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Provocative, Human, Eclectic

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Steve Edwards offers a solution to gun control (**p. 17**) as well as an article about John Chestnut Whittaker and Henry Ossian Flipper, two of the first black cadets appointed to West Point (**p. 19**), and Pete Eikenberry concludes this issue with an article entitled, "How FBI Misconduct in 1968 Affected the 'Amount in Controversy' in 1976" (**p. 22**).

We invite you to connect with us on LinkedIn.

From the President

Special Anniversaries

By Vilia B. Hayes



The courts in the Second Circuit have been celebrating a series of special anniversaries and the Federal Bar council and its members have been happy to be a part of the celebrations. On Thursday, March 3, 2016, the Federal Bar Council will honor the judges of the Eastern District of New York in celebration of the 150th anniversary of the Eastern District at the 2016 Judges Reception to be held at The Union League Club. (Register online at www.federalbarcouncil.com.) This follows the 80th birthday celebration for the Thurgood Marshall United States Courthouse, which took place on January 27, 2016, and the year-long celebration of the 250th anniversary of the Southern District of New York.

Commencing in September 2016, the Court of Appeals for the Second Circuit will celebrate its 125th anniversary with monthly public events, including a Federal Bar Council Inn of Court re-enactment of a famous Second Circuit appeal (to be determined). All of the events will be posted on the Federal Bar Council calendar.

Celebrating these anniversaries makes me pause and appreciate the beautiful court buildings and history that I, and all of us who practice in the courts of the Second Circuit, have been privileged to experience. It also reminds us of the legendary judges and important cases that have been decided here.

Annual Report

I also am delighted to report that our 2015 annual report was issued in December: http://www.federalbarcouncil.org/FBC-Files/2013_2014_FBC_Annual_Report_Website.pdf. It has been another great year for the Council, as you can see. I invite you all to review the report, including the work of our committees, and encourage you to volunteer for a committee. I also encourage each of you to recommend two new members, especially junior lawyers, for membership and for participation on one of our committees.

Membership Benefits

As a reminder, one of the benefits of membership is that new members will receive free copies of the *Second Circuit Redbook* and of our recently published, beautiful *Courthouses of the Second Circuit* book. Here is a link to our membership information online, which lawyers can use to join and which lists key advantages of membership, chief among which are our highly rated continuing legal education programs, offered free to members throughout the year: http://www.federalbarcouncil.org/member_benefits.php. Our CLE programs typically are moderated by federal judges, and all of our events provide a collegial setting for interactions among our members.

I look forward to seeing you at our upcoming events.

From the Editor

A Thanksgiving Luncheon to Remember

By Bennette D. Kramer



The Federal Bar Council Thanksgiving Luncheon this year had all the usual events: trumpet welcome; Pledge of Allegiance; welcome by David Kelley, the Luncheon's chair; introduction of new officers, trustees, and direc-

tors by Nominating Chair Robert Fiske; and presentation of the Emory Buckner Medal to recipients by Council President Vilia Hayes.

What was extraordinary about the rest of the proceedings was that there were two recipients of the Emory Buckner Medal: Chief Judge Carol Amon of the Eastern District and Chief Judge Loretta Preska of the Southern District of New York, both of whom are nearing the end of their terms.

As Vilia Hayes explained, Judges Amon and Preska share many similarities. They both took on chief judge responsibilities during the financial crisis that began in 2008 – Judge Preska in 2009 and Judge Amon in 2011 – and both have worked hard to maintain funding for 24-hour a day security in federal courthouses. In addition, both dealt with the sequestration budget: Judge Preska along with Chief Judge Gerald Rosen of the Eastern District of Michigan, mobilized 87 federal district chief judges to write a letter to Vice President Joseph Biden, and Judge Amon, through the efforts of her son Chris, met with then-Speaker of the House John Boehner and explained the disastrous effects of the sequestration on the courts. As a result of these efforts, additional appropriations for the courts were included in a 2014 budget deal.

Both judges sprang into action following Superstorm Sandy. Judge Preska worked to plan for the storm and opened the courthouse for emergency hearings the day after the storm, despite a dark courthouse lacking heat and hot water. Judge Amon gave office space in the Eastern District's courthouse to the Federal Emergency Management Agency.

There were two recipients of the Emory Buckner Medal: Chief Judge Carol Amon of the Eastern District and Chief Judge Loretta Preska of the Southern District of New York, both of whom are nearing the end of their terms.

Judge Amon

Hayes introduced Judge Amon as a transplant from Virginia who, after attending Catholic schools, obtained an undergraduate degree from William and Mary and a law degree from the University of Virginia. Judge Amon served in the Office of General Counsel of the Communications Satellite Corporation and then as an Assistant U.S. Attorney in the Eastern District of New York, where she was chief of the Frauds Unit, chief of General Crimes, and senior litigation counsel. Judge Amon was a U.S. magistrate judge before she was appointed as a district judge in 1990.

As a district judge, Judge Amon has handled a wide range of cases involving organized crime, financial fraud, class actions, and the First Amendment. She has been chair of the Judicial Conference's Committee on the Codes of Conduct, becoming one of the nation's leading authorities on judicial ethics. As chief judge, one of her greatest achievements has been working with the General Services Administration and court administration to secure the perimeter of the Brooklyn courthouse.

Judge Amon noted the family members who had come to cheer her on and remarked on the similarities between Judge Preska and herself. She said that if you get into a battle with the GSA or need funds for the court, Judge Preska is the person you want by your side, fighting the same battle and giving encouragement.

Judge Amon reflected on Emory Buckner as a role model for public service and said that her father-in-law, Carl H. Amon, Jr., head of the litigation department at Hale & Dorr, was a similar role model for her. Like Buckner, he was a mentor to many young lawyers, including Judge Amon. They were both highly principled men, devoted to their families. Judge Amon also pointed to inspiration on the court set by the five members of the great generation who are World War II veterans: Leo Glasser, Jack Weinstein, Arthur Spatt, Thomas Platt, and Leonard Wexler.

Judge Amon has found great joy as chief judge. She has gotten to know her colleagues, whom she jocularly described

as a "motley crew" comprised of scholars and doers, idealists and pragmatists, kind hearts and "tough love"-givers. She loves the varied backgrounds of the members of the court. She also has loved celebrating the court's 150th anniversary, learning about the Eastern District's rich history including the establishment of the court under President Abraham Lincoln, the visit of President Theodore Roosevelt for a naturalization ceremony, and the espionage trials that became the subjects of films. The court has evolved from one established to handle admiralty cases to a court that handles some of the most varied and important cases today.

Judge Amon concluded by thanking the Council lawyers who supported the court in its quest for adequate funding and in celebrating the court's 150th anniversary. She also thanked the Council, Judge Preska, her judicial colleagues, her family, and her courtroom deputy for all of their support.

Judge Preska

Hayes introduced Judge Preska as a native of Delmar, New York. She also attended Catholic schools and then attended the College of St. Rose, majoring in chemistry. Judge Preska graduated from Fordham Law School, one of eight women in her class, going on to pursue a Master of Laws in trade regulation at New York University School of Law. She participated in private practice at Cahill Gordon & Reindel and at Hertzog, Calamari & Gleason.

Judge Preska was appointed to the district court in 1992 and became chief judge in 2009. Judge Preska has handled a variety of matters while on the bench, one of the most dramatic of which was the "Somali Pirate" case. She is an enthusiastic supporter of Fordham Law School and is a former trustee of the university.

As chief judge, she has started a Congressional outreach plan, bringing Senators and members of the House to the courthouse to discuss the state of the judiciary and the Southern District.

