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Higher Education Highlights

The Newsletter of the Higher Education Practice

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Clery Act Amendments May Impact Title IX Best Practices

by Christine M. Pickel

With the re-enactment of the Violence Against Women Act ("VAWA"), Congress has created new Clery Act reporting obligations that overlap with, and are sometimes inconsistent with, OCR's Title IX guidance. These changes raise questions about best practices for Title IX compliance.

A school's sexual assault policies and procedures are subject to both the Clery Act and Title IX, but the two regimes are not co-extensive nor are they necessarily consistent in their directives. In evaluating Title IX policies and procedures in light of the recent legislation, colleges and universities may consider the following (by no means exhaustive) nuances:

- **Standard of Evidence:** The Clery-required annual security report must now contain a statement of the standard of evidence to be used in a proceeding arising from the report of sexual assault, but does not mandate the standard to be implemented. OCR explicitly endorses a preponderance of the evidence standard. Some observers have suggested that Congress' decision not to incorporate the "more likely than not" standard in VAWA provides legal support for use of a different standard in resolving Title IX complaints. And in fact, the most recent resolution agreement arising from a DOJ/ OCR Title IX investigation does not specify the standard of proof to be used in Title IX Complaint investigations. However, that agreement does state that DOJ and OCR must approve the school's policies and procedures related to sex discrimination. [1] OCR, if acting consistently with its guidance letter, will likely mandate a preponderance of the evidence standard.

- **Confidentiality:** The Clery annual security report must state how the school will protect victims' confidentiality (including within public record-keeping). By contrast, OCR's Dear Colleague Letter recommends that universities consider a victim's desire for confidentiality, but

1 *See* http://www.justice.gov/crt/about/edu/documents/montanaagree.pdf

does not go so far as to mandate a confidentiality policy. The most recent resolution agreement with the University of Montana – Missoula requires that the university's policies contain a more general "assurance that the University will keep the complaint confidential to the extent possible."[2] Compliance with differing requirements may be feasible. Schools may be better able to protect confidentiality in the course of reporting crime statistics, while doing so may prove less feasible when the school is carrying out its duty to investigate a Title IX claim.

- **Resolution:** The Clery Act requires a "prompt, fair, and impartial investigation and resolution" of sexual assault complaints —– codification of slightly different language than the Title IX Dear Colleague Letter, which seeks "adequate, reliable, and impartial investigation" of sexual discrimination claims (including sexual violence) and imposes a "prompt and equitable" standard for resolution of Title IX complaints. The nuance in this language likely has little practical effect, but colleges and universities should be aware of the differences when drafting policy language.
- **Concurrent Notice:** The Clery Act now requires concurrent notice to the accused and accuser of the outcome of any sexual assault investigations. Integrating a concurrent written notice requirement into a school's Title IX policies and procedures would help to ensure compliance with the Clery Act and would be consistent with OCR's recommendation that both parties receive written notice of the outcome of sex discrimination complaint investigations.
- **Prevention and Awareness Training:** VAWA and the Dear Colleague Letter appear to be consistent in that both regimes emphasize campus-wide prevention and awareness training. VAWA requires "ongoing prevention and awareness campaigns for students and faculty."[3] This requirement appears consistent with resolution agreements reached between a number of higher education institutions and OCR which call for periodic "climate checks" or "climate surveys" and regular awareness programming.

As colleges and universities revise their Clery Act procedures, they should be mindful that although some of the language in the amendments may appear familiar from the Title IX context, obligations under the Clery Act and Title IX are not co-extensive. Compliance with Clery reporting laws, including the policy statements now mandatory in the annual security review, does not equate to Title IX compliance. Institutions should consider which situations require consistency between their Clery and Title IX policies, and which situations merit distinct procedures.

2 *Id.*

3 http://www.govtrack.us/congress/bills/113/s47/text

Student Speech and Liability in MOOCs – a Brave New World

by Joseph C. Monahan

We're familiar with the usual variety of challenges arising from student speech and conduct in the context of the traditional ivy-covered bricks and mortar campus setting. We have protocols for dealing with challenges such as threats of violence or self-harm. But how do college and university risk managers handle similar issues when the speech appears in cyberspace, where an ever-increasing number of "massive open online courses" (MOOCs) exist and the speaker may be thousands of miles away? On an even more basic level, when do risk managers have an obligation to MOOC participants (who may not be students of the university) to identify and address safety concerns? Our upcoming article in the 2013 *URMIA Journal*

examines the impact of MOOC discussion board speech on colleges and universities. The article proposes an analysis that courts may utilize in creating common law principles for deciding these difficult questions. Here's a preview of the issues our article explores, which all risk managers should be considering:

