



# FEDERAL CLAIMS BAR ASSOCIATION

*Spring 2010 Newsletter*

## **Letter from the Honorable Emily C. Hewitt, Chief Judge**



My seasonal wish for the members of the United States Court of Federal Claims Bar Association is a summer that includes at least some relaxation. With my colleagues at the court, I look forward to the continuation of the court's vibrant partnership with the Bar Association.

The United States Court of Federal Claims Bar Association has the distinction of being the only voluntary bar in the nation with 501(c)(3) non-profit status. As the Bar Association's application for non-profit status states, the Bar Association is organized to "maintain and raise the standards of proficiency, integrity, and ethics in the administration of justice before the United States Court of Federal Claims . . . through fostering continuing legal education."

The Bar Association's support for the court's practicing attorneys takes the form of meetings, conferences, legal education seminars, publication of the Bar Association's Practice and Procedure manual and quarterly publication of this Newsletter. In all these ways, the Bar Association helps establish and maintain the high standards of professional practice that characterize the bar of this court. Because practice at the Court of Federal Claims involves some of the most sophisticated

civil litigation in the nation, it is highly desirable that members of the court's bar have the ready source of high-quality educational opportunities the Bar Association provides.

Another critical role of the Bar Association in the life of the court is its support of the key events that mark transitions at the court.

Several of the events occur annually, but one occurs only occasionally--in fact only four times in the twenty-eight years since the court's organization in 1982 into its present form. That event is the presentation of a portrait to mark the completion of service of a chief judge. On April 7, 2010 the CFC Bar Association presented to the court the portrait of the **Honorable Edward J. Damich**, who served as chief judge from May 13, 2002 to March 11, 2009. Bar Association President **Steve Hollman** made the presentation on behalf of the Bar Association and expressed the Bar's deep

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appreciation for Judge Damich's service and his support of Bar Association activities. It was my privilege to accept the portrait on behalf of the court and to have the opportunity to add my own words of appreciation for Judge Damich's service.

The principal speaker in Judge Damich's honor was the **Honorable Loren A. Smith**. Judge Smith, as many will know, is the longest-serving chief judge of the court, having held the office from January 14, 1986 to July 11, 2000. Judge Smith has long been a colleague of Judge Damich, not only since Judge Damich's appointment to the court but also long before as a fellow law professor. Judge Smith's remarks expressed admiration and appreciation. Judge Smith's remarks, however, never leave out "the good parts." As expected, Judge Smith's remarks were highly entertaining, occasionally at the expense--it must be said--of the honoree. Judge Damich concluded the program with appreciation for the gift and for both Steve Hollman's and Judge Smith's remarks (including, with respect to the latter, one or two words of repartee). The portrait--a photograph of which appears in this issue--includes many symbols reflecting aspects of Judge Damich's career and interests, including a book titled Copyright and Patents and a 2005 volume of the Federal Claims Reporter, commemorating the sesquicentennial of the court, which occurred during Judge Damich's tenure as chief. Altogether a very handsome and interesting portrait to honor years of distinguished service.

In addition to its recognition of past service, the Bar Association also recently sponsored one of the court's several forward-looking events: a most enjoyable reception on May 26 for law clerks of the court and their families to celebrate their ceremonial swearing-in to the Bar of the court. **Bryant Snee**, President-Elect of the CFC Bar Association, made welcoming remarks to the new admittees and extended the traditional (and generous) offer to clerks of the court of an initial year's membership in the Bar Association with no membership fee. And now a word from the Chief Judge to new admittees: by all means JOIN!

A bit earlier in May, the Bar Association sponsored one of the court's signature events, a luncheon at the Willard Hotel marking Law Day. This event appears also to have marked a transition. The luncheon was held on Friday, May 7, 2010, with **Solicitor General Elena Kagan** as our honored

luncheon speaker. The Solicitor General's remarks addressed highlights in the history of the court, and she graciously accepted a certificate of honorary membership in the Bar of the court. On Monday, May 10, 2010, **President Obama** nominated Solicitor General Kagan to fill the vacancy on the United States Supreme Court that will be created by the retirement of **Associate Justice John Paul Stevens** at the conclusion of the Court's term. The court is delighted to have had the opportunity to hear an address from the first woman to serve as Solicitor General of the United States on what now appears to have been her final day in active service in that position.

