



THE LIBERTY LEGEND

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Tony Lacy

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THOUGHTS FROM THE PRESIDENT

I am honored to be writing my first column as president of the NAFD. Before anything else, I want to thank our hard-working and inspiring immediate past president, Carol Brook, for a job well done over the past two years. I also want to thank all officers, board members, and committee members.

At first, it was hard to find anything upbeat to write. On the criminal defense front, things look, at least at first blush, increasingly bleak. A bill now pending in Congress would drastically cut back on federal habeas review of state convictions. In the aftermath of the Supreme Court's decision in United States v. Booker, there are rumblings of new sentencing legislation far more draconian than the Sentencing Guidelines they would replace. And, of course, hiring freezes and the possibility of budget cuts make it ever more difficult for federal defenders to serve the increasing numbers of people in need of our assistance.

Yet, in spite of all these (and other) negative developments, I feel hopeful. I feel hopeful because I know, after over 15 years as a federal defender, that there is nothing that federal defenders do

better than beating the odds. Day in and day out, federal defenders continue to rise to the challenge by providing the highest quality representation that money can't buy. And, throughout the country, federal defenders are helping to change the system for the better, by writing amicus briefs, by public education and outreach, by committee memberships, by testimony before Congress and the Sentencing Commission, and by a host of other activities.

In short, I am hopeful because I continue to be inspired and motivated by the passion and brilliance of my fellow federal defenders. Whenever I start to feel beaten down, I look around me and see what my fellow federal defenders are doing, and it gives me the strength to fight another day. So, thanks to all of you, my friends and heroes.

Okay – on a less maudlin note: if any of you have any suggestions or ideas for NAFD, please let me know. Here's wishing all of you a joyous holiday season and a Happy New Year 2006 (with lots and lots of defense victories).

All best,
Tim Crooks, President

In this issue . . .

THOUGHTS FROM THE PRESIDENT 1

RECIPIENTS OF THE
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS
2005 OUTSTANDING ASSISTANT FEDERAL DEFENDER AWARDS 2

THE CONSTITUTIONAL IMPLICATIONS
OF POLYGRAPH TESTING OF DEFENDANTS
CONVICTED OF SEXUAL OFFENSES 4
By Christopher S. Koyste, Assistant Federal Public Defender, District of Delaware

RECIPIENTS OF THE
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS
2005 OUTSTANDING INVESTIGATORS AND PARALEGAL AWARDS 8

SAYING “I DO” TO THE MARITAL PRIVILEGES:
A POST-GOODRIDGE INQUIRY 9
By Keith Hilzendeger, Law Clerk, Capital Habeas Unit, District of Arizona, Phoenix

KUDOSKORNER 18

ADVANCED FEDERAL DEFENDER SEMINAR
SAN ANTONIO 2005 24
*By Tim Crooks, NAFD President, Supervisory Assistant Federal Public Defender,
Southern District of Texas, Houston*

“NO MORE TULIAS” LEGISLATION 26

**RECIPIENTS OF THE
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS
2005 OUTSTANDING ASSISTANT FEDERAL DEFENDER AWARDS**

In a system of truly remarkable defenders, we are proud to recognize the following three persons, whose dedication, commitment and quality of representation

exemplify the highest standards of our calling. The awards were presented at the Advanced Defender Training Seminar in San Antonio this year.

BARBARA MANDEL

Although Barbara came to the New Mexico defender office straight from a federal clerkship with a district court judge, she brought with her a maturity and focus uniformly recognized as “unequaled in the office.” She is variously described as an “incredibly knowledgeable individual whose ethics are beyond reproach,” “someone who consistently goes above and beyond in vigorously representing and caring for each client” and as a person who “knows her way around the courtroom and the courthouse and whose written work is excellent.” Everyone agrees she is exceptionally thorough and always the best prepared person in the courtroom.

THE LIBERTY LEGEND

She is well respected by the entire legal community. Now a supervisor in Las Cruces, Barbara is a mentor to the younger lawyers in the office and a leader to all. As one of her nominators said: “The dedication, knowledge and ability she brings to her representation of our clients is something we should all strive for in our careers.”

DENISE SOLIS BENSON

Denise has devoted her entire career to defending those persons who most desperately need representation. Before coming to the federal defender office, she worked in the Legal Aid Society in Queens, N.Y., for five years, where she rapidly rose to the position of Senior Staff Attorney.

Since 1993, Denise has worked in the Eastern District of Texas defender office. She is now the sole Staff Attorney in the Sherman office, where she handles a demanding case load (80+ cases) and supervises all of the office staff. Last year alone, she tried seven cases to a jury. She is known as a “true professional,” treating all of her clients with the greatest respect. District Judge Ron Clark describes Denise as “the consummate example of a lawyer fulfilling her ethical and professional duties.” He also writes that she has “the patience of a saint.” All of those who know her remark on her extraordinary ability to work under pressure. As one of her nominators noted: “Mrs. Benson is a credit to all Federal Public Defender Offices, the Office of Defender Services, and the entire legal profession.”

MICHAEL H. SOKOLOW

Luckily for all of us, Michael has devoted himself to federal public defense. He has been an assistant in the Houston, Texas defender office for 18 years, serving as both a trial lawyer and an appellate lawyer, excelling equally in each position. One of his nominators comments: “In one notable instance, Michael obtained an acquittal for one client after a three-month jury trial; then he turned around and handled the appeal of a co-defendant!” As the head of Houston’s appellate section, Michael not only supervises over 1000 appeals annually, but consistently achieves an amazing level of success. His appellate skills are best demonstrated by the fact that he personally briefed and argued two Supreme Court cases – *Deal v. United States* and *Witte v. United States*.

Kudos for Michael range from “the consummate lawyer’s lawyer,” to “Ethicsmeister,” to “an invaluable colleague” to “someone who is never too busy to help others and always treats everyone with the utmost respect.” One writer says: “Truth be told, I could never come close to fully describing what a wonderful person Michael is to work with, and what a wonderful resource he is for us, the defender community, and the criminal defense bar in general.”

THE CONSTITUTIONAL IMPLICATIONS OF POLYGRAPH TESTING OF DEFENDANTS CONVICTED OF SEXUAL OFFENSES

By Christopher S. Koyste, Assistant Federal Public Defender, District of Delaware

I. Introduction.

Polygraph examinations have been widely used in the United States for the screening of employees in the United States military, the FBI, the CIA, the Department of Defense, as well as in many branches of both federal and local law enforcement. A polygraph examination measures an individual's heart rate, blood pressure, respiratory rate and sweat production when asked a set of varying questions. By comparing responses to the various questions, an examiner may opine as to whether a subject told the truth in relation to certain answers. Polygraph examinations continue to be used in this country even though its methodology and results have been shown to be unreliable. The National Academy of Sciences conducted an in-depth analysis of polygraph testing and issued a press release on October 8, 2002, which stated that "(t)he federal government should not rely on polygraph examinations for screening prospective or current employees to identify spies of other national-security risks because the test results are too inaccurate when used this way."