Are MOOC participants students? Many observers may be overlooking this critical, initial question. If participants are not students, the traditional liability framework, as described in the Restatement of Torts and decades of case law, for determining an institution's responsibility to respond to threatening speech may not apply. A number of case-specific facts including the specific Terms of Use agreements that MOOC participants sign, whether the participants pay for the course, and whether university credit is given would likely impact that analysis. We can expect that the answer to this question will change with different programs and over time as MOOCs evolve.

Can we apply the traditional liability framework to MOOC "students?" Next, we assume that at least in some cases MOOC participants will be deemed university students. Applying a traditional framework to this new frontier of torts proves tricky. Traditionally, courts have imposed liability for student injuries by: (1) finding that a special relationship exists between the college and its student; or (2) finding that the university, as a landowner, had a duty to render its premises safe for invitees. These "negligence by omission" cases impose liability where the school failed to protect the student from injury. Our article explores, in depth, the factors that courts consider under these two traditional theories and considers how other cases dealing with liability for online statements (in a variety of contexts) may influence the application of the traditional common law principles.

What are the best practices for colleges and universities that sponsor MOOCs? Finally, our article suggests some best practices for institutions to consider when dealing with liability issues arising from online speech. You will find our article, *MOOCs and the Institution's Duties to Protect Students from Themselves and Others: Brave New World or Much Ado About Nothing?* in the 2013 edition of the *URMIA Journal*.

Assistance and Emotional Support Animals Are Just the Tip of the Iceberg: Implications of the *United States of America v. University of Nebraska at Kearney*

by Robert L. Duston

A decision granting partial summary judgment in a federal district court case is sometimes worth reading, but is seldom cause for alarm. Not this time. **Every NACUA Member needs to pay close attention to what is going on in *United States of America v. University of Nebraska at Kearney, Civil. 4:11-CV-3209 (D. Neb.).*** DOJ brought the case on behalf of several students with disabilities who were denied permission to have small dogs documented as "emotional support animals" in their dorm rooms. On April 19, 2013 the court granted DOJ's motion for partial summary judgment, holding that the Fair Housing Act (FHA) applies to all college and university built or operated housing, including apartments and dorms. Unless DOJ's position is reversed on some later appeal, or a circuit split develops, opening the floodgates to "assistance animals" based on a doctor's note may be the least of the problems that schools will face.

Did You Know *this is one of the first cases clearly addressing whether the FHA definition of a "dwelling" covers campus housing?* The briefs filed by University of Nebraska at Kearney ("UNK") and DOJ detail the case law, legislative history and application of the FHA to other types of housing, and agreed this would be one of the first opinions to expressly address the issue. DOJ's position, accepted by the court, is that the

FHA definition of "dwelling" broadly covers all forms of campus housing—dormitory residence halls, apartments, and even Greek housing.

Did You Know *HUD issued new guidance on assistance animals a week after the court's decision?* http://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf. This April 25, 2013 Notice reaffirms positions HUD took in a February 2011 Memorandum discussed in the *Grand Valley State University* guinea pig case. (See Christina Riggs' article in the Spring 2013 *Higher Education Highlights*.) HUD says that every FHA or Section 504-covered housing provider should apply the ADA first when evaluating a request to use of a comfort animal. If the animal does not qualify as a "service animal," the provider must then evaluate the request under the FHA/Section 504. The requesting party may be required to show that he or she: (1) has a disability (while HUD does not say so, it is likely to follow the relaxed definitions of disability under the ADA Amendments Act); *and* (2) has a disability-related need for an "assistance" animal. The FHA definition of assistance animal is quite broad, and includes animals that provide "protection or rescue assistance" or "emotional support that alleviates one or more of the identified symptoms or effects of a person's existing disability."

Did You Know *how little documentation can be required? Or that there is a "Sample Letter for Companion Animal" on HUD's Website?* One of the most common misperceptions people have under the ADA/FHA/Section 504 is that service or assistance animals need to have a license or certification, proof of training, wear a special tag or vest, or be on a leash or harness. *None of these are required.* HUD says that housing providers may ask for "documentation from a physician, psychiatrist, social worker or other mental health professional" confirming the animal is an emotional support animal. The housing provider cannot demand more documentation or access to medical records or medical providers. In other words, according to HUD, a note from any qualified health professional is sufficient. Advocates have published sample letters with fill-in-the-blanks, and one such form was posted on a HUD blog here: portal.hud.gov/hudportal/documents/huddoc?id=DOC_7399.doc.

