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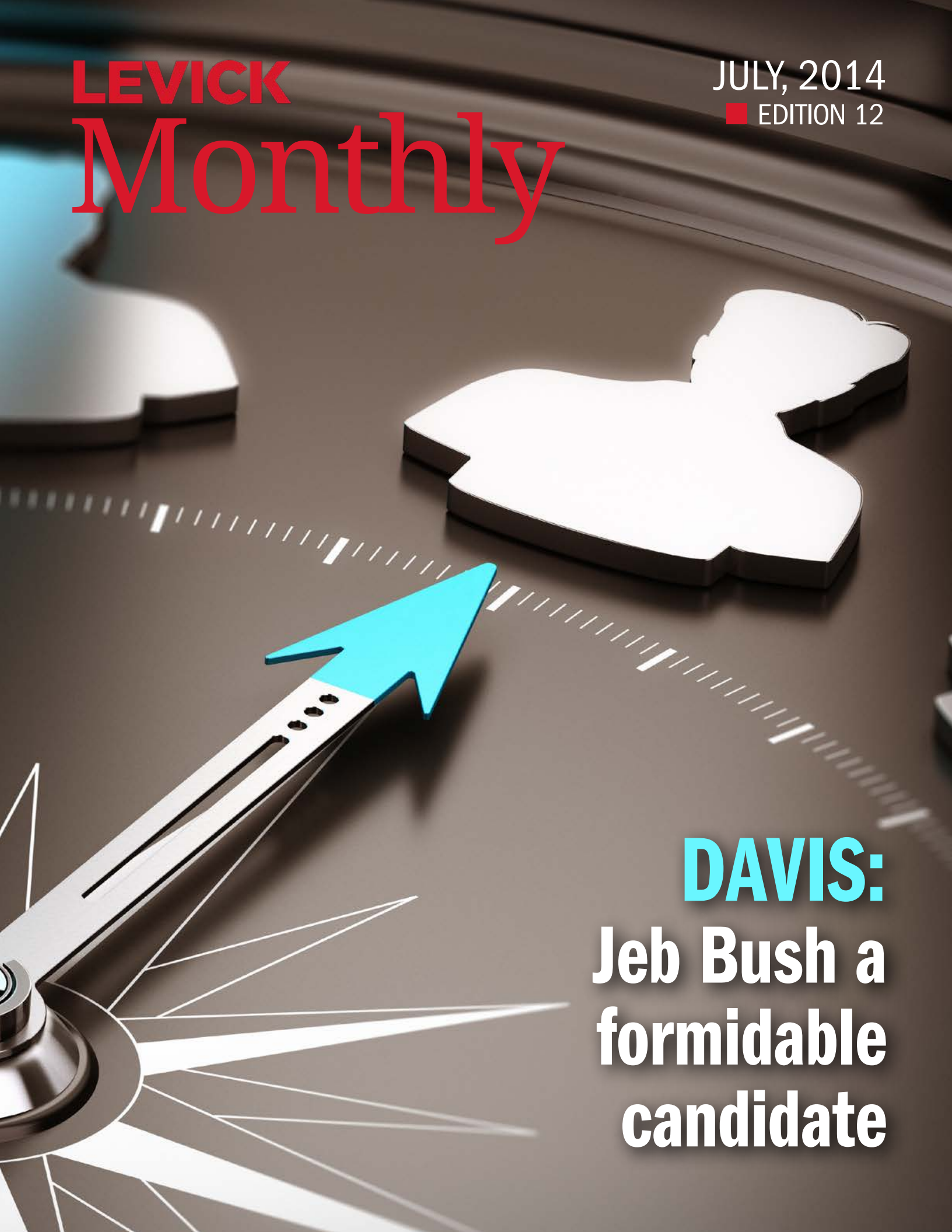

DAVIS: Jeb Bush a formidable candidate

LEVICK
Monthly

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DAVIS:
Jeb Bush a Formidable Candidate

Lanny Davis

Originally Published on The Hill

OK, OK. To the Bush family, and particularly to former two-term Florida Gov. Jeb Bush: don't worry. Let me start, upfront, by saying: I would never vote for Jeb Bush for president. He is way too conservative for me.

