

Symposium: Shifting Powers in the Federal Courts

Transcript of February 21, 2006, Discussion Between Erwin Chemerinsky, Mark Osler, and Tim A. Baker—Moderated by Rosalie B. Levinson

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**TRANSCRIPT OF FEBRUARY 21, 2005,
DISCUSSION BETWEEN
ERWIN CHEMERINSKY, MARK OSLER, AND
TIM A. BAKER – MODERATED BY
ROSALIE B. LEVINSON***

MR. DOHERTY: Good afternoon. My name is Matt Doherty and I've had the privilege of being the symposium editor for Volume 39 for the Valparaiso University Law Review. This year's symposium is on "Shifting Powers in the Federal Courts." We are on a bit of a time crunch right now as one of our panelists has to get to a flight early. So without further delay, I'm going to introduce Professor Rosalie Levinson, an expert in federal courts.

PROFESSOR LEVINSON: Thank you so much, Matt. I'm delighted to have this opportunity to introduce our panelists for today's program on "Shifting Powers," which is better described as hot topics facing the federal courts today. Each of the speakers will address a different but very significant subject.

Professor Erwin Chemerinsky will talk about the performance of federal courts and the war on terror. Professor Mark Osler will address the federal sentencing guidelines, but his focus will be on the real power-broker with regards to sentencing; namely, the U.S. Attorney. And finally, Judge Tim Baker will talk about what is a very clear shift in power in recent years to federal magistrate judges. Because the topics are so different, we have decided that the best way to proceed is for me to introduce the speakers one at a time before their presentations. We will allow a few minutes for questions and then move on to the next topic. That way, hopefully we can better focus our attention on each of the varied subject matters. In addition, if we are running a little late, Professor Chemerinsky can excuse himself so he can make his flight.

So I will start by introducing Erwin Chemerinsky, a dear friend of mine who is currently the Alston & Bird Professor of Law at Duke University School Of Law. He really needs no introduction because

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Erwin Chemerinsky, Alston & Bird Professor of Law, Duke Law School

Mark Osler, Professor of Law, Baylor Law School

U.S. Magistrate Judge Tim A. Baker, Southern District of Indiana

Rosalie Berger Levinson, Richard and Phyllis Duesenberg Professor of Law,
Valparaiso University School of Law.

every student in this room has used his constitutional law material for a number of years, and I have been told by con-law students that they have relied on his Constitutional Law Treatise to get them through con-law, and on his Federal Courts Treatise to get them through Federal practice courses. And those of you who have not used his textbook know him because he is a prolific writer. In addition to the textbooks, he's authored over a hundred articles. Further, whenever I get a brochure about any significant conference, Erwin Chemerinsky is on the panel of speakers. He basically is crisscrossing the country at all times. And on top of all of that, he is arguing court cases, including, I might note, two Supreme Court cases coming up this March; more specifically, on March 2, the Ten Commandments case. So he really is in the forefront of many major constitutional law developments. I have had the great opportunity to read his materials and listen to many of his lectures, and I am always awed at how brilliant a person he is. In addition to being brilliant, he is warm, kind and considerate, a very unusual combination. And I am very delighted that he has taken time from what is an incredibly busy schedule with these arguments coming up, to make a return visit to Valpo Law School.

Professor Chemerinsky, we're honored to have you today.

(Audience applauds).

PROFESSOR CHEMERINSKY: Thank you. Thanks for the incredibly kind introduction. It's really an honor and a pleasure to be with you. For those of you who have bought my books, my children's college education fund thanks you. It's terrific to be back at Valparaiso Law School. It's very special to be here now because when I was here two years ago, Rosalie was in the hospital and I said, I hope very much you'll invite me to have a chance to come back when Rosalie is well, and so the chance to see her and be part of this program when she can be here makes it all the better.

We're now three and a half years since the tragic day of September 11, 2001. And for each of us, those three and a half years have probably gone by quickly. But actually when we talk about being in a war, that's a relatively long period of time. It wasn't that much longer that the United States was involved in World War II. It's longer than the amount of time that the United States Government was involved in World War I. It does provide us the opportunity for evaluating how have the federal courts done with regard to the war on terrorism. And I have what may seem to be an unusual thesis; and that is, that the federal district courts

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have generally done better than the federal courts of appeals with regard to protecting civil liberties. It's actually challenged what the government has done with the war on terrorism. And though we've got many Supreme Court cases, overall I'd say the federal courts of appeals have even done a little better than the United States Supreme Court with regard to the war on terrorism. It's interesting to think about why this has happened.

What I'd like to do in the brief time that I have is make three points. First, I want to suggest to you that overall over the course of American history we've compromised civil liberties in times of crisis and come to recognize in hindsight that we weren't made any safer. This is the context that has gone on since September 11. Second, I want to evaluate how the federal courts have done since September 11 and develop the thesis I just stated for you. And third, I want to offer some tentative thoughts as to why might it be that the federal district courts really have done better than the federal courts of appeals. A couple of disclaimers at the outset, my talk this afternoon is descriptive rather than normative. I don't have time in fifteen minutes to defend that protecting civil liberties is a good thing. I'm going to assume that. And so when I say the district courts have done better than the court of appeals, I'm assuming that better protecting civil liberties is something that is desirable.

Obviously, a fuller exposition requires that I defend the normative basis of my hypothesis. Second, for the sake of time, I'm not going to focus on the Supreme Court's decisions, but I'm really looking at the district court and the courts of appeals in terms of the recent case about the war on terrorism. There are only three Supreme Court cases with regard to civil liberties and the war on terrorism. All were decided June 28 of 2004 in *Rasul v. Bush*, *Hamdi v. Rumsfeld*, and *Rumsfeld v. Padilla*, and while I'll allude to them, my focus really is going to be in the district courts and the courts of appeals, and I think that's important because those are the courts that are much less often talked about than what the Supreme Court is doing.

And finally, a word of apology. As Rosalie said, I'm going to need to leave at 5:00. And I apologize I have to leave during the discussion of the other speakers. I teach tomorrow morning at 8:40, and the last flight that I can get tonight is at 8:20 and I can't afford to miss another day of classes, and so that's why I'm leaving a bit early.

Through all of that as preface, let me just start with my first point, which is the necessary background. Throughout American history,

whenever there's been a crisis, especially a foreign-based crisis, and the response has been repression, we've come to realize in hindsight, we weren't made any safer. I don't think we can talk about what's gone on since September 11 without having this history in mind; and again, for the sake of limited time, only briefly recounted to refresh your recollections.

