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BEFORE FEDERAL COURTS AND AGENCIES

May 2, 2002

**HAND DELIVERED**

Dockets Management Branch  
Food and Drug Administration  
Room 1-23  
12420 Parklawn Drive  
Rockville, Maryland 20857

Re: Docket No. 00D-1537 (Draft Guidance On Referencing Discontinued Labeling)

Dear FDA:

Please file the enclosed letter in the docket referenced above. Thank you for your attention to this matter.

Sincerely,



Arthur Y. Tsien

AYT:jdc  
Enclosure

00D-1537

C5

MAY -2 P 2:57

# GILBERT'S

May 1, 2002

4378 '02 MAY -2 P2:52

**Via Facsimile**

Mr. Daniel Troy  
Office of Chief Counsel  
U.S. Food and Drug Administration  
5600 Fishers Lane  
Rockville, Maryland 20857  
U.S.A.

Dear Mr. Troy:

**Re: April 8, 2002, Article "FDA discontinued label guidance on hold; is generic Tramadol frozen too?" from *The Pink Sheet*, April 8, 2002**

**Docket OOD-1537: Draft Guidance for Industry on Referencing Discontinued Labeling for Listed Drugs in Abbreviated New Drug Submissions**

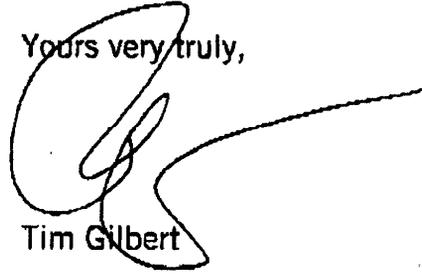
**Docket 01P-0495: Apotex Corp. Citizen Petition re Ultram (tramadol)**

We have reviewed the April 8, 2002, article in the Pink Sheet where it is stated "FDA has stopped work on a guidance which would permit generics to reference discontinued labeling after the Office of Chief Counsel raised objections about the draft document. The general counsel's office is understood to have raised concerns regarding the statutory authority for the guidance".

We attach a copy of an opinion from Professor David Bederman of the Emory University School of Law, which addresses the statutory authority for the draft Guidance.

We would be pleased to discuss this matter with you or provide you with further information. Please do not hesitate to contact me.

Yours very truly,

A handwritten signature in black ink, appearing to be 'Tim Gilbert', with a long horizontal flourish extending to the right.

Tim Gilbert

TG:nt  
Encl.

cc: Elizabeth Dickinson

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*Qualified in Georgia  
and the District of Columbia*

*Attorney at Law  
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April 23, 2002

Tim Gilbert, Esq.  
Gilbert's  
The Flatiron Building  
49 Wellington Street East  
Toronto, Ontario M5E 1C9  
CANADA

Re: Expert Opinion on Statutory Authorization for  
"Carve Out" of Indications or other Labeling Information  
Protected by Patent or Exclusivity

Dear Tim:

You have requested my expert opinion as to the statutory basis, under the relevant provisions of 21 U.S.C. § 355, for the U.S. Food and Drug Administration ("FDA") to permit generic drug manufacturers to obtain, through Abbreviated New Drug Applications ("ANDAs"), approval of products seeking fewer indications than were approved for the pioneer drug, or using different labels than a brand product in cases where sections of the brand labeling are still covered by patent or exclusivity. **I conclude in this letter opinion that the FDA has ample statutory authority to make such approvals.**

I am qualified to render this opinion by virtue of my academic and professional experience, and my full Curriculum Vitae is attached. Briefly, I have written numerous books and articles on

## David J. Bederman, Esq.

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questions of statutory interpretation and agency action, have instructed law students on these subjects for many years, and have litigated many cases (including a number in the U.S. Supreme Court) on these questions.

For the purposes of rendering this opinion, you have provided for my review the following statutory and administrative materials: (1) 21 U.S.C. § 355; (2) 21 C.F.R. §§ 314.94 & 314.127; (3) the Draft Guidance for Industry on Referencing Discontinued Labeling for Listed Drugs in Abbreviated New Drug Applications, HHS/FDA/CDER (October 2000) (hereinafter "Draft Guidance"); and (4) the submissions made by the Generic Pharmaceutical Association (GPhA) and Pharmaceutical Research and Manufacturers of America (PhRMA) for the FDA Symposium on the Hatch-Waxman Act in January 2002. I have supplemented these items with the fruits of my own research.

This opinion proceeds by (1) examining the relevant statutory provisions and the manner in which they have been implemented through FDA regulations; (2) assessing how FDA has been given the statutory grant to allow "carve-outs" for indications and other labeling information protected by patent or exclusivity, in light of traditional rules of statutory interpretation; and (3) determining whether the FDA is at liberty to depart from the clear statutory text and intent in allowing such carve-outs, particularly when controlling judicial precedent has held that Congress has spoken to this issue, within the meaning of the relevant holding of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

### A. Relevant Statutory and Regulatory Background.

21 U.S.C. § 355(j) is the crucial statutory provision in determining whether FDA has the authority to permit generics to file ANDAs for products with indications or labeling not subject to exclusivity, even though those indications or labeling may not precisely match the current presentation of the product by the pioneer drug manufacturer. Section 355(j)(2)(A)(i) requires that an abbreviated application for a new drug contain: "information to show that the conditions of use prescribed, recommended, or suggested in the labeling proposed for the new drug have been previously approved for a drug listed under paragraph (7) (hereinafter in this subsection referred to as a 'listed drug')." *Id.* Moreover, section 355(j)(2)(A)(ii)(v) requires the ANDA applicant to submit

(v) information to show that the labeling proposed for the new drug is the same as the labeling approved for the listed drug referred to in clause (i) except for changes required because of differences approved under a petition filed under subparagraph (C) or because the new drug and the listed drug are produced or distributed by different manufacturers.

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Id.

The complications that arise in the interpretation of these statutory provisions occur where a brand pharmaceutical company makes changes in the composition, appearance, dosing, administration or labeling of a product, pursuant to supplemental NDA provisions under section 355(j)(5)(D)(iv). FDA acceptance of such changes would typically trigger three-year exclusivity for the product. Brand manufacturer changes can be major or minor, reflecting major scientific breakthroughs (which might cast doubt on the safety and effectiveness of the prior product) or merely marketing gambits (such as minor changes in appearance or dosing of the product). In any event, brand manufacturers have not only claimed three years of exclusivity for minor changes, but also have sought to completely block the approval and marketing, under 355(j), of the generic version of the previous brand product, even where there is no question that the former version of the product is safe and effective. In essence, brand manufacturers have sought to interpret the language of 355(j) by asserting that any new supplemental NDA provides 36 month exclusivity for the new product (as altered), as well as prohibiting any marketing of a generic version of the former, "superseded" product.

For this proposition, brand manufacturers have relied on the language in 355(j)(2)(A)(ii)(v) that the "labeling proposed for the new drug is the same as the labeling approved for the listed drug." Id. According to this argument, the ANDA applicant is in a "Catch-22": they must apply for a product with the same label as a listed drug, but in so doing they run afoul of the brand manufacturer's exclusivity. Under this theory, even minor or trivial changes in a product – which have no bearing on a drug's safety and effectiveness – would preclude any generic entry for that product (in either its earlier or later forms).