Now that that's over with, I think Bush is a really good guy — a good person, good father, good husband, good brother (to my Yale College friend, two-term President George W. Bush) and good son to his great, great dad, former President George H.W. Bush.

Jeb Bush's positions on two issues, in my view, make him formidable against a Democratic presidential candidate in 2016: education reform and immigration policy.

On education, Bush has become authentically one of the leading education reformers in the nation today, a source of new ideas about improving public schools that he largely implemented as Florida governor and would be expected to fight for as president.

I like, especially, his Florida program of grading schools A-F, based on student test scores, creating incentives for schools receiving higher grades (more state aid, higher teacher salaries) and the reverse for lower grades. (I do worry about "teaching for testing" though.)

Bush has also shown courage on the immigration reform issue. He has made himself a target of the far-right fringe of the Republican Party base that, at least to date, has disproportionately influenced the Republican presidential nomination process.

Of course he supports increased border enforcement, like most Americans. But he also allows for a pathway to legal residence and perhaps citizenship (he has been ambiguous about the latter), but only if the illegal resident earns the right to such status over a period of years, such as by paying back taxes, satisfying work requirements, achieving English literacy and maybe completing a public service requirement.

Those who describe such a program as "amnesty," defined as an automatic grant of legal citizenship without any burdens

or requirements to earn that status, are flat-out wrong.

Also, Bush was attacked by the far right when this past spring he said that some immigrants come to the United States illegally, suffering great risks and hardships, out of an "act of love" to help their families.

> "Bush has made himself a target of the far-right fringe of the Republican Party base"

Arizona's conservative junior senator, Jeff Flake, who hails from a state that has been more adversely affected by its porous border with Mexico than most other states, defended Bush's expression: "Truth is, I agree with Jeb and I applaud him for having the guts to say it. … Sure, some come with the intent to do harm or simply to take advantage of our generosity, But many come to find work to feed their families."

In 1998 and 2002, Bush was elected and reelected as governor of Florida carrying about 60 percent of the Latino vote. In 2012, Republican presidential nominee Mitt Romney, who lost by a substantial margin to President Obama, said he believed in "self-deportation" as his main approach to immigration reform. Romney carried less than one-fourth of the Latino vote nationally vs. Obama's 75 percent; in the swing states, such as Colorado and New Mexico, the gap made up the margin of difference.

> "Truth is, I agree with Jeb and I applaud him for having the guts to say it"

Those who care about enacting the conservative agenda know they can't do so without winning the presidency, and that won't happen without a more moderate GOP national platform on immigration reform to cut into this Latino vote gap significantly.

Then there are the far-right "Righteous Republicans," who seem to prefer what they define as ideological purity over victory and real change. They were doing a lot of high-fiving last week after House Majority Leader Eric Cantor (R-Va.) was defeated in a party primary by an unknown professor who opposed any form of immigration reform, which they immediately claimed was the reason for the upset. (Actually it was more complicated than that, but don't tell them.)

I, as a Democrat, of course, am rooting for these Righteous Republicans to prevail in 2016. My hope, therefore, is for a Ted Cruz/ Rand Paul ticket, or vice versa.

And I say to both of these gentlemen: May the force be with you (and not Jeb Bush).

The Real Cancer that Caused the VA Scandal

Veterans just don't trust the system.

Richard Levick
Originally Published in USA Today

We can talk about incompetence. Or indifference. Or bureaucratic intransigence. Most likely, it was some combination of the three that created the tragic wait times and falsified reporting at the U.S. Department of Veterans Affairs (VA) that were so woefully chronicled in the recent VA Inspector General's report.

But let's add another fatal character flaw to the list: "Chronic Distrust." Those two words are likely all that's required as an epitaph for the bureaucrats responsible for the VA scandal that shamed a nation: Distrust of the very people you're supposed to serve, and who so richly merit that service. Distrust of the VA's own leadership. Distrust of health care providers, especially doctors.

"First and foremost, we have a VA claims process that begins with presumptive skepticism," says Admiral Edward M. Straw. "It's an adversarial exercise in which veterans are forced to prove that they have earned the care they're trying to access."

"Not only does that tie up resources; it allows the health care capacity deficit to hide behind a wall of pending claims and appeals," adds Admiral Straw, a 30-year Navy veteran who, as director and chief executive officer of the Defense Logistics Agency in the 1990s, oversaw a radical overhaul similar to what's now needed at the VA.

