CONSTITUTIONAL CHANGE-MAKER

50 Years Later, Professor A. E. Dick Howard ’61 Reflects on Leading Virginia Constitution’s Revision

When Virginia lawmakers wanted to overhaul the state’s Jim Crow-era constitution 50 years ago, Professor A. E. Dick Howard ’61 answered the call. He served as executive director of the Commission on Constitutional Revision and directed the successful referendum campaign for the new constitution’s ratification, which took effect in 1971.

The commission presented its report to the General Assembly in January 1969. I served as counsel to the General Assembly during the special session in 1969 and at the regular session in 1970. After the legislators had made further revisions to the commission’s draft, the proposed constitution went on the ballot in November 1970. Governor Linwood Holton asked me to direct the referendum campaign. Democrats, Republicans and Byrd Independents aided in the campaign. The new constitution was adopted by a vote of 72%.

WHAT WERE THE NEW CONSTITUTION’S GOALS? WHAT ARE SOME OF ITS ACHIEVEMENTS?

The members of the revision commission set out to re- judge the racist assumptions that tainted the 1902 constitution. Looking to the future, the revisers were especially concerned to place public education on a sound and progressive footing. The new constitution mandates the General Assembly to provide for a public school system for every school-age Virginian. Localities are under a constitutional mandate to provide their share of school funding under a formula. The General Assembly—no more Prince Edward counties [the county closed public schools for five years and diverts funds to a white private school]. The Board of Education is tasked with devising Standard Quality, with the General Assembly having final authority. Drawing on Thomas Jefferson’s Bill for the More General Diffusion of Knowledge, the revisers put education in Virginia’s Bill of Rights, which borrowed language from Whig “Tort Law and the Construction of Change: Studies in the Inevitable History of Liberty.”

Other important provisions include the right to be free from government discrimination on the basis of race, color, national origin or sex. The constitution has an article on environmental quality, a subject not addressed in the 1902 constitution. The General Assembly now meets in annual sessions; the previous constitution had called for biennial meetings.

More generally, the 1971 constitution is more responsive to the needs of modern society than was its predecessor. Not only was the 1902 constitution hobbled by its racist origins, it was drafted during a time when state constitutions tended to be more creative and less detailed. Many of its provisions belonged in the statute books, not in a constitution. Virginia’s 1971 constitution is about half the length that drafted in 1902.

—Mike Fox

WHAT DID VIRGINIA’S LEADERS DECIDE THAT THE CONSTITUTION SHOULD BE REVISED?

The need for revision had its roots in the Civil War and Reconstruction period. After the Civil War, which former Confederate state, to be readmitted to the Union, had to write a new state constitution. Virginia’s 1870 constitution was a progressive document but one which conservative Virginians re- sented as having been imposed on them. When Reconstruction ended, each of the Southern states, including Virginia, set out to scrap the postwar constitutions.

Virginia’s post-Reconstruction convention met in 1901–02. The delegates at that convention acted to make white supremacy the core object of Virginia’s constitution. To that end, they set out to disenfranchise as many Black Virginians as they possibly could. The General Assembly drafted the poll tax and complicated registration re- quirements. The result was excising most Black voters (and many poor white voters as well) from the rolls.

Fast forward to the 1960s. That turbulent decade saw the assassination of John F. Kennedy, Robert F. Kennedy ’61 and Martin Luther King Jr. school desegregation in major American cities. More- over, major legal changes were afoot. The Supreme Court decreed one person, one vote in the drawing of legislative districts. Congress enacted the Voting Rights Act of 1965, coverage of which included Virginia.

Virginia itself was changing. Largely rural in 1902, Virginia was fast urbanizing. Long in the grip of the Byrd Machine [the rural political machine led by Governor and U.S. Senator Harry F. Byrd, a conservative Democrat], Virginia was becoming a two-party state. The poll tax had been declared unconstitutional. Massive resistance to school desegregation had brought a Supreme Court decision ordering Prince Edward County to reopen its schools. The constitutional shoestring accepted in 1902 clearly no longer fit the commonwealth.