I could begin in the early days of the country when the survival of the Republic was still in doubt, when Congress in 1798 passed the Alien Sedition Act, federal law that made it a federal crime to falsely criticize the government or government officials. Hundreds of individuals went to prison for speech milder than what Jay Leno or David Letterman say on a nightly basis. Thomas Jefferson ran for president in the year 1800 and part of his platform was having the Alien Sedition Act repealed. When he was elected, he pardoned all committed under it. In 1964 the Supreme Court said that even though no court had declared the Alien Sedition Act unconstitutional, it was declared unconstitutional in the court of history. It's a wonderful metaphor but it can't hide that hundreds of people were imprisoned just for their political speech.

During the civil war, President Abraham Lincoln suspended the writ of habeas corpus even though there's nothing in the constitution that authorizes such presidential action. In fact, the Supreme Court after the civil war declared Lincoln's actions unconstitutional.

We don't know the exact number but hundreds, if not thousands of individuals, were imprisoned during the civil war simply for their speech criticizing the way the north was fighting the civil war. There's no indication from civil war historians that this repression made the country any safer, or helped the north win the civil war. During World War I, Congress passed two laws, the Espionage Acts of 1917 and 1918, that essentially made it a federal crime to criticize the draft or the war effort. If you studied First Amendment law, you know cases like *Schenk* and *Debbs* where people went to prison for tame, ineffectual speech. Schenk was sentenced to ten years in prison just for circulating a leaflet that argued that the draft was involuntary servitude in the violation of the Thirteenth Amendment. Debbs went to prison for ten years just for giving a speech in which she said, quote, "You are good for more than cannon fodder." There's more that I'd like to say but I can't for fear that I might go to prison.

During World War II, a hundred and ten thousand Japanese Americans, aliens and citizens, adults and children, were uprooted from

their life-long home for what President Franklin Roosevelt called concentration camps. The deprivation of civil liberties was enormous as individuals were incarcerated solely based on their race. Not one Japanese American was ever accused, indicted, or convicted of espionage or any crime against national security.

One more example before getting to the modern era. During the McCarthy era, individuals lost their jobs and sometimes their liberty just for being suspected of being a communist. The leading Supreme Court case during the era, *United States v. Dennis*, involved a group of individuals who were sentenced to twenty years in prison for teaching the works of Marks and Lennon and Engles. There was no evidence of any sort that their speech had the slightest effect. But the Supreme Court in an opinion by Chief Justice Fred Minson said, "When the evil is as grave as the overthrow of the government, there doesn't have to be any proof that the speech increases the likelihood of harm."

I think it's so important that we appraise what the government has done since September 11 with this backdrop of history in mind. What has happened since September 11? We now have a fairly large number of cases that have been brought challenging what the government has done with regard to the war on terrorism. And what I find interesting is, there are many cases where the district courts have ruled in favor of civil liberties against the government where they have been overruled by the courts of appeals. Almost no cases where the district courts have ruled in favor of the government against civil liberties where they've been overruled by the courts of appeals. There have been some cases where the district courts and the courts of appeals have agreed.

So you don't think of this as just anecdotal, let me quickly give you five major district court cases, each drawn from a different circuit, that ruled against the government on civil liberties issues where the Court of Appeals reversed. Let me do them in number order of circuit, starting with the D.C. Circuit. There was an important decision of the United States District Court for the District of Columbia, a case called *Center for National Security Studies v. Department of Justice*. It was a Freedom Information Act to try to find out information about the number of individuals being held by the government as part of the war on terrorism. In fact, I'd ask each of you to engage in a simple thought experiment. Ask yourself how many people the government is now holding or have held as part of the war on terrorism? My guess is that no one in this room knows the answer to that question because the United States government has refused to tell us. Until December of 2001,

for the first three months after September 11, the government announced figures of the number individuals being held for immigration violations as part of the war on terrorism, but then they stopped giving that data, now from three years ago. They've never told us how many people are being held for things like being material witnesses, or for other reasons, like the war on terrorism.

About two years ago I participated in a debate for the then Assistant Attorney General from the Criminal Division of the Justice Department, Michael Chertoff, since the Third Circuit judge and now the nominee to head the Department of Homeland Security, and I asked a simple question, "How many people is the government now holding or have they held as part of the war on terrorism?" He said, "I can't tell you that. It's classified." I said, "I'm just a simple law professor but I don't get it. How does it hurt national security to tell us that it's fifty or five hundred or five thousand, or ten thousand?" He said, "I can't tell you." Well, that's what the Center For National Security Studies with the Department of Justice was meaning to find out: How many? What are their names? When were they apprehended? Why are they being held? And perhaps some of that information can't be released, but surely some should be. The Federal District Court judge in the District of Columbia, Judge Gladys Kessler, ruled in favor of the Center For National Security Studies. The United States Court of Appeals and the D.C. Circuit in a two-to-one decision reversed. The D.C. Circuit said it might be that releasing some of this information could be harmful to national security as it gives the terrorists certain information or clues they wouldn't otherwise have. And I'm not sure why knowing the number of apprehended terrorists tells that. Even in terms of the names, you would think if the terrorists are well organized, they would already know some of their members are missing and have been apprehended by the government.

Let me give you a second example, moving now to the Second Circuit, a district court case by the name of *United States v. Awadallah*. *United States v. Awadallah* involves an individual who was apprehended by the United States Government and was held in solitary confinement. When he was brought into federal court, he was brought into court with three sets of chains. You wonder, what's his crime? He wasn't charged with any crime. He was being held as a material witness to testify before a Grand Jury. Now there is a federal statute that allows individuals to be held as material witnesses; however, there's restrictions. There has to be shown that the testimony is essential, there's no other way to achieve it and the like. The government contends that it doesn't need to make

such showings as part of the war on terrorism. A judge in New York said that the government should not be able to use the material witness statute to hold people to testify before a Grand Jury. The United States Court of Appeals for the Second Circuit reversed and said that individuals could be held as material witnesses for Grand Jury testimony. The Supreme Court recently denied cert, and the case is back before the district court.

Let me go to the Third Circuit. There is a case called *New Jersey Press v. Ashcroft*. Right after September 11 the head immigration judge, Michael Creppy, issued what's commonly known as the Creppy memo which called for blanket secrecy of immigration in cities. A Federal District Court judge in Detroit declared this unconstitutional in *Detroit Free Press v. Ashcroft*, saying that blanket secrecy violated the rights of the press and the public to attend these proceedings. The United States Court of Appeals for the Sixth Circuit agreed. In regard to the *New Jersey Press v. Ashcroft*, the Federal District Court judge from New Jersey agreed with the position taken by the Detroit court, with the Sixth Circuit, that this violated the First Amendment, but the Third Circuit in a two-to-one decision reversed and said that blanket secrecy did not violate the First Amendment. Judge Becker writing for the court said, "We can't tell if some innocuous fact might be used by terrorists as part of a mosaic that could harm national security." Of course, though, as Judge Keith said, "If that's true, that could justify closing any proceeding or all proceedings because there might be some innocuous fact that we don't realize could be used by terrorists." The Supreme Court denied review.

