



Proceedings

A monthly newsletter from McGraw-Hill Education



November 2017 Volume 9, Issue 4

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Dear Professor,

Happy fall season, everyone! Welcome to McGraw-Hill Education's November 2017 issue of Proceedings, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 9, Issue 4 of Proceedings incorporates "hot topics" in business law, video suggestions, an ethical dilemma, teaching tips, and a "chapter key" cross-referencing the November 2017 newsletter topics with the various McGraw-Hill Education business law textbooks.

You will find a wide range of topics/issues in this publication, including:

1. The Harvey Weinstein sexual harassment scandal;
2. A recent sexual harassment scandal in the United States military;
3. Constitutional (free speech) issues related to President Donald Trump's Twitter account;
4. Videos related to a) a case involving due process in the United States military and b) Senator Hillary Clinton's claim that sexism and racism are "endemic" in America;
5. An "ethical dilemma" related to the opioid crisis in the United States; and
6. "Teaching tips" related to Article 1 ("Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades"), Article 2 ("Army Sacks General for Sexy Texts to Wife of a Sergeant"), and Video 2 ("Hillary Clinton: Misogyny is 'Endemic'") of the newsletter.

I wish all of you a fantastic remainder of the fall semester!

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Of Special Interest

This section of the newsletter covers three (3) topics:

- 1) The Harvey Weinstein sexual harassment scandal;
- 2) A recent sexual harassment scandal in the United States military; and
- 3) Constitutional (free speech) issues related to President Donald Trump's Twitter account.

Hot Topics in Business Law

Article 1: “Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades”

<https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>

According to the article, two decades ago, the Hollywood producer Harvey Weinstein invited Ashley Judd to the Peninsula Beverly Hills hotel for what the young actress expected to be a business breakfast meeting. Instead, he had her sent up to his room, where he appeared in a bathrobe and asked if he could give her a massage or she could watch him shower, she recalled in an interview.

“How do I get out of the room as fast as possible without alienating Harvey Weinstein?” Ms. Judd said she remembers thinking.

In 2014, Mr. Weinstein invited Emily Nestor, who had worked just one day as a temporary employee, to the same hotel and made another offer: If she accepted his sexual advances, he would boost her career, according to accounts she provided to colleagues who sent them to Weinstein Company executives. The following year, once again at the Peninsula, a female assistant said Mr. Weinstein badgered her into giving him a massage while he was naked, leaving her “crying and very distraught,” wrote a colleague, Lauren O’Connor, in a searing memo asserting sexual harassment and other misconduct by their boss.

“There is a toxic environment for women at this company,” Ms. O’Connor said in the letter, addressed to several executives at the company run by Mr. Weinstein.

An investigation by The New York Times found previously undisclosed allegations against Mr. Weinstein stretching over nearly three decades, documented through interviews with current and former employees and film industry workers, as well as legal records, emails and internal documents from the businesses he has run, Miramax and the Weinstein Company.

During that time, after being confronted with allegations including sexual harassment and unwanted physical contact, Mr. Weinstein has reached at least eight settlements with women, according to two company officials speaking



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on the condition of anonymity. Among the recipients, The Times found, were a young assistant in New York in 1990, an actress in 1997, an assistant in London in 1998, an Italian model in 2015 and Ms. O'Connor shortly after, according to records and those familiar with the agreements.

In a statement to The Times on Thursday afternoon, Mr. Weinstein said: "I appreciate the way I've behaved with colleagues in the past has caused a lot of pain, and I sincerely apologize for it. Though I'm trying to do better, I know I have a long way to go."

He added that he was working with therapists and planning to take a leave of absence to "deal with this issue head on."

Lisa Bloom, a lawyer advising Mr. Weinstein, said in a statement that "he denies many of the accusations as patently false." In comments to The Times earlier this week, Mr. Weinstein said that many claims in Ms. O'Connor's memo were "off base" and that they had parted on good terms.

He and his representatives declined to comment on any of the settlements, including providing information about who paid them. But Mr. Weinstein said that in addressing employee concerns about workplace issues, "my motto is to keep the peace."

Ms. Bloom, who has been advising Mr. Weinstein over the last year on gender and power dynamics, called him "an old dinosaur learning new ways." She said she had "explained to him that due to the power difference between a major studio head like him and most others in the industry, whatever his motives, some of his words and behaviors can be perceived as inappropriate, even intimidating."

Though Ms. O'Connor had been writing only about a two-year period, her memo echoed other women's complaints. Mr. Weinstein required her to have casting discussions with aspiring actresses after they had private appointments in his hotel room, she said, her description matching those of other former employees. She suspected that she and other female Weinstein employees, she wrote, were being used to facilitate liaisons with "vulnerable women who hope he will get them work."

The allegations piled up even as Mr. Weinstein helped define popular culture. He has collected six best-picture Oscars and turned out a number of touchstones, from the films "Sex, Lies, and Videotape," "Pulp Fiction" and "Good Will Hunting" to the television show "Project Runway." In public, he presents himself as a liberal lion, a champion of women and a winner of not just artistic but humanitarian awards.

In 2015, the year Ms. O'Connor wrote her memo, his company distributed "The Hunting Ground," a documentary about campus sexual assault. A longtime Democratic donor, he hosted a fund-raiser for Hillary Clinton in his Manhattan home last year. He employed Malia Obama, the oldest daughter of former President Barack Obama, as an intern this year, and recently helped endow a faculty chair at Rutgers University in Gloria Steinem's name. During the Sundance Film Festival in January, when Park City, Utah, held its version of nationwide women's marches, Mr. Weinstein joined the parade.



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“From the outside, it seemed golden — the Oscars, the success, the remarkable cultural impact,” said Mark Gill, former president of Miramax Los Angeles when the company was owned by Disney. “But behind the scenes, it was a mess, and this was the biggest mess of all,” he added, referring to Mr. Weinstein’s treatment of women.

Dozens of Mr. Weinstein’s former and current employees, from assistants to top executives, said they knew of inappropriate conduct while they worked for him. Only a handful said they ever confronted him.

Mr. Weinstein enforced a code of silence; employees of the Weinstein Company have contracts saying they will not criticize it or its leaders in a way that could harm its “business reputation” or “any employee’s personal reputation,” a recent document shows. And most of the women accepting payouts agreed to confidentiality clauses prohibiting them from speaking about the deals or the events that led to them.

Charles Harder, a lawyer representing Mr. Weinstein, said it was not unusual to enter into settlements to avoid lengthy and costly litigation. He added, “It’s not evidence of anything.”

At Fox News, where the conservative icons Roger E. Ailes and Bill O’Reilly were accused of harassment, women have received payouts well into the millions of dollars. But most of the women involved in the Weinstein agreements collected between roughly \$80,000 and \$150,000, according to people familiar with the negotiations.

In the wake of Ms. O’Connor’s 2015 memo, some Weinstein Company board members and executives, including Mr. Weinstein’s brother and longtime partner, Bob, 62, were alarmed about the allegations, according to several people who spoke on the condition of anonymity. In the end, though, board members were assured there was no need to investigate. After reaching a settlement with Mr. Weinstein, Ms. O’Connor withdrew her complaint and thanked him for the career opportunity he had given her.

“The parties made peace very quickly,” Ms. Bloom said.

Through her lawyer, Nicole Page, Ms. O’Connor declined to be interviewed. In the memo, she explained how unnerved she was by what she witnessed or encountered while a literary scout and production executive at the company. “I am just starting out in my career, and have been and remain fearful about speaking up,” Ms. O’Connor wrote. “But remaining silent is causing me great distress.”

In speaking out about her hotel episode, Ms. Judd said in a recent interview, “Women have been talking about Harvey amongst ourselves for a long time, and it’s simply beyond time to have the conversation publicly.”



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A Common Narrative

Ms. Nestor, a law and business school student, accepted Mr. Weinstein's breakfast invitation at the Peninsula because she did not want to miss an opportunity, she later told colleagues. After she arrived, he offered to help her career while boasting about a series of famous actresses he claimed to have slept with, according to accounts that colleagues compiled after hearing her story and then sent on to company executives.

"She said he was very persistent and focused though she kept saying no for over an hour," one internal document said. Ms. Nestor, who declined to comment for this article, refused his bargain, the records noted. "She was disappointed that he met with her and did not seem to be interested in her résumé or skill set." The young woman chose not to report the episode to human resources personnel, but the allegations came to management's attention through other employees.

Across the years and continents, accounts of Mr. Weinstein's conduct share a common narrative: Women reported to a hotel for what they thought were work reasons, only to discover that Mr. Weinstein, who has been married for most of three decades, sometimes seemed to have different interests. His home base was New York, but his rolling headquarters were luxury hotels: the Peninsula Beverly Hills and the Savoy in London, the Hôtel du Cap-Eden-Roc near the Cannes Film Festival in France and the Stein Eriksen Lodge near the Sundance Film Festival.

Working for Mr. Weinstein could mean getting him out of bed in the morning and doing "turndown duty" late at night, preparing him for sleep. Like the colleague cited in Ms. O'Connor's memo, some junior employees required to perform those tasks said they were disturbing.

In interviews, eight women described varying behavior by Mr. Weinstein: appearing nearly or fully naked in front of them, requiring them to be present while he bathed or repeatedly asking for a massage or initiating one himself. The women, typically in their early or middle 20s and hoping to get a toehold in the film industry, said he could switch course quickly — meetings and clipboards one moment, intimate comments the next. One woman advised a peer to wear a parka when summoned for duty as a layer of protection against unwelcome advances.

Laura Madden, a former employee who said Mr. Weinstein prodded her for massages at hotels in Dublin and London beginning in 1991, said he had a way of making anyone who objected feel like an outlier. "It was so manipulative," she said in an interview. "You constantly question yourself — am I the one who is the problem?"

"I don't know anything about that," Mr. Weinstein said.

Most women who told The Times that they experienced misconduct by Mr. Weinstein had never met one another. They range in age from early 20s to late 40s and live in different cities. Some said they did not report the behavior because there were no witnesses and they feared retaliation by Mr. Weinstein. Others said they felt embarrassed. But most confided in co-workers.



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Ms. Madden later told Karen Katz, a friend and colleague in the acquisitions department, about Mr. Weinstein's overtures, including a time she locked herself in the bathroom of his hotel room, sobbing. "We were so young at the time," said Ms. Katz, now a documentary filmmaker. "We did not understand how wrong it was or how Laura should deal with it."

Others in the London office said the same. "I was pretty disturbed and angry," said Sallie Hodges, another former employee, recalling the accounts she heard from colleagues. "That's kind of the way things were."

The human resources operation was considered weak in New York and worse in London, so some employees banded together in solidarity. "If a female executive was asked to go to a meeting solo, she and a colleague would generally double up" so as not to be alone with Mr. Weinstein, recalled Mr. Gill, the former president of Miramax Los Angeles.

Many women who worked with Mr. Weinstein said they never experienced sexual harassment or knew of anyone who did, and recalled him as a boss who gave them valuable opportunities at young ages. Some described long and satisfying careers with him, praising him as a mentor and advocate.

But in interviews, some of the former employees who said they had troubling experiences with Mr. Weinstein asked a common question: How could allegations repeating the same pattern — young women, a powerful male producer, even some of the same hotels — have accumulated for almost three decades?

"It wasn't a secret to the inner circle," said Kathy DeClesis, Bob Weinstein's assistant in the early 1990s. She supervised a young woman who left the company abruptly after an encounter with Harvey Weinstein and who later received a settlement, according to several former employees.

Speaking up could have been costly. A job with Mr. Weinstein was a privileged perch at the nexus of money, fame and art, and plenty of his former assistants have risen high in Hollywood. He could be charming and generous: gift baskets, flowers, personal or career help and cash. At the Cannes Film Festival, according to several former colleagues, he sometimes handed out thousands of dollars as impromptu bonuses.

Mr. Weinstein was a volcanic personality, though, given to fits of rage and personal lashings of male and female employees alike. When a female guest of his had to wait for a hotel room upgrade, he yelled that Ms. O'Connor would be better off marrying a "fat, rich Jewish" man because she was probably just good for "being a wife" and "making babies," she wrote in her memo. (He added some expletives, she said.) His treatment of women was sometimes written off as just another form of toxicity, according to multiple former employees.

In the fall of 1998, a 25-year-old London assistant named Zelda Perkins confronted Mr. Weinstein. According to former colleagues, she and several co-workers had been regularly subjected to inappropriate requests or comments in hotel rooms, and she was particularly concerned about the



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treatment of another woman in the office. She told Mr. Weinstein that he had to stop, according to the former colleagues, and that she would go public or initiate legal action unless he changed his behavior.

Steve Hutensky, one of Miramax's entertainment lawyers, was dispatched to London to negotiate a settlement with Ms. Perkins and her lawyer. He declined to comment for this article.

Ms. Perkins, now a theater producer in London, also declined to comment for this article, saying that she could not discuss her work at Miramax or whether she had entered into any agreements.

Months after the settlement, Mr. Weinstein triumphed at the Oscars, with "Life Is Beautiful" and "Shakespeare in Love" winning 10 awards. A few years later, Mr. Weinstein, who had produced a series of British-themed movies, was made a Commander of the British Empire, an honorary title just short of knighthood.

'Coercive Bargaining'

For actors, a meeting with Mr. Weinstein could yield dazzling rewards: scripts, parts, award campaigns, magazine coverage, influence on lucrative endorsement deals. He knew how to blast small films to box office success, and deliver polished dramas like "The King's Speech" and popular attractions like the "Scary Movie" franchise. Mr. Weinstein's films helped define femininity, sex and romance, from Catherine Zeta-Jones in "Chicago" to Jennifer Lawrence in "Silver Linings Playbook."

But movies were also his private leverage. When Mr. Weinstein invited Ms. Judd to breakfast in Beverly Hills, she had been shooting the thriller "Kiss the Girls" all night, but the meeting seemed too important to miss. After arriving at the hotel lobby, she was surprised to learn that they would be talking in his suite; she decided to order cereal, she said, so the food would come quickly and she could leave.

Mr. Weinstein soon issued invitation after invitation, she said. Could he give her a massage? When she refused, he suggested a shoulder rub. She rejected that too, she recalled. He steered her toward a closet, asking her to help pick out his clothing for the day, and then toward the bathroom. Would she watch him take a shower? she remembered him saying.

"I said no, a lot of ways, a lot of times, and he always came back at me with some new ask," Ms. Judd said. "It was all this bargaining, this coercive bargaining."

To get out of the room, she said, she quipped that if Mr. Weinstein wanted to touch her, she would first have to win an Oscar in one of his movies. She recalled feeling "panicky, trapped," she said in the interview. "There's a lot on the line, the cachet that came with Miramax."



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Not long afterward, she related what had happened to her mother, the singer Naomi Judd, who confirmed their conversation to a Times reporter. Years later, Ashley Judd appeared in two Weinstein films without incident, she said. In 2015, she shared an account of the episode in the hotel room with “Variety” without naming the man involved.

In 1997, Mr. Weinstein reached a previously undisclosed settlement with Rose McGowan, then a 23-year-old-actress, after an episode in a hotel room during the Sundance Film Festival. The \$100,000 settlement was “not to be construed as an admission” by Mr. Weinstein, but intended to “avoid litigation and buy peace,” according to the legal document, which was reviewed by The Times. Ms. McGowan had just appeared in the slasher film “Scream” and would later star in the television show “Charmed.” She declined to comment.

Just months before Ms. O’Connor wrote her memo, a young female employee quit after complaining of being forced to arrange what she believed to be assignments for Mr. Weinstein, according to two people familiar with her departure. The woman, who asked not to be identified to protect her privacy, said a nondisclosure agreement prevented her from commenting.

Soon, complaints about Mr. Weinstein’s behavior prompted the board of his company to take notice.

