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The Separation of Powers: Complicated, Sometimes Messy, but the System Works

By Dennis Friend
The Daily Record

George Washington once complained that in Congress, "party disputes and personal quarrels are the great business of the day whilst the momentous concerns of an empire ... are but secondary considerations. Business of a trifling nature and personal concernment withdraws their attention from matters of great national moment."

There are those who would argue today that nothing has changed.

Did the framers of the Constitution make a mistake?

Not at all, Professor Sean Watts said. He teaches Constitutional Law at Creighton University School of Law.

"It's tempting to think that partisan hostility and noisy factions are byproducts of modern phenomena like social media. In fact, they're part of the design of our constitutional system," Watts said.

The country's founders came up with a concept of separation of powers for the newly-formed government. A Congress, a President and a Supreme Court would share power and would interact with each other, offering checks and balances as three distinct and independent branches of government. The plan defined legislative, executive and judicial powers and outlined how they interact.

"No, they did not make a mistake," according to Anne Marie O'Brien, President of the Omaha Bar Association and partner at the law firm of Lamson, Dugan & Murray, LLP. "The Founding Fathers knew the result of their handiwork because partisan hostility had manifested itself almost immediately. But better to give everyone a voice, even if some used their voices more aggressively than others."

"Ambition must be made to counteract ambition," James Madison explained in Federalist 51. Madison believed the separation of powers along with built-in checks and balances would preserve political liberty and provide a framework for freedom.

"Teaching and researching constitutional law, I've come to understand that our founding generation valued debate over consensus. The way they ambiguously scattered authority between the various branches of government practically guaranteed that succeeding generations would quarrel and clash over governance," Watts said.

"No, they didn't make a mistake," said Democratic Congressional candidate Kara Eastman. "We do need checks and balances, and it's okay for big decisions to take time and work. Part of our democracy is being able to engage and share different ideas and it's a shame that our current Congress and the Administration are often in gridlock.

"This isn't a problem with checks and balances, this is a problem with people who are putting special interests above the people they serve. We need leaders that can bring people together, with values that put people first, and who are able to work together toward solutions. We need reform to eliminate gerrymandering which makes districts uncompetitive and creates a hyper-partisan environment."

Charles Shane Ellison concurred. He is special assistant professor of law, Immigrant and Refugee Law Clinic, Creighton University School of Law, and legal director for Immigrant Legal Center, an Affiliate of the Justice For Our Neighbors Network. "There can be little doubt as to the ingenuity of the founders in constructing our robust system of checks and balances in the Constitution," he said.

The Courts

The best-known power of the Supreme Court may be judicial review. Ellison pointed out that, "In today's highly partisan environment, those checks are as important as they have ever been. Indeed, especially of late, the role of the judiciary in particular has been paramount in resisting executive overreach in the area of extreme

See SEPARATION OF POWERS, page 4

LAW DAY 2018

FRAMEWORK for FREEDOM: Separation of Powers

Robert M. Spire Award Hon. Mike Heavican Celebrated For His Devotion to the Law

By Lorraine Boyd
The Daily Record

The Chief Justice is in a unique position to honor the legacy of Robert M. Spire, the late lawyer for whom the Omaha Bar Association's Public Service Award is named.

At the Law Day luncheon on May 1, Nebraska Supreme Court Justice Michael G. (he goes by Mike) Heavican will receive the award named for his mentor.

Asked what the award meant to him, Heavican replied, "Obviously it's huge to anyone who is given the award, but Bob Spire was somebody I worked with as a young lawyer. When he was the [Nebraska] attorney general, I was the Lancaster county attorney. We had a lot of interaction. He was a magnificent lawyer, a fantastic example to everyone who practices law as to integrity and hard work and so forth, so the award means a great deal to me."

Mike Heavican first came to this writer's attention when he became Nebraska's attorney general in 2001. During an interview, he was friendly, soft-spoken, laid back, confident and knowledgeable. Seventeen years later, not much has changed in his demeanor.

Visiting after the Supreme Court's hearing of oral arguments at Millard North High School on an April afternoon, he shared his thoughts on the necessity of the Supreme Court educating the public about the Judicial branch of government, and about his role in making that happen.

Hon. Mike Heavican has spent his whole career in public service to bring justice to the people of Nebraska.

"The most basic thing to do is to provide a fair and impartial forum to handle legal disputes. You cannot overestimate the importance of that system for any democracy and certainly Nebraska has a flourishing democracy as a state, and the country as a whole, and an independent Judiciary is all-important to maintain that," Heavican said.

"You can almost be assured that if you find a dysfunctional country, it's because there is not an independent judiciary, and THAT is because the executive branch probably has usurped the powers of the Judiciary."

What other services does our high court have to ensure people have access to justice?

"With regard to services, the Nebraska Supreme Court regulates the legal profession, we do all of the juvenile justice supervision work through our probation office. We do all of the adult probation work in the state, which is increasingly important because of our overcrowded prison situation. We have the public guardian as part of the Supreme Court, so we provide a lot of services, in addition to the court services we provide," he said.

Spire award winners demonstrate a commitment to the public's knowledge of the law. Referring to

See ROBERT M. SPIRE AWARD, page 3

OBA Public Service Award 2018

Law Library Deemed 'Core of Our Enterprise as Omaha's Law School'

By Julien R. Fielding
The Daily Record

The Omaha Bar Association has chosen the Creighton Law Library as the recipient of its non-attorney Public Service Award, which was initiated on Law Day in 1983. "While Creighton deans and professors have been previous award recipients, the law library has not," said Dave Sommers, executive director of the OBA.

Sommers said that he's "seen firsthand how helpful the library is in assisting members of the public, as well as lawyers, and alums … with their legal questions."

Michael J. Kelly, interim dean of Creighton University School of Law, said that the Klutznick Law Library in the McGrath North Mullin & Kratz Legal Research Center (in the Ahmanson Law Center) is "at the core of our enterprise as Omaha's law school. Not only is it an amazing repository of legal information, it is the cornerstone of the innovative legal scholarship I, our faculty and students produce and contribute to the nation's ongoing legal dialogue each year.

"Home to the Creighton Law Review and the Omaha Bar Association, our law library is a rich resource for the entire community. The dedicated staff work hard to preserve our legal heritage, while simultaneously ensuring that Omaha's lawyers and our alumni have the latest cases and statutes from every jurisdiction to resolve the most challenging legal disputes of our time. Creighton University School of Law would not be what it is without our treasured law library, and we are extremely proud of them for receiving this honor and award."

"The library is open to the general public with legal research needs," said Troy C. Johnson, director of Creighton Law Library. "This includes a spectrum of patrons, from pro se individuals to local attorneys. The library provides resources that specifically support both of these groups.

"For example, for pro se patrons we have a robust collection of NOLO publications. NOLO is a publisher that specializes in materials for people representing themselves."

NOLO began publishing do-it-yourself legal guides in 1971. In the 40 years since its founding, NOLO has evolved with technology, developing do-it-yourself software.

"What makes NOLO items stand out is their ability to include the details that would really make a difference for someone representing themselves. There are rubber-meets-the-road details that NOLO publications provide that are often not in any other resource."

Johnson continued, "For local attorneys, we have a robust collection that allows them to do deep level research on almost all major areas of law. We also have a Westlaw Patron Access account that is available to both pro se patrons and local attorneys. If someone is physically in our library, our electronic resource licenses allow any patron to access our entire collection. There are some very select resources that are only accessible to our students and faculty, but 99 percent of our materials can be accessed by anyone as long as they are in the law library. The Westlaw for Patrons account and a Bloomberg Law account that is accessible to all our patrons is a significant investment. If our focus was only on faculty and students we would not have resources like these."

Troy C. Johnson, director of Creighton Law Library, has been described as someone who always wants to be helpful – perfect credentials for a law librarian.

Creighton Law Library has some unique resources that the public wouldn't find elsewhere, Johnson said. "We also work to support other libraries in Omaha. The Douglas County Law Library provides excellent resources and service, and we have an agreement to share resources with them. We also have had a history of providing a student to work at that library as a liaison and to help support both institutions."

"We are very grateful to the Omaha Bar Association for recognizing us," Johnson said. "Libraries are service-oriented institutions, so this type of award goes to the heart of what we do, and as such, we are very honored to receive it."

Johnson said that he encourages members of the local bar to come in and look around the library and allow staff members to show them what the law library has to offer. "We can show subject-specific materials to attorneys for the area they practice," Johnson continued. "I think it is useful for people to ask questions even when they don't think there is any material they are missing. Asking questions allows attorneys to find materials they did not even know existed.

"The law library has a reference e-mail that can be used for questions without initially having to come into the library. [The e-mail address is lawref@lists.creighton.edu.] We can verify if there are resources on a specific topic and we can also address specific reference questions via email. Ultimately though, to have the best access local attorneys will want to consider

See OBA PUBLIC SERVICE AWARD 2018, page 5

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Pending Decision Looms Large

Patent Law's Future Has Not Escaped Scrutiny of High Court

Patent attorney Ryan Grace, owner and founding partner of Advent, has built the firm into one of the largest intellectual property law firms in Nebraska. Advent operates not only throughout the United States but in Canada and London as well.

By Julien R. Fielding
The Daily Record

In late November of last year, the U.S. Supreme Court heard the *Oil States Energy Services LLC v. Greene's Energy Group LLC* patent case. What this means, said Luke Holst, patent attorney at McGrath North, is that they have been asked to decide whether the America Invents Act's most popular patent review procedure, Inter Partes Review (IPR), is constitutional or not.

Ryan T. Grace, patent and trademark attorney and managing partner at Advent LLP, provided background on the case: "The *Oil States Energy Services v. Greene's Energy Group* ['Oil States'] case turns on a process for disputing the validity of a patent created by the America Invents Act (AIA) which was signed into law in 2011. The process is called Inter Partes Review (IPR) and involves an administrative proceeding at the Patent Office. The process is generally faster and cheaper than challenging the validity of the patent in an Article III federal court. Yet, the rules and standards during IPR are much different than those followed by the federal court.

"In this case, Oil States Energy Services ['Oil States'] attempted to sue Greene's Energy Group ['Greene's Energy Group'] for patent infringement. Greene's Energy Group filed an IPR asserting that Oil States' patent should not have been granted in the first place. The Patent Office agreed with Greens Energy Group and cancelled Oil States' patent," Grace said.

"The issue before the Supreme Court is Oil States' assertion that the IPR process is unconstitutional, because private property rights were taken from them by an administrative proceeding (i.e., the IPR). Oil States argues that patent rights are a private property right and adjudication of the patent validity must take place in an Article III federal court with a jury."

"In response to a growing sense that questionable patents are too easily obtained and are too difficult and expensive to challenge in federal courts, Congress sought to provide a more efficient system for challenging such patents," said John P. Passarelli, partner at Kutak Rock.