A fourth example comes from the Fourth Circuit: the famous case of *Hamdi v. Rumsfeld*. Yaser Hamdi is an American citizen who was apprehended in Afghanistan and brought to the United States. He was initially taken to Guantanamo. When it was discovered he was an American citizen, he was brought to the military prison in South Carolina. A Federal District Court in Virginia ruled that Hamdi had a right to consult with a lawyer. The United States Court of Appeals for the Fourth Circuit reversed. The federal district court then promulgated a series of questions for the government to answer to justify holding Hamdi as an enemy combatant. Again, the Fourth Circuit reversed the district court, saying that the government did not need to answer the questions in order to justify holding an enemy combatant, that the president had inherent authority as Commander in Chief to hold enemy combatants. As you know, the Supreme Court in June, in part, affirmed the Fourth Circuit saying that the president did have the authority

pursuant to resolution authorizing military force after September 11 to obtain enemy combatants, but the Supreme Court said that due process is required.

Fifth and final example involves the Ninth Circuit and a case coming out of the central district of California: a case called *United States v. Romani*. Romani was one of a group of individuals who was convicted of the law for assisting a terrorist organization. It was for raising money and giving money to an organization in Iran that was working for freedoms in Iran. Now, what Romani and his codefendants wanted to do was to argue that the organization they were giving to wasn't a terrorist organization at all. There's no First Amendment right to aid a terrorist organization. So he wanted to argue this wasn't a terrorist organization, it was a humanitarian organization. And the United States District Court for the Central District of California in an opinion by Judge Rob Ratatazuki said that he should be able to challenge the predicate for his detention whether this is a terrorist organization. If it is not a terrorist organization, the contributions are protected by the First Amendment. But the United States Court of Appeals for the Ninth Circuit in December reversed. The Ninth Circuit said, "Under the statute if the Secretary of State deems an organization a terrorist organization, only that organization can challenge the designation in the United States Court of Appeals, District of Columbia Circuit, and that's it." So Romani can be convicted under this law without ever challenging whether or not his speech is protected by the First Amendment.

There's only one case I can identify where the district court came out against civil liberties and the Court of Appeals reversed, and actually the case that I'm counsel, a case called *Gherebi v. Bush*, representing a detainee in Guantanamo by the name of Falen Gherebi. The district court in California ruled that no court had jurisdiction to attain this court was deficient. But the Ninth Circuit reversed and now the case is pending in the D.C. Circuit. But other than that, I can't point to any instance where the district court ruled against civil liberties and the Court of Appeals was more pro-civil liberties.

There are a number of other district court cases where the district courts ruled in favor of civil liberties that are now on review in courts of appeals. In *Hamdi v. Rumsfeld* the Federal District Court for the District of Columbia, James Robinson, ruled that it violates the Geneva Convention to use military tribunals for Guantanamo detainees. In *Guantanamo Detainees*, Judge Joyce Hens-Greens a few weeks ago ruled that those who are held in Guantanamo state a cause of action on claim

for relief. In *Doe v. Ashcroft* a federal district court in New York ruled that the national security letters that allow the government to subpoena personal information without following Fourth Amendment requirements is unconstitutional. It will be interesting to see if this pattern continues. But my sense is that we now have enough cases, the ones I mentioned to you and some others like them, to say there really is a trend or a pattern. So I'll use my the last couple of minutes or the third part of my remarks to think about, why should this be the trend. If you'll accept that we have enough data to come to this conclusion, why so? Of course, it might be that this is all just anecdotal, that even these cases just aren't enough. Maybe it's just the luck of the draw that you might have more progressive district judges and more conservative Court of Appeals judges. One reason I wanted to pick for you examples from different circuits, is because you can't, I think, dismiss the cases so easily. One thesis that I want to defend here as an explanation is the district court judges are selected less on the basis of ideology, and Court of Appeals judges are much more selected on the basis of ideology. Ideology, likewise, plays much less of a role in the United States Senate than District Court nominees and much more of a role for Federal Court of Appeals judges. No district judges were filibustered by the Senate in the last four years, but ten Court of Appeals judges were filibustered. With a greater ideological orientation of the courts of appeals might explain why the courts of appeals come to different conclusions than the district courts. There may also be an explanation in terms of role orientation. I would suggest that district court judges perceive their role as evaluating the credibility of the evidence before them. That's what district court judges do all the time. They're much less likely to accept the assertions of the government and defer to them, much more likely to say there was no basis in the affidavit that the government is claiming. The courts of appeals, which are less in the business of evaluating the credibility of witnesses, were much more willing to defer to the government, to accept the testimony that was before them.

Now let me just conclude with two quotes of late Supreme Court justices. And again, I think they're all about the broader context of what I'm discussing. One comes from the late Justice Robert Jackson, where he said the constitution is not a suicide pact. And I certainly agree, and I believe that there are times when even precious liberties need to be compromised for the sake of national security. But I also think we have to remember the words of late Justice Louis Brandeis who said that the greatest threat to liberty will come from people who claim to be acting for beneficial purposes. People born to freedom know to resist the tyrant despots. He said that the insidious threat to liberty will come from well-

meaning people of zeal with little understanding of what the constitution is about. Now, Louis Brandeis never knew John Ashcroft or Donald Rumsfeld, but if he had, he couldn't have used better words to describe them.

(Applause).

PROFESSOR LEVINSON: Maybe it's simply that district court judges are more willing and open to understand the teachings of history than appellate court judges. Are there any comments or questions either from the panelists or from the audience? We just have a few minutes but does anybody want to comment or does anyone have a specific question?

(No response.)

PROFESSOR LEVINSON: Okay. We'll move on to the second speaker so we can try to stay on time. Our second speaker is Mark Osler. He has been at the center of the controversy regarding the federal sentencing guidelines. He testified before the U.S. Sentencing Commission. He has written articles on the federal sentencing guidelines, and, in fact, he was quoted in a footnote in Justice Stevens' dissent to the Booker case. In 1995, he joined the Department of Justice as an Assistant U.S. Attorney where he served as lead counsel for the government in major felony trials. At Baylor Law School he teaches advanced criminal procedure and criminal law courses. Because of his experience as an Assistant U.S. Attorney, he offers us a unique insight as to who really is the power-broker when it comes to sentencing, and he basically targets the U.S. Attorney's office. He promises to provide us some very concrete suggestions as to what should be done about this dilemma. Professor Osler.

(Applause).