In March 2015, Mr. Weinstein had invited Ambra Battilana, an Italian model and aspiring actress, to his TriBeCa office on a Friday evening to discuss her career. Within hours, she called the police. Ms. Battilana told them that Mr. Weinstein had grabbed her breasts after asking if they were real and put his hands up her skirt, the police report says.

The claims were taken up by the New York Police Department’s Special Victims Squad and splashed across the pages of tabloids, along with reports that the woman had worked with investigators to secretly record a confession from Mr. Weinstein. The Manhattan district attorney’s office later declined to bring charges.

But Mr. Weinstein made a payment to Ms. Battilana, according to people familiar with the settlement, speaking on the condition of anonymity about the confidential agreement.

The public nature of the episode concerned some executives and board members of the Weinstein Company. (Harvey and Bob Weinstein together own 42 percent of the privately held business.) When several board members pressed Mr. Weinstein about it, he insisted that the woman had set him up, colleagues recalled.

Ms. Battilana had testified in court proceedings against associates of former Prime Minister Silvio Berlusconi of Italy who are accused of procuring women for alleged sex parties, and the Italian news media also reported that, years ago, Ms. Battilana accused a septuagenarian boyfriend of sexual harassment, a complaint that was apparently dismissed. Ms. Battilana did not respond to requests for comment. Her lawyer, Mauro Rufini, could not be reached for comment.



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After the episode, Lance Maerov, a board member, said he successfully pushed for a code of behavior for the company that included detailed language about sexual harassment.

Then Ms. O'Connor's memo hit, with page after page of detailed accusations. In describing the experiences of women at the company, including her own, she wrote, "The balance of power is me: 0, Harvey Weinstein: 10."

She was a valued employee — Mr. Weinstein described her as "fantastic," "a great person," "a brilliant executive" — so the complaint rattled top executives, including Bob Weinstein. When the board was notified of it by email, Mr. Maerov insisted that an outside lawyer determine whether the allegations were true, he said in an interview.

But the inquiry never happened. Mr. Weinstein had reached a settlement with Ms. O'Connor, and there was no longer anything to investigate.

"Because this matter has been resolved and no further action is required, I withdraw my complaint," Ms. O'Connor wrote in an email to the head of human resources six days after sending her memo. She also wrote a letter to Mr. Weinstein thanking him for the opportunity to learn about the entertainment industry.

Discussion Questions

1. Define sexual harassment.

According to the United States Equal Employment Opportunity Commission (EEOC):

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when

- 1. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,*
- 2. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individuals, or*
- 3. such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. 29 C.F.R. § 1604.11(1980).*

2. Describe the law(s) that prohibit(s) sexual harassment.



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Title VII of the Civil Rights Act of 1964, the landmark legislation that outlaws discrimination based on sex, race, color, national origin, or religion, prohibits sexual harassment. As interpreted, Title VII of the Civil Rights Act of 1964 includes sexual harassment as an illegal form of sex discrimination.

3. Does it surprise you that events like the ones described in this article continue to occur, despite well-established sexual harassment law and the potential liability the aggressor faces for violating such law? Explain your response.

This is an opinion question, so student responses may vary.

Article 2: “Army Sacks General for Sexy Texts to Wife of a Sergeant”

<https://www.usatoday.com/story/news/politics/2017/10/15/army-sacks-general-sexy-texts-wife-sergeant/765070001/>

Note: In addition to the article, please also refer to the two videos included at the above-referenced internet address.

According to the article, the Army has sacked a two-star general who sent flirty messages to the wife of an enlisted soldier at his post in Italy, including one in which he referred to the woman as a "HOTTIE."

Maj. Gen. Joseph Harrington until last month had commanded U.S. Army Africa from his post in Europe. The media first reported about the Facebook messages, triggering an inspector general's investigation, Harrington's suspension and now his firing.

Harrington's dismissal was "due to a loss of confidence in his ability to command," Army Col. Patrick Seiber, a spokesman, said in a statement. "The Army has been investigating allegations related to Maj. Gen. Harrington's communications with the spouse of an enlisted soldier; however, since the review of the investigation is still ongoing, we can provide no further comment at this time."

Harrington's removal is likely a career-killer for an officer whose future had seemed bright. He had been a top aide to the former Chairman of the Joint Chiefs of Staff, Army Gen. Martin Dempsey. Like several generals before him who have been snared in sex scandals, Harrington will probably be reassigned until the investigation is complete and then a board of officers will determine the rank in which he last served satisfactorily. That will determine his rank in retirement.

Ending Harrington's career is the appropriate punishment, if this is a single incident, said Don Christensen, the Air Force's former chief prosecutor and president of Protect Our Defenders, a group that advocates on behalf of victims of sexual assault in the military. The Army must conduct a thorough investigation to determine if there are other instances or victims, he said.



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“It would be rather unusual for him to have done this for the first time in his 50s,” Christensen said.

The Army has seen several senior officers felled by scandal in recent years. They include Lt. Gen. Ron Lewis, the former top adviser to then-Defense Secretary Ash Carter, whose lavish tabs at strip bars on an official trip killed his career. He was stripped of a star, as was Maj. Gen. Wayne Grigsby, whose relationship with a subordinate woman drew scrutiny. The Air Force and Navy have seen the careers of senior officer end in disgrace.

Most recently, the most senior ranks of the Navy have come under scrutiny after it was revealed that the spokesman for the Chief of Naval operations had been allowed to stay on the job after being accused of sexual misconduct while dressed as Santa Claus at an office Christmas party.

That story triggered a call by Sen. Kirsten Gillibrand, D-N.Y., and a member of the Armed Services Committee, for an inspector general's investigation to determine if Navy Adm. John Richardson showed favoritism to his aide, Cdr. Chris Servello.

Sen. Kirsten Gillibrand criticized the U.S. Armed Forces, saying, "The military still does not take these cases of sexual assault and sexual harassment seriously."

Harrington and the woman, decades his junior, exchanged dozens of messages, many of them personal and referring to her appearance. He called her a "HOTTIE" in one, and others in which he acknowledged her husband, a sergeant, would not be happy with the relationship.

Harrington also asked her to delete the messages. She didn't, and many of them were shared with the media.

Until he was suspended, Harrington had the authority to order cases to go to court martial, including those involving sexual assault and harassment, as well as any involving the woman's husband.

Discussion Questions

1. In your reasoned opinion, does merely referring to someone as a “HOTTIE” (see the article) constitute sexual harassment? Why or why not?

As interpreted by the Equal Employment Opportunity Commission (EEOC) and federal law, sexual harassment liability can result from one severe offense, or a series of pervasive, relatively minor offenses. It is important to note that the Army has a high degree of legal autonomy and is governed by its own Uniform Code of Military Justice (UCMJ) and other internal regulations. In this particular case, the Army made its own decision regarding Maj. Gen. Joseph Harrington's dismissal.

2. Based on the information set forth in this article, is the termination of Maj. Gen. Joseph Harrington's career the appropriate punishment in this case? Why or why not?



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This is an opinion question, so student responses may vary.

3. As the article indicates, Sen. Kirsten Gillibrand has criticized the U.S. Armed Forces, saying, "The military still does not take these cases of sexual assault and sexual harassment seriously." Do you agree with Sen. Gillibrand's assertion? Why or why not?

Senator Gillibrand's claim that "(t)he military still does not take these cases of sexual assault and sexual harassment seriously" would appear to be controverted by the Army's decision to terminate Maj. Gen. Harrington.

Article 3: "Trump's Lawyers: Courts Have No Say over His Twitter Feed"

<http://wset.com/news/nation-world/trumps-lawyers-courts-have-no-say-over-his-twitter-feed>

According to the article, President Donald Trump can block his critics from following him on Twitter without violating the First Amendment despite a lawsuit's claims that it violates the Constitution to do so, government lawyers say.

Trial attorneys with the U.S. Department of Justice in Washington submitted papers recently to a New York federal judge, saying a lawsuit challenging Trump over the issue should be thrown out.

"The President uses the account for his speech, not as a forum for the private speech of others," the lawyers wrote. "And his decision to block certain users allows him to choose the information he consumes and the individuals with whom he interacts — expressive choices that public officials retain the right to make, even when those choices are made on the basis of viewpoint."