Looking forward to the fall, the Bar Association is sponsoring the court's annual Judicial Conference on October 27 at the National Courts Building, concluding with a reception at the United States Supreme Court from 5 - 7 pm. In the evening before the conference, an event at the Dolley Madison House will honor the two decades of service of **Gary Golkiewicz** as chief special master of the Vaccine Program. One of the panels at the Judicial Conference will feature Gary's successor as Chief Special Master, **Sandra (Dee) Lord**.

With all best wishes,  
Chief Judge Hewitt

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## ***President's message***



Winston Churchill once said: "We make a living by what we get. We make a life by what we give." Practicing before the Court of Federal Claims means partaking in an abundance of riches. It means presenting sophisticated, often cutting-edge issues to a learned and judicious bench to vindicate the principle that the laws of our government apply to claims against the government itself. But it also means rich and rewarding opportunities to be of service to the Court community. The Court of Federal Claims Bar Association tries to provide opportunities to serve our members and the public.

Part of our service is aimed at promoting our mission of educating practitioners and the public. We have advanced this educational mission in a

number of ways over the past several months.

First, we sponsored our first ever student writing competition. From nine entries on topics pertaining to subjects within the Court's jurisdiction, the Bar Association on May 7<sup>th</sup>, at the Court's annual Law Day observance, presented **Timothy R. Wyatt** as the winner of its 2009 Law Student Writing Competition, with the first prize of \$1,500 for his paper: *In Search of Reasonable Compensation: Patent Infringement by Defense Contractors with the Authorization and Consent of the U.S. Government.*

Second, the Bar Association helped sponsor the Court's Seventh Annual Law Day Observance luncheon featuring, as the special guest speaker, **The Honorable Elena Kagan, Solicitor General of the United States.** The occasion marked the final public appearance for "General Kagan," as she referred to herself, before her nomination by **President Obama** three days later to become the 112<sup>th</sup> justice of the Supreme Court, filling the seat left open by retiring **Justice John Paul Stevens.**

Solicitor General Kagan discussed the unique role of her office as an agent of the President, charged with defending the constitutionality of congressional statutes, and with a special duty towards the Supreme Court. She also discussed the history of **Belva Lockwood**, the first woman to argue before the Supreme Court, and the first woman to be admitted to the Supreme Court bar and to the Court of Claims. Finally she reviewed some of the important issues facing the nation that have generated litigation before the Court of Federal Claims, including jurisdictional questions involving claims by Native Americans for mismanagement of tribal trusts and preemption issues involved in vaccine litigation.

We paid additional homage to our educational mission by inviting area law students to join us as guests of the Bar Association at the Law Day luncheon and assigning Judicial Law Clerks from the Court to act as their hosts at the luncheon.

Third, we kicked off our Brown Bag educational lunch series with a June 8<sup>th</sup> program on LEED [Leadership in Energy & Environmental Design, an internationally recognized green building certification system providing third-party verification that a building or community was designed and built using strategies aimed at improving

performance across a range of environmental metrics] in Federal Construction. The panelists at the lively discussion included **Judge Marian Blank Horn** from the Court, **Lance Davis** from GSA, **Scott P. Fitzsimmons** from Watt, Tieder Hoffar & Fitzgerald, LLP, and **Steve Gillingham** from the National Courts Section of the Department of Justice. Our next Brown Bag lunch will be held on June 29<sup>th</sup> from noon to 1:30 p.m. and will be directed to law clerks and summer interns. Featured speakers will include **Special Master Patricia Campbell-Smith** and private practitioner **Don Grove**, who handles Indian Law Claims. We are grateful for the work of **John Buckley** from Judge Damich's staff and **Kenneth Dintzer**, an Assistant Director of the National Courts Section at the Department of Justice.

Fourth, thanks to the tireless efforts of our Editor-in-Chief, **Mary M. Abate** from the Tax Division of DOJ, we published for Bar Association members the most recent edition of *Inside 717* summarizing case law developments in matters before the Court during the first calendar quarter of 2010. We are grateful to **Christopher Dove** from the Tax Division of DOJ and **Luke Levasseur** from Mayer Brown for agreeing to serve as Contributing Editors for Court Procedure.

In addition to serving our educational mission, the Bar Association also serves the Court community by honoring members who have made significant contributions to that community. We paid that honor to **The Honorable Edward J. Damich** by presenting his portrait to the Court in a celebration at Dolley Madison House on April 7<sup>th</sup>, commemorating his service as Chief Judge from 2002 to 2009.



