

# Boston Bar Journal

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## **Lessons from a Pioneer**

**By BBA President Carol A. Starkey**  
**President's Page**

On June 22nd, I had the honor of presenting Massachusetts Supreme Judicial Court Justice Geraldine S. Hines with the Boston Bar Association's Haskell Cohn Award for Distinguished Judicial Service. In her heartfelt and compelling address to the more than 120 people in attendance, what came through clearly was Justice Hines' honest desire to bring about positive change, her sense of what is just and fair, a deep respect for the law and the judiciary, and her acknowledgement that there is still work to be done, or as she gracefully put it "still a fight to be fought."

This struck me as a powerful way to approach many things in life, be it a career or a one-time project. Enter with an honest intent to improve something, stay mindful of what's just and right, and avoid complacency. In looking back on my tenure as President through this lens, I'm proud of the innovative changes and the principled positions that the Boston Bar Association has put forth this year.

Almost a year ago, when I stepped into the role of 95th president of the Boston Bar Association, I reflected on the changing natures of both the city of Boston and the practice of law. At the forefront of healthcare and education for decades, our city is now also leading the nation in the technology, life sciences, and venture capital sectors, to the extent that global companies like GE are deciding that Boston is where they need to be. These constantly-evolving industries bring new legal issues and challenges, demanding that lawyers in all practice areas become more technologically proficient and industry savvy to remain competitive in today's global economy. I saw it as not only an opportunity, but essential that lawyers who practice in these fields stay connected with what's happening on the front lines.

That's why I was thrilled to be leading the charge as the BBA developed a series of industry-specific conferences, such as life sciences, venture capital, higher education and cybersecurity, among others. Nearly 1,000 BBA members attended these events, a remarkable turnout for the first year. As a result, we saw BBA sponsor organizations grow significantly, as we still continue to find success in meeting the needs of both national and local firms and organizations through holding these major conferences. And I am deeply gratified to share the news that planning for the second annual Life Sciences Conference – to be held on October 3rd – is well underway.

But as delighted as I was to focus the BBA on connecting lawyers with industry through producing larger, inter-disciplinary conferences during my term as BBA President, the end of 2016 brought a new set of challenges for all of us. Beginning in November, on both the state and national level, we faced an ever-increasing political climate of uncertainty, fraught with ever-changing events that created general unrest amidst our most vulnerable populations. In order to answer the immediate concerns of our members and organizational stakeholders, as BBA President, I weighed in on legal matters that, we felt, as the leadership of the BBA, were strongly in the public interest and squarely within the mission of our organization.

Recognizing that we as lawyers are at our best when we are dealing with well defined issues and actual cases and controversies, we remained vigilant in ensuring that individual and due process rights remain valued and protected in the implementation of our laws. Our Law Day in the Schools program focused on teaching Boston Public Schools students the value of due process under the law. The BBA also continued its ongoing work with community partners to present “Know Your Rights” programs.

As deportation of immigrants residing in our cities and towns became a potential collateral consequence of involvement with our judicial system, the BBA’s Amicus Committee also took action. Submitting an amicus brief in October of 2016, the BBA advocated for the Supreme Judicial Court to bring long awaited closure to nearly 20,000 people impacted by the actions of former drug-lab chemist Annie Dookhan.

As a result of their convictions, these individuals faced a wide array of collateral consequences, including a significant portion at risk for deportation. The BBA’s amicus brief – urged the Supreme Judicial Court to vacate all outstanding drug convictions in which Dookhan was the primary or secondary chemist. The brief argued that this course of action, more than five years after the scandal first came to light, was necessary to protect the fairness and integrity of our criminal justice system, and we were extremely gratified to see this outcome achieved.

At the national level, the BBA joined the ABA and other bar associations across the country to voice opposition to the January 2017 Executive Order issued by President Trump on immigration, which targeted inhabitants of seven different countries for disparate treatment. For decades, the BBA has worked to ensure that individual and due process rights remain valued and protected as bedrock principles in the implementation of our laws. And we have a long history of strong opposition to proposals which would use national origin, race, ethnicity, religion, gender, gender identity, sexual orientation, or other integral individual traits as the basis for discrimination in any form. This practice speaks to the heart of who we are as an organization of lawyers - to preserve access to justice for all of us – not just a few of us.

Following this statement of opposition, I was moved and inspired by the hundreds of members who raised their hands to help by attending one (or more) of the numerous immigration pro bono trainings that the BBA planned and hosted over the last six months. We then followed up on these concerns by submitting an affidavit in support of the lawsuit filed against the President’s Executive Order in federal court, along with the Massachusetts Attorney General and so many other bar associations and organizations. And I have continued to follow this issue, along with many of you, as it has made its way through our judicial system to the United States Supreme Court. Throughout my term as BBA President, never have I felt it was more important for all lawyers, but in particular bar leaders, to speak out and educate others on the importance of our Constitutional democracy’s reliance on an independent judiciary as one of this country’s three equal branches of government, as well as our country’s unwavering commitment to the Rule of Law.

And finally, I have spent much of this year working on criminal justice reform issues, and to ensure that funding for civil legal aid remains a budget priority. I was honored to address the crowd of more than 700 attorneys at Walk to the Hill in January, and proud to make the case that

legal aid generates a return on investment in the editorial pages of the Boston Globe. This fight, however, is very much one still to be fought, long into the future.

Eliminating the Legal Services Corporation – which remains on this administration’s federal budget chopping block despite strong advocacy from our state’s delegation – would have dire consequences for our nation’s most vulnerable people, including at-risk children, victims of domestic violence, and veterans. It would also have negative consequences for our nation’s bottom line.

If you’re interested in learning about the state or federal budget process, or just looking for tips on how to speak to your legislators about legal aid, please listen to the BBA’s policy podcast, Issue Spot, on SoundCloud, iTunes, or GooglePlay.

As the year comes to a close, I want you all to know that it has been a joy, an honor, and a truly life changing experience to serve as your President of the Boston Bar Association, particularly during this challenging time in our country’s history. I am proud of all that we accomplished this year, despite those challenges, but there is still so much work left to do.

I look forward to watching this great organization continue to innovate the practice of law, advocate for those requiring access to justice, and always, always speak out for our Constitution and the Rule of Law. I have every confidence in the capable leadership of my friend and former colleague, Mark D. Smith. I know that under Mark’s leadership, the BBA will carry on its important work with great compassion, integrity and practicality, just like the man at the helm.

So I will be soon saying my goodbyes, but to quote Justice Hines one last time, I promise to continue “The fight to be fought. Off I go!”

*Carol A. Starkey is the president of the Boston Bar Association. She is a partner at Conn, Kavanaugh, Rosenthal, Peisch & Ford.*

## **Changing the Culture: Making Civil Litigation Reform Work Through Superior Court Rule 20 and Standing Order 1-88(F)**

**By Hon. Douglas H. Wilkins**

**Voice of the Judiciary**

The Courts are committed to the "just, speedy, and inexpensive determination of every action." Mass. R. Civ. P. 1. Hopefully, that does not come as a surprise. I fear, though, that many lawyers, parties and clients assume that there is little or nothing they can do about a "system" they may perceive as inflexible, expensive and inefficient.

Not so. With leadership from Chief Justice Gants, the trial courts have adopted new rules and initiatives, effective this year, to reform the civil justice system. The goal is to make the courts more responsive to user needs, less expensive, more efficient, less time-consuming, and a superior forum for resolving disputes as compared to, for instance, arbitration.

In the Superior Court, lawyers, parties and clients must play a central role, if our reforms are to work. Effective January 1, 2017, Superior Court Rule 20 and a Pilot Project for case management conferences (Standing Order 1-88(F)) give them significant input into scheduling, timing of settlement and ADR, eliminating unnecessary steps, streamlining discovery and trials, and addressing other common sources of delay. Those initiatives reflect the work of an ad hoc committee, which included a cross-section of bar members, law professors and judges, chaired originally by now-retired Superior Court Judge Raymond Brassard and now by Superior Court Judge Bruce Henry.

Adopting these rules was the easy part. Implementation is harder. We realize that we are trying to change the culture. For some reason, when I talk to bar groups, I hear mixed messages. For instance, there seems to be a desire for more Rule 16 case management conferences, but a reluctance even to request them. Apparently, there is a sense that judges won't grant a Rule 16 conference; or that making the motion requires substantial motion practice, instead of simply asking for the conference. If my assessment is correct, then both the bench and the bar – perhaps with urging from clients and insurers – may want to rethink some of the existing assumptions and "traditional wisdom" about what other participants in the system are thinking. General counsel and other in-house counsel of any public or private entity that finds itself regularly involved in litigation also has a significant interest in reducing costs by asking trial counsel to use these new rules.

We have tried to make it as easy as possible for lawyers and parties to do so. A standard Rule 20 motion appears, in a fillable PDF, on the Superior Court's web site. The motion may be joint or contested. You don't have to think up (or fight about) an agenda; the form motion already contains one. Notices for Pilot Project case management conferences are already being sent by court clerks in employment, real estate, construction, products liability cases and, upon request, in other case categories. Preparation for these case management conferences includes filling out a case management report (Standing Order 1-88, Appendix A) and exchanging a demand and response.

The forms and Rule 20 itself list a wide and self-explanatory menu of options, too long to discuss in this article. The nature and benefits of most of these options are probably self-explanatory. If

the Court approves an individual track (schedule) for your case, then the one-size-fits-all deadlines of Standing Order 1-88 no longer apply to that case. See Amended Standing Order 1-88(B)(2) (“Individual Track”)

It may be useful, though, to mention one option that can address a common concern – issuance of written findings in bench trials. The current process starts with a potentially costly and time-consuming need for the parties to prepare detailed proposed findings of fact. After the trial, the parties often ask to submit additional findings to conform to the evidence. That takes more lawyer hours and additional time. The judge may need significant time to issued detailed findings, particularly where exhibits and testimony are voluminous and a transcript is not immediately forthcoming. All the while, the judge is probably ready to decide the case at the close of the evidence. And yet, the detailed written findings required by Rule 52(a) often are not worth the expense, effort and delay. Unless there is some actual need for detailed written findings for appeal purposes (or otherwise), the parties will save significant legal expense by having the judge issue a decision in a form that is the same or similar to the "verdict slip" in a jury trial, perhaps after a conference to specify the rules of law the judge will apply.

Superior Court Rule 20(h) tries to address these problems. It allows the parties to agree to waive detailed written findings, in which case Superior Court Rule 1-17 requires the judge to issue the equivalent of a special jury verdict. At the same time, these rules recognize the parties’ right to complete Rule 52(a) written findings if they wish. You will be seeing this option offered in new standard forms for final pretrial conferences and in the standard pretrial order for jury-waived cases. The parties can also explore this option during pilot project case management conferences.

This example illustrates a larger point. The current time standards were adopted in 1988 as Standing Order 1-88. While there have been some amendments since then, the basic tracking order deadlines still set standards by case category. Standard deadlines have worked well to reduce the huge backlog that existed 30 years ago. The time has come, however, to customize case management and avoid unnecessary costs and delay that standardization can cause.

Lawyers frequently ask me whether judges will be receptive to Rule 20 motions to change existing tracking orders. Will judges seriously entertain requests for case management and settlement conferences and actually consider reasonable limitations on motions, discovery and the like? I know that some will. In fact, in April, 2016, the Superior Court judges unanimously adopted the very rules that contemplate those motions and requests. It is also true that the past few years have seen an unusually high number of new Superior Court appointees, whose views and practices may not conform to past assumptions about case management from the bench. To be sure, the rules respect the discretion of individual judges to make the ultimate decision, so there will be individual variation in rulings on motions and requests. But it can’t hurt to ask.

*Judge Wilkins is an Associate Justice of the Superior Court, Chair of the Superior Court Rules Committee, and a Member of the Superior Court Ad Hoc Committee on Civil Litigation Reform.*

## **Sanctuary Cities: Distinguishing Rhetoric from Reality**

**By Inez Friedman-Boyce, Jennifer Luz, Sarah J. Fischer, Alexandra Lu, and Louis L. Lobel  
Legal Analysis**

Less than a week after his inauguration, President Trump signed Executive Order No. 13,768 (“Order”), threatening to “crackdown on sanctuary cities that refuse to comply with federal law and that harbor criminal aliens” by cutting off federal grant money.<sup>1</sup> This article examines the current political and legal landscape affecting sanctuary cities and the policies that define the “sanctuary city” designation.<sup>2</sup>

### **What Is A “Sanctuary City”?**

There is no single, legal definition of a “sanctuary city”; rather, the designation refers generally to cities and counties that have policies—whether formally or informally adopted—that are intended to further public safety by mitigating against any deterrent effects that immigration status might have on residents’ cooperation with local law enforcement officials and by distinguishing between local police and federal immigration officials. Studies that inform sanctuary policies indicate that victims of and witnesses to crimes are less likely to come forward to report and assist with the investigation and prosecution of crimes if they fear deportation as a possible result.<sup>3</sup> Despite some variation, sanctuary cities share the common policy objective: to build community trust in order to “promote public safety and confidence in local law enforcement.”

### **What Are Sanctuary Policies?**

Sanctuary policies differ across jurisdictions to accommodate local needs and priorities. Some have written policies that expressly prohibit police from inquiring about immigration status or direct local law enforcement not to comply with civil detainer requests by the U.S. Immigration and Customs Enforcement (“ICE”) to hold noncitizens for up to 48 hours to provide ICE agents extra time to take them into federal custody for deportation purposes. Others identify as sanctuary cities but have no written policies. Florida’s Miami-Dade County’s policy, until recently, was to refuse detainer requests except where the suspect had been charged with a non-bondable offense or had previously been convicted of a violent felony. Meanwhile, California’s Santa Clara County refuses to honor all detainer requests.

