

# Daily Journal

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**INTELLECTUAL PROPERTY:** California's economy relies on industries that earn revenue based on innovation and depends on the protection of intellectual property rights. By James Cooper of California Western School of Law, **PAGE 5**

**GOVERNMENT:** Despite the fanfare surrounding the end of combat operations in Iraq, the United States will continue to pull strings there. By Marjorie Cohn of Thomas Jefferson School of Law, **PAGE 6**

**CRIMINAL:** Los Angeles' 'Grim Sleeper' was the first case in America to use familial DNA testing to solve a crime. What does this process involve? By Frank Loo a San Bernardino County deputy public defender, **PAGE 7**

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## Downturn Pushing More Attorneys To Solo Practices

Layoffs and Slack Prospects Have Made Hanging Out a Shingle More Attractive

By Anna Scott  
Daily Journal Staff Writer

Nathaniel Kelly's career options seemed limitless when he was hired two years ago, right out of USC law school, for a six-figure job in the Los Angeles office of the corporate firm Kaye Scholer.

But as the recession took hold, Kelly, an associate in the corporate finance department, saw the deals he was working on fizzle. By February 2009, he said, his billable hours had withered and the firm had started to shed lawyers. He was reassigned to the litigation department to assist with document review on a case, which was settled in March, leaving him with little to do. In April 2009, eight months after he started, Kelly took a buyout and started job-hunting.

"I went from 10 or 12 job offers and a lot of interviews with some of the best firms in the country to sending my résumé to an anonymous post on Craigslist," he said.

Kelly, 27, picked up legal work where he could. He represented his family in mineral rights deals in Colorado and Texas and did part-time contract work for a securities firm. Eventually he cobbled together enough work to open a Beverly Hills solo practice, focused largely on family law, including trusts and estates, pre-nuptial agreements and divorces, in February 2010. So far it has been rewarding, but not easy.

"It's been a lot of time and financial investment just to be a continuing business," Kelly admitted. But, he added, "I felt like this was better than doc review."

Kelly has minimal debt thanks to a partial scholarship to USC and no undergraduate

loans, which, coupled with the generous buyout from his previous firm, helped him afford the initial investment to set up shop and purchase malpractice insurance for \$1,500 a year. He also shares office space in a suite with flexible rent, based on common area use. Still, sustaining his business is an ongoing challenge. Kelly bills himself out at slightly less than \$200 an hour and, if he has a good year, expects to take home about half his Kaye Scholer salary in 2010. Finding clients with significant legal issues and the ability to pay is key.

"I have to spend almost as much time getting the work," he said, "but less time doing the work."

Kelly once envisioned becoming a plaintiffs' lawyer, perhaps at his own firm, but said his current experience has made him reexamine his long-term goals.

"I saw myself up there, standing by myself in front of the jury, but never thought that far in terms of what it would take, the actual business, to be in that position," he said. "That's what I'm working on now."

Kelly is committed to his solo practice for the time being, he said, but has his eyes open to other opportunities while he figures out his ultimate objective.

Kelly is one of many lawyers who have struck out on their own since the economy started its downward spiral. The percentage of solo practitioners among law school alumni who graduated between 1982 and 2009 and work in private practice has crept from 3 percent in 2007 to 5.5 percent in 2009, according to a July report from the National Association for Law Placement, Inc. A rising number of them appear to be lawyers not long out of school. Solo practi-



Robert Levins / Daily Journal

Nathaniel Kelly

tioners represent about 2.9 percent of all lawyer jobs reported for the class of 2009, compared with 1.9 percent for the previous class, according to NALP.

That spike reflects fewer opportunities at established law firms, said NALP Executive Director James Leipold. Many new solo shops will fold when jobs return, he predicted.

"It's the economy," said Leipold. "If you look at other recessions, you see the same patterns. As the economy improves and law firms increase their hiring over time, we will see less."

In the meantime, recent graduates who have opened solo practices can gain valuable experience but also face big challenges.