Breaking News at Press Time
The Supreme Court on April 24, in a 7-2 decision, upheld the constitutionality of the America Invents Act process.
The High Court ruled that patent rights were fundamentally a "public right" not "private property." What this means for the future of patents will be explored here in a future article.

"This will be the United States Supreme Court's first opportunity to determine whether that 'more efficient system' is constitutional, so you have the Supreme Court about to weigh in on this important question as to how litigants can challenge the validity of United States patents."

Holst added that "proponents of IPRs view the administrative proceedings as a faster, less expensive tool than federal litigation to combat 'patent trolls' and challenge the validity of weak patents. Critics believe IPRs undermine U.S. innovation, noting that these administrative proceedings use a different legal standard than the federal courts and are more likely to invalidate a patent, wherein some studies show IPR 'kill rates' as high as 90 percent."

Since this case involves patents, it would seem that only a small number of Americans would be affected.

But that's not the case. According to Fortune magazine, the "constitutional challenge could topple a major pillar of the current patent system and send economic ripples through the tech and retail sectors."

Holst claims that "any American who has a creative bone in their body will be affected by the Supreme Court's decision, whether they are a startup entrepreneur, a CEO of a Fortune 500 company, or simply [someone who] likes to watch Shark Tank. Not only does this decision have the potential of removing a major pillar from the

See PATENT LAW, page 6

About the 2018 Law Day Theme

This year's May 1 Law Day theme is one that represents the bedrock of our democracy: "Separation of Powers: Framework for Freedom."

The U.S. Constitution defines our government as one with distinct and independent branches – the President, Congress and the Supreme Court. These three separate branches share power and each branch serves as a check on the power of the others.

"Ambition must be made to counteract ambition," James Madison explained in Federalist 51. Why? Madison believed that the Constitution's principles of separation of powers and checks and balances preserved political liberty. They provided a framework for freedom.

The topics we have chosen to explore in this issue were prompted by published lists of concerns about what the future holds for our democracy. They are important because our framework must be preserved and defended in order to keep our nation free.

Today's news is full of concerns about overreach of power by the three branches. The outcomes affect us all and not in small ways. Here, we offer experts' insights into some of these concerns in our featured stories.

Some leaders in our legal community were invited to share their thoughts on the theme. You'll find these contributions scattered throughout the issue.

Robert M. Spire Award

Continued from page 1

the appearances at Millard North, as well as at Creighton School of Law that morning, he noted, "This is part of that process. We try to do as much education as we can, and all of the kinds of outreach that we have been doing for decades, and even more intensely in recent years. [We do] these kinds of events in schools; webcasting of our oral arguments and cameras in the courts – generally we've tried to be more open so that we are not the forgotten branch of government.

"Every summer we do a reach-out program to an area of greater Nebraska. This summer we will be going up to northeast Nebraska. We will be visiting courthouses and judges and legal organizations and community members there. Our initial plan also includes visits to the reservations. It's important that we reach out to all people of Nebraska."

When Heavican was first named Chief Justice in 2006 by then-Governor Dave Heineman, the governor pointed to two areas in which he hoped Heavican would lead: "Protecting the best interests of vulnerable children and helping advance reasonable sentencing guidelines for community corrections."

Heavican responded with the efforts he and the Court have made in the past 12 years.

[We have] "the Juvenile Justice supervision; we have active Eyes of the Child committees around the state trying to emphasize children in the courts; and we are an integral part of the efforts to have fewer people incarcerated and more of them handled by community corrections on the adult level, including the diversion courts."

When Heavican became Chief Justice, Sen. Ben Nelson said he hoped he would "continue the tradition of John Hendry by taking the bench out to the people and being an outgoing spokesman and advocate for the law." Check.

Heavican also noted he has tried to fulfill his promise to be "as accessible as retiring Chief Justice John Hendry."

Asked what the people's perception is of the Judicial Branch, Heavican said, "Surveys show that we are viewed more positively by the public than our other two compatriot branches of government. I think most people have a positive opinion of the courts, but, of course, it is important for us to do these kinds of outreach things to be accessible."

These are difficult times. What kind of challenges will the Court face in the future?

"We have huge challenges on budgetary issues. Most of our budget comes from the Legislature. Local courthouses are funded by local property tax dollars.

"But on a broader scale, lots of folks who have disputes to be resolved are going places other than the court system because our system is too slow and it costs too much money. For example, lots of people who are litigants in our court system can't afford lawyers, so they try to represent themselves.

"Those are huge challenges for the profession that we have to take a very good look at and make sure that we are really efficient as to how we administer justice and also that we adapt to what people expect not only from the legal profession and the courts, but really from all institutions today. So, for example, we have to be technologically savvy and we have to make sure there is great access to the court system through technology."

Do bar associations such as the Nebraska State Bar and the Omaha Bar have an important purpose in the judicial system?

"Bar associations are good because they bring lawyers together and they emphasize all the things that lawyers need to think of: a broader perspective, congeniality, working together, the need to educate the public, the special role the legal profession has in democracies. Those are things that bar associations foster and that is how the legal profession is refreshed, reborn and becomes more pertinent to everybody's lives." He means it – even though he lives in Lincoln, he attends many functions of the Omaha Bar Association, so many that some probably think he lives here.

Heavican spent his legal career before the Supreme Court as a prosecutor. The native of Columbus, Neb., earned his bachelor's degree and juris doctorate at the University of Nebraska-Lincoln. He started his legal career as Deputy Lancaster County Attorney and worked his way up to County Attorney. In 1981, he joined the Nebraska Attorney General's office and was appointed AG in 2001, with bi-partisan support in the Senate. After five years, he was selected to lead the Nebraska Supreme Court.

He was described by a colleague in the Lancaster County Attorney's office as someone who "liked to be here early and see what people were doing, very involved in the office." Robert Spire was once quoted as saying his motto was to "get up early and work hard, to listen to the people and accept criticism, to correct my mistakes and try to do what is right."

It looks as if the OBA Public Service Award recipient has followed in the footsteps of Robert M. Spire. A fitting tribute, indeed.

"Hamilton believed judges could counterbalance the powerful legislative and executive branches merely through a reputation for integrity and good judgment. If that reputation is tainted by judicial misconduct, the Constitution's framework for freedom is shattered."

– Hon. Laurie Smith Camp
Chief Judge, U.S. District Court
District of Nebraska

Separation of Powers

Continued from page 1

immigration enforcement."

However, the high court's ability to declare a legislative or executive act a violation of the Constitution is not found within the Constitution itself. The Court established this doctrine in 1803 in the case of *Marbury v. Madison* when it had to decide whether an Act of Congress or the Constitution was the supreme law of the land. The Judiciary Act of 1789 gave the Supreme Court original jurisdiction to issue writs of mandamus (legal orders compelling government officials to act in accordance with the law). Article VI of the Constitution establishes the Constitution as the supreme law of the land and the Supreme Court held that an Act of Congress that is contrary to the Constitution could not stand. In subsequent cases, the Court also established its authority to strike down state laws found to be in violation of the Constitution.

Before the passage of the Fourteenth Amendment in 1869, the provisions of the Bill of Rights were only applicable to the federal government. After the amendment's passage, the Supreme Court began ruling that most of its provisions were applicable to the states as well. Therefore, the Court has final say over when a right is protected by the Constitution or when a Constitutional right is violated.

Robert Alt, a visiting fellow with the Heritage Foundation, wrote in "What Is the Proper Role of the Courts?" that "Alexander Hamilton referred to the judiciary as the least dangerous branch of government, stating that judges under the Constitution would possess 'neither force nor will, but merely judgment.' Yet recently, the courts have wielded great power, directing the President on questions as monumental as how to conduct war, and micromanaging the states concerning even the most minute details of local school and prison operations."

O'Brien suggested the judiciary does as well as humanly possible and will generally offer a good-faith effort to interpret the Constitution.

"The study of Behavioral Economics looks at how we as human beings decide things. Daniel Kahneman won the Nobel Prize for his groundbreaking work in this area. He determined through research with his partner, Amos Tversky, that people regularly make decisions that include subconscious bias, even when they do not believe that they are being swayed."

Since judges are human, O'Brien stated, "we can assume, based upon Kahneman and Tversky's work, that some amount of political bias may indeed subconsciously affect how a judge decides issues regarding the Constitution."

Sean Watts

Anne Marie O'Brien

Kara Eastman

Charles Shane Ellison

Appellate courts were created with this notion in mind, O'Brien said. "If bias is prevalent and unwarranted, an appellate court of appeals can reverse a decision that seems inherently unfair. The legal system has its own set of checks and balances that operate to ensure that each decision can stand on its general merits. It may be imperfect, but it is the most fair system in the world today to resolve issues between people."

James Madison wrote "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

Basically, the Founders gave the power to make laws to Congress, the power to enforce laws to the President and the power to interpret laws to the courts.

But there are limits. Federal courts can hear cases but cannot issue advisory opinions. Courts cannot expound on a law of their choosing or even at the request of the President himself, but must wait for a case to be properly presented to the court. The courts would have the authority to determine whether laws passed by the legislature were consistent with the fundamental and superior law of the Constitution. If a law was contrary to the Constitution, then it was void.

The Supreme Court agreed when it ruled in the case of *Marbury v. Madison*. In weighing the validity of a provision of the Judiciary Act of 1789, Chief Justice John Marshall declared that "It is emphatically the province and duty of the judicial department to say what the law is."

The Marbury Court did not claim that the courts possessed exclusive or supreme authority to interpret the constitutionality of laws. The other branches also are responsible for interpreting the Constitution.

The President, for example, takes an oath to support the Constitution and carries out this oath by determining which laws to sign.

"While the President may sign or veto legislation for political or policy reasons, the President faithfully discharges his oath by vetoing legislation if he believes that it would violate the Constitution," Alt said. If the law was signed by one of his predecessors, a President may engage in constitutional interpretation by choosing not to enforce it if he believes it to be unconstitutional. Members of Congress also take an oath to support the Constitution and will interpret the Constitution by deciding which laws to enact. Congress may choose to enact or reject legislation for political or policy reasons, but when its members reject legislation that would violate the Constitution, they are acting in accordance with their oaths.

"The proper role of a judge in a constitutional republic is a modest one," Alt wrote. "Ours is a government of laws and not men. This basic truth requires that disputes be adjudicated based on what the law actually says, rather than the whims of judges."

That means judges acting in accordance with their constitutional duties will at times uphold laws that may be bad policy, and strike down laws that may be good policy. Judicial review requires a judge to determine not whether the law leads to good or bad results, but whether the law violates the Constitution.

"Supreme Court judges are appointed by Republican and Democratic presidents," Eastman pointed out. Therefore, "Some are more liberal, and some are more conservative. The idea is that they'll be able to look at the facts in front of them and work together to come to a consensus – weighing the Constitution, precedent and the impact their decision will make on the U.S. as a whole." Eastman concedes, "This doesn't always happen, and when our Supreme Court becomes unbalanced with too many partisan judges on one side or another, it will be even more challenging to come to impartial decisions rather than decisions influenced by special interests."