They say the president's decision to stop some individuals from following him on his 8-year-old @realDonaldTrump account, which has over 40 million followers, is not state action. Public officials, they add, sometimes announce a new policy initiative or make statements about public policy on the campaign trail or in meetings with leaders of a political party.

"The fact that an official chooses to make such an announcement in an unofficial setting does not retroactively convert into state action the decision about which members of the public to allow into the event," the lawyers said.

The lawyers said his Twitter account "is not a right conferred by the presidency," but rather is a private platform run by a private company.

In a warning that ruling against Trump might threaten the constitutional separation of powers, the lawyers wrote that "courts are prohibited from enjoining the discretionary conduct of the President."

The lawsuit was filed in July by the Knight First Amendment Institute at Columbia University and seven people rejected by Trump after criticizing the president.



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Jameel Jaffer, the institute's director, said Trump's lawyers were wrong in their legal analysis and to accept their statement that the courts had no say over the issue could have "far-reaching and intolerable" implications.

"The president isn't above the law," Jaffer said in a statement.

Katie Fallow, a senior staff attorney with the institute, said the argument by government lawyers that Trump's Twitter feed is a personal account "is not defensible given that the president routinely uses it for official purposes and both the president and his aides have publicly described the account as official."

Discussion Questions

1. Describe the First Amendment to the United States Constitution's "free speech" provision.

According to the First Amendment to the United States Constitution, "Congress shall make no law...abridging the freedom of speech."

2. Assess the legal argument(s) of President Trump's attorneys regarding this issue.

President Trump's attorneys have made the following three (3) related arguments regarding this case:

- a. His Twitter account is intended for his speech, not a forum for the private speech of others;*
- b. His decision to stop some individuals from following him on his Twitter account is not state (i.e., government) action; and*
- c. His Twitter account is not a "right conferred by the presidency," but a private platform run by a private company.*

In your author's opinion, regardless of what one might think regarding President Trump's decisions to use Twitter as a primary method of communication and to block certain individuals from following him on his Twitter account, there is no First Amendment violation. Opponents of President Trump have a virtually limitless number of opportunities (including forums) within which to express their opposition to the president and his policies.

3. Assess the legal argument(s) of the plaintiffs (the Knight First Amendment Institute at Columbia University and seven people rejected by President Trump on Twitter after criticizing the president) in this case.



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The essence of the plaintiffs' argument is that President Trump's Twitter feed, although described by Trump's attorneys as a personal account, is an official (i.e., presidential) communications platform. In your author's opinion, even assuming arguendo that Trump's Twitter feed is an official communications platform, President Trump's opponents have a host of information sources indicating specifically what he "tweets" on a daily basis, as well as a virtually limitless number of opportunities (including forums) within which to express their opposition to the president and his policies.



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Video Suggestions

Video 1: “Army Deserter Bowe Bergdahl Doubts He Could Get a Fair Trial after Trump Comments”

<http://abcnews.go.com/Politics/alleged-deserter-bowe-bergdahl-doubts-fair-trial-trump/story?id=50501256>

Note: In addition to the video, please also see the following article also included at the above-referenced internet address:

“Army Deserter Bowe Bergdahl Doubts He Could Get a Fair Trial after Trump Comments”

According to the article, former Taliban prisoner Sgt. Bowe Bergdahl pleaded guilty to charges of desertion and misbehavior before the enemy after a short military hearing at Fort Bragg, North Carolina recently after expressing doubts that he could get a fair trial after campaign statements by Donald Trump.

Despite surviving five years in a Taliban cage, Bergdahl, Trump said in several campaign speeches as a presidential candidate, was a "traitor" who should be executed.

In an on-camera interview shot last year by a British filmmaker, Bergdahl says the words of the man who is now his commander in chief would have made a fair trial impossible.

"We may as well go back to kangaroo courts and lynch mobs that got what they wanted," Bergdahl says. "The people who want to hang me — you're never going to convince those people."

Bergdahl, a 501st Parachute Infantry Regiment trooper, walked off his combat outpost in Afghanistan in June 2009 and was quickly captured by the Taliban. During his five years in captivity with the Haqqani Network — the same Taliban faction that held American Caitlan Coleman and her family hostage for five years until they were freed last Wednesday — he endured what one U.S. official called the worst case of prisoner abuse since the Vietnam War.

He was released in 2014 in exchange for five Taliban prisoners at Guantanamo Bay — a deal that was harshly criticized on the campaign trail



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by then-candidate Trump, who called Bergdahl "garbage" and even suggested that he should have been summarily executed.

"You know, in the old days — bing, bong," Trump said as he mimicked firing a rifle. "When we were strong."

Bergdahl was released in 2014 in a prisoner exchange for five Taliban soldiers being held at Guantanamo Bay.

Speaking to British war filmmaker Sean Langan, who was held captive by the same Taliban group in 2008, Bergdahl says he wants to fight back against what he calls a false narrative fueled by conservative outlets like Fox News that sought to portray him as a traitor and jihadi sympathizer who had been persuaded to fight against the United States alongside his captors.

Such rumors are false, military officials have said.

"You know, it's just insulting, frankly," Bergdahl tells Langan. "It's very insulting, the idea that they would think I did that."

In 2014, then-Fox News correspondents Megyn Kelly and James Rosen reported on "secret documents" obtained by the network that purported to show Bergdahl had "shown affection" for his captors, converted to Islam and become a "mujahid," or jihadi.

According to Bergdahl, however, he thought the conditions in captivity might kill him before his captors could.

"It was getting so bad that I was literally looking at myself, you know, looking at joints, looking my ribs and just going, 'I'm going to die here from sickness, or I can die escaping,'" he says. "You know, it didn't really matter."

In his first on-camera interview, Bowe Bergdahl spoke with British filmmaker Sean Langan, who was also taken captive by the same Taliban group.

He attempted to escape twice, according to military officials, and he was severely punished after being recaptured. Terrence Russell, a military official who debriefs former U.S. captives for the U.S. Joint Personnel Recovery Agency, says Bergdahl was tortured in a way reminiscent of the brutality visited upon prisoners of war in Vietnam decades ago.

"When they recaptured him and brought him back, the next day they spread-eagled and secured him to a metal bed frame," Russell says to Langan in another video. "They took a plastic pipe ... and they started beating his feet and his legs repeatedly with this plastic pipe ... The idea was to just beat him and injure his legs and his feet so that he could not walk away again."

Bergdahl also says he was confined for more than four years to a cage that was only 7 feet by 6 feet.



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"From first year," Bergdahl says when asked how much time he spent in that cage. "So second, third, fourth and then into the fifth year."

It remains a mystery, however, why he walked off his post.

In his first on-camera interview, Bowe Bergdahl spoke with British filmmaker Sean Langan, who was also taken captive by the same Taliban group.

Another senior official who spoke to Langan for his documentary was retired Army Lt. Gen. Michael Flynn, who, as the former head of intelligence for special operations in Afghanistan and then as the director of the Defense Intelligence Agency, was deeply involved in the early search for Bergdahl. He also briefly served as Trump's national security adviser after working on his campaign, and he tells Langan that he "absolutely" believes Bergdahl left his base with the intention to meet the Taliban.

But Bergdahl disputes that, saying in a taped conversation with filmmaker Mark Boal that was broadcast in the second season of the "Serial" podcast that he walked off post in an attempt to report to senior officers that his platoon commander was "unfit" for his position.

Bergdahl has not been charged with any crime related to aiding the enemy.

Whatever his reasons were, at least two soldiers were seriously wounded during the search to find him, as the media first reported in 2014. In response to questions from Army Judge Col. Jeffery Nance on Monday, Bergdahl admitted multiple times that he did not fully appreciate the enormity of his actions.

"At the time, I had no thoughts anyone would come searching for me ... however looking back I see it was a very obvious mistake," Bergdahl said. "I believed they would notice me missing, but I didn't think they would pull off a crucial mission to look for one private."

