



DIRECTORS
ROUNDTABLE

WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

Joshua Mintz

& the Law Department of the MacArthur Foundation

THE SPEAKERS



Joshua Mintz

Vice President, General Counsel and Secretary, The John D. and Catherine T. MacArthur Foundation



Douglas Varley

Member, Caplin & Drysdale, Chartered



Kimberly Eney

Counsel, Latham & Watkins LLP



Tomer Inbar

Partner, Patterson Belknap Webb & Tyler LLP



Norah Jones

Partner, Quarles & Brady LLP

(The biographies of the speakers are presented at the end of this transcript. Further information about the Directors Roundtable can be found at our website, directorsroundtable.com.)

TO THE READER

General Counsel are more important than ever in history. Boards of Directors look increasingly to them to enhance financial and business strategy, compliance, and integrity of corporate operations. In recognition of our distinguished Guest of Honor and his colleagues, we are honoring Joshua Mintz and the Legal Department of the MacArthur Foundation with the leading global honor for General Counsel and law departments.

The John D. and Catherine T. MacArthur Foundation supports creative people, effective institutions, and influential networks building a more just, verdant and peaceful world. His address focused on key issues facing the General Counsel of an international not-for-profit in the context of the evolving nature of philanthropy and the role of private foundations in effecting social change. The panelists discussed this important topic with the Guest of Honor and shared their expertise on other key issues for tax-exempts and their donors.

The Directors Roundtable is a civic group which organizes the preeminent worldwide programming for Directors and their advisors, including General Counsel. Join us on social media for the latest news for Directors on corporate governance and other important VIP issues.



Joshua Mintz

*Vice President, General Counsel
and Secretary*



As Vice President, General Counsel (since 1994) and Secretary of the Foundation, Josh is responsible for the overall legal affairs of the Foundation worldwide and is a member of the Executive Leadership Team that advises the President of the Foundation on policy matters and strategic direction. He also coordinates the work of MacArthur Advisory Services, an initiative of the Foundation through which MacArthur staff with appropriate expertise advises other foundations, corporate donors, and individual donors on a range of issues and questions and help connect such donors to other external resources when appropriate. He oversees the Foundation’s small philanthropy grant portfolio and is an officer and on the board of various affiliates of the Foundation, including current Board Chair of Arc Chicago LLC, the fund established by the Foundation to make investments to further the Benefit Chicago initiative.

Prior to joining the Foundation, Josh was a partner with the law firm of Sidley Austin LLP, specializing in commercial litigation and business reorganization, including real estate restructurings.

Josh currently serves as the Chairman of the Board of Security Council Reports, a charitable organization whose mission is to make the work of the Security Council more effective and transparent. He also serves on the Board of Collective Shift (and

on the Audit Committee), a not-for-profit organization dedicated to redesigning social systems for the connected age. He is also on the Board of the Francis W. Parker School, an independent private school, where he is Chairman of the Audit Committee. Josh is past President and a member of the Board of Directors of the Juvenile Protective Association, a not-for-profit organization providing counseling and other services to children at risk and their families. He was a member of the Board of Directors of the Council on Foundations where he was the Chairman of the Audit Committee and member of the Governance Committee from 2011 through 2017. Josh was also a member of the Board of Directors of the Donors Forum from 2003-2009, where, during various periods, he served as the Treasurer, the Chair of the Audit/Finance Committee, and the Chairman of the Compensation/Benefits Committee. He was also a member of the Legal Framework Work Group of the Panel on the Non-profit Sector convened by Independent Sector.

Josh received his J.D. from the University of Miami School of Law, magna cum laude, in 1981. He teaches a one-week short course on *Emerging Forms of Philanthropy and the Role of Private Foundations in Effecting Social Change* at the Law School. He has a Bachelor of Arts degree in history/education from the University of Colorado.

The John D. and Catherine T. MacArthur Foundation

The John D. and Catherine T. MacArthur Foundation is a grant-making private foundation organized and operated for charitable purposes under section 501(c)3 of the Internal Revenue Code. It has assets of about \$7 billion and makes charitable distributions of about \$300 million per year. The Foundation is intended to operate in perpetuity and manages its investment assets with that objective in mind through a professional investment department. With its grant and impact investments, and other strategies

and tools, it supports creative people, effective institutions, and influential networks building a more just, verdant, and peaceful world. MacArthur is placing a few big bets that truly significant progress is possible on some of the world’s most pressing social challenges, including over-incarceration, global climate change, nuclear risk, and significantly increasing financial capital for the social sector. In addition to the MacArthur Fellows Program, the Foundation continues its historic commitments to the role of journalism in a responsible and responsive democracy, as well as the strength and vitality of our headquarters city, Chicago.

The Office of the General Counsel helps the Foundation achieve its mission in an ethical and lawful manner. The Office seeks to promptly find solutions; provide guidance and education; protect the Foundation from liability; help preserve the Foundation’s reputation; and ensure the integrity of the Foundation’s work.

The Office is guided by the following values: Adherence to the highest ethical norms; discretion; fairness; and courtesy.

CELIA ROADY: Good morning. I'm Celia Roady, and I am a partner at Morgan Lewis. The Firm is pleased to host this event to give well-deserved honors and recognition to Josh Mintz. Many of you know the work that Josh has done as General Counsel at MacArthur, which has been very impressive. Josh has led the legal team at MacArthur while it's developed a lot of significant programs, including the Genius awards. One of the Foundation's most recent projects has been "Hundred and Change," which is an extremely creative and high-profile project to bring impactful changes to the world. Josh has been the legal mind behind all of this great work.

I also want to take a minute to recognize Josh for his significant contribution to the non-profit sector more broadly. Josh speaks every year at a conference at Georgetown on tax-exempt organizations. He's been very generous in doing this for many years and sharing a lot of information about how foundations grapple with difficult issues — not "inside information" like any of the secret stuff that goes on at MacArthur. [LAUGHTER] but very practical "how to" information. I'm the chair of that conference, and we always get great reviews for Josh's presentations. Josh also participates in several informal networks of foundation general counsels. Some of them are the general counsels of the big foundations, like MacArthur, but others are from smaller foundations and some Midwest foundations. I've heard from many other general counsel that these networks are incredibly valuable, largely because Josh and others are so willing to share their experiences. This is a long way of saying that in addition to the work Josh does for MacArthur Foundation, he plays an important role in the non-profit sector as a whole. Thank you, Josh.

I also want to thank Karen and commend the Directors Roundtable for looking beyond the for-profit world and recognizing some of the talented general counsel at non-profit organizations. These general counsel have different but equally important roles to play and certainly deserve recognition. Thank you, Karen.



KAREN TODD: Good morning, and welcome! I'm Karen Todd, the Chief Operating Officer and Executive Director of Directors Roundtable.

We're very pleased that you're here today. I want to especially thank the people of the John D. and Catherine T. MacArthur Foundation, the outside law firms, the bar groups, the university law schools, local chambers and other organizations who made a point to be here today. We're very appreciative that you're here.

The Directors Roundtable is a civic group whose mission is to organize the finest programming on a national and global basis for boards of directors and their advisors, which, of course, include General Counsel. Over the last 27 years, this has resulted in 800 programs on six continents. Our Chairman, Jack Friedman, started this series after speaking with corporate directors, who told him that it was rare for a large corporation to be validated for the work they do. He decided to provide a forum for executives and corporate counsel to talk about their companies, the accomplishments in which they take pride, and how they have overcome obstacles of running a business in today's world.

We honor General Counsel and their law departments so they may share their successful actions and strategies with the Directors Roundtable community, via today's program, and also a full-color transcript that we'll make available to about 100,000 leaders worldwide.

Today, it's our pleasure to honor Joshua Mintz, Vice President, General Counsel and Secretary of the John D. and Catherine T. MacArthur Foundation, and also our distinguished panelists: Doug Varley from Caplin & Drysdale; Norah Jones from Quarles & Brady; Kimberly Eney from Latham & Watkins; and Tomer Inbar from Patterson Belknap.

I have a special surprise for Josh, which is a letter from the Dean at the University of Miami School of Law, his alma mater.

Dear Josh:

Congratulations. The University of Miami School of Law is honored to have you as an alumnus and as a valued teaching colleague. You are the best in your field, and you make an important difference in the world. It doesn't get much better than that.

Best wishes on this day of celebrating your accomplishments.

Sincerely,

Patricia D. White
Dean & Professor of Law

Now I'm going to turn it over to Josh. [APPLAUSE]

JOSHUA MINTZ: Thank you! I have a confession. My confession is that when I first got this note from the Directors Roundtable, I was a little bit suspicious. Suspicion can come when you work at a large private foundation that actually gives away money because so many messages you get either explicitly or implicitly are asking for money. I also had a little bit of feeling, like many of us, when you get those letters in the mail that said, "You have won a vacation in Las Vegas!" [LAUGHTER]



You open it up and it's like, yes — you just have to spend two days being sold on buying the patch of land out in the desert with no connection to Las Vegas. So, I said, "What's the catch here?"

I did a little bit of digging, and one of my friends, who is the General Counsel of the Gates Foundation, Connie Collingsworth, had been honored, and I thought that that was a good sign. Then I saw some of the great work that the Directors Roundtable does and some of the distinguished counsel that were part of the group. My suspicions were allayed.

One of the things that I'm not very comfortable about is hearing people talk about me, or even talking about myself. One of the things that I really valued about the award was the fact that the award is really to the Legal Department. Many of you know, whether you are inside counsel or outside counsel or in business, that the team is what makes any person successful. I really want to thank my team — many of whom are here — and I'd like to just mention their names, if I can: Nancy Rinder, Audette Garritano, Vicki White and Debby Little. Jennifer Bartlett, who's our newest associate, is not here — she's hiking in Peru

somewhere, but I know she's thinking of us as she's reaching Machu Picchu. [LAUGHTER]

I also want to recognize Emily Friedman, Chelsea Ziegler, and our newest colleague, Jorge Lopez. I'm really grateful for them, and for prior colleagues, Lisa Montez, who is now the General Counsel of the Walton Family Foundation, David Chernoff, and Nancy Ewing. I'd like to give them a round of applause. [APPLAUSE]

It's been my privilege to work at MacArthur for close to 24 years and to watch the evolution of philanthropy during that time. A lot has changed, and we'll hear today — both from some of my comments and the comments of my friends about those changes. Some things have stayed the same, but one of the things that has helped guide philanthropies in general and actors in the not-for-profit sector is the distinguished Bar that has served foundations and not-for-profits so well. So, when I thought about this situation in receiving the award to go back to, "What's the catch in this whole effort?" The "catch" was the opportunity to sit alongside some of my friends and lawyers who have served MacArthur Foundation and other foundations so capably. I'd really

like to thank Doug Varley and Norah Jones, Kim Eney and Tomer Inbar, for coming today — many from out of town.

I want to say that in painting this picture of the landscape today, many of you may not be familiar with the field, so I'm going to try to stay away from jargon, and I'll get a little nudge under the table from somebody if I stray too far. Karen told us last night, "Please don't use acronyms." Other than the IRS, which I think everybody knows, we'll try to stay away from them. [LAUGHTER]

I want to start with a bit of a provocative statement which is really geared more, perhaps, towards this transcript, which is a little bit mindboggling to think — it may go to 100,000 people — I don't know that 100,000 people read it, but it's out there. I would say that a private foundation without an internal legal team or closely engaged outside counsel is committing philanthropic malpractice. There's my statement, for all those foundations out there that don't have in-house counsel or work closely with outside counsel.

There are two reasons for that: one, it puts the institution at risk in a field that is heavily regulated. Second, as importantly, is that it

puts the rest of the field at risk. Foundations or other not-for-profit organizations that are engaged in work, if they stumble, if they fail to comply with the law, in our field what's been proven repeatedly — many of my colleagues at the table would affirm this — is it creates pressure on Congress and states' attorney generals to act, and often, those actions are going to be punitive against the whole field.

That aspect has a flip side of it, which to me is what does that mean for the counsel in the field, whether in-house or outside counsel: we have to adapt to the times. I'm going to talk about what that means in a moment.

First, I want you to bear with me in a little experiment, which is that I want you to close your eyes, but don't go to sleep — I hope you had your cup of coffee — close your eyes for a minute and think about the year 1994. Think about a memory from 1994 that you can remember (and for many of us, it's a long time ago, but for others, it's not). You can open your eyes again.

