

THE ALI Reporter

THE QUARTERLY NEWSLETTER OF THE AMERICAN LAW INSTITUTE

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SUMMER 2017

THE PRESIDENT'S LETTER

Dear Friends:

I am very much looking forward to serving the ALI over the next few years as your President. The ALI has always held a high place in my own thinking about the law and the legal profession, and I consider that it is one of the very best features of the legal landscape in America. We are all grateful for the wonderful leadership that Roberta Cooper Ramo has provided over the past nine years. And the future looks bright. Roberta will continue as Chair of the Council so we will continue to benefit from her wisdom and advice. We have a dynamic duo in Director Ricky Revesz and Deputy Director Stephanie Middleton. We also have a terrific staff and a balanced budget. Most of all, we have an active and engaged group of distinguished and thoughtful volunteers in the membership body and on the Council.

We have plenty of important work to do. Those of you who attended the Annual Meeting know that the agenda was packed and that the discussions were lively and insightful. The rundown of existing projects gives one a sense of the reach and ambition of the Institute: American Indians; Charitable Nonprofits; Children and the Law; Compliance, Enforcement, and Risk Management for Corporations; Conflict of Laws; Consumer Contracts; Copyright; Data Privacy; Economic Harm Torts; Government Ethics; Intentional Torts; International Commercial Arbitration; Liability Insurance; Model Penal Code: Sexual Assault; Policing; Property; and Sexual and Gender-Based Misconduct on Campus. In May, members approved final project drafts in Election Administration; Foreign Relations: Jurisdiction, Immunities, and Treaties; and Model Penal Code: Sentencing.

As we look forward to our 100th anniversary in 2023, this is a good time to do some strategic planning around the Institute's goals for the future. We have an important legacy in the Restatements, Principles, and Model Codes, which we will want to safeguard and further. We live in a dynamic period of technological and other change, and we will also want to consider the degree to which our focus might shift or broaden to include new trends. I look forward to your thoughts on how the Institute can best continue its important work of improving the law and its administration.

I send best wishes for the summer and look forward to meeting you in the coming months.

Sincerely,



ALI President David F. Levi



COVERAGE OF THE 94TH ANNUAL MEETING IN THIS ISSUE.

Annual Meeting Recap

The American Law Institute's 94th Annual Meeting took place May 22-24, 2017, in Washington, DC. The agenda consisted of 10 projects, three of which were completed with membership approval.

The Meeting also marked the end of Roberta Cooper Ramo's remarkable reign as ALI President; she passed the gavel to ALI President David F. Levi at the Meeting. Distinguished speakers were featured on each of the three days, including Justice Ruth Bader Ginsburg in a conversation with President Ramo at the Annual Dinner, and Conrad K. Harper, upon receiving the Henry J. Friendly Medal from Judge D. Brock Hornby.

LEARN MORE ABOUT PRESIDENT
DAVID F. LEVI ON PAGE 7.

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Upcoming Meetings & Events

For more information, visit www.ali.org.

SEPTEMBER 2017

September 7 (JOINT)

Restatement of the Law, Liability Insurance
Philadelphia, PA

September 8 (JOINT)

Restatement of the Law Third,
Torts: Liability for Economic Harm
Philadelphia, PA

OCTOBER 2017

October 5 (JOINT)

Restatement of the Law,
Charitable Nonprofit Organizations
Los Angeles, CA

October 12-13 (JOINT)

Restatement of the Law Fourth, Property
Philadelphia, PA

October 13 (JOINT)

Model Penal Code: Sexual Assault
and Related Offenses
New York, NY

October 19-20

Council Meeting - October 2017
New York, NY

MAY 2018

May 21-23

95th Annual Meeting
Washington, DC

**VIEW ALL UPCOMING MEETINGS
AND EVENTS ON PAGE 27.**

Conference of European Restructuring and Insolvency Law Founded

Earlier this year, the Conference of European Restructuring and Insolvency Law (CERIL) announced its formation. CERIL is an independent nonprofit organization of restructuring and insolvency practitioners, academics, and judges committed to the improvement of legal and practice frameworks at the national and European levels. Its primary purpose is to advise on technical and policy issues relating to restructuring and insolvency laws, regulation and practice, and any related laws in Europe.

CERIL's governance is made up of an Executive and a Board. The Executive is formed by seven conferees, including two ALI members: Chair, Bob Wessels, Emeritus Professor of International Insolvency Law, Leiden University; and board member Ian F. Fletcher, Emeritus Professor of International Commercial Law, Principal Research Associate, University College London, both of whom also served as Reporters on ALI's project, Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases.

CERIL is a group of prominent academics and practitioners with extensive experience working in the reform of insolvency laws at the national and European level, as well as advising international organizations active in the insolvency field. Founders and members of the invitation-only group include members of the European Commission Experts' Group in Restructuring and Insolvency as well as those involved in the European Law Institute's project on Rescue of Business in Insolvency Law.

On why now is an ideal time for the organization's launch, Professor Wessels said, "We, as founding conferees, felt the moment was there to establish a collective authority as the obvious point of reference for national legislators and policy-makers, as well as acting as a source of expert advice for the EU institutions and other multiparty organisations."

Participants contribute views, on a nonpartisan basis, based on their knowledge and experience as practitioners, judges, and academics. They also reflect the diversity of national insolvency systems and legal traditions in Europe.

CERIL establishes a platform that allows for the exchange of ideas, in-depth discussions, often in the context of joint studies and statements of advice on technical and policy matters. It may support legislative initiatives on a European Union or national level but also discuss fundamental principles and concepts. Ten Working Parties have been set up to prepare future CERIL statements on such matters as directors' liability, acts detrimental to an insolvency estate, the role of shareholders in a restructuring, improving professional and ethical rules applicable to insolvency practitioners, and consumer rights in case of the insolvency of a retailer.

Project Spotlight: Principles of the Law, Government Ethics

by Mark Quiner, Director of the Center for Ethics in Government, National Conference of State Legislatures, and Liaison to the Government Ethics Project



INTRODUCTION:

If there's one topic that is constantly in the news today, it's the topic of ethics. It seems impossible to pick up a newspaper or listen to a news broadcast without a prominently featured ethics-related news story. The ethical issues that have recently arisen with the new presidential administration have been widely broadcast. The leaders of the project, Reporter Richard Briffault and Associate Reporters Kathleen Clark and Richard W. Painter, have been prominently featured as ethics experts in the media when ethical issues arise. They are often asked to comment on the current news story involving ethics.

And one doesn't even need to mention the endless stream of news stories involving politicians and the ethical implications of their actions. My job as Director of the Center for Ethics in Government at the National Conference of State Legislatures is to, among other things, monitor the state of ethics affairs in the country and be a resource for all state legislators and legislative staff. The Center fields inquiries constantly regarding ethical matters of importance from legislators, legislative staff, media, and interested citizens.

So it is in this context that The American Law Institute has appropriately created the project on Government Ethics. As aptly stated by the ALI summary, at www.ali.org/projects/show/government-ethics, "This project seeks to enunciate a set of principles or best practices that will both reflect the emerging law of government ethics and provide guidelines to shape its future development. The project will focus on standards applicable to the operations of the legislative and executive branches."

Turning to the project provisions, the main areas of focus include "lobbying, gifts and other things of value given to public officials, conflicts of interest involving the private activities of public officials, the political uses of public office, lobbying and administration and enforcement mechanisms." Much information about the project, including the latest Preliminary Draft and the approved Tentative Draft No. 1, may be accessed at the project's website noted above.

DISCUSSION:

The project is currently organized into six Chapters, with a possible additional Chapter addressing the subject of lobbying. Currently, the project is working from the third Preliminary Draft. Chapter 1 outlines the scope, general principles, and definitions. Chapter 2 addresses gifts to public servants and financial relationships between public servants and prohibited sources. Chapter 3 addresses conflicts of interest and outside activities of public servants. Chapter 4 focuses on public benefits of public resources in elections. Chapter 5 addresses the topic of post-employment restrictions on former public servants, the so-called "revolving door" issue. Chapter 6 contains administrative and enforcement provisions. An additional Chapter may be added on the subject of lobbying. If such occurs, that will become the new Chapter 6, and Chapter 6 will be renumbered as Chapter 7.

While most agree that the topic of lobbying is of utmost importance, it was the feeling of the project members that the focus should be on addressing ethics issues involving public servants first, and then consider lobbying to be included in the project.

In its current version, Chapter 2 addresses gifts to public servants and financial relationships between public servants and prohibited sources. Here at the Ethics Center, the number one question we field relates to gifts. There is a strong public perception that gifts to public servants are inherently suspect. And it matters not whether you're in a large urban area or small rural part of the country, the public watches with keen interest whenever a public servant receives a "gift."

The recent decision by the U.S. Supreme Court involving former Virginia Governor Bob McDonnell garnered much attention in the media and the public eye. Governor McDonnell was charged with federal corruption for receiving over \$175,000 in luxury products, loans, and vacations from a private individual when he was governor. In exchange for the gifts, the governor used his office to provide the individual with connections leading to business opportunities. The Supreme Court overturned his conviction for corruption, finding that the jury was improperly instructed concerning various informal steps which the governor took to aid the individual's company. The Court also noted that the gifts themselves were legal under Virginia state law at the time (the law has since been amended).

Writing for the Court, Chief Justice John Roberts stated: "There is no doubt that this case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government's

THE DIRECTOR'S LETTER BY RICHARD L. REVESZ

Roberta Cooper Ramo: American Lawyer



It's hard to believe that I didn't know Roberta four years ago. I knew about her, of course. And what I knew were not just the facts of her extraordinary career, which had so many "firsts" of enormous significance, including being the first woman President of the American Bar Association and the first woman President of The American Law Institute. I also knew what she had done with the positions that she had worked so hard to attain: how she had used them to make our legal system fairer and more effective, and how she had used them to open a leadership path for people who did not look like the then-traditional leaders of the elite organizations in the legal profession.

Roberta often talks about what it means to be an "American lawyer." In her lexicon, it means much more than merely being a lawyer admitted to practice law in at least one state. (And it doesn't mean a lawyer admitted to the bar of every state, though when Roberta recounted during our Dallas reception last year that she was a Texas lawyer I thought that she might have that distinction.) And, while high ethical standards are a necessary condition for meeting Roberta's "American lawyer" definition, they are far from a sufficient condition. Being an "American lawyer" means a great deal more. It means doing the right and courageous thing even when not doing so would be legal and ethical as well. It means acting at all times in ways that will make our legal system stronger and more respected. It is admittedly difficult to come up with a full definition of what it means to be an "American lawyer" and it is understandable that many respected lawyers would disagree about some of the elements. But I have no doubt that everyone would agree that nobody exemplifies the ideal of the "American lawyer" better than Roberta. She is the quintessential "American lawyer." And, for that, the ALI and so many other institutions are so grateful!

And I am personally enormously grateful because, even though I didn't know Roberta four years ago, she has now become such an important part of my life, as a boss, as a mentor, and as a friend. And, touchingly, she has made Vicki and me feel that we are part of her extended family.

For Roberta, her family is at the core of what is important. She takes such delight in them and in the extraordinary things they do, from all the lives that Barry has saved as a result of his clinical practice, his research, and his medical advice on TV; to the many disadvantaged citizens of New Mexico that Jenny has helped through her leadership of New Mexico Appleseed; and to the clear understanding of the consequences of globalization that emerges from Joshua's books. I have never heard Roberta so happy as when we talked about Jenny's amazing accomplishments in putting an end, in New Mexico, to the truly abhorrent practice of the "lunch shaming" of schoolchildren whose parents can't afford to pay for a school lunch. Or when I told her that I had run into Justice Kennedy in New York's Penn Station and that as I walked with him down to the platform and he got into his train, he turned around and said: "Please tell Roberta that I finished reading Joshua's book and that it's great!" Well, maybe Roberta was even happier recounting her granddaughter's first smile and the performance of her grandsons in their elementary school play.

Luckily, Roberta has a very capacious vision of "family." So many of us have been treated as members of Roberta's extended family. And, that is a real privilege! Vicki and I quickly became close to her non-extended family, and were introduced to the music scene in Santa Fe, the leadership of the New Mexico legal community, and the major cardiology institutions in Albuquerque (not because we had any heart trouble at the time).

**"WHAT WOULD I TELL LAWYERS?
I WOULD TELL THEM TO FOLLOW
ROBERTA RAMO'S LEAD."**

**U.S. SUPREME COURT ASSOCIATE JUSTICE
RUTH BADER GINSBURG**

AT ALI'S ANNUAL DINNER WHEN ASKED ABOUT LAWYERS'
SPECIAL RESPONSIBILITIES FOR HANDLING ATTACKS ON
THE INSTITUTIONS OF THE AMERICAN JUSTICE SYSTEM



We came to have a real sense of Roberta, not only as an extraordinary institutional leader, but also as an extraordinary person, one able to connect people, bring them together, and make them feel valued and loved.

Many remarkable individuals who had to fight as hard as Roberta to be accepted and who had as many “firsts” as Roberta become hardened by the experience. It becomes difficult for them to remain gracious, to be good mentors to people who don’t understand the hurdles faced by the prior generation. Trial by fire made Roberta formidable, determined, and steely, but never took away her humility and her humanity.

Roberta will, of course, continue to be centrally involved in the work of the ALI as the Chair of the Council. That makes this transition less emotionally fraught. It is a celebration and not a good-bye.



Roberta Cooper Ramo: Ahead of Her Time

By ALI Deputy Director Stephanie Middleton

Roberta tells a story about her maternal grandparents who lived in Wyoming. President Teddy Roosevelt was visiting the local fort and her grandfather went home to change into his finest clothes, only to see his wife sitting by the door in her fanciest outfit.

“Why are you dressed up?” he asked.

“I am going to meet the President,” she answered.

“But this is for men only,” he told her.

“Not anymore!” she replied.

Roberta has completed three terms as President of the ALI. Her grandmother’s approach to life helps explain why Roberta was the first woman to hold that position at the ALI and, before that, at the ABA. In so many ways, her persistence and refusal to accept the status quo has had positive effects on ALI’s governance, projects, and culture.

Coupled with her persistence are always good humor, a desire to listen to others, and, always, kindness and courtesy. She takes other people seriously, but not herself too seriously. She brings light, but not heat, to discussions. This tone at the top from Roberta has been the essence of her leadership of members at Annual Meetings, and throughout the year with Council and staff. Although she has handed over the gavel, her influence will be lasting.

Roberta will be Chair of the ALI Council for three years. David Levi, Ricky Revesz, and I, along with Council and members, will continue to have the benefit of her wisdom and grace for a while longer.



Stephanie A. Middleton, Roberta Cooper Ramo, and the Annual Meeting’s cutest photo-bomber, Ms. Ramo’s grandson Rafi

Roberta Cooper Ramo: By the Numbers

1991
Elected to ALI

1997
Elected to ALI Council

2008
Became ALI President

2017



Roberta Cooper Ramo as she passed the gavel to David F. Levi at the Annual Meeting

Projects Completed

- 6** RESTATEMENTS
- 3** PRINCIPLES
- 1** MODEL PENAL CODE REVISION
- 2** OTHER PROJECTS

Projects Initiated

- 11** RESTATEMENTS
- 5** PRINCIPLES
- 1** MODEL PENAL CODE REVISION
- 1** OTHER PROJECT

Two projects were initiated and seen through to completion:



Restatement of the Law Fourth, The Foreign Relations Law of the United States (Jurisdiction, Treaties, and Sovereign Immunity)



Principles of the Law, Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes

VISIT WWW.ALI.ORG/RAMO TO VIEW A VIDEO HONORING HER SERVICE.

Thank You, Modrall Sperling.

On March 28, in Albuquerque, New Mexico, Modrall Sperling shareholders Roberta Cooper Ramo, Arthur D. Melendres, and Lynn H. Slade invited ALI members to the firm for a panel discussion. ALI Director Richard L. Revesz and ALI Deputy Director Stephanie A. Middleton took a moment to thank the firm for its generosity throughout Roberta Cooper Ramo’s time as ALI President.

The event featured speakers Judge Harris L Hartz of the U.S. Court of Appeals, Tenth Circuit; Chief Judge Sarah Michael Singleton of the First Judicial District Court of New Mexico; Judge James O. Browning of the U.S. District Court, District of New Mexico; and Patrick V. Apodaca, Senior Vice President and General Counsel for PNM Resources. Each speaker talked about the importance of the work of ALI, both to courts and practitioners, noting that they often turn first to the Restatements and Principles of the Law when a question of law arises.

ALI would like to thank Modrall Sperling for hosting the reception, but more importantly for Ms. Ramo’s time while she served as ALI’s President. At the Annual Meeting, ALI presented the law firm with a resolution that thanked everyone at the firm for “recognizing the importance of the work of the Institute and for the firm’s unstinting support of the Institute through the service of Roberta Cooper Ramo as President of the Institute from May 2008 to May 2017.”



Roberta Cooper Ramo, on behalf of Modrall Sperling, is presented with the Certificate of Appreciation.

Welcome President Levi

We had the opportunity to talk with President Levi about his career and long history of service to the law. Watch the video online at www.ali.org/levi to learn more about his journey to becoming the president of ALI.

At the adjournment of the 2017 Annual Meeting, Dean David F. Levi of Duke Law School assumed the role of ALI President. He was elected to this role by ALI's Council in January 2016. For the past year-and-a-half, President Levi has worked closely with then-President Roberta Cooper Ramo on the transition.

President Levi has been an active member of ALI for more than 25 years, serving on the Council for more than 10 years. He was an Adviser on the Federal Judicial Code Revision and Aggregate Litigation projects, and currently is an Adviser on the Project on Sexual and Gender-Based Misconduct on Campus: Procedural Frameworks and Analysis. As president, he will chair the Executive Committee of the ALI Council, preside at the Annual Meeting, and serve as a member of nearly all standing committees.

"I am delighted to have David as my successor," said Roberta Cooper Ramo, who will now serve as ALI's Chair of the Council. "He is a brilliant legal mind and a proven leader who has great passion for the mission of The American Law Institute."

"I have known David for many years and am excited to have the opportunity to work with him as ALI's next President," added Richard L. Revesz, ALI's Director and Dean Emeritus of New York University School of Law. "The American Law Institute will benefit greatly from David's academic and judicial experience. He brings great wisdom, sound judgment, and a record of enormously distinguished accomplishment. David has dedicated his life to serving the law, and I know that he will serve the Institute admirably."

President Levi will be stepping down as the dean of Duke Law in June 2018.