Nebraska Republican Senator Ben Sasse concurred: "As is necessary in all three branches, the Article III branch of government must faithfully uphold the Constitution and the rule of law. That's why, as a member of the Senate's Judiciary Committee, I was a vocal advocate for the nominations of Neil Gorsuch and Steve Grasz. Both know that their black robes are there to cloak their personal policy preferences – those are the type of judges the judiciary needs."

The Legislative Branch

Sasse said the separation and balance of powers "are good, necessary, and integral parts of the American experiment. Unfortunately, for decades, Washington hasn't been interested in fixing our big problems with serious solutions." A combination of issues, he said, has left Congress at "one of its weakest points in history. Too many politicians who focus on permanent incumbency are eager to pass off legislative responsibilities to the Executive Branch. Both parties expand the Executive Branch when they're in the Oval Office."

Eastman, too, said she is worried that the sometimes-fierce partisanship of the legislative branch can adversely affect legislation.

"Our lawmaking process is currently held hostage by special interest groups. Citizens United has allowed large donations and corporate contributions to corrupt our political system. Members of Congress are mostly millionaires."

In addition, Eastman said, gerrymandering is also a threat, citing Nebraska's Second Congressional District.

"(It) was redrawn along partisan lines in 2010 after Obama won the district in 2008. Gerrymandering gave Republicans a solid majority in the House in 2012, even though Democratic candidates won a million more votes. … Gerrymandering increases partisan politics and prevents all Americans from having their voices heard in government. Not all issues need to be partisan issues."

Lee H. Hamilton, a distinguished scholar at the Indiana University School of Global and International Studies and a former Indiana congressman, also thinks the United States of America stands at a crucial point in history. Congress is in deep trouble, he said, "and no one seems to be offering hope. Its public standing is abysmal, occasionally dropping into the single digits in polling. Very few people seem to respect it, even on Capitol Hill." He is worried that more power is shifting to the president: "The 'balance of power' you read about in seventh-grade civics? It's a myth today. Co-equal branches? Not anymore. Members of Congress over the years have delegated much of their power to other branches, especially the executive, so that they can escape accountability for tough choices; … bills are often drafted outside the committee system, without careful deliberation, consideration, or even participation by most members. The leadership has accumulated more and more power, leaving ordinary members out of the loop, especially in the all-important budget process."

Ellison said the sometimes-fierce partisanship of the legislative branch can indeed have a serious affect on the type and quality of legislation, but he remains hopeful.

"In an ideal world, vigorous competition should unearth shortcomings and oversights within legislative proposals in much the same way that adversaries in litigation ferret out the weaknesses of their opponent's argument. Such debate should result in thorough and thoughtful outcomes."

Hamilton described a Congress that has become extremely polarized, resulting in decisions that are more extreme, "and Congress has largely rejected its oversight responsibilities, which ought to carry a weight equal to legislating – and which put it on a par with the executive branch. It uses the subpoena power rarely, grills administration and other witnesses only occasionally, and even more rarely holds the executive branch accountable."

He suggested that "Congress needs to reassert the authority given it by the Constitution to serve as a check on executive overreach and misguided policy-making. Americans have a right to be disappointed in the performance of the legislative branch. But they also have an obligation to speak up about it and demand action not just on a favored bill, but on improving the effectiveness of the Congress itself."

And Ellison offered a caveat to his statement that vigorous discussion can lead to good legislative outcomes: "However, this assumes a measure of good faith, sound ethics, and fair play between the participants. While such assumptions – particularly in an age of "alternative facts" – are not always sound, we should continue to call our elected officials to collegiality even while they zealously defend their positions."

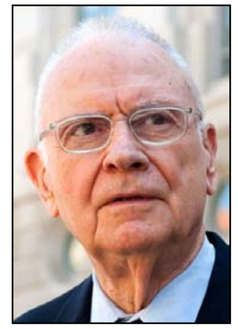
Sasse said, "The bottom line is this: If we're going to turn this

See SEPARATION OF POWERS, page 5

> As Alexander Hamilton recited in Federalist 78, "There is no liberty if the power of judging be not separated from the legislative and executive powers." To preserve our framework for freedom, each branch of our government must operate faithfully within its own realm with the Constitution as the supreme law.
>
> – Hon. L. Steven Grasz
> Circuit Judge, U.S. Court of Appeals
> Eighth Circuit

Robert Alt

Ben Sasse



Lee H. Hamilton

Separation of Powers

Continued from page 4

around, we need to re-teach some fundamental civics. Our federal government is a shared project meant to be a framework to secure our rights through checked and limited government. That was the bold claim made by the founders. That's not something our kids learn anymore. We haven't taught civics in this country for decades. A shocking number of younger Americans can't name all three branches of government. We need to teach and celebrate civics and force Washington to drop its short-term obsessions and refocus on the most important, more urgent stuff. That's how we start to fix this mess."

The Executive Branch and The Two-party System

"Every President leaves a mark on the office that will affect future administrations. Only history will be able to tell the extent of that mark," Ellison said. Even with the built-in division of powers and with the concept that the executive, legislative and judicial are co-equal branches of government, each occupant of the Oval Office will have individual ideas and approaches and will leave an imprint.

That's what has concerned Eastman: "I am gravely concerned about the current President's values and actions. We need a new Congress to hold him accountable and represent our values. Right now, we are setting a precedent where the President is held to different standards than the rest of the citizens of the United States.

However, dissension and discord have been constant election companions almost from the start. "The Founding Fathers created a brilliant outline of governmental checks and balances that has held up well for over 200 years," O'Brien said. "The system was initially driven by a desire to avoid the central location of power in a king with final say in all things. Remember, the genesis of the Declaration of Independence was to create self-rule and escape the sovereignty of King George. Fierce conversation is baked into the process. A democracy allows for a difference of opinions, which necessarily comes with aggressive partisanship. Our Founding Fathers were often bitterly partisan themselves."

Consider the opposing viewpoints of Thomas Jefferson and Alexander Hamilton, she said. Hamilton led the Federalist Party and supported a strong national government with a powerful president and courts. Jefferson led the Republicans and believed political power should be spread throughout the population.

O'Brien pointed out that Hamilton, Jefferson and James Madison "fought aggressively both in person and under noms de plume to determine whether the United States would be an agrarian economy with more democratic governance (Jefferson), or an industrial economy with more sovereign oversight (Hamilton). This was in the very first years of the Republic. It was so bad at the inception that George Washington mentioned the bitterness of partisanship in his 1796 farewell address to the presidency. He witnessed firsthand the fights between Hamilton, Jefferson and Madison. Washington warned that politics was 'sharpened by the spirit of revenge' and could lead to 'formal and permanent despotism' if both sides were not willing to come to compromise of some sort. The level of rhetoric in our politics has ebbed and flowed since then."

In fact, the intense disagreement helped create the system of political parties in the United States.

George Washington ran unopposed and won the nation's first two presidential elections. However, as Harold Braverman and Christine Johnson wrote in "The Making of a Nation," the presidential election in 1796 marked the beginning of two-party presidential races.

Republican Thomas Jefferson ran, as did Federalist candidate John Adams. Adams was expected to win. He was well known, had campaigned for American independence and had been Washington's choice for vice president. But the Federalists, led by former Treasury Secretary Alexander Hamilton, worked against Adams and tried to win support for Thomas Pinckney of South Carolina.

When the votes were counted, 71 electors voted for Adams, 68 voted for Republican Thomas Jefferson and only sixty voted for Hamilton's choice.

Back then, the candidate with the most votes became president and the candidate with the next largest number became vice president. So America's second president would be John Adams. Its second vice president would be Jefferson.

"Fierce partisanship is simply a reflection of passion," O'Brien pointed out. "The more passionate we are about issues, the more we are willing to fight for them. It may seem that today's discourse is more fierce than ever. But we know from history that this is not true. At the beginning of the Republic, the rhetoric was extraordinarily hostile."

For example, the rancor did not improve after the election. Adams kept President Washington's cabinet. The three men who were Washington's chief government officials would now advise President Adams. Washington had appointed them at Hamilton's request. However, according to Braverman and Johnson, the secretary of state knew little about foreign relations, the secretary of the treasury knew little about finance and the secretary of war knew nothing about military matters and defense. Adams may have kept these men as an act of party unity or because he could not get anyone else.

"Whatever his reason, the decision was politically costly, for the three men worked together against him. President Adams told his cabinet secretaries what he wanted. Then they went to Alexander Hamilton for orders," Braverman and Johnson wrote. In the end, the choice helped destroy the Federalist Party.

"Adams, like other Federalists, believed that men of money and position should govern America. He did not trust the common people," Braverman and Johnson wrote. He did not want to become involved in party arguments or compromises so other Federalists often worked against him."

The tug-of-war continues on Capitol Hill today, Ellison said. For example, "In the realm of immigration policy, the executive branch traditionally has had significant authority. But the current administration is seeking to significantly expand the outer limits of that authority. While many of those efforts have been fully or partially enjoined, the Supreme Court will have to make the final decision on where to draw the line. I am hopeful that – in the words of John Adams – ours can remain a 'government of law, and not of men.'"

O'Brien noted that the sometimes-fierce partisanship of the legislative branch occurs today as it did at the nation's founding.

"The stakes today – nuclear war, rising debt, globalization – are high; just as they were at the inception of our government," she said. "There was, and is, more passion on each side to push its agenda to solve such big issues. We also know from history that the business of the Republic is a slow moving mountain. So while the rhetoric of individuals can vacillate widely from one extreme to another, the business of the legislature and the judiciary is well designed to slowly turn in a manner that is more contemplative and measured to the benefit of the majority. It takes fierce partisanship to move this mountain. And so it should."

Adams once wrote: "In politics, a man must always walk on broken glass and red-hot iron. It is not easy to do this when you are not wearing shoes. But some men must do it. There are many dangerous things that have to be done for our country in these dangerous times. If nobody else will do them, I will."

OBA Public Service Award 2018

Continued from page 2

coming into the library because then they will have access to all of our resources."

Located on the second floor of the Ahmanson Law Center, the Klutznick Law Library/McGrath North Mullin & Kratz Legal Research Center has more than 45,000-square-feet of space and employs three librarians and six support staff, three of whom have obtained their Master of Library Science degrees. For more information, go to https://law.creighton.edu/academics/law-library. Or call 402-280-2875.

Each year on Law Day, two service awards are presented: The Robert M. Spire Public Service Award, which is presented to an attorney or attorney organization; and the Omaha Bar Association Public Service Award, which is presented to a non-attorney individual or organization.

