National Association of Former United States Attorneys

January 2009

Washington DC 2008 Conference Report

FBI Director Robert Mueller, the lead off speaker at the 2008 annual meeting, said that September 11, 2001 was a watershed date for the FBI. As with many federal agencies, the mission of the bureau changed, perhaps permanently. Prior to 9-11 the role of the FBI in the national security area was to investigate attacks on the United States, identify the perpetrators, arrest and convict them. After 9-11 the role of the bureau has been to prevent attacks. Find those who are planning terrorist attacks and immobilize them.

Mueller, standing amidst the audience in his shirt sleeves, identified counter terrorism as the prime national priority of the bureau. Two thousand agents have been moved from criminal investigations to national security. One target is the cyber area, to prevent terrorists from penetrating our financial system. Mueller said the other two priorities are public corruption and organized crime. He described organized crime in the new sense, ethic gangs of Asian, Russian, Middle European, Middle Eastern participants, as well as the traditional mafia.

Mueller said the key player in the counter terrorism campaign is the SAC (Special Agent in Charge) of each office. The first metric of the SAC is to prevent another 9-11. His or her job is to discover if there is a terrorism chief swimming in his waters. If so then take him and his major players off the street before they can act. Mueller said the United States has taken Afghanistan away as a major refuge, but now Pakistan is becoming a new sanctuary.

A major threat is the core Al Qaeda members who carry European passports. Mueller said they can enter the United States without visas. He said there is a home grown group of terrorists with no ties to Al Qaeda who have emerged from prisons which bear watching.

See Mueller on page 3

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Mueller continued from page 1

Criminal investigations in the sub prime mortgage area have not received a lot of publicity, yet the FBI has achieved 26 indictments stemming from fraud in the mortgage business.

Mueller said that violent crime has remained at the same level over the past year, yet there some very high figures in some cities. He said one of the causes was persons returning from prison.

He said the intelligence capability of the bureau has changed from reactive to preventative. The FBI leaders must understand their domain, who are the players, and what is their threat capacity. In order to carry out this intelligence function there is a demand for foreign speaking agents in all the ethnic areas. Mueller said the cooperation with the CIA has improved. He gave the example of a terrorist suspect being picked up in a foreign country who has an American telephone number in his possession. Now that number is transferred by the CIA to the FBI who will identify the person who subscribes to that number, and determine that person's status and activity. He said there is a globalization of the FBI effort, with 80 Legats (Legal Attaches at Embassies) across the world. The Legats are the center of intelligence activity for the bureau.

In response to the question whether the FBI has enough CPA's or skilled accountants to handle complex white collar investigations, Mueller said a white collar case should be worked the same way as a drug case; find out who is involved, flip a key person, and then indict the rest with that key person's testimony.

"The way to investigate a complex white collar offenses is to treat it as a dope case; flip an insider and get him to testify against the others." - Robert Mueller

Mueller closed by saying the Department of Justice needs better planning and goals. At present the FBI has a five year plan with specific goals while the Department of Justice has a one year plan.

PHOTOS OF 2008

NATIONAL CONFERENCE

Hundreds of photos of the 2008 NAFUSA Annual Conference are located on our website, www.nafusa.org. Links to photos of the cocktail reception at the J.W. Marriott rooftop balcony overlooking the Washington D.C. landmarks, the CLE session, the Potomac River fall lunch cruise, the speaker's dinner, etc., are all located on the website. Click on the "View Slideshow" link and let the photos pass in sequence without any effort on your part.

AMBASSADOR THOMAS A. SCHWEICH BUILDING AFGHANISTAN'S LEGAL SYSTEM

Ambassador Schweich began the presentation with a history of Afghanistan. He said that the reason Afghanistan is important is that the country is the key transportation nexis for traffic throughout the middle east.

Ambassador Schweich said Afghanistan has been the focus of numerous invasions since the first century, many occupations by foreign powers, with the result of a haphazard legal system. The Greeks, Huns, Russians, and British all contributed to the present total lack of a judicial system. Ambassador Schweich said the country needs a strong leader. Without a strong leader, the country has always faltered. Following the Russian withdrawal there arose a strong Islamic movement. The Taliban brought in the strictest form of Islam. The Taliban invited Osama bin Laden to come to the country as an operating base.