Judge Preska talked about the "Mother Court" – the first federal court in the country, with its first sitting on the first Tuesday of November 1789. She said that the first judge – James Duane – was born in Manhattan and served as the first mayor of New York City. She noted that the Eastern District was carved out of the Southern district in 1865.

Judge Preska acknowledged and thanked Senators Daniel Patrick Moynihan and Alfonse D'Amato. They were responsible for Judges Preska and Amon's ascension to the bench, and their names adorn the two new courthouses in the districts – the Southern District Moynihan Courthouse at 500 Pearl Street in Manhattan, and the Eastern District's Alfonse D'Amato Courthouse in Central Islip. Senator D'Amato was present at the Thanksgiving Luncheon.

Judge Preska described some of the travails that she and Judge Amon experienced as chief judges, including acting as supplicants on behalf of their courts to the Administrative Office in Washington and the Second Circuit. Together they worked with chief judges nationwide to call attention to the devastating effects of the budget crisis on the federal courts. Both succeeded in maintaining security in and around the courthouses 24 hours a day, seven days a week. In addition, each chief judge has worked to achieve security construction priorities. The Southern District is about to finish a security screen pavilion to ease entry into the Moynihan Courthouse, and the Eastern District has completed the project to secure the perimeter of the Brooklyn courthouse.

Judge Preska disclosed that the most gratifying part of the chief judge job has been working with her fellow judges on the court. She also has enjoyed working with the people who make the court work – a devoted group of public servants – and her chambers staff, who have taken care of her and all the extra burdens brought on by her position as chief judge. She gave a shout out to her husband and two children, who make her proud every day. Finally, she thanked the lawyers who have supported her during her term as chief judge, and the Council, for honoring her with the Emory Buckner award.

We who practice in the Southern and Eastern Districts of New York have been lucky to have such hard-working and dedicated chief judges. As a result of Judg-

es Amon and Preska's efforts, the courthouses in both districts are safer and more financially secure. We thank them both and wish them well in their post-chief judicial lives.

Our View

Former Council Presidents in Defense of Judge Block

By Robert A. Anello, Steven M. Edwards, and George B. Yankwitt

Last December, the New York Post *wrote a series of articles harshly criticizing Eastern District Judge Frederic Block for a decision he made on a suppression motion. We thought the criticism was intemperate and misplaced, so we wrote this opinion piece to inform the public and put the matter in perspective. Unfortunately, the* Post *did not see fit to publish it, so it is being published here. Although it is tempting to let the story die, articles such as the articles that appeared in the* Post *become part of a historical record, and we believe it is important to set the record straight.*

We are litigators and former bar association presidents in New York. We write with regard to several articles and an opinion editorial that appeared recently in the *Post* (December 4 and 6) regarding a ruling by federal judge Frederic Block in which he granted a motion to suppress evidence of a gun that was found on a suspect in a stop and frisk. The *Post*'s articles and editorial are unfortunate because they do not correctly describe the context in which Judge Block made his ruling, they attack him personally, and they could have a chilling effect on what we hope is a strong and independent judiciary.

The Fourth Amendment to the U.S. Constitution prohibits unreasonable searches and seizures. The U.S. Supreme Court has interpreted this to mean that a person cannot be stopped and searched on the street unless the officer reasonably suspects that the person has committed a crime and may be armed and dangerous. If a person is stopped and searched in the absence of "reasonable suspicion," the Supreme Court has directed federal district judges to rule that anything uncovered in that search is not admissible in evidence.

In a suppression hearing, the arresting officers typically take the witness stand and testify about the facts that support their reasonable suspicion. The Supreme Court has held that the government has the burden of demonstrating through that testimony that the officers' suspicion is based on objective facts. Among other things, this requires the judge to evaluate the credibility of the arresting officers in

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deciding whether the government has met its burden.

The Case

In the case in question, the arresting officers testified that they were in an unmarked car in a high crime neighborhood when they saw two men walking toward them. When the men were about 15 feet away, one of them allegedly lifted his sweatshirt to reveal a gun tucked into his waistband. The officers got out of their car, approached the men and pulled the gun out of the defendant's waistband. The officers acknowledged that they did not pull their guns even though they claimed that the defendant was armed; nor did they ask the two men to put up their hands. The officers also could not agree on which of them held the defendant's hands while the other took out the gun. One of the officers conceded on cross-examination that the whole story sounded "crazy."

In a three-page opinion, Judge Block granted the motion to suppress because he found that the government had not met its burden of demonstrating that the warrantless search was supported by reasonable suspicion. He did not explicitly state that the officers were lying, possibly out of deference to them, but he obviously found that their testimony was not credible. At the end of his opinion, Judge Block stated:

> The Court recognizes the difficulty of police work and the benefits derived from the removal of a firearm from the streets of New York City, however, in light of the circumstances surrounding the underlying search, the Defendant's motion is granted.

The judge's decision was simple: He was required by the law to consider the credibility of the arresting officers, and he did so. He could have ignored the evidence and denied the motion to suppress because he thought the defendant was clearly guilty, but he chose to follow the standards laid down by the U.S. Supreme Court. Although we may not like the result, the remedy for that lies with the Constitution and Supreme Court; a federal district judge should not decide on their own to ignore the rules.

The judge's decision was simple: He was required by the law to consider the credibility of the arresting officers, and he did so.

The Real Issues

Unfortunately, instead of disagreeing with the result and explaining the reasons for its disagreement, the *Post* chose to attack the judge, calling him a "lunatic" who "defended a defendant" because he "doesn't give a s--t." This language has the effect of diverting attention from the real issues and suggesting that there is something seriously wrong with this particular judge. Our system of justice depends on the vast majority of the people voluntarily complying with the law and police officers performing their duty consistent with our constitution – which thankfully is usually the case. Personal attacks and the demeaning of judges breed disrespect for the law, making it more difficult to achieve compliance.

Personal attacks such as the one leveled against Judge Block also threaten judicial independence. One of the strengths of our system is the ability of judges to stand up to the legislative and executive branches. We want judges to do what they think is right, even if it is unpopular. This includes telling the executive branch that it cannot use the fruits of a search if it has not complied with the Constitution. This is what distinguishes our country from other countries where people can be thrown in jail simply because they have offended the powers that be.

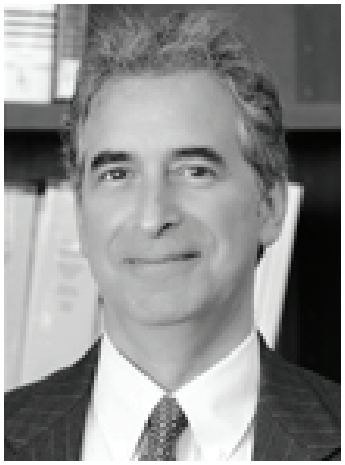
Even though judges are appointed for life, they are human beings. No human being likes to be humiliated and ridiculed simply because they have made an honest decision. It should not surprise anyone if, at some point, a person might alter a decision rather than being held up to public scorn. We don't want that; the *Post* – which zealously and properly safeguards the important Constitutional provisions that protect it – should not want

that either. A decision can be criticized on the merits, in a way that helps the public to understand the issue, without engaging in unwarranted personal attacks against the judge who wrote it.

New Appointments

Judge Victor A. Bolden Sworn in in Connecticut

By James I. Glasser



On January 7, 2015, Judge Victor A. Bolden was sworn in as the 38th U.S. District Judge for the District of Connecticut. He is the third Barack Obama appointee to take office in the District of Connecticut, filling the position created when Judge Janet B. Arterton took senior status. The two other Connecticut judges appointed by President Obama are Judges Meyer and Shea.

Judge Bolden was recognized for his legal scholarship and even temperament by Connecticut Senators Chris Murphy and Richard Blumenthal; they stated that "Victor Bolden has the intellect, integrity and life experience that will make him a judge of courage and compassion." Similarly, Connecticut Congresswoman Rosa DeLauro observed that, "Victor is a deep believer in the rule of law and would make a fine, impartial judge for all Connecticut residents…. Victor understands the impact the law has on people."

William Prout, a partner at Wiggin and Dana, where Judge Bolden worked from 2000 to 2005, gave Judge Bolden high praise, stating, "Victor is as fine a man as I have ever known, he's a man of decency, integrity, caring, compassion and sound moral judgment."

During the investiture ceremony on March 30, 2015, New Haven Mayor Toni Harp observed that she "could think of no one more appropriate to shoulder the burden of a federal judge, no one better suited to consider weighty matters, and no one more appropriate to be called Your Honor."

Perhaps the greatest praise, however, has come from Frank Ricci, the lead plaintiff in *Ricci v. DeStefano*, in which Ricci found himself on the opposite side of the "v" from Judge Bolden in his prior role as Corporation Counsel for the City of New Haven. Recall that the *Ricci* case was litigated all the way to the U.S. Supreme Court. Despite their presumptive adversarial relationship, Ricci wrote to the Senate Judiciary Committee in strong support of Judge Bolden's nomination, noting that, "Although Victor represented the City and therefore would be naturally presumed an adversary *it never felt that way*…. He's always conscious that there are real people affected by decisions that are made but he is also very deliberate in those decisions with an unwavering commitment to the law…. I cannot think of anyone who would make a finer addition to our federal judiciary than him." High praise indeed, particularly from an adversary, but not at all surprising to those who know Judge Bolden.

After Judge Bolden's young son, Caleb Marshall Bolden, recited aloud, from memory, the preamble of the Constitution and helped his dad don his judicial robe, Judge Bolden addressed Chief Judge Janet Hall, who presided over his induction, the full court, Connecticut's Congressional delegation, and an overflow crowd and observed that as one chapter of his career in public service ended and a new one began, "there is no greater calling than to serve the public," and he vowed his service to "the court with unyielding fidelity to the law."

Background and Education

Judge Bolden was born in New York in 1965 and was raised in the Dyckman Housing Projects in the Inwood section of Manhattan. He is one of four children born to loving and selfless parents. His mother worked as a nurse specializing in nephrology.

His father worked in a bank and also served as a church minister. Judge Bolden described his parents as individuals devoted to helping others and to raising their family in an environment of love and generosity.

The Bolden family moved from Inwood to Medford, Long Island. Judge Bolden attended Patchogue-Medford High School, where he not only excelled academically but also participated in student activities including serving as the president of the Honor Society and president of the Future Business Leaders of America Club. He graduated from high school in 1982 and enrolled in Columbia University.

While at Columbia, Judge Bolden distinguished himself academically, earning the Brod Room Prize, the John T. Lewis Scholarship, the Milch Prize, and the Leonard A. Pullman Memorial Prize for scholarship and service to Columbia College. In 1986, after graduating from Columbia, Judge Bolden enrolled at Harvard Law School. At Harvard, Judge Bolden again distinguished himself, earning, among other awards, the Irving Oberman Memorial Award for the best paper on a current legal subject. Judge Bolden earned his J.D. from Harvard in 1989 and was admitted to the New York bar in 1990.



Judge Bolden

Professional Career

After graduating from Harvard, Judge Bolden did not pursue coveted clerkships or high paying Wall Street jobs. Judge Bolden spent his first year as a Marvin Karpatkin fellow with the American Civil Liberties Union Foundation. Upon completing the year-long fellowship, Judge Bolden was asked to stay with the ACLU as a staff attorney for an additional four years. Judge Bolden recalled having wonderful mentors at the ACLU, including Helen Hershkoff (who now teaches at New York University Law School) and Steven Shapiro, the legal director of the ACLU. They were his role models as a young lawyer. "Helen was a brilliant lawyer and tactician; she knew the nuts-and-bolts of lawyering. Steve was one of the best and clearest writers I have ever known," Judge Bolden told me.

Judge Bolden recalled trying the case of *Ihler v. Chisolm* in Montana while with the ACLU. The case involved the abuse and neglect of patients at a mental health facility. He was successful in the trial of the matter and

learned a lot about being a lawyer through the process. The early trial experience also shaped his thinking about trials and how to litigate. Lessons learned in that early experience, and many others over the years, have influenced certain of his chambers' practices now that he is a judge.

Judge Bolden left the ACLU and went to work for the NAACP Legal Defense and Educational Fund, during which time he also served on the board of advisors for the National Voting Rights Institute.

When I asked Judge Bolden how his career landed him in Connecticut, he explained that he came to Connecticut in 1997 when he and his wife, whom he married in 1995, were juggling their respective careers. At the time, his wife was finishing up her Ph.D. at Princeton and ultimately landed her first academic job at the University of Connecticut. Judge Bolden was working at the NAACP in New York. They ultimately decided to live in New Haven, which was in "commuting distance," albeit not easy commuting distance, for both. When Judge Bolden's wife achieved an academic appointment at Yale, they decided to make their home in the New Haven area.

When the daily commute from New Haven became too much, Judge Bolden joined the New Haven firm of Wiggin and Dana, where he worked from 2000 to 2005. At Wiggin and Dana, Judge Bolden had the opportunity to work closely with Mark Kravitz, who later became a federal judge. Judge Bolden considers Judge Kravitz to be one of his important mentors, both as lawyer and judge. Judge Bolden recalls Judge Kravitz as a brilliant thinker with a razor sharp mind and an intense preparer who knew how to dissect a problem and get to its core. He had a knack for simplifying and clarifying complex issues and presenting them persuasively. Judge Kravitz was a noted appellate advocate and Judge Bolden recalled that working together to prepare for an appellate argument was a "transformative" experience. Judge Bolden also appreciated Judge Kravitz's ability to achieve balance. He worked hard but ensured time to devote to his family.

During his time at Wiggin and Dana, Judge Bolden demonstrated a continuing commitment to public service. He served on the boards of the National Coalition Against Censorship, the Connecticut Food Bank, and the International Center of New Haven. Judge Bolden left Wiggin and Dana in 2005 to return to the NAACP Legal Defense and Education Fund and to serve as its general counsel, a post he held until 2009.

In 2009, Judge Bolden became Corporation Counsel for the City of New Haven. As the city's lawyer, Judge Bolden managed a diverse portfolio of matters including the case of *Ricci v. DeStefano*, in which white firefighters challenged the city's decision to throw out the results of a promotional exam where the results reflected racial bias. During the pendency of the case, Judge Bolden demonstrated a professionalism and respect for individuals that would cause lead plaintiff Frank Ricci to refer to him as "a consummate professional with unquestionable integrity."

Throughout the entirety of his legal career, Judge Bolden has been a prolific writer and speaker. As a member of the editorial board of the *Connecticut Law Tribune*, he wrote eight editorials between 2012 and 2013. In addition, he wrote 15 articles ranging in complexity from letters to the editor to full law review articles. He also has written for many other publications. Judge Bolden is an eloquent and thoughtful public speaker and is much sought after by bar associations, church groups, public interest groups, and charitable and other organizations.

