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Our 25th Anniversary!

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From the Editor

Reflections on the Winter Meeting

By Bennette D. Kramer

The 2018 Winter Bench and Bar Conference took place this year at the Four Seasons Resort in Nevis from February 10 to February 17. An article discussing the excellent programs appears later in this issue, but in this column I want to share some reflections on other aspects of the conference.

Justice Breyer

We were very fortunate to have Justice Stephen Breyer join us the first night. He has a house in Nevis, an island he said he loves. Justice Breyer was leaving the next day, so he could not join us for the rest of the conference, but he graciously agreed to be interviewed by Second Circuit Judge Christopher Droney, the chair of the conference, and he shared some thoughts about the Court.

Justice Breyer said that he misses Justice Antonin Scalia and talked about their differing approaches to deciding cases. Justice Breyer described the six different ways to consider a case: text, history, tradition, precedent, purpose, and consequences. He said that Justice Scalia looked at the first four in making decisions while Justice Breyer focused on the last two. The bottom line is that Justice Breyer thinks that the Constitution is evolving and Justice Scalia thought all answers to its meaning are found in history. Justice Scalia liked rules and Justice Breyer likes to look at the purpose of a statute and the impact of any decision.

He said that all the Justices take their job seriously. They discuss the issues, read the briefs, and write opinions. Justice Breyer finds amicus briefs help him when they provide information on the impact of a decision, but not when they just recite the law. In the 2016 term with only eight Justices, everyone tried harder to find agreement. A couple of cases were decided on narrower grounds and a couple were held over.

When he first joined the Court, Justice Breyer questioned whether he could do the job, but after a few years he concluded that he would just do the best he could. Justices depend on the bar to explain complicated issues and make them clearer. He said that a good lawyer can explain anything.

Justice Breyer makes speeches and talks to classes. He talks about civics and government institutions and tells his audience members that he hopes they participate in government, because the Constitution will not work unless everyone takes part.

After the interview by Judge Droney, Justice Breyer joined the group for the first dinner of the conference.

Whitney North Seymour Award

Federal Bar Council President David Schafer presented the Whitney North Seymour Award for Public Service by a Private Practitioner to Carey Dunn at the final dinner of the Winter Meeting.

Dunn is now general counsel to Manhattan's district attorney, bringing his career full circle after starting as an assistant district attorney under Robert Morgenthau following his graduation from Harvard Law School in 1984. Dunn spent the next 30 years at Davis Polk & Wardwell, devoting spending considerable time to public service. At the request of Chief Judge Judith Kaye of the New York Court of Appeals, he worked with Bob Fiske on a study of drug courts, intended to divert drug users from long prison sentences.

He also served on Chief Judge Kaye's special Commission on Reconstruction of New York State Courts. He was president of the New York City Bar Association, where he developed a law project for households of modest means, which also provided career opportunities for young lawyers.

Dunn also is known for his performances as a drummer in rock banks, including the Davis Polk band.

Accepting the award, Dunn emphasized the importance of talking to new lawyers about creating their own path to public service. Dunn acknowledged that there has been a culture shift in law firms since he started practicing. Firms are now more like businesses with an emphasis on billable hours, making time out for public service more of a challenge for young lawyers. Dunn

talked about his own choice to go to work at the district attorney's office when he was finishing law school. Dunn had an offer from Robert Morgenthau to work at the district attorney's office. He spoke to Mike Armstrong, who told him instead to clerk for a federal judge, come to work for his firm, go to the Southern District of New York, and back to the firm. Dunn then interviewed for a clerkship with Southern District Judge John Keenan and told him he wanted to try cases. Judge Keenan, who had spent time in the district attorney's office, told Dunn to work for Morgenthau.

Dunn's message for new lawyers was to be open to new possibilities and make a commitment to use their skills in aid of the dispossessed. In short, do good and provide *pro bono* support for the poor.

Women in the Law

One of the programs explored issues relating to women in the law, discussed in detail below. During the program and in a later conversation I realized that the essential factor for the advancement and equality of women in firms and elsewhere is absolute commitment by those at the top levels.

Bob Fiske, who was U.S. Attorney for the Southern District of New York from 1976 to 1980, stood up during the question and answer part of the program and said that after he was nominated to became U.S. Attorney for the Southern District and began the hiring process for assistants, he looked at the gender breakdown and realized there were only eight women in the office. In response, Fiske directed his hiring committee to hire 50 percent women. This hiring decision resulted in a U.S. Attorney's office where women had equal opportunities to rise within the office and move into prestigious positions following their service.

We were very fortunate to have Justice Stephen Breyer join us the first night.

Some of the women who worked under Bob Fiske were Mary Jo White, who later served as chair of the Securities and Exchange Commission from 2013 to 2017; four women who later became judges in the Southern District of New York: Barbara Jones, Denise Cote, Deborah Batts, and Naomi Reice Buchwald; Patricia Williams, who later became a New York Supreme Court judge; Jo Ann Harris, subsequently an assistant attorney general of the U.S. Department of Justice's Criminal Division; Mary Daly, later dean of St. John's Law School; Jane Booth, who became general counsel of Columbia University; Sarah Moss, who thereafter served as general counsel of Estee Lauder; Nancy Atlas, who became a judge in the U.S. District Court for the Eastern District of Texas; Patricia Hynes, subsequently president of the New York City Bar Association and The Legal Aid Society; Roanne Mann and Kathy Roberts, who became U.S. magistrate judges in the Eastern and Southern Districts of New York, respectively; Pam Chepiga, Jane Parver, and Sara Gold, who became law firm partners; Thea Dignam, later the chief assistant district attorney and deputy controller under Elizabeth Holtzman and head of the Atlanta office of the Securities and Exchange Commission; and Minna Schrag, a law firm partner and senior trial counsel at the International Tribunal in Yugoslavia.

In the U.S. Attorney's Office, Bob Fiske not only hired women but also appointed them to executive positions: Naomi Reice Buchwald as chief of the Civil Division, Shira Nieman as chief of major crimes, and Patricia Hynes as chief of official corruption and special prosecutions.

Bob is very proud of his accomplishments, as well he should be. He wrote to me: "One of the things I was proudest of went beyond cases filed and convictions obtained. Continuing to hire on the merits, we saw an increase in the number of female AUSAs in my four years from eight to thirty-eight, with eight of those serving in executive positions. And the number of African-American lawyers in the Office went from one to eight during my tenure."

Without a true commitment from the top, women will never have the opportunity in law firms to achieve equal partnership opportunities or equal pay. Bob Fiske has shown what such a commitment can accomplish.

Developments

Council Holds Winter Meeting in Nevis; Carey Dunne Receives Seymour Award

By Bennette D. Kramer and Steven M. Edwards





The Federal Bar Council held its annual Winter Bench and Bar Conference at the Four Seasons Nevis from February 10 through February 17, 2018. Marjorie Berman and Larry Krantz chaired the meeting, and Second Circuit Judge Christopher Droney headed the Planning Committee. Carey Dunne, counsel to Manhattan District Attorney Cyrus Vance, received the Whitney North Seymour Award for public service by a private practitioner. Below, we describe the programs presented.

Consumer Class Actions

A panel led by Southern District Judge Naomi R. Buchwald discussed consumer class actions. The discussion began with panel organizer Kenneth Plevan showing a video on products that all had one thing in common: They were sold by defendants in consumer class actions. Plevan noted that these cases stemmed from a Federal Trade Commission decision in *In re Pfizer* that sellers must have a reasonable basis for all claims made in connection with the marketing of their product – a concept called "substantiation." Many courts require consumer research to prove potential confusion about a claim, although the FTC does not require it.

Lawrence King, who litigates mostly on the plaintiffs' side, noted that he typically conducts consumer research when he learns that a product makes a questionable claim. He often finds plaintiffs this way. Nina Rose, who represents defendants, said that a vast majority of cases are lawyer initiated.

According to King, in most cases the plaintiff will send out a demand letter. In some states, a statute requires it. The demand letter often becomes a basis to negotiate settlement. Rose responded that defendants will often respond aggressively, because they do not want to encourage plaintiffs. Plevan observed, however, that if a class is certified, the risk is great, and often a case can be settled by making a simple change, which is for the better.

King said cases are typically brought in federal court because of the class action fairness statute, although California – where cases are brought in state court – is an exception. Rose said she prefers to be in federal court and will often try to consolidate cases in a multidistrict litigation for efficiency purposes. King said there are still a lot of nationwide classes. Rose noted that the courts in some circuits will simply strike nationwide classes, although courts in the Second Circuit will not.

Both King and Rose agreed that *Twombly* has made it necessary to conduct more thorough investigations. King said he will often describe the survey in his complaint. The panelists also discussed class action strategies and damage calculations. In some cases, plaintiffs will conduct a regression analysis to determine if consumers paid a premium for a particular characteristic. Rose noted that in most cases, fewer than 10 percent of class members file claims, which raises issues about what happens to the money.