Admiral Straw calls for a system based on presumptive approval of claims, just like the system the IRS uses for tax refunds.

"Shouldn't the VA show that same level of confidence in our veterans?" he asks. "The idea that a Vietnam veteran sailor has to prove that his ship was tied up to the pier in Da Nang 45 years ago, and then prove that he went ashore to be eligible for disability compensation for an Agent Orange-driven cancer ought to be unthinkable."

"Shouldn't the VA show that same level of confidence in our veterans?"

Trust. The VA likewise needs to trust veterans to make their own health care decisions. In addition, there must be greater system-wide reliance on private and community providers, such as the 6000federally qualified health centers across the country, in order to increase access to quality care. In that context, Admiral Straw also calls for "a significant investment in community mental health capacity that makes mental health services widely available and convenient for the veteran."

A fundamental compass shift is needed. First, we can no longer insist that all services transpire within VA facilities. Consonant with that, we need more medical, and less administrative, involvement from the get-go, with an eye to removing the bonus incentives that, according to the Inspector General's report, encouraged the wait-time manipulation by VA staffers.

"Right now, money trumps veteran needs," says Admiral Straw. "The VA is run by very senior, almost tenured, civilians who seem to care more about their careers than veteran needs. Rather than work with medical professionals to streamline their policies

and procedures which would have resulted in the same, if not more of the productivity and cost-savings they sought by manipulating the system — they opted for an easy, unilateral approach that cost lives."

"Right now, money trumps veteran needs,"

Alas, history proves how hard it is to transform well-entrenched bureaucracies, no matter how glaring the need or coherent the solutions. The only recourse at such historic junctures is strong new leadership, in this case a no-nonsense man or woman to replace Eric Shinseki.

"Retired military brass, senators, lawyers, bankers, celebrities and politicians without a proven turnaround record are not going to get the job done," says Admiral Straw. "What's needed is a veteran of the business world who has not just been successful, but been responsible for helping troubled organizations right themselves."

The first choice of many, Cleveland Clinic CEO Dr. Toby Cosgrove, took himself out of the running on June 7, but the White House at least seems to have a pretty good idea of the kind of person we've got to find. Here too the issue boils down to trust. It's not enough to be hard nosed. Leaders must have followers, people who believe in the vision and will go extra miles to make it happen.

The good news is that this issue is one that the American people really do care about. Whoever takes Secretary Shineski's place will have their support and, therefore, plenty of political capital for implementing the reforms that are desperately needed.


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AEREO AND MELTWATER: The Ghost of Napsters Past

Richard Levick
Originally Published on Forbes.com

As is sometimes the case with Supreme Court rulings that are supposed to provide closure, the 6-3 Aereo decision – which found that company in violation of copyright law by streaming broadcast TV signals to subscribers without paying for them – seems to have accomplished the opposite. At least that's the impression we get from the massive media coverage that followed on SCOTUS' deliberations.

True, the consensus does seem to be that Aereo itself was dealt a death blow, a conclusion only encouraged by Barry Diller's own widely quoted warning that there was no "Plan B" in the event of an adverse ruling.

Yet even that conclusion from Aereo's highest-profile backer has been intensely contested as Forbes commentators and others map out business options still available to Aereo, likewise surmising that Aereo might now find ways to work with the networks and content-providers to serve their respective interests. (By contrast, Aereo's chances for successfully lobbying Congress are deemed virtually nil despite Congress' historic receptivity to tech companies.)

In any event, Aereo's is but one business model and larger questions obviously remain as to industry-wide consequences. The worst-case scenario conjures up the mighty ghost of Napster and the possibility that embedded interests have won a Pyrrhic victory – Pyrrhic because the legal win ultimately disconnects them from compelling marketplace preferences. Not to belabor the obvious but, if the law is hard-pressed to maintain pace with changing technologies, so too do corporate behemoths risk alienating consumers and other stakeholders by self-protectively relying on the strict letter of that law.