PROFESSOR OSLER: Thank you. I came here from Waco and not many people get to say that—there's tiny little airplanes that fly out of Waco, and we're flying to Dallas out of Waco in this little Saab 340. It takes off full, which means there are 14 people inside. And as we approach Dallas, for some reason the plane started going from side-to-side. It could be that it was windy, but it wasn't windy when we took off, and the passengers were starting to make those noises like people at the fireworks show, "Ooooh. Aaaaaah," lurching from side-to-side, and people are offering theories about why it's doing that: "We're being shot at from the ground." But no one really knew why this was happening,

and after the feeling of air sickness passed, I realized this is a pretty good analogy as to what I've been looking at for a while in federal sentencing, where we've been jerking back and forth for no apparent reason.

For years under the federal sentencing guidelines, more and more power and discretion was accruing to federal prosecutors, which seemed like a good thing if you're a federal prosecutor, which Judge Baker and I both were about the same time in the heart of this. And then in 2003 the Feeney Amendment had passed; and I don't have time to fully explain that, but that added to the discretion that the prosecutor had. A first-day-on-the-job prosecutor walking in the courtroom, many Article III judges would tell you, that prosecutor had more discretion than that judge who may have had thirty years' of experience. Now just recently, in January, in the *Booker* decision the Supreme Court changed all that and gave the discretion largely back to the judges by making the guidelines advisory as opposed to mandatory. How that's going to play out, we don't know. Congress may just as quickly switch the discretion back to the prosecutors to give them the power. And there's been a lot of analysis of what's going to happen and how this has gone back and forth.

But all that masks something that I have come to believe is really more important, and that is, how do prosecutors exercise what discretion they have? Whether the discretion is larger or smaller at any given moment, how do they make those decisions? Those individual prosecutors who have somebody in their office, an agent who wants to bring them a case, how do they decide to take it or not? You'd expect there would be a guiding principle, that something would come down from the Attorney General saying "Here's how you decide," that it would be in the U.S. Attorney's manual, but that's not really true. It largely comes down to the conscience of that individual prosecutor, and if there is a supervisor that needs to approve things, how good that prosecutor is at convincing the supervisor of her position.

Does that matter? It matters a lot.

Before moving to Waco, I was from Detroit. We're between Detroit and Chicago right now, and I'm going to talk about those two cities. When you come from Detroit, there's a lot of sadness there. That hasn't been a successful place. I lived as a child in a neighborhood on the East side of Detroit; and near there, where there were houses and stores, now there are fields. There might as well be a farm there. What happened? Well, in part, what happened was the effects of generations of racism, of

police overreaction, of rioting. But also on top of all that, it was crack that undid what social fabric was left in some parts of Detroit, not all of it but some parts. It was very sad to see that happen to your home. Being from Detroit for many people is like being deeply in love with someone who lets you down over and over again.

When I was in law school, my first year I worked with for the U.S. Attorney in Chicago, so I went out to Chicago—what a beautiful city. And I discovered something very odd, which was that in Chicago, they didn't seem to have crack; this was 1987 and it had been in Detroit for a long time. And Chicago also had a crime rate much lower than other major cities at that time. Working at the U.S. Attorney's office, I had people that I could talk to about this. But what I heard was this: That crack came to cities in the early 80's, late 70's, brought by Jamaican posses, as they call them. And they came to Chicago just like they went to other places. But something happened in Chicago. There was this gang there, some of you may have heard of them, the El Rukns, who came out of the Black Stone Rangers on the south side, led by a man named Jeff Fort, among others. The El Rukns controlled the powder cocaine trade in Chicago. And what they did when the Jamaicans came, is that they killed them. And then some more would come and they'd kill them. If people came from L.A. or people came from New York and wanted to sell crack or show people how to make it, they'd kill them. And nobody took down the El Rukns. Now, I asked people, "you know who is killing people, why don't you take down this gang?"

Prosecutorial discretion. What happens when you take down that gang? Eventually they did indict the El Rukns. Unfortunately, it was a terribly flawed prosecution that didn't work out very well. But crack came to Chicago. The crime rate skyrocketed, the murder rate became one of the highest in the nation for a period of time. Whereas, everywhere else, the crack coming in was starting to slacken.

So does it matter? It matters a lot. It matters an awful lot.

So what can guide prosecutorial discretion? What principle can we look to? There's been very little written about this that I was able to find, which was a little scary given how important it is. The best I could do in terms of throwing out principles was to look back to my own experience as a prosecutor and the justifications that I used and that my colleagues used to justify the decisions we made in exercising discretion. I remembered basically four types of justifications, though I'm sure there's others. I don't claim this to be an inclusive list.

The first I would call “across the board, law enforcement.” That is, that if someone violates federal law, we’re going to prosecute them. That’s easy to say, but Federal criminal law at this point is so broad that that’s impossible. Very often if I was justifying taking a case, if I was talking to a defendant’s family about why we were seeking what we were seeking, the simple answer was that they broke the law. But that doesn’t do much to guide discretion because there are just too many criminal acts—You’re working with so many crimes and so many potential criminals. But it is a principle: A very expensive one to follow through on but it’s a principle.

The second principle I would call “leveling.” And that is the instinct to target those who have been most advantaged, to go after those who have been most successful, and have more compassion towards those who have been less advantaged. Sometimes you’ll hear this as a justification for going after particularly affluent defendants. I can’t say that any one prosecutor has had this as their principle for the employment of discretion, but certainly when people are talking about the Martha Stewart prosecution, both those who defended it and those who attacked it talked about leveling as an influence.

Now the third possible principle that I remembered I would call “message sending” —That we can employ discretion in such a way that we’ll create general deterrence. We’ll pick those cases that are going to be high profile to send a message to others—“don’t commit crimes” — and we often say that’s what we’re doing. Now, of course, if it’s going to be a method of employing discretion, it’s going to have to apply to some cases and not others. And unfortunately, prosecutors tend to say as often as they can that they’re trying to send a message. Less attention, of course, is paid to how that message is conveyed or if it’s conveyed at all to those who might make a choice. That theory, which has the good goal, I think, of crime control, also makes the assumption that criminals are rational actors, that they weigh benefits and costs before they act. That may be true. That may not be true. I’m not going to go there right now.

The fourth principle that as I became more experienced I tended to favor, is what I call “key-man targeting.” And what I mean by that, is that in conspiracies, in crimes that involve more than one person, some of those people are going to matter more than others in terms of enabling crime to continue. That is, everyone in a conspiracy isn’t equally able. Some have special skills, special talents that make the whole thing run. And if you take out those people, it will have a more specific affect on

crime. That guided some of my work. For example, one thing I really wanted to do because people kept breaking into my car and taking stuff, was to stop people from breaking into my car and taking stuff. I lost a lot of radios. But the way we did that is we went after the fences and we didn't care so much about the thieves; we took away the market. We took down a number of fences, and the break-in rate to cars in southeastern Michigan went down by over seventy percent. We didn't worry about going after every thief, because after a while those people stopped being thieves because there was no one to sell the goods to.