The United States had no reaction to all the turmoil until its embassies in Kenya and Tanzania were bombed in 1998. The United States began to take an interest in the affairs of Afghanistan. After 9/11, the United States sent in troops to hunt down the terrorists who were behind the attacks on the United States. The international aid supplied to the country provided little funds for the judiciary.

Ambassador Schweich said a country cannot be a 2/3 democracy. The new constitution has no Article III judges and there is no semblance of a legal system. The constitution declares there can be no law which will run contra to Islamic law. For example, in a civil case the parties are required to sit before a party elder for a resolution of the dispute. The settlement costs could include the defendant's goat and his daughter.

Ambassador Schweich feels the country needs to build a judiciary. There needs to be international coordination in doing the job. Presently, Italy is the lead nation in the process and cannot do it. At present, there is no agreement as to what judicial procedure will work.

The Department of Justice decided to focus on the drug problem in the country. It sent in six Assistant United States Attorneys to train judges. After studying the situation, DOJ officials concluded a special court for drug cases was necessary. Afghanistan is responsible for 93% of the world's her-

oin.evenue. Heroin accounts for 40% of the country's gross revenue. There are 150,000 hectares of poppy plants under cultivation.

The Ambassador feels that until the drug problem is solved, the government will be unstable. The drugs are undermining the country's economic development. Until there is a downside to growing poppies, the drug trade will continue. The big problem is that the Taliban is into the drug trade in a big way. NATO needs to get into the anti-drug enforcement. DEA agents have been sent in to train police officers. Unless the drug problem is corrected, there will be no negotiations regarding a stable government. The Ambassador believes the Afghans and Pakistanis blame each other for permitting terrorist traffic.

"If the United States and the other countries pull out it will be regarded as a total failure for NATO, and NATO will no longer be regarded as a recognizable force anywhere in the world." - Ambassador Schweich

Ambassador Schweich said more drug enforcement agents are needed. In answer to a question about the DEA's attitude of supplying agents, he said the DEA Administrator is sympathetic to the problem and is trying to secure funds to send more agents.

The issue of whether to conduct raids into Pakistan is a very complicated diplomatic question. The Pakistani's believe the United States is using their country as a scapegoat. If we make any raids into that country, there will be strong anti-American reaction.

PRESENTATION OF MARK FILIP, DEPUTY ATTORNEY GENERAL

Mark Filip was a federal district court judge, Northern District of Illinois for two years. He resigned earlier this year to take the post of Deputy Attorney General.

Filip said as a young college student in Illinois, he was inspired to become a lawyer to be an Assistant United States Attorney, after reading the publicity from Operation Greyland conducted by the U.S. Attorney in Chicago.

Filip addressed the issue of the protection of the attorney client privilege in corporate investigations, and the issue of a corporation paying the counsel fees of its officers and employees during a criminal investigation.

"The Department of Justice will treat the corporation the same as an individual. Credit will be given for cooperation, for disclosure of facts, not for waiving the attorney client privilege." - Mark Filip

Filip sought to explain the DOJ policy concerning the corporation's cooperation with DOJ during a grand jury investigation. He said DOJ has a common cause with the corporation to protect the market place. He said the corporation has a key role in providing records and key personnel to supply information. DOJ wants to prevent undue problems and disruption.

Filip said in the past DOJ has been criticized for demanding a waiver of the attorney client privilege in return for credit for cooperation. DOJ has also been criticized for withholding credit for cooperation where a corporation pays the attorneys fees of its officers and employees during an investigation. These policies have undergone recent review.

Filip said the attorney client privilege is the key to the legal system, and the goal of DOJ is to respect the rights of the individuals involved.

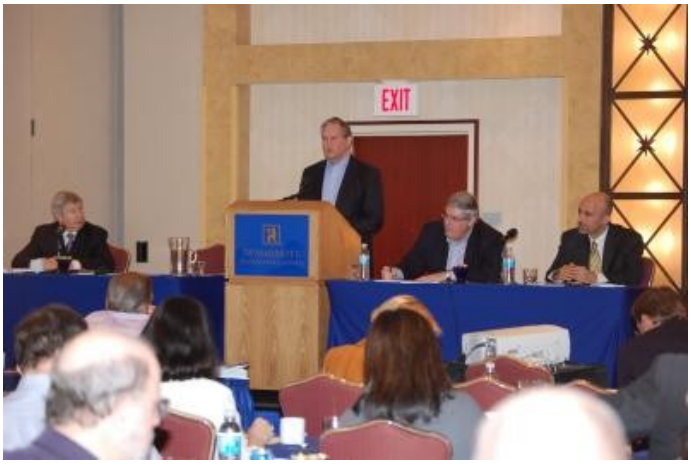
The DOJ has made several revisions to its policy. It will now treat the corporation the same as an individual. Credit will be given for cooperation, for disclosure of facts, not a waiver of attorney client privilege. The prosecutors need facts, and is not interested in whether or not there is a waiver.