Did You Know *that under the FHA the animal may only be excluded under the "direct threat" standard?* HUD says a school would have to make an *individualized inquiry* that the *specific animal*, not the breed, size, weight (or apparently species), is a direct threat to the health, safety or property of others.

Did You Know *the potential implications of the FHA on room assignments and construction?* In trying to persuade the court that Congress could not have intended that the FHA apply to campus housing, UNK argued that the FHA's ban on sex and familial status discrimination would prevent colleges and universities from assigning students to rooms on floors based upon sex, assigning students with children under age 18 to particular housing, or segregated Greek housing. These arguments did not prevail.

There are also great financial risks if the FHA's construction provisions apply. The FHA requires that all multi-family dwellings constructed for first occupancy after March 31, 1991 meet certain requirements for accessibility and adaptability (e.g. kitchens and bathrooms where a wheelchair can maneuver) *in every unit, not just a certain percentage.* 24 CFR §100.205. The definition of "covered multifamily dwellings" does not include "families." They are "buildings consisting of 4 or more dwelling units if such buildings have one or more elevators; and ground floor dwelling units in other buildings consisting of 4 or more dwelling units." 24 CFR §100.201. Given DOJ's position and the UNK court's conclusion that campus housing units are "dwellings," advocates and plaintiffs' lawyers may argue that the FHA's construction requirements have applied since 1991. Nothing would be grandfathered, there could be strict liability for failure to meet new construction standards, and claims may be made decades later.

Need to Know More? The overlapping rules regarding animals on campus and in dorms have been debated for years, so the implications of *United States of America v. University of Nebraska at Kearney* are meaningful. The additional implications of the FHA and 2010 ADA Standards on campus housing and new projects (including those by private developers) is a whole different issue with major financial implications.

Saul Ewing intends to publish expanded analyses and present a two-part webinar series on these topics in July/August. Subscribers to the firm's Higher Educations Highlights will be notified. In the meantime, if you would like additional information, Rob Duston may be reached at rduston@saul.com.

"Shared" Governance and the Struggle for Campus Control (Part I)

by Keith Lorenze

In the traditional model of university governance, even though the governing board of the university operates as the final institutional authority, much of the responsibility for governance is delegated to, or "shared" with, academic administrators and faculty. In practice, this concept of "shared governance" means that a university's board and administrators "tend to defer to the faculty on academic issues, such as curriculum development, the creation of degree programs, research direction, and classroom instruction."[1] Shared governance is grounded in the notion of academic freedom and that "major decisions have to be consultative if they are to be effective," since "there is little incentive for tenured faculty members to go along with a plan they do not support."[2] Thus, universities traditionally have operated based on the principle of "'advice and consent' between faculty and administrators."[3]

Traditional and cooperative "sharing" of institutional power on college campuses has been challenged over the last two to three years. Faculty declarations of "no confidence" in university administrators are becoming increasingly prevalent, as are countervailing threats by administrators to reduce or eliminate participation by faculty in "non-academic" decisions, or sometimes even decisions that would have a substantial impact on academic life.

While it is certainly possible that these recent "shots across the bow" and other rhetorical skirmishes may be the result of economic pressures and budgetary cuts, differences in competing strategic visions or even mere personality conflicts, recent events at New York University, St. Louis University, and Gustavus Adolphus College are worth a closer look.

New York University

In March 2013, the faculty of the New York University ("NYU") College of Arts and Sciences passed a vote of "no confidence" in NYU President John Sexton. The vote has been interpreted as reflecting faculty disapproval of President Sexton's style of governance. Some faculty members claim that he has "marginalized" them by "rarely engag[ing] in substantive conversation and often ignor[ing] dissenting voices" when "making decisions about the university's strategic direction."[4] Foremost among the strategic decisions, and among those that served as catalysts for the "no confidence" vote, were President Sexton's recent initiatives to expand NYU's campus location in Greenwich Village and to pursue global expansion through the creation of a network of study abroad sites and the establishment of NYU campuses in Abu Dhabi and Shanghai.[5]

Yet it seems clear that the "no confidence" vote was about more than differences in strategic vision. Many faculty members stressed that, with respect to the local expansion, they "were largely cut out of the planning process until it was too late to make changes."[6] Regarding NYU's global expansion, faculty members argued that, in addition to not providing them with sufficient opportunities to provide "input in the direction of the overseas sites," President Sexton had given inadequate attention to their "concerns about academic freedom" and the potential shift in "attention [away] from academic programs in New York."[7] Consistent with the traditional model of shared governance, they see "such initiatives as reshaping institutional mission and curriculum"[8] and, thus, implicating the need for faculty participation.