Judge Buchwald concluded the discussion by asking whether consumer class actions are good or bad. Rose expressed the view that they do not benefit consumers; they benefit the lawyers. King responded by agreeing that there are examples of cases that should not have been brought, but many

cases are serious and meritorious. "It's all about holding companies accountable," he said. The question is, "Where do you draw the line on misrepresentations to consumers." Plevan observed that the threat of consumer class actions helps in advising companies. He added: "Sometimes you say, if you do this you'll get sued."

Wrongful Conduct Abroad, Litigation at Home

Southern District Judge Victor Marrero chaired a panel including Arthur Abbey, David E. Brodsky, Daniel J. Kramer, Elaine H. Mandelbaum, Aido Verbruggen, and Richard B. Zabel. The program began with a dramatization of a meeting raising issues relating to cooperation among international investigators. The skit highlighted the differences in regulations governing investigations in the United States and in a mythical foreign country. For example, the foreign government could wiretap without court approval, although that would be criminal conduct in the United States, and in European countries only communications with outside lawyers are privileged, not those with the general counsel. In the ensuing discussion, Zabel said that the Department of Justice would conduct a separate, not joint, investigation, so it would not be tagged with violations of U.S. laws and the Constitution by actions of people in the other country. He said that individual targets of the investigation have rights, but corporations do not. The government wants to avoid situations where the foreign authority violates rights that witnesses would have in the United States.

Verbruggen, a Dutch lawyer, said that if U.S. agencies are involved in an investigation in the Netherlands the impact is vast, because the U.S. agencies tend to be dominant. He said the Dutch have begun to adopt U.S. protections; the Dutch have the equivalent of the Fifth Amendment. One of the impacts of U.S. involvement in Dutch cases is that there has been an increase in cooperation and settlements in criminal cases.

The panel next turned to considerations for in-house counsel in multinational investigations. Mandelbaum said that before cooperation for the most credibility a corporation should conduct an investigation using outside counsel. Abbey agreed, saying that the company must figure out what has gone wrong and what to say publicly. Mandelbaum stated that in-house counsel must gauge the timing for disclosure – the earlier the better. Abbey noted that the company must also consider the impact disclosure will have on the company's stock.

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Next, Brodsky discussed the strategy of dealing with prosecutors. He said that (1) counsel should get control of the investigation; (2) consider whether the company is being set up by a competitor; (3) consider whether evidence from abroad may taint the U.S. case; (4) recognize that getting documents through IMLAT was notoriously difficult; (5) sort out jurisdictional issues; and (6) consider whether the foreign entity has paid bribes to foreign officials. He reiterated that the company should always ask an outside law firm to conduct the investigation of the company. Zabel said that the Justice Department must determine whether the U.S. has sufficient contacts to the wrongdoing. The DOJ will be glad that an American lawyer is involved, and will want the company to accept a subpoena and provide documents and information very quickly. The company needs to monitor the foreign subsidiary to make sure they are not moving assets. Brodsky noted that the DOJ has no authority to subpoena a foreign entity and that European data privacy was a big problem. The DOJ has little patience for claims of data privacy.

After public disclosure, the company will face civil suits for securities fraud or antitrust claims. Class certification is difficult when fraud occurs predominately overseas because of the extraterritoriality limitations of *Morrison*. Kramer said that bond transactions have to be examined to see if there is a U.S. connection. If the company settles with the Securities and Exchange Commission, the class members will receive compensation and the insurance will pay the rest of a class-action settlement.

In negotiating a deferred prosecution agreement in a foreign country, Zabel said that foreign negotiations make the process much longer and more complicated. Such an agreement would take months of preparation and discussion. A sensitive point is the extent of the facts to include. Zabel said that imposition of a monitor on a foreign corporation, which reported to U.S. investigators, would require the permission of the foreign government. Mandelbaum said that a company that pled guilty to Foreign Corrupt Practices Act violations instead of antitrust violations would have an advantage in civil litigation. Every word is important in assessing the collateral consequences of a settlement. Customers and the press will evaluate the settlement carefully.

Supreme Court Review

In a panel moderated by Second Circuit Judge Christopher Droney, Neal Katyal and Miguel Estrada discussed the Supreme Court's docket. Katyal noted that Justice Ruth Bader Ginsburg has predicted that the next term will be momentous. With the death of Antonin Scalia, the Court had to avoid cases where there might be a four to four split. In all, in the last term the Court decided only 62 cases, the least in the Court's history, and 78 percent were reversals.

The discussion began with *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* where a bakery refused to make a custom cake for a gay couple. One of the issues is whether cake making is speech. Estrada predicted that Justice Kennedy will be the vote to watch, because he is a great advocate of free speech, as well as a defender of gay rights. The Solicitor General has filed a brief in favor of the cake maker. Katyal agreed that it is difficult to predict how this one will come out.

Jesner v. Arab Bank involves the question whether there is corporate liability under the Alien Tort Statute for acts committed outside the United States. Although this long-forgotten statute had a brief revival in 1980 as a result of the decision in *Filartiga v. Pena-Iralo,* the Court's approach recently has been to cut it back. In *Kioval,* the Court held that there is no jurisdiction over foreign governmental entities for acts committed outside the United States. The panelists agreed that this case probably would be dismissed, and it was on April 24, 2018.

United States v. Microsoft raises the question whether emails stored on a server in Ireland can be subpoenaed in the United States. After the case was argued, it was rendered moot by the passage by Congress of the Clarifying Overseas Use of Data Act, which requires entities in the United States to produce documents stored overseas.

The panel discussed *Carpenter v. United States,* where the issue is whether the government can search cellphone records without a warrant. It calls into question the "third-party rule," which provides that there is no privacy interest in telephone or financial records because those records are held by a third party. Estrada expressed the view that there should be no Fourth Amendment issue here, but Katyal suggested that the Court may be rethinking the third-party rule for the digital age. This could have a big impact on programs such as the National Security Agency's metadata program.

Gill v. Whitford is the gerrymandering case. Estrada described this case as a "Justice Kennedy special." He noted that it is very hard to come up with a standard for this area. People should not be surprised that redistricting is political. The Court has held in the past that the Constitution does not guarantee proportional representation. If the Court changes its mind, it will be overwhelmed with cases. Katyal agreed that this could have the effect of politicizing the Court.

The panel discussed *Trump v. Hawaii,* the travel ban case, which Katyal just argued in April. Katyal noted that he has raised two issues: (1) Is the president's subjective intent sufficient to establish that this ban is directed at Muslims in violation of the Establishment Clause, and (2) is it discrimination in violation of the immigration statute? Estrada cautioned against confusing the office of the president with the current occupant. The statute clearly gives the president the right to make these decisions, in his view. He added: "Neal's case is harder than he thinks."

Corruption Post-*McDonnell*

Southern District Judge William H. Pauley, III, moderated a panel including Christopher Conniff, Rita Glavin, Matthew Fishbein, and Paul Fishman.

Judge Pauley discussed the history of prosecution of public officials for corruption. He talked about the evolution of the mail fraud statute from its initial enactment in 1972 to the present day. He said that, following the Supreme Court decisions in *McNally*, *Skilling*, and *McDonnell*, the definition of honest services fraud was narrowed to include an "official act," evidencing a formal exercise of government power.

Conniff said that *McDonnell* changed the focus of honest services fraud from a quid pro quo scheme to an official action requirement. In *McDonnell*, the Court held that meetings and phone calls were not official acts but they could still be evidence under the law. In prosecutions going forward, the jury will be asked to look at the same criminal activity, but will be instructed that to find a defendant guilty, it must find that this activity adds up to official acts.

Glavin pointed out that McDonnell was charged with honest services fraud and Hobbs Act violations but was not charged under the federal bribery act. The definition of fraud used by the Court included the federal definition of official act from the federal bribery act, 18 U.S.C. § 201(a)(3). In addition, Justice Breyer considered amicus briefs from numerous attorneys general because he wanted to know what the impact of the decision would be. The attorneys general said that if an honest services fraud conviction could arise from any act by a public official, it would chill how people dealt with public officials. *McDonnell* was a sea change, because it was a state case with no federal bribery statute charge.

Fishman said that after *McDonnell* the government would have to prove that a public official exerted pressure and gave advice to another public official that was expected to result in "official actions." Glavin said that McDonnell's only action was to call and ask other officials to have a meeting.

Fishbein said that moving from *McNally* to *Skilling* to *McDonnell*, the problem has been definition. Before *McNally*, the acts underlying honest service prosecutions had always been bribery type acts. However, politicians need to call donors and ask for money. Even though the gifts McDonnell received were not campaign contributions, in Virginia gifts are legal. In *McDonnell* the Court was unanimous, sending the message that it needs more clarity on what constitutes improper behavior. Glavin said that contributions can be linked to a quid pro quo, but there must be an explicit prior agreement for

the politician to act after receiving money or other gifts.

