



Proceedings

A monthly newsletter from McGraw-Hill



November 2013 Volume 5, Issue 4



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Dear Professor,

The vibrant colors of the fall season abound! Welcome to McGraw-Hill's November 2013 issue of Proceedings, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 5, 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 2013 newsletter topics with the various McGraw-Hill business law textbooks.

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

1. A Los Angeles woman's lawsuit against an area hospital and an anesthesiologist for a "sticker prank" performed during surgery;
2. A Fourth Amendment case involving a UNC professor who was pulled over by a fire truck;
3. A doctor who relinquished a \$100,000 gift to him in the will of reclusive heiress Huguette Clark;
4. Videos related to a) a man who confessed, via YouTube, to a DUI Killing; and b) executive (presidential) war powers;
5. An "ethical dilemma" related to Article 3 ("Doctor Gives up \$100,000 Gift as Huguette Clark Estate Negotiations Collapse") of the newsletter; and
6. "Teaching tips" related to Video 2 ("Obama: I'm Taking Vote in Congress 'Very Seriously'") of the newsletter.

Happy Thanksgiving!

Jeffrey D. Penley, J.D.
Catawba Valley Community College
Hickory, North Carolina



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Of Special Interest

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

- 1) A Los Angeles woman's lawsuit against an area hospital and an anesthesiologist for a "sticker prank" performed during surgery;
- 2) A Fourth Amendment case involving a UNC professor who was pulled over by a fire truck; and
- 3) A doctor who relinquished a \$100,000 gift to him in the will of reclusive heiress Huguette Clark.

Hot Topics in Business Law

Article 1: "Woman Sues Hospital for Sticker Prank during Surgery"

<http://abcnews.go.com/Health/woman-sues-hospital-sticker-prank-surgery/story?id=20204405>

According to the article, a Los Angeles woman is suing an area hospital and her anesthesiologist for allegedly putting a mustache and stickers on her face during surgery as part of a prank that she claims violated her dignity and endangered her health.

The unidentified woman, who worked as a surgical supply purchaser at the hospital, said her coworkers affixed a fake mustache above her lip and yellow tear drops below her left eye before a nurse snapped a photo, according to the suit.

"Perhaps the most vulnerable position any human being will ever endure in their life is a time when they are placed under full anesthesia," reads the lawsuit, which claims the woman was fully anesthetized rather than sedated "for the sole purpose of humiliating and embarrassing the patient."

The woman said that she learned of the prank when she returned to work after the October 2011 surgery and was approached by some coworkers who had seen the photos. Other coworkers avoided her, she claims.

She filed suit against Dr. Patrick Yang of Torrance Memorial Medical Center on August 15 in Los Angeles County Superior court.

Torrance Memorial acknowledged the mustache photo incident in a statement, saying the prank was "intended to be humorous in nature." And although the anesthesiologist and the nurse "demonstrated poor judgment," the hospital maintains that most of the woman's allegations are "factually inaccurate, grossly exaggerated or fabricated."

"While the breach of professionalism outlined above regrettably did occur, Torrance Memorial is vigorously defending this lawsuit and requesting its dismissal," the statement reads, stressing that anesthesiologist Yang and the patient were "friendly" and "had a good working relationship."



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The woman claims in the lawsuit that she was unable to return to work at the hospital because of "mental anguish" and "emotional and physical distress" prompted by the prank.

Beyond the "intentional infliction of emotional distress," she's accusing Yang and the hospital of defamation, invasion of privacy, negligence and civil conspiracy as well as battery and sexual harassment for "placing obscene images on her face" and positioning her neck "so that they could keep her mouth open in order to make a crude sexual joke."

She further claims that coworkers at the hospital "knowingly and willingly agreed and conspired among themselves to not self-report the true nature of this incident to the Department of Health" and failed to "impose sufficient discipline on its employees which would have prevented the further dissemination of photographs of plaintiff while she was under anesthesia."