1 Kevin Kiley, "Augustana Retreat an Exercise in Collective Governance," in *Inside Higher Ed* (March 16, 2012) (accessed on www.insidehighered.com on June 6, 2013).

2 *Id.* (paraphrasing statements made by Rodney A. Smolla, President of Furman University and a noted scholar of free expression and shared governance in higher education).

3 Gavan Gideon, "The Challenge of 'Shared Governance,' " in *Yale Daily News* (April 12, 2012) (accessed on yaledailynews.com on June 6, 2013).

4 Kevin Kiley, "New York University Vote of No Confidence Raises Debate About Ambitions and Governance Models," in *Inside Higher Ed* (March 18, 2013) (accessed on www.insidehighered.com on June 6, 2013).

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

Saint Louis University

Beginning in August 2012, Saint Louis University ("SLU") captured national attention when the administration, led by President Lawrence H. Biondi and Vice President for Academic Affairs Manoj Patankar, proposed a "controversial post-tenure review plan that would have forced faculty members to essentially reapply for tenure every three years."[9] Although the proposal eventually was withdrawn, it led to a firestorm of "complaints by faculty members that they were being cut out of decision-making."[10] Faculty members in both the College of Arts and Sciences and the Faculty Senate passed votes of "no confidence" in both President Biondi and Vice President Patankar.

The faculty votes of "no confidence" in SLU President Biondi may be characterized as merely knee-jerk reactions to perceived threats to their own job security. However, as one faculty member noted, "You don't get this kind of reaction over something that just popped up in the last two months."[11] Faculty members have claimed that the SLU administration, under President Biondi's leadership, has made "a handful of administrative decisions," such as the closure of the graduate school and the restructuring of the College of Education and Public Service, that "were made without giving faculty members a meaningful voice."[12] Since, according to some faculty members, these decisions clearly implicate "curriculum development, the creation of degree programs, research direction, and classroom instruction,"[13] the SLU administration should have sought and obtained the "advice and consent" of the faculty under the traditional shared-governance model.

Gustavus Adolphus College

In December 2012, the Faculty Senate at Gustavus Adolphus College formally called for President Jack Ohle's resignation at the end of the academic year.[14] This recent demand has been perceived as a reaction to "four years of problems"[15] from the faculty's perspective. The grievances made by faculty members span the length of President Ohle's tenure in office, which began in 2008, and include claims that he has "marginalized them in important decisions, poorly managed the institution and regularly violated faculty-governance procedures."[16] While the specific allegations include claims that President Ohle made budgetary decisions without faculty consultation, they also accuse him of "improperly interfering with faculty searches" and reducing the level of responsibility of academic deans, which resulted in several high-level resignations during his tenure.[17]

Like the "no confidence" votes at NYU and SLU, the faculty demand for the Gustavus Adolphus president's resignation can be viewed as an effort by faculty members to reassert their power in the traditional shared-governance model. Insofar as President Ohle's intervention into academic matters such as faculty hiring allegedly contravened established policies, and to the extent that the budgetary concerns impact on "curriculum development, the creation of degree programs, research direction, and classroom instruction,"[18] Gustavus Adolphus faculty members expressed concern about such departures from the traditional model and their continuing ability to participate in campus governance.

Conclusion

The recent eruption of debates may simply be the result of "administrators fac[ing] increased pressure to quickly enact change to deal with economic pressures, and budget decisions increasingly intrude on curricular matters."[19] Some faculty members attribute the tension to a perceived growth of an outside "technocratic, management class" within many university administrations.[20]

Such faculty members lament that these "professional administrators from outside faculty ranks are generally hired [in]to

9 Kevin Kiley, "Out on a Limb," in *Inside Higher Ed* (December 10, 2012) (accessed on www.insidehighered.com on June 6, 2013).