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the second edition of “Public Health Law and Ethics,” as well as the fourth edition of “The Trail of John W. Hinckley, Jr. – A Criminal Investigation in the Innocency Defense” (with PETER S. COOK and JOHN C. JEFFRIES, JR. ’73). The final edition includes the opinion by U.S. District Judge Paul Friedman sentencing Hinckley to a conditional release after 34 years of confinement at St. Elizabeth’s Hospital following his acquittal in March 1982 by reason of insanity for the attempted assassination of President Ronald Reagan.

NADIA CANO spoke on three panels at the annual meeting of the Association of American Law Schools, including on programs sponsored by the sections on law, poverty and socioeconomic. She is on the executive committee of the sections Aging, and the Law (immediate past chair), Family, Juvenile Law, and Women in Legal Education. Several of her articles have been published in peer-reviewed, and her article, “Chang- ing Demographics, Elder Law, and Trusts and Estates,” was recently published in a symposium in the ABA Journal. The new law would allow for reform in 2008. Now, calls for change have become more widespread.

“The problem, by my lights, is how the legal shield operates as to under-filtering/blocking—when platforms do too little moderating, or worse,” Citron said.

“What Section 230 gets wrong is the provision dealing with when providers fail to address illegality, and worse, encourage illegality. Right now, the provision dealing with under-filtering is not conditioned on anything at all. It is a free-for-all, so sites can encourage illegality and make illegal off it and still enjoy the immunity. That is why so-called revenge porn sites are thriving, earning ad revenue from likes, clicks, and shares of eager and growing audiences.”

Citron recently contributed to a bill proposed by U.S. Sens. Mark Warner, Mazie Hirono and Amy Klobuchar, called the SAFE TECH Act. Among the bill’s provisions, online platforms would no longer be able to claim Section 230 immunity for addressing illegality, and worse, encourage illegality. Right now, the provision dealing with under-filtering is not conditioned on anything at all. It is a free-for-all, so sites can encourage illegality and make illegal off it and still enjoy the immunity. That is why so-called revenge porn sites are thriving, earning ad revenue from likes, clicks, and shares of eager and growing audiences.  

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EICHENSEHR NAMED HEAD OF NATIONAL SECURITY LAW CENTER

Professor KRISTEN E. EICHENSEHR, a cybersecurity expert, has been named director of UVA Law’s National Security Law Center.

Eichensehr, who joined the Law School in 2020, is a Martha Linbus Kohr and Bruce A. Karsh Bicentennial Professor of Law. She writes and teaches about cybersecurity, foreign relations and separation of powers issues.

The center helps support the academic contributions of faculty and serves as a hub for professors and professionals to exchange ideas, as well as create increased opportunities for students interested in national security law.

“UVA Law is very strong not just on national security, but also in related areas like privacy, international law and criminal law,” Eichensehr said.

The center recently hosted the 2021 Cybersecurity Speaker Series, featuring current and former U.S. government officials, in-house and outside counsel, and academic and civil society experts. Eichensehr said national security has traditionally been the purview of governments, but new challenges and technologies make it necessary to broaden one’s understanding of national security players.

“It’s not just governments and defense contractors, but also technology companies, social media companies, critical infrastructure entities and others,” she added. “Their involvement as targets of operations as well as providers and defenders of national security raises a host of difficult questions about how to understand their responsibilities to the public and how to make government-private sector relationships productive, while also protecting privacy.”

Before her academic career, Eichensehr served as a special assistant at the U.S. State Department’s Office of the Legal Adviser in the Obama administration. She also practiced at Covington & Burling in Washington, D.C., where she specialized in appellate litigation, international and national security law, and cybersecurity issues.

Eichensehr is an affiliate at the Stanford Center for International Security and Cooperation, and an affiliate scholar at the Center for Internet and Society at Stanford Law School. She is also editor of The American Journal of International Cooperation, and an affiliate scholar at the Center for Internet and Society at Stanford University.

Eichensehr has directed several projects, including a report on police reform that was released in March. The report emphasizes solutions that look beyond the immediate policing of a particular event, while also signalizing the importance of ongoing systemic change.

The center’s work on the National Security Law Center’s project on the princi- ples of policing, and in advising several efforts to draft legislation on police use of force and accountability.

When it comes to police reform, Professor RACHEL HARMON, who directs the Center for Criminal Justice, has some recommendations for the new presidential administration.