Torrance Memorial maintains that the anesthesiologist's medical group "took appropriate corrective action to address his conduct," and says the nurse was disciplined by the hospital.

"In addition, the medical center reported the situation to the Joint Commission and the American Nurses Credentialing Center, both of which investigated and closed the incident with no findings," the hospital said in a statement.

"We take patient rights and privacy very seriously," the statement reads. "After our internal investigation into the 2011 incident, we conducted additional training among the hospital's staff about demonstrating professionalism at all times. We have taken substantial steps including privacy training to ensure patient rights are respected and protected for every patient in our hospital, even if that patient is a friend and colleague."

The woman is seeking damages for emotional and physical distress resulting in depression, anxiety, sleeplessness and panic attacks, according to the lawsuit. She's also seeking compensation for loss of earnings -- past and future -- and legal fees.

Discussion Questions

1. As the article indicates, the civil lawsuit filed in this case alleges the tort of "intentional infliction of emotional distress." Describe this tort.

Intentional infliction of emotional distress is a tort involving emotional pain and suffering that results from the defendant's intentional, extremely reckless or grossly negligent actions. Even without evidence of physical injury, a plaintiff in such an action can recover if he or she can demonstrate, by the greater weight of the evidence, that the defendant's intentional, extremely reckless or grossly negligent actions caused the plaintiff to experience substantial emotional harm.

2. As the article indicates, the civil lawsuit filed in this case alleges the tort of "invasion of privacy." Describe this tort.



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“Invasion of privacy” is a common law tort involving the defendant’s violation of the plaintiff’s privacy rights. Just as there are constitutional protections against governmental invasions of an individual’s privacy (see the Fourth Amendment to the United States Constitution), the common law of torts prohibits one party from invading another party’s privacy rights. If the tort of invasion of privacy occurs, the plaintiff is entitled to seek an injunction against the defendant proscribing future violations of the plaintiff’s privacy, and money damages to account for the violation of privacy rights.

3. Torrance Memorial Hospital, a defendant in the lawsuit, acknowledges a “breach of professionalism” in this case. Do you agree or disagree that what occurred constituted a breach of professionalism? In light of potential legal liability, is there no more room for humor in the workplace environment? Explain your response.

This is an opinion question, so student responses to this question may vary. Although there was a co-worker relationship between the plaintiff and the defendant anesthesiologist, which should arguably allow for some informality and humor, the plaintiff was undergoing surgery, a very serious matter that should demand the full attention of the defendant anesthesiologist.

Article 2: “UNC Prof Ignites 4th Amendment Debate after Being Pulled over by Fire Truck”

<http://www.foxnews.com/us/2013/09/09/unc-professor-ignites-4th-amendment-debate-after-questioning-traffic-stop-by/?test=latestnews>

According to the article, when a North Carolina firefighter switched on the siren atop his Chapel Hill Fire Department truck to get a driver he suspected of being impaired to pull over, he probably did not expect to ignite a constitutional debate.

But that is exactly what has happened. The woman Fire Lieutenant Gordon Shatley pulled over on his way back from a call was Dorothy Hoogland Verkerk, a professor at the University of North Carolina and former town council member who is arguing use of the fire truck and siren - which are not authorized for law enforcement actions - gave the color of government to what might otherwise have been a lawful citizen's arrest. And although a lower court upheld Verkerk's arrest, an appellate court remanded the case with instructions to consider whether it was an illegal search and seizure.

The incident occurred in May 2011, and led to Verkerk's arrest and eventual conviction by an Orange County District Court judge for driving while intoxicated. Verkerk, who teaches art history at UNC-Chapel Hill, claimed in her appeal that Shatley violated her rights under the Fourth Amendment when he used the lights and sirens on the fire truck he was driving to pull her over. When she sped away, he called police who later caught and charged her.



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Lower court Judge Elaine Bushfan denied Verkerk's motion claiming that Shatley had conducted a citizen's arrest, but suspended her sentence and ordered the professor to spend 30 days in jail plus 18 months' probation, pay a \$1,000 fine, and perform 72 hours of community service.

