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Pillars of Justice

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IN THIS ISSUE

2 The Big Fights: IJ's Strategy Over Three Decades

Enjoy an exclusive interview with Dana Berliner, IJ's senior vice president and litigation director.

6 IJ Irons Out a Quick Win in Case of "Historic" Laundry

IJ attorney Paul Avelar recaps the exciting outcome in an Arizona case that was over before it began!

9 Then & Now: IJ's First Clients

IJ's first case turns 33 years old! Join us as we revisit the case of Taalib-Din Uqdah and his wife, Pamela Ferrell.

A Special Publication for Institute for Justice *Four Pillars Society* Members

EDITOR'S NOTE

Dear Steadfast IJ Supporter,

I'm pleased to share with you IJ's third issue of *Pillars of Justice*, marking one year of publication. I hope reading this publication has made you proud of the indispensable role you play in making our fight for freedom and justice possible.

As a member of IJ's Four Pillars Society, you're familiar with the four pillars of our litigation: property rights, economic liberty, free speech, and educational freedom. And in our flagship magazine, *Liberty & Law*, you read about our projects and successes in each of those areas. *Pillars of Justice* is meant as a companion to give you more insight into what happens before a case launch, how cases progress on the path to ultimate victory, and how IJ designs strategic initiatives for long-term legal change.

All of that work is made possible by four other "pillars" highlighted on this cover: clients, donors, staff, and mission. So you might notice that we have adjusted the format of this publication to emphasize how each feature focuses on one—or more!—of those pillars. Taalib-Din Uqdah shares his enduring legacy as IJ's first **client**. We answer some questions recently asked by **donors** like you. Dana Berliner discusses how IJ has grown and what lessons she has learned over her 30-year career as an integral part of IJ's **staff**, from attorney to litigation director. And Paul Avelar writes about IJ's mission in action—securing a win for property rights even before filing a lawsuit.

Our hope is that this publication becomes an ongoing conversation between IJ and our most dedicated supporters. To do that, we need your input! If there is something you've been wondering about our work, chances are other supporters are curious, too. We'll answer all questions privately—and may even feature yours in a future issue of Pillars of Justice. I also welcome any feedback you might have: what you like, what you want to read more about, and what we could improve. You can submit questions and comments at IJ.org/POJ.

Once again, thank you for your generosity and compassion as we stand together to protect the constitutional rights of all Americans.

Kim

Kim Norberg

DIRECTOR OF DONOR COMMUNICATIONS

The Big Fights: IJ's Strategy Over Three Decades

Dana Berliner is IJ's senior vice president and litigation director. On her 30th anniversary at IJ, we talked about how her role and IJ's capabilities have evolved and how the most important things—including our mission—have remained steadfast. Excerpts are below; the full conversation can be found by following this QR code.

What made you decide to pursue a career in public interest law?

I wanted to do property rights. Law school is very tracked: do well in classes, work on law journal, get a clerkship, get a job at a firm. And I *did* get a clerkship, but then I stepped off the track to think about what I actually wanted to do and basically immediately decided that I wanted to do property rights.

Why property rights?

Property rights are really important. It's a truism that they are the foundation of every right. Property rights are where you can ground your right to speech, you can ground your right to economic liberty, you can ground your privacy rights, your right to contract. All of this relates to having strong property rights. Not that the Supreme Court always believes that, but it is there in the Constitution! And all of those [rights] stem from you actually having the right to the fruits of your labor and to the real property that you either own or lease. So it was just an issue I thought was super important and fundamental, and that was what I wanted to do.

What was one of the first cases that you worked on?

So our first cases, actual cases, were economic liberty and educational choice.

And when I joined IJ, which was at the beginning of '94, we'd done a couple of amici, but we had not had our own litigation in either the First Amendment or property rights.

I think our first property rights case was one that I litigated in Minnesota where there was one law that defined a public water as everything below the high water mark and one law that said that everything that was a public water was open to the public. We represented an elderly brother and sister who had a large piece of land and much of it, although dry, was below the high water mark, and they did not want people tromping through there to hunt and using their land as if it was public.

So it was about the right to exclude—an issue that IJ litigates to this day in many different contexts. And we lost, really because of a procedural pitfall that I learned. That now I make sure other people don't do.

What did you learn that we now don't do anymore?

One of the things that I learned through that is that if you have not made the government commit in writing to a position before you sue, they will claim that is not their position. Even if it was.

So there were two laws, as I said. Obviously the result of these two laws, which were state statutes, was that this land was supposed to be open to the public under state law. Because it was below the high water mark. But when we got to court, they said, "No. If they'd only asked us, we would've told them that land was closed to the public." And I am sure that had we asked them beforehand, they would not have said that. But we didn't ask beforehand. Once you've sued, then it is too late to get them to commit to a position.

So the result of that case was interesting because the court said that we lost because the land was not open to the public. And so they could exclude people, but technically we lost. But they could exclude people and that was good. And it also taught us that it is very important to make sure that we know what the government's position is definitely before we sue.

How is your role different now?

My role now primarily is to keep an eye on all of the litigation, help people to strategize about the litigation, and I also then review most things that go to the court. We make sure that someone reviews everything that goes to a court.

The advantage of that is that we can make sure that we always take the same position on all kinds of issues. Both from big picture issues about the importance of a particular kind of property or what we think about substantive due process to much smaller issues, like "How do we interpret the clean hands doctrine?" and "Is just compensation damages or equitable relief?"

So sometimes it's a more technical legal question, sometimes it's a big philosophical question, but IJ speaks with one voice. And that means that we have to be saying the same thing. So if a brief presents something in a way that is in conflict with something else we've said, it's got to be harmonized or we don't say it. That's really important

because IJ is a very principled place. Most non-IJ lawyers will make an argument that fits their particular case, and it doesn't need to be the same argument that they made in another case. It doesn't need to be consistent. Here, we do not say things that are inconsistent with other things that we have said, unless there's a big discussion and we officially change our position. But other than that, it's all coming from the same jurisprudential foundation, and it has to then show up in the same way in briefs.

Has it become harder to reconcile or harmonize the different positions as IJ has grown?

Not the big picture positions, because we wouldn't take a case that would go against our principles.

It can be a little harder to keep track of positions that we have on procedural issues, because those have to be the same too. So what we say about damages versus equitable relief has to be consistent. And you see more technical and procedural issues when you have more cases.

Philosophically, we do spend a lot of time coming up with the particular theories that we're going to advance, and when we are doing that, we are harmonizing them. Our view on property rights is the same across all property rights cases, and that's not hard to maintain because everyone here believes in property rights and wants to make them more robust in every context. So I don't think it's hard to maintain the consistency.

It hasn't become more difficult as we've grown. We do a ton more property cases than we used to in a lot of different areas, but they all are consistent. Now we do forfeiture, we do Fourth Amendment, fines and fees, zoning, but those are consistent with what we did on takings and rental inspections 25 years ago. So they fit philosophically together.

What has surprised you the most at IJ?

I can think of a couple things.

One is how principled the clients are. Many of the clients recognize that the case that they're doing with IJ is their opportunity to change the world in an important way. And so it matters to them much more than whatever the particular issue is. Because they really want something to change in the way their state or their city or the U.S. operates.

What is another thing that has surprised me? One is how hard the cases are. And not just hard but complicated. The cases, many of these issues are way more legally complex than they should be. They should be pretty straightforward legal issues. But a case that really should only take a year or two might take eight because they get way more legally complex than they should.

Shifting gears, one of the things that we say at IJ all the time is that we think in terms of decades and not years. So what does that mean, and how does that influence what you're doing on a day-to-day basis?

What it means is the law does not change rapidly. It is by its nature a very slow-moving enterprise. So you have to plan for long-term change. Let's take economic liberty. We began with a position that people should be allowed to do the occupation of their choosing. That is an important right and fundamental to human happiness.

Then you have to start thinking, "How will you achieve that?" We started off just doing federal constitutional cases. Then we realized that it was important to do state constitutional cases as well. We think about which states we're going to target, which kinds of cases will get at particular legal claims in that state.

In addition, there was almost no information in the world about regulation of occupations. We began a multi-year project to document restrictions at the state level on the right to earn a living, which became our *License to Work* reports. Each one of those takes several years to make, because you have to survey every state and every law that interferes with entry-level businesses. We had to think through setting that up so that there could actually be information in the world that we could talk about.

And not just that, but because people just weren't aware of the issue, there had to be a communication strategy to get people to learn about this more and to care about it and to connect with it. IJ's activism team is also involved in it. For example, now they are working with specific cities in making their regulations better for small businesses and [easier] for small businesses to start.

