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A Candid Conversation with New SBA V.P.

by Lane Brent Forsythe

The following is an interview with Scott FitzGerald, the newly elected Vice-President of the Student Bar Association. Mr. FitzGerald is from Milwaukee, Wisconsin and is a recent graduate of Johns Hopkins University. This interview focuses on FitzGerald's views concerning the role of the SBA and the presence of a Jesuit tradition at Fordham Law School.

Q. What exactly does the Student Bar Association do?

A. The SBA is the representative governing body of students. It is the direct voice between students and the administration. The SBA coordinates student complaints. People in the SBA should know to whom to speak to solve problems or be able to find out.

Q. Does the SBA have any official powers? Can it act unilaterally?

A. Yes, for example, we can negotiate with Marriott about TANGS and Bar Nights. We can seek sponsorship of our events. We also review class schedules to see if they are reasonable.

Q. What if the class schedule is unreasonable? What exactly can the SBA do about it?

A. The SBA can go to Dean Rivera with the complaint but it is up to the Dean to actually make changes.

Q. It sounds like the SBA is an ombudsman or a conduit for student complaints. Can you unilaterally act or do you just make suggestions to the administration?

A. We are like a group of ombudspeople, but we can organize social events on our own. Although I don't know what the administration would do if we did Fordham Night at a strip club!

"It is not a popularity contest, it's more name recognition and how many people you know."

Q. What exactly can you do as Vice President?

A. For one thing, I chair the Student Faculty Committee which is how we tell the faculty what the students want. Representatives of each faculty and student committee get together, they tell us their plans and we respond. This is a new program, and sometimes the faculty do not show up, which is a problem. This year, the Vice President wrote the SBA update. I would also like to write it, but it might be more of a team effort this year. We haven't decided yet.

New SBA Executive Board

From left to right: Scott FitzGerald, Terri Austin, Chris Hawke, Kelly Crawford, J.R. Wilson.

Q. Why do you think you won the election?

A. Because I pulled the sympathy vote with my crutches. Seriously, last year I ran and lost—I deserved to lose. I was stupid to think I could win as a first-year. With the way the election is set up, this is impossible. They use a ticket format. As you can see, this year the whole ticket I was on won. We have a great ticket, I think we all deserved to win, but last year my whole ticket lost and we certainly qualified. The problem is that people know one person and then they vote for the whole ticket. This isn't really fair to independent candidates. On the other hand, with the ticket system, you have a group of people who can work together, which is good.

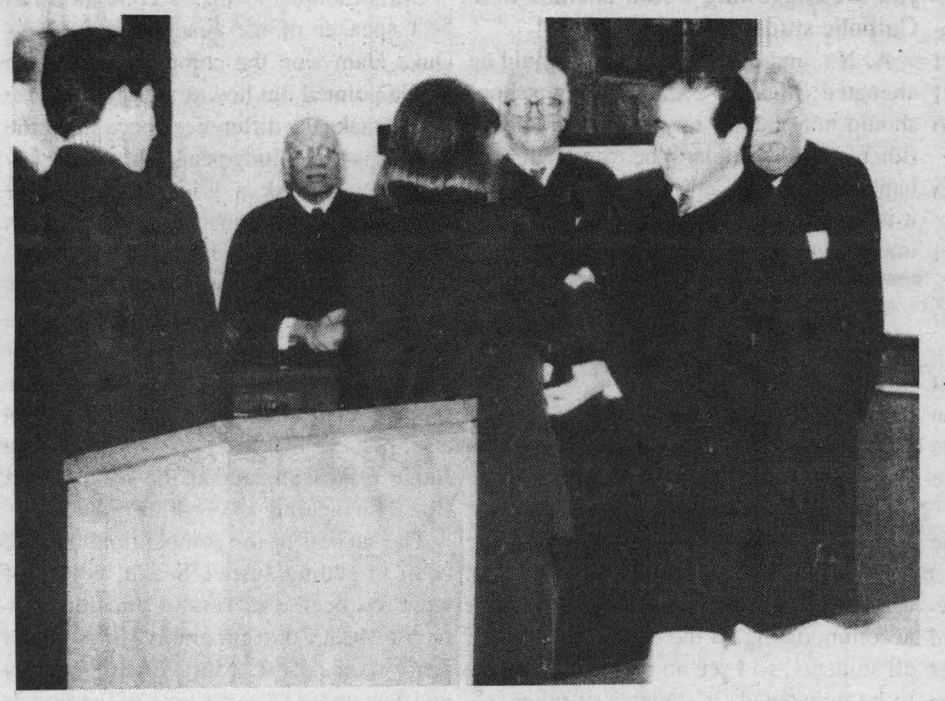
"Fordham students want free booze and free food."