I asked Judge Bolden how he became interested in law. He indicated that his parents dedicated themselves to helping others and he saw a career in law as a vehicle that would enable him to do the same. When I asked whether he had particular inspirations or heroes, he quickly identified Martin Luther King, Jr., Justice Thurgood Marshall, and his own parents. Judge Bolden has studied the orations of Dr. King. That exercise, along with watching his father devote tremendous time to crafting, polishing, and perfecting his sermons, has contributed to his proficiency as an orator. Judge Bolden admires both Dr. King and Justice Marshall for their ability to effect change for

society.

Judge Bolden considers himself privileged to have had the opportunity to work on the *Brown v. Board of Education of Topeka Shawnee County Kansas* case. After a ruling from the U.S. Court of Appeals for the Tenth Circuit holding that further desegregation relief was required in the schools in Topeka, Kansas, there was a trial on remedy before the Kansas district court. Judge Bolden, along with co-counsel, represented the plaintiff school children and parents in the trial. The remedy ultimately implemented resulted in the school district being declared unitary in 1999, ending federal court supervision. To be involved in the case initiated by Thurgood Marshall was an unfathomable privilege. It is, no doubt, also a reason Judge Bolden's son's middle name is Marshall.

Taking the Bench

Judge Bolden has had a full docket from the moment he took the bench. He is enjoying the ability to make certain the rule of law is respected and expending the time and effort to get it right. He finds that having advocated on behalf of both plaintiffs and defendants, for government and against government, for employers and against employers, etc., gives him good perspective. He is not at all reluctant to get involved in discovery disputes and enjoys helping parties get "unstuck." He urges parties to consider what is really important in a dispute and to work hard to figure out if there is a way to resolve the dispute. He is a proponent of referring matters out early to attempt to resolve them. Judge Bolden believes that a judge "should be fair, even-tempered, open-minded, and capable of deciding every matter based on the relevant facts and applicable law" and that a judge also should treat litigants in a respectful and professional manner.

Judge Bolden is a welcome addition to Connecticut's extraordinary federal judiciary.

FBC News

A Day in the Life of a BOP Inmate

By Marjorie E. Berman



Divergent descriptions of a day in the life of a Bureau of Prisons inmate were presented at a program sponsored by the Council's Committee on Sentencing and Alternatives to Incarceration. So at odds were the views presented that it became clear that the answer to what a day in the life of an inmate looks like is a function of perspective, experience, and facility. In short, like most things, the answer depends on who is providing it.

The Panel

The panel drew from diverse perspectives with one of the panelists having had an inside view of prison life – Jeff Smith, who served one year at the federal correctional institution ("FCI") in Manchester, Kentucky. Prior to his conviction for corruption, he had been a state senator in Missouri. The other panelists were Judge Shira Scheindlin, Judge Stefan Underhill (both members of the committee), Michael Tafelski (Regional Counsel Northeast Region, Bureau of Prisons), and Nicholas Turner (president and director of the Vera Institute of Justice). The panel was moderated by Martin Horn (Lecturer in Corrections at John Jay College and former commissioner of the New York City Department of Correction). The program was introduced by Larry Krantz, chair of the committee, who commented that the program presented a unique opportunity for those practicing criminal law to see behind the curtain as to what happens when a defendant is sentenced to prison. Even experienced criminal defense lawyers often have little insight into this since the job of

the attorney typically ends at sentencing and appeal.

The State of Incarceration

The panel opened with Horn repeating a critical insight from the Vera Institute's 2006 report entitled, "Confronting Confinement." The report said: "What happens inside jails and prisons does not stay inside jails and prisons. It comes home with prisoners after they are released and with corrections officers at the end of each day's shift. We must create safe and productive conditions of confinement not only because it is the right thing to do, but because it influences the safety, health, and prosperity of us all." It was in that spirt, Horn remarked, that the committee brought the program. "It matters to all of us because it affects all of us."

Nicholas Turner, president of the Vera Institute, presented chilling statistics about the state of confinement in the United States. Referring to the continuing legal education materials distributed with the program, he reported on the exponential growth in the rate of incarceration over the last four decades – from approximately 200,000 inmates in 1972 to 1.5 million inmates in 2013. Further, the rate of incarceration in the U.S. – at 716 people per 100,000 – far outstrips any other country in the world. Indeed, the next closest contender, Turner reported, is Rwanda at 476 people per 100,000. The rate of incarceration in the U.S. is six to 10 times the rate of countries we perceive as our peers. Given the enormous number of people who will confront incarceration at some point in their lives, Turner argued that we all need to think about conditions of confinement, which are obscure and unknown to many of us. He welcomed the change in the air with all sides coming together for justice reform, increased public interest in conditions of confinement, and renewed focus on rehabilitation and return to the community.

So at odds were the views presented that it became clear that the answer to what a day in the life of an inmate looks like is a function of perspective, experience, and facility.

The Judges' Views

The insights provided by Judge Scheindlin and Judge Underhill were largely the product of their prior visit to Otisville Prison, which had been arranged as part of this program. Shortly before the formal program, committee members including Judges Scheindlin and Underhill visited the Otisville Federal Correctional Facility for a tour and introduction to the facility and its programs. This visit was Judge Scheindlin's first since she had visited a prison as part of her orientation when she was appointed to the bench.

Both judges were favorably impressed with the conditions and programs offered at Otisville, a medium security facility with an adjacent minimum security satellite camp and a detention center. They met with the warden and staff and spoke with two prisoners. They reported that Otisville has a special focus to debrief and rehabilitate former gang members. Rehabilitation efforts are strong with ESL and GED available, computer skills training, and vocational training. Aware of the acute problem of boredom among inmates, Otisville offers extensive programming to keep prisoners occupied. She described as well a state-of-the-art gym and opportunities for team sports. She observed that the housing unit featured cells with double bunks, freedom of movement, and comfortable community space. From her conversation with the warden and the staff, she felt there was genuine concern for rehabilitation and re-entry. The representatives of Otisville reported that there was *no* violence at the prison. Judge Scheindlin questioned if Otisville was representative or an outlier.

The committee also met with two prisoners. The first was a former gang member of the Aryan Nation who had spent 15 years in solitary. He reported that his experience outside of Otisville is that prisons are controlled by gangs. With the help of the program at Otisville, designed for people who want to break their ties with gangs, he now has re-

nounced his affiliation. He reported that now that he has done so, he believes that if he returned to certain states he would be killed. The second prisoner, convicted of bank robbery, has a wife and children at home. At Otisville, he found both religion and education. In fact, he learned to read. His goal, when released, is to work with a re-entry population in the area of drug addiction.

Judge Underhill, who has made visits to a number of prisons, remarked that Otisville is something of a jewel within the Bureau of Prisons. The warden is progressive and he instills in inmates and guards a positive culture to bring out the best in people.

Judge Underhill made some general observations about the critical importance of internal jobs for inmates. He is a huge supporter of UNICORE and the values that inmates learn by having a job, including learning respect, working with others, efficiency, thrift, and how to handle their earnings. He reported that for many inmates, the job they have in prison is their first job and will give them the skills they need to find and keep a job upon release. Judge Underhill also made a powerful suggestion that the criminal rules should be changed to allow sentenced defendants to have one opportunity, after serving a prescribed portion of their sentence, to go back to the sentencing judge and ask for a sentencing reduction based on rehabilitative efforts while in prison. Interestingly, a few weeks after the program, Judge Underhill authored an opinion piece that was published in *The New York Times* making the same suggestion (*available at* http://www.nytimes.com/2016/01/24/opinion/sunday/did-i-sentence-a-murderer-or-a-cooperative-witness.html?_r=0).

The takeaway: The judges saw what appeared to be both a highly functional and effective program at Otisville. Perhaps what they saw was indicative of other successful programs in the Bureau of Prisons system. On the other hand, perhaps, as Judges Scheindlin and Underhill suggested, what they observed was an aspiration for prison life – but not indicative of a typical prisoner's experience.