The criteria under consideration for the award includes: (1) The public's knowledge of the law or the legal system has been enhanced in some significant way by the recipient's efforts; (2) The recipient has focused on providing service to the community for purposes other than pecuniary profits; and (3) The recipient has demonstrated long-term commitment to the enhancement of the public's knowledge of the law.

The award recipients are nominated by the Omaha Bar Association's Public Service Committee and chosen by the OBA Board of Directors. Committee co-chairs are Larry Roland of the Goosmann Law Firm and President-elect Patrick Cooper of Fraser Stryker PC LLO.

Four to Receive Ellick Service Award

By Lorraine Boyd
The Daily Record

At the Omaha Bar Association's Law Day luncheon, four attorneys will be honored with the Alfred G. Ellick Lawyer Referral Service Award. It is the fourth year for the award named in honor of the OBA president who, in 1962, established the OBA Lawyer Referral Service (LRS).

Up until now, 121 attorneys have been recognized for their service as members of the LRS for 10 or more years.

Three of the four Omaha attorneys receiving the award this year are Patrick Cavanaugh, Rodney Dahlquist and David Handley. The fourth requested no publicity.

The non-profit public service, led by its executive director, Donna Birkby, is designed to assist the public in accessing lawyers who practice in various areas of law. Areas in which the participating lawyers offer their expertise include criminal defense, divorce and family law, personal injury, worker's compensation, bankruptcy, landlord/tenant, real estate and other practice areas.

Patrick Cavanaugh

The Creighton University School of Law graduate is a partner in the Cavanaugh Law Firm and specializes in Social Security Disability law. He is a former trial attorney with the Douglas County Public Defenders Office.

"I've been a part of LRS for 16 or 17 years. In the beginning, I just wanted to get my name out there. At first I handled all kinds of cases, then I narrowed my practice to primarily disability cases. So now I often refer callers to other specialists, something I do across the board all day. I don't do it for the money. It gives you a sense of fulfillment to help someone in a tough spot. It's rewarding to be able to help facilitate a client finding the right lawyer, Cavanaugh said.

"With an authority like the Bar behind it, it lends a level of confidence to clients. I've enjoyed being a part of it."

Patrick Cavanaugh

Rodney Dahlquist

David Handley

Rodney Dahlquist

Rodney Dahlquist is a member of the Dornan Law Team, focusing his practice on civil litigation. He is a graduate of the University of Nebraska College of Law.

"I was first listed with LRS when I graduated from law school in 2008. I did so because I was in need of clients," Dahlquist said. "I continue to do it today because it does provide a service. Some referrals will have a fairly straightforward legal issue that you can address in full during the consult. Others have more complicated matters requiring ongoing representation. No matter the issues, all of the referrals are looking for information so they can make intelligent decisions on how to handle the situation they are facing in their lives."

David Handley

David Handley, a graduate of Creighton University School of Law, practices primarily in workers' compensation and personal injury at Watson & Carroll law firm. He holds certificates for Criminal Law and Procedure and for Concentrated Studies in Dispute Resolution. In addition to being in private practice, Handley was also an assistant attorney general in the Nebraska Attorney General's Office.

"I've been listed on the Lawyer Referral Service for 10 years. I don't do anything different for that service than I do in my everyday work life. People who need help call and I help when I can. Sometimes people just need an understandable explanation of the law. Sometimes they just need a little guidance or a nudge in the right direction. Sometimes they need to hear that they are on the right track. Sometimes they need to hear that they don't actually need a lawyer. Sometimes they need representation. I'm kind of feeling a little bit shy about even receiving an award because I haven't done anything miraculous. I'm doing the same thing that thousands of lawyers do every day; I'm helping people."

LRS

The Omaha Lawyer Referral Service provides referrals to callers who are located in Omaha (Douglas County) and also in the surrounding counties of Sarpy, Cass and Washington, to the Omaha lawyers listed with the LRS.

While the client pays a fee of forty dollars to the attorney for the first thirty-minute consultation, there is never a fee charged by LRS for making a referral. No fees are charged for an initial consultation with worker's compensation, personal injury or Social Security lawyers.

The Lawyer Referral Service is designed to serve those who can afford the services of a lawyer. Persons who cannot afford a lawyer will be given the numbers to resources that provide legal services by income.

"Those attorneys who are receiving this award have shown dedication and commitment to the Lawyer Referral Service, and to the good works of the service," OBA Executive Director Dave Sommers said.

Patent Law

Continued from page 3

current patent system, it could affect thousands of concluded/pending IPRs and bring a wave of lawsuits that send ripples throughout the national economy."

"This case will influence the strength of patents and our patent system," Grace said. "If the Court determines that patents convey a private property right (e.g., if the Court determines that the IPR process is unconstitutional), the value of patents will increase, and patent holders should have more access to capital for innovation and defense of their patents against patent infringers. If the Court determines that patents convey a public property right (e.g., if the Court determines that the IPR process is constitutional), the value of patents will remain at the status quo or even decrease and patent holders will continue to struggle with enforcement of their patents against infringers, especially those who have deep pockets."

"Our Founding Fathers appreciated the importance of a good patent system to provide incentive for inventions and to protect those who invent," Passarelli said. "Specifically, the United States Constitution provided to Congress the power 'To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.' (Article I, Section 8.)

"I am sure the average American wants to incentivize drug companies to find cures for today's health care maladies. United States patent protection is what motivates these drug companies to spend billions and billions of dollars in research and development. Of course, patents cover all inventions, including

Passarelli

Holst

inventions in the sciences, technologies, manufacturing and the like, so the patent system encourages invention. However, equally important is that we must ensure questionable patents aren't used to frustrate a competitive environment," Passarelli said.

Grace added that: "IPR proceedings, along with other features of the American Invents Act (AIA), which became effective March 16, 2013, have had the unintended effect of eroding the strength of America's Patent system. Independent inventors and small companies are often the most adversely affected by IPR proceedings and other provisions of the AIA. IPRs were couched as a cheap and fast method to correct Patent Office errors resulting in the issuing of bad patents. However, the burdens imposed by IPRs fall asymmetrically on patent holders.

"With amendments being very rare, the IPR system has been a red herring for killing – not repairing – patents at abnormally high rates (at one time only around four percent of patents were held valid after IPR). Because of the IPR process, the incentive to innovate has decreased due to the uncertainty of the property right. Consequently, start-ups are having a more difficult time obtaining funding for innovations, and patent holders are having a more difficult time enforcing their rights against infringers with deep pockets because there are fewer investment dollars to help fund patent acquisition and enforcement. This unintended erosion is occurring at the same time Europe, China and other countries are taking steps to strengthen their patents systems, which is incentivizing the investment of research dollars overseas."

How do Passarelli, Holst and Grace think that the Supreme Court will vote?

Passarelli

"Studies have shown that questionable patents are invalidated at a much higher rate in IPRs than in federal court cases tried to either the court or to a jury," Passarelli said. "It is impossible to predict how the court will rule based upon statements made by the Justices during oral argument.

"The questions related to whether patent rights are public rights and, thus, susceptible to review by an administrative agency created by Congress (the Patent Office) or whether they are private rights requiring, under the Seventh Amendment of the Constitution, 'the right of trial by jury' in a federal court.

"Hopefully the Justices will issue clear instruction to the lower courts and to practitioners so that inventors and those seeking to invalidate wrongfully procured patents can govern their actions accordingly. No one questions the importance of patents to encourage the inventive process.

"However, just about every corporation in America can point to a situation where patents have been abused, which adds significant costs to the consumers of products and services. I think it is a close call as to how the Justices will rule but I would expect the Supreme Court to find that Congress' IPR system for challenging patents is constitutional."

Holst

"As a former patent examiner at the USPTO, I understand the significant burdens placed on the examining corps and thus believe IPRs serve as a useful and cost-effective administrative review mechanism for determining whether a patent was correctly issued in the first place," Holst said. "I have considered arguments presented before the Supreme Court that view patents as a form of private property requiring Article III adjudication unpersuasive.

"Rather, I find more compelling the interpretation of patents as a form of 'public rights' akin to leases in public lands that are limited in time, require periodic payments to maintain rights, revert to the public after expiration and subject to administrative revocation.

"The right to appeal an IPR decision to the U.S. Court of Appeals for the Federal Circuit also helps relieve my concerns about encroachment on Article III judicial power. Thus, for these reasons, including the ramifications of potentially affecting thousands of concluded/pending IPRs, I predict that the Supreme Court will preserve the status quo and uphold the constitutionality of IPRs, although the Court may offer guidance that brings Patent Trial and Appeal Board standards more in line with the federal courts."

Grace

"I believe that patents are a private property right and that IPR and the AIA went too far in attempting to stifle patent litigation," Grace said. "The result has given patent holders very little leverage against patent infringers with deep pockets. In particular, I like Justice Gorsuch's statements calling out the 'private right' issue:

Justice Gorsuch: *Ms. Ho, we have a number of cases that have arguably addressed this issue already, like McCormick, for example, in which this Court said the only authority competent to set a patent aside or to annul it or to correct it for any reason whatever is vested in the courts of the United States. We have cases – and American Bell is another one. We have that wonderful quote from Justice [Joseph] Story indicating that any correction to a patent has to go to a court.*

"I have been monitoring the commentary on the oral arguments, and there is little agreement among those watching this case with respect to a likely outcome," Grace said. "Given the ideology on the bench and the line of questioning, I believe that the court will uphold the constitutionality of IPRs by a narrow margin. Yet, such a discussion would not preclude Congress from taking steps to revamp the IPR process and again strengthen the U.S. patent system."

Courtroom Drama

Thousands of fourth-graders have been touring the Douglas County Courthouse and City-County Building as part of Law Day. The activity is sponsored by the Omaha Law League, which raises money annually to cover bus transportation for the students.

Judges from Douglas County Court and District Court volunteered to host students and their guides. Here Judge Vernon Daniels urges students to work hard, stay out of trouble and stay in school. He shed his robe early, letting a student try it on for size. Tour guides included District Court Judge Marcela Keim (below, center), attorney Karen Hicks (right) and OLL member Jean Kelly. Students pictured here are from Wilson Focus School.

– Photos by Lorraine Boyd

The Judicial Branch is Alive and Kicking

A Perspective By
Judge Vernon Daniels
Douglas County
Separate Juvenile Court

Separation of Powers: Framework for Freedom. What a timely theme for Law Day 2018. It is equally important for all three branches of our government to take notice of the same. Now, much can be said and written on the subject and indeed this has been done. Readers have ample selections from which to read and to form their own opinions.

Pending independent review of writings on the topic, please allow me to offer a few things to ponder along the way. The foundation for the pondering is that the judiciary must remain independent of the legislative and executive branches of government and others who may seek resolutions of legal disputes on anything but our laws. Assuring this is the responsibility of the three branches of government and all citizens. All must remember that the majority is not always correct and/or acts in a constitutional manner.