"It's at best a difficult way to start your career," said Leipold. "What students often lack are the business skills."

Doing without the built-in guidance of more experienced attorneys that comes with big firm jobs is another major pitfall for young solo practitioners, said Allan Tanenbaum, an Atlanta-based lawyer who until last month chaired the American

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## Federal Agents Can Take DNA Of Pretrial Accused Felons

By John Roemer  
Daily Journal Staff Writer

Federal agents can sample the DNA of pretrial felony defendants without a warrant, a divided 9th U.S. Circuit Court of Appeals panel held on Tuesday in the first such decision nationally by a federal appellate court.

The 2-1 ruling drew immediate fire from the American Civil Liberties Union and from defense lawyers who saw it as a further erosion of the Fourth Amendment right to be free from warrantless search or seizure. *U.S. v. Pool*, 2010 DJDAR 14485.

The panel majority, in an opinion by Circuit Judge Consuelo M. Callahan, said the practice of requiring DNA from federal defendants would be limited to cases where courts or grand juries have found probable cause to order a defendant to stand trial on felony charges. She added that the DNA obtained would be used for identification purposes only, not to explore an individual's genetic profile.

But Circuit Judge Mary M. Schroeder, noting that DNA can provide far more information about individuals than do fingerprints, warned in a strong dissent, "No circuit has ever before approved such a warrantless search or seizure before an individual has been convicted of any crime. ... I disagree and would hold that

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## No Privilege For In-House Lawyers EU Court Rules

By Jill Redhage  
Daily Journal Staff Writer

The Court of Justice of the European Union ruled on Tuesday that in-house counsel's correspondence with clients doesn't qualify for attorney-client privilege in antitrust matters, thwarting corporate counsel attempts to bring privilege policies in Europe in line with those in U.S. courts.

The ruling brings to a close seven years' worth of efforts by U.K.-based Akzo Nobel Chemicals Ltd. and a long list of intervening organizations to convince the court that professional privilege should apply to in-house counsel advice as much as it does to advice provided by outside legal advisors. *Akzo Nobel Chemicals Ltd. v. EU, Case 550/07*.

"An in-house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the same way as an external lawyer, because he occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence," the court wrote.

Susan Hackett, general counsel of the Association of Corporate Counsel, which intervened in the case, said in a phone interview that the ruling insults the ethics and

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### GUEST COLUMN

The 9th Circuit was wrong to prevent victims of torture from suing because privileged state secrets might later become crucial evidence, says **Erwin Chemerinsky** of UCI School of Law.

By Erwin Chemerinsky

Long ago, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Supreme Court declared that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Unfortunately, this was obviously forgotten by the judges in the majority of the 9th U.S. Circuit Court of Appeals' recent decision that victims of torture could not bring a suit against a company that allegedly actively participated in illegal abductions and inhumane treatment. *Mohamed v. Jeppesen Dataplan Inc.*, 2010 WL 3489913 (9th Cir. Sept. 8, 2010). In a 6-5 *en banc* decision,

the 9th Circuit reversed a panel's decision and held that the lawsuit had to be dismissed because of the state secrets doctrine.

The case involved several plaintiffs who claimed that they were victims of the CIA's extraordinary rendition program and were illegally abducted, taken in secret to foreign countries, detained in horrible conditions for long periods of time, and tortured. The torture described violated every protocol of human rights laws and included beatings which broke bones, electrodes attached to and administering electric shocks to genitals, and deprivation of food for long periods of time. The psychological torture included threats of harm to family members, extreme degradation, and sleep deprivation.

The plaintiffs sued Jeppesen Dataplan Inc., on the grounds that it "played an integral role in the forced" abductions and detentions. The complaint alleged that Jeppesen had actual or constructive "knowledge of the objectives of the rendition program" including knowledge that the plaintiffs "would be subjected to forced disappearance, detention, and torture" by U.S. and foreign government officials.

