

EDITOR IN CHIEF'S PAGE

Mid-November 2022. It seems like such a short time ago that the last edition of this Journal went online. Yet, when we look back I'm guessing that most of us will have forgotten many of the dramatic events of the past six months, or at least put those memories in deep storage. As has been my custom in prior editions of the Journal, I thought I'd take us on a short trip down memory lane and provide a snapshot of what was taking place in the world around us when the latest edition was put to bed by our erstwhile authors, peer review editors and student editors.

And I've added a small twist. It has been hard to ignore stories about advances in artificial intelligence – computer programs that can mimic the work of famous artists, create photorealistic fake pictures and videos, compose news stories. One computer creation – a new song seemingly sung by Drake – was downloaded several hundred times before it was taken down. And we've seen AI's quirks and deep flaws. One enterprising reporter armed with knowledge of computer logic systems coaxed an AI bot to confess its love for him and to urge him to leave his wife! So what is the twist? There is a paragraph in this Editor's Page that I did not write. It was created by ChatGPT. Can you tell which one? Read on. I'll let you know at the end.

The Changed Legal Landscape

- **Constitutionality of investigative hearings, ALJ structure**

In a 9-0 decision, the Supreme Court ruled that private parties could bring direct constitutional challenges to the FTC's and SEC's in-house enforcement proceedings in federal district courts without first appealing the agencies' decisions.¹ The Court's decision did not rule on the constitutionality of the claims the plaintiffs had brought against the FTC and the SEC – namely whether (1) the agencies could conduct in-house administrative proceedings to enforce their statutory schemes and (2) ALJs can constitutionally be afforded procedural protections against removal. The latter issue is before the Supreme Court in the government's petition for certiorari to review the Fifth Circuit's decision in *Jarkesy et al. v. SEC* declaring that SEC ALJs have unconstitutional removal protections.² While the cases by their terms applied only to the SEC and the FTC, the Court's ruling could open avenues to challenge the similar structure of other regulatory agencies, including FERC.

- **What is substantial evidence?**

Practitioners before FERC have long understood that to pass muster under the FPA's and NGA's substantial evidence standard, there must be "more than a

1. *Axon Enter., Inc. v. FTC, et al.*, 2023 WL 2938328, No. 21-1239 (S. Ct. Apr. 14, 2023).

2. *Jarkesy et al. v. SEC*, 34 F.4th 446 (5th Cir. 2022), *petition for certiorari pending*, *SEC v. Jarkesy et al.*, No. 20-61007.

scintilla of evidence” to support the agency’s fact findings,³ and that while it cannot disregard contrary evidence,⁴ neither is it bound by a weight of the evidence standard.⁵ But the Fifth Circuit, which has previously held that the agency’s finding will be upheld even where conflicting evidence of “equivalent quality” supports a contrary conclusion,⁶ appears to be moving away from that standard in a ruling enjoining parts of an FDA rule authorizing the use of mifepristone, a ruling subsequently stayed by the Supreme Court.⁷

- **The Rising proliferation of “Major Question Doctrine” cases**

Last spring I wrote an article for Energy Brief warning of the implications for regulatory stability if the greatly expanded “major questions doctrine” discussed in two “shadow docket” cases were adopted in the then impending *West Virginia v. EPA* decision.⁸ The Court, as most readers will know by now, did adopt the doctrine in that case and it has produced a spate of challenges to regulatory actions in federal district and appellate courts in the ensuing year.⁹ Counting the shadow docket decisions in 2021 and 2022, the Supreme Court alone has taken up MDQ questions five times in 2021 and 2022,¹⁰ more than in the entire prior

3. Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).

4. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

5. S. Carolina Pub. Serv. Auth. v. FERC, 762 F.3d 41, 54 (D.C. Cir. 2014).

6. Nat’l Grain and Feed Ass’n v. OSHA, 866 F.2d 717, 740 (5th Cir. 1988).

7. See, e.g., Alliance for Hippocratic Med., et al. v. FDA, No. 23-10362 (5th Cir. 2023) (upholding injunction against use of mifepristone without prior doctor’s visit or beyond seven weeks as likely “arbitrary and capricious” without considering whether substantial evidence supported agency’s findings that serious adverse effects from permitted use of the drug were “exceedingly rare”). See Emergency Motion Under Rule 27.3 for a Stay Pending Appeal, Alliance for Hippocratic Med., et al. v. FDA, No. 23-10362 (filed Apr. 10, 2023), stay granted, Danco Labs., LLC v. Alliance for Hippocratic Med., et al., No. 22A901 (S. Ct. Apr. 21, 2023). Justice Alito would have denied the stay, concluding that the movants had not shown irreparable harm. His reasoning: that the government likely would not enforce the Fifth Circuit’s ruling anyway (“The Government has not dispelled legitimate doubts that it would even obey an unfavorable court order in these cases”) *Id.* at 3-4.

8. Harvey L. Reiter, *Would FERC’s Landmark Decisions Have Survived Review Under the Supreme Court’s Expanding “Major Questions Doctrine” And Could The Doctrine Stifle New Regulatory Initiatives?*, 3 EBA Brief 1 (2022), https://www.eba-net.org/wp-content/uploads/2023/01/EBA_Brief_V3-1.pdf.

9. Kentucky v. Biden, 23 F.4th 585 (6th Cir. 2022) (denying stay of lower court order Enjoining Property Act rule mandating that the employees of federal contractors in “covered contract[s]” with the federal government become fully vaccinated against COVID-19. Injunction granted on grounds that rule was violative of MQD); Georgia v. President of the United States, 46 F.4th 1283 (11th Cir. 2022) (narrowing the nationwide scope of the injunction); Brown v. Dept. of Educ., No. 4:22-cv-0908-P, 2022 WL 16858525 (N.D. Tex. Nov. 10, 2022) (finding the debt relief plan violated MQD); Louisiana v. Biden, 585 F. Supp. 3d 840 (W.D. La. 2022) (Cain - social cost of carbon Executive order - reversed on appeal by 5th Cir. as not final agency); Oklahoma v. Biden, 577 F. Supp. 3d 1245 (W.D. Okla. 2021) (rejecting Oklahoma’s challenge to vaccine mandate for National Guard members - not a “major question”); United States v. Empire Bulkers Ltd., 583 F.Supp.3d 746 (E.D. La. 2022) (rejecting criminal defendant’s charge that regulation cited in indictment was violation of major questions doctrine); Kovac v. Wray, 363 F.Supp.3d 721 (N.D. Tex. 2023) (accepting claim that government’s terrorist watchlist regulations violated MQD and bemoaning fact that Sup. Ct says clear statement only applies to “major questions” - but finding “clear” authorization for watchlist to be used in screening airline passengers); Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022) (stating issue as: did Congress authorize the National Marine Fisheries Service to make herring fishermen in the Atlantic pay the wages of federal monitors who inspect them at sea?); Ohio v. Yellen, 53 F.4th 983 (6th Cir. 2022) (determining plaintiff could have, but failed to challenge regulation as violative of the underlying statute under MQD); Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144 (M.D. Fla. 2022) (upholding challenge to CDC mask mandate on public transit as violative of MDQ as alternative ground to finding Chevron deference inapplicable).