It is my hope that whatever one's viewpoint, after a fair analysis, we all reach the same conclusion. Separation of powers is indispensable to the orderly society that we seek to maintain. Political views aside, whenever one feels aggrieved by another member of society or a governmental body, the familiar step is to "lawyer up" and turn to the judiciary -that rather quiet branch of the government. A review of the legal proceedings pending and noted on the back pages of the Daily Record or a peek into a courtroom provides adequate proof that the judicial branch is alive and kicking.

Whether at state or federal levels, the judicial branch of our government is coequal to the legislative and executive branches. Put another way, the judicial branch is neither inferior nor subservient to the legislative and executive branches. Just as the judiciary is not to perform or assume the constitutional authority conferred on the other branches, the legislative and executive branches are to remain in their respective constitutional lanes.

Judges in our courts are to impartially hear disputes, determine which fact or set of facts are entitled to legal weight, and then apply the law as our intellectual analysis dictates. Judges do not and should not have a horse in the race. However, this function is not done in isolation. Attorneys perform a critical role in the process.

Attorneys must develop the facts, articulate the issue(s) and clearly identify why their client is entitled "under the law" to the relief requested (and being ever so mindful that argument of counsel is not evidence). Failure at any of these stages may lead to an undesired relief and assertions that the readers of this article can freely insert. Most commonly, the judge is ill-equipped for the black robe.

Assuming that all have discharged the duties that we are all assigned, there must be the recognition that reasonable minds and people can and do disagree on the facts and how laws are to be applied. Indeed not all legislation enacted is crystal clear and it is the duty of the court to interpret the law using the judge's best abilities. The judicial branch presumes until shown otherwise that our co- equal branches are acting in a manner consistent with their constitutional duties. The judicial branch is entitled to the same presumption. If change in the law is required, it is the providence of the legislative and executive branches to do so. The courts and judges specifically are not entitled to act as a legislative or executive officer any more than these latter branches can overreach into the judicial realm.

The branch of government where I proudly serve does not hold press conferences or engage in the political thicket. In short, beyond its written orders, the court can neither explain nor defend itself. This is unlike the two other branches of government. For this reason, once rulings are made, improper motives can be assigned by others to rulings. In such situations, the court through its judges must remain silent. Silence, however, must not be interpreted as weakness. Rather restraint for fear that impartiality would be compromised.

Just as the other branches of government require others to speak on their behalf, the judiciary requires the same consideration. The judiciary is not to be treated as a door mat or afterthought. Assuming that our judges are showing up, treating litigants fairly, and discharging our duties, let us not assign improper motives as the reason for an unfavorable outcome. As noted above, many factors independent of the judges can and do impact outcomes. Assuming that all of the moving parts in the fact finding process are operating "on all fours," it bears repeating that "reasonable minds looking at the same set of facts and the law can and will differ". This certainly does not mean that the judicial branch and its judges have failed. If there are disagreements, the appellant process exists.

When practicing, on behalf of my client, the desired outcome did not always obtain. (Lest the reader form the wrong impression, there were also favorable outcomes). My attempt at humor aside, I was careful not to rip apart the judge and/or the judicial branch of government. In order for any judicial decision to have any meaningful impact, the integrity of the court must not be destroyed. I knew that future clients would be returning to the same courts for an orderly resolution of a dispute. Baseless assignment of motives will render any, if not all, decisions suspect. If this happens, all three branches in our governmental arrangement will be in peril and materially compromised to the point of being unable to discharge their respective duties

So as we celebrate Law Day let us also remember the vital, and at times imperfect, role that all of the governmental branches and the separation of powers play en route to a more perfect society.

We the People

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

– James Madison
Federalist Papers

As Presiding Judge for the Douglas County District Court, I can say the Judges on this bench are honored and proud to play a role in the judicial branch of this great country.

– Hon. Duane C. Dougherty
Presiding Judge, Douglas County District Court

Teacher Marlo Tomich multi-tasks while the sixth-graders brainstormed.

Student teacher Sammie Pollis emulates her mentor. Kim Dickhut's class also participated in the lawyer's visit.

Students Propose a 'Brain Break'

It's never too soon to go back into the classroom and share your knowledge with young students. Attorney Tom Gross proved that when he visited sixth-graders at District 66's Swanson Elementary in April. Gross and many other lawyers told eager elementary students about the legal profession and how it affects them. "Lawyers in the Classroom" is an annual event tied to the Omaha Bar Association's observance of Law Day. The topic this year was the Separation of Powers.

Gross brought along the booklet "Unicam Kids – A Visit to Your Nebraska Legislature" and used it to demonstrate how the three branches of government work together.

Splitting the class into three groups, Gross charged them with coming up with a proposal for a new rule (aka a bill) that could be presented to the school board and the superintendant. They jumped at the chance and came up with some viable ideas, coining the "Brain Break Bill." Gross told them they had great promise at becoming state senators!

In classrooms all over the metro area, students are learning about the practice of law firsthand. The purpose of Law Day is to acquaint the public with how the Rule of Law relates to nearly every facet of our lives in America today. Starting that education early is the aim of this and other activities organized by the Bar and the legal community.

– By Lorraine Boyd

Branding Your Law Firm – and Yourself – in the 21st Century

By Elizabeth A. Elliott
The Daily Record

A successful law firm relies on the talent of its attorneys and staff that provide excellent service to clients. It takes branding around whatever makes a firm unique to make it resonate with people and stand out. Branding goes beyond the logos.

It's a brave new world out there in law firm advertising. From being forbidden, to being discouraged, to embracing it, law firms have discovered the value of advertising. Gone is the stigma of the shocking and sometimes crude television ads of attorneys "chasing ambulances." As rules [written and unwritten] have changed, so have law firms' approaches to reaching potential clients. They have embraced not only the traditional mass media, but social media avenues as well.

Part of the reason for that necessity is the way people prefer to receive information. One study showed that "19 percent of millennials who have ever had a legal issue say they'd rather text or email their lawyer than talk on the phone or face-to-face, compared to 14 percent of [all] Americans." Options for communicating with potential clients must be offered, and that includes texting, live chat, e-mail and other methods, according to a Clio study. And that includes how you connect with them in the first place.

Since the rules of advertising have changed, it is imperative that lawyers know those rules. The Nebraska Rules of Professional Conduct provide guidance to lawyers on the ethics of advertising, according to Liz Neeley, executive director of the Nebraska State Bar Association. (Find the rules here: supremecourt.nebraska.gov/supreme-court-rules/chapter-3-attorneys-and-practice-law/article-5-nebraska-rules-professional-56.)

If you are a new law firm, you need to first identify your target market.

"My favorite analogy in marketing is that it is like a hot air balloon. It takes a lot of energy and effort to get the balloon in the air, but very little to sustain it. Give frequent bursts to remind people you're there," said Jennifer Colwell, president of the Nebraska chapter of the Association of Legal Administrators.

Long-established law firms cannot grow stagnate when it comes to branding. "The best companies have reinvented themselves many, many times over 100 years. Those who failed to reinvent themselves didn't make it 100 years," Colwell said. A law firm marketing consultant or advertising agency can share success stories, making more senior partners feel comfortable with the change, she pointed out.

Jennifer Colwell, president of the Nebraska Chapter of the Association of Legal Administrators, meets with her team at McGill, Workman & Lepp, P.C., L.L.O. Colwell is one of 500 Certified Legal Managers worldwide.
– Photo by Don Shepard, Don Shepard Photography

"As the oldest and largest locally-based law firm in Nebraska (founded in 1873), we understand the importance of the solid foundation on which we were built," said Meredith A. Williams, marketing director at Baird Holm LLP.

"However, it's equally important to show our clients the ways in which we are engaged in constant evolution – of our systems, processes, people – especially as technology changes. A law firm, or any business for that matter, cannot enjoy 145 years in existence without being nimble and progressive-minded."

Within a law firm, everyone must understand the brand and who the firm wants to be. "Creating a culture of business development is critical and having everyone understand the brand and who the firm wants to be is very important," Colwell said. "Encourage your attorneys and staff to tag the firm when they are participating in community events or can take the opportunity to promote your clients' successes."

Being proactive in branding is a way to stay on top of the message. "If you don't tell the public what you want them to know about you, they'll make it up," Colwell said. "Be consistent in your efforts across all platforms, including the work product that leaves the office."

Little things can make a big difference in branding. "How you answer your phone or how you present yourself relative to competitors can make a big impact on your brand out in the real world where competition is fierce," said Bryan Wells, senior client development consultant for FindLaw serving Nebraska and Iowa. "What technique works best is going to vary from firm to firm. But for everyone, it begins with understanding that your brand extends beyond your logo."

Communication with clients throughout the process is key when rebranding. If a firm is located in several states, Colwell said to cater the branding to the individual markets.

Once a firm understands its brand, it can feel more confident in marketing decisions. Wells gave the example of a two-person practice in Ralston. "Play up that boutique vibe by highlighting your personal attention to detail, your specific expertise and your convenient location with ample parking," he said. "You might not need everyone in downtown Omaha to see your billboard, but you might want to target commuters within a certain income bracket with smart Facebook advertisements."

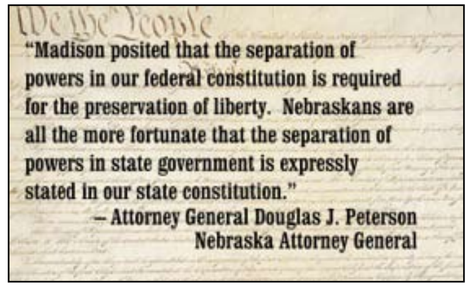
Attorneys within a large law firm should create a personal brand. "Large firms may not need all individual lawyers to develop their own business, but the more well-known a lawyer is directly translates into more business for the firm and higher compensation and independence for the individual," Colwell said.

Attorneys can keep their LinkedIn profiles updated, share content, speak for organizations and businesses and be involved in the community to build their personal brand.

They don't have to build their brand alone.

"If they have a firm marketing person, they will have someone to give them guidance. Attorneys

See BRANDING, page 11



What Is a Chatbot and What Is It Doing in My Law Firm?

By Emily Kerr
The Daily Record

Imagine a world in which companies could save significant time and increase productivity. How? By including chatbots in their arsenal of technology.

Lately, in the corporate community chatbots have made a noticeable impact on the job force by taking the place of lower-level employees. They perform tasks in a law firm, for example, that were once designated to junior partners, paralegals and legal secretaries. In an article from Forbes.com, noted futurist Michio Kaku notes, "The job market of the future will consist of those jobs that robots cannot perform" because of how dramatically they will transform the work force."

However, in the opinion of Mary E. Vandenack of Vandenack Weaver, LLC, "my mantra for technology is to use it for processes that are repeatable and predictable."

Mary E. Vandenack of Vandenack Weaver, LLC, says, "My mantra for technology is to use it for processes that are repeatable and predictable."

