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Provocative, Human, Eclectic

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We invite you to connect with us on LinkedIn.

From the President

As if Being a Judge Wasn't Public Service Enough

By Robert J. Anello



In my first column as Federal Bar Council President, I noted with pride the efforts of my fellow private practice lawyers in devoting considerable time to *pro bono* charitable endeavors. In this issue of the *Quarterly*, I want to focus on the comparable efforts of the judiciary, many members of which undertake an impressive amount of *pro bono* work in addition to serving the public in their official duties, for which they unquestionably are undercompensated. Going above and beyond what is required or expected, these public officials demonstrate that the generosity of time and spirit that is widespread among legal practitioners in our community does not end when those same practicing lawyers don black robes.

Although I can choose from many extracurricular acts of public service by our judges, the volunteer work performed by the judiciary in the rehabilitation programs aimed at assisting offenders in reintegrating into their communities and society at large exemplifies the commitment of the men and women we entrust with our country's most important work.

These programs, in which judges participate outside the scope of their regular duties and without additional remuneration, focus on the whole person rather than the criminal acts of a person, by offering drug and mental health treatment, in addition to education, vocational, and employment assistance so that criminal offenders have a better chance of leading law abiding lives. The judges do not take a passive role in this process; in fact, when it comes time to meet with program participants, the judges step down from the bench, take off their robes, and roll up their sleeves to talk directly to offenders in an effort to reduce their chances of returning to prison. In many instances, judges join forces with federal defenders, the probation department, and prosecutors to identify defendants eligible for participation.

"Drug Courts"

These programs have developed nationwide, in state and federal courts, and are identified by a variety of names and acronyms including Support Court, POP ("Pretrial Opportunity Program"), SOS ("Special Options Services"), SOAR ("Supervision Opportunities to Advance Reentry"), or STAR ("Supervision Treatment and Re-Entry"), and even, colloquially, "drug courts." Some serve as an alternative to incarceration, while others serve to help offenders transition back into society after incarceration. A recent *New York Times* article noted the growth of such programs in federal courts, citing examples from New York, Connecticut, California, Illinois, New Hampshire, South Carolina, Virginia, and Washington that involved approximately 400 federal defendants. Some of the most successful of these programs exist right here in our own Second Circuit backyard.

The Eastern District of New York is host to three such programs — POP, a pre-sentence drug court, STAR, a post-sentence treatment program, and SOS, a program overseen by Magistrate Judges Joan Azrack and Cheryl Pollak that provides intensive pre-sentence supervision of non-violent youthful offenders below the age of 25. Both POP and STAR are aimed at addressing those offenders whose drug use led to criminal activity.

In 2012, the Eastern District's Judge John Gleeson and Magistrate Judge Steven Gold collaborated with defense attorneys, prosecutors, and pretrial services to start POP. The program is aimed at identifying low level drug offenders with substance abuse problems of their own — a category of individuals that comprise the bulk of the federal prison population. Individuals participating in POP take part in support group meetings and are actively monitored by the volunteering judges. To graduate from POP, participants must

maintain sobriety for at least one year. According to one participant, the judges make a real effort to get deeply involved and "get to know who you are."

Pretrial Opportunity Programs

Along with Judges Gleeson and Gold, other judges in the Eastern District of New York also have overseen Pretrial Opportunity Programs. Judge Frederic Block and Magistrate Judge Robert Levy have led a class of offenders, and Judge Joanna Seybert and Magistrate Judge Gary Brown work with a POP out of Central Islip.

Judge Dora Irizarry runs STAR, a supervised reentry program for drug offenders that began in 2002 under the late Judge Charles Sifton. STAR is offered to offenders post-sentence, although some participants are admitted to the program as an alternative to incarceration. The key components of STAR are education, job placement, drug treatment, cognitive behavioral therapy, and community service.

The Eastern District is not alone these efforts. In 2012, Southern District of New York Judge Harold Baer and Magistrate Judge Henry Pitman began and operated SOAR, a reentry program for federal offenders, and Connecticut's district judges, including Judge Stefan Underhill, Judge Janet Bond Arterton, and Judge Vanessa Bryant, oversee the District of Connecticut's Support Courts. All of these programs demonstrate the federal bench's commitment to reducing recidivism, finding and fostering alternatives to incarceration, and providing offenders with the tools necessary to lead productive lives.

The wholly volunteer efforts of these federal judges in creating, running, and championing these programs should not be taken lightly. In an opinion released earlier this year, Judge Gleeson noted that the services offered by courts as an alternative to imprisonment can do a lot to reduce the "unnecessary and excessively punitive costs of over-incarceration." Speaking not only of the growing prison population and the concomitant rising costs of maintaining our prison system, Judge Gleeson also noted the human cost of mass incarceration, writing that "[l]ives are ruined, families are destroyed, and communities are weakened."

An initial review suggests that Judge Gleeson's assessment of these programs is spot-on. Evidence indicates that participants are one-third less likely to be recidivist than those offenders not offered similar treatment opportunities, with recidivism rates dropping from 15 percent to 10 percent. Further, federal drug court programs have the potential to save the federal government significant sums in incarceration costs. According to the Federal Register, approximately $290,000 is required to house an inmate in federal prison for a year while supervision by a probation officer for a year costs only approximately $3,300. Although additional costs are associated with drug courts, the vast difference in cost between incarceration and probation cannot be ignored. Unfortunately, like so many other worthwhile programs, federal drug courts have felt the impact of budget cuts despite the judiciary's commitment of time and resources.

The volunteer work performed by the judiciary in the rehabilitation programs aimed at assisting offenders in reintegrating into their communities and society at large exemplifies the commitment of the men and women we entrust with our country's most important work.

Extraordinary Efforts

Nevertheless, the judges responsible for initiating and running these programs should be applauded for their extraordinary efforts. Federal judges have foregone more lucrative positions in the private sector to serve the public and, if they have not already impressed us with their accomplishments, their additional efforts to reform our justice system and address the growing prison costs and population are an inspiration for us all.

From the Editor

The SOS Program in the Eastern District of New York

By Bennette D. Kramer



Recently, I visited a courtroom in the Eastern District of New York where Magistrate Judges Cheryl Pollak and Joan Azrack held a courtroom session of the Special Options Services Program of the U.S. Pretrial Services Agency, Eastern District of New York (the "SOS Program"). I followed up my visit to the court session with a chat with Judge Pollak and Pretrial Services Officer Amina Adossa-Ali, who manages the program. I was amazed at the connections that Amina Adossa-Ali and the two judges have made to the young defendants. The success of the program rests on their dedication and involvement.

Alternative to Pretrial Detention

The SOS Program was established in 2000 as "an alternative to pretrial detention for juvenile and young adult defendants." (All quotes are from the U.S. Pretrial Services Agency Program description.) Adossa-Ali has been running it since 2002. Judges Pollak and Azrack have been involved since March 2013. Eligible defendants are non-violent juveniles and young adults between 18 and 25. The program provides support and access to educational, training, and counseling programs that may not otherwise be available to the defendants with the hope of breaking lifetime (and sometimes intergenerational) cycles of poverty, lack of education, and crime through intensive supervision and guidance.

Defendants are identified by pretrial officers, judges, defense attorneys, or prosecutors as potential participants in the program with Pretrial Services making the final decision. If Pretrial Services says a defendant is acceptable, he or she is admitted to the program. Pretrial Services considers a number of factors for eligibility including drug use and current drug addiction; mental health history; victim of rape, incest, or molestation; loss of parent or guardian; victim of child abuse, abandonment, or neglect; incarceration of one or more parents; lack of threat to the community; and willingness to participate in the program and abide by its strict conditions. Participation in the program is then included as a special condition of pre-trial release. However, "special completion of the Program does not entitle them to a reduction of sentence." The sentencing judge, however, will consider any post-arrest rehabilitation as a factor at sentencing. Judge Pollak said that the majority of the successful program participants had been sentenced to probation since she and Judge Azrack took over the program.

Release Conditions

Adossa-Ali, the Pretrial Services Officer assigned to each of the defendants in the program, explains the purpose, program structure, and goals of the SOS Program, along with the release conditions, to the defendant, the defense attorney, and any family members or significant others present. The release conditions are tailored to the needs and goals of the individual defendants with the aim of providing stability and direction to defendants. Release conditions include reporting once a week in person to the Pretrial Officer; curfew and/or travel restrictions; mental health counseling and treatment; drug testing, counseling, and treatment; vocational and educational counseling or training; life skills, parenting, or child rearing classes; anger management or stress management classes or counseling; sex education, sexuality, and relationship counseling; and participation in SOS Program court sessions.

Adossa-Ali explained that many of the defendants had never kept regular schedules, attended school, or worked regularly so

that simply getting them to keep a schedule or even get up in the morning to go to work or school was often difficult. Participants stay in the program at least a year, but the average length of participation is 18 months to two years. The longest a defendant has stayed in the program is five and one-half years. Adossa-Ali said that the progress of individual defendants was like a roller coaster with ups and downs sometimes coming within a week. She explained that summers were the worst because school was out and defendants did not have enough to do. She said a key to success of these program participants was keeping busy and, therefore, out of trouble.

Close Supervision

The program relies on close supervision by Adossa-Ali and Judges Pollak and Azrack. Adossa-Ali has weekly in-person meetings with each defendant and, as necessary, more frequent phone contact to monitor conduct. She also has regular contact with family members, treatment providers, counselors, school personnel, and others, and verifies residence and employment. Pretrial Services performs random drug testing and frequent criminal record checks. Adossa-Ali described the need in one case to make daily calls early in the morning to a defendant to make sure that he was out of bed. In court she talked about daily calls to another defendant's school to monitor his attendance and on-time arrival.

All defendants attend one of two monthly court sessions, with the group of 24 pretrial defendants and two defendants on probation split between the sessions. Judges Pollak and Azrack initially intended to handle separate groups, but decided that they would be more effective if they met with each group together. Adossa-Ali prepares a report on each defendant for the court sessions.

From my vantage point, the reports provide an astounding amount of detail on the individuals' lives. For example, during the time I observed, issues arose relating to the importance of attending therapy sessions, school, GED tutoring (provided at the courthouse by a volunteer), and parenting classes. Judges Pollak and Azrack provided much practical advice on personal and life-affecting issues, such as putting money aside to pay taxes and working to take the GED and driving tests. They were quick to congratulate defendants who had met goals in schools, jobs, or other areas, but did not hesitate to remind those who had not achieved their goals or obligations how important it was to comply with program requirements. They em-

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phasized many times that school must be a priority and that getting to a job on time was key.

Judge Pollak and Adossa-Ali talked about the support programs that Adossa-Ali had been able to assemble through a number of resources. Among the resources that she uses are the New York City Department of Youth & Community Development for employment assistance; the Fortune Society for drug programs; the New York Center for Neuropsychology & Forensic Behavioral Science for therapy and counseling; the Center for Community Alternatives for health education, parenting skills, life skills, therapy, drug counseling, and vocational training for juvenile and young adult mothers; the Homeless Rights Project for homeless defendants with families; the Urban Justice Center for welfare, food stamps, Medicaid, and housing eviction; and the Hope Program for job readiness and training. Both Judge Pollak and Adossa-Ali emphasized it was most important to provide education, training, and job opportunities for defendants and for them to develop plans and goals for the future.

Step-by-Step Approach

Adossa-Ali said that she takes a step-by-step approach in working with defendants to set goals, beginning with small steps such as making a phone call. Adossa-Ali refers defendants with mental health or family issues to counselors for therapy. For drug treatment and mental health assistance, Pretrial Services can use contract facilities, but because the SOS Program is not a national program, Adossa-Ali has to find community-based programs for other support services. Many of those programs will not take federal defendants because they are funded by the state. Adossa-Ali says she often has to beg some programs to take the defendants in the program.

I was amazed at the connections that Amina Adossa-Ali and the two judges have made to the young defendants. The success of the program rests on their dedication and involvement.

In one major success, the Federal Defenders convinced the Doe Fund to take a program participant. The majority of the Doe Fund participants are state parolees who are older, but they have set up a CORE program for homeless participants 18 to 24. One of the SOS Program participants fit the criteria.

As with every other criminal case, under the SOS Program the Pretrial Officer is responsible for addressing non-compliance with conditions of release. Methods for managing non-compliance include investigations, with interviews of the defendant and relevant third parties to determine the facts and possible explanations; issuing a reprimand; discussions with defense counsel and/or the prosecutor; conducting NCIC checks and obtaining relevant court documents; and notifying the court with a recommendation of appropriate action.

Judge Pollak and Adossa-Ali said that virtually all of the defendants in the SOS Program need time at the beginning to adjust to all of the program rules — some have more difficulty than others. Penalties for violations range from heavier curfews to electronic monitoring. Every participant starts out with a curfew that is monitored by random electronic phone calls to a landline phone. If the defendant complies with the curfew and is otherwise compliant with program requirements, Pretrial Services will not object when a defense counsel requests that the court remove the curfew for a defendant, but if a defendant is non-compliant, Adossa-Ali will begin by tightening the curfew — from 9 p.m. to 7 p.m., for example. If non-compliance continues or increases, there are two methods of electronic monitoring available. The first is an ankle bracelet that records when a defendant leaves and returns home. The second is an ankle bracelet with a GPS tracking device that allows constant tracking. The monitoring devices can be problematic, particularly for defendants who are stopped and frisked. The police will always take in a person wear-

ing an ankle bracelet, causing additional problems for these defendants. The final and most extreme penalty for a violation is a remand to custody.

Wave of the Future

Half of the program participants meet with the judges at each session. They come to court as a group and each individual defendant sits at a table in the courtroom in turn and speaks with the judges individually with all the other group members listening. Watching Judges Pollak and Azrack and Adossa-Ali talk with the program participants about the details of their lives — the goals they have met, the school progress they have made, the other programs (such as GED and driver's education) they are attending — left me impressed by the level of detail that is known and followed through the program. When they had met their goals, the participants were very proud of themselves, showing a self confidence they probably had never before known. In contrast, the backsliders were chastened and vowed to do better. I am in awe of the effort that has gone into making this program a success. Judge Pollak said that such programs were the wave of the future, as judges and the justice system try to keep more defendants out of prison and break the cycles of poverty and lack of education that have resulted in their involvement with the criminal justice system.

Developments

Southern District Judge Kimba Wood Honored at Thanksgiving Luncheon

By Bennette D. Kramer



Luncheon Chair Karen Patton Seymour called the attendees at the 2013 Federal Bar Council Thanksgiving Luncheon to order. Following lunch, she introduced Steven Edwards, chair of the Council Nominating Committee. Edwards introduced newly elected officers and members of the boards of the Federal Bar Council and Federal Bar Foundation.