"My mom always said, 'life was like a box of chocolates'; you never know what you're going to get."

[AUDIENCE MEMBER]: It's from Forrest Gump.

JOSHUA MINTZ: Right! Forrest Gump was one of the key movies then, also The Lion King, believe it or not — for those of us with children at the time, it seems like it was always with us. ShawShank Redemption was another movie. There was no Amazon, though; there was no Google, and there was no Facebook. Think about those types of things that are so intrinsic to our lives today. There were the beginnings of technology — I think Netscape was the first web browser. But technology was pretty nascent. There were cell phones, but no iPhones.

On a more serious note, Nelson Mandela became the first black president of South Africa. We all remember the ill-fated O.J. Simpson Bronco chase, which was that year, as well.



On the sports scene, and I mention this, the Houston Rockets won the NBA championship, but for those of us from Chicago, we know why that occurred, and that's because Michael Jordan was off playing baseball that year.

I'm sure many of you, as you closed your eyes, thought, "1994...that was also the year Josh Mintz went to the MacArthur Foundation as General Counsel." **[LAUGHTER]**

It was also, coincidentally, the year that Doug Varley went to Caplin & Drysdale.

I want to turn now, to what philanthropy looked like in 1994, and contrast it to today in high-level terms.

In 1994, roughly speaking, there were 46,000 private foundations. These were the principal vehicle by which wealthy people would do their philanthropy. That's because they were altruistic or got the tax break. At that time, MacArthur was the third-largest private foundation in the United States, at about \$3 billion. The Ford Foundation was the largest, at about \$6 or \$7 billion. Collectively, there are about \$222 billion in assets of the foundations in the United States.

Let's compare that to today. It's difficult to figure out the exact numbers, but I'm using round numbers. About 100,000 private foundations; about \$800 billion in assets. The Gates Foundation, which didn't exist in 1994, is now the largest at about \$60 billion, which is a staggering number. Legal departments at the time I started — and I didn't, at the time, keep a record of this — but I would say, maybe Celia and Doug may remember this, three or four private foundations have General Counsel. Ford had one; Robert Wood Johnson, and some others. Today, many more — close to 50, perhaps — have in-house legal departments with General Counsel, and there's a trend for foundations to bring in-house counsel into their realm. The most notable of that was our colleague, Lisa Montez, who became the first General Counsel of the Walton Family Foundation, which is a collection of Walton family members' assets down in Bentonville. But Kresge Foundation also added lawyers. Again, not surprisingly coming from me — that's a very good sign. But it's a good sign for the sector, as well.

In 1994, donor-advised funds — which are funds in which wealthy individuals can basically place money usually with a community foundation and then advise that foundation about where to spend the money. The money sits with the community foundation or other entity — they were around, but I don't think there were very many of them, and they really weren't so popular. Today, billions of dollars sit in both community foundation donor-advised funds, but importantly, in commercial donor-advised funds, such as Fidelity Charitable Trusts, Vanguard and Schwab. Other funds such as National Philanthropic Trust, and Silicon Valley Community Foundation have grown as well — Silicon Valley had an asset base at one point, of close to \$14 billion. It turned out, however, in an interesting twist, some part of that was Bitcoin. Some rich Silicon Valley folks wanted to make a donation and they gave Bitcoin and, of course, the value of that depends on any given day.

When you think about the structure of these funds and the amount of wealth now in donor-advised funds, it's a very different ball game from 1994. They've come under quite a bit of criticism, because when a wealthy person gives money to a donor-advised fund, they get the tax break. The money sits in the donor-advised fund until the person advises that they want to spend it on a charitable endeavor. There's lots of discussion in the philanthropic community about donor-advised funds.

Another thing that's very different from 1994, in my experience, is the use of what we call fiscal sponsorships. These are organizations that basically can adopt smaller projects or people that don't want to form their own 501(c)(3) organizations and the fiscal sponsor says, "Come to my home, and for a fee, I'll take the money in," and the key here — and it's a lot of work for the lawyers of the MacArthur Foundation and others — is to make sure that it's not just money being funneled through an entity to people in an organization that doesn't have charitable status. That's another significant change.

In 1994, foundations were beginning to have websites, but the transparency and accountability of foundations was much lower than it is today. There might have been rudimentary websites — but, unlike today most foundations then did not have their tax returns on a website; Foundations, by law, were required to give their tax returns to people if asked. When I was thinking about going to MacArthur Foundation from Sidley Austin in 1994, and I was trying to figure out how much I could really know about it, I had to go to the Secretary of State's office down the street here and ask for a copy of the 990 to wade through. Now, most foundations, like MacArthur, put it on their web site. Also, on the web site are many of our policies, all of the grants that we made, data about our financial performance and our investment performance. This issue of accountability has implications in the policies that are

“One of the things that I really valued about the award was the fact that the award is really to the Legal Department. Many of you know, whether you are inside counsel or outside counsel or in business, that the team is what makes any person successful.” — Joshua Mintz

made available because the lawyers have to be sure that the policies are clear and that you follow the policies. Anybody can now go on your web site and say, "I see you have a policy on this," and if they experience it differently, it could be a problem.

Transparency has become the coin of the realm for a lot of large foundations — not all, but the larger foundations like MacArthur and Ford and the like are really focused on providing the information and being accountable. That goes for the boards of directors, as well, and their fulfillment of their fiduciary duties.

Another set of distinctions from 1994 is the #MeToo movement. Of course, organizations like private foundations and others in the not-for-profit sectors and companies were concerned about workplace misconduct and sexual harassment in 1994. Today, however, the #MeToo movement is prevalent across all of philanthropy and the not-for-profit sector like many other industries. That's something that all of us, in any company or business we're in, have to pay attention to. That's an issue for lawyers, as well, both inside the organization and outside.

Diversity, equity and inclusion efforts also raise lots of issues for lawyers, because there are, as many of you know, a series of laws around discrimination, originally built, of course, to protect people of color. Anti-discrimination laws such Title VI or Section 1981 require organizations to be careful and attentive to those requirements that, in trying to ensure that you're providing an opportunity for historically disadvantaged people, you're not excluding an opportunity for others.

I don't know how many of you know the word "impact investing." In 1994, that word didn't exist. "Impact investing" means the use of assets in investment activity to achieve both a financial return and a beneficial social return. That term wasn't even coined until five or 10 years ago. In 1994, MacArthur and Ford and others were doing what were called "program-related investments," that is investments that have a charitable purpose but may also have some small return. Today, the impact investment field is one of the largest — it's billions and billions of dollars; there's a whole coterie of organizations that have been formed to help expedite such investments. It's caught on in commercial farms, and places like Blackstone and other big financial institutions are trying to build impact investment arms, because it's increasingly popular with millennials and young people coming out of college and graduate schools who want to get into the finance game. It's not their parents' finance game; it's their finance game. It's "How am I going to have an impact in what I do and what I invest." That's a significant shift.

Another significant shift, before I forget this, is in the international area. In 1994, a lot of foundations — MacArthur included — in the '90s were beginning to open up foreign offices. This was a time, if many of us can recall, where there was a sense of optimism and hope in terms of how an increasingly connected world could be a fertile ground for the advancement of human rights and other issues. MacArthur opened up offices, for example, in Russia, Nigeria, Mexico, as well as Brazil and India. The Ford Foundation and others have international offices. There was a period of time in which there was a feeling of hopefulness and optimism, as I said. Today, while there's still many

courageous and brave men and women who are working hard to advance human rights in various areas of the world, there's a phrase that people use called "the shrinking space." Meaning that countries are increasingly using laws to try to limit the reach of civil society. Even democracies — India among them and Israel and others — don't like the fact that foreign funds from MacArthur or others or the Open Society Institute are coming in and seen as influencing their politics. These laws are constricting activity, and MacArthur felt this in Russia where, in the beginning, after the fall of the Soviet Union there was hope that Russia might move towards more democracy — today, we know that that seems to be a pipe dream. We also saw that, from MacArthur's standpoint, the advancement of a number of laws that really caused us to realize we couldn't have the impact we wanted, so we had to close our office.

In all these aspects that I mentioned, lawyers must play a critical role.

Think about technology today versus 1994, particularly in the context of how lawyers or foundations deal with it. There was, in 1994, as I said, the beginning of websites but not much more. Today, there are data collection privacy concerns at *all* of our organizations — not-for-profit or for-profit. Privacy and data are huge issues that have to be addressed from a business technology standpoint and from a legal standpoint. The GDPR [General Data Protection Regulation] law that Europe enacted affected many of us in the United States who didn't think the long arm of Europe could reach here on that issue. Protection, of course, of information under the Health Care law or other aspects is also critical.

When we think about the political environment today, as many of us unfortunately have to do with the daily barrage of tweets and stories, it affects foundations, too. In 1994, foundations could look at the world and seek to influence policies within a limited sense, and to have impact. Today, there's a demand for private foundations to have more impact

in the political arena, but we're constricted by laws against lobbying and strict prohibitions against intervening in a political campaign. That's given rise to the growth of what are called (c)(4) organizations, which are social welfare organizations that are allowed to participate in politics to a much greater extent than charitable organizations. What we're seeing, partly as a result of the limitations on lobbying applicable to private foundations and partly as a result of the influx of new philanthropists, is a growing array of different types of organizations that philanthropists are now using to have impact.

Philanthropists today, in contrast to '94, where the vehicle most commonly used was the private foundation, now increasingly, use limited liability companies. Mark Zuckerberg and Priscilla Chan formed a limited liability company. Jeff Skoll has a whole array of companies. These are used to have ways to have influence in the political sphere, in other places like education, where the constraints of a private foundation make it more difficult.

The amount of wealth today that is available relative to 1994 is just staggering. How many of you have heard of the Giving Pledges? The Giving Pledge, which came about in 2010 when Warren Buffet and Bill and Melinda Gates came up with the idea, says to wealthy people, "You need to give more than half of your wealth to philanthropy or charitable causes during your lifetime or in your will." Today, 186 families have signed the Giving Pledge across 22 countries. The wealth — this is an estimate, of course, and it changes every day — is almost a trillion dollars. That's a lot of money that can be used, and will be used, for charitable purposes. Some of these statistics won't include some of the Giving Pledgers, but Bridgespan estimates, in the United States alone, there's 1,800 families with a net worth of \$500 million or more, with a collective set of assets of \$3.7 trillion. Of that number, \$3.7 trillion, only about 2% is given to social causes each year, as opposed to, say, schools or hospitals or libraries. If we can increase that



by 2%, that would allow for another \$37 to \$40 billion to be used to address social problems in the country or the world, and that is compared to about \$50 to \$60 billion that foundations give each year. Think about the accretive amount of that number. and that's just the United States. Giving in China, in India, in the Gulf States, is also about \$25 to \$30 billion annually. That's increasing in those countries, as well.

When you think about the combination of that enormous wealth and the different vehicles and tools that can be used to advance it, it's a really exciting time for lawyers, for accountants, and for the visionaries who think about how they can have the most impact.

What we're seeing today as a result of that increased wealth are several different ways that individuals are approaching this. One is through aggregation of funds. There are groups, and a new organization that was formed out of the McConnell Clark Foundation, called Blue Meridian, in which they brought together a number of funders — wealthy families, other foundations — in an aggregate form and said, "By pooling our money, we can have a much greater impact." They have a governance structure that allows them to decide, "Let's put our money together to attack this particular problem of poverty." This is much better than having scattered efforts.

The same thing with a group that grew out of Rockefeller Foundation called CoImpact. These are what we call aggregators. There's also all different types of prizes and competitions, including a group called Audacious that works together with the TED Talks to band together some wealthy individuals and families that take a selection of proposed applications and make significant awards to them.

What then do standard foundations do, that are more constrained than those organizations that have living donors? A number of organizations are forming their own set of entities to try to take advantage of opportunity. Gates, which, of course, has living donors, formed a public charity. Lumina Foundation formed a public charity.

