

## EDITOR-IN-CHIEF'S PAGE

And I thought the six months leading up to the publication of the *Journal* last November were tumultuous. Since then we've witnessed the reported death toll from COVID-19 more than double, police officer Derek Chauvin's conviction for the murder of George Floyd, a pepper spray assault by Windsor, Virginia police officers on Army Lt. Caron Nazario – unarmed and in uniform and an apparent victim of “driving while black,” widespread power outages in Texas with huge regulatory and market consequences – and, unforgettably, an insurrection at the Capitol by a mob of supporters of the former President. My late father, a Holocaust survivor from Poland, remarked to me years ago that the most amazing sight to him was an Inauguration Day when the incumbent president who had lost the election would attend, shake hands with the winner, and then just walk off the stage. That did not happen this year. Instead, as Senate Minority Leader Mitch McConnell recounted at the conclusion of President Trump's second impeachment trial, the attack on our democratic institutions was instigated by the former President himself:

January 6th was a disgrace. American citizens attacked their own government. They used terrorism to try to stop a specific piece of democratic business they did not like. Fellow Americans beat and bloodied our own police. They stormed the Senate floor. They tried to hunt down the Speaker of the House. They built a gallows and chanted about murdering the Vice President.

They did this because they had been fed wild falsehoods by the most powerful man on Earth — because he was angry he'd lost an election.

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This was an intensifying crescendo of conspiracy theories, orchestrated by an outgoing president who seemed determined to either overturn the voters' decision or else torch our institutions on the way out.

While former President Trump plainly had the largest megaphone, he did not create, but simply amplified and normalized the preexisting voices of racism, religious bigotry, and xenophobia. That the insurrection was led not merely by disappointed voters, but white supremacists, was clear from the Capitol Police Inspector General's post-January 6<sup>th</sup> report. It found that “Stop the Steal” – the name popularly given to the rioters' rallying cry – had the “propensity to attract white supremacists, militia members, and others who actively promote violence.”

The link between hate speech and violent conduct is, unfortunately, unmistakable. A recent study by the Anti-Defamation League (ADL) found a near doubling of white supremacist propaganda distribution from 2019 to 2020. The spread of this literature, notes Oren Segal of ADL's Center on Extremism, “helps to bolster recruitment efforts and spreads fear by targeting specific groups, including the Jewish, Black, Muslim and LGBTQ+ communities, as well as non-white immigrants.” And we have seen the violence. Attacks on black churches, synagogues, mosques, and LGBTQ individuals have been an all too common occurrence in recent years.

Asian Americans have been among the hardest-hit targets. A recent study conducted for the World Health Organization found that racist and anti-Asian

hashtags soared, and have not leveled off since the former President first tweeted “Chinese virus” in March 2020 to describe COVID-19. It is unfortunately no coincidence that the rise in anti-Asian hate speech has been followed by a rise in assaults on Asian Americans and Pacific Islanders. As President Biden stated at his first press conference, “words have consequences.” Asian Americans and Pacific Islanders, he noted, have “been verbally assaulted, physically assaulted, killed. It’s been a year of living in fear for their lives.” “That has to change, because our silence is complicity,” he said. “We have to speak out. We have to act.”<sup>1</sup>

Why am I writing about all this in the *Energy Law Journal*? Because I’m hoping that *we* will speak out and that *we* will act. The EBA can be rightly proud of its diversity policy. But while we have done much to diversify both the membership and leadership of the energy bar, a vibrant and diverse bar depends, ultimately, on a larger society in which bona fide opportunities for education and economic advancement aren’t dependent on one’s nationality, sexual orientation, race, or religion.

Many of you may already be members of the nearly 300 firms that have joined the Law Firm Antiracism Alliance – <https://www.lawfirmantiracismalliance.org/lfaa charter/alliance-firms>. LFAA participation is open to members of any law firm, small, large, or in between. LFAA has a number of working groups addressing the broader issue of societal racism. There are working groups looking at housing, education, gun violence, health care, environmental justice, etc. (In the interest of full disclosure I am co-chair of the Immigration Working Group). If your firm is already a member, consider joining one of the working groups. If the firm you work for or with is not already a member, consider urging it to join.

On the related issues of environmental and energy justice, I would also call to your attention the Department of Energy’s newly created position of Deputy Director for Energy Justice. The first person to hold the position, law professor Shalanda Baker, will have responsibility for implementing President Biden’s January 27, 2021 Executive Order creating the Justice40 initiative, which will involve consultation with disadvantaged communities about directing federal energy-related investments into those communities.