Several Massachusetts communities have sanctuary policies that limit local police cooperation with ICE, including Arlington, Boston, Cambridge, Chelsea, Holyoke, Lawrence, Newton, Northampton, and Somerville. Chelsea declared itself a sanctuary city in June 2007, adopting a policy that “immigration status (or lack thereof) . . . is not and shall not be a matter of local police concern or subsequent enforcement action by the [Chelsea Police Department] unless there exists through reliable and credible information a potential threat to public safety and/or national security.”<sup>4</sup> The policy only governs civil immigration matters and does not prohibit Chelsea Police from assisting with criminal matters. Lawrence adopted its Trust Ordinance in August 2015 “to increase public confidence in Lawrence Law Enforcement by providing guidelines associated with federal immigration enforcement, arrests, and detentions.”<sup>5</sup> Pursuant to the Ordinance, Lawrence police will not detain an individual based solely on an immigration hold or



administrative warrant—or absent a warrant signed by a judge and based on probable cause—but will allow ICE officers with criminal warrants to use their facilities.

Since Trump’s election, more Massachusetts communities have galvanized to consider “sanctuary city” status. The Massachusetts Legislature also is considering a state-wide sanctuary policy, the Safe Communities Act, which would prohibit, inter alia, the use of state and local law enforcement resources or the Massachusetts Registry of Motor Vehicles record-keeping system for immigration enforcement purposes, and the arrest or detention of individuals solely on the basis of civil detainer requests or administrative warrants.<sup>6</sup> Police would not be prevented from pursuing immigrants who commit crimes subject to applicable federal laws and constitutional standards. Because sanctuary policies have broad support across the Commonwealth, two exceptions have attracted disproportionate press attention: in January 2017, the Republican sheriffs of Bristol and Plymouth County each signed agreements with ICE to deputize their correctional officers to detain individuals for immigration violations under Section 287(g) of the Immigration and Nationality Act.

## **The Order**

On January 25, 2017, President Trump signed the Order entitled “Enhancing Public Safety in the Interior of the United States.” By its plain language, the Order threatens “all Federal grant money” received by “sanctuary jurisdictions.” The Order includes several internally inconsistent and ambiguous definitions of sanctuary jurisdictions. Section 1 defines “sanctuary jurisdictions” as those that “willfully violate Federal law in an attempt to shield aliens from removal.” Section 9(a) defines the term more broadly as jurisdictions that “willfully refuse to comply with 8 U.S.C. § 1373” (“§ 1373”), which states that “a Federal, State, or local government entity or official may not prohibit or in any way restrict, any government entity or official from sending to, or receiving from, the [INS] information regarding the citizenships or immigration status, lawful or unlawful, of any individual,” “or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.” Section 9(b) orders a retroactive identification of sanctuary jurisdictions based on a list to be publicized weekly including “any jurisdiction that ignored or otherwise failed to honor any detainers.” The Order also gives the Secretary of the Department of Homeland Security (“DHS”) unfettered “authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction.”

The impact of the Order was felt immediately nationwide, with reports of decreased utilization of police, health, and social services by immigrant communities. And cities that had enacted sanctuary policies in effort to address the very fear and community distrust the Order has revived are now faced with deciding between prioritizing community safety or abandoning their sanctuary policies to avoid potentially losing critical federal funding. In letters dated April 21, 2017 sent to nine jurisdictions, the Department of Justice (“DOJ”) demanded proof of compliance with § 1373, coupled with the threat of terminating certain grants. Confronted with the Order, some jurisdictions, including Miami-Dade County, Florida and Dayton, Ohio rescinded their sanctuary policies,<sup>7</sup> and other cities like Quincy, Massachusetts, have declined to adopt a proposed policy. Yet other communities chose to fight back, declaring that challenging the Order is “just as much about protecting residents as it is about protecting federal resources.”

## Legal Challenges to the Order

On January 31, 2017, San Francisco filed the first lawsuit challenging the constitutionality of Section 9(a) of the Order, which states: “jurisdictions that willfully refuse to comply with 8 U.S.C. § 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary [of Homeland Security].” Other suits quickly followed by Santa Clara County and Richmond in California; Chelsea and Lawrence, Massachusetts; and Seattle, Washington.<sup>8</sup> Santa Clara, consistent with its long-standing position that it does not comply with § 1373, asserted only constitutional arguments, but the remaining jurisdictions sought declarations they complied with § 1373 and therefore were not “sanctuary jurisdictions” subject to the Section 9(a) sanctions.

These cases assert the following constitutional challenges to the Order:

- violation of the separation of powers doctrine (legislates a penalty and imposes new conditions on federal grants that only Congress can authorize and impermissibly refuses to spend funds already appropriated by Congress);
- void for vagueness under the Fifth Amendment (fails to specify the prohibited conduct that would subject the local jurisdiction to defunding, includes no guidance on what constitutes a “sanctuary jurisdiction” subject to penalties, and has “expansive standardless language” open to arbitrary and discriminatory enforcement);
- violation of procedural due process under the Fifth Amendment (jeopardizes local jurisdictions’ entitlement to money appropriated by Congress without administrative or judicial procedure);
- violation of the spending clause of the Tenth Amendment (imposes, without notice, vague conditions after funds have already been accepted, with no nexus between the federal funds threatened and the Order’s purpose, and uses coercive financial inducements); and
- violation of the principles of federalism and state sovereignty under the Tenth Amendment (compels local jurisdictions to administer or enforce federal immigration policies and programs through coercion, and may subject cities to Fourth Amendment liability; imposes a blanket restriction on local policymaking discretion regarding how to treat immigration status of residents and a specific restriction on the regulation of law enforcement priorities and policies to address the best interest of residents).<sup>9</sup>

On April 25, 2017, Judge William H. Orrick III of the Northern District of California ordered a nationwide preliminary injunction against enforcement of the Order’s defunding provision in the Santa Clara and San Francisco cases. Judge Orrick rejected the DOJ’s arguments that: (1) the claims were not “prudentially ripe” because the harms are too contingent, and the DOJ and DHS have not determined the terms of the Order, (2) there was no loss of funds or cognizable harm because neither Santa Clara nor San Francisco had been named “sanctuary jurisdictions” pursuant to the Order, (3) the Order did not change existing law, as it would be enforced only “to the extent consistent with the law,” (4) it was restricted to three DOJ and DHS “grants that are already conditioned on compliance with § 1373,” and (5) it was therefore “merely an exercise of the President’s ‘bully pulpit’” that “highlight[ed] a changed approach to immigration

enforcement.” Judge Orrick wrote: (1) “[t]here is no doubt that Section 9(a), as written, changes the law” and “purport[s] to give the Secretary or Attorney General the unilateral authority to alter [§ 1373],” a power reserved to Congress, and (2) standing is established “by demonstrating a well-founded fear of enforcement and a threatened injury that is ‘sufficiently real and imminent,’” and Santa Clara and San Francisco, are likely to be designated “sanctuary jurisdictions” under the Order given their policies, and withdrawing review would result in hardship that is more than financial loss. Further, Judge Orrick found a high likelihood of success on the merits of the constitutional claims, that there was impending irreparable harm based on budgetary uncertainty and constitutional injury, and that the balance of equities and public interest squarely tips in favor of the injunction. Finally, Judge Orrick found “a nationwide injunction is appropriate” because the constitutional violations had nationwide consequences.

### **The Chelsea and Lawrence Lawsuits**

On February 8, 2017, Chelsea and Lawrence filed their complaint, challenging the Order on the previously discussed constitutional and declaratory relief grounds. Their motivation in filing suit underscores what is at stake for many sanctuary cities nationwide.<sup>10</sup> Simply put: “[i]t is impossible [for a sanctuary city] to create a budget when it is unclear what effect the Executive Order will have on its funding.” The crippling consequence is especially stark in communities like Chelsea and Lawrence. Chelsea is a working-class city where over 60% of its residents identify as Hispanic or Latino, over 40% are foreign-born, and over 20% live below the poverty level with a per capita income of \$21,722.00. Chelsea counts on the federal government for about 10%, or \$14 million, of its \$170 million annual budget. Similarly, Lawrence is a working class city where over 70% of its residents identify as Hispanic or Latino, over 35% are foreign-born, and over 25% live below the poverty level with a per capita income of \$17,167.00. Lawrence counts on the federal government for over 15%, or \$38 million, of its \$245 million annual budget. The Order threatened large portions of these impoverished cities’ budgets because of policies they deemed necessary for their communities’ public safety. In early May, while the DOJ’s motion to dismiss was pending, Judge Orrick’s national injunction issued; the DOJ and Chelsea and Lawrence subsequently agreed to a stay, pending resolution of the injunction.

### **Where We Are Now**

On May 22, 2017, Attorney General Sessions issued a “Memorandum on the Implementation of the Executive Order” (“Memo”), codifying arguments advanced by the DOJ at the preliminary injunction hearing. Relying on the Memo, in late May, the DOJ moved for reconsideration of the nationwide injunction in the San Francisco and Santa Clara cases. The DOJ then filed motions to dismiss on procedural and substantive grounds in the San Francisco, Santa Clara, Richmond, and Seattle cases. On July 20, 2017, Judge Orrick issued an order denying the motions for reconsideration and motions to dismiss in the Santa Clara and San Francisco cases, finding that the Memo did not impact his prior conclusion regarding standing, ripeness, and likelihood of success on the merits. Additionally, he concluded that San Francisco had stated a claim for declaratory relief.

## Conclusion

While a nationwide preliminary injunction has been entered, many questions remain. The interplay between federal and state law regarding ICE detainees remains unclear; the constitutionality of § 1373 is still undecided; and future federal actions against sanctuary cities remain real possibilities. The Memo, purporting to narrow the definition of “sanctuary jurisdictions” and limit the sources of federal funding that are threatened by the Order, is arguably inconsistent with the terms of the Order itself, does not have the force of law, and is subject to change. It remains to be seen to what extent local policy makers are able to prioritize public safety over federal immigration enforcement without jeopardizing critical federal funding.

<sup>1</sup> [Exec. Order No. 13,768, 82 Fed. Reg. 8799](#) (Jan. 25, 2017). Joseph Spector [Cities Back Lawsuit to Block Immigration Order](#), USA Today, Feb. 17, 2017.

<sup>2</sup> See Benjamin Gonzalez, Loren Collingwood, Stephen Omar El-Khatib, [The Politics of Refuge: Sanctuary Cities, Crime, and Undocumented Immigration](#), Urban Affairs Review, May 7, 2017.

<sup>3</sup> For example, one study found that 70% of undocumented immigrants and 44% of Latinos are less likely to contact law enforcement if they are victims of a crime for fear that the police will ask about immigration status, and 67% of undocumented immigrants and 45% of Latinos are less likely to report crimes because of the same fear. See Nik Theodore, [Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement](#) (Dep’t of Urban Planning and Policy, Uni. of Ill. at Chicago, Chicago, IL), May 201, at 5-6.

<sup>4</sup> Chelsea, MA, [Resolution of the City of Chelsea, Massachusetts](#) (Jun. 4, 2007).

<sup>5</sup> Lawrence, MA, [Lawrence Trust Ordinance](#), Chapter 9.20 (June 8, 2015).

<sup>6</sup> [S.1305](#) and [H.3269](#), 190th Gen. Court of the Commonwealth of Mass. (Mass. 2017).

<sup>7</sup> As Mayor Carlos Giménez of Miami-Dade explained, “It’s really not worth the risk of losing millions of dollars ... in discretionary money from the feds.” Ray Sanchez, [Florida’s Largest County to Comply with Trump’s Sanctuary Crackdown](#), CNNpolitics, Updated Jan. 27, 2017.

<sup>8</sup> *City and County of San Francisco v. Trump et al.*, 4:17-cv-00485-DMR (N.D. Cal. Jan.31, 2017), *County of Santa Clara v. Trump et al.*, 5:17-cv-00574-LHK (N.D. Cal. Feb. 3, 2017); *City of Chelsea, et al. v. Trump, et al.*, 1:17-cv-10214-GAO (D. Mass. Feb. 8, 2017); *City of Richmond v. Trump et al.*, 3:17-cv-01535-SK (N.D.Cal. Mar. 21, 2017); *City of Seattle v Trump et al.*, 2:17-cv-00497-BAT (W.D. Wash. Mar. 29, 2017), The San Francisco, Santa Clara and Richmond, California cases have been [related](#) before [Judge William H. Orrick, III](#).

<sup>9</sup> See, e.g., [Credle v. Gimenez, et al.](#), 1:17-cv-22477 (S.D. Fl. filed on Jul. 5, 2017); [Commonwealth v. Lunn](#), SJC-12276 (decided July 24, 2017) (holding federal civil detainees unconstitutional under Massachusetts Constitution).

<sup>10</sup> Elizabeth Ross, [How Can “Sanctuary Cities” Resist Trump? This Lawsuit Could Provide a Blueprint](#), Public Radio International, Updated Apr. 12, 2017.

*Inez Friedman-Boyce is a partner, Jennifer Luz is counsel, and Sarah Fischer, Alexandra Lu, and Louis Lobel are associates at Goodwin Procter LLP. Ms. Friedman-Boyce is a past co-chair of the BBA Class Actions Committee and the current co-chair of the Lawyers’ Committee for Civil Rights and Economic Justice. Along with the Lawyers’ Committee, they are all counsel for the Cities of Chelsea and Lawrence in litigation pending in the U.S. District Court for the District of Massachusetts challenging President Trump’s sanctuary city executive order.*

**Executive Order: Strike of a Pen, Law of the Land?**  
**By M. Patrick Moore and Kate R. Cook**  
**Legal Analysis**

**Introduction**

The President of the United States and the Governor of Massachusetts have the implied power to issue executive orders that, in certain contexts, will have the force of law. Focusing on the federal system and the Massachusetts state system, this article will address the concept of the executive order, how it has changed over time, and why executive orders are used to further wide-ranging policy goals. The article will also address the judicial scrutiny of executive orders, including, in particular, whether they are owed any deference or presumption of lawfulness.