After his guilty plea, the question remaining before the military is what form of punishment Bergdahl deserves. On that question, even Flynn doubts that justice would be best served by putting a former prisoner back in prison.

"So the guy deserted his men, his soldiers, his squad — no doubt," Flynn says. "[But] I don't think he should serve another day in any sort of confinement or jail or anything like that, because frankly, even though he put himself into this situation to a degree, we — the United States government and the United States military — put him in Afghanistan."

Discussion Questions

1. Describe the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution. Do constitutional principles of due process apply to military hearings/tribunals? Why or why not?



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According to the Fifth Amendment to the United States Constitution, “(n)o person shall be...deprived of life, liberty, or property, without due process of law...”

According to the Fourteenth Amendment to the United States Constitution, “(n)o State...shall...deprive any person of life, liberty, or property, without due process of law...”

In other words, in the United States judicial system, due process standards limit what both the federal and state governments can do regarding deprivation of life, liberty, or property.

As mentioned in response to Article 2 (“Army Sacks General for Sexy Texts to Wife of a Sergeant”), Discussion Question Number 2 of this newsletter, the Army has a high degree of legal autonomy and is governed by its own Uniform Code of Military Justice (UCMJ) and other internal regulations. With that being said, the Army does recognize its own version of due process.

2. Assess the propriety of then-presidential candidate Trump’s assertions in several campaign speeches, that Sgt. Bowe Bergdahl is a "traitor" who should be executed.

This is, in essence, an opinion question, so student responses to this question may vary.

3. Do you agree or disagree with Sgt. Bergdahl’s assertion that he may not receive a fair trial in this case? Explain your response.

This is an opinion question, so student responses to this question may vary. In large part, whether Sgt. Bergdahl receives a fair trial will depend on each juror’s ability to disregard (or ignore) Trump’s assertion that Bergdahl is a “traitor” who should be executed.

Video 2: “Hillary Clinton: Misogyny is ‘Endemic’”

<http://www.cnn.com/2017/10/15/politics/clinton-endemic-misogyny-cnntv/index.html>

Note: In addition to the video, please also see the following article included at the above-referenced internet address:

“Hillary Clinton: Misogyny is ‘Endemic’”

According to the article, Hillary Clinton slammed what she called "endemic" sexism and misogyny in America during an interview with Fareed Zakaria.

Clinton, who was interviewed by Zakaria on his show, "GPS," said sexism was so inherent that she purposely hadn't highlighted her career history of fighting for women's rights when she ran for president in 2016. However, she admitted that with the benefit of hindsight, she "could have tried harder" to do so.



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"I'm a middle-class girl from the middle of the country, and so I always struggled with like, OK, so what's my story. And it suddenly dawned on me that I was the beneficiary of these radical changes in, you know, women's rights and opportunities that began in the '60s and continue and that I could have and maybe should have tried harder to tell that story," she conceded.

"I never thought there would be that receptive an audience," she emphasized.

This was in contrast, she pointed out, to former Presidents Barack Obama and her husband, Bill Clinton, whose stories were more appealing to the public.

"People immediately saw this arc of, you know, poverty in Hope, Arkansas, from a biracial family in Hawaii, how really impressive and exciting their stories were," she said.

Clinton said the election of Donald Trump, despite his "level of sexism," was "Exhibit A of what we're up against," and observed what she called "a backlash against women speaking out."

"I think sexism and misogyny are endemic in our society," she said.

"You see it online, as women express an opinion and then are totally deluged. You see it in Silicon Valley, you see it in the media, you see it in a lot of places where women's advancement has gone very far, much further than it certainly seemed at the time when I was coming of age," she told Zakaria. However, she noted that she had been encouraged by those who "push back" against sexism, especially men who are the "fathers of daughters, and husbands of wives," who "care about fundamental fairness," and who support female expression.

"There seems now to be a willingness by more and more women and girls to claim their rights in a very explicit way, not an apologetic way. Not like, 'Oh, you know, excuse me, let me express my opinion,' but 'No, I have an opinion. I want to tell you what that opinion is,'" she said.

However, Clinton lamented that the word "feminist" still seemed to be "a word nobody wants to use."

"Feminism is not about women having more rights. It's about women having equal rights, in the workplace, in the politics of a society, in the culture, having the right to be yourself and to be able to express that, and to have that both appreciated and providing a platform to go as far as your talent and hard work will take you," she said.

Discussion Questions

1. Define "sexism" and "misogyny."

Sexism is defined as prejudice, stereotyping, or discrimination, typically against women, on the basis of sex.

Misogyny is defined as dislike of, contempt for, or ingrained prejudice against women.



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2. Do you agree or disagree with Hillary Clinton's assertion that the word "feminist" appears to be "a word nobody wants to use?" Explain your response.

This is an opinion question, so student responses may vary.

3. Do you agree or disagree with Mrs. Clinton's assertion that sexism and misogyny are "endemic" in America? Explain your response.

This is an opinion question, so student responses may vary.



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Of Special Interest

This section of the newsletter addresses the opioid crisis in the United States.

Ethical Dilemma

“Ex-DEA Agent: Opioid Crisis Fueled by Drug Industry and Congress”

<https://www.cbsnews.com/news/ex-dea-agent-opioid-crisis-fueled-by-drug-industry-and-congress/>

Note: In addition to the video, please also see the following article included at the above-referenced internet address:

“Ex-DEA Agent: Opioid Crisis Fueled by Drug Industry and Congress”

According to the article, in the midst of the worst drug epidemic in American history, the U.S. Drug Enforcement Administration's ability to keep addictive opioids off U.S. streets was derailed -- that according to Joe Rannazzisi, one of the most important whistleblowers ever interviewed by 60 Minutes. Rannazzisi ran the DEA's Office of Diversion Control, the division that regulates and investigates the pharmaceutical industry. Now in a joint investigation by 60 Minutes and The Washington Post, Rannazzisi tells the inside story of how, he says, the opioid crisis was allowed to spread -- aided by Congress, lobbyists, and a drug distribution industry that shipped, almost unchecked, hundreds of millions of pills to rogue pharmacies and pain clinics providing the rocket fuel for a crisis that, over the last two decades, has claimed 200,000 lives.

JOE RANNAZZISI: This is an industry that's out of control. What they wanna do, is do what they wanna do, and not worry about what the law is. And if they don't follow the law in drug supply, people die. That's just it. People die.

Joe Rannazzisi is a tough, blunt former DEA deputy assistant administrator with a law degree, a pharmacy degree and a smoldering rage at the unrelenting death toll from opioids. His greatest ire is reserved for the distributors -- some of them multibillion dollar, Fortune 500 companies. They are the middlemen that ship the pain pills from manufacturers, like Purdue Pharma and Johnson & Johnson to drug stores all over the country. Rannazzisi accuses the distributors of fueling the opioid epidemic by turning a blind eye to pain pills being diverted to illicit use.



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JOE RANNAZZISI: This is an industry that allowed millions and millions of drugs to go into bad pharmacies and doctors' offices, that distributed them out to people who had no legitimate need for those drugs.

BILL WHITAKER: Who are these distributors?

JOE RANNAZZISI: The three largest distributors are Cardinal Health, McKesson, and AmerisourceBergen. They control probably 85 or 90 percent of the drugs going downstream.

BILL WHITAKER: You know the implication of what you're saying, that these big companies knew that they were pumping drugs into American communities that were killing people.

JOE RANNAZZISI: That's not an implication, that's a fact. That's exactly what they did.

In the late 1990s, opioids like oxycodone and hydrocodone became a routine medical treatment for chronic pain. Drug companies assured doctors and congressional investigators -- as in this 2001 hearing -- that the pain medications were effective and safe.

Purdue Executive to Congress in 2001: Addiction is not common, addiction is rare in the pain patient who is properly managed.

With many doctors convinced the drugs posed few risks, prescriptions skyrocketed and so did addiction.

Many people who'd become addicted to painkillers turned to shady pill mills -- pain clinics with rogue doctors to write fraudulent prescriptions and complicit pharmacists to fill them -- one-stop shopping for controlled narcotics.