Fishman and Glavin discussed other statutes that could be used to prosecute public officials, including 18 U.S.C. § 666, the Travel Act, and 18 U.S.C. § 1001.

The program ended with a discussion of the future of honest services fraud after *McDonnell*. Conniff said that the defense must read the indictment carefully and get pre-trial information on meetings. Glavin said that the government wants to use the Section 201(c)(3) definition and put it into Section 666, making federal courts the cops for what are really state cases. If you look at the federal law as subsuming state cases, it raises questions of federalism. Fishman also said that in the Bridgegate case, the government charged Section 666 based on misappropriation of Port Authority resources for a non-governmental purpose that cost resources such as more police.

Special Counsel

A panel led by Eastern District of New York Judge Pamela K. Chen discussed special prosecutors over the years. David Schaefer reviewed the history of the special counsel concept, starting with the Whiskey Ring scandal in 1875, where there were 238 indictments and 10 convictions until President Grant fired the special counsel for hinting that Grant was involved in the scandal. A watershed moment was reached in 1973 when President Richard M. Nixon fired special prosecutor Archibald Cox in what became known as the Saturday Night Massacre. In 1978, as counsel to Senator Abraham Ribicoff of Connecticut, Schaefer played a role in drafting the Ethics in Government Act, which provided that special counsel would be appointed by a three judge court. The Ethics in Government Act was subject to renewal on a periodic basis.

Robert Fiske, who was the first special prosecutor in the Whitewater investigation of President Bill Clinton, explained that Republicans in Congress, as a result of their experience with the Iran-Contra investigation, decided to let the Ethics in Government statute lapse in 1992. Fiske was appointed by Attorney General Janet Reno, who did not want to appoint a special prosecutor but finally relented when Clinton asked her to do so. Congress then reestablished a special prosecutor statute in 1994, and Fiske was replaced by Kenneth Starr, who was also on the panel.

Starr described his experience as special prosecutor, which led to a lengthy report and the impeachment by the House (but not conviction by the Senate) of President Clinton. Starr explained that the expansion of the investigation into the Monica Lewinsky affair, which was quite controversial at the time, had been authorized by Reno. The irony, according to Starr, is that he had always been against a special prosecutor statute because he thinks it is an undue intrusion by the legislative branch into the authority of the executive branch.

Neal Katyal, who was also on the panel, drafted the current regulations after the statute expired again. Katyal confessed that he does not like special prosecutor statutes, suggesting that the late Justice Antonin Scalia was right in *Morrison v. Olson,* when he called it a headless fourth branch of government. Katyal views it as a tradeoff between independence and accountability, and Katyal comes down on the side of accountability.

The current regulation requires the special counsel to follow all Department of Justice regulations. The attorney general determines the scope of the investigation and can require an explanation of special counsel decisions, although the attorney general should not be involved in day-to-day decisions. The attorney general can reject the special counsel's decisions if the attorney general finds them to be "inappropriate or unwarranted," and the attorney general can remove the special counsel for misconduct, dereliction of duty, incapacity, conflict of interest, or other good cause. If the attorney general decides to remove the special counsel, however, the attorney general must report that to the Senate Judiciary Committee.

The panel discussed whether the special counsel can seek to indict the president. Katyal noted that there is an opinion of the office of legal counsel that says no. Starr countered that there is language in some opinions that suggests that a president can be in-

dicted. The panel also discussed whether the president can fire the special counsel. Katyal expressed the view that the president can direct the attorney general to fire the special counsel. Schaefer was of the view that the special counsel is protected by the Appointments Clause of the Constitution. Fiske noted that the Saturday Night Massacre was the subject of one of the articles of impeachment that the House filed against Nixon.

Katyal and Starr recalled that in the aftermath of the Saturday Night Massacre, Robert Bork fired Cox, appointed a new special prosecutor, and promulgated a regulation that provided that the president would not exercise his constitutional power to remove the special prosecutor unless the special prosecutor engaged in "extraordinary improprieties," and even then, would only do so with the consensus of various people in the House and Senate. After the meeting, Katyal and Starr proposed that approach in an op ed article that was published in *The New York Time*s on February 19, 2018.

Internment of Japanese Americans Revisited

District of Connecticut Chief Judge Janet C. Hall moderated the program about Japanese Internment during World War II, which consisted of dramatic presentations and interviews with Eastern District Judge Kiyo Matsumoto (by video) and former Acting Solicitor General Neal Katyal. The dramatic presentations began with a script written by Circuit Judge Denny Chin and Kathy Chin for the Asian American Bar Association about the Heart Mountain Draft Resisters, a group of draft-age citizens of Japanese-American descent who had been sent to internment camps. A large number refused to report for their pre-induction physical exams to protest the deprivation of their civil rights. Sixty-three of the Japanese inductees who refused to report for their physicals were tried for draft evasion. Following a bench trial, Judge T. Blake Kennedy issued a decision finding all defendants guilty and holding that the discrimination by the government was justified. Each defendant was sentenced to three years in prison.

In another federal trial in Oklahoma, a jury convicted seven leaders of the resistance. Jimmy Omura, a newspaper editor, indicted on the basis of writing a newspaper column about his refusal to go to war to protest the deprivation of his rights, was acquitted. The most culpable of the leaders were sentenced to four years in prison, the least culpable to two years. The verdict was affirmed by the Tenth Circuit. Although Heart Mountain was closed on November 10, 1945, the defendants remained in prison a year longer.

Next, the panel of actors presented the factual background and court proceeding in the prosecutions of Minoru Yasui and Gordon Hirabayashi for curfew violations and Fred Korematsu for being in a place from which all persons of Japanese ancestry were excluded. The Supreme Court upheld the Yasui and Hirabayshi convictions on the ground of military necessity based on the danger of sabotage and espionage. The Supreme Court also upheld the Korematsu conviction based on military necessity.

Years later, on April 19, 1984, Judge Marilyn Hall Patel of the Northern District of California granted Korematsu's petition for *coram nobis* and vacated his conviction. Discussing the Supreme Court decision, Judge Patel stated: "As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused." *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984). On May 20, 2011, Acting Solicitor General Neal Katyal issued a "Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases." (*See* more below.)

Eastern District Judge Matsumoto, whose mother and father were both imprisoned as young adults during the Internment,

appeared by videotape in an interview conducted prior to the conference. She spoke movingly about the difficult experiences of her American citizen parents, both of whom had been in college at the time of the internment. Following the issuance of Executive Order 9066 which mandated the evacuation of citizens of Japanese descent from the West Coast, her mother's family was removed from their home in San Francisco to an assembly center where they brought with them only what they could carry. They lived in a horse stall at a converted racetrack while the internment camps were built and eventually were moved to a camp in Utah's desert, on an Indian reservation. They lived in 20 foot by 20 foot barracks, shared communal showers and eating facilities, and were surrounded by guard towers and barbed wire fences. They remained in custody for almost the duration of the war. Her father's family was moved to an internment camp in Arizona. After a year or so at the camp, he applied to college outside the evacuation zone and matriculated at Washington University to continue his education that had been interrupted. Like many Japanese Americans, following the war they experienced feelings of shame and bitterness, but were intent on not letting those feelings impact their future lives. While many Japanese Americans were unable to speak of the past to their children, they coped in part by teaching their children about the inequities and instilling in them a need to be ever vigilant in the fight against inequality. Her parents were proud of this county despite its mistakes. That faith was reinforced when Neal Katyal, as acting solicitor general, issued a confession of error in the *Korematsu* case in 2011. That was an enormous moment for her father and she described Mr. Katyal as a "hero" to the Japanese American community.

Chief Judge Hall interviewed Katyal about issuing the confession of error. Katyal explained that it is a longstanding practice of the solicitor general, approximately two or three times each term, to ask the Court to take certiorari on a particular case that was decided in its favor in the court below and to rule against the government. The *Korematsu* submission was not a true confession of error because there was not a pending case.

The Korematsu confession of error grew out of a 2011 summer project on immigration. Katyal examined the briefs in the Korematsu matter and came to a startling understanding: The Court had erred in the *Korematsu* case by basing the justification for conviction on military defense which arose from the solicitor general's office's intentional non-disclosure of relevant information.

The brief filed by Solicitor General Fahey in *Korematsu* defended the large scale internment by stating that it was impossible to determine which Japanese and Japanese Americans were loyal and which were disloyal. However, before filing the brief with the Supreme Court, the solicitor general had learned of an intelligence report that undermined this position by stating unequivocally that the government could absolutely identify the three percent who were disloyal and that such persons could be rounded up. This report was not disclosed by the solicitor general. For this reason, certain members of the solicitor general's staff vigorously opposed filing the brief, believing that it "might approximate the suppression of evidence." To resolve the dispute a footnote was inserted to ambiguously compromise the conflict. At oral argument, however, when questioned about the footnote by Justice Jackson, Solicitor General Fahey affirmatively argued that there was nothing in the brief that called into question the government's position. While some information concerning the intelligence report had nevertheless reached the Supreme Court, the Court relied principally on this misstatement by the Justice Department to reach its decision.