Q. During the campaign, somebody put up signs around school which

Continued on page 2

Supreme Court Justice Scalia Comes to Fordham

Sixteenth Annual Kaufman Moot Court Competition



Scalia congratulates participants.

by William Bruno

The University of Miami might have Brennan, but we had Scalia for one evening, courtesy of the Fordham Moot Court Board. Supreme Court Justice Antonin Scalia, joined by Chief Judge James Okes and Judges Lawrence Pierce and Joseph McLaughlin, all of the Second Circuit, judged the final round of the sixteenth annual Irving R. Kaufman Securities Law Moot Court Competition (Garineh Dovletian, editor).

The two finalists were Duke and Emory. The problem was based on a hypothetical involving one Tip Trader (respondent represented by Emory) allegedly engaged in insider trading based on information obtained from Switzerland about a pending tender offer for a Swiss corporation and a subsequent transaction on the Swiss market. The petitioner (represented by Duke), was an American citizen adversely affected by Trader's transaction.

Although the regulation involved (SEC Rule 14e-3) was a securities regulation matter, the two questions dealt jurisdictional and administrative law questions. First, could American courts exercise jurisdiction over a trader who received information garnered overseas that induced him to make an overseas transaction? Second, was the SEC within its authority when it promulgated Role 14e-3 which states that once a tender offer is underway, an investor who purchases securities of the company after having acquired information (directly or indirectly) from a member of one of the transacting parties in said tender offer shall have committed a fraudulent, deceptive or manipulative" act or practice within the meaning of section 14(e) of the Act (Securities Exchange Act of 1934)?

Christoper Winnock, for Duke, took questions on the jurisdiction issue on whether or not two phone calls made in the United States was enough to trigger jurisdiction and responded that it was the type, rather than the amount, of conduct that mattered and that the one phone call that triggered the transaction led to a doubling in the stock price. When asked if the statutes prohibiting insider trading had foreign actions in mind, Winnock argued that the respondent was an American operating in the United States.

Catherine SanMartino, for Emory, in response (n.b.—Chris Campbell for Duke actually argued second but the Emory position is being done here so that the reader can get a better grip on the opposing positions on each issue), used a but-for analysis that no financial fluctuations would have taken place but for the lunch conversation in Switzerland that resulted in the information being acquired and the share purchase in the Swiss market. SanMartino also argued in response to Judge pierce asking why Congress didn't intend for foreign, as well as interstate commerce, to be regulated that the Congressional intent was that the act should not apply outside the country and that international comity and respect for foreign countries right to police themselves indicated that U.S. courts shouldn't hear cases that primarily involved foreign markets.

In rebuttal (n.b.—again, the rebuttals took place after the arguments but are presented out of sequence to more clearly present the arguments on each issue) Winnock argued that §27 of the Act gave jurisdiction to the district courts in any district where the defendant is found or transacts business and that this did not yield to the interests Switzerland might have in policing its own markets.

The questions addressed to Campbell on the validity of the regulation centered largely on whether insider trading constitutes a fraudulent practice. Section 10(b) of the Act of 1934 prohibited "manipulative and deceptive devices" while §14(e), under which the SEC promulgated the rule in question permits the SEC to "define, and prescribe means reasonably designed to prevent, such acts and practices as are *fraudulent*, deceptive, or manipulative" [emphasis added] includes insider trading. Campbell responded to Justice Scalia's inquiry as to what Congress' adding fraud to §14(e) means, stating that a party was guilty of it if he had knowledge that a party who didn't have the trader's sources couldn't get with a diligent inquiry. When further pressed, Campbell stated that even a lucky aquisition of knowledge could be fraudulent if the knowledge included essential facts to the transaction to which Scalia responded, "Counselor, you're taking all the sport out of investing."

Steve Kushner, for Emory, argued that the traditional deference to administrative application of statutes through regulation should not allow an abuse of the statute. Since the section of the Act that applies to tender offers (§14(e)) mentioned fraud explicitly, as opposed to §10(b), the com-

Continued on page 2

Breeden Descends on Fordham

by Paul F. Cavanaugh

On February 27, 1991, Richard Breeden, the Chairman of the Securities and Exchange Commission, was invited to make a presentation at the Fordham University Graduate Colloquium. Breeden spoke on "The Role of Accounting in the Thrift Crisis." Despite the seemingly dry subject, Breeden was able to make the speech interesting and informative.

Breeden stated that "the question was not whether, but when" the thrift industry crisis would occur. He saw the problems originating in the creation of thrifts in 1934 as institutions that borrow short (savings accounts) and lend long (mortgages).

Deregulation of the thrift industry in the 1980s increased the risk, as rates paid to depositors climbed. Breeden pointed to the federal deposit insurance as a factor in preventing the sound management of risk by thrift executives. Greater risk in diversification was possible, Breeden said, because Uncle Sam would pick up the bill from bad investments.

After setting this backdrop, Breeden explained some of the accounting practices which contributed to the impending crisis. Breeden described a change in regulatory accounting principles, set by the Home Loan Bank Board, which allowed institutions to convert a loss into an asset. This was done by reflecting a loan sold at a loss as a "deferred loan loss" and then amortizing it over the original life of the loan.

Breeden outlined an optional adjustment created in 1982. A bank was allowed to list an asset at market value when market value exceeded cost, thereby "writing up" the asset. However, this same procedure did not apply to "writing down" an asset in the event of a drop in value.

These accounting practices created an appearance of health, while according to Breeden, the Home Loan Bank Board was aware of the distortions being created. Breeden used the creation of "goodwill" as an example. If the Bank Board merged two insolvent institutions, losses would be conveted in "good will" and listed as an asset. This policy led to $500 billion in deposits being lent out in 1982 and backed up by $15 billion in goodwill (banks had a 3% capital requirement—$500 billion in loans x 3% equals $15 billion in capital requirement.

To conclude his presentation, Breeden discussed areas for future change. At present, securities offerings by thrifts and banks are not subject to SEC regulation. Breeden suggests that all institutions making securities offerings be regulated by one agency under one set of rules. Federal Savings and Loan Insurance Corporation has been run by the Home Loan Bank Board. This created a conflict of interest because thrift equity investors absorbed any losses before the FSLIC and the Home Loan Bank Board determined what bad information these investors received.

Finally, Breeden believes that the accounting standards should be changed. The treasury bills held by thrifts have a precise value and can be listed at this value; however, the loans made by the thrifts do not have a precise value. Because these non-liquid assets are not able to absorb losses, they should not be listed as assets by the banks.

Although many may not find such a discussion compelling, it did reveal some of the means by which the public is assured of the safety of many financial institutions. The details of accounting may not be thought provoking to everyone, but as described by Richard Breeden, the results can be.