Previously issued regulations by the FDA have seemingly resolved this paradox by ruling that "differences between [a generic applicant's] proposed labeling and labeling approved for the [brand drug] may include . . . omission of an indication or other aspect of labeling protected by patent or accorded exclusivity under section 505(j)(5)(D) of [the Hatch-Waxman Act]." 21 C.F.R. 314.94(a)(8)(iv). Additionally, the FDA by regulation has indicated that differences in generic and brand labels were permitted where "aspects of the listed drug's labeling are protected by patent, or by exclusivity, and such differences do not render the proposed drug product less safe or effective than the listed drug for all remaining, non-protected conditions of use." 21 C.F.R. 314.127(a)(7). See also Draft Guidance, at lines 146-54. More generally, the FDA has interpreted section 355(j)(2)(A)(v) to permit changes in labeling because of "differences in expiration date, formulation, bioavailability, or pharmacokinetics, [or] labeling revisions made to comply with current FDA labeling guidelines or other guidance." 21 C.F.R. § 314.94(a)(8)(iv).

One last element needs to be reviewed in the context of the statutory and regulatory

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background to the drug labeling and exclusivity issue. On January 4, 2002, Public Law 101-109 (Best Pharmaceuticals for Children Act) was signed into law, section 11 of which speaks to this issue in the context of pediatric drugs and clarifies that a subsequent addition of labeling information for a drug for use with children will not serve as a bar for generic entry for previous versions of that drug. See *id.* section 11(a)(3)(C) (“this sub-section does not effect . . . the question of the eligibility for approval of any application under section 505(j) that omits any other conditions of approval entitled to exclusivity under clause (iii) or (iv) of section 505(j)(5)(D)”). It is important to realize, however, that the underlying section for this amendment – 21 U.S.C. §§ 355a(b) & (c) – differs in material respects with section 355(j). Thus the argument that a congressional change is required to resolve the ambiguity of generic entry for previous iterations of non-pediatric drugs does not necessarily follow. Indeed, I conclude (as discussed below) that the text and legislative history of section 355(j) clearly stipulates that FDA has the authority to allow a carve-out for indications and labeling not the subject of exclusivity.

### **B. Statutory Authority for Carve-Out of Labeling and Indication Requirements.**

Application of traditional means of statutory interpretation clearly lead to the conclusion that FDA has the authority to permit generic drug manufacturers to obtain approval of products seeking fewer indications than were approved for the pioneer drug, or using different labels than a brand product in cases where sections of the brand labeling are still covered by patent or exclusivity. I reach this conclusion based on both the application of textual and contextual interpretation of the relevant provisions of section 355(j), as well as accepted usages of legislative history as manifesting the clear intent of Congress on this point. Finally, and perhaps most importantly, this interpretation of the statute has been the only one validated by judicial decisions.

#### **1. Textual and Contextual Readings**

The textual basis for FDA’s authority arises from (1) a cross-reading of the relevant provisions, and (2) the number of qualifications that are found in section 355(j)(2)(A)(v)’s language. While the introductory passage for the provision indicates that the ANDA applicant must provide “information to show that the labeling proposed for the new drug is the same as the labeling approved for the listed drug referred to in clause (i)” a glance at the cross-reference to 355(j)(2)(A)(i) shows that the “same . . . labeling” requirement is not necessarily made in relation to a listing as amended by a supplemental NDA under section 355(j)(5)(D)(iv). In other words, the “same . . . labeling” requirement is satisfied by a generic entering an application with labeling information that matches the label on any earlier NDA filed by a brand-name pharmaceutical maker.

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This is confirmed by the reference to 355(j)(2)(A)(i) which mentions a drug “*previously approved*”. 21 U.S.C. § 355(j)(2)(A)(i) (emphasis added); see also id. § 355(j)(4)(B) (FDA may reject an ANDA in which it is not claimed that the proposed conditions of use have been “*previously approved*”). Congress is presumed to mean what it says, and words used in a statute are to be construed according to their ordinary or natural meaning. See *Perrin v. United States*, 444 U.S. 37, 42 (1979) (words not defined in statute should be given ordinary or common meaning). By using the term “*previously*” in its cross-reference in 355(j)(2)(A)(v), Congress intended to allow reference not only to the product’s currently-approved conditions of use and labeling, but also to those conditions of use and labeling that were “*previously*” – but not necessarily currently – approved. Any other interpretation would render the word “*previously*” as mere surplusage, and established canons of statutory interpretation are adamant that all words in a statute should be given force. It is “a cardinal principle of statutory construction” that “a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” *Duncan v. Walker*, 533 U.S. 167, 121 S.Ct. 2120, 2125 (2001) (internal quotation marks omitted); see *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute.’” (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883))).

Even more significant are the express statutory exemptions even from this requirement of “*same . . . labeling*.” Under section 355(j)(2)(A)(v), the requirement is waived where “*changes [are] required because of differences approved under a petition filed under subparagraph (C)*” [suitability petitions] or because of deliberate differences in absorption rates of drugs (under section 355(j)(8)(B)(ii)), lastly and most pertinently, because of changes required “*because the new drug and the listed drug are produced or distributed by different manufacturers.*” A straightforward reading of the statute would thus indicate that the “*same . . . labeling*” requirement is simply inoperative when the new drug and listed drug are produced or distributed by different manufacturers. And, as will be considered below, this may be consistent with the legislative purpose of this provision as being a limit on the brand-name manufacturer’s ability to monopolize production of certain drugs.

Viewing the language of 355(j)(2)(A)(v) in its entire context, including the cross-references, and related provisions, yields an interpretation consistent with the view that FDA has the statutory authority – if not the express obligation – to grant ANDAs with variant labeling and indicative elements. See *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988) (statutory interpretation is a “holistic endeavor”); *United States Dep’t of Defense v. National Labor Relations Authority*, 510 U.S. 487, 494 (1994); *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986). And even if one were limited to the strict words of the text of 355(j)(2)(A)(v) – because, after all, “The starting point in statutory interpretation is ‘the language [of the statute] itself.’” *United States v. James*, 478 U.S. 597, 604

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(1986) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)) – that would still produce an interpretation that tends to support the statutory authority of the FDA in granting variant ANDAs.

### 2. Legislative History

I am satisfied that a textual reading of section 355(j) suffices to confirm that Congress has clearly and unambiguously authorized the FDA to grant ANDAs which reference a drug's previously approved conditions of use and labeling, so long as there is no question that such conditions of use and labeling are for a safe and effective drug. Such a textual conclusion would, happily, end my labors, because I am a strong advocate of textualism in statutory construction. In an abundance of caution, however, I did proceed to research the legislative history of the Hatch-Waxman amendments to the Food and Drug Act, which produced the currently-codified code section at 21 U.S.C. § 355(j). What I discovered may be one of the strongest examples I have yet uncovered of legislative history manifestly confirming a clear statutory command.

The Report accompanying the House version of Hatch-Waxman, expressly noted that the Act “permits an ANDA to be approved for less than all of the indications for which the listed drug has been approved.” H.R. Rep. No. 857(I), 98<sup>th</sup> Cong., 2d Sess. 21-22, reprinted in U.S.C.C.A.N. 2654-55. As hardly needs to be explained, such Reports – often conveying the work of the Congressional committee charged with considering a piece of legislation, as well as a section-by-section analysis of a bill – is considered the most probative evidence of congressional intent through legislative history. See *Busic v. United States*, 446 U.S. 398, 405 (1980). But the House Report is probative in this instance, precisely because it is bolstered by the clear text of the statute. Cf. *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994) (“But it is the statute, and not the Committee Report, which is the authoritative expression of the law, and the statute prominently omits reference to generation.”) (citations omitted).