10. Alabama Assoc. of Realtors v. Dept. of Health and Human Servs., 141 S. Ct. 2485 (2021); Nat. Fed’n of Indep. Bus. v. OSHA, 142 S. Ct. 661 (2022); West Virginia v. EPA, 142 S. Ct. 2587 (2022); Biden v. Missouri, 142 S. Ct. 647 (2022) (four dissenting Justices stating that vaccine requirement for hospitals receiving Medicare funding violated MDQ); Biden v. Nebraska/U.S. Dept. of Educ. v. Brown, Nos. 22-506, 22-535 (S. Ct. Jan. 4, 2023) (student loan forgiveness).

history of the Court. This was foreseeable despite the Court’s characterization of the doctrine as one reserved for “extraordinary cases.”¹¹ The doctrine declares agency actions of “vast economic and political significance” as presenting major questions and holds that such actions are ultra vires if they do not rely on express Congressional authorization.¹² But it defines neither standard, creating an open invitation to mount MDQ challenges, an invitation, it seems, that litigants are taking up with great frequency.¹³

- **Antitrust**

“I need to make antitrust sexy again.”

Senator Amy Klobuchar discussing scheduled hearings on LiveNation/Ticketmasters’s alleged monopolistic ticketing practices.¹⁴

“Industry consolidation and unfair practices, discriminatory conduct, that all sounds really boring, but it sounds a lot more interesting when a Taylor Swift fan is putting it to music,” she added in a reference to then-circulating TikTok videos about Ticketmaster’s control of the live concert ticket market.¹⁵

Not only Congress, but the antitrust enforcement agencies have taken a more aggressive stance against what they consider anticompetitive practices and mergers. In early April, the FTC ordered Illumina, which manufactures gene-sequencing machines, to divest itself of Grail, a cancer-test developer with which it had already merged following an ALJ’s approval of the merger.¹⁶

Unscrambling a merger, while uncommon, is not without precedent. And it has happened in the natural gas industry. In 1962, the Supreme Court reversed the Federal Power Commission’s approval of El Paso Natural Gas Company’s acquisition of the stock of Pacific Northwest Pipeline Company, a merger the Justice Department’s antitrust division was then challenging in court. The FPC had no authority to immunize mergers from the antitrust laws, it held, and accordingly should have delayed action on the application until the antitrust proceedings had concluded.¹⁷ But the merger had already been consummated and, when the Supreme Court later upheld the Justice Department’s antitrust challenge to the merger, El Paso was forced to divest itself of the other pipeline.¹⁸ While FERC has conditioned many of them, it has been decades since it has disallowed an electric utility merger. How a more aggressive FTC and DOJ merger policy might affect merger applications coming before FERC may be material for future articles in this Journal.

11. West Virginia v. EPA, 142 S. Ct. 2587, 2595 (2022).

12. *Id.* at 2595, 2605.

13. Donald Goodson, of NYU’s Institute for Policy Integrity, takes a more sanguine view in his article appearing the spring edition of the ELJ’s sister publication, Energy Brief. See Donald L.R. Goodson, *The Impact of West Virginia v. EPA on Challenges to FERC’s Authority Under the Major Questions Doctrine*, 4 EBA Brief 10 (2023), <https://www.eba-net.org/wp-content/uploads/2023/04/EBA-Brief-Vol-4-Issue-1-2023.pdf>. He argues that major economic and political significance has been replaced by a narrower test – whether the rule is “unheralded and transformative.” *Id.*

14. *Highlights from the Ticketmaster hearing: Senators criticize ‘monopoly’ over Taylor Swift fiasco*, NBC NEWS, <https://www.nbcnews.com/politics/congress/live-blog/ticketmaster-taylor-swift-senate-committee-hearing-live-updates-rcna66687> (last updated Jan. 24, 2023).

15. *Id.*

16. *Steve Lohr, F.T.C. Orders Gene-Sequencing Company Illumina to Divest Acquisition*, N.Y. TIMES (Apr. 3, 2023), <https://www.nytimes.com/2023/04/03/business/ftc-illumina-grail-divest.html#:~:text=F.T.C.%20Orders%20Gene%2DSequencing%20Company%20Illumina%20to%20Divest%20Acquisition>.

17. California v. FPC, 369 U.S. 482 (1962).

18. United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).

- **Second Amendment jurisprudence**

The Supreme Court’s *Bruen* opinion expanding the Second Amendment to include the right to carry guns outside the home¹⁹ continues to have ripple effects. Federal law prohibits the possession of firearms by persons subject to domestic violence protective orders.²⁰ Zackey Rahimi was made subject to such a protective order after assaulting his former girlfriend, but was later “involved in five shootings in and around Arlington, Texas” and indicted for possessing a firearm while subject to a protective order.²¹ Citing *Bruen*, the Fifth Circuit declared the law unconstitutional. The law, it reasoned, was not “consistent with the Nation’s historical tradition of firearm regulation”²² because there were no analogous firearm regulations or laws either at the nation’s founding nor at the time the Fourteenth Amendment was ratified – “an outlier that our ancestors would never have accepted.”²³ Wow.

Physical Threats to the Grid

“FBI thwarts neo-Nazi plot to attack Baltimore Gas & Electric substations, ‘completely destroy’ city.” That was the headline in a February 2023 article in *Utility Dive*.²⁴ Matthew Olsen, assistant attorney general for national security, described the arrests of Sarah Beth Clendaniel and Brandon Clint Russell this way: “Driven by their ideology of racially-motivated hatred, the defendants allegedly schemed to attack local power grid facilities.”²⁵

This attack, unfortunately, was not an isolated incident. The same *Utility Dive* article cites federal government warnings in 2022 “that domestic terrorists had developed ‘credible, specific plans’ to attack the U.S. power grid.”²⁶ Citing a report from the U.S. General Accounting Office, *Newsweek* reported that “[i]n the first eight months of 2022, the U.S. electrical grid was physically attacked 107 times.”²⁷ These events were at least in part a motivation for FERC’s December 15, 2022 order directing NERC to prepare a report analyzing the effectiveness of current NERC standards to address physical threats to the Bulk Power grid.²⁸ That report has now been released.²⁹

19. N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111 (2023).

20. 18 U.S.C. § 922(g)(8) (2022).

21. United States v. Rahimi, 59 F. 4th 163, 168 (5th Cir. 2023).

22. *Id.* at 172.

23. *Id.* at 179.