<http://www4.nationalacademies.org/news.nsf/isbn/0309084369?OpenDocument>).

In spite of the fact that our nation's

scientific community has rebuffed the validity of polygraph examinations, there remains one growing market for this pseudoscience; the supervision of individuals convicted of sex offenses.

A. Circuit Courts Conclude that Defendants May Assert Their Fifth Amendment Right to Not Answer Incriminating Questions Asked During A Polygraph Examination.

The practice of forced polygraph examinations of criminal defendants in sex offenses arose in the state court system and has gradually appeared in our federal system. Their use is encouraged by probation officers who claim that the tests "aid" the officers ability to supervise defendants and to determine when they are involved in high risk behavior or have recidivated. See Kim English, et. al., [The Value of Polygraph Testing in Sex Offender Management](#), Research Report Submitted to the National Institute of Justice (Colorado Department of Public Safety 2000)

<http://dcj.state.co.us/ors/pdf/docs/revisedpolyrpt6.pdf>).

Prior to 2001, polygraph testing had not been ordered by any judge in the United States District Court for the District of

Delaware as a condition of post conviction supervision. However, in December, 2001, when one of our clients was sentenced to a term of incarceration in relation to a sex offense, a polygraph examination condition was imposed without any notice in the presentence report and over objection of the defense. The special condition mandated that the “defendant shall submit to random polygraph examination, examination to be administered by a certified examiner, at the direction and discretion of the United States Probation Officer.”

The Delaware Federal Defenders Office appealed the polygraph condition but it was upheld by the Third Circuit Court of Appeals in United States v. Lee, 315 F.3d 206 (3d Cir. 2003). The Third Circuit noted that the polygraph condition “does not violate Lee’s Fifth Amendment right because the condition does not require him to answer incriminating questions.” Id. at 212. Quite favorably to the defense, the Third Circuit stated that “if a question is asked during the polygraph examination which calls for an answer that would incriminate appellant in a future criminal proceeding, Lee retains the right to invoke his Fifth Amendment privilege and remain silent.” Id. at 212-13. The Third Circuit narrowed the scope of a defendant’s Fifth Amendment right by limiting its application to new criminal charges and not to facts that would only support a violation of probation or supervised release. Id. at 213. The conclusion that a defendant does not have the right to remain silent in relation to questions that could violate his supervision but not give rise to a new criminal charge is

consistent with the United States Supreme Court’s findings in Minnesota v. Murphy, 465 U.S. 420, 435-36 n.7 (1984).

The Third Circuit has not revisited this polygraph issue, but the Ninth Circuit did earlier this year in United States v. Antelope, 395 F.3d 1128 (9th Cir. 2005). (The Montana Federal Public Defender’s Office represented Mr. Antelope.) In Antelope, the primary issue was whether a defendant who is ordered to participate in the Sexual Abuse Behavior Evaluation and Recovery program (“Saber”), can have his supervision revoked for failing to reveal his full sexual history without a grant of immunity. Id. at 1132. (A polygraph test would be used to “verify” whether Antelope’s written disclosure was truthful. Id.) The Ninth Circuit held, consistent with the Third Circuit’s opinion in Lee, that a defendant could not be compelled to waive the Fifth Amendment and incriminate himself during a term of supervision. In so finding, the Ninth Circuit noted that Antelope’s risk of incrimination was “real and appreciable.” Id. at 1135. The Ninth Circuit reasoned that “it seems only fair to infer that his sexual autobiography would, in fact, reveal sex crimes” which would cause a “real danger of self-incrimination, not simply a remote or speculative threat.” Id.

B. Litigation Strategies to Prevent Polygraph Examinations or Further Limit Their Use.

Since case law now provides some tangible limitations on the use of a polygraph examination, additional litigation could

THE LIBERTY LEGEND

further limit the use of a polygraph test as a condition of supervision. In addition to Fifth Amendment concerns, a defendant that is court ordered to take a polygraph test should be able to assert the right to have the assistance of counsel to determine whether questions asked are incriminating.

Arguments against the imposition of polygraph testing include that it is unnecessary, time consuming, and fiscally unwise. Counseling and therapy by specialized psychological professionals is a more logical method to treat and supervise such a client rather than spending limited supervision resources on what is essentially a pseudoscientific interrogation. If a client lacks a significant history of sexual deviancy or is a minimal risk to recidivate, such an argument could easily be adopted by the district court on a case by case basis. If polygraph testing is ordered, it could be argued that the court must narrowly define the procedures surrounding the examination itself so as to protect a defendant's rights. See United States v. Crandon, 173 F.3d 122, 128 (3d Cir. 1999) (A special condition of supervision must be "narrowly tailored" and "directly related to deterring [the defendant] and protecting the public."). Provided that objections are raised at the sentencing hearing, special conditions of supervised release or probation can be directly appealed even if a defendant still has a term of incarceration to serve. See United States v. Ofchinick, 937 F.2d 892 (3d Cir. 1991). (A condition of supervised release can be challenged immediately after the sentence is imposed, rather than waiting until a

revocation proceedings is initiated.)

The one district court judge in Delaware that has ordered polygraph testing has previously required that the examinations be given randomly. This presents a problem because the typical defendant may not have the legal knowledge to determine whether a question triggers Fifth Amendment protections. Therefore, a defendant needs to have the ability to seek legal advice concerning the questions asked of him. A scheduled polygraph examination will assure that counsel is available to give needed input as to when our client could permissibly assert his Fifth Amendment privilege. Furthermore, there is no significant reason why the examination needs to be randomly scheduled unless the purpose is to prevent a client from receiving the advice of counsel.

One may consider asking the court at a sentencing hearing to include in the wording of the special condition that counsel is permitted to be with the defendant at all stages of the polygraph examination. In the event that this is not permitted by the court, it could then be argued that counsel must be permitted to attend the pretest interview and review the questions that will be asked of our clients so that input can be given as to what questions could implicate their Fifth Amendment rights.

Before an individual is attached to the polygraph machine, a pretest interview is conducted by the examiner when the defendant's background is reviewed and the subject is told the relevant questions that they

will be asked when they are attached to the polygraph machine. (At times, there may be a posttest interview in which the examiner may ask questions of a defendant as a follow-up to the examination.) During the pretest interview, a defendant may be asked to sign a waiver of liability form for the polygraph examiner and the probation office. This may be challenged in that a defendant should not be required to hold harmless the probation office or a polygraph examiner from his own negligent acts. Furthermore, any waiver of rights form should not include language that a defendant is voluntarily taking the test since he is compelled to take the polygraph examination as a special condition of his supervision. Also, if the court rules that counsel is not allowed to be present during the examination or its stages, it can be argued that the supervision conditions should expressly note that a defendant is permitted to leave the examination room to ask counsel for legal advice in relation to the questions asked of him.

C. District of Delaware's Procedures for the Polygraph Examinations of Defendants.

In August of this year the first polygraph examination of an individual convicted of a sex offense was conducted by the United States Probation Office for the District of Delaware. After meeting with the Federal Public Defender's office, the U.S. Probation Office formulated procedures in relation to how it will conduct the polygraph examination. The Probation Office indicated that it would notify our client one week prior to the date of the examination. It is

incumbent on our clients to inform us as to when their examinations will take place in order to receive the assistance of counsel.

The Probation Office has indicated that it will not allow counsel to be present with a client during any stage of the polygraph examination. Counsel may, however, remain outside of the examination room in order to be available to our client. Once the client enters the examination room, he is presented a waiver of liability form to sign. Our client is permitted to leave the pretest interview at any time to ask counsel whether a question posed to them could implicate their Fifth Amendment right to remain silent. Once our client is attached to the polygraph apparatus, it could cause the results of the test to be even more unreliable than normal if an individual is repeatedly disconnected from the machine to ask Counsel additional questions. Our clients have been advised that once the apparatus is attached to them, they are permitted to leave the examination room to ask counsel a question only once. At any time that a client is concerned that a question violates his Fifth Amendment rights, he can assert his privilege to not answer the question. After the apparatus is unattached, the polygraph examiner and/or the Probation Officer may begin a posttest interview. During this stage, a client can again seek the advice of counsel if any additional questions asked cause them Fifth Amendment concerns. After the examination is completed, we meet with our client to review their responses to the questions asked of them.

D. Conclusion.

The use of forced polygraph examinations creates an environment that undermines a defendant's Constitutional rights. By continuing to assert Constitutional protections and litigating the issues surrounding the use of polygraph examinations, we in the federal system will

further protect the rights of the accused and allow our clients to re-socialize themselves with dignity. We can decrease the future use of polygraph examinations by creatively addressing the many issues that are raised by these tests, and by reminding district courts that the Constitution continues to protect an individual, even after a felony conviction.

**RECIPIENTS OF THE
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS
2005 OUTSTANDING INVESTIGATORS AND
PARALEGAL AWARDS**

On March 31st in Chicago, at the National Defense Investigator Conference, two of our terrific investigators were presented with the NAFD's annual Outstanding Investigator Award – Wesley

Burns of the Southern District of Illinois and Floyd Hancock of the Eastern and Western Districts of Arkansas. Jan Kullburg of the District of Arizona was awarded Outstanding Paralegal.

WESLEY BURNS

Wesley Burns has written the book on innovative investigating during his fifteen years in the federal defender program. He is conversant with boxing trainers in East St. Louis and with diplomatic staff in Latin America. He can speak with familiarity on German medical schools and on the mechanics of American cars. He has filmed sentencing mitigation videos which move an audience to tears, and has a knack for a turn of the phrase which results in contagious laughter. Wesley has been an active NDIA Board member.

FLOYD HANCOCK

Floyd Hancock's nomination for outstanding investigator noted that Floyd has such outstanding management and personnel skills that his Defender, Jennifer Horan, often seeks his advice on those matters. And Jennifer also noted that Floyd is multi-talented. He has the ability to conduct independent investigations that make the difference between life and death for clients,

to create and teach computer skills to the lawyers and to train and supervise other investigators and paralegals. And he does it all with a smile on his face, giving everyone the benefit of the doubt. I need to note that his resume indicates that one of his hobbies is juggling!

JAN KULLBERG

This year the Outstanding Paralegal award went to Jan Kullberg of the Phoenix Defender office. Jan has over 13 years of experience and is now a Supervising Paralegal. She too is a person of many talents. Because of her awesome administrative and technical skills, she was recruited by the Training Branch of the AO to work on their programs. She also served on the Board of the NDIA, helping to plan its programs. Her organizational skills are incomparable. Her nomination explains that she has “organized literally hundreds of boxes of discovery, catalogued them and computerized a flow chart that is now the ‘gold standard.’” Jan has done extraordinary work for the NAFD by putting together the very first federal defender directory to list the staff in each defender office and then, just this past year, by updating that directory.

SAYING “I DO” TO THE MARITAL PRIVILEGES: A POST-GOODRIDGE INQUIRY

By Keith Hilzendeger, Law Clerk, Capital Habeas Unit, District of Arizona, Phoenix

Amidst the clamor of the current debate over whether gay and lesbian couples should be allowed to marry, the respective sides understandably pay little attention to the impact of their positions on the law of privilege. When marriage was universally restricted to permanent relationships of straight couples, courts could straightforwardly apply the marital privileges. If the couple was married, the privilege applied; if they were not, it did not. In the last decade, however, the law has begun to sanction gay and lesbian relationships, affording them marriage-like protections and even marriage itself. Realizing that marriage is usually automatically portable and that

people harbor tremendous expectations in having the law recognize their marriages as valid when they move from place to place, the Defense of Marriage Act and similar state laws deny married gay and lesbian couples the predictability and portability that married straight couples enjoy. Examining the interplay of these two developments on the law of privileges exposes an inequity in the law that full and equal recognition of gay and lesbian relationships as marriage in all places could easily cure.

In the law of evidence, a privilege is either a “right to refuse to disclose” or a “right to prevent someone else from disclosing”

“information to a tribunal that would otherwise be entitled to demand and make use of that information in performing its assigned function.” They function as “counterweights” against “the public[’s] right to every man’s evidence.” Courts tolerate the counterbalancing role of privileges because they promote other social goods-typically valuable privacy interests. And so “the privilege for confidential marital communications is justified, not because it is bad for courts to pry into marital secrets, but because the revelation of such secrets is likely to have a destructive impact on marriages.”

***What are the marital privileges,
and how do they work?***

There are two different yet related marital privileges, but most people refer to them interchangeably. The first kind of marital privilege is the marital communications privilege, which at the option of one spouse prevents the other from divulging confidential communications made during the marriage-even after the marriage has ended. This is the quintessential marital privilege, and it exists to “throw a veil of secrecy around certain areas of privacy in order to protect autonomy and dignity.” To be sure, it “amounts to suppression of relevant evidence” while increasing the “risk of inconvenience” or “injustice in individual cases.” But “the cost of denying the privilege” is “far greater” in that “public confidence in the marital privilege” and “public trust in the confidential nature of marital communications” will erode and “domestic relations issues” will be

“exponential[ly] entangle[d]” in “third-party litigation.”

The other kind of marital privilege is the adverse testimony privilege. It allows one spouse to forbid the other from testifying against him or her at trial. It is the older of the marital privileges, and it stems from two ancient legal rules: “first, the rule that an accused was not permitted to testify in his own behalf because of his interest in the proceeding; second, the concept that husband and wife were one, and that since the woman had no separate legal existence, the husband was that one.” Even when many states had abandoned or modified the common-law prohibition on the defendant’s spouse testifying against him, the federal courts retained it, although they have modified it over the years in light of “reason and experience.” The adverse testimony privilege is not as broad as the marital communications privilege. It allows exceptions for “crimes by one spouse against the other,” including criminal abandonment or neglect, and for civil cases in which the spouses are adverse parties. In some states, the defendant-spouse is the holder of the privilege, but in others it is the testifying spouse.

In state court, statutory law defines the scope of the privilege. Not all states provide for both kinds of privilege. Some states allow the spouse against whom the testimony is offered to control whether his or her spouse testifies. Others vest the decision not to testify only in the witness-spouse. Because modern privileges in state court are established by statute, applying them is

typically a matter of statutory construction.

In federal court the law is more murky. Federal common law supplies the law of privilege in federal court, except when state law supplies the rule of decision on a claim or defense. Thus the dimensions of the marital privilege in federal court are a function of the claim at issue in the case. Both marital privileges exist in federal law. With regard to the adverse testimony privilege, federal common law places it in the hands of the witness-spouse alone. But federal common law allows either spouse to invoke the marital communications privilege.

Who may claim the marital privileges?

Because a privilege detracts from the truth-seeking function of our adversarial system, courts want to limit the scope of that privilege to those situations where the values it promotes safely outweigh the obstacle it poses to the gathering of the truth. Following Professor Wigmore, courts have embraced a four-part test to determine when this should happen:

1. The communication must “originate[] in a confidence that it will not be disclosed.”
2. Confidentiality must be “essential to the full maintenance of the relationship between the parties.”
3. The relationship must be one that “the community believes should be fostered.”
4. The harm to the relationship from the

disclosure must be greater than the benefit sought by disclosure at trial.

Marriage as the law has understood it easily satisfies this test. “[T]he privilege is necessary to support the peace and tranquility of families and to protect the marital relation.” “There is a natural repugnance in every fair-minded person to compelling a wife or husband to be the means of the other’s condemnation, and to compelling the culprit to the humiliation of being condemned by the words of his intimate life partner.” So far, however, attempts to apply the privilege to relationships other than legal marriages have failed. Without extending legal protection to these “de facto marriages,” they are implicitly not “worthy of protection” under the privileges.

A valid marriage must exist between the parties in order for either of them to claim the privilege. “[T]he marital privilege has always been predicated upon the concept of marriage, rather than upon any unity of economic interest.” Thus, the California Court of Appeal has held that a wife who had been estranged from her husband for 17 years may claim the privilege. However, a valid marriage may not be enough—state law typically extends the privilege to communications made during periods of separation while the marriage is “irretrievably broken,” as long as there has been no formal divorce, and under federal law the privilege only survives the marriage with respect to the marital communications privilege. But if the parties have not married, there can be no claim of privilege, no matter how long the

relationship has otherwise lasted. In another case the California Court of Appeal wondered, “how long would a couple have to cohabit before the relationship could be considered to have ripened into a relationship worthy of even the title of meretricious for the purposes of” the marital privilege?

Because claiming the privilege requires a valid marriage, courts defer to the legislature’s choice to recognize certain relationships as a marriage when determining who may invoke the privilege. “It is for the legislature to determine whether [a] relationship[], because of [its] commonness in today’s society or for other policy reasons, deserve[s] the statutory protection afforded the sanctity of the marriage union.” While a state may not recognize a common-law marriage as valid under its own law, it may recognize a common-law marriage from another state as valid. In such cases, the privilege extends to those common-law marriages.

Federal common law likewise requires a valid marriage to claim the privilege. The Supreme Court has observed that “the law of marriage and domestic relations are concerns traditionally reserved to the states.” Yet even in the face of a valid marriage under state law, the “reason and experience” of the federal courts may lead them to refuse to extend the privilege in the face of “other considerations” that “may negate it.” In general, the privilege applies in federal court when, on balance, “society’s interest in the confidential marital relationship” outweighs “society’s interest in the search for truth.” This is particularly the

case when the defendant and the spouse were permanently separated at the time the communication at issue was made.

What about the Defense of Marriage Act and similar state laws?

Many states have enacted laws or amended their constitutions to restrict marriage to opposite-sex couples. Some states also refuse to recognize relationships in other states that confer the benefits of marriage to couples of both the same and of opposite sex. Furthermore, the federal Defense of Marriage Act (DOMA) prevents the federal government from recognizing legal marriages of gay and lesbian couples under state law. These laws purport to exclude gay and lesbian couples from marriage and the concomitant legal protections-including the marital privilege. But by its very terms, the DOMA does not regulate the development of federal common law. Arguably, the “reason and experience” of the federal courts could allow them to extend the marital privileges to a lesbian couple married under Massachusetts law even though that couple could not, say, file a joint federal income tax return or joint bankruptcy petition.

How is a civil union or a domestic partnership different from marriage?

Marriage is, well, marriage. Civil unions and domestic partnerships are structures intended to confer the same bundle of rights and responsibilities as a legal

marriage does, but without affixing the label “marriage.” Marriages are generally portable from one state to another. Civil unions and domestic partnerships are not.

How may a couple invoke the marital privileges?

In the ordinary run of things, invoking the privilege is simple. A married couple may refuse to divulge confidential communications made between them during the marriage, or a witness-spouse may refuse to testify against her spouse in court. The typical dispute involves whether the communication was intended to be confidential or whether the witness-spouse holds the privilege at the time she offers her testimony. Although a valid marriage is a necessary but not sufficient condition for claiming either of the privileges, such a thing has historically been easy to demonstrate in the typical case.