Scalia Judges Moot Court

Continued from page 1

mon-law definition of fraud should be used, which, according to Kushner in his discussion with Judge Oakes, didn't include the use of inside information proscribed in Rule 14(e). Therefore since the rule prohibited activities that the statute didn't allow the SEC to prohibit, it was invalid. Justice Scalia pointed out that the Act authorized the SEC to take steps to prevent fraud, therefore, couldn't the SEC bar measures that weren't fraudulent by themselves as a prophylactice measure to prevent fraud. Kushner responded that the SEC couldn't redefine fraud and Justice Scalia, apparently not satisfied with that answer, pressed again.

Campbell, in rebuttal, cited recent cases that indicated a broad definition of fraud that included insider trading.

The first two awards were presented by retired Judge Irving Kaufman (LAW '31), late of the Second Circuit, for whom the competition is named. Chris Campbell of Duke won as Best Speaker of the Preliminary Round while Allen Wolf and Lawrence DeGiulio of Albany Law School (Union University) won as writers of the best brief. In presenting the awards, Judge Kaufman praised the superb performance of the teams and the meticulous preparation. He also lauded the competition itself, describing this year's competition as its "sweet 16" and saying how he felt he was basking in the accomplishments of a brilliant child. Kaufman wryly suggested that the reason they were judges from the Second Circuit presiding over the final round was that the fastest way they could be called "Justice" was by so doing.

Chris Campbell won a second award as best speaker of the final round and the Duke team won the competition. Justice Scalia pointed out how oral argument can "often make the difference" because of the questions that a judge can ask an attorney that he can't ask a brief. Judge Pierce suggested that the unusually advantageous rebuttal by Duke may have tipped the contest (n.b.—In this reporter's opinion, Kushner's apparent trouble with Justice Scalia's questions as to why the SEC couldn't bar non-fraudulent acts as a prophylactic measure was also a factor). Judge McLaughlin also praised the level of advocacy and Judge Oakes applauded the Moot Court Board for creating a "very fine problem."

The success of the competition, and the coup in getting Justice Scalia, is part of what has been a successful year for Fordham's Moot Court program. The National Team (Anne Britt, Mary Ellen Donnelly and Suzanne O'Leary) won the regionals and advanced to the national quarterfinals. The Jessup team (Yasho Lahiri, Leslie Mauro, Terry McCormick and Alan Rafterman) also won the regionals with Rafterman winning as best speaker (the nationals start April 15). The Trial Advocacy team (Brian Daly, Henry Klingeman and Seth Popper) advanced to the regional quarterfinals. The Cardozo (Matt Meade, Andrew Crabtree and Mary Beth Furia) and Wagner (Manny Grillo, Marcie Schlanger and Douglas Taus) teams advanced to the quarterfinals at their respective tournaments and the Craven team (Andrew Shipe, Caroline Marshall and Joanna Watman) advanced to the elimination round (final sixteen) of its tournament.

FitzGerald Speaks . . .

Continued from page 1

claimed the whole election was nothing but a popularity contest. Do you think this is true?

A. [Pause] It is not a popularity contest, it's more name recognition and how many people you know. You can't expect it to be based on issues with a campaign that lasts one week with no debates and limits on how many posters you can use. Issues are meaningless because you can't get your message out. Even the presidential candidates had only four minutes to speak.

Q. That being the case, do you feel you were elected with any mandate from the students?

A. No, but I feel I have a responsibility to do what is best for the students.

Q. Even if you couldn't tell from the election, what do you sense Fordham students really want?

A. Fordham students want free booze and free food. They want Fordham to be in the top twenty, they all want jobs; they want the library to be at a pleasant temperature. They don't want exam conflicts. They don't want their locks cut during the summer. They also want Fordham to be a nationally known school.

Q. Except for the food and the booze, it seems like the SBA is presently empowered only to make suggestions.

A. Basically, although as far as the school's reputation goes, this can be improved by a more positive attitude among students and alumni.

Q. Do you think the average student it happy to be here?

A. Every student I have spoken to says Fordham was their third choice. It was for me. All this means is that we were smart enough to apply to top schools. I am tired of hearing people complain about Fordham, especially when they have no suggestions on how to make it better. I'm from Milwaukee. New York is not exactly one of my favorite places so I could very easily be negative, but I love the people at Fordham. If my undergraduate college were not in the top 15, I would be upset, but I wouldn't go around saying it sucked, I would talk it up and recommend it to people.