Beyond conspiracies, looking at those who commit crimes on their own, probably looking at recidivism is the way to identify the key man. That is, those who have a pattern are more likely to cause more damage in the future. If we exercise discretion at the prosecutorial level, the focus on those people is more likely to result in crime control. Obviously I favor, out of those four principles, the key-man approach, because I do think it's a principle and I think it's attainable as well.

I think what the Attorney General should say is, "This is a principle I want prosecutors in the districts to use." When you're trying to decide who to charge, who to give a break to, what sentencing to seek, this should guide you. Will it work? Probably not all the time, but it's better than making it up as you go along. Let me give you an example in terms of effectiveness of looking at the key man. You go to a bagel shop, a chain bagel shop, and you look in the window where they're making the bagels. And in there there's a big sign, this big sign that tells the people working back there how to make the bagels. They do that because the people who make the bagels turn over a lot. They quit every three weeks. There's 250 percent turnover in that position, and they want to be able to hire somebody that morning and have them making bagels by 11:00, and they've structured their business that way.

Now, if you wanted to take down bagel shops, it would not work to target the bagel makers. It wouldn't matter. That business is structured to account for taking out the bagel makers. You'd want to find out who it is that makes the leases for that place, who makes the payments, who figures out the logistics of how the truck gets there with the frozen dough. You take *them* out and it's going to stop. You take out the bagel-makers, there's going to be a whole new batch the next day reading that sign, but that's been our approach to crack. Crack is cooked on stoves by the people at the bottom of that network of criminals. The incentives to agents in federal law are to go after the people who possess and sell the crack, the "bagel makers." How surprising it doesn't go away! We've

had a lot of arrests. We've had a lot of convictions. We've had a lot of crack, and there's a cost to that. If you don't believe me, go to Detroit.

I think that a criticism of what I'm saying, that I'm sure I'll hear from people, is that you would be taking away from the individual discretion that prosecutors have right now and even from the local discretion that U.S. Attorneys have, that you'd be taking away from their ability to make decisions at the local level. And that's true. Although, from what I know, I think the discretion resides much more at the trial attorney level and the immediate supervisor than the U.S. Attorney who doesn't usually get involved in individual cases in terms of discretionary choices.

I think one of the values of having a principle to guide discretion is if criminal law is going to have a moral voice, it has to have something that commonly guides discretion. If it's simply the conscience of those thousands of prosecutors, then it's just a galaxy of stars all with their own hue of light.

There used to be a rap song that talked about "the police have their own gang." And I remember this because defendants used to yell it at us sometimes, "You just got your own gang." And I dismissed that. It would be much easier to dismiss that criticism if we had a common moral force behind prosecutorial discretion, where at the end of the day I could say to those people who questioned what we were doing, "We're doing it because this is right."

(Applause).

PROFESSOR LEVINSON: Any questions or comments for Professor Osler? Yes, Professor Lind.

AUDIENCE MEMBER: Hi. I think it's really interesting to approach this question from the federal prospective as opposed to the state prospective. It seems to me that the U.S. Attorney's office is a relatively privileged place for prosecutors to work for a lot of different reasons. And one of the things I noticed you didn't put on your list of factors, was simply the ease with which one might be able to obtain a conviction. And it seems to me that that really is a factor, at least at the state court level, of prosecution, is that people are going to shy away if it's difficult, if the defendant is represented by a more formidable opponent, and so on and so forth. Of course that raises horrendous justice issues with regard to distribution of resources and things like that. I wonder if you could comment on that.

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PROFESSOR OSLER: Yes. Two things on that. First of all, I couldn't agree more with the latter point that you made, that people do what's easiest. And I think that that's wrong. That's one reason that I believe there should be a guiding principle because in the absence of a guiding principle, there's more and more career prosecutors who find ways of coping with the stresses over time; they do what's easiest. And that's not principle.

In terms of state versus federal, there's something that I addressed in the article that I didn't play out here, and that is that I think that federal prosecution differs from state prosecution in an important way; in that, almost all state prosecutors, the D.A.s. are elected. And they do have to articulate principle, at least at some level, we would hope, when they run for office. And if they don't live up to that principle, they're going to be thrown out. Does that always happen? Of course not. But there is a check in the state system that we don't have in the federal system. So I don't think that the argument I made in terms of the federal system not having that principle behind the exercise of discretion holds in the same manner as to the state system. I think you're right that the tendency to go towards what is easiest is true in the state system as well. Frankly, I'm kind of stumped about how to address that within the states.

PROFESSOR LEVINSON: Any other questions or comments from the audience or from the panelists?

(No response.)

PROFESSOR LEVINSON: We can move on to our third speaker, Judge Tim Baker. I'm especially proud to introduce him. He is a Valpo alumnus, and he was a student of mine many moons ago. I can honestly say, having taught for over thirty years that he is one of the very best students I have ever taught, as well as his wife, who is in the audience. And I have no cases pending before the judge, so this is a completely honest assessment. After graduation, he clerked for a federal court judge, and then, like Professor Osler, joined the U.S. Attorney's office and served as Assistant U.S. Attorney. In 2001 he was appointed as a magistrate judge for the Southern District of Indiana. In the meantime, he has been very active in the Indianapolis Bar Association, and he has really focused his time and energy on encouraging civility and professionalism in the bar, a very noteworthy goal, I might add. I have had the unique pleasure of serving on panels with Judge Baker before and he does an excellent job. He is going to do a Power Point

presentation, which is a nice way to get started. It will wake you all up. I am very proud and very delighted to welcome you back to Valpo.

(Applause).

JUDGE BAKER: Thank you. As we talk about the shifting powers today, I can't help but reflect that so many times that I was sitting out there and the professors were up here. And now I'm standing up here and I see Professors Levinson, Vandercoy, Myers, Bodensteiner, and Moskowitz, and so many more. If I had more time, I would love an opportunity to ask all of them questions. Now that would be a power shift. We don't have time for that today. Instead, I'm here to talk about the expanding role of magistrate judges in the federal courts and the shift of power that has occurred in that regard. Let me start by using the words of District Judge William Young from Massachusetts. He commented in an open letter to his colleagues in the "Federal Lawyer" recently, "The evidence is all around us. It is the Article I not the Article III trial judiciary that is today expanding, vital and taking on ever more judicial responsibilities." Judge Young got it right, and he's not the first one to have noticed. In fact, the Supreme Court has observed that federal magistrates account for a staggering volume of judicial work and are indispensable. Now as we reflect upon those words, we should go back to the origins of federal judicial power, which is, of course, Article III, Section 1, of the Constitution, which generally provides that federal judges are appointed for life, as long as they behave well, and will not have their salary diminished, and that there should be no periodic appointments. It was Alexander Hamilton in his federalist papers, in fact, that said, periodic appointments, however regulated, or by whomsoever made would in some way or the other be fatal to judges' necessary independence. At least, that was Alexander Hamilton's theory. Now let's look at today's reality.