Early on, anxiety over the consequences of a SCOTUS decision for cloud technology itself was felt all the way up the political food chain when the Obama Administration urged a narrow decision. After all, the sanctity of free signals seemed to be at risk, an untenable prospect for the likes of Google and Dropbox. Justice Stephen Breyer, writing for the majority, asserted that the decision is indeed limited and will not "discourage the emergence or use of different kinds of technologies."

Respectfully, it's hard to understand just how limited the decision actually is.

"Aereo would say this was not a limited

decision. The case wrecks its business model," says media lawyer and litigator Charles "Chip" Babcock," a partner at Jackson & Walker L.L.P. "But the people in the cloud who were 'freaking out' will find language in the opinion to give them comfort. Whether it provides actual relief or just psychic relief remains to be seen."

Yet as Babcock readily acknowledges, "psychic" factors can be as prepossessing as any legal determinations for those who seek to crystal-ball business trends. (Full disclosure: my firm has a business relationship with Mr. Babcock.) That is particularly true when a major case either reinforces parallel events or offers a quirky exception to those developments.

"Often times the Court sets a national tone with its opinions and it seems that will be the case here. This is the first BIG win for content providers against new technology, but there have been previous signs that the content providers were making progress in this debate," says Babcock.

Among those previous signs, none seem more revelatory – albeit virtually unmentioned in the current Aereo discussion – than Associated Press v. Meltwater U.S. Holdings, Inc., a district court case decided, March 2013, in favor of the Associated Press, which had brought suit against Meltwater Group for clipping and sharing news. Meltwater argued that it was not infringing under the requirements of fair use, and that its service was "transformative."

In and of itself, Meltwater is not finally dispositive, especially since a parallel action in the UK yielded mixed results for the aggregator. Some analysts also argue that the fair use defense can still apply to news articles under different circumstances. Those "other circumstances" include amended non-infringing services, in turn suggesting that such companies (like Aereo, presumably) can often rejigger their business strategies as legal mandates warrant.

That said, Babcock still expects that content providers will be "heartened by this [Aereo] decision and that the atmospherics of content versus technology will start to tilt back to the content side." To be sure, legal as well as business strategies are driven by "atmospherics," not just precedent – and a purportedly "narrow" decision can be just as much a call to rejuvenated effort by the victor as a broad one.

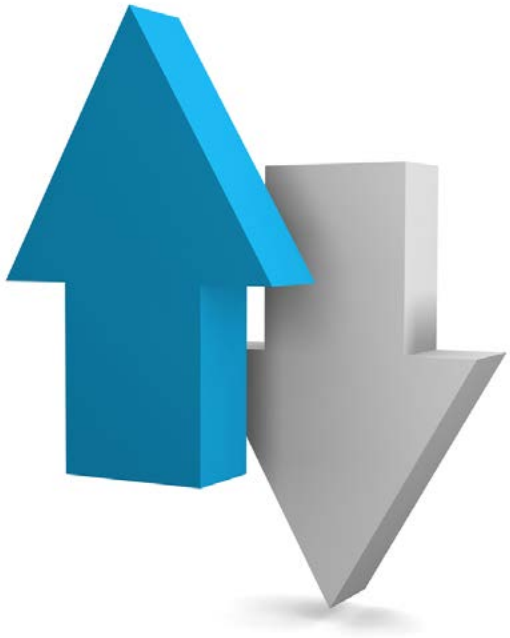
So expect the entertainment establishment to be more aggressive, at least in the near future. Expect the networks to be all the more assiduous in detecting and challenging technological threats to their own traditional business models.

Sweet music indeed for industry lawyers! Hopefully, though, the industry itself is sufficiently well-advised to invest at least as much of its resources on providing users of services like Aereo and Meltwater with the conveniences they demand. Media analyst Robin Flynn of SNL Kagan, for one, observes that Aereo did indeed revivify dormant discussions among broadcasters pushed by Aereo to think about new formats – if only to keep Aereo from using them.

I guess that's a backward sort of way to achieve progress. But it's progress nonetheless.

Dov Charney and American Apparel Discover Gravity

How you act on the way up impacts what happens on the way down.



