The Moritz Briefing

An occasional newsletter highlighting recent activities and achievements of the Moritz Faculty.

INSIDE

TO BE SEEN AND HEARD

It has been a busy summer for Moritzers—even with an extra-long newsletter, it is impossible to fit in all of the media hits and accomplishments of our colleagues. Here are the highlights:

In its endless quest to cut government spending, DOGE sent a "Survey of Surveys" to federal agencies in order to evaluate the usefulness of surveys that the agencies send out. The survey threatened agencies with loss of funding if they did not respond. Ironically, DOGE's survey was itself duplicative of a review of surveys that the Office of Management and Budget undertakes every year. Administrative Law expert **Bridget Dooling** did not approve, telling NPR that DOGE's action was "of dubious value" and said that the threat to government employees was "yet another disgraceful example of this administration's clumsy, malevolent immiseration of federal employees."

The Trump Administration is looking at AI to help it with its deregulation goals by having AI tools write the new regulations that will overturn the old ones. Bridget told George Washington University's Regulatory Studies Center that this might not be a good plan, since we should not be "outsourcing" the "reasoned decision making" that agencies are required to engage in. Bridget also made thirteen public comments in regulatory dockets at the Department of Energy, arguing that in each instance, the agency made a "fundamental administrative law error." Bridget was also quoted in a *Vox* story on the current relationship between President Trump and the Federalist Society.

Other cuts proposed by the Trump Administration include eliminating the Legal Services Corp., which funds civil legal aid throughout Ohio. **Nancy Rogers** joined three other former Ohio Attorneys General in a *Columbus Dispatch* Op-Ed criticizing this cut, arguing that "legal aid resolves serious civil legal problems early – issues that can be life-altering, like domestic violence, unlawful evictions, predatory debt collection, fraud, denial of veterans' benefits and lack of access to health care or income support."

TO BE SEEN AND HEARD continued

The Trump Administration is also garnering a reputation for not making permanent records of their actions. Meetings now take place in secret, communications take place over encrypted software and are automatically deleted, and orders are given by phone rather than in writing. You would expect there to be a law that regulates when and how government agencies make records, and you would be right: the 1950 Federal Records Act. Unfortunately, according to what **Margaret Kwoka** told the *Washington Post*, this law has rarely been challenged, and so even though the administration's distaste for written records is "problematic," she cannot say for certain that it is illegal. Margaret also co-wrote an amicus brief with the Supreme Court on the question of whether DOGE is subject to FOIA. (Margaret's answer: Yes.)

In a number of recent decisions, the Supreme Court has refused to recognize limits on the President's power. **Peter Shane** analyzed this trend in his *Washington Monthly* article "Another Supreme Court Blow for Autocracy?" in which he argued that the Court "doubled down on the strongman theory of the Presidency." In another *Washington Monthly* article, he criticized Trump's unilateral decision to bomb Iran's nuclear sites, claiming that "[t]here is no serious argument that the Constitution, as written, authorizes presidents to launch an unprovoked military attack on another sovereign nation without any plausible claim of prior legislative authorization." Peter was also quoted in a *Washington Post* article on the President's tactic of not enforcing many regulations: "[Trump is] saying across the board that 'if I don't like it, I'm not going to enforce it.' To my knowledge, no other president has taken that kind of stance." Finally, Peter wrote an *Atlantic* article on the many ways the Roberts Court is legitimating this expansion of executive power, arguing that "Trump's use of executive power is not a distortion of the Roberts Court's theory of the presidency; it *is* the Court's theory of the presidency, come to life."

The Supreme Court also made headlines when it ruled that a district court cannot issue nationwide injunctions, even when faced with the easiest possible Constitutional question, such as whether a unilateral executive order overrules the plain text of the Constitution. **Ruth Colker** told 10TV news that nationwide injunctions have always been unpopular with Presidents from both parties, but that prohibiting them in the birthright citizenship case "is really messy" because now "we don't know anything about what's happening in birthright citizenship." Ruth also appeared on the "Ask the Expert" feature on KCBS radio, where she discussed upcoming Supreme Court cases regarding bans on transgender athletes competing in women's sports.

The Court also decided a lower profile case, *Hewitt v. United States*. *Hewitt* held that the First Step Act's reduced mandatory minimum penalties for committing a crime while possessing a gun applies to people whose sentences were imposed before the law was passed but vacated after its enactment. Criminal justice expert **Doug Berman** explained to *Law360* that the ruling will immediately affect only about two dozen people, but that the number might expand dramatically depending on how appellate courts respond to the opinion. Doug also psychoanalyzed Justice Gorsuch, noting that he "sees these criminal cases as, you know, the big bully state against the little criminal defendant – and that it's important for interpretations to be sensitive to that reality."