The reality of today is that magistrate judges comprise close to half of the judges sitting on the district courts. And magistrate judges are subject to periodic appointments and otherwise lack many of the indicia of independence that characterize the Article III judiciary. Today's presentation is not a promotion by me to elevate the Article I judiciary to Article III status. It's simply an acknowledgement that in today's federal court there has been a shift of power; and it's important for lawyers and litigants to recognize that shift.

Let's look at the numbers. As of fiscal year 2003, there were 543 full-time magistrate judges in the federal courts compared to 651 district

judges. Now I'm not including in these numbers bankruptcy judges, which are also Article I judges. But the bankruptcy courts are a separate court. I'm dealing just with the district courts and those are the numbers of the judges sitting on the district court. Let's look closer. In 2003, magistrate judges presided over more than eleven percent of the civil trials, and from 1994 through 2003 magistrate judges conducted slightly more than 14% of the civil trials nationwide. Now, of course those are averages and it's going to depend upon your district in terms of how many actual trials, and how much responsibility, a particular magistrate judge has. But you should know that in certain districts, like Oregon, magistrate judges have a very active role. And in the Eastern District of Missouri, magistrate judges are responsible for disposing of more than 20% of all the cases filed in those districts. It was Judge Poser, I believe, in the *Geras v. Lafayette Display Fixtures* case who wrote a pretty emotional and powerful dissent, and he said that he could envision a day perhaps when magistrate judges would handle 50% of the civil cases filed in the federal courts. I don't think that's realistic. I don't think that's going to happen. I think the district judges today and forever will do the heavy lifting on the trial work and on the summary judgment work in federal courts. But there is a shift. It's real and it needs to be acknowledged.

Let's talk then about the appointment process of magistrate judges, because that is one of the important differences. Magistrate judges are appointed based upon recommendations of merit selection panels. In contrast, Article III judges are, of course, appointed by the president and confirmed by the senate. Full-time magistrate judges serve eight-year terms. And, I'm happy to say, those terms can be repeated. In fact, the magistrate judge that I replaced had been on the bench for twenty-four years. In fact, he's still on the bench. He is currently in a recall status which is the magistrate judge equivalent to senior status for the district judges. Now, let's look at the appointment process for Article III judges. This cartoon somewhat demonstrates this. This is the senate judiciary chamber with three nooses hanging over three empty chairs, with one person commenting to the other, I see the senate is preparing for Supreme Court confirmations. The road to the Supreme Court is necessarily more rigorous than the road to the district court bench. Nevertheless, the senate floor is littered with would-be nominees to the Supreme Court and to the district courts. And you don't have those pressures at the magistrate judge level. Well, as you music fans may know, David Byrne from the Talking Heads asked in a famous song, "How did we get here?" So let me tell you briefly how we did get here. The Judiciary Act of 1789 started it all. Arrest and bail issues were

governed by state judicial officers under that act as first promulgated. In 1793 Congress authorized a federal circuit court to appoint one or more discreet persons learned in the law to take bail in federal criminal cases. In 1817 Congress renamed those persons commissioners. And in 1842, Congress authorized the commissioners to authorize general criminal process in federal cases by issuing arrest warrants and to allow them to hold persons for trial. In 1896 that office was renamed United States Commissioner. And then it gets more interesting. In 1968 the Federal Magistrate Act was passed and officially created the office of the United States Magistrate. In 1976 the powers of the magistrate were clarified further and magistrate judges got the authority to issue reports and recommendations. And for those of you who don't know what that is, reports and recommendation are a process pursuant to which magistrate judges will issue a written decision on pending motions, often a dispositive motion, such as a motion for summary judgment or a motion to dismiss. And a party has ten days to object to that ruling. If there's no objection, the district judge typically would adopt that ruling as that of the district judge. That authority came in 1976, further expanding the authority of magistrate judges. And then the Federal Magistrate Act of 1979 gave magistrates the authority to conduct trials in civil cases upon the consent of the parties, expanded jurisdiction to handle all federal misdemeanors, and my favorite provision of the law, authorized funding for law clerks.

Now, fast forward to 1990. This is really the key part where the power shift really picks up. The Judicial Improvement Act of 1990 did two things. The first thing it did was change the title of the position to United States Magistrate Judge. It added the word "judge" to the title so that the title was commensurate with the responsibility actually being exercised by the position, which was important for a lot of reasons. But just as important, perhaps more important, was the Civil Justice Reform Act of 1990, which was, I believe, Title I of the Judicial Improvements Act. The Civil Justice Reform Act emphasized the importance of early involvement by a judicial officer. What that act said was that each of the ninety-two districts throughout the country in the federal courts had to come up with a Delay Reduction and Expense Plan. In other words, every district had to figure out, Why are cases taking so long to get to trial? Why is it so expensive? Every district had to come up with a plan, and use a judicial officer to figure out how to make the process better. And that judicial officer typically was the magistrate judge. As one commentator had stated, "Regardless of the roles played by magistrate judges under particular Expense and Delay Reduction Plans, the office of the magistrate judge will, on balance, grow under the C.J.R.A." And

as another author has noted, "In effect, magistrates now exercise many of the same powers as federal district judges. They decide motions, hear evidence, instruct juries, and render final decisions in civil and criminal cases." And, in deed, that's the fact, that's exactly what happens. In fact, the Senate Judiciary Committee that considered the C.J.R.A. cited to the increasingly heavy demands of civil and criminal dockets in concluding that magistrate judges should have a much more important role to play in the process.

Well, let's take a look at those dockets that Congress was so concerned about. They're bloated. Civil filings increased by eleven percent in fiscal year 2004. The number of pending criminal cases in the district courts have increased every year since 1994. And look how many pending cases there were at the end of fiscal year 2003, over 261,000 pending civil cases. Over 60,000 pending criminal cases. And as our last speaker mentioned, the crack epidemic has been a problem. And now if you've looked at the papers it's the methamphetamine. In fact, there was a front page article in the *Indianapolis Star* on Sunday all about methamphetamine. The number of criminal cases that this situation has generated is staggering for the federal courts. And they're frequently multi-defendant cases which utilize an incredible amount of the resources of the federal district judges because they have primary responsibility for the criminal docket. And so what happens when the district judges are tied up on methamphetamine and the other 60,000 criminal cases that are pending? Cases get pushed to the magistrate judges; and there's that shift of power that I'm talking about.