He became dean in 2007 and in his 10 years in that position, presided over major expansions of faculty, research, academic programs, and fundraising. He has also taught courses on judicial behavior, legal history, and reforming the civil justice system in North Carolina.

Prior to his appointment as dean, he was a judge on the United States District Court for the Eastern District of California from 1990 until 2007, serving as Chief Judge from 2003. Prior to that, he was a prosecutor in the U.S. Attorney's Office for the Eastern District of California and in 1986 was appointed by President Ronald Reagan as the United States Attorney for the Eastern District of California, serving in that position until his judicial appointment by President George H.W. Bush.

Dean Levi earned his A.B. in history and literature, *magna cum laude*, from Harvard College. He entered Harvard's graduate program in history, specializing in English legal history and serving as a teaching fellow in English history and literature. He graduated Order of the Coif in 1980 from Stanford Law School, where he was also president of the *Stanford Law Review*. Following graduation, he was a law clerk to Judge Ben C. Duniway of the U.S. Court of Appeals for the Ninth Circuit, and then to Justice Lewis F. Powell, Jr., of the U.S. Supreme Court.

In 1994, he was appointed by Chief Justice William H. Rehnquist to the Advisory Committee on the Federal Rules of Civil Procedure and became Chair of this committee in 2000. In 2003, he was appointed Chair of the Standing Committee on Rules of Practice and Procedure, which, along with its five advisory rules committees, carries on a continuous study of the operation and



David F. Levi at Ranney Ranch, owned by George, Edward, Nancy Ranney (President Levi's wife), and their spouses and children (ranneyranch.com)

effect of the federal rules as directed by the Rules Enabling Act. He was reappointed by Chief Justice John G. Roberts, Jr., to serve as the academic member of that committee and served in that capacity from 2009 to 2015.

Dean Levi is a fellow of the American Academy of Arts and Sciences. He was the first president and a founder of the Milton L. Schwartz American Inn of Court, now the Schwartz-Levi American Inn of Court, at the King Hall School of Law, University of California at Davis.

Actions Taken at the 94th Annual Meeting

MONDAY, MAY 22

U.S. Foreign Relations Law – Jurisdiction, Treaties, Sovereign Immunity*

The membership voted to approve all three Tentative Drafts. This approval marks the completion of the Jurisdiction, Treaties, and Sovereign Immunity sections of the Restatement of the Law Fourth, The Foreign Relations Law of the United States.

Charitable Nonprofits*

The membership voted to approve Tentative Draft No. 2, which includes § 3.05 of Chapter 3 (Changes to Purpose and Organization), § 5.01 of Chapter 5 (Government Regulation of Charities), and Chapter 6 (Standing of Private Parties).

Election Administration*

Tentative Draft No. 2 was voted for approval by the membership. This Draft included Part II (Principles for the Resolution of Ballot-Counting Disputes), which contains Subparts A (General Principles) and B (Specific Procedures). Membership approval of Part II marks the completion of this project.

International Commercial Arbitration*

The membership voted to approve all Sections covered in Tentative Draft No. 5, which includes Chapter 5, covering Investor-State Arbitration, and Chapter 1 (General Provisions), Topic 1 (Definitions (§ 1-1(5a)-(5n)).

Intentional Torts*

Tentative Draft No. 2 was presented to the membership. The draft includes § 3 and §§ 7-9 of Chapter 1 (Definitions of Intentional Torts to Persons; Transferred Intent). (Note: In response to comments received at the March 30, 2017, joint meeting of the Advisers and Members Consultative Group, the Reporters proposed revisions dated April 20, 2017 to the black letter and Comments of Tentative Draft No. 2, § 3, for discussion at the 2017 Annual Meeting. These revisions added a new subsection (b)(i) and (ii) to § 3.) A motion presented on the floor by Guy Miller Struve to strike the knowledge provision in § 3(b)(i), passed after a counted vote of the membership. After the Reporters agreed to a friendly amendment, submitted in a motion by Richard W. Wright, to add the words “sole or principal” before “purpose” in § 3(b)(ii), a second motion by Guy Miller Struve to strike the purpose standard in § 3(b)(ii) was defeated. Due to a lack of time, the remaining Sections were not discussed.



Reporters David P. Stewart, Curtis A. Bradley, Paul B. Stephan, and William S. Dodge



Then-President Roberta Cooper Ramo joins in celebrating the approval of Tentative Draft No. 2 at the Annual Meeting.



Yvonne Gonzalez Rogers of the Northern District of California, Reporter Edward B. Foley, Associate Reporter Steven F. Huefner, and ALI Deputy Director Stephanie A. Middleton



José F. Anderson of the University of Baltimore School of Law

TUESDAY, MAY 23

Liability Insurance*

After a thought-provoking discussion, the membership voted to approve the new Sections that were discussed today as well as revised §§ 13 and 24, and the Reporters agreed that another year of work would include Advisers and MCG meetings in the fall, approval of a new Council Draft, and Proposed Final Draft No. 2 to be presented at the 2018 Annual Meeting. New Sections presented for approval included §§ 36, 42-44, and all of Chapter 4 (except for § 46, which was approved as § 34 in T.D. No. 1).

Consumer Contracts

Reporters Omri Ben-Shahar and Florencia Marotta-Wurgler presented a Discussion Draft to the membership. This draft contains all nine Sections of the project. There were no votes taken during this session.

Sexual Assault*

Tentative Draft No. 3 was presented to the membership, which includes Section 213.0(1)-(2), Definitions; Section 213.1, Forcible Rape; and Section 213.4, Sexual Penetration or Oral Sex Without Consent.

The definitions of “Sexual penetration” and “Oral sex” were discussed and approved as presented in the draft after a motion on each definition was presented from the floor and did not pass. There was discussion on 213.1, but there was not enough time for all motions on this Section to be considered. The following are details of the actions taken at the Meeting:

- A motion to add “purposeful” to Section 213.0(1) failed.
- A motion to replace “touching” with “penetration or envelopment” in Section 213.0(2) failed.
- A motion to move the mens rea from the end to the beginning of Section 213.1 was accepted by the Reporters as a friendly amendment.
- A motion to remove “recklessly” from Section 213.1 passed.
- As previously announced, the session had to stop for the Annual Dinner.
- A Boskey motion* to approve Sections 213.0(1) and 213.0(2) passed.
- Sections 213.1 and 213.4 will be reviewed at future meetings.



Lorelie S. Masters of Hunton & Williams LLP



Lauren E. Willis of Loyola Law School, Los Angeles



Cynthia E. Nance of the University of Arkansas-Fayetteville, Leflar Law Center, Carol F. Lee of Taconic Capital Advisors LP, and David J. Seipp of Boston University School of Law

Projects Approved, What Comes Next?

At this year's Annual Meeting, Sentencing, Election Administration, and three portions (Jurisdiction, Sovereign Immunity, and Treaties) of the U.S. Foreign Relations Law project were approved for the final time, thus "completing" the projects. However, work is not entirely done.

Upon final approval of a project by ALI's membership, the Reporters, subject to oversight by the Director, will now prepare the Institute's official text for publication. At this stage, the Reporters are authorized to correct and update citations and other references, to make editorial and stylistic improvements, and to implement any remaining substantive changes directed or agreed to by the Council, or the membership at the Annual Meetings.

Until the official text is published, all drafts that were previously approved by the membership remain the official position of ALI. Therefore, previous Tentative Drafts of Election Administration and U.S. Foreign Relations Law may be cited as such. In fact, drafts of Foreign Relations Law have already been cited. The Proposed Final Draft of the Sentencing project from this year's Meeting, which included all Sections of the project, is the position of the Institute until the official text is prepared.

Once the official text is submitted for publication, the Reporters will review the page proof and the index. Once this is complete, the new volume will be printed and bound, available for sale.

YOU CAN HELP ALI LET THE LEGAL COMMUNITY KNOW THAT THESE PROJECTS ARE COMPLETE. YOU MAY TELL LEGISLATORS, JUDGES, PRACTICING LAWYERS, AND PROFESSORS THAT THESE PROJECTS AND THEIR DRAFTS MAY BE CITED AS ALI'S POSITION.

ALI thanks the Reporters, project participants, and ALI members who gave us their time and insight on these projects. We look forward to next year's Meeting, where we will likely have additional projects on the agenda for final approval.

ACTIONS TAKEN CONTINUED FROM PAGE 9

WEDNESDAY, MAY 24

Sentencing*

The membership voted to approve the Proposed Final Draft. With this draft approval, the Model Penal Code: Sentencing project is now complete.



ALI Treasurer Wallace B. Jefferson, ALI Deputy Director Stephanie A. Middleton, Associate Reporter Cecelia M. Klingele, Reporter Kevin R. Reitz, ALI Chair of the Council Roberta Cooper Ramo, and ALI Director Richard L. Revesz

“A PROJECT LIKE THIS IS IMPORTANT IN WAYS WE COULDN'T EVEN IMAGINE WHEN YOU STARTED IT,” SAID ROBERTA COOPER RAMO UPON MEMBERSHIP APPROVAL OF THE SENTENCING PROJECT.

Policing*

The membership approved all Sections contained in Tentative Draft No. 1, which included the Use of Force principles. This was the first Annual Meeting appearance and vote for this project.