Richard Levick
Published on Forbes.com

A few years before Mark Zuckerberg launched Facebook from Harvard, Dov Charney was sowing the seeds of his own commercial empire just a few miles north at Tufts. The irreverent t-shirts he manufactured were a hit with the generation sandwiched between X and the millennials. They were so successful that Charney founded American Apparel APP -4.96% in 1998. By the time the company went public in 2006, it was doing $275 million in annual sales. As far as Boston entrepreneurship was concerned, The Social Network wasn't the only stunning success story in town.

With last week's announcement that the American Apparel board has ousted Charney because he refused to accept a reduced "creative" role at the company, it seems he failed in an area that Zuckerberg is beginning to master (albeit slowly). When a career evolves from the dorm room to the boardroom, behavior must as well – because acts once characterized as "eccentric" and "irreverent" when times are good can be quickly redefined as "troubling" and "problematic" when they are not.

In Charney's case, the "troubling" behaviors alleged by the board – and several former employees who have or are currently suing Charney – include sexual harassment and misuse of funds. There is rampant innuendo about his "playboy" lifestyle, which is rumored to include a Hefner-esque mansion. He is said to have paraded around the factory floor in his underwear. He has been accused of assaulting a store manager and hurling racial and ethnic slurs at staffers. One former employee has even alleged that Charney kept her as his personal "sex slave" for a period of eight months.

When the company was profitable, or when it still seemed plausible that Charney could turn it around after years of heavy losses, these allegations were brushed aside, settled, or flat out denied. Now that

the stock has plunged from $15 a share in 2007 to $2 last summer to $0.47 by April 2014, the board has far less patience. With Charney's reputation overshadowing the company brand and business partners starting to run for cover, the board finally initiated an internal investigation in March 2014. Based on the findings, it delivered Charney its ultimatum last week: take a back seat to new leadership or hit the road – sort of, with a nice four year severance and consulting agreement.

> **"stock has plunged from $15 a share in 2007 to $2 last summer to $0.47 by April 2014 ...**

Now, we all know that sex sells in the fashion industry. And anyone who has seen The Devil Wears Prada understands that this world has more than its share of abrasive, somewhat insensitive characters. These factors may explain why the board allowed Charney such a long leash for such a long time. But, if proven true, the allegations against Charney go far beyond the relatively minor gaffes we've seen from competitors such as Abercrombie's Mike Jeffries, Lululemon's Chip Wilson, and others.

As such, they brought about a Bobby Knight moment of sorts when the numbers no longer justified tolerance of Charney's behavior. The board effectively said 'we could put up with all that yelling, screaming, and chair throwing when you were winning championships. Now, not so much.'

Staying true to form, Charney is now predictably fighting back. A letter to the board written by newly-hired counsel Patricia Glaser states that American Apparel "violated its legal and contractual obligations to Mr. Charney in numerous respects," and that he has suffered "substantial professional, reputational and financial injuries" as a result. The letter's points notwithstanding, Charney's selection of Glaser as his counsel and spokesperson is about the only thing he has going for him at this point. She is one of the best in the business and a woman to boot, which lends some – but not much – credibility to his assertions that the allegations – of sexual harassment, at least – are overblown.

Of course, calculating "reputational damage" for a man who shows up to the office only in his underwear, sends out videos of himself naked, and uses his company as an apparent dating service will be entertaining to watch, should damages ever be awarded.

How you act on the way up has a lot to do with how you're treated on the way down – and Charney's actions during his ascendency have left him with few allies to rely upon during the descent. No third parties are stepping up to defend his good name, articulate how important his "vision" is to the company's future, or even echo positive messages about, for example, Charney's commitment to insourcing labor (though even that too has been called into question).

Worst of all for Charney, the board has taken control of the conversation by leaking details of the investigation to the media. That has forced Charney to swim upstream against the already dominant perception – a fact evident in the defensive and inconsistent nature of Charney's pubic responses to date. One minute, his team is complaining that the alleged acts took place years ago. In the next breath, it is asserting that the allegations are "baseless." Which is it? Not a strong start when leadership of the company you founded is on the line.

> **"One minute, his team is complaining that the alleged acts took place years ago. In the next breath, it is asserting that the allegations are "baseless." Which is it?**

Then, there is the board itself, which might be well positioned to win the battle but could end up losing the war anyway. As noted above, it has shaped the overarching narrative at the outset by initiating the investigation in the first place (carried about by the reputable law firm Jones Day), taking decisive action, and backing up its move via what seem to be carefully timed and orchestrated leaks. But all that said, important questions still remain.

