



## Letter from the Editor

Welcome to Fall! As part of our effort to assist in educating the public about the civil justice system, we are compiling information about the sponsors and contributors of the various advertisements critical of the civil justice system in West Virginia that have been circulating in the media and on billboards throughout the state, and plan to feature the information in the December issue of The Blackstone Club Commentaries, in the “State of Justice” column.

We often see billboards against “Abusive lawsuits,” from groups such as “Citizens Against Lawsuit Abuse,” or the state Chamber of Commerce that the civil justice system is “broken” in West Virginia, and we

think that West Virginia citizens have the right to know who is paying for that campaign, especially when so many citizens, lawyers and Judges in the State of West Virginia work so hard to maintain the integrity of the civil justice system. We also think our various legal associations, to the extent legally possible, ought to be paying for and running corresponding public interest announcements to provide this information to the public.

A suggestion? A website by the WVTLA providing detailed information on the campaign, and the renting of a billboard in each county of the state listing the website in large letters with the following lead-in: “Abusive Lawsuits or Abusive Advertising to Influence Jurors? You be the Judge.”

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## Tullamore Dew Profiles Gerald P. Duff

I was born and raised in Haverhill, Massachusetts. My maternal grandparents were McCarthys from County Cork, Ireland. After surviving the Sisters of St.

Joseph for 12 years, I turned to the Augustinians and I received my undergraduate

degree from Merrimack College in Andover, Massachusetts in 1968.

I thereafter fulfilled my liberal Massachusetts college buddies (think of the Deltas in Animal House) prediction that I’d go to the mid-west and become a conservative. (Damn right, Lanny!) And I did so with my J.D. from the University of Notre Dame Law School in 1971. Served a short tour of duty in the U.S. Army.

(Still a very decent shot if I do say so.) I then had the great privilege and honor to be Law Clerk to the legendary United States District Judge

Joseph P.

Kinneary in Columbus, Ohio from 1971-1973. Since then, been defeating, and like to think, exasperating

Plaintiff’s lawyers like Pat Cassidy by defending the “Good Guys”- *i.e.* doctors and hospitals, etc., first at Kinder, Kinder, & Hanlon, and since 1984 at Hanlon, Duff (and those other guys).

Have no intentions of retiring in the foreseeable future; and can’t anyway since my wife and three wonderful children, Joe,

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# 2006 Blackstone Club Members

Landers P. Bonenberger	Ronald W. Kasserman
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Lisa Hill.	William E. Watson
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Warmuth	

## Duff- *con'd from P. 1*

Kathy and Chrissy, and my cherished grandson Luke, won't let me! Joe is an MBA banker type. Kathy has her B.S. in Civil Engineering from Notre Dame. She went downhill for her Masters at Northwestern University in Chicago. Chrissy is in her fourth year of

the Doctor of Pharmacy program at Ohio Northern University. Luke

is 10 months old and is going to be a linebacker at Notre Dame!

Consider myself an amateur Historian. As my wife and paralegal would say - I can talk for hours on my heroes such as Sir Winston S.

Churchill, Ted Williams (the late Boston Red Sox Star, the greatest hitter that ever lived - and he didn't need steroids to do it!), or, say, on the American Civil War.

No stranger myself to good wine and cigars and, the occasional Jameson, but equally comfortable,

**“No stranger myself to good wine and cigars and the occasional Jameson.”**

(somewhat heretically for an Irishman) with The MacCallan (neat please).

I very much enjoyed speaking to the Black-

stone Club in August. I was greatly appreciative of the kind, indeed generous compliments thereafter from many of you! Stole some of WALS cigars on my way out - they weren't bad!

Regards. 

*NOTE - Every issue will contain a profile of one of our members, presented in alphabetical order, so fellow members can learn about each member's interests and accomplishments in and OUT of the profession.*

## Commentaries

is the official newsletter of the Blackstone Club, and is published by the Wheeling Academy of Law and Science. For more information, contact Barb Knutsen, Executive Director - 304.232.2576 [barbaraknutsen@firststatecapitol.com](mailto:barbaraknutsen@firststatecapitol.com)

## Letter from the Editor

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editor in putting together the article for the next edition, please call Barb at 232-2576 or e-mail her at [barbaraknutsen@firststatecapitol.com](mailto:barbaraknutsen@firststatecapitol.com).

