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The authors' experience is matched only by their respect within the industry. Robert Matyas is a retired vice president for facilities and business operations at Cornell University. He chaired the task committee on Dispute Review

Boards of the ASCE. A.A. Matthews is a construction engineering consultant specializing in large civil engineering projects. Bob Smith is a practicing attorney and a principal of Construction Strategies, Inc., a subsidiary of Wickwire Gavin, B.C. P.E. Sperry is a construction consultant and former chairman of the Underground Technology Research Council of the ASCE.

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## A VIEW FROM THE TOWER

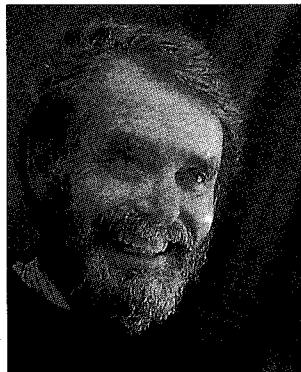
Browsing through the Winter 1997 issue of our sister publication, the *Procurement Lawyer*, my eyes were drawn to two papers on the *O'Hare* and *Umbehr* cases decided by the U.S. Supreme Court.\* They have triggered this extended Tower column. (Thanks, editors.) The authors, Patricia H. Wittie and Christopher R. Yukins, told us how two companies, one a tow truck operator (*O'Hare*) and the other a waste hauler (*Umbehr*), were removed from a rotating list of towing companies (*O'Hare*) and terminated under an at-will contract to haul trash (*Umbehr*). Both claimed they angered "City Hall" because of their political activities. Their activities, according to the majority, were protected by the First Amendment.

A scathing dissent by Justice Scalia, joined in by Justice Thomas, sought to justify patronage that Scalia defined in essence as rewarding your friends and punishing your enemies. This according to Scalia was "an American tradition as old as the Republic." Scalia went on to say:

Government favors those who agree with its political views, and disfavors those who disagree, every day . . . in a million ways, including the letting of contracts for government business.

To be fair, Scalia's attack on the majority was not based upon a defense of shady and vengeful dealings by "City Hall." He stated that there were plenty of statutes and regulations that bar these political reprisals (according to Scalia, over 5,037 pages of fine print in the CFR and similar state laws and regulations), and it was not needed to make the reprisals an abridgment of freedom of speech.

I had just completed the manuscript for the tentatively



Justin Sweet

entitled "Sweet on Construction Law." It is being published by the ABA and will be available by the time you read this column. (I get no talk show invitations, so . . .) The section I found most difficult dealt with corruption. What is it? Is it endemic to construction? If so, why? Why in some states and cities and not others? Why more in states and cities than in Federal procurement? Why in some countries more than others?

Of course I could only touch the surface. But even so, I had to rewrite that section many times and am still not fully satisfied with it.

To be sure I worried about contractors trying to get something to which the law did not entitle them (sometimes to get what the law *did* entitle them) by paying money, making gifts, or the like. In these cases we saw allegations that government entities decided to punish their enemies by actions such as knocking *O'Hare* off the rotating list of towing companies and dropping *Umbehr* from its trash hauling contract.

Yet my concerns — trying to get something to which you are not entitled or moving the process along when officials take their time hoping for a "tip," and that raised by *O'Hare* and *Umbehr* cases, using the power to procure services to exact political reprisals — are connected. Attempting to curry favor, seeking to influence an outcome illegally, or using patronage to stay in or gain power are all corrupt, broadly defined. In small and large ways they can infect or abuse the legal process. Yet it is hard to escape these activities in real life. To illustrate this let me enlist my memory to speak about how it has touched my simple, uneventful life. If they touched me, they have touched all of us.

Let me go back to growing up in squeaky clean Madison, Wisconsin. The first brush I had with patronage occurred when I was in college and needed money. The national elections of 1948 were about to be held. I knew our local alderman, Franz Haas. I asked Franz if he could get me a job manning the polling place at a local school. He agreed. I earned \$25 for my work.

Why did Franz do it? He owed me nothing. I did not kick back any portion of my pay to him. (This would have been unheard of in Madison.) Franz never expected a campaign contribution. In my view he wanted both to show his power and to do a favor to a student constituent.

What should Franz have done? Post a notice stating that the positions were available, conduct examinations, and interview all the candidates?

My next meeting with this “taking advantage of who you know” occurred when I worked for the state attorney general. I represented, along with the deputy attorney general, a state patrolman who had been sued for false arrest. To prepare the defense I met a number of employees of the Motor Vehicle Department. When I bought a car I wanted a low license number. This, I thought, was a mark of prestige. I called someone I had met at the Motor Vehicle Department. I asked that I be given a low number. He did.

Why did he do it? I believe he simply wanted to do me a favor. Should he have done it? I suppose that in a perfect

We were exposed to the Chicago vocabulary of fixes, bagmen, clout, syndicates, and precinct captains.