**All approvals by the membership at the Annual Meeting are subject to the discussion at the Meeting and the usual editorial prerogative.*



Matthew R. Segal of the ACLU Foundation of Massachusetts

Council Elections

During Tuesday's Reports and Business session at the Annual Meeting, Nominating Committee Chair Anthony J. Scirica of the U.S. Court of Appeals for the Third Circuit, presented to the membership four nominees for the ALI Council. All four were approved by the membership to a five-year term. The new Council members are Nathan L. Hecht of the Texas Supreme Court, Troy A. McKenzie of NYU School of Law, Stephanie E. Parker of Jones Day, and Jeffrey S. Sutton of the U.S. Court of Appeals for the Sixth Circuit. Short biographies of Council members can be found on the ALI website.



ALI's newest Council members Troy A. McKenzie, Jeffrey S. Sutton, Stephanie E. Parker, and Nathan L. Hecht

Henry J. Friendly Medal: Conrad K. Harper

Conrad K. Harper was presented the Henry J. Friendly Medal at this year's Annual Meeting. The Medal recognizes contributions to the law in the tradition of Judge Friendly and the Institute.

"For me, four nouns partially characterize Conrad . . . Language, Selflessness, Literacy, Principle," said D. Brock Hornby, Chair of the Awards Committee, when presenting the Medal to Mr. Harper. Judge Hornby observed that although Judge Friendly is often recognized for his work as a judge, he was first an outstanding New York City lawyer. "Today we have the privilege of awarding the Friendly Medal to a lawyer who meets the Friendly Award criteria in abundance, namely, contributions to the law in the tradition of Judge Friendly and the Institute." He went on to discuss some of Mr. Harper's professional highlights as well as his dedication to the Institute.

"Through my 40 years as a member of the Institute, I have had some of the most enriching, intellectually stimulating, and enjoyable times of my professional life," said Mr. Harper upon accepting the Medal. He reflected on how Judge Friendly's high standard of quality in judgment during his time in private practice carried through to his legacy on the bench.

Mr. Harper revealed how he has tried to implement this high standard in his practice of the law, including the importance of acquiring the "elements necessary for a true understanding of the law, naming, among others, a command of history, philosophy, economics, psychology, political science, computers and their underlying mathematics, as well as working with artists and architects."

Mr. Harper is a retired partner at Simpson Thacher & Bartlett. He received his bachelor's degree from Howard University in 1962 before graduating from Harvard Law School in 1965. Mr. Harper spent the first five years of his career as a staff lawyer for the NAACP Legal Defense and Educational Fund in New York. He joined Simpson Thacher in 1971, and became its first African American partner in 1974. In 1993, Mr. Harper was appointed Legal Adviser for the U.S. Department of State. From 1993 to 1996 and from 1998 to 2004, he also served as U.S. representative to the Permanent Court of Arbitration at The Hague. In 1996, he returned to Simpson Thacher, and became of counsel to the firm in 2003.

To read Mr. Harper's complete biography, please visit ALI's Annual Meeting website at www.ali.org/annual-meeting-2017/speakers.



D. Brock Hornby with Henry J. Friendly Medal recipient Conrad K. Harper



Conrad K. Harper

Speakers at the Annual Meeting

On Monday, May 22, ABA President **Linda A. Klein** of Baker Donelson Bearman Caldwell & Berkowitz talked about what defines today's lawyers, the importance of a competent and independent judiciary, and the ABA's commitment to protecting citizens' access to legal representation. She encouraged the attendees in the room by stating, "lawyers—armed with a commitment to the rule of law, due process, and access to justice—are, and always will be, what makes American democracy the envy of the world."

On Tuesday, May 23, **David W. Rivkin** of Debevoise & Plimpton and Immediate Past President of the International Bar Association, reflected on lessons learned during his time as IBA president, highlighting the IBA's dedication to justice and the rule of law, and the importance for lawyers to fight against corruption, to do not just what is legal but what is right, and to fulfill their role as protectors of democracy and of the rule of law.

Members who attended the Tuesday Members Luncheon Honoring New Life Members (Class of 1992) and New 50-Year Members (Class of 1967) heard remarks from the Reverend Dr. **Wesley S. Williams, Jr.**, of Lockhart Companies Inc. In his speech, Dr. Williams discussed the role of law in the life of a legal professional after or apart from the practice of law. After concluding at the outset that he does not agree that there is life after or apart from law practice, he explained: "I honestly

think that law practice, by nature, is an integral and energizing part of any life you live, no matter what the externalities may suggest. You're still a lawyer. You think like a lawyer. And, in many, many ways, you will do what a lawyer would do every step of the way. It's uncanny."

Tuesday concluded with the Annual Reception and Dinner, where Associate Justice **Ruth Bader Ginsburg** of the Supreme Court of the United States was joined by then-ALI President **Roberta Cooper Ramo** of Modrall Sperling. Some of the topics they discussed include the Institute's continued role in the legal system (as evidenced by case citations), the Justice's perception of the impact of politics on the Court, her love of opera, and her exercise routine.

On Wednesday, May 24, during a break from project sessions, **Mariano-Florentino Cuéllar** of the California Supreme Court presented the Early Career Scholars Medal to Co-Recipient **Daniel Schwarcz** of the University of Minnesota Law School, who gave an address on modernizing consumer protection regulation in insurance. Co-Recipient **Colleen V. Chien** of Santa Clara University School of Law was unable to attend the Meeting.

Wednesday's Members Luncheon featured speaker **Thomas C. Goldstein** of Goldstein & Russell, P.C., and co-founder and publisher of SCOTUSblog. Mr. Goldstein examined, "The Evolving Supreme Court through the Eyes of SCOTUSblog." He told the audience that it "will be fascinating to see where Justice Gorsuch will go," and predicted that religion, gun rights, and property rights may be taken up by the Court soon.

Watch the speakers' remarks online at www.ali.org/annual-meeting-2017/videos.



Linda A. Klein



David W. Rivkin



Mariano-Florentino Cuéllar and Daniel Schwarcz



Wesley S. Williams, Jr.



Roberta Cooper Ramo and Associate Justice Ruth Bader Ginsburg



Thomas C. Goldstein

Annual Dinner

Members attended the Annual Dinner on the second night of the Meeting. In addition to networking with new and old friends, members were treated to a lively question and answer discussion with U.S. Supreme Court Associate Justice Ruth Bader Ginsburg and then-President Roberta Cooper Ramo.



Kevin J. Hamilton of Perkins Coie, Sally Katzen of NYU Law School, and Troy A. McKenzie of NYU Law School



Nelly N. Khouzam of the Florida Second District Court of Appeal, Aya Gruber of the University of Colorado - Boulder Law School, and John G. Crabtree of Crabtree & Auslander



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Catherine M. Recker of Welsh & Recker and Elizabeth J. Shapiro of the U.S. Department of Justice

Join a Special Group of ALI Members

Each year, many ALI members generously step forward to support The American Law Institute's mission by voluntarily doubling their annual dues payments. We are extremely grateful to the nearly 900 members who opted to become Sustaining Members during the 2016–2017 fiscal year—our highest number ever! These special members make a meaningful difference in the Institute's ability to fund its operations and undertake new initiatives that advance our important law-reform work. We proudly recognize all Sustaining Members for supporting the Institute's objective to clarify and improve the law in our Annual Report and on our website.

The Institute's annual dues are kept modest, and have not increased from their current level in 12 years. To remain independent and free from outside influence, ALI relies on the generosity of its members, who provide critical funding by becoming Sustaining Members and making other generous donations.

We hope that you will consider joining this special group of members by selecting the Sustaining Member option on your 2017–2018 dues statement, which you should have received last month. If you are a Life Member, you can join by voluntarily contributing your previous dues category amount of \$125 or \$250.

Thank you for your support of ALI.

94th Annual Meeting Members Reception and Buffet

This year's reception took place at the National Museum of Women in the Arts. Founded in 1987, the museum is the only major museum in the world solely dedicated to recognizing women's creative contributions. It displays the works of remarkable women artists of the past while also promoting the best women artists working today.



Members and guests gathered at the National Museum of Women in the Arts for the annual Members Reception.



Robert H. Mundheim of Shearman & Sterling and Michele Coleman Mayes of the New York Public Library



Yvonne Gonzalez Rogers of the U.S. District Court, Northern District of California, and Goodwin Liu of the California Supreme Court



Ronald Weich of the University of Baltimore School of Law, Virginia E. Sloan of the Constitution Project, and C.J. Peters of the University of Baltimore School of Law

New Record in Giving Set as ALI Honors the Classes of 1992 and 1967



1992 Class Gift Co-Chairs Steven O. Weise, Gail B. Agrawal, and Mitchell A. Lowenthal are joined by then-President Roberta Cooper Ramo to present the 1992 Class Gift.

ALI celebrated its new Life Members and 50-Year Members—the Classes of 1992 and 1967—at a luncheon on Tuesday, May 23 in Washington, D.C. Always a special event, this year’s luncheon was particularly festive as 1992 Class Co-Chair Steven O. Weise of Proskauer Rose LLP presented the Institute with a Class Gift of \$186,907, setting a new record for Class giving.

Speaking on behalf of fellow Co-Chairs Gail B. Agrawal of University of Iowa College of Law, Mitchell A. Lowenthal of Cleary Gottlieb Steen & Hamilton LLP, and Gregory K. Palm of Goldman, Sachs & Co., Mr. Weise described how rewarding it was to connect with Class members, and thanked them for “[giving] what they could give, at all price ranges” because they “support the overall activities and the approaches of ALI.”