No Editor-in-Chief’s page, of course, would fail to talk about the *Journal* itself. As outgoing EBA President Rueger notes in her President’s Message, you’ll find an interesting array of articles in this edition.

Four of the five articles touch on various aspects of market power and its regulation. Two articles address whether FERC is overstating market power concerns. In *MOPR Madness*, Josh Macey and Robert Ward explore the question whether the minimum offer price rules that FERC has approved over the last decade are chasing an imaginary (or at least overblown) monopsony power threat to capacity markets posed by buyers and, in the process, are doing more harm than good. John R. Morris, Jéssica Dutra & Tristan Snow Cobb also argue in their article that FERC may be overestimating market power – in this case seller market power – under its current delivered price tests used to evaluate mergers.

The two other market power-themed articles express the opposite concern – that FERC’s policies do not offer strong enough medicine to address serious market power concerns. Ari Peskoe recounts the history of FERC’s open access policies and their salutary effect, but warns in *Is the Utility Transmission Syndi-*

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1. As of this writing, the U.S. House and Senate had both passed versions of the COVID-19 Hate Crimes Act (S-937 and H.R. 6721), legislation that would authorize the Attorney General to review COVID-19 hate crimes against Asian Americans and to provide guidance to state and local law enforcement agencies to facilitate online reporting of such incidents.

*cate Forever?* that FERC's policies still enable incumbent transmission owners to maintain unearned monopolies. Daniel Arthur and Michael Tolleth express a similar concern in their piece – that current FERC policies governing oil pipeline regulation fail to prevent the exercise of pipeline market power, a failure that is resulting in the underdevelopment of oil pipeline capacity.

Scott Gaille is to writing for the *Journal* what Alex Baldwin is to hosting Saturday Night Live. His seventh article for the *Journal* is another wonderful example of practical scholarship, in this case a lesson in tsouris<sup>2</sup>-avoidance when negotiating construction and service agreements. The time spent negotiating enumerated adjustment clauses up front, he argues, can pay off for both parties in substantial reductions in litigation risk.

This edition also includes reviews of two interesting books. Ken Barry offers his observations on Bill Gates's recent book on combating climate change. And Josh Macey earns a special distinction with his review of Scott Hempling's book on electric mergers: Professor Macey becomes the first person in the *Journal's* history to have authored both an article and a book review in the same edition of the *Journal*.

This edition of the *Journal* also marks a bittersweet occasion for me, Kat Gamache and my predecessor, Bob Fleishman. All of us have worked closely for years with Tulsa law professor Robert Butkin, the faculty advisor to the students serving on the *Energy Law Journal*. After many years of stellar service to the law school and to the *Journal*, Professor Butkin is retiring. He leaves an enviable legacy, both as a mentor to a generation of students and as a beloved teacher. And he is responsible for many aspects of the *Journal's* student operation that we take for granted – the yearly workshop for incoming student members of the *Journal* that helps familiarize them with the field of energy law, the requirement that student members of the *Journal* complete a course in Administrative Law, and his efforts to secure internships for students that will prepare them for a career in energy law.

While we will miss his presence in the day-to-day operation of the *Journal*, his retirement is not the end of our friendship and we will continue to count on his sage advice. We are also fortunate that the law school has appointed a worthy successor to take Professor Butkin's place. Professor Warigia Bowman will bring a passion for teaching and for the welfare of her students to the task and we look forward to working with her in the years to come.

Finally, I must offer special thanks to our peer review editors and student editors for their hard work producing another *Journal* edition during a pandemic. Student Editor-in-Chief Jackson Bowker and his editorial board have done a remarkable job under trying circumstances. I cannot adequately express my appreciation for their efforts. And I would be remiss if I did not also point out that the *Journal's* authors uniformly expressed their appreciation for the peer review and student editors' work as well.

Harvey L. Reiter  
Potomac, MD May 2021

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2. "Tsouris" (Yiddish) has been defined as "Troubles, woes, worries, suffering." LEO ROSTEN, *THE NEW JOYS OF YIDDISH* (Lawrence Bush ed., rev. ed. 2003) (1968). Or, in the context of Scott Gaille's article: "You mean they're suing us? Couldn't we have avoided this tsouris by writing a clearer contract?"