Q. Do you think Fordham has a unique niche?

A. We are not cut-throat. I've met people from NYU and Columbia . . . they are more competitive in a negative sort of way. They compete against each other instead of themselves. This isn't the case at Fordham. It is rare that you can't get an outline. That is why we are called the "friendly school." This is a rare thing these days, and I hope we keep this attitude.

Q. Do you think Fordham is close enough to the Jesuit tradition?

A. No, not at all. But it is tough, because there aren't that many qualified Jesuit lawyers to teach. Many of them get swept into administrative positions where students can't see them. I came here to be at a Jesuit school. It was a myth, it didn't happen.

Q. How could Fordham get closer to the Jesuit tradition?

A. First, put more priests in visible positions, which as I said may be hard. Also the administration needs to be more active explaining what it [the Jesuit tradition] is all about which they are not doing. We should have weekly Mass on the campus of the law school, in the McNally Amphitheater perhaps. They have daily Mass in Lowenstein but I don't feel part of that campus. I think the administration would be surprised how many law students would go to Mass. I think we should also offer more classes on theology and the law. If we can offer classes on sex roles and the law, we can certainly have something on theology.

Q. Do you think any of these changes you are suggesting would alienate non-Catholic students?

A. No, and I don't think they should be alienated. Mass at a Catholic law school should not alienate anybody. It would be ridiculous for people to be offended. This happens to be a Catholic law school and it is time for the administration to start to implement some of these changes.

"We should have weekly Mass on the campus of the law school."

Q. Wouldn't this discourage non-Catholics from applying to Fordham?

A. No, I disagree. This is a Catholic school. I believe we should have Mass on campus. I think the school will always be accommodating to the religious needs of all students, so I see no reason for anyone to be threatened. If students of other religions wish to organize religious gatherings on campus, I support them whole heartedly, and I hope that cuts both ways.

The Inevitability of Pro Bono

by Keith A. Styrcula

One need look no further than recent headlines to understand why public confidence in the integrity of the legal profession is flagging. Attorney Steven J. Romer absonded with $25 million from 40 clients in January. Park Avenue lawyer Harvey Meyerson was accused of bilking his clients $2.5 million for work never performed. Negligence-case counselor Morris J. Eisen and six associates were convicted of falsifying evidence and bribing witnesses to obtain multi-million dollar verdicts in bogus lawsuits.

Recurring scandals of this sort have the most unfortunate effect of tainting the entire profession, one that is already unfairly stereotyped as greedy, self-absorbed and amoral. Accordingly, now is a perfect time to implement a *pro bono* requirement program for the 88,000 practicing attorneys in the state.

Of course, *pro bono* service for the poor and the needy is far more than a mere panacea for lawyer-bashing. It is necessary to contend with a social need that has attained the status of a national emergency. An American Bar Association study found that nine out of ten impoverished people are not having their legal needs represented by licensed counsel.

Federal and state budget cuts have all but slammed the courtroom door shut to the people who need access to the judicial system the most. In New York City Housing Court last year, landlords were represented by attorneys in 80 percent of all matters before the court—while tenants were represented only 15 percent of the time. At a time when the disparity between those who have and those who have not is greater than at any time in American history, nowhere is this more painfully evident than in the courtroom.

To redress this crisis, New York Chief Judge Sol Wachtler last May gave the profession two years to implement a wide-scale voluntary *pro bono* program before he imposed mandatory public service on all attorneys. In the meantime, however, the Marrero Committee reported to Judge Wachtler that an all-volunteer option would fall far short of filling the gaping maw and urged the Chief Judge to enact a 20-hour per annum requirement on all members of the bar immediately.