MacArthur has done several different things. We created – some of you may have heard about this – 100&Change – Celia mentioned this at the beginning – was a competition in which we decided that we would make one \$100-million award through a competitive process, that anybody could apply to, on any problem in the world. That was a little bit of a daunting problem, because it could be *anything* – poverty, the environment, refugees. We got 1,800 initial applications; ultimately, it was winnowed down to about 900 viable ones, and through a very careful selection process with a lot of judges, many of whom participated from this panel and perhaps in the audience – our board eventually determined that the first award would go to Sesame Street and International Rescue Committee to address education in the refugee crisis in the Middle East – in Jordan and Syria and Lebanon. As part of that, we decided that there was an opportunity that we're thinking now about creating a new entity that would serve as a platform to allow other philanthropists who might want to take advantage of a prize competition – it doesn't have to be for \$100 million; it could be for \$10 million, it could be for \$15 million – and they could select the area that they want to fund. We now have the infrastructure to bring together phenomenal ideas from

“Foundations or other not-for-profit organizations that are engaged in work, if they stumble, if they fail to comply with the law, in our field what's been proven repeatedly – many of my colleagues at the table would affirm this – is it creates pressure on Congress and states' attorney generals to act, and often, those actions are going to be punitive against the whole field.”

– Joshua Mintz

people that are seeking to solve a problem but are lacking capital to do it or the ability to bring it to scale, and philanthropists who may want to sponsor a prize. Then we would keep that data from the applications, and we'd make that available in a public way to other philanthropists who may not care to do a prize competition – that's one way of thinking about it – but they may want to just reach directly into this database.

We also, as some of you in Chicago may know, are in partnership with Chicago Community Trust and Calvin Impact Capital to create something called “Benefit Chicago.” This structure allows the Foundation, through a sole member limited liability company we created to make low-interest loans to communities in Chicago most in need of development, of building wealth, of creating wealth in communities that lack it, and creating jobs and job readiness.

In the impact investment space, we're thinking about a new experiment that we're calling C3, the Catalytic Capital Consortium, which would be an effort for us to band together with other like-minded investors and form impact investment partnerships to address most specifically the sustainable development goals of the United Nations.

In the recent past, we created and spun out an entity called Collective Shift to carry on the work of our digital media and learning area. And that effort, which was led by one of our former program directors, Connie Yowell, just reached fruition in a very unusual way. Harking back to Forrest Gump – in a box of

chocolates, you never know what you'll get – this effort basically ended up with a merger between Collective Shift, which was founded on these principles of our philosophy on education called “connected learning” with Southern New Hampshire University. We now have the support of Southern New Hampshire University, which is a significant online university with a campus in New Hampshire. I encourage you all to look that up, because it's very exciting.

All of this, as I say, is fertile ground for lawyers. I want to talk for a minute about my view, of what the necessary characteristics are for lawyers, in this field to succeed – but it's actually applicable to lawyers anywhere. When you see what's out there, and how quickly people are moving and the mission-driven efforts of them, lawyers have to have the ability to act with urgency, because we don't have a lot of time to sit and ponder all the different types of potential variables. We have to be able to express our views succinctly. We have to, with our other actors, be creative and innovative. We have to be responsive. There has to be a base of knowledge – when you think about some of the things I've mentioned – and this is why the counsel here and in the audience are so valuable. Think about some of the areas of law that you would have to know, given some of the things I've described. You have to know tax-exempt law; you have to know other tax law; you have to know employment law; you have to know corporate law; you have to know securities and privacy law and HIPAA and contract, and all sorts of international law.

One of the things I've found, being in-house, is that it's very difficult to be an expert in these multiple fields. Big firms, however, have very specific experts deep in the field. This is something in which you have to know what you know, know what you don't know, and know where you need to get help. That's why I have my peers here. You have to understand risk, but not be too averse to risk. Basically, and I call this a little play on "Guardians of the Universe," you have to be guardians of the institution, particularly in a foundation like MacArthur, where it's intended to be perpetual. All of us at MacArthur are temporary stewards of the assets, the board included. But that means we have to be able to look out beyond our own individual career horizons and say, "How are we going to best protect the interests of future generations? How do we protect the assets of MacArthur so that they can continue to have an impact?" Lawyers have to help their institutions grapple with that hard question about, "Do we spend more money now, because the problems today are so important, or do we want to preserve some dry powder, because who knows what the problems are tomorrow?" That's tough, because many people at the Foundation and elsewhere say, "If we don't figure out climate change, with the most recent U.N. report saying we have until 2040 until Earth seemingly burns up into a crisp, then what's the sense of waiting for later?" These are good debates where lawyers can play a helpful role.

The key thing, though, in trying to wrap this up in terms of something more digestible, the word that I settled on is "partnership." Lawyers, in whatever field they're in, have to be in partnership with people in the organization — in our case, it's programs, it's investments, it's impact investments, it's communications, it's human resources. They have to partner, as I said earlier, with a team. You have to partner with your outside counsel. You have to partner with your peers. As Celia mentioned, one of the great joys that I have is the ability to talk with other General Counsel and learn from them and share ideas.



Partnership is a critical aspect of this. Part of being a good partner is knowing the business that you're in; knowing more about the entity; knowing more about the company — whatever you're doing — to be familiar with it. You have to be able to build that understanding and trust.

In closing, I would like to describe all of these aspects in a few words. I'm not sure I captured all, but I'm going to call them "the five Ps." I mentioned one — Partnership. Two is Preparation — being ready and knowledgeable about what you have to do. Three is Participation. That means participate in the life of your foundation and the life of your company, so you understand the business, you understand the dynamics and the needs. Four is Perseverance, because it's not always easy, and you have to push ahead. Fifth is Prudence, which I mentioned, which is really the ability of counsel to be the ones that sometimes are the conscience of the organization, to ensure the entity, whatever it may be, acts with prudence.

I'm going to close with a sixth one, even though I said there are only five. The sixth is really important to me, and that's Privilege. That's the privilege that I've had to serve at MacArthur for 24 years; to serve with an extraordinary group of people; to serve an institution that, while not perfect, is mission-driven to improve the world. So that's my privilege.

Now it's my privilege to turn it over to this august panel. Thank you very much! [APPLAUSE]

KAREN TODD: Before we take up each of the panelists' presentations, I am going to ask Josh a couple of questions. In looking at the website last night, I noticed that the purpose of the MacArthur Foundation is "supporting creative people, effective institutions and influential networks, to build a more just, verdant and peaceful world." That's a pretty lofty goal. Can you tell us about the five named arms of that?

JOSHUA MINTZ: We have decided, under the leadership of Julia Stasch, our President, about four and a half years ago, that we had a large number with 16 to 18 programs. Both the board and Julia felt that we were spread a little too thin, trying to do too much. Even though we have vast resources, in some ways, it's very little. In other ways, when you think about the resources of government or the problems we were confronting, it's a relatively small number. We determined that we would — I'm quite certain we didn't coin this term, but we do claim some credit to it — do four big bets. One is climate solutions, and one is Nigeria. One is criminal justice, where we're focusing on jails; and the other is nuclear security, what we call nuclear challenges. The idea is to try to prevent the continued production and hopefully to never use fission material for nuclear weapons.

Then we kept what we call two enduring commitments, which are journalism and media, as a really important bulwark to try to advance democracy; and the other is this core commitment to Chicago.

We have these other areas that we call field support strategies, one of which is technology in the public interest, which is really examining, with the growth of artificial intelligence, how do issues of ethics, law and morality play in as artificial intelligence gets going. We have a small philanthropy portfolio that I'm responsible for, to

strengthen the field, and we're thinking about our impact investment (c)(3) initiative as a field support initiative, and, of course, our Fellows Program.

KAREN TODD: How do you measure effectiveness of these programs? Obviously, the public wants to know how that could be determined.

JOSHUA MINTZ: That's the holy grail of any impact institution. We're fortunate that we began under the leadership of Bob Gallucci, but put, in effect, on steroids, with Julia Stasch, to build an evaluation and assessment team led by a wonderful person, Chantell Johnson. She's building a team. We embed evaluation and assessment into our programs from the get-go. We retain what we call a learning partner – there's that keyword again – to work with our programs, to develop change. That's a little jargon for philanthropy, but it's basically, in a sense, what are you trying to accomplish? How do you know if you're going to accomplish it, and how will you get there? We create a series of goals and outputs and how we're going to measure them, for each one of our programs. It's a discipline that is tremendously important to us, and we think about it. The phrase we use is called "design build," in which we have these strategies, and we know that external events can affect it. For example, when we started with our climate solution effort, President Obama was in office. The administration was very receptive to the work we were doing. We said, "We're going to focus on enhancing U.S. leadership and supporting the efforts of the Paris Accords." Life's a box of chocolates. You never know what you're going to get." Now we have an administration that's less favorably disposed. We have to be able to be adaptive. The design builders say, "Can we still achieve what we sought to achieve? How can we be nimble and adapt to the changing environment in the U.S.?" We've shifted our work to more state work; we've shifted it to working in India and we actually have a module in China. The idea is that these strategies



which will be reviewed – they're intended to be time-limited strategies, so they will not go on forever. They have mileposts and they have goals, and we're going to evaluate very carefully along the way under the board's direction, to basically say, "Are we meeting these goals; can we meet them; and if we can't, then we have to think about responsibly ending the program."

But since they're more or less in their infancy, we've got a bit of a ways to go.

KAREN TODD: Thank you. Our next speaker is Doug Varley from Caplin & Drysdale.

DOUGLAS VARLEY: Thank you very much, Josh, for including me in this great event. I feel liberated talking to this group at this time. Usually when a lawyer is talking to a bunch of other lawyers, it's a CLE [Continuing Legal Education] context and you're grinding through some regulations or sequence of cases. This event has a different purpose. We want to honor Josh and the MacArthur legal team. The way I'd like to contribute to that is by talking about one small facet of the law that Josh is responsible for, and maybe help us understand why this particular set of legal issues is important to his client and his client's ability to

advance its mission. More importantly, I want to emphasize why it's important to *all* of us that Josh and his colleagues manage these issues as well as they do.

Private foundations exist at this interesting intersection between private wealth and public purposes. Donors get enormous tax benefits under the tax laws with the creation of a private foundation. But because of those benefits, their donated wealth has to be committed to public purposes. As Josh acknowledged, that raises societal concerns. At various times over the many years we've had endowed philanthropies, there has been a lack of trust about how private foundations use their resources. That concern is not really front and center at the current moment. Private foundations are pretty popular in Washington right now. But episodically, serious suspicions arise, and private foundations get more critical attention than they would want. So, when you think about the long-term, one of the things at stake when lawyers like Josh and his colleagues advise their clients is the reputation of institutionalized philanthropy. In the background of the lawyer's advice, sometimes farther back sometimes front and center, is making sure private foundations are worthy of the valuable tax benefits they receive and understood to be worthy of those benefits.

Private foundations have, as Josh mentioned, vast wealth – very substantial resources. Because they've got a lot of money, they are really unaccountable to any external constituency. There really is no market discipline that applies to Josh's client when it decides how to spend its money. Businesses fail if no one buys their services. Public charities fail if no one gives them money. Private foundations don't face that challenge. It changes your business situation if the money has already been made.

Back in the 1960s, that lack of accountability, coupled with a few reports of egregious bad actors, created serious concern in Congress that private foundations could not

be trusted to use their assets in a way that merited the tax breaks that they and their donors receive. So, in an extraordinary fit of pique, Congress imposed a really byzantine regulatory regime on private foundations — a lawyer’s dream, actually.

I am going to focus my remarks on one tiny facet of that regime. Actually, the guy who hired me was instrumental in designing these hyper-complex rules. I’ve always wondered if that wasn’t part of the purpose. [LAUGHTER] I’m just joking, of course! One element of that very complicated regulatory regime involves restrictions on political speech, which Josh mentioned. From a strictly legal perspective, private foundations are the most disabled actors in our political ecosystem. The rules that apply to them are even stricter than the rules that apply to other charitable organizations. And of course, charities are more restricted than corporations, section 501(c)(4) organizations and other actors in our political system. So, private foundations have the most restrictive rules of engagement.

There are two rules, very simple to state. One is, private foundations can’t spend any of their resources attempting to influence legislation. The second rule states that private foundations cannot attempt to influence elections for public office. We have one of those coming up.

Violations of either of these rules trigger a 20% penalty tax and, at least in theory, could cost a foundation its tax-exempt status. Now that’s a head-scratcher for most people who don’t live in the world of tax-exempt organizations. We have a First Amendment that says Congress will write no law restricting the freedom of speech. But these two rules are pretty restrictive. Rather than follow that digression, I’ll just recommend that you read a case, *Regan v. Taxation with Representation of Washington*, in which the Supreme Court engaged in some very creative reasoning to maintain the constitutionality of restrictions on tax-exempt speech.

