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Shortchanged Workers Demand Attorney’s Fees and a Fair Test for Determining Prevailing Party Status

By: Elizabeth Soltan, J.D. ’19 and Patricio Rossi

The average American worker earns $7,500 less than they should according to a 2017 analysis from Glassdoor. Low-wage immigrant workers, particularly immigrant women, are disproportionately susceptible to workplace violations such as underpayment. Litigation to combat illegal practices such as wage theft costs more than these workers can afford.

The Harvard Legal Aid Bureau (HLAB), a student-led civil legal aid organization at Harvard Law School, provides free legal representation to low-income and disenfranchised communities in the Greater Boston area, advocating for rights that may not otherwise be enforced for marginalized populations. Under the supervision of Clinical Instructor Patricio Rossi, nearly 10 HLAB students have played a critical role in helping two immigrant women of color obtain relief for wage theft from their employer. Two current students have been fighting to ensure low-wage workers like the women in this case have access to attorney’s fees. The suit, Ferman, et. al. v. Sturgis Cleaners, Inc., was brought by two former employees of the South Boston dry cleaners who claimed they were underpaid for their labor, a violation of the Massachusetts Wage Act and Overtime Pay Act.

Kellie MacDonald ’15 originally filed the case in 2014 in Suffolk Superior Court on behalf of the two former employees of Sturgis Dry Cleaners and Tailors. The suit alleged that the employer failed to pay the workers for all of their hours worked, including overtime hours, totaling approximately $28,000 in unpaid wages. The case settled in 2016 for approximately $20,000. The parties could not, however, agree to terms on attorney’s fees, and agreed to let the court decide the issue.

Khystyn McGarry ’17 and Michele Hall ’17 filed a petition for attorney’s fees, arguing that, pursuant to the “Catalyst Theory”, the workers were the prevailing party. The catalyst theory involves a two-part test. For a plaintiff to prevail, his/her lawsuit must be “a necessary and important factor in achieving the [sought-after] relief” and cannot be “frivolous, unreasonable, or groundless.” The plaintiffs argued they met both of the requirements of the catalyst theory. The employers argued that a party could not be a prevailing party without clear court intervention. In the spring of 2017, the Superior Court awarded HLAB approximately $16,000 in attorney’s fees. The employers appealed the decision and HLAB students Jag Singh ’18 and Lark Turner ’18 filed an application with the Supreme Judicial Court (“SJC”) for Direct Appellate Review, which was eventually granted.

Immediately after returning from summer break, Elizabeth Soltan ’19, Kenneth Parreno ’19, and Josephine Herman ’20 began work on the workers’ appeal brief. Under a tight timeline, they crafted a persuasive argument that the “Catalyst Theory” is the proper test in Massachusetts to determine prevailing party status. Nearly ten groups, including the American Civil Liberties Union of Massachusetts, the Massachusetts Law Reform Institute, and the Immigrant Worker Center Collaborative, filed amicus briefs in support of the plaintiff-appellees. On December 4, 2018, Soltan argued before the Massachusetts Supreme Judicial Court (SJC). She spent an intense few weeks preparing and mooting her argument. All of the practice paid off as Soltan delivered an incredibly poised argument to the SJC justices. The argument centered on how to determine “prevailing party” status, for the purpose of awarding attorney’s fees, under the Massachusetts Wage Act.

On Feb. 19, the SJC published its decision in the Ferman case, with Justice Kafker writing for the Court. The SJC held that the catalyst test applies to claims under the MA Wage Act and affirmed the award of attorney’s fees to HLAB’s clients. The rule will make it easier for low-income workers to obtain competent counsel and to vindicate their rights under the Wage Act. The decision recognized the importance of the Act’s fee-shifting framework as a “necessary incentive for attorneys to take such cases and a powerful disincentive for employers to withhold wages in the first place.” This is good news for low-income workers fighting back against an epidemic of wage theft estimated to cost Massachusetts workers $700 million annually.
On February 7, the Food Law and Policy Clinic (FLPC) provided written testimony to the Maryland Environment & Transportation Committee in support of a bill that would expand the state’s “Complete Streets” grant program to cover projects which improve access to nutritious food to residents living in food deserts.

Throughout 2017, FLPC had the opportunity to work with stakeholders in Maryland who were involved in creating the Maryland Food Charter to develop a complementary policy scan of state policies related to the food system as well as opportunities for change. Following a series of interviews, community meetings, and legal and policy research, FLPC published its findings in “A Review of Food System Policies in Maryland.” This report outlined possible initiatives for the state of Maryland to enhance its food production, safety, and waste prevention policies in order to make the state’s food system stronger and better able to serve the people of Maryland.