"Much of the law and what lawyers do is about providing justice," the Committee report said. "Lawyers have a special obligation to ensure a legal system that protects the rights of individuals and their political, civil and religious freedoms."

A substantial segment of the state's lawyerse are vehemently opposed to being compelled to zealously represent a client who cannot afford to pay legal fees. Indeed, some have called a *pro bono* requirement "unconstitutional," a form of "involuntary servitude," and a violation of the Equal Protection clause. Regrettably, it is this type of rhetoric that reinforces the unsavory image of attorneys as individuals whose financial self-interests consistently come before the vow to serve the greater public good.

Proponents of *pro bono* contend that the practice of law is in reality a state-granted monopoly, a *privilege* and not a *right*. Therefore, *pro bono* would be a proper "tax" on the privilege to practice law. Further, it is argued that the attorney's devotion to the greater public good is an obligation inherent to membership in the Bar. The Code of Professional Responsibility unambiguously states that the provision of legal services to the impoverished and the needy is a "moral obligation of each lawyer as well as the profession generally."

From an objective perspective, twenty hours per year is not too onerous a burden when compared to the rigors of lengthy, low-paying residency doctors and physicians must complete before commencing a career in medicine. Attorneys have no such requirement. Further, the general public has an obligation to participate in jury duty when so called, an obligation from which lawyers are legally exempted. The *pro bono* requirement would be tantamount to the lawyer's equivalent of jury duty.

If changing the mindset of the profession is a prerequisite to the acceptance of *pro bono* requirements, the law schools have a unique opportunity to set the trend. At present, only four of the nation's 180 law schools have mandatory *pro bono*, but the trend is moving decidedly toward public service as to a 4- to 6-credit prerequisite to graduation—a part of the curriculum not unlike Torts or Contracts. Our own Dean John D. Feerick has implemented a loan-forgiveness program for students who choose a career in public service law and has proposed the adoption of mandatory *pro bono* participation by law students in the 1992-93 academic year.

Clearly, the burden of serving the needy cannot—and must not—rest principally on the shoulder of the law schools. More large firms should follow the example set last year by Debevoise & Plimpton and Paul Weiss Rifkind Wharton & Garrison, whose attorneys average 115 and 120 hours, respectively, of public service work. These firms' devotion of time, vision and brainpower is proof-positive that a modest *pro bono* program need not cut into the profitablity of the firm. It is not inconceivable that law firms could perhaps someday hold their devotion to public service in the same esteem as their ability to execute top-flight legal work.

Regardless of the ongoing rhetoric, the handwriting is on the wall. If we don't voluntarily embrace a public service requirement of our own choosing, the good Chief Judge Wachtler will impose one upon us. As members of a largely self-regulating profesion, legal practitioners must seize every opportunity to assure the public that we are capable of meeting the needs of society and of serving in the interests of "justice for all." Indisputably, this is one of those opportunities.

LETTERS

To the Editor:

I have read with interest your articles dealing with alcoholism and Al-Anon. I have found them provoking and valuable. As a senior at the law school, a recovering alcoholic and a member of Alcoholics Anonymous, I too feel the need to convey my feelings on this most serious subject. Alcoholics Anonymous saved my life and has enabled me to begin anew, one day at a time.

I only hope that our fellow students can begin to comprehend the devastating effects of alcoholism. A disease that destroys your physical, emotional and spiritual well-being. One that has no cure. Recovery is only possible through the guidance and love of other alcoholics.

Alcoholism does not discriminate as to age, race, creed or social class. One need not be homeless or destitute to suffer its pangs. In fact, I was a periodic drinker, able to function in my job and personal relations, at least for a while. However, alcoholism is a progressive disease and the effects eventually led me to emotional bankruptcy.

But I was one of the lucky ones: I found A.A. A program founded by alcoholics, dedicated to helping alcoholics. A.A. is not only about putting down the drink, but dealing with the daily trials of a sober life. Something that most of us have never done.