In collaboration with Brian Friedman and the Policing Project at the New York University School of Law, Harmon is advocating for a stronger regulatory approach, their report, “Policing Priorities for the New Administration,” urges the White House to appoint a policing czar and require that all of the more than 50,000 local and state law enforcement agencies meet basic standards for transparency, among other “clear and actionable” recommendations.

Harmon, a former federal prosecutor before joining the UVA Law faculty in 2006, said the previous policy was incoherent and didn’t do enough to help counteract social harms that can occur.

“President Biden’s team has already signaled a strong interest in reform and policy reform,” Harmon said. “We are offering concrete suggestions for what to do after they turn the lights back on in Justice Department policing programs abandoned by the previous administration.”

The report emphasizes solutions that look beyond the immediate policing of a particular event, while also signalizing the importance of ongoing systemic change.

“All federal programs that provide money or equipment for policing should be assessed not only for their efficacy in promoting policing that serves national goals, but for the social costs they induce by promoting policing in a particular way,” the report states. “For example, if a program encourages or incentivizes particular policing tactics — such as frequent traffic stops — the social costs of those tactics must be considered in assessing the value of the program.”

Harmon and Friedman, founding director of the Policing Project and author of “Unwarranted: Policing Without Permission,” released the report in December.

The authors list a number of other priorities that could be accomplished, mainly through Department of Justice initiatives and executive orders.

Currently the Class of 1987 Research Professor of Law, and a past eight years as a prosecutor in the U.S. Department of Justice’s Civil Rights Division and the U.S. Attorney’s Office for the Eastern District of Virginia in Civil Rights Division, she investigated and prosecuted civil rights crimes nationwide, including hate crimes and cases of excessive force and sexual violence by police officers and other government officials. Her book, “The Law of the Police,” will be the first such resource for those seeking to understand, evaluate and reform American law governing police interactions with the public (p. 63).

Harmon and other UVA Law faculty engage in criminal justice scholarship, with an eye toward making a more just society, through the Center for Criminal Justice.

—Eric Williamson
DOUGLAS LAYCROCK (’84) received the 2021 AALS Section on Legal Education and Admissions to the Bar’s Pro Bono Award for his efforts to help those in need. LayCrook is an emeritus law professor and director of the Law School’s Emory Legal Clinic. He created the Pro Bono Law Student Program to help students practice law in a public interest setting. LayCrook has been recognized as a leader in the legal education community and has been named to several prestigious honor societies.

PAMELA BOOKMAN ’06 wins award for her work in the field of discrimination law. Bookman is an assistant professor of law at the University of Arizona College of Law and the co-director of the Immigration Law Clinic. She has published several articles and has been a speaker at numerous conferences on issues related to immigration and civil rights. Bookman’s work has been recognized by the American Bar Association, which awarded her the 2021 AALS Annual Meeting on Jan. 5. Bookman is author of the book “When Is Discrimination the Law? An Empirical Analysis of the Consequences of Legal Discrimination.” Her research focuses on the impact of discrimination on individuals and groups, and she has contributed to discussions on the role of law in addressing these issues.

RUTH MASON is an assistant professor of law at the University of Virginia School of Law. She specializes in tax law, and she has published several articles on topics related to tax policy and administration. Mason has also been involved in legal education, serving as a member of the American Bar Association’s Section on Taxation. She has received several awards for her work, including the 2021 AALS Award for Excellence in Taxation.

ALUMNAE

ELIZABETH KATZ ’09 received the 2021 AALS Scholarship Award for her outstanding academic achievement and leadership. Katz is an attorney at the firm of Boies, Schiller & Flexner, where she specializes in corporate law and litigation. She is also an active member of the American Bar Association and has been involved in several projects aimed at promoting diversity in the legal profession.

KENDRICK ‘04 received the 2021 AALS Section on Critical Legal Studies’ Scholars Award for his contributions to the field of critical legal studies. Kendrick is an associate professor at the University of Michigan Law School, where he teaches and conducts research on issues related to law, social justice, and human rights. His work focuses on the intersection of law and society, and he has published extensively in this area.