The advice given by the General Counsel might be crucial as to how the corporation's conduct is viewed, and waiver of this advice might be crucial to a corporation's defense.

The DOJ will not consider whether the corporation pays the legal fees of its officers and employees. The only time this would be relevant if it is combined with evidence of purposeful obstruction.

The DOJ will no longer be concerned if there is a joint defense agreement between the corporation and its officers and employees. In determining whether the corporation has cooperated, the DOJ cannot use the fact that the corporation has disciplined its employees. This fact is used only to determine whether a remedial process has been completed.

Filip emphasized that the corporation's cooperation or non-cooperation is not to be considered evidence of guilt.



Jim Robinson, Jay Stephens, Joe Warin, and Gil Soffer speak on the Deferred Prosecutions and Corporate Monitors panel.

PANEL DISCUSSION

"Deferred Prosecutions and Corporate Monitors"

Jay Stephens—Moderator, Raytheon Company
James Robinson—Cadwalder, Wickersham & Taft LLP, Former Assistant Attorney General and current Corporate Monitor
Gil Soffer—Associate Deputy Attorney General
Joe Warin—Gibson, Dunn & Crutcher LLP

The panel discussed the use of Deferred Prosecution Agreements and Non Prosecution Agreements and the use of Corporate Monitors to oversee the agreement the corporation has made with the government.

Gil Soffer

Gil Soffer said the terms DPA and NPA are often confused. He said Deferred Prosecution Agreements mean there are charges filed and there is some agreement as to corporate reform while Non Prosecution Agreements means no charges are filed, and the corporation and the government nonetheless make an agreement for corporate reform. Both programs include cooperation between the corporation and the government, and an implementation of a compliance program.

When should these programs be used? Soffer said they are very valuable where there are enormous consequences of a company being found guilty of federal crimes, such as Arthur Anderson. Soffer said it is appropriate to use a corporate monitor where a particular expertise is required. He said there is always an allegation that the DOJ will exercise its discretion in favor of selecting former DOJ officials as monitors. A monitor must be approved by a committee at the company, and recommended to the DOJ. The ultimate approval is with the Attorney General. The Monitor is independent of the company, and there exists no attorney client privilege as to communications to the monitor. The monitor's primary responsibility is to assess internal controls.

The monitor must report misconduct or other instances of fraud. He is required to notify both the company and the DOJ. If he discovers present ongoing misconduct he is to notify only the government.

Joe Warin

The decision to grant an NPA or DPA varies with the districts. He said the selection of a monitor is a patchwork quilt of procedures between districts. The monitor goes in after changes have been made, and guilty parties are gone. A good corporation has its act together by the time the monitor arrives. The bible of how the monitor is to act is the final agreement between the company and DOJ. He urged that the document be the product of a great deal of wordsmithing. He advised that the document be very precise. It should spell out how testing is to be performed; how to test the employee performance.

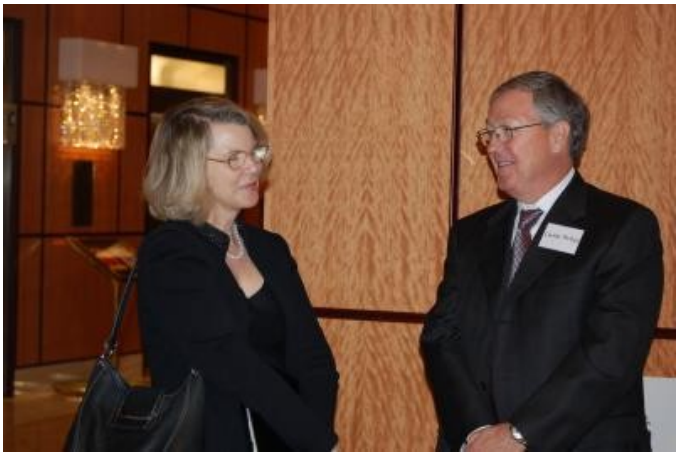
"The bible of the monitorship is the final agreement between DOJ and the corporation. It should be the product of precise wordsmithing, and detail just what is to be accomplished and how." - Joe Warin

Jim Robinson

Robinson is currently serving as a corporate monitor. It is a great service to the corporation to focus on the selection of the monitor. He said there has been a big disparity on the method to select the monitor or how the monitor agreement should read.

