



# Federal Bar Association

Northern District of Ohio Chapter

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Winter 2021

### Winter 2021

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### PRESIDENT'S PODIUM

Welcome to the first edition of the FBA NDOH Newsletter in 2021. Certainly, there is a lot to be optimistic about as we start this new year. Our monthly board meetings and most of our events continue to be virtual, but I am optimistic that we will be able to meet in-person again soon.

The FBA NDOH ended 2020 on a high note with our annual professionalism seminar. Each year we aim to provide an ethics CLE in December at no cost to our members, and this year's presentation was outstanding. We were fortunate to have Attorney James Robenalt of Thompson Hine LLP to discuss his book "Ballots and Bullets: Black Power Politics and Urban Guerrilla Warfare in 1968 Cleveland." While the events took place in 1968, the topic could not have been timelier. Attorney Robenalt was extremely knowledgeable and informative, and we greatly appreciate his time and teaching.

December was also an active month for the civics committee who hosted the 2020 Civics Essay Contest and Bill of Rights Birthday Party. Typically, the Bill of Rights Birthday Party is held in an elementary school classroom to teach students about the Constitution and the Bill of Rights. This year the civics committee did an excellent job modifying the program to a virtual format, which went off seamlessly. Rachel McKay, a 2022 J.D. candidate from Case Western Reserve University School of Law was this year's winner of the Civics Essay Contest. Her writing focused on voting rights you can find her award-winning essay, in its entirety, on page 5. The civics committee has also been awarded a grant from the FBA Foundation to hold a "My Day in Court" seminar, which would be designed to educate school children on the court process. We look forward to this event as the weather warms and the children are welcomed back in the courthouse.

February got off to a great start with a virtual brown bag lunch with Magistrate Judge Michael R. Merz from the United States District Court, Southern District of Ohio already completed. Judge Merz talked about "The Death Penalty in Ohio – Is it Dead, ...or Just Anaesthetized?" and provided an understanding of the historical background of the death penalty in Ohio and his thoughts on where the practice was headed. While we are all likely disappointed for not being able to gather in-person for these intimate lunches, Judge Merz was likely thankful for not having to trek to the Northern District to enjoy our subfreezing temperatures for his discussion. Nonetheless, we are appreciative of Judge Merz's willingness to lend his time and energy on such a fascinating topic, as we were able to draw a record attendance for this event.

Recognizing that February is Black History Month, we were honored to host the FBA NDOH's first meeting of the Diversity Book Club on February 25, 2021. This month we discussed *Between the World and Me*, the 2015 winner of the National Book Award by acclaimed author Ta-Nehisi Coates. The Diversity Committee had the brilliant idea of starting a book club to help prompt more discussion on diversity, race, and education in the United States, particularly involving those in the legal profession. The book club offers a unique forum to have an intellectual conversation with judges and practitioners over lunch regarding the past, present and future of diversity in the United States. *Between the World and Me*, which is written as a letter to the author's son, is a compelling starting point for the FBA book club to continue the conversation about these prudent topics. Additionally, the FBA NDOH was proudly awarded a grant from the Foundation of the FBA for an educational diversity CLE, and are actively working on putting together an engaging program in the coming months.

In the spring, we are looking forward to offering more CLE's and programs to our members at a reduced cost or no cost. Look for an upcoming CLE on Employment Law and COVID, as well as an Immigration Trial Practices CLE with Assistant Chief Immigration Judge James McCarthy III.

The pandemic has certainly provided challenges to bar organizations where we are accustomed to meeting in-person, learning and exchanging ideas. I am very proud and appreciate of our chapter's ability to adapt and the hard work that has been put in to continue to achieve our mission of strengthening the federal legal system and administration of justice by severing the interests and needs of our practitioners and the federal judiciary.



## Members in the News

### HOW I SPENT MY 2020 SUMMER VACATION

Judge Jack Zouhary

I planned to spend my summer vacation on a river cruise in Europe. I also had a family reunion planned and, with four young grandchildren, I hoped to travel to playgrounds, amusement parks and Imagination Station. Alas, the virus dashed my Senior Status plans.

Instead, I came to work in a lonely courthouse where the public was specifically disinvented. My trial schedule was wiped out. And case management took on new challenges. Like many, I learned how to Zoom. Telephone conferences which were a standard diet became more frequent. And settlement conferences were forced into video performances. The criminal docket came to a near standstill, except for motions from inmates requesting early release from BOP facilities due to COVID-19. Our Chambers handled 40 such motions — three more just filed this week — which require immediate attention because of the potential health hazards (I granted five so far). While I was able to host summer externs both in the courthouse and remotely, the usual social activities were missed.

In March 2020 the civil filings slowed, but then picked up and collided with the backlog of cases (and trials) that had already been delayed by the virus. Jury trials were impossible until a short window opened in the fall — when I tried a two-day personal injury case with COVID protocols for jury selection and the trial itself. Lawyers and jurors gave us high marks. (P.S. — I also learned I can do without sidebars!) Our District successfully completed several short jury trials, both civil and criminal.

Where are we now in early 2021 — almost one year later? We have a tentative start date for jury trials in April. Video arraignments are standard fare along with guilty pleas. Courthouse doors are opening slowly — I will give counsel and parties the option of appearing by video or in person if the gathering is small. With the limited number of courtrooms available for safe distancing, judges in each courthouse must now work together to prioritize use of the COVID trial-ready courtroom.