Improving access to nutritious food was one of the main concerns raised by the many Maryland community members and experts with whom we engaged. As one of our suggestions to increase food access, we recommended using urban transportation resources to move residents in food deserts—areas of low healthy food availability—to local food markets. Maryland’s House Bill 82 uses the novel approach of incorporating food access into the state’s definition of a Complete Streets program—a grant program that allows local governments to receive funding for infrastructure projects which improve quality of life. This approach allows Maryland to get its food access resources to local governments, who are best suited to understand their local food access barriers and needs and to tailor their solutions efficiently to those specific needs.

As a student in FLPC, this was the point where I was invited to write legislative testimony on behalf of FLPC supporting Maryland’s Bill. This project gave me the opportunity on to work with the staff of Maryland legislators, and with expert FLPC fellows and advocates who had worked with Maryland and knew its specific legal and political landscape. This has been a rare learning opportunity in policy-making that I would be hard pressed to find elsewhere—it turns out that Harvard Law School does not, in fact, offer as many law-making classes as it does law-abiding ones (judicial activism schemes aside).

Maryland’s House Bill 82 addresses food access issues in three key ways. First, the bill would give the term “food deserts” its first official state law definition as “[a] community that does not have easy access to healthy food, including fresh fruits and vegetables, typically in the form of a supermarket, grocery store, or farmer’s market.”

Second, the text of the bill expands the definition of Complete Streets to include food access so as to expand the types of local transportation projects the policy can fund. Third, the bill creates a ranking system for such projects which improve food access specifically for areas already designated as food deserts. The approach of moving infrastructure funding towards food access—especially through a Complete Streets program, is an innovative one. We look forward to seeing more creative solutions like this at the state level from Maryland and across the country.
During the 2019 Winter Term, over 200 Harvard Law School (HLS) students traveled off campus for three weeks, gaining hands-on experience addressing the legal needs in communities across the globe. Through the Independent Clinical Program and Externship Clinics, HLS students gain a practical experience in their field of study building their expertise on an issue and developing critical lawyering skills.

87 students participated in HLS’s Independent Clinical Program, traveling to 18 countries, 13 states, and 21 cities to work with government agencies, legal services and non-profit organizations, and the judiciary. The program gives students an opportunity to design a project related to their specialized area of interest in the law or field of practice. Students are able to then gain hands-on experience in their potential career fields. This past winter, students worked with attorney advisors in the Office of Clinical and Pro Bono Programs (OCP) to design projects addressing issues that transcend national borders, including anti-displacement protections after devastating hurricanes, voting rights litigation, humanitarian asylum and refugee protections.

Through the Externship Clinics, January Term students participated in on-site clinical work at hundreds of organizations across the United States. The externship clinics range in focus from sports teams to U.S. government agencies, to employment and labor rights work. Over the winter term, students worked at federal agencies such as Attorney General offices in California, Nebraska, Kentucky, New York, and Texas, and the Federal Public Defender offices in Nevada, Missouri, Pennsylvania, and Texas; civil rights organizations such as the MacArthur Justice Center (Washington, D.C.), Southern Center for Human Rights (Atlanta, GA), American Civil Liberties Union (Durham, NC); and private entities such as the Wasserman Media Group (Los Angeles, CA), the Women’s Tennis Association (Petersburg, FL), Nashville Predators (Nashville, TN), Major League Baseball (New York, NY), and the Detroit Pistons (Detroit, MI). Students reviewed and helped draft contracts and sponsorships agreements, represented clients with capital sentences, and conducted legal research on wage and discrimination disputes. Students’ work experiences enhanced their confidence in their skillset and provided meaningful assistance to the clients they served.

Even in the short three week term in January, students were able to make an impact in the communities and organizations they worked in internationally and domestically. The independent clinical program and externships are unique experiences for students to learn from and develop into the lawyers they wish to be in the world.

Rapid Impact: Harvard Law Students Travel the Globe over Winter Term for Clinical Work

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When democracies endure prolonged crises, a complete constitutional review can be valuable to legitimize the nation’s constitution and to create an outlet for national healing. The Gambia launched the Constitutional Review Commission (CRC) to conduct a full-scale review of the current constitution after enduring the 22-year rule of Yahya Jammeh, whose administration was characterized with the flouting of constitutional norms and violations of clear constitutional provisions. The Gambia is a small West African nation that is—with the exception of a 50-mile coast on the Atlantic Ocean—surrounded entirely by Senegal and is seven times smaller than Niger State, the largest state in Nigeria. Despite the country’s small size, what happens here has important implications for youthful constitutional democracies around the globe.