The Fordham community has been an integral part of my recovery. There are at least 3 weekly A.A. meetings here at Lincoln Center and countless others in both New York City and the surrounding areas. If anyone believes that he or she has a drinking problem, I implore you to reach out for help. The first step means only putting down the drink. This could be the difference between life and death, it was for me.

Anonymous

To the Editor:

As Chairperson of BLSA, I am writing in repsonse to two articles printed in the February, 1991 edition of *The Advocate*, in which numerous references and generalizations were made concerning African-Americans. In particular, I am referring to Lane Forsythe's "Right on Target" and Dan O'Toole's "Affirmative Action: The Dangers and Pitfalls" articles. While BLSA will comment more fully on these articles in a future issue of *The Advocate*, we would like to state our opinion for the record at this time.

Lane Forsythe, writing under the banner "On Target," quoted Thomas Sowell's *Preferencial Policies*. Without context or explanation, Forsythe wrote that "a study of 10 leading law schools showed that the average grade of their black students was at the 8th percentile." What is Mr. Forsythe trying to say? And why can't he say it in his own words instead of hiding behind a statistic that is not only questionable, but meaningless without a context? Rather than stating his own views, Mr. Forsythe delegated this duty to Dan O'Toole by giving him Mr. Sowell's book to review.

The issues addressed in these articles are large, complicated, important issues deserving of wider and more even-handed attention. Therefore, BLSA will respond more fully in the September 1991 edition of this paper. We hope that at this time we can stimulate a positive discussion not only on affirmative action, but on latent racism present in student views.

Deneen L. Donnley, BLSA Chairperson

The Gipper Talks GUNS

by Steven Budin

Ronald Reagan came to Washington. He gave a short speech, a Reagan speech. Big on pomp, short on detail. He left. Vintage Reagan. What that speech contained, however, was not vintage Reagan. Reagan, in a dramatic reversal of the stance he took during his presidency, endorsed the Brady Bill, a bill requiring a seven-day waiting period before the purchase of a handgun, named after the press secretary with whom Reagan took a bullet on March 30, 1981.

Recent polls indicate that 90 percent of Americans support this bill. Yet many in Congress still oppose it. Why? The answer is simple, these Congressmen want to be re-elected. One will obviously ask, "Why would a Congressman in his right mind vote against a bill 90 percent of Americans support?" The answer to this question is also simple: the NRA. The National Rifle Association obviously opposes this legislation. This is the same NRA that pours millions of dollars into the re-election coffers of incumbent congressmen. The NRA has proposed its own legislation that would allow gun merchants to obtain an instantaneous background check via a nationwide computer system using the same technology as credit card checks. Many feel this system is years away from feasibility.

The NRA-controlled Congressmen, who would never in a million years vote against their money tree, have Ronald Reagan to thank. He is their excuse. Reagan, the patriarch of the conservative movement, has a wing-span large enough to cover those in the House, Senate and White House who were looking for that seemingly elusive escape hatch from the claws of the NRA. Fence-sitters in the Congress, like Alfonse D'Amato, can follow in the footsteps of their mentor and save face, and vote for this piece of sensible legislation.

George Bush, an NRA member himself, has also been given enormous political leeway. Bush, looking for a way out of the dilemma, has been saved once again. Bush, the ever-shrewd and professional politician, should utilize this opportunity to link last year's failed anti-crime package to this now unstoppable locomotive. This package increases the number of federal crimes that may be punishable by death. This way he wins on two counts; he gets nationwide credit for passing a bill with overwhelming public support and the increased political clout on the Hill by resurrecting an anti-crime package that the Democrats had thought was long gone.

The Advocate

Fordham University School of Law

The Advocate is the official newspaper of Fordham Law School, published by the students of this school. The purpose of *The Advocate* is to report the news concerning the Fordham Law School community and developments on the legal profession, and to provide students with a medium for communication and expression of opinion. *The Advocate* does not necessarily concur with opinions expressed herein, and is not responsible for the opinions of individual authors or for factual errors in contributions received.

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