– Photo by Don Shepard, Don Shepard Photography

Essentially, a chatbot is a conversational agent made up of software that simulates human speech and interacts with a person via telephone or computer "chat box." Have you ever ordered a pizza through your Facebook Messenger? Ordered an Uber ride via that same Messenger? Then you've interacted with a chatbot.

There are web-based applications as well as stand-alone apps, which are now being utilized, in some cases, as the first level of a corporation's customer support system.

In England, LawBot, was developed by a group of law students at the University of Cambridge to help victims of crime by providing a preliminary assessment of their situation and then providing them with information on what actions are available for them to pursue.

Vandenack recommends the use of chatbots in the RFP (request for proposal) process and for answering frequently asked questions, noticing recently that "one of the places we're seeing the bots being used is in contract review."

Artificial Intelligence technology is also being used in some law firms to proofread and standardize certain documents for clients, which will soon be offered as technology improves. Since they are becoming so versatile and Artificial Intelligence software is beginning to take hold in the corporate infrastructure, the future has great potential for these learning machines. However, the technology is still in its infancy, using simple input and response algorithms to assist its users.

Eventually, chatbots and AI will be able to take over the time-consuming processes and mundane tasks from law firm staff, freeing employees up to spend more time serving their clients' legal needs. Chatbots also give those that may need assistance outside the typical parameters of an eight-to-five workday the opportunity to get answers they need without an inconvenient wait time. These systems require a lot of data to run and can cost law firms a sizeable investment to launch, but in the end, chatbots can streamline the entire RFP process for law firms and other companies alike.

Beginning in the 1990s and only growing since then, chatbots have adapted and slowly gained traction in the technological world. To assist a customer or client, chatbots go through a process of recognition and response called parsing, which interprets and then decides which of a series of appropriate responses the user may be looking for based on the information presented.

While some chatbots deliver a seamless, human-like experience, others deliver long pauses while processing information and present themselves clearly as robots.

James Pieper, an attorney and colleague of Vandenack, describes his philosophy on the technology: "I think, for so many people, it's this black box out there; you don't know where it's coming from. The problem is people don't have a lot of transparency in terms of where the decisions are being made and how it learns to make these decisions."

While large, internationally well-known law firms such as Norton Rose and Foley Lardner are among those to integrate chatbots into their repertoire – they are using Neota Logic applications – Vandenack insists "the legal world is a little behind when it comes to technology."

Experts predict chatbots and the use of Artificial Intelligence technology in law firms will soon change the face of the legal community. Where once junior attorneys and partners were the only means of serving clients, these intelligent programs are becoming more and more integral to the legal process, rendering humans less necessary as time goes on.

A couple of other uses of chatbots are Docubot, that works through lawyers' websites to help consumers generate legal documents and that also performs client intake, and Legalibot from Spain, which helps users compose legal documents and contracts through Facebook Messenger.

Luckily for attorneys, "right now, the potential is greater than the reality," says Vandenack.

One struggle with chatbots is that they are limited by the algorithms that are programmed within them. If a chatbot has a very mundane algorithm with a limited ability to interpret information, the results can be frustrating for users. Perhaps the most difficult part for chatbots' ability to learn and interpret is spoken language itself. Including nuances, sarcasm, and turn of phrase in the English language, it is no wonder chatbots struggle to interpret the meaning of client questions. Sometimes, there is no substitute for the judgment and interpretation of a conscious human being.

As chatbots in the future become increasingly integral to everyday life in the legal field, the question of liability will surely be an issue that needs to be addressed. As humans are replaced by artificially intelligent creations – created by outside companies – there will need to be close attention paid to how the laws governing them will adapt and change. Security and confidentiality are two concerns.

"This is why, in the legal world, you see things move so slowly," Vandenack says, "if we have a chatbot on our website and it is answering questions, there is sort of a distinction between general information and legal advice. If the chatbot on the website is answering questions, that's where we run into liability. If we allow a chatbot to give legal advice, we'd better be sure its got good programming behind it."

Chatbots have proven themselves to be incredibly useful, increasing productivity while eliminating mundane tasks that companies typically pay their attorneys and other employees to perform. While there are certainly benefits to having a digital assistant, legal professionals must be increasingly aware of how much responsibility can be delegated to an automated system. However, if a balance between man and machine can be maintained, chatbots look to eventually be the new "Friday" in every office across the globe.

> "The separation of the powers of the Executive, Legislative and Judicial branches of our government creates a check and balance that provides a safeguard to Democracy and Freedom. Citizens must be vigilant to preserve this separation of powers, otherwise we open the door to autocracy."
> – Charles F. Gotch
> President, Nebraska State Bar Foundation

> The judicial, executive and legislative branches of our government do not exist in a vacuum. Although each branch has its own responsibilities, and friction may sometimes occur, they must cooperate with one another for our government to function.
> – Hon. Marcela A. Keim
> Presiding Judge, Douglas County Court

Marijuana and Nebraska – The Laws Remain the Same

By Andy Roberts
The Daily Record

Call it marijuana, herb, tree, weed, Mary Jane, or any of the other names for hemp that is dried and then smoked.

Just make sure you call it illegal in Nebraska.

Of course, just one state west, in Colorado, call it party time. Marijuana, even for recreational purposes, is legal.

But whatever you do, don't bring it across the state line and get caught with it in Nebraska.

NORML – the National Organization for the Reform of Marijuana Laws – is working to change weed's status.

The aim of NORML, an American non-profit organization based in Washington, DC, is to move public opinion sufficiently to achieve the legalization of non-medical marijuana in the United States so that the responsible use of cannabis by adults is no longer subject to penalty.

According to their website, NORML "supports the removal of all criminal penalties for the private possession and responsible use of marijuana by adults, including the cultivation for personal use, and the casual nonprofit transfers of small amounts," and "supports the development of a legally controlled market for cannabis." NORML and the NORML Foundation support "both those fighting prosecution under marijuana laws and those working to legalize marijuana."

Others, such as the governor and the attorney general, are not on the same team.

Omaha attorney Dan Stockmann spent a decade in the Douglas County Public Defender's Office and another five years doing general criminal defense work in the Omaha area. Today he is one of seven attorneys on the NORML Legal Committee, not employed by the organization but ready to defend people suspected of breaking the state's marijuana laws.

Omaha attorney Dan Stockmann spends his time "almost exclusively' defending people targeted by law enforcement for transporting marijuana across the state.

– Photo by Don Shepard, Don Shepard Photography

"My work now almost exclusively consists of defending people who have been targeted by law enforcement as they travel across Nebraska," Stockmann stated. Most, if not all, of those clients live somewhere other than in Nebraska and simply were passing through the state on their way home.

"Law enforcement in Nebraska has increased its presence on the I-80 and is spending more time than ever before on "Interstate drug interdiction,'" he said. That has resulted in more arrests for marijuana-based offenses along the I-80 corridor.

Nebraska Attorney General Doug Peterson declined to speculate on when or if the state's marijuana laws might change. Stockmann pointed out efforts have been undertaken in recent years to pass a medical marijuana law, but to no avail.

"There have also been efforts to get the issue on the ballot and let voters decide," Stockmann said. "Polling suggests that if a medical marijuana law was to be on the ballot, voters would pass it fairly easily."

Cannabis oil is legal under certain circumstances in Iowa under a bill signed last year by then-Gov. Terry Branstad. Products that can be smoked or eaten remain banned, and the amount of THC – the drug's active ingredient – is limited.

NORML makes it clear where the long-time pro-marijuana organization stands. Its website points to claims that the Drug War has created a "U.S. prison population that is six to ten times as high as most Western European nations."

NORML goes on to say: "The United States is a close second only to Russia in its rate of incarceration per 100,000 people. In 2012, more than 749,000 people were arrested in this country for marijuana-related offenses alone."

The pro-marijuana organization went on to state its belief that marijuana prohibition creates more problems than it solves which leads to the needless arrest of "hundreds of thousands" of citizens who otherwise have no problems with the law.

Which doesn't mean Colorado's legalization went over well.

In 2014, Nebraska's then-Attorney General Jon Bruning and Oklahoma's A.G., Scott Pruitt, sued Colorado over its legalization of marijuana and the problems marijuana sales were causing neighboring states. The U.S. Supreme Court, in 2016, declined to hear the case.

Attorney General Peterson pointed out that, while the lawsuit no longer is pending, the court's refusal to hear the suit changed nothing in Nebraska.

"Marijuana remains illegal under federal law," Peterson emphasized.

See MARIJUANA, page 14

Branding

Continued from page 9

should stay consistent with firm branding," according to Roy Sexton, director of marketing for the Legal Marketing Association Midwest Region. "The firm already is spending money on that branding. See if they have templates for things like white papers," he said.

Consulting clients is another key. "Find out from your clients what sets you apart and keeps them returning or what has been successful," he said. "If you can speak the language of business people, make it part of your brand."

Wells said the most obvious change that social media has brought to legal marketing is that it makes brands more accessible. "In a literal sense, Facebook and Twitter have made it incredibly easy for consumers to connect with brands on their terms," he said. "In a bad customer service scenario, that might look like someone complaining about a delayed flight on Twitter. In better circumstances, it might mean a favorable review posted on your firm's Facebook page or a prospect reaching out with a legal question in the comments on an article you shared."

Wells said the casual nature of social media allows for brands to show more personality. "Studies have shown that legal consumers, in particular, value things like trust and empathy nearly as much as a firm's reputation or location."

Posting candid pictures of their local activities or sharing relevant articles that reinforce their expertise, said Wells, expands beyond the traditional attorneys standing in front of a wall of books.

Social media has influenced branding in both positive and negative ways. "It is more effective and less expensive than traditional advertising," Colwell said. "It is also more time-consuming and difficult to manage."

Attorneys are familiar with cases where social media goes awry and may be nervous to use social media for brand development. Much attorney work, such as articles and white papers, may be visible only to a certain audience.

"Social media allows me, as a marketing person, to get content into others' hands and create an awareness of the work of the attorneys," said Sexton.

Consider the status of your law firm or personal brand and reach out to a marketing professional if it is time to rebrand.

> How brilliant were our founding fathers to conceive of the concept of three separate but equal branches of government as the foundation of the democracy. Always be mindful that if one branch does not function, our democracy, like a three-legged stool, will fail.
> – Timothy R. Engler
> President, Nebraska State Bar Association

Gerrymandering:
Most Important Case Since 1819 Regarding Structure of Our Government

By Lorraine Boyd
The Daily Record

"Gerrymandering is the single most serious threat to the structure of our government, to our democracy."

Michael G. Fenner, a Constitutional law professor at Creighton University School of Law, made that bold statement at the annual Omaha Bar Association's "Lunch with Fenner" in February. Many others agree, although there are both pros and cons to the issue.

Just what is gerrymandering, and specifically, partisan gerrymandering?