Now in its sixth year, the Class Gift initiative funds several important aspects of the Institute’s mission, including financial-assistance programs that ensure judges and public-sector attorneys can attend ALI’s meetings and participate in its work, and the Early Career Scholars Medal and annual conference, a program that engages the next generation of eminent legal minds.

“We are thoroughly pleased that our Class came through,” Mr. Weise continued, after noting that the Class of 1992 was significantly smaller in size than each of the previous classes to participate in the Class Gift program, “[a]nd we hope to be sitting out in the audience next year hearing that the Class of 1993 has beaten our record.”

Representing the Class of 1967 was Ralph L. Halpern of Buffalo, New York. Mr. Halpern, now retired, was previously Senior Counsel at Jaeckle Fleischmann & Mugel, LLP, and served on the Members Consultative Groups for Restatement Third, Torts: Products Liability, and Restatement Third, The Law Governing Lawyers. Then-President Designate David F. Levi presented a medallion honoring Mr. Halpern’s 50 years as a member of the Institute.



Then-President Designate David F. Levi congratulates Ralph L. Halpern '67 on his 50 years of involvement with ALI.

The Rev. Dr. Wesley S. Williams, Jr., President and Co-Chairman of Lockhart Companies Inc., and 1992 Class member, was the luncheon speaker. Dr. Williams, who has had a lengthy and esteemed legal career as both a practicing attorney and a law professor, and was later ordained to priesthood in the Episcopal Church, asked attendees if they believed there is life after law practice. Acknowledging that his own career would suggest the answer is that there is, he surprised the audience by stating there is not.

“[L]aw practice, by nature, is an integral and energizing part of any life you live, no matter what the externalities may suggest,” Dr. Williams explained. “Law practice of the sort that we lift up in the ALI has proved itself to be manifested as an important part of every imaginable pursuit of mine, from casual or purposeful observation, to disciplined research, to appreciation of the complexity, if not elusiveness, of truth.” An essential aspect of being a lawyer, Dr. Williams continued, is that “in anything we get ourselves associated with” there will always be a “never-ending need for us to understand all sides of a proposition, and then to soar above it, with sound, ethical judgment.” Dr. Williams’s remarks will be available this summer at www.ali.org/annual-meeting-2017.

The Class Gift program will continue with the 1993 Life Member Class that will be honored at ALI’s 95th Annual Meeting next May.

The 1992 Life Member Class Gift

The American Law Institute celebrates each gift that contributed to the success of this campaign. We deeply appreciate your generosity.

The 1992 Life Member Class Gift will be used to fund important aspects of the Institute's mission, including the Members Consultative Group Travel Assistance program, the Early Career Scholars Medal and annual conference, the Judges and Public-Sector Lawyers Expense Reimbursement program, and the Institute's influential law-reform projects.

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1992 and 1967 Class members gathered to celebrate 25 and 50 years with the Institute.

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The ALI Development Office has made every attempt to publish an accurate list of donors for the 1992 Life Member Class Gift campaign. In the event of an error or omission, please contact Kyle Jakob at 215-243-1660 or kjakob@ali.org.

This list is produced exclusively for the ALI community. The Institute prohibits the distribution of this list to other commercial or philanthropic organizations.

Welcome to the Institute's Newest Members

ALI welcomed its newest members during two special events at this year's Annual Meeting. New members gathered at a dinner the evening before the Annual Meeting kicked off, as well as at a luncheon the first day. A special thank you to Munger Tolles & Olson for sponsoring this year's New Member Dinner.



New Member Dinner hosts Fred A. Rowley, Jr., of Munger Tolles & Olson, Virginia M. Kendall of the U.S. District Court, Northern District of Illinois, Nelly N. Khouzam of the Florida Second District Court of Appeal, and Victor E. Schwartz of Shook, Hardy & Bacon



Jayne LaVecchia of the New Jersey Supreme Court, Anne C. Foster of Richards, Layton & Finger, Pamela S. Tikellis of Chimicles & Tikellis, and Doneene Keemer Damon of Richards, Layton & Finger



ALI's newest members at the Annual Meeting

Annual Meeting Panel Discussions

This year's Annual Meeting featured two valuable panel discussions. Sunday's panel featured **David E. Sternberg** of Brown Brothers Harriman & Co., **Raymond J. Lohier, Jr.**, of the U.S. Court of Appeals, Second Circuit, **Michele Coleman Mayes** of The New York Public Library, **Robert H. Mundheim** of Shearman & Sterling LLP, and **John F. Savarese** of Wachtell, Lipton, Rosen & Katz. The panelists discussed what in-house and outside lawyers should do to assess and manage the situation when an organization is surprised by a negative event that may be material.

Tuesday's breakfast featured a panel discussion with Justices **Goodwin Liu** and **Mariano-Florentino Cuéllar** of the California Supreme Court, and Professor **Eloise Pasachoff** from Georgetown University Law Center, where they examined the Constitution and the right to education.



David G. Leitch of Bank of America, Fred A. Rowley, Jr., of Munger Tolles & Olson, and Michael W. Fitzgerald of the U.S. District Court, Central District of California



Amelia H. Boss of Drexel University Thomas R. Kline School of Law, Sean B. Seymore of Vanderbilt University Law School, and Sharon K. Sandeen of Mitchell Hamline School of Law



Tomiko Brown-Nagin of Harvard Law School and Kim Forde-Mazrui of University of Virginia School of Law



Sunday's Organizations and Crisis Management Panel



The Constitution and Right to Education Panel

PROJECT SPOTLIGHT: PRINCIPLES OF THE LAW, GOVERNMENT ETHICS CONTINUED FROM PAGE 3

boundless interpretation of the federal bribery statute. A more limited interpretation of the term ‘official act’ leaves ample room for prosecuting corruption, while comporting with the text of the statute and the precedent of this Court.” *McDonnell v. United States*, 579 U.S. ____ (No. 15-474, 2016).

The term gift in chapter 2 is defined as “anything of more than nominal value.” Principles of the Law, Government Ethics § 201(a) (Preliminary Draft No. 3, Feb. 19, 2016). The draft will attempt to set a definitive fair market amount for the term nominal value. Current law in all 50 states varies greatly when it comes to the regulation of gifts to public servants. The state laws vary from absolute prohibition of a gift of any value (so called “no cup of coffee” laws) to gifts valued in the hundreds of dollars. All the state laws on gifts may be accessed at the Ethics Center’s website, www.ncsl.org/research/ethics.

Much attention is given to gifts from prohibited sources. A prohibited source is defined as an individual or entity that does business or seeks to do business with the public servant’s agency; conducts activities that are regulated by the public servant’s agency; seeks official action by the agency; or is substantially affected differently from the general public by the official actions of the agency, to cite a few. A public servant is prohibited from engaging in a financial transaction or relationship with a prohibited source except in a few enumerated circumstances.

Obviously, certain exceptions must apply. The prohibition on gifts or financial transactions does not apply to a family member or one with a personal relationship to the public servant if it is reasonable to infer that the gift or financial transaction or relationship was primarily motivated by the family or personal relationship. Gifts of complimentary attendance at events are also exempt from the prohibition given certain circumstances.

Payments for travel, meals, and lodging are always a sensitive topic and perhaps the number one question on gifts that we receive at the Ethics Center. When a public servant travels and is subsidized by any payment, such fact immediately becomes an issue of public concern. The draft makes provision for gifts for public servants for work-related travel if such travel is found to be in the “best interest of the agency.” Id. § 206(a). The draft provides detailed provisions addressing when such payments are appropriate and gives guidance on this sensitive topic.

Finally, Chapter 2 addresses a rather extensive list of “other exceptions” to the prohibition on gifts, and concludes with the statement that any agency may adopt its own rules, regulations, or procedures that are more restrictive than the requirements found in the Chapter.

Chapter 3 addresses conflicts of interest and the outside activities of public officials. The first words in the Introductory Note read: “Public office is a public trust. Public servants are called upon to exercise discretion and make decisions that inevitably benefit some private parties and harm others. By prohibiting public servants from participating in matters in which they have a financial interest or where they may be biased, the government can help ensure that these decisions are made on the merits, with the goal of furthering the overarching public interest rather than more venal promotion of some private interest.” Id., Chapter 3, Introductory Note. I think those words set the tone for the provisions of Chapter 3 in an area that can be so very difficult for a public servant.

A public servant is prohibited from substantially participating in a matter in which he or she has a “direct and predictable effect on an economic interest of the public servant.” Id. § 301. Provisions address the need for impartiality for participation in particular matters in representing other parties. This is often part of avoiding

the “appearance of impropriety” standard. The Chapter contains extensive provisions on waivers by those affected by such participation, prohibitions on acquisition or retention of certain financial interests, and restrictions on appearances and communications on behalf of others.

Chapter 4 addresses the topic of election and the use of public resources. A public official is generally prohibited from using public resources to “promote, attack, support, or oppose the campaign of any candidate for elected office.” Id. § 401(a) (Tentative Draft No. 1, 2015). The provisions address advertising, travel, election-related activities during working hours, and so forth. It is worthy of note that Chapter 4 has been approved by the full ALI membership.