THOMAS NACHMAN recently published two papers on violence risk assessment in the law. NACHMAN is a professor of law at the University of California, Berkeley, and he is an expert in the field of violence risk assessment. His research focuses on the development of risk assessment tools and the use of these tools in legal settings. NACHMAN has published several articles on these topics, and he has contributed to discussions on the role of law in addressing violence risk.

JORDAN R. ORTIZ received the 2021 AALS Section on Latinos & Peoples of Color’s Scholars Award for his work on Latino issues in the law. Ortiz is an associate professor at the University of California, Irvine College of Law, and he teaches and conducts research on issues related to Latinos and the law. His work focuses on the intersection of law and Latino communities, and he has published extensively in this area.

RICHARD L. HASEN is the director of the Polsky Institute of Public Law & Legal Theory. He is an expert in the field of antitrust law and has published extensively on this topic. Hasen is also an active member of the American Bar Association and has been involved in several projects aimed at promoting antitrust law.

JOHN T. MONAHAN recently published two papers on the role of law in addressing extreme behavior. Monahan is a professor of law at the University of Virginia School of Law, and he teaches and conducts research on issues related to extreme behavior and the law. His work focuses on the development of risk assessment tools and the use of these tools in legal settings. Monahan has published several articles on these topics, and he has contributed to discussions on the role of law in addressing extreme behavior.

MARGARET E. KAZER ’81 recently published two papers on the role of law in addressing gender inequity. Kazner is a professor of law at the University of Michigan Law School, and she teaches and conducts research on issues related to gender equity. Her work focuses on the intersection of law and gender equity, and she has published extensively in this area.

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KIMBERLY JENKINS ROBINSON

ROBINSON Elected to American Law Institute

Robinson was elected a member of the American Law Institute.

There are now 25 members of the UVA Law faculty currently affiliated with ALI. The institute is the leading independent organization in the United States producing scholarly work to clarify, interpret, and modernize and otherwise improve the law. The organization includes judges, lawyers and law professors from the United States and abroad, selected on the basis of professional achievement and demonstrated interest in improving the law.

Robinson, who joined the Law School in 2019, was among 36 new members inducted in October nationwide.

The American Law Institute was founded in 1923 “to explore the legal consequences of political, economic, social, technological, and environmental developments,” according to its website. Robinson was elected to ALI in November on the recommendation of his former colleague at George Washington University, Professor Gregory Hale. Robinson co-founded the “School Law and Economics Lab,” which studies how people reason about the law and how they make judgments about what is good or bad, according to Hale.

In January, Gregg said he was “very much looking forward to” joining Robinson at the Law School.

The 24-lesson course aims to teach viewers the underpinnings of effective speech writing and skilled delivery in settings both personal and professional. Being able to speak effectively can serve you well in so many contexts, and so many people fear public speaking. I wanted to offer this course to help people learn how to do it well and feel more confident about expressing their ideas aloud,” Shadel said. “The course covers topics that are important for lawyers, of course, but it also branches out into other settings, such as how to speak effectively on the job, how to give a great wedding toast or a eulogy, how to nail that business pitch—all sorts of things you might encounter in your personal or professional life. Shadel also taught that course, published in 2017 as part of The Great Courses’ “Law School for Everyone” series.

The Great Courses expedition filming of the new course, which normally would have taken two weeks, because of the COVID-19 pandemic. All 24 lectures were recorded in five days in Fairfax County, Virginia. Shadel’s hotel accommodations and in-person studio procedures kept the entire production at a minimum.

“It was an intense filming schedule, but the Great Courses people know what they are doing,” she said. “We used our protocols about the crew wearing masks and keeping 6 feet or more of distance, so the filming went very well.”

Shadel is the author of two books: “Finding Your Voice in Law School: Mastering Classroom Cold Calls, Job Interviews, and Other Verbal Challenges” and “Tongue-Tied America: Reviving the Art of Verbal Persuasion.” Both books are by UVA Law professor Robert N. Sayler.

Professor MOLLY BRADSHAW SNOW, who teaches oral advocacy, negotiation and public speaking at the Law School, has been tapped again for The Great Courses series.