### 3. Judicial Constructions of 355(j)

Lastly, it is important to realize that in properly construing section 355(j) as to whether the FDA must accept ANDAs which reference a drug's previous, but not currently, approved conditions of use and labeling, we are assisted by several credible judicial interpretations. Indeed, as I will suggest in the final section of this opinion letter below, these judicial interpretations may actually be binding on the FDA, and the agency may not be at liberty to depart from them.

The first of these cases is *Bristol-Myers Squibb Co. v. Shalala*, 91 F.3d 1493 (D.C. Cir.

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1996). In this matter, a drug manufacturer brought an action challenging FDA regulations governing approval of new generic drugs based on research paid for by manufacturer of a pioneer drug with which generic product was therapeutically interchangeable. The Court of Appeals, Douglas Ginsburg, Circuit Judge, held that FDA may approve ANDAs for new generic drug even though the label of the generic product will not include one or more indications that appear on the label of pioneer drug upon which ANDA is based.

The discussion of the D.C. Circuit Court of Appeals is clear and cogent in the interpretation of sections 355(j)(2)(A)(i) and 355(j)(2)(A)(v), and it is worth quoting in its entirety:

The crux of the dispute is whether 21 U.S.C. § 355(j)(2)(A)(v) permits the agency to approve an ANDA for a new generic drug even though the label of the generic product will not include one or more indications that appear on the label of the pioneer drug upon which the ANDA is based. BMS [Bristol-Myers Squibb] rests its case squarely upon the first step in the analysis prescribed in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Thus, the question is whether the Congress has directly addressed the issue now in dispute. BMS argues that it has, and that the statute clearly precludes such approval, as follows: Section 355(j)(2)(A)(v) requires that the generic label be "the same" as that of the pioneer; there are two exceptions in the statute that, by negative implication, preclude all others; and neither exception permits the label of a generic product approved under § 355(j) to list fewer than all the indications listed on the label of the pioneer drug upon which the ANDA of the generic drug is based. Q.E.D.

Not so, says the Secretary. One of the statutory exceptions to the same-label requirement does "accommodate the situation in which the generic drug manufacturer has sought [§ 355(j)] approval for fewer than all of the indications of the pioneer manufacturer's drug." That exception is for "changes required ... because the new drug and the listed drug are produced or distributed by different manufacturers." 21 U.S.C. §355(j)(2)(A)(v). We agree.

First, only the Secretary's interpretation of § 355(j)(2)(A)(v) works in harmony with two other provisions of the Act. Section 355(j)(2)(A)(i) requires that an ANDA include "information to show that the conditions of use prescribed, recommended, or suggested in the labeling proposed for the new drug have been previously approved for a [listed] drug." This requirement would be redundant if the same label-requirement in § 355(j)(2)(A)(v) applied to indications for use. In addition, § 355(j)(3) lists the circumstances in which the Secretary may disapprove an ANDA; that the labeling

**David J. Bederman, Esq.**

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proposed for the new generic does not list every indication approved for the pioneer is not among these. Instead, § 355(j)(3)(B) provides that the Secretary may disapprove an ANDA if "the information submitted with the application is insufficient to show that each of the proposed conditions of use have [sic] been previously approved for the listed drug referred to in the application." In other words, the statute expresses the legislature's concern that the new generic be safe and effective for each indication that will appear on its label; whether the label for the new generic lists every indication approved for use of the pioneer is a matter of indifference.

Second, and still more persuasive, § 355(j)(4)(D)(iv), by its terms, appears to protect the manufacturer of a pioneer drug only against the manufacture of a generic substitute using the pioneer's proprietary research undertaken to obtain approval for a supplemental indication. The appellant's interpretation of § 355(j)(2)(A)(v), however, would turn § 355(j)(4)(D)(iv) into a bar to the generic manufacturer's use of research undertaken to obtain approval for any indication for the pioneer drug, a reading that offers much broader protection from competition than § 355(j)(4)(D)(iv) would otherwise confer. Under BMS's interpretation, every time a supplemental indication is added to the labeling of a pioneer drug, the manufacturer of the pioneer would get three more years of protection against the approval of any ANDA based upon that pioneer drug, including one that lists only the original indication(s) of the pioneer. By way of contrast, under the Secretary's interpretation of the Act, a pioneer drug manufacturer that obtains approval for a supplemental indication based upon proprietary research will enjoy three years during which the FDA will not approve any ANDA that includes the supplemental indication. BMS claims that economic reality renders the protection offered by the Secretary largely an illusion. Perhaps so, but why? By BMS's own account, it is because the value of the protection the Congress most clearly conferred upon pioneers would be greater but for some state laws and health insurers that mandate substitution of generic drugs. That is not a sufficient basis upon which to conclude that the Congress intended to confer upon the manufacturers of pioneer drugs the much broader protection that BMS now seeks.

Finally, we note that the Secretary's interpretation finds unusually strong support in the legislative history of § 355(j). The Report accompanying the House bill expressly noted that it "permits an ANDA to be approved for less than all of the indications for which the listed drug has been approved." H.R.Rep. No. 857 (Part I), 98th Cong., 2d Sess. 21-22, reprinted in 1984 U.S.C.C.A.N. 2654-55. BMS points out that the three-year period of exclusivity for supplemental indications in § 355(j)(4)(D)(iv) was added to the bill after the report was written, but that does not undermine the Secretary's argument. It suggests merely that the Congress added that provision understanding that § 355(j)(2)(v) does not prevent a generic manufacturer from obtaining approval for fewer

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indications than the FDA has approved for the pioneer--which is precisely the way in which the Secretary interprets the Act.

91 F.3d at 1499-1500.

A similar result was reached by the U.S. Court of Appeals for the Fourth Circuit in *Zeneca, Inc. v. Shalala*, 213 F.3d 161 (4th Cir. 2000). The Fourth Circuit concluded that FDA regulations, including 21 C.F.R. § 314.94(a)(8) permit labeling variations because of formulation changes or changes made to comply with prevailing FDA labeling guidances, and provided sufficient leeway to allow the labeling changes for the generic product at issue in the case. See 213 F.3d at 169-70.

Thus, of the two court of appeals to have considered the interpretation of section 355(j), both held that FDA is statutorily authorized to accept ANDAs which reference a drug's previous, but not currently, approved conditions of use and labeling.

**C. Interpretive Departure and *Chevron*.**

That leaves one final question to be answered in this opinion: may the FDA legitimately depart from the clearly-established construction of section 355(j) which gives FDA the statutory authorization to accept ANDAs with superseded labeling or conditions of approval? Under the rule of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), if a court of competent authority has held that a statutory text is clear (under *Chevron* "step one" analysis), and thus no deference to agency interpretation is required (under *Chevron* "step two"), then the meaning of the statute is fixed and the agency (nor any other party for that matter) is not at liberty to depart from that interpretation, absent an intervening change or amendment to the statutory text. This rule nullifying *Chevron* deference to agency interpretations, and denying interpretive departures by agencies, has been consistently followed by the U.S. Supreme Court. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination."); *California v. FERC*, 495 U.S. 490, 499 (1990).