Chapter 5 addresses the sensitive, yet timely topic of post-employment restrictions on former public servants. The so-called “revolving door” laws have been front and center in the recent presidential campaign as then candidate Donald Trump promised to “drain the swamp.” In part, he was probably referring to former public servants who obtain good jobs in the private sector following their public service. However, there is a need to balance the experience that former public servants bring to private industry versus the need to avoid the appearance of a conflict of interest. As the ALI Reporters’ Memorandum aptly notes: “Some of the very features that make the former public servant appealing to the private sector may be a source of ethical concern, leading to conflicts of interest or an appearance of impropriety that may result in a loss of public confidence that government decisions are being taken in the public interest.” See id., Chapter 5, Reporters’ Memorandum at p. xviii (Council Draft No. 2, Dec. 11, 2015). Further, there is a need to “balance the public’s interest in preventing the misuse of public power for private benefit and guarding against the appearance of impropriety, on the one hand, with the public’s interest in

being able to attract public servants who may also want to consider spending part of their careers in the private sector, on the other hand.” Id.

Indeed, this author is currently employed in the nonprofit world at the Center for Ethics in Government. I spent 26 years working for the Wyoming Legislature and gained considerable experience in public service and ethics laws, rules, and regulations and their application to public servants in the legislature. My previous experience has been valuable in performing my current duties as Director of the Ethics Center.

Lastly, Chapter 6 will contain administrative and enforcement provisions. As noted earlier, lobbying may be included in the project as an additional Chapter.

SUMMARY:

I recently had the opportunity to speak to various elected officials and higher-education personnel in the countries of Georgia and Kazakhstan. I was excited to tell them about the ALI Project on Ethics and that there will be suggested guidelines which will be applicable to any interested public official or government. The audience members were very interested to hear about this timely project. I am sure the project will be met with great interest not only in North America, but also around the globe. It is truly an honor for me to be working with this eminent group of distinguished people to bring this project forward.

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The Institute in the Courts: State Supreme Courts Adopt Contracts 2d Provisions

The highest courts of two states recently adopted Sections of the Restatement of the Law Second, Contracts. Summaries of those opinions follow.

In *Dobson Bay Club II DD, LLC v. La Sonrisa de Siena, LLC*, 393 P.3d 449 (Ariz. 2017), the Supreme Court of Arizona adopted Restatement of the Law Second, Contracts § 356(1). That case involved a dispute over the legality of a five percent late-fee provision in a promissory note, which obligated a commercial borrower to pay nearly \$1.4 million when it was late in submitting a balloon payment on a loan. The trial court granted partial summary judgment to the lender, finding that the late fee was enforceable; the court of appeals reversed that portion of the judgment. Vacating the opinion of the court of appeals and reversing and remanding the trial court’s grant of summary judgment, the Supreme Court of Arizona held that the late fee was an unenforceable penalty. The court adopted § 356(1) of the Restatement “to test the enforceability of a stipulated damages provision,” and, applying that test, explained that, here, “. . . the late fee neither reasonably forecasted anticipated damages for the losses identified in the late fee provision nor reasonably approximated the actual losses”; moreover, “the difficulty of proving [the lender’s] loss as identified in the late fee provision was slight.” The court explained its adoption of § 356(1), saying “. . . the test best accommodates the goal of compensating the non-breaching party for a loss rather than penalizing the breaching party. Under the Restatement Second test, courts have flexibility to respect the parties’ right to stipulate to damages for a breach but, when appropriate, prevent imposition of a penalty.”

In *Roach v. BM Motoring, LLC*, 155 A.3d 985 (N.J. 2017), the Supreme Court of New Jersey adopted Restatement of the Law Second, Contracts § 241. In that case, two used-car buyers who had disputes with the same used-car dealer, and who attempted to comply with the terms of a dispute-resolution agreement (DRA) in their purchase agreements by filing their claims with the American Arbitration Association (AAA), were unable to proceed with their claims when the dealer failed to respond to the AAA’s requests for filing fees related to the first buyer’s dispute, causing the AAA to refuse to “accept for administration any disputes involving [the dealer].” When the buyers then filed a complaint in New Jersey state court against the dealer, the trial court dismissed their claims for failure to arbitrate; the court of appeals affirmed. Reversing and remanding the matter for further proceedings, the Supreme Court of New Jersey held that “defendants’ knowing refusal to cooperate with plaintiffs’ arbitration demands, filed in reasonable compliance with the parties’ agreement, amount[ed] to a material breach of the DRA and, as such, bar[red] the breaching party from later compelling arbitration.” The court adopted § 241 of the Restatement and, “keep[ing] in mind the Second Restatement’s ‘flexible criteria’ for assessing a material breach,” concluded, among other things, that “[a] failure to advance required fees that results in the dismissal of the arbitration claim deprives a party of the benefit of the agreement. Therefore, the failure to advance fees ‘goes to the essence’ of the DRA and amounts to a material breach.”

The Institute is currently working on the Restatement of the Law of Consumer Contracts, which draws on the Restatement Second of Contracts, the Uniform Commercial Code, and court opinions in cases involving disputes between businesses and consumers. For more information, visit the projects page on the ALI website at www.ali.org/projects.

Modernizing Consumer Protection Regulation in Insurance



After Wednesday's presentation of the Early Career Scholars Medal, Co-Recipient Daniel Schwarcz talked to the audience about modernizing consumer protection regulation in insurance. He began by discussing the history of insurance regulation, and then went on to explain why he believes that much state insurance regulation is premised on outdated or incorrect assumptions.

Professor Schwarcz's scholarship develops this theme in three broad areas: the lack of transparency in property/casualty insurance markets, the failure of rate regulation in property/casualty insurance markets, and the limitations of state solvency regulation, particularly in life insurance markets. After his presentation, Professor Schwarcz engaged in a Q&A with the audience.

Please note that the Early Career Scholars Medal was formerly known as the Young Scholars Medal. The award was renamed earlier this year.



Young Scholars Conference Examines Law and Corporate Finance: Credit Markets and Corporate Reorganization

2015 ALI Young Scholars Medal Co-Recipient Michael N. Simkovic of USC Gould School of Law organized a conference on Law and Corporate Finance: Credit Markets and Corporate Reorganization at NYU School of Law. The April 4th event co-sponsored by ALI included panel discussions addressing innovations in corporate finance and corporate reorganization.

Credit markets play a vital role financing economic activity. Across market segments, borrowers, lenders, and financial intermediaries face similar challenges and have developed innovative legal, regulatory, and privately negotiated solutions. Challenges include: balancing flexibility for borrowers with protections for lenders; limiting leverage for the benefit of diffuse third parties; and facilitating value-enhancing transactions amid manager-creditor and inter-creditor conflict.

The conference began with a keynote address by James H.M. Sprayregen of Kirkland & Ellis about financial regulation and disintermediation. The conference discussion was structured around four panels:

Panel 1: Flexible Lending Contracts (TIA, etc.)

Moderator: Richard C. Squire of Fordham University School of Law

Panelists: Damian S. Schaible of Davis Polk, Mark J. Roe of Harvard Law School, Albert Choi of University of Virginia School of Law, and Frederick Tung of Boston University School of Law

Panel 2: Limits on Leverage (Fraudulent Transfer, etc.)

Moderator: Benjamin I. Finestone of Quinn Emanuel

Panelists: Douglas G. Baird of University of Chicago Law School, James M. Peck of Morrison Foerster and former Southern District of New York Bankruptcy Judge, Robert J. Stark of Brown Rudnick, and Luke A. Barefoot of Cleary Gottlieb

Panel 3: Auctions (363, etc.)

Moderator: James P. Seery, Jr., of River Birch Capital

Panelists: Stephen J. Lubben of Seton Hall University School of Law and *New York Times* columnist, Christopher S. Sontchi of the U.S. Bankruptcy Court, District of Delaware, Jeffrey N. Gordon of Columbia Law School, Barry E. Adler of NYU School of Law, and Elizabeth S. Stong of the U.S. Bankruptcy Court, Eastern District of New York

Panel 4: Puerto Rico (or Restructuring without Bankruptcy Precedent)

Moderator: Douglas G. Baird of the University of Chicago Law School

Panelists: Jim Millstein of Millstein & Co., Robert K. Rasmussen of USC Gould School of Law, Clayton Gillette of NYU School of Law, and Sean A. O'Neal of Cleary Gottlieb

Notes About Members and Colleagues

Tom Baker of University of Pennsylvania Law School was interviewed by Penn Law, after this year's ALI Annual Meeting, regarding the status of the Liability Insurance project and what role he hopes it will have in insurance law. The Q&A appears on *The ALI Adviser*.

Barry Barnett of Susman Godfrey has been named by *Best Lawyers of America* as the "2017 Lawyer of the Year" for Bet-the-Company Litigation in Houston, Texas.

For her years of dedication to the provision of legal aid and advancement of equal access to justice, **Helaine M. Barnett** received the Outstanding Service Award from The Fellows of the American Bar Foundation.

University of Chicago Law School professor **William Baude** was awarded the Paul M. Bator Award. This prestigious award, presented by the Federalist Society, is given to academics under the age of 40 who have made a significant public impact, and have demonstrated excellence in legal scholarship, a commitment to teaching, and a concern for students.

Brooklyn Law School professor **Anita Bernstein** has written "Treble Damages in New York: A Field Guide" for the *New York Law Journal*. She explains how New York's fee shifting, punitive damages, and treble damages will allow prevailing plaintiffs to collect more than just compensatory damages.