Council President Robert Anello thanked Edwards for taking the time to chair the Nominating Committee and Karen Seymour for chairing the luncheon. He also thanked those responsible for organizing the luncheon, particularly the Federal Bar Council staff. Anello looked back at the accomplishments of the Federal Bar Council during the past year, including the Fall Retreat, CLE programs, Public Service Committee immigration and asylum projects, Special Committee on Sentencing Reform and Criminal Practice Committee programs, Westchester and Central Islip Committee receptions and programs, and newly formed affinity groups. Anello also looked forward to the Winter Meeting in Costa Rica.

The Emory Buckner Award

Anello then introduced Southern District Judge Kimba Wood and presented the Emory Buckner Award to her. In presenting the Emory Buckner Award to Judge Wood, Anello noted that after she obtained degrees from Connecticut College, the London School of Economics, and Harvard Law School (as one of fewer than 20 women in her class), she entered private practice where she was the only female attorney at Steptoe & Johnson and the first woman in the field of antitrust law at LeBoeuf, Lamb. Judge Wood also worked in the Legal Services Program at the Office of Economic Opportunity as part of President Lyndon Johnson's War on Poverty Program.

Judge Wood was nominated to serve on the Southern District in 1987 by President Ronald Reagan. She has developed a reputation of calmness and fairness while handling numerous significant cases. One of her greatest challenges was sentencing Michael Milken for securities fraud. Milken's activities had led to the financial failures of the savings

and loans and an outraged public wanted him to be sentenced to a long term. Observers noted that Judge Wood had sentenced him to a term that appeared to satisfy everyone — not too long and not too short. Judge Wood also has handled cases involving shredded wheat, Christie's Auction House, and Pepsi. Judge Wood served as Chief Judge of the Southern District from 2006 to 2009, implementing modernization of the court administration and projects to move cases along. Saying that Judge Wood was an extraordinary role model for women, combining a female presence with an effective professional presence, Anello presented her with the 2013 Emory Buckner Award.

Judge Wood's Remarks

Judge Wood said that she was deeply honored to receive the award from a group that she admires. She thanked her fellow judges who have made her 25 years on the bench so enjoyable.

In her remarks, Judge Wood focused on the burden of the budget cuts on the judiciary over the past four years. The judicial budget has decreased from $50.6 million in 2010 to $41.4 million for 2014 as a result of across-the-board budget cuts to all three branches of the government. But the federal judiciary is in a different position from the other branches because it is required to handle all cases that are filed. Chief Judges Loretta Preska and Carol Amon have been able to shift money around to retain enough staff to allow the court system to function, but the courts are less and less able to handle full workloads. Judge Wood said that the courts needed letters supporting restoration of adequate funds for the judiciary to encourage Congress to restore funding to an adequate level.

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Judge Wood then provided a stark picture of the effects of the budget cuts. In the Southern District, judges have had to cut back on the number of trials and delay the terrorism trial of Osama Bin Laden's son-in-law because the Federal Defenders cannot handle their caseload. In October, the court almost reached the point of not being able to pay jurors, which would have resulted in a suspension of jury trials. IT equipment, printers, and furniture are breaking down. Lighting and air are cut off in the courthouses at 6:00 p.m.; the clerk's office has had to downsize by 50 employees, many of whom were the most experienced; judge's law clerks have to fill in for absent courtroom deputies, slowing down work in chambers; and judges can no longer get extra help to handle difficult cases, such as terrorism, death penalty, and complex civil cases. Judges have been told that they may not be able to retain the present number of law clerks in the future. Public safety has been compromised by a 39 percent cut in court security and broken security systems and equipment that cannot be replaced. Public safety also is jeopardized by having fewer probation and pretrial officers available to monitor criminal defendants at the same time the number of convicted offenders is rising. As a result, searches of homes, GPS tracking, drug testing, and residential drug treatment have been reduced or eliminated.

The cutbacks prevent the pretrial and probation offices from doing an adequate job of monitoring defendants, resulting in less deterrence and a diminished ability to respond to illegal activity. The Southern District bankruptcy court now closes at 5:00 p.m. instead of offering round the clock attention. Staff cuts of 39 percent have led to the closing of its records department.

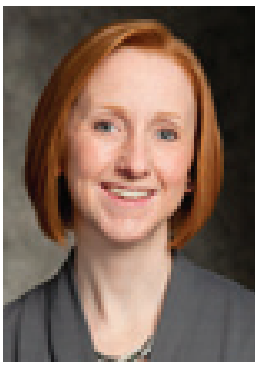
Call to Action

Judge Wood emphasized that the judiciary is on the brink of crisis and repeated her plea to the attorneys present to write letters encouraging Congress to roll back the budget cuts.

FBC News

The 2013 Fall Bench and Bar Retreat

By Sarah Cave and Ferve Ozturk





The Federal Bar Council Second Circuit Courts and First Decade Committees hosted the Fall Bench and Bar Retreat on October 25 to October 27, 2013 at the Cranwell Resort, Spa and Golf Club in Lenox, Massachusetts. Over 150 people attended the weekend-long retreat, which brought together federal judges, Council members and their families, and experts in their fields for six CLE Programs.

The Federal Rules Challenge held on Friday afternoon launched the weekend. The Challenge was a Jeopardy-style quiz game covering the rules and procedures applicable to the Second Circuit, including the Federal Rules of Civil Procedure. The teams of six tested their knowledge of civil and criminal procedure in a wide range of categories, including "So You Thought You Could Sleep Through Ethics?" and "I Say, You Say, We All Say for Hearsay." The come-from-behind winners were Robin Zablow, Howard Sussman, Jason Canales, and Linda Goldstein. The program was organized by SCCC member Robert Morvillo and FDC members Travis Mock and Mark Pincus. In the evening, guests enjoyed a welcome reception and buffet dinner.

Drones

The programming on Saturday morning began with New Frontiers in National Security, focusing on the legal implications of unmanned drones and remote surveillance. Following an introduction by Southern District Judge Kevin P. Duffy, Ed O'Callaghan presented excerpts from a U.S. Customs and Border Patrol training video demonstrating the types of drones federal law enforcement agencies use, their capabilities, and how law enforcement utilizes the information that drones collect.

Hina Shamsi, director of the ACLU's National Security Project, emphasized that her organization's concern is not that the use of drones is *per se* unlawful, but rather that their use not devolve into generalized surveillance far from the battlefield. The NSP's motivation for developing standards of accountability for the unlawful use of drones and transparency concerning their use is the protection of privacy and the prevention of any chilling of the right to freedom of association.

Daphne Eviatar, senior counsel at Human Rights First's Law and Security Program, argued that the United States should be held to international legal standards applicable to armed conflict and human rights. Eviatar suggested that courts can and should promote transparency and police the standards of international law when cases by victims, survivors, and their families are litigated, and that legislators may need to enact new causes of action to enforce international norms.

Shifting to the governmental perspective, Andrew Weissmann, general counsel of the Federal Bureau of Investigation, described how the FBI, the only Justice Department agency to use drones, does so under strict limitations and supervision by the Federal Aviation Administration. Drones have been used domestically only 10 times in the last five years, most recently in a dramatic kidnapping case in February 2013.

Carrie Cohen, Assistant U.S. Attorney for the Southern District of New York, discussed other forms of remote surveillance federal prosecutors commonly employ, describing recent Supreme Court and court of appeals precedent on warrants for remote and cellular surveillance.

SCCC member Jim Beha and FDC member Ashley Miller coordinated the program.

Cloud Computing

Next, Eastern District Judge Margo Brodie led a discussion of the ethical implications of cloud computing. Patrick Burke provided an overview of cloud computing, a common way to outsource data storage or collect and host data for review in discovery. He noted the risks associated with placing electronically-stored information in the cloud, including data security, data privacy, record retention, contracts, and unanticipated costs. Burke cautioned that practitioners should ask their cloud computing service providers for information concerning how data is backed up, the provider's financial stability, and procedures for extracting and deleting information from the vendor. Steven Bennett described the conversation that attorneys should have with their clients about what type of information should be kept with a cloud computing vendor and how that information will be used. For foreign clients, strict privacy regulations in Europe and elsewhere restrict the movement of data. David Horowitz ended with a discussion with reference to applicable New York ethical rules relating to confidentiality and attorney competence.

The program was coordinated by SCCC member Mark Berman and FDC member Rachel Hemani.

The *Aereo* Case

The final program on Saturday was a mock U.S. Supreme Court argument in *WNET v. Aereo, Inc.* (2d Cir. 2013). In the decision, the Second Circuit permitted Aereo — a new service that allows each fee-paying subscriber to watch live or recorded free TV shows over the Internet via a tiny individualized antenna — to continue its service without having copyright licenses to transmit the shows. FOX, CBS, and other copyright holders disagreed with the decision, arguing that Aereo's technology exists solely to circumvent their copyrights and to broadcast the networks' content without compensation. The mock argument explored how the decision may upend the network television business.

Southern District Judge J. Paul Oetken, Southern District Judge Edgardo Ramos, and Oren Warshavsky played the roles of Supreme Court justices.

Manisha Sheth argued on behalf of the broadcast networks that the Aereo technology fell within the plain language of the Copyright Act as a "public" performance of a work subject to copyright. She contended that a decision in Aereo's favor would create incentives for broadcast networks to move from free over-the-air channels to cable-only channels, to the detriment of viewers.

Gerry Silver argued on behalf of Aereo that the technology was not a "public" performance because each subscriber acquired an individual copy of the program through his or her own individualized antenna. Silver maintained that the service was no different from an updated version of an antenna on the roof of a viewer's house to enable the viewer to watch free over-the-air TV. Silver also asserted that Aereo was indistinguishable from the DVR system upheld in *Cartoon Network LP, LLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), and that the broadcasters benefitted from increased viewings of their shows.

The program concluded with a discussion of the implications of the Supreme Court's review of the *Aereo* decision. The program was coordinated by SCCC member Gerry Silver and FDC member Robin Dull.

The day ended with dinner and a rousing musical performance of *Joseph and the Technicolor Dreamrobe*, a parody of *Joseph and the Amazing Technicolor Dreamcoat*, by talented members of the FBC Inn of Court. The star-studded cast included Steve Edwards, Larry Krantz, Margie Berman, Shelia Boston, Karla Sanchez, Sammi Malek, Jason Canales, Phyllis Malgieri, Lia Brooks, and Andrew Mancilla, with a cameo appearance by Southern District Judge Vincent Briccetti.

False Confessions

The Sunday morning programs commenced with a program on false confessions. Dr. Saul Kassin, Distinguished Professor of Psychology at John Jay College of Criminal Justice and Massachusetts Professor of Psychology at Williams College, who has pioneered the study of false

confessions, led the discussion by examining several examples of well-known criminal cases where the veracity of confessions was at issue.

Kassin described the study of false confessions as involving principles of psychology, forensic research, and case studies. He noted that the purpose of the study of false confessions is not to opine that a particular confession is false, but rather to identify the factors that increase the risk of falsity in a confession. Kassin elaborated on three types of false confessions: voluntary, where the individual confesses without any external pressure; compliant, where the individual confesses to escape a stressful situation, avoid a threatened harm, or gain a reward; and internalized, where an innocent person is subjected to suggestive techniques and comes to believe that he or she actually committed the crime.

Kassin next explained that the interrogation process typically follows a pattern of custody, isolation, confrontation, minimization, and confession. The process is inherently risky to innocent suspects depending on their personal vulnerabilities, the length of the interrogation, and the tactics used, among others. Confessions, Kassin emphasized, are transformational to juries — they typically overwhelm other evidence at trial.

Southern District Judge Edgardo Ramos then led the panel in a lively discussion, first assessing how groups like the Innocence Project and the expansion of DNA evidence have made the public receptive over the last 20 years to understanding that confessions may be false.

Douglass Maynard, Deputy Commissioner for Legal Matters at the New York Police Department, related that law enforcement is fully aware of the possibility of false confessions, and specifically trains officers to assess the character of suspects and be wary of the risks of falsity.

New York County Chief Assistant District Attorney Daniel Alonso noted that district attorneys in New York State, in cooperation with the State Police and the New York Police Department, have voluntary protocols to record interrogations from beginning to end, a process that is being rolled out in certain parts of New York City. Alonso noted that his office has been recording interrogations since the 1980s, and Kassin observed that 17 states already mandate the recording of entire interrogations.

The panel discussed judicial oversight of interrogations through review of the voluntariness in particular cases, and expressed reservations about procedures imposed by the legislature, preferring instead the approach of law enforcement determining the appropriate training and procedures. The concept of a bright-line rule against the use of false statements made in interrogations was compared to a broader spectrum of admissibility of such statements.

SCCC member Harry Rimm and FDC member Suzanne Forster coordinated the program.

Gideon

The weekend concluded with a performance of the FBC Inn of Court program *Clarence's Excellent Adventure: The Story of a Man, a Pint and a Pencil*. Developed by the Inn of Court team lead by Judge Briccetti, the program told the story of the Supreme Court's landmark decision in *Gideon v. Wainwright*, which held that, in a criminal case involving no special circumstances, an indigent defendant had the right to appointed counsel.

A panel discussion followed, examining how *Gideon* has affected the criminal court system over the last five decades, and whether its promises have been fulfilled or remain aspirational. Judge Briccetti led a spirited roundtable between David Patton, Executive Director and Attorney-in-Chief of the Federal Defenders of New York, and Daniel S. Medwed, Professor of Law at Northeastern University of Law. Patton began by asking whether the criminal justice system is fairer today than it was when *Gideon* was decided and maintained that the system is less fair today due in part to stricter sentencing guidelines. He noted that Federal Defenders' offices nationwide have been weakened by budget cuts. Professor Medwed discussed inadequate representation of counsel. He provided striking examples of cases that he has reviewed in his law school clinic, where failure of assigned defense

counsel to investigate critical details of a case led to the false incarceration of criminal defendants for numerous years.

The program was coordinated by SCCC member Kathy Marks and FDC member Sammi Malek. The Inn of Court presentation featured Judge Briccetti, Kathy Marks, Greg Morvillo, Jim Beha, Margie Berman, Sammi Malek, Phyllis Malgieri, Lia Brooks, Jason Canales, Michael Rakower, and Andrew Mancilla. The 2013 Fall Retreat was co-chaired by SCCC member Sarah Cave and FDC member Ferve Ozturk. The Retreat also was coordinated by FBC President Robert Anello; SCCC Chair Linda Goldstein; and FDC Chair Christopher Colorado.