For starters, there have been no amendments made to Hatch-Waxman which affect the relevant portions of section 355(j). The question thus becomes one of whether the D.C. Circuit's decision in *Bristol-Myers Squibb Co. v. Shalala*, 91 F.3d 1493 (D.C. Cir. 1996), was made under "step one" of *Chevron* (interpreting the statute's "clear meaning"), or, rather, under *Chevron*

**David J. Bederman, Esq.**

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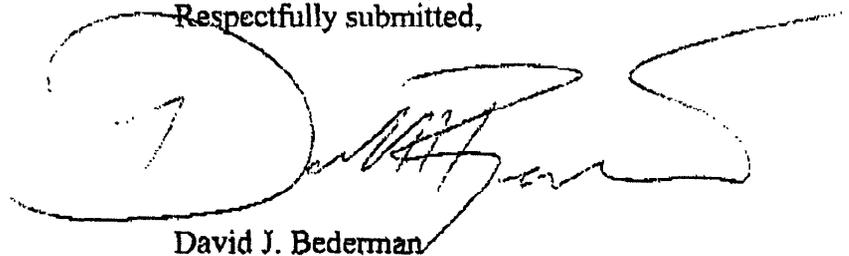
“step two” where the rendering court deferred to the agency interpretation under the gracious standard of that case. I believe the plain reading of the *Bristol-Myers* decision is that the D.C. Circuit ruled under the first step of the *Chevron* analysis. Indeed, only that first step is mentioned in the decision. See 91 F.3d at 1499. In rejecting BMS’s submission in the case, the D.C. Circuit squarely aligned itself with the FDA’s textual construction of the “clear meaning” of the statute. Although somewhat more equivocal, the Fourth Circuit’s decision in *Zeneca, Inc. v. Shalala*, 213 F.3d 161 (4th Cir. 2000) appears to reach a similar conclusion, although that opinion does mention *Chevron* “step-two” deference.

I am mindful that agencies should be given the freedom to change their minds in the interpretation of what courts have found to be ambiguous statutes. But all courts that have considered the issue have concluded that section 355(j) is *not* ambiguous as to acceptance of ANDAs with superseded labeling or conditions of approval. In view of these holdings, my opinion would be that the FDA is not a liberty to advance a contrary interpretation to that decided earlier by courts as the “clear meaning” of the relevant statutory provisions. Any other rule would allow agencies to subvert principles of stare decisis, as well as the clear statutory mandates of Congress.

### **Conclusion**

I conclude that under the relevant provisions of 21 U.S.C. § 355(j), the FDA has ample statutory authority to permit generic drug manufacturers to obtain, through ANDAs, approval of products seeking fewer indications than were approved for the pioneer drug, or using different labels than a brand product in cases where sections of the brand labeling are still covered by patent or exclusivity. The Draft Guidance issued by the FDA in October 2000 is thus also supported by ample statutory authorization.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David J. Bederman', is written over a large, faint circular stamp or watermark.

David J. Bederman

April 2002

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### III

#### Academic Appointments

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School of Law (Fall 1995)  
Visiting Associate Professor of Law, University of  
Virginia School of Law (1996 - 1997)  
Distinguished Fulbright Chair, Osgoode Hall Law School,  
York University, Canada (Fall 2001)  
Professor, Emory University School of Law (1997 - present)

#### Teaching Interests

Public International Law (9 years)  
International Institutions (6 years)  
International Environmental Law (Seminar) (3 years)  
Torts (4 years)  
Legal Methods (3 years)  
Admiralty (4 years)  
Constitution & Foreign Relations (Seminar) (4 years)  
Law of International Common Spaces (7 years)  
Customary Law (with Prof. Harold J. Berman) (4 years)  
Law of the Sea (Seminar) (1 year)  
War and Terrorism (Seminar) (1 year)

#### Teaching Materials Developed

*The Law of International Institutions: Selected Issues and*

Materials (revised to 2001)  
The Law of International Common Spaces: Selected Materials  
and Case Studies (revised to 2001)  
Customary Law: Selected Materials and Problems (with Harold  
J. Berman) (revised to 1999)

Professional Affiliations & Activities

President, Procedural Aspects of International Law (PAIL)  
Institute, October 1996 - present  
Member, American Society of International Law, Executive  
Committee, April 2000 - April 2001  
Member, American Society of International Law, Executive  
Council, April 1998 - April 2001  
Co-Chair, American Society of International Law, Annual  
Program Committee, 2001  
Member, American Society of International Law, Annual  
Program Committee 2000  
Co-Chair, American Society of International Law/Dutch  
Society of International Law Joint Meeting Planning  
Committee, 1999  
Chair & Reporter, American Society of International Law  
Panel on State Responsibility, January 1993 - present  
Member, American Bar Association Section of International  
Law & Practice, Working Group on the Foreign Sovereign  
Immunities Act, May 1998 - present  
Member, International Law Association (U.S. Branch)  
Executive Committee, November 1994 - present  
Member, International Law Association Committee on  
Diplomatic Protection of Persons and Property, May 1997 -  
present  
Member, International Law Association Committee on  
Transnational Enforcement of Environmental Law,  
August 1999 - present  
Member, International Law Association (U.S. Branch)  
Committee on the Formation of Customary International Law,  
January 1998 - present  
Member, International Law Association (U.S. Branch)  
Committee on Maritime Neutrality, November 1994-July 1998  
Chairman, International Law Association (U.S. Branch)  
Committee on International Law in U.S. Courts,  
July 1992 - December 1994  
Chairman, Subcommittee on the Marine Environment,  
International Environmental Law Committee of the  
American Bar Association's Section of International  
Law and Practice, October 1990 - April 1992  
Member, Academic Council, Institute for Transnational  
Arbitration  
Member, ABA Section of International Law and Practice,  
Amicus Brief Committee, April 1996 - August 1998

Member, International Law Association (U.S. Branch)  
Annual Meeting Committee (1993 & 1997)  
Member, Maritime Law Association of the United States  
Committee on Uniformity of U.S. Maritime Law

#### Advisory Committees and Governmental Consultations

Member, Shipping Coordination Committee of the U.S.  
Department of State, November 1990 - present  
Member, International Working Group, Advisory Committee,  
National Invasive Species Council (2000)  
International Law Consultant to the  
U.S. Department of State, August 1999 - present  
U.S. Department of Justice, September 1999 - present  
Overseas Private Investment Corporation (OPIC),  
1996 - 1998  
Internal Revenue Service (IRS), 1997 - 1998

#### Editorial Boards

Board of Editors, AMERICAN JOURNAL OF INTERNATIONAL LAW,  
April 1999 - present  
Editorial Board, JOURNAL OF MARITIME LAW AND COMMERCE,  
October 1999 - present  
Editorial Board, JOURNAL OF THE HISTORY OF INTERNATIONAL  
LAW/REVUE D'HISTOIRE DU DROIT INTERNATIONAL, April 1998 -  
present  
Editorial Board, GROTIANA  
Board of Advisors, VIRGINIA JOURNAL OF INTERNATIONAL LAW  
Faculty Advisor, EMORY INTERNATIONAL LAW REVIEW  
Member, Editorial Board, Procedural Aspects of International  
Law Institute, January 1994 - present  
Case Note Editor, JOURNAL OF MARITIME LAW AND COMMERCE, June  
1995 - October 1999

#### Scholarships, Honors & Prizes

Francis Deák Prize, AMERICAN JOURNAL OF INTERNATIONAL LAW  
Board of Editors, 1989  
Winner, Bruno Bitker Essay Contest, ABA Standing  
Committee on World Order Under Law, 1988  
Raven Society, University of Virginia, 1987  
Hardy Cross Dillard Prize, University of Virginia  
School of Law, 1986  
Baxter Scholarship, ABA International Law and  
Practice Section, 1986  
American Friends of the LSE Scholarship, American  
Friends of the London School of Economics, 1983-84  
Rhodes Scholarship Finalist (State of Georgia), 1982