The Inmate's Views

Jeff Smith, based on his experience at Manchester, a medium security facility with an adjacent minimum security satellite camp, was sharply critical of the Bureau of Prisons and prison life. (Although Smith was convicted of a white collar crime, he was assigned to Manchester rather than a camp facility. His observation was that 98 percent of the inmates at Manchester had been convicted of drug-related charges.) He described difficult and often undignified circumstances during his year of incarceration at the facility.

His experience sharply contrasted with the description of Otisville provided by Judges Scheindlin and Underhill. In his experience, there were no programs to improve inmates, to tap potential, or to provide education. He further criticized the system for making the ability to stay in touch with loved ones so difficult – crippling an important support system. He reported, for example, that a phone call from prison cost $1 to $2 per minute. However, his monthly salary for his job of moving food from the trucks to the prison freezers was $5.25. Those financial constraints also made it difficult to have decent hygiene and maintain personal dignity. Other than a bar of soap, every other personal hygiene product – deodorant, shampoo, toothpaste – had to be purchased.

He described his experience that most prisoners have a "hustle" inside – so that they can make money to survive. From his perspective, many inmates have sharp entrepreneurial skills, with no opportunity to redirect them in a productive way into legitimate meaningful work.

He described that his one and only educational opportunity while incarcerated consisted of a computer class in which the following occurred: Inmates were told to (1) turn on the "on" button; (2) turn off the computer; (3) shut the "f" up; and (4) get back to your cells. That was the whole of it.

The takeaway: Smith has an agenda to reform prisons. He wants prisons to provide education, to provide dignity, and to maintain family relationships as much as possible. He recently authored a book on this subject.

With a goal of change, he is not in the business of talking about what prison does well. On the other hand, he may not have seen Manchester doing anything well.

The BOP Representative's View

As a representative of the Bureau of Prisons, Michael Tafelski spoke about it in extremely positive terms. He described the bureau's mission as protecting society by confining offenders in facilities that are safe, humane, and appropriately secure, and that provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens. In short, the bureau wants to do what is right.

He described a typical day in the 121 federal correctional institutions as follows: Lights go on at 6 a.m. At 6:30, there is breakfast, religious time, pill line, and meeting with dieticians and health professionals for sick call. Work call begins at 7:30 and all inmates are assigned to work through a variety of different programs. Lunch is provided at 11 a.m. and inmates return to work until 3:30. At 4 p.m. there is an inmate count.

Following dinner there are other opportunities for religious, educational, and recreational programs. At 9 p.m. the compound closes and at 11:30, the lights go out. There are multiple counts during the night.

He reported that recent surveys demonstrated that 82 to 94 percent of inmates feel safe.

He described the major challenges facing the Bureau of Prisins as, (1) the use of restrictive housing (a/k/a solitary confinement); (2) the treatment of mental health issues by the 600 doctoral level psychologists who are part of the system; and (3) preparing inmates for re-entry, which he described as beginning on the first day of prison.

With respect to recidivism, his perspective was that large populations are addicts before they come to prison, and that until we as a country straighten out our drug problem, we are not going to see a decline in recidivism.

The takeaway: The Bureau of Prisons has an enormous job to accomplish under extremely challenging circumstances. No doubt it has both strengths and areas for improvement. It certainly appears that the Otisville facility is one of the jewels of the bureau's system, but it also caters to a unique population of inmates including those seeking to break free from a gang environment.

On a topic as complex and varied as understanding what a day in the life of a Bureau of Prisons inmate is like, we can only expect the answers to be as diverse as the experiences of the participants in the system. Indeed, the only way to attempt to form some sense of the "truth" of the experience is to learn from all of the perspectives in the quest for improvement, and also to understand that each facility has its own unique environment, staff, and culture. As we focus on change, we need to consider both macro and micro issues.

IP Law

Implications of the 2015 Amendments to the Federal Rules on Patent Cases

By Paul W. Garrity and Tyler E. Baker





The December 1, 2015 amendments to the Federal Rules of Civil Procedure ("FRCP"), including amendments to Rules 1, 4, 16, 26, 33, 34, 37, 55, and 84, will have a clear and immediate impact on federal court litigants. The amendments apply to newly filed cases, as well as pending cases insofar as "just and prac-

ticable." This article examines some of the key amendments to the FRCP and considers the impact these new procedural rules will have on patent litigation practice.

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Rules 26(b) and (c)

Some of the most significant amendments include those to Rules 26(b) and 26(c), which seek to codify a discovery rule of proportionality. According to the notes of the Civil Rules Advisory Committee (the "Advisory Committee"), the amendments to Rule 26 are intended to promote efficiency and prompt early discussion about discovery between the parties. Broad language previously found in the Rule ("reasonably calculated to lead to the discovery of admissible evidence") has been replaced with the language that will impact the scope of discovery. The revised Rule now requires that the parties consider whether discovery is "proportional to the needs of the case" in making discovery requests, responses, and objections. *See* Rule 26(b)(1). In determining proportionality, amended Rule 26(b)(1) considers:

(1) The importance of the issues at stake;

(2) The amount in controversy;

(3) The parties' relative access to relevant information;

(4) The parties' resources;

(5) The importance of the discovery in resolving the issues; and

(6) Whether the burden or expense of the discovery outweighs its likely benefit.

No single factor is designed to outweigh the other factors in determining whether the discovery sought is proportional. While acknowledging that the burden of responding to discovery lies heavier on the party who has more information, the Advisory Committee Note explains that this change to Rule 26 neither places the burden of addressing all proportionality considerations on the party seeking discovery, nor permits the opposing party to refuse discovery by making boilerplate objections based on proportionality.

Proportionality will be welcome in patent disputes. The patent bar has come a long way since the court in *Minnesota Mining & Mfg. Co. v. Norton Co.*, 36 F.R.D. 1, 3-4 (N.D. Ohio 1964), bemoaned, when considering patent suits, that "no other segment of cases on our docket produces such consistent examples of bitterness, stubbornness and pettiness." That said, it remains the case that intellectual property litigation costs substantially more on average than other types of civil litigation. While multiple jurisdictions, including the Southern District of New York, have adopted local patent rules, these rules do not speak to the scope of discovery. The amendments to the FRCP should function to close this gap. Indeed, the new rules have already been applied in patent cases. The Eastern District of Michigan, in a ruling granting a motion to quash a third party subpoena in a patent dispute, noted with respect to the construction of proportionality that it must be read in conjunction with the additional limitations on the scope of discovery found in Rule 26(b)(2)(C). *Hemlock Semiconductor Corp. v. Kyocera Corp.*, No. 15-cv-11236 (E.D. Mich. Jan. 6, 2016).

Rule 84

An additional change to the FRCP is the abrogation of Rule 84. This Rule had provided that the forms in the Appendix of Forms "suffice under these rules and illustrate the simplicity and brevity that these rules contemplate." Form 18 of the Appendix ("Complaint for Patent Infringement") had long allowed patent owners to file a complaint without articulating a theory of infringement with particularity. The sufficiency of such plead-

ing had been upheld by the U.S. Court of Appeals for the Federal Circuit, ruling that "a proper use of a form contained in the Appendix of Forms effectively immunizes a claimant from attack regarding the sufficiency of the pleading [i.e., a motion to dismiss]" (*K-Tech Telecomm., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1283 (Fed. Cir. 2013)), and "to the extent the parties argue that *Twombly* and its progeny conflict with the Forms create differing pleadings requirements, the Forms control." (*In re Bill of Lading Transmission and Processing Sys. Patent Litig.*, 681 F.3d 1323, 1334 (Fed. Cir. 2012).