Named after Elbridge Gerry, the Massachusetts governor who tried to gain a partisan edge by redistricting the state legislature in 1812, gerrymandering is one of the few "dark arts" within politics openly embraced by politicians. Despite its critics and legal challenges, gerrymandering has endured.

Redistricting is done every 10 years after the U.S. Census to ensure that congressional, legislative and state board districts include roughly the same number of people. When redistricting is done – by state legislators – with an eye to create political advantage to one party or the other, it becomes partisan gerrymandering. One result is sometimes districts with outrageous borders.

The Supreme Court agreed to hear the case of *Gill v. Whitford*, which concerns partisan gerrymandering in Wisconsin. Democratic voters there say gerrymandering the voting districts has given Republicans too much power and violates the Constitution. It will be the first time that the Supreme Court will evaluate partisan redistricting based on the First Amendment's freedom of association clause in addition to the Equal Protection Clause.

The Court heard oral arguments in October 2017 and their ruling is expected next month. At that time, the Court agreed to hear the merits of another partisan gerrymandering case, *Benisek v. Lamone*, which is related to the 2011 redistricting of Maryland's 6th Congressional district. Oral arguments were heard by the court March 28, 2018.

When the Supreme Court last addressed partisan gerrymandering in detail, all nine justices agreed that "an excessive injection of politics" into the redistricting process violates the Constitution. The Court splintered, however, on two pivotal issues: how to know when an injection of politics is excessive, and who should decide.

Historically, the Court has been reluctant to get involved in the issue, seeing it as a local function, centered in the Legislative branch of government, not the Judicial branch. But they have made an exception now, and the decision is expected to hinge on swing-voter Justice Anthony M. Kennedy.

Heather K. Gerken, the J. Skelly Wright Professor of Law at Yale Law School, wrote on VOX.com, "The justices are highly sensitive about giving the impression that nine unelected people are overriding the decisions of a democratically elected legislature."

Locally, there have been some concerns about gerrymandering in Nebraska, but by and large, the members of the officially nonpartisan Unicameral agree they worked together in 2011.

Republicans today hold 31 out of 49 legislative seats and the Governor's Office.

Depending on the results of the 2018 election, Republicans could have the ability to cement that edge by drawing even fewer majority-Democratic districts in the Legislature. The next redistricting will take place after the 2020 Census. Those elected in 2018 and 2020 will draw the maps.

Fenner said districts were meant to be drawn to reflect diversity, with neither party operating in the extreme. "Diverse groups of people live in districts. Candidates had to reflect that diversity, had to moderate. Neither of the two political parties was extreme. Candidates clustered in the middle. They could get things done, could compromise.

"Today, the Democrats and the Republications are a little like the Palestinians and the Jews. Extreme Democrats and extreme Republicans were gerrymandered. Now the candidates have to appeal to the extremes."

Fenner noted that the Massachusetts District that Gerry initially drew "looked like a salamander."

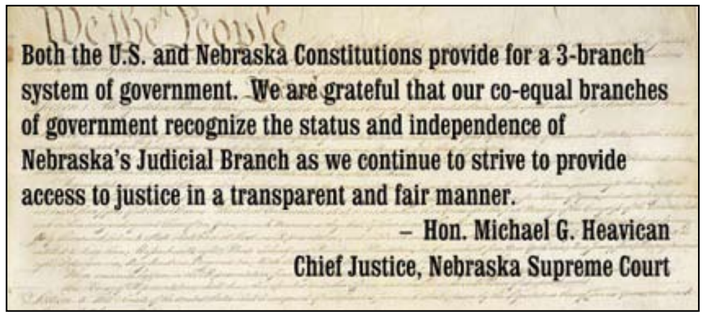
Michael G. Fenner

Palma Joy Strand

Something similar happened in Tuskegee, Ala. "It was basically a square city. African Americans were not allowed to vote. Then, when the Civil Rights Act was passed in 1957 giving them the vote, the new district drawn excluded all but four or five African Americans. Then they created a 28-sided district without one single Caucasian. They 'fenced Negroes' out of town, violating the 15th Amendment."

Fenner called out other gerrymandered districts, such as in South Carolina, Texas, North Carolina, California, Illinois, Maryland and Pennsylvania – as well as Wisconsin

See GERRYMANDERING, page 14



Poster and Essay Contests Part of Law Day Outreach

Judges selected, from left, Meg Raabe, Second Place; Gigi Salerno, First Place; and Abby Wessling, Third Place in the Essay Contest. All three are students of Greg Gorske, history teacher at St. Pius/St.

Area wide 8th graders were invited to compete in the annual Omaha Bar Association's Law Day Essay Contest. OLPA (Omaha Legal Professionals Association) served as liaison with the Omaha Bar Association and received essays from students from Gretna Middle School and St. Pius/St. Leo Catholic School.

Hon. Lyle E. Strom, retired Senior United States District Judge for the District of Nebraska; Jason Grams, attorney at Lamson, Dugan & Murray; and Rebecca Kratky, sixth grade teacher at Oakdale Elementary School, served as judges.

All three winners (pictured above) are 8th graders in Greg Gorski's history class at St. Pius/St. Leo Catholic School in Omaha. Gorski has been teaching for 4 years at St. Pius/St. Leo after 26 years as a practicing attorney in Omaha. Two of his students were winners in last year's competition.

Cash prizes of $150, $125 and $100 will be awarded to the winners at the Law Day luncheon.

First Place

Separation of Powers: Framework for Freedom

By Gigi Salerno

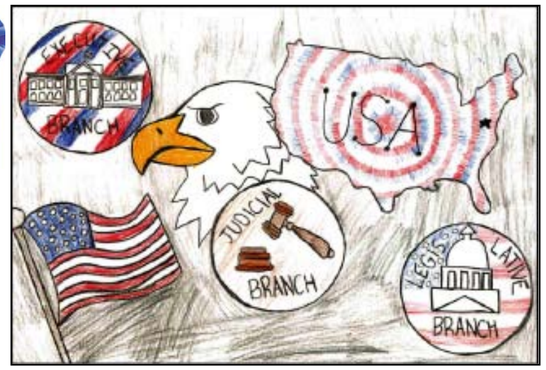
When drafting the Constitution, our Founding Fathers devised a system based not on efficiency, but on the concept of freedom. To accomplish this, they created a structure of separate powers, in which each branch could check another, confirming that one could never become more powerful than the other. The Founding Fathers separated the powers of the federal government into three distinct branches: legislative, executive, and judicial.

Over two hundred years later, the system meticulously organized by the Founding Fathers is still in place. The constitutional design for the separation of powers continues to successfully fulfill its original intent: preventing the abuse of power and protecting individual rights. Each branch can place a check on the other, confirming a balance of power. The government relies on each of these branches, and could not operate without all three. These checks ensure that, through the balance of power, no rights can be taken away from us. This system was designed for the people, with the people, and by the people. We must remain active in the government to ensure that our freedoms remain. Our voices are heard through these branches, and the checks are in place to ensure this prevails.

John Adams wrote that "Power must never be trusted without a check." Without a check on the federal government, our leaders could become tyrannous and eliminate most of our fundamental rights. Because of the separation of power, however, our power will never be without a check, ensuring that citizens will always have a voice.

Gretna Elementary School fifth-grader Ellie Melton earns the congratulations of her teacher, Stephanie Bartram, on her first place win in the Poster Contest. Ellie's parents are Charlie and Andi Melton. Her poster is on a billboard near 78th and Dodge Streets.

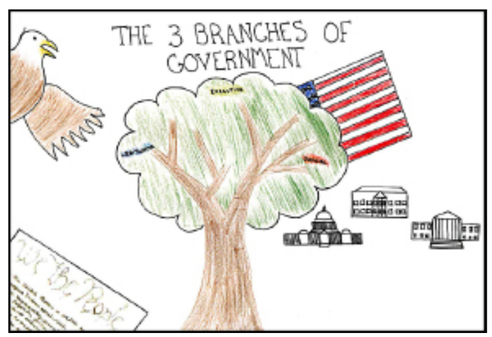
FIRST



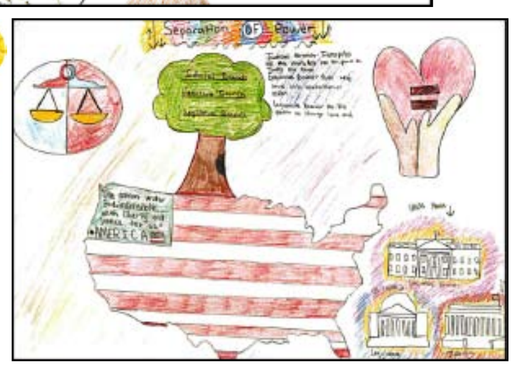
L-R: Surrounded by her students, Pine Creek Elementary School fifth-grade teacher Kathleen Cannon, congratulates 3rd Place Poster Contest winner Kerenzia Amouzou, daughter of Eya Assignon & Date Amouzou, and 2nd Place winner Addison Reinoehl, daughter of Jared & Sara Reinoehl. The annual city-wide contest is sponsored by the Nebraska Paralegal Association (NePA), and coordinated by Tom Tilden, ACP, and Sandi Armstrong, CP.

– Photos by Lorraine Boyd

SECOND



THIRD



Marijuana

Continued from page 11

"Unless and until that changes, the Attorney General's view is that state legalization schemes are likewise illegal."

Congress has not acted to change federal laws in the wake of the state decisions, and Stockmann said he had no answer for that inaction. President Trump has said they he will support a "federalism-based legislative solution to fix the states' rights issue."

Stockmann added he doesn't see a local U.S. Attorney bringing federal charges against a medical marijuana patient for simple possession, but on the local level, at least in Nebraska, it frequently happens.

"Law enforcement in Nebraska does not factor in the motivation for a person carrying a user amount of a marijuana product," he said. "I have had several out of state medical marijuana clients facing prosecution for felony drug offenses simply because they brought their prescription with them as they were traveling through Nebraska."

Peterson doesn't see anything happening to make medical marijuana legal in Nebraska in the near future.

"Any legalization would need to be lead out by the medical field supported by robust study, under DEA licensing, with FDA approval," the attorney general stated. "Currently, efforts to legalize medical marijuana appear to be driven by the industry."

The state's anti-marijuana position helps define Stockmann's role as it relates to NORML, which he said is to assist people who are not Nebraska residents but find themselves arrested and jailed here.

"They are scared of going to jail in a place unfamiliar to them and far from their family and friends," he shared. "They are scared of losing their job and their life as they know it. All for possessing a substance that is legal in eight states recreationally and medically in 29."

With that he also provided some free legal advice.

"Don't bring it to Nebraska or you will face prosecution for a drug offense," Stockmann offered. "If you happen to buy a user amount of a hash product or edible marijuana, you will face prosecution for a felony offense in Nebraska punishable by 0-2 years in jail and up to a $10,000 fine."

That makes marijuana, still, an expensive – and illegal – form of recreation in Nebraska.