I fully expect that some of these changes will continue even after the virus loses its potency. Certainly, technology has allowed us to advance the goal of “just, speedy, and inexpensive” disposition of cases under Federal Civil Rule 1. But a settlement conference in the courthouse, in my view, is more effective — and more successful — when everyone can gather in person. I also believe that jury trials, and important hearings, still need to be in person. For example, because of the importance of deciding whether and for how long a defendant should be sentenced, I prefer those hearings in person. (There was an experiment in Erie County, Ohio years ago that promoted videotape trials — allowing a jury to view the entire trial on tape. For good reason, it did not catch on.) Technology can certainly continue to assist with effective case management, and we will be experimenting with bench and jury trials by Zoom. But it cannot entirely replace face-to-face hearings. The constitutional issues with Zoom criminal trials and the resulting backlog of criminal defendants waiting for trial, are concerns.

I look forward to seeing more lawyers in person again — and lawyers who have already returned unanimously remark — “It’s nice to be back in the courthouse.” In the meantime, I am already looking at travel brochures for this fall and beyond, and planning play dates with the grandkids.

**Members in the News Cont.****Greater Cleveland  
Food Bank**

Dear Contributing Members,

On behalf of the Federal Bar Association's Northern District of Ohio Chapter and the Chapter's Newer Lawyers Committee, thank you for your generosity and support of our virtual food drive. With your help we were able to raise over \$3,000 for families in need throughout the Greater Cleveland area. This has been a challenging year for all of us, but through your donation you have made things just a little less challenging for our neighbors and friends in need this winter. We wish you health and happiness in this new year and are truly grateful for your contributions.

Best regards,

The Newer Lawyers Committee

Federal Bar Association, NDOH Chapter

[Click here to visit our personal page.](#)

If the text above does not appear as a clickable link, you can visit the web address:

[http://support.greaterclevelandfoodbank.org/site/TR?  
px=2769861&pg=personal&fr\\_id=1141&et=eM1slQdoep2OP4H8YfLyDg&s\\_tafid=2156](http://support.greaterclevelandfoodbank.org/site/TR?px=2769861&pg=personal&fr_id=1141&et=eM1slQdoep2OP4H8YfLyDg&s_tafid=2156)

[Click here to view the team page for FBA Young Lawyers Food Drive](#)

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[http://support.greaterclevelandfoodbank.org/site/TR?team\\_id=3141&pg=team&fr\\_id=1141&et=Frg62B2A-  
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## Awards and Events in the News

### BOARD MEMBER STEPHEN NEWMAN RECEIVES BOOTS FISHER AWARD FROM NATIONAL FBA

Deneen LaMonica



The Federal Bar Association's Northern District of Ohio Chapter extends its heartfelt congratulations to Stephen C. Newman. Mr. Newman has been selected as the national recipient of the Elaine Boots Fisher Service Award for exemplary community, public, and charitable service.

Mr. Newman obtained his B.S. from Taylor University, his M.S. from the National War College, National Defense University, and his J.D. from Capital University Law School. He went on to earn a LL.M. from the Judge Advocate General's Legal Center.

He was a U.S. Marine for 25 years before retiring as the Chief Defense Counsel of the U.S. Marines Corps.

Mr. Newman was appointed the Federal Public Defender for the Northern District of Ohio by the Sixth Circuit U.S. Court of Appeals in February 2016 and reappointed in 2020.

Mr. Newman is a mentor to the men and women who served with him during his 25-year Marine Corps career. Mr. Newman's deep concern is not just for those who served with him but those who have served in all branches of the military. Shortly after arriving to the Defender's Office, he learned of a Veteran's Court in the Southern District of Ohio which services the specific needs of veterans. Recognizing that no such court existed in the Northern District of Ohio, he sought a different way to assist the local veterans. Shortly after joining the Northern District of Ohio FBA, he spearheaded a Wills for Vets program. He envisioned offering simple wills to veterans, staffed by volunteer attorneys. He built the program from the ground up, soliciting a volunteer staff of attorneys and administrative assistants, securing laptops, organizing the legal documents, training staff, and partnering with the local Veterans Administration for the location of the all-day program.

Mr. Newman is well known for supporting diversity and inclusion for not only his office but all the Federal Defender offices. When he arrived as the new Defender, he was surprised that the office did not have a dedicated position focused on this important issue and created the position of Diversity and Inclusion Coordinator. That role today is involved in all aspects of hiring and retention of talent in the Defender's office.

Mr. Newman has also been involved nationally with the federal public defenders' efforts to address implicit bias and racism by serving on the planning committee and securing a national speaker for a Defender Conference and Training Seminar and also serving on committees focused on this important issue.

To view Mr. Newman's acceptance speech, please go to our local chapter website at: [www.fba-ndohio.org](http://www.fba-ndohio.org) or to the National FBA's website at <https://www.fedbar.org/about-us/leadership/leadership-resources-portal/fba-awards-program/2020-winner-acceptance-videos/>

## Awards and Events in the News Cont.

### CIVICS ESSAY CONTEST

Sarah Cleves

The Civics Committee of the Northern District of Ohio Chapter of the Federal Bar Association held its first ever Civics Essay Contest in October 2020. In honor of the 100th anniversary of the ratification of the Nineteenth Amendment, law students were asked to consider why the right to vote is still important, including discussing relevant constitutional provisions, amendments, statutes, case law, and other legal authorities and addressing the historical challenges that certain groups have faced in asserting their voting rights. This year's winner is Rachel McKay, a 2022 J.D. candidate from Case Western Reserve University School of Law. Her essay follows.