**Discussion**

Throughout history, executive orders have addressed issues of profound national and local importance. Our system of classifying national security information, for example, is set by executive order. See Exec. Order No. 13526 (Dec. 29, 2009). So, too, is the process by which national security agencies determine who may have access to such information. See Exec. Order No. 13764 (Jan. 17, 2017); see also 50 U.S.C. § 3161 (instructing the President to issue such an order). Executive orders define the process by which nearly every federal and state agency may regulate. See generally Exec. Order No. 12291 (Feb. 17, 1981) (centralizing federal regulatory planning and review); Mass. Exec. Order No. 562 (Mar. 31, 2015) (synthesizing state regulatory review). And they provide the definition of an unfunded mandate, at least at the local level. Mass. Exec. Order No. 145 (Oct. 21, 1978). Executive orders have both advanced principles of equal protection and hindered them. See Exec. Order No. 9981 (July 26, 1948) (desegregating the armed forces); Exec. Order No. 10450 (Apr. 27, 1953) (excluding gay and lesbian officials from government service during all administrations from Eisenhower to Clinton); Exec. Order No. 12968 (Aug. 2, 1995) (establishing that the federal government no longer will “discriminate on the basis . . . [of] sexual orientation in granting access to classified information”).

Despite the importance of executive orders, neither the United States nor the Massachusetts Constitutions expressly grants the power to issue them. Rather, the power is implied from the executive’s core authority to administer the laws. See U.S. Const. art. II (“The executive Power shall be vested in a President . . . .”); *id.*, art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed . . . .”); Mass. Const. pt. II, ch. 2, § 1, art. I (“There shall be a supreme executive magistrate, who shall be styled, the Governor of the Commonwealth of Massachusetts . . . .”). The scope of that power has been, and continues to be, the focus of significant debate. In this article, we focus on the legal framework of that ongoing debate.

The Supreme Court tells us that history is an important guide to the scope of executive power. See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014). On that score, the record is clear. Dating back to President Washington, each President has interpreted his executive power to encompass the authority to issue executive orders. See Phillip J. Cooper, *By Order of the President: Administration by Executive Order and Proclamation*, 18 *Admin. & Soc’y* 233, 236 (1986) (describing Washington’s use of executive orders and proclamations). Massachusetts

Governors likely have exercised the same power for just as long, though Governor Saltonstall (who served from 1939-1945) was the first to track the orders formally. See Mass. Legis. Research Council, Report Relative to Gubernatorial Executive Orders, submitted as 1981 House 6557, at 22 (1981) (“Mass. H. Rep.”).

Historically, the number of presidential and gubernatorial executive orders peaked during periods of national emergency and war, most notably the Civil War, World War I, the Great Depression and World War II. See Cooper, *supra*, at 236-37. Governor Saltonstall, for example, began issuing a disproportionately high number of orders at the outset of World War II. See Mass. H. Rep. at 22, 80. No executive, however, used the authority with such regularity as President Franklin Roosevelt, who issued 567 orders in 1933 alone and a total of 3,727 orders before his death in 1945. See Cooper, *supra*, at 237. President Roosevelt averaged nearly 285 executive orders per year—a trend that increased steadily through the conclusion of World War II. See John Contrubis, Cong. Research Serv., Rep. No. 95-772, Executive Orders and Proclamations, at CRS-25 tbl.1 (1999). Since his administration, no President has averaged more than 78 per year. *Id.*; Tara L. Branum, President or King? The Use and Abuse of Executive Orders in Modern Day America, 28 J. Legis. 1, 27-29 (2002).

Perhaps as a result of the constitutional silence on the issue, there is no codified definition of an executive order. The most commonly referenced definition is set forth in a 1957 report from a committee of the U.S. House of Representatives. It reads, in pertinent part: “Executive orders . . . are directives or actions by the President. When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law. . . . Executive orders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only indirectly.” H. Comm. on Gov’t Operations, 85th Cong., Executive Orders and Proclamations: A Study of a Use of Presidential Powers 1 (1957); see also Vivian S. Chu & Todd Garvey, Cong. Research Serv., RS20846, Executive Orders: Issuance, Modification, and Revocation (2014); see generally Contrubis, *supra*. Massachusetts law similarly lacks a statutory definition of executive order, though the Supreme Judicial Court has recognized such orders as the “formal” exercise (or delegation) of powers granted to the Governor by the constitution or the legislature. See Opinion of the Justices, 368 Mass. 866, 874-75 (1975).

Regarding the substance and reviewability of executive orders, policymakers and courts alike are guided by the three categories set forth in Justice Robert Jackson’s seminal concurrence in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). That case famously involved President Truman’s attempt to seize most of the nation’s steel mills to quell labor unrest during the Korean War, which Truman attempted to accomplish via executive order directing the Secretary of Commerce to take possession of and operate the mills. *Id.* at 583. In analyzing Truman’s order, Justice Jackson set forth three “practical situations in which a President may doubt, or others may challenge, his powers.” *Id.* at 635.

Though Justice Jackson described the “three practical situations” as “over-simplified,” they continue to be the benchmarks against which the exercise of executive power is measured. *Id.* at 635-38. First, when acting with express or implied legislative authorization, the executive exercises both the power vested in the executive and the authority of the legislature, and the

executive's actions are presumed valid. Second, when the executive acts in the "zone of twilight" defined by legislative silence or inaction on the issue, executive authority will be addressed on a case-by-case basis. Third, when the executive contravenes legislative action, the executive's action is presumptively impermissible. *Id.* at 637-38.

The most common executive orders fall into the first category, i.e., action where the executive is expressly authorized to act. Such orders are generally directed to, and govern actions by, government officials and agencies. The reason is simple. Executive orders are not self-executing; most exist against the backdrop that an executive official who fails to comply with the order will be removed. See generally *Myers v. United States*, 272 U.S. 52 (1926). The majority of executive orders pertain to internal matters of government administration, the creation of task forces, and the commissioning of reports. Typically, the order will set forth clearly the basis of its authority. Cf. 1 C.F.R. § 19.1(b) (2017) ("The order or proclamation shall contain a citation of the authority under which it is issued.").

Though the legal framework is routine, the subject matter of such orders is often rich and significant. On the state level, for example, the Governor is expressly afforded the constitutional authority to nominate and appoint judges. See Mass. Const. pt. II, ch. 2, § 1, art. 9. In 1975, Governor Dukakis established the Judicial Nominating Commission (JNC) by executive order, on the theory that the "high quality of judicial officer appointments can be best assured by the use of a non-partisan judicial nominating commission composed of outstanding laymen and lawyers." Mass. Exec. Order No. 114 (Jan. 3, 1975). The Supreme Judicial Court upheld the Governor's authority to create the JNC by executive order, which established "formally and publicly" the "enlist[ment] [of] such aid as he deems necessary to investigate the availability of qualified candidates for judicial office." *Opinion of the Justices*, 368 Mass. 866, 874-75 (1975). Though each successive Governor has slightly revised the JNC, the tradition of a formalized nominating process continues.

Even where the executive has acted pursuant to an express grant of authority, however, there are checks. For example, when President Trump established his most recent travel ban, see Exec. Order No. 13780 (March 6, 2017), he purported to act under his express statutory authority to bar the immigration of certain individuals he "finds . . . would be detrimental to the interests of the United States." See 8 U.S.C. § 1182(f). Subsequent litigation has focused on whether President Trump actually made such a finding and, if he did so, whether it was improperly infected with religious considerations (in violation of the First Amendment) or was otherwise arbitrary (in violation of the Fifth or Fourteenth Amendments). See, e.g., *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017); *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017). The Supreme Court will hear these cases during the first session of October Term 2017. See *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (granting the Government's petitions for certiorari, staying in part the lower courts' injunctions, and holding that the Executive Order cannot be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States).

Executive orders in Justice Jackson's second category, where the scope of executive authority is not well-defined, are evaluated on a case-by-case basis. A reviewing court will scour the Constitution and consider "all the circumstances which might shed light on the views of the

Legislative Branch towards such action, including congressional inertia, indifference, or quiescence.” *Dames & Moore v. Regan*, 453 U.S. 654, 668-69 (1981) (internal quotation omitted). In *Dames & Moore*, the Supreme Court analyzed a series of executive orders that extinguished American liens against Iranian property and barred claims against Iranian property in American courts. There, the Court recognized that a “long-continued [executive] practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of [legislative] consent.” *Id.* at 686 (second and third alterations in original) (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)). In other words, the absence of legislative disapproval following executive action on uncertain terrain will be a relevant consideration. *Id.* at 686-88.

Sometimes, particularly regarding long-standing executive orders, legislative approval is express. President Reagan’s Executive Order No. 12333, for example, established a framework for the collection of foreign intelligence. The order itself relied on executive authority granted “by the Constitution” and by the 1947 National Security Act which, most prominently, created the National Security Council but which contained no express delegation of authority to the President. The order remains in place and, reportedly, is the legal basis for much of the National Security Agency’s data collection. See Erica Newland, *Executive Orders in Court*, 124 *Yale L.J.* 2026, 2030 (2015). The order is now expressly referenced many times in the United States Code. Indeed, Congress even requires the regular reporting of any violations of the order. See 50 U.S.C. § 3110.

Executive orders in the third category, where the executive has acted in contravention of legislation, generally are not permitted. For example, the Governor may not seize facilities of the Massachusetts Bay Transportation Authority where such action is barred by the General Laws. See *Mass. Bay Transp. Auth. Advisory Bd. v. Mass. Bay Transp. Auth.*, 382 *Mass.* 569, 578-79 (1981). Nor may the President bar a federal contractor that has hired permanent replacements for striking workers where the contractor is expressly afforded by federal law the right to hire such replacements. See *Chamber of Commerce v. Reich*, 74 *F.3d* 1322, 1338-39 (D.C. Cir. 1996).

Where executive orders are well-anchored in existing law, they can be attractive tools for policymakers, in part because of the minimal process associated with them. As a senior aide to President Clinton once quipped: “Stroke of the pen, law of the land. Kind of cool.” Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 *J. Legislation* 1, 1 (2002). Accordingly, an executive order may be an expeditious and tangible step towards accomplishing a policy goal. See, e.g., Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245, 2300 (2001) (describing President Clinton’s use of “deliverables,” like announcing the issuance of an executive order, to advance his political agenda). Little is required of the executive other than publishing the order in the respective federal or state register. See 44 U.S.C. § 1505; G.L. c. 30A, § 6.

But the same qualities that make orders attractive can make them perilous, particularly where the subject matter strays beyond routine administrative or ceremonial purposes. Other types of executive action, most prominently including administrative rulemaking, include formalized stakeholder input before the action is finalized. The notice-and-comment regulatory process, for example, requires the executive branch to hear—and, where appropriate, address—stakeholder



comments and concerns before a regulation is finalized. See 5 U.S.C. § 553; G.L. c. 30A, §§ 2-3. An executive order may be issued without such external input. Although robust internal legal and litigation risk analyses should be undertaken before an order is signed, that is a matter of practice rather than law. Compare 1 C.F.R. § 19.2 (setting forth typical process of Attorney General review), with Ryan Lizza, *Why Sally Yates Stood Up to Trump*, *New Yorker* (May 29, 2017) (noting that the Acting Attorney General first learned of Exec. Order No. 13768, President Trump’s first travel ban, from media reports).

Where an executive order that substantively affects the rights or property interests of stakeholders is issued, litigation is likely to follow, particularly where its legal foundation is uncertain or untested. Recent experience is illustrative. See, e.g., *Int’l Refugee Assistance Project*, 137 S. Ct. at 2088 (granting certiorari review of Exec. Order No. 13780, commonly referred to as the “travel ban”); *County of Santa Clara v. Trump*, 2017 WL 1459081 (N.D. Cal. Apr. 25, 2017) (enjoining enforcement of Exec. Order No. 13768 regarding grant funding to so-called sanctuary cities on several constitutional grounds); cf. *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam) (equally divided court affirming Fifth Circuit decision invalidating Department of Homeland Security memoranda regarding deferred action on certain undocumented immigrants). As Justice Jackson teaches us, that is as it should be: “Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution.” *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

## **Conclusion**

Executive orders can function as a formalized statement to the public regarding how executives intend to solve an administrative problem or discharge their duties. To withstand judicial review, executive orders must be rooted in constitutional or statutory authority and comply with the relevant constitution. Moreover, because executive orders lack the procedural protections that accompany administrative rulemaking and the deliberative process that shapes legislation, executive orders outside the obvious bounds of executive power deserve particular scrutiny.

*Kate R. Cook is co-chair of the Boston Bar Association’s Civil Rights and Civil Liberties Section and Of Counsel at Sugarman Rogers. She previously served as Chief Legal Counsel to Governor Deval Patrick, where she assisted in drafting numerous Executive Orders.*

*M. Patrick Moore Jr. is co-chair of the Boston Bar Association’s Government Lawyers Forum and Counsel at Hemenway and Barnes LLP. He previously served as Associated Counsel and Advisor for Presidential Personnel in the White House of President Barack Obama, and as Deputy Legal Counsel to Governors Deval Patrick and Charlie Baker. In those roles, he assisted in drafting, analysis and review of executive orders.*

## **The Administrative Law of Deregulation: The Long Road for the Trump Administration to Undo Obama-Era Regulations**

**By Daniel Lyons**

### **Legal Analysis**

Dysfunction among Washington's elected branches has thrust the administrative state—the alphabet soup of federal agencies that together do the day-to-day work of governing the republic—into the nation's political spotlight. Frustrated by his inability to get the Republican-led Congress to pass his legislation, President Obama [governed by “pen and phone,”](#) leaning on the administrative state to accomplish much of his second-term agenda. From immigration reform to transgender rights to climate change, agencies became the primary engines driving the White House's policy agenda.

Unsurprisingly, President Trump has focused on undoing many of these agency initiatives. As a candidate, Trump campaigned on a platform of deregulation, arguing that agency regulations inhibit economic growth. And as president, he moved quickly to reverse certain Obama-era administrative initiatives and [established agency-level task forces to identify others for repeal.](#) [White House advisor Stephen Bannon described these efforts as](#) a fight for the “deconstruction of the administrative state.”