Not surprisingly, the Bush administration intervened in the lawsuit and sought to have it dismissed based on the state secrets doctrine. Far more surprising and terribly disappointing, the Obama administration took the same approach in this case. If the allegations of the plaintiffs' complaint are true, the illegal activities

See Page 6 — WRONG

### DAILY APPELLATE REPORT

#### CIVIL LAW

**Bankruptcy:** Residence remains within bankruptcy estate although value of claimed exemption plus encumbrances on residence was equal to value at filing of petition. *Gebhart v. Gaughan (In re Gebhart)*, U.S.C.A. 9th, DAR p. 14475

**Prisoners' Rights:** No due process violation exists where prison officials have reasonable basis for restricting inmate's visitation privileges. *Dunn v. Castro*, U.S.C.A. 9th, DAR p. 14479

#### CRIMINAL LAW

**Criminal Law and Procedure:** Government's interest in definitively determining defendant's identity outweighs defendant's privacy interest in giving DNA sample as condition of pre-trial release. *U.S. v. Pool*, U.S.C.A. 9th, DAR p. 14485

Summaries and full texts appear in insert

### BRIEFLY

**Consumer Attorneys of California** and United Policyholders, a group that assists consumers in advocating for coverage from their insurance companies, are teaming up to help victims of the San Bruno gas line explosion and fire. The two groups have been putting together a panel of volunteer attorneys to help victims of the catastrophe understand their insurance policies and properly file claims, according to Christopher Dolan, president of the consumer attorneys' group. Dolan said the panel will reach out to victims through aid organizations like the American Red Cross. At least four people died and dozens more were injured Sept. 9 when a Pacific Gas & Electric gas line ruptured, sparking a huge fire that destroyed and damaged more than 40 homes. State and federal agencies are investigating the cause.

**Even as the economy soured** and unemployment soared in 2009, a two-decade trend of falling crime continued nationwide and in California, according to data released this week by the FBI. Crime

rates fell across the board last year in California compared to 2008, with drops in violent crime (6.3 percent), murder and nonnegligent manslaughter (8.2 percent) and in property crime (7.1 percent.) The automobile theft rate fell 15 percent, with 28,506 fewer cars stolen, or 164,021 total. Meanwhile, the seasonally adjusted unemployment rate in California rose to 12.3 percent in December 2009 from 9.7 percent a year earlier, according to the Bureau of Labor Statistics.

**San Jose-based online auction site** eBay Inc. successfully fought off a trademark infringement lawsuit filed by Tiffany Inc. when a New York federal judge dismissed the luxury goods company's last claim. The 2nd U.S. Circuit Court of Appeals affirmed a judge's dismissal of Tiffany's direct and contributory trademark infringement claims, and U.S. District Judge Richard Sullivan on Monday dismissed the final claim against eBay for false advertising. New York-based attorneys at Weil, Gotshal & Manges represented eBay.

### MORE NEWS



#### Internationally Connected

U.S. District Judge Christina Snyder, left, is never far from work, even when she's on the other side of the globe. **PAGE 2**

#### Empowering Women Lawyers for the Next Decade

Fifteen years after joining the Women Lawyers Association of Los Angeles as a second-year law student, Angela S. Haskins will take over on Thursday as president of the 1,000-member organization. **PAGE 4**

The Daily Journal is soliciting nominations for our annual list of the top ADR professionals in California. To receive a nomination form, email nominations@dailyjournal.com. Submissions are due **Sept. 24**. The list will be published Oct. 20.

# Business as Usual in Iraq

By Marjorie Cohn

Last week, President Barack Obama ceremoniously announced that U.S. combat operations had ended in Iraq. As Democrats face an uphill battle in the upcoming midterm elections, Obama felt he had to make good on his campaign promise to move the fighting from Iraq to Afghanistan. But while he has escalated the killing in Afghanistan, it's business as usual in Iraq.