### Rachel McKay

Case Western Reserve University  
Civics Essay Contest

Do what you are told to do in each statement, nothing more, nothing less. Be careful as one wrong answer denotes failure of the test. You have 10 minutes to complete the test.

1. Draw a line around the number or letter of this sentence.
2. Draw a line under the last word in this line.
3. Cross out the longest word in this line.
4. Draw a line around the shortest word in this line.
5. Circle the first, first letter of the alphabet in this line.
6. In the space below draw three circles, one inside by (engulfed by) the other...

(State of Louisiana literacy test from Tangipahoa Parish, summer of 1964).<sup>1</sup>

The right to take this test was hard-fought. Six percent of the country could vote when the first president was elected,<sup>2</sup> and the definition of "we the people" has inched broader since.

Almost 100 years later, on the rising wave of Reconstruction, the Fifteenth Amendment cemented the right to vote of African American men.<sup>3</sup> The registration and election of Black men surged. Approximately 2,000 Black elected officials had entered office in former Confederate states by 1877, alongside twenty Black congressional representatives between 1870 and 1901, including people formerly enslaved.<sup>4</sup>

<sup>1</sup> *Literacy Tests: The Louisiana Literacy Test*, THE LAW LIBRARY OF LOUISIANA, (July 18, 2019), <https://lasc.libguides.com/c.php?g=940581&p=6830148> (noting that this literacy test from Tangipahoa Parish has become famous, but is not representative of literacy tests widely used in Louisiana from the 1950s through 1960s.)

<sup>2</sup> Jill Lepore, *Rock, Paper, Scissors: How We Used to Vote*, THE NEW YORKER (Oct. 13, 2008), <https://www.newyorker.com/magazine/2008/10/13/rock-paper-scissors>.

<sup>3</sup> U.S. Const. amend. XV; *Black Americans in Congress: Reconstruction's New Order*, U.S. HOUSE OF REPRESENTATIVES, HISTORY, ART & ARCHIVES, (accessed Oct. 31, 2020), <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Fifteenth-Amendment/Reconstruction/>.

<sup>4</sup> *Discovering a Page's Place in the "Second American Revolution"*, U.S. HOUSE OF REPRESENTATIVES, HISTORY, ART & ARCHIVES, (Feb. 21, 2013), [https://history.house.gov/Blog/2013/February/2-19-First\\_Black\\_Page/](https://history.house.gov/Blog/2013/February/2-19-First_Black_Page/).

## Awards and Events in the News Cont.

But the rising wave of Reconstruction crashed, or rather, was razed.<sup>5</sup> As the last federal troops left the former Confederate states in 1877, Jim Crow began, as state legislatures instituted literacy tests, poll taxes, and grandfather clauses to bar Black voters.<sup>6</sup> Louisiana grandfather clauses crushed Black voter registration from 44.8% to 4% in 4 years.<sup>7</sup> The severity of this shift in our nation's trajectory is incomprehensible. The South next elected Black congresspeople in 1972.<sup>8</sup>

A near ninety-year storm of voter disenfranchisement raged on, ultimately tempered by the Voting Rights Act of 1965. The VRA required federal approval for election law changes in states with historically discriminatory voting policies, directly resulting in increased voter registration and turnout from people of color, and increasing over years. The VRA became known as one of the nation's most effective federal civil-rights laws in history.<sup>9</sup>

But, like the rising wave of Reconstruction, these protections were razed. In the 2013 *Shelby County v. Holder*<sup>10</sup> decision, the Supreme Court ruled that the VRA's key provisions were not constitutional—because they were no longer necessary.

Legislatures capitalized. Previously regulated jurisdictions lost over 1000 polling locations from 2014 to 2018, despite increased voter turnout.<sup>11</sup> A study on *Shelby*'s impact from the Leadership Conference Education Fund noted that while certain locations could have closed for good cause, it was the sheer number of closures, in partnership with racialized tactics of voter suppression, that was alarming.<sup>12</sup> In the aftermath, the Fourth Circuit had to strike down North Carolina's attempted voter ID provisions, which required DMV-issued identification from voters, a rule calculated after data had shown that Black voters would disproportionately lack this ID. The court famously noted that the legislature had targeted Black voters "with almost surgical precision."<sup>13</sup> These legislative stunts affirmed the late Justice Ginsburg's intuition in her *Shelby* dissent, warning that removing voter discrimination precautions because they were working was like "throwing away your umbrella in a rainstorm because you are not getting wet."<sup>14</sup>

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<sup>5</sup> See Allen C. Guelzo, *Reconstruction Didn't Fail. It was Overthrown*, TIME, (Apr. 30, 2018), <https://time.com/5256940/reconstruction-failure-excerpt/>.

<sup>6</sup> Danyelle Solomon, Connor Maxwell & Abril Castro, *Systemic Inequality and American Democracy*, CENTER FOR AMERICAN PROGRESS, (Aug. 7, 2019), <https://www.americanprogress.org/issues/race/reports/2019/08/07/473003/systemic-inequality-american-democracy/>.