Sharing Our Research

Bridget Dooling spoke at the Federalist Society's Thirteenth Annual Executive Branch Review Conference on "The Art of Deregulation: Executive Orders and Limited Government."

Kent Barnett gave the commencement address at his Centre College, his alma mater, where he urged the new graduates to "wring the best out of this education that you have received and use it to further ideas, truth, and humanity."

Five members of our faculty– **Micah Berman, Bridget Dooling** (not pictured)**, Rob Kim, Becky Wolitz,** and **Patti Zettler** attended the American Society of Law, Medicine, and Ethics's Health Law Professors Conference, which is the biggest FDA law and policy conference of the year. Patti also gave talks at the Food and Drug Institute Annual Meeting, where she spoke on "FDA in Flux: The First Four Months of the New Administration," and at the Clinical Trials Transformation Initiative, where she participated in an event on "The State of Clinical Trials: Charting the Path to 2030."

TO BE SEEN AND HEARD continued

Having trouble falling asleep at night? You can join millions of Americans who take melatonin to have more regular sleep patterns—but make sure you exercise skepticism when reading the labels. A recent FDA study has shown that many of the products do not in fact contain the amount of melatonin listed on their label—one fifth of them had between zero and 76% of the claimed amount, and a third of them had between 126% and 667% of the claimed amount. This seems like a problem, according to FDA expert **Patti Zettler**, who told the Washington Post that "some supplement companies design products to have an additional amount of an ingredient so that the product has at least 100% of the claimed amount of the ingredient throughout its shelf life," but that companies do have "an obligation under the law to ensure that their products meet safety standards." Among her many other media hits, Patti was also cited in Bloomberg News in an article about the FDA offering to trade faster drug reviews for lower prices. She also co-authored an article in the *Journal of the American Medical Association* disapproving of the FDA review process for Novavax's COVID-19 vaccine and a *New England Journal of Medicine* article criticizing a judge's ruling on the FDA's authority to regulate laboratory-developed tests. Her article "Pharmaceutical Federalism" was also cited by the Fourth Circuit in a case upholding West Virginia's abortion ban.

Why is American democracy in such peril? This was the topic of **Ned Foley's** speech at the University In Melbourne. Ned told our Austrialian friends that there were two "distinct creative moments" in the formation of our democracy: the founding of the republic in 1787, and the expansion of the franchisse in the 1960s. The first moment included a flaw that threatens American democracy today: the Electoral College, which has led to situations where challenging the votes of a few thousand voters in a few states can change the outcome of an election, even if one candidate won the popular vote by millions of votes. And the second moment failed to fix other flaws in the American system, such as partisan primary elections that have contributed to the breakdown in civic virtue and the "post-2000 political attitude of seeking political power at all costs, no matter how contrary to the wishes of the voters themselves"

Many lawyers see so-called"soft skills" as innate characteristics that cannot be taught in law school, and at any rate not essential to being a successful attorney. In a recent *National Jurist* article, **Jill Boone** challenges these assumption. As she notes: "[P]ause for a second and think of someone you professionally admire. I'm sure a part of your admiration stems from their competence and technical mastery… but I bet it is more than that. Maybe it's their humility, self-deprecating humor, organization skills, drive or quiet confidence. Maybe it's the way they communicate or the way they lead meetings, the way they manage disagreement or the way they adapt to change, the way they take constructive feedback or the way they remain unflappable during times of crisis." Given this, Jill argues that soft skills—"teamwork, critical thinking, emotional intelligence, communication, attitude and work ethic"—can be improved with training and practice and are integral to excelling as a lawyer.

Sharing Our Research, continued…

Patti also attended BioLawPalooza 7.0 (yes, that is its actual name) at Stanford Law School, where she spoke on "The Public Health Case Against FDA Independence." She was joined there by Becky, who present her article "What We Are Owed." Becky also attended the Regulation and Innovation in the Biosciences (RIBS) Workshop at the SJ Quinney College of Law at the University of Utah, presenting her "Shareholder Primacy's Failed Guardrails." Becky joined the RIBS steering committee, so she will help plan future conferences.

Carolina Academic Press is publishing the third edition of Ohio Legal Research, co-authored by **Sara Sampson.**

Colleen Settineri presented at the 2025 Association for Legal Writing Directors ("AWLD") Biennial Conference Arizona State University's Sandra Day O'Connor College of Law. Her session was entitled "Ending on a High Note: Designing the Last Class to Reenergize Students and Ourselves."