That is when Verkerk filed with the court of appeals and the three-member panel ordered Bushfan to consider anew the legality of Shatley stopping the driver. In particular, the appellate judges said it must be determined whether or not Shatley acted as a private citizen or as a governmental officer; if Shatley did act as a government officer, whether he followed Fourth Amendment criteria and had reasonable suspicion that a crime was being committed; and finally if the stop was unconstitutional, if that tainted evidence and the subsequent police traffic stop.

One member of the appeals panel, Judge Robert Hunter, found that Shatley was indeed a governmental officer at the time he stopped her, but conceded that he lacked police training and the legal authority to make an official traffic stop.

According to court documents, Shatley was on his way to a fire scene the night of May 27, 2011, when he saw Verkerk's Mercedes stopped in an intersection. He noticed that the headlights were off and that the interior and auxiliary lights were lit and that the driver's side window was partially opened despite a pouring rain. Shatley continued to his destination where he was no longer needed, and headed back to the firehouse.

On the way back, Shatley claims he pulled up behind Verkerk's car as she was driving with a hazard light on and was weaving while driving much slower than the speed limit. Shatley told the driver of the fire truck to turn on the lights and siren to prevent other cars from passing.

Verkerk's car then swerved to the right and hit the curb before coming to a stop, according to the documents.

Shatley hopped out of the fire truck and approached her car to see if she was okay. He did not ask if she was drunk but did urge her to park her car and have someone pick her up, according to documents. She told Shatley that she would, but then drove off. She was picked up by Chapel Hill Police 10 minutes later and charged with driving while impaired and had her license taken away.

In addition to teaching at UNC, Verkerk is a former member of the Town Council and is a local environmental activist.

Discussion Questions

1. Describe the Fourth Amendment to the United States Constitution.

The Fourth Amendment to the United States Constitution protects against governmental invasion of privacy. The language of the Fourth Amendment is as follows:



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The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. What are the Fourth Amendment concerns in this case?

In the subject case, the Fourth Amendment concerns are: 1) whether firefighter Gordon Shatley was acting as a government officer when he used the lights and siren of the fire truck he was operating to stop Dorothy Verkerk; and 2) if so, whether his actions either complied with or violated the dictates of the Fourth Amendment (specifically, whether he had “reasonable suspicion” to justify stopping her).

3. In your reasoned opinion, did Fire Lieutenant Gordon Shatley violate the Fourth Amendment to the United States Constitution in this case? Why or why not?

This is an opinion question, so student responses may vary. As the article indicates, resolution of this case is centered on the question of whether Fire Lieutenant Shatley was acting as a private citizen or as a government official when he stopped Ms. Verkerk; if he was acting as a private citizen, the Fourth Amendment does not apply to the stop, but if he was instead acting as a government official, the Fourth Amendment would apply and Shatley would need “reasonable suspicion” in order to justify the stop. In your author’s opinion, it is reasonable to conclude that Shatley was acting as a representative of the government at the time of the stop, since he was “on the clock,” wearing a firefighter’s uniform, and driving a government-owned vehicle (the fire truck). In your author’s opinion, the fact that Shatley was not officially authorized to use the fire truck’s lights and siren for law enforcement actions matters not; what matters is that he chose, during the scope and course of his employment, to use the lights and siren for such purpose. Is it reasonable to assume that Ms. Verkerk could feel at liberty to decline Shatley’s insistence that she stop her vehicle?

Article 3: “Doctor Gives up \$100,000 Gift as Huguette Clark Estate Negotiations Collapse”

<http://investigations.nbcnews.com/news/2013/09/10/20405184-doctor-gives-up-100000-gift-as-huguette-clark-estate-negotiations-collapse?lite>

According to the article, settlement negotiations have broken down in the battle for the \$300 million estate of reclusive heiress Huguette Clark, according to several of the 60 attorneys involved.