Legal History

Simon Rifkind and the Case of the Maligned Author

By C. Evan Stewart



Readers of the *Federal Bar Council Quarterly* will recall, when we last looked at Judge Simon Rifkind (Vol. XX, No. 3; May 2013), the focus was on his extraordinary essay: "The Lawyer's Role and Responsibility in Modern Society." This time the focus will be on Mr. Rifkind's most famous client, Jacqueline Bouvier Kennedy Onassis, and the turmoil over her attempts (legal and otherwise) to scuttle the publication of *The Death of a President*, authored by William Manchester.

An Authorized History

Within weeks of JFK's assassination, and mindful that many would be vying for the chance to write the definitive book on the events surrounding that tragedy, Jackie Kennedy ultimately picked Manchester for the job. Her first choice, Theodore White (her collaborator in starting the "Camelot" legend — *after* the assassination), declined. Manchester had written a highly admiring (some believed fawning) book on JFK during his lifetime (*Portrait of a President*); moreover, he had given the President control over that book's galleys. Those two facts may have tipped the scales in his favor. And although he was quite busy on other projects, Manchester did not feel he could say no to the martyred President's widow.

The next step for Manchester was to meet with the Attorney General, Robert F. Kennedy. At his first meeting with RFK, the author was "shocked by his appearance. I have never seen a man with less resilience. Much of the time he seemed to be in a trance, staring off into space, his face a study in grief." RFK notwithstanding made it clear he had his sister-in-law's authority over the project. And to that end, he told Manchester the book would be issued by Harper & Row and edited by Evan Thomas (who had performed similar work for the Kennedys on *Profiles in Courage* and *The Enemy Within)*; that Manchester was contractually obligated to another publisher was a minor technicality. Ultimately, a memorandum of understanding was crafted and signed to cover the book project, with its points including:

- The book would come out *after* the November 1968 election (unless it was finished earlier).
- The final manuscript would not be published "unless and until approved" by both RFK and Mrs. Kennedy.
- Manchester's compensation would be a flat $36,000 (without expenses); he also would be entitled to royalties from foreign sales (if any), and magazine serialization(s) (if any).

The Attorney General's office then announced the book project to the public, stating that "these arrangements have been made with Mr. Manchester in the interest of historical accuracy and to prevent distortion and sensationalism."

A Work in Progress

Manchester immediately terminated all other endeavors, moved to Washington, and started to work. Besides extensive research and visits to every site to be described in the book, Manchester also met Mrs. Kennedy for two five-hour interviews. The sessions were taped and, as Manchester's later wrote: "Future historians may be puzzled by odd clinking noises on the tapes. They were ice cubes. The only way we could get through those long evenings was with the aid of great containers of daiquiris…. There are also frequent sounds of matches being struck…. Before [the first interview] I hadn't smoked for two years…; eight years would pass before I quit again."

Manchester worked around the clock. Within a short period, he had lost 20 pounds and his clothes fit him so poorly that Ethel Kennedy told him he needed a new tailor. On March 26, 1965, Manchester checked himself into a Connecticut hospital with "nervous exhaustion." Out after 10 days, he drove himself on and by March 1966 he had produced a first draft entitled *The Death of Lancer* (JFK's Secret Service name). Evan Thomas then informed him that RFK and Mrs. Kennedy would not be reviewing the manuscript; instead, in addition to reviews by Thomas and Manchester's literary agent (Don Congdon), two RFK aides/friends (Ed Guthman and John Seigenthaler) were being delegated the task of protecting the Kennedy family's legacy (and Camelot). The group of reviewers expanded quickly to include the chairman of Harper's (Cass Canfield), Ethel Kennedy, Arthur Schlesinger, and Dick Goodwin (former speechwriter for JFK and later LBJ).

The Early Reviews

Over the course of the spring of 1966, Manchester started getting feedback. Thomas, for example, wrote: "This is the finest book I've read in 20 years here." Canfield weighed in with: "A work of unusual distinction and great power." Schlesinger wrote: "I think this is a remarkable and potentially great book. The research, the feeling, the narrative power, the evocation of personality and atmosphere, much of the writing — all are superb…. I hope you can stop them from editing too much history out of the manuscript." And Goodwin called it "a masterful achievement."

At the same time, the reviewers had over 100 suggested changes, virtually all of which were non-substantive (*e.g.*, Guthman — "Page 10 — First line. Question the use of the word… "ignorant." I think this should be checked. Largely unfamiliar or unacquainted might be better." "Page 686 — Reference to Angel's four mighty Boeing engines. The



President John F. Kennedy and First Lady Jacqueline Kennedy arrive for the President's State of the Union Address. Photo courtesy John F. Kennedy Presidential Library and Museum.

plane is a Boeing but the engines are Pratt — Whitney."; "Page 1177 — wrong identification for Carmine Bellino. He is a certified public accountant.") Of Goodwin's few comments, the most significant was to recommend the title be changed to *The Death of a President*. Manchester responded affirmatively to this round of comments, believing "virtually all [the proposed changes] improved the manuscript."

The Next Set of Reviews

The euphoria of the first read-through was quickly diminished as a result of reviewers' second and third read-throughs. Of the people closest to RFK, the principal concern was the often unflattering portrayal of JFK's successor, Lyndon Johnson, and the potential political fall-out this Kennedy-authorized work could have on RFK's difficult relationship with LBJ, as well as on RFK's political future. A 36 hour session with Thomas in a Manhattan apartment was designed to eliminate any and all negative LBJ references (*e.g.*, Manchester had described LBJ as a practitioner of political tergiversation. Thomas asked: "What does tergiversation mean?" Manchester: "Evasiveness, equivocation — running a broken field." Thomas: "That goes."). Manchester left the meeting with Thomas believing that all of the political objections had been addressed. He was wrong.

Two lengthy sessions going over additional revisions were required in June and July of 1966. After the second one, Seigenthaler, speaking for RFK and Mrs. Kennedy, declared that the manuscript was approved for possible serialization and publication. Thomas and Manchester, however, believed they needed some affirmation directly from RFK; after a bit of pestering, RFK sent Manchester a telegram stating: "While I have not read William Manchester's account of the death of President Kennedy,… members of the Kennedy family will place no obstacle in the way of publication of his work."

This telegram allowed Harper to proceed with targeting the book to be released in January 1967. It also allowed for Congdon to conduct a bidding war for magazine serialization — a war ultimately won by *Look* magazine for $665,000. Manchester thereupon called RFK in Hyannis Port. RFK's reaction: "Great! Isn't that a record? [It was] *Look* has been so nice to the family and Henry Luce [publisher of *Life*] has been such a bastard."

Enter Jackie

Manchester was pleased (he would suddenly be rich), and RFK certainly seemed okay where things stood; but one person was not: JFK's widow. Mrs. Kennedy, who had been upset with Arthur Schlesinger when his Pulitzer prize-winning book on JFK had been serialized, was even more upset now. From Evan Thomas, Manchester learned that Mrs. Kennedy was objecting to the serialization money not going to the JFK library; but what ultimately became clear to Manchester was that "she didn't really want any book, that at most she would accept only a dull, obscure volume." ("I thought," she would tell Manchester in September, "that it would be bound in black and put away on dark library shelves.") RFK, under immense pressure from his sister-in-law, now made that clear to Thomas, wiring him: "Under the present circumstances, with the situation as difficult as it is, I feel the book on President Kennedy's death should neither be published nor serialized." This led to a stormy meeting in August 1966 in RFK's Senate office (he had been elected in 1964), in which Thomas, Seigenthaler, RFK, and Manchester "conferred, fumed, shouted, and glared — and settled nothing." According to Manchester, "Bobby was at his most abrasive; at various times he threatened to take *Look* to court, insisted that [Manchester] give more money to the library, and demanded that I stop the serialization, all the while assuring [Thomas] that he wanted the book to be published."

At the same time, Seigenthaler was submitting over 100 new changes — which Manchester viewed as "frank distortion." And a new editor was introduced: Mrs. Kennedy's secretary, Pam Turnure (also one of JFK's many alleged paramours). Turnure issued 77 changes, most of which



President John F. Kennedy, Jacqueline Kennedy, and others attend reception for members of the diplomatic corps. Photo courtesy John F. Kennedy Presidential Library and Museum.

were directed to dealing with personal items about the former First Lady about which the public knew nothing (*e.g.*, the fact that Mrs. Kennedy regularly smoked cigarettes).

Also in August was a meeting of *Look* executives with RFK, Mrs. Kennedy, and her lawyer, Simon Rifkind. In response to a variety of threats, *Look* agreed to reduce the number of installments from seven to four. This was a substantial monetary hit to the magazine, but it did little to appease the Kennedys.

Mrs. Kennedy then tried a new approach: she invited Manchester and Goodwin up to Hyannis Port to resolve things. The Kennedy plane, the *Caroline*, flew the two men to the Cape, where Mrs. Kennedy met them on the tarmac, "wearing sunglasses and a green mini-skirt; she looked stunning." After some sporting events, the three got down to business. Unfortunately, the session was chaotic, with wild emotional swings and no real progress at getting to a rational compromise. What was clear to Manchester was that Mrs. Kennedy was determined to fight and to win; memorably she said: "Anybody who is against me will look like a rat unless I run off with Eddie Fisher." (Fisher had entered tabloid Hell in the 1950s when he had left his wife, Debbie Reynolds, for Elizabeth Taylor.)

With Harper's now lawyering up, bringing in Harriet Pilpel of Greenbaum, Wolf & Ernst, *Look* was also exploring how to protect itself — not just from the Kennedys, but also from Manchester; the author, now totally frazzled, had suggested that *he* might seek an injunction to block the magazine. *Look*'s response: it would sue him for "at least several hundred thousand dollars."

As if that were not enough, Goodwin now weighed in again, seeking the deletion of thousands of words from the four *Look* installments. RFK then invited Manchester to Hickory Hill (his Virginia estate), where, *inter alia*, he expressed concern that what Manchester had written "will injure both Johnson and me" (even while admitting he still had not read a single word written by the author).

Trying to escape the pressure cooker, Manchester booked passage for England aboard the *Queen Mary*. The night before it left, the author, at a Manhattan hotel under an assumed name, was surprised in the lobby by Thomas, who bore 30 more demanded changes from Seigenthaler and Turnure. The following morning, at breakfast he was confronted by Goodwin and Burke Marshall (a key aide under RFK at the Justice Department) with nine new demands. Shaken, he retreated up to his hotel room; within minutes, Bobby Kennedy was pounding on the door, yelling: "Bill, Bill, I know you're in there!"

Manchester somehow avoided a mano-a-mano confrontation with RFK and made his cruise. In his absence, Mrs. Kennedy shifted her anger to Harper's and, more particularly, to Evan Thomas. Blaming him for the entire *Look* imbroglio (as well as other sins), she leaned over at the end of a meeting and whispered to

Thomas, "I'm going to ruin you."

While in England, Manchester continued to receive a battery of suggested changes from Goodwin, many of which the author agreed to. Harper's then weighed in, demanding more changes or it would not publish the book. This latter piece of news made JFK's widow very happy; it also caused Manchester to make 28 more changes to the manuscript. With that, Harper's green-lighted the book. And Mrs. Kennedy went nuclear.

Rifkind in Motion

Issuing a statement (written by Ted Sorenson) that the book was "tasteless and distorted" and that Manchester and his publishers had disregarded "accepted standards of propriety and good faith" and had violated "the dignity and privacy of [her] children," Mrs. Kennedy authorized Rifkind to go to New York State Supreme Court on December 16, 1966 to enjoin both Harper's and *Look*. Manchester, on board the Queen Mary returning to America, now recalled her words at Hyannis Port and realized he was being cast as Eddie Fisher (*i.e.*, the "rat").

But on closer inspection, the papers supporting Rifkind's submission had some serious flaws. First and foremost was Mrs. Kennedy's affidavit. Notwithstanding the Sorenson-drafted statement, she averred that she had "never seen Manchester's manuscript;" she further averred neither Harper's nor *Look* had allowed her to see it. That second representation was not accurate. Moreover, given the voluminous paper record of RFK representing her interests in the project and the numerous Kennedy representatives' involvement in the back and forth on the manuscript, a full detailing of all that in court would be telling (and not in her favor).

Even more problematic was RFK's affidavit, in which he "categorically state[d] that at no time did I ever give my approval or consent to the text of the manuscript, to any publication thereof, or to any time of publication; nor did I ever say or do anything from which the defendants could reasonably have believed that I did…. The fact is that no one who read the manuscript had authority to approve it on behalf of Mrs. Kennedy or me." As Manchester later wrote, these bold statements opened up RFK to possible perjury, since "[t]here were at least twenty witnesses who could testify that this simply was not so."

Indeed, upon review of the Kennedy legal papers, *Look's* general counsel offered to quit if he did not win such a slam-dunk case. That said, the public relations war was at an all-time high with a lot at stake — *e.g.*, if *Look* had to postpone one issue, it could cost millions; RFK's reputation for ruthlessness was being revived; the uproar was increasing the public's interest in the book (the opposite of what Mrs. Kennedy wanted); Mrs. Kennedy's poll numbers were in decline (for the first time), etc. Judge Rifkind also weighed in extra-judicially: "I don't know about literary integrity, nor the matter of history. But I believe strongly in a man keeping his word, particularly when it is in a written memorandum of understanding."

On January 16, 1967, the trial was set to start, with RFK scheduled as the first witness. Hours before this rendezvous with destiny, the parties settled. In exchange for some further, non-substantive edits (*e.g.*, substituting "vanished" for "disappeared") — a total of seven pages of a 710 page book was cut — a consent decree was ordered by the Supreme Court Justice that allowed the "revised" manuscript to be published. By the term of the decree, Mrs. Kennedy could seek injunctive relief against anyone publishing a form of the book inconsistent with the "revised" manuscript (*Stern* magazine in Germany promptly announced it would do just that); the decree also, *inter alia*, ordered destruction of the "original" manuscript (except for four copies), and the delivery of Manchester's tapes with Mrs. Kennedy to the Kennedy Library (under seal). Judge Rifkind was quoted in the *New York Post*: "I never like to speak in terms of victory or defeat in a law case. I'll just say we are satisfied."

Postscript

- Manchester quickly patched up his relationship with a number of Kennedy loyalists, and later campaigned for

RFK during his presidential run in 1968.

- By 1970, royalties for *The Death of a President* totaled $1,057,247.64, all of which were donated to the JFK Library. When the first check for $750,000 reached the library, Mrs. Kennedy contacted Manchester and also issued a "gracious statement" to the press that said, "I think it is so beautiful what Mr. Manchester did."
- Evan Thomas, whom Manchester felt had let him down in face of the Kennedys' pressure, ultimately left Harper's for another firm. More importantly, having gotten multiple sclerosis in the 1950s, Thomas' disease had gone into remission (for the most part) thereafter. Unfortunately, the stress of this drama brought the disease back to the fore and stayed with him until his death in 1998. Perhaps ironically, his son (also Evan Thomas) would later write the best, extant biography of RFK: *Robert Kennedy: His Life* (Simon & Schuster 2006).
- Someday, if the Kennedys allow it, a great book will be written tracing the provenance of the various edits to the manuscript as it was tinkered with by so many people with different agendas (historical, political, and other).
- The historical record is unclear of exactly when it happened. But at some point, Mrs. Kennedy sat down in her apartment at 1040 Fifth Avenue and finally read Manchester's book cover-to-cover. When she finished it, it is reported that she said only one word: "fascinating."

Legal History

The Voice of Treason, Part II: Tokyo Rose

By Molly Guptill Manning



This is the second installment of a two-part series, which examines the treason trials of Mildred Gillars ("Axis Sally"), who broadcast programs from Germany for American troops, and Iva Toguri D'Aquino ("Tokyo Rose"), an American radio broadcaster for Japan during World War II.

Radio and the War

In 1944, the United States prepared to invade Leyte Island in the Philippines. Retaking the Philippines held special significance: three years earlier, American forces — outnumbered and understocked — were forced to surrender the islands to Japan. "There is a limit to human endurance, and that point has long passed," Lt. Gen. Jonathan Wainwright famously told President Roosevelt. With that message, thousands of Americans became prisoners of war and the test of human endurance began in earnest. Forced to march 80 miles (in what became known as the Bataan Death March) without food and water to a POW camp where they would face inhuman conditions, many perished in the first days of their captivity. Those who survived faced years of cruel treatment.

In 1944, the United States sent a Navy fleet to Leyte and soon overpowered the Japanese defenses. Yet, each night Radio Tokyo would announce Japan's dominance over the Allies. After playing American dance music to lure American GIs to listen to the program, a pleasant female voice would interrupt to give a battle report. Speaking in English and sometimes identifying herself as "Tokyo Rose," this disc jockey would recite information that was so inaccurate that Allied soldiers could not help but be amused. For example, after the Japanese military was pummeled by the Allies, "Tokyo Rose" declared: "The Americans' great naval defeat caused great gloom in New York when news was flashed in lights around The Times building in Times Square." The Americans who participated in the

battle roared with laughter when they heard Rose's shameless lies.

Radio Tokyo's goal was to broadcast programs that would destroy the morale of the Allies. The personality known as "Tokyo Rose" — which was adopted by a dozen or more women — seemed to be Japan's premiere vehicle for propaganda intended to weaken resolve. But, the broadcasts did not seem to have the effect that Radio Tokyo had wished. American servicemen did listen — stationed on remote islands or on ships far from land, isolation and boredom were difficult to overcome. They yearned for the comforts and delights that they had enjoyed back home. Listening to a woman's voice in a familiar language, hearing news updates and American music — these were the reasons Americans in the Pacific tuned into Japan's radio broadcasts. Besides, much of Rose's propaganda-laden messages were transparent enough to cause no real damage to morale. But, she also had her moments.

Although not the same caliber as Axis Sally's military intelligence, Tokyo Rose would sometimes predict the future with incredible accuracy. For instance, on August 5, 1943, she stated that American troops were expected to land on the island of Kiska on August 17th — Tokyo Rose was off by only two days. Also, when it came to her American casualty reports, she was spot on. She never inflated the numbers, but her manner of reporting was callous. "Well, you boys in Moresby, how did you like that ack-ack last night over Rabaul," she asked during one broadcast. "Your communiqué didn't say anything about losing those two Fortresses, did it? But you fellows know, don't you? You know what did not come back," she taunted. The hearty laughter that accompanied Rose's misinformation about Allied defeats turned into silence when the casualty reports began. Although she was telling the truth, her words still stung.

Searching for Tokyo Rose

After V-J Day, American journalists discovered a woman living in Japan who claimed to have broadcast programs in English for American troops. According to these reporters, when they interviewed Iva Toguri D'Aquino, she stated that she was Tokyo Rose (it is not clear whether she said this because it was truthful or if she wished to make her story more sensational and intriguing). A storm of publicity followed, and D'Aquino thereafter insisted that she had never called herself "Tokyo Rose" during her broadcasts (at trial, no evidence was ever admitted showing that she had).

Military occupation authorities soon arrested and questioned D'Aquino, but she was released from custody in 1946 after officials concluded that there were "no grounds for prosecuting her." However, two years later, the Justice Department reopened the case. By this time, D'Aquino had relocated from Japan to California (D'Aquino was born in the United States, but had traveled to Japan on the eve of war to care for an ailing relative; once the war began, she was essentially trapped in Japan until the war ended).

Words on Trial

The Constitution of the United States provides that treason "shall consist only in levying war against [the United States], or in adhering to [its] enemies, giving them aid and comfort." The Constitution further provides: "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." As for the elements of treason, some questioned whether D'Aquino's broadcasts gave aid and comfort to Japan. After all, American servicemen found them laughable. As for proving treason, because D'Aquino maintained her innocence (and would not confess in open court), the prosecution would have to call two witnesses who could link D'Aquino to a single broadcast — apparently based on voice alone. The war had ended nearly five years earlier and more than a dozen women adopted the "Tokyo Rose" nickname for their Radio Tokyo broadcasts. Was it possible for two people to remember a single broadcast in enough to detail to identify it as an overt act? Could they be certain that the voice they had heard over a cackle of static was D'Aquino's?

A 12-week trial ensued.

Among the witnesses called by the prosecution were former supervisors at Radio Tokyo who generally testified that D'Aquino had willingly made propaganda broadcasts. The prosecution was permitted to play a few broadcast tapes of "Tokyo Rose" programs, but none of these tapes were identified as containing D'Aquino's voice. D'Aquino testified on her own behalf. She insisted that she had never made any statements disloyal to the United States as a broadcaster for Radio Tokyo. Allied POWs who worked for Radio Tokyo were also called to testify on behalf of the defense, and they confirmed that D'Aquino did not broadcast propaganda. Additionally, a statement D'Aquino had made to the F.B.I. was admitted into evidence; it stated that she had "sought to reduce the programs' effectiveness as propaganda by inserting double meanings in some of her broadcasts." Was a woman trapped in a nation at war with the United States and who was forced to work for Japanese radio giving aid and comfort to Japan? Or, did she covertly work to deactivate the otherwise explosive propaganda that Japan planned to unleash on Americans?

Verdict & Beyond

The jury ultimately convicted D'Aquino of a single count of treason based on one broadcast in October 1944. The statement that was the basis for treason was: "Orphans of the Pacific, you really are orphans now. How will you get home now that all your ships are lost?"

After serving a sentence of six and one-half years, D'Aquino moved to Chicago and operated a grocery store and gift shop. Time passed, but her desire to clear her name did not diminish. In the 1970s, she appealed for a presidential pardon. At the time, pressure mounted for D'Aquino's pardon — even the foreperson of the jury that had convicted D'Aquino spoke on her behalf. The foreperson explained that "the jurors had been inflamed by anti-Japanese feelings after the end of the war" and thus voted to convict her. One of the last official acts of President Gerald Ford was to pardon D'Aquino. The President did not provide any explanation for this decision. Perhaps he was moved by the foreperson's admission that the entire jury was essentially biased against D'Aquino and the fact that there was no dispute that D'Aquino was forced to work for Radio Tokyo and her broadcasts "never did any harm." In fact, even the U.S. Navy "in a confident burst of satire, ... cited the Tokyo Roses for 'contributing greatly to the morale' of the armed forces in the Pacific."

Axis Sally and Tokyo Rose: two women trapped in enemy nations and forced to broadcast radio programs for their survival. Were their convictions merely the product of post-war biases (as the foreperson for D'Aquino's trial suggested)? Or did the testimony and other evidence establish that two witnesses could link each woman to an overt act that amounted to aiding and comforting the enemy? Two jury trials, one pardon, and over 60 years later and legal historians continue to scratch their heads as they consider the verdicts in these trials.

Works cited: "Tokyo Rose Stirs Philippine Mirth," *The New York Times*, Oct. 30, 1944, at 3; "By Any Other Name," *Time* magazine, Apr. 10, 1944, at 31 (Pony Edition); Richard Goldstein, "Iva Toguri D'Aquino, Known as Tokyo Rose and Later Convicted of Treason, Dies at 90," *The New York Times*, Sept. 28, 2006; David Bird, "Ford Pardons 'Tokyo Rose' in One of Last Official Acts as President," *The New York Times*, Jan. 20, 1977.

Legal History

Josh Morse: A Courageous Law School Dean

By Pete Eikenberry



Josh Morse followed in his father's footsteps after he graduated

from Ole Miss and its law school by becoming a lawyer in the sawmill town of Poplarville, Mississippi. His record would make Atticus Finch of *To Kill a Mockingbird* feel proud. Josh tried 23 murder trials, winning 22. The 23rd defendant was convicted of a lesser charge. He also successfully defended a number of African Americans who had violent encounters with the police. I had never heard of him until I recently e-mailed the article about Cleve McDowell, the first black student admitted into the Ole Miss Law School, to Richard Gershon, dean of the University of Mississippi School of Law. Cleve McDowell was admitted by court order, and it was the university and not the law school that expelled him three months later in September 1963. I asked Dean Gershon how was it that two black students were admitted to the law school shortly thereafter. The dean emailed back that the admissions had occurred because of the courage of Dean Josh Morse.

Josh Morse, I learned, had died in 2012. His remarkable obituary was in *The New York Times*. When he became dean of Ole Miss Law School in 1964, he was on a fellowship at Yale Law School, as was customary for second year faculty members at the law school. As dean, he hired two new Yale Law School graduates as professors, with six more to be hired into an Ole Miss faculty of 21. Five other young professors were recruited who were native Mississippians and one of them, recently retired Ole Miss Professor John R. Bradley, reported to me that there was a sense of mission and comradery among the "baker's dozen" of young new faculty members.

After securing a federal grant, Josh initiated faculty and student clinical participation in lawsuits on behalf of poor Mississippians. Upon receiving a five year Ford Foundation grant, Josh increased the faculty and actively recruited black students with scholarships.

By 1966 there were 20 black students in a student population of 360. The first black female, Constance Slaughter, graduated in 1970, following the graduation in 1967 of the first black graduate, Reuben Anderson. Recently, I spoke with Reuben by telephone for about 30 minutes. He is a partner of the law firm of Phelps Dunbar in Jackson, Mississippi, and is on the board of AT&T and Kroger. He was the first black person appointed to the Supreme Court of the State of Mississippi and the first to be president of the Mississippi Bar Association. In 1965, Reuben was the first African American student after Cleve McDowell to be admitted to Ole Miss Law School. He previously had applied but had been rejected



Dean Joshua Marion Morse III

because he could not supply references from five graduates of the law school. Reuben's father was employed in Jackson as a bricklayer, and Reuben was admitted to a law school in another state as the result of assistance given to him by a white lawyer practicing in Jackson; he attended that school for one year. Subsequently, Josh Morse recruited him to Ole Miss.

At the law school, none of the white students would sit next to him. However, two of them became Reuben's friends and invited him to dinner at a Jackson restaurant that still exists. Upon entering, the manager chased his two fellow students out with a machete, saying that "the n[…] can stay!," apparently attempting to avoid a federal sanction, "but you guys have to get the hell out!"

Usually Reuben ate on campus with one or more of the four undergraduate black students at the university. He traveled by bus back and forth from school for holidays and other times to his home in Jackson. The only problem with the bus was that he was always given a hard time for sitting in the front of it. His best friends at law school were the two Yale Law graduates whom Dean Morse first recruited to join the Ole Miss faculty. He states that he is still mad at one of them for giving him a C+ rather than a B on a paper for not following instructions to skip every other line. In a hostile atmosphere, Reuben just concentrated on his studies.



University of Mississippi School of Law

Dean Morse stayed in touch throughout Reuben's attendance and helped him select courses and professors and to secure a summer job with the U.S. Justice Department in the summer of 1966. (That summer I was in Mississippi and appeared frequently in federal court in Oxford, the site of the university.) During law school, Reuben traveled with Josh Morse on a university plane to recruit other black law students. When I was in Mississippi, there were only six black lawyers in the state. Reuben stated that it was important to have a significant number of black students at the law school, since Ole Miss law graduates were admitted to practice law without a bar exam. Thus, the black graduates of Ole Miss became lawyers immediately upon graduation.

A columnist from the publisher of the state's two largest newspapers wrote that, under Morse's leadership, the law school had become "a tool of the leftist Ford Foundation, the Negro Revolution and the politically minded U.S. Department of Justice's efforts to 'change Mississippi.'" In 1966, the law student speakers bureau hosted Attorney General Robert Kennedy to speak at the Ole Miss campus. Josh resisted the outside pressure to cancel the talk and 5,000 people attended and welcomed RFK with thunderous applause. Dean Morse invited visiting law faculty members from Yale, Harvard, New York University, and Columbia to teach a public law course every semester in 1964, 1965, and 1966. Aaron Henry, the NAACP state president, spoke to a constitutional law class.

Finally, the school lawyers filed a school desegregation suit against a local school and the State of Mississippi. After the suit against the state, the university's

chancellor gave up the grant from the federal government, necessarily ending the law school's legal services program. By that time, Josh had been denied a raise for three straight years despite uniform raises for other university faculty members. Thus, after five years as dean, Josh Morse was forced out of Ole Miss and he became dean of the College of Law at Florida State University. Constance Slaughter Harvey became the first black woman judge in Mississippi in 1976, 10 years after the appointment of Constance Baker Motley to the Southern District of New York as the first black woman federal judge in the U.S.

In the Courts

Speaking with Judge Nelson S. Román

By U.S. Magistrate Judge Lisa Margaret Smith

On May 13, 2013, the Honorable Nelson S. Román was appointed as a U.S. District Judge for the Southern District of New York by President Barack Obama. Judge Román took the bench for the first time on June 10, 2013. He sits in the Charles L. Brieant, Jr. Federal Building and U.S. Courthouse in White Plains.