24. Robert Walton, *FBI thwarts neo-Nazi plot to attack Baltimore Gas & Electric substations, ‘completely destroy’ city*, UTILITY DIVE (Feb. 7, 2023), https://www.utilitydive.com/news/fbi-thwarts-neo-nazi-plot-to-attack-baltimore-gas-electric-substations/642147/?utm_source=Sailthru&utm_medium=email&utm_campaign=Issue:%202023-02-07%20Utility%20Dive%20Newsletter%20%5Bissue:47873%5D&utm_term=Utility%20Dive.

25. *Id.*

26. *Id.* See also Ilana Krill & Bennett Clifford, MAYHEM, MURDER, AND MISDIRECTION: VIOLENT EXTREMIST ATTACK PLOTS AGAINST CRITICAL INFRASTRUCTURE IN THE UNITED STATES, 2016-2022 (2022), G.W. UNIV., <https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/CriticalInfrastructureTargeting09072022.pdf>.

27. Tom O’Connor & Naveed Jamali, *Domestic Terrorists Could Take Out U.S. Power Grid—and Attacks Have Started*, NEWSWEEK (Jan. 1, 2023), <https://www.newsweek.com/2023/01/20/domestic-terrorists-could-take-out-us-power-grid-attacks-have-started-1772786.html>.

28. *N. Am. Elec. Reliability Corp.*, 181 FERC ¶ 61,230 (2022).

29. N. AM. ELEC. RELIABILITY CORP., EVALUATION OF THE PHYSICAL SECURITY RELIABILITY STANDARD AND PHYSICAL SECURITY ATTACKS TO THE BULK-POWER SYSTEM (2023), <https://www.nerc.com/FilingsOrders/us/NERC Filings to FERC DL/NERC Report on CIP-014-3.pdf>.

Climate Change Red Alerts

Warnings about the accelerating pace of climate change continue to make the news. A March 2023 report of the U.N.’s Intergovernmental Panel on Climate Change (IPCC) “found that the world is likely to surpass its most ambitious climate target — limiting warming to 1.5 degrees Celsius (2.7 degrees Fahrenheit) above preindustrial temperatures — by the early 2030s.”³⁰ As Washington Post reporter Sarah Kaplan recounts, the report warns that if temperature increases exceed that target “climate disasters will become so extreme that people will not be able to adapt. Basic components of the Earth system will be fundamentally, irrevocably altered. Heat waves, famines and infectious diseases could claim millions of additional lives by century’s end.”³¹ Less than a month later, Jianjun Yin, a climate scientist at the University of Arizona, reported his findings that sea levels along the Gulf Coast have risen by “nearly five inches” since 2010 and that NOAA data indicates that the sea level near New Orleans is now “eight inches higher than it was in 2006, just after Hurricane Katrina.”³²

The dire messages these reports convey, if anything, make two recent dystopian works – *The Deluge*, a novel by Stephen Markley and *Extrapolations* – a miniseries on AppleTV+ – even more terrifying. Both stories are set in the near future and depict with eerie plausibility the consequences of inaction on climate issues.³³

National Security

- **Leaks of classified material**

Security experts will be wondering long after publication of this edition of the Journal how a twenty-one year old National Guardsman could obtain access to, copy and release to the world top secret documents about Ukrainian and Russian war plans and preparedness. The internet posting of these documents and the subsequent arrest of Massachusetts Air National Guard member Jack Teixeira sent shock waves through the intelligence community.

- **Chinese spy surveillance balloon**

The nation’s attention was captured for a week in late January and early February as a Chinese spy surveillance balloon travelled across the United States. It was ultimately shot down over the coast of South Carolina. A subsequent leak of classified documents describe four other such spy balloons of which U.S. intelligence was aware, raising already high tensions between the US and China.³⁴

War Crimes and More War

In March, the International Criminal Court issued an arrest warrant for Russian President Vladimir Putin, accusing him of committing war crimes directly and focusing “on the unlawful deportation of children from Ukraine to Russia, a

30. Sarah Kaplan, *World is on brink of catastrophic warming, U.N. climate change report says*, WASH. POST (Mar. 20, 2023), <https://www.washingtonpost.com/climate-environment/2023/03/20/climate-change-ipcc-report-15/>.

31. *Id.*

32. Chris Mooney & Brad Dennis, *Seas have drastically risen along Gulf Coast*, WASH. POST (Apr. 10, 2023), <https://www.washingtonpost.com/climate-environment/2023/04/10/sea-level-rise-southern-us/>.

33. I have not thought of myself as a glutton for the dystopian, but have to admit I’m looking forward to the next season of *Handmaid’s Tale*.

34. Evan Hill et al., *Leaked secret documents detail up to four additional Chinese spy balloons*, WASH. POST (Apr. 14, 2023), <https://www.msn.com/en-us/news/world/leaked-secret-documents-detail-up-to-four-additional-chinese-spy-balloons/ar-AA19SLwK>.

charge also brought against Maria Lvova-Belova, Russia's – if you can believe it – commissioner for children's rights.³⁵

Four years after the overthrow of Sudanese dictator Omar al-Bashir, civilian control of Sudan remains elusive. Hundreds of Sudanese civilians were killed in April as fighting broke out between the military and a major paramilitary group that overthrew the short-lived civilian government in 2021.³⁶

Bank Collapse

Unprepared for rising interest rates and holding too much near zero interest Treasury bonds, Silicon Valley Bank collapsed from lightning-like flight of depositors in early March. It was the second largest bank failure in U. S. history.³⁷

Speakership Battle

It took 15 rounds of votes and a number of promises to holdouts no longer on the fringes of his party, but Kevin McCarthy achieved his dream of becoming Speaker of the House.

Debt Ceiling Cliff

The drama over the debt ceiling will almost certainly still be ongoing when this edition of the Journal goes online. The constitutionality of the debt ceiling – a statutory limit on the executive branch's authority to pay for debts already incurred – has been debated by academics³⁸ as both a violation of the Constitution's Borrowing Clause³⁹ and section four of the Fourteenth Amendment.⁴⁰ And it has been raised many times in our history without debate – three times alone during the last Administration, for example. But the current majority in the House of Representatives, while agreeing that default on our debt would be catastrophic, is insisting on cuts to *future* spending as a condition of agreeing to pay for *past* debts. The President, meanwhile maintains that he will not bargain over the full faith and credit of the United States. Hang on for what is sure to be an unnecessarily scary ride.

35. Antoinette Radford & Frank Gardner, *The International Criminal Court (ICC) has issued an arrest warrant for Russian President Vladimir Putin*, BBC NEWS (Mar. 18, 2023), <https://www.bbc.com/news/world-europe-64992727>.

36. Katharine Houreld & John Hudson, *Civilian toll rises in Sudan as military, rivals fight for control*, WASH. POST (Apr. 16, 2023), <https://www.washingtonpost.com/world/2023/04/16/sudan-conflict-rapid-support-forces-military/>.