The United States, with its huge embassy in Baghdad and five large bases throughout Iraq, will continue to pull the strings there. Last week, Vice President Joe Biden delivered a power-sharing plan to the Iraqis, who have been unable to form a government in the six months since the March election resulted in a stalemate. "We think that's better for the future of Iraq," Biden declared. *The New York Times* speculated about whether "the Americans can close the deal." But the United States will continue to do a lot more than simply make suggestions about how Iraqis should share political power.

The timing of Obama's announcement that combat troops are leaving Iraq is based on the Status of Forces Agreement (SOFA) the Bush administration negotiated with the Iraqis in 2008. It calls for U.S. combat troops to leave Iraq by Aug. 31, 2010. The SOFA also requires the Pentagon to withdraw all of its forces by the end of 2011, but this date may be extended.

Obama's speech about withdrawing combat troops from Iraq is an effort to demonstrate compliance with the SOFA as the midterm elections draw near. But events on the ground reveal that he is playing a political version of the old shell game. As Obama proclaimed the redeployment of a Stryker battalion out of Iraq, 3,000 combat troops from the 3rd Armored Cavalry Regiment redeployed back into Iraq from Fort Hood, Texas. And that cavalry regiment will have plenty of company. The State Department is more than doubling its "security contractors" to 7,000 to make sure U.S. interests are protected. And with them will come 24 Blackhawk helicopters, 50 mine resistant ambush-protected vehicles and other military equipment.

Fifty thousand U.S. military troops remain in Iraq. Forty-five hundred U.S. special forces troops continue to fight and kill with Iraqi special forces. American troops are still authorized to take preemptive action against any threat they perceive. The policy regarding air strikes and bombings will remain unchanged. And untold numbers of "civilian contractors" — more accurately called mercenaries — will stay in Iraq, unaccountable for their war crimes.

When Obama spoke to the nation about ending combat operations in Iraq, he delivered his message with a spin that would make George W. Bush proud. Obama renamed the U.S. occupation of Iraq "Operation New Dawn," and talked of the sacrifices we made during "Operation Iraqi Freedom."

But he failed to mention the more than 100,000 dead Iraqis, the untold numbers of wounded Iraqis and the 2 million Iraqis who went into exile. He said nothing about the few hours per day that most Iraqis enjoy electricity. He neglected to note that unions have been outlawed and Iraq's infrastructure is in shambles. And he omitted any reference to the illegality of Bush's war of aggression — in violation of the UN Charter — and Bush's policy of torture and abuse of Iraqis — in violation of the



Six Vermont Army National Guard air ambulance helicopters are framed by Camel's Hump as they leave the Army Aviation Support Facility in South Burlington, Vt., on Saturday, Sept. 11, 2010. The helicopters are part of a year-long deployment of 66 members of the guard's Company C, 3-126th Aviation (Air Ambulance) unit to Iraq.

Associated Press

Geneva Conventions. Obama chose instead to praise his predecessor, saying, "No one could doubt President Bush's...commitment to our security." But foreign occupation of Iraq and mistreatment of prisoners never made us more secure.

Obama also failed to remind us that we went to war based on two lies by the Bush administration: that Iraq had weapons of mass destruction, and that al Qaeda was in bed with Saddam Hussein.

Obama spoke of "credible elections" in Iraq. But "Iraq does not have a functional democracy," said Raed Jarrar, Iraq consultant for American Friends Service Committee and a senior fellow at Peace Action. "We cannot expect to have a functional democracy from Iraq that was imposed by a foreign occupation," he said on Democracy Now!

"The new Iraqi state is among the most corrupt in the world," journalist Nir Rosen wrote in *Foreign Policy*. "It is only effective at being brutal and providing a minimum level of security. It fails to provide adequate services to its people, millions of whom are barely able to survive. Iraqis are traumatized. Every day there are assassinations with silenced pistols and the small magnetic car bombs known as sticky bombs."

Obama put the cost of the wars at \$3 trillion, an awesome sum that could well be used to provide universal health care, quality education, and improved infrastructure to create jobs in this country.