JOE RANNAZZISI: Pain clinics overnight popping-up -- off an entrance ramp, or an exit ramp on an interstate. And all of a sudden there's a pain clinic there.

BILL WHITAKER: Had you ever seen anything like that before?

JOE RANNAZZISI: Never. In fact-- it was my opinion that this made the whole crack epidemic look like nothing.

JOE RANNAZZISI These weren't kids slinging crack on the corner. These were professionals who were doing it. They were just drug dealers in lab coats.

BILL WHITAKER: You know what a chilling picture that paints?

JOE RANNAZZISI: I do, 'cause I watched them get arrested, and I was the one who approved the cases.

Despite arrests of unscrupulous purveyors, opioids kept flooding the black market. The death toll kept rising. This map shows the U.S. death rate from drug overdose in 1999. By 2015, the map



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looked like this. Most of these deaths were opioid related. Joe Rannazzisi told us prosecuting crooked doctors and pharmacists wasn't stemming the epidemic, so he decided to move up the food chain.

JOE RANNAZZISI: There had to be a choke point. And the choke point was the distributors.

BILL WHITAKER: What took you so long to go to that choke point of the distributors?

JOE RANNAZZISI: This was all new to us. We weren't seeing just some security violations, and a few bad orders. We were seeing hundreds of bad orders that involved millions and millions of tablets. That's when we started going after the distributors.

A distributor's representative told us the problem is not distributors but doctors who overprescribe pain medication, but the distributors know exactly how many pills go to every drug store they supply. And they are required under the Controlled Substances Act to report and stop what the DEA calls "suspicious orders" -- such as unusually large or frequent shipments of opioids. But DEA investigators say many distributors ignored that requirement.

JIM GELDHOF: They had a business plan. Their plan was to sell a lotta pills and make a lot of money. And they did both of those very well.

Jim Geldhof, a 40-year DEA veteran, ran pharmaceutical investigations from dea's detroit field office. Frank Younker supervised the agency's operations in Cincinnati. Joe Rannazzisi was their supervisor. They saw distributors shipping thousands of suspicious orders. One example: a pharmacy in Kermit, West Virginia, a town of just 392 people, ordered nine million hydrocodone pills over two years.

JIM GELDHOF: All we were looking for is a good-faith effort by these companies to do the right thing. And there was no good-faith effort. Greed always trumped compliance. It did every time. But don't sit here and tell me that, "Well, we're not sure what a suspicious order is." Really? I mean this-- this co-- this pharmacy just bought 50 times an amount that a normal pharmacy purchases and they are in a town of 5,000 people. You don't know that that's suspicious? I mean at some point you're just turning a blind eye to it.

BILL WHITAKER: These companies are a big reason for this epidemic?

JIM GELDHOF: Yeah, absolutely they are.

JIM GELDHOF: And I can tell you with 100 percent accuracy that we were in there on multiple occasions trying to get them to change their behavior. And they just flat out ignored us.

In 2008, the DEA slapped McKesson, the country's largest drug distributor, with a \$13.2 million dollar fine. That same year, Cardinal Health paid a \$34 million fine. Both companies were penalized by the DEA for filling hundreds of suspicious orders -- millions of pills.



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Over the last seven years, distributors' fines have totaled more than \$341 million. The companies cried foul and complained to Congress that DEA regulations were vague and the agency was treating them like a foreign drug cartel. In a letter, the healthcare distribution alliance, which represents distributors, told us they wanted to work with the DEA. Effective enforcement, they wrote, "must be a two-way street."

BILL WHITAKER: Frank, you said you were tough but fair. The industry says you guys were unfair. That you were taking unfair hits at them.

FRANK YOUNKER: Tell that to the people who lost their sons and daughters. See how fair they think it is.

In 2011, more than 17,000 Americans died from opioid prescription overdoses. That same year Cardinal Health, the second largest distributor, started pushing back at Joe Rannazzisi. The companies' attorneys went over his head and called his bosses at the Justice Department, who called in Rannazzisi to have him explain his tactics.

JOE RANNAZZISI: And it in-- infuriated me that I was over there, trying to explain what my motives were or why I was going after these corporations? And when I went back to the office, and I sat down with my staff, I basically said, "You know, I just got questioned on why we're doing-- why we're doing what we're doing. This is-- this-- this is-- now this is war. We're going after these people and we're not going to stop."

BILL WHITAKER: Do you really think you were getting this pushback because you were going after big companies, Fortune 500 companies?

JOE RANNAZZISI: I have no doubt in my mind. So the question is, why would it be any different for these companies as compared to the small mom-and-pops that we had done hundreds of times before.

BILL WHITAKER: What's the difference?

JOE RANNAZZISI: The difference is, is they have a lot of money, and a lot of influence. And that's the difference.

Rannazzisi says the drug industry used that money and influence to pressure top lawyers at the DEA to take a softer approach. Former DEA attorney Jonathan Novak said it divided the litigation office. He said in 2013, he noticed a sea change in the way prosecutions of big distributors were handled. Cases his supervisors once would have easily approved, now weren't good enough.

JONATHAN NOVAK: We had been achieving incredible success in an almost unstoppable wave, and then suddenly it stopped.

Novak prosecuted cases brought to him by Joe Rannazzisi's investigators. He said his caseload started to slow down dramatically.



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JONATHAN NOVAK: These were not cases where it was black -- where it was grey... These were cases where the evidence was crystal clear that there was wrongdoing going on.

He said his bosses started to bog down the system, demanding ever more evidence.

JONATHAN NOVAK: But now, three undercovers by four officers over three months, that wouldn't be enough. Maybe we need an expert to explain how recording equipment works. Maybe we need an expert to explain-- the system for prescribing. What's a prescription? It felt honestly confusing and almost insane. Where was this coming from?

Jim Geldhof says his investigations were getting bogged down too. He was looking into one mid-sized distributor that had shipped more than 28 million pain pills to pharmacies in West Virginia over five years. About 11 million of those pills wound up in Mingo County, population 25,000. Suddenly, he said, he ran into roadblocks from one of attorney Jonathan Novak's bosses.

JIM GELDHOF: "I spent a year working on this case. I sent it down there and it's never good enough. Every time I talked to this guy he wants something else. And I get it for 'em and that's still not good enough." You know? And this goes on and on and on. When this-- these roadblocks keep-- get thrown up in your face, at that point you know they just don't want the case.

BILL WHITAKER: But this is the DEA. That's what you're supposed to do.

FRANK YOUNKER: Yeah.

JIM GELDHOF: You would think.

The DEA's toughest sanction is to freeze distributors shipments of narcotics -- a step they haven't taken in almost two years.

JONATHAN NOVAK: I mean there's no denying the numbers. At the height of the opioid epidemic, inexplicably, they slowed down.

He said one big reason for the slowdown: DC's notorious revolving door. Novak said he saw a parade of DEA lawyers switch sides and jump to high-paying jobs defending the drug industry. Once they'd made the leap, they lobbied their former colleagues, novak's bosses, and argued the dea's cases were weak and ultimately would lose in court. It had a chilling effect on dea litigators.

JONATHAN NOVAK: Some of the best and the brightest former DEA attorneys are now on the other side and know all of the -- the -- the weak points. Their fingerprints are on, memos and policy and -- and -- and emails going out where you see this concoction of what they might argue in the future.

BILL WHITAKER: You and the other attorneys had been winning these cases.

JONATHAN NOVAK: All of the time.



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The Justice Department is the agency that oversees the DEA. A senior attorney at the department at the time, told us in a statement, "Department of Justice leadership was not advised that DEA had changed enforcement strategies...Any significant policy shift should have been brought to [our] attention."

FRANK YOUNKER: There was a lotta pills, a lotta people dyin', and-- and we had tools in our toolbox to try to use and stem that flow. But it seemed down in headquarters that that toolbox was shut off.

BILL WHITAKER: You're watching an out of control epidemic and yet you both feel that at the height of this epidemic your-- your-- your hands were being tied?

FRANK YOUNKER: Yeah, if it's a war on drugs then treat it like a war.