Under the old Rules, artful patent litigators commonly filed bare-bones complaints that provided little notice of the asserted claims. As such, the plaintiff faced minimal risk of being confined to a particular theory of infringement and the accused infringer bore the burden of advancing a non-infringement position without any meaningful understanding of the patentee's claims. Non-practicing entities, who have dominated the statistics for patent-infringement actions, often exploited this tactic to initiate litigation without incurring the expense of a thorough investigation, and to instigate swift nuisance-value settlements by placing the financial cloud of discovery and establishing non-infringement on the alleged infringer.

More constructively, the liberal patent infringement pleading standards were truly beneficial in situations where the patentee genuinely suspected infringement, but was unable to extensively compare the patent claims to the accused product in the absence of some meaningful discovery, for instance, infringement actions concerning computer-based systems that seemingly operate in a black-box. The Rule also afforded the plaintiff the further benefit of developing its infringement position according to the substantive responses of the accused infringer.

The abrogation of Rule 84 will have at least some impact on patent litigation even though the Advisory Committee Note for the amendment states that "[t]he abrogation of Rule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8." Practitioners asserting claims for patent infringement are, of course, now advised to satisfy the pleading standards set forth by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). To meet these standards, patent owners will likely be required to enumerate a specific infringement theory, state with particularity the patent claims that are being infringed, and provide more detail supporting their infringement allegations.

For traditional filers of patent infringement actions who diligently performed pre-filing investigation, the difference should be subtle and not necessarily significant. For others, the requirement for more factual detail supporting infringement allegations should deter the pursuit of questionable claims for the purpose of instigating nuisance-value based settlements. The new pleading standards also should balance the odds between the parties by providing the accused infringer with more adequate notice of the asserted claims and a chance to challenge frivolous claims on non-infringement grounds at the pleading stage. Moreover, the new rule should further serve the interests of judicial economy by allowing the federal courts to define more targeted discovery parameters at an earlier stage and reduce the volume of defensive motions challenging the sufficiency of pre-filing investigations under Rule 11.

Editor's note: Paul W. Garrity is the managing partner of Sheppard Mullin Richter & Hampton LLP's New York office. Tyler E. Baker is an associate in the firm's New York office.

A Clarification

Senior U.S. District Judge Jack B. Weinstein, highlighted in the article, "Celebrating Four Fabulous Nonagenarians for E.D.N.Y.'s 150th," in our September/October/November 2015 issue, has let us know that he served as Lieutenant Weinstein in the Navy on a submarine that sank a Japanese Cruiser, and not, as we wrote, as Lt. Commander Weinstein. Our apologies for the error.

In the Courts

A Southern District Tradition

By Lisa Margaret Smith

On December 4, 2015, a group of thespians presented the annual Courthouse Follies at the Moynihan Courthouse in Manhattan. The Follies, a send-up of current events using silly songs and comic dialogue, has been a regular holiday gift to the Southern District of New York community for more than 20 years. An extraordinary group of Southern District employees and members of the greater courthouse community come together, inspired by the humorous lyrics and repartee written for this purpose and, after a few rehearsals, manage to amuse a crowd full of judges, courthouse employees, attorneys, relatives, and other friends of the court. This year was no exception.

Nancy Festinger's Creation

The Follies was the brainchild of the late Nancy Festinger, who was a fixture in the Southern District's interpreter's office, and although the show initially was performed by members of the interpreter's office staff, over time it grew to include courthouse employees of every kind, as well as private attorneys, law clerks, and even judges. Nancy was the original creative writer, with a



Judges Swain, Smith, Rakoff, and Ellis. Photo courtesy Paula Gold, Chief Interpreter, Southern District of New York.

co-creator, although after a few years she partnered with Steven Statsinger, who then was an attorney with the Federal Defenders' Office and who now is a judge of the Criminal Court of the City of New York.

After Nancy's untimely death from cancer in 2012, the reins of the show were expertly picked up by Nancy's colleague in the interpreter's office, David Mintz, and he has continued to collaborate with Judge Statsinger to create the annual show. Judge Statsinger returns to his old stomping grounds each year as co-author in support of the efforts of the cast and crew to create another masterpiece – or, if not a masterpiece, at least the source of much laughter. Nancy once described the Follies as a show that makes fun of everyone, including politicians, judges, attorneys, and the cast members themselves, and that continues to be the great joy of the event. The show has been lovingly dedicated to the memory of the amazing Nancy since 2012.

The cast has traditionally included several judges, with a humorous scene written by Judge Jed Rakoff every year since 2000. There was even an occasion when Judge Sonia Sotomayor participated, dressed as a hobo. For the past few years a quartet of judges has trod the boards, presenting a song with original lyrics written by Judge Rakoff. The quartet includes Judge Rakoff, Judge Laura Taylor Swain, Judge Ronald L. Ellis, and this author. This year's song was called "It's a Jury Trial," and it celebrated the joy of holding a jury trial, from the viewpoint of 2030, by which time jury trials, according to the show, will have become a thing of the past. Judges Swain, Ellis, and myself, bewigged, served as senior judges, while Judge Rakoff, wearing a beanie, represented a "baby" member of the Southern District bench. As usual, the song, with its accompanying dance, was a great hit.

Another highlight included, "You're Gonna Lose This Deal," sung by a frustrated attorney, played by interpreter Cristina Arsuaga (dressed like a clown) to her uncooperative client, Judge Statsinger (dressed in an orange jumpsuit). Judge Statsinger, whose character had been accused of stealing food from the courthouse cafeteria, offered the heart-rending, "I Dreamed of Cream of Mushroom Soup."

Memorable Moments

Other memorable moments included, "It's Our Job and We Can't Fall Short," performed beautifully by law clerks Craig Convissar, Ravi Ramanathan, and Steve Schuldman along with commercial litigator Caitlin Fahey; "Since I am a Rich Man," in a top notch performance by Craig Convissar; "He Surely Knew What Crime It Was," sung elegantly as both a ballad and an upbeat jazz number by the show's prosecutor, played by Labe Richman, who actually is a defense attorney; and "I Don't Get No Satisfaction," performed with feeling by David Mintz as Chief Judge Fleska.

The raucous finale, "Come, Friends, We've Been Set Free," was sung by the entire cast, and was followed by a standing ovation from the audience. The Follies' extraordinary pianist, Norma J. Curley, did her usual outstanding job of accompanying the singers, modulating as needed whenever the performers found a new and unexpected way to sing a song.

For those who have never seen the Follies, I recommend that next year, in late November, you keep watch for signs in the Moynihan Courthouse advertising the 2016 event. You will not be disappointed!

My View

The Answer to Gun Control

By Steven M. Edwards



Here is the answer to the gun control problem: Put a GPS chip on every gun so it can be tracked wherever it goes. Satellite net-

works can be programmed to send warnings to law enforcement whenever there are concentrations of guns or guns are in suspicious locations. If a person appears to be driving around with an arsenal of guns, law enforcement can check it out. If a person appears to be taking guns into a movie theater, a church, or a school, law enforcement can get there in a hurry. If multiple people with guns are converging on a concert venue, multiple law enforcement people can be there to meet them.

The chips can be programmed to identify the type of gun, just as a GPS system in a car can identify the make and model. Law enforcement will know whether the gun is an assault weapon or a hunting rifle. Law enforcement also will be able to pinpoint the location of guns that have been lost or stolen.