37. Jim Tankersley, *How Silicon Valley Bank's Failure Could Have Spread Far and Wide*, N.Y. TIMES (Apr. 13, 2023), <https://www.nytimes.com/2023/04/13/us/politics/silicon-valley-bank-widespread-failure.html>.

38. Thomas Geoghegan, *The Constitutional Case for Disarming the Debt Ceiling*, NEW REPUBLIC (Jan. 6, 2023), <https://newrepublic.com/article/169857/debt-ceiling-law-terminate-constitution>.

39. Article I, section 8 reads: "The Congress shall have Power to Lay and Collect Taxes, Duties, Imposts, to pay the Debts and provide for the Common Defence and General Welfare of the United States; To borrow money on the credit of the United States." (emphasis added). U.S. Const. art. 1, § 8. Geoghegan argues that Congress has the power to borrow, only on the condition of its use to prevent a default, quoting Hamilton Federalist Number 30, "Who would lend to a government that would preface its overture for borrowing by an act which demonstrated that no reliance could be placed on the steadiness of its measure for paying for it?" Geoghegan, *supra* note 38.

40. Section 4 of the Fourteenth Amendment says, in part: "The validity of the public debt of the United States, authorized by law, including debts incurred for the payment of pensions and bounties for service in suppressing insurrection or rebellion, shall not be questioned." U.S. Const. amend. XIV, § 4.

Lame Duck Session of Congress

The lame duck session of Congress, which ended after the ELJ's fall edition, was noteworthy for two bipartisan pieces of legislation. Congress amended the Electoral Count Act to emphasize the purely ministerial role played by a Vice President in counting electoral votes. And it passed a law adding protections for gay and interracial marriage.

The Fake News Network?

"I hate him passionately."

So wrote Tucker Carlson (subsequently fired by Fox, but then offered a job on the Russian state media network RT) in describing his feelings toward Donald Trump. This email was part of a treasure trove of internal Fox emails disclosed during discovery in Dominion Voting Systems defamation suit against NewsCorp, the parent company of Fox News.⁴¹ In the months leading up to Dominion's scheduled April 17 defamation trial against Fox excerpts from scores of emails depicted executives and on air personalities as loathe to describe election conspiracies as bunk at the risk of alienating the network's audience.⁴² The trial judge had already ruled on summary judgment that claims that Dominion had altered votes were lies. The issue at the trial therefore, had it been held, was whether or not the lies the network aired about Dominion's voting machines were deliberate falsehoods or at least broadcast with reckless disregard for their truth or falsity.⁴³ Acknowledging the judge's findings, and avoiding trial, Fox settled the lawsuit by agreeing to pay Dominion more than three quarters of a billion dollars in damages. "Lies have consequences," said Dominion's lawyer, Justin Nelson.⁴⁴

Fox still faces a similar defamation suit by Smartmatic, another manufacturer of voting machines.⁴⁵ And Dominion still has defamation lawsuits pending against Rudolph Guiliani, Sydney Powell, Mike (the pillow guy) Lindell and against the Newsmax and OneAmerica broadcast networks.

Another Big Defamation Case

Several years ago the former president responded to a claim by E. Jean Carroll that he had once raped her by allegedly disparaging her and claiming she "wasn't my type." The latter then brought a defamation case in New York. Trump had moved to dismiss the suit on grounds that his statements were immunized because he was acting "within the scope of his duties as U.S. President." The DC Court of Appeals rejected that claim, finding that under DC law the question wasn't whether his actions were within the scope of his employment, but whether they were in furtherance of his duties to the government. That fact question the

41. Sarah Ellison, *Trump Spurred an 'existential crisis' at Fox News, lawsuit exhibits show*, WASH. POST (Mar. 7, 2023), <https://www.washingtonpost.com/media/2023/03/07/fox-news-dominion-tucker-carlson-texts/>.

42. As NPR reporters David Folkenflik and Mary Yang described Fox's internal documents: "Primetime stars Tucker Carlson, Laura Ingraham and Sean Hannity privately trashed the people who lied about Dominion on their network's airwaves and yet also trashed the reporters who sought to hold them accountable for those lies." David Folkenflik & Mary Yang, *Fox News settles blockbuster defamation lawsuit with Dominion Voting Systems*, NPR (Apr. 18, 2023), <https://www.npr.org/2023/04/18/1170339114/fox-news-settles-blockbuster-defamation-lawsuit-with-dominion-voting-systems>.

43. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964).

44. David Folkenflik & Mary Yang, *Fox News settles blockbuster defamation lawsuit with Dominion Voting Systems*, NPR (Apr. 18, 2023), <https://www.npr.org/2023/04/18/1170339114/fox-news-settles-blockbuster-defamation-lawsuit-with-dominion-voting-systems>.

45. Amy B Wang, et al., *Fox News still faces \$2.7 billion defamation lawsuit from Smartmatic*, WASH. POST (Apr. 19, 2023), <https://www.washingtonpost.com/media/2023/04/18/fox-news-smartmatic-defamation-lawsuit/>.

DC Court of Appeals left for the federal courts in New York to decide.⁴⁶ Trump repeated the same remarks after he'd left the Presidency and was sued by Carroll again. The defamation trial in *that* case began in late April. After less than three hours of deliberation a unanimous, mostly male jury found Trump liable for sexually abusing and defaming Ms. Carroll.

Chutzpah and Profiles in Half-Courage

Former Vice President Mike Pence, threatened with death by a Trump-inspired mob and willing to write a book about Jan 6th, nonetheless refused to testify under oath before the Jan. 6th Committee on grounds that doing so would be a violation of the separation of powers between the executive branch (him) and the legislative branch (the Jan. 6th Committee). Then, months later, when subpoenaed by the Justice Department (the executive branch) he also opposed the subpoena on “separation of powers” grounds – arguing that on Jan. 6th he was part of the legislative branch (president of the Senate) and couldn't honor a subpoena by the same executive branch he claimed to be part of months earlier.⁴⁷ Chutzpah.⁴⁸

In what conservative commentator Charlie Sykes referred to as a “profile in half courage,”⁴⁹ more than two years after the January 6th attacks, the former Vice President chose a closed-door, untelevised event – the annual Gridiron Dinner – to lay the blame squarely on the former President for the violence on January 6, 2021:

“President Trump was wrong. I had no right to overturn the election. And his reckless words endangered my family and everyone at the Capitol that day. And I know that history will hold Donald Trump accountable.”⁵⁰

More chutzpah

The former president made more news with the announcement in April that he had filed a lawsuit – for \$500 million – against his former attorney Michael Cohen. Trump's claim was not for defamation but for alleged violation of a non-disclosure agreement. Trump's complaint simultaneously alleges both that Cohen disclosed confidential attorney-client communications in his book *and* that what the book discussed was “spreading falsehoods,” i.e., did not contain Trump's communications.⁵¹ Go figure.

