme is substantially similar to that of Florida's with one noteworthy exception. Florida's sentencing scheme requires the trial judge to give great weight to the jury's recommendation and may not override the advisory verdict of life unless "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ." Alabama's capital sentencing statue by contrast requires only that the judge "consider" the jury's recommendation.[6]

In June, the Alabama Court of Criminal Appeals ordered the trial court judge to vacate her order, and uphold the Constitutionality of Alabama Death Penalty sentencing scheme. The court's decision was based on the fact that Alabama, unlike Florida, states that a capital murder defendant "is not eligible for the death penalty unless the jury unanimously finds beyond a reasonable doubt, either during the guilt phase or during the penalty phase of the trial, that at least one of the aggravating circumstances … exists." However, in *Hurst*, the United States Supreme Court held that the death penalty sentencing scheme was unconstitutional because the judge rather than the jury, determined whether aggravating circumstances existed.[7]

Please see *Death Penalty* on page 11

Death Penalty from page 10

On Friday, September 30, 2016, the Alabama Supreme Court, in a different capital murder case, confirmed the constitutionality of the death penalty. The court noted its own ruling in *Ex Parte Waldrup*,[8] stating that "the Sixth Amendment 'does not require that a jury weigh the aggravating circumstances and the mitigating circumstances' because, rather than being 'a factual determination', the weighing process is 'a moral or legal judgment.'" Thus, once the jury has made an unanimously factual determination that a defendant meets the requirements for the death penalty, the judge makes a legal determination whether to impose it.[9]

Citations:

1. *Alabama v. Billups*, No. CC-2005-001755.00, (10th Jud. Cir., March 3, 2016), citing Heery, Shannon, *If It's Constitutional, Then What's the Problem?:* The Use of Judicial Override in Alabama Death Sentencing. Washington University Journal of Law and Policy. 2010 Print.
2. *Harris v. State*, 513 U.S. 304 (1995)
3. http://www.al.com/news/birmingham/index.ssf/2016/06/alabama_appeals_court_death_se.html, last reviewed, October 10, 2016
4. *Ex Parte Waldrop*, 859 So. 2d 1181 (2002)
5. https://www.washingtonpost.com/news/post-nation/wp/2016/09/30/alaba...tes-death-penalty-system-is-constitutional/?utm_term=.9fdac7565b07, retrieved September 20, 2016

Federal Government's Motion to Dismiss Denied in Landmark Climate Change Lawsuit

By Harris R. Frank

Most people know about global climate change. In fact, most of us probably believe (at least to some degree) that it poses an imminent danger to humanity. It has been said, however, that we demonstrate a very weak belief in general, as evidenced by our lack of action in attempting to prevent or reduce future ecological catastrophe. The psychoanalytic philosopher Slavoj Zizek diagnoses this lack of action as follows:

> "I know very well (that global warming is a threat to the entire humanity), but nonetheless…(I cannot really believe it). It is enough to see the natural world to which my mind is connected: green grass and trees, the sighing of the breeze, the rising of the sun […] can one really imagine all this being disturbed?" [1]

Put simply, there is a split between our intellectual understanding of climate change and our day-to-day experience (e.g. the sun rises and the sun sets as it always has), which makes it difficult for our common sense to accept that the flow of everyday life could really be disturbed at such a fundamental level.[2]

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This split arguably sets the stage for *Juliana, et al. v. United States, et al*[3], a lawsuit recently filed in the U.S. District Court for the District of Oregon, which has been heralded by some environmentalists as "the most important lawsuit on the planet right now."[4] Plaintiffs, twenty-one young people from across the country (aged 8-19), are suing the United States and various government officials and agencies because, they claim, the "aggregate acts" of the federal government in "authorizing, permitting, and incentivizing, fossil fuel production, consumption" has caused "atmospheric CO2 to increase to levels causing Plaintiff's harm."[5] More specifically, the Plaintiffs' allege that the federal government has known for decades that its conduct has substantially increased carbon pollution, causing global warming and dangerous climate change.[6] Yet, despite this knowledge, the federal government has continued to act with "deliberate indifference" to the dangerous CO_2 concentrations it helped facilitate and enhance.[7]

It is under this backdrop the young Plaintiffs bring an assembly of substantive due process claims pursuant to the Fifth Amendment:

According to the young Plaintiffs, the deliberate indifference of the federal government has increased carbon emissions such as to "shock the conscience" and dangerously infringe upon our nation's climate system, the stability of which is critical to Plaintiffs' enumerated rights to life, liberties, and property (and already recognized implicit liberties such as Plaintiffs' right to move freely, to family, and to personnel security).[8] The Plaintiffs further assert that the federal government has violated their equal protection rights embedded in the Fifth Amendment by "[D]eliberately discriminating against children and future generations… in order to foster the short-term economic and energy interests of other classes, including corporations."[9] The Plaintiffs' complaint goes on to allege the federal government has, without due process of law, infringed upon their unenumerated and unalienable rights reserved by the Ninth Amendment[10] (i.e. "the implicit right to stable climate system, atmosphere and oceans …free from dangerous levels…of CO_2 caused by Defendants").[11]