A jury trial is scheduled for Surrogate's Court in Manhattan.

In other news in the case: Huguette Clark's personal physician, internist Dr. Henry Singman, told the court he is renouncing the \$100,000 that he was left in his patient's last will and testament. He is giving up that money, his attorney told the court, so he can freely testify for the will. New York law



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limits testimony by beneficiaries. Singman told the court he knew nothing of the will until after Clark died.

The doctor and his family received another \$951,808 in gifts over 20 years while Clark lived; Singman faces a court action by the estate's temporary administrator to force payback of those gifts. Attorneys for Clark's relatives have not been able to agree on a settlement with the beneficiaries named in the will: a charitable foundation, a hospital, Clark's multimillionaire private-duty registered nurse, a goddaughter, attorney, accountant, doctor and several employees. Her will stated emphatically that none of her money should go to her relatives, who are descended from her father's first marriage. The relatives challenged the will, claiming it was the product of fraud, that Clark was incompetent, and that the signing ceremony was faulty.

"Negotiations are now in non-existence," one attorney said. Another described them as "not active." And a third said, "The settlement binder went back on the shelf."

Huguette (pronounced "oo-GET") Marcelle Clark was the youngest daughter of former United States Senator William Andrews Clark (1839-1925), one of the copper kings of Montana and one of the richest men of the Gilded Age, a railroad builder and founder of Las Vegas. Born in Paris in 1906, Huguette was a shy painter and doll collector who spent her last 20 years living in simple hospital rooms. During that time, her fabulous homes in Connecticut, California and New York sat unoccupied but carefully maintained.

After she died at 104 in May 2011, Clark's will was challenged by 19 of her relatives, who contend that she was mentally ill and incompetent, the victim of fraud by her nurse, attorney and accountant. These relatives are descendants from Clark's father's first marriage, the closest to her being half grandnieces and grandnephews. Her will says, "I intentionally make no provision...for any members of my family...having had minimal contacts with them over the years."

Fourteen of the 19 said in legal papers that they never met their reclusive aunt. The last time any of them recalled speaking with her in person was in 1957, although some said hello when their parents were on the phone with Huguette on holidays. If a jury throws out the will, they will inherit all her estate, valued conservatively at \$307 million, or about \$175 million after taxes and fees. She had no children and no survivors on her mother's side. A 20th Clark relative was found dead of exposure in December under a Wyoming railroad trestle. His heirs will receive his share of any winnings.

Charities are the largest beneficiaries of Clark's will as written, receiving 85 percent of the payout. A Belloguardo Foundation for the arts, at her summer estate in Santa Barbara, Calif., would receive real estate, nearly all of Clark's paintings, and cash – together worth \$124 million, or 71 percent of the estate. The Corcoran Gallery of Art in Washington, D.C., would receive a Monet painting from the "Water Lilies" series, appraised at \$25 million, or 14 percent.

Next in the will are her registered nurse, Hadassah Peri, receiving \$15.3 million after taxes, including the doll collection worth \$1.7 million; goddaughter Wanda Styka (pronounced STEE-kuh), \$7.9



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million; Beth Israel Medical Center in New York, \$1 million; attorney Wallace "Wally" Bock, \$500,000; personal assistant Christopher Sattler, \$370,000; accountant Irving Kamsler, \$370,000; property managers John C. Douglas III in California, \$163,000, and Tony Ruggiero in Connecticut, \$12,000; and the doctor, Singman, who has given up his gift. Clark had signed a will just six weeks earlier, making only one bequest: \$5 million to nurse Peri. The rest of the money under that will would have gone by default to her relatives, who were not named. The attorney and accountant say that Clark signed the first will because she wanted to fulfill a promise to give another \$5 million to Peri, and that they agreed with Clark that she would soon finish a list of beneficiaries, which was made official in the second will.