“... in the United States alone, there’s 1,800 families with a net worth of \$500 million or more, with a collective set of assets of \$3.7 trillion. Of that number, \$3.7 trillion, only about 2% is given to social causes each year, as opposed to, say, schools or hospitals or libraries.” — Joshua Mintz

Assuming that these restrictions on speech are constitutional, it’s worth asking: “Why do we have them? Why do they matter? What motivates them?” The most famous and frequently cited justification for these rules comes from *Slee v. C.I.R.*, in which Judge Learned Hand ruled that the American Birth Control League did not qualify as a charitable organization for tax purposes because the League sought legislation to decriminalize contraception. This is obviously a very old case. In reaching this conclusion, Judge Hand said the reason we require tax-exempt organizations to avoid lobbying is because Treasury has to “stand aside” from influencing government policy. The idea being, apparently, that there’s something corrupting about having government provide benefits to organizations that in turn try to influence government; there’s a circularity there that potentially undermines the integrity of our policymaking process.

Another explanation for the rules is that there’s something about advocating government action that is, by its nature, inherently linked up with advancing private as opposed to public objectives. The bedrock characteristic of charitable organizations is that they operate exclusively for public rather than private purposes. There is an argument that by advocating a particular government action — one that suits your views or desires — you’re as much the beneficiary of the activity as the public. Unavoidably, you’re asking government to make the society more the way you want it to be. If I have an organization, and I buy land and plant trees on it, that’s a public benefit activity — we can call it “environmental protection”; we can call it “civic beautification.” My act furthers a recognized charitable purpose. If, in contrast, my organization uses its resources

to lobby Congress to pass a law that says Josh has got to plant trees, that feels different. That feels like advancing one particular agenda (mine) at the expense of another (Josh’s). You can see my lobbying as advancing one private interest — albeit one we might wish more people shared. In the language of the *Federalist Papers*, my tree advocacy represents a “faction” — just one point of view, a private party trying to influence government to do what it wants. So, this argument goes, my advocacy has a private purpose by its nature, not a public purpose and, therefore, is not legitimately worthy of subsidy through the tax code.

Whatever we think of these rationales, we have to admit that it is widely accepted that for one reason or another, the speech restrictions — even if they are of uncertain constitutionality — are not dumb. People generally tend to think that these rules actually protect something that is important. We saw pretty astonishing evidence of this very recently. President Trump, first by executive order and then as part of the recent tax reform legislation, has tried to have the campaign prohibition repealed at least as applied to churches — maybe as applied to all non-profit organizations. Surprising, to me at least, was the fact that the voices loudest in objecting to that change were frequently churches, pastors, and other charitable organizations. You might think they’d all be saying, “Hooray! We’re going to take the shackles off and start wielding our influence.” In fact, many tax-exempt organizations said “No — that’s a bad idea; let’s not do that.”

So, there is good evidence that it is widely accepted that the restrictions on non-profit speech have some legitimacy — even if the

precise rationale is a bit murky. “Widely accepted,” but not “universally accepted.” At a minimum, there are program officers at private foundations who have a very different perspective on this. That different perspective is rooted in the recognition that participation in our civic discourse, in our elections and legislative process, is a vitally important public good. Non-profits, since the beginning of the non-profit world – even before we had a tax code providing them subvention – have been critically important in organizing and facilitating that participation. It’s an essential element of the way our democracy works. Private foundations want to, and can, provide support for organizations engaged in that activity.

Let’s look at some examples. In the electoral context, private foundations can and do encourage participation in the process of selecting political leaders. Every election, we see dismally low participation in the elections process at all levels. To help remedy that, private foundations can and do support nonpartisan “get out the vote” drives that actually increase the percentage of people who go to the polls. If certain technical rules are followed, private foundations can also support voter registration drives. There’s a storied history of private foundations providing resources to register African Americans during the civil rights movement that philanthropy is justifiably proud of. Private foundations and their grantees also educate voters on *how* to vote, *where* to vote, *why* they should vote, and where the candidates stand on issues. In the period running up to every election, you see candidate debates giving voters the opportunity to ask questions of the candidates who would lead them and voter guides that provide information voters need to know to make an informed decision. A lot of that activity happens because of checks from private foundations.

Similarly, on the policymaking side, private foundations provide significant resources to organizations working to advance specific policies for the benefit of underserved communities or the broader public. They



also support creating and sharing technical information that decision makers, including legislators, need in order to make intelligent judgments as they set the policy course for our country or for a state or at a municipal level. We generally think of the kinds of organizations providing this kind of information as “think tanks,” and think tanks rely in part on private foundations for their funding.

Further, private foundations also fund educational campaigns – not political campaigns – but efforts to inform the public both about particular policy issues and also how elected representatives are acting on those issues. Such efforts increase transparency and hold government officials accountable for their actions so that constituents understand how they are actually being represented. All of that is allowed, notwithstanding the restrictions on political and legislative activity, as long as the foundation and its grantees maintain a non-partisan stance.

So, private foundations are actually able to support a lot of activity in the policy space that you might not have expected, given the seemingly broad prohibitions about what they’re allowed to do. That’s a good thing!

What’s happened is that the law has evolved to strike a balance between the two sides of this coin. On the one hand, there is something important about limiting the

ability of tax-subsidized wealth to have influence in the political process. There’s also something very important about empowering that wealth to be used for good public purposes, to support the legislative and electoral ecosystem in which we all live.

We’re all lawyers here today, we all know how that works out – that means *complexity*. Right? The law is striking a balance between competing goods, so it’s going to get complicated. That’s been the 70-year arc of this area. Some of the rules that Josh has to work with are old, quite out of date, and really undefined. Other aspects of the legal regime are more recent, hyper-technical, and sometimes lead to results which, frankly, could be characterized as too good to be true. Except that those surprising legal results are usually true, because they are grounded in these very hyper-technical rules that were hammered out as compromises in the regulatory process in the 1980s.

I’ll give another quick example. Imagine a radio ad, and it informs the audience that there is a bill pending that would restrict gun ownership rights. The announcer goes on to say this bill is “unconstitutional. It’s heinous; it’s going to make good people criminals if they try to protect themselves.” That ad is likely not prohibited as an attempt to influence legislation under the rules that apply to Josh’s client. On the other hand, if you just add the words, “Call your congressman,” now it’s prohibited. However, in some special cases, even the *earlier* version of the ad without the “call your congressman” is prohibited. To really know whether the ad is okay, you have to look into facts like: how widely publicized the gun legislation is and how much time has elapsed between when the ad runs and when the legislature votes.

This all means there are lots of opportunities for the exercise of legal craft and judgment, when trying to keep a foundation legally safe but also effective in this area. Which brings us back to Josh and his team and the practical reality that they have to live with. This is a hard area in which to advise a client.

First of all, it's hard because in a mission-driven organization, people care passionately about their jobs and what they want to do. Many people go to work at foundations because they want to see change, and they expect their lawyers to tell them how they can get it.

Second, the restrictions on speech are counterintuitive in a way a lot of non-profit regulations are not. You kind of know in your gut that paying the CEO excessive compensation, or using foundation assets to benefit the donor's family is wrong. There are obviously questions about what's "excessive" or when an action actually benefits the donor. But the principle is pretty self-explanatory. Not so, the restrictions on non-profit speech. It's hard for people to understand why working against a candidate they oppose is bad, since in every other context, it's good. It's hard to explain why it's hard to support legislation, because in every other context, the First Amendment says it should be easy. It's hard to have a discourse with the client and maintain credibility when the client believes the rules themselves are nuts.

Finally — and I speak from experience here — frequently, the lawyer wants to get to "yes" as badly as anybody in the conversation. Because, honestly, sometimes we're mission-driven, too.

This all makes for a very complicated, dynamic — and sometimes fraught — area in which to advise clients. The best that we can try to do, and I have observed from the outside that Josh's team does this excellently, is try to keep faith with the law. At the same time as we work to make sure that the client is protected legally, we strive not to sacrifice effectiveness, not to compromise the mission unnecessarily.

With that, I'll say thanks for inviting me to this party, and thanks, Josh, for giving me the opportunity to work with you on this stuff throughout the years. [APPLAUSE]

KAREN TODD: Doug, in terms of social media, are there posts or tweets that could be considered lobbying?

DOUGLAS VARLEY: There are certainly posts or tweets that could be considered lobbying. I owe a huge debt to Elon Musk, because people no longer say, "A tweet doesn't matter. It's just a tweet; it can't possibly matter." They do matter. We could spend more time than we have going through the nuances of what would take a tweet to be legally problematic, but let's just say if Josh sends out a tweet saying, "Vote for this guy," and it's a MacArthur handle — then that would be a problem. Social media is the terra incognita for all of us, but it's definitely where the interesting questions are.

KAREN TODD: Okay. Now we're going hear from Tomer Inbar, from Patterson Belknap. He was not at the dinner, so he didn't get the prohibition about the acronyms; we'll let him sneak by on that. [LAUGHTER]

TOMER INBAR: Thank you, everybody; thank you, Josh. As I start, I've always thought about Josh as the consummate General Counsel. In 1994, I was in kindergarten, perhaps. [LAUGHTER]

I remember, as a junior lawyer, coming up and working with Josh and hearing about what MacArthur did. It always set the benchmark for me, as I was thinking about what a General Counsel's office was, and its role and function within an organization. Still, to this day, now that I'm in junior high school, perhaps [LAUGHTER] that's my benchmark. I think of Josh's shop, and the people coming out of it, and the training they get, and the latitude they have, as something that is important and that I think is a good example for other organizations.

I'm going to talk about a couple of things that Josh mentioned in his remarks, and similar to where Doug was, these are also areas that are complicated, though not



mentioned in the *Federalist Papers*, or going back that far. They are really new to a lot of us, even though the concepts have been around for a long time.

What I'd like to do is focus on the technique of utilizing and aggregating investment capital for impact. Josh talked about impact investing; there are lots of acronyms in this area — we're not going to use many of them, and when we do, I will define them. What we're going to talk about is how this space has evolved from a place where 30 or 40 years ago, people were doing very — "simple" is the wrong word — not complicated transactions; they were making investments that were, in many ways, grants in investment clothing.

Now we have an interesting (in a good way and a bad way), but much more complicated regime where people are trying to use the market and commercial mechanisms — and other partners, both charitable, exempt and non-exempt — in a way that furthers charity and social impact generally. Trying to find where those things start and end is sometimes complicated. Then I'm going to end with one area where Josh was talking about, which I know is dear to the folks at MacArthur, namely trying to find a way to bring others along. This is one of the mechanisms that we see as paramount now

that there have been a lot of market leaders in this space and a lot of people who are doing this. The trick is, how do we get all the money off the sidelines, and how do we say, “This is a good thing.” On the other side of that, the responsibility that it is not just about *saying* “this is a good thing,” but also actually it *being* a good thing. In a space where we’re utilizing investment and market practices, that often, corporate lawyers talk about the “deal high.” I’ve seen this in the context of non-profits, that when the corporate part takes over, it’s exciting; it’s fast-moving; it’s productive in a different way; and sometimes people forget why they’re there. The responsibility of a legal team, the responsibility of a shop as at MacArthur and others, is to put a check on that and say, “What are we here for, and why; and what are we doing to accomplish and gauge impact? How do we push the mechanism back towards the place where we’re coming from, as opposed to allowing the market to take over?”

I’m going to go through a couple of things. Non-profit, tax-exempt organizations have had a longstanding role in aggregating capital for social good. Grantmaking is aggregating capital for social good. People often don’t think of those as investments; though interestingly, some foundations talk about them as investments. Grantmaking often brings other money to the table. More and more, we have complex grantmaking; we have initiatives that really leverage grantmaking to bring other actors in, to bring investment capital in, and that’s an important aspect of this.

We have multi-funder initiatives. Josh talked about Blue Meridian. The idea that there are ways of bringing like-minded people to the table to do something that everybody agrees should be done. When we do that, we do that in collaboration in partnership. Josh mentioned program-related investments, PRIs (the first acronym of the presentation!). Program-related investments have been around for a long time, and have gotten more and more complicated and

“Transparency has become the coin of the realm for a lot of large foundations – not all, but the larger foundations like MacArthur and Ford and the like are really focused on providing the information and being accountable.”