Sheila L. Birnbaum of Quinn Emanuel Urquhart & Sullivan was presented with the Judge Edward Weinfeld Award by NYU School of Law. The award was established in memory of Judge Weinfeld, who was president of the NYU School of Law's board of trustees from 1973 to 1988, and recognizes the professional distinction of alumni who graduated from the law school 50 years ago or more.

Baker & McKenzie attorney **Susan G. Braden** has been selected as chief judge of the U.S. Court of Federal Claims by President Donald Trump.

Immediate past president of the ABA and partner of Locke Lord LLP **Paulette Brown**, and Chair of the ABA Commission on Women and New York Public Library General Counsel **Michele Coleman Mayes** participated in the New Jersey Women Lawyers Association's presentation of "Gender, the Law, and the 2016 Presidential Election."

Insurance litigation specialist **Timothy W. Burns** of Perkins Coie has announced his run for the Wisconsin Supreme Court.

Penn State University Dickinson School of Law professor **William E. Butler** was awarded the Gold Medal, the highest honor of the National Academy of Legal Sciences of Ukraine, for meritorious services to Ukrainian Law.

Elizabeth J. Cabraser of Lief Cabraser is featured in Law360's Sidebar article, "On Playing Drums and Life on the Road."

University of Hawai'i at Mānoa William S. Richardson School of Law professor **David L. Callies** will receive the 2017 Brigham-Kanner Property Rights Prize in October. The William & Mary Property Rights Project will honor Professor Callies during the project's 14th annual conference to be held at William & Mary Law School.

Baltimore Mayor Catherine Pugh has announced that **Andre M. Davis** of the U.S. Court of Appeals for the Fourth Circuit has been appointed Baltimore's city solicitor, effective September 1.

Utah Supreme Court Justice **Christine M. Durham** will retire from the bench, effective November 16, ending a 35-year tenure.

The *National Law Journal* has talked to **Ivan K. Fong** of 3M Co. about the transitions in his legal career. Mr. Fong clerked for U.S. Supreme Court Justice Sandra Day O'Connor, served as deputy associate attorney general for the U.S. Justice Department, and was Homeland Security general counsel. In the interview, Mr. Fong reflects on these roles and what is to come.



*William Baude receiving the Paul M. Bator Award
Credit: Matt Wood/The Federalist Society*

Equal Justice Works will honor chairman and CEO of Merck & Co., Inc. **Kenneth C. Frazier** at its Annual Dinner in November. The organization recognizes lawyers who exemplify the values of "compassion, dedication and commitment to achieving equal justice for individuals and communities in need."

Barry Friedman of NYU School of Law discussed "Reshaping Policing for the 21st Century" at the National Constitution Center on February 21. The program was moderated by **Jeffrey Rosen**, president and CEO of the National Constitution Center.

Heather Gerken will be the next dean of Yale Law School, effective July 1. She will be the law school's first woman dean.

Charles B. Gibbons of Buchanan Ingersoll & Rooney has released the seventh edition of *Pennsylvania Rules of Evidence with Trial Objections* (Thomson Reuters 2016).

Sedgwick partner **Kirk C. Jenkins** has been elected as Secretary-Treasurer of the California Academy of Appellate Lawyers for the 2017-2018 term.

NOTES ABOUT MEMBERS AND COLLEAGUES CONTINUED FROM PAGE 23

Yale Law School professor **Harold Hongju Koh** delivered the 40th Annual Foulston Siefkin Lecture, “The Trump Administration and International Law,” at Washburn University School of Law. Professor Koh explored the key areas of U.S. foreign policy, including whether, and to what extent, the new administration can permanently change the nature of the U.S. relationship with international law and institutions.

Duke Law School dean **David F. Levi** has announced that he will be stepping down as dean in June 2018.

Roberta D. Liebenberg of Fine, Kaplan and Black received the Martha Fay Africa Golden Hammer Award from the American Bar Association’s Law Practice Division at the ABA Midyear Meeting in Miami, in recognition of professional excellence in her career and her commitment to diversity.

NYU President Andrew Hamilton, along with the NYU Alumni Association (NYUAA), honored **Martin Lipton** of Wachtell, Lipton, Rosen & Katz at the annual NYUAA Awards Luncheon. He received the Eugene J. Keogh Award for Distinguished Public Service.

The Institute of Judicial Administration of NYU School of Law’s 23rd annual William J. Brennan Lecture on State Courts and Social Justice featured California Supreme Court Justice **Goodwin Liu**. In the lecture, “State Constitutions and the Protection of Individual Rights: A Reappraisal,” Justice Liu discussed the importance of state courts in interpreting state constitutional provisions that are similar to provisions of the federal Constitution.

Margaret H. Marshall, Senior Counsel at Choate Hall & Stewart, has been elected a member of the American Philosophical Society, the oldest learned society in the United States.

Harvard Law School Dean **Martha L. Minow** and Yale Law School Dean **Robert C. Post** wrote the op-ed “Standing up for ‘so-called’ law,” published on February 10, by *The Boston Globe*.



Harold Hongju Koh presenting “The Trump Administration and International Law”
Credit: Washburn University School of Law

Charles J. Ogletree Jr. of Harvard Law School was presented with the first-ever Distinguished Life Fellow Award during the 61st annual Fellows Awards Reception and Banquet hosted by The Fellows of the American Bar Foundation at the ABA’s Midyear Meeting. The award recognizes individuals displaying a lifetime of sustained and significant professional achievement and public service.

R. Ashby Pate of Lightfoot, Franklin & White will serve as a deputy attorney general representing former Interim State Superintendent of Education, Philip Cleveland. Mr. Pate was appointed by the state attorney general on March 3.

In an op-ed piece for *The New York Times*, University of Chicago Law School professor **Eric A. Posner** analyzed the recent clash between the judicial and executive branches over President Trump’s travel ban.

Roberta Cooper Ramo of Modrall Sperling was the 2017 Ulysses and Marguerite Schwartz Memorial Lecturer at the University of Chicago Law School. Ms. Ramo shared her thoughts on the obligations of American lawyers to the Democracy from private clients to government positions.

Doug Rendleman has published *Commercial Bribery: Choice and Measurement Within a Remedies Smorgasbord*, 74 WASH. & LEE L. REV. 369 (2017). The article analyzes and discusses three Restatements:

Restatement Third, Restitution and Unjust Enrichment (2011), Restatement Third, Agency (2006), and Restatement of the Law, Employment Law (2015).

Richard L. Revesz of NYU School of Law has written an op-ed piece for *Newsweek*. The article, “Will Trump’s EPA Chief, Scott Pruitt, Keep Our Air and Water Clean?” urges the new EPA Administrator to take seriously the EPA’s critical mission to ensure clean air and water for every American.

Lindsay G. Robertson of the University of Oklahoma College of Law received the Regents’ Award for Superior Professional and University Service and Outreach at the university’s annual event, “A Tribute to the Faculty.”

Planet Lex podcast host **Daniel B. Rodriguez**, dean of Northwestern University Pritzker School of Law, recently spoke with Northwestern Law professor Jim Speta about the government’s handling of online privacy, cybersecurity, and net neutrality.

Eduardo Roberto Rodriguez of Atlas Hall Rodriguez has received the 2017 American Inns of Court Professionalism Award for the Fifth Circuit. The award is presented “to a lawyer or judge whose life and practice display sterling character and unquestioned integrity, coupled with ongoing dedication to the highest standards of the legal profession and the rule of law.”

Kermit Roosevelt III of the University of Pennsylvania Law School took part in a dialogue with George Takei at the Franklin D. Roosevelt Presidential Library. The discussion took place on the opening day of the Library’s newest exhibit, “Images of Internment: The Incarceration of Japanese Americans During World War II.”

Charles W. Schwartz of Houston, Texas, was recently elected as Chairman of the Board of Regents of the Texas A&M University System. The Texas A&M System is one of the largest university systems in the United States.

In Memoriam



Mr. Coleman addresses the ALI membership after receiving the Henry J. Friendly Medal in 2000.

William T. Coleman, Jr.

William T. Coleman, Jr., an adviser to several Presidents, who served as Secretary of Transportation during the Ford Administration, died at his home in Alexandria, Virginia, on March 31. He was 96.

A senior partner and the Senior Counselor of the law firm of O'Melveny & Myers in its Washington, DC, office, Mr. Coleman was a main architect of the legal strategy leading to *Brown v. Board of Education* and the desegregation of schools and other public facilities throughout the United States, and he played a leading role for almost 70 years in the effort to give reality to the principle of equality under law.

Mr. Coleman was a member of ALI since 1963 and of its Council since 1969, taking Council Emeritus status in 2008. In 2000, the Institute presented to him its most prestigious award, the Henry J. Friendly Medal, for his outstanding contributions to the law in the tradition of the late Judge Friendly and the Institute. Two of his three children, Lovida H. Coleman, Jr., and William T. Coleman III, are also lawyers and ALI members, and the third, Hardin L. Coleman, is a professor at, and the former dean of, the Boston University School of Education. His wife is the former Lovida Hardin of New Orleans.



Credit: Berkeley Law

Herma Hill Kay

University of California Berkeley School of Law professor and former dean Herma Hill Kay passed away on June 10. She was 82.