The portrait shows a judicious looking man in a black robe. His features betray a discerning and inquisitive intellect and reflect a desire to serve and a willingness to lead. He served well as the Ambassador of the Court community to the public, and he is ably succeeded in that role by **Chief Judge Emily C. Hewitt.**

In addition to the activities described above, we have undertaken some self-evaluation to enable us to serve the Court community better. We are asking ourselves what is our core mission, and how do we define success? How can we develop new leaders for the Bar Association? What should we be doing with our financial resources to promote our mission?

We would benefit greatly from your input in answering these questions and organizing our activities. There are ample opportunities for you to participate. Consider joining a committee. Our Standing Committees on Law and Practice Education, Communications, Judicial Conference, Membership, Publications and Rules all welcome new participants, as do our Substantive Committees on Takings, Government Contracts, Taxes, Indian Law and Vaccines. To join, simply contact one of the Committee Chairs listed at <http://www.cfcbar.org/index.php/committees> or send me an email at [president@cfcbar.org](mailto:president@cfcbar.org)

And please do not hesitate to contact me with your ideas about how the Bar Association can serve you better.

Steven P. Hollman, President  
U.S. Court of Federal Claims Bar Association

**Winner of the 2009 Law Student Writing Competition Recognized at Law Day Observance Luncheon**



On May 7th, at the Court's annual Law Day

observance, the Court of Federal Claims Bar Association presented **Timothy R. Wyatt**, the winner of our 2009 Law Student Writing Competition, with the first prize of \$1,500 for his paper, *In Search of Reasonable Compensation: Patent Infringement by Defense Contractors with the Authorization and Consent of the U.S. Government*.

Wyatt is a graduating 3L at Wake Forest University School of Law in Winston-Salem, NC. He is a graduate of North Carolina State University and also holds a graduate degree in civil engineering from the Georgia Institute of Technology. Prior to attending law school, he worked for more than ten years as a private contractor for the U.S. Department of Defense. As a law student, he has served as Articles Editor of the Wake Forest Law Review and president of the Wake Forest intellectual property law association. He has received the Brooks Pierce empirical studies award for outstanding student contribution to the Wake Forest Law Review, and the Airport Cooperative Research Program graduate research award for his study on legal challenges to airport construction. Upon graduation and passing the bar exam, he plans to practice construction law for Conner Gwyn Schenck, PLLC in Greensboro, NC.

Thanks to our friends and colleagues at the **Federal Circuit Bar Association**, Timothy's paper will be published in the Federal Circuit Bar Journal later this year.

**Remarks Of Solicitor General Elena Kagan During Law Day Observance, May 7, 2010 (used with permission)**



Good Afternoon.

Thank you Chief Judge Hewitt for that wonderful introduction. And thank you for inviting me to speak at your annual Law Day observance. It's a pleasure to be here with you today at the

Willard Hotel, which is of course where this court first sat when it was founded in 1855.



I don't need to tell you that the Court of Federal Claims, and the bar that serves it, plays an indispensable role in our government. It serves a very practical function in adjudicating individual monetary claims against the United States. But I think it's also important to recognize the symbolic function that the court serves. Founded for the purpose of protecting citizen's rights against the government, the Court embodies the principle that nobody and nothing --not even the government-- is above the law. The Court truly lives up to its billing as "the People's court."

I've been told that despite all this, there are still some people who don't know exactly what the Court of Federal Claims does. Well, that is something that I can certainly relate to. I find that many people don't know what the Solicitor General does either. Some people think that I'm the person who put those warnings on cigarette packages. Still others assume when they hear me called "General Kagan" that I'm part of the military. But in fact, as most of you know, the "general" in my title means something entirely different: it's not a rank of any sort, but instead a reference to the matters over which I have jurisdiction. That is, I'm the government's solicitor over "general" matters. In that sense, calling me General Kagan makes about as much sense as calling me Comprehensive Kagan. But I kind of like the title anyway.

Now, as you know, the Court of Federal Claims was born of necessity when the early system for handling claims against the federal government -- private bills in Congress-- became too unwieldy. Similarly, the position of Solicitor General was created when the crush of Supreme Court litigation proved too burdensome for the Attorney General. In the early days, the Attorney General himself was responsible for arguing all of the cases on behalf of the United States government before the Supreme Court -- and it was a part time job. Of course, this was an impossible task, especially as the federal government grew. As an ad hoc measure, private attorneys were hired to argue some of the government's cases at the Court. But, as you might imagine, this was inefficient and expensive. In fact, it wasn't uncommon for a single private attorney's annual income from Supreme Court arguments on behalf of the government to exceed the Attorney General's entire salary. So in 1870, Congress finally passed a statute establishing the Department of Justice and creating the position of Solicitor General. Within two years, the

government no longer had to hire private attorneys to argue cases before the Supreme Court.