On a personal note, you probably all have heard by now that our fellow member Bob Gaudio was in a serious automobile accident this month. Don't forget to let Bob know we are thinking about him and wish him a speedy recovery. Cards can be sent to Bob at UPMC Presbyterian, 200 Lothrop St. Pittsburgh, PA 15213



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Have you renewed your Blackstone Club membership? It's time to renew for 2007. Don't miss a minute of what we have in store for you next year. Call Barb today at 232.2576.

## THE WALSH FOUNDATION: Educational Outreach

*As we like to say, "If those who believe in the Civil Justice System don't educate the public, those who don't will."*

We're on track for another year in the schools for mock trials. Ohio Co. Curriculum Coordinator, Kim Miller, met with Barb to discuss this year's venture and we're excited! Kim tells us over and over

how much teachers, students and school administrators like and appreciate this program, and for that we are grateful.

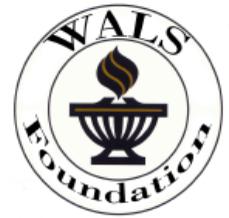
The WALSH Foundation is in the process of preparing the NEW scripts to be used and

Barb has obtained tons of new info after observing a 2 1/2 day criminal trial in Ohio Co. Circuit Court. (At one point, Judge Recht jokingly wanted

to know if she was going to stay in court forever!)

We are also going to expand into Hancock, Brooke and Marshall counties this year, as well as

try to reach students in the local private and parochial schools. We will, of course, go back to Kanawha County in the spring and have been contacted by people in Jackson County for our next "tour." 



*Thanks again, to all lawyers who participate in this growing educational program! I'll be calling you soon.*

# ASK BARTLEBY

Dear Bartleby,

What was Wheeling's legal history with "yellow dog contracts?"

-Kevin Flanagan

Dear Kevin,

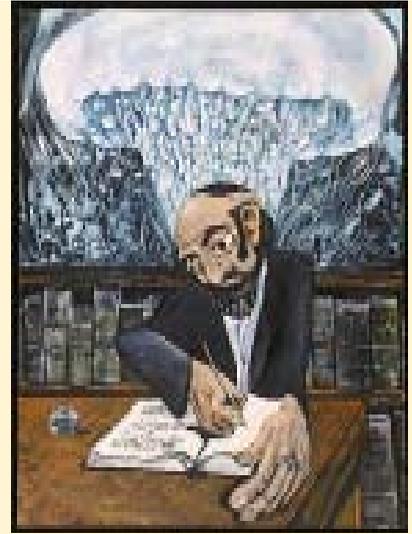
When The Pittsburgh Bessemer Steel Company began operations in nearby Homestead in 1881, it required its employees to sign agreements that they would not join any labor organization during their employment. These "yellow dog contracts" were an early thorn in the side of labor organizations, and led to bitter strikes in Allegheny County, culminating in the famous Homestead Strike with the Carnegie Steel Company on July 6, 1892.

While the "yellow dog" contract was notorious in the early steel industry in Pennsylvania, it was used extensively in West Virginia to keep the United Mine Workers of America from unionizing West Virginia coal operations.

In 1907, the legality of "yellow dog contracts" had still not been conclusively settled when the Judge of the U.S. District (then Circuit) Court for the Northern District of West Virginia, Alston Gordon Dayton, awarded an injunction to the Hitchman Coal & Coke Company banning the United Mine Workers of America (and others, including union official John Mitchell) from peacefully organizing or soliciting Hitchman's employees for membership in the union, or conducting a strike over Hitchman's refusal to recognize the union, because Hitchman had secured "yellow dog contracts" from its employees in advance of offering them a position to the effect that they would not join a union, and withdraw from employment if they did so.

The *Hitchman* case went all the way to the

Supreme Court, but was not decided until 1917, as *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229. By that time, the Supreme Court had already decided that employers had the right to make non-membership in a union a condition of employment. *Adair v. United States*, 208 U.S. 161 (1908). The case nonetheless achieved some notoriety, with the Supreme Court reversing the appellate court's overturning of Judge Dayton's injunction, and holding that even peaceful solicitation of the union in the face of Hitchman's pre-employment contracts amounted to "malicious interference" with Hitchman's property.