Asked about whether it was troubling that *Korematsu* and other cases remain on the books, Katyal feels the cases have been thoroughly discredited. However, Katyal noted that Justice Scalia said that those who did not think the Korematsu situation would happen again were kidding themselves. Despite the outcome of the cases, Katyal finds faith in the voices of those in the Department of Justice who spoke out against the solicitor general at the time, and the confession of error is a recognition that the solicitor general neither fulfilled the govern-

ment's role of candor nor acted properly in defending the Japanese internment.

Women and the Law

One of the highlights of the meeting was a program on women and the law, moderated by Eastern District of New York Judge LaShann DeArcy Hall. Judge DeArcy Hall began the discussion by describing the City Bar report on Best Practices for the Hiring, Training, Retention and Advancement of Women Attorneys, which picked up on a report that Betsy Plevan had done on gender discrimination in 1995. Panelist Carrie Cohen added to that a discussion of former Southern District of New York Judge Shira Scheindlin's article on women litigators in high stakes trials. Cohen cited surveys that show that equity partners in large law firms are only 18 percent women, and only two percent are African-American women. One survey showed that 76 percent of lead counsel in cases were men, and 87 percent of lead counsel in class actions were men.

According to Cohen, the surveys suggest that the main reason for these disparities is client preferences, but she added that the remedies for that are sponsorship, opportunities to work in court, and opportunities to work directly with clients. Judge DeArcy Hall observed that sponsorship is more proactive than mentorship; it involves advocating for women as opposed to simply taking an interest. Judge DeArcy Hall added: "The needle needs to move, and the people in this room can make that happen."

Panelist Sharon Nelles noted that there are many important role models for women today, including Rita Glavin and Roberta Kaplan, who were in the audience. She noted that Justice Scarpulla and Justice Friedman had been very active at the state level in promoting women in the law. Nelles added that she saw her role as a sponsor of women at her firm as making sure they become partner. At Sullivan & Cromwell, she is working with the general counsel of JP Morgan Chase to create teams that are 50 percent diverse by 2020.

Judge DeArcy Hall asked about unconscious bias. This elicited a comment from Miguel Estrada, who was in the audience, that it is very difficult to attract women and minorities in firms these days. Nelles suggested that it is really not a pipeline problem. There is not enough sponsoring, and women are stalling. Cohen, however, agreed that there may be some self-selection going on. Many women are finding that being a partner in a major law firm is simply not rewarding enough.

Bob Fiske, who was in the audience, rejected the notion that women do not like the rough and tumble of complex litigation. He pointed out that when he became U.S. Attorney in 1976, he made it a point to hire women, many of whom have become very successful. He recalled that, from time to time, he would get complaints that the women were too aggressive.

In the end, the consensus of the group seemed to be that there is no simple answer to the low level of women who are equity partners in major law firms, but it is important to have a level playing field. Maybe women are choosing other alternatives because they are wiser, as George Yankwitt suggested, or maybe being an equity partner in a large law firm is not for everyone, which was Estrada's point. But Judge DeArcy Hall emphasized that, for those women who want to become equity partners in large law firms, it is important that they be given an equal opportunity to do so.

Litigation Ethics and Technology

District of Connecticut Judge Victor A. Bolden chaired a program in which panelists Gina Caruso, Professor Bruce Green, and William McGuinness discussed six hypothetical situations raising ethical issues.

In the first hypothetical, a lawyer urged a corporate partner to post on a private listserve for his high school class which the judge in his case also attended. The panelists agreed that the posting would be an improper *ex parte* communication, because a lawyer cannot make indirect contacts with the court that he or she could not make directly. The situation would be different if the partner posted on a public blog rather than a private list. Green said that there is a big difference between social media available to everyone and social media open

to a limited number of people.

In the second hypothetical, a criminal defense lawyer with a trademark blog, intended to inform and educate, posted decisions from cases where he did well using only the public record, but without getting the clients' permission. Caruso said that the lawyer violated the duty of confidentiality to the client because, even though the information was public, the lawyer was publishing information that was embarrassing or detrimental to the client. The information was not generally known in the community even if it was in the court file. If the information had been widely publicized in the media, there would not be a violation of the duty of confidentiality.

Hypothetical number three involved an assistant federal prosecutor with a blog in which he discussed a recent white collar case in another district. The prosecutor gave an accurate description of the sentence in the case and then provided his opinion that the sentence was below the guidelines. The case decision had not yet been appealed. Green said because the blog did not include a false statement, the post was not sanctionable.

In hypothetical number four, a personal injury lawyer caused her receptionist to befriend a neighbor on Facebook who was on the other side of a case and whom the lawyer knew to be represented. Caruso noted that this conduct was sanctionable because the lawyer caused the receptionist to take action that the lawyer herself could not take – impermissible contact with a represented party. However, in New York such a friend request would not be considered deceit, while in other jurisdictions it would. Green disagreed, stating that the "friend request" was not deceptive and did not concern the subject of the personal injury lawsuit, so should not be sanctionable.

In hypothetical number five, a plaintiffs' personal injury lawyer looked at the client's Facebook page and told the client it was unhelpful. The client took the page down. McGuinness said that there was no ethical violation because the lawyer did not tell the plaintiff what to do, but advised him about the legal implications of his past and future conduct. In New York and Florida, a person can take down a Facebook page as long as he or she keeps a copy. A person would be guilty of spoliation if he or she was aware of a probability of a claim, and destroyed evidence. There would be an irrebuttable presumption that there was value in what was destroyed.

Hypothetical number six involved a senior associate who received an email from a male partner with sexist comments about opposing counsel. The associate sent the email to a friend in another firm who posted it on a popular blog. McGuinness said that if the managing partner had sent the email directly to the lawyer on the other side, he would have been subject to discipline for sexual harassment. The senior associate would be negligent for exposing the partner's email if the information disclosed confidential client information and was embarrassing or detrimental to the client. Here, disclosure was inadvertent, but the lesson is that electronic communications never go away. Lawyers need to be educated to be careful. Here, the associate would most likely be fired, but the partner most deserved reprimand.

Developments

Judge Rakoff Receives Learned Hand Medal at Law Day Dinner

By Bennette D. Kramer

On May 2, 2016, the Federal Bar Council held its annual Law Day Dinner. The Council's president, David R. Schaefer, presented the Learned Hand Medal for Excellence in Federal Jurisprudence to Southern District of New York Judge Jed S. Rakoff.

Judge Rakoff received a B.A. from Swarthmore College, a Masters of Philosophy from Oxford University, and a J.D. from Harvard Law School. He then clerked for Third Circuit Judge Abraham L. Freedman.

After two years at Debevoise, Plimpton, Lyons and Gates, he became an Assistant U.S. Attorney for the Southern District of New York. Following seven years at the U.S. Attorney's Office, he became a partner at Mudge, Rose, Guthrie, Alexander & Ferdon and then Fried, Frank Har-

ris, Shriver and Jacobson. Judge Rakoff entered on duty as a U.S. Judge for the Southern District of New York on March 1, 1996 and took senior status on December 31, 2010.

Judge Rakoff has been very active apart from his judicial duties. He has been an adjunct professor at Columbia Law School since 1988 and served on the executive committee of the New York City Bar Association. Judge Rakoff has explored the intersection of law and science, serving on the governance board of the MacArthur Foundation Project on Law and Neuroscience, chairing the National Academy of Science Committee on Eyewitness Identification, and serving as a commissioner on the National Commission on Forensic Science.

Judge Rakoff also writes about jurisprudence for *The New York Review of Books*. He has written about his concerns about the death penalty and has tried to encourage new thinking about it, having concluded that the long delays connected with the death penalty and the deprivation of any opportunity for exoneration constituted cruel and inhuman punishment. Judge Rakoff previously had supported the death penalty.

Concerned about the fairness of the legal system, Judge Rakoff has written extensively about the unfairness of the Sentencing Guidelines, and has used his own practices to make criminal proceedings fairer. For example, he requires early *Brady* disclosures and imposes the same sentence on a criminal defendant regardless of whether the defendant pled guilty or was convicted at trial.

Schaefer spoke to many lawyers who said that Judge Rakoff was imaginative, courageous, known for novel, bold, well-reasoned, courageous decisions, independent, and fearless and inexhaustible. Schaefer said that Judge Rakoff's greatest skill may be ballroom dancing, and he has a well-earned reputation for his sense of humor and love of music and lyrics.

High Cost of Legal Services

In accepting the Learned Hand Medal, Judge Rakoff focused on the high cost of legal services and solutions to provide affordable legal counsel for ordinary people. He said that he was deeply honored to receive the Learned Hand Medal, which would not have been possible without his many mentors. He said that he was indebted to many for their support – his family, parents, two brothers, his long-suffering courtroom deputies, law clerks, Bob Fiske, Judge Milton Pollack, his law partners, judicial and academic colleagues, Judge Bob Katzmann (the "perfect judge"), and the members of the Federal Bar Council. He thanked his wife, Ann Rosenberg Rakoff, the retired executive director or the Corporate Law Center at Fordham School of Law, whom he met 45 years ago, for her love and support.