The attorney and accountant are also expected to renounce their bequests so they can testify freely. Although a criminal investigation by the Manhattan district attorney officially remains open, no one has been charged. Police found that the paper trail supported the attorney and accountant's account that Clark authorized expenses and gifts, writing checks in her own steady hand, the same handwriting that appears on the will.

Discussion Questions

1. As the article indicates, Huguette Clark's personal physician, internist Henry Singman, and his family received \$951,808 in gifts over twenty (20) years while Clark was alive. Was it legal for Dr. Singman to receive gifts from his patient? Why or why not?

It is legal for a physician (or any other donee) to receive such gifts, provided that the following essential elements of a gift transaction are present: a) donor intent to make a gift; b) delivery of the property from the donor to the donee; and 3) donee acceptance of the property. Whether the receipt of such gifts is ethical is an entirely different debate that should spark vigorous class participation.

2. On what legal basis is Ms. Clark's will being challenged?

Ms. Clark's will is being challenged on the basis of alleged lack of testamentary capacity and fraud. The nineteen (19) relatives who are challenging the will contend that Ms. Clark did not have sufficient mental capacity to execute a will; they are also arguing that she was the victim of fraud committed by her nurse, attorney and accountant. Students should understand that just because Ms. Clark was of advanced age at the time of the execution of her will, age alone does not invalidate a will. In fact, courts presume the elderly have sufficient testamentary capacity to execute a valid will.

3. As the article indicates, charities are the largest beneficiaries of Clark's will, scheduled to receive eighty-five (85) percent of the estate distribution. In your reasoned opinion, is this reason enough for a probate judge to uphold the validity of the will? Why or why not?

This is an opinion question, so student responses will likely vary. It is interesting to note that if the will is invalidated on the basis of lack of testamentary capacity, the entire document and all of its provisions will be invalid, including gifts to the named charities. In such a scenario, Ms. Clark's



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legally-recognized heirs would receive the property.

Video Suggestions

Video 1: “Man Who Admitted DUI Killing via YouTube: I Hope People 'Take My Message to Heart'”

<http://www.today.com/news/man-who-admitted-dui-killing-youtube-i-hope-people-take-8C11118660>

Note: In addition to the video, please also review the following article (also located at the above-referenced web address):

According to the article, a day before his arraignment for aggravated vehicular homicide in the wake of his confession on YouTube, an Ohio man is hoping others can learn from his situation.

Matthew Cordle, 22, who could face between two and eight-and-a-half years in prison, admitted to killing a man while driving under the influence in a YouTube video that has gotten more than a million views. Cordle enters his arraignment proceeding knowing his video gave prosecutors evidence they could use to give him a long jail sentence.

“I hope the Canzani family can get some closure with this,” Cordle said. And I pray that they find peace someday and that people really take my message to heart.”

In the video clip, Cordle admits that on June 22, 2013, he hit and killed Vincent Canzani, 61, in a crash while driving under the influence. The indictment handed down on Monday says that Cordle's blood-alcohol level was 0.19, more than twice the legal limit in Ohio.

In his YouTube video, Cordle pleads with those watching the video to learn from his mistake and not drink and drive.

“I will take full responsibility for everything I’ve done to Vincent and his family,” Cordle says in the video. “I’m willing to take that sentence for one reason, and that reason is so that I can pass that message on to you. I’m begging you, please don’t drink and drive.”

In a statement, one of Canzani’s daughters accused Cordle of using the video to get a lighter sentence. But Cordle told Dahlgren, “This video is not about me. It’s about the message.”



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“I could tell that his motivations for doing it were sincere,” Cordle’s attorney, George Breitmayer III, said. “He wanted to raise awareness.”

On September 7, his mother, Kari Cordle, posted his video on her Facebook page.

"I am posting this video to support my son in his goal to get out his sincere and powerful message to never drink and drive," she wrote. "I am proud of his courage and strength to see this through. Thank you son."