But he overlooked the cost of treating our disabled veterans, many of whom return with traumatic brain injury and post traumatic stress

disorder. "There is no question that the Iraq war added substantially to the federal debt," Joseph Stiglitz and Linda Bilmes wrote in the *Washington Post*. "The global financial crisis was due, at least in part, to the war," they added.

Regardless of how Obama tries to spin his message about the disaster the United States has created in Iraq, 60 percent of Americans think the U.S. invasion of Iraq was a mistake, 70 percent believe it wasn't worth sacrificing American lives, and only one quarter feel it made us safer. The majority of Iraqis also oppose the U.S. occupation.

As I ponder events unfolding in Iraq, and Obama's efforts to explain them to us, I am reminded of the highly decorated Marine Corps General Smedley Butler. Nearly 70 years ago he declared that, "War is a racket." He was referring to the use of Marines in Central America during the early 20th century to protect U.S. corporations like United Fruit, which were exploiting agricultural resources in that region.

In my view, the Iraq war had a similar purpose — to secure the rich Iraqi oil fields and make them available to corporations that will continue to feed America's petroleum addiction.

In a more honest speech, Obama would have said we successfully removed a leader who was unfriendly to American geopolitical and economic interests and replaced him with people beholden to U.S. money and materiel. U.S. forces have been downsized and re-branded. The "enduring presence posts" (new nomenclature for U.S. bases in Iraq) will ensure that we maintain hegemony in Iraq. Mission accomplished.

**The United States, with its huge embassy in Baghdad and five large bases throughout Iraq, will continue to pull the strings there.**



Marjorie Cohn is a professor at Thomas Jefferson School of Law and past president of the National Lawyers Guild. The author of "Cowboy Republic: Six Ways the Bush Gang Has Defied the Law," she is deputy secretary general of the International Association of Democratic Lawyers. (www.marjoriecohn.com.)

## Wrong in All Aspects

Continued from page 1

by the CIA and others should be public and not hidden, the plaintiffs should receive whatever remedies the law can provide, and all involved should be held accountable. It is deeply offensive and simply wrong that the government can violate the most essential norms of human rights and then hide behind secrecy.

Moreover, the central flaw in the 9th Circuit's opinion was its assumption that state secrets inevitably would be revealed by the litigation. Countless details of the CIA's rendition program already have been made public. The dissenting judges attached a 23-page appendix that lists publicly available information documenting this. At the very least, the plaintiffs should have had the chance to prove their case based on the publicly available material. The defendant's claim that it could not advance a defense without using "state secrets" was premature at the pleading stage of the lawsuit. Besides, surely there are

other ways to protect sensitive classified information short of dismissing the plaintiffs' entire complaint.

Indeed, the 9th Circuit's decision was not justified even under the law of the state secrets doctrine. As the court correctly described, there are two distinct parts of the state secrets doctrine. One, called the "Totten bar," requires dismissal of claims which inevitably would reveal disclosure of state secrets. This is based on the Supreme Court's declaration in *Totten v. United States*, 92 U.S. 105 (1876), that "as a general principle...public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law regards as confidential." As the 9th Circuit explained, "[t]he Totten bar applies only when the 'very subject matter' of the action is a state secret." The 9th Circuit did not use the *Totten* bar to dismiss the plaintiffs' claim.