The CRC is considering a broad range of issues for the new constitution ranging from granular issues, such as what the qualifications for a judge should be, to broader issues like whether a right to health care and housing should be enshrined within the constitution. This is the second time a committee has been organized to review a pre-existing constitution. When Jammeh came to power as leader of the 1994 military junta, he organized a CRC to create the nation’s current constitution. Important considerations for the current CRC include: 1) how a culture of judicial independence can be constitutionally promoted and protected when, at best, the judiciary has been silent in the midst of unconstitutional conduct or co-opted to serve the interests of the President; and 2) how the constitution’s language can be given substantive effect to protect, among other things, a free press and rights of marginalized groups.

Paradoxically, perhaps the greatest effect of the CRC’s presence will not come with changes to the constitution, but instead through empowering civil society to share political opinions without the fear of repercussions. The CRC has traveled across the country to receive input from members of civil society and this has fostered a sense of political and civic activism that would have been unthinkable under the prior administration. From speaking with local taxi drivers during my morning commute to discussions with senior members of the Gambian Bar Association and lawyers at the Ministry of Justice, everyone is deeply engaged with the complex issues facing the new constitution. Despite diverging opinions, the unifying theme is for greater oversight of the president.

Adama Barrow, The Gambia’s current president, has little in common with former President and military junta leader Yahya Jammeh. For one, President Barrow came into power at 51 and ran for president as an independent while his predecessor came into power as the leader of a military coup at the ripe age of 29. Moreover, Barrow has freed journalists and members of opposition parties while his predecessor imprisoned and, as described in hearings at the Truth Reconciliation and Reparations Commission (TRRC), tortured government dissenters in the infamous Mile Two prison and executed 50 Ghanaian nationals. Barrow has also sought to rekindle economic and diplomatic ties with Senegal and the Economic Community of West African States (ECOWAS) subregion while his predecessor created extensive diplomatic schisms within the region. Yet despite these differences, the experience with Jammeh has left the nation skeptical of the presidency as an institution. There are high expectations that the new constitution will be more durable and effective than the current constitution.

The current constitution came into effect in 1997 and provides for, among many important provisions, “freedom and independence of the press and other information media,” §207(3), prohibitions against torture and inhumane treatment, §21, and that the judiciary “shall be independent and...shall not be subject to the control or direction of any person or authority” §120(3). However, Jammeh successfully introduced amendments that undermined these provisions. For example, President Jammeh amended §52 of the Criminal Code Act to make written or oral statements considered critical of the government a legal cause of action. To prevent the erosion of constitutional checks and balances “by the parochial interests of one man,” the CRC is just one facet of the transformative justice process that operates in tandem with the Truth Reconciliation and Reparations Commission (TRRC) to raise greater awareness of Jammeh’s actions. The TRRC has heard testimony from those who participated in the military coup with Jammeh and claims of torture during his administration.

Dr. Baba Jallow, the Executive Secretary of the TRRC, described the purpose of the transformative justice process as creating ‘nation-schools’ that inform citizens, especially the youth, on the language and purpose of the constitution so that no future government can violate or trivialize their rights as the previous administration did. A constitution, regardless of how well written, can only have substantive effect if a nation’s citizens understand their rights and oppose those forces that conflict with the constitution. The outcome of this process will serve as an important template for similarly situated constitutional democracies seeking to promote civic engagement and prevent the re-occurrence of harmful government actions.
In the middle of January, the town of Mytilene on the island of Lesvos is stuck in holiday mode. Christmas songs are still streaming, decorations are still up, and the bakeries still have “Happy 2019!” cakes in the windows. Just a few miles away from this idyllic little Greek town is Moria. Moria is an entirely different world—just the name itself evokes some Lord of the Rings-like nightmare. The infamous camp houses refugees hailing primarily from Afghanistan, Yemen, the DRC, and Iran. 8,000 men, women, and children—all living in freezing, flimsy tents in a shanty town on a hillside.

Most of these refugees are stuck in Moria for months at a time, waiting for the date of their important asylum interviews. This interview will determine whether or not they are granted asylum in Greece, or whether the European Asylum Office (EASO) or Greek Asylum Service has determined that their country of origin or port of last entry (usually Turkey) is safe enough for them to be deported back there. Upon arrival, many of these asylum seekers are asked which European country they would like to go to upon their arrival, and most are not aware that they will not be allowed to remain anywhere besides Greece, if allowed to remain at all.

My time in Greece was also the first time I had to confront the limits of what I could do. I simply did not have the power to fix the food in Moria, which was so unpalatable that one woman told me she eats just enough to keep herself alive. I did not have the power to compel the man in the Greek post office to surrender a letter to a minor containing the identity card he needed to prove his age. I could not change the interview dates of a mother and father who had to wait in Moria for another 6 months. I could not bring back electricity when it got cut during the freezing cold night. And I simply did not have the power to erase the pain of the man who had witnessed his family members die in front of him.