The chips can be programmed so it is possible to tell whether the gun is in the possession of law enforcement or a member of the public. If a police officer loses or sells his or her gun, the GPS chip can be programmed to give off a signal making it clear that the gun is no longer in the exempt category. Law enforcement will be able to follow guns after a crime has been committed, as well as before.

It should be relatively simple to program the GPS chip to give off a signal if it is no longer attached to the gun. Like a home smoke detector, the signal can be off so long as everything is in proper working order. As soon as the bond between the chip and the gun is broken, however, the alarm could go off.

It will be necessary to have a power source for the chip, but it should be possible to accomplish that with batteries. Watches have batteries that last for years. Rechargeable batteries are also a possibility.

A law can be passed requiring that every newly manufactured gun have a chip. Guns already in circulation would have to be brought to centers where chips can be embedded; otherwise they are unlawful guns. It may take some time, but after five or 10 years, virtually every gun could have a GPS chip.

Here is the answer to the gun control problem: Put a GPS chip on every gun so it can be tracked wherever it goes.

The Second Amendment

GPS chips on guns would not violate the Second Amendment. No one would be prevented from obtaining a gun. GPS chips on guns is just a way of regulating the possession of guns. In *District of Columbia v. Heller*, the Supreme Court made it clear that the government can regulate the possession of guns in various ways, including prohibiting felons and the mentally ill from possessing guns, forbidding the carrying of guns in sensitive places such as schools and government buildings and passing laws imposing conditions and qualifications on the commercial sale of arms. Compared to many of the restrictions on firearms that are universally accepted today, putting chips on guns imposes a relatively minor burden on the exercise of Second Amendment rights. GPS chips will have no impact on the ability of people to keep and bear arms.

Nor would GPS chips violate any privacy rights. GPS chips on guns would be like electronic license plates. We put licenses plates on cars so we can keep track of them. We recognize that cars can be stolen or used to commit crimes. Licenses plates make it easier to find cars, and they would make it easier to find guns.

It might be argued that there is no right to drive a car – it is a privilege – while there is a right to own a gun. But other constitutional rights are licensed in various ways. A speaker may be required to get a permit. A church may be required to identify itself in order to get a tax exemption. The Supreme Court in *Heller* explicitly recognized that the government may require a gun owner to get a license, so why not an electronic license?

U.S. v. Jones

The Supreme Court's decision in *United States v. Jones* is not an impediment. In *Jones* the Supreme Court ruled that placement of a GPS device on a car was a "search" under the Fourth

Amendment. The Court did not rule that it was an unreasonable search – it left that question open because the government had not raised it. The fundamental problem in *Jones* was that the defendant's expectation of privacy was violated when the police surreptitiously put a GPS device on his car. If GPS chips are put on every gun, no one will be surprised that they are being used for tracking purposes. It is not a search any more than tracking a plane by radar is a search.

The beauty of the GPS chip solution is that it answers the objections of gun control opponents. It will not keep guns out of the hands of law-abiding citizens. It will not prevent people from carrying guns where it is permitted by state law. And it will be far more effective than measures such as background checks.

Whenever a mass shooting tragedy occurs, the opponents of gun control suggest that the tragedy could have been averted, or at least minimized, if the victims had guns to protect themselves. Those on the other side of the argument express concern about innocent people being killed if untrained people try to use guns to protect themselves. My proposal for GPS chips on guns provides a compromise: By enabling law enforcement to determine whether guns are in the wrong places, law enforcement can get there quickly and use their training to provide an effective response.

Think of what law enforcement could have done if it had detected Adam Lanza when he was 10 miles away from the Sandy Hook School with a cache of weapons. Think of what would have been possible if the police in Aurora, Colorado, had been alerted as soon as James Holmes entered a movie theater with guns. Consider what the people enjoying a holiday party at the San Bernardino Department of Health could have done if they had known they were in danger as soon as Syed Farook and Tashfeen Malik entered the parking lot. Imagine the lives that could have been saved at the Bataclan Theater if the police had known that there was a carload of people with guns driving through the streets of Paris.

It is a solution too good to pass up.

Legal History

A Few Good Men

By Steven M. Edwards

You cannot make this stuff up.

John Chestnut Whittaker was one of the first black cadets appointed to West Point. He was born a slave on the Chestnut plantation in South Carolina. He was owned by James Chestnut, who ordered the first shot to be fired on Fort Sumter, beginning the Civil War. He began his education at the University of South Carolina and was appointed to West Point in 1876 as part the reconstruction effort to provide opportunities to African Americans after the war. By all accounts, he was a very religious person, and he carried his mother's bible with him wherever he went.

Whittaker's life at West Point was miserable. The white cadets decided that it would violate their "Honor Code" to talk to Whittaker, so he sat alone in the dining room, carried his own utensils back and forth, and for the most part had no friends. The lone exception was his roommate the first year, Henry Flipper, who was also black and was the first African American to graduate from West Point. But Flipper was gone after Whittaker's first year (more about Flipper later).

In Whittaker's fourth year, he was found tied to his bed, bleeding from knife wounds and bruised from what appeared to be a severe beating. Pages had been torn from his Bible, and a note was pinned to his shirt that said, "Mr. Whittaker, you will be fixed." The incident attracted national attention, with members of Congress and the northern newspapers demanding that the Superintendent of West Point do something. The Superintendent was General John M. Schofield, who had fought with Sherman during the Civil War, served as Secretary of War under President Andrew Johnson, and later recommended the establishment of a naval base at Pearl Harbor in Hawaii (the Schofield barracks in Oahu are named after him).

After a lengthy investigation, Schofield concluded that Whittaker had faked the attack because

he was failing a philosophy course and was concerned about being expelled from the school. There was a court martial, and Judge Advocate Major Asa Bird Gardiner was brought in to be the prosecutor. Gardiner was an avowed racist who later became active in New York City politics. A leader of Tammany Hall, he became the Manhattan District Attorney but was removed from office by Governor Theodore Roosevelt on charges of corruption.

Whittaker was convicted, but he appealed the decision, and it ultimately was overturned by President Chester A. Arthur. Nevertheless, Whittaker was "separated" from West Point on the order of Secretary of War Robert Todd Lincoln, President Abraham Lincoln's son, because he had failed the philosophy exam. Lacking a commission that would enable him to serve in the army, Whittaker went back to South Carolina, went to law school, and passed the bar. He ultimately became an educator and served as a high school principal in Oklahoma City, where Ralph Ellison was one of his students, and was a professor of psychology at the college level. In 1995, President William Clinton awarded Whittaker a posthumous commission.

Matter of Honor

Michael Chepiga, a former Simpson Thacher partner and Federal Bar Council veteran, has written a play about this. Entitled "Matter of Honor," the play had a successful run at the Pasadena Playhouse in 2008. Chepiga examines the subject on multiple levels through a fictional character named Chase, a private investigator who has been hired by Schofield to investigate the Whittaker episode. Early in the play, Schofield tells Chase that he is in a difficult position because there are people who are of the opinion that he has not done enough for Whittaker and there are those who think he has done too much. Chase responds:

> Opinions are useless. People will argue forever and never change their minds. You have to ignore all that and focus on just one thing – the facts. Once you have *them*, what you have to do becomes simple and clear.

As the play progresses, we see Chase embracing the world of science, which can determine things with certainty, while Whittaker clings to faith and his Bible. Ultimately, Chase concludes that Whittaker did it to himself, because that is the only theory that fits the facts. Shortly before the trial, however, it is revealed that Chase is a deeply flawed person with a drinking problem who is haunted by his parents' decision to pay a poor Irish immigrant $700 to serve as Chase's substitute in the draft. When he testifies at trial, Chase states that his earlier conclusion was wrong – it was only a theory that fit the facts – and he had missed one basic fact: "It's just not in his nature." Whittaker had endured the worst possible treatment at West Point, but he had persevered. In fact, he already had been told that he would be given another chance to take the philosophy exam when the incident occurred.