TO BE SEEN AND HEARD continued

Currently, anyone wanting to pass the New York state bar exam has to take both the Unified Bar Exam and a less rigorous, state-specific, open-book online test. An Advisory Panel is considering changing that online test back to a more rigorous, in-person state law test, which was the procedure before 2016. Bar licensing expert and bar exam reformer **Debby Merrit** "very much hopes" this does not happen, since it would also undermine their goal of ensuring examinees learned New York state law: "If people are studying for both NextGen and the New York-specific component, they're not going to remember either as well." Debby was happier about a new proposal in California, which would continue the state's current provisional licensure program, initially enacted during the pandemic when testing protocols were upended, until Dec. 31, 2027. Debby told the *ABA Journal* that "[p]rovisional licensees practice under an experienced attorney's supervision and are somewhat limited in the work they can do—this protects the public. At the same time, the provisional licensees can begin working for pay and building their skills (fair to the candidates) and help serve clients (client benefit)." And Debby got a big win in Nevada, which just changed its bar exam to include a performance test and sixty hours of supervised practice. Debby told the *ABA Journal* that the new plan "is a win for candidates, law schools, the profession and—most of all—clients."

At two different political rallies this year, Elon Musk and Steve Bannon have performed what many believed was a Nazi salute. They later claimed it was merely a "wave," or an "awkward gesture," but **Dakota Rudesill** calls these excuses "flimsy" because "the gesture is so distinct and the offense is so monstrous." In an essay for *The Vital Center*, Dakota argues that "Straight-arm salutes should be flagged and condemned for what they most obviously are: inherently terrorizing performative fascist conduct, at odds with our nation's traditions of liberty and proud heritage of defeating authoritarians abroad and preventing their ascendance domestically." Dakota was also on the *National Institute for Deterrence Studies* podcast talking about "The Legal Landscape of Nuclear Deterrence," was interviewed on WOSU to discuss the legal issues involved with deploying Marines to Los Angeles, went on KFGO's public affairs talk show "News & Views" to discuss his recent *Bench & Bar* essay on how citizens can act ethically in politically stressful times, and flew to Anchorage (a day before Trump and Putina arrived) to present the same essay to a Federal Bar Association conference.

As always, the country's chaotic immigration policy gave **César Cuauhtémoc García Hernández** plenty of opportunities to comment: he spoke to AP about the history of the "sanctuary movement" that has evolved into modern-day sanctuary cities (originating in Medieval Europe when civil law enforcement could not enter churches); to the *Washington Post* about Trump's new travel ban (which represented "a maturing of the Trump administration's legal arguments);" to CNN about the family of the man who committed an antisemitic firebombing in Boulder (criticizing ICE's decision to imprison the family members, since they had no involvement or prior knowledge of the attack); to *The Times* about President Trump's plan to scare undocumented immigrants into "self-deporting" (just making people afraid doesn't mean that more people will leave, since conditions in the immigrants' home country are a bigger factor than the fear created by the U.S. government); to *Marketplace* about the cost to ICE of detaining migrants in detention centers ($187.48 per person, which is currently $6.9 million per day for the 36,000 people in custody); and to *Bloomberg Law* on the new DOJ policy of charging undocumented immigrants with the crime of "evading immigration officers" ("the Trump administration has made it absolutely clear that what they want is for prosecutors to put immigration offenses as the top of their priority list above all else.")

Sharing Our Research, continued…

Sarah Cole, who was recently appointed as the new Scholar-in-Residence for the International Academy of Mediators, flew to the AIM conference in Australia, speaking on the subject of "Artificial Intelligence and Mediation."

Ned Foley co-authored an article for the University of Chicago's Center for Effective Government's *Democracy Reform Primer Series* on Condorcet Voting and wrote a SCOTUSblog piece on Justice, Democracy, and the Law.

Amy Schmitz participated in multiple conferences over the summer, including *Updating the FAA Section 7 for the Digital Age, Summit II* at American University; *AI and Cyberjustice Roundtable*, at the University of Montreal Cyberjustice Lab; and *New Developments in Arbitration* at the Canada Department of Justice–Department of Justice Negotiation, Mediation and Arbitration.

To Be Seen and Heard Continued…

César is also writing a recurring series on *SCOTUSblog* called "Immigration Matters" in which he analyzes the Court's extensive immigration docket. In one recent article, he concluded that "In just six months, the Court's emergency docket has already proven valuable to the Trump administration's immigration policy agenda," and predicted that the administration would continue to "expand the federal government's capacity to detain and deport." In another, he commented on Florida's new law (which has been blocked by the courts) which makes unauthorized entry a violation of state law.

At 5:30 every morning, Honda employee Joab Scott puts on his required protective gear and prepares his workstation so that he can begin his shift at 6:00 AM. Honda says he only gets paid starting at 6:00, when he starts working on automobiles. Scott says he should start getting paid at 5:30, since he is required by Honda to make those preparations in order to do his job—and he sued Honda in federal court to get that pay for himself and all similarly situated workers. Will his suit succeed? Almost certainly, **Courtlyn Roser-Jones** told the *Columbus Dispatch*: "There is a pretty wide collection of case law about what is called donning and doffing – gear you have to wear that's required, [so that] it's considered part of your continuous workday. There's never a perfect case, but this sounds like it meets that requirement." Courtlyn even had some free legal advice for Honda: "This seems like a pretty straightforward case and I think Honda should settle it."