As long as marriage between gay people remained merely a possibility, we could never probe the extent to which the courts would apply the marital privileges to those marriages. But in 1999 the Vermont Supreme Court ruled that under its constitution, the state had to afford gay and lesbian couples the same rights and privileges as it did to opposite-sex couples. And in 2003 the Massachusetts Supreme Judicial Court went even further to rule that it must allow gay and lesbian couples to marry. More recently California and Connecticut have created domestic partnership laws that extend most of the legal protections of marriage to

gay and lesbian couples. When these gay and lesbian couples who have married or become domestic partners attempt to invoke the marital privilege, what will happen? Imagine the following scenario.

David and William have married in Massachusetts. They decide to take a honeymoon through the American Southwest, including a stop at the Grand Canyon. They spend the night at a bed and breakfast in Flagstaff. While having a drink at a local tavern, a fellow patron attacked David, and David punched him. After the altercation is over, Flagstaff Police arrest David on an assault charge. At trial, David claims self-defense. The prosecution calls William to testify against David. Can either David or William claim the adverse testimony privilege so that William cannot testify?

In order for the adverse testimony privilege to apply, Arizona law must recognize David and William's marriage as valid. “Unless strong public policy exceptions require otherwise, the validity of the marriage is generally determined by the law of the place of marriage.” “The strong public policy exceptions we look to in determining which state’s law to apply are those pronounced by the Arizona legislature.” In Arizona, “[t]he Legislature undoubtedly has the power to enact what marriages shall

be void in this state, notwithstanding their validity in the state where celebrated.” And Arizona does not recognize the validity of marriages performed in other states that would be “void and prohibited” if performed in Arizona. Marriage between persons of the same sex is void and prohibited in Arizona. Thus, neither David nor William may claim the marital privilege in Arizona.

How can it be that one state’s law will recognize a marriage and another’s won’t?

This question is truly perplexing. Few people suggest that marriage should be abolished in its entirety. The Arizona Legislature recognizes the value of marriage. Confidentiality between spouses is essential to maintaining that relationship. Because David and William are married, impinging on their expectation of confidentiality by forcing either of them to testify would presumably upset their relationship more than the fact-finding process of the trial would benefit. Massachusetts law recognizes this aspect of their marital relationship and allows them to invoke the marital privilege. Arizona law probably does not because its “strong public policy” allows it to avoid giving effect to David and William’s legal marriage in Massachusetts.

Under the common-law *lex loci* doctrine, a marriage that is valid in the place it was performed is valid in Arizona. “[A]ll nations have consented, or are presumed to consent, for the common benefit and advantage, that such marriages shall be good or not according to the laws of the country

where they are celebrated. By observing this rule few, if any, inconveniences can arise. By disregarding it, infinite mischiefs must ensue.” “Marriage is a matter of intense public concern, and all states have rules stating how marriages may be contracted and prohibiting certain marriages.” For this reason, state statutes preserve the *lex loci* doctrine unless “strong public policy exceptions require otherwise.”

Despite this public policy exception, the law of the state with “a more significant relationship to the parties and the marriage” will control. In *Donlann v. Macgurn*, an Arizona couple married while on vacation in Puerto Vallarta, in the Mexican state of Jalisco. The couple returned to Arizona and lived as a married couple. Seven years after their trip to Puerto Vallarta, the wife asked for a divorce. The trial court dismissed the divorce petition on the grounds that the marriage performed in Puerto Vallarta was invalid under Jalisco law, and hence there was no marriage to dissolve. The Court of Appeals agreed that the marriage was not valid under Jalisco law, but ruled that it was valid under Arizona law because the couple expected their Jalisco marriage to be valid in Arizona. Therefore, to “protect[] the justified expectations of the parties,” Arizona would recognize their marriage as valid even though it was not valid under Jalisco law.

David and William’s “justified expectations” as vacationers in Arizona might lead to the conclusion that Arizona law should recognize their valid Massachusetts marriage—at least in the limited circumstances

presented by my example. Unlike the marriage at issue in *Donlann*, Arizona has no significant relationship to David and William. They do not intend to make Arizona their permanent place of abode; after their honeymoon is over, they will presumably return to Massachusetts to live. They naturally believe that their marriage, which Massachusetts law treats on equal footing with other marriages it recognizes, would be recognized by other states in the same way. Given Arizona's lack of a significant relationship to David and William, and their highly justified expectations in having Arizona recognize the validity of their marriage just as it would any other valid Massachusetts marriage, the Restatement of Conflict of Laws dictates that Arizona may have to recognize the validity of David and William's marriage-for purposes of the privilege at least.

It may be surprising to learn that Arizona's refusal to recognize David and William's marriage does not run afoul of the Full Faith and Credit Clause of the U.S. Constitution. The Clause requires that "[f]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." Marriage is certainly a "public act" of a state. But this is not enough to require Arizona to recognize David and William's valid marriage performed in Massachusetts. The mere fact that one state has granted a person a license to do a particular thing

cannot compel another state to recognize that license as well. If that were the case, then all states would have to recognize, for example, Arizona's permits to carry concealed weapons or a driver's license issued to a ten-year-old girl. "The Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" For this reason, the "strong public policy" exception provided for in choice-of-law questions allows states to avoid the Full Faith and Credit Clause in similar situations.

Does Arizona's refusal to recognize for purposes of the marital privileges valid marriages between gay and lesbian people raise any other constitutional issues?

Claiming the marital privileges requires a valid marriage. In situations where the married couple seeks to claim the privilege in a place other than that where they were married, this means that the law under which the couple seeks to claim the privileges must recognize it as valid. The law of the forum may also have a constitutional obligation to recognize out-of-state marriages for purposes of the privileges.

Arizona's refusal to recognize David and William's marriage may violate the state constitution. Arizona may not enact any law "granting to any citizen... privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Arizona's prohibition against recognizing legal

marriages between persons of the same sex performed in other states appears to run afoul of this provision. If “[m]arriages valid by the laws of the place where contracted are valid in [Arizona], except marriages that are void and prohibited,” and marriages between persons of the same sex are “void and prohibited,” then Arizona grants a privilege to some citizens—namely, straight married couples—that it does not grant to others—namely, gay ones.

Laws that treat similarly situated persons differently can only stand upon an adequate level of justification. If the law differentiates between people in their exercise of a fundamental right, then the law can only stand if “there is a compelling state interest to be served and the regulation is necessary and narrowly tailored to achieve the legislative objective.” Even where no fundamental right is at stake, the law can only stand if “there is a legitimate state interest to be served and the legislative classification rationally furthers that interest.” The right to travel to another state and be treated on equal footing with the citizens of that other state is a fundamental right. And “a desire to harm a politically unpopular group,” such as gay couples, demands “a more searching form of rational basis review” than, say, mere economic legislation. When a law “impos[es] a broad and undifferentiated disability on a single named group,” it fails an equal protection analysis under even a rational-basis standard of review.