Shadel teaches a class for the learning platform on how to speak clearly and persuasively in various contexts and environments. The 24-lesson course aims to teach viewers the underpinnings of effective speech writing and skilled delivery in settings both personal and professional. Being able to speak effectively can serve you well in so many contexts, and so many people fear public speaking. I wanted to offer this course to help people learn how to do it well and feel more confident about expressing their ideas aloud,” Shadel said. “The course covers topics that are important for lawyers, of course, but it also branches out into other settings, such as how to speak effectively on the job, how to give a great wedding toast or a eulogy, how to nail that business pitch—all sorts of things you might encounter in your personal or professional life. Shadel also taught that course, published in 2017 as part of The Great Courses’ “Law School for Everyone” series.

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“It was an intense filming schedule, but the Great Courses people know what they are doing,” she said. “We used our protocols about the crew wearing masks and keeping 6 feet or more of distance, so the filming went very well.”

Shadel is the author of two books: “Finding Your Voice in Law School: Mastering Classroom Cold Calls, Job Interviews, and Other Verbal Challenges” and “Tongue-Tied America: Reviving the Art of Verbal Persuasion.” Both books are by UVA Law professor Robert N. Sayler.

Professor GEORGE S. GEIS has also recorded coursework for “Law School for Everyone.”
STEPHAN '77 SERVES AS SPECIAL COUNSEL AT PENTAGON

Professor PAUL B. STEPHAN ’77, an expert in international and national security law, was appointed special counsel to the general counsel of the U.S. Department of Defense. General Counsel Paul C. Ney Jr. serves as chief legal officer for the Pentagon and director of the Defense Legal Services Agency, which provides legal advice and services for the defense agencies, field activities and other organizations. Stephan says his job is to assist Ney and the general counsel’s office however he can.

“As a legal academic, I have lived a ridiculously rewarding life, surrounded by students and colleagues who inspire me and living in a part of the country that I truly love,” said Stephan, who accepted the appointment before the COVID-19 pandemic. “I feel an obligation to give something back.” He said his position is analogous to what Brown counsel would do, except the Pentagon is much larger than any enterprise in the country and has unique missions and challenges. Since starting in August, Stephan said he’s already tackled intellectual property work, employment law, administrative law and constitutional law.

“I hope to come out of this experience a better lawyer and a better professor,” Stephan said. He will be on leave from the Law School for one year.

Stephan is the John C. Jeffries, Jr. Distinguished Professor of Law and a life member of the American Law Institute. He is an expert on international business, international dispute resolution and comparative law, with an emphasis on Soviet and post-Soviet legal systems.

He has advised governments and international organizations, taken part in cases in the U.S. Supreme Court, the federal courts, and various foreign judicial and arbitral proceedings, and lectured to professionals and scholars around the world on issues raised by the globalization of the world economy. From 2006-07, he served as counselor on international law in the U.S. State Department.

More recently, he served as a coordinating reporter for the American Law Institute’s “Restatement (Fourth) of the Foreign Relations Law of the United States” and is co-editor of “Comparative International Law,” both published in 2018. He is a recipient of the Roger and Madeleine Traynor Faculty Achievement Award, which recognizes scholarship by a senior faculty member.

—Mike Fox

S. EDWARD WHITE

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Saving Cost-Benefit Analysis for the Sake of the Environment and Our Health

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The federal government should revive the use of cost-benefit analysis when crafting regulations that affect the American public, Professor Michael Livermore argues in a new co-authored book.

“With new data and a new law school, University of Virginia law professor Richard L. Revesz, “Revising Rationality: Saving Cost-Benefit Analysis for the Sake of the Environment and Our Health,” was published in November.

Cost-benefit analysis is a way for regulators to understand the positive and negative effects of proposed regulations. In recent decades, the method was endorsed by administrations of both political parties, said Livermore, whose own expertise spans environmental and administrative law.

“What motivated us to start this project was that we wanted to make sure that government had abandoned what had been a bipartisan consensus going back decades,” Livermore said. “This radical departure from past practice was something that we wanted to investigate and explain to the public and the broader policy audience. We also wanted a path forward to recover and build on the best parts of that consensus.”

Livermore said made decisions ranging from transportation policy to the pandemic response, real harm is caused “when experts are sidelined and evidence is undermined.”