There are other pressures; budget crisis, criticism of judicial decisions, and actions taken in discharge of judges' duties, congressional investigations of judicial misconduct, which our prior speaker touched upon. And the theme he mentioned actually requires certain reporting requirements that have added extra pressures on the district judges.

Let's talk about the powers of the magistrate judges and see how this power shift has really occurred. Let's begin by looking at 28 U.S.C. § 636. That's where the statutory provision is and the power comes from that. Upon consent of the parties, magistrate judges can and do conduct all proceedings in a civil case. The 2003 Supreme Court case of *Roell v. Withrow* allowed for implied consent to magistrate judges. In the good old days, parties filed a formal written consent with the clerk's office. That's not even required anymore. The Supreme Court said in *Roell* that implied consent from the parties' conduct is all that's required to consent to the magistrate. Yet even without an implied or expressed consent,

magistrate judges determine a wide variety of pretrial matters and recommend the disposition of a wide variety of motions. And you need to understand the standard of review. On the reports and recommendations that I discussed, the standard of review is *de novo*. But again if nobody objects, those recommendations generally are going to be adopted. But the standard of review for most other non-dispositive motions is clearly erroneous or contrary to law. For those of you that have practiced in federal court or for the students who hope to practice in federal court, you know that the battle ground of federal litigation is the discovery process. If you want to prove your case, you're going to need the discovery to support your case. If the magistrate judge says you're not going to get that discovery, the only way to get that overturned is by going to the district judge and showing that that ruling is clearly erroneous or contrary to law. That's a difficult standard to meet.

In addition, the Federal Court Improvement Act of 2000 gave magistrate judges limited contempt powers for the first time. Prior to this, magistrate judges were required to certify facts and report them to the district judge so that the district judge could decide whether, in fact, a contempt had occurred. Under this new act, magistrates judges now have the authority to find persons in contempt for acts that occur in their presence.

There's a variety of rulings, case law, that further expand upon the powers of the magistrate judge. I've just picked a few to review with you. Magistrate judges have the authority under Rule 26 to issue a protective order to prevent the release of discovery information to the public. They have the authority under Rule 16 to require a party's presence at conferences. In fact, last week I had a case involving a lawyer from Minneapolis and a party from Fort Lauderdale. I required both of them to be in attendance for a settlement conference. That requires an expenditure of time and resources by parties, and yet that's normally and naturally within the duties of the magistrate judge in today's system. Magistrate judges have the authority to rule on motions for mental competency examinations; to certify petitions, petitioners for extradition; to conduct felony *voir dire* proceedings with the parties' consent; to preside over felony jury deliberations – if the district judge is available by telephone. That's one of my favorite cases. The case shows the natural tension between the pressures on the district judge and what the magistrate judge is allowed to do. The magistrate judge can preside over felony jury deliberations as long as the district judge is available by phone. I don't know if it was outcome determinative in that case that

the district judge had call waiting. Magistrate judges also have the authority to read *Allen* charges to the jury, to accept a verdict where the district judge was occupied with other court business, to preside over an evidentiary hearing to determine the voluntariness of a defendant's guilty plea. Here's a particularly good one: a magistrate judge had the authority to overrule an earlier ruling by a district judge after the parties had consented. Courts have also held that a litigant cannot supplement the record before the district judge after the magistrate judge has done the report and recommendation. At that point, the record is closed. Finally, magistrate judges have the authority to allow a beeper or electronic tracking device to be attached to a suspect's plane.

Those are just a few examples. There are many more. I have barely scratched the surface on the criminal side, where magistrate judges routinely issue search warrants and decide whether defendants are going to be detained pending trial. Those criminal pretrial matters are typically determined by the magistrate judges. That's an incredible amount of authority to decide whether somebody is going to be detained for trial when there's been absolutely no finding of wrong doing by that defendant.

There are various causes of this changing landscape; various efforts to decrease the district judge's discretion, if not their outright jurisdiction. The sentencing guidelines is one example of that.

Another cause is that the number of civil trials having markedly fallen over the years. Let's look at those numbers briefly. In 1970, 10% of the civil cases were going to trial. In 2003 only 2.5% of the civil cases went to trial. If district judges are the trial judges, and not many civil cases are going to trial, then necessarily the district judges are not exercising that part of their authority that they formerly did. And as this graph demonstrates perhaps more vividly, the number of civil trials has decreased dramatically. There's no reason to think that's going to end any time soon. Other changes include the rise in mediation and other alternative dispute resolution methods. Magistrate judges in the federal system typically are responsible for conducting settlement conferences, and we are essentially the face of the case. If you're a litigant or a lawyer and you come to the district court, you may often find that you will see the magistrate judge and not the district judge, unless the case ultimately goes to trial and it's not a consent case. And so in conclusion, let me say this: Despite the requirements of Article III of the Constitution and the fears of Alexander Hamilton, Article I judges make up nearly half of the judges sitting on the district court. Judge Young was correct in

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observing that Article I judiciary is taking an expanding and ever more vital role. There are numerous causes of magistrate judges' expanded roles, including the availability of consent jurisdiction, the Civil Justice Reform Act, emphasis on increased case management by the Court—typically by the magistrate judges—and the rise of alternative dispute resolution, which also is handled primarily by the magistrate judges. Given this backdrop, there is no reason to believe this trend will dissipate. Thank you.

(Applause).

PROFESSOR LEVINSON: Thank you, Judge Baker. Actually, I have a question. I mean, I think I'm going to reassume my role as professor. Obviously the concern with Article I judges is they don't have lifetime tenure appointments; they're somewhat beholden to the district court judges who appoint them. Has a study ever been done as to whether magistrates ever not get reappointed? Is that something that should be of concern? Is there any kind of real pressure being exerted in any way by district court judges? Have there been any statistical studies done? My experience tells me that magistrates are reappointed every eight years.

JUDGE BAKER: I don't know of actual studies. I do know the administrative office of the federal magistrate judges keeps records of all those. So if you wanted to find the answer to that question, you could. My understanding is similar to yours, that generally speaking, magistrate judges are reappointed. Now there's another part to your question and I can't remember what it was.

PROFESSOR LEVINSON: The other part is the suggestion that because district courts appoint you and district courts have the power not to reappoint you—

JUDGE BAKER: Right.

PROFESSOR LEVINSON:—I mean, I would hope there isn't any sense of pressure to perform or decide cases certain ways, but I thought that was a question worth asking.