<sup>7</sup> *Voting Rights Act: Major Dates in History*, ALCU, (2020), <https://www.aclu.org/voting-rights-act-major-dates-history>.

<sup>8</sup> *Id.*; See *Black-American Members by Congress, 1870–Present*, U.S. HOUSE OF REPRESENTATIVES, HISTORY, ART & ARCHIVES, (accessed Nov. 22, 2020), <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Black-American-Representatives-and-Senators-by-Congress/>; See also Anette Gordon-Reed, *What If Reconstruction Hadn't Failed?* THE ATLANTIC, (Oct. 26, 2015), <https://www.theatlantic.com/politics/archive/2015/10/what-if-reconstruction-hadnt-failed/412219/>.

<sup>9</sup> 52 U.S.C. § 10301; *1965 Voting Rights Act*, GEORGETOWN LAW, (updated July 29, 2020), <https://guides.ll.georgetown.edu/c.php?g=592919&p=4172704>; *Democracy Diverted: Polling Place Closures and the Right to Vote*, THE LEADERSHIP CONFERENCE EDUCATION FUND, at 4, (Sept. 2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf>.

<sup>10</sup> 570 U.S. 529 (2013).

<sup>11</sup> *Democracy Diverted*, *supra* note 11, at 10.

<sup>12</sup> *Id.* at 52.

<sup>13</sup> *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016); see also Christopher Ingraham, *The 'Smoking Gun' Proving North Carolina Republicans Tried to Disenfranchise Black Voters*, THE WASHINGTON POST, (July 29, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/07/29/the-smoking-gun-proving-north-carolina-republicans-tried-to-disenfranchise-black-voters/>.

<sup>14</sup> *Shelby Cty.*, 570 U.S. at 590 (Ginsburg, J., dissenting).

## Awards and Events in the News Cont.

As the rainstorm of *Shelby* rages on, our current moment reminds us that many others were never under the protection of this umbrella. Those still unable to vote on November 3 included over 643,000 Dreamers, the estimated 5.17 million people disenfranchised by a felony conviction, and the estimated four million people in U.S. territories of Puerto Rico, Guam, American Samoa, Virgin Islands, and the Northern Mariana Islands.<sup>15</sup>

But the story of our nation's electorate is not over. In 1789, the Constitution spoke in ambiguous terms to the 6 percent voting in that first election.<sup>16</sup> It said "We the people ..."

Lawyers love ambiguity. Lawyers make money in ambiguity. And lawyers find opportunity in ambiguity. We can continue to find opportunity for a stronger we in the ambiguity of the constitution.

And on the centennial of the Nineteenth Amendment, we can take notes. While a woman's right to vote was legally affirmed in 1920, it wasn't until 1968 that the first Black woman was elected to Congress.<sup>17</sup> It was Shirley Chisholm who said, "If they don't give you a seat at the table, bring a folding chair." We must humbly remember that 94 percent of us once pulled up a folding chair.<sup>18</sup> With this recognition, we will make space at the table, as space was made for us. We will protect the spaces still threatened. And we will do so with our vote.

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<sup>16</sup> Lepore, *supra* note 2.

<sup>17</sup> U.S. Const. amend. XIX; Rajini Vaidyanathan, *Before Hillary Clinton, There Was Shirley Chisholm*, BBC NEWS, (Jan. 26, 2016), <https://www.bbc.com/news/magazine-35057641>.

<sup>18</sup> Vaidyanathan, *supra* note 17.