46. *Trump v. Carroll*, No. 22-SP-745, 2023 WL 2920882 (D.C. Apr. 13, 2023). Adding some drama to his already dubious “not my type” defense, an unsealed deposition transcript showed that Trump had misidentified a picture of a younger Carroll as Marla Maples, one of his former wives. Elizabeth Hartfield & Kara Scannel, *Donald Trump mistook E. Jean Carroll for his ex-wife Marla Maples in a photo, deposition transcripts show*, CNN (Jan. 20, 2023), <https://www.cnn.com/2023/01/19/politics/trump-e-jean-carroll-deposition-photo/index.html>.

47. Pence later chose not to appeal the court order rejecting his claim and testified before a grand jury.

48. The D.C. Circuit has defined chutzpah as follows: “Chutzpah is a young man, convicted of murdering his parents, who argues for mercy on the ground that he is an orphan.” *Harbor Ins. Co. v. Schnabel Found. Co.*, 946 F.2d 930, 937 n.5 (D.C. Cir. 1991). *See also Marks v. Comm'r of Internal Revenue*, 947 F.2d 983, 986 (D.C. Cir. 1991) (discussing the D.C. Circuit's “developing chutzpah doctrine”).

49. Charlie Sykes, *Why Not Pence?*, BULWARK (Mar. 13, 2023), <https://morningshots.thebulwark.com/p/why-not-pence>. Sykes's remarks were an allusion to *Profiles in Courage*, the Pulitzer prize-winning book by the late President John F. Kennedy.

50. David Jackson, *Pence says history will hold Trump ‘accountable’ for Jan. 6, rebukes him for endangering his family*, USA TODAY (Mar. 12, 2023), <https://www.usatoday.com/story/news/politics/2023/03/12/pence-jan-6-history-hold-trump-accountable/11459297002/>.

51. Kelly Garrity, *Trump sues his former fixer Michael Cohen for over \$500 million*, POLITICO (Apr. 12, 2023), <https://www.politico.com/news/2023/04/12/trump-sues-ex-lawyer-michael-cohen-00091735>.

Mass shootings

Firearms had already become the number one cause of death among children in 2020.⁵² And we have become numb to the number of mass shootings. Already scarily frequent, they now number nearly *two* per day, double the itself staggering mass shooting figure of one per day from 2014-2019.⁵³ While correlation and causation are not the same, it is hard to dismiss the correlation between the increase in mass shootings and the proliferation of weapons generally (with no corresponding increase in mental illness),⁵⁴ and the exponential increase in private ownership of assault rifles.⁵⁵ And because only 32 percent of American adults own firearms,⁵⁶ with estimates of 400 million firearms in circulation (more than the total US population including children),⁵⁷ the mathematical implication is that many gun owners must literally wield arsenals.

Among the many mass shootings in the last six months was another mass school shooting at a private school in Tennessee. When three legislators subsequently took to the Tennessee house floor out of order to protest state inaction on gun violence the heavily gerrymandered legislature voted to expel two of them for this rules violation – Justin Pearson of Memphis and Justin Jones of Nashville – but spared by one vote the expulsion of Gloria Johnson.⁵⁸ The legislature’s actions appear to have backfired. The expelled legislators were both reappointed to their seats in less than a week and both conservative Governor Lee and Lt. Gov. McNally have now come out in support of red flag laws.⁵⁹

Orwellian

Speaker of the House, Kevin McCarthy chose to provide Tucker Carlson “exclusive access” to the Jan. 6 videos. McCarthy described his decision as an effort to promote “transparency,” but Carlson’s subsequent selective use of video clips to describe the attacks as peaceful and orderly “tourist” visits to the Capitol were trashed by Republican Senators.⁶⁰

52. *Preventing Gun Violence, the Leading Cause of Childhood Death*, NAT’L INSTITUTES OF HEALTH (July 5, 2022), https://www.nichd.nih.gov/about/org/od/directors_corner/prev_updates/gun-violence-July2022.

53. Nadine Yousif, *Why number of US mass shootings has risen sharply*, BBC NEWS (Mar. 28, 2023), <https://www.bbc.com/news/world-us-canada-64377360>.

54. Gun industry sales have grown 11% per year between 2018 and 2023. *Gun & Ammunition Stores in the US - Market Size 2002–2028*, IBIS WORLD, <https://www.ibisworld.com/industry-statistics/market-size/gun-ammunition-stores-united-states/#:~:text=past%20years%3F-,The%20market%20size%20of%20the%20Gun%20%26%20Ammunition%20Stores%20industry%20in,average%20between%202018%20and%202023> (last updated Sept. 30, 2022).

55. Joe Walsh, *Record 2.8 Million AR-15 And AK-Style Rifles Entered U.S. Circulation In 2020, Gun Group Says*, FORBES (July 20, 2022), <https://www.forbes.com/sites/alisondurkee/2022/07/20/record-28-million-ar-15-and-ak-style-rifles-entered-us-circulation-in-2020-gun-group-says/?sh=1248ebd527ca> (“Manufacturing figures for AR-15 and AK-style rifles, minus exports, have exploded in recent decades, from fewer than 100,000 annually in the late 1990s—when many of those firearms were prohibited for civilian use under the 1994-2004 federal assault weapons ban—to more than 1 million every year since 2015” and 2.8 million in 2020.)

56. Lydia Saad, *What Percentage of Americans Own Guns?*, GALLUP (Nov. 13, 2020), <https://news.gallup.com/poll/264932/percentage-americans-own-guns.aspx>.

57. Walsh, *supra* note 55.

58. Liz Crampton, *Tennessee Republicans may have just handed a lifeline to Democrats*, POLITICO (Apr. 12, 2023), <https://www.politico.com/news/2023/04/12/tennessee-democrats-justin-jones-pearson-00091631>.

59. Emily Chochrane, *Second Expelled Democrat is Sent Back to Tennessee House*, N.Y. TIMES (Apr. 12, 2023), <https://www.nytimes.com/2023/04/12/us/justin-pearson-tennessee-house-vote.html#:~:text=Second%20Expelled%20Democrat%20Is%20Sent%20Back%20to%20Tennessee%20House>.

60. Paul Kane, et al., *‘Just a lie’: Senate Republicans blast Tucker Carlson’s Jan. 6 narrative*, WASH. POST (Mar. 8, 2023), <https://www.washingtonpost.com/politics/2023/03/07/tucker-carlson-jan-6-senate-republicans/>.

Speaking of Orwellian use of common words, the Ohio legislature passed a law this winter defining natural gas as green energy.⁶¹

Indictments, investigations, civil litigation and the former President

In the weeks leading up to his indictment for falsifying business records to cover up hush money payments to a porn star in advance of the 2016 presidential election, the former president posted a picture of himself brandishing a baseball bat, juxtaposed to a picture of Manhattan District Attorney Alvin Bragg (see below), warning in his post of “potential death and destruction” if he were to be indicted.⁶² Hours later Bragg received a written death threat in a mailed envelope also ominously containing white powder (that fortunately turned out to be non-poisonous).⁶³



Unhinged

“I am your retribution.”