But how, precisely, can an agency conduct an about-face and reverse a policy decision that it only recently adopted? The answer is surprisingly complex, turning in part upon the way the agency formulated its policy and how long it has been in effect. The answer is also extremely important. Each year, agencies enact more rules than Congress and hear far more cases than the federal court system. Administrative process is the primary legal check on what is often called the “headless fourth branch of government.” The Trump administration's deregulation campaign will withstand court challenges only to the extent that it gets agency process right.

### **Policy Statements**

The easiest agency decisions to reverse are so-called interpretive rules and policy statements. These are agency statements that, in theory, create no new rights or responsibilities for regulated entities, but rather simply clarify what the agency currently believes that existing law already requires. Because these so-called “nonlegislative rules” do not change the law, they are exempt from the Administrative Procedure Act's notice and comment process. As a result, agencies are generally free to issue or revoke these statements at will, subject only to the agency's own procedures for doing so.

Perhaps the most high-profile interpretive rule in President Trump's crosshairs was the Education Department's guidance regarding transgender students. In January 2015, the Department of Education's Office of Civil Rights [issued an opinion letter](#) explaining that under the agency's regulations implementing Title IX, schools are permitted to separate bathroom facilities by sex, but “must treat transgender students consistent with their gender identity.” The agency followed this with [a second letter](#), in May 2016, explaining that a student's sex under the statute equates to his or her gender identity. The opinion letters had legal consequences. The Fourth Circuit deferred to the first letter in [G.G. v. Gloucester County School Board](#), a 2016

decision reversing the dismissal of a transgender student's suit for bathroom access.<sup>1</sup> Four months later, a [federal district court in Texas](#) enjoined the letter on the ground that it changed the law and therefore was not merely an interpretive rule.<sup>2</sup> In October 2016, the Supreme Court granted certiorari in *Gloucester County*.<sup>3</sup>

On February 22, 2017, the agency issued a new opinion letter that withdrew and rescinded the earlier two letters. It explained that the earlier letters “do not contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process.” The Supreme Court then [vacated and remanded \*Gloucester County\*](#) back to the Fourth Circuit to reconsider its decision in light of the new letter. In the meantime, several states including Massachusetts have stepped up to fill the void in transgender rights left by the agency's most recent action.<sup>4</sup>

### **Recent Regulations: The Congressional Review Act**

Regulations enacted during the final months of the Obama administration were susceptible to rescission via the [Congressional Review Act](#), a 1995 law enacted as part of Newt Gingrich's Contract with America to encourage greater legislative oversight of agency rulemaking.<sup>5</sup> The Congressional Review Act requires agencies to report to Congress whenever enacting a rule with a \$100 million impact on the economy. Congress then has 60 legislative days to pass a joint resolution disapproving the rule. The Act provides expedited debate procedures, including a prohibition on filibusters. If both houses pass the resolution and either the president signs it or Congress overrides a presidential veto, the rule is voided and the agency is prohibited from issuing any rule “substantially the same” as the rejected rule.

In theory, the Congressional Review Act gives Congress greater oversight of agency action, restoring some of the power lost in *INS v. Chadha*<sup>6</sup> (which invalidated the legislative veto, a process that permitted the House or Senate to unilaterally invalidate certain agency action). But in practice, a successful joint resolution is exceedingly difficult to achieve, because absent a veto-proof majority, it requires the approval of the president, who is unlikely to agree to repeal one of his agencies' major rules. In fact, prior to President Trump's inauguration, the Congressional Review Act had been successfully deployed only once, to invalidate a 2001 Department of Labor ergonomics rule passed in the twilight moments of the Clinton administration and repealed shortly after President George W. Bush's inauguration.

But the current Congress successfully passed, and President Trump signed, a record fourteen resolutions of disapproval.<sup>7</sup> One of the most far reaching of these was the voiding of the Department of the Interior's [Stream Protection Rule](#), which took effect on the final day of Obama's term. The rule would have prohibited mining practices that adversely affected streams and water supplies and would have required mining companies to restore streams and mined areas such that they could support all uses that they could have supported prior to mining activities. Congress passed a [resolution of disapproval](#) in January 2017 and President Trump signed it on February 16. As a result, [the agency reports](#), the rule was nullified and “the regulations that are now in effect are the same as those that were in effect on January 18, 2017,” the day before the new rule would have taken effect. The agency is “in the process of amending all the regulations altered by the Stream Protection Rule back to the form in which those

regulations existed on January 18, 2017. When complete, these amendments will be published in the Federal Register.”

### **Older Regulations: Notice and Comment Rulemaking**

Older regulations may be rescinded primarily via the notice and comment process outlined in the Administrative Procedure Act—the same process the agency went through to enact the regulation.<sup>8</sup> First the agency must promulgate a notice of proposed rulemaking, which usually includes an explanation why the agency seeks to take action and the text of the rule the agency proposes to adopt (but in the deregulatory posture, it could instead identify the text the agency proposes to delete). The agency then must invite public comment, which occurs in two rounds: an initial comment period and a reply comment period. After the comment period has closed, the agency must review the comments filed and will ultimately issue a final rule, which becomes binding after publication in the Federal Register (and expiration of the 60-day Congressional Review Act clock).

Deregulation via notice and comment rulemaking differs in two important ways from the other avenues discussed above, both of which can potentially derail the agency’s plans. First, the public has the opportunity to provide input into the agency’s process. One need not be a lawyer to comment on a proposed rule, including a proposal to rescind an existing rule. Most open agency proceedings are listed at [www.regulations.gov](http://www.regulations.gov), where one can file a comment by uploading a document or even simply by typing into a text box and pressing “submit.” This comment process is not merely window-dressing. By law, agencies must review and respond to these comments in its final rule. More specifically, while an agency need not address every point in every submission, it must respond to significant comments in a reasoned manner to show that the major policy critiques were considered by the agency.

Second, opponents can seek judicial review of the agency’s decision. Like all final agency action, a decision to revoke or modify an existing rule is subject to review under the Administrative Procedure Act’s “arbitrary and capricious” standard. In the deregulatory context, the touchstone case is [Motor Vehicle Manufacturers Association vs. State Farm Insurance Co.](#), in which petitioners challenged the Reagan administration’s rescission of a Carter-era rule mandating that cars contain either automatic seatbelts or airbags.<sup>9</sup> The Supreme Court explained that both adopting a new rule and repealing an existing rule change the legal baseline, and therefore in both cases the agency must “examine the relevant data and articulate a satisfactory explanation for its action.”<sup>10</sup> Furthermore, because repeal involves a reversal of the agency’s previous views on the issue, this explanation should include a discussion of why the agency had changed its position.

In *State Farm*, the Department of Transportation justified the repeal by arguing that, contrary to the agency’s original estimate that 60% of cars would have automatic seatbelts and 40% would have airbags, the agency now believed that over 99% of cars would choose the seatbelt option. And this was problematic because new studies showed that most Americans would deactivate the automatic seatbelts, meaning the regulation would not measurably improve automobile safety. The Supreme Court unanimously vacated this repeal because the agency failed to explain why it did not simply adopt an “airbags only” rule instead, which, from a safety perspective, would

seem to be a logical response if automatic seatbelts were deemed ineffective. The Court explained that the agency could repeal the rule completely, but it had to explain why it chose that path rather than the other options that were on the table.

Learning from *State Farm*, the Trump administration is beginning the notice and comment process to repeal select Obama-era regulations. One of the first out the gate is the Federal Communications Commission's [notice of proposed rulemaking](#) to repeal the classification of broadband providers as common carriers. In a series of orders between 2002 and 2005, the Commission had classified broadband access as a lightly-regulated "information service" under the Communications Act. In 2015, to bolster its legal arguments in support of net neutrality, the agency reversed those orders and instead classified broadband access as "telecommunications service" subject to common carriage regulations. The Commission's 2015 decision was a 3-2 party-line vote. The two dissenting Republican commissioners now constitute a 2-1 majority, and have proposed to repeal the 2015 decision. Consistent with *State Farm*, the notice of proposed rulemaking stresses the unintended consequences of the 2015 order, including a decline in broadband investment and a weakening of privacy laws. It also stresses that repeal would restore the agency's original classification, and thus draws upon the agency's prior deliberations to justify its current decision. Unsurprisingly, many of the comments have challenged these factual assertions, and the final rule must address these comments if the Commission decides to proceed with the repeal.

### **Politics and the Administrative Law of Deregulation**

Of course, adhering to *State Farm* is a bit of a fiction. Ultimately, in these cases the agency has not suffered a change of heart, but of personnel. The Trump administration's decision to repeal Obama-era regulations stems from a change to a political regime that favors less regulation. The same was true of the Reagan administration's deregulation efforts, which drove the agency's position in *State Farm*. In partial dissent in that case, then-Justice Rehnquist suggested that the Court should call a spade a spade and allow politically driven reversals. He would have held that "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."<sup>11</sup> The majority did not directly respond to this point, although one might argue that if it worked reciprocally, such an explanation would eviscerate judicial review of agency action. A general regulatory or deregulatory mood may explain an agency's broad goals, but it says nothing about why any particular rule is justified on the facts relevant to its merits. The Court was right to require a policy, rather than political, explanation for an agency's action.

### **Lessons for the Trump Administration**

By reversing policy statements with which it disagreed and passing Congressional Review Act resolutions against Obama's eleventh-hour initiatives, the Trump administration has identified the low-hanging fruit in its deregulatory project. The lesson of *State Farm* is that repealing other, longer-standing policies will not be as easy. It will require agencies to undergo the same time-consuming process as they did to enact the rules that they seek now to undo—and to overcome similar opposition from those who support the status quo.

And this is where the Trump administration's focus on short-term gains may hurt its longer-term goals. As an initial volley against the administrative state, President Trump announced a government-wide hiring freeze.<sup>12</sup> As Obama-era employees departed, this attrition has left agencies short of the personnel needed to do the blocking and tackling required under *State Farm*. His proposed agency budget cuts compound the problem, by denying agencies the resources they need to implement deregulation.<sup>13</sup>

As he left office, President Harry S. Truman remarked of his successor, "He'll sit there and say, 'do this' and 'do that' and nothing will happen. Poor Ike—it won't be a bit like the Army." The Trump administration may soon learn a similar lesson the hard way. If the White House is serious about achieving lasting deregulatory change, it must do so methodically, on an agency-by-agency, regulation-by-regulation basis, and avoid securing minor budget victories at the expense of losing the agency resources necessary to effect that change.

<sup>1</sup> *G.G. ex rel Grimm v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), vacated and remanded, *Gloucester County School Bd. v. G.G. ex rel Grimm*, 137 S.Ct. 1239 (2017).

<sup>2</sup> *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016).

<sup>3</sup> *Gloucester County School Bd. v. G.G. ex rel Grimm*, 137 S.Ct. 369 (2017).

<sup>4</sup> See Massachusetts Session Laws 2016 c.134, available at <https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter134><https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter134>.

<sup>5</sup> 5 U.S.C. § 801 *et seq.*

<sup>6</sup> 462 U.S. 919 (1983).

<sup>7</sup> Pub.L. 115-4 (Feb. 14, 2017) (SEC Disclosure Rule); Pub.L. 115-5 (Feb. 16, 2017) (Stream Protection Rule); Pub.L. 115-8 (Feb. 28, 2017) (SSA Rule implementing NICS Improvement Act of 2007); Pub.L. 115-11 (Mar. 27, 2017) (NASA rule on government contracts); Pub.L. 115-12 (Mar. 27, 2017) (DOI rule on land use plans); Pub.L. 115-13 (Mar. 27, 2017) (Education Department accountability rule); Pub.L. 115-4 (Mar. 27, 2017) (Education Department teacher preparation rule); Pub.L. 115-17 (Mar. 31, 2017) (DOL Drug Testing Rule); Pub.L. 115-20 (Apr. 3, 2017) (DOI Rule on Alaska Wildlife Refuges); Pub.L. 115-21 (Apr. 3, 2017) (DOL employee injury recordkeeping rule); Pub.L. 115-22 (Apr. 3, 2017) (FCC Data Privacy Rule); Pub.L. 115-23 (Apr. 13, 2017) (HHS Title X rule); Pub.L. 115-24 (Apr. 13, 2017) (DOL rule on municipal savings plans); Pub.L. 115-35 (May 17, 2017) (DOL rule on state savings plans).

<sup>8</sup> See 5 U.S.C. § 553.

<sup>9</sup> 463 U.S. 29 (1983).

<sup>10</sup> *Id.* at 30.

<sup>11</sup> *Id.* at 59 (Rehnquist, J., concurring in part and dissenting in part).

<sup>12</sup> See Presidential Memorandum Regarding the Hiring Freeze, January 23, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-hiring-freeze>.

<sup>13</sup> See President Trump's Taxpayer First Budget, available at <https://www.whitehouse.gov/taxpayers-first>; see Gregory Kreig and Will Mullery, Trump's Budget By the Numbers: What Gets Cut and Why, CNN.com, May 23, 2017, available at <http://www.cnn.com/2017/05/23/politics/trump-budget-cuts-programs/index.html>.

*Daniel Lyons is an Associate Professor of Law (with tenure) at Boston College Law School, where he specializes in administrative law, telecommunications, and Internet law.*

## **“U Visa” Relief for Undocumented Victims of Crime**

**By Lisa Locher**  
**Heads Up**

U Nonimmigrant Status, commonly called the “U visa,” was created by Congress in 2000 to provide a mechanism to encourage undocumented immigrants who had been trafficked, exploited, victimized, or abused to “report these crimes to law enforcement and fully participate in the investigation of the crimes” without fear of removal or deportation. Victims of Trafficking and Violence Prevention Act, Pub. L. 106-386, § 1513(a)(1), 114 Stat. 1464, 1533 (2000). Specifically, if a law enforcement agency certifies that a victim has been “helpful” in the investigation or prosecution of a crime, he or she may then petition U.S. Citizenship and Immigration Services (“USCIS”) for a U visa, which, if granted, provides a legal right to live and work in the United States for up to four years. The U visa thus encourages undocumented immigrants to cooperate and participate with law enforcement to address crimes, resulting in safer communities.

