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Provocative, Human, Eclectic

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From the President

Norms and Expected Behavior for Lawyers

By David R. Schaefer



Recently, there has been much discussion about the norms and expected behavior of our political leaders. Without commenting on that, it is important to note that there are also norms and expected behavior for lawyers practicing in our courts. The Federal Bar Council has traditionally played an important role in fostering and promoting those attitudes. Chief among them is for those practicing before the federal courts in the Second Circuit to deal with our adversaries and the judiciary in a cordial, truthful, and respectful manner.

The practice of law in our courts presents its own challenges. Bright and talented lawyers at the beginning of their careers face enormous pressure to work long hours to be successful. Litigation is by its nature an adversarial process, most often with participants who are winners or losers. Very often the clients engaged in litigation are there because of contentious, high stakes disputes, either caused by, or resulting in, antagonism between the parties

It is our role at the Federal Bar Council, and our individual role as practitioners in the federal courts, to care about the level of discourse, the level of collegiality, and the truthfulness and the integrity of those engaged in this activity. The increased pressure to satisfy demanding clients and to meet the demands of law firms in a competitive environment lead new lawyers to perceive that being aggressive and antagonistic to opposing lawyers, and sometimes even to judges, is necessary and acceptable. There are many very good reasons why such conduct is not successful or acceptable in the long run, or even the short run.

Most practitioners know that litigating in the federal courts in the Second Circuit can be an extremely enjoyable and rewarding practice. There is nothing better than to try a case where you are opposed by a talented, collegial, ethical lawyer, and are appearing before a brilliant judge who respects the attorneys and conducts a trial with the understanding that the attorneys and the judge are engaged in an important public exercise to resolve a dispute in an efficient manner with the ultimate goal of justice being done.

It is our responsibility to continue to mentor and counsel our fellow practitioners as to the importance of dealing with our adversaries and co-counsel in a collegial manner and with the utmost integrity.

It is our responsibility to continue to mentor and counsel our fellow practitioners as to the importance of dealing with our adversaries and co-counsel in a collegial manner and with the utmost integrity. This should be reflected in the language that attorneys use in communicating with each other, as well as the extension of courtesies to opposing counsel that do not significantly prejudice your client. It also takes the form of encouraging attorneys to engage in activities, such as those of the Federal Bar Council, to sharpen their skills, while at the same time developing personal relationships with other practitioners and judges to further the collegiality and quality of practice in the courts of our circuit.

Just as there are norms that are established for the way presidents and other public officials conduct themselves and interact with each other, there are customs and norms that the Federal Bar Council has been engaged in developing and encouraging for over 50 years. Making sure that these customs and standards continue in the future is our responsibility and requires our continuing commitment.

From the Editor

Judge Jack B. Weinstein Feted on His 50th Anniversary on the Bench

By Bennette D. Kramer



On July 13, 2017, the U.S. District Court for the Eastern District of New York held a celebration honoring Judge Jack B. Weinstein's 50 years on the bench in the Ceremonial Courtroom in the Brooklyn courthouse. At age 95, despite his senior status, Judge Weinstