

Korologos's Commandments

Perhaps no person has shepherded more people through the Senate confirmation process than Tom C. Korologos.

It's almost a hobby for Korologos, president of the Washington government relations firm of Timmons and Company Inc. and the former top Senate lobbyist for President Richard M. Nixon.

Those who have profited from attending the Tom Korologos cram school on how to be confirmed include Gerald R. Ford (en route to the vice presidency), Nelson Rockefeller (up to replace Ford), Henry Kissinger and Alexander Haig on their ways to becoming secretaries of State, and William Rehnquist and Antonin Scalia on their paths to becoming chief justice and associate justice, respectively, of the Supreme Court.

Korologos by his count has helped somewhere between 300 and 400 nominees win confirmation, including a score of Cabinet officers and more than 100 U.S. ambassadors. He does this pro bono. Here is some of that free advice:

1. Model yourself after a bridegroom at a wedding. Be on time, stay out of the way and keep your mouth shut.
2. Between the day of nomination and the day of confirmation, give no speeches, write no letters, make no public appearances. Senators do not like to read about grand plans of an unconfirmed nominee.
3. You may have been a brilliant success in the corporate world or some other field of endeavor, but the Senate expects you to be suitably humble and deferential, not cocky.
4. There is no subject on this Earth that the Senate is not free to probe. Be ready with polite and persuasive answers.
5. The purpose of the hearing is to get in and get out. Follow the 80-20 rule. If the senators are talking 80 percent of the time and you are talking 20, you are winning. If it's 60 for them and 40 for you, you've got a problem. If it's a 50-50, you're losing and the confirmation is in trouble.
6. The Constitution stops at the hearing room door. There are no rules of evidence like in a trial. It's not going to be fair or fun. There will be hearsay questions, irrelevant questions and even some stupid questions. Be ready for all of them.

FROM A SURVIVOR'S GUIDE FOR PRESIDENTIAL NOMINEES 75 (2000).

DEFUSED OPINION

“THE CONTROVERSY OVER the status of unpublished opinions is, to be sure, of great interest and importance, but this sort of factor will not save a case from becoming moot. We sit to decide cases, not issues, and whether unpublished opinions have precedential effect no longer has any relevance for the decision of this tax-refund case.” So spoke Judge Richard Arnold for a unanimous en banc United States Court of Appeals for the Eighth Circuit, vacating the panel decision in *Anastasoff v. United States* declaring unconstitu-

tional the court's local rule barring citation to unpublished opinions. The end of *Anastasoff* also ends the prospect of speedy determination of the constitutionality of federal court rules that permit judges to select those cases that will have precedential effect.

The air went out of *Anastasoff's* sails when the federal government informed the court that it had resolved the underlying dispute by paying, with interest, Faye Anastasoff's claim to a \$6,436 tax refund. As if to ensure the mootness of *Anastasoff*, the government also submitted an Internal Revenue Service “Action on Decision” statement that the IRS was aban-

doning the unpublished opinion on which the *Anastasoff* panel had relied and under which Ms. Anastasoff had lost (*Christie v. United States*), and acquiescing in a Second Circuit decision (*Weisbart v. United States*) under which Ms. Anastasoff would have prevailed.

Eighth Circuit Rule 28A(i) and its siblings in other courts have survived to serve again, at least for now.

Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 Green Bag 2d 17 (2000); *Anastasoff v. United States*, 223 F.3d 898, vacated, no. 99-3917EM (8th Cir., Dec. 18, 2000) (en banc); *Weisbart v. United States*, 222 F.3d 93 (2d Cir. 2000); *Christie v. United States*, no. 91-2375MN (8th Cir, Mar. 20, 1992) (per curiam).

THE HORSE COMES HOME TO ROOST

INTERNET EXCEPTIONALISM is waning. Dot-com investors have learned that sometimes stock prices are linked to financial performance. And dot-com consumers have begun to learn that there is no direct correlation between media salivation over a dot-com merchant and that merchant's capacity to provide high-quality products or low prices or quick delivery.

In a related development, late-blooming champions of traditional, bricks-and-mortar legal concepts are appearing on the Internet – at least when it comes to the law of property. They have discovered the costs of, among other things, giving away information that they could sell if only they could shut down free access to portions of the Internet that they now view as their own. In other words, they have lost their faith in the law of the horse.

In 1996 Judge Frank Easterbrook cautioned against the creation of special property laws for cyberspace. He described the craze for e-law as an example of what Karl Llewellyn called the “the law of the horse.” Llewellyn was

contrasting the Uniform Commercial Code (“rules for trade between merchants,” “a menu of options from which they could choose at low cost”) with the law of the horse (“rules for idiosyncratic transactions between amateurs”). In place of a special law of the cyber-horse, Easterbrook proposed: “Develop a sound law of intellectual property, then apply it to computer networks.” Experience appears to be teaching that Easterbrook was right. As e-businesses become less amateurish, as the pressures of the market begin to sort out losers as well as winners, netizens look for some regular rules to govern the sorting.

Maureen O'Rourke of Boston University reports that the dot-com pioneers of yesterday – Amazon, eBay, and their ilk – are leading the charge. Having staked their claims to pieces of the ether and developed valuable brand identities, product and market information, and other goodies, these e-big businesses are as committed as any bricks-and-mortar Neanderthal to profiting from information capital and keeping customers loyal by keeping them in the dark about the comparative value of others' products and services.

O'Rourke focuses on current litigation over the access of shopbots – Internet services that gather pricing and other information from numerous web retailers and provide it to consumers in a format that facilitates comparison shopping – to the web sites of major players such as eBay. But her thoughtful proposals – amounting essentially to a soft landing in a rationalized, generally applicable property law regime – are specific manifestations of the themes identified by Easterbrook long ago: (1) make rules clearer, to promote bargains; (2) create property rights, where now there are none – again to make bargains possible; and (3) create bargaining institutions.

Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. Chi. Legal F. 207; Maureen A. O'Rourke, *Shaping Competition on the Internet*, 53 Vand. L. Rev. 1965 (2000).