Cordle's attorneys stood by his decision to make the video even though he was advised by others to fight the charges. He plans to plead not guilty at Wednesday's arraignment but will eventually change his plea to guilty, according to his attorneys, and his sentence could be handed down within the next 30 days. “The attorneys that I have now, Ross & Midian, never told me to lie, and they are very supportive of the decision to plead guilty,” Cordle said.

Prosecutors say the public confession doesn’t change the fact that Cordle's blood-alcohol level was twice the legal limit and say his admission will not lessen the sentence they will pursue.

“He was behind the wheel of the car going the wrong way on the freeway, early in the morning, with a 0.19 blood alcohol content,” Franklin County prosecutor Don O’Brien said. “That kind of case is one that we aggressively prosecute and seek typically a maximum kind of sentence.”

Whatever the length of his sentence, Cordle told his attorney that he hopes to continue to speak about the dangers of drunk driving when he is released.

Update: Since the publication of this article, Matthew Cordle was sentenced to six and one-half years in prison for aggravated vehicular homicide and operating a vehicle while impaired. For further information regarding Mr. Cordle’s punishment, see the article and related video at the web address referenced below:

“Man Who Confessed to Drunken Driving in Viral Video Gets 6½ Years”

<http://www.cnn.com/2013/10/23/justice/ohio-dui-confession-sentencing/>

Discussion Questions

1. Is Matthew Cordle’s YouTube confession conclusive evidence of his guilt in this case? Why or why not?

Although a videotaped confession is not conclusive, irrefutable evidence of a defendant’s guilt (since, for example, the confession might have been coerced “behind the scenes”), it is certainly strong evidence a jury can ordinarily consider in reaching a criminal verdict.



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2. In your reasoned opinion, should Cordle's confession and his post-incident exhortations not to drink and drive serve to lessen his punishment in this case? Why or why not?

This is an opinion question, so student responses will likely vary. More conservative-minded students would not likely consider Cordle's confession and post-incident exhortations not to drink and drive as mitigating factors, while more liberal students would likely use such statements as mitigating factors in the punishment phase of this case.

3. If you were serving as prosecutor in this case, what argument(s) would you make to support full punishment for Matthew Cordle?

A prosecutor arguing in favor of full punishment for Matthew Cordle would likely contend that enforcement of criminal law is necessary for respect of the law and achievement of the primary goals of criminal law; namely, to serve as retribution (punishment) for wrongdoing, and to deter future wrongdoing, both by the defendant and others. A prosecutor might also suggest that Mr. Cordle's confession and post-incident exhortations not to drink and drive were not made because he is truly sorry and/or desires to dissuade others from similar wrongdoing; instead, such pronouncements were made solely for the purpose of reducing his punishment.

Video 2: "Obama: I'm Taking Vote in Congress 'Very Seriously'"

<http://www.today.com/news/obama-im-taking-vote-congress-very-seriously-8C11118214>

Discussion Questions

1. What is the best legal argument supporting congressional authority to decide whether engage the United States in war?

Article I, Section 8, Clause 11 of the United States Constitution grants the United States Congress the power to declare war.

2. What is the best legal argument supporting executive (i.e., presidential) authority to decide whether to engage the United States in war?

The United States president derives the power to direct the military from Article II, Section 2 of the United States Constitution, which names the president "commander-in-chief" of the armed forces.

3. If the United States Congress does not vote in favor of war, does the president have the authority to "override" the congressional decision? If so, on what legal basis, and under what circumstances?



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The War Powers Resolution, commonly referred to as the War Powers Act, addresses such a scenario. For a detailed description of the War Powers Act, please refer to the material set forth in “Teaching Tips” 1 and 2 (beginning on page 16) of this newsletter.



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Of Special Interest

This section of the newsletter addresses the question of whether it is ethical for a professional, such as a doctor, to accept gifts given to him by a patient.