Why did it take so long for the board to act (cue the scene from Casablanca about being "shocked, shocked that there is gambling going on in here.")? What are its plans to compete in a maturing marketplace that may be squeezing the company out of existence? How does it plan to regain lost market share without a visionary leader at the helm? How will it manage its relationship with investors when it just fired the company's largest shareholder?

If the stories about him are true, Dov Charney didn't just own the company, he acted like he did. As long as American Apparel was profitable, his board didn't seem to care. Now, both are hanging on by the slimmest of threads because they failed to understand a key tenet of American commerce:

When you're still on campus, it may be OK to go to work in your underwear. Once you graduate, it's time to grow up.

Caesar's Wife: GCs in the Spotlight and Under the Gun

Perhaps a truth of the GM situation, irrespective of how it resolves, is that GCs can't have it both ways.

Richard Levick
Originally Published on Inside Counsel Magazine

No matter what eventually happens, the controversy surrounding General Motors' defective ignition switches and the company's alleged failure to recall the product when needed will continue to resonate for in-house counsel in the decades-long struggle to define their dual public and client responsibilities.

As of this writing, the GM law department is being hurled into the vortex of accusation and investigation, especially when, on May 17, The New York Times ran the front-page story, "Inquiry by General Motors is Said to Focus on its Lawyers."

The very existence of such prominent coverage underscores a few essential themes regarding the evolving profile of in-house counsel.

First, in-house counsel are no longer behind-the-scenes participants in events that affect the corporate brand. The GM story may not be the first instance in which GCs and their minions have faced significant exposure, but it's a watershed moment nonetheless as we're talking about the legal department of one of the world's signature business entities.

GCs now find themselves sitting on boards and expanding their authority to strategic frontiers well beyond the narrow confines of traditional lawyering. That spells opportunity, but it also carries with it the same risk that all officers and directors undergo when companies allegedly violate the trust of their diverse stakeholders.

Second, nowhere are the burdens of accountability and transparency heavier than on the shoulders of in-house counsel. Here, too, is a salient opportunity for professional self-enhancement by in-house counsel: not just as consigliere, but to function as guarantors of the brand. "Of course, today's in-house lawyer is much more involved in a company's overall business strategy and day-

to-day operations," notes Amar Sarwal, vice president and chief legal strategist for the Association of Corporate Counsel. "Part of this role encompasses conducting effective internal investigations to uncover whether misconduct has occurred and to advise the company as to its legal and ethical obligations."

In assuming such responsibility, Caesar's wife must be beyond proverbial reproach. The lawyers cannot wait until the eleventh hour to take action, as has been alleged in the GM case. Nor can they keep victims and their families in the dark, as has also been alleged, and certainly not when the Secretary of Transportation has taken pains to remind us that doing so costs people their lives. If it was ever permissible, it certainly no longer is in the "Age of Transparency" when those outside the company will eventually find out.

The time to do the right thing is always now.

Third, a seemingly shrewd legal strategy can directly disserve an entity's long-term business interests. It is appropriate risk management to settle cases when long-term outcomes are uncertain or where publicity of any sort is potentially damaging regardless of who's right and who's wrong.

By contrast, settlements settle nothing when, as alleged in the GM case, the prime motive is to preclude damaging testimony, resulting in problems that continue festering and predictably resurface with exponentially increased organizational liability.

Here Sarwal offers an important caveat: "Whenever in-house counsel are placed in the crosshairs by regulators or others, it should be remembered that in-house lawyers represent the business, and that the business—not the lawyers—makes the strategic decisions, such as whether or not to settle."

In any event, perhaps a truth of the GM situation, irrespective of how it resolves, is that GCs can't have it both ways. If they want the newfound authority and enterprise-wide profile toward which their professional roles are trending, they must recognize that they cannot then recede into the shadows once—fairly or not—the glare of an unfriendly spotlight enfolds them.

THE UBER FRACAS

{ Luddite Regulators Target Innovation }

Richard Levick

Originally Published on Forbes.com

We saw it with the lodging-rental website Airbnb when in January the Federal Court of Germany ruled that a transfer of residence to tourists is not covered by permission to sublet. In 2013, New York City went after Airbnb users with possible fines.