Arizona law divides valid out-of-state marriages into two categories—those that

would be “void and prohibited” if performed in Arizona, and those that would not. It chooses to give effect to the latter but not the former. Under the equal privileges and immunities clause, a court must decide whether the state’s “strong public policy” against recognizing these “void and prohibited” marriages outweighs its interest in protecting the justified expectations of any couple married out of state in having Arizona recognize its marriage. The level of scrutiny that the court will apply to Arizona’s marriage recognition laws will determine which of these competing interests is stronger, and hence whether the law can survive an equal protection analysis.

How would the federal marital privileges apply to a married gay couple?

Due to the source of law from which federal evidentiary privileges derive, federal law might be more forgiving. Imagine the following situation.

Susan and Victoria married in Provincetown, Massachusetts, and decided to honeymoon on a cruise through the North Atlantic. The cruise set sail from Boston and was to arrive in Montreal seven days later. Their first port of call was Bar Harbor, Maine. While over the open ocean en route to Bar Harbor, outside the territorial jurisdiction of either Maine, Massachusetts, or New Hampshire, Susan and Victoria

befriend Dennis at a lounge on the ship. Dennis drinks to excess, becomes belligerent and abusive, and rapes Victoria after Susan returned to their cabin. Later on, Victoria confides in Susan that she may have encouraged Dennis's behavior, though she certainly never consented to any sexual activity. Traumatized, Susan and Victoria disembark at Bar Harbor, and the United States Marshals take Dennis into custody on a charge of rape. At Dennis's trial in federal court, his lawyer calls Susan to testify about Victoria's behavior before the attack. Can Susan claim the marital communications privilege and refuse to testify?

Dennis wants to use Susan's testimony as evidence that Victoria might have consented to the sexual encounter. If Susan can successfully claim the marital communications privilege, however, this testimony will be unavailable to Dennis. In order for Susan to claim the marital privileges, however, federal common law governing the marital communications privilege will have to recognize their marriage as valid.

At this point federal common law relies on the "reason and experience" of the federal courts to determine whether Susan and Victoria's marriage should allow them to claim the marital communications privilege

and refuse to testify at Dennis's trial. On the one hand, federal courts "strictly construe[]" the privileges that exist and are reluctant to create new ones. This reluctance might counsel against expanding the law of privilege to apply to Susan and Victoria's marriage simply because allowing two women to marry is a new thing in American life. On the other hand, the criteria identified by Professor Wigmore and long employed by the courts do not support treating one state-licensed marriage differently from another based simply on the sexual orientation of the spouses. Victoria expressed her doubts about her encounter with Dennis to Susan expecting that their marital confidence would not later be exposed in a public forum. Massachusetts, at least, believes that this confidentiality is essential to Susan and Victoria's marriage, a relationship which it has fostered by granting it legal protection. Doubtless the harm Susan and Victoria's marriage would suffer is greater than the benefit the court trying Dennis would obtain from violating their expectation of privacy. If Professor Wigmore's test is part of the "reason and experience" of the federal courts, it may allow Susan and Victoria to claim the marital communications privilege, even though a state court, bound as it is by state law, could not.

The emergence of legal recognition for the committed relationships of gay and lesbian people-and the counteracting effort to limit the legal recognition of those relationships-leads to some odd results in the law. In some cases, gay and lesbian couples do not enjoy a protection freely given to

straight married couples, such as the marital privileges. There the contradictory goals of fostering marital harmony and containing the spread of marriages between gays and lesbians leads to a result few straight couples would tolerate. Treating marriages between gay or lesbian couples exactly the same as

marriages between straight couples would be the simplest means of avoiding these odd results. Overall, however, these puzzling implications for criminal law and criminal cases are probably not weighty enough to tip the balance.

KUDOSKORNER

AFPDs Fred Tiemann and Christopher Knight, and Investigator Daniel Stankoski, Southern District of Alabama, won an acquittal for a client

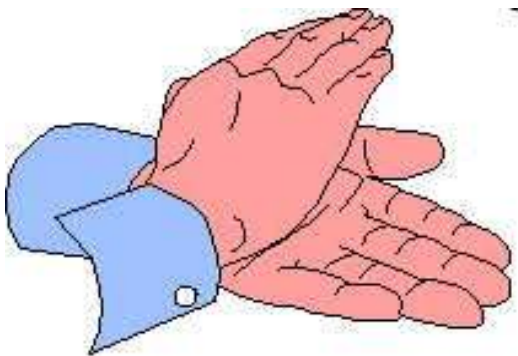
charged with being a felon in possession of ammunition. In addition to exploiting the numerous weaknesses in the government's case, they presented compelling expert testimony on fingerprint analysis that contributed to the exoneration of their client.

AFPD Joel Parris, District of Arizona, Tucson, had a case dismissed after what seemed to be a simple request for discovery - he asked to inspect a horse of course. There were two versions of the facts, one from the agent and one from the client. The agent's version: agents are on horseback near Newfield when they encountered a group of unidentified aliens. Joel's 5'4", 125 lb. Zapotec client fled, then suddenly turned and "ran directly at the horse." There was a collision, and then the client allegedly tried to reach up and grab the reins, whereupon the agent used his collapsible steel baton on the client's head. Client got 20 stitches and a charge of assault. Client's version: The horseman charged at him, he ran in terror, was knocked to his knees by the horse, he turned and put up his hands toward the horse above in fear of getting stomped, got hit on the head and passed out. Joel, sensing a problem with the agent's version, talked to people with more horse experience, including a former mounted police officer; no one believed the official version. As soon as Joel requested the opportunity to inspect the horse and the BPA horse-patrol training materials, the charge got dismissed - of course.

THE LIBERTY LEGEND

Late-breaking congratulations in the Sami Al-Arian "terrorist" case in Florida. We recently learned AFPDs Kevin Beck, Allison Guagliardo and Wadie Said, Middle District of Florida, Tampa, obtained not guilty verdicts on 25 counts and a mistrial on the remaining 8 counts for their client, Hatem Naji Fariz, after six months of trial. Our great congratulations to each of them and to Mr. Fariz. More on that in the next edition of The Liberty Legend.

AFPDs Benjamin Gonzales and Margaret Katze, District of New Mexico, Albuquerque, won an interesting case. Their client was acquitted of two counts of aggravated sexual abuse of a five year-old child. When the child witness became unavailable, the trial judge granted a motion in limine to exclude the child's statements to an FBI agent, under Crawford v. Washington. There was no physical evidence or other statements of the child to other potential witnesses. The client had given a full oral confession admitting the acts charged to FBI and tribal interrogators, including an apology letter to the child handwritten by the client. They called an expert witness whom the court qualified as an expert on coercive police interrogation practices to educate the jury about how police are trained to get incriminating statements from suspects, guilty and innocent alike. The witness was Dr. Deborah Davis, Ph.D., from the University of Nevada, Reno, who made presentations on the psychology of false confessions and investigating the eyewitness at the National Seminar for Federal Defenders in San Antonio this past summer. The client testified that he admitted the crimes to end the ordeal of interrogation.



Usually a defense lawyer doesn't want her name in a caption: that usually means bad things. In this case, though, AFPD Nancy Bergeson, District of Oregon, Portland, can view the caption as a vindication for the attorney-client privilege. U.S. v. Bergeson, No. 04-35312 (10-13-05). Defendant had a trial date on drug charges set for 9/21. Defense counsel moved for a continuance, which was granted and the trial reset for 10/21/03. Defendant was not

THE LIBERTY LEGEND

in the court for the continuance hearing and failed to appear for trial on that date. The government then subpoenaed defense counsel (an AFPD) for the grand jury to testify for a charge of bail-jumping regarding whether she had informed defendant of the date. The district court quashed the subpoena under Rule 17 as “unreasonable or oppressive.” Counsel argued that the attorney-client relationship and privilege would be breached if forced to testify. The district court held that the government had enough other evidence (a letter to defendant and testimony of mother). An interesting issue was whether this was reviewed de novo or for discretion. The government argued for de novo, but the 9th Circuit found, with the weighing of factors, that discretion was a better standard. The factors considered were proper, which included the attorney-client relationship, the quantity and quality of the other evidence, and DOJ’s own directives all which weighed in favor of quashing. The 9th Circuit scoffed at the government’s argument that there was a distinction between appointed counsel (“not of defendant’s choice”) and retained. The 9th Circuit stressed that not every subpoena for counsel would be quashed, but indicated that the test was high and that the government better not count on it.

AFPD Senior Litigator Penn Hackney, Western District of Pennsylvania, Pittsburgh, recently had two outstanding victories. In June, Penn obtained a suppression order when a state parole agent searched his client’s bedroom “for his own safety” because he had recently found a gun in another parolee’s bedroom and Penn’s client was on parole for a prior gun possession conviction and had a prior parole violation for gun possession. The court ruled that those facts did not provide the requisite “individualized reasonable suspicion” to search this parolee’s bedroom.

Then in August, Penn obtained a judgment of acquittal in a 922(g) case because the government could not prove that sentence had been pronounced on the prior conviction and Penn showed that the state decisional law defined “conviction” to require a judgment of sentence unless the legislature says different. The government similarly failed to show that the Pennsylvania legislature altered the state’s common law on the point.

THE LIBERTY LEGEND

After a three day trial with 24 witnesses, the jury took an hour and half to come back with a verdict of not guilty for AFPD Senior Trial Attorney Dan Newsome, Western District of Texas, Del Rio. Dan's client was arrested at the 277 N check point after agents discovered 89 kilos of marijuana atop the load of water bottles he was hauling to a bottling company in Colorado. The Colorado bottling company has ordered a load of bottles every month for the last four years. Eldorado Springs Bottling Company orders from Allied in Iowa who then turns the order over to ASG in Florida who then sends the order to Kimex in Queretero, Mexico. Kimex ships to Raygar (a logistics company) in Laredo. Raygar sees to getting the load through customs and coordinates shipping once in the United States. This particular load arrived in an Air Road trailer. Air Road apparently does not ordinarily go to Colorado. While the Company and Air Road negotiated hauling fees, the trailer sat in Air Road's unsecured freight yard for five days. Finally, Air Road agrees to haul the load and calls the defendant in Del Rio. He picks up the load in Laredo mid-afternoon (trailer is not sealed-defendant locked with his own lock) returning to Del Rio. He gets back to Del Rio and messes around trying to find someone to go with him and finally takes off late in the evening. He arrives at the checkpoint around 10:00 p.m. At the checkpoint agent asks what's in the trunk. The defendant hands over the bill of lading (suspicion aroused for various incomprehensible reasons that were the subject of a motion to suppress) and consents to inspection of the trailer. The defendant unlocks doors - agents see something on top of the bottles. At trial, Dan had a few holes to plug. The defendant's log book didn't match his story. The global positioning system ("GPS") didn't quite match his story. Dan attacked the GPS as unreliable and admitted the defendant fudged on his log books. Dan created an alternate theory - the common denominator in this smuggling venture is the regular shipping of these bottles. Anyone in the pipeline would know when and where the load was. In any case, the jury did not buy the government's theory that the defendant loaded the dope in Encinal or Laredo or Del Rio. In Dan's words, it was a brutal trial. During argument on pretrial motions the judge threatened to sanction Dan. Oscar



THE LIBERTY LEGEND

Barrientos and Viviano Pena were the investigators; Brad Bogan was the pretrial motions guru; and Pat Saucedo was the glue that held the team together.

Dan Newsome was voted "Lawyer of the Year" by the Del Rio Chapter of the Federal Bar Association. Congratulations to Dan. A well-deserved distinction.

AFPDs Selena Solis and Edgar Holguin, Western District of Texas, El Paso, with the outstanding assistance of Johnny Guerrero, Investigator, and Bruce Weathers, Research and Writing Specialist, heard not guilty multiple times in a case charging false statements, aiding and abetting attempted illegal entry, and false use of document. The government alleged and tried to prove that the defendant intentionally tried to help his passenger lady friend to enter illegally, by giving her his wife's birth certificate and vouching for her citizenship at the bridge. The AUSA took a shotgun approach with five counts carved out of the same conduct. Inspector's reports were incomplete & their testimony at times were contradictory. The defendant's "confession" was made to only one inspector, during a brief conversation not witnessed by any other inspectors. The passenger was not available to testify, thanks to government. Selena's closing was great, it struck at the heart of the government's lack of investigation. Edgar's direct of the client's wife, which gave a good and plausible reason for the birth certificates being in the car resonated with the jury as well.

Finally, to show that the jury was actually working, on Tuesday night, the jurors sent out a note at about 7:30 p.m., "can we move our cars, can we have some snacks," and "can we come back in the morning?" The judge allowed them to leave close to 8:00 p.m. One of the jurors went to her car and found a tire boot placed on her car as she had apparently taken two spaces in the county parking lot, a result of running late. On Wednesday, the jury foreperson, again running late, parked on the street, swung the door open, jumped out of the car and hit El Paso Police Department officer Chairez, a bike patrol officer, with the door knocking him to the ground. She yelled, "Sorry. I'm late for court," and takes off. Needless to say, she is talked to and information taken from her just in case Chairez is hurt. She was very late, but so was the judge, so it was a wash. Luckily, the two jurors did not hold it against the defense.