– Joshua Mintz

broad-reaching, but they are charitable. For all intents and purposes, they are grants, in the sense of, again, achieving a charitable goal, putting aside the mechanism, putting aside the intention, the return – all those thorny problems of the market. At the heart of it is a charitable act designed to achieve a charitable outcome. There are limitations around those. Then we flip over to the prudent impact investing side, mission-related investments or MRIs. They have a lot of different acronyms that attach to them, but the idea is that those things are prudent investments. For example, Goldman Sachs and other for-profit commercial investors could make them. A regular investment shop or a regular fiduciary of a charity could say, “I want to achieve impact at the same time as I want to achieve solid, prudent investment returns.” Those take lots of different forms, and they’ve been around for a while, also. Think about shareholder activism or anti-apartheid; think about a lot of different things. “I don’t invest in alcohol, I don’t invest in tobacco, I don’t invest in firearms.” They are all impact investing. The spectrum changes over time to the point where what we do is actually targeting investments now to achieve certain impact. Investing in EdTech; investing in mechanisms that provide financial access to low-income people that may also be prudent; investing in charitable impact funds. If 20 years ago someone would say that Goldman Sachs would have a social impact fund, people there would have said, “Don’t even talk to us any more! This is crazy talk! Go find a job at Acumen or Accion or some nice fuzzy shop that does investing.” Now, almost every investment house has impact funds and impact managers. That’s something that’s important to think about.

Tax-exempts play an important role in this. Often, it’s catalytic capital. Private foundations have more patience. They would say, “Our horizon isn’t four years, five years, 10 years and out; we can look and we can look beyond that, because” – to Josh’s point about stewards for the future, not just of the money they have, but the future of us all, as we think about the role towards impact. Private foundations and other charities can think about these things with a longer time horizon.

We think about impact investment funds and we talk about economic development activities. We have community development financial institutions in many communities and these institutions are critical to the economic development of distressed communities. We have incubators and accelerators. We see them popping up all over the place, coming out of universities, coming out of charities, coming in the for-profit sector. The idea that businesses that have social missions somehow will help us, and that it’s important to catalyze them early on when they’re at their most critical juncture is a relatively new concept. We see government programs like the low-income housing tax credits, new market tax credits and now we have opportunity zones. All of these things are designed to bring money off the sidelines to achieve impact.

Other areas include advocacy and education. We had Douglas talking about lobbying and education, and that way, there are lots of people who focus on advocating on behalf of bringing more capital in, and even to changing laws. Again, not directly, because the lobbying, as Doug mentioned, is not necessarily something we do. Though underneath the table, the program officers desperately want to do it, but the heart of it



is that we try to move the needle in a way that allows other people to come in. It's also a way of aggregating impact, because the education, the teaching, the technical assistance, and the sector building is important.

I'm going to talk about program-related investments and mission-related investments quickly, and then move on through it. When I think about the impact investing continuum, I think of grantmaking on one end, and then moving across to a line in the middle, which is where I cross over from the charitable to simply impact. Again, one thing that's important for us to remember, that "impact" is a broad term, and "charitable" is a subset of that. What's interesting is that, charitable was the focus of impact investing for a long time. That has flipped dramatically in the last 10 years, where charitable has now become this little piece of impact investing. We're talking about people who are trying to bring billions and billions of dollars to impact investing broadly construed – not just charitable impact investing. That's been interesting to see.

Charitable impact investing exists in the program-related investing sphere, which is a specific animal for private foundations,

coming out of the regulations Doug was talking about. They emerged in a fit of pique back in 1969, when Congress thought private foundations were going to eat the world and couldn't have them do that. We had a couple of regulations that came in that brought us the program-related investment rules, which come out of a prudent investing analysis that said that private foundations have to invest prudently, even though they were already required to do that under state law. Under federal law, we would put in a prohibition on making investments that jeopardized the ability of the private foundation to carry out its exempt purposes. For folks making investments as part of their program activities, for example, into banks that were lending to minority businesses, those investments would be considered inherently risky and not prudent under the new regulatory regime and would suddenly be prohibited. In response to requests from the field, Congress said, "We hear you; let's carve out these things called 'program-related investments.'" They came up with a definition – the way I always imagine it is that someone said to someone else, "Give me a definition that no investor that is sane would ever think of this as an investment." [LAUGHTER]

They'd say, "How about this?" The first thing is, the investment has to be for charitable purposes. It has to have a primary charitable intent. No real investor was going to invest for charitable purposes back in 1969 or whenever. Then, if that's not enough, you can't actually have a profit motive intent, which is – that's paraphrasing it; it's worded a little differently. The idea is that not only does it have to be charitable, but you can't be doing this with the intent of making money. This is just something that you're doing for charitable impact.

Then there's no lobbying or political campaign activity, which we've already heard from Doug, they can't do anyway – so we have that piece as defining what the program-related investments are.

Mission-related investments are on the other side of that line and need to satisfy a "prudence" standard. Thus, a mission-related investment (and the other acronyms that come with it) is an investment that is prudent by nature. It would fit into your portfolio, and your investment committee will not harrumph about it, which a lot of investment committees do about social impact. It also has a bottom line social impact, and that is up to you. You figure out what that is, and you figure out how impactful. Therefore, you can decide "I have an impact investment." It's amazing what some people will call "impact investments." Some people will say, "Yes, it was great – I invested in Africa. I have an impact investment." You have to actually think about it, but you're not responsible to anybody except the prudence gods, and those are very lenient gods. [LAUGHTER]

Public charities don't make PRIs (program-related investments) because PRIs are a creature of the private foundation rules. However, more and more, public charities act in a PRI-like manner and want to carry out impact investing that is charitable and also impactful. They follow that same pattern in many ways, but they're not stuck with the "over-lawyering" concerns that



sometimes people worry about with program-related investments. At the heart of it, again, if you want to use investing for charitable purposes and you think of it as a program activity, then you have to find the program in it. You can't just say, "it's a program-related investment, go with God." You find the program in this thing, and you say, "This is charitable, and this is why." This gets back to something Josh mentioned, the notion of being rigorous about it. It was in response to a question about the outcomes. Think about why you're doing it, the narrative. Often with my clients, I say, "This is a story and you need to tell it in a way that makes sense and shows the reasons why you are doing this," particularly when you get as complicated as we are getting these days it needs to make sense — and I think Celia probably taught me this, so I will give her credit. Again, it is important to think about it backwards from an IRS audit perspective, if you have the right narrative about what it is you're doing and why, and if you have followed through then you should be okay (unless you're completely off-base, in which case, you're fighting about it). The IRS often doesn't know any better than you do in the areas where there is not much guidance and we are all working off of the same basic principles. But when you're fighting in the grey area, the more you can do to establish charity, tell the story in a right way, that helps you. It's important to think about that.

Private foundations and others have lots of different ways to utilize their capital. They can subordinate capital to bring in other investors; they can provide first-loss capital, so that they can essentially provide guarantees in areas where they want to bring in commercial money. We saw a lot of this in the early days of the social impact bonds, pay-for-performance/success transactions, where certain private foundations would come in with a lot of money for grant and then PRI layers. A Goldman (and I'm not picking on Goldman for any reason except they were in a lot of these transactions), where their money was more secure would say, "Yes, this is a no-brainer!" If I have a private foundation securing my return and a government also securing my return, then I'm okay, and I'll come in and do it. What that was doing was building up a whole industry of different mechanisms to aggregate capital and to think about impact.

I'd like to end on where I think some conversations I've had with Josh and others with Josh and his team, this notion of if you build it, what happens. How do you do this to bring it about? We know we have these tools. They've been around for a while. At the heart of it, though, is this notion of "What can a foundation do that cares about both the field and about achieving impact, too?"

The first is lead by example, so actually *do* something and bring people along with you. Tell them, "Here's what we're doing and why; here's why it's beneficial; you should try it. Not only that, we've built it, so all you have to do is hop aboard." That's an important thing and a really good way to utilize a private foundation's muscle.

Educate the field. Celia mentioned this, that Josh is out there speaking. I have spoken with Josh a lot; I've heard Josh speak a lot; and I've heard folks in his shop speak. They talk about what they do and why and help the resources. When I talk to other people in the field, often they'll say, "Yes, I spoke to Josh at MacArthur," "I spoke to

this person at MacArthur, who was really helpful and generous." Often that person is coming out of an investment bank, where no one would ever talk to them, and they'll say, "Why are they so nice? What's going on here?" [LAUGHTER]

I tell them, "It's a different field; people are very helpful, not just Josh, it's all good!" [LAUGHTER]

The other thing he mentioned, and we see a lot of partnerships with like-minded funders — if you're doing something and someone else is doing something, we're more powerful together in that partnership. How do we navigate the rules around that to make it both successful, easy, and accessible? Create structures. If you have a legal team of five or seven people, you have capacity — and you have outside counsel — you might have more capacity to create structures, to create a public charity, to create partnerships. Then share information and materials and be a resource. Those are the things that I've always loved about working with MacArthur — again, from being junior to a little more senior — and it's a lot of fun. This is why we do it, and this is exciting, the more we create collaborations and partnerships the more we can move impact and show people that this is easy. We have a responsibility to do it right and show people how to do it and bring them along. We can also tell them not to do it when it doesn't make sense or fit, and we come out in a place where these interesting mechanisms aren't abused.

Thank you! [APPLAUSE]

KAREN TODD: This Uniform Prudent Management of Institutional Funds Act was the hobble, I assume, that the legislators came up with for these kinds of funds. Can you tell us, first, what you think their purpose was in doing it, and whether it worked?

TOMER INBAR: Sure. As I mentioned at some point in that, was that state law typically regulates the investment of charitable

assets. UPMIFA (The Uniform Prudent Management of Institutional Funds Act) is a statute that came after the last iteration of this regulation, that loosened up the valves a little. It made it clear that you can consider the special nature of an investment to the charitable purposes of an organization, as part of a prudence analysis. When a typical investment fiduciary thinks of prudence, they think of market, timing, assets, returns, etc. UPMIFA allows all the way at the bottom of several factors, is this fuzzier factor that says, “You can consider this.” That allows people to say, “That return is still prudent, but I’m willing to take a little less because of the special nature of the relationship.” That actually helped us a lot for people, and it helped when the Feds finally said, “If you’re prudent under state law, then you’re prudent for the purposes,” that I was saying before, and that suite of restrictions that Doug started with, is no longer a mismatch. For many years, they refused to say that if you are prudent under state law, you are also prudent for federal law.

KAREN TODD: Thank you. Our next speaker is Norah Jones from Quarles & Brady.

NORAH JONES: Thank you, Karen. Thank you very much, Josh, for inviting me to participate.

We here on the panel all had free reign to pick whatever topic we thought would be of interest and relevant to today’s discussion. In preparing, I wanted to step back and think a bit about what is it exactly, if I could articulate it, about working with Josh and his team at MacArthur that is so rewarding to us, as lawyers? I am speaking very comfortably for myself and for my colleagues at Quarles & Brady in saying that it isn’t just the obvious sense of pride and satisfaction we get in helping this team do the really incredible stuff that they do, and being able to participate in that, even in just a very small way. Intellectually, it’s also the reward of the programs that they do is really interesting and challenging. They are at their vanguard of working within,

“Impact investing” means the use of assets in investment activity to achieve both a financial return and a beneficial social return. That term wasn’t even coined until five or 10 years ago. . . It’s caught on in commercial farms, and places like Blackstone and other big financial institutions are trying to build impact investment arms, because it’s increasingly popular with millennials and young people coming out of college and graduate schools who want to get into the finance game.”

– Joshua Mintz

as Doug explained, this draconian set of rules from a million years ago. Taking those into the challenges of today, and pushing them forward in a way that’s appropriate and prudent, but also really creative. It gets philanthropy and philanthropic resources out in the forefront of meeting some of the biggest challenges that we see in our society here in Chicago, in the country, and around the world. We know that we get called when there are really thorny questions, and it’s fantastic, to use one of Josh’s keywords, to be able to partner with a group like this, to think through issues on not only the technical nitty gritty, how does this fit within these really complicated, outdated rules, but how creative can we be in getting to “yes”? As Doug said, lawyers have an ill-deserved reputation of saying “no.” We really want to say “yes.” We might say, “Your first idea isn’t exactly the right fit, but let’s get to ‘yes’ some other way.” That is our goal.