We've seen it with Tesla as entrenched automobile dealers do all they can to thwart a revolution in transportation that will have decisive and salutary environmental impact.

In fact, we've been seeing it for years in the myriad of legal strategies devised to somehow control and confine Internet traffic.

Studies say that Uber and similar companies, have already caused ownership reductions.

And, we're seeing it right now with Uber, the taxi-hailing app that could, like Tesla, also revolutionize transportation, in this case by reducing demand for private car ownership and reallocating urban space used for parking, as some observers hypothesize. Studies say that Uber and similar companies such as Lyft have already caused ownership reductions.

Uber has of late been most prominently featured in the news for the $1.2 billion it raised on a stunning $18.2 billion valuation. Among many important implications of those numbers, the most important is simple: They prove a compelling public demand for Uber's services. According to reports, four-year gross revenue projections hover in the $10 billion neighborhood, with margins at 20%.

In turn, the thunderous marketplace clamor for Uber underscores a salient fact symptomatic of all quixotic efforts to stem the tide of time; namely, that the regulatory tactics applied, often based on slight technicalities, are not driven by concerns over public safety or welfare. Uber's private sector antagonists eagerly feed this letter-of-the-law strategy; London cabbies, for example, claim that, with fares calibrated by time and distance, Uber operates a meter system only black cabs are allowed to use. Well, who cares besides black cabbies?

Sure, we must regulate the production and distribution of pharmaceuticals. But stifle the right to find a cab during a downpour? Why?

In the case of Uber, the "why" is obvious. Like so much past technological innovation, enterprises such as Uber threaten jobs; in this case, the livelihoods of cabbies throughout the world. Wherever such threats occur, "entrenched interests" are immediately created while innovators like Uber co-founder and CEO Travis Kalanick become their target. It's simple populism both in Europe where drivers have taken to the streets in vociferous protest as well as in America where a number of states, apparently responsive to political pressures, have gone after Uber and Lyft. On June 5, for instance, the Virginia Department of Motor Vehicles issued cease-and-desist letters to both companies.

It's an interesting dynamic when regulators seem simultaneously answerable to efforts by oil and automotive industry behemoths to throw

roadblocks (no pun intended) against the pioneering innovations of a Tesla – while equally answerable to working class constituents threatened by an Uber. For both camps, free market shibboleths are marvelously reassuring until that self-same free market actually disrupts one's security and sense of well-being. Strange bedfellows get made as corporate powers and rank-and-file protestors embark on parallel efforts to stifle technology in order to preserve the status quo.

But stifle the right to find a cab during a downpour? Why?

Of course, status quos can never be preserved. Corporations cannot compete unless they embrace technological change and all the public benefits that such change offers, while workers in jeopardy can at best only postpone their day of reckoning by denying conveniences the public insists on having. If the regulators in Virginia and elsewhere had had their way a century ago, Henry Ford would have been compelled to build barns to house his Model T's – assuming the hansom industry would have allowed those cars to even get built in the first place.

Today, the political directorate is not monolithic and there are public sector overseers who are willing, reluctantly or not, to support the changes that technology has made inevitable. The protests in London, for example, occurred because Transport for London did approve Uber's right to operate in the city. Stateside, San Antonio Mayor Julian Castro ably and courageously signaled his support right after his own police department announced it would arrest Lyft drivers.

Such public officials understand that the marketplace is now digital – and driven by economics, not socio-economic agendas. The marketplace may prefer to see job creation and job preservation, but it insists on neither. When investors put an $18.2 billion number on a parvenu tech company, the message is decisive and unmistakable.

If Uber does not finally make good on its claims to be quicker, faster, and (sometimes) cheaper – or if the price-gouging charges prove justified – the marketplace will renew its deliberations. But it will make the final decision, not the Commonwealth of Virginia. There's a singular irony in that as Virginia's Cease and Desist inspired a torrential pro-Uber response on #VAneedsUber, which status quo-minded decision-makers must now be hard-pressed to ignore.

One technology, it seems, inevitably allies with other technologies. In the long term, it is a far more powerful alliance than any presumed accommodation between trade associations and local departments of transportation.