So there's still a plan, but all of these things take time. You have to litigate. And we're continuing to do that. We've gotten cases at state high courts, but it takes

several years to get there. So that's also a thing to bear in mind. You bring a case, and if you're going to get it up to its highest level, that is going to take years. So you have to be planning for multiple years. If you want things to go to multiple state high courts, you've got to bring a bunch of them, because some of them will go away for various reasons. So you have to plan to do that. At the same time doing research so that there's more information. Going for governments that are willing to make things better, beginning to work with them to improve things.

What do you see as the greatest challenge facing IJ?

I think it's probably overcoming judicial reluctance to rule against the government. At least for litigation, setting aside any of the specifics, courts don't like to rule against the government. A lot of [judges] worked for the government; they work for the government now. They just don't like to rule against it. So I think that's, at least in terms of law, that is our biggest challenge.

Government is endlessly creative. And even when we are successful in ending one kind of rights violation, they will come up with a new one, and then we have to address that. That's not just a litigation challenge. That is a challenge for all people who think freedom is important. But the inclination to deference is our biggest challenge in changing the world. And it's something we have to overcome in every single case.

The last question that I'll ask you is, what are you optimistic about?

IJ is running on all cylinders. We've got some really interesting, important, complex cases. We can handle big fights. We have enough staff and resources to do that. And we can take on very resource-intensive fights. We have a strategic research team that can create high-quality data that is frequently the main resource on a topic. We have of course a stellar communications team. We have activism that is starting new and exciting projects. We have developed model legislation. So we're really running well and we have a lot of capabilities now that we did not when I started and there were 11 people at IJ. We can handle really big issues and really important cases. Thinking in decades, having the resources to think in decades, makes it possible to do these consequential cases. Sometimes, we can see at the beginning that it's a 15-year case and litigating the issue in multiple places will take even longer. And it's going to require a high level of expert witnesses and all kinds of very expensive things that, if you are successful, will make a huge difference in the world. We can do that. ◆

IJ Irons Out a Quick Win in Case of "Historic" Laundry

Paul Avelar
MANAGING ATTORNEY OF IJ'S ARIZONA OFFICE

BY PAUL AVELAR

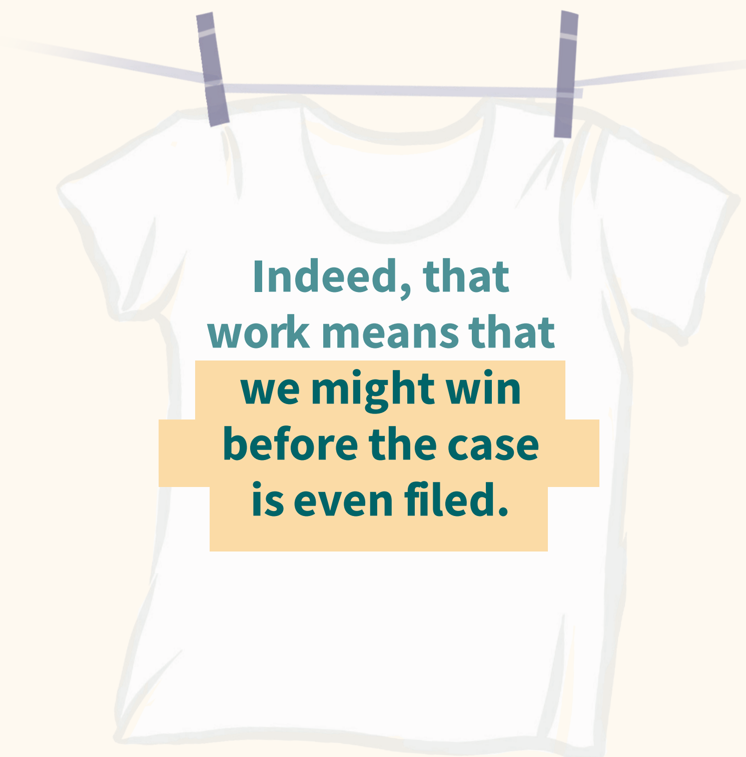
A friend of mine who worked for a different public interest law firm once asked me if IJ grew our clients in a lab somewhere because they are all "just perfect." We don't. But we do invest quite a bit of work into the process of finding the right clients, with the right legal issue, to drive the right case forward. And because that work happens *before* any case is ever filed, it is not always visible.

Indeed, that work means that we might win before the case is even filed.

The first step in strategic litigation is knowing that a potential case exists. Sometimes that happens because the right person contacts IJ about their problem. Sometimes that happens by knowing about an abusive law and going to look for someone harmed by it. And sometimes that happens by reading the news.

The news is where we first heard about Craig and Marilyn Milum.