I’m going to get a little more basic than my colleagues have so far. One of the things that is most significant about the contributions that MacArthur makes and Josh and his team do, particularly when they’re doing speaking engagements and the outreach that they do, is that not only are they telling other foundations in the philanthropic community, how you can be creative and what you can do and how you can use your resources in a way that might seem a bit untraditional. They are actually *doing* it. I can’t tell you the number of times where

we have talked with a newer foundation or a newer program officer who’d get really nervous and uncomfortable about making – we’ll talk about this in a second – what’s called an “expenditure responsibility grant,” or making a grant to a foreign organization. The fact that you have a MacArthur in the world that does these things so well and so routinely and without panic, gives a sense of comfort to the rest of the philanthropic community. “We can do this, too. We might not be doing 100&Change; we might not be creating Benefit Chicago; but we can do something more creative or a little bit more out of the box than where we were starting, to move the needle on the issue that we care about, in a more direct and impactful way.”

That’s one of the less-recognized or, at least for me, until I tried to think through it a little more particularly, benefits that we see in the philanthropic community, from MacArthur and Josh and his team.

I wanted to spend a couple of minutes talking about grantmaking in the foundation world. Putting a bit of context on the table and talking about some of the ways where you can be a creative grant maker, but without the risk that you might think comes along with that. It’s a very easy to accomplish way. If you are new to a corporate foundation world, or if you’ve been there for a while but you’re looking for a way to expand your grantmaking portfolio,

there are some very comfortable baby steps that you can take to push things a bit more but still be in a very comfortable position.

Before I do that, just a quick review. Private foundations, as Doug was explaining, are subject to this whole host of rules that just don't apply to other 501(c)(3) organizations. Within those, there's two that I want to focus on.

The first is – and I think folks in general have an understanding that this exists – private foundations like MacArthur are generally required to spend 5% of their assets every year on charitable purposes. The quick vernacular for that, as people say, you've got to give away 5% of your assets; you have to grant out 5% of your assets. While that is a way to get there, that is not the only way to get there. It's an expenditure test. What you're looking at is total expenditures. Grants count, but direct expenses count, too. So do staff expenses and other expenses that you incur for running direct programs. Right out of the box, the tax law is telling you it's not just grants; you can satisfy your requirement by doing things other than, or in addition to, grants. That can let you get into some creative and innovative environments.

The second, though, is you want to be mindful of the fact that you can't just open your checkbooks, write a bunch of checks or spend a bunch of money with staff expenses, without doing some diligence. There's a second set of rules in the private foundation world that limit or restrict the types of organizations to which you can make those grants, or for which you can incur expenses.

A lot of times, what we see is people take these rules as prohibitions, and they say, "I want to live only in a world that is as fool-proof as possible, because we have limited resources. We probably don't have inside counsel. We probably don't have access to outside counsel that does this work all the time, so we're going to stick to the safest grants out there. What are those?" In a

nutshell, the safest and easiest way to make grants if you're a private foundation is to make your grants to 501(c)(3) organizations that are domestic and are public charities. Unless they are what's called "non-functionally integrated type III supporting organizations," but we're not going to talk about that right now. That's not an acronym; it's just an awful term, and we're not going to focus on it. [LAUGHTER]

There's a whole other world of philanthropy and charitable organizations out there that are able and available to be recipients of distributions from your foundation. The few that I want to mention are individuals. You can make grants to charities that lobby for general operating. You can make grants to charities that lobby for particular programs that include lobbying, as long as you meet certain tests. You can make grants to other private foundations. You can even make grants, in certain cases, to non-charitable organizations, to for-profits, to other types of tax-exempt organizations. There's this entire structure out there that is not that hard for foundations to comply with in order to get where they need to go.

When we're talking about grants to individuals, that can be things like scholarships, the traditional scholarship program. It also can be programs like the ones that MacArthur does – awards, prizes, recognition. You can really advance a charitable purpose by recognizing individuals that have contributed in some meaningful way to the thing it is that you care most about. There are rules and technical requirements that come into play, but I'm telling you, they are not that bad. You can make it happen. You want to be sure you comply with them, that you do it and you do it right; but once you've got it set up, you've got a terrific opportunity to engage with your mission in a way that just writing grants to other organizations won't necessarily allow.

The same thing is true with grants to charities that lobby. We hear the misinformation a lot that, "I'm a foundation; I can't make a grant



to that 501(c)(3) charity because they have an advocacy arm or a lobbying program." That's not the case. You can make general operating grants, as long as they are true general operating and you haven't earmarked them for any particular purpose. You could even fund a particular education campaign that a charity is running, so long as you meet certain tests and you can be confident and document that you are not funding the lobbying portion of whatever that budget is.

You can make grants, like I mentioned, to other private foundations. You're not restricted just to public charities. There are certain redistribution requirements that come into play, but it's something that foundations like MacArthur do all the time and do well. You can make grants to foreign organizations.

One thing to keep in mind is that when you get into some of these less-traditional grantmaking arrangements, is you'll hear the term "expenditure responsibility." What expenditure responsibility is, at its core, has been codified in the Internal Revenue Code, but it's really good grantmaking. When you look at the requirements of expenditure responsibility, what it is asking you to do as the funding foundation is really not different

than what good grantmaking oversight would require in any event. You do a pre-grant inquiry to be sure that the recipient of your grant is capable of doing the things that you are expecting them to do. You have a written grant agreement that includes certain provisions that are required to be included by the Internal Revenue Code, none of which are all that crazy. You're requiring reports to you from the grantee. You're requiring them to keep track of the money that you've given them, and you're requiring that if they don't use the money for the appropriate purpose, they return it to you. Nothing outlandish, nothing crazy there. Then you are reporting to the IRS on your Form 990 that you've made these types of grants and what the status is.

I can tell you that it's a last piece that we probably get the most hesitation from with other foundations, "I can't put this on my 990. I can't tell them I made an expenditure responsibility grant. Isn't that a huge audit concern?" It is fantastic to be able to use the MacArthurs of the world to say, "They do this all the time. This is something that the tax law allows you to do. It gives you the pathway to do it. You can do it. This is not a red flag. You can do it right. This is going to get you where you want to be, sometimes faster than more traditional grants would allow you to do."

The last thing I want to emphasize, as I said in the beginning, is remember that this distribution requirement is not just grants. There are a whole lot of options out there that foundations can do. Many do really well, like MacArthur, that count toward that distribution requirement, but in some ways may create a more meaningful or lasting impact. Convenings of grantees, where you get your program area grantees together to talk with one another about what they've learned, what their successes are, what are challenges in the field, what are opportunities for improvement. Your expenses in supporting that convening and running that convening, those count toward your distribution requirement.



Technical assistance, the time that your staff spends talking to grantees or others in the field about opportunities, points of learning, points of growth – those all count towards your distribution requirement, as well.

Program-related investments that Tomer was talking about. Those are fantastic, because those count as a grant when you make them. They count toward your distribution requirement when you make them. In an ideal world, that program-related investment works out; you get those funds back, and you can reinvest them and get another distribution credit at the time that you make that second reinvestment.

I would say that one of the best ways in which MacArthur and Josh and his team are such an example to all of us in the field and to other organizations, as well, is this challenge to think creatively. Think beyond the grant; think outside of the box. There are a lot of ways to get to that 5% distribution requirement. Also, it's not a cap; it's a minimum. You aren't just spending to 5%. There's nothing wrong with going beyond 5%, and you can often do that in a really impactful way by using tools other than grants. [APPLAUSE]

KAREN TODD: What would you say is the biggest pitfall a foundation faces when making a grant?

NORAH JONES: It is not understanding, up front, the diligence that needs to happen. It is always – and this would be similar to what Tomer was saying about documenting the reasons of why you're going into a program-related investment or a mission-related investment and the like. One of the biggest pitfalls is just writing a check and being done with it, without doing upfront diligence to be sure that you've got it structured in the right way. It's really hard to fix things after they've been done. It's not impossible, but it is challenging.

KAREN TODD: How close to the purpose of a foundation would a grant have to be? Do you have any leeway in terms of what you can do, or does it have to match the purpose exactly?

NORAH JONES: It depends on the foundation and what its specific purposes are. Some foundations have very broad purposes. They are organized and operated for any of the 501(c)(3)-enumerated purposes – charitable, educational, scientific, religious, literary – it's easy to make something fit within that umbrella. Others are very narrow and have a very clear, stated focus, and those can present more challenges.

KAREN TODD: Thank you. Our next speaker is Kim Eney, who is at Latham & Watkins.

Kim, we've talked about seeking social change through policy change; utilizing and aggregating investment capital for impact; and creative grantmaking. What are some of the special legal considerations that come into play when engaging in philanthropy and pursuing impact internationally?

KIMBERLY ENEY: Thank you, Karen. Thanks, Josh, for inviting me to be here.

There are certainly a number of considerations that come into play when we're talking about engaging in philanthropy internationally. Josh highlighted some of these considerations, but I'll walk through the details a bit.

The good news is that international philanthropy is growing. There is a report from the Foundation Center showing that in 2015, international philanthropy had reached an all-time high of about \$9.3 billion, which was great to see. I also happened to see, in the local news this morning, that Halloween candy sales are estimated to reach \$9 billion this year! [LAUGHTER]

When I saw that, and then thought about international philanthropy hitting an all-time high of about \$9.3 billion, I realized, “There’s probably more that can be done in the space of international philanthropy!” [LAUGHTER]

Regardless of the state of Halloween candy sales, however, it is great that more charitable organizations are engaged in international philanthropy. The Foundation Center report also showed that from 2002 to 2015, the average grant size for international projects tripled to about \$600,000 so it is very clear that there is a growing interest among charitable organizations in engaging in international grant-making and making social change around the world.

International philanthropy often involves thinking through a number of legal considerations that don’t typically arise in connection with domestic philanthropy. First, as we’ve discussed, charitable organizations classified as foundations are subject to special rules under the tax laws. Whenever a foundation makes a grant to an organization that isn’t recognized as a Section 501(c)(3) charity in the U.S., then the foundation needs to decide whether it’s going to exercise expenditure responsibility or make an equivalency determination in order to ensure compliance under Sections 4942 and 4945 of the Internal Revenue Code. The equivalency determination process essentially involves making a determination that a foreign entity is the equivalent of a U.S. Section 501(c)(3) charity. Equivalency determinations offer more flexibility in terms of grant-making because foundations can treat foreign equivalency grants in the same manner as they



treat grants to Section 501(c)(3) charities. As a result, the foundation doesn’t need to impose all of the requirements associated with the expenditure responsibility rules which Norah highlighted in her comments. In addition, in recent years, the field has come together and developed new platforms, such as NGOsource, which enable foundations to obtain these determinations in a streamlined fashion.

If a foundation doesn’t get an equivalency determination, then it needs to exercise expenditure responsibility. As Norah mentioned, expenditure responsibility requires the foundation to, among other things, prohibit the use of funds for lobbying and campaign activities. Ensuring compliance with this prohibition can be particularly challenging in the international context where organizations receiving foundation funds are less familiar with the definitions of lobbying and campaign activities for purposes of the relevant limitations applicable to Section 501(c)(3) organizations. As a result, a foundation making a grant to an organization that is based in another country needs to ensure that the grantee really understands what the expenditure responsibility requirements, particularly the prohibition on lobbying and campaign activities, entail. Investing resources in training grantees on these requirements is an important component to helping ensure foreign grantees understand the rules and facilitate the foundation’s compliance

under the U.S. tax laws. That’s certainly one consideration that comes into play when we’re talking about engaging in the international space.

There are some additional considerations that I thought I’d briefly mention. First, there are some tax law considerations associated with withholding. Whenever a foundation or a charitable organization is making a grant to an organization that is based outside of the U.S., then it needs to think about potential withholding obligations if some of its grant funds will support activities in the U.S., such as travel to attend a conference in the United States. Second, there are sanctions-related considerations associated with pursuing philanthropic activity in certain countries. The U.S. Department of Treasury’s Office of Foreign Assets Control or OFAC restricts the ability for U.S. organizations to work, operate, make grants or care for people in countries where there are sanctions. For example, countries like Sudan, Syria, and North Korea are all subject to comprehensive U.S. sanctions and therefore require an understanding of the general licenses, specific licenses, and exemptions necessary in order to engage in work in these countries. There are also list-based sanctions, requiring charitable organizations to review the names of persons appearing on the Specially Designated Nationals and Blocked Persons List that OFAC administers. Third, charitable organizations also need to ensure that their funds aren’t being used for terrorist activities and aren’t going to end up providing material support to terrorist organizations. “Material support” is defined very broadly, and it is important to understand what does and does not meet that definition. There are also anti-bribery laws that U.S. organizations must consider when transmitting funds in another country. Finally, there are certain filings associated with maintaining bank accounts or assets outside of the U.S., such as those required in connection with the Foreign Account Tax Compliance Act (FATCA) and Foreign Bank Account Report (FBAR) compliance, and banks must comply with anti-money laundering

and know-your-customer rules which have discouraged them from banking with organizations expending funds outside the U.S.