JOE RANNAZZISI: Addiction rate was still increasing. The amount of people seeking treatment was still increasing. It was all increasing. Still, the amount of prescriptions were increasing. And we started slowing down.

As cases nearly ground to a halt at DEA, the drug industry began lobbying Congress for legislation that would destroy DEA's enforcement powers. That part of the story when we return.

In 2013, Joe Rannazzisi and his DEA investigators were trying to crack down on big drug distributors that ship drugs to pharmacies across the country. He accused them of turning a blind eye as millions of prescription pain pills ended up on the black market. Then, a new threat surfaced on Capitol Hill. With the help of members of Congress, the drug industry began to quietly pave the way for legislation that essentially would strip the DEA of its most potent tool in fighting the spread of dangerous narcotics.

JOE RANNAZZISI: If I was gonna write a book about how to harm the United States with pharmaceuticals, the only thing I could think of that would immediately harm is to take the authority away from the investigative agency that is trying to enforce the Controlled Substances Act and the regulations implemented under the act. And that's what this bill did.

The bill, introduced in the House by Pennsylvania Congressman Tom Marino and Congresswoman Marsha Blackburn of Tennessee, was promoted as a way to ensure that patients had access to the pain medication they needed.

Jonathan Novak, who worked in the DEA's legal office, says what the bill really did was strip the agency of its ability to immediately freeze suspicious shipments of prescription narcotics to keep drugs off U.S. streets -- what the DEA calls diversion.

JONATHAN NOVAK: You're not gonna be able to hold anyone higher up the food chain accountable.

BILL WHITAKER: Because of this law?



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JONATHAN NOVAK: Because of this law

BILL WHITAKER: How hard does it make your job in going after the wholesale distributors?

JONATHAN NOVAK: I would say it makes it nearly impossible.

This 2015, Justice Department memo we obtained supports that. It states the bill "could actually result in increased diversion, abuse, and public health and safety consequences."

JONATHAN NOVAK: They are toothless. I don't know how they stop this now. It's a very sad state of affairs.

Who drafted the legislation that would have such a dire effect? The answer came in another internal Justice Department email released to 60 Minutes and The Washington Post under the Freedom of Information Act: "Linden Barber used to work for the DEA. He wrote the Marino bill."

Ad: Hi, My name is Linden Barber. I'm the director of the DEA litigation and compliance practice at Quarles and Brady's Health Law Group.

Barber went through the revolving door. He left his job as associate chief counsel of the DEA and within a month joined a law firm where he lobbied Congress on behalf of drug companies and wrote legislation. He advertised what he could offer a client facing DEA scrutiny.

Ad continued: If you have a DEA compliance issue, or you're facing a government investigation, or you're having administrative or civil litigation involving the Controlled Substances Act, I'd be happy to hear from you.

JONATHAN NOVAK: It's not surprising that this bill, that has intimate knowledge of the way that DEA, you know, regulations are enforced, the way that those laws work, was written by someone who spent a lot of time there, charged a lot of cases there.

BILL WHITAKER: Knew the workings?

JONATHAN NOVAK: Very much so.

Eric Holder was the attorney general at the time, he warned the new law would undermine law enforcement efforts to "prevent communities and families from falling prey to dangerous drugs."

The major drug companies -- distributors, chain drug stores and pharmaceutical manufacturers -- mobilized too. According to federal filings, during the two years the legislation was considered and amended, they spent \$102 million lobbying Congress on the bill and other legislation, claiming the DEA was out of control, making it harder for patients to get needed medication.

A particular thorn for the drug industry and the bill's sponsors was Joe Rannazzisi. He had been a witness before Congress more than 30 times and was called on again to testify about this bill.



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JOE RANNAZZISI: 16,651 people in 2010 died of opiate overdose. OK. Opiate-associated overdose. This is not a game. We are not playing a game.

MARSHA BLACKBURN: Nobody is saying it is a game, sir. We're just trying to craft some legislation. Let me ask you...

Rannazzisi, who admits to having a temper, felt so strongly about the damage the bill could do, he lashed out at Marino's committee staffers.

TOM MARINO: It is my understanding that Joe Rannazzisi, a senior DEA official, has publicly accused we sponsors of the bill of --quote supporting criminals --unquote. This offends me immensely.

BILL WHITAKER: Congressman Marino from Pennsylvania said that you accused him of helping criminals.

JOE RANNAZZISI: I've never accused Congressman Marino of helping criminals. I said that this bill is going to protect defendants that we have under investigation. And if Congressman Marino thinks I accused him of something, I don't know what to tell you.

But a week after the hearing on legislation that would hobble the DEA's enforcement authority, Marino and Blackburn wrote the inspector general for the Justice Department, demanding that Rannazzisi be investigated for trying to quote "intimidate the United States Congress."

MATT MURPHY: There were people in industry that didn't care much for Joe Rannazzisi, wanted him silenced, or wanted him outta the way. Basically unceremoniously kick him to the curb.

After almost 30 years with the DEA, Matt Murphy, Rannazzisi's lieutenant, became a consultant for the drug industry -- an industry with which he's now disillusioned. He said he was shocked at the animosity he witnessed toward his friend and former boss.

MATT MURPHY: My theory is that the industry through lobbying groups donated -- a certain amount of money to politicians to get a law passed that favored the industry. And also maybe using those political ties to have Joe removed.

BILL WHITAKER: Congress launched an investigation of him?

MATT MURPHY: Right.

BILL WHITAKER: And he was out?

MATT MURPHY: Yeah, pressure was put on for him to be moved out. I'm pretty confident of that. There was no reason to take the guy who was the most qualified person in DEA to run the Office of Diversion Control out of the Office of Diversion Control.



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The investigation requested by Congressman Marino against Rannazzisi went nowhere, but soon after, Rannazzisi was stripped of his responsibilities. He says he went from supervising 600 people to supervising none -- so he resigned.

JOE RANNAZZISI: We were totally focused on all these people dying and all these drugs being diverted. And we were not really looking at our flanks, waiting for somebody to come after us. So maybe that was my fault. And I just never realized that that was something that would have occurred.

In the end, the DEA signed off on the final version of the "Marino bill." A senior DEA representative told us the agency fought hard to stop it, but in the face of growing pressure from Congress and industry lobbyists, was forced to accept a deal it did not want. The bill was presented to the Senate in March of 2016.

Majority Leader Mitch McConnell brought the legislation to the floor and it passed the Senate through unanimous consent with no objections and no recorded votes.

It passed the House the same way, with members of Congress chatting away on the floor.

A week later, with no objections from Congress or the DEA, President Barack Obama signed it into law without ceremony or the usual bill signing photo-op. Marino issued a press release the next day claiming credit for the legislation.

The drug distributors declared victory and told us the new law would in no way limit DEA's enforcement abilities. But DEA chief administrative law judge, John J. Mulrooney, who must adjudicate the law, wrote in a soon-to-be-published Marquette Law Review article we obtained, that the new legislation "would make it all but...impossible" to prosecute unscrupulous distributors.

JOE RANNAZZISI: I just don't understand why Congress would pass a bill that strips us of our authority in the height of an opioid epidemic in places like Congressman Marino's district and Congressman Blackburn's district. Why are these people sponsoring bills, when people in their backyards are dying from drugs that are coming from the same people that these bills are protecting?

BILL WHITAKER: Why do you think that is?

JOE RANNAZZISI: Because I think that the drug industry -- the manufacturers, wholesalers, distributors and chain drugstores -- have an influence over Congress that has never been seen before. And these people came in with their influence and their money and got a whole statute changed because they didn't like it.

Seven months after the bill became law, Congressman Marino's point man on the legislation, his Chief of Staff Bill Tighe, became a lobbyist for the National Association of Chain Drug Stores.

Since the crackdown on the distributors began, the pharmaceutical industry and law firms that represent them have hired at least 46 investigators, attorneys and supervisors from the DEA, including 32 directly from the division that regulates the drug industry.



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Mike Gill, chief of staff for the DEA administrator, was hired by HDJN, one of the country's largest healthcare law firms.