Although I faced these significant limitations on my ability to change the desperate situation of the people of Moria, I also witnessed firsthand the incredible power I could have as an attorney in helping others attain their legal rights, and in serving as an advocate and confidante for those that are not in the position to advocate for themselves. My experience in Lesvos was the first time I felt truly rewarded in my decision to pursue the path of the law.
A Look at Refugee Legal Advocacy in Germany

By: Niku Jafarnia J.D./MPP ‘20

This J-term, I did an independent clinical in Germany, exploring the issues refugees are facing in the country, particularly with respect to legal advocacy and representation. More specifically, I wanted to explore the viability of an organization that would allow refugees to play a greater role in legal processes relevant to the refugee community.

From my work in the refugee legal advocacy space, I have been struck by the lack of initiatives that include and train members of the refugee community to work as legal advocates for themselves. I felt that Germany would be a good place to start building an organization that would work towards this goal. Since an influx of refugees arrived in Germany in 2015, the policies put in place by the German government, while far from perfect, have generally given Germany the image of being a “pro-refugee” society, particularly when compared to many of its neighbors. I wanted to test this claim, and learn more about what organizations in Germany were doing to support and empower refugees.

During my research, I was particularly struck by the divergences between the German and U.S. asylum and refugee systems. Though the German system has significant room for improvement—particularly as their efforts to deport and exclude refugees have increased—there was a certain humanity that I recognized in the system of services and in the government-provided provisions, educational opportunities, and shelters provided to refugees. This image presented a stark contrast with the U.S.’s increasingly militarized southern border and systematic imprisonment of migrants. Hopefully, countries will look to Germany’s inclusionary policies as an example, rather than replicating the U.S.’s administration’s efforts to demonize and dehumanize those who have come to the U.S. seeking refuge.

While I still have many unanswered questions, my time in Germany has made clear that in spite of Germany’s more progressive policies toward refugees and migrants, there remains a lack of support for members of these communities to advocate for themselves, particularly in the legal sphere. On a more positive note, my research also revealed that there is a general willingness among many refugee-focused NGOs and government agencies to support an initiative that would empower refugees, and that would allow them to meaningfully participate in their own communities’ legal representation. I look forward to returning to Germany this summer to further explore my organizational idea.

I had the opportunity to meet with people working across a vast spectrum of organizations, from small start-ups, to much larger government-supported NGOs, to German government and UN employees. I also had the opportunity to spend a day with Isabel Schayani (pictured), a former Harvard John F. Kennedy Memorial Fellow who started a program within WDR (a German public-broadcasting news station) that provides refugees with critical programming and information about their legal rights in Farsi and Arabic. Most importantly, I was able to meet with people who had come to Germany seeking asylum, and hear their perspectives on the ever-changing asylum and refugee system in Germany.
As a veteran, I came to Harvard Law School’s Safety Net Project (SNP) within the Veteran’s Legal Clinic to help bridge the civilian-military divide. SNP offered me a chance to help civilians and veterans realize some part of the American dream.

The veterans clinic serves civilians and veterans alike, and the SNP provides civilians and veterans with guidance through the Social Security, SNAP, Medicaid, and poverty prevention processes. We serve a strong legal need: Nearly 70 percent of Social Security applicants have no legal representation.

As a student, the clinic offered me a pathway to maintain the momentum I’d built up establishing my litigation skills in my summer at the California Attorney General’s office. The SNP gives me full responsibility for my cases: preparing an evidentiary record, interviewing clients, writing a legal brief, delivering oral argument, direct questioning of clients, cross-examining experts, and if a case is denied, preparing for the appellate argument.

A veteran recently told me that our team had changed his life. He was fond of saying that if it weren’t for bad luck, he’d have no luck at all. He was falsely imprisoned, sexually assaulted as a child, and tragically self-aware of all of it.

Most painful was his nobility, his gentle demeanor, and his broken strength. He blamed no one. He accepted responsibility for more than just his actions—he accepted responsibility for the world. The military has a way of conditioning many of us not to seek help until it’s too late, to shoulder the blame for circumstances beyond our control—to grin and bear it. It’s our strength in war and, often, our undoing at home.

After combing through more than 500 pages of medical records and recruiting mental health experts to evaluate the long history of impairments and treatment, I put together a written argument that led the administrative law judge to make a decision on the record—telling us on the day of the hearing that he was approving the case for more than eight years of retroactive benefits. This highly unusual move happens only when the ALJ determines the case is clearly in the applicant’s favor and a hearing is no longer necessary.