In the months preceding his verbal attack on Manhattan’s district attorney, the former President began his nascent campaign for the presidency with this vengeful declaration at one of his first campaign rallies.⁶⁴ This outburst followed his widely criticized decision to invite not one, but two Holocaust deniers – Kanye West and Nick Fuentes – to an intimate dinner at Mar-a-Lago.⁶⁵

61. Jane Zuckerman, *With a stroke of his pen, Gov. DeWine defines natural gas as green energy*, CLEVELAND.COM (Jan. 6, 2023), https://www.cleveland.com/open/2023/01/with-stroke-of-his-pen-gov-mike-dewine-defines-natural-gas-as-green-energy.html?utm_source=Sailthru&utm_medium=email&utm_campaign=Issue:%202023-01-09%20Utility%20Dive%20Newsletter%20%5Bissue:47156%5D&utm_term=Utility%20Dive. See also Maxine Joselow, *How dark money groups led Ohio to redefine gas as ‘green energy’*, WASH. POST (Jan. 17, 2023), <https://www.washingtonpost.com/climate-environment/2023/01/17/ohio-natural-gas-green-energy/>.

62. Lee Brown & Steven Nelson, *Trump posts disturbing baseball bat photo with Alvin Bragg, threatens ‘death and destruction’*, N.Y. POST (Mar. 24, 2023), <https://nypost.com/2023/03/24/trump-shares-pic-holding-baseball-bat-near-das-head/>.

63. Michael R. Sisak, Associated Press, *Powder, threatening letter sent to Manhattan district attorney investigating Trump*, PBS, (Mar. 24, 2023), <https://www.pbs.org/newshour/politics/powder-threatening-letter-sent-to-manhattan-district-attorney-investigating-trump>.

64. Aaron Blake, *Trump’s dark ‘I am your retribution pledge – and how GOP enabled it*, WASH. POST (Mar. 6, 2023), <https://www.washingtonpost.com/politics/2023/03/06/trumps-dark-i-am-your-retribution-pledge-how-gop-enabled-it/>.

65. Maeve Reston & Kristen Holmes, *Trump hosted Holocaust denier at Mar-a-Lago estate during visit with Kanye West, a week after announcing 2024 run*, CNN (Nov. 26, 2022), <https://www.cnn.com/2022/11/25/politics/trump-kanye-west-nick-fuentes-mar-a-lago/index.html>.

Sports

My apologies to the Detroit Lions. In the last edition of the Journal I referred to the “lowly” Lions’ victory over the Packers as evidence of Aaron Rodgers’s declining skills. But the Lions went on to win eight of their last ten games. And while they did not make the playoffs (a fate the Lions have shared with Detroit’s Tigers, Redwings and Pistons since 2019), commentators did consider them to be the best team that didn’t make the playoffs.

Argentina won the World Cup in a thrilling overtime victory over France in Qatar amidst controversy over corruption in the selection of the host country. Soccer great Lionel Messi’s final World Cup triumph was followed a few weeks later with the death of 82 year old Pele, maybe the greatest soccer player ever.

Hall of Fame pitcher Gaylord Perry, notorious for throwing a spitball, passed away on December 1. He was also such a notoriously bad hitter that his manager, Alvin Dark, once said “there’ll be a man on the moon before he hits a homerun.” Perry did hit a homerun. It was on July 20, 1969, the same day Neil Armstrong became the first man to walk on the moon. As Perry remarked, “Dark was right, but only by an hour.”⁶⁶

Chicago Black Hawks left winger (a hockey position, not a political orientation) Bobby Hull passed away at 84. The “Golden Jet” led the NHL in goals seven times. While he and Detroit Redwing great Gordie Howe were rivals for most of their long careers, they paired up, briefly, for 8 games in 1981 with the Hartford Whalers before both retired.

The announced sale of the NFL’s Washington Commanders by owner Daniel Snyder made the front page of the Washington Post’s April 14, 2023 edition with a summary of an article in the paper’s sports section reading: “New owner’s best quality? He’s not Daniel Snyder.” And the sports section itself proclaimed that when the sale was announced “local sports talk radio stations opened [their] lines to ecstatic listeners.”⁶⁷

George Santos

It turns out that George Santos, newly elected to Congress from Long Island, lied to voters about, well everything. And in a real twist, here was a politician who lied that he *was* Jewish. Incredibly, after being denounced by his own party leaders in New York, and despite “facing multiple investigations from the House Ethics Committee and law enforcement,” Santos has announced that he will run for reelection.⁶⁸ He was subsequently charged in federal court with campaign finance violations.

January 6th Committee Report

The Jan 6th Committee issued its final report, recommending criminal charges against former President Trump to DOJ. Meanwhile, two of his avid supporters – far right Oath Keeper leaders Stewart Rhodes and Kelly Megs – were convicted of seditious conspiracy, as were Enrique Tarrío and three other members of the Proud Boys.⁶⁹

66. Harrison Smith, *Gaylord Perry, spitball-throwing Hall of Famer, dies at 84*, WASH. POST (Dec. 1, 2022), <https://www.washingtonpost.com/obituaries/2022/12/01/pitcher-gaylord-perry-dead/>.

67. Scott Allen, et al., *On a ‘national holiday’ for Commanders fans, stadium talk intensifies*, WASH. POST (Apr. 13, 2023), <https://www.washingtonpost.com/sports/2023/04/13/commanders-sale-fans-stadium/>.

68. Ben Jacobs, *George Santos is running for reelection because “good isn’t good enough”*, VOX (Apr. 18, 2023), <https://www.vox.com/politics/2023/4/17/23687258/george-santos-running-for-reelection>.

69. *Leader of Oath Keepers and Oath Keepers Member Found Guilty of Seditious Conspiracy and Other Charges Related to U.S. Capitol Breach*, DEP’T OF JUSTICE, OFFICE OF PUB. AFFAIRS (Nov. 29, 2022),

Judicial Propriety

The Supreme Court has come under increased scrutiny as the only federal court whose members are not bound by the judicial code of ethics.⁷⁰ One of its members, Justice Thomas, has faced questions about his previously undisclosed receipt of lavish gifts and vacations from a wealthy friend as well as unreported income from the sale of his mother's home (which she continues to occupy) to that same friend.⁷¹ And federal district court judge Matthew Kacsmaryk, the author of a nationwide injunction barring the use of mifepristone (later suspended), has come under fire for failing to disclose his connection to an article he had submitted to a University of Texas law journal prior to hearings on his 2017 nomination to serve on the federal bench. A report in the Washington Post detailed an email Kacsmaryk had sent to the journal months after the article had been submitted, asking that his name be taken off the article for "reasons I may discuss at a later date."⁷² This was significant, the report explained, for two reasons. At the time the email was sent, he was under consideration by the White House for a judicial appointment. And the draft law review article itself argued that physicians "cannot use their pens to prescribe abortifacient drugs designed to kill unborn children."⁷³

Speech Police

- **Big Brother**

Former President Clinton famously remarked during his 1996 State of the Union address that "The era of Big Government is over."⁷⁴ In announcing the opening of Florida's legislative session, its governor might well have proclaimed that the "the era of Big Brother is just starting." Barring cruise lines during the height of COVID from requiring crews and passengers to be vaccinated, stripping Disney of its authority to run the local utility as punishment for criticism of his "don't say gay" bill, blocking state money for a Tampa Bay Rays training facility after a team tweet against gun violence⁷⁵ – these were apparently just the start.