Judge Román was born and raised in New York City. The only son of a firefighter and a housewife, Judge Román was raised with three sisters. His father prided himself on being one of the first Hispanic members of the Fire Department of the City of New York, and he instilled a sense of public service in his only son. Judge Román took the civil service test several times, intending to become a firefighter like his father, but it was the New York Police Department that called first, so he became a police officer in 1982, after three years of pursuing a course of study at Fordham College, part of Fordham University. Shortly after acquiring his shield Judge Román elected to continue his studies, spending two years at Fordham School of General Studies, also part of Fordham University. In 1984 he earned his Bachelor of Arts *summa cum laude* in Political Science, becoming the first member of his family to graduate from college.

Brooklyn Law

After another year as a patrol officer Judge Román began attending Brooklyn Law School part time while continuing to serve as one of New York's finest. One year into his law school career Judge Román was moved from patrol duty and assigned to work in the Office of the Deputy Police Commission for Legal Matters, while he continued with his legal studies. He excelled sufficiently in law school to be invited to intern in the Honors Program at the Securities and Exchange Commission during the summer of 1988. In the spring of 1989 Judge Román received his J.D. from Brooklyn Law School and completed his career as a police officer. He was the first member of his family to earn a graduate school degree, and the first to become a lawyer. In August of that year he became an Assistant District Attorney for Kings County (Brooklyn). After two years with the Kings County D.A. Judge Román spent two years as a Special Narcotics Assistant District Attorney with the Office of the Special Narcotics Prosecutor before returning to the Brooklyn D.A.'s Office.

Judge Román was able to utilize his law enforcement experience when he became a prosecutor, finding that he could discern when police officers were exaggerating, as they occasionally did, and when they were being completely honest. Judge Román felt that his own experience helped him to develop a full picture of what the officers had faced at the time of an arrest or other encounter, thereby making him a more effective prosecutor. Both in the D.A.'s Office and in the Office of the Special Narcotics Prosecutor, Judge Román enjoyed being an advocate and conducting trials.

The Housing Court

In January 1995, Judge Román accepted a position as law clerk to the New York City Civil Court Judge Jose Padilla, Jr. At about the same time Judge Román was

approached by persons searching for qualified individuals who might be appropriate candidates for the New York Housing Court. Judge Román had no particular background in the subject matter of the Housing Court, but he was told repeatedly that when he began conferencing matters for Judge Padilla he had quickly gained a reputation as having the right temperament and demeanor to become a judge. So, after three years clerking for Judge Padilla, Judge Román was appointed a Judge of the Housing Part of the New York City Civil Court. The appointment was made by the Chief Administrative Judge Jonathan Lippman for the New York State Court System. In Housing Court Judge Román handled cases with a large number of *pro se* litigants, and he quickly learned the importance of dealing patiently with the parties in this part of his docket. In 2000 he was elected Judge of the New York City Civil Court. He quickly learned that the docket in this new position included more attorneys, and was therefore much more adversarial, than in Housing Court.

Not one to sit on his laurels, Judge Román ran for State Supreme Court and was elected in 2002. He was assigned to the Civil Term where he had a very heavy caseload of approximately 1500 cases per year. He worked hard to be efficient, disposing of some 600 motions annually in those cases. The caseload was much more complex and diverse than his caseload in New York City Civil Court, and Judge Román conducted many more trials, averaging about 30 trials to verdict each year. He also was one of just two judges handling guardianship proceedings for a period of two years, and he took this responsibility very seriously, devoting a great deal of time to these sensitive cases. During his first 11 years on the bench Judge Román earned a reputation for efficiency and well-reasoned opinions, and in 2009 he was appointed by then-Governor David Patterson to sit as an Associate Justice on the Appellate Division, First Department. Judge Román served as an appellate court judge until his appointment to the Southern District of New York in 2013.



Judge Román

Judge Román reports that his nomination and confirmation process took about a year. He stated that this process is not for the faint of heart, because those involved in the process have available a full storehouse of knowledge about the candidate's private and personal affairs. During the process he was still working as a sitting judge, and he felt that certain decisions were given more scrutiny by the media because of his nomination; specifically, he decided a controversial stop and frisk case that resulted in public criticism, that was more pointed than had been the case before his nomination. He recommends that those who embark on the process of seeking a nomination should stick to their core values, and not let the process itself compromise their determination.

Judge Román has enjoyed his experience on the federal bench, where he has been impressed by the complexity of the cases and the quality of the attorneys. He has much more support in the form of law clerk assistance on

the federal bench than he did in state court, which is particularly helpful in light of the challenging nature of many of his cases. His advice to counsel appearing before him is that they know their cases well and be prepared.

Judge Román is devoted to his family, spending as much time as possible with his wife and two children, including coaching his younger child's recreation league and travel soccer teams.

The Interview

The Partner Track: A Discussion with Author Helen Wan

By Victor Olds



I recently spoke with a colleague who happens to be a litigation partner at a large, prestigious international law firm about interests and activities *beyond* the daily practice of law. After going through a litany of interesting possibilities she finally remarked, "and of course, what litigation lawyer hasn't fantasized about someday writing the Great American Novel?" I had just completed and reviewed first-time author Helen Wan's novel *The Partner Track*, a story about the daunting challenges confronting a brilliant young, female, Asian corporate associate up for partnership at a large fictional New York law firm. As my conversation with Wan (herself a transactional attorney at Time Inc.) reflects, it appears that similar dreams are entertained by our corporate attorney colleagues as well.

OLDS: What inspired you to write *The Partner Track*? And is writing something that has always been one of your interests?

WAN: Over a decade ago, as a 25-year-old fresh out of law school, having just landed at my first job at a huge corporate law firm, I quickly realized that all the skills that had served me (and many of my fellow new recruits) so well up until that point in our lives — that is, knowing how to study hard, get good grades, take tests well — were sort of out the window. Once we'd arrived at the "Parsons Valentines" (the novel's fictional law firm) of the world, ALL of us were equally "good at school," so that alone wasn't good enough. I discovered there were predictable, observable patterns of who among us was succeeding and who was not, who quickly found powerful mentors to take them under their wing, who did not, and it all had to do with how well and how quickly one mastered the art of fitting in to that corporate culture, perfecting all those "soft skills" that are simply not teachable in law school. If you didn't happen to grow up with a background where you'd been exposed to this culture and its unwritten code, you had to teach them to yourself ASAP. I looked around and thought there should be some sort of "decoder ring" — a primer or handbook — for those of us who felt like fish out of water in that new, very privileged, rarefied environment. I remember walking into bookstores (bookstores were still plentiful back then!) trying to find a book about how to succeed as a young person of color in corporate America while remaining authentic and true to yourself. Finding none, I decided to write that book myself.

Now, all these years later, I pinch myself that this book is finally out in the world, and seems to be reaching its audience. I treasure and save every single email and comment I've gotten from readers who say, "Thank you for telling our story." One of my favorites came from a young 3L at Columbia Law who'd just finished her first summer at a large, prestigious firm (much like Parsons Valentine) and told me, "I wish I'd read your book at the beginning of my summer, rather than toward the end. It would have made me feel so much less alone." Well, as a first time novelist, there was no higher compliment I could get than that. That meant so much to me.

OLDS: Did the fact that you are yourself a corporate attorney affect the way in which you went about researching the book? In other words, did you decide to focus on specific aspects of associate law firm life based on your own experiences, or was it more your sense that those were the areas likely to be of greatest interest and concern to your readers?

WAN: Because my book is a novel, it didn't necessitate conventional "research" in the way a work of nonfiction would. But it was certainly very important to me to convey as accurate and realistic a portrait of law firm life as possible, from the perspective of a young female associate. I certainly drew from my own experiences of that life, as well as those of close friends and colleagues who generously shared their own life and career experiences and personal anecdotes with me.

OLDS: When writing your book, did you encounter any resistance from friends and colleagues to share experiences that you might draw upon for the book?

WAN: Not at all. In fact, just the opposite. I found that friends and colleagues (and not all of them were lawyers) were incredibly enthusiastic about this book I was trying to write about life in corporate America, and that many people — especially, but not exclusively, women and people of color — actively offered up their own personal experiences and urged, "You've GOT to put this in your novel!" I was lucky in terms of how forthcoming people were willing to be, and how many people said to me, "It's about time someone wrote a novel about this!"

I remember walking into bookstores (bookstores were still plentiful back then!) trying to find a book about how to succeed as a young person of color in corporate America while remaining authentic and true to yourself. Finding none, I decided to write that book myself.

OLDS: What has been the general reaction from people you know among associates and/or partners from law firms following the release of your book?

WAN: I've been honored and thrilled (and frankly, surprised) by the overwhelmingly warm, enthusiastic response my book has gotten from the legal community, especially the large national law firms. One question I get asked a lot, at the many law firms, law schools, bar associations, and corporations where I've been asked to speak about my book, is, "What were your former and current employers' reactions to the publication of your book?" Well, the answer is that Paul Weiss, Frankfurt Kurnit, and Time Warner all threw me amazing book parties to celebrate the book's release. I was so touched by their kindness and enthusiasm! Even my publisher wanted to know, why do you think all these huge law firms feel so comfortable embracing your book, when it's such an unvarnished look at the challenges faced by young lawyers? I finally posed this question at one of these firms who had invited me to speak at several of their offices around the country. The representative of the firm told me (and I'm paraphrasing), "Are you kidding? We've been waiting for a book like this. So many books on diversity never work because they feel too didactic, or too preachy. It's the very fact that this book *is* written as a novel that makes it "safe" for partners at mega-firms to talk about diversity using this book as the lens. Since no one in particular is implicated, there's no need for the partners or senior management to feel on the defensive, making it the perfect platform to launch a meaningful diversity and inclusion discussion for lawyers, not to mention a good Business Development event." I thought that was an interesting explanation!

OLDS: And do you find different reactions from people based upon whether they happen to be an associate, an associate of color, a

partner, female, male, *etc*.? In other words, have you detected any general trends from people of different categories?

WAN: That's a great question. I'd hoped and expected that the book would really resonate with women lawyers and law students (like that young 3L at Columbia). And that has, happily, come true. But I did NOT expect so many men, particularly white male readers, to also tell me that they, too — against their own expectations — found themselves relating to this young, female minority character and seeing themselves in her. One white male senior partner in his late 50s, whose firm was hosting a book event for me, told me, "I'll be honest. I read your book because HR told me to. But I'm glad I did. I really related to Ingrid. Especially her reaction to the firm outing. I remember being incredibly nervous at my first firm outing, for the same reasons! The point is, you don't have to be a woman or a minority to feel those emotions. Many of them are universal." I've heard this sentiment from a surprising number of male readers. So maybe there's more commonality there than I first thought.

OLDS: I hope you won't mind my asking a question that I am guessing is on the minds of many of your readers, which is this: acknowledging the fact that your book is a complete work of fiction in terms of the people and events portrayed therein, you are nonetheless a young, well-educated and accomplished Asian American female corporate lawyer (as is Ingrid Yung, your protagonist), so how much of your life experiences (if any) — both professional and personal — mirror that of Ingrid's? Or, if "mirrored" is the wrong word, did you borrow from your own experiences in developing Ingrid Yung's character?

WAN: Yes, of course, every novelist draws from his or her own life experiences. But happily, the plot of this book is decidedly fiction — thank goodness! Because it's a novel, I had the fun of making up a whole story arc — I got to invent all kinds of plot twists and turns, but I certainly tried to draw the emotion from real life. I think every writer tries to do that.

OLDS: How long did it take you to complete this book project, and do you have any words of wisdom for other aspiring authors who might also be facing the challenge of writing a novel or other written work while simultaneously holding down a full time job and being a wife and mother?

WAN: How much time have you got? It took me 12 years between first starting the novel and getting the book deal from St. Martin's Press. Since I'm also a full-time lawyer, I wrote this novel in fits and starts, at night and on weekends, during precious weeks of hoarded-up vacation. I decided to tear it up and rewrite it nearly from scratch three times and just jettisoned whole drafts. There were whole years when I just wasn't working on it at all. Finally, I happened to go to an event where the writer Anna Quindlen was speaking (it was an event hosted by my law firm, ironically) and she sagely pointed out the distinction between people who really want to *write,* and those who just want to *have written.* I suddenly realized that she was describing my predicament. In order to be one of the people who had written, I needed to actually *write!* Enough excuses about having a full-time legal career, being too tired by the time I got home from work, being too busy to write, etc. I signed myself up for a "Fiction Writing 101" class that met once a week after work, and the homework pages I wrote for that class became the seed for this novel. All these years later, I'm thrilled this book is now out in the world. Truly, it has been a labor of love.

My tip for aspiring writers? Write the book you wish you could read. You know, the one you can't find on the shelves at your favorite bookstore. For a new writer, I think it's just as important (maybe even more important) to notice what's *not* being published as to observe what *is.* I was not seeing any honest, realistic, contemporary stories being told about how a person of color can remain an authentic self while succeeding in corporate America, or about how race, gender, and class complicate the journey up the corporate ladder. So I decided to write one.

OLDS: What were your major challenges in getting your book written and published?

WAN: Ha! Again, how much time you got? I definitely encountered obstacles trying to convince mainstream agents and editors in the publishing industry that this type of story would indeed find a ready and eager audience. The problem with my book, I kept hearing over and over, was that it did not fall neatly into any "genre" that the publishing industry knew how to market.

For one thing, my book featured an Asian American female protagonist, but I was told the rest of it didn't read like a traditional "ethnic novel" -- a term that I find to be of limited utility anyway. (Nary an arranged marriage or soul-searching trip to China in the entire manuscript! This was apparently confusing to some folks.) Could I please make it either much more "Chinese" or just take the "ethnic part" out entirely? (I was even asked by one agent from a very big-name agency whether I had ever considered rewriting this book, but "not from the point of view of a minority." Um, no. Just, all kinds of no.)

Second, it featured corporate intrigue and a billion-dollar merger as part of its story line, but who'd ever heard of a legal thriller told from the perspective of a young Chinese-American woman?

Finally, my book also was intentionally written in a direct, snappy, straight-ahead style, and has a romantic love interest, so was it "chick lit"? (See comment above re: the term "ethnic novel.") But the consensus came back that it wasn't really "chick lit" either because who'd ever heard of chick lit about race in the workplace and identity politics?