A law school classmate was working his way through school selling soap. He could not get a contract from the city. A Chicago cousin came to town. He gave him sage Chicago advice. Bribe the purchasing agent. My classmate said that won’t work here.

Let me deviate a bit from mostly innocuous lunches, to which I will return, to something more substantial that ties in with Scalia’s dissent on patronage. During the 1970s my brother ran an airline that had landing rights at Midway and O’Hare Airports (O’Hare again). His company had been overcharged and had a clearly valid claim. My brother told me that his company would have to wait a long time for its money unless it hired a particular law firm closely connected with City Hall, a Democratic firm in a Democratic town.

Scalia, in discussing patronage, said that it is normal practice for the party in control of the City Hall to hire a law firm closely connected with it (that means contributions).

The alternative to patronage in picking a law firm is competitive bidding. I don’t want to explore the pros and cons of obtaining professional services by competitive bidding.

I want to focus upon the realities of politics and the cost of campaigns. How do you extract

the money from lawyers? How about dangling bond or other legal work and maybe judgeships before them to get them to part with their money? Yet lawyers do not, as a rule, do anything as crass as paying money to get the contract or judgeship. If that is uncovered, heads roll and even governments may fall, as we have seen in Italy and Japan. No *quid pro quo* deals. But less than that and we are in Scalia’s patronage camp.

Now let me return to lunches, experiences that I have seen and that involve mixed motivations — personal, social, and business. They create moral dilemmas. In my early days of teaching I worked the Federal Procurement “conference” circuit. Most of these conferences were held in nice places like Monterey, California. The attendees were a mix of federal officials who dealt with awards and claims. They were lawyers and contract specialists who worked for the defense industry and lawyers who had government contractor clients. At the end of a weary day of lectures, questions and answers, and client “development,” we would all take off for a nice sea food restaurant on the Monterey Wharf. We would sit at large tables. Usually, one of the lawyers for a big contractor or a partner of a law firm would surreptitiously contact the waiter to make sure he got the check. The rest of us, federal employees and a few academics like me, would protest half-heartedly. (Low per diems meant McDonalds or paying out of your own pocket.) There are no judges in the crowd. They are different. Let me illustrate.

A California lawyer told me he ran into a Supreme Court

## How do you extract the money from lawyers? How about dangling bond or other legal work and maybe judgeships before them to get them to part with their money?

world I should have had to stand in line like everyone else and get what came next. (Would he have been disciplined for doing this? In Madison he might have been.) But I don’t think most of us would condemn him. But if I had paid my contact money for the favor, most people would think this would be different. He would have been directly profiting from his position. Yet even this would be less “corrupt” than fixing a ticket. It did not affect the administration of justice.

My next Madison illustration was not personal but it leads me into lunches, an activity I shall discuss later. As a state capitol Madison had its share of lobbyists. The *Capital Times*, a shrill clarion of earlier Wisconsin Progressive days, made a big thing about a lobbyist picking up the lunch check of a state senator. The senator huffed and puffed and stated that his vote could not be purchased for a lunch.

But why did the lobbyist pick up the check? At the very least he wanted access to the senator, just as those who recently sipped coffee at the White House. Access meant a private phone number, one that would get you past the secretarial barriers. Also, the lobbyist may have wanted to look like a generous fellow. Finally they may have been part of a culture in which it was expected that the host, in this case the lobbyist, would pick up the check. More on check grabbing later when I get to my own experiences as a luncheon guest.

Now, living in honest Madison did not mean we were immune to the great metropolis 150 miles to the southeast.

judge friend from another state at an airport. He offered to buy her a drink. She refused. Said if it ever got back home, she would be in real trouble. No drinks from lawyers for the judge.

Now I am on the International Construction Law Circuit. New names and faces but same check grabbing. I am in Heidelberg. After a hard day in the lecture room we all grab a cab and go to a nice restaurant for dinner. A suave Swiss (actually a transplanted Bavarian German) lawyer picks up the check. We protest a bit, but only a bit.

Let's look at check grabbing. Small potatoes compared with what fat cats at the White House for "tea" are shooting for. Yet they do reflect the moral dilemmas in the professional-social world. Why did the attorney at Monterey grab the check? His motives were, I believe, mixed. He may have wanted to nurture friendship or, as they say these days, a relationship with federal employees. This could have been done with the vague hope that this might be useful in the future. He wanted access, a personal phone number.

It might go farther. He might hope to be able to influence the official if he had to pass on something that involved the check grabber's client. But it rarely got to the point of a *quid pro quo*, of a deal, a "here's an envelope. I expect you to take care of things." I am speaking of Federal procurement, not state or local. In some parts of the Wild West of state and local arenas anything is possible.

Before I return to check grabbing at Heidelberg, the Monterey experience raises an issue that I never considered until the modern emphasis on Partnering. Let me explain.

We hear a great deal these days about the combative nature of the construction contract relationship, how this leads to distrust, "stone walling," and the use of anything to "get the other guy." Many argue for a closer bonding between the participants in a construction project. They hope to instill a sense of respect for the other party's needs. This can lead to cooperation and reduce the adversarial attitudes that can be so destructive in claims handling and even before. We want the key people to respect and even like each other. This is accomplished through informal contacts, discussion of common goals, and just getting to know and respect one another.

Many of the participants at the Monterey conferences either had or were likely to have claims pending before the federal agencies. Being friendly with the federal people could be helpful to the claimant and his attorney. Now while this can be looked at as seeking friendship (not a pay-back for a lunch) with the hope of influencing her if needed, it could also be looked upon as creating respect for the check grabbing lawyer, and a greater effort to understand his position by the government official. (Am I naive?) The same might relate to the attitude of the lawyer toward the government official, an understanding of why the latter

could not allow the claim. Their friendship and respect for each other could create the kind of "partnering" at the claims level that we try to foster in the construction relationship.

To be sure it may lead to a wider avenue for a bribe or corrupt practices. The owner's representative may go easy on the contractor because he likes his superintendent and has a drink with him after work. But that is the risk you run when you have people who are friends in the position where one can help the other. But the upside is that friendship can be the lubricant that helps them work together and not be at each other's throats. In the long run both may benefit.

Let's get back to the Swiss lawyer who picked up the dinner check at Heidelberg. His motives were, in my view, different than the Monterey check-grabber. He may have

**I do not get excited about check grabbing, except for judges.  
It is human nature to try to make friends, including friends  
who can be useful in a business context.**

been influenced by friendship. Maybe he was a high class Willy Loman, just wanting to be liked. We were a bunch of academics who couldn't throw him any business. We might be named as an arbitrator in one of his disputes but this was really a long shot. He might have wanted to show generosity in order to get conference invitations that we controlled. (Great form of advertising.) But as I think about it in retrospect he grabbed the check because he wanted to show us he was a big player in this game. He also liked us and respected our unpaid efforts to advance the law. I never felt I should have raised a fuss over the table and fought for my part of the check nor sent him a check for my share. This was social. I saw nothing wrong with it.

I do not get excited about check grabbing, except for judges. It is human nature to try to make friends, including friends who can be useful in a business context. But it also can be motivated in part by kindness and generosity, to "be a nice guy."

Lately I have taken to quoting Archy, the pithy philosophical cockroach created by Don Marquis. Archy said "honesty is a good thing . . . but is not profitable unless kept strictly under control." Let me interpret Archy's sometimes cryptic admonition. I think he is telling us that we, as imperfect people in an imperfect world, must wink a bit at slight deviations from pure honesty.

We should, except for judges, not seek to be holier than the Pope nor expect others to be. The power and prestige of judges puts them in a different category. They are Popes and should behave like Popes, at least modern ones.

Let me conclude this extended Tower column. As to the cases that generated this outpouring of reminiscences and

homespun philosophy, the *O'Hare* and *Umbehr* cases, they are not likely to have much effect upon federal procurement. That system is honeycombed, according to Justice Scalia, with laws and regulations dealing with procurement. But as suggested by Yukins, we may witness more assertions by terminated federal contractors that they were fired because they "whistle blew" on the federal agency, a violation of their rights of free speech.

We may, though, see invocation of this constitutional protection in the *awarding* of federal contracts. The majority's conclusions warned that it was only addressing termination of an existing relationship and that it did not address "suits by bidders or applicants for new government contracts." But we have heard this song before. Limited holdings often become the rule, especially in Constitutional Law.

When we move to what Wittie calls the "remaining vestiges of Tammany Hall and the Wild West," the less controlled world of state and local contracts, we may see more claims by government contractors based upon the first

amendment protection granted in these cases. (Watch for more back room dealing and trumped-up reasons for termination by the public entity.) I would prefer that only conduct specifically barred by existing statutes and regulations be the basis for claims. Here I go along with Scalia.

Of course we should punish vigorously makers of deals that create abuse of power and that seek to pervert justice. Social conventions such as grabbing checks and buying drinks, which seek friendship and the advantages they *may* bring, are very fact-sensitive. Change the facts even slightly, and a different outcome may result. But in general, except for judges, I go along with Archy.

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\* *Board of County Commissioners, Wabaunsee County v. Umbehr,*

U.S. \_\_, 116 S. Ct. 2342 (1996); *O'Hare Trucking Service, Inc. v. City of Northlake*, \_\_ U.S. \_\_, 116 S. Ct. 2353 (1996). The Scalia dissent, joined in by Justice Thomas is found at U.S. \_\_, 116 S.Ct. 2361 (1996).

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