Today, in addition to arguing cases at the Supreme Court on behalf of the government and as a friend of the court, the Solicitor General's Office is responsible for supervising the litigation on behalf of the government in appellate courts. That role is perhaps underappreciated, but it is crucial. By deciding which cases are appealed and which arguments are advanced in those appeals, the Office is able to maintain consistency in the government's litigation position throughout the country. And the office is able to shape, to at least some extent, what cases look like if and when they rise to the Supreme Court level.

The Solicitor General's Office occupies a unique position within the federal government because although it is located within the Executive Branch, and my ultimate boss is certainly the President, the office has a special relationship with the other two branches as well. With respect to the Legislative Branch, I am responsible for defending the constitutionality of congressional statutes whenever a defense can reasonably be made. This year, of the six arguments I presented at the Court, five were defenses of congressional statutes. With respect to the Court, I and the other lawyers in my office view ourselves as having a special duty -- above and beyond that owed by other attorneys -- to respect the Court's prior decisions, and to conduct litigation with complete candor. I even have a formal office at the Court. As far as I know, the only other person with an office in two branches of government is the Vice President.

The Court of Federal Claims also has a sort of hybrid quality with important cross-branch relationships, especially when you consider its history. Originally, it was an arm of Congress with no authority to render final judgments. Today the Court has full judicial power, but it still retains the ability to advise Congress on private bills -- a power that, to my knowledge, no other judicial body possesses. For a time, the Court was an Article III tribunal. Now it is an Article I tribunal, but its decisions may be appealed to the Federal Circuit and the Supreme Court. I also like to think that the Court has a special relationship with the Executive branch given that Executive branch attorneys appear in every case that the court hears.

In my view, the special relationships my office has

with the other branches of government only serve to strengthen its mission. And so too for the Court of Federal Claims -- that its role as what some have termed the “keeper of the nation’s conscience” is aided by its important relationships with the various branches.

Now, much has been made of the fact that I am the first woman Solicitor General. But of course, I am very far from being the first woman to argue before the Supreme Court. That honor goes to Belva Lockwood, who I recently learned was also the first woman to argue before the Court of Claims. In Belva Lockwood’s time, in the latter half of the 19th Century, women were not allowed to practice law in many jurisdictions. Ms. Lockwood managed to get admitted to the D.C. Bar, but in the course of her practice, she took on a patent case, which was then under the jurisdiction of the Court of Claims. When she sought admittance to practice before the Court of Claims in 1874, her application was rejected. The presiding judge of the Court of Claims expressed concern that if women were admitted to practice before the court, then there was nothing to stop the wife of a judge from trying a case in front of him. Moreover, the judge explained, if a judge could interpret a court rule to compel the admission of women, then he could also order that women be allowed to join the military. The horror.

Never one to take “no” for an answer, Ms. Lockwood went straight to the Supreme Court. (But as a temporary measure, she wrote out the oral argument and had her client read it in front of the court of claims). At the Supreme Court, Ms. Lockwood’s application was denied in an order by Chief Justice Morrison Waite. He wrote: “By the uniform practice of the court, from its organization to the present time . . . none but men are admitted to practice before it as attorneys and counsellors.”

But that didn’t stop Lockwood either. She spent three years lobbying Congress and in 1879 finally persuaded it to pass a law allowing women to practice in all federal courts. She became the first woman to be admitted to the Supreme Court bar and to the Court of Claims.

And then, Ms. Lockwood became something of a regular at the Court of Claims. In fact, her most famous case in the Supreme Court originated in the Court of Claims. Ms. Lockwood represented the North Carolina Cherokee Indians in a dispute over money owed by the government to the tribe. In

1906, at the age of 75, she argued the case before the Supreme Court and the Court handed down a million dollar verdict with nearly four million dollars in interest.

The theme of this year’s law day is “Law in the 21st Century: Enduring Traditions, Emerging Challenges.” So far, I think my remarks fall in the “enduring traditions” category. But the Court of Federal Claims also plays an important role in tackling emerging challenges.