So the challenge boiled down to the fact that the mainstream publishing industry knows very well how to market Amy Tan, and they know how to market John Grisham, and they know how to market Lauren Weisberger, but no one knew how to tackle the marketing of Amy Tan Grisham Weisberger. That's why, finally, eons later, I was fortunate to meet the right agent who then introduced my book to the right editor. And I've been so incredibly grateful for everything that has happened since!

OLDS: How has the book been received thus far by the general public?

WAN: One very gratifying thing has been that the book seems to be resonating with both lawyers and non-lawyers alike. It was a huge honor when my book was selected as *Real Simple* magazine's December 2013 Book Club pick, as well as Amherst College's November 2013 Book Club pick. The fact that readers from all over the country who have never even set foot in a law firm are writing me to tell me how much they appreciated Ingrid's story has really meant the world to me. I have appreciated every single reader letter.

OLDS: In writing *The Partner Track* was your goal simply to write a good work of fiction, or were you also hoping to stimulate thinking among both partners and associates about some of the issues touched upon in the book?

WAN: Oh, that one's easy. Yes, I most certainly hoped to stimulate thoughtful, meaningful conversation by writing and publishing this novel. And knowing that those conversations are actually now happening — and getting to witness many of them firsthand during my recent book tour — has been such an honor for me.

OLDS: Several of the scenes in the book are very dramatic — indeed, shocking — as it relates to things that went on at the fictional firm of Parsons Valentine & Hunt LLP. One scene in particular comes to mind, which was the firm's summer outing where several associates put on — I don't want to give anything away here for the sake of anyone who has yet to read the book — let's just say a racially charged display of off-color humor. Had you actually heard of similar things happening at large firms while working on the book?

WAN: It was very important to me to conjure up and include only scenes that I thought could conceivably take place in real life. [Laughing.] And maybe I made the book a little TOO realistic.

During my very first book event at a law firm, I read a snippet from that firm outing scene. After my reading, as I signed books, a male partner from the host law firm came up to me and said conspiratorially, "I was actually *at* that firm outing." I looked at him and said, "Which one do you mean?" He nodded at the book. "The one where that happened. A few years back." I said, "Really? I don't think so, because I actually made that scene up!" He was really surprised. He told me he felt sure that scene had been based on an incident that he himself had witnessed firsthand, at another law firm where he had summered. I told him no, actually, I hadn't even heard of that particular event. But I was happy to know my novel was so realistic!

OLDS: Do you perceive that you are treated any differently at work now that your book has been published? And if so, in what ways?

WAN: Well, I'm fortunate that my colleagues at work (I'm in-house counsel at Time Inc.) have been supportive and enthusiastic. It also certainly helps that I happen to be in-house counsel at a media company. People at my company know a thing or two about nurturing creativity. One interesting thing is that a lot of my clients — who are business leaders across the division — had had no idea that I was also a novelist in my "spare time" in addition to being their full-time lawyer. I think this may have helped them to view their Law Department, and lawyers in general, in a slightly different light. (As it turns out, lawyers ARE human beings with souls and senses of humor!)

OLDS: If there were one thing that you would like for people to take away from *The Partner Track* what would that be?

WAN: If my book helps even one lawyer -- who finds him or herself feeling a bit isolated or unsure how to navigate the law firm environment — to feel a little "less alone," as that young 3L at Columbia Law put it, then I'll feel that my book has served a useful and good purpose. And the twelve long, lonely years it took me to write and find a publisher for it will have been worthwhile.

OLDS: Lastly, any chance that we will see future Helen Wan novels, and if so, any hints on what subjects you might look to tackle next?

WAN: Yes, thanks for asking. I'm definitely at work on a new novel. Once I handed in the final finished manuscript of *The Partner Track* to my editor, I couldn't wait to immerse myself in a new creative project, meet and get to know a new cast of characters. My next book is not an actual sequel to Ingrid's story, but it too involves certain subjects that continue to fascinate me. I am intrigued by how class, race, gender, family, and cultural heritage influence and inform the personal and professional decisions we all make as individuals. I find group dynamics, especially in the workplace setting, infinitely amusing and interesting. I like using fiction to explore the ways in which corporate culture and its hold on modern life impact our pursuit of happiness. Lastly, I'm a sucker for a good underdog story.

FBC News

The Public Service Committee

By Lewis J. Liman and David Oliwenstein





March 18, 2013 marked the 50th anniversary of the Supreme Court's landmark decision in *Gideon v. Wainright*. In that case, the Court held that any individual who is subjected to a felony criminal trial in this country is entitled to a lawyer, regardless of

that individual's ability to pay for representation. That anniversary occurs as the legal profession itself in the United States is undergoing profound change: the need for lawyers to navigate the regulatory state is at an all-time high while the cost of law school and the expense of delivering legal services is causing a contraction in certain areas of legal practice and limiting the opportunity for primarily younger lawyers to obtain the same trial and deposition experience that more senior lawyers enjoyed in earlier times.

The confluence of *Gideon's* anniversary and the evolving nature of the legal profession provides a fitting opportunity to consider a pressing societal issue: how best to satisfy the unmet need for legal services in a society in which those services can often make the difference between whether a person is permitted to remain in the United States or forced to leave, whether a person has housing or is left homeless, whether someone receives disability insurance, or whether a detainee receives medical care while in the custody of the government.

Increasing Access to Counsel

The Federal Bar Council's Public Service Committee provides a vehicle for members of the private bar to seek to narrow the gap between the demand and supply of legal services within the Second Circuit courts. Indeed, the committee's core mission is to increase access to counsel and to assist the courts in promoting the sound administration of justice. In 2013, the committee has worked on a variety of projects and initiatives in furtherance of these goals.

In the immigration context, where demand for resources is extraordinarily high, the committee has sponsored various initiatives to provide counsel for indigent individuals who face the risk of deportation. The committee has facilitated a pilot program with the Immigration Study Group and Human Rights First to obtain counsel for *pro se* litigants in removal proceedings. As part of this project, judges of the New York Immigration Court refer *pro se* litigants for initial screenings with volunteer lawyers from one of five firms that are currently participating in the project. The *pro se* litigants then receive general advice during the screening process and, if warranted, *pro bono* counsel is appointed. Over the course of the two-year pilot phase of this project, Human Rights First and members of the private bar have provided representation to more than 50 indigent immigrants. The committee is working with Human Rights First to expand this highly successful program beyond the pilot phase to add additional firms.

The committee also partnered with the Clerk's Office of the U.S. Court of Appeals for the Second Circuit as well as the Immigration Justice Clinic at Cardozo Law School to enlist volunteer lawyers to determine whether *pro se* petitioners' interests are best served by seeking remand to Immigration Court or having the Second Circuit hear their claims on the merits. Because of an overwhelming response from the private bar, the Second Circuit was able to appoint counsel in every case that the federal government identified.

The committee is also working on several exciting initiatives to expand access to justice in other types of civil cases. In early 2014, the committee launched a project that enables the district courts to appoint *pro bono* counsel in *pro se* cases for a limited representation, to take and defend depositions (and to perform other services for the client in connection with that limited representation). The program provides *pro bono* opportunities to practitioners within the Second Circuit who are unable to take on cases from complaint through trial, and thereby increase the number of individuals who are represented by counsel. The committee is also working on a project to provide representation to *pro se* litigants in social security appeals in federal district court.

In addition to the usual difficulties associated with managing substantial *pro se* dockets, 2013 presented unique challenges for the federal courts. As a result of sequestration, the federal judiciary received $350 million less in funding in 2013 than it had received in 2012. The effects of the sequester were particularly significant in the Second Circuit be-

cause of the heavy caseload and high concentration of complex cases.

Concerned about the impact of a further reduction in resources on an already overburdened court system, the committee and the Federal Bar Council Second Circuit Courts Committee submitted a letter to President Obama and Congressional leaders outlining the devastating impact of sequestration on the courts' ability to carry out their constitutional mandates.

Panels and CLE Sessions

In addition to these important projects, the committee fulfills its mission by hosting panel discussions and CLE sessions on a wide range of public service related issues. On November 12, 2013, the committee cosponsored a panel with the New York Lawyers for the Public Interest for lawyers exploring the transition from private practice to the public sector. The discussion — which included attorneys from the U.S. Attorney's Office, the SEC's Division of Enforcement, the Federal Reserve Bank of New York, the New York State Attorney General's Office and the New York City Council — was attended by over 50 members of the private bar. The committee already is working on its next CLE panel, which will provide a full day of trial advocacy training to attorneys who are willing to take on a *pro bono* matter in the Southern District of New York. The panelists will include experienced trial attorneys as well as judges from the Southern District.

These are just a sample of the initiatives that the committee has worked on over this past year. The committee always is looking for ways to assist the courts within the Second Circuit and to increase access to justice. The committee looks forward to expanding these projects — and developing new projects aimed at assisting the neediest individuals within the Second Circuit — in 2014.

FBC News

An Update on Affinity Groups

By Marjorie Berman



Last year, the Federal Bar Council announced the advent of affinity groups — an initiative for FBC members looking for social opportunities, at limited cost, to meet with like-minded lawyers who share their outside- the-law interests. Based on the survey responses the FBC received, the following four fun-filled affinity groups were formed and are up and running.

The current Book Club Group, coordinated by Jay Gerber and Jackie Rovine, is focusing on the theme of courage and adversity in classic short works by prominent authors such as Melville, Conrad, Tolstoy, Hemmingway, and Camus. The group meets approximately every six weeks from 6:30 — 8 p.m. If you would like to join, contact Jay at jay.gerber@hoganlovells.com or Jackie at jrovine@bakerlaw.com.

Our Theatre Group, coordinated by Bruce Turkle and Jason Canales, has enjoyed two great gatherings. The first, a dinner at Sardi's and, the second, an outing to the off-Broadway production of the hilarious Buyer and Cellar, were both big hits. Further outings are planned for the coming months. If you are interested in joining the Theatre Affinity Group, please contact Bruce at bturkle@phillipsnizer.com or Jason at jcanales@mosessinger.com.

The Food and Wine Group is for the gastronomical among us. Contact David Einhorn at deinhorn@bakerlaw.com or Mike Litrownik at mlitrownik@outtengolden.com to join this delicious adventure.

Our Out and About Group is for those of us who simply want a taste of everything — theatre, food, music, sports, museum, and plenty more. If this sounds like your cup of tea, contact Maranda Fritz at maranda.fritz@thomp-

Last year, the Federal Bar Council announced the advent of affinity groups — an initiative for FBC members looking for social opportunities, at limited cost, to meet with like-minded lawyers who share their outside-the-law interests.

sonhine.com or Jessica Bartlett at jessica.bartlett@shearman.com).

Over the coming months, we'll be looking to expand our affinity groups circle. Top contenders include a second Book Club Group, Movies and The Law, Sports Outings, Music Performances, Cycling, and discussion groups in the areas of Foreign Policy and Constitutional Law. We're also looking to form affinity groups that will center their activities in FBC areas outside of New York City including Connecticut, Nassau County, Suffolk County, and Westchester. We are looking for volunteers to serve as coordinators so if there is an interest that you would like to share with others from the FBC, please consider volunteering to run a new group. While we welcome all of our members to participate in affinity groups, this is an especially good opportunity for First Decaders to get involved in the FBC and to meet and mingle with members of our community. For any questions or comments about affinity groups, please contact Margie Berman, the chair of the program, at mberman@krantzberman.com.

FBC News

Westchester Committee Celebrates the Holidays

By Carly S. Grant



The frosty air was no deterrent to the members of the Westchester Committee of the Federal Bar Council. They showed up in force at the Westchester Committee's holiday party on December 12, 2013 to celebrate the merry season and year's end. This year, the festivities took place at Butterfield 8 on Mamaroneck Avenue in White Plains.

Among those celebrating the holiday cheer were judges from the Southern District of New York, including District Judges Naomi Reice Buchwald, Cathy Seibel, and Vincent Briccetti, and Magistrate Judges Lisa Margaret Smith and Paul Davison.

A crowd of current Southern District law clerks from the Honorable Charles L. Brieant, Jr. Federal Building and U.S. Courthouse in White Plains also attended. They represented a spectrum of new and seasoned staff. A couple of former law clerks also attended, using the occasion to socialize with former co-clerks and their successors.

Everyone enjoyed the food and libations served by Butterfield 8, which provided a relaxed setting for the judges, attorneys, and law clerks to mingle. Judges Briccetti and Davison discussed their days as criminal defense attorneys. Several people reflected upon the retirement of Magistrate Judge George Yanthis, on October 31, and the mark he left among his colleagues and the bar. Russell Yankwitt, chair of the Westchester Committee, said that he was looking forward to more continuing legal education programming in 2014 offered by the committee.

The conversations reflected the warm relationships among the members of the committee. The atmosphere was a welcome surprise to the newer law clerks and demonstrated a benefit of interacting with judges of the Southern District of New York outside of the courtroom. Judge Smith summed up the evening, stating, "The Westchester Committee holiday party is always a highlight of the season. The turnout was great this year. It is lovely to have the opportunity to mingle informally with practitioners who appear in our court."

FBC News

Reining in Mandatory Minimums: Perspectives from Both Side of the "V"

By Marjorie Berman



A lively panel discussion held on November 21, 2013, moderated by the Honorable John Gleeson, explored contrasting perspectives on whether mandatory minimums enhance or undermine our criminal justice system. Each of the four speakers spoke convincingly in support of the position he or she brought to the discussion and Judge Gleeson, with wit and grace, posed challenging questions designed to test those perspectives.

The Landscape

The discussion began with Judge Gleeson providing an overview of the mandatory minimum landscape. That landscape grew out of a Congressional response to the "war-on-drugs" during the 1980s, but was later extended to other areas, including child pornography and minimums for carrying a firearm in furtherance of a violent or drug trafficking crime. Judge Gleeson, echoing the voices of a national movement, asked whether, in light of growing criticism of mandatory minimums, overcrowding of federal prisons, the exploding cost of incarceration to the federal budget and the human toll caused by extended sentences, the pendulum is poised to swing back. Indeed, in a statement before the Judiciary Committee in September 2013, the chair of the U.S. Sentencing Commission stated that the Commission "unanimously agrees that mandatory minimum sentences in their current form have led to unintended results, caused unwarranted disparity in sentencing, and contributed to the current crisis in the federal prison population and budget [and] ... statutory changes to address these problems are appropriate."