Craig's dad bought and ran an industrial laundry in Phoenix in 1956. Craig started working there when he turned 13 and kept working there through high school and college. By the late '70s, Craig—together with Marilyn, his college sweetheart and now wife—took over. When Craig retired in 2019, the Milums sold the business but held on to the now-aged laundry facility because it represented their retirement nest egg.



In the nearly 70 years that the Milum family owned the laundry, Phoenix grew exponentially. The laundry facility sits on nearly 2.5 acres on what is now the edge of downtown Phoenix. What used to be light industrial buildings and warehouses is now a vibrant center for commerce and high-rise urban living. The property is, therefore, a prime candidate for development as a mixed-use, dense residential location. There are numerous new apartment complexes either recently completed or still under construction within three blocks.

The Milums' nest egg was, therefore, looking good, and they put the property on the market. But the city of Phoenix had other plans. For several years, the city threatened to designate the property as "historic," which would greatly limit how the property could be redeveloped, reducing its value by millions. This had already made it hard for the Milums to sell at an appropriate price. But in 2023, the Milums forced the city's hand, and the city finally started the process to impose a "historic preservation" zoning overlay.

That is when we learned about the Milums. Skipping ahead a bit, the next step was to contact them. Not only find them and talk to them, but to begin to sort out the real facts—more than just what the news says. That involves visiting the site to see the place for ourselves, researching the history and architecture of the building, reviewing all the documents the Milums have, and spending significant time together to make sure that they are as "perfect" as they appear and that we are the right attorneys for them.

That was it.

After months—indeed years—of pressure from the city, it was over in 30 seconds. The Milums were free to move forward, sell their property, and *finally* enjoy their golden years.

As the Milums' case wound its way through the Phoenix zoning bureaucracy, IJ was there, behind the scenes, to make sure their rights were protected. We weighed in—in public, in real time—to make sure that the citizens of Phoenix knew what was happening to the Milums and how the situation could affect them.

And that's when things started to change. Although zoning proposals from the city usually sail through, the perfectness of the Milums' case stood out. Local media, which had noted the Milums' situation, became sympathetic. The city's own zoning commission opposed the city's proposal. Phoenix began to drag its feet.

By the day of the final council meeting to vote on the proposal, we had done a half dozen media interviews, op-eds, news spots, and more. We also had a plan for litigation if the city council did the wrong thing.

But in a turn of events the Milums didn't see coming, the council voted against the rezoning 8-1. That was it. After months—indeed years—of pressure from the city, it was over inside of 30 seconds. The Milums were free to move forward, sell their property, and *finally* enjoy their golden years.

And IJ never had to—never *got* to—go to court to fight for them. Another victory for property rights, even if not as big as it might have been.

But—and this is the big question skipped over above—why would this have been an IJ case? What justified all the work we were willing to put in? Property rights, of course. But more specifically, it was a strategic

opportunity to reinforce a nearly 20-year-old victory and highlight our new Zoning Justice Project.

Following the *Kelo* decision (in which the U.S. Supreme Court blessed the use of eminent domain for "economic development"), Arizona, like many states, reformed its laws. But thanks to a combination of factors—including IJ having an office in the state and having already worked on the ground for a couple years at that point—Arizona's Private Property Rights Protection Act went further.

Under that law—which was adopted directly by Arizona voters—when new land-use regulations diminish property values, property owners are entitled to just compensation. Even though that law has now been in place for 18 years, there has not been much litigation about it.

As the Milums' situation shows, government is far too eager to impose new regulations where all the costs are borne by property owners. If government itself has to pay the costs its regulations foist on property owners, it will be less likely to enact new restrictions unless they are truly necessary.

The Milums' case, had we actually gotten to litigate it, would have been our first chance to reinforce the statutory protections for property rights that we worked to support. Having the law on paper is great, but we want to make sure that courts are enforcing the law so that it is not just a parchment barrier against government abuse.

Still, if justice delayed is justice denied, it is good that the Milums' case was won before it was launched. And because of the work we did here, IJ is better positioned to fight similar abuses in the future—maybe even in a case that actually makes it to court. ◆

We want to make sure that courts are enforcing the law so that it is not just a parchment barrier against government abuse.