## Awards and Events in the News Cont.

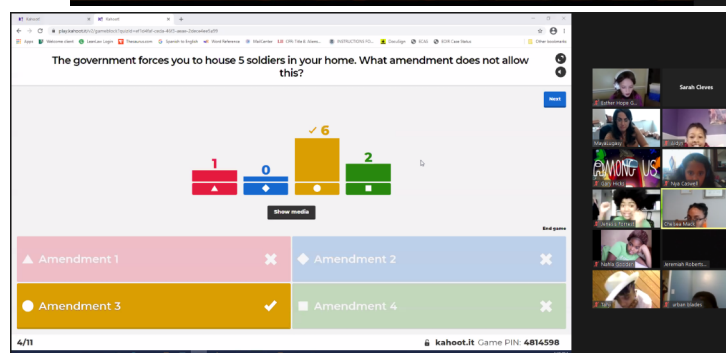
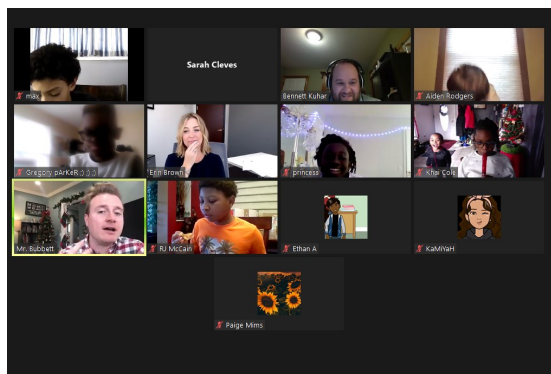
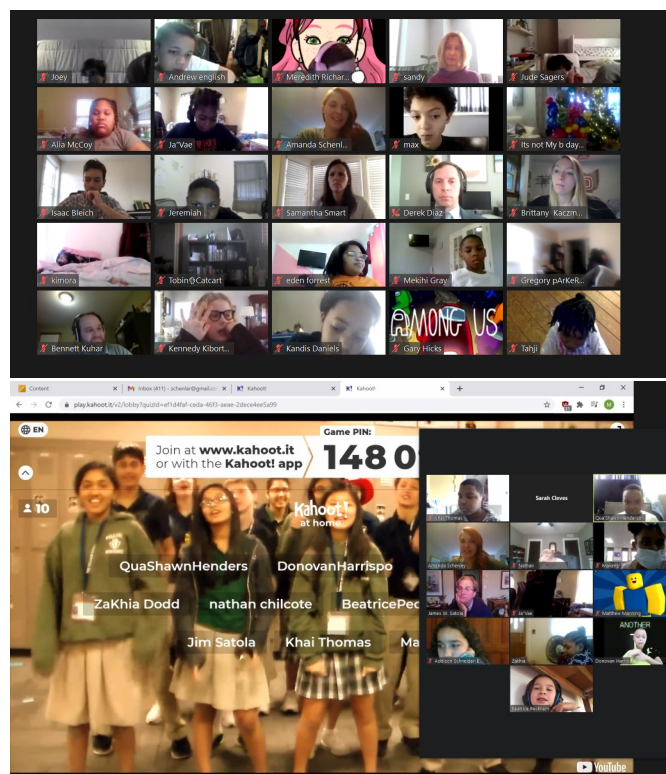
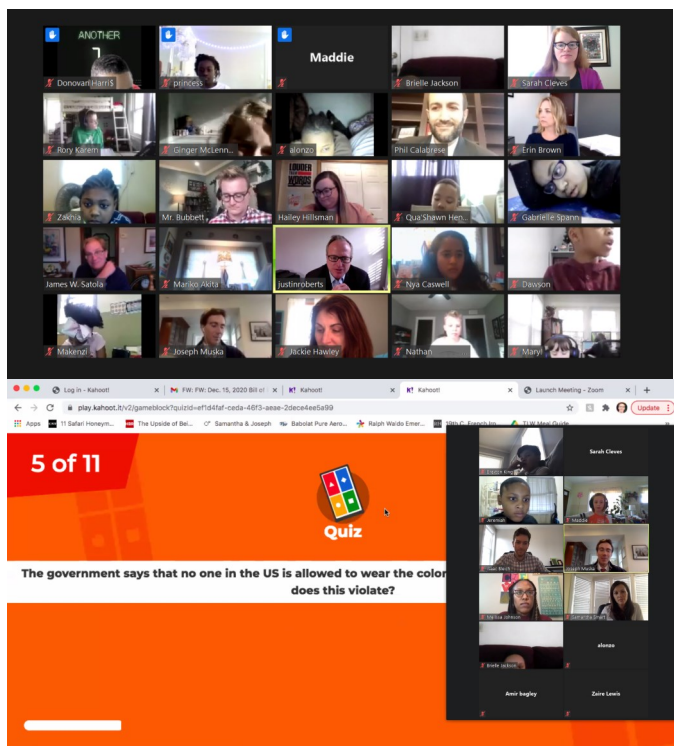
### 2020 BILL OF RIGHTS BIRTHDAY PARTY

Sarah Cleves and Joseph Muska  
Co-Chairs, Civics Committee

The Civics Committee of the Northern District of Ohio Chapter of the Federal Bar Association hosted its annual Bill of Rights Birthday Party on Tuesday, December 15, 2020, with fourth graders from Campus International School. The event was held virtually for the first time.

Hailey Hillsman, a Cleveland-Marshall College of Law student, created a fun program for the students and volunteers. Hillsman opened the celebration with a presentation summarizing the Bill of Rights. The students then participated in a Kahoot trivia game created by Hillsman, answering questions about the Bill of Rights. Volunteers reviewed the answers with students and answered student questions about the role the Bill of Rights plays in their careers and generally about a career in law.

Thank you to Campus International School for hosting us again this year. And a special thank you to all our volunteers: Erin Brown, Judge Philip Calabrese, Sarah Cleves, Derek Diaz, Hailey Hillsman, Brittany Kaczmarczyk, Bennett Kuhar, Maya Lugasy, Chelsea Mack, Joe Muska, Sandy Opacich, Cate Purdum, Justin Roberts, Jim Satola, Amanda Schenley, Sam Smart, and J Thompson.



## CLASH OF AMERICAN IDEALS: INCITEMENT AND THE FIRST AMENDMENT

Nathan P. Nasrallah & James J. Walsh\*

The January 6, 2021, insurrection at the Capitol has renewed interest in the dynamic between incitement speech and First Amendment protections. Below we provide a brief overview of some landmark cases in this area, in addition to some cases of more recent vintage.

The United States legal system has long struggled to balance the value of free speech and the importance of protecting public order and safety—a balancing act that is “as persistent as it is perplexing.” *Niemotko v. Maryland*, 340 U.S. 268, 275 (1951) (Frankfurter, J., concurring). Though the First Amendment’s language is absolute, the Supreme Court instructs that it “does not embrace certain categories of speech,” including incitement of imminent lawless action. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245–46 (2002). The “line between unlawful incitement and permissible showmanship—between a plea for physical action and a figurative chumming of political waters—is unclear.” Clay Calvert, *First Amendment Envelope Pushers: Revisiting the Incitement-to-Violence Test with Messrs. Brandenburg, Trump, & Spencer*, 51 Conn. L. Rev. 117, 125 (2019).