Due Process

Opining that mandatory minimums "destroy fundamental notions of due process in our system," David Patton, executive director and attorney-in-chief of Federal Defenders of New York, bemoaned the disproportionate power that prosecutors have in such a system. While recognizing that prosecutors have always had enormous discretion and control at the "front end," mandatory minimums give prosecutors control at the "back end" — *i.e.* sentencing — as well, thus curtailing the power of the sentencing judge to exercise discretion. Further, Patton contended that the threat of mandatory minimums unfairly drives defendants to plead guilty where they might otherwise have gone to trial, because "very few people can stomach the process" when threatened with minimums. Judge Gleeson questioned Patton as to whether in practice the "Holder Memo" has diminished the force of mandatory minimums. The "Holder Memo," issued by Attorney General Eric Holder, urges prosecutors not to charge defendants with mandatory minimums if four criteria are met: the crime is not violent, the defendant is not an organizer, the defendant has no significant ties to a large scale drug organization and the defendant does not have a significant criminal history. Patton responded that the "Holder Memo" has somewhat, but not significantly, softened the threat.

Marshall Miller, chief of the Criminal Division of the U.S. Attorney's Office for the Eastern District of New York, speaking in his individual capacity, provided a contrasting perspective. Miller argued that, in practice, mandatory minimums are not as draconian as they might appear because the decision of whether to charge a defendant with an offense carrying a mandatory minimum requires and receives an individualized assessment. In practice, Miller argued, it is not sufficient for a prosecutor simply to determine that a mandatory minimum charge can be brought. Rather, he

asserted, prosecutors are required to determine that it is the just thing to do — and it is that core belief and policy that is incorporated in the "Holder Memo." For this reason, Miller cautioned, it is unlikely that there will be any further dramatic policy changes.

Judge Gleeson questioned whether, in practice, there are instances where a defendant who is not deserving of a mandatory minimum charge is charged in that way nonetheless, as a means to procure government cooperation from that witness. Miller indicated that the Eastern District of New York has a policy against using mandatory minimum charges in this fashion. Miller concluded his remarks noting that mandatory minimums play an important role in criminal justice.

The discussion continued with remarks from Jonathan Wroblewski, director of the Office of Policy and Litigation of the U.S. Department of Justice and ex officio member of the U.S. Sentencing Commission, who described his mission as that of a reformer. Recognizing that reforms are necessary, Wroblewski stated that the distortions in the system caused by mandatory minimums are not a function of the *mandatory* piece of the equation, but with the levels imposed by the *minimum* piece, particularly with respect to nonviolent offenses. While noting that research has concluded that increases in incarceration periods have contributed in some fashion to reduced crime, reform is necessary to "unwind the excesses" in the present system. He noted the extreme importance of maintaining the balance of power among the legislative branch (which defines crimes and the range of sentences), the executive branch (which investigates and brings charges) and the judicial branch (which imposes sentence) in the criminal justice system. Patton reacted by questioning whether prosecutors, who play on the "executive team," given human nature, can reasonably be expected to play the judicial role as well, in deciding who deserves to be charged with a mandatory minimum.

The panel was rounded out by a very human personal perspective on the human and moral cost of mandatory minimums. Julie Stewart, president of Families Against Mandatory Minimums, heavily criticized the mandatory minimum scheme for drug crimes charging that the quantities and minimums set forth in the statutes were totally random, not thought out and not researched at the time. She argued that tinkering with the system was not sufficient. Rather, she implored, it is time to extinguish the system entirely and give control back to judges to impose appropriate sentences without the restrictions imposed by mandatory minimum charges. Describing the recently introduced Justice Safety Valve Act as a "judge's dream" she championed this legislation that will authorize federal judges to depart below a mandatory minimum prison term in cases where the minimum sentence is not necessary to protect public safety.

This timely and important program was jointly sponsored by the FBC's Special Committee on Sentencing Reform and Alternatives to Incarceration, chaired by Larry Krantz, and New York University School of Law Center on the Administration of Criminal Law. The program was coordinated by James Keneally, Nancy Hoppock, and Rekha Nair, law clerk to Judge Lois Bloom.

Second Circuit Decisions

"Charbucks" and the Likelihood of Dilution of Federal Trademark Dilution Law

By Peter S. Sloane and Jonathan W. Thomas





On November 15, 2013, the Second Circuit issued its third and final ruling in *Starbucks Corp. v. Wolfe's Borough Coffee, Inc. d/b/a Black Bear Micro Roastery*, 736 F.3d 198 (2d Cir. 2013), ending the long-

waged coffee battle between Starbucks and Black Bear over Black Bear's use of the marks MISTER CHARBUCKS, MR. CHARBUCKS, and CHARBUCKS BLEND for packaged coffee (the "Charbucks Marks"). In a decision authored by the Honorable Raymond Lohier, Jr., the Second Circuit affirmed Southern District Judge Laura Swain's determination that Starbucks failed to demonstrate that the Charbucks Marks were likely to dilute the distinctiveness of Starbucks' famous name and marks.

The battle between Starbucks and Black Bear, a New England-based micro-coffee roaster and retailer, started brewing in 1997, when Black Bear admittedly began using the Charbucks Marks to connote and contrast the dark-roasted nature of Starbucks' dark-roasted coffee (Black Bear's use of the Charbucks Marks as a source identifier was ultimately fatal to its "parody" defense). After Starbucks and Black Bear failed to reach an out-of-court settlement, Starbucks sued Black Bear for, *inter alia*, trademark dilution by "blurring" in 2001 ("*Starbucks I*").

Dilution by "Blurring"

Dilution by "blurring" is the concept that the selling power and value of a famous mark are "whittled away" due to unauthorized use of a mark by others, traditionally on non-competing goods. As legal scholar Frank Schechter once quipped: "if you allow Rolls Royce restaurants and Rolls Royce cafeterias, and Rolls Royce pants, and Rolls Royce candy, in 10 years you will not have the Rolls Royce mark any more." Thus, while the primary purpose of trademark law is to prevent consumer confusion, the purpose of trademark dilution law is to protect the strength and brand power of famous trademarks, like Starbucks.

Starbucks I* and *II

While *Starbucks I* was pending, the Supreme Court issued its controversial decision in *Moseley v. V. Secret Catalogue*, 537 U.S. 418 (2003), where the Court held that proof of "actual dilution" was required in order to prevail under the Federal Trademark Dilution Act ("FTDA"). Applying this standard at a 2005 bench trial, Judge Swain dismissed Starbucks' complaint, holding, *inter alia*, that Starbucks failed to demonstrate actual dilution of its marks by the Charbucks Marks. Starbucks then appealed to the Second Circuit for the first of three times ("*Starbucks II*").

However, while *Starbucks II* was pending, Congress enacted the Trademark Dilution Revision Act of 2006 (the "TDRA"), which set forth a six-factor test to determine whether a "likelihood of dilution" existed. This change was precipitated in large part because of the response of the International Trademark Association ("INTA") to the Supreme Court's decision in *Moseley*. INTA members testified before Congress that requiring proof of actual dilution would force owners of famous marks to wait until the selling power of their marks had been "permanently impaired" before seeking redress. With this change in the law, the Second Circuit remanded *Starbucks I* to the District Court for reconsideration.

Starbucks III-VI

After two more losses in district court ("*Starbucks III*" and "*Starbucks V*"), and an intervening partial victory at the Second Circuit ("*Starbucks IV*"), Starbucks appealed to the Second Circuit for the third and final time in 2012, *i.e. Starbucks VI*. In *Starbucks VI*, Starbucks argued that the District Court erred in *Starbucks V* with respect to the TDRA's first, fifth, and sixth factors when it found that the Charbucks Marks and Starbucks' trademarks were only "minimally similar" and Starbucks' survey evidence demonstrated a "relatively small" association between the marks.

With respect to the finding of minimal similarity, the Second Circuit invoked the "law of the case" doctrine and declined to revisit its prior ruling in *Starbucks IV*, wherein it upheld the District Court's finding in *Starbucks III* that the marks were only "minimally similar" (based upon an evaluation of the overall context in which the Charbucks Marks were used in commerce, rather than simply comparing "Charbucks" to "Starbucks," which the

District Court noted had a "strong similarity.").

As to the "relatively small' association between the marks, the Second Circuit upheld the District Court's finding that Black Bear's *intent* to create an association with Starbucks' marks did not create a presumption of actual association. In rejecting Starbucks' argument to the contrary, the Second Circuit held that if evidence of an intent to create an association was *per se* evidence of actual association, then the actual association factor would be rendered superfluous. Furthermore, the Second Circuit held that Starbucks' survey evidence concerning actual association was "fundamentally flawed" because it failed to present the Charbucks Marks as they were used in commerce, a requirement which, according to the Court, is based upon the plain language of the TDRA.

Dilution by Blurring after "Charbucks"

The Second Circuit's decision in *Starbucks VI* makes clear that how a junior mark is *used in commerce* is a key consideration that owners of famous marks and their trademark attorneys must carefully consider before bringing suit under the TDRA and when conducting surveys. Moreover, the decision arguably renders famous marks susceptible to dilution "by a thousand cuts" in the Second Circuit, which is antithetical to the purpose of the law and the reason behind the TDRA. Now, junior users will likely rely upon "Charbucks" to try to support their use of marks nearly identical to famous marks, but presented differently in the marketplace. This begs the question of whether dilution is all but dead in the Second Circuit as it is difficult to imagine a more famous mark than Starbucks and how one can come closer than the Charbucks Marks do, especially for competing goods.

Observations

The GTMO 9/11 Military Commission Proceedings

By William Weinstein

Along with 10 other representatives of non-governmental organizations, I was given the opportunity to travel to the Guantanamo Bay Naval Base ("GTMO") to observe the military commission hearings held October 22 to October 25 in connection with the government's prosecution of the five individuals jointly charged with the 9/11 attacks and their tragic consequences: alleged mastermind Khalid Shaikh Mohammad ("KSM"), Walid Bin Attash, Ramzi Bin al-Shibh, Ammar al Baluchi (a/k/a Ali Abdul Aziz Ali), and Mustafa Ahmed al Hawsawi.

Our diverse observer group ranged from law students to a retired Army Brigadier General, and included a former military prosecutor and a current state district attorney, representatives of the ACLU, the Brennan Center for Justice, Human Rights First, and Judicial Watch, and a member of the Board of Governors of the American Bar Association. As a member of the Federal Courts Committee of the New York City Bar Association, I attended without any particular orientation or agenda, with the principal intention to compare the operations of the military commission with the federal courts, in which much of my legal practice has taken place.

At GTMO

Our group of observers, along with the families of 9/11 victims and survivors, watched video and audio feeds of the courtroom proceedings on several television screens in a gallery behind five panels of clear, soundproofed plexiglass. The video and audio feeds were transmitted after a 40-second delay, allowing remarks to be translated and screened for classification review before being transmitted to us. In the event of an improper disclosure of classified information, the presiding judge or courtroom security officer could activate rotating "red lights" to close off the proceedings and prevent exposure to those in the gallery.

According to the prepared opening remarks of Chief Prosecutor Brigadier General Mark Martins, by the commencement of the October hearings, 129 sub-

stantive motions had been briefed, with eight mooted, dismissed, or withdrawn, 30 submitted for decision, and 67 motions ruled on.

The Motions

Forty-one motions were identified on the docketing order for the October 22 to October 25 hearings. Most of the motions tended to fit into one of three categories: (i) motions seeking to prevent the government from affirmatively interfering with the attorney-client relationship and the privileged communications between defense counsel and the defendants; (ii) motions to obtain or preserve physical and written evidence regarding the government's program of "Rendition, Detention and Interrogation" ("RDI") and its use of "Enhanced Interrogation Techniques" on the defendants — torture — including the facilities in which the defendants were detained and tortured, and bodily evidence of the torture; and (iii) motions to dismiss or abate the proceedings because of violations of statutory, military, constitutional and/or international law, including international laws prohibiting torture. A number of motions were interrelated, and substantially all of the 41 motions were argued during the hearings, in two instances accompanied by live witness testimony.

From the first day, it was clear that the stated military commission goals of "transparency," "fairness," and "justice" in the prosecution of the 9/11 defendants cannot be achieved with certainty of results and finality any time in the determinable future, not because of any inherent defect in the nature of military commission proceedings, but because of the complications and consequences of the government's ongoing classification of the documents and information relating to the RDI and torture, and the restrictions on defense counsels' access to and use of the classified information.

That the torture is inextricably intertwined with the commission proceedings is most directly a result of the fact that the proceedings are capital prosecutions seeking the death penalty against all five defendants. As presiding Judge Colonel James Pohl candidly stated during the hearings, "[O]bviously, in a death penalty case, mitigation is always relevant. In fact, it may be the most relevant part of the entire case ... anything that you believe is relevant to your presentation on findings and/or sentence."

That the United States used RDI "black sites" and torture in connection with the 9/11 defendants obviously is no secret. The CIA's May 7, 2004 Special Review report on Counterterrorism Detention and Interrogation Activities from September 2001 to October 2003 — the CIA torture report disclosing its rationale for the purportedly legal and illegal ranges of physical and psychological abuse and degradation that could be used in RDI — was made public years ago, and is now readily accessible on the web. The CIA torture report confirms, for example, that 9/11 defendant KSM was waterboarded 183 times in March 2003, which Senator McCain described in 2007 as "not a complicated procedure. It is torture."

Controlling Information

Our observer group was exposed to the consequences of the government's attempt to control the RDI and torture information virtually at the beginning of the first day's hearings. Judge Pohl was confronted with an issue that he stated he has had to deal with "again and again and again": the searches and seizures of the defendants' privileged legal files in their cells and other attempts by military and non-military personnel to access or control privileged communications that include, *inter alia,* RDI and torture-related classified information.

In this particular instance, defense counsel charged that while she was meeting with her client at the end of September, military personnel entered the defendant's cell, removed properly marked privileged legal materials from the legal bin in which all legal materials are to be maintained, and translated and read them, and that as a result, the defendant had stopped writing legal-related letters to his counsel, for fear his retained copies would continue to be seized. As we learned, these searches and seizures of legally privileged documents and other attempts to invade the attorney-client privilege extended back almost two years.

In October 2011, military personnel unilaterally seized and fully read all of the papers in the defendants' cells — including substantial privileged legal materials — in what was described as a "baseline" review to determine the legal or non-legal, and classified or non-classified, nature of every seized document to confirm that the documents bore stamps in accordance with the marking conventions imposed by the military Joint Task Force ("JTF"), which has overall responsibility for running the GTMO detention operations.

In January 2013, defense attorneys discovered surveillance devices disguised as smoke detectors in the huts where defense counsel met with their clients. On January 28, 2013, during courtroom proceedings, there was an unauthorized "red light" activation by someone other than Judge Pohl or the courtroom security officer (presumably an original classification authority or other intelligence agency monitoring the proceedings), that required Judge Pohl to order changes in the courtroom audio system to prevent future such occurrences.