There has been a call for legislation to force DOJ to write regulations for a monitor. Robinson is concerned about the legislation – which will tell the monitor how to exercise his discretion. Robinson feels the process needs more refinement as to when to use a monitor.

Robinson raised the issue of how DOJ manages the monitor system. Who exercises operational control? He said the agreement is really between the company and the monitor. The parties should ensure that the government does not become overbearing in how the monitor operates. He said the DOJ doesn't want to be in the business of selecting the monitor. The company should be able to control the fees for the monitor. There should be a contractual agreement between the corporation and the monitor. The corporation should be free to complain to the DOJ about the conduct of the monitor. All these details should be sorted out at the time of executing the agreement.



Maureen Mahoney and Carter Phillips before the Supreme Court Panel.

PANEL DISCUSSION

"Recent Cases & Practice Before the Supreme Court"

Maureen Mahoney, Latham Watkins

Carter Phillips, Sidley & Austin

Linda Greenhouse, New York Times

NAFUSA member Jay Stephens moderated a panel consisting of Linda Greenhouse, former Supreme Court reporter for the *New York Times*, Maureen Mahoney, of Latham Watkins, a former Deputy Solicitor General and Carter Philips, Sidley & Austin, a former Deputy Solicitor General. Both Phillips and Mahoney have argued over 20 cases before the Supreme Court.

Linda Greenhouse sees the court in transition. For eleven years there were no new members and there was a small group dynamic. Then rapid change occurred with two new members. She pointed out the decision this year of *Medellin v. Texas* where a defendant from Mexico was not given his right to be interviewed by the Mexican consulate, as required by treaty. He received a death sentence. The Supreme Court denied this relief, holding that the treaty is not self -executing. Mexico went to the World Court on behalf of the defendant and approximately 50 other Mexican nationals held in American jails. The World Court held the defendant had the right to see the Mexican consulate. Defendant asked for a stay of execution until the full Supreme Court could consider the order of the World Court. Four members of Supreme Court voted in favor of a stay. It takes five votes to stay the enforcement of a lower court's decision, pending a rehearing. The majority declined a stay. Each member of the minority filed a dissenting opinion. Greenhouse said that in the era of civility that once pervaded the court, since four votes are enough to grant certiorari, one of the members of the majority would have joined the minority to insure the case was heard. Greenhouse thought this was significant to show the dissention on the court. The two other panel members disagreed on the significance of the vote, and did not read the declination to stay as signifying internal dissention.

She noted there were a number of 5-4 decisions during the first two years of the Roberts administration. Greenhouse said a case that illustrated the conflict in the court is *District of Columbia v. Heller*, the Second Amendment gun case. She said Justice Scalia who wrote the opinion for the majority, and Justice Stevens, who wrote the opinion for the dissent both used the same ground, a review of originalism to come to different conclusions. Many observers thought it was really fought to a draw. Many critics who are generally in sync with Scalia issued critical appraisals of his opinion. Judge Posner of the Seventh Circuit questioned Scalia's view of the historical origins of the Second Amendment. Judge Harvie Wilkenson of the Fourth Circuit said Scalia had engaged in the same type of judicial activism that Scalia regularly disdains, and had engaged in the same decision process that Scalia criticized in *Roe v. Wade*.