10 *Id.*

11 *Id.*

12 *Id.*

13 *See* Kiley, *supra*, at n.1

14 Kevin Kiley, "Gustavus Adophus Faculty Push Back Against President with Aid of Confidential Leak Site," in *Inside Higher Ed* (February 7, 2013).

15 *Id.*

16 *Id.*

17 *Id.*

18 *See* Kiley, *supra*, at n.1

19 *Id.*

20 *See* Gideon, *supra*, at n.3 (quoting Professor Dimitri Gutas of Yale University).

these roles," which has led to "a proliferation of new positions like assistant deans, associate provosts and vice presidents."[21] Whereas these administrative positions used to be filled on a temporary basis by faculty members,[22] today's "increased prevalence of senior administrators who did not come up through faculty ranks"[23] and theoretically do not think like faculty may, in part, explain the increasing tensions on campus between faculty and administrators. Many faculty also perceive that as university boards are typically composed of alumni, business leaders, and professionals,[24] the university governing board will side with the administrators, instead of the faculty, by expressing public support to the administration and its initiative – which is exactly what happened in the NYU, Gustavus Adolphus, and SLU cases.

In Part II of this article, which will feature in our next edition of this newsletter, we will explore legal implications and challenges surrounding these shared governance issues and some suggestions for best practices and risk mitigation. Stay tuned.

21 *See id.*

22 *See id.*

23 *See* Kiley, *supra*, at n.1.

24 *See* Kiley, *supra*, at n.1.

Warning Shots Fired: Tax-Exempt Bond Borrowers Beware!

by Joshua S. Pasker and Michael C. Barnes

In recent weeks, the Securities and Exchange Commission has undertaken two unprecedented enforcement actions, one against an issuer of tax-exempt bonds and one against a borrower of tax-exempt bond proceeds.[1] Colleges and universities that utilize tax-exempt bond proceeds will glean a major lesson from these proceedings: the SEC has indicated that statements or omissions in communications that were never even intended to reach the investor marketplace may violate securities laws. This is the first time that the SEC has applied this principle to issuers and borrowers of tax-exempt municipal bonds. The two recent enforcement actions send a clear message that borrowers such as colleges and universities should adhere strictly to the terms of contracts involving municipal bond proceeds, make all required financial information disclosures and provide training for their financial directors on the limitations and obligations related to bond financing.

In an action against the City of Harrisburg, Pennsylvania, the SEC for the first time charged a municipal bond issuer with making false and misleading statements in communications outside of the issuer's disclosure documents to investors. The SEC found fault with the city's failure to disclose significant financial exposure resulting from a failing incinerator project that had been financed by tax-exempt bonds. According to the SEC, the city neglected to disclose the financial exposure in various documents and communications, including its budget, its mid-year report and the mayor's State of the City address, all published on Harrisburg's website after city officials were made aware of the financial problems relating to the incinerator project.[2]

The novelty of this enforcement action lies in the fact that the SEC asserted a securities violation based on allegedly misleading information that was not specifically intended to reach the investor marketplace. The SEC justified the charges on the basis that the city had not made its contractually required annual filing of financial information to the website that serves as the central repository for information disclosures relating to tax-exempt bonds. The SEC theorized that the failure to provide updated financial information directly to the investor community increased the likelihood that investors would rely on information supplied by the city on its website. In a press release accompanying the charges, the SEC stated that a failure to comply with ongoing disclosure obligations may increase the risk that public statements by officials may be deemed to be misleading or to omit material information.

1 *See In re City of Harrisburg, Pa.*, Exchange Act Release No. 69515 (May 6, 2013) at http://www.saul.com/media/site_files/3516_HigherEdNL040813v5.pdf and *In re City of S. Miami, Fl.*, Securities Act Release No. 9404 (May 22, 2013) at http://www.sec.gov/litigation/admin/2013/33-9404.pdf .

2 *In re City of Harrisburg, Pa.* at 8-11.

In a second recent SEC action of significance to colleges and universities, the agency found the City of South Miami, Florida — a borrower of tax-exempt bond proceeds — liable for securities fraud when it allegedly made inaccurate certifications about its compliance with loan documents governing the use of tax-exempt bond proceeds.[3] According to the SEC, South Miami leased a bond-financed project (a mixed-use retail and public parking facility) to a private developer, in contravention of the loan documents. When additional bonds were issued for the project, the city represented to the bond issuer that it had used the facility and bond proceeds in accordance with the loan documents. Though these statements were not intended to reach the investor marketplace, the SEC nonetheless charged the tax-exempt bond borrower with securities fraud because the false representations ultimately put the underlying investors at risk for tax liability. Perhaps implying a lack of institutional knowledge that contributed to the infringement, the SEC noted that none of South Miami's recent string of finance directors had received training or guidance on disclosure requirements or tax regulations relating to bond financings.