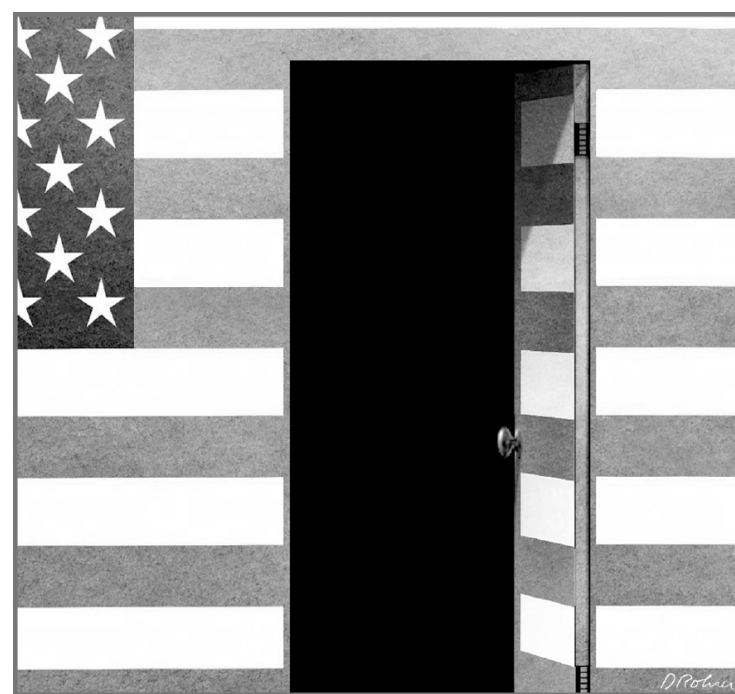
Rather, the 9th Circuit relied on the second aspect of the state secrets doctrine, which is an evidentiary privilege that excludes state secrets from being used as evidence. This is based on the Supreme Court's decision in *United States v. Reynolds*, 345 U.S. 1 (1953). The 9th Circuit declared: "[W]e hold that dismissal is nonetheless required under *Reynolds* because there is no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets." The court said that "further litigation presents an unacceptable risk of disclosure of state secrets no matter what legal or factual theories Jeppesen would choose to advance during a defense."

The court expressly relied upon a very disturbing decision of the 4th U.S. Circuit Court of Appeals, which ordered dismissal of a suit brought by a man who was allegedly apprehended by the CIA by mistake, brutally tortured, and then released by being dumped on the streets of Albania. *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), cert. denied, 552 U.S. 947 (2007). Jane Mayer, in her book, "The Dark Side" (2008), describes in detail how Khaled El-Masri was apprehended in Europe because of confusion with someone else of the same name, held for a lengthy period of time, and subjected to truly inhumane treatment, only to be dumped on the streets of a foreign country when the mistake was discovered by the CIA. The 4th Circuit ordered the case dismissed because there was an unacceptable risk of the disclosure of state secrets.

But both the 4th and 9th Circuits were wrong in using the *Reynolds* evidentiary privilege to dismiss a lawsuit at the pleading stage based on a motion to dismiss for failure to state a claim. An evidentiary privilege must be invoked in response to attempts to introduce specific pieces of evidence. It is premature to apply it before any evidence has been proffered. As the five dissenting judges in *Jeppesen* noted: "The state secrets privilege, as an evidentiary privilege, is relevant not to the sufficiency of the complaint, but only to the sufficiency of evidence available to later substantiate the complaint."

Put another way, an evidentiary privilege should not bar the plaintiffs from being able to prove their complaint through other, not privileged evidence. Especially in a situation like this one, where so much information already is public about extraordinary renditions, it is impossible to say at the pleading stage that the plaintiff could not prove its case or that the defendant could not defend itself without use of privileged information. Dismissal, if ever appropriate, was premature at the pleading stage.

Perhaps the case truly could not have been litigated without revealing state secrets and ultimately would have had to be dismissed. Such a



conclusion would have been enormously distressing because it would have meant that the government and defendants could violate the law and avoid accountability by hiding behind secrecy. But it is even worse to dismiss at the pleading stage based on an assumption that the case might later require dismissal.

There must be a strong presumption that the legal system should be available to provide a remedy for those who allege that the government and businesses working with them engaged in illegal abductions and torture. The 9th Circuit was simply wrong in saying that the case should be dismissed because privileged state secrets might later be crucial evidence for the plaintiffs or defendants.

Hopefully, the powerful dissent of five 9th Circuit judges will persuade the Supreme Court to take the case and reverse this awful decision. The 9th Circuit's decision just can't be reconciled with *Marbury's* command that the "very essence of civil liberty" demands that remedies be provided to those whose basic rights have been violated.



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## Daily Journal

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