Many of the important issues facing the nation today generate litigation in the Court of Federal Claims. Perhaps most notably, the wars in Afghanistan and Iraq have generated cases in your Court. In addition to cases brought by military personnel over pay and benefit disputes, the Court has heard military contracts claims. None of these cases has reached the Supreme Court yet, but I suspect that’s only a matter of time. My office recently filed a cert petition in a very different kind of case that originated in your court. That case, called *United States v. Tohono O’Odham Nation* involves a significant area of litigation in the Court of Federal Claims -- claims by Native Americans for mismanagement of tribal trusts.

In *Tohono*, the Court of Federal Claims dismissed a complaint filed by the tribe, holding that it did not have jurisdiction under Section 1500 because the Tribe had filed a similar complaint in federal district court that involved the same parties, the same trust, the same asserted trust obligations, and the same asserted breaches of trust. The Federal Circuit reversed, holding that the two claims involved different requested relief and thus Section 1500’s jurisdictional bar was inapplicable. We filed a cert petition arguing that the Court of Federal Claims decision was correct. The Court granted cert and the case will be heard next term.

Another set of cases that the Court of Federal Claims has been handling is the vaccine cases. The Office of the Special Masters within this court designed an innovative way to hear in an orderly manner the thousands of cases claiming that certain vaccines cause autism. My office is also working on this issue --- more specifically, whether federal legislation preempts similar claims brought in the state courts. The Supreme Court this term requested the views of the Solicitor General’s Office in a case called *American Home Products v. Ferrari*. That case involved a design defect suit in Georgia state court against vaccine manufacturers.

## **"BROWN BAG" EVENTS**

The trial court dismissed the case, holding that it was preempted by the National Childhood Vaccine Injury Act, but the Supreme Court of Georgia reversed and reinstated the claims. It held that the vaccine act was not designed to bar all design defect claims, but instead permitted juries to undertake a case-by-case analysis of whether a safer vaccine design was available. The vaccine manufacturers sought certiorari and the Supreme Court requested our view on the case. We agreed with the trial court that the suit was preempted and urged the Court to decide the question raised in the case about the scope of the Vaccine Act. The Court took our suggestion and granted certiorari so that case will be heard next term as well. If our view prevails, petitioners will be required to file this kind of claim in the Court of Federal Claims before bringing a civil action.

These are just a few of the important issues that both your court and our office are handling. Over the years, a significant number of cases from your court have reached the Supreme Court, including *Navajo Nation*, (both of them), *Winstar*, and *Hatter* to name a few. I have no doubt that there will be many more in the future. Perhaps related to the current financial crisis, or the breach of contract suits involving spent nuclear fuel and the Yucca Mountain facility. Whatever challenges do emerge, I have no doubt that this Court and its bar will handle them with the skill and commitment to protecting the citizens of this nation that has characterized this court for over 150 years.

Thank you very much for inviting me to this special occasion. And more important, thank you for all the excellent work the court and the bar that serves it is doing.



The CFC Bar Association held the first of its 2010 series of brown-bag educational programs at noon, on **Tuesday, June 8**, in the Dining Room of the historic Tayloe House. **Chief Judge Hewitt** welcomed the guests and then called on panel moderator and participant **Judge Marian Horn** to introduce the program and begin the discussion. The topic was whether the application of LEED ("Leadership in Energy and Environmental Design") standards in federal building construction had implications for legal disputes before the Court of Federal Claims. Panelists also included **Scott Fitzsimmons**, of Watt Tieder, who initially suggested the topic to the CFC Bar; **Lance Davis**, an architect with the General Services Administration; and **Steve Gillingham**, an Assistant Director of the National Courts Section of the Department of Justice.

The Bar Association's next brown-bag program, "Using Your Internship or Clerkship to Springboard Your Legal Career," will be held on **Tuesday, June 29**, also in the Tayloe House. It is open to Bar Association members and especially to law students, law clerks, and other young or new lawyers, whether at this or other courts, private practice firms or government agencies. The panel members include **Special Master Patricia Campbell-Smith**; **Donald Grove**, Managing Partner, Nordhaus Law Firm, Washington, D.C.; **Matthew Solomson**, National Courts Section, Department of Justice; and **Greg Shoemaker**, Law Clerk, Senior Judge Loren Smith, Court of Federal Claims. All of the panelists are present or former law clerks at the Court of Federal Claims.

Although styled a "brown-bag," the CFC Bar Association will provide sandwiches, soft drinks, etc., to attendees. As space will be limited, please register via the Bar Association website to ensure your attendance.

**To Join The Court Of Federal Claims Bar Association, Click On "Membership" At [www.cfcbar.org](http://www.cfcbar.org)**



**Photos From Judge Damich Portrait Unveiling  
April 7, 2010**







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