Imprimis: I am a man who, from his youth upwards, has been filled with a profound conviction that the easiest way of life is the best. — *Bartleby, the Scrivener* Herman Melville

One organizer from the Ladies Garment Workers Union, Fannie Sellens, achieved celebrity status among labor activists at the time, (and a stint in a Fairmont jail) for defying one of Judge Dayton's injunction orders.

In a thoughtful dissent in the *Hitchman* case, Justice Brandeis questioned how the Supreme court, which did not dispute that the union was a lawful organization engaged in

peaceful conduct, could find its solicitation of employees to join the union and support a strike any more coercive than the employer's obtaining of the agreements not to join a union as a condition of employment. Accordingly, he would not have granted the injunction in the first place. In this, he was a then lone voice in the great tradition of Judge Oliver Wendell Holmes, who had argued as early as 1896 that economic self-interest was justification enough for peaceful union coercion. *Vegeahn v. Guntner*, 167 Mass.92 (1896), dissenting opinion. With the advent of the National Labor Relations Act, "yellow dog contracts" were made illegal. But the NLRB has lately allowed large employers to accomplish the same result by simply designating employees "supervisors," and adding, if necessary, minor supervisory duties to their jobs, to keep them from being eligible to join or support a union.

Judge Dayton, born

in Phillippi in 1857, was a former Member of Congress from the Second Congressional District of west Virginia, and practiced previously in Barbour County with the firm of Dayton & Dayton. While in Congress, Judge Dayton distinguished himself in naval affairs, promoted rights for veterans of the civil war, and urged armed conflict "if necessary" with Spain, concluding with the prescient words, "Cuba will be free!"

Hitchman was represented in the Supreme Court of United States by Wheeling attorney Charles R.E. Gilchrist. Also born in 1857, he was admitted to practice in West Virginia, at Wheeling, in 1881, and specialized in corporation, estate and labor union litigation in state and federal courts. At the time, he was noted to have one of the most extensive individual law libraries in the country.

The union and individual defendants were represented in the Supreme Court of the

United States by West Virginia lawyers Charles Edgar Hogg, (1852-1935) from Point Pleasant, WV, a former dean of the College of Law of West Virginia University, and author of a number of works on legal procedure, and Charles J. Hogg, of Charleston, WV.

Yours Truly,

Bartleby, the Scrivener



Currently, we are in the process renewing Blackstone club memberships for 2007 while acquiring new!

Join now and bring your spouse/significant other to the FREE annual Black-Tie Dinner-Banquet in December.

Keep in mind that your dues not only cover these bi-monthly social events. Other benefits include: five (60 min.) Continuing Legal Education presentations, plus unlimited use of the Blackstone clubroom.

**CALL TODAY -  
232-2576**

# The State of Justice

## “Congress is considering passing a “torture” bill..”

Last issue, we did a feature on the growing threats to TRIAL BY JURY GUARANTEED by the United States Constitution. But it is not the only Constitutional GUARANTEE at risk today. In the category of “Say, what?” Congress is considering passing a “torture” bill which, even apart from its disheartening encroachments on the Geneva Accords, disallows any court anywhere from challenging it or any proceedings under it.

Section 950j of the proposed Act provides,

“No court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or

judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.”

The person who taught me Constitutional law, the late Professor and ABA Journal columnist Arthur John Keeffe must be spinning in his grave. He thought, (rather quaintly, I suppose) that this issue was settled way back in *Marbury v. Madison*, the great decision on SEPARATION OF POWERS that upheld the right of the Supreme Court of the United States of JUDICIAL REVIEW.

Other provisions of the proposed Act reveal why judicial review may be necessary, not only to preserve other constitutional GUARANTEES, like FREEDOM OF SPEECH, but our very democracy itself.

Subsection 4(b)(26) of section 950v of HR 6166 which includes crimes triable by military commissions, provides as follows:

“Any person subject to this chapter, who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished as a military commission under this chapter may direct.”

Foreign radical Jihadists are not thought to have any allegiance or duty to the United States, so this language presumably allows trial of a U.S. Citizen for breaching their “allegiance” to the United States in such a way as to “aid an enemy of the United

States.” What constitutes a breach of “allegiance” to the United States? What gives aid to the enemy?