David Lawrence Scholar, Princeton University, 1982-83

IV

Other Employment

COVINGTON & BURLING, Washington, D.C.  
Associate; December 1989 - June 1991

IRAN-UNITED STATES CLAIMS TRIBUNAL, The Hague  
Legal Assistant; November 1988 - December 1989

HON. CHARLES E. WIGGINS, NINTH CIRCUIT U.S. COURT OF  
APPEALS, Reno, Nevada  
Judicial Clerk; September 1987 - September 1988

COVINGTON & BURLING, Washington, D.C.  
Summer Associate; May - July 1987

KILPATRICK & CODY, Atlanta, Georgia  
Summer Associate; May - July 1986

McGLINCHEY, STAFFORD, MINTZ, CELLINI & LANG, New Orleans  
Summer Associate; June - August 1985

Bar Admissions

Georgia, December 1987  
District of Columbia, October 1988  
U.S. Court of Appeals for the Ninth Circuit, April 1988  
U.S. District Court for the District of Columbia,  
August 1990  
U.S. Court of Appeals for the Federal Circuit, April 1991  
U.S. Court of Appeals for the Third Circuit, November 1991  
U.S. Supreme Court, December 1991  
U.S. Court of Appeals for the Eleventh Circuit, June 1992  
U.S. Court of Appeals for the Fourth Circuit, May 1997  
U.S. Court of Appeals for the Tenth Circuit, October 1997  
U.S. Court of Appeals for the Eighth Circuit, January 1999  
U.S. Court of Appeals for the Second Circuit, February 2001

Reported Cases as Counsel

Boos v. Barry, 485 U.S. 312 (1988) (dignity of foreign  
embassies and First Amendment) (amicus)  
Georgia v. South Carolina, 497 U.S. 376 (1990)  
(lateral seaward boundary dispute)  
In re Baker, 579 A.2d 676 (D.C. 1990)  
(bar admissions challenge)  
Lucas v. South Carolina Coastal Council, 505 U.S. 1003

(1992) (regulatory takings under fifth amendment)  
United States v. Steinmetz, 973 F.2d 212 (3d Cir. 1992)  
(title to wreck under international law)  
Smith v. United States, 507 U.S. 197 (1993)  
(federal tort claims from Antarctica)  
Stevens v. City of Cannon Beach, 510 U.S. 1207 (1994)  
(due process challenge to custom-based property law)  
Zych v. The SEABIRD, 19 F.3d 1136 (7th Cir. 1994)  
(constitutional challenge of Abandoned Shipwreck Act)  
Hess v. Port Authority Trans-Hudson, 513 U.S. 30 (1994)  
(11th Amendment and interstate compact entities)  
Action for a Clean Environment v. Georgia, 457 S.E.2d 273  
(Ga. App. 1995) (facial First Amendment challenges)  
Falcout Bros. v. The PANGAEA, 966 F. Supp. 1143 (S.D. Ala.  
1997) (salvage of derelict) (court-appointed amici)  
Regents of University of California v. Doe, 519 U.S. 425  
(1997) (Eleventh Amendment and federal indemnification)  
Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997)  
(quiet title actions against state officers)  
Eastman Kodak v. Kavlin, 978 F. Supp. 1078 (S.D. Fla. 1997)  
(arbitrary detentions and the Alien Tort Statute)  
California v. Deep Sea Research, Inc., 118 S.Ct. 1464 (1998)  
(Eleventh Amendment and ASA)  
Paraguay v. Gilmore, 134 F.3d 662 (4th Cir. 1998) (political  
question doctrine and treaty claims) (amicus)  
In re Straight, 143 F.3d 1387 (10th Cir. 1998) (Eleventh  
Amendment and bankruptcy)  
In re Burke, 146 F.3d 1313 (11th Cir. 1998) (11th Amendment  
and waivers in bankruptcy)  
Bouchard Transp. Co. v. Updegraff, 147 F.3d 1344 (11th Cir.  
1998) (11th Amendment and Liability Limitation actions)  
Sea Hunt, Inc. v. Unidentified Vessel, 22 F. Supp.2d 521  
(E.D.Va. 1998) (U.S. interventions for foreign  
nations); 181 F.R.D. 325 (unverified claims in in rem  
admiralty actions); 182 F.R.D. 206 (U.S. regulatory  
authority over shipwrecks offshore); 47 F. Supp.2d 678  
(E.D. Va. 1999) (abandonment of Spanish warships); 191  
F.R.D. 508 (deference in treaty interpretation); 221 F.3d  
634 (4<sup>th</sup> Cir. 2000).  
Illinois v. Zych, 710 N.E.2d 820 (Ill. 1999) (standard of  
abandonment for shipwrecks)  
In re Rose, 187 F.3d 926 (8th Cir. 1999) (11th Amendment and  
waivers in bankruptcy)  
Yukon Recovery, L.L.C. v. Certain Abandoned Property, 205 F.3d  
1189 (9<sup>th</sup> Cir. 2000) (insurance claims to shipwrecks)  
United States v. Locke, 529 U.S. 89 (2000) (validity of State  
shipping regulation) (counsel for amicus Maritime Law  
Association of the U.S.)  
C & L Enterprises, Inc. v. Citizens Potawatomi Indian Tribe  
of Oklahoma, 121 S.Ct. 1589 (2001) (arbitration clauses  
and tribal sovereign immunity)

### Testimony Given

U.S. Congress, House Subcommittee on Science of the Committee on Science, Space and Technology, February 8, 1994, Concerning Antarctic Environmental Protection Act of 1994, H.R. 3532 (delivered by Beth Claudia Marks)

U.S. Congress, House Subcommittee on Insular and International Affairs of the Committee on Interior and Insular Affairs, September 18, 1990, Concerning the Antarctica World Park and Protection Act of 1990, H.R. 4514 (delivered by Evelyn M. Hurwich)

District of Columbia Council, June 30, 1987, Protection for Foreign Officials, Official Guests, and Internationally Protected Persons Amendments Act of 1987

### Representations and Consultancies

PROCEDURAL ASPECTS OF INTERNATIONAL LAW (PAIL) INSTITUTE, Washington, D.C.