UBER

PICKUP LOCATION

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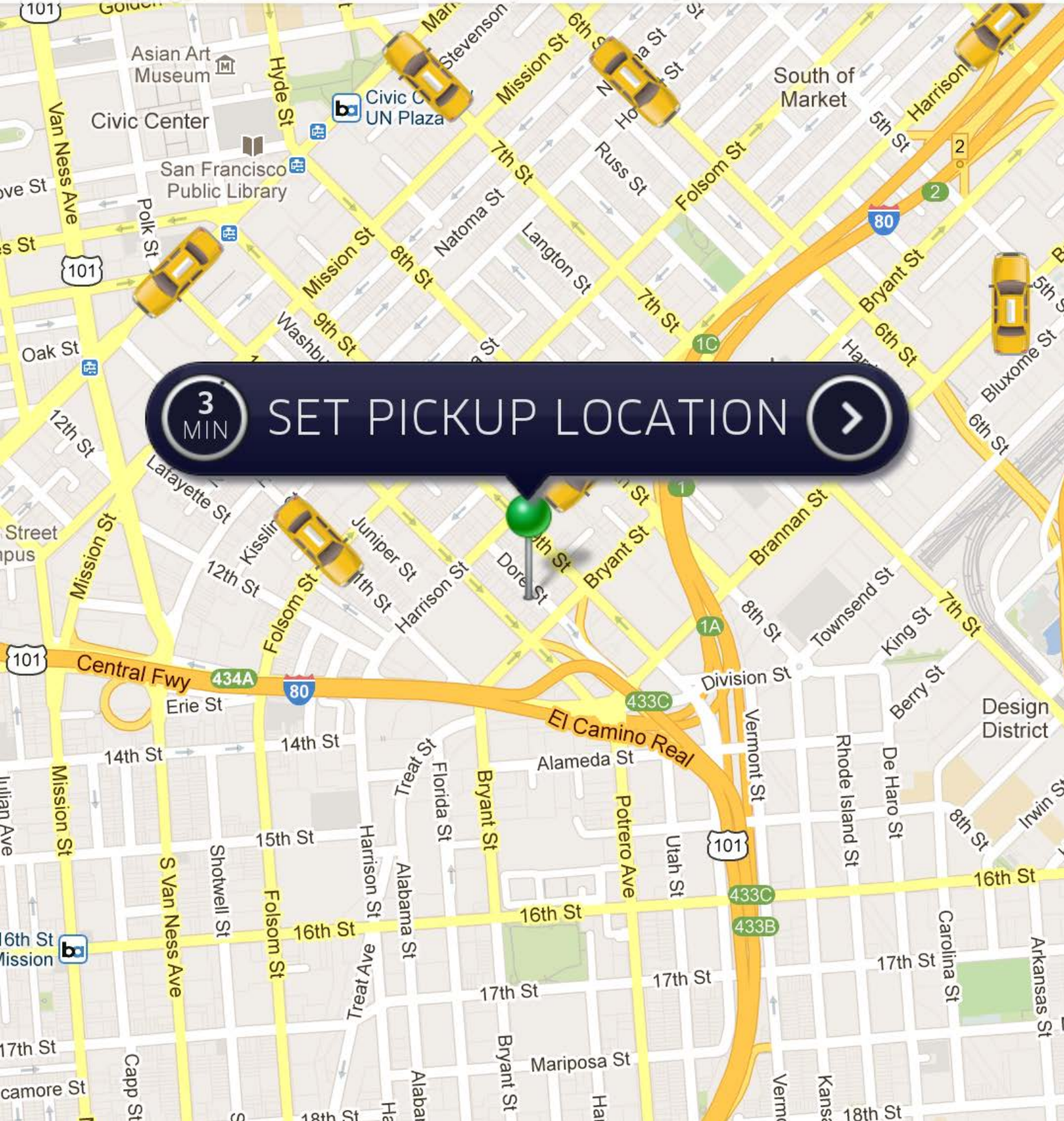

Bill Beutler
ON EDITING WIKIPEDIA

In this LEVICK Daily video interview, Bill Beutler, founder of the content marketing firm Beutler Ink, explains the dos and don’ts of Wikipedia editing, especially when conflicts of interest are readily apparent.

THE URGENCY OF NOW.