Judge Rakoff pointed to Judah Gribetz as the man responsible for Judge Rakoff being a judge. He listed Gribetz's long record of public service, including as chair of Senator Moynihan's judicial selection committee. Most recently, Gribetz has served since 1988 as the special master appointed by Judge Edward Korman to monitor the settlement in the Swiss Bank Holocaust Litigation.

Judge Rakoff turned to the problem with the legal system and his potential solutions. He explained that the legal system has priced itself out of reach of most Americans. It used to be that individual litigants were represented by counsel. Today, two-thirds of litigants in state courts are pro se. In two courts – Family Court and Housing Court – 80 percent of litigants are unrepresented. Many cannot even get to court or get legal advice for small matters. Most working class defendants cannot find lawyers they can afford, and lawyers make a difference. For example, in foreclosure cases with lawyers, 50 percent of defendants can avoid foreclosure, while without lawyers only 10 percent are successful. It is a failure of the profession to provide affordable legal counsel. In New York City, there is legislation to provide free legal counsel to low income people facing eviction, but a more global solution is necessary.

Judge Rakoff stated that the market has not taken care of the problem because the profession is a cartel, keeping others out through the prohibition of the unauthorized practice of law. In addition, the costs have risen because of the expense of e-discovery and the tripling of lawyer billing rates.

Possible Solutions

Judge Rakoff set out three possible solutions:

(1) Legal Insurance: He said that it had been tried, but had not caught on because of the high cost of the insurance and because people were less likely to foresee legal problems.

(2) On-line legal assistance: This is limited to preparation of legal documents and raises concerns about the unauthorized practice of law. A person giving on-line advice cannot represent clients in court.

(3) Certified legal practitioners: Services could be provided at a fraction of the cost.

The state of Washington has a program for licensed legal technicians that has been opposed by members of the bar and has developed slowly. Massachusetts and Utah are considering such programs. In 2014, a New York court made legal assistants available to help unrepresented litigants.

A program for certified legal practitioners could be staffed through law school courses, apprenticeships at law firms and licensing for legal advice. The certified legal practitioners could assist litigants in housing court, family court and city administrative courts. Over time, the practitioners could become specialized. The quality would probably not be as high as with law school graduates, but would provide services that would not be available at all otherwise.

In New York, setting up such a program would require a lot of work. Planners would have to figure out what practitioners could and could not do; law schools would have to develop programs; and law firms would have to set up apprenticeship programs.

Real justice will not be achieved if people do not have professional help in legal matters, Judge Rakoff said.

Legal History

Did William Rehnquist Lie to Become a Justice, and Then Chief Justice?

By C. Evan Stewart



In December 1952, William H. Rehnquist wrote a memorandum to his boss, Supreme Court Justice Robert H. Jackson. It likely was written just after the first set of oral arguments on the legendary case *Brown v. Board of Education*, 347 U.S. 483 (1954). The title of the memorandum was "A Random Thought on the Segregation Cases." To many legal historians it is the most "notorious" memorandum ever written by a Supreme Court clerk.

A Random Thought (or Two)

Rehnquist's memorandum is a brief, six paragraph document. The bulk of the memorandum deals with cases which caused the Supreme Court to get into "hot water" – *e.g.*, *Dred Scott* (*see Federal Bar Council Quarterly*, May 2016), *Lochner* (*see Federal Bar Council Quarterly*, February 2017), and the Court's decisions invalidating the first set of New Deal legislation (*see Federal Bar Council Quarterly*, February 2008).

The document then turns to parts of the oral argument recently proffered by John W. Davis and by Thurgood Marshall. Davis (of Davis Polk & Wardwell) represented the state of South Carolina; he had argued that the resolution of the issue must be left to Congress, and that the Justices' personal views should not play a decisive role in the outcome. In response, Rehnquist wrote:

> [T]he Court is, as Davis suggested, being asked to read its own sociological views into the Constitution. Urging a view palpably at variance with precedent and probably with legislative history, appellants seek to convince the Court of the moral wrongness of the treatment they are receiving. I would suggest that this is a question the Court

need never reach; for regardless of the Justice's individual views and the merits of segregation, it quite clearly is not one of those extreme cases which commands intervention from one of any conviction. If this Court, because its members individually are "liberal," and dislike segregation, now chooses to strike it down, it differs from the [Anti-New Deal Court] only in the kinds of litigants it favors and the kinds of special claims it protects. To those who would argue that "personal" rights are more sacrosanct than "property" rights, the short answer is that the Constitution makes no such distinction.

Marshall (of the NAACP) had famously based much of his argument on sociological evidence. Indeed, before the Court, he asked that it take judicial notice of Gunnar Myrdal's "An American Dilemma: The Negro Problem and Modern Democracy" (Harper's 1944), which detailed the causes and consequences of segregation (the Court in fact took Marshall up on his request – *see* footnote 11 of its decision). To that point, the Rehnquist memorandum replied: "If the Fourteenth Amendment did not enact Spencer's *Social Statios* [sic] [a reference to Justice Holmes' famous dissent in *Lochner*], it just as surely did not enact Myrdal's *American Dilemma*."

If that had been the totality of Rehnquist's memorandum, it is highly unlikely it would have become so famous/infamous. It is the penultimate sentence that has caused the big kerfuffle: "*I realize that it is an unpopular and unhumanitarian position for which I have been excoriated by 'liberal' colleagyes* [sic]*, but I think* Plessy *v.* Ferguson *was right and should be re-affirmed*." *Plessy*, of course, is one of the *worst* cases in the Court's entire jurisprudence, where the Court (with one dissent) embraced the "separate but equal" doctrine (*see Federal Bar Council Quarterly*, August 2016).

Nominee to the Supreme Court

Rehnquist joined the Nixon administration as an assistant attorney general, in charge of the Office of Legal Counsel. The president's first meeting with him did not go well; Nixon told his White House counsel (John Dean) that Rehnquist "dressed like a clown" (pink shirt, psychedelic tie, etc.). Nonetheless, in 1971, the president nominated Rehnquist, along with Lewis F. Powell, to fill the vacant seats of Justices Hugo Black and John Marshall Harlan II.

Rehnquist's nomination was opposed by many Democratic senators, but it looked like he would nonetheless be confirmed (the Senate Judiciary Committee voted out his nomination 12 to 4). On December 6, 1971, however, just as the Senate was ready to debate his appointment, *Newsweek* magazine released the text of the Rehnquist memorandum, written 19 years before. At first, Rehnquist stood silent on the document and whether he was even its author (his initials, WHR, are at the bottom of the memorandum).

Two days later, he delivered a letter to the chairman of the Senate Judiciary Committee, James O. Eastland (Democrat from Mississippi). In his letter, Rehnquist wrote:

> As best I can reconstruct the circumstances after nineteen years, the memorandum was prepared by me at Justice Jackson's request; it was intended as a rough draft of a statement of *his* views at the conference of the Justices, rather than as a statement of my views…. He expressed concern that the conference should have the benefit of all of the arguments in support of the constitutionality of the "separate but equal" doctrine, as well as those against its constitutionality.
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> ****
>
> I am satisfied that the memorandum was not designed to be a statement of *my* views on these cases. Justice Jackson not only would not have welcomed such a submission in this form, but he would have quite emphatically rejected it and, I believe, admonished the clerk who had submitted it. I am fortified in this conclusion because the bald, simplistic conclusion that "*Plessy v. Ferguson* was right and should be re-affirmed" is not an accurate statement of my own views at the time.
>
> I believe that the memoran-

> dum was prepared by me as a statement of Justice Jackson's tentative views for his own use at conference. The informal nature of the memorandum and its lack of any introductory language make me think that it was prepared very shortly after one of our oral discussions of the subject. It is absolutely inconceivable to me that I would have prepared such a document without previous oral discussion with him and specific instructions to do so.
>
> ****
>
> In view of some of the recent Senate floor debate, I wish to state unequivocally that I fully support the legal reasoning and the rightness from the standpoint of fundamental fairness of the *Brown* decision.

(Emphasis in original.)

Rehnquist's 1952 memorandum and his 1971 written explanation of it were debated by the Senate. After a week (and with Christmas looming), the nomination was approved by a vote of 68 to 26.

A Second Time Around

In 1986, Chief Justice Warren Burger announced his retirement and President Reagan nominated William Rehnquist to succeed him. Now Rehnquist's opponents would get to ask him – under oath – what they had not been able to do in 1971; to wit, they could interrogate him on his 1952 memorandum.