### **U Visa Eligibility**

To be eligible for a U visa, a petitioner must satisfy the following four criteria. See generally 8 U.S.C. § 1101(a)(15)(U)(i).

First, she must have suffered substantial mental or physical abuse as a result of being the victim of a “qualifying crime.” “[Q]ualifying crimes” include 28 crimes specified in the Immigration and Nationality Act, such as domestic violence, rape, torture, trafficking, incest, sexual assault, abusive sexual contact, sexual exploitation, felonious assault, and blackmail.

Second, she must possess information concerning the criminal activity.

Third, she must establish that she has been helpful, is being helpful, or is likely to be helpful in the investigation and/or prosecution of the crime. That circumstance must be certified by a law enforcement agency—that is, a federal, state, or local police agency, a prosecutor, or a judge—using USCIS Form I-918 Supplement B. See 8 U.S.C. § 1184(p). Without a completed Supplement B certification, the application cannot proceed.

Finally, the crime must have occurred in the United States.

### **U Visa Application Process**

To apply for a U visa, a petitioner completes and submits a petition (USCIS Form I-918) containing biographical information, a personal statement “describing the facts of the victimization,” and the certified Supplement B. The petitioner typically will also include supporting evidence, such as police reports, medical records, court documents, and letters from therapists or counselors. Most petitioners also submit USCIS Form I-765, which requests authorization to be employed in the United States. And a petitioner may also apply for “derivative” visas to cover certain family members, using USCIS Form I-918 Supplement A. Specifically, if the petitioner is under 21 years of age, she can apply for her spouse, children,



parents, and unmarried sibling(s) who are under the age of 18. If the petitioner is over 21, she may only apply for her spouse and children.

If the petitioner believes she has inadmissibility issues—which can include illegal entry into the country, prior removal from the country, or certain health conditions—she must also submit USCIS Form I-192, which requests a waiver of any grounds of inadmissibility that might otherwise prevent her from obtaining legal immigration status. The U visa program is not subject to certain grounds of inadmissibility that typically would apply—specifically that the petitioner is a public charge or is working without proper certification. Moreover, the U visa program allows USCIS to waive many of the remaining grounds of inadmissibility if it is in the “public or national interest to do so.” 8 U.S.C. § 1182(d)(14). Although the I-192 requires a petitioner to disclose damaging information to USCIS, in the past a petitioner was unlikely to face immigration consequences based on that disclosure alone. Pursuant to a 2011 internal agency memorandum, it was the policy of Immigration and Customs Enforcement (“ICE”) to not “initiate removal proceedings against an individual known to be the immediate victim or witness to a crime.” The continuing viability of this policy is now in question due to the current administration’s recent executive orders.

While filing Form I-918 requires no fee, Forms I-192 and I-765 carry non-refundable filing fees totaling approximately \$1,300. A petitioner may request a fee waiver using USCIS Form I-912.

Once the petitioner’s application packet containing all of these forms is submitted to USCIS’s Vermont Service Center in St. Albans, Vermont, USCIS will adjudicate the application. Adjudication can be time-consuming: The backlog is approximately three years, meaning that USCIS is currently adjudicating U visa applications filed during the summer of 2014.

If USCIS approves the application, USCIS will grant the petitioner employment authorization in the United States and legal status in the form of a U visa for up to four years. USCIS, however, is authorized to grant only 10,000 U visas annually. If an application is approved, but there are no U visas remaining available for quota reasons, USCIS will place the petitioner on a “deferred action” waitlist and typically will grant work authorization during that waiting period.

At the end of the petitioner’s four years of U visa status, she can apply to adjust her status to lawful permanent resident, i.e., become a “green card” holder.

### **The U Visa Experience for Petitioners**

Despite the U visa program’s many positive aspects for undocumented immigrant victims of crime, the process to seek and obtain one can be frustrating, even harrowing.

Law enforcement agency practices vary widely as to when they will certify a petitioner’s helpfulness. Many agencies will certify the petitioner’s helpfulness during any stage of an investigation or prosecution, which accords with the fact that the U visa program does not require an actual prosecution or conviction to occur. Other agencies, however, will not certify helpfulness until the criminal prosecution is concluded or the defendant defaults, meaning that the time merely to confirm the petitioner’s eligibility for a U visa can drag out for years—to say

nothing of the time for USCIS to adjudicate the application and for the victim to await an available U visa.

Additionally, even under the best of circumstances, undocumented immigrants will rarely come forward to report abuse or victimization. Undocumented immigrants often believe abusers' routine threats to call the police or ICE. Many undocumented immigrants yield to this basic fear and will not disclose crimes to, or cooperate with, the police. The current administration's actions threaten to chill undocumented immigrants from reporting crimes against them. President Trump's January 25, 2017 Executive Order "Enhancing Public Safety in the Interior of the United States," which sets enforcement priorities for removing undocumented immigrants, gives no deference to victims of crimes, unlike the 2011 ICE policy memorandum noted above. DHS Secretary John Kelly's February 20, 2017 memorandum "Enforcement of the Immigration Laws to Serve the National Interest," which implements the Executive Order, specifically states that "all existing conflicting directives, memoranda, or field guidance regarding the enforcement of our immigration laws and priorities for removal are hereby rescinded to the extent of the conflict." It is unclear exactly how this affects the 2011 memorandum that forswears removal proceedings against victims or witnesses of crimes. Lastly, the Administration has called for empowering state and local agencies to perform immigration enforcement functions, which threatens to further discourage undocumented immigrants from reporting crimes, despite the availability of U visa relief.

The uncertainty surrounding once-established policies is in such flux that immigration practitioners can no longer rely on previously established customary practices. Immigration practitioners are now more likely to warn undocumented clients who are prepared to come forward about the potential risks of seeking a U visa and thus drawing the attention of USCIS and ICE.

*Lisa Locher currently works in the immigration unit at Greater Boston Legal Services (GBLS) and is a Guberman Fellow in the Legal Studies Department of Brandeis University. Her prior experience includes over 15 years of practicing family law at GBLS. Attorney Locher worked for the Department of Children and Families. Attorney Locher is a graduate of Northeastern University School of Law*

## **Early Lease Termination Under G.L. c. 186, § 24: An Essential Escape Route for Tenants Who Are Facing Domestic Violence, Sexual Assault, or Stalking**

**Julia Devanthery**

### **Legal Analysis**

Survivors of sexual assault, domestic violence, or stalking often have to leave their homes and relocate to a safer place with little notice or planning in order to avoid harm by a perpetrator who knows where they live. My client Olivia<sup>1</sup> (whose name and identifying information I have changed to protect her privacy) was raped by a college classmate. Olivia's rapist was also her upstairs neighbor. After the incident she saw him coming and going from the building, in the elevator, and around other common areas. She was terrified of what he might do to her and ashamed every time she saw him. Olivia knew she had to get far away from the person who assaulted her as soon as possible. When she asked her property manager about moving out of her apartment, he very politely directed her to the paragraph of her lease that provided for a three-month rent penalty for early lease termination. Olivia could not pay three months' rent in addition to moving costs for a new apartment. Frustrated, scared, and confused, she hid from her rapist by locking herself into her apartment, missing school and work. After several weeks, a local rape crisis center referred her to me. Fortunately, [G.L. c. 186, § 24](#), "*Termination of rental agreement or tenancy by victim of domestic violence, rape, sexual assault or stalking*" ("Section 24"), was signed into law in 2013, after decades of law-reform efforts by survivors and housing advocates. Its purpose is to help tenants like Olivia leave their homes for safety reasons without incurring financial penalties. With our help, Olivia asserted those rights and moved out of her apartment in less than 24 hours.

Olivia's case illustrates that because Section 24 is not well known or understood, survivors across the Commonwealth remain trapped in unsafe living situations and unable to break free from abuse for fear of financial liability. This article aims to familiarize the practitioner with the provisions of Section 24 so that its benefits may be more broadly utilized.

### **A Brief History of G.L. c. 186, § 24.**

In recognition of the unique housing needs of survivors of domestic violence, sexual assault, and stalking, the Massachusetts Legislature passed a comprehensive statute aimed at decreasing homelessness among victims of violence and increasing their possibilities for escaping harm without financial repercussions, titled [An Act Relative to Housing Rights for Victims of Domestic Violence, Rape, Sexual Assault and Stalking](#) ("the Act"). The Act was patterned after the federal Violence Against Women Act ("VAWA"), [42 U.S.C. § 14043e-11](#), which also contains special housing protections for survivors. The Act established four new tenant protections for survivors of domestic violence, sexual assault, or stalking in the Commonwealth: the right to have locks changed at home, [G.L. c. 186, § 26](#); the right to call upon law enforcement or the courts for protection against abuse without reprisal from a property owner, [G.L. c. 239, § 2A](#); the right to terminate a lease early for safety reasons, [G.L. c. 186, § 24](#); and a prohibition against discrimination based on a prospective tenant's use of any of the lease-breaking or lock-change protections. [G.L. c. 186, § 25](#). Section 24, the right to terminate a rental agreement early, mirrors a similar VAWA provision allowing early termination of Section 8 leases. See [24 C.F.R.](#)

[982.354\(b\)\(4\)](#). Section 24 extends the right to flee an unsafe housing without penalties to all tenants in the Commonwealth, not just those who received federal housing subsidies.

After the Act became law, Lieutenant Governor Murray, who then chaired both [the Governor's Council to Address Sexual and Domestic Violence](#) and [the Interagency Council on Housing and Homelessness](#), summed up the intent of the legislation by saying, "[a]fter facing the emotional and physical trauma of abuse or assault, victims of sexual and domestic violence often struggle with ongoing concern for personal safety, housing instability or potential homelessness if they need to leave their residence. By partnering with the legislature and community based advocates, we are helping to improve the safety of victims in their own home and providing opportunities to improve their safety without further financial penalties."<sup>2</sup> Taken as a whole, and in light of the purpose expressed by lawmakers, it is clear that the law aims to protect survivors' access to housing and to allow them as much flexibility as possible to decide whether relocating is their safest solution. The Legislature sent a firm message to tenants and landlords alike: survivors should not lose housing because of abuse, nor should they be trapped in unsafe housing by the financial obligations of a tenancy agreement if they must leave.

### **The Mechanics of G.L. c. 186, § 24.**

#### **Who Qualifies for Protection Under G.L. c. 186, § 24?**

Pursuant to Section 24, a tenant may terminate a rental agreement or tenancy by giving written notice to the property owner that a member of the household has been a victim of domestic violence, rape, sexual assault, or stalking within the past three months, or that the tenant is in fear of imminent serious physical harm from such abuse. [G.L. c. 186, § 24\(a\)](#). Where the violence took place, the identity of the perpetrator, whether the perpetrator is part of the household, and whether the owner had any prior knowledge of the abuse are all irrelevant to the question of whether a tenant is eligible for early lease termination under Section 24 (nevertheless these are all issues landlords have raised with me in seeking to avoid complying with the law). The only threshold eligibility criteria are: (1) that the tenant or household member has experienced domestic or sexual abuse in the past three months, or is in imminent fear of serious physical harm, (2) that the tenant requests termination of the tenancy to the owner in writing, and (3) that the tenant vacates the unit within three months of giving the early termination notice. [G.L. c. 186, § 24\(b\)](#).<sup>3</sup>

The landlord may, but is not required to, ask for proof of the domestic violence, sexual assault, or stalking. [G.L. c. 186, § 24\(e\)](#). The statute provides three possible ways for a tenant to prove she is a victim eligible for early lease termination. She can provide the owner with (1) a copy of a G.L. c. 209A or G.L. c. 258E protection order, (2) a record from a court or law enforcement agency documenting an act of domestic violence, rape, sexual assault, or stalking, stating the name of the perpetrator if known, or (3) a written verification by a qualified third party to whom the victim reported violence. [G.L. c. 186, § 24\(e\)\(1\)-\(3\)](#). Under the third method for verification, a qualified third party can be a police officer or law enforcement professional, a medical care provider, an employee of the Department of Children and Families or of the Department of Transitional Assistance, a licensed social worker, a licensed mental health professional, a sexual assault counselor, or a domestic violence victims' counselor. [G.L. c. 186, § 23\(iii\)](#). The letter must be verified by the victim in a statement signed under the pains and penalties of perjury.

[G.L. c. 186, § 24\(e\)\(3\)](#). Counsel for tenants should be attentive to issues of privacy and dignity when advising a client on which form of verification to provide, and given a choice between multiple methods, the one with the least detail is often preferable.

Once an owner obtains proof of the tenant's status as a qualified victim he or she must keep such documentation confidential and may not share the content with any other person or agency unless the victim provides written authorization or unless required by a court or by government regulation. [G.L. c. 186, § 24\(f\)](#). Confidentiality is essential to victims, as the verification documents often contain private, embarrassing, or otherwise sensitive material. Owners cannot share this information with co-tenants or anyone else who may inquire about the reason for the early lease termination.

### **When Does Termination Occur?**

If a tenant seeks early termination under Section 24, the tenancy terminates on the date that a tenant surrenders her interest in the premises, or the "quitting date". [G.L. c. 186, § 23](#). If the tenant has already vacated the unit, the quitting date is the date that she gave notice to the landlord of her intent to abandon the unit and not return. If a survivor left on the 1<sup>st</sup> of the month, but didn't inform her landlord that she vacated until the 15<sup>th</sup>, the quitting date is the 15<sup>th</sup>. *Id.* If the tenant gives notice prior to vacating the unit, the quitting date is either (A) the date the tenant intends to vacate or (B) the actual date that she vacates after providing the notice. *Id.* If the tenant is still in the unit and informs the landlord of an intent to leave by the 1<sup>st</sup> day of the following month, but doesn't turn over possession of the unit until the 15<sup>th</sup>, the quitting date is the 15<sup>th</sup>.