And most recently, Jason Hedges, a senior DEA attorney overseeing enforcement cases during the slowdown, joined the pharmaceutical and regulatory division of DC-based law firm Hogan Lovells. He declined to speak with us.

AmerisourceBergen and McKesson declined our requests to appear on camera.

So did Cardinal Health, which three months ago hired the author of the bill, Linden Barber, as senior vice president. With Scott Higham and Lenny Bernstein of the Washington Post, we called the head of public relations of Cardinal and asked to speak with Barber.

BILL WHITAKER: This is Bill Whitaker I'm a correspondent with 60 Minutes, I was calling to see if, um, we could speak with Linden Barber.

We were told the company would not make him available.

We also tried for several months to speak to Congressman Marino. Finally, we went to his DC office.

BILL WHITAKER: Hello. I'm Bill Whitaker with, uh, 60 Minutes.

MARINO STAFFER: Yes.

BILL WHITAKER: And we'd like to speak with Congressman Marino if we could.

MARINO STAFFER: I'm going to have to refer you to our Chief of Staff.

We were told he was not available...

MARINO CHIEF OF STAFF: Can you please turn the camera off and we have to ask the camera to leave the office.

His staff then called the Capitol Hill Police on us.

CAPITOL POLICE: Just accept the uninvite and leave the area.

When Joe Rannazzisi looks back he has one regret.

Joe Rannazzisi: You know all these people that died happened under my watch. The one thing I wanted to do, the one thing that I just thought would have the most impact, is to lock up, arrest one of these corporate officers. You arrest a corporate officer. You arrest somebody that's involved in the decision process, knowing what the law is. If you make that arrest, then everybody sits up and takes notice because three-piece-suit guys just don't do well in prison. They don't.



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Joe Rannazzissi now consults with state attorneys general who have filed suit against distributors for their role in the opioid crisis. Tennessee Congresswoman Marsha Blackburn is running for the Senate. As for Congressman Marino, he was just nominated to be President Donald Trump's new drug czar.

Discussion Questions

1. In your reasoned opinion, does the United States Congress have a responsibility (legal and/or ethical) to address the opioid “crisis?” Explain your response.

In its position as the legislative (law-making) branch of the federal government, and given its responsibility to establish and advance public policy in the United States, Congress arguably has both a legal and an ethical obligation to address the opioid problem.

2. In your reasoned opinion, does the pharmaceutical industry have a responsibility (legal and/or ethical) to address the opioid “crisis?” Explain your response.

In your author’s opinion, even if the pharmaceutical industry complies with laws regarding the manufacture, sale and use of opioids, it still has an ethical obligation to collaborate with the United States Congress in addressing the opioid problem. Business has an ethical responsibility to “address the ills of its own wreckage.”

3. In your reasoned opinion, what efforts (if any) should be undertaken to control the lobbying efforts of the pharmaceutical industry in Congress? Explain your response.

This is an opinion question soliciting specific remedies, so student responses will likely vary.



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Of Special Interest

This section of the newsletter will assist you in addressing Article 1 (“Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades”), Article 2 (“Army Sacks General for Sexy Texts to Wife of a Sergeant”), and Video 2 (“Hillary Clinton: Misogyny is ‘Endemic’”) of the newsletter.

Teaching Tips

Teaching Tip 1 (Related to Article 1—“Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades”, Article 2—“Army Sacks General for Sexy Texts to Wife of a Sergeant”, and Video 2—“Hillary Clinton: Misogyny is ‘Endemic’”):

For guidance from the United States Equal Employment Opportunity Commission (EEOC) in terms of what may or may not constitute sexual harassment, please refer to the following internet address:

https://www.eeoc.gov/laws/types/sexual_harassment.cfm

Sexual Harassment

It is unlawful to harass a person (an applicant or employee) because of that person’s sex. Harassment can include “sexual harassment” or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.

Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person’s sex. For example, it is illegal to harass a woman by making offensive comments about women in general.

Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.

Although the law doesn’t prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.



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Teaching Tip 2 (Related to Article 1—“Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades”, Article 2—“Army Sacks General for Sexy Texts to Wife of a Sergeant”, and Video 2—“Hillary Clinton: Misogyny is ‘Endemic’”):

For additional information from the United States Equal Employment Opportunity Commission (EEOC) regarding sexual harassment, please see the following internet address:

<https://www.eeoc.gov/eeoc/publications/fs-sex.cfm>

Facts about Sexual Harassment

Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Title VII applies to employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations, as well as to the federal government.

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

- The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- The harasser's conduct must be unwelcome.

It is helpful for the victim to inform the harasser directly that the conduct is unwelcome and must stop. The victim should use any employer complaint mechanism or grievance system available.

When investigating allegations of sexual harassment, EEOC looks at the whole record: the circumstances, such as the nature of the sexual advances, and the context in which the alleged



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incidents occurred. A determination on the allegations is made from the facts on a case-by-case basis.

Prevention is the best tool to eliminate sexual harassment in the workplace. Employers are encouraged to take steps necessary to prevent sexual harassment from occurring. They should clearly communicate to employees that sexual harassment will not be tolerated. They can do so by providing sexual harassment training to their employees and by establishing an effective complaint or grievance process and taking immediate and appropriate action when an employee complains. It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on sex or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII.



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Chapter Key for McGraw-Hill Education Business Law Texts:

	Hot Topics	Video Suggestions	Ethical Dilemma	Teaching Tips
Barnes et al., Law for Business	Chapters 4 and 25	Chapters 4 and 25	Chapter 3	Chapter 25
Bennett-Alexander & Hartman, Employment Law for Business	Chapters 3, 4, 8 and 9	Chapters 3, 4, 8 and 9	N/A	Chapters 3, 4, 8 and 9
Kubasek et al., Dynamic Business Law	Chapters 5, 42 and 43	Chapters 5, 42 and 43	Chapter 2	Chapters 42 and 43
Kubasek et al., Dynamic Business Law: The Essentials	Chapters 5 and 24	Chapters 5 and 24	Chapter 2	Chapter 24
Liuzzo, Essentials of Business Law	Chapters 5, 31 and 32	Chapters 5, 31 and 32	Chapter 2	Chapters 31 and 32
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment	Chapters 3 and 51	Chapters 3 and 51	Chapter 4	Chapter 51
McAdams et al., Law, Business & Society	Chapters 5, 12 and 13	Chapters 5, 12 and 13	Chapter 2	Chapters 12 and 13
Melvin, The Legal Environment of Business: A Managerial Approach	Chapters 2, 11 and 12	Chapters 2, 11 and 12	Chapter 5	Chapters 11 and 12
Pagnattaro et al., The Legal and Regulatory Environment of Business	Chapters 6, 20 and 21	Chapters 6, 20 and 21	Chapter 2	Chapters 20 and 21
Sukys, Brown, Business Law with UCC Applications	Chapters 2 and 23	Chapters 2 and 23	Chapter 1	Chapter 23



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This Newsletter Supports the Following Business Law Texts:

- Barnes et al., Law for Business, 13th Edition ©2018 (1259722325)
- Bennett-Alexander et al., Employment Law for Business, 8th Edition ©2015 (0078023793) *New edition available Jan 2018!*
- Kubasek et al., Dynamic Business Law, 4th Edition ©2017 (1259723585)
- Kubasek et al., Dynamic Business Law: The Essentials, 3rd Edition ©2016 (007802384X) *New edition available Jan 2018!*
- Liuzzo, Essentials of Business Law, 9th Edition ©2016 (07802319X) *New edition available Feb 2018!*
- Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 16th Edition ©2016 (0077733711) *New edition available Jan 2018!*
- McAdams et al., Law, Business & Society, 12th Edition ©2018 (1259721884) – *New edition now available!*
- Melvin, The Legal Environment of Business: A Managerial Approach, 3rd edition ©2018 (1259686205)
- Pagnattaro et al., The Legal and Regulatory Environment of Business, 17th Edition ©2016 (0078023858) *New edition available Jan 2018!*
- Sukys (formerly Brown/Sukys), Business Law with UCC Applications, 14th Edition ©2017 (0077733738)