President and Trustee of non-profit NGO dedicated to research and study of international law, October 1996  
- present

ANTARCTICA AND SOUTHERN OCEAN COALITION, Washington, D.C.  
Board member and chief international law advisor for world's largest NGO dedicated to protecting the polar environment, January 1990 - present

NATIONAL COLLEGIATE CONFERENCE ASSOCIATION, New York  
President, Board of Directors of non-profit, educational organization associated with the United Nations, April 1983 - April 1985

ADVISORY COMMITTEE ON POLLUTION OF THE SEA, London, U.K.  
Accredited ACOPS observer to the International Maritime Organization's Conference on Liability and Compensation for Damages in Connexion with the Carriage of Certain Substances by Sea; January - June 1984

V

### Books

The Spirit of International Law (University of Georgia Press)

(forthcoming 2002)

The Visible College of International Law: Proceedings of the  
95<sup>th</sup> Annual Meeting (American Society of International Law)  
(2001) (edited with Lucy Reed)

International Law in Antiquity (Cambridge University Press)  
(2001)

Classical Canons: Classicism, Rhetoric and Treaty  
Interpretation (Ashgate Publishing) (2001)

International Law Frameworks (Foundation Press) (2001)

International Claims: Their Settlement by Lump Sum  
Agreements, 1975-1995 (with Burns H. Weston and Richard B.  
Lillich) (Transnational Publishers) (1999)

The Iran-United States Claims Tribunal: Its Contribution to  
to the Law of State Responsibility for Injuries to Aliens  
(edited with Richard B. Lillich and Dan Magraw)  
(Transnational Publishers & American Society of  
International Law) (1998)

### Articles

Maritime Preservation Law: Old Challenges, New Trends,  
— Widener L. Symp. J. — (2002)

Collective Security, Demilitarization and Pariah States,  
13 Eur. J. Int'l L. 121 (2002)

Globalization, International Law and U.S. Foreign Policy,  
50 Emory L.J. 717 (2001)

Grotius and His Followers on Treaty Construction, 3 J. Hist.  
Int'l L. 18 (2001)

Creditors' Claims in International Law, 34 Int'l Law. 235  
(2000)

Rethinking the Legal Status of Sunken Warships, 31 Ocean  
Dev. & Int'l L. 97 (2000)

Admiralty Jurisdiction, 31 J. Mar. L. & Com. 189 (2000)

Deference or Deception: Treaty Rights as Political  
Questions, 70 U. Col. L. Rev. 1439 (1999)

Historic Salvage and the Law of the Sea, 30 U. Miami Inter-  
Am. L. Rev. 99 (1998)

- The Jurisprudence of the Foreign Claims Settlement  
Commission: Iran Claims, 91 Am. J. Int'l L. 436 (1997)  
(with Richard B. Lillich)
- Admiralty and the Eleventh Amendment, 72 Notre Dame L. Rev.  
935 (1997)
- Uniformity, Delegation and the Dormant Admiralty Clause,  
28 J. Mar. L. & Com. 1 (1997)
- The Curious Resurrection of Custom: Beach Access and  
Judicial Takings, 96 Colum. L. Rev. 1375 (1996)
- The Souls of International Organizations: Legal Personality  
and the Lighthouse at Cape Spartel, 36 Va. J. Int'l L. 275  
(1996)
- Reception of the Classical Tradition in International Law:  
Grotius' *De Jure Belli ac Pacis*, 10 Emory Int'l L. Rev. 1  
(1996); 16-17 Grotiana (n.s.) 3 (1995-96)
- Dead Man's Hand: Reshuffling Foreign Sovereign Immunities  
in U.S. Human Rights Litigation, 25 Ga. J. Int'l & Comp.  
L. 255 (1995-96)
- The U.N. Compensation Commission and the Tradition of  
International Claims Settlement, 27 N.Y.U. J. Int'l L. &  
Pol. 1 (1994)
- Revivalist Canons and Treaty Interpretation, 41 UCLA  
L. Rev. 953 (1994)
- Nationality of Individual Claimants before the Iran-  
United States Claims Tribunal, 42 Int'l & Comp. L. Q.  
119 (1993)
- Article II Courts, 44 Mercer L. Rev. 825 (1993)
- The Cautionary Tale of Alexander McLeod: Superior Orders  
and the American Writ of Habeas Corpus, 41 Emory L. J.  
515 (1992)
- International Control of Marine "Pollution" by Exotic  
Species, 18 Ecology L. Q. 677 (1991)
- Contributory Fault and State Responsibility,  
30 Va. J. Int'l L. 335 (1990)
- Compulsory Pilotage, Public Policy, and the Early Private  
International Law of Torts, 64 Tul. L. Rev. 1033 (1990)
- Beneficial Ownership of International Claims,

38 Int'l & Comp. L. Q. 935 (1989)

Exploring the Foreign Country Exception: Federal Tort Claims in Antarctica, 21 Vand. J. Transnat'l L. 731 (1988)

The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist View of the Law of Nations, 82 Am. J. Int'l L. 1 (1988)

Extraterritorial Domicile and the Constitution, 28 Va. J. Int'l L. 451 (1988)

The Imagery of Injustice at Mussel Slough: Railroad Land Grants, Corporation Law, and the "Great Conglomerate West," 1 W. Legal Hist. 237 (1988)

The Bank for International Settlements and the Debt Crisis: A New Role for the Central Bankers' Bank?, 6 Int'l Tax & Bus. Lawyer 92 (1988)

High Risks in the High Arctic: Jurisdiction and Compensation for Oil Pollution from Offshore Operations in the Beaufort Sea, 4 Alaska L. Rev. 37 (1987)

#### Contributions to Books

Salvage, 8 Benedict on Admiralty: Desk Reference (first issued Apr. 2001)

CCAMLR in Crisis: A Case Study of Marine Management in the Southern Ocean, in The Law of the Sea: Emerging Issues and Inherited Doctrines 169 (H. Scheiber ed. 2000)

Eligible Claimants Before the Tribunal, in The Iran-U.S. Claims Tribunal: Its Contribution to the Law of State Responsibility for Injuries to Aliens 47 (R. Lillich, D. Magraw & D. Bederman eds. 1998)

Banana Bills: Suppressing Speech About Food Safety, in Consuming Passions: Food in the Age of Anxiety 65 (Times Higher Education Supplement ed. 1998)

Border and Transborder Actions (Nicaragua v. Honduras), in Commentaries on World Court Decisions (1987-1997) 63 (P. Bekker ed. 1998)

The Curious Resurrection of Custom: Beach Access and Judicial Takings, in 1997 Zoning and Planning Law Handbook 203 (C. Carpenter ed. 1997)

Historic Analogues of the U.N. Compensation Commission, in The Thirteenth Sokol Colloquium on Private International Law: The U.N. Compensation Commission 257 (R. Lillich ed.) (1995)

The Glorious Past and Uncertain Future of International Claims Tribunals, in International Courts for the 21st Century 161 (M. Janis ed. 1992)

The Hague Peace Conferences of 1899 and 1907, in International Courts for the 21st Century 9 (M. Janis ed. 1992)

Religion and the Sources of International Law in Antiquity, in The Influence of Religion on the Development of International Law 3 (M. Janis ed. 1991) & Religion and International Law 1 (M. Janis & C. Evans ed. 1999)

#### Book Reviews and Essays

95 Am. J. Int'l L. 245 (2001) (R. Tuck, The Rights of War and Peace (1999))

Constructivism, Positivism and Empiricism in International Law, 89 Geo. L. J. 469 (2001) (review essay of A. Arend, Legal Rules and International Society (1999))

565 Annals of the Am. Acad. of Pol. & Soc. Science 227 (Sept. 1999) (V. Harle, Ideas of Social Order in the Ancient World (1998))

93 Am. J. Int'l L. 538 (1999) (C. Brower & J. Brueschke, The Iran-United States Claims Tribunal (1998))

Theory on Ice: Antarctica in International Law and Relations, 39 Va. J. Int'l L. 467 (1998) (review essay of C. Joyner & E. Theis, Eagle Over the Ice: The U.S. in the Antarctic (1997); D. Rothwell, The Polar Regions and the Development of International Law (1996); Governing the Antarctic: The effectiveness and legitimacy of the Antarctic Treaty System (O. Stokke & D. Vidas, eds. 1996)).