The Wall Street Journal printed this front page news blurb in its Oct 1, issue:

“Bush told a military group that asserting Iraq made the U.S. less safe swallows ‘the enemy’s propoganda...”

*Con’d on P.7*

**“The person who taught me Constitutional law, the late Professor and ABA Journal columnist Arthur John Keeffe, must be spinning in his grave.”**

**Patrick S. Cassidy**

## Con'd from P. 6

Yet just weeks ago, the New York Times reported on a new National Intelligence Estimate, a consensus report of the U.S. intelligence agencies, that found that the Iraq war has become a “cause celebre” for radical Jihadists and that because of the war, radical Jihadists “are increasing in both number and geographic dispersion.”

Does this make our intelligence agencies “enemy propagandists?” Does reporting this information give “aid and comfort” to the “enemy?” Does it not cause you more than a little concern that congress has proposed that no courts are to consider these, and other issues related to this bill?

When our forefathers drafted the Constitution, they knew that no King, no President, no Congress, no Judge, would or should have a monopoly on wisdom or power. They did not believe that any one person (or group of persons) were so morally superior as to be able to differentiate between

the “good guys,” and the “others.” After all, George III had his own problem with people he defined as “terrorists” (and we called “patriots”). That’s why our forebears insisted on a nation of laws, not men. That’s why they built, with the Constitution, safeguards to the very fabric of our democracy by assuring such things as TRIAL BY JURY, SEPARATION OF POWERS, and FREEDOM OF SPEECH.

And what about our allegiance, as lawyers, as Judges, as elected officials of the United States? I was reminded recently that the “Pledge of Allegiance To the Flag is not part of the Constitution. But the constitution does require a “pledge.” It requires every federal and state official, every federal and state judge, to take an oath to uphold and support the Constitution of the United States. Lesser laws, but with the same noble intent, require lawyers, upon admission to the bar, to make a similar pledge— to uphold and defend the Constitution. It is the Constitution itself

the  
**Blackstone**  
club



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that makes many of us proud to recite that other, more ubiquitous “Pledge of Allegiance.”

Part of me feels foolish for having to write these words. To some, they may seem “clichés,”—truisms that we all know to be true, and not worthy of repeating. But we seem to be living in a time of “disconnect,” when our common shared values, and simple fundamental principals, get overlooked in favor of the purple rhetoric of partisan bickering.

Perhaps now, more than ever, we should take a breath, forget that we belong to one political party or the other, and reflect back on what we learned in Con Law 101, and consider the oath we took when entering into this profession. Perhaps then we will speak out, loud and clear, “in the place where we live.”

Then, perhaps too, our elected officials, be they Republicans or Democrats, legislators or judges, as well as our fellow lawyers, will heed the call, will hear the ubiquitous voice of our forebears, challenging us to go back to the basics, to remember the pledge of allegiance we all took, not as an unthinking chant, but “as a matter of law”— the one upon which our democracy, our country, rests. 

*Ed. Note - Since this article was written President Bush signed into law the Military Commissions Act of 2006 on Tuesday of this week.*

# Upcoming Blackstone Club Meetings & CLE's

**Tonight:** "Bob Noone and the Well Hung Jury"

*Presentation sponsored by Tom Myers,  
Blackstone Club Member*

the  
**Blackstone**  
club



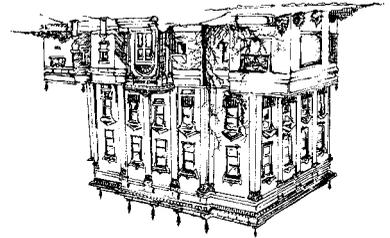
**Dec. 14** - Black Tie Dinner Party and presentation of the  
BEST of the Blackstone Club award! (members and significant others)

## Upcoming CLE's

**Nov.15** - "Divorcing Parents: What Issues are They facing in Family Court?"

*Presentation by Shari McPhail*

**Dec. 8** - A Morning With the Judges - *Honorable Arthur M. Recht* and other  
Judge (TBA) - 60 min. CLE noon series - FREE to Blackstone Club Members



First State Capitol  
1413 Eoff Street  
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