In 1960, Professor Kay joined the Berkeley Law faculty, becoming the second woman to do so. During her tenure, the number of women students increased from a small handful to more than 50 percent of the class, and the number of women faculty grew exponentially. She became the school's first woman dean in 1992, serving for eight years.

Professor Kay became a member of the ALI Council in 1985, taking Emeritus status in 2012. She was a member of several ALI Committees including Executive, Nominating, and Membership. Professor Kay was also an Adviser on ALI's Principles of the Law of Family Dissolution, Restatement of Employment Law, and Restatement Third, Conflict of Laws.

TO READ MORE ON THESE MEMBERS' CONTRIBUTIONS TO THE PRACTICE OF LAW, VISIT THE IN MEMORIAM FEATURES AT WWW.ALI.ORG/NEWS.

ELECTED MEMBERS

Steven A. Brick, San Francisco, CA;
Phillip L. Mann, Washington, DC;
Dennis Owens, Kansas City, MO;
Alan N. Resnick, Hempstead, NY;
Wm. T. Robinson III, Florence, KY

LIFE MEMBERS

George E. Ashley, Dallas, TX; **Daniel L. Berman**, Salt Lake City, UT; **David M. Borden**, Hartford, CT; **Edward R. Brown**, Shaker Heights, OH; **William T. Coleman, Jr.**, Washington, DC; **Richard E. Deer**, Indianapolis, IN; **Mary Doyle**, Coral Gables, FL; **Edward C. Halbach, Jr.**, Berkeley, CA; **John D. Hastie**, Norman, OK; **James B. Hurlock**, New York, NY; **Charles W. Joiner**, Naples, FL; **Herma Hill Kay**, Berkeley, CA; **Phyllis A. Kravitch**, Atlanta, GA; **William B. Matteson**, New York, NY; **John T. Noonan, Jr.**, San Francisco, CA; **Alison L. Smith**, Houston, TX; **Melvin J. Sykes**, Baltimore, MD; **Thomas A. Welch**, Walnut Creek, CA; **Mervin M. Wilf**, Narberth, PA

NOTES ABOUT MEMBERS AND COLLEAGUES CONTINUED FROM PAGE 24

The 2017 American Inns of Court Professionalism Award for the Third Circuit was awarded to **Anthony J. Scirica** of the U.S. Court of Appeals for the Third Circuit. Chief Judge **D. Brooks Smith** and Judge **Kent A. Jordan** presented Judge Scirica with the award at the Third Circuit Judicial Conference on April 19.

Harvard Law School professor **Robert H. Sitkoff** has been appointed to the Uniform Law Commission drafting committee for an Act on Electronic Wills. The committee will draft model legislation addressing the formation, validity, and recognition of electronic wills.

Kaighn Smith, Jr., of Drummond Woodsum presented “Ethical ‘Obligations’ and Affirmative Tribal Sovereignty” at the 21st Annual Tribal Law & Government Conference, hosted by the University of Kansas School of Law.

Peter Y. Solmssen, a member of the OECD Secretary-General’s High Level Advisory Group on Anti-Corruption and Integrity, contributed to the recommendations on ways the OECD can strengthen its work on combating bribery and promoting integrity.

Corporate Counsel has chosen four legal departments as Best Legal Departments 2017. Clorox Company, of which **Laura Stein** is executive vice president and general counsel, is among the honorees.

David E. Sternberg of Brown Brothers Harriman was awarded the Spirit of Excellence Award at the Appleseed and NY Appleseed Pillars of Justice’s annual reception on June 13.

In his *Philadelphia Inquirer* op-ed piece, “Commentary: Sex, the Constitution, and standing up for core values,” University of Chicago Law School professor **Geoffrey R. Stone** examines how American law has called into question the constitutionality of government regulations of sexually related behavior.

The Huffington Post has published an essay by University of Vermont President **E. Thomas Sullivan**. The essay, “Speech and Expression on Campus,” speaks of the difficulties college campuses face concerning “where to draw the line between first amendment free speech rights and sanctionable harassment.”

Mary-Christine Sungaila of Haynes and Boone received the Ellis Island Medal of Honor. The award is given by the National Ethnic Coalition of Organizations to a U.S. immigrant or native-born citizen who has made significant contributions to their local communities, the nation, or the world, both through professional accomplishments and service to humanity.

Cobalt Law senior counsel **Michael Traynor** has joined the Environmental Law Institute’s Leadership Council. The Council recognizes leaders for their commitment of resources and time to the Institute’s vision of a healthy environment, prosperous economies, and vibrant communities founded on the rule of law.

Lawrence W. Waggoner of the University of Michigan Law School published, “Marriage Is on the Decline and Cohabitation Is on the Rise: At What Point, if Ever, Should Unmarried Partners Acquire Marital Rights,” 50 *Fam. L.Q.* 215 (2016), posted on MLaw Repository. The article, which is the lead article in a Symposium on “Nonmarital Partner Rights and Families Today,” cites government data showing that marriages are not keeping pace with, but cohabitations are outpacing, increases in population. It notes that legislation granting marital rights for longer-term cohabitations or cohabitations with children has been enacted in Australia, Canada, Ireland, New Zealand, and Scotland, and introduced in the United Kingdom for England and Wales, and proposes a uniform act on the subject for the United States.

American Indian Law

February 9, 2017 in Philadelphia, PA

For this project session, the Reporters delivered updated drafts of Chapters 2 (tribal powers) and 4 (business law) for review and comment. A draft of the Indian Child Welfare Act subchapter, intended for inclusion in Chapter 3 (state powers), was also presented for discussion. The next project meeting will be held on November 30, 2017.



Project participants collaborate during February meeting.

This year's recipient of the American Society of International Law's Goler T. Butcher Medal was **Patricia M.**

Wald. The award was presented at the 111th ASIL Annual Meeting in April at Washington, DC, and is given to a distinguished person for outstanding contributions to the development or effective realization of international human rights.

Seth P. Waxman of WilmerHale joined author David Dalin at The National Archives in a discussion about the eight Jewish men and women who have served as justices of the U.S. Supreme Court: Louis D. Brandeis, Benjamin N. Cardozo, Felix Frankfurter, Arthur J. Goldberg, Abe Fortas, Ruth Bader Ginsburg, Stephen G. Breyer, and Elena Kagan.

James F. Williams of Perkins Coie has been named Office Managing Partner of the firm's Seattle office.

An article written by **Ingrid Wuerth** of Vanderbilt University Law School in *Lawfare* discusses the constitutional power that the executive branch has when it comes to foreign official immunity determinations. Professor Wuerth concludes that as a matter of constitutional law and policy, U.S. courts should apply federal common law to such determinations and "not treat executive statements or suggestions of immunity as controlling."

Donald Norman Zillman of the University of Maine School of Law is the author of *Living the World War: A Weekly Exploration of the American Experience in World War I—Volume One* (Vandeplas Publishing 2016) (with Elizabeth Elsbach). The book draws on *The New York Times* and the Congressional Record for the period of October 1, 1916 to December 31, 1917 to provide a weekly review of the American experience in World War I.

If you would like to share any recent events or publications in the next ALI newsletter, please email us at notes@ali.org.

Meetings and Events Calendar At-A-Glance

(for more information, visit www.ali.org)

Below is a list of upcoming meetings and events. This schedule may change, so please do not make travel arrangements until you receive an email notice that registration is open.

2017

September 7 (JOINT)

Restatement of the Law, Liability Insurance
Philadelphia, PA

September 8 (JOINT)

Restatement of the Law Third, Torts: Liability for Economic Harm
Philadelphia, PA

October 5 (JOINT)

Restatement of the Law, Charitable Nonprofit Organizations
Los Angeles, CA

October 12-13 (JOINT)

Restatement of the Law Fourth, Property
Philadelphia, PA

October 13 (JOINT)

Model Penal Code: Sexual Assault and Related Offenses
New York, NY

October 19-20

Council Meeting - October 2017
New York, NY

October 26 (JOINT)

Restatement of the Law, Consumer Contracts
Philadelphia, PA

October 26 (JOINT)

Restatement of the Law Third, Conflict of Laws
Philadelphia, PA

October 27 (JOINT)

Principles of the Law, Compliance, Enforcement, and Risk Management for Corporations, Nonprofits, and Other Organizations
Philadelphia, PA

November 9 (JOINT)

Principles of the Law, Policing
Philadelphia, PA

November 10 (JOINT)

Restatement of the Law, The U.S. Law of International Commercial Arbitration
Philadelphia, PA

November 30 (JOINT)

Restatement of the Law, The Law of American Indians
New York, NY

December 1 (JOINT)

Restatement of the Law, Children and the Law
Philadelphia, PA

December 7 (JOINT)

Restatement of the Law, Copyright
Philadelphia, PA



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The ALI Adviser Continues to Grow

The ALI Adviser now features fifteen of the Institute's projects, with **three projects added** after the Annual Meeting.

- Law of American Indians
- Charitable Nonprofit Organizations
- **Children and the Law**
- Consumer Contracts
- Data Privacy
- **Economic Harm Torts**
- Election Administration
- U.S. Foreign Relations Law
- **Government Ethics**
- Intentional Torts to Persons
- International Commercial Arbitration
- Liability Insurance
- Policing
- Sentencing
- Sexual Assault

If you would like to contribute a piece to the online project forum, please email the Communications Department at communications@ali.org.

VISIT WWW.THEALIADVISER.ORG TO LEARN MORE.