For decades, courts fashioned this line by asking (in various iterations) whether the speaker created a “clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety.” *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940). In 1949, when racial segregation was the status quo, Irving Feiner was arrested and convicted of disorderly conduct after addressing a large crowd through a loud-speaker system on a public sidewalk. *Feiner v. New York*, 340 U.S. 315, 316–19 (1951). Feiner urged his listeners to attend a meeting at the Syracuse Hotel, then made “derogatory remarks” about President Truman and various local political officials, urging African Americans to “rise up in arms and fight for equal rights.” *Id.* In upholding Feiner’s conviction, the Supreme Court explained that his speech created a clear and present danger by aggravating a large crowd and ignoring police requests to stop. *Id.* at 320.

Ultimately, in 1969, the Supreme Court announced a more speech-protective test in *Brandenburg v. Ohio*, which courts still rely on today. There, a leader of a Ku Klux Klan group in Ohio was convicted under the Ohio Criminal Syndicalism Act after holding a cross-burning rally and proclaiming in part that if the government “continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance [sic] taken.” *Brandenburg v. Ohio*, 395 U.S. 444, 446 (1969). The Supreme Court struck down the Ohio statute as unconstitutional, emphasizing the difference between “abstract teaching of moral propriety or even moral necessity to resort to force and violence” and “preparing a group for violent action and steeling it to such action.” *Id.* at 447–48.

The Court’s decision in *Brandenburg* led to a three-part test to determine whether speech incites imminent lawless action: (1) **intent** to cause illegal action; (2) **imminence** of illegal action; and (3) **likelihood** of such action. *Id.* at 448–49.

The Court clarified its imminence requirement in *Hess v. Indiana*, 414 U.S. 105 (1973). In that case, the speaker was arrested during an antiwar demonstration at Indiana University’s campus for shouting, “We’ll take to the f\*\*\*\*\* street [later or again].” *Id.* at 107. The Court held that states could not punish this speech because, “at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time.” *Id.* at 108.

More recently, the legal community revisited the incitement standard after incidents during the 2016 presidential campaign and the August 2017 “Unite the Right” rally in Charlottesville, Virginia. In March 2016, several protestors attended then-candidate Trump’s campaign rally in Louisville, Kentucky “with the intention of peacefully protesting.” *Nwanguma v. Trump*, 903 F.3d 604, 606 (6th Cir. 2018).

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\* The authors are associates in the litigation department at Benesch in Cleveland.

On five different occasions, Trump issued directives to “get ‘em out of here,” referring to the protestors. *Id.* In response, audience members assaulted, punched, and shoved the protestors, who later filed tort claims against Trump for incitement to riot, among other things. *Id.* at 606–07. The complaint described “a chaotic and violent scene in which a crowd of people turned on three individuals.” *Id.* at 608.

The Western District of Kentucky denied Trump’s motion to dismiss, reasoning that the phrase “‘get ‘em out of here’ is stated in the imperative” and was “an order, an instruction, a command” that is not entitled to First Amendment protection. *Nwanguma v. Trump*, 273 F. Supp. 3d 719, 727 (W.D. Ky. 2017), *rev’d and remanded*, 903 F.3d 604 (6th Cir. 2018). The Sixth Circuit granted Trump’s interlocutory appeal—see *In re Trump*, 874 F.3d 948 (6th Cir. 2017)—and then reversed the district court’s decision. The Sixth Circuit explained that incitement speech must specifically advocate for unlawful action and that “not a single word encouraged violence or lawlessness.” *Nwanguma*, 903 F.3d at 610. Although “Trump’s words may *arguably* have had a tendency to encourage unlawful use of force,” this was not enough under the *Brandenburg* test. *Id.*

In the wake of the violent Charlottesville rally, several major public universities cancelled events where Richard Spencer, a notorious white nationalist who was present at Charlottesville, planned to participate. Each of the universities explained that they feared Mr. Spencer would jeopardize public safety by inciting violence. Clay Calvert, *First Amendment Envelope Pushers: Revisiting the Incitement-to-Violence Test with Messrs. Brandenburg, Trump, & Spencer*, 51 Conn. L. Rev. 117, 145–49 (2019). As one university president put it, “the First Amendment does not require our University to risk imminent violence.” Press Release, Pennsylvania State University, *Richard Spencer Is Not Welcome to Speak at Penn State* (Aug. 22, 2017), <http://news.psu.edu/story/478590/2017/08/22/administration/richard-spencer-not-welcome-speak-penn-state>. Spencer challenged that assertion by filing claims against the universities under 42 U.S.C. § 1983, alleging violations of his civil rights.