### **What Financial Obligations Exist Between the Parties?**

Tenants are responsible for rent through the quitting date, but are not liable for rent after the quitting date. [G.L. c. 186, § 24\(c\)](#). This provision of the statute is drafted unartfully, and therefore it is the source of some misunderstanding among owners and their attorneys who routinely ask tenants to pay for the month after the quitting date before agreeing to release them from ongoing obligations under the rental agreement. This practice amounts to asking survivors to pay double rent in the same month (one month to the former owner and one to the next landlord at her new, safer apartment). Such a request is unaffordable for many and has the effect of trapping victims in unsafe apartments. Moreover, the practice of asking for a month's early termination penalty is in direct contravention of the legislative purpose expressed by lawmakers involved in writing and sponsoring the bill. For example, Senator Jamie Eldridge, one of the co-sponsors of the legislation, issued a press release stating, "This bill will help those victims who face a financial and/or legal barrier to leaving their home and . . . to vacate their lease or rental agreements *without financial penalty*."<sup>4</sup> Senator Cynthia Creem, another co-sponsor of the legislation, was quoted in the Governor Deval Patrick's press release as saying that, "[t]his new law will provide important protections to victims of domestic violence, sexual abuse and stalking by giving them the ability to choose whether to stay in their residences or move *without having to weigh their personal safety against financial considerations*."<sup>5</sup> The statements of lawmakers involved in drafting and passing the statute repeatedly confirm that qualifying survivors should not suffer financial consequences for seeking protection under Section 24, and therefore owners should not seek rent from tenants for periods after the quitting date. Section 24 shifts the

financial burden associated with an emergency relocation away from survivors and on to landlords, at least in terms of the cost of turning a vacated apartment over and re-renting it. This legislative choice likely reflects lawmakers' conclusion that property owners are in a better position to absorb these costs than survivors of domestic violence or sexual assault.

After termination, owners are responsible for refunding the tenant any pre-paid rent, (including the last month's rent) and the security deposit, if applicable, in compliance with G.L. c. 186, § 15B. [G.L. c. 186, § 24\(c\)](#).

### **Special Considerations with Regard to Co-Tenants.**

Section 24 does not terminate the rental obligations of co-tenants who are not qualified to terminate their leases for safety reasons. [G.L. c. 186, § 24\(d\)](#). The practical implications for co-tenants is that while one tenant may be able to terminate the lease early and on very short notice, the remaining tenant continues to be bound by the terms of the tenancy with the owner. If the co-tenants were jointly and severally liable under the lease (which is very common), the remaining tenant continues to be liable for the entire monthly rent after the survivor vacates. On the other hand, if roommates had individual tenancy agreements with the landlord, the remaining roommate's share would stay the same after the survivor vacated, and the landlord would receive less rent for the unit until a replacement tenant moves in. Given the incredibly low vacancy rates and high demand for rental housing in Massachusetts,<sup>6</sup> owners working closely with remaining tenants should be able to identify a replacement co-tenant in a timely manner.

### **The Bar Can Give G.L. c. 186, § 24 Meaning by Raising Awareness and Respecting Its Precepts.**

Section 24 has been law for over four years, yet there is a pervasive lack of awareness about the possibility of early termination, and an alarming level of misunderstanding among landlords and tenants alike about how the law works. Section 24 was enacted to allow maximum flexibility and minimal financial barriers to the most vulnerable tenants in the Commonwealth: those in the process of extricating themselves from abusive relationships and those who are fleeing homes with which their rapists or stalkers are familiar. Olivia, who is a rare example of a survivor who was able to access legal representation to terminate her lease early, now lives in a new apartment where she can focus on her studies and rebuild her life without the fear and trauma of living in the same building as her rapist. All qualifying survivors should be able to benefit from Section 24, not just those who can afford or find legal counsel. Increasing awareness and compliance with [G.L. c. 186, § 24](#) will ensure that more victims have the opportunity to break free from abuse and claim the dignity of living in a home free from violence.

Julia Devanthery is a Clinical Instructor at the WilmerHale Legal Services Center of Harvard Law School where she co-teaches and supervises students enrolled in the Housing Clinic and the Housing Justice for Survivors Project. Ms. Devanthery received her juris doctor from Northeastern School of Law in 2009 and her B.A. in Sociology from Brown University in 2004.

<sup>1</sup> This article uses gendered pronouns to describe victims and survivors as "she." This is in part to reflect the fact that all of my clients seeking the protection of G.L. c. 186, § 24 have been

women, and also because there is ample research to support the assertion that most domestic violence and sexual assault cases involve female victims. See Molly Dragiewicz and Yvonne Lindgren, *The Gendered Nature of Domestic Violence: Statistical Data for Lawyers Considering Equal Protection Analysis*, [17 Am. U. J. Gender Soc. Pol'y & L. 229](#), 242-257 (2009).

<sup>2</sup> [Press Release, Governor Deval Patrick Press Office, Governor Patrick Signs Legislation to Provide Housing Rights and Protections for Victims of Sexual Assault and Domestic Violence](#) (Jan. 3, 2013).

<sup>3</sup> If the tenant fails to vacate within three months, the notice to terminate the tenancy is considered void.

<sup>4</sup> [Press Release, Team Eldridge, Housing Committee Advances Bill to Help Victims of Domestic Violence, Sexual Assault](#) (March 26, 2012). (Emphasis added.)

<sup>5</sup> [Press Release, Governor Deval Patrick Press Office, Governor Patrick Signs Legislation to Provide Housing Rights and Protections for Victims of Sexual Assault and Domestic Violence](#) (Jan. 3, 2013). (Emphasis added).

<sup>6</sup> For example, the vacancy rate for rental housing in Greater Boston is 3.4%, lower than at any time since 2001. [The Greater Boston Housing Report Card 2016, The Trouble with Growth, How Unbalanced Economic Expansion Affects Housing](#), Prepared by The Kitty and Michael Dukakis Center for Urban and Regional Policy, Northeastern University for the Boston Foundation (2016).

*Julia Devanthery is a Clinical Instructor at the WilmerHale Legal Services Center of Harvard Law School where she co-teaches and supervises students enrolled in the Housing Clinic and the Housing Justice for Survivors Project. Ms. Devanthery received her juris doctor from Northeastern School of Law in 2009 and her B.A. in Sociology from Brown University in 2004.*

## ***Cantell v. Commissioner of Correction, Class Actions and the Mootness Doctrine***

**By Jeff Goldman**

### **Case Focus**

In *Cantell v. Commissioner of Correction*, 475 Mass. 745 (2016), four inmates appealed from the denial of their petition for class certification to seek a class-wide injunction limiting the use of “special management units” or “SMUs” in state prisons. The Superior Court had denied a motion for class certification, and the Appeals Court had dismissed the plaintiffs’ appeal from the denial as moot because, “when the plaintiffs’ appeal was before that court, it was uncontested that none of the named plaintiffs was still confined in an SMU.” 475 Mass. at 752-53.

The SJC could have fixed the Appeals Court’s mootness error by relying on the established principle that on an appeal from the denial of class certification, the court determines mootness based on whether the claim was moot while before the trial court, regardless of whether the class representative’s claims became moot while the case was on appeal. *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 404 (1980); *see also Gonzales v. Commissioner of Correction*, 407 Mass. 448, 452-53 (1990) (holding that where individual claims become moot prior to class certification motion, class claims are dismissed); 1 William B. Rubenstein, *Newberg on Class Actions* § 2:10 (5th ed. 2011). In other words, as the U.S. Supreme Court held in a 1980 decision also involving claims by prisoners, the determination of mootness on appeal from a denial of class certification “relat[es] back” to the plaintiffs’ situation as it existed before the trial court. *Geraghty*, 445 U.S. at 404. Had the SJC applied *Geraghty* in *Cantell*, the outcome would have been the same but the Court’s decision much easier: because “[a]t the time of the motion judge’s decision [on the motion for class certification], one of the named plaintiffs . . . remained in an SMU,” there was therefore no mootness problem. *Id.* However, none of the briefs in *Cantell* cited *Geraghty*, and the SJC resolved the mootness issue by relying entirely on *Wolf v. Commissioner of Public Welfare*, 367 Mass. 293, 297–298 (1975). Discussing *Wolf*, the SJC reasoned that the case was:

not moot because the plaintiffs brought this case as a putative class action, and the class action allegations contained in the amended complaint remain operative until a judge has considered and rejected them on their merits. *See Wolf* [] (adopting rule followed by number of Federal courts “that a class action is not mooted by the settlement or termination of the named plaintiff’s individual claim”). This is particularly true where, as the plaintiffs argue is the case here, it is within the defendants’ power voluntarily to cease the allegedly wrongful conduct with respect to any named plaintiff by unilaterally deciding to release him from an SMU. “If the underlying controversy continues, a court will not allow a defendant’s voluntary cessation of his allegedly wrongful conduct with respect to named plaintiffs to moot the case for the entire plaintiff class.” [*Wolf*] at 299 []. The statement applies to the present case: the alleged wrongs set out in the amended complaint continue to affect the putative class of individuals who remain confined to SMUs. In these circumstances, the plaintiffs’ appeal is not subject to dismissal on mootness grounds.

This formulation—“that a class action is not mooted by the settlement or termination of the named plaintiff’s individual claim”—is imprecise and will likely need to be revisited. Although it works in the circumstances of *Cantell*, it cannot be said as a general matter “that a class action



is not mooted by the settlement or termination of the named plaintiff's individual claim.” In typical cases, and where no other mootness exception applies, if all individual claims become moot before the filing of a class certification motion, the entire case should be dismissed. *See, e.g., Gonzalez*, 407 Mass. at 450; *Cruz v. Farquharson*, 252 F.3d 530, 533 (1st Cir. 2001) (“Despite the fact that a case is brought as a putative class action, it ordinarily must be dismissed as moot if no decision on class certification has occurred by the time that the individual claims of all named plaintiffs have been fully resolved.”). Accordingly, it was probably a mistake for the SJC to state that “class action allegations . . . remain operative until a judge has considered and rejected them on their merits.” Whether this is dicta or not, an attorney reasonably could use these statements to support an argument that the mootness of a class representative’s personal claims *never* matters under Massachusetts law, even if the personal claims were moot *before* filing a motion for class certification motion, or even that there is *never* a mootness defense in a class action.

This imprecise language notwithstanding, lower courts should not take *Cantell* as foreshadowing the SJC’s abrogation of mootness doctrine in class actions. The SJC regularly invokes the mootness doctrine, particularly in cases of constitutional dimension. Further, the SJC recognized in at least two cases after *Wolf* that the mootness doctrine applies to class claims. In *Flint v. Commissioner of Public Works*, 412 Mass. 416, 419-20 (1992), the SJC rejected on mootness grounds class action claims for declaratory relief. And in *Gonzales*, the SJC reversed the trial court’s certification of a class of prisoners (and directed that the case be dismissed unless resuscitated within thirty days by a new plaintiff) because the two named plaintiffs were no longer incarcerated at the time of the class certification motion.

Finally, *Wolf* does not actually support the parenthetical that the SJC used to summarize it in *Cantell*. *Wolf* held merely that the named plaintiffs’ claims were not necessarily moot under the common law because they were “capable of repetition yet evading review.” In fact, *Wolf* was a prototypical “capable of repetition yet evading review” case: the claim was that the plaintiff and other members of the class were not receiving replacement public assistance checks within the required four-day period, but rather some days later. It would have been virtually impossible for any claimant file a lawsuit and achieve class certification while any single check was outstanding. (The “capable of repetition yet evading review” exception might also have applied in *Cantell*, although it was not necessary for the SJC to reach the question.)

In short, in its class action-mootness jurisprudence, as in most of its other opinions about justiciability, the SJC has taken a flexible approach, deciding some technically-expired issues on their merits because there are sound, common-law reasons to do so, while refusing to adjudicate stale issues when no traditional exception to mootness doctrine applies. When the next opportunity arises for the SJC to apply the mootness doctrine in a class action, the Court should reiterate its past, sound approach and reject any attempt to read *Cantell* as requiring a categorical approach to mootness in class cases.

*Jeff Goldman is of counsel at Morgan, Lewis & Bockius, LLP. His practice centers on securities litigation and regulatory enforcement defense.*

## Fasten Your Seatbelt: The SJC Revises the Standard for Anti-SLAPP Motions

By Richard J. Yurko

### Legal Analysis

In [\*Blanchard v. Steward Carney Hospital\*](#), 477 Mass. 141 (2017), a surprise decision rendered in May, the Supreme Judicial Court altered significantly its “well-established” test—reflected in over two decades of precedent—for how trial courts are to evaluate special motions to dismiss under the Massachusetts anti-SLAPP statute. Whether this decision, which creates a new way to defeat the anti-SLAPP special motion to dismiss, effectively guts the statute or is just a bump on the road to a better understanding of it, will be determined by years of decisions in cases that have yet to arise. However, no less of an authority than the Court of Appeals for the First Circuit has already observed that *Blanchard* “dramatically shifted” the law under the anti-SLAPP statute.<sup>1</sup>

### Background

The anti-SLAPP statute, G.L. c. 231, § 59H, was enacted in 1994 over the veto of Governor William Weld to protect citizens from “strategic litigation against public participation,” i.e. “SLAPP” lawsuits. The immediate impetus for the statute was a long and expensive case against a group of Rehoboth residents who opposed a local real estate development. The legislature concluded that persons who were exercising their rights of petitioning and speech were being punished for doing so by litigation in which their petitioning was the basis for claims against them. Effectively, what the statute does is create a statutory qualified immunity from suit for non-sham petitioning activities and an expedited procedure for dismissing claims arising from such petitioning, typically before the expense of discovery. The broad statutory definitions evidence a broad prophylactic purpose.