Our client was spared having to dive deep into his trauma for the record. Realizing this, he was overcome with relief. And while we all shared a brief moment of joy, that veteran’s need is no less important than helping the civilians who walk through our doors. Our communities thrive together.

As President Eisenhower noted in his seminal Cross of Iron speech, “Every gun that is made, every warship launched, every rocket fired signifies in the final sense, a theft from those who hunger and are not fed, those who are cold and are not clothed. This world in arms is not spending money alone.”

I may not be able to change the status quo, but the SNP empowers me to help Americans left behind by perpetual war. Here, they’re not forgotten. Here, my mission is no different than it was in the Army: to serve the American people.
“Without City Life, many people wouldn’t know how they can do anything [to fight for their right to housing],” said Gabrielle, one of the organizers for City Life/Vida Urbana. City Life is a grassroots group that organizes communities to fight against the forces that fuel displacement in Boston. The Jamaica Plain based organization frequently works with Project No One Leaves (PNOL), a student practice organization at Harvard Law School that informs low-income tenants of their rights. On January 10, PNOL hosted several City Life organizers to speak to the HLS community about the ramifications of gentrification in Boston.

According to City Life leaders, an overwhelming majority of Roxbury residents are at risk of being displaced. The cost of housing in Roxbury increased by 70% between 2010 and 2015. The devastating mix of displacement, capitalism, racialized gentrification, and property exploitation is what some call antithetical to local economic development in Boston. Even still, landlords are aware of the influx of newcomers that can afford to pay higher rents, thereby pushing out current residents in favor of higher profits from new residents. As more and more properties in Boston are becoming increasingly expensive, middle- and low-income individuals and families have fewer options to secure housing. When landlords raise the rents and attempt to evict residents, people are often not given sufficient notice to find suitable housing.

The stress of losing one’s home and scrambling to find an alternative has serious consequences on people’s mental, physical, and emotional health. The trauma of housing insecurity affects children and young people, altering how they navigate the world and their feelings about financial security. Long-time residents lose their social ties and networks to their communities, which can in turn affect the physical systems that help fight against chronic conditions and diseases. “The social costs for displaced families, such as intergenerational health impacts, is not borne by the landlords,” said Lawrence, another organizer with City Life. Landlords and urban developers prioritize profit over community welfare. Organizations like City Life develop community leaders to fight against the forces that fuel displacement and its harmful effects through direct organizing of tenants in protest and advocacy strategies, connecting tenants to legal representation, and informing residents of their rights.

It’s an uphill battle for many residents to try and retain their housing through the court system. Landlords and property owners often have legal representation, while many tenants cannot afford a lawyer. Tenants are not fighting a fair fight. They often begin the process at a disadvantage, left to represent themselves in a convoluted system that can leave them feeling culpable if they lose their home. “People are left to represent themselves in these hearings, and you don’t understand the language of the court,” Gabrielle exclaimed. Gabrielle is determined to spread public awareness of City Life’s work to help other residents like her. “I came to City Life to get legal help after I attempted to fight with my bank on my own. I couldn’t understand what was going on even though I had nearly ten years of banking experience and a masters degree in business. My bank gave me the run around for years until I came to City Life and was empowered with information about my rights. The bank was very deceptive. Many people don’t know their rights, that’s why I have decided to become an ambassador and organizer with City Life.”

Fighting against housing displacement is how City Life and PNOL work jointly to combat racial, social, and economic injustice. PNOL sometimes refers residents struggling to retain their housing to legal aid organizations like the Harvard Legal Aid Bureau (HLAB), which provide representation to low-income and marginalized communities in civil matters. The difference can be life-altering. Keeping people in their homes helps keep families whole and counteracts actions that destabilize communities. Boston is a historic city, but loses significant remnants of its past when communities are removed and remade. “Preserving communities and cultures are more important to me then preserving bricks for historical purposes,” said Lawrence. PNOL plays a critical role in raising awareness of tenants’ legal rights and legal services available to them. In partnership with City Life, both organizations work to develop a community-based model for social and systemic change, one tenant at a time.
Semester in Washington Program

Chapter Three

By: Jonathan Wroblewski, Lecturer on Law

Jonathan Wroblewski directs the Semester in Washington Program. In the entry below, Johnathan welcomes incoming students with an overview of the political dynamics in D.C.

And now Chapter Three. The President’s policy agenda, beyond stricter immigration controls, remains foggy at best. Policy craft at the White House has not improved, with the exception of the passage of criminal justice reform legislation, led by presidential son-in-law Jared Kushner, just hours before this most recent shutdown. And of course, most importantly, Paul Ryan has been replaced by Nancy Pelosi as Speaker of the House, and a new Democratic majority has taken control of the House of Representatives. That really matters. And the first manifestation of it was the capitulation by the President on January 25 to end the longest shutdown in American history; at least temporarily. Elections matter; and leadership matters. And the new Democratic majority in the House will make for — has already made for — a completely new policy and political dynamic in Washington. It will manifest itself in ways large and small over the semester and over the next two years.

For the Semester in Washington Program, 2019 is shaping up to be a fascinating year (from day one). The policy vacuums, opportunities, fights and chaos will be all around us. So will varying tones of debate, and certainly some crudeness. How will we deal with it? What will we do in our placements? We have a terrific group of very talented students who have arranged — and for some, rearranged — wonderful placements in and around Washington. These placements began for some in the Winter Term (during the shutdown), and began for others January 28. Regardless, the placements will give us the opportunity to be part of government litigation, legal advice and policymaking. In addition, our class will read and think and discuss policymaking by the government lawyer. We will consider a framework for policymaking; discuss the ethics of government lawyering (who do we really work for); and practice some of the skills needed for the government lawyer engaged in policymaking and legal advising. And we will have a front row seat to — and a role to play in — the history unfolding before our very eyes.

Chapter Two of the Trump presidency was about governing in a time of unified, Republican control of U.S. government. Not that the President was any more predictable or stable or graceful in his actions or his policies during this phase of his presidency. But some things became much clearer. For one, the President would continue to tweet and speak in the tone that sets him apart, with all of its ramifications. For another, the White House’s lack of policy craft — or even a significant policy agenda — left a critical and consequential vacuum. The vacuum was partially filled by establishment Republicans who controlled Congress and the levers of power in Washington — think the filling of the federal judiciary and tax cuts. Where the views of these leaders were shared across almost the entirety of the party, there was action. The vacuum was also partially filled by strong agency leadership — think Attorney General Jeff Session’s undoing Obama-era actions at the Department of Justice, or deregulation in other agencies, or the end of net neutrality. And finally, the vacuum was partially filled by inaction and chaos — think the budget, immigration and many other policies — where the Republican party itself has been fractured and thus there has been an inability to make policy deals. Policy craft still matters. And the lack of it in the White House has consequences. The shutdown of January 2018 was one of them.

For the presidency of Donald Trump, 2019 has ushered in a new and very different kind of chapter. The first chapter began with Trump’s 2016 election. A few days after the election, I traveled to Cambridge and met with three different groups of students, including the incoming Semester in Washington Class of 2017. You may remember those days and what people on campus and around the country were feeling then. For liberals and conservatives, there was anxiety, bred by an uncertainty of what the future would hold, and shock after an election result almost no one expected. That uncertainty and shock held sway in D.C. too, with anxiety slowly morphing into questions and strategizing: How would the President govern? What would the new Administration look like and who would join it? How would the President impact the work of Congress and the bureaucracy? What would be the policy agenda? And how should each of us react?

We will also meet some fascinating people who have made government lawyering and policymaking at least a part of their careers and get their take on the events of the day. We will attend a Supreme Court argument. We will discuss the policymaking process with those who have lived it. We will find some folks who represent private companies and practice some of the skills needed for the government lawyer engaged in policymaking and legal advising. And we will have a front row seat to — and a role to play in — the history unfolding before our very eyes.

Source: Pixabay
The Cyberlaw Clinic filed an amicus brief in the United States Court of Appeals for the D.C. Circuit on behalf of a group of former United States Magistrate Judges, supporting the unsealing of government surveillance orders and applications. The brief supports Jason Leopold, a BuzzFeed News journalist, and the Reporters Committee for Freedom of the Press (“RCFP”). The appeal arises out of a petition that Leopold filed in the D.C. District Court to unseal applications and orders for pen registers, trap and trace devices, tracking devices, stored email, and other types of surveillance, many of which remain sealed indefinitely in practice. He argued that, once the seal is no longer necessary, public access to these judicial records is required under the First Amendment and common law right of access to court records. Leopold was later joined by RCFP.

The parties originally worked with the United States Attorney’s Office for the District of Columbia to narrow the scope of the request, but although some information was turned over, the majority of the applications and orders remained sealed. On February 26, 2018, the district court denied petitioners access to any additional old surveillance matters and granted only very limited access to surveillance applications and orders going forward. The court based its decision largely on the administrative burden the full request would place on the government.