New technology can be used to improve access to justice and make courtrooms more efficient—for example, Tyler Technology has created court management software that helps court staff manage caseloads. But occasionally the software has glitches that could result in defendants being re-arrested on expired warrants, or kept in jail for weeks without a hearing. In a recent *Law360* article, **Amy Schmitz** acknowledged that improvements needed to be made in these technologies but argued forcefully that courts had to modernize: "There are big benefits just by having access to data that you can then use for data-driven policy changes. You can think through what are the bottlenecks, how do we improve processes. It's very hard to figure anything out when it's paper that people are still pushing around." Amy and her JusticeTech program were also profiled in a recent *New America* article, which described an initiative in which software developed by JusticeTech pulls detailed eviction records directly from the court system, allowing JusticeTech to analyze the data to help improve housing stability and eviction prevention. This can find "patterns in housing instability, support legal system innovation, and shift the conversation from crisis response to prevention."

In the 1990s, Pepsi created a marketing campaign in which it promised a United States military Harrier fighter jet to any customer who collected seven million Pepsi Points. One customer realized that you could buy Pepsi Points for ten cents each, raised $700,000, bought seven million Pepsi Points, and demanded the jet, which touched off a three year litigation as to whether Pepsi had agreed to a contract. Some of us may remember this incident—but Kroger apparently did not. They recently posted a claim on Facebook in which they promised to bring back their retro cube signs if their post received at least 10,000 likes. It received more than 15,000, and now Kroger is claiming that the post was a humorous marketing scheme, not an offer. Amy commented on this case in the *Cincinnati Enquirer*, citing the Pepsi litigation and commenting that "Pepsi learned their lesson. That's why disclaimers are everywhere."

In 1916, President Roosevelt instituted a tax on people when they died, seeking to break up large family fortunes. The Death Tax/Estate Tax is still with us today, at least if you and your spouse have over $30 million in assets. Congress is now considering the Death Tax Repeal Act of 2025, to support "hardworking families and farmers" so they can "provide for [their] communities for generations." Tax expert **Blaine Saito** sees the issue a bit differently, telling the *Dayton Daily News* that repealing the tax would increase the wealth disparity in this country: "A full repeal, or even a very high exemption amount would benefit those with a lot of wealth that they can pass on to their heirs, generally the very wealthy people in society."

To Be Seen and Heard Continued…

The 100-year old Federal Arbitration Act ("FAA") was meant to create a policy that favored arbitration over litigation. For decades, lower courts interpreted the Act to mean that any party who opposed private dispute resolution had to demonstrate they suffered prejudice by a delay to compel enforcement of an arbitration pact at the outset of litigation. Then, in 2022, the Supreme Court rejected this prejudice requirement in *Morgan v. Sundance*. Since then, circuit courts have been trying to agree on the proper interpretation of the FAA in this context. One thing they all agree on, according to **Sarah Cole**, is rejecting the argument that a party can keep arbitration in reserve while attempting to win in court first. As Sarah told *Bloomberg News*, "Judges are going to hold companies' feet to the fire on the question of whether they knew they had an arbitration agreement."

CONGRATULATIONS AND KUDOS

César Cuauhtémoc García Hernández won the Colorado Book Prize in General Nonfiction from Colorado Humanities for his book *Welcome the Wretched*. Congratulations to César for this honor and for all the other accolades the book has garnered.

Amy Schmitz was selected to serve on the *Beyond the Pages* Task Force, a new ABA Section of Dispute Resolution made up of Dispute Resolution leaders that will develop a new means for sharing information about dispute resolution. She was also invited to be a member of the editorial board of the peer-reviewed journal *Arbitration: The Journal of Arbitration, Mediation, and Dispute Management*. Congrats to Amy on these new positions!

The curatorium of the Hague Academy of International Law has selected **Mohamed Helal** to co-direct the Center for Studies and Research in International Law. The Hague Academy is the most prestigious institution of learning in international law globally. Mohamed will lead the research of twenty-four esteemed scholars on issues related to international law and cyberspace. Congratulations Mohamed!

The United States Sentencing Commission's mandate includes "evidence-based sentencing policy and practices, evaluating the effectiveness and fairness of federal sentencing in the criminal justice system, and conducting research to help drive our work forward." In order to help fulfil these responsibilities, the Commission created a new Advisory Group on Research and Data Practices ("RDPAG") to ensure that the Commission continues to employ best practices regarding data collection, interpretation and analysis consistent with other government agencies and non-governmental organizations. One of the appointees to this new Group is our own **Doug Berman.** Congratulations to Doug on the appointment!