The Feigned Demise of Prize, 9 Emory Int'l L. Rev. 31 (1995) (review essay of 11 J.H.W. Verzijl, International Law in Historical Perspective (1992))

88 Am. J. Int'l L. 403 (1994) (W. Mapp, The Iran-U.S. Claims Tribunal: The First Ten Years (1993))

- 7 Emory Int'l L. Rev. 693 (1993) (T. Franck, Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs? (1992))
- 24 Law & Pol'y Int'l Bus. 653 (1993) (J. Westberg, International Claims and Transactions Involving Government Parties: Case Law of the Iran-U.S. Claims Tribunal (1991))
- 33 Va. J. Int'l L. 239 (1992) (O. Schachter, International Law in Theory and Practice (1991))
- 86 Am. J. Int'l L. 411 (1992) (H. Bull, B. Kingsbury, A. Roberts (eds.), Hugo Grotius and International Relations (1990))
- 5 Emory Int'l L. Rev. 653 (1991) (V. Coussirat-Coustère & P. Eisemann, Repertory of International Arbitral Jurisprudence (1989 & 1991))
- 23 N.Y.U. J. Int'l L. & Pol. 217 (1990) (M. Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (1989))
- 84 Am. J. Int'l L. 775 (1990) (F. Kratochwil, Rules, Norms and Decisions (1989))
- 83 Am. J. Int'l L. 406 (1989) (F. Tesón, Humanitarian Intervention: An Inquiry into Law and Morality (1988))
- 83 Am. J. Int'l L. 211 (1989) (E.D. Brown & R.R. Churchill (eds.), The U.N. Convention on the Law of the Sea: Impact and Implementation (1987))
- Stalking Phaedrus, 18 Ga. J. Int'l & Comp. L. 527 (1988) (review essay of D. Kennedy, International Legal Structures (1987))
- 82 Am. J. Int'l L. 854 (1988) (H.J. Bourguignon, Sir William Scott, Lord Stowell: Judge of the High Court of Admiralty, 1798-1828 (1987))
- 27 Va. J. Int'l L. 945 (1987) (J.W. Kindt, Marine Pollution and the Law of the Sea (1986)) (with Ambassador Takeo Iguchi)

#### Shorter Articles and Other Published Scholarship

- Reforming the Foreign Sovereign Immunities Act, \_\_\_ Colum. J. Transnat'l L. \_\_\_ (2002) (with A. Vollmer, C. Bradley, M. Cymrot & J. Dellapenna)

- International Law Advocacy and its Discontents, 2 Chi. J. Int'l L. 475 (2001)
- International Decision, Larsen v. Kingdom of Hawaii, 95 Am. J. Int'l L. 927 (2001) (with K. Hilbert)
- I Hate International Law Scholarship (Sort Of), 1 Chi. J. Int'l L. 75 (2000)
- Second Newport Symposium: Sunken Treasure, 102 Il Diritto Marittimo 292 (2000)
- Agents of International Discourse: A Conspectus on the Future of International Law Journals, 40 Va. J. Int'l L. 817 (2000) (with J. Hamilton)
- The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal, 30 J. Mar. L. & Com. 331 (1999)
- Case Note, In re Air Crash Off Long Island, 30 J. Mar. L. & Com. 143 (1999) (with A. Cole)
- Food Libel: Litigating Scientific Uncertainty in a Constitutional Twilight Zone, 10 DePaul Bus. L. J. 191 (1998)
- International Decision, Abraham-Youri v. United States, 92 Am. J. Int'l L. 533 (1998) (with J. Borchert)
- Dooley v. Korean Air Lines, 1997-98 Preview of U.S. Supreme Court Cases (issue 7, April 8, 1998), at 431
- International Decision, United States v. Alaska, 92 Am. J. Int'l L. 82 (1998)
- Tribute to Richard B. Lillich: Remembrances of a Student, Perspectives from a Colleague, 38 Va. J. Int'l L. 67 (1997), and 4 ILSA J. Int'l & Comp. L. ii (1998) (no. 2, Spring)
- Case Note, Pierpoint v. Barnes, 28 J. Mar. L. & Com. 369 (1997) (with E. Snodgrass)
- Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes, 34 Harv. J. on Legis. 135 (1997) (with S. Christensen & S. Quesenberry)
- Case Note, Marine Coatings, Inc. v. United States, 27 J. Mar. L. & Com. 661 (1996) (with P. Bauer)

- Case Note, *Maritrans v. Balsa* 37, 27 J. Mar. L. & Com. 353 (1996) (with J. Mallinson)
- Case Note, *Faneuil Advisors, Inc. v. Sea Hawk*, 26 J. Mar. L. & Com. 621 (1995) (with J. Dehner)
- Zicherman v. Korean Airlines*, 1995-96 Preview of U.S. Supreme Court Cases (issue 2, Oct. 16, 1995), at 57
- International Decision, *Saghi v. Islamic Republic of Iran*, 87 Am. J. Int'l L. 447 (1993)
- International Law in Municipal Courts, [1993-94] Proceedings of the American Branch of the International Law Association 88
- International Decision, *United States v. Alaska*, 86 Am. J. Int'l L. 558 (1992)
- United States v. Alaska*, 1991-92 Preview of U.S. Supreme Court Cases (issue 8, Apr. 17, 1992), at 291
- The Antarctic and Southern Ocean Coalition's Convention on Antarctic Conservation: Introduction and Commentary, 4 Geo. Int'l Env'tal L. Rev. 47 (1991)
- International Decision, *Georgia v. South Carolina*, 84 Am. J. Int'l L. 909 (1990)
- International Decision, *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc.*, 84 Am. J. Int'l L. 556 (1990)
- International Decision, *Border and Transborder Armed Actions - Nicaragua v. Honduras*, 83 Am. J. Int'l L. 353 (1989)
- Prospects for European Air Deregulation, 21 Int'l Lawyer 561 (1987)

### Student Work

- Recent Development, *Ambassadors and Consuls - Finzer v. Barry*, 27 Va. J. Int'l L. 399 (1987)
- Dead in the Water: International Law, Diplomacy, and Compensation for Chemical Pollution at Sea*, 26 Va. J. Int'l L. 485 (1986)
- On Realistic Sino-American Military Cooperation*, 1 Princeton World Review 15 (1982)

Papers Given at Academic and Professional Conferences

- Section 1983 Litigation: Removal to Federal Court, Georgia  
ICLE, Atlanta, May 9, 2002 (presenter)
- Underwater Intervention, New Orleans, March 2, 2002, panels  
on shipwreck management and UNESCO Convention (speaker)
- Terrorism: Causes and Responses, Osgoode Hall Law School,  
Toronto, Sept. 25, 2001, Lawfulness of Forceful Responses  
to the Harboring of Terrorists (presenter)
- The Effects of and Responses to Globalization, Boğaziçi  
University, Istanbul, May 31-June 1, 2001, establishing new  
international regimes (presenter) (Halle faculty seminar)
- The Impact of International Law of a Decade of Measures  
Against Iraq, European University Institute, Florence, May  
24-25, 2001, arms control regimes (presenter)
- Tennessee Bar Association, International Business Law  
Symposium, Nashville, Apr. 27, 2001 (presenter)
- American Enterprise Institute, Washington, DC, Apr. 3-4, 2001,  
Symposium on American Sovereignty and Issues for the New  
Administration and New Decade (commentator)
- Tenenbaum Conference, Emory University, Nov. 1-2, 2000,  
Panel on legal regulation of hate speech (presenter)
- American Society of International Law, 2000 Meeting,  
Washington, D.C., April 6, 2000, panel on international  
crimes under the Alien Tort Statute (presenter) & April 8,  
2000, panel on State Responsibility (chair & presenter)
- Teaching Ancient Law in the Modern University, March 4,  
2000, Emory University (moderator)
- Underwater Intervention, Houston, January 25-27, 2000,  
panels on shipwreck management and Draft UNESCO Convention  
(speaker)
- Association of American Law Schools (Sections on Legal  
History & Maritime Law), Annual Meeting, Washington, D.C.,  
January 7, 2000, The Many Faces of Jensen (presenter)
- International Law Association (American Branch), Annual  
Meeting, New York City, November 6, 1999, panel on  
liability for environmental harm to Antarctica (presenter)
- Hague Joint Conference of International Law, May 19-22,