Leopold and RCFP have appealed the district court decision to the D.C. Circuit, asking for the court to grant access to the records under the First Amendment and the common law right of access to judicial records. Although the lower court decision is specific to the context of the D.C. district, Leopold’s case has the potential to shape how federal courts generally handle requests for information regarding government surveillance practices.

Amici are all former United States magistrate judges with a shared interest in unsealing federal surveillance orders and a diverse set of experiences on and off the bench:

- Judge Mildred Methvin has served as judge in Louisiana, Maryland, and Pennsylvania and is a former AUSA. She is currently an attorney and mediator in Louisiana.
- Judge Brian Owsley has served as a judge in Texas and is a former trial attorney for the U.S. Department of Justice. He is currently an assistant professor of law at University of North Texas at Dallas College of Law.
- Judge Viktor Pohorelsky served as a judge in New York. Prior to his judicial appointment, he had a fourteen-year career as a litigator in private practice and as an AUSA.
- Judge Stephen Smith served as a judge in Texas and is the current director of the Fourth Amendment & Open Courts program at Stanford Law School’s Center for Internet and Society.
- Judge David Waxse served as a judge in Kansas and is the former President of the Kansas Bar Association and former Chair of the Kansas Commission on Judicial Qualifications.

Based on their more than 90 years of collective experience on the bench, amici explain the practical consequences of unsealing surveillance matters. Amici outline the process of unsealing surveillance applications and orders in their courtrooms and discuss places where the administrative burden can be reduced, including the shift to e-filing of sealed surveillance applications and orders.

Amici further explain why the burdens of unsealing are not as dire as the district court predicted: surveillance filings can be easily redacted, the majority of unsealings of old surveillance matters proceed unopposed, and properly redacted surveillance documents present no real risk to law enforcement practices. Amici also explain the downsides of considering government inconvenience when determining whether the public should have access to surveillance orders. As administrative practices vary greatly across judges and across government offices, taking the administrative burden into account would effectively make the common law right depend on the size, efficiency, and workload of the government office who made the request or the judge who received it.

The Cyberlaw Clinic is honored to have represented such august amici and hopes the D.C. Circuit Court of Appeals will seriously consider their input. Fall 2018 Cyberlaw Clinic student Akua Abu helped develop arguments for the brief, and the brief was written by Winter 2019 student Alexandra Noonan with assistance from Clinical Fellow Kendra Albert and Clinical Instructor Mason Kortz.
Almost five months after a migrant mother and son with ties to Keene arrived in New England, their future in the United States is still up in the air.

Honduran citizens Jessica Baca Garcia and her teenage son, Mario Jafet Cerrito Baca, sought asylum in the United States after crossing the border in May. They had been detained in separate centers in Texas until July. The two were reunited at the end of that month and have since been living with family members in New Bedford, Mass.

Much has changed since then, said their relative Jessica Garcia, who works at The Sentinel. Mario, who goes by Jafet, is attending public school. His English has improved in leaps and bounds, Garcia said. In October, he celebrated his 13th birthday alongside his cousins.

Baca Garcia can’t legally work, so she stays at home, helping her sister cook and clean and watching her toddler niece, Tiaani. Baca Garcia’s new life in New Bedford is safer than her life in Honduras, she told her family members. Still, the anxiety of having been separated from her son lingers, Garcia said.

“Jessica has not left the house at all,” she said. “She’s very nervous all the time, not so much at home but she was afraid to leave the house.”

Baca Garcia sought asylum status for her and Jafet because of “horrific violence” in their native country, including abuse from her boyfriend, who has gang ties, Jessica Garcia said in July. She’s afraid she will be killed if returned to Honduras.

Jafet was one of an estimated 3,000 children who were separated from their parents at the U.S.-Mexico border under President Donald Trump’s “zero tolerance” policy.

During their separation in Texas, Baca Garcia went before an immigration judge and her asylum application was denied. For a while, it seemed as though mother and son were destined to get deported.

Around that time, lawyers Nancy Kelly and John Willshire of Boston-based Harvard Immigration and Refugee Clinic at Greater Boston Legal Services started representing mother and son for free. Willshire said Jafet’s case is proceeding through the immigration system, but that he and Kelly are waiting to hear if Baca Garcia’s case will be re-opened.

In recent months, he said, there have been some favorable developments in the immigration court system that would perhaps allow Baca Garcia’s case to be re-heard. A settlement agreement will allow some parents who were separated from their children at the border to have their cases re-heard.

“This family has gone through an awful lot and it was really an impossible situation for them to be detained,” Willshire said. “And after they got here, they were both really traumatized.”

Willshire said he does not know how long the proceedings will take, or their possible outcomes. But he said both Baca Garcia and her son will continue these proceedings at the immigration court in Boston.