Spencer prevailed in his case against Auburn University. See *Padgett v. Auburn Univ.*, No. 3:17-CV-231-WKW, 2017 WL 10241386 (M.D. Ala. Apr. 18, 2017). Citing *Brandenburg*, the Middle District of Alabama explained, first, that “Auburn did not produce evidence that Mr. Spencer’s speech is likely to likely to incite or produce imminent lawless action.” *Id.* at \*1. The evidence showed that both Auburn University and Spencer were prepared to bolster security. *Id.* And, the court noted that the university’s concern for Spencer’s ideology, along with the listeners’ reaction to that ideology, constituted viewpoint discrimination. *Id.*

At least two individuals were convicted under the Anti-Riot Act for their participation in Charlottesville, along with two other violent, white-supremacist rallies. At each rally, the defendants assaulted counter-protestors, including by chasing them down, punching, and choking them. *United States v. Miselis*, 972 F.3d 518, 526–27 (4th Cir. 2020). The defendants appealed their convictions on the grounds that the Anti-Riot Act was facially overbroad. *Id.* at 525. The Fourth Circuit agreed in part, but it upheld the defendants’ convictions under the Act’s surviving provisions. *Id.* at 525–26, 547. The court explained that several of the Act’s provisions “sweep[] up a substantial amount of speech that retains the status of protected advocacy under *Brandenburg* insofar as it encompasses speech tending to ‘encourage’ or ‘promote’ a riot . . . , as well as speech ‘urging’ others to riot or ‘involving’ mere advocacy of violence.” *Id.* at 530.

Speech enjoys broad protection under current precedent, even if that speech could pose a threat to public safety, and even if it is “offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989). On February 16, 2021, however, Representative Bennie Thompson (D-Miss.)—chairman of the House Homeland Security Committee—sued former president Donald Trump and his lawyer, Rudy Giuliani, in the United States District Court for the District of Columbia, alleging that their speech incited the January 6 violence at the Capitol. See *Thompson v. Trump*, 1:2021-cv-00400 (D.D.C.).

This lawsuit and others could represent a new era in incitement jurisprudence, forcing courts to reappraise the delicate balance between free speech and social order. If nothing else, it will underscore that this Republic resolves differences in courts of law, not through violence that has “the probability [to cause] serious injury to the State.” *Whitney v. California*, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring).

**Akron Law Review 2021 Symposium, March 12, 20201, 9:00 am – 11:30 am**

This year's annual symposium hosted by The Akron Law Review is titled COVID & The Practice of Law: Impacts of Legal Technology. While the law is known for being slow to adapt, the pandemic has forced legal practitioners to move online via virtual hearings, trials, and client consultations. As we look toward the future of the profession, the question that arises, and what this symposium hopes to answer, is "How will technology continue to impact the practice of law?" Authors and experts in the field will come together to discuss three topics: artificially intelligent legal practice, telelawyering, and open-source legal documents. Each of these topics will be presented on during the symposium and will later be published in the symposium issue of the Akron Law Review.

There is no fee to attend this symposium. Here is the registration link:

[https://akron.qualtrics.com/jfe/form/SV\\_bfPqlecxEZWljAG](https://akron.qualtrics.com/jfe/form/SV_bfPqlecxEZWljAG)

THE UNIVERSITY OF AKRON SCHOOL OF LAW

**23<sup>rd</sup> Annual Symposium on Intellectual Property Law and Policy**

**Thursday and Friday, March 25 – 26, 2021**

This two-day online CLE will be held virtually from noon – 5:00 p.m. each day. It will cover legal updates and discussions in all areas of IP Law including patents, trademarks, copyrights, trade secrets, and international IP issues.

Topics will include:

- IP Law and Policy for the Next 4 Years
- Best Practices for Diversity, Equity, and Inclusion in IP
- Building an Ethical Culture and Dynamic Among and Between In-house and Outside Counsel
- Survey of Trademark Laws and Updates around the World
- The Latest Tools and Challenges for Copyright Enforcement
- PTAB Practice: Effective Advocacy and Use of Experts

and more

Registration and fees

- Registration: \$300
- Government employees and faculty rate: \$150

Student rate: \$10

Please note that this year's rates have been reduced due to the event being held online. Fee covers two half days of online CLE panels. We have applied for 8 hours of CLE, including 1.25 hours of professional conduct.

More information and registration is available here:

<https://www.uakron.edu/law/intellectual-property/symposium/>



## Federal Bar Association

Northern District of Ohio Chapter

### Immigration Trial Practice CLE

#### Featuring

Assistant Chief Immigration Judge James McCarthy, Scott Bratton partner at MJB Immigration, Aleksandar Cuic partner at Brown Immigration Law, and Farhad Sethna at Law Offices of Farhad Sethna.

When: April 23 2021

Time: 12pm - 1 pm

via Zoom Webinar

Cleveland—Zoom

1.0 CLE Credit Hours

(accreditation approval pending)

#### Registration Fees

FBA Member - FREE Non-Member - \$25

Registration deadline April 16, 2021

Must register online to receive the Zoom Invite

Please click here if you would like to register for this event:

[Calendar Main | FBA \(fba-ndohio.org\)](#)

Email: [admin@fba-ndohio.org](mailto:admin@fba-ndohio.org) Phone: 440-226-4402

### SAVE THE DATE

MIAMI is host to the FBA 2021 Annual Meeting & Convention

September 23-25

### **You're Invited!**

*The South Florida Chapter invites you  
to a reception at PAMM (Pérez Art Museum Miami) on  
September 24, 2021*

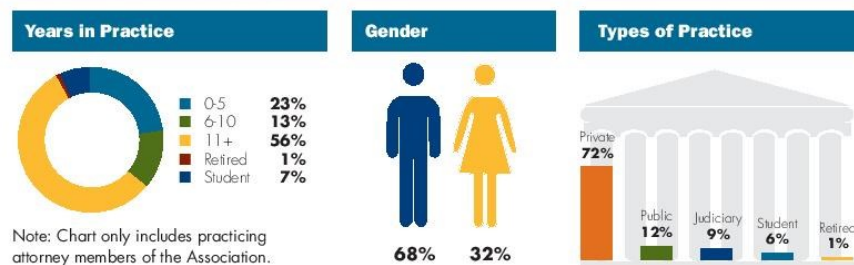
Click [here](#) for more information!