Then & Now: IJ's First Clients

Left to Right:
Pamela Ferrell, Scott Bullock, and Taalib-Din Uqdah

THEN

Taalib-Din Uqdah and his wife, Pamela Ferrell, were IJ's very first clients—and their case was our very first victory. Pioneers in African hairstyling, Taalib-Din and Pamela were subjected to a years-long campaign of harassment by the D.C. Board of Cosmetology, including fines for operating a beauty salon and training program without a cosmetology license (which had nothing to do with braiding). Taalib-Din and Pamela teamed up with IJ. As a result of our lawsuit, the D.C. city council created a separate, much less burdensome, license for hair braiders.

NOW

Today, Taalib-Din and Pamela's shop, Cornrows & Co., is still thriving in the nation's capital—and they continue to advocate for economic freedom for hair braiders nationwide. Meanwhile, IJ has gone on to reduce or eliminate legal barriers to hair braiding in dozens of states; in 2024, Pennsylvania became the 34th state to abolish licensing requirements of any kind for braiders. After seeing an IJ conference room named for him and his legacy during our open house in October, Taalib-Din compared his surprise and awe to his experience meeting his childhood hero, Muhammad Ali. ◆

IJ Answers

1

Q: **Do you ever participate as amicus at appellate courts, as opposed to being counsel for the injured party?**

—Joy S., *IL*

A: Yes! Although IJ is primarily focused on our own original litigation, we do participate as amicus in carefully selected cases in both state and federal court. Many of these amicus briefs, stretching all the way back to our founding in 1991, are available on our website: https://ij.org/amicus/.

One thing that distinguishes IJ's amicus practice from some other groups is that we are extremely selective. We only file in cases where we think the issue is important and where we feel that IJ has unique expertise or arguments. We never want to file what we call a "me too" brief, i.e., a brief that just repeats arguments made by the parties or the other amici. Because of this, IJ is frequently invited to participate in oral argument in cases in which we have filed amicus briefs.

2

Q: **Is there a constitutional basis for protecting the public's right to know what government is doing, and if so, what kind of case(s) are you looking for?**

—Sam P., *WA*

A: The short answer is that it depends on the context. The Supreme Court has held, for example, that there is a First Amendment right of access to court documents and court proceedings. This right is not absolute, which means that courts can keep some records sealed, but they must generally show that there is a good reason for keeping those records sealed that outweighs the public's right of access. Unfortunately, the Supreme Court has rejected any broader constitutional right of access to government records. Instead, any right to access those records is established by statute, such as the federal Freedom of Information Act (FOIA) and its state-level analogues.

On the topic of FOIA, IJ's Strategic Research team files FOIA requests all the time to get data for the reports it produces. Unsurprisingly, government officials often withhold records that we are legally entitled to, and then we have to sue them to get those records—usually represented by pro bono lawyers from our Human Action Network, a nationwide network of attorneys who have previously worked with IJ as clerks or attended our student training events. In 2022, for example, we finally prevailed in a seven-year fight for IRS forfeiture records!

3

Q: Given the separate concurrence by Justices Gorsuch and Thomas [in *Culley v. Marshall*, in which the U.S. Supreme Court ruled that due process did not require a prompt post-seizure hearing in civil forfeiture cases], what could possibly have been their rationale for ruling with the majority as they did?

—Anonymous Donor, *CA*

A: The concurrence penned by Justice Gorsuch and joined by Justice Thomas cited IJ's amicus brief in the case and relied heavily on IJ's extensive forfeiture research, as did the dissent by Justice Sotomayor (joined by Justices Kagan and Jackson). The difference in thinking may stem from the concurrence's incorrect reading of history on the specific issue before the Court—and the facts underlying the *Culley* case were not very compelling, which is why it is so important for IJ to find cases with great facts and get them before the Court. But it's clear that the concurring Justices and dissenting Justices alike want the Court to take up other civil forfeiture cases that go to even more fundamental and important issues surrounding the pernicious practice. ◆

Do you have a question for IJ?

Is there a topic that you'd like to learn more about, or a case you'd like to see us highlight? Any other feedback about this periodical? Submit it here using the QR code!

We may feature your questions or ideas in a future issue. All questions will also be answered privately.

Four Pillars Society, have you seen your name on IJ's 4PS wall?

Next time you are in the D.C. area, feel free to arrange for a personalized tour of our headquarters and we can show you your personalized name plate!

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Pillars of Justice

A SPECIAL PUBLICATION FOR INSTITUTE FOR JUSTICE *FOUR PILLARS SOCIETY* MEMBERS

This exclusive publication goes behind the scenes of IJ's work and the real people it impacts. It is designed to give a deeper look into the long-term strategy and vision that Four Pillars Society members like you make possible.

Thank you for your enduring commitment to IJ as we unleash freedom and justice!

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