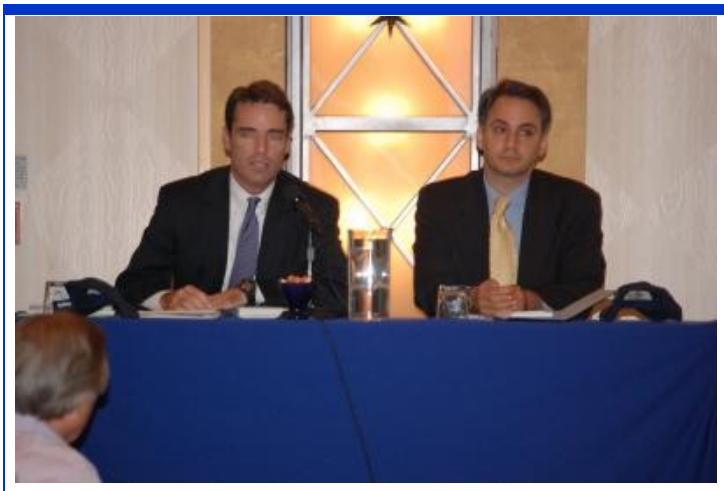
Greenhouse said the great mystery is how the Bush administration has lost all the cases concerning persons who are incarcerated at Guantanamo Bay prison. She believed one of the problems is the administration's prosecution and detention plans did not include the right to habeas corpus in the federal courts. She pointed out that Alberto Gonzales had written an op-ed article in the *New York Times* in which he said *habeas corpus* would be available to those persons. She believed that some members of the Bush administration also thought *habeas corpus* should be available to those persons incarcerated in Guantanamo. She thought if the administration had been a bit more compromising and had offered habeas to the detainees, the courts would have been more receptive to Bush administration effort.

Carter Philips said that Chief Justice Roberts has tried to get major decisions decided incrementally, instead of orders with a broad sweep. Scalia and Thomas are critical of this approach. Phillips thought that the last year was a year of more incremental decisions.

Phillips said the Chief Justice believes the court could accept more cases for review. In the past few years, the court has accepted approximately 70 cases per year. The Chief Justice believes it should be 100.

Phillips noted that there is a recent phenomenon of former prosecutors and former jurists joining together in defense of criminal cases. He said there was enormous confusion in the federal sentencing area until the cases of *Aprendi, Booker, and Gault* were decided. He said there is a wonderful mixture of Justices in support of sentence reform that one cannot find in other areas.

Maureen Mahoney represented Arthur Anderson in the Supreme Court which she won 9-0. She said the Court is expressing a trend of fair warning to defendants. She cited as an example the Arthur Anderson decision in which the Court rejected the old adage, ignorance of the law is not a defense. The Court held there must be a conscious intent to violate the law. She said this defense has been used in false claims act prosecutions where the defendants' actions are judged whether they are objectively reasonable.



James Benjamin and Benjamin Wittes on the Terrorism Cases in Federal Court Panel.

PANEL DISCUSSION

"Prosecuting Terrorism Cases In Federal Court—Pro & Con"

James J. Benjamin—Former AUSA, S.D.N.Y.

Benjamin Wittes—Author of Law and Long War, Brookings Institute Fellow

The two panelists presented the pros and cons of prosecuting terrorists in the regular federal court system or in special military tribunals.

Benjamin said there has been a lot of widely accepted criticism of using the regular federal court system to try persons charged with terrorism against the United States. A main issue is the detention of the defendants. Benjamin stated the criminal justice system has done a good job to date trying terrorists. It has led to reliable results, and no breaches of security. There is not a need for a new court, and there are many tools available. He added there is no need for a new system of detention. Benjamin distributed copies of a bound 170 page white paper, "*In Pursuit of Justice, Prosecuting Terrorism Cases in the Federal Courts*" which he co-authored, published by Human Rights First, May 2008.

"The federal criminal justice system has done a good job trying terrorists. There is no need for special courts. There are many tools available." - James Benjamin

Wittes said he believes there is a need for a tribunal outside the present federal court system. He said the difference between his method and that suggested by Benjamin is an optical disparity. Wittes said the main object of the military proceeding is to keep the captive persons out of action. This should be done under the laws of war. He recognized that aside from keeping the suspects out of action, a prosecution may be necessary. A big issue is what are the laws of detention. What body of law is to be applied? This is a hybrid conflict.

Wittes said if criminal justice system should handle all the terrorist prosecutions – then a great deal of thought must be given as to what to do in the future. There must be a relationship between detention and trial. The courts must recognize the need for detention. He said detention is the threshold factor in a terrorism case. Generally there is no inclination to go to trial as long as the suspect is detained. Wittes suggested that the standard for detention should be raised, and the trials be brought sooner.

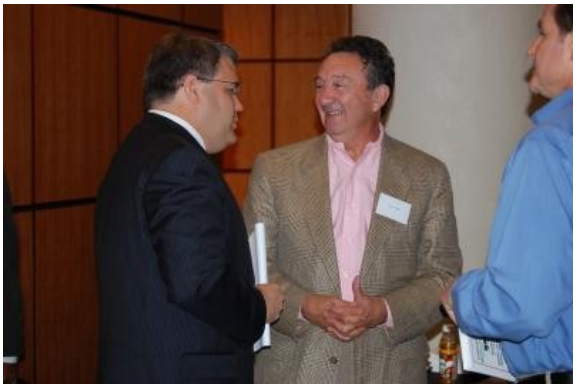
Wittes suggested a national security court with defined procedural safeguards as a prospective measure. Wittes suggested that there be a new Article III court, with Article III judges presiding. There should be a new procedure for this court. Wittes said there is nothing radical about creating a new court. *Ad hoc* tribunals have bad odor, but throughout the history of the United States there have been such tribunals, Nuremberg War Crimes Tribunal, The Japanese War Crimes Tribunals, The Haig Tribunals, all specially created. There would be a need to create an institution to handle the detainees, with procedural safeguards.

"There is a need for a tribunal outside the present federal court system… There is nothing radical about creating a new court." - Benjamin Wittes

Wittes said, in all the special courts the key is the right to counsel. In the trial context – the military commissions could handle more of those cases in an expedited manner than regular federal courts.

One Nafusa audience member asked the panel members why during World War II, the allies rounded up hundreds of the enemy, and kept them confined for several years without a trial or habeas corpus access to the courts, but now these present enemy members are getting special treatment because they chose not to wear a uniform. The panel members agreed that this was one of the most difficult questions to answer in this debate, as this is not a conventional war.

Program Summary Articles of the
2008 Washington DC Conference
Were Written By
Peter Vaira
(ED Pennsylvania 1978-82)



Pictured—Mark Filip and Peter Vaira

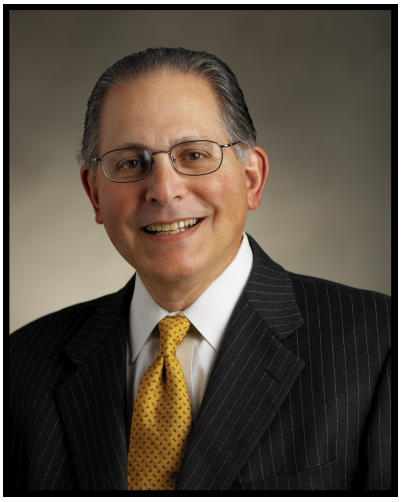
Meet Mike McKay
New NAFUSA President

As U.S. Attorney for the Western District of Washington in Seattle from 1989 to 1993, McKay supervised the litigation of many prominent lawsuits filed on behalf of or against the United States. It was McKay who decided the charges in the first flag burning case in America, an action granted direct review by the United States Supreme Court. During his tenure, he reorganized the office to more efficiently handle specialized types of cases involving drugs, environmental crime and bank fraud.

His interest in public service has led McKay to help run numerous political campaigns. He played leadership roles in the 1988 and 2000 Bush campaigns and was the Washington State Vice-Chair of Bush-Cheney '04 campaign. He has chaired numerous campaigns of former King County Prosecutor Norm Maleng. He was vice-chair of the Washington Citizens Commission on Salaries for Elected Officials and has served on and chaired committees which recommended to Washington's U.S. Senators candidates for the federal bench. Mike was vice chair of the Review Board that advises the Archbishop of Seattle on priest molestation allegations. He serves as a member of the board of directors of the Legal Services Corporation, after being nominated by President George W. Bush and confirmed by the U.S. Senate in 2003.

In private practice, McKay has represented numerous corporations and corporate officers facing government investigations. He also has supervised corporate internal investigations. He has represented a variety of clients in civil matters, including a major asbestos manufacturer facing personal injury actions and the Washington Public Power Supply System bondholders in a $7.5 billion lawsuit against the State of Washington.

McKay graduated from the University of Washington in 1973 with a B.A. in Political Science, with distinction. A 1976 graduate of Creighton University School of Law, where he received in 2001 the Alumni Merit Award, McKay has an A.V. legal rating by Martindale-Hubbell. He was vice chair of the U.S. Attorney General's Advisory Committee and is listed in "Who's Who in America" and "Who's Who in American Law."