The new statutory immunity was heir to a long line of federal cases protecting the First Amendment right to petition.<sup>2</sup> What is different in the anti-SLAPP statute, and in similar statutes in other states, is the expedited dismissal procedure (supplanting the normal rules for dispositive motions) and the fact that it was a positive enactment by the legislature rather than a rule developed by judges over time. Perhaps for these two reasons, the statute has not always been a favorite of the courts. See, e.g., [\*Adams v. Whitman\*](#), 62 Mass. App. Ct. 850 (2005) (extensive dicta worrying that the anti-SLAPP statute needlessly eliminates litigation-based tort claims). For twenty years, however, the Supreme Judicial Court sought to apply the statute as written—regardless of some of the justices’ apparent doubts concerning its scope—and often corrected trial courts and appellate panels that strayed too far from the words of the statute. E.g., [\*Duracraft Corp. v. Holmes Products Corp.\*](#), 427 Mass. 156, 163 (1998) (noting that legislature “ignored [the] potential uses [of the statute] in litigation far different from the typical SLAPP suit”); [\*Town of Hanover v. New England Regional Council of Carpenters\*](#), 467 Mass. 587, 594 (2014) (reversing trial court’s denial of special motion to dismiss and concluding that granting the motion was in accord with the reasons underlying the anti-SLAPP statute’s enactment). No longer.

## The Original *Duracraft* Test

Two decades ago in *Duracraft*, the Supreme Judicial Court announced what it would later call the “well-established” two-part test for deciding a special motion to dismiss under the statute. E.g., *Benoit v. Frederickson*, 454 Mass. 148, 152 (2009); *Wenger v. Aceto*, 451 Mass. 1, 5 (2008). First, the moving party who asserts that she is being sued based upon her petitioning activities (typically the defendant) must demonstrate that the claims against her have no substantial basis other than her petitioning activities. If she succeeds in doing so, then the burden shifts to the nonmoving party (typically the plaintiff) to show, in the words of the statute, that the defendant’s petitioning “was devoid of any reasonable factual support or any arguable basis in law and [that] the moving party’s acts caused actual injury to the responding party.” G.L. c. 231, § 59H. Essentially, this second step in the analysis places a high, but not insurmountable, burden on the plaintiff to show early on that the petitioning was an unsupportable sham. Because the burden in the second step of the analysis was indeed steep, many plaintiffs focused their defense to a special motion to dismiss on the first step in the analysis, *i.e.* whether the defendant had shown that the plaintiff’s claims were based *solely* on defendant’s petitioning.

There are several key points about the *Duracraft* framework. First, the test is objective, just as the test in the statute is objective—whether the claim is based on petitioning and whether the petitioning has, or does not have, “reasonable factual support.”<sup>3</sup> 427 Mass. at 165. Second, the focus is not on the ultimate question of the validity of the plaintiff’s claim but rather on the non-sham nature of defendant’s petitioning, as befits an immunity. *Id.* Third, the decision on whether immunity exists is generally to be made at the start of the case, otherwise the benefits of qualified immunity are lost. *Id.* at 161; *see also Pearson v. Callahan*, 555 U.S. 223, 231-32 (2009) (stressing importance of resolving immunity questions at earliest possible stage in litigation).

## The Subjective *Blanchard* Addition

In *Blanchard*, the Court left the prior *Duracraft* framework intact but added an alternative way to defeat a special motion to dismiss. Rather than scale the high peak of showing the petitioning was a sham under the second part of the *Duracraft* test, plaintiffs can now convince a trial court judge that their “primary” motivation for each claim “was not to chill the special movant’s legitimate petitioning activities.” To make this alternative showing, “the nonmoving party must establish, such that the motion judge may conclude with fair assurance, that its primary motivating goal in bringing its claim, viewed in its entirety, was not to interfere with and burden defendants’ petition rights, but to seek damages for the personal harm to it from the defendants’ alleged legally transgressive acts.” *Blanchard*, 477 Mass. at 160 (internal quotations and citations omitted).

This “motivation” standard finds no antecedent in the language of the statute itself which, as noted, focuses strictly on the merits of the petitioning activity. One might wonder what plaintiff will not now file an affidavit calmly assuring the trial court that burdening the defendant’s petitioning was the farthest thing from its mind? Would not the Rehoboth developer, beset by neighborhood opposition, have done just that? By grafting a subjective branch onto an otherwise objective test, the Court has opened a Pandora’s Box of unanswered questions like:

(a) How does one prove or disprove, without discovery, the plaintiff’s “primary motivating goal”?

(b) If one of the chief goals of the anti-SLAPP statute was the earliest possible termination of potential SLAPP suits before the time and expense of discovery, how can such discovery be avoided if the question now turns on the plaintiff’s “primary” motivation?

(c) How is a trial court, or for that matter a reviewing court, supposed to weigh an affidavit from a plaintiff swearing it does not seek to burden the defendant’s petitioning, against objective—but inconclusive—evidence to the contrary?

## Rationale

None of the parties in *Blanchard* argued for this shift. The Court did not request briefs from the parties or *amici* on a possible new test. Yet the Court altered two decades of its own jurisprudence on the subject. So, one has to wonder why the Court was moved to announce a new test.<sup>4</sup>

The Court proffered one stated rationale for the new test. It suggested that the *Duracraft* “framework,” which simply implemented the objective language of the statute, was much broader than the “fundamental statutory concern” of just eliminating SLAPP suits. 477 Mass. at 155. According to the Court, without the benefit of a citation to the statute, the statutory language sweeps more broadly than the legislative intent because “[i]t is only ... the actual ‘SLAPP’ suit,” *i.e.* the “meritless claim targeting legitimate petitioning activity,” that “the Legislature intended to stop early in its tracks.” *Id.* at 157.

This justification contradicts extensive Massachusetts precedent by purporting to create a clash between the intent of a statute and its words. As this very Court confirmed just three weeks later, Massachusetts courts are supposed to look for the statute’s intent in the words of the statute. “Where the language of the statute is clear and unambiguous, it is conclusive as to legislative intent.” [AIDS Support Group of Cape Cod, Inc. v. Town of Barnstable](#), 477 Mass. 296, 300 (June 14, 2017)(collecting cases). The words of the anti-SLAPP statute broadly defined petitioning activities, defined a qualified immunity for those activities, and crafted an objective test and an expedited procedure for enforcing that immunity. That the immunity was prophylactic and certainly broader on its face than the one SLAPP suit that prompted the statute is evident from the face of the statute. No linguistic gymnastics can derive a narrow “intent” standard from such broad language, especially where the statute was enacted over the veto of a governor who argued for a much more narrow law. *See, e.g.,* David Kluff, *The Scalpel or the Bludgeon? Twenty Years of Anti-SLAPP in Massachusetts*, 58 B.B.J. 5 (2014). Had the Court followed its own precedent, which it reaffirmed three weeks later in the *Barnstable* case, it would not have set up a false clash between the words of the statute and its true “intent.”

The Court may have acted for two other reasons, implied but not fully stated in the decision. First, perhaps the Court might have thought the new test was necessary to keep the statute constitutional. *Blanchard*, 477 Mass. at 157-158. Second, the Court might have thought that a new test was necessary to save the plaintiff nurses’ claims, which didn’t seem to the Court to be

SLAPP claims at all. *Id.* at 154. Neither of these intimated reasons is correct or, for that matter, particularly satisfying.

In *Duracraft*, the Court twenty years ago came up with the two-part test to resolve the supposed constitutional tension between preferring the defendant's prior petitioning to the plaintiff's new petitioning (where the latter seeks to hold the defendant liable for its petitioning). *Duracraft*, 427 Mass. at 167-68. Other than its flawed legislative "intent" argument, the *Blanchard* Court does not satisfactorily explain why the *Duracraft* balancing was now insufficient. Moreover, the Court never grappled with a fundamental flaw in the "constitutional balancing" argument to begin with. In enacting the anti-SLAPP statute, the legislature actually changed the substantive law of the Commonwealth,<sup>5</sup> as it is entitled to do. By creating what is, effectively, a qualified immunity from suit for non-sham petitioning, the legislature altered the substantive tort law of the Commonwealth. Upon such enactment, over a governor's veto, the legislature effectively made claims based solely on meritorious petitioning activity no longer valid. There is no right, constitutional or otherwise, for a plaintiff to petition for redress under old, supplanted law. There is no tension between two types of valid petitioning, but rather only a tension between former law and new law—an easy "tension" to resolve.

Moreover, the Court could have held for the plaintiffs in *Blanchard* simply by applying *Duracraft*. In *Duracraft*, the defendant's special motion to dismiss was deemed properly denied because the plaintiff's claims were not based *solely* on the defendant's petitioning. *Duracraft*, 427 Mass. at 168. There existed a written contract (a nondisclosure and confidentiality agreement) between plaintiff and defendant. *Id.* That contract was an additional, non-petitioning factor in the claims that arose from the defendant's petitioning (his testimony at a deposition).

In *Blanchard*, the nurses sued their former employer, Steward Carney Hospital, for defamation allegedly arising from the employer's comments to newspapers and in emails to all employees about the hospital's termination of them. Although the claim may have been for defamation, it unquestionably arose from the employer-employee relationship and against an alleged termination "for cause" required by the nurses' union contract with the employer. *See* 477 Mass. at 145 n.7 (noting the collective bargaining agreement and an arbitrator's finding in favor of the nurses). In short, what made the statements defamatory was the necessary suggestion that there had been cause for the nurses' termination (or, in the words of *Blanchard*, the nurses' "culpability," 477 Mass. at 142), even though none of the nurses had been accused of any individual wrongdoing. The nurses' defamation claim was not subject to the anti-SLAPP statute under a straightforward application of *Duracraft* because it rested, in part, on the employer-employee relationship and the union contract between the plaintiffs and defendant—just as the contract in *Duracraft* provided a substantial basis to the claim in addition to the petitioning. Thus, no new test was required for the Court to preserve the nurses' defamation claim.

There is, of course, always the possibility that in subsequent decisions, the Supreme Judicial Court will return to an objective standard derived from the actual words of the anti-SLAPP statute. Often, decisions that seem like a wrong turn are, on further judicial reflection, treated as *sui generis* until a decade or two later when they are overruled. *E.g.*, [Lawrence v. Texas](#), 539 U.S. 558 (2003) (overruling [Bowers v. Hardwick](#), 478 U.S. 168 (1986)).

But it is perhaps much more likely that, with a new judicially-created subjective defense to an anti-SLAPP special motion to dismiss, trial and appellate courts will spend a decade or more trying to reconcile the objective words of the statute with this new subjective judicial exception to a legislatively-crafted immunity. Given the judicial equivocation under the statute even before this latest decision, my prediction is that courts and judges will scatter in how loose or how narrow to construe this new judicially-created exception to legislatively-created immunity. We are all in for a bumpy ride.

<sup>1</sup> [\*Steinmetz v. Coyle & Caron, Inc.\*](#), 2017 U.S. App. LEXIS 11916 at \*5 (1st Cir. June 29, 2017). In *Steinmetz*, the First Circuit has certified another important anti-SLAPP question to the Supreme Judicial Court: is a paid consultant who is aiding a group in its petitioning covered by the statute? The SJC's occasional dicta on this question is internally inconsistent, and conflicts with its and the Massachusetts Appeals Court's holdings in cases like [\*Town of Hanover\*](#), *infra*.

<sup>2</sup> See, e.g., [\*BE&K Construction Co. v. NLRB\*](#), 536 U.S. 516, 524-25 (2002); [\*Stern v. United States Gypsum, Inc.\*](#), 547 F.2d 1329, 1342 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1977); [\*In re Primus\*](#), 436 U.S. 412, 426 (1978); [\*United Trans. Union v. Michigan Bar\*](#), 401 U.S. 576, 585 (1971); [\*United Mine Workers of America v. Ill. State Bar Ass'n\*](#), 389 U.S. 217, 222 (1967).

<sup>3</sup> Indeed, the Supreme Judicial Court repeatedly eschewed any inquiry into defendant's subjective motive for petitioning in the first part of the test. E.g., [\*Benoit\*](#) at 153; [\*Office One\*](#) at 122; [\*Fabre v. Walton\*](#), 436 Mass. 517, 523-24 (2002).

<sup>4</sup> The [\*Blanchard\*](#) case did have one significantly redeeming aspect. It made short work, confined largely to a footnote, to the argument that somehow the anti-SLAPP statute's special motion to dismiss was a violation of state or federal guaranties of the right to a jury trial in certain civil cases. [\*Blanchard\*](#), 477 Mass. at 158 n.24.

<sup>5</sup> In [\*Steinmetz\*](#), the Court of Appeals for the First Circuit recognized that the Massachusetts anti-SLAPP statute (like the Maine anti-SLAPP statute, which was the subject of an earlier decision) was substantive law, not procedural law, and therefore ought to be applied in federal court under [\*Erie RR v. Tompkins\*](#), 304 U.S. 64 (1938), in diversity cases. [\*Steinmetz\*](#), 2017 U.S. App. LEXIS 11916 at \*2, 6 (citing [\*Steinmetz v. Coyle & Caron, Inc.\*](#), 2016 U.S. Dist. LEXIS 99631 at \*6-8 (D. Mass. July 29, 2016)).

*Richard Yurko is the founding shareholder of Yurko, Salvesen & Remz, P.C. and has frequently authored briefs on behalf of amicus curiae parties on the anti-SLAPP statute.*

***Ferri v. Powell-Ferri: Expansion of Common Law "Trust Decanting" in Massachusetts***  
**By Marc J. Bloostein**  
**Case Focus**

Trust decanting is a method by which the trustee of an irrevocable trust distributes trust assets into a new trust with revised terms. In *Ferri v. Powell-Ferri*, 476 Mass. 651 (2017), the Supreme Judicial Court (SJC) held that trust property in a Massachusetts irrevocable trust may be decanted into a new trust even if doing so would remove the trust assets from the beneficiary's marital estate during his divorce. The SJC left open, however, whether decanting solely to deprive the beneficiary's spouse of marital assets would be invalid as contrary to public policy. *Id.* at 664 (Gants, C.J., concurring). Although *Ferri* provides needed guidance to trustees on decanting, it leaves some unanswered questions that should be addressed by the legislature.