1999, The Hague, Conference co-Chair & Chair of Panel  
on WTO Jurisprudence

American Society of International Law, 1999 Meeting,  
Washington, D.C., March 27, 1999, panel on the  
Heritage of the Nineteenth Century (chair & presenter)

Fletcher School of Law and Diplomacy, Medford,  
Massachusetts, February 4, 1999, Adams Lecturer on  
International Resource Management and the Southern Ocean

Delegating Sovereignty: Constitutional and Legal  
Implications of U.S. Participation in Treaty Regimes,  
NYU School of Law, February 27-28, 1999 (participant)

Foreign Affairs Law at the End of the Century, University  
of Colorado Law School, Boulder, Colorado, January 22 &  
23, 1999, panel on separation of powers in foreign  
relations (presenter)

The Law of the Sea: A "Year of the Ocean" Symposium, Boalt  
Hall School of Law, Berkeley, October 30 - November 1,  
1998, panel on history of the law of the sea (discussant),  
panel on ocean regions and Southern Ocean (presenter)

Domestic and International Commercial Transactions,  
Atlanta, Oct. 3, 1998, panel on UNIDROIT Principles and  
customary law

Maritime Law Symposium, Newport, R.I., Aug. 13-15, 1998,  
debate on UNESCO Convention on Underwater Cultural  
Heritage

American Society of International Law, 1998 Meeting,  
Washington, D.C., April 4, 1998, panel on state  
responsibility (chair), remarks reprinted in Article  
40(2)(c) & (f) of the ILC Draft Articles on State  
Responsibility: Standing of Injured States Arising under  
Customary International Law and Treaties, 1998 Am. Soc'y  
Int'l L. Proc. 291.

Law of the Sea Institute, 31st Annual Conference, Miami,  
Florida, March 30, 1998, panel on underwater cultural  
heritage (presenter)

DePaul Law School Symposium on Limitations on Commercial  
Speech, Chicago, Illinois, March 6, 1998 (presenter),  
remarks reprinted in 10 DePaul Bus. L. J. 169 (1998)

Emory Law School Symposium on Religious Human Rights in the  
United States, January 29, 1998, Atlanta, Georgia,  
roundtable discussion on International Human Rights

standards in the United States (participant), proceedings reprinted in 12 Emory Int'l L. Rev. 973, 981 (1998)

International Law Association (American Branch), Annual Meeting, New York City, November 7, 1997, panel on Alien Tort Statute and human rights litigation (chair)

Fourth ASIL/NVIR Joint Meeting, July 2-5, 1997, The Hague, panel on comparative human rights enforcement (chair), proceedings reprinted in The Enforcement of Human Rights and Humanitarian Law by Civil Suits in Municipal Courts: The Civil Dimension of Universal Jurisdiction, in Contemporary International Law Issues: New Forms, New Applications - 1997 ASIL/NVIR Joint Conference 156 (1998)

Observer, 49th Session of the U.N. International Law Commission, Geneva (June - July 1997)

New Approaches to International Law, May 9-11, 1997, Harvard Law School, panel on international legal history scholarship

University de Paris I (Panthéon-Sorbonne), Faculté de Droit, Paris, November 28, 1996, speech on extraterritorial impact of U.S. sanctions laws

Conference on Administrative and Expert Monitoring of International Legal Norms, NYU School of Law, February 2-4, 1996 (participant)

International Law Association (American Branch), Annual Meeting, New York City, November 2, 1996, panel on Alien Tort Statute and human rights litigation (panelist)

American Law Institute-American Bar Association (ALI-ABA), Inverse Condemnation and Related Government Liability, Washington, D.C., October 17-19, 1996 (speaker)

International Law Association (American Branch), Annual Meeting, New York City, November 3, 1995, panel on U.S. law and international law (chair)

Harvard Law School, International Legal Practice Colloquium, March 9, 1995, paper on the Legal Personality of International Organizations: a Historical Approach

Third Meeting of the International Society for the Classical Tradition, Boston, Massachusetts, March 9, 1995, paper on The Reception of the Classical Tradition in International Law

New York University School of Law, Center for International

Studies, Guest Seminar, September 29, 1994, talk on historical aspects of recognition of international court judgments

The Thirteenth Sokol Colloquium on Private International Law: The U.N. Compensation Commission, Charlottesville, Virginia, April 15-16, 1994, panel on the contribution of the UNCC to the international claims settlement process

Colloquium on Customary International Human Rights Law, Athens, Georgia, March 4-5, 1994, panel on the problems of proving international human rights law in U.S. courts

International Law Association (American Branch), Annual Meeting, New York City, October 29, 1993, panel on the Supreme Court and international law (chair and presenter)

Federal Judicial Center, Maritime Law Seminar, Annapolis, Maryland, October 29-31, 1992, lectures on Collisions, Limitation of Liability and General Average

International Studies Association, 1992 Annual Meeting, Atlanta, Georgia, April 3, 1992, presentation on Teaching International Law

International Courts Institute, Executive Committee Meeting, Heidelberg, Germany, May 29-31, 1991, paper on International Claims Tribunals

American Bar Association, International Law Section Spring Meeting, Washington, D.C., April 26, 1991, Panel on the Oil Pollution Act of 1990 (moderator)

American Society of International Law, 1991 Meeting, Washington, D.C., April 20, 1991, Panel on the International Law Year in Review, paper on current judicial decisions, reprinted in 1991 ASIL Proceedings 574

American Society of International Law, 1988 Meeting, Washington, D.C., April 21, 1988, Panel on the History of International Law, reprinted in 1988 ASIL Proceedings 25 (reporter)

### Opinions and Editorials

In Titanic Case, IP and Admiralty Laws Collide,  
National Law Journal, October 19, 1998, at C18  
(with J. Prowda)

Gagging on Provisions, The Times Higher Education Supplement

(U.K.) (Nov. 14, 1997), at 18

Pollution Confusion, Fulton County Daily Report (Sept. 9, 1991), at § 3, p. 14

Professional Correspondence

International Legal Theory (American Society of International Law), volume 6, No. 1, at 9 (Spring 2000) (Henry Wheaton and 19<sup>th</sup> century international legal history)

Law of the Sea Institute's "L.O.S. Lieder," volume 6, No. 10, at 3 (July 1996) (Salvage Law, Archaeology and Shipwrecks)

Law of the Sea Institute's "L.O.S. Lieder," volume 6, No. 5, at 7 (April 1995) (Draft Convention on Underwater Cultural Heritage)

Law of the Sea Institute's "L.O.S. Lieder," volume 5, No. 7, at 5 (June 1993) (Protection of Underwater Cultural Heritage)

Law of the Sea Institute's "L.O.S. Lieder," volume 5, No. 3, at 5 (August 1992) (Flag States and Bareboat Charters)