Gerrymandering

Continued from page 12

– which sought to maintain control in the legislature, Fenner said.

"Political gerrymandering comes in two forms: 1) Cram the opposing party in one district; 2) Divide minority party into many districts, creating safe seats.

"Where there used to be policy debates and proxy battles, now there is one big tribal conflict.

"Once gerrymandering is in place it is hard to change. It tends to move candidates to the extreme wing of both parties. To win, they just have to appeal to the base.

"The biggest step we can take to get back to normal politics is to put a stop to partisan gerrymandering. Some states have done this on their own. [Arizona appointed an independent commission.] There are lots of recognizable geometric states."

Voters v. Legislators

Fenner's key point: "Should voters select legislators? Or should legislators select voters? It's clearly the former. It's a core principal of our democracy. … The opposite subverts government."

He said gerrymandering violates the structure of the Constitution. "We don't have the same kind of government the founders envisioned. … It's a violation of voters' fundamental right to have their vote count. The problem with drawing partisan districts is that some voters end up with wasted votes. … It denies some voters the right to have a chance [for their vote to count]. It's a Constitutional rough equivalency of the vote count – of every person's vote.

"The problem with these state statutes and the way they draw the districts is that you end up with wasted votes and with some votes counting more than others. Coupled with equal protection of the law, this is a state act of unequal treatment that disadvantages one political party and does so intentionally in order for the advantaged party to gain and maintain control of the legislature. It's political party discrimination." He added that there are also free speech and freedom of association arguments.

Palma Joy Strand, a professor of law in the department of Interdisciplinary Studies at Creighton University, wrote a paper published on Slate.com entitled "Time to Protect Our Democracy."

In it, she made the case against partisan gerrymandering.

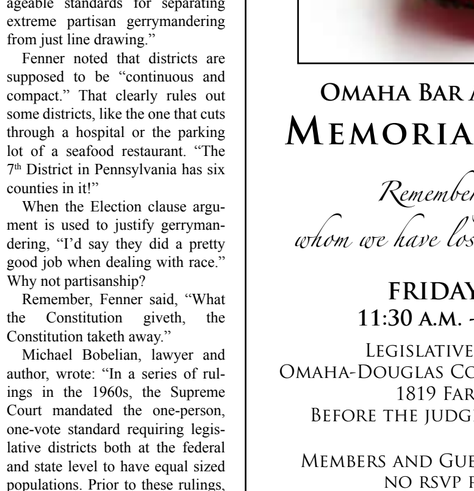
She noted that in *Gill v. Whitford*, Wisconsin argued that partisan gerrymandering is not "justiciable" – that this type of districting decision is not subject to judicial oversight. The court held more than 30 years ago in *Davis v. Bandemer*, however, that partisan gerrymandering challenges are, in fact, justiciable.

"That opinion, which I worked on as a clerk for Justice Byron White, provides crucial insight into the court's choices in this case, which has the potential to revolutionize our political system. If the court follows the precedent and logic of Justice White, it will recognize that the time has come to rein in partisan gerrymandering, which has run amok in the years since the court issued its *Davis* opinion."

Strand noted that Justice White wrote: "[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political system as a whole."

In Favor of Gerrymandering

In the interest of fairness, Fenner added: "Here are some arguments in favor of gerrymandering: 1)



There are no judicially manageable standards by which courts can determine regular district lines from gerrymandered ones. 2) The election clause in the Constitution says the task [of mapping districts] is granted to the states. Well, in 37 states they are drawn by legislatures, but they can't draw lines that discriminate."

"My response," Fenner said, "is 1) just the irregularity of the lines is a prima facie case that there's a problem; 2) the language of the drafters, the legislature's history of the gerrymandering that 'we are using it for partisan advantage' is a problem; and 3) percentages. If 60 percent of the state votes blue, and only 25 percent of the blue candidates win election, that's a problem." He noted than in North Carolina, 53 percent of the voters elected 77 percent of the seats in the legislature.

"These are all judicially manageable standards for separating extreme partisan gerrymandering from just line drawing."

Fenner noted that districts are supposed to be "continuous and compact." That clearly rules out some districts, like the one that cuts through a hospital or the parking lot of a seafood restaurant. "The 7th District in Pennsylvania has six counties in it!"

When the Election clause argument is used to justify gerrymandering, "I'd say they did a pretty good job when dealing with race." Why not partisanship?

Remember, Fenner said, "What the Constitution giveth, the Constitution taketh away."

Michael Bobelian, lawyer and author, wrote: "In a series of rulings in the 1960s, the Supreme Court mandated the one-person, one-vote standard requiring legislative districts both at the federal and state level to have equal sized populations. Prior to these rulings, rural districts were heavily over-represented as state governments refused to re-calibrate their districts over a period of many decades. These distorted districts spread like a pox across the nation, infecting liberal and conservative states from every region."

Bobelian also quoted Justice Ruth Bader Ginsburg when she offered a rebuttal to Justice Gorsuch during the *Gill v. Whitford* oral arguments: "If you can stack a legislature in this way, what incentive is there for a voter to exercise his vote? Whether it's a Democratic district or a Republican district, the result – using this map, the result is preordained in most of the districts."

While the Court found in 1987 that the issue is justiciable, it still ruled against the challenger on other grounds. In 2004, the Court ruled 4-4-1, with Kennedy agreeing with the challenger but saying there was not enough evidence.

The Court has changed since then, but it doesn't seem to have changed the liberal/conservative/Kennedy split. And Roberts might come down on the side of Wisconsin voters. He's a big believer in the structure of the government created by the Constitution.

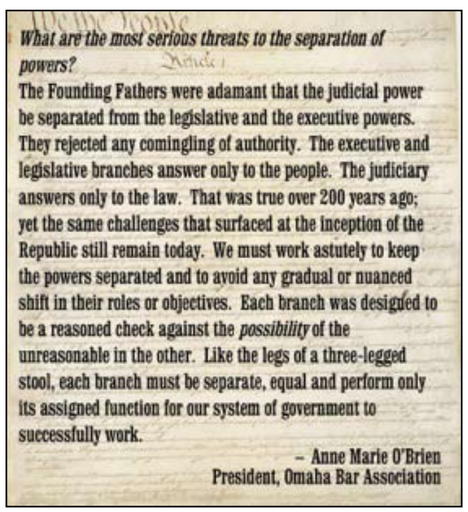
Fenner said, "Gerrymandering subverts the very pillars of our Constitution. It's no longer a government of, by and for the people. It's of, by and for the legislators. I hope the Supreme Court delivers a knock out blow to the practice."

How will the Supreme Court come out on this?

"It ain't the law until the Supreme Court says it's the law," Fenner said.

Then Fenner added, "Actually, Kennedy will decide."

For Prof. Fenner's complete remarks, go to www.omahabarassociation.com/page/Podcast and select Podcast #13.



What are the most serious threats to the separation of powers?

The Founding Fathers were adamant that the judicial power be separated from the legislative and the executive powers. They rejected any comingling of authority. The executive and legislative branches answer only to the people. The judiciary answers only to the law. That was true over 200 years ago; yet the same challenges that surfaced at the inception of the Republic still remain today. We must work astutely to keep the powers separated and to avoid any gradual or nuanced shift in their roles or objectives. Each branch was designed to be a reasoned check against the *possibility* of the unreasonable in the other. Like the legs of a three-legged stool, each branch must be separate, equal and perform only its assigned function for our system of government to successfully work.

– Anne Marie O'Brien
President, Omaha Bar Association

Omaha Legal Professionals Honor Members' Service

Hon. Laurie Smith Camp, Chief Judge of the U.S. District Court for the District of Nebraska, served as Master of Ceremonies and delivered a thought-provoking speech laced with her trademark wit.

Cathy Trent-Vilim, a partner at Lamson, Dugan and Murray, LLP was honored as Boss of the Year. She was nominated by Laura Cejka.

– Photos by Lorraine Boyd

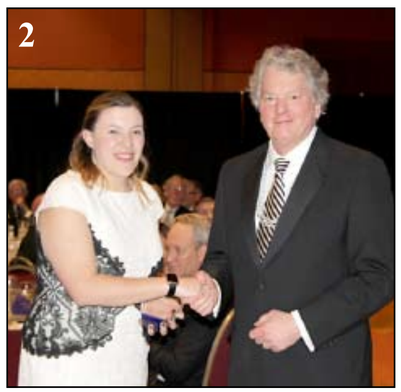
Nadine Ostrow, President; Jean Roeder, Vice President; Donna Olson, Secretary; Jeanne Mangimelli, Treasurer; and Doris Crayton, Chapter Representative are the 2018-2019 OLPA officers, sworn in at the Annual Awards Banquet and Boss Appreciation Dinner.

Donna Olson, right, of Fraser Stryker, won the Oscar Award, given to a member in recognition of outstanding loyalty, service and attendance. Cherie Sempek presented the award.

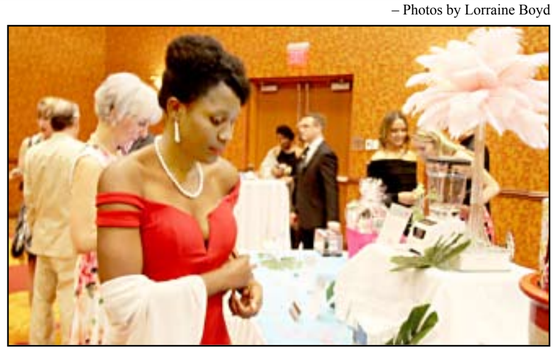
Lynda Henningsen (far left), publisher of *The Daily Record* and immediate past president of OLPA, was honored as this year's Legal Professional of the Year. She accepted the award from Laura Cejka.

From left, the winners of $500 scholarships, Raul Ramirez and Amou Riing, were announced by scholarship committee members Lynda Jensen-Hansen, Donna Birkby and Dave Raddatz. Riing is a senior at Omaha Northwest High Magnet School and plans to attend college, then law school. Ramirez is a senior at Omaha South High Magnet School and has plans to study criminal justice at the University of Nebraska-Omaha with the career objective of becoming an FBI agent.

‘Let’s Flamingle,’ Said the Nebraska Lawyers Foundation



– Photos by Lorraine Boyd



The 2018 Visionary Awards – for contributions and commitment to the Nebraska Lawyers Foundation – were presented by J. Scott Paul, president of the foundation, at the 2018 Barristers’ Ball on April 14.

The annual event, chaired this year by Jane Langan Mach and Jeff Mach, featured a reception, dinner, silent and live auctions and dancing to the music of Pam & the Pearls at the Embassy Suites, La Vista.

Honorees were the firm of Brouillette, Dugan & Troshynski, P.C., LLO, of North Platte (1); Jennifer D. Kearney of Grand Island (2); Ryan P. Sullivan of Lincoln (3); and James A. Cada of Lincoln (4).

This year’s theme was “Escape to the Tropics.”