Ethical Dilemma

Ethical Dilemma (Related to Article 3: “Doctor Gives up \$100,000 Gift as Huguette Clark Estate Negotiations Collapse”)

<http://investigations.nbcnews.com/news/2013/09/10/20405184-doctor-gives-up-100000-gift-as-huguette-clark-estate-negotiations-collapse?lite>

Discussion Questions

1. Aside from the issue of whether it is legal for a doctor to accept gifts from his patient, is it ethical for a doctor to do so? Why or why not?

As mentioned in response to Article 3, Discussion Question Number 1 above, it is legal for a physician (or any other donee) to receive such gifts, provided that the following essential elements of a gift transaction are present: a) donor intent to make a gift; b) delivery of the property from the donor to the donee; and 3) donee acceptance of the property. Whether the receipt of such gifts is ethical is an entirely different debate that should spark vigorous class participation; many students may likely conclude that the “higher” ethical standard should guide a doctor to not accept such gifts.

2. As the article indicates, other professionals who provided services to Ms. Clark are scheduled to receive distributions under her will, including a registered nurse, an attorney, a personal assistant, an accountant, and property managers. In your reasoned opinion, is it ethical for these individuals to accept distributions in accordance with Ms. Clark’s will? Why or why not?

This is an opinion question, so student responses will likely vary. As mentioned in response to Discussion Question Number 1 above, the “higher” ethical standard should arguably guide such professionals to not accept such gifts.

3. Is your answer to Discussion Question 2 above influenced by the amount of the gifts to the named beneficiaries (for example, \$15.3 million to the registered nurse?) Explain your response.

This is an opinion question, so student responses will likely vary. The large amounts of the gifts might likely influence students to conclude that the acceptance of such gifts is unethical; although arguably, the conclusion



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should be the same regardless of whether the gift is for one (1) dollar, or one (1) million dollars.



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Of Special Interest

This section of the newsletter will assist you in covering Video 2 ("Obama: I'm Taking vote in Congress 'Very Seriously'") of the newsletter.

Teaching Tips

Teaching Tip 1 (Related to Video 2—"Obama: I'm Taking Vote in Congress 'Very Seriously'"):

"War Powers"

<http://www.loc.gov/law/help/war-powers.php>

Teaching Tip 2 (Related to Video 2--"Obama: I'm Taking Vote in Congress 'Very Seriously'"):

"Why the War Powers Act Doesn't Work"

<http://www.npr.org/2011/06/16/137222043/why-the-war-powers-act-doesnt-work>

According to the article, it is a fight the United States Congress cannot seem to win.

Once again, members of Congress are upset that a president has not consulted them to their satisfaction on the question of entering into a war. They are now taking several steps to express their frustration with President Obama about his handling of the bombing campaign in Libya.

Recently, ten (10) House members filed a lawsuit designed to block the Obama administration from further participation in the war. Along with numerous other members of Congress, including Republican House Speaker John Boehner of Ohio, they say Obama is in violation of the War Powers Act.

The 1973 law was meant to prevent presidents from sustaining wars without congressional approval. But no one thinks the lawsuit will succeed. And the War Powers Act has never been successfully employed to end any military mission.

"The War Powers resolution really does not work," says former Representative Lee Hamilton, who co-chaired the Iraq Study Group and the 9/11 Commission.



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Instead, the War Powers Act has largely been used as it is being used now — as a political tool that allows Congress to criticize a president about the prosecution of a war.

"The rhetoric is sadly familiar," says Gordon Adams, a foreign policy professor at American University. "It just flips by party, depending on who is deploying the troops."

The law was passed over the veto of President Richard M. Nixon. The intention was to prevent America from entering into protracted military engagements, as Vietnam had become, without the approval of Congress.

The president has 60 days to seek formal approval from Congress after engaging in hostilities, with the possibility of a 30-day extension. "When the United States makes a decision to go to war, it ought not to be made by one person," says Hamilton, who was chairman of the House Foreign Affairs Committee from 1993 to 1995.

The United States has engaged in dozens of military actions abroad, but Congress has declared war formally only a handful of times:

1. The War of 1812;
2. The Mexican War (1846);
3. The Spanish-American War (1898);
4. World War I (1917); and
5. World War II (1941).