Another wide-scale seizure occurred again, in mid-February 2013, while the defendants and their counsel were attending commission hearings. Military personnel seized all of the defendants' privileged and other legal papers, both to determine whether they were properly marked and contained in the proper legal and non-legal bins, and to locate any physical contraband. Some physical contraband — a metal pen refill, three pencils, and some zip ties — were found during the searches, confirming the genuine security issues the GTMO military personnel face on a daily basis. But both the physical contraband and the propriety of document marking could be visually observed, and there was no legitimate reason that the legal materials should have been removed from the defendants' cells. In fact, the next day Judge Pohl directed military personnel to return the seized legal materials to the defendants, although legal files of defendant Hawsawi were not returned for a number of weeks, causing additional proceedings during which his counsel tried to establish the reason for the delay — including as part of the hearings we observed, though no answers were then provided, necessitating more requests and motion practice for the production of witnesses with knowledge and relevant documents regarding the seizure.

Security Interests

These searches, seizures, and attempts to control the torture-related classified information were directly related to decisions by the military to place security interests above the constitutionally-mandated protections of attorney-client privileged communications. On December 27, 2011, orders were issued by the GTMO JTF Commander requiring defense counsel to agree that, to be able to communicate and meet with the defendants, all mail correspondence between counsel and the defendants, and all written materials to be brought by counsel into or out of meetings with the defendants — including case-related privileged legal materials — were required to be screened for "contraband." The December 27th orders additionally obligated the screeners in some instances to disclose the screened privileged material to the JTF Commander for possible further dissemination — presumably to military or non-military intelligence personnel. The orders also barred defense counsel from discussing certain topics with the defendants even if directly related to the case and their defense.

Because the December 27th orders violated a slew of applicable military and civilian attorney ethics rules, the Chief Defense Counsel of the Office of Military Commissions issued a memorandum on January 13, 2012 prohibiting all military commission defense counsel from agreeing to or complying with the orders. The Chief Defense Counsel's January 13, 2012 directive was subsequently confirmed by the February 19, 2012 opinion of the National Association of Criminal Defense Lawyers that compliance with the December 27th orders would be unethical.

It must be emphasized that there have never been allegations that the contents of the seized and reviewed legal materials were actually provided to the prosecution

team — they were being seized for intelligence purposes — eight years or more after all five defendants had been "rendered."

On November 6, 2013, shortly after we left GTMO, and more than 22 months after the GTMO JTF Commander issued his December 27, 2011 orders mandating the override of the attorney-client privilege and materially impeding counsels' defense preparation, Judge Pohl issued an order designed to countermand the December 27th orders, by excluding from the definition of "contraband" virtually all information that was directly related to the commission proceedings against the defendants, even if it related to their detention and torture. Judge Pohl's order also transferred control of the review of legal mail from GTMO military personnel to the military commission itself, accompanied by stringent guidelines effectively prohibiting the review of legal mail for anything other than physical contraband and proper markings. As a result of Judge Pohl's order, for the first time in November 2013 defense attorneys were permitted to discuss any topic with the defendants so long as it was related to the case, and can now communicate confidentially with their clients by letter, with the logistics for telephone communications currently being worked through.

Protective Order #1

At the time we attended the hearings, the commission procedures regarding the handling of certain classified information were set forth in a February 9, 2013 document called Amended Protective Order #1 (the "Protective Order"). Although all defense counsel have classification clearances to receive and review the classified RDI and torture information, the Protective Order requires them to expressly agree in writing to comply with its terms to be entitled to receive the information. One provision of the Protective Order, however, had, up to the time of the hearings we attended, substantially impaired the ability of defense counsel to fully represent the defendants, or even to receive the classified information for review.

Specifically, the Protective Order included within the definition of "classified information" the "observations and experiences" of the defendants regarding the RDI and torture techniques applied to them. Furthermore, because virtually all of the RDI and torture information was classified, then under the Protective Order what the defendants tell their counsel about their torture cannot be publicly confirmed or denied by defense counsel — even if the information was otherwise widely available in public sources, such as the Constitution Project's Task Force report derived from unclassified sources. Indeed, for defense counsel to do so would constitute an unauthorized disclosure of classified information that could violate criminal laws and subject them to criminal prosecution. Thus, the "observations and experiences" provision, combined with the continuing classification of the RDI and torture information, is another barricade precluding defense counsel from meeting their ethical and constitutional obligations in these death penalty proceedings to seek alternative sources of mitigation evidence.

Motion to Dismiss Under International Law

Among the many motions relating to the RDI and torture we heard argued was a joint motion by all defendants to dismiss the case against them because the Protective Order, including the "observations and experiences" provision, prevents defense counsel from seeking alternative sources of mitigation evidence, and violates their rights under international law (including the United Nations Convention against Torture ("CAT")) to bring claims for redress in a domestic or international forum based on their torture, as well as the right of defense counsel to assist with those claims.

Defense counsel contend that international law *obligates* both defense counsel and a tribunal — including the military commission — to report acts or alleged acts of torture in violation of CAT to international bodies. But because the Protective Order and the classification of the RDI and torture information regardless of source prohibits defense counsel from meeting this reporting obligation,

as well as limiting their ability to adequately represent the defendants because of the prohibition against publicly communicating about the defendants' torture, defense counsel for four of the defendants refused to agree in writing to comply with the terms of the Protective Order. In the absence of this agreement, defense counsel are precluded from receiving relevant classified material the government might otherwise be prepared to produce. So the proceedings have been further deadlocked and delayed.

Decisions Issued

On December 16, 2013, Judge Pohl issued several rulings on the defendants' joint motions to dismiss. In one ruling, Judge Pohl denied the motion principally asserting that the inclusion and classification of the RDI and torture related "observations and experiences" of the defendants in the Protective Order prevented defense counsel from seeking alternative sources of mitigation evidence, stating that the commission lacked the authority to override the OCA. Nevertheless, Judge Pohl agreed to amend the Protective Order by removing the challenged language, but also inserted a new provision requiring defense counsel to provide notice if any defendant "intends to make statements or offer testimony at *any* proceeding" (emphasis added). Thus, it is unclear whether the removal of the "observations and experiences" provision will actually allow the defendants to communicate with foreign government officials, medical care providers, human rights authorities and media regarding the RDI and their torture, and whether they will be able to affirmatively pursue torture-related claims in an appropriate public forum, or whether the government will continue to prevent that from happening.

Furthermore, as Judge Pohl also stated in this ruling, his decision to remove the "observations and experiences" provision "does not lessen in any sense the responsibilities of counsel to fulfill all the obligations inherent in possessing a security clearance." Thus, because defense counsel still are required under the Protective Order to treat the defendants' RDI and torture-related observations and experiences communicated to them as classified, the ruling does not remove the restrictions on their ability to publicly discuss or investigate the facts regarding the defendants' torture in connection with the development of the torture-related defense and sentencing mitigation. Nor does the ruling remove the restriction on their obligation to report the torture in violation of CAT to international bodies, and that same issue could continue to prevent defense counsel from agreeing to the Protective Order so as to be entitled to receive the classified information.

Judge Pohl also issued a ruling on December 16, 2013 denying the defendants' joint motion to dismiss asserting that the Protective Order and its requirements for handling the classified RDI and torture-related information, including the defendants' observations and experiences, violates the defendants' rights under international law (including CAT) to bring claims for redress in a domestic or international forum based on their torture, as well as the right and ability of defense counsel to assist with those claims and to develop mitigation evidence. For the purposes of deciding the motion, Judge Pohl stated that he "accepts as true [that] the treatment of each [defendant] at the hands of 'agents of the United States' during relevant times ... could be viewed as a violation of the Convention Against Torture." With respect to CAT, he held that the treaty was not "self-executing," and that the absence of implementing federal legislation means that the defendants were not entitled to relief in federal courts. Additionally, Judge Pohl held that there was no private right of action under the federal statutes defining and criminalizing torture, 18 U.S.C. §§ 2340 and 2340A. Third, Judge Pohl held that even assuming torture is prohibited as a *jus cogens* norm of customary international law, that law is not part of domestic U.S. law in the absence of implementing legislation, and thus was not a ground for relief by the commission under the provisions of the Military Commission Act of 2009. Finally, Judge Pohl held that responsibility for

the classification of the RDI and torture-related information, including defendants' observations and experiences, rests with the OCA and cannot be overridden.

"Torture"

During the 21 hours over four days of hearings that we observed, the word "torture" appeared in the transcript 293 times. Regardless of the government's classification of torture, Judge Pohl publicly accepted as true that the defendants were tortured for the purposes of their joint motions to dismiss, although he rejected their argument that the torture could support dismissal under U.S. and international law in connection with their prosecution. Torture has permeated the entirety of the 9/11 military commission proceedings, and its classification has bound defense counsel and the commission in one big Gordian knot. Yet the government has continued to adhere to its classification of the specific techniques of torture and degradation inflicted on each defendant, along with the other relevant RDI information.

Ironically, only one of the 41 motions on the October 22 to October 25 docket might be considered "mundane" in the context of all court proceedings, federal or otherwise, and was not addressed until close to the end of the last day of the hearings: the prosecution's motion for a trial scheduling order. The prosecution proposed the resolution of all legal, discovery, and evidentiary motions by August 2014, with four more months after that for defense counsel to prepare for trial, with *voir dire* and the seating of a panel in January 2015. The proposal was extremely optimistic, at best, given the fact that defense counsel were not even able to freely communicate with their clients about privileged matters until this past November, and that there still are major barriers to the receipt and use by defense counsel of the classified RDI and torture information in connection with their development of the defense and mitigation.

In fact, numbers provided by the defense regarding the current status of discovery showed that the proposed schedule was impossible. Just in terms of "straightforward" discovery requests, as of the October hearings there were 67 pending defense discovery requests, some going back to July 2012, where defense counsel still were waiting for a firm response from the government. Several requests dating from October 2012 involve unfulfilled government agreements to produce, and 21 requests were "in production" — *i.e.,* where something had been produced but the parties were in continuing discussions about its sufficiency, including issues of excessive redaction. Additionally, as of the October hearings there were 13 pending motions to compel. Seventeen discovery requests were actually satisfied and complete.

The Trial Conduct Order

After the hearings, to move that discovery along, Judge Pohl issued a "Trial Conduct Order" on November 7, 2013 requiring an interim response to a discovery request within 14 days, and a final answer within 28 days. The failure to provide a final answer within 28 days will be deemed a "constructive denial" entitling the requesting party — *i.e.,* the defense — to move the commission to compel production. Note, however, that the judge's solution where there is no timely, definite, final answer places the burden on the defense to speculate in a motion to compel why the requested information is not being produced.

Far less "mundane" or "straightforward" is the vast scope of the discovery that defense counsel still must undertake. As defense counsel noted, the government has been preparing its case for years with coordination among multiple government agencies and foreign governments, and it already has been tried in large part in connection with the prosecution of Zacarias Moussaoui, the "20th hijacker," who was not part of the RDI program, and who pleaded guilty, thus limiting the need for discovery to sentencing and mitigation.

Defense counsel in the 9/11 prosecutions, however, in many respects are starting from scratch in a case where their investigation spans five continents and 17 countries. To further illustrate the differences, defense counsel ob-

served that while only some 9,000 pages of FBI "Form 302" reports had been produced in these proceedings, 180,000 Forms 302 (not just pages) had been produced in the Moussaoui proceedings. Furthermore, FBI reports that already had been reviewed and tendered to Moussaoui's counsel in those proceedings still were going through a classification review in the 9/11 proceedings.

Conclusion

There is a tendency these days to place the blame for the delay in our ability to obtain justice with respect to the 9/11 defendants at the door of the military commission. It is, however, the torture and its continuing classification and concealment by the government — by far — that creates the greatest uncertainty whether the government's prosecution of the 9/11 defendants will be successful and achieve finality.

The determination by the Original Classification Authority to classify the RDI and torture is binding both on the military commission and the federal courts, so there is no "benefit" to a change of forum in that crucial respect. Defense counsel are pursuing the prescribed administrative procedures requesting that the OCA declassify the information. And on October 22, the first day of the hearings we attended, all defense counsel wrote an impassioned letter to President Obama, citing to his June 2011 statement reaffirming the commitment of the United States to the tenets of CAT and domestic law and their prohibition against torture, and asking the President to remove the classification restrictions on the RDI and torture information relating to the 9/11 defendants, to enable counsel to fully and faithfully discharge their defense duties in order to achieve "true transparency and meaningful justice" in the commission proceedings.

The ultimate in cognitive dissonance may occur if, as a result of Judge Pohl's recent order, the defendants are now free to discuss and pursue their torture related claim in a public, international forum, but the same information continues to be classified by the OCA.

As defense counsel for KSM pointed out, the prosecution's unrealistically short pre-trial schedule would be another ground to challenge the results in *habeas* proceedings. Because of the delays to date resulting from the classification of the torture — not to mention what certainly seems like old-fashioned "stonewalling" by the government — and because of the vast international scope of the investigation and discovery of evidence and witnesses by defense counsel necessary to discharge their defense duties, a projected start date for the trial of the defendants no earlier than January 2016 is both likely and realistic. A trial lasting for one year through commission findings and sentence takes us to 2017. Then there are the direct appeals, first to the Court of Military Commission Review, then the U.S. Court of Appeals for the District of Columbia, and probably next the Supreme Court. And then, because of the issues regarding the torture and the impairment in the effective assistance of counsel resulting from its classification, *habeas* proceedings in the U.S. District Court for the District of Columbia are certainly a strong possibility, with appeals again to the D.C. Circuit Court of Appeals and the Supreme Court. That leaves us with a time frame concluding more than two decades after 9/11 with no strong assurance of finality.

To this writer, it seems that there is only one solution. President Obama could cut this Gordian knot, declassify the specific information regarding the detention and torture of the 9/11 defendants necessary to their defense, enable defense counsel to fully and faithfully discharge their sworn duties under the Constitution, and eliminate the uncertainties and substantial, wholly unacceptable litigation risks that the government's continued classification and concealment of the torture creates. It must be the paramount concern of the entire government to ensure that the victims of 9/11 and their families and loved ones, whose losses are irreparable, and all citizens of the United States and the world who share their loss and the horror of 9/11, are finally able to obtain lasting justice. If "justice delayed is justice denied," then in no other case can the delay of justice be more damaging to the shared interests of the American people. A do-over is not acceptable.