Common law decanting pursuant to language in an irrevocable trust was first recognized in Massachusetts in *Morse v. Kraft*, 466 Mass. 92 (2013). In *Morse*, the Court interpreted the trust instrument to authorize the trustees to distribute the trust assets to a new trust. *Morse*, 466 Mass. at 96-98. The key factors that allowed the trustees to decant assets into a new trust were: (1) the trustees' unlimited discretion over distributions; (2) the trustees' power to apply property for the benefit of a beneficiary; and (3) the broad grant of powers to the trustees. *Id.* at 98-99. To determine the settlors' intent with respect to decanting, the SJC considered the post-execution affidavits of the settlor, draftsperson and disinterested trustee. *Id.* at 97. The Court declined to adopt a rule that any trustee with broad distribution power has the inherent power to decant, and instead opted for a case-by-case determination taking into account the terms of the trust instrument. *See Ferri*, 476 Mass. at 658 (citing *Morse*, 466 Mass. at 97).

In *Ferri*, the irrevocable trust at issue had been established for the benefit of Paul Ferri, Jr., the settlor's son. Beginning at age 35, Paul could withdraw an increasing portion of the trust property; at the time of the decanting he could withdraw about 75% of the principal. Shortly after Paul's wife filed for divorce in Connecticut, the trustees effectively eliminated Paul's power to withdraw by decanting the assets into a new trust (without informing Paul or obtaining his consent). There is no question that the decanting was an effort by the trustees to remove the trust property from Paul's marital estate. *Id.* at 653.

The Connecticut Supreme Court certified three questions to the SJC, including whether the trust instrument, which was governed by Massachusetts law, authorized the trustees to decant. 476 Mass. at 652. Unlike in *Morse*, the trustees were not waiting for court approval—they had already decanted (indeed, they had done so even before the SJC decided *Morse*).

The SJC answered that the *Ferri* trust instrument allowed decanting. The trust instrument gave the trustees broad discretionary distribution powers “virtually identical to provisions in the *Morse* trust,” along with discretion even more expansive than that afforded in the *Morse* instrument. Consequently, the settlor's intention to authorize decanting “would seem to follow necessarily.” *Id.* at 657-58. In particular, the SJC found that the trustees' explicit authority to “segregate irrevocably [net income and principal] for later payment to” the beneficiary “indicate[d] the settlor's intention to allow decanting.” *Id.* at 658. Thus, the SJC held that decanting was proper if done in the beneficiary's best interest, unless and until all the trust assets had been withdrawn by the beneficiary. *Id.* at 662.

The Court rejected *Powell-Ferri*'s counter-argument that decanting was not allowed because it would render the beneficiary's power to withdraw nugatory. First, all trust provisions must be

read consistently, and if “withdrawable” property could not be decanted, then there would be no point to the trust after the age of full vesting with the beneficiary. *Id.* at 660. Second, because the trustees hold full legal title to all trust property, that property remains subject to their full stewardship and power, including the authority to decant. *Id.* at 660-61. Third, the two methods of distributing trust property—the beneficiary’s withdrawal power and the trustee’s power of distribution—are not mutually exclusive and decanting is consistent with the trustees’ power to irrevocably sequester for “[s]o long as [the beneficiary] is living.” *Id.* at 661. The SJC also found that the settlor’s affidavit could evidence the settlor’s intent if the settlor’s intent were otherwise ambiguous at the time he created the trust, and so long as the affidavit did not contradict or attempt to vary the terms of the trust. *Id.* at 663.

In short, although *Ferri*, like *Morse*, affirmed the importance of considering the trust instrument as a whole in determining the settlor’s intent regarding decanting, the *Ferri* Court nevertheless favored the trustees’ decanting power despite the trusts’ potentially conflicting withdrawal right provisions. In so deciding, the SJC expressly did not consider whether, in some circumstances, the existence of a withdrawal power might override trust provisions that allow decanting as a matter of public policy, as the Connecticut trial court had decided. *See Ferri v. Powell-Ferri* (SC 19317), 2013 Conn. Super. LEXIS 1938. As Chief Justice Gants pointed out in his concurrence, *Ferri* did not answer “whether Massachusetts law will permit trustees in Massachusetts to create a new spendthrift trust and decant to it all the assets from an existing non-spendthrift trust where the sole purpose of the transfer is to remove the trust’s assets from the marital assets that might be distributed to the beneficiary’s spouse in a divorce action.” 476 Mass. at 664 (Gants, C.J., concurring) (noting the Massachusetts prohibition against trusts that violate public policy in the Massachusetts Uniform Trust Code, G.L. c. 203E, § 404).

Notably, the *Ferri* Court also did not consider the ramifications of the provision of the Massachusetts Uniform Trust Code which provides that the holder of a non-lapsing withdrawal power under the terms of a trust (whether revocable or irrevocable) is treated as if he were the settlor of a revocable trust with respect to the property subject to the power, and the rights of the other beneficiaries are subject to his control and the duties of the trustee are owed exclusively to him. G.L. c. 203E, § 603. Nor did *Ferri* articulate any fiduciary limits to decanting, although there must be limits. *See, e.g., Old Colony Trust Co. v. Silliman*, 352 Mass. 6, 10 (1967) (“[E]ven very broad discretionary powers are to be exercised in accordance with fiduciary standards and with reasonable regard for usual fiduciary principles.”). *Ferri* raised additional questions by suggesting—without explaining—that a “duty to decant” may exist. 476 Mass. at 661.

Consequently, *Ferri* leaves trustees to ponder the limits of their power to decant, whether they might have a duty to decant and, if so, under what circumstances. The Massachusetts legislature should adopt a decanting statute to provide a path for trustees to decant with clear limits and safeguards.

*Marc J. Bloostein is a partner in Ropes & Gray LLP’s private client group and focuses on estate planning and fiduciary law. He was co-chair of the BBA’s Trusts and Estates Section from 2011 to 2013, he played a key role in the 2012 enactment of the Massachusetts Uniform Trust Code, and he teaches a course on estate planning at Harvard Law School.*





## Disagreement Resolved: Unpreserved Public Trial Violation Does Not Require Automatic Reversal of a Criminal Conviction

By Bethany Stevens

### Case Focus

The Supreme Court's decision in [Weaver v. Massachusetts, \(16-240, June 22, 2017\)](#), did not resolve the broad disagreement for which it granted certiorari—whether a criminal defendant must demonstrate prejudice when a structural error is not preserved at trial. The Court, however, did resolve the disagreement in the context of trial counsel's failure to object to the closure of the courtroom in violation of a defendant's Sixth Amendment right to a public trial. Still, while the ultimate focus of *Weaver* is narrow, the resolution of this limited issue is very important in Massachusetts. This is because it was a fairly common practice by court officers, prior to 2007, to close courtrooms to the public due to space constraints during jury selection in criminal trials. As such, the finality of numerous Massachusetts convictions hinged on the Supreme Court's decision.

It has been well settled that closure of the courtroom to the public in a criminal trial violates a defendant's Sixth Amendment right to a public trial. It has also been well settled that the violation of the public trial right is considered a “structural” error. A structural error is a constitutional violation that, in the direct review context, generally entitles a defendant to automatic reversal without any inquiry into prejudice. It was not clear, however, whether the public trial right extended to jury selection. It also was not clear whether an unpreserved violation of the public trial right required the same remedy of automatic reversal.

In April of 2007, the First Circuit concluded that the public trial right does extend to jury selection and that the structural nature of this Sixth Amendment violation, even when unpreserved, required reversal of a criminal conviction without any showing of prejudice. [Owens v. United States, 483 F.3d 48, 61-66 \(1st Cir. 2007\)](#). The First Circuit's decision called into question numerous Massachusetts State court convictions, including the murder conviction of Kentel Weaver, and prompted numerous motions for a new trial. These convictions were further called into question when the Supreme Court issued its controversial *per curiam* opinion in [Presley v. Georgia, 558 U.S. 209, 213 \(2010\)](#), which recognized explicitly for the first time that the Sixth Amendment right to a public trial does indeed extend to jury selection.

Weaver, who was charged with murdering a 15-year old boy, went to trial in 2006, prior to *Owens* and *Presley*. The jury was selected from jury pools of 60-100 potential jurors and the *voir dire* took place in a courtroom that accommodated seating for only 50-60 people.

The defendant's mother and her minister were turned away from the courtroom by a court officer during the two days of the jury selection process in order to accommodate the large number of jurors. The defendant's mother told trial counsel about her inability to get into the courtroom, but counsel did not bring it to the defendant's attention or object; trial counsel believed that a courtroom closure during the jury selection process was constitutional. At trial, the jury convicted the defendant of first degree murder.

Five years later and following the First Circuit's decision in *Owens*, Weaver filed a motion for a new trial seeking automatic reversal of his murder conviction because counsel failed to object to the closure of the courtroom during the jury selection process. While his motion was pending, the Supreme Judicial Court issued its decision in [Commonwealth v. LaChance, 469 Mass. 854, 856 \(2014\)](#), which, contrary to the First Circuit, held that a public trial violation, despite being a "structural" error, can be procedurally waived and, that an unpreserved claim of this sort will not entitle a defendant to automatic reversal; rather, a defendant is only entitled to a new trial upon a showing that trial counsel's constitutionally deficient performance caused prejudice.

In *Weaver*, the Supreme Court concluded that the Supreme Judicial Court was correct. A public trial violation that is not preserved at trial and raised on direct appeal requires the defendant to establish prejudice as a result of the error. The Supreme Court broke new ground in its explanation that not all structural errors are the same. In so doing, the Court identified three broad rationales for why its decisions have deemed particular errors "structural." The first rationale for deeming an error structural in nature is not because the constitutional right at issue protects the defendant from erroneous conviction, but instead because it protects some other important interest. For example, the denial of a defendant's right to conduct his own defense is a structural error not because it provides a trial benefit to the defendant (in fact, it usually increases the likelihood of an unfavorable outcome), but because the Constitution requires that a defendant must be allowed to make his own choices about the proper way to protect his own liberty. A second rationale for deeming an error structural in nature is when the effects of the error are simply too hard to measure. This too can be seen in the denial of a defendant's constitutional right to select his or her own attorney. Finally, some errors—like the denial of an attorney altogether or the failure to give a reasonable doubt instruction—are structural in nature because the error always results in fundamental unfairness to the defendant at trial. The Court concluded these different reasons for deeming an error structural require the use of a different standard when considering an ineffective assistance of counsel claim premised on the failure to object to the underlying error.

In evaluating the unpreserved structural error at issue in *Weaver*, the Court recognized that it cannot be that a public trial violation results in fundamental unfairness in every case because the courtroom can be closed over the defendant's objection as long as the trial judge makes on the record findings pursuant to [Waller v. Georgia, 467 U.S. 39, 48 \(1984\)](#) to justify the closure. Rather, the violation of the public trial right is deemed structural error because it protects other important interests (namely, the public's interest and constitutional right pursuant to the First Amendment), and because the effects of the error are simply too hard to measure. Moreover, analyzing an unpreserved error of this type differently than if the error had been preserved is justified where a contemporaneous objection would allow the trial judge to cure the violation by either opening the courtroom or explaining the reasons for the closure.

Thus, Weaver would only have been entitled to a new trial if he had been able to show that trial counsel's failure to object to the closure of the courtroom during the jury selection process was both constitutionally deficient *and* that the deficiency resulted in prejudice. The Supreme Court went on to assume "that prejudice [could] be shown by a demonstration of fundamental unfairness," but found that such fundamental unfairness was not shown in *Weaver* where the "trial was not conducted in a secret or remote place," and "[t]he closure was limited to the

jury *voir dire*; the courtroom remained open during the evidentiary phase of the trial; the closure decision apparently was made by court officers rather than the judge; there were many members of the venire who did not become jurors but who did observe the proceedings; and there was a record made of the proceedings that does not indicate any basis for concern, other than the closure itself.” Slip op. at 15. Additionally, there was no suggestion of any misconduct or impropriety of any of the jurors, the judge, or any other party. Finally, there was strong evidence of the defendant’s guilt and Weaver did not provide any “sense of a reasonable probability of a different outcome but for counsel’s failure to object.” Slip op. at 14. The defendant was not entitled to a new trial.

In a concurring opinion, Justice Thomas, joined by Justice Gorsuch, noted his willingness to reconsider the Supreme Court’s *per curiam* opinion in *Presley*. In a dissenting opinion, however, Justice Breyer, with whom Justice Kagan joined, expressed concern with ranking structural errors in terms of egregiousness and noted that the Court’s framework ignores the fact that the public trial right is indeed impossible to measure, which means that a defendant would never be able to meet that showing. Justice Breyer would not impose that impossible burden.

Responding in part to the dissent’s concern, in reaching its conclusion the majority opinion expressly recognized the corollary concern that “an ineffective assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, thus undermining the finality of jury verdicts. For this reason, the rules governing ineffective assistance claims must be applied with scrupulous care.” Slip op. at 14, internal quotation marks omitted. Applying these principles, *Weaver* concludes that an unpreserved Sixth Amendment public trial violation, in the context of jury selection procedures, does not result in automatic reversal of a defendant’s conviction. The Supreme Court’s decision thus resolves the framework that applies to the numerous Massachusetts convictions resulting from trials prior to the *Owens* and *Presley* decisions where the public had been excluded, without objection, from the jury selection process. The disagreement over this important issue has been settled.

*Bethany Stevens is the Director of Legal Policy and Deputy General Counsel to the Administrative Office of the District Court, and is a member of the BBA’s Criminal Law Section Steering Committee. Previously, she served as the Deputy Chief of the Middlesex District Attorney’s Appeals Bureau where she litigated closed courtroom claims at the trial level as well as at the Appeals Court and Supreme Judicial Court.*