<https://www.justice.gov/opa/pr/leader-oath-keepers-and-oath-keepers-member-found-guilty-seditious-conspiracy-and-other>; Ella Lee, *4 Proud Boys, including leader Enrique Tarrío, guilty of seditious conspiracy for Jan. 6 Capitol attack*, USA TODAY (May 4, 2023), <https://www.msn.com/en-us/news/us/4-proud-boys-including-leader-enrique-tarrio-guilty-of-seditious-conspiracy-for-jan-6-capitol-attack/ar-AA1aJS2m?ocid=entnewsntp&pc=U531&cvid=a9069325929b4921b876147d2cdb0e26&ei=16>.

70. *Supreme Court Justices Should Follow Binding Code of Ethics, ABA House Says*, AM. BAR ASS'N (Feb. 27, 2023), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/feb-23-wl/scotus-ethics-0223wl/#:~:text=While%20Supreme%20Court%20justices%20must,report%20accompanying%20the%20resolution%20says.

71. *Justice Thomas faces new scrutiny for real estate deal with Republican donor*, PBS (Apr. 13, 2023), <https://www.pbs.org/newshour/show/justice-thomas-faces-new-scrutiny-for-real-estate-deal-with-republican-donor>; Eugene Robinson, *Clarence Thomas's explanations fail the laugh test*, WASH. POST (Apr. 18, 2023), <https://www.washingtonpost.com/opinions/2023/04/17/clarence-thomas-disclosures-harlan-crow-respect/>.

72. Caroline Kitchener, et al., *The controversial article Matthew Kacsmaryk did not disclose to the Senate*, WASH. POST (Apr. 15, 2023), <https://www.washingtonpost.com/politics/2023/04/15/matthew-kacsmaryk-law-review/>.

73. *Id.*

74. 'The era of big government is over': CNN transcript of President Clinton's radio address, CNN (Jan. 27, 1996), http://www.cnn.com/US/9601/budget/01-27/clinton_radio/.

75. Steve Contorno, *DeSantis blocks state money for Tampa Bay Rays training facility after team tweets against gun violence*, CNN (June 3, 2022), <https://www.cnn.com/2022/06/03/politics/ron-desantis-tampa-bay-rays-gun-violence/index.html>. His latest act of retaliation against Disney – a threat to construct a prison on vacant land bordering Disney's property – evoked criticism from past and current governors in his party that his actions were anti-business and not conservative. Kierra Frazier, 'So unnecessary': Republicans pile on DeSantis over Disney, POLITICO, <https://www.politico.com/news/2023/04/18/chris-christie-ron-desantis-disney-00092505> (last

Since winning reelection, the likely presidential aspirant has made Big Brother initiatives a hallmark of his new term. After the College Board criticized his decision to strip AP African American Studies classes from high school curriculums, he threatened to block the teaching of *all* AP courses.⁷⁶ He has promoted the creation of private causes of action against companies that choose to provide employees with diversity training and pushed legislation to strip state universities of control over their own curriculums and directed teachers in public schools to refer to transgender students by their sex assigned at birth. And in a legislative session not yet over, he has signed bills “banning abortion after six weeks of pregnancy and broadening the death penalty by eliminating the requirement for a unanimous verdict,”⁷⁷ and in the wake of daily mass shootings nationwide, he signed a bill authorizing permitless carry of concealed weapons.⁷⁸

These are all proposals that have become, or are almost certain to become law by a rubber stamp legislature that would make Xi Jinping blush. But chilling debate hasn’t been limited to the acts of the Florida legislature. The state’s board of education has banned teaching about sexual orientation or gender identity even in high school.⁷⁹ Would a high school civics teacher discussing the Supreme Court’s decision in *Obergefell v. Hodges* face dismissal?

- **Heckler’s Veto**

Lacking the power of government, but no less offensive was the treatment of conservative Fifth Circuit Judge Kyle Duncan by the students *and* a faculty member at Stanford Law School. In his career before taking the bench, Duncan had litigated many cases against gay and transgender rights. Students opposed to his viewpoints shouted down the judge during his attempted remarks. But rather than trying to restore order, Associate Dean Tirien Steinbach instead posed this question to the judge, “Is the juice worth the squeeze?” – suggesting that there was no worthwhile purpose in espousing views that might upset the students. This response rightly drew both an apology to the speaker and condemnation of the students’ uncivil conduct from the school’s dean, who reminded students and faculty that freedom of speech was not limited to those with whom one shares the same views.⁸⁰

updated Apr. 19, 2023). Disney has since sued DeSantis, maintaining that his actions amounted to unconstitutional retaliation for Disney’s exercise of its First Amendment rights. *Walt Disney Parks and Resorts U.S., Inc. v. DeSantis, et al.* No. 4:23-cv-00163-M (N.D. Fla. Apr. 26, 2023).

76. Nicholas Reimann, *DeSantis Threatens Florida Ban Of AP Classes In Latest College Board Jab*, FORBES (Feb. 13, 2023) <https://www.forbes.com/sites/nicholasreimann/2023/02/13/desantis-threatens-florida-ban-of-ap-classes-in-latest-college-board-jab/?sh=33206882f11f>. See also Ana Ceballos, *Florida rejects AP African American Studies course, claiming it ‘lacks educational value’*, MIAMI HERALD (Jan. 23, 2023), <https://www.miamiherald.com/news/local/education/article271362032.html#storylink=cpy>.

77. Tim Craig & Lori Rozsa, *How DeSantis became Florida’s most powerful governor in a generation*, WASH. POST (Apr. 18, 2023), <https://www.washingtonpost.com/nation/2023/04/16/florida-ron-desantis-governor-legislature-power/>.

78. Christopher Spata, *Florida concealed carry goes permitless, and gun instructors hope for the best*, TAMPA BAY TIMES (Apr. 4, 2023), <https://www.tampabay.com/news/florida/2023/04/04/florida-concealed-carry-goes-permitless-gun-instructors-hope-safety/>.

79. Hannah Natanson, *Florida bans teaching about gender identity in all public schools*, WASH. POST (Apr. 19, 2023), <https://www.washingtonpost.com/education/2023/04/19/florida-bans-teaching-gender-identity-sexuality/>.