I've briefly walked through a number of considerations associated with international philanthropy, and there are many. Something that can be done creatively to navigate these considerations, and certainly is being done more and more, is for Section 501(c)(3) organizations to engage in partnerships. Tomer mentioned the importance of partnerships in the impact investing space. Certainly, that's important in the international space as well. The MacArthur Foundation's 100&Change project provides a great example of how partnerships can help address some of the legal complexities that I just mentioned and drive social impact in the international space.

The MacArthur Foundation launched the 100&Change project as a competition for a \$100 million grant to fund a single proposal that promises real and measurable progress in solving a critical problem of our time. The Foundation awarded its \$100 million grant to a project between two U.S. Section 501(c)(3) charities: (1) Sesame Workshop, which provides "Sesame Street," a children's educational television program that we all know and probably enjoyed at some point in our lives and has brought the "Sesame Street" program to children in countries around the world; and (2) the International Rescue Committee, which is an organization that for years has been working with people who are suffering from humanitarian crises and is focused on caring for refugees.

Sesame Workshop and the International Rescue Committee came together to propose a project that involves implementing an evidence-based, early childhood development intervention designed to address the "toxic stress" experienced by children in the Syrian response region, namely Jordan, Lebanon, Iraq, and Syria. The project is focused on improving children's learning outcomes in the near-term and their intellectual and emotional development over the



long term. The Sesame Workshop and the International Rescue Committee are two organizations that already have the tools to care for people and provide educational opportunities for children living in places outside the U.S. so the proposed project ultimately capitalizes on their strengths.

The fact that the MacArthur Foundation could make a grant to these organizations to carry out such important international work is great, and it certainly offers a number of advantages from a legal perspective. I mentioned that there is a comprehensive sanctions program in Syria, and the International Rescue Committee has experience navigating U.S. laws with respect to work in the Syrian response region. According to its website, it provides support to over one million people across Syria each year, almost half of them children. In addition, because the two organizations are U.S. Section 501(c)(3) charities, the Foundation's grant does not require exercising expenditure responsibility or making a foreign equivalency determination. This 100&Change grant is just one example of some of the great work that the MacArthur Foundation is doing in the international space, and the advantages of identifying creative solutions, often partnerships, for navigating the various legal considerations related to driving social impact internationally.

KAREN TODD: What about cultural considerations?

KIMBERLY ENEY: There are certainly a number of cultural considerations associated with making social change internationally, both in terms of ensuring that the work that an organization is funding is consistent with the cultural expectations of the country, and understanding that in certain countries, funding from U.S. sources isn't always viewed as favorably as some of us in the U.S. might think or want or hope (what Josh mentioned as the "shrinking space"). For example, some countries impose caps or taxes on foreign funding. Other countries may stigmatize local organizations that receive foreign support by deeming these organizations "foreign agents." It makes it harder to work in certain countries, and requires more creativity.

KAREN TODD: Okay. How can a 501(c)(3) or charitable organization make change from the inside out?

KIMBERLY ENEY: So much of what we have highlighted on this panel involves the importance of what foundations are doing on the outside to effect social change, be it through policy change, impact investing, or grantmaking, or even in the international space. However, I also think it is important to highlight how crucial it is for



foundations and other charitable organizations to pursue social impact on the inside, within their own spaces. I included a report in the materials that talks about 12 ways that foundations are transforming themselves to achieve impact, and it highlights such accomplishments as breaking silos and addressing power dynamics. While these opportunities for foundations to transform themselves don't directly involve legal considerations, there certainly are legal implications associated with evaluating and taking an inside look at what the foundation is doing, how the foundation is working, and making changes. Josh mentioned the Just Imperative. That is a great example of how the MacArthur Foundation is engaged in self-reflection. Through the Just Imperative, the Foundation recognizes that making social change doesn't simply involve maximizing impact for the world outside, but that it also involves taking a look at its own decision-making and practices.

My work as a lawyer involves a relatively objective experience: understanding a set of facts, reviewing the law, and applying the law to the facts. Although my personal experiences don't inform or otherwise shape my work as a lawyer, my experience as an African-American woman is certainly unavoidable on a day-to-day basis as soon as

I pick my head up out of the books or step away from the computer screen. Workplaces are an aggregation of people coming from all different walks of life, and there are opportunities to embrace that and achieve impact through acknowledging the diverse experiences and perspectives of its employees. I know that the MacArthur Foundation cares about achieving impact in this way and, with the Just Imperative, I think it's important to acknowledge and look to the Foundation as a model for driving social impact from the inside out.

KAREN TODD: Great. Thank you. [APPLAUSE]

I wanted to ask each of you if you could tell us how you got into the not-for-profit sector, because most lawyers go into corporate or for-profit. Doug?

DOUGLAS VARLEY: First, I avoided going to law school as long as I possibly could, and when I graduated from law school, tax seemed like the least lawyerly kind of law to practice. [LAUGHTER]

It's very geeky. Then, I was very lucky that when I got to a firm that specialized in tax law, there was an existing private foundation practice. I was drawn to those lawyers

and to their clients. There's a lot of non-financial remuneration in this business; it's getting to know super-interesting and exciting organizations. That's how I got into it.

KAREN TODD: Thank you. Norah?

NORAH JONES: Before law school, I was first a social worker and then an urban planner. To my great surprise, I loved my tax classes in law school, and particularly loved my estate and gift tax professor, who turned out to be a former classmate of the woman – Janice Rodgers – who chaired our group at Quarles & Brady. She directed me to Janice, and I felt like all of my prior experiences came full-circle. I love the geeky tax aspect of this job, and I love the clients that we work for, and the work they do.

KAREN TODD: Great. Josh?

JOSHUA MINTZ: The Foundation had been a client of Sidley when I was there, one of my clients. I got exposed to the work, and it was really appealing to me. I wasn't a tax geek, and I'm still not a tax geek. I'm not sure whether that's a badge of honor or not. It really was the mission attraction and the fact that I feel this obligation is, as Celia mentioned, to really turn around and try as much as I can to get back to people to share. It's a really extraordinary opportunity and privilege.

KAREN TODD: Thank you. Kim?

KIMBERLY ENEY: I took some time off between college and law school, and I worked at a communications consulting firm for non-profits during that time. I loved working with non-profits, and I realized that all of the different interests that I had in college (I went to Brown so there were many), *all* related to the non-profit sector in some way. I went to law school motivated to figure out a way to advise non-profit organizations from a legal perspective. I learned that I could become a tax law geek and enjoyed it. I attended NYU Law, and I connected very early on to Jill Manny, who runs the National Center on

Philanthropy and the Law. She learned that I was from D.C., and connected me right away to Celia and to Tomer (who worked with Celia at the time), and their shop in D.C., so I had the great pleasure of starting out in this space.

KAREN TODD: Okay. Tomer?

TOMER INBAR: I was a classical Japanese literature Ph.D. student. [LAUGHTER]

Doug, even though you tried to avoid it, I tried to avoid it longer. Then I had the misfortune of driving from D.C., where my folks live, to Ithaca, on the second day of the Clarence Thomas/Anita Hill hearings, and spent eight hours in the car listening to those. I determined that our democracy couldn't get any worse than that moment (and now I long for that moment – not to be political!) [LAUGHTER]

Then I got up to Ithaca and said I can't really fight over pronunciation of eighth century Korean phonemes any more. It was easier to go to law school than to get a job teaching at an experimental high school in upstate New York. I went to law school, and then ended up working with Celia for many years. That's why I went to law school and wanted to do, and also what I did at NYU, where they have a great program in law and philanthropy.

KAREN TODD: Thank you. What advice can you give to corporations who want to set up a charitable foundation? Doug?

DOUGLAS VARLEY: My first advice to a company that wanted to do that is to think carefully about it, because it depends on the circumstances. There may be an external tax circumstance where a large charitable deduction is needed and putting money into a foundation can be a way to satisfy that need. If you're talking about funding your regular activity, I'm not sure that a private foundation is always the right way to do it. You can give to existing charities and get a deduction.



I love private foundations – it has been a privilege to work with them. But one of my adages is that it is rarely the case that anything gets simpler when you add a private foundation to the mix. I would look and say, “What are you getting from a tax perspective out of your giving, in addition to the program and educational benefits that you might get? Do you really need a foundation?” Once you've got one, there's this ominous set of rules we keep referring to. Once you add a foundation, you've got those rules, and they're very counterintuitive. That would be my advice, to think prudently about the decision.

KAREN TODD: Thank you. Norah?

NORAH JONES: That will probably be a recurrent theme. I would first ask, “Why? What do you think you are going to do with it?” Then figure out what the right advice is, for all the reasons that Doug described. People want it; they jump into it; and then you have it, and you have to live with it, and that might not be what they really want.

KAREN TODD: Okay. Josh?

JOSHUA MINTZ: I'll defer to my experts over here!

KAREN TODD: I understand.

KIMBERLY ENEY: I agree with the prior comments. I would also work with a company on evaluating the various alternatives. Setting up a foundation is one option, but a company also could give directly to charitable organizations. Another option would be to establish a donor-advised fund. After laying out the alternatives, I would want to help the company think through the pros and cons associated with each option, including the level of control that they want to have over the contribution, as well as how closely aligned they want their company's name to be with the contributions. For example, a contribution from a donor-advised fund is not technically a contribution from the company so that involves a more tenuous relationship. Ultimately, I'd want to think through the company's motivations for giving and evaluate which alternative is best suited for achieving those motives.

KAREN TODD: Thanks. Tomer?

TOMER INBAR: How do you talk last on a question where everybody's answered it so well? The other piece in my mind, how I synthesize it, is that often you're doing this for a business reason, that you believe that it will help your business to do this, and there are different ways that businesses can be helped. There is goodwill, and there is reputation in the community; but often, the real driver is that they think that it will increase or help their bottom line. That aligning their giving will somehow give them a competitive or business edge that isn't simply recognition. Be very careful about that, because then you're back into all of the complexity of navigating these rules, and you inevitably will fail, if that's your motivator, then you are going to be frustrated at every turn. You have to think about what is your motivation – why are you doing it? Again, everything everybody else has said.

KAREN TODD: Alright. Do we have any questions from the audience?

[AUDIENCE MEMBER]: As an utter neophyte in this area, I'm interested in the panel's perspective on the *Citizens United* decision, and any impact that you see it having to flow through to these rules applicable to foundations.

DOUG VARLEY: *Citizens United* has changed everything for corporations, but it doesn't directly impact foundations. *Citizens United*, just to be clear, says corporations can make independent expenditures. An independent expenditure is a non-coordinated communication endorsing a candidate. Since *Citizens United*, corporations can do that. That's a big and very fundamental change in the regulation of politics in our country. It doesn't *immediately* affect private foundations, because these *other* rules I was talking about say private foundations can't do independent expenditures, because they can't support or oppose candidates. But what the case has done — and I'd really be interested in seeing what the other panelists think about this — is change the environment in which foundations work. It used to be that in the non-profit sector writ large, other than political parties and the PACs that support them, there was very little interface between non-profit corporations and explicitly political actors. Now you have non-profit corporations that can make independent expenditures, and you have donors that can make undisclosed contributions to those entities. That's changing the expectations for what a donee is supposed to deliver. The ecosystem has just become much more political since *Citizens United*. Not *immediately* for the foundation. They do not ask the question, "Can we make an independent expenditure now?" But, when you look at who foundations are funding and how those groups are operating, the grantees are different now; they're working in a changed reality.

KAREN TODD: Anyone else want to comment on that?

NORAH JONES: I think that's exactly right.

KAREN TODD: Okay. I would like to ask each of you to tell me your greatest joy in doing this work. Josh?