Lastly, the Plaintiffs contend that the federal government has violated its duties to protect the territorial waters and atmosphere of the nation as commonly shared "public trust" resources under the "public trust doctrine".[12] The public trust doctrine maintains that certain vital natural resources are the shared, common property of all citizens that cannot be subject to private ownership and must be conserved and protected by the government.[13] ("As sovereign trustee of such resources, government has a fiduciary obligation to protect such natural assets for the beneficiaries of the trust, which include both present and future generations")[14]

It is worth mentioning that a similar case, *Alec L, v. Jackson*,[15] was dismissed by the D.C. district court with prejudice. The *Alec L* Plaintiffs (also children suing the federal government and represented by mostly the same counsel) maintained that federal subject matter jurisdiction existed over their claims because the federal government has fundamental public trust duties.[16] The D.C. Circuit subsequently affirmed the dismissal, determining that the Supreme Court's holding in *PPL Montana*, "directly and categorically rejected any federal constitutional foundation for [the public trust] doctrine, without qualification or reservation."[17] The Supreme Court denied the *Alec L* Plaintiffs' petition for certiorari.[18]

Another interesting aspect of *Juliana, et al.* is the relief sought by the young Plaintiffs, which includes, among other things, a Court order that the federal government "prepare a consumption based inventory of U.S. CO_2 emissions" and "prepare and implement an enforceable national remedial plan to *phase out fossil fuel emissions* and draw down excess atmospheric CO_2…"[19]

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The federal government and interveners (trade groups representing nearly all of the world's largest fossil fuel companies) filed motions to dismiss the suit, fervently claiming that the Plaintiffs lacked constitutional standing, raised non-justiciable political questions and failed to state a valid constitutional claim.[20] Interestingly enough, District Court Magistrate Judge Thomas Coffin *denied* the federal government's and industry lobbyists' motions to dismiss. In his 24-page recommendation, the Magistrate Judge highlighted his justification for the result reached:

> "Plaintiffs assert a novel theory somewhere between a civil rights action and NEPA/Clean Air Act/ Clean Water Act Suit to force the government to take action to reduce harmful pollution…The debate about climate change and its impact has been before various political bodies for some time now. Plaintiffs give this debate justiciability by asserting harms that befall or will befall them personally and to a greater extent than older segments of society… the alleged valuing of short term economic interest despite the cost to human life, necessitates a need for the courts to evaluate the constitutional parameters of the action or inaction taken by the government. This is especially true when such harms have an alleged disparate impact on a discrete class of society."[21]

It is tempting to admire the refreshing ingeniousness of Plaintiffs' claims; but, on the other hand, whether these claims will be able to withstand future justiciability and constitutional analysis is questionable, if not highly unlikely. Additionally, and perhaps worst of all for Plaintiffs' argument, is the *Alec L* case briefly discussed above. Of particular importance is the Supreme Court's denial of certiorari in that case, which supports the D. C. Circuit's narrow understanding of the public trust doctrine as exclusively a matter of state law. This is of additional significance since Plaintiffs' substantive due process claims ostensibly hinge on the public trust doctrine. ("By exercising sovereignty over the air space…Defendants have also assumed custodial responsibilities over the climate system within its jurisdiction and influence")[22]

Of course, the Defendants have objected to Magistrate Judge Coffin's recommendation, and accordingly, U.S. District Judge Ann Aiken will consider the matter de novo and accept, reject, or modify the recommendation. Judge Aiken heard oral arguments on Sept. 13 and is expected to make her decision sometime in November.

UPDATE: On November 10, 2016 Judge Aiken issued an order that denied both the fossil fuel industry's and the federal government's motion to dismiss the case, officially giving the youth standing in court."

Citations:

[1] Slavoj Zizek, *Living in the End Times,* 445-446 (2011).

[2] Slavoj Zizek, *In Defense of Lost Causes, 444-446* (*2009*).

[3] No. 6:15-cv-1517-TC (April 8, 2016)

[4] Bill McKibben & Naomi Klein

[5] Memorandum of Plaintiffs in Opposition to Federal Defendants' Motion to Dismiss, (#41) at pp. 36.

[6] First Amended Complaint for Declaratory and Injunctive Relief ("FAC"), ¶ 133, ECF No. 7 (Sept. 10, 2015).

[7] *Id.* ¶ 285.

[8] *Id.* ¶ 285.

[9] *Id.* ¶¶ 294, 299.

[10] *Id.* ¶¶ 277- 289, 302-306.

[11] Plaintiffs Memorandum in Response to Federal Objections, (# 75) at pp. 3

[12] FAC, ¶¶ 277- 289, 307-310.