80. Ruth Marcus, *Stanford students lost a chance to learn when they shouted down a judge*, WASH. POST (Mar. 27, 2023), <https://www.washingtonpost.com/opinions/2023/03/27/stanford-law-free-speech-judge-stuart-kyle-duncan/>. Duncan did not escape Marcus’s criticism either. She decried as a “flimsy excuse for intolerance” his stated grounds in one case for refusing to refer to a transgender inmate by the pronoun of her choice: that doing so “may unintentionally convey [the court’s] tacit approval of the litigant’s underlying legal position.” *Id.*

- **Drag shows**

Who would have thought that the need to ban drag shows would become a thing? Days after an earlier picture of him dressed in drag in his high school yearbook was published, Tennessee Governor Bill Lee nonetheless signed into law a statute criminalizing drag shows that that might be seen by children, i.e., available publicly.⁸¹ The law would prohibit public “adult cabaret performances” by “male or female impersonators.” Would that mean banning TV broadcasts of Dustin Hoffman in *Tootsie* and Robin Williams in *Mrs. Doubtfire*, or Martin Lawrence in *Big Mamma's House*, or John Travolta in *Hairspray*? Or maybe YouTube-accessible comedy sketches featuring a younger Donald Trump in drag? How about Kate McKinnon’s impersonations of Rudolph Giuliani and Jeff Sessions on Saturday Night Live? Challenges to the law no doubt await.

Earthquake in Turkey and Syria

One of the most devastating earthquakes in recent history rocked parts of Turkey and Syria in early February, killing tens of thousands and damaging or destroying hundreds of thousands of buildings, leaving many survivors homeless.⁸² Recovery efforts in the latter country have been further complicated by the ongoing civil war there.

Gone but not forgotten

Last month Ben Ferencz passed away. At the age of 103 he was the sole surviving Nuremberg Nazi war crimes prosecutor. Diminutive in physical stature, but a towering figure in the fight for human rights, Ferencz urged the creation of an international court that could prosecute any government’s leaders for war crimes. The 2002 establishment of the International Criminal Court in The Hague saw his hopes realized.⁸³

Pope Benedict XVI, the 265th Pope of the Catholic Church, passed away on December 31, 2022, at the age of 94. His death was announced by the Vatican, and tributes poured in from around the world, including from his successor, Pope Francis.⁸⁴ Benedict had resigned from the papacy in 2013 due to health reasons, becoming the first Pope in over 600 years to do so.⁸⁵ He was widely respected for his theological writings and was known for his conservative views on issues such as homosexuality, contraception, and the ordination of women.⁸⁶ Despite criticism

81. Gloria Oladipo, *Tennessee governor to ban drag shows – despite photo of him dressed in drag*, GUARDIAN (Feb. 28, 2023), <https://www.theguardian.com/us-news/2023/feb/28/tennessee-governor-ban-drag-shows-photo-bill-lee>.

82. Zeynep Bilginsoy & Suzan Fraser, Associated Press, *Turkey, Syria face more loss after latest earthquake*, PBS (Feb. 21, 2023), <https://www.pbs.org/newshour/world/turkey-syria-face-more-loss-after-latest-earthquake>.

83. Mike Schneider *Ben Ferencz, last living Nuremberg prosecutor of Nazis, dies*, Washington Post (April 8, 2023), https://www.washingtonpost.com/politics/2023/04/08/holocaust-nuremberg-nazis-jews-prosecution/6436aa18-d64b-11ed-ac8b-cd7da05168e9_story.html.

84. “Pope Benedict XVI, former leader of Catholic Church, dies at 94,” NBC News, April 15, 2022, <https://www.nbcnews.com/news/world/pope-benedict-xvi-former-leader-catholic-church-dies-94-rcna20613>.

85. “Pope Benedict XVI,” Biography.com, accessed April 21, 2023, <https://www.biography.com/religious-figure/pope-benedict-xvi>.

86. “Pope Benedict XVI’s Legacy: Conservative, Intellectual and Authoritative,” The New York Times, February 11, 2013, <https://www.nytimes.com/2013/02/12/world/europe/pope-benedict-xvis-legacy-conservative-intellectual-and-authoritative.html>.

from some quarters, Benedict remained a popular figure among many Catholics and was seen as a steadfast defender of traditional Church teachings.⁸⁷

Barbara Walters died at age 93 on December 30, 2022. The first woman to anchor a network news show and the first anchor, male or female, to earn an annual salary of \$1 million, gained her greatest fame for her interviews with the powerful and famous – including a joint interview with Anwar Sadat and Menachem Begin, an interview with Richard Nixon and interviews with both Monica Lewinsky and Hilary Clinton.⁸⁸

Scientific Breakthrough

Last December scientists at the National Ignition Facility did what had eluded their predecessors for decades – produce more energy from a fusion explosion than the energy used to spark the fusion reaction. Commercially viable carbon-free, radioactive-free power stations may still be far off, but the breakthrough suggests it is possible.⁸⁹

Looking Forward

It has been a whirlwind six months. The Federal Energy Regulatory Commission is still short a fifth commissioner, but the world moves on. We've finally emerged from the worst of the COVID pandemic; President Biden has formally declared that the National Health Emergency will end on May 11. One thing has remained constant about the work of the Journal, though. Our authors, peer review editors and student editors - volunteers all - continue to devote their time and skills to produce a Journal of which the Energy Bar Association can be proud. I want to express a special thanks to the Journal's outgoing student editor-in-chief – Sotheby Shedeck – for her tireless and excellent work. Our authors – typically practitioners, regulators and policymakers with heavy workloads – will often have to fit their writing efforts within our publication schedule. There are predictably unpredictable changes to deadlines that our students must then accommodate. Sotheby and her staff have handled these with grace and patience and deserve our thanks.

You're probably still waiting to discover which of the paragraphs of this Editor's Page was created by ChatGPT. It was the paragraph about the death of Pope Benedict. Was there a giveaway? Well the footnotes created by the computer program were not in blue book form. Congratulations if you guessed correctly.

Harvey Reiter
Washington, DC May 2023

87. "Pope Benedict XVI remembered as a 'great man of faith' after his death," *The Guardian* (April 15, 2022), <https://www.theguardian.com/world/2022/apr/15/pope-benedict-xvi-remembered-as-a-great-man-of-faith-after-his-death>.

88. Lawrence I. Barrett, *Barbara Walters, TV's tireless pursuer of the newsmaker 'get,' dies at 93*, WASH. POST (Dec. 31, 2022), <https://www.washingtonpost.com/obituaries/2022/12/30/barbara-walters-tv-dies/>.

89. Dan Cleary, *With historic explosion, a long sought fusion breakthrough*, SCIENCE (Dec. 13, 2022), <https://www.science.org/content/article/historic-explosion-long-sought-fusion-breakthrough>.