JUDGE BAKER: I don't know what they're doing in every district. I couldn't comment on that. But in the Southern District of Indiana, I don't feel that pressure. I have heard of a few magistrate judges who were not reappointed, but since I wasn't personally involved in these situations, I really couldn't comment. But certainly commentators, I

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think Professor Mead in one of the articles mentioned in my written article for this symposium, talk about those pressures.

PROFESSOR LEVINSON: Thank you. Anybody else have a question for the judge, or a comment? Professor Lind.

AUDIENCE MEMBER: What would you say is the most common example of litigants finding out later that they impliedly consented to having somebody like you try their civil case?

JUDGE BAKER: Well, the *Withrow* case was really a great one because that was a case in which the case got set for trial on the magistrate judge's docket and went to trial. One side lost, then realized they hadn't consented in writing. Well, it was too late at that point. You can't go back. As far as how does that happen? In the federal system, we typically have a case management plan, and in the case management plan there's a specific provision that says, "Do you consent to the magistrate judge?" And if it says "Yes," then it gets shifted over to the magistrate judge. There are times where parties, rushing to get their case management plans filed, might not read them as closely as they should. Or perhaps one party thought the other side had authorized them to represent to the Court that both sides consented to the magistrate judge. That's the best example I can think of where that can happen. Otherwise, it would seem to me it would be pretty obvious if you're on a magistrate judge track or a district judge track because you will, in most cases, get a trial date that will indicate who your trial is with.

PROFESSOR LEVINSON: Any other questions?

AUDIENCE MEMBER: I apologize but before Professor Chemerinsky leaves, I want to ask him one question. Not to take away from you.

JUDGE BAKER: That's fine.

AUDIENCE MEMBER: Professor Chemerinsky, I wanted to ask you, not to pry into your personal business, but if there is any interest in you serving as a Supreme Court Justice? And if so in the realm of which you are involved in the appellate courts, if there's a possibility that you would be appointed as a Supreme Court judge?

PROFESSOR CHEMERINSKY: Not in this lifetime. I am much too liberal. I'll tell you a true story. In 1998 I got a call from the White

House counsel's office saying that I was on the short list for consideration for the Ninth Circuit. And the person in the White House counsel's office was then doing judicial selection, a man by the name of John Durossi. He was very nice. I said, "Look, you're not going to want me. I've written all the stuff that's pro-choice, pro-gay and lesbian rights, against the death penalty. I said, I'm not confirmable." They said nice things, and they had me over the course of a couple of months send copies of everything I could find that I had ever written, all my credit, everything. And then they called and said, "You know, we discovered that because you had opposed proposition 209 that eliminated affirmative action in California, we don't think that we could get you through the Senate. Thanks but no thanks." You know, I could have told them that to start with. So your question is so sweet to even think of me in that context, but there would have to be such a political earthquake that I could ever be considered for something like that. But the great thing, and I'm sure Professor Levinson feels the same way, I have the best job in the world. I don't need to think about getting some other job. It's hard to imagine a better one. But should you get elected president and should I still be in the realm of age that it's possible, I would love for you to consider me.

PROFESSOR LEVINSON: Thank you. You go catch your flight now. Are there any other questions for any of the—well Professor Chemerinsky has to go—but for the other two panelists? We have one minute. Stephanie.

AUDIENCE MEMBER: I have a question for Judge Baker. You kind of displayed that there's an increase in the role of magistrate judge. Do you personally believe that, whether constitutionally or in any other sense, that the magistrate judge should have that power, or do you think that it should turn back, in some sense, to having the district judges still being able to have that?

JUDGE BAKER: Well I think Article III is something that absolutely has to be respected. And I think you have to be very careful expanding the power of the magistrate judge too far because it will run right up against Article III. The purpose of the presentation today is to point out that this expansive role is occurring, that there are Article III tensions there. How far that goes depends on how the Supreme Court wants to interpret that. They have dealt with that issue a few times and have generally allowed the exercise of authority by the magistrate judge, as long as the district judge retains some type of ultimate control, or in the civil context, as long as the parties consent.

PROFESSOR LEVINSON: Any other final questions?

AUDIENCE MEMBER: For the judge, how do you see magistrate roles changing with the latest legislation coming through on class action suits? Are you going to basically have an increased load in handling like discovery issues or possibly even smaller civil cases that don't want to wait behind the other class action suits that might have to go to the federal courts?

JUDGE BAKER: Why am I getting all the questions? Excellent question. In fact, just before I came up for this presentation I printed out the new legislation which was just signed into law. For those of you who don't know it, class action litigation is changing dramatically. Presumably to stop forum shopping in state courts, most big time class actions are going to be brought into federal courts. Yeah, I do see that as an opportunity and a possible further expansion of the role of the magistrate judge because class actions are one type of case where I frequently do get consents. I can get a consent in any part in the case. It could be at the very beginning or it could be at the end of the case where, let's say, I've been involved with the parties to negotiate a settlement. Class action settlements under Rule 23 have to be approved by the Court; you have to have an opportunity for objections, and frequently I'll get a consent at that point because the parties have been in to see me, they know I'm very familiar with the case, they'll consent, and we'll have the fairness hearing. So I definitely see at least that aspect of being more likely for consent. Whether it has a broad impact at the very beginning for consents, I don't know. I think in the real big class actions, it's probably unlikely that magistrate judges are going to get consents on those cases. Could it be a basis for additional discovery disputes? Absolutely. Class actions are ripe with discovery disputes and problems because you have to go through the discovery of the class issue before you generally get to the merits issue. So there's frequently a discovery dispute in there, and that almost always involves the magistrate judge.

AUDIENCE MEMBER: Kind of following up on that. Federal courts have often been thought of as being unfavorable to plaintiffs, and defendants want to remove to federal court whenever they can. Why do you think that is so? That's partly why the Class Action Fairness Act may have been passed.

JUDGE BAKER: Why do I think that federal courts are viewed more favorably to defendants?

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AUDIENCE MEMBER: Yes.

JUDGE BAKER: That is a very loaded question. Let me answer that as carefully as I can. In federal courts, in general there may be stricter requirements in terms of following established guidelines. I mentioned the case management plan, for example, that sets very specific guidelines on when things have to be done, when experts have to be disclosed. In state court—based on my years as a lawyer and in talking to my state court colleagues on the bench—it's a little looser in terms of that. It's a little looser in terms of maybe who will qualify as an expert. It's a little different in terms of the summary judgment procedure. It's a little different in terms of what kind of jury pool you're going to get when that case goes to trial. There are a lot of steps along the way that might create an environment that a defense lawyer might think, "I'm better off if I'm in federal court." That isn't always true, but there is that perception.

PROFESSOR LEVINSON: Anything else? We have a reception out in the atrium. Please give our speakers a round of applause.