## Federal Bar Association

# Benefits of Membership

Joining the FBA entitles you to membership within the national organization as well as within your local FBA chapter. Members receive a host of special benefits designed to uphold the mission of the FBA and support each member's career within the federal legal system. Association activities and member benefits are organized into five primary categories.

### You're in Good Company



#### Advocacy

The organization's headquarters are located outside of Washington, D.C., in Arlington, Va., giving it the proximity necessary to remain engaged on behalf of its members.

- government relations efforts as defined by the FBA Issues Agenda
- annual Capitol Hill Day
- monthly updates on recent government relations developments

#### Networking and Leadership

The FBA is large enough to have an impact on the federal legal profession, but small enough to provide opportunities for networking and leadership. The FBA is governed by a 15-member, elected, Board of Directors and numerous volunteer members.

- more than 95 chapters across all federal circuits
- 22 practice area sections
- five career divisions
- volunteer leadership opportunities within each chapter, section, and division

#### Education

The FBA offers more than 700 credit hours of continuing legal education (CLE) at both the national and local level throughout the year.

- national CLE conferences
- bimonthly CLE webinars
- local chapter-sponsored CLE events

#### Publications and Communication

As part of your membership, you will receive and have access to:

- FBA website ([www.fedbar.org](http://www.fedbar.org))
- The Federal Lawyer magazine (10x per year)
- bimonthly eNewsletter
- section, division, and chapter newsletters (printed)
- Judicial Profile Index (archived)

#### Legal Career Center

The Legal Career Center is an online resource for both employers looking to hire and job seekers looking for a position within the federal legal community. Employers have the option of posting jobs available to the FBA Legal Career Center only, or to the Legal Job Exchange Network that reaches thousands of potential candidates through the network of partner job boards. Job seekers have free access and can use the Legal Career Center to post resumes, search for jobs, and prepare for interviews, as they launch their careers.

#### Member-Only Advantages

- Member Plus affinity program
- online membership directory
- optional public directory listing
- online specialty items catalog
- discounted rates for CLE, networking events, publications, and other services

## Become a Sustaining Member

### Support

Sixty dollars of every sustaining membership is used to support educational programs and publications of the FBA.

### Save

Sustaining members save five percent on national event registrations and publications orders, and are recognized annually in *The Federal Lawyer* and at FBA events.

Sustaining Members also receive one free CLE webinar per year—a \$99 value!



**Federal Bar Association**

**Make your mark within the federal legal community.**

**Sign up for membership today at [www.fedbar.org/join](http://www.fedbar.org/join).**

Contact the FBA at (571) 481-9100 or [membership@fedbar.org](mailto:membership@fedbar.org) for more information.

**FBA-NDOH Calendar of Events:****March 10, 2021 FBA-NDOH Board Meeting****April 21, 2021 FBA-NDOH Board Meeting****April 23, 2021 Immigration Trial Practice Skills CLE****May 19, 2021 FBA-NDOH Board Meeting**

***We add events to our calendar often so please check our website for upcoming events that may not be listed here.***



## Federal Bar Association

Northern District of Ohio Chapter



Federal Bar Association

### STATEMENT OF THE FEDERAL BAR ASSOCIATION BOARD OF DIRECTORS ON JUDICIAL INDEPENDENCE

Judicial independence, free of external pressure or political intimidation, lies at the foundation of our constitutional democracy. An independent judiciary needs to remain free of undue influence from the legislative and executive branches and to remain beholden only to the maintenance of the rule of law and the protection of individual rights and personal liberties. We affirm the right to challenge a judge's ruling for reasons based in fact, law or policy. However, when robust criticism of the federal judiciary crosses into personal attacks or intimidation, it threatens to undermine public confidence in the fairness of our courts, the constitutional checks and balances underlying our government and the preservation of liberty.

*The Federal Bar Association is comprised of over 19,000 public and private sector lawyers practicing in our federal courts, hailing from all fifty states and the U.S. Territories. The Federal Bar Association is a non-partisan professional organization created to promote the sound administration of justice and integrity, quality and independence of the judiciary.*

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**INTER ALIA** is the official publication of the Northern District, Ohio Chapter of the Federal Bar Association.

If you are a FBA member and are interested in submitting content for our next publication please contact Stephen H. Jett no later than May 1, 2021

Next publication is scheduled for Spring 2021.

# SOLACE

Support of Lawyers/Legal Personnel - All Concern Encouraged

Our Chapter supports the FBA's SOLACE program, which provides a way for the FBA legal community to reach out in small, but meaningful and compassionate ways, to FBA members and those related to them in the legal community who experience a death, or some catastrophic event, illness, sickness, injury, or other personal crisis. For more information, please follow this link:

<http://www.fedbar.org/Outreach/SOLACE.aspx>, or contact our Chapter Liaison Robert Chudakoff at [rchudakoff@ulmer.com](mailto:rchudakoff@ulmer.com) or [mailto:rchudakoff@ulmer.com](mailto:mailto:rchudakoff@ulmer.com)

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