[13] 65 Planning & Environmental Law No. 8, p.7

[14] *Id.*

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[15]Alec L. v. Jackson, 863 F. Supp. 2d 11, 12 (D.D.C. 2012), *aff'd sub nom*. Alec L. *ex rel.* Loorz v. McCarthy (*Alex L. II)*, 561 F. App'x 7 (D.C. Cir. 2014), *cert denied,* 135 S. Ct. 774 (2014).
[16]*Alec L.,* 863 F. Supp. 2d at 15.
[17] *Alex L II,* 561 F. App'x at 7-8.
[18]*Alec L. v. McCarthy*, 135 S. Ct. 774 (2014).
[19]FAC, at 94.
[20]Order & Findings and Recommendations ("F&R"), (#68) at pp. 3-4.
[21] F&R 8.

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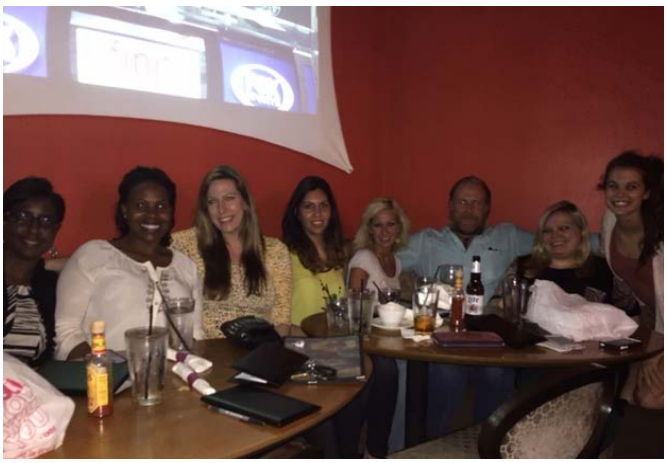

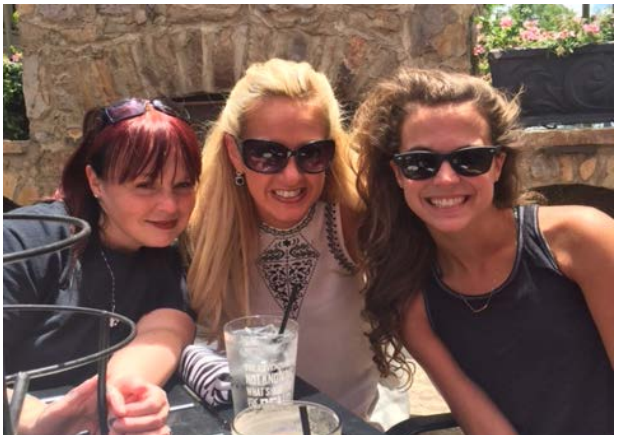

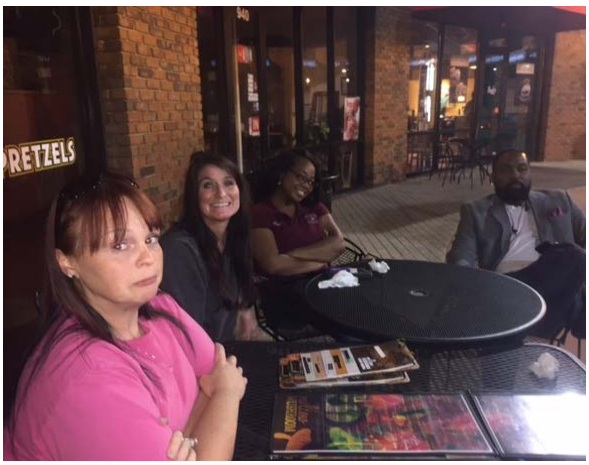

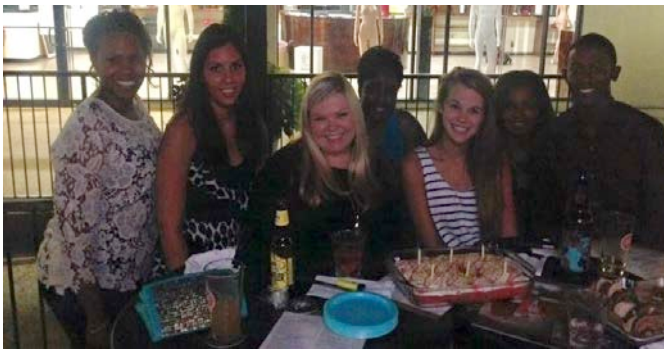

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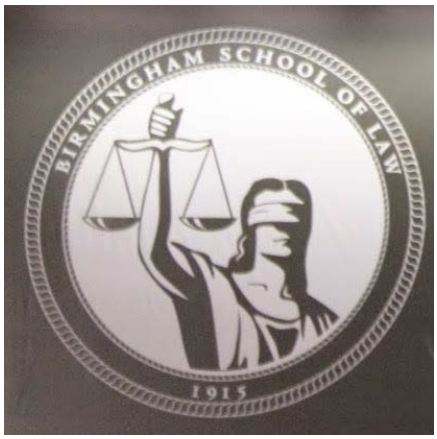

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