THE LIBERTY LEGEND

The client was very happy, he cried in the courtroom, as his daughter had to celebrate her 6th birthday on Tuesday in the courtroom. On a lighter note, Johnny took the client to Paso Del Norte Bridge (ICE Office) and after about an hour or so, the client walked out with his papers presumably a free man. Client, a Legal Permanent Resident, will probably be able to keep his immigration status too.

Also in the Western District of Texas, El Paso, AFPDs Reggie Trejo and Edgar Holguin, and Veronica Esqueda, Investigator, won a quick not guilty for a client that was charged with being a felon in possession of a firearm. The government alleged that the client had been staying at a hotel in El Paso for several days with a meth trafficker and his girlfriend. They were operating a meth lab in this hotel room. The ATF had received a tip regarding the meth lab and weapons at the room. On February 9, 2004, the ATF and El Paso police went to the hotel. They saw the client leaving in a car. They pulled him over, searched the car and found meth, but no weapons. They then raided the room, found a meth lab as well as forged checks and I ds. During their search of the room, they found a pistol under the mattress of one of the two beds. The meth dealer claimed it was the client's pistol. At an interview later that day, two ATF agents claimed the client admitted to them that he had been staying at the hotel with the meth dealer for several days, that it was his gun, and that he was planning to sell it to get more drugs. ATF was unable to lift prints off the gun.

The judge let in a great deal of evidence against the client, including the fact that the meth had been found in his car and in the hotel room, that the client had been trying to pass checks in the days before his arrest and that the client was a drug addict.



Reggie did a wonderful job of cross-examining the meth dealer, who was called as a government witness. He admitted to having been previously arrested twice over the last 8 months with guns and drugs. And he also admitted to "having a fascination with guns," as he put it. Veronica's intensive investigation placed the client in Las Cruces when, according to his confession, he had been in El Paso. She was able to determine the room in which he had purportedly stayed in at

the hotel had not even been rented out during the time alleged by the agents. This was key to discrediting the reliability of the confession of the client. Reggie wrapped it up with a masterful closing and the jury came back 15 minutes later with a not guilty (along with a recommendation by one of the jurors to place the client into drug rehab).

Thanks to Lupe Maldonado, Legal Secretary, who helped with subpoenas and the witnesses and to Bruce Weathers, Research and Writing Specialist, for his arguments regarding redacting the indictment, which contained three felony convictions and which the judge was considering submitting in its entirety to the jury.

If you read The Liberty Legend regularly, you may have wondered why your much deserved Kudo was conspicuously missing. The editors solicit Kudos before every edition. If we are not told of successes and achievements, we have no way of sharing them with the Association. What are you waiting for? The editors are accepting Kudos 24/7 at Tony_Lacy@fd.org and Lori_Ulrich@fd.org.

ADVANCED FEDERAL DEFENDER SEMINAR SAN ANTONIO 2005

*By Tim Crooks, NAFD President , Supervisory Assistant Federal Public Defender,
Southern District of Texas, Houston*

Thanks to our host defender office, the Federal Public Defender's Office for the Western District of Texas, the 2005 Advanced Federal Defender Seminar held in San Antonio in June of 2005 was a roaring success socially as well as professionally. The social highlight of the seminar was undoubtedly the wonderful party organized by the FPD – WDTX to commemorate the 30th anniversary of that office's founding by its still-defender, Lucien B. Campbell.

The party was held on the night of Thursday, June 2, 2005, at the Santa Ana Room in the Bell Building in downtown San Antonio (the site of General Santa Ana's campground during the siege of the Alamo). Accompanying the cocktails and a buffet-style Mexican dinner (with a large cake in the shape of the State of Texas) was musical entertainment by Mariachis Los Gavilancillos (with mariachis provided by FPD – WDTX investigators Albert Mireles and David Davila) and, later, by Jazz Protagonists, a jazz

THE LIBERTY LEGEND

combo led by the son of one of Lucien's first hires.



Lucien B. Campbell, FPD - W.D. TX, Chuck Arburg, Education Division, FJC, Henry Martin, FPD - M. TN, and Carol Brook, Outgoing NAFD President - AFD - N. IL. (left to right)

In a ceremony during dinner, Lucien and the office were honored for the office's long and distinguished tenure. Judge Edward Prado of the United States Court of Appeals for the Fifth Circuit, himself a former AFD in the Western District under Lucien,

gave a tribute speech laced with Judge Prado's trademark humor. Joe Downey from the Administrative Office of the United States Courts read a tribute letter from Ted Lidz at the AO. FPD Henry Martin from Nashville also gave a congratulatory speech. And, finally, Lucien and his office were lauded by two members of his own staff, Henry Bemporad and Bill Maynard, culminating with the presentation, to Lucien and the office, of a framed collection of memorabilia from the office's three United States Supreme Court cases (all victories!).

Special kudos should go to the members of the FPD – WDTX office responsible for organizing this fabulous party: Chief Deputy FPD Henry Bemporad; AFDs Molly Roth and Kurt May; Administrative Officer Susan Andrade; and Wendy Rutherford, Secretary to the Defender. Thanks to all of these people, and all the other members of the staff of the FPD – WDTX, for a memorable social conclusion to the seminar in June.



AFDs Molly Roth and Kurt May, W.D. TX, present Lucien B. Campbell, FPD - W.D. TX, a framed collection of memorabilia from the office's three United States Supreme Court cases.

“NO MORE TULIAS” LEGISLATION

The National Association of Federal Defenders co-signed a letter in support of the “No More Tulias: Drug Law Enforcement Evidentiary Standards Improvement Act of 2005,” introduced on May 25, 2005 by Representative Sheila Jackson Lee. The bill is named after the drug task force scandal in Tulia, Texas in 1999 during which 15 percent of the town’s African American population was arrested, prosecuted and sentenced to decades in prison based on the uncorroborated testimony of a federally funded undercover officer with a record of racial impropriety. The defendant’s have since been pardoned, but Tulia was not an isolated incident. The legislation would provide oversight and accountability for the millions of federal dollars distributed to state and local law enforcement agencies to fight the “drug war.” The bill would help put an end to abuses by enhancing the evidentiary standard required to convict a person for a drug offense, and improve the criteria under which states hire drug task force officers. It would deny federal money to states that do not have laws preventing convictions for drug offenses based solely on uncorroborated testimony.