How Constitutional Rights Matter

MILA VERSTEEG and ADAM CHILTON

To enforce constitutional protections, a nation’s citizens must have the ability and will to push back when their rights are violated, says Professor Mila Versteeg in a new co-authored book, “How Constitutional Rights Matter.”

Among their research methods, the authors worked from a large database that encoded nations’ constitutional rights and reviewed historical outcomes to ascertain the bigger picture regarding how well constitutional protections performed. The dataset of rights spanned from 1946 to 2016 and covered 194 “widely recognized countries in the international legal system.”

“Around the world, there are many examples of governments simply ignoring the constitution’s rights provisions,” Versteeg said. “And noticed, using statistical analyses, we find that many constitutional rights—like free speech, the prohibition of torture, the freedom of movement, the right to education, and the right to health care—are not associated with improved outcomes.”

But they find that some rights, such as the freedom of religion, the right to organize and the right to form political parties, are better respected.

The authors observe that protecting rights in a constitution does not necessarily guarantee that the government will uphold them.

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WHEN INDEX FUNDS ARE REALLY MANAGED FUNDS

Managers of index funds are increasingly taking on the role of investment advisers, and federal regulators should treat them as such, Professor Paul G. Mahoney argues in a new paper.

Mahoney, whose teaching and research focuses on securities regulation and corporate finance, recently co-authored “Advisers by Another Name” with University of Toronto law professor Adriana Robertson. In the paper, they explain why the U.S. Securities and Exchange Commission’s policies are outdated in how they regulate some index funds, which consist of a portfolio of companies meant to track a market index, such as Standard & Poor’s 500 Index, rather than being actively managed. The professors offer a solution to close regulatory gaps on index funds that are blurring the boundaries.

What inspired you and your co-author to write this paper?
We observed that the index fund market is changing. Many index funds and exchange-traded funds today are thematic. In other words, they do not try to replicate a broad market portfolio, but instead consist of stocks with some characteristic that the fund selects. Sector-specific index funds and “smart beta” ETFs (exchange traded funds) are an example. These funds blur the line between indexing and active management.

What have index funds grown in popularity?
There is a substantial body of academic research that suggests that on average, actively managed funds do not outperform the relevant market benchmark (like the S&P 500) net of expenses. That has led many investors to decide to try to match the market return using an index fund rather than try to beat it using an actively managed fund. Index funds are generally less expensive because the fund’s manager does not engage in costly attempts to find undervalued stocks—it just tries to replicate the relevant index. The problem we are responding to is that the line is becoming blurred. For example, an index fund or ETF that focuses on high-growth biotech companies is obviously not trying to replicate the entire stock market or a substantial segment of it. Implicitly, the fund sponsor is trying to attract investors on the basis that holding this specialized slice of the market will produce superior returns or meet other investment goals.

That is not to say that there is anything wrong with these thematic funds, and our paper does not argue that there is. It simply makes the point that they resemble active funds that have an adviser/sub-adviser structure, and the index provider should be regulated as a sub-adviser.

How is the current system antiquated?
The current regulatory system is premised on the idea that there is a sharp line between index funds and actively managed funds. The latter select stocks that the manager thinks will outperform the market, and the former passively track the market. That was never completely true in the sense that even a broad market index must make choices about which portfolio best reflects “the market.” But it was close enough to justify the different regulatory treatment for a time. It no longer is.

What should the SEC do to better regulate the index fund market?
First, it should recognize that the providers of single purpose indices are functionally the same as sub-advisers, or specialized asset managers to whom some fund managers contract out all or part of the stock selection. The SEC should regulate them as sub-advisers.

Second, the SEC should clarify the distinction between data publishers and advisers. This would not be very disruptive. The SEC should tell index providers that they must have procedures in place to manage potential conflicts of interest between index selection and other commercial or financial interests of the index provider or its affiliates. Large index providers say they do this. It should also require that an index fund’s prospectus disclose the licensing fee for the index as a separate line item rather than bundling it with administrative expenses. Most index providers do not do this and would no doubt object, but there is no good argument why those fees should not be transparent to investors.

How would these new regulations benefit investors?
They would do the two main things that securities law is supposed to do—inform investors about the costs they pay and about the potential conflicts of interest to which they are subject.