Rehnquist began his testimony before the Judiciary Committee by reaffirming his 1971 letter to Senator Eastland: "[I] have absolutely no reason to doubt its correctness now." He then tried to address/mitigate the discordant sentiments voiced in his memorandum. First off, he declared that he had always "thought Plessy against Ferguson was wrong," even when he had clerked for Justice Jackson. (This reiterated an assertion previously written in his 1971 letter to Senator Eastland.) At the same time, however, he noted that *Plessy* "had been on the books for 69 years, [that Congress had not acted in the interim, and] that the same Congress that promulgated the 14th Amendment had required segregated schools in the District [of Columbia]…. [Accordingly, he (and Justice Jackson)] saw factors on both sides." Rehnquist also pledged his fealty to *Brown* – both as to its outcome and reasoning. (This also tracked an assertion that had been made in his 1971 letter to Senator Eastland.) Rehnquist next attempted to put the historical portions of his memorandum into the context of Justice Jackson's own previously expressed views:

> Justice Jackson was a great believer in the idea of whatever you want to call representative democracy, the Court having made mistakes in the past by reading its own moral views into the Constitution. And much of the theme of this one and a half page memo is along those ideas that the Court has run afoul in the past by reading into the Constitution what it felt were the morally right views, only to find that it had made a mistake. And this apparently was an effort to apply those ideas to the *Brown* case.
>
> ****
>
> [T]he thesis which is very roughly and very shortly, certainly developed in the memo that most of the Court's mistakes up to that time had been reading its own moral notions into the Constitution was a view that Justice Jackson was a champion of. His entire book, "Struggle for Judicial Supremacy," is devoted to that thesis.

And lastly, he (and Senator Orrin Hatch (Republican from Utah)) noted that the Justices' notes from the initial, December 1952 conference – directly after the first oral argument (about the time of Rehnquist's memorandum) – showed a very uncertain set of Justices, perplexed about how best to move forward (of whom Jackson was but one).

Then came the attacks, the harshest of which came from Democratic Senators Howard Metzenbaum (Ohio), Ted Kennedy (Massachusetts), and Joe Biden (Delaware). Both Kennedy and Metzenbaum drilled in on the repeated use of "I" in the document. Kennedy: "Do the 'I's' refer to you, Mr. Rehnquist?" Rehnquist: "No, I do not think

they do." Kennedy: "You maintain that the 'I's' refer to Justice Jackson?" Rehnquist: "Yes. Obviously something for him to say."

To Metzenbaum's incredulous questioning on the "I's", Rehnquist offered these answers:

> Yes, I suppose one could read it either way. The "I's" in it certainly could have been mine rather, just looking at it as a text, rather than Justice Jackson's.
>
> ***
>
> I think the reconstructing again on the basis of this memo, I would suspect that a logical interpretation in the last paragraph is I perhaps imagined this was the way Justices spoke in conference.

When Biden questioned him on the part of the sentence which referenced being "excoriated by 'liberal' colleagyes [sic]," Rehnquist testified that he was referencing the likelihood of Jackson being "excoriated" at some future conference of the Justices; at the same time, he did not deny that he had had hard-fought policy arguments on this subject with his fellow clerks: "Again, it is hard to remember back, but I think it probably seemed to me at this time that some of the others simply were not facing the arguments on the other side, and I thought they ought to be faced…. I thought there were good arguments to be made in support [of the other side]."

Ultimately, the Judiciary Committee voted out the nomination 13 to 5 (besides the aforementioned anti-senators, Paul Simon (Democrat, Illinois) and Patrick Leahy (Democrat, Vermont) also voted "no"). Thereafter, the Senate confirmed Rehnquist by a vote of 65 to 33. He served as Chief Justice until his death on September 3, 2005. Rehnquist was succeeded by John Roberts, who had served as his law clerk in 1980-81.

Evidence Supporting Rehnquist's Testimony

The most direct evidence in favor of Rehnquist's explanation of the memorandum is his uncontradicted sworn testimony. Justice Jackson, having died on October 9, 1954 (after joining the Court's initial, unanimous decision, but before its "remedies" decision – *Brown v. Board of Education*, 349 U.S. 294 (1955) ("all deliberate speed")), was not in a position to dispute his former clerk's version.

Rehnquist's fellow clerk, Donald Cronson, also weighed in on this subject, first in a telegram sent from London three days after the *Newsweek* article. Cronson had also written a memorandum for Justice Jackson at the same time as Rehnquist (more about that later). As for Rehnquist's memorandum, Cronson recalled collaborating on it with Rehnquist; indeed, he claimed "a great deal of the content was the result of my suggestions … and it is probable that the memorandum is more mine than [Rehnquist's]." Cronson further stated that Jackson had asked for a memorandum "supporting the proposition that *Plessy* was correct." At the same time, however, Cronson also told *The New York Times* that both he and Rehnquist "personally thought at the time [1952] that the 1896 decision, *Plessy v. Ferguson*, was wrong."

Finally, it seems clear from Justice Jackson's prior decisions, writings, and contemporaneous evidence, especially at the time of the first set of oral arguments on *Brown*, that he was troubled by how to adequately deal with *Plessy*, Congress' role/responsibility to desegregate schools and public accommodations, Marshall's sociology arguments (which he never found persuasive), and how to effect an appropriate remedy (if the Court were to step in where Congress had failed to act). The fact that Jackson himself drafted six versions of a separate (but never published) opinion on *Brown* (long after Rehnquist's clerkship had ended – starting on December 7, 1953, ending on March 15, 1954) is further evidence that Jackson was struggling with how best to articulate a constitutional basis for the Court making a "political decision" against segregated schools.

Evidence At Odds With Rehnquist's Testimony

First and foremost, at no point in his career did Justice Jackson ever say or write *anything* indicating that *he* thought *Plessy* "was right and should be reaffirmed." Indeed, both in 1971 and 1986, Jackson's long-serving secretary accused Rehnquist of "smear[ing]" a great man: "Justice Jackson did not ask law

clerks to express his views. He expressed his own and they expressed theirs. That's what happened in this instance."

And it was not only partisan Democrats who were not buying Rehnquist's story. Years later, John Dean wrote: "I thought he lied. His explanation was so at odds with the style and contents of his memo to Jackson that it did not pass the smell test…. To say I was disappointed is an understatement."

Almost as implausible as Rehnquist's explanations (under oath) as to the "I's" not being him was his explanation of Jackson being "excoriated by 'liberal' colleagyes [sic]." First of all, there is no evidence of Jackson ever being excoriated by his Supreme Court colleagues. And while Jackson believed in judicial restraint, he was in fact a political liberal, having served President Franklin D. Roosevelt in a number of capacities before joining the Court (*e.g.*, Solicitor General, Attorney General). Finally, not only did other contemporaneous clerks (*e.g.*, Alexander Bickel, Donald Trautman, John Fassett) recall contentious, lunchtime debates with Rehnquist, so did Donald Cronson, who later wrote: "Bill Rehnquist defended the [pro-*Plessy*] position with gusto and cogency. His virtuoso performance [at the lunch-time debates] on the subject of *Plessy* may have led to the composition of the WHR memorandum."

And Cronson also proved unhelpful to Rehnquist in other ways as well. First off was his own 1952 memorandum, "A Few Expressed Prejudices on the Segregation Cases." Based upon Jackson's constitutional and jurisprudential views, not only did it offer numerous alternative ways to deal with *Brown* (including the one the Court ultimately chose: not overruling *Plessy* per se, but holding that "separate but equal" violated the Constitution when applied specifically to public schools), it also set forth Cronson's view that "*Plessy* was wrong." Perhaps more important was its use of pronouns, where Cronson consistently referred *not* to "I," but to Jackson's prerogative(s) (*e.g.*, "One of the main characteristics to be found in *your work* on this court is a reluctance to overrule existing constitutional laws…." (emphasis added); "*You* are still the justice."). In sum, the approach, tone, and style of Cronson's memorandum stands in fairly stark contrast to Rehnquist's.

Even more problematic was the fact that Cronson's memory got more refreshed as he thought more about his interactions with his co-clerk. In 1975, Cronson prepared another memorandum ("A Short Note on an Unimportant Memorandum"), which he sent on to Rehnquist; he expected that it would cause "the basically trivial episode of the WHR Memorandum [to] soon be allowed to obtain the obscurity that it deserves." It is in this document that Cronson first undercut Rehnquist's "excoriated" explanation (he also later did so in a 1986 *Washington Post* story). Cronson then posited that Rehnquist's attribution of the "I's" to Jackson "was a trivial error, and an entirely honest one." He went on to attempt to reconcile inconsistencies between his version of what happened in 1952 with Rehnquist's; but those attempts only highlighted that the circle could not be squared. In reply, Rehnquist asked Cronson not to publish his memorandum, suggesting that this was "a case where it is best to let sleeping dogs lie."