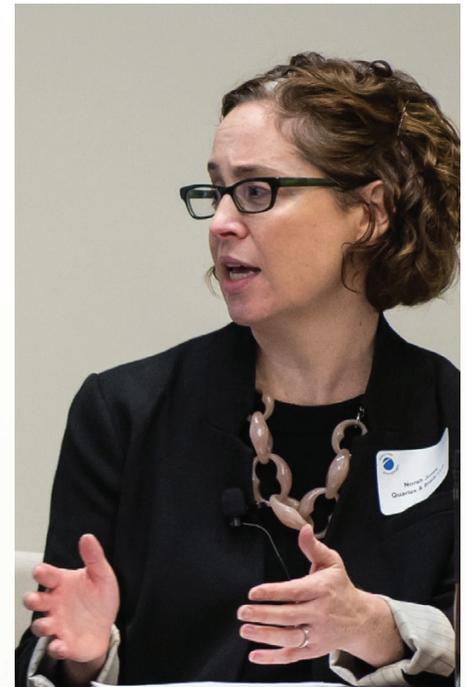
JOSHUA MINTZ: It's going to sound sappy. I mentioned it at the beginning. It's the opportunity to work for a mission-driven organization in which the people are passionate and care so deeply about the work they're doing. Then the smaller aspect, is the team of people that I work with, and they are an amazing group of people. The combination of working for an organization that it's a privilege to work for, that inspires me every day.

KAREN TODD: Wonderful. Kim?

KIMBERLY ENEY: One of the things that I like doing is helping to empower people with ideas about ways to change the community and change the world. These ideas can come from individuals working at big companies or influential philanthropic institutions such as the MacArthur Foundation, but they can also come from people who suddenly develop an idea while volunteering at their children's school or serving in the military. The diversity associated with the individuals and organizations working in the space and the ability to support and advise on how these various ideas can advance charitable purposes is something I enjoy.

KAREN TODD: Thank you. Tomer?

TOMER INBAR: Apart from what Josh and Kim said, there's also this notion of being a partner of my client. I do feel a part of them in a way that my partners and my other colleagues don't with their clients. In the sense that there is often a deepening of the relationship between us and the mission. We feel that we are helping carry out that mission, and we do have a lot to offer. When I enter into that engagement, I feel that identification, that imperative — of course, with the appropriate distance and all the legal caveats. [LAUGHTER]



Deep down in my heart, it's this notion that what we are doing has an impact. All of us on this panel have the kinds of practices where we really do shape who we represent and why we represent those organizations. It does reflect who we are in a lot of ways. At least, it does for me.

KAREN TODD: I understand. Norah?

NORAH JONES: One of the things I like the best is when a client calls and you hear in their voice that they're marching to their sentence and they've been instructed to ask you something, and they just know you're going to say "No." If they have to call and ask, I love being able to say "Yes. We can absolutely do that, and let's figure it out!" Within five minutes, you've made somebody's day better, because they thought you were going to shoot their program down, and instead, you've said "Let's get this going!" That's great. I'll just copy what others have said, truly, the biggest joy is the clients and my colleagues.

KAREN TODD: Thank you. Doug?

DOUGLAS VARLEY: I'd like to pick up on what Norah said, because that moment when you tell somebody they can do something they think they can't is really a happy moment. I don't know if it's the *greatest* moment of professional joy, but it's probably the most recurring.

A number of years ago, I was approached by some private foundations about a project they thought they might not be able to pull off. If you know San Francisco at all, the southern end of San Francisco Bay used to be all salt ponds. The Cargill Company had created ponds – hundreds and thousands of acres of drying ponds – and if you flew into San Francisco, when you looked out the plane window, there were these red and brown hideous things. A few years back,

some foundations decided that they really wanted to clean that up. But, they recognized that, in addition to their own spending, they would need federal money for a project that big. That raised lobbying issues, so the foundations were concerned that they could not work with the government to clean up the salt ponds. That was the impasse. Ultimately, we worked out a legal strategy for partnering with the federal government and the State of California to leverage the foundation's spending to get government money to clean up all those ponds – to turn them into functioning wetlands. And that too has been a recurring source of joy for me every time I fly in to San Francisco! I look down at those ponds, and every year, they're greener than they were the year before. This is a very tangible way to see that

these philanthropies do make a real difference. While it's sometimes hard to evaluate success in this business, sometimes it's not hard at all; it just hits you right in the face.

KAREN TODD: I'd like to end on that positive note. I want to thank all of our Distinguished Panelists for sharing their expertise. I'd like to thank Josh very much for allowing us to give him and his legal department this honor. Let's give them all a hand. [APPLAUSE]

JOSHUA MINTZ: I'd like to thank Directors Roundtable for putting this on, and for the four of you to take your very valuable time and share your expertise with all of us. Thank you. [APPLAUSE]



Douglas Varley
Member

Douglas N. Varley is a Member of Caplin & Drysdale's Washington, D.C., office. He became a Member of the firm in February, 2000.

Mr. Varley's practice focuses principally on advising exempt organizations, in particular, private foundations. He has guided the design of major grantmaking programs and participated in the development of national public educational campaigns targeted on a range of significant policy issues. In addition

to helping a diverse array of non-profit organizations comply with the rules governing lobbying and political activities, his areas of concentration also include such matters as international philanthropy, restrictions on executive compensation, transactions with for-profit organizations, and minimizing unrelated business income tax. Before embarking on his legal career, Mr. Varley administered grantmaking programs for college and university faculty at the National Endowment for the Humanities.



Caplin & Drysdale, Chartered

For more than half a century, Caplin & Drysdale has been a leading provider of a full range of tax, tax controversy, and related legal services to companies, organizations, and individuals throughout the United States and around the world. With offices in New York City and Washington, D.C., the firm also offers counseling on matters relating to bankruptcy, complex litigation, corporate law, creditors' rights, employee benefits, exempt organizations, political activity, private client services, and white-collar defense. Our ranks include former senior staff from the Internal Revenue Service, the U.S. Treasury, the Federal Election Commission, and the Justice Department. Their substantial technical skill and considerable knowledge on how

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Kimberly Eney
Counsel

LATHAM & WATKINS LLP

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Kimberly Eney is counsel in the Washington, D.C. office of Latham & Watkins, and a member of the Tax Practice.

Ms. Eney has over a decade of experience advising a wide range of non-profit organizations on federal tax laws and related matters integral to advancing their mission. Her clients have included leading private foundations; research institutes; family foundations; media and sports organizations; civil rights and advocacy organizations; museums and arts institutions; community and economic development organizations; colleges and universities; hospitals and medical research organizations; social welfare organizations; business leagues and trade associations; churches and religious organizations; and many other types of special-purpose organizations.

Ms. Eney advises clients on compliance with tax-exempt status, the Chapter 42 excise tax regime applicable to private foundations, earned income strategies and the unrelated business income tax, affiliate

relationships, compensation practices and the intermediate sanctions regime, the public support test, and the rules on lobbying and campaign activity.

Ms. Eney also advises on board governance matters, and she has worked with boards on reviewing and revising bylaws and governance policies, addressing and managing conflicts of interest, and approving complex transactions. Additionally, she works with clients on structuring, and maintaining impact investing programs, including PRIs and MRIs.

In conjunction with her tax practice, Ms. Eney is a regular speaker at non-profit industry conferences, and has had multiple articles featured in *Taxation of Exempts*. Prior to joining Latham, Ms. Eney was counsel at a Washington, D.C.-based firm, and a fellow at the National Center on Philanthropy and the Law. Ms. Eney also served as a member of the Steering Committee for the District of Columbia Bar Taxation Community from 2015-2018.

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Tomer Inbar
Partner

**Patterson
Belknap**

Patterson Belknap Webb & Tyler LLP

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Tomer Inbar represents U.S. and international tax-exempt organizations (and for-profit organizations that deal with them) in a broad range of structural and operating matters, including obtaining and maintaining tax-exemption, tax and corporate issues, impact and charitable investing, regulatory compliance, governance, operational policies and procedures, IRS audits and state attorney general investigations, unrelated business income tax issues, and executive compensation matters.

He regularly advises on an array of transactions and structures involving tax-exempt organizations, including joint ventures and the establishment of for-profit subsidiaries, corporate restructuring, mergers and acquisitions, program related investments, charitable fund formation, establishing accelerators and incubators, hybrid structures and licensing and service arrangements.

consumer products companies to financial institutions; from fine art museums to famous entertainers; from foreign companies seeking to transact business on U.S. stock exchanges to U.S. companies doing business abroad.

Patterson Belknap is a magnet for independent thinkers. We were founded by attorneys who believed they could create a more congenial atmosphere on their own, away from the lockstep anonymity of larger firms. The firm carefully manages growth and purposefully operates with a single office in New York City. As a result, we can exercise concentrated quality control, and our attorneys can draw freely on each other's skills in an atmosphere that has been described as "collegial to the extreme." *The National Law Journal* has included Patterson Belknap on a list of firms that it considers to have "the nimbleness and adaptability that come from lean operations and strong client ties." This environment promotes the responsiveness, efficiency and personal attention we believe clients seek.

Among Mr. Inbar's clients are private foundations and public charities, including colleges and universities, environmental conservation groups, economic development organizations, advocacy groups and museums and cultural institutions, many of which are active worldwide.

Mr. Inbar is a regular speaker at programs for tax-exempt organizations. Recent topics have focused on structuring program and mission related investments, charitable investment funds, lobbying and political campaign activities, the fiduciary aspects of program and mission relating investing, aggregating capital for social good, charitable issues relating to energy and the environment, crisis management and communications, and board governance considerations and liability concerns. Mr. Inbar is Co-Chair of the planning committee for the University of Texas Non-profit Organizations Institute.

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Norah Jones
Partner



Norah Jones is an attorney in the Tax-Exempt Organizations Group at Quarles & Brady LLP. She focuses her practice on advising public charities, private foundations, hospitals, trade associations, and other tax-exempt entities on a variety of legal and tax matters, such as

- Advising clients regarding the creation of new tax-exempt organizations and the application for appropriate federal and state tax-exemptions for such organizations.
- Advising private foundations regarding complex program-related investment matters, including loans, guarantees, and direct investments.
- Counseling clients with respect to proper structuring of multi-entity coalitions and collaborations.
- Advising clients regarding significant and complex gifts.
- Drafting and reviewing corporate governance documents.
- Advising organizations with respect to maintaining tax-exempt and public charity status.
- Counseling clients regarding unrelated business income matters and structuring.
- Advising organizations regarding compliance with tax laws for tax-exempt organizations, including excess benefit transaction rules and private foundation excise tax laws.
- Representing clients engaged in Internal Revenue Service audits.
- Representing clients seeking rulings from the Internal Revenue Service.
- Assisting private foundations with respect to grants to international organizations and to individuals, expenditure responsibility, and self-dealing.

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Celia Roady

Partner

Morgan Lewis

Celia Roady counsels tax-exempt organizations on tax and governance issues. Charities, foundations, colleges and universities, museums, and other non-profits are among her clients. She regularly advises private foundations and public charities on operational and programmatic issues, including the structuring of complex grants, program-related investments, joint ventures and collaboration arrangements. Tax-exempt organizations turn to Celia for advice on issues such as executive compensation, private foundation excise taxes, unrelated business income, corporate sponsorships, lobbying and campaign intervention, and board governance practices. Celia regularly represents tax-exempt organizations in Internal Revenue Service (IRS) audits, as well as seeking IRS rulings and determinations.

Celia has been recognized by myriad publications for her legal skills, and served on the IRS advisory committee on tax-exempt and government entities from 2010 to 2013. Celia chairs Georgetown University Law

Center's annual conference, "Representing and Managing Tax-Exempt Organizations," and frequently writes and speaks on non-profit issues.

Active in professional organizations, Celia is a fellow with the American College of Tax Counsel. She served a two-year term as vice chair of communications for the American Bar Association (ABA) Section on Taxation. She is a former ABA Tax Section council member and former chair of the exempt organizations committee. Celia also was chair of the exempt organizations committee of the District of Columbia Bar Association Tax Section, chair of the D.C. Bar's Council on Sections, and a member of the steering committee of the D.C. Bar Tax Section.

From 2004 to 2005, Celia served on the governance work group of the Panel on the Non-profit Sector, which was convened by Independent Sector to provide comments to the U.S. Senate Finance Committee.

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