Like South Miami, universities and colleges that benefit from tax-exempt bond proceeds enter into agreements that govern the use of bond proceeds and restrict the use of bond-financed facilities. These agreements can be violated inadvertently due to unfamiliarity with the meaning or application of the underlying tax rules or a failure to recognize the significance of the documents entered into in connection with a bond offering. Now, after the South Miami enforcement action, the SEC has made clear that violations of tax rules may lead not only to financial exposure to the IRS, but to potential liability for securities fraud as well. This liability may include significant financial penalties, jail time or settlement costs.

In order to avoid becoming the target of the next SEC enforcement action, colleges and universities should establish policies and procedures to ensure compliance with securities law requirements applicable to tax-exempt bonds. For further information, please contact Joshua S. Pasker (jpasker@saul.com, 215-972-7783) or Michael C. Barnes (mbarnes@saul.com, 215-972-7188), members of Saul Ewing's Public Finance Practice.

3 *In re City of S. Miami, Fl.* at 7.

Federal Court Rules that Subpoenas are Its Domain, Boston College Still Directed to Comply

by James D. Taylor and Nichole C. Alling

University lawyers are well-accustomed to responding to broad reaching and burdensome subpoenas. Many are mundane, requiring little substantive work, but occasionally the subpoena touches on more important issues and principles. That is precisely what happened recently in the First Circuit Court of Appeals. There, the court held that "the enforcement of subpoenas is an inherent judicial function which, by virtue of the doctrine of separation of powers, cannot be constitutionally divested from the courts of the United States." *United States of America v. Trustees of Boston College*, No. 12-1236 (1st Cir. May 31, 2013). The decision – which comes after years of dispute between Boston College and the United States government over the government's August 2011 subpoena seeking oral histories collected by Boston College for the school's "Belfast Project" – further clarified the role of the federal courts in the enforcement of subpoenas and rejected the government's position that courts have no discretion under 18 U.S.C. § 3512 and the US-UK MLAT (a 1996 Treaty between the United States and the United Kingdom on mutual legal assistance in criminal matters) to review subpoenas issued pursuant to the US-UK MLAT.

The government's August 2011 subpoena resulted from a request by the UK to the U.S. government pursuant to the US-UK MLAT for assistance in investigating the 1974 disappearance of a woman in Belfast, and sought to gain access to Boston College's Belfast Project materials to help it do so. Of specific interest were a number of interviews and testimonies of former participants in the oft-violent independence movement in Northern Ireland, which were a part of the numerous

oral histories that comprised the Belfast Project. Due to strict confidentiality agreements with the interviewees, Boston College closely monitored use of the project materials and restricted access for research and study purposes. It was not surprising then that Boston College filed a motion to quash the government's August 2011 subpoena. But the college's request was denied and the District Court of Massachusetts ordered the production of 85 Belfast Project interviews. Boston College appealed that decision, which led the First Circuit Court of Appeals to consider the federal courts' constitutional position to review and control the process of executing a subpoena request.

Reviewing both the language of the US-UK MLAT and the constitutional role and reasoning behind the U.S.'s tri-furcated balance of powers, the Court of Appeals rejected the government's position that only the Attorney General, and not the courts, could review subpoenas issued pursuant to the US-UK MLAT. According to the court, if its conclusion were otherwise, federal courts would be no more than "rubber stamps for commissioners appointed pursuant to the treaty" and subpoenas issued by the executive branch would be "automatically enforced by the courts" in such a way that the executive branch would "virtually exercise judicial powers." That, the court found, would be contrary to the constitution.

After finding it had discretion to review enforcement of the August 2011 subpoena, the court then found that the subpoena materials were to be reviewed under an "ordinary standard of relevance," declining Boston College's request that review be under a heightened "direct relevance" standard. Nevertheless, the court held that the district court abused its discretion by directing the production of certain Belfast Project materials irrelevant to the government's August 2011 subpoena. Exercising its "inherent judicial function," the court reduced the number of oral histories ordered for production from 85 to 11.

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