Another memorandum written by Rehnquist for Jackson during his clerkship also hurts his "I's" explanation. Before the Court in *Terry v. Adams*, 347 U.S. 461 (1953), was the issue of whether white-only pre-primary elections were constitutional. Rehnquist's memorandum first stated:

> I have a hard time being detached about this case, because several of the Rodell school of thought among the clerks began screaming as soon as they saw this that "Now we can show those damn Southerners," etc. I take a dim view of the pathological search for discrimination, a la Walker White, Black, Douglas, Rodell, etc., and as a result I now have something of a mental bloc against this case.

Rehnquist then went on to write:

> If you are going to dissent, I should think you might combine the ideas which you expressed last week with an attack on the reasoning of the two "majority opinions."

***

> Your ideas – the Constitution does not prevent the majority from banding together, nor does it attaint [sic] success in the effort. It is about time the Court faced the fact that white people on [sic] the South don't like the colored people; the Constitution restrains them from effecting this dislike through state action, but it most assuredly did not appoint the Court as a sociological watchdog to rear up every time private discrimination raises its admittedly ugly head.

When questioned about this memorandum by Senate Judiciary Committee members in 1986, Rehnquist was very clear in delineating that the "I's" meant him and the "you"/"Your" references meant Jackson.

(Interestingly, Jackson first drafted a dissenting opinion, in accord with Rehnquist's memorandum. Later, however, he changed his mind and joined Justice Clark's opinion, which concurred in the majority ruling that white-only pre-primaries violated the Fifteenth Amendment.)

Then there is the history of Rehnquist's views about *Brown* itself. While he pledged fealty to its holding and reasoning in 1971 and 1986, he was very careful not to testify that he agreed with it at the time it was handed down. And that is because he did *not*.

After clerking, Rehnquist moved to Phoenix and began practicing in a small firm which had (in his words) "very little to do with either past or current decisions of the Supreme Court of the United States." But that did not quiet his interest in those subjects or his desire to engage in public debate thereon. In 1957, for example, Rehnquist spoke at a local bar association and railed against, among other things, the Warren Court's "Black Monday" decisions (*Brown* was widely referred to throughout the South as "Black Monday"). In that same year, Rehnquist published the first of two articles in *U.S. News & World Report*. While the thrust of both articles was on the influence of the Supreme Court's "liberal" clerks, Rehnquist also threw in a critique of the Court's "expansion of federal power at the expense of State power" – a coded phraseology many Southerners were leveling at the Warren Court in the wake of *Brown* ("Impeach Earl Warren").

Then, in 1959, Rehnquist penned an article for the *Harvard Law Record*. Finding it appalling that no Senator had questioned Justice Charles Whittaker in his confirmation hearings about the *Brown* decision "decided three years before and implementing decisions [that] had been handed down in the interim," Rehnquist let Harvardians know how he really felt:

> There are those who bemoan the absence of *stare decisis* in constitutional law, but of its absence there can be no doubt. And it is no accident that the provisions of the constitution which have been most productive of judicial law-making – the "due process of law" and "equal protection of the laws" clauses – are about the vaguest and most general of any in the instrument. The Court in *Brown v. Board of Education* … held in effect that the framers of the Fourteenth Amendment left it to the Court to decide what "due process" and "equal protection" meant. Whether or not the framers thought this, it is sufficient for this discussion that the present Court thinks the framers thought it.

In 1964, Rehnquist continued in a similar vein, opposing a proposed Public Accommodation Ordinance for Phoenix. In 1967, he published a letter defending *de facto* segregation in Phoenix's public schools; in that letter, Rehnquist posited that the elimination of such segregation was "distressing to me," as well as to many who "would feel we are no more dedicated to an 'integrated' society than we are to a 'segregated' society."

When he testified at his 1971 confirmation hearings, Rehnquist was very careful in what he said about *Brown*. Repeatedly, he testified that *Brown* represented settled constitutional law because a unanimous Supreme Court had ruled on the initial decision and it had been "repeatedly reaffirmed by a changing group of [Justices];" "that, to me, is very strong evidence that the Constitution does, in fact, require that result." (*See* 1971 Transcript at pp. 55, 76, 161, 167-69.)

In 1985 (the year before he was nominated to become Chief Justice), Rehnquist gave an interview to *The New York Times*. In it, he repeated his view that *Brown now* constituted well-settled constitutional law. But he candidly acknowledged that his views had changed about *Brown* since his clerkship: "I think they probably have…. I think there was a perfectly reasonable argument the other way…. Whatever I wrote for Justice Jackson was obviously a long time ago, and to kind of integrate it into something I'm telling you now, I find rather difficult."

* * *

So did William Rehnquist lie, misrepresent, dissemble to the Senate Judiciary Committee? I will let the reader(s) decide.

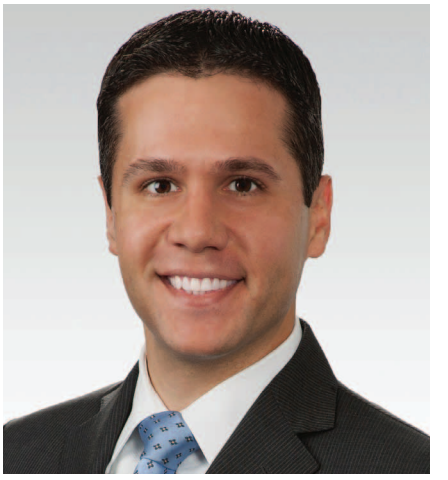
Postscripts

- The starting points for readers who want to know more on this subject (beyond the 1971 and 1986 hearing transcripts) are R. Kluger's "Simple Justice: The History of *Brown v. Board of Education*" (Knopf 1975); D. O'Brien's "Justice Robert H. Jackson's Unpublished Opinion in *Brown v. Board*" (Kansas 2017); J. Simon's "Eisenhower v. Warren" (Liveright 2018); and J. Barrett & B. Snyder, "Rehnquist's Missing Letter: A Former Law Clerk's 1955 Thoughts on Justice Jackson and Brown," 53 *Boston College Law Review* 631 (2012).
- It was not only conservatives and Southerners who found *Brown* to be a troubling decision. Learned Hand, for example, in his famous 1958 lectures at the Harvard Law School, attacked – in general – the Court as having become "Platonic Guardians," and – as to *Brown* specifically – it being a decision not based in law. In other words, if equal protection meant anything, *Plessy* had to be expressly overruled and *all* racial discrimination had to be found unconstitutional. *See also* H. Wechsler's "Toward Neutral Principles of Constitutional Law," 78 *Harvard Law Review* 1 (1959). But that would mean, among other things, all public accommodations would have to become non-discriminatory and various states' anti-miscegenation statutes would also have to be struck down; those equal protection advances would not come until the Civil Rights Act of 1964 and *Loving v. Virginia*, 388 U.S. 1 (1967).
- Many believe that *Brown* was a seismic break from *Plessy v. Ferguson*. But let us allow Chief Justice Warren to put that notion to rest: "Some people think *Brown* was revolutionary, … [but] I see it as evolutionary in character. Just look at the various cases that had been eroding *Plessy* for so many years [*e.g.*, *Smith v. Allwright*, 321 U.S. 649 (1944) (striking down a Texas primary law disenfranchising blacks); *Shelly v. Kraemer*, 334 U.S. 1 (1948) (striking down restrictive covenants in real estate contracts); *Sweatt v. Painter*, 339 U.S. 629 (1950) (the University of Texas Law School required to admit a black student; creating an alternative all-black law school did not provide equal facilities, resources, or opportunities)]…. It was natural, the logical and practically the only way the case could be decided."

Intellectual Property Update

Combating Copyright Trolls with Rule 68

By Tal Dickstein



While patent trolls have plagued technology and pharmaceutical companies for years, a less well-known but equally vexatious creature has recently set its sights on media and entertainment companies – the copyright troll. Image recognition software

allows entities known as "rights administrators" to scan the web for unauthorized uses of a creative work – most often a photograph. Those administrators then retain lawyers to serve demand notices or file suit against media companies, website operators and even prominent celebrities, and then retain a percentage of any settlement or judgment. The success of this enterprise depends largely on the fact that defending a copyright infringement lawsuit involving a one-time, low-profile use can be more costly than any likely damage award. As a result, even where there are viable defenses such as *de minimis* use, fair use or implied license, defendants frequently settle for more than the case is worth just to avoid the costs of litigation.

Fortunately, there are ways to fight back against copyright trolls that seek to leverage the high cost of litigation into an outsized settlement. Rule 68 of the Federal Rules of Civil Procedure allows a defendant to make a formal settlement offer – known as an "offer of judgment" – and provides that, if the plaintiff rejects the offer but ultimately does not recover more than the unaccepted offer, the plaintiff "must" pay the defendant's costs incurred after the date of the offer. Rule 68 is designed to force plaintiffs to bear the costs of litigation that result when they refuse to settle for what they can reasonably expect to recover at trial.