Brady Receives St. Thomas More Award

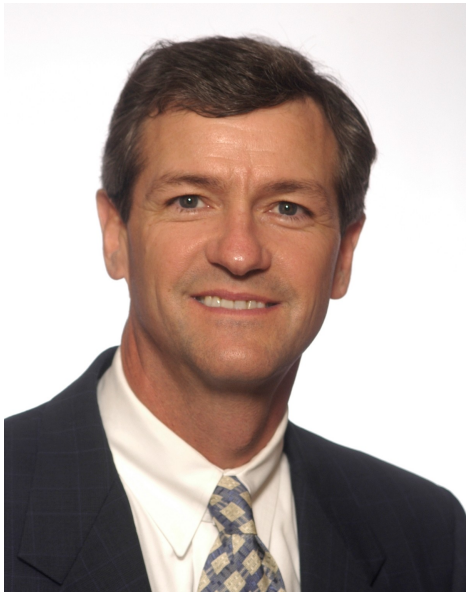
James S. Brady was honored by the Catholic Lawyers Association of Western Michigan as the recipient of the St. Thomas More award.

The St. Thomas More Award, named for the Patron Saint of Lawyers, exemplifies the qualities of the namesake and recognizes the recipient for high ethical standards, spiritual growth and fellowship, and attentiveness to legal and societal issues that affect morality, justice and faith.

James S. Brady has been practicing law since graduating from Notre Dame Law School in 1969. His practice is focused on representing a wide range of business entities, executives, medical professionals, and other individuals in criminal matters involving a wide variety of corporate, government, and individual crimes. He is the chair of Miller Johnson's criminal practice group and former chair of the litigation section. Mr. Brady is a former U.S. Attorney for the Western District of Michigan and past president of the National Association of Former U.S. Attorneys.

He is listed in "The Best Lawyers in America®" for commercial litigation, first amendment law, non-white-collar criminal defense, white-collar criminal defense, and personal injury litigation. He is a Michigan "Super Lawyer" for criminal defense and in *Who's Who in America*.

NEW PUBLICATIONS BY NAFUSA MEMBERS

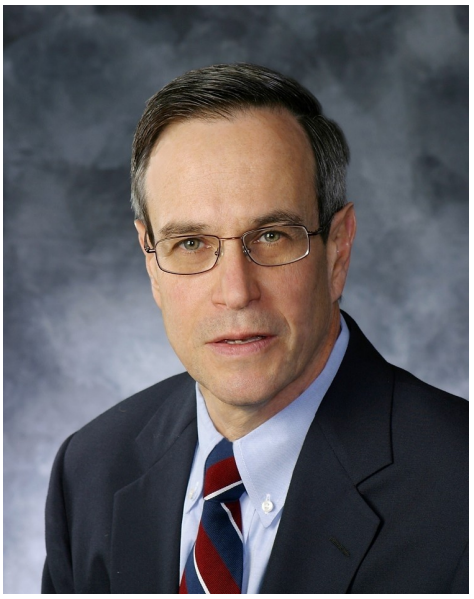


Federal & State Securities Enforcement

By Bart Daniel, Matthew Hubbell, Joseph Griffith Jr., Tracy Meyers, and M. Rhett DeHart

In the wake of corporate securities and accounting scandals and the recent bailouts of Fannie Mae and other financial giants, securities enforcement is changing before our eyes. As a result, Congress has enacted sweeping legislation providing prosecutors and investigators the procedural and substantive tools to more easily detect, investigate and prosecute securities and accountings fraud.

This publication is a ready reference for private practitioners and prosecutors alike who deal with securities enforcement. It describes the recent turnabout in the Department of Justice policy as updated in the United States Attorney's Manual in regard to cooperation by an organization and the payment of attorneys fees for its employees.



Federal Criminal Restitution

By Catharine Goodwin, Jay Grenig, and Nathan Fishbach

This book provides a step-by-step approach to the determination of restitution. It describes how this determination affects other portions of the criminal justice process, such as the charging decision and the determination of the appropriate sentence. It also discusses how the criminal justice system interacts at times with the civil litigation process to determine restitution.

This guide will be valuable to all of the participants in the sentencing process, including the prosecution and defense attorneys (the primary players); the victims (whose role is evolving); the Court (which imposes the restitution); and the probation office (which must enforce the Court's restitution order.)

Mark Your Calendar

NAFUSA

Annual Conference

October 1 – 3, 2009

Washington Athletic Club

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C/O Ron Woods
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