The mother and son’s plight attracted much public attention: A Change.org petition attracted nearly 290,000 signatures, and U.S. Sen. Jeanne Shaheen, D-N.H., intervened on the pair’s behalf. Also, a crowdfunding campaign for Baca Garcia and her son raised about $2,200.

Jessica Garcia said mother and son are using the funds for their living expenses and to pay for trips to meet their lawyers.

In the meantime, the family vacillates between anxiety and hope. Garcia said the wait has put a strain on the family.

“If they have to pick them up and bring them home I would just be completely devastated,” Garcia said, adding that if Baca Garcia can’t stay in the United States, her son will go with her to Honduras. At times, Jessica Garcia allows herself to cautiously dream about the future. Perhaps, down the line, the family will start a Honduran food restaurant in the Boston area, and Baca Garcia could work there. Maybe she and Jafet would have enough money to live in an apartment of their own.

But it all hinges on the asylum proceedings, Garcia knows. Willshire, for his part, is optimistic about Baca Garcia and Jafet’s chances.

“This family is a very particularly special family in the sense that they really suffered incredibly and we’re trying to help them,” he said.
A Ninth Circuit judge suggested that the Trump administration’s Education Department used a flawed formula to make defrauded students pay back at least some loan debt to the federal government.

“It certainly seems at least plausible to say what was being compared here were apples and oranges, and the number that was being used as the comparator was being taken out of context entirely,” U.S. Circuit Judge Marsha Berzon said during the hearing.

Berzon was responding to a Justice Department lawyer’s argument that the method used to determine how much defrauded students should pay back in loan debt was both fair and practical.

Education Secretary Betsy DeVos is appealing a May 2018 court order forcing her to stop collecting loan payments from students who were misled about post-graduation job prospects by the now-defunct, for-profit Corinthian Colleges.

In December 2017, the Education Department announced it would reverse an Obama-era rule that gave full debt forgiveness to students deceived by Corinthian Colleges, a private 100-campus institution that collapsed in April 2015 after multiple state and federal investigations exposed its fraudulent marketing practices.

A lawyer representing a nationwide class of more than 100,000 student borrowers argued the department’s new “Average Earnings” rule used an unfair formula to rescind the government’s previous offer of full debt relief.

Attorney Joshua Rovenger, of the Legal Services Center of Harvard Law School, said the department only used earnings data from 2014, when some students were still in school, and compared it to average earnings of graduates from other colleges, including those who now work minimum-wage jobs with their degrees and certificates.

Additionally, Rovenger argued, the department failed to account for graduates who work in fields that have nothing to do with their areas of study.

Justice Department lawyer Joshua Salzman countered that the use of existing data to assign value to each program was the most practical way to ensure borrowers only get compensated for “actual harm suffered.” The department maintains that cancelling all of the students’ loan debt would divert resources from important educational programs.

“What the plaintiffs are asking for is an assumption that everyone got zero value,” Salzman told the circuit judges.

Despite the lawyers’ focus on the fairness of the formula, U.S. Magistrate Judge Sallie Kim blocked the “Average Earnings” rule for a different reason – because the Education Department obtained the earnings data by sharing borrowers’ personal information with the Social Security Administration in violation of the Privacy Act.

Challenging that finding, Salzman argued that the “end product” of the data exchange is more important than how the data was obtained. Salzman insisted the result was “aggregate earnings data,” not individualized, personally identifiable information.

That argument didn’t go over well with Berzon, who pointed out that personally identifiable information was shared with the Social Security Administration in the first place.

When Salzman explained how “end-product” data was used “to determine how much relief individual borrowers should get based on the program,” Berzon interrupted.

“There you go! Individual borrowers! It ended up with individual borrowers,” Berzon exclaimed.

But Salzman insisted exemptions in the Privacy Act allow the government to use citizens’ private data for “routine uses” and “programmatic purposes.”

Rovenger countered that the Privacy Act also requires the government to notify people when it shares their private information, and the department’s “general disclosures” on loan applications and borrower defense claim applications were insufficient.

“We urge this court to continue protecting these students and affirm the injunction,” Rovenger said in his final pitch to the panel. U.S. Circuit Judge Richard Paez and U.S. District Judge Gary Feinerman, sitting by designation from the Northern District of Illinois, joined Berzon on the panel.

The panel did not indicate when it would issue a ruling.

After granting the plaintiffs’ request for an injunction last year, Magistrate Judge Kim declined to revive the prior Obama administration policy that would completely wipe out the students’ loan debt. In October, Kim granted the borrowers’ motion for class certification, allowing a nationwide class of approximately 110,000 students to team up in their lawsuit against the Education Department.
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