For Rule 68 to be effective, however, plaintiffs must face the risk of paying not only defendants' taxable costs, including filing fees, witness fees, and copying costs, but also their attorneys' fees, which are often far greater than their taxable costs. The Supreme Court held in *Marek v. Chesny*, 473 U.S. 1 (1985), that, where the underlying statute defines costs to include attorneys' fees, such fees are also included in costs for purposes of Rule 68. The Court reasoned that this "plain meaning" interpretation gave effect to both Rule 68 and the definition of costs in the civil rights law at issue in that case, and was consistent with Rule 68's policy of encouraging settlements. Because Section 505 of the Copyright Act allows for an award of attorneys' fees to the prevailing party as part of its costs, a logical application of *Marek* leads to the conclusion that, where a copyright defendant's costs are shifted to the plaintiff under Rule 68, the defendants' attorneys' fees should also be shifted to the plaintiff. *See, e.g., Jordan v. Time, Inc.*, 111 F.3d 102, 103-05 (11th Cir. 1997) (awarding attorneys' fees to copyright defendant under Rule 68, because cost-shifting language of Rule 68 is mandatory, and Copyright Act includes attorneys' fees in its definition of costs); *Lucas v. Wild Dunes Real Estate, Inc.*, 197 F.R.D. 172, 176-77 (D.S.C. 2000) (awarding attorneys' fees to copyright defendant under Rule 68 even though fee-shifting was not available under the Copyright Act, because plaintiff did not register his work before the infringement). At least one district court in the Second Circuit has followed this approach. *See Baker v. Urban Outfitters, Inc.*, 431 F. Supp. 2d 351, 361-62 (S.D.N.Y. 2006) ("[B]ecause the instant case was one for copyright infringement and because the Copyright Act defines 'costs' to include attorneys' fees, [plaintiff] is required to pay to [defendant] both its costs and its attorneys' fees incurred after the making of the offer").

Unfortunately, at least one other court in this circuit has held that, while a plaintiff who obtained a judgment in an amount less than a rejected offer of judgment cannot recover attorneys' fees from the defendant, the defendant is also precluded from recovering fees from the plaintiff. *See Boisson v. Banian Ltd.*, 221 F.R.D. 378, 382 (E.D.N.Y. 2004). That court focused on a statement in *Marek* that fees may be awarded under Rule 68 where they are "properly awardable" under the underlying statute. Because the Copyright Act allows an award of attorneys' fees only to the "prevailing party," the court reasoned that a defendant who loses at trial, albeit in an amount less than a rejected offer of judgment, is not a prevailing party, and is therefore not entitled to recover fees under Rule 68. But the Court in *Marek* held only that attorneys' fees are included in costs for purposes of Rule 68 where the underlying statute defines costs to include attorneys' fees. It did not hold that fees may be shifted under Rule 68 only if they would also be shifted under the applicable substantive statute. Reading *Marek* in that manner ignores Rule 68's mandate that costs (which the Copyright Act defines as including attorneys'

fees) "must" be shifted when the plaintiff recovers less than an unaccepted offer of judgment.

Because the Second Circuit has yet to squarely address the issue, it will likely have an opportunity to clarify the interplay between Rule 68 and the Copyright Act in a way that is faithful to Rule 68's mandatory cost-shifting provision, as well as its underlying policy goal. Doing so would force copyright trolls to consider the full costs of litigation before rejecting offers of judgment that reasonably approximate what the plaintiff can expect to recover at trial, and thereby deter vexatious litigation.

Editor's Note: The author is a partner with Loeb & Loeb LLP.

Legal Practice

Guantanamo Bay II

By Pete Eikenberry



Last November 4, I boarded a large commercial airliner at Andrews Air Force Base in Washington, D.C., to travel to Guantanamo Bay ("GTMO") Cuba, with five other lawyers recruited to observe legal proceedings against alleged USS Cole bomber, Abd al-Rahim al-Nashiri. There did not appear to be more than 20 or 30 people on the plane, and we had the pick of the seats. Although our passports were never stamped as having been anywhere during the one week assignment, they were required to travel to Cuba. We were a disparate group; one was a prosecutor for the State of California, one was a second year student at Columbia Law School, one was a lawyer serving as a legal intern with Human Rights First, one was a recent graduate of Indiana Law School, and one was in an international law master's program at Georgetown.

Upon landing, we were transported by boat to the base. We were briefed by the administrator of the justice complex. We then toured the justice compound where the courtroom had been constructed out of a group of large trailers, with a standard bench for the judge, a dozen or so rows of metal desks for the various legal participants, and a room in the back with about eight rows of chairs behind glass windows. The observers were to be seated on one side of that room, with family members of the USS Cole victims on the other side. We toured the three metal prefab holding compartments available for counsel to interview their clients. We were shown our quarters for the week: two large Quonset style tents, one for females and one for males, in a small tent city, with showers and restroom facilities about 100 yards or so away. (The tents were kept very cold to deter rodents, and I wore a skullcap, long underwear, and wool socks to bed.) There were picnic tables outside where we gathered to caucus or talk to others of interest, including Carol Rosenberg, a *Miami Herald* reporter who has covered GTMO for years.

Our driver, guide, mentor, and minder was a retired navy officer who, in 2008, was responsible for constructing the justice complex. Every day he drove us to dine in a cafeteria or restaurant, to the bowling alley, beach, or movies in our spare time, and to court when it was in session.

On the first day of hearings, we were assigned seats for our observations; I was number 13. We were not to talk, doodle, read, or do anything except watch the proceeding or take notes. To use the restroom, we were escorted by military personnel to and from the facilities outside the court building. There were long benches on the side of the courtroom against the wall where six to 10 military personnel observed the proceedings and, from time to time, escorted witnesses to the stand. al-Nashiri was escorted into the courtroom by two military personnel, one at each elbow.

We visually followed the proceedings through the windows and audibly from television sets placed above the window with a 40 second delay. Outside of the justice compound area there was

the normal commotion of everyday life of a small city, including a McDonald's, a supermarket, parking lots, and a church.

"Enhanced Interrogation"

al-Nashiri was an alleged colleague of Osama Bin Laden, and the attack he allegedly masterminded resulted in the deaths of 17 U.S. sailors. After his capture by the CIA in October 2002, he was subjected to "enhanced interrogation" techniques by the CIA at a "black site" in Poland.

During his 1,370 days in CIA custody, he was repeatedly waterboarded, kenneled like a dog, fed rectally, and mock-executed with a gun and a power drill. (Other techniques remain classified.) Legal proceedings commenced against him at GTMO in 2008, when he was assigned a legal team headed by Indiana death-penalty qualified lawyer, "learned counsel" Richard Kammen. Two civilian lawyers and one military lawyer were assigned to assist Kammen.

Recent Proceedings

In June 2017, Marine General John Baker recommended to al-Nashiri's counsel that they not conduct attorney-client meetings at GTMO; General Baker was informed that attorney/client confidentiality had not been maintained and could not be guaranteed in the future. (Listening devices apparently had been placed in smoke detectors in the three prefab attorney/client communication compounds.) After Kammen's consultation with a New York ethics professor, Kammen and the two other civilian defense counsel sought General Baker's permission to withdraw as counsel to al-Nashiri.

On October 11, 2017, General Baker accepted the resignations of the three civilian lawyers of al-Nashiri's legal team, including learned counsel. (General Baker has statutory authority equal to that of a U.S. district judge to administer the defense of U.S. Military Commission detainees.) However, Air Force Colonel Spath, the military trial judge for the al-Nashiri proceeding, ruled in October 2017 that the resignations of counsel were ineffective and only he could accept them.

On November 1, 2017, three days before we arrived at GTMO, Colonel Spath found General Baker in contempt, fined him $1,000, and ordered him confined to his trailer barracks at GTMO for 21 days. Later, another Defense Department official released General Baker from custody, but his sentence remains in litigation. During my tour as an observer in November 2017, Judge Spath received testimony relative to the bombing of the USS Cole. However, Lieutenant Alaric Piette, the only remaining defense attorney, did not cross-examine witnesses or make arguments to the court; in his judgment, he was unqualified in the absence of learned counsel. (*See* *The New York Times*, "Lawyer in Terror Trial is Seen as Unfit. He Agrees." Feb. 6, 2018, at 1.)

Conclusions

In September 2017, General Baker declared, "The Guantanamo Military Commissions are a failed experiment—and considering the gravity and importance of these cases, that failure is one that hurts us all." Of the 5,000 personnel stationed at GTMO, 1,700 work directly to support the legal proceedings, which in the case of al-Nashiri really do not proceed.

As I previously have reported in these pages, in a recent 12-month period, the Defense Department expended over half a billion dollars for the primary purpose of supporting the justice center in Guantanamo, where 14 alleged terrorists await trial. (Although there are about three dozen other detainees, they are merely "prisoners of war from the battlefield," to be released when the "war" is over.)

The al-Nashiri case is a significant one in view of the evidence indisputably obtained against him by torture, and the government's surveillance of attorney/client communications. USS Cole victim families travel to GTMO to observe the proceedings. There is an apparent likelihood that there will be no closure for the family members for decades. The issues of torture and government surveillance of confidential communications may never be resolved.

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