But, as Hamilton notes, no president has accepted the constitutionality of the War Powers Act, viewing it as a violation of the separation of powers and the president's authority as commander in chief.

In 2000, the Supreme Court turned back a challenge brought by a group of 31 members of Congress who complained that U.S. participation in a bombing campaign in Yugoslavia violated the act.

"There is a long pattern of members going to court on War Powers cases," says Louis Fisher, a constitutional scholar who retired last year after 40 years as an adviser to Congress.

"Ninety-five percent of the time, courts say, 'Thirty of you are saying the president violated the law, 30 others in an amicus brief are saying he didn't. We're not going to get involved,'" Fisher says.

As a result, the debate over violations of the War Powers Act has devolved into a distraction.



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Hamilton says the law's intent was valid and that "Congress ought to hold the administration's feet to the fire with regard to Libya."

But he argues that the 1973 law has become a "political tool that allows members of Congress to dodge taking a position on the intervention itself. As is often the case, they argue the process rather than the substance."

Both the Republican and Democratic congressional caucuses are divided about Libya. Some would prefer a more concerted effort to target Libyan leader Moammar Gadhafi, while others worry about an expansion of the mission from protecting civilians to seeking regime change.

As a result, it is difficult for Congress to speak with one voice in its battle with Obama. On June 3, the House approved a resolution criticizing the president for not providing a "compelling rationale" for the Libya campaign, but turned back legislation that would have pulled out U.S. forces within 15 days.

Both Hamilton and Adams say the War Powers Act is being used primarily as a political cudgel against Obama.

"Is the War Powers Act about protecting the power of Congress relative to the president, or about the two political parties?" asks Noah Feldman, a professor of international law at Harvard University. "Everyone in Congress wants to protect Congress, but they also want to protect the president of their party."

While some members of Congress may use the law to criticize the president for political reasons, others will defend a president of their own party — even those who had invoked the War Powers Act the last time the other party held the White House.

"It does not matter if you are [George W.] Bush or Obama, you want more power in the White House," Feldman says. "Everyone in Congress wants to protect Congress, but they also want to protect the president of their party."

As a result, Congress never manages to speak with one voice and insist en masse to the courts that a president is in violation of the War Powers Act.

Congress can ultimately express its displeasure about a war by cutting off funds. But with the defense budget so large, the Libyan effort is being handled out of petty cash. A White House report Wednesday said the campaign had cost \$715 million so far, with the total rising to \$1.1 billion by early September.

"They are taking the money out of operating costs," Feldman says. "Because we have wars going on elsewhere, Congress is not going to take away funds for troops elsewhere, so when the



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administration comes back and says we need to make up the funds for Afghanistan and Iraq, it's going to be hard for Congress to say no."

Faced with warnings about the 90-day deadline under the War Powers Act, the Obama administration recently sent Congress a report arguing that the law does not apply because U.S. military operations in Libya are "distinct from the kind of 'hostilities' contemplated by the resolution's 60-day term."

The administration's argument is that NATO is in charge and there are not any U.S. ground troops in Libya, so therefore the U.S. is not at war in the sense covered by the law. "We are in no way putting into question the constitutionality of the War Powers resolution," Ben Rhodes, the deputy national security adviser, said.

This is the sort of response that administrations typically reach for in trying to avoid a direct challenge to the law, while also avoiding adhering too faithfully to its requirements, says Glenn Antizzo, a political scientist at Mississippi College.

"One trick that presidents try, on both sides of the aisle, is to adhere to aspects of the War Powers Act without actually saying you're invoking the War Powers Act."

The dance both sides are doing does little to clarify exactly what deference the executive branch owes to Congress in military matters.

"Again and again, you try to find some credible way to at least request that the executive branch honors the War Powers Act," says Anthony Cordesman, a former Senate aide who is now a national security analyst at the Center for Strategic & International Studies. "Again and again, you back away and weaken Congress."



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