The moral of the story is that Whittaker should have been given the benefit of the doubt because the government had the burden of proof. He was convicted on the basis of opinions masquerading as facts. In the end, he persevered; he lived to be 73 and was known for his quiet dignity and his refusal to criticize West Point.

Whittaker was convicted on the basis of opinions masquerading as facts. In the end, he persevered; he lived to be 73 and was known for his quiet dignity and his refusal to criticize West Point.

Henry Ossian Flipper

The story of Whittaker's first year roommate, Henry Ossian Flipper, is even more extraordinary. Like Whittaker, Flipper was born a slave. Like Whittaker, he was ostracized by the other cadets at West Point. But unlike Whittaker, he graduated and received his commission. Flipper was assigned to the 10th Cavalry Regi-

ment, a group of all black soldiers. He was the first African American to lead that group, which was known as the "Buffalo Soldiers." According to popular lore, they were given that name by their Native American adversaries, who thought their hair resembled that of bison. And yes, it's the same group that Bob Marley was talking about when he wrote "fighting on arrival, fighting for survival."

Flipper was an extraordinarily capable and personable individual. His commander, Captain Nicholas M. Nolan, took Flipper under his wing and made him his right hand man. Nolan infuriated his colleagues by inviting Flipper to dinner, where his daughter was present, and Flipper eventually became friendly with Nolan's sister-in-law, and they often rode horses together. This just wasn't done in 1879 in the United States, let alone at an army base in Texas. Nolan's response to his critics was that Flipper was an "officer and a gentleman."

In 1879, a federal marshal arrested a number of local ranchers for illegal possession of tobacco and took them to trial before a county judge. The county judge acquitted the ranchers, so the marshal arrested the county judge and other officials and brought them to Fort Elliott, where Nolan and Flipper were stationed. Nolan directed Flipper to sneak



Henry Ossian Flipper. Photo courtesy the Miriam and Ira D. Wallach Division of Art, Prints and Photographs: Print Collection, The New York Public Library. "Lt. Flipper." The New York Public Library Digital Collections.

the prisoners out in the middle of the night, but they were caught, and the federal marshal brought charges against Flipper for obstruction of justice. Flipper was convicted by a federal judge, who fined him $1,000, but the fine was quickly suspended shortly after the marshal left town.

The story of Whittaker's first year roommate, Henry Ossian Flipper, is even more extraordinary.

Flipper then was transferred to another fort, where he was appointed quartermaster. Flipper continued his relationship with Mollie Dwyer, which did not sit well with some of his colleagues. He was accused of embezzlement, among other things, and subjected to a court martial. Flipper was acquitted of embezzlement but convicted of "conduct unbecoming an officer and a gentleman." The basis for the conviction was unclear, but correspondence between Flipper and Dwyer was among the evidence used against him. As a result of the conviction, Flipper was discharged from the army.

Flipper went on to become a very successful civil engineer, working in Texas, Mexico, Arizona, and Venezuela. He made a lot of money and eventually ended up in Washington as a special assistant to the Secretary of the Interior. He died at the age of 84 in 1940. It is said that Henry Flipper was a favorite of General Colin Powell, who for a number of years had a painting of Flipper leading the Buffalo Soldiers on the wall behind his desk. In 1998, a group of lawyers from Arnold & Porter, working pro bono, filed a petition with the White House seeking a pardon. On February 19, 1999, President Clinton granted Henry Flipper a full pardon. There is now a Henry O. Flipper award at West Point for graduating cadets who exhibit "leadership, self-discipline and perseverance in the face of unusual difficulties."

It is said that Henry Flipper was a favorite of General Colin Powell, who for a number of years had a painting of Flipper leading the Buffalo Soldiers on the wall behind his desk.

Unfortunately, nice guys do not always finish first, but if they persevere, they may ultimately get the recognition they deserve. They also can lead good lives, which may be enough of a reward in itself. John Chestnut Whittaker and Henry Ossian Flipper were a couple of good men who persevered.

Personal History

How FBI Misconduct in 1968 Affected the "Amount in Controversy" in 1976

By Pete Eikenberry



Prior to 1976, no action based on a federal question jurisdiction could be brought without satisfying the "amount in controversy" requirement (then $10,000.) In 1970, I was a candidate for U.S. Congress in the Democratic primary in the 14th Congressional District in Brooklyn when I was interviewed by Tom Buckley, a reporter from the *New York Times*. Tom informed me that my adversary, 28-year congressman John Rooney, had stated to Buckley that Rooney had had me investigated by the FBI (in my 1968 campaign against Rooney.)

At the time, the FBI's funding was controlled by a house subcommittee chaired by Rooney. Buckley also passed the same information along to Hofstra Pro-

fessor Leon Friedman, who was an attorney for the ACLU.

Friedman approached me after I lost the 1970 primary contest; he asked if I would be willing to sue the FBI if the ACLU represented me, and I agreed. During my action against FBI officials, Friedman secured in discovery an FBI memo. It revealed that Rooney had telephoned the FBI in 1968 and had asked for a full field investigation of me and for it to turn over my FBI file to him.

Hoover's Mark

In the margin of the memo there was a "no" with an "H" next to full field investigation, and a "yes" with an "H" next to it as to turning over my file. Another FBI memo explained that the "H" represented J. Edgar Hoover's disapproval and authorization, respectively.

My lawsuit eventually was dismissed in the U.S. District Court for the District of Columbia, to which it had been transferred from the Eastern District of New York, for the reason that the claim did not meet the $10,000 amount in controversy required by statute. Thereafter, in Washington, Professor Friedman ran into a former student who was an aide to the congressman who headed the House Committee on the Courts and the Administration of Justice. As a result of the encounter, in 1976, the subcommittee recommended and Congress passed legislation that eliminated the amount in controversy requirement for suits against the U.S. government or its agents.

On appeal in the U.S. Court of Appeals for the District of Columbia Circuit, my case against the FBI was reinstated retroactively because of the passage of the statute as amended to make it retroactive. *See Eikenberry v. Callahan,* 653 F.2d 632 (D.C. Cir. 1981).

As a result of the encounter, in 1976, the subcommittee recommended and Congress passed legislation that eliminated the amount in controversy requirement for suits against the U.S. government or its agents.

In 1980, this same subcommittee under the same chair got the requirement dropped by Congress for all federal question cases.

This past January, while working on his memoirs, Professor Friedman recalled this sequence of events and brought them to my attention.

\Other Documents

I also learned that he had other documents that he had received in discovery from the FBI. I had never seen them. They included some from the investigation, arrest, and sentencing to a jail term of a constable in Grenada, Mississippi. He had slugged me when I had served him with a subpoena while I was a civil rights lawyer in 1966.

Among the documents were other "confidential" communications between the FBI and Rooney from 1958 to 1978, including information on other election opponents of Rooney who had been investigated by the FBI at his request.

Also, in a 1958 letter signed "Edgar," *New York Post* reporter Murray Kempton was stated to be "a former member of the Young Communist League." In the same letter, the *Post* editor was alleged to be a former member of the Young Communist League as well.

My eight-year action against FBI officials became moot once Hoover and then the other two individual FBI defendants died. In my lawsuit, the FBI officials were defended by Assistant U.S. Attorney for the Eastern District Bob Begleiter, who subsequently became a good friend and a fellow Federal Bar Council member.

Federal Bar Council
123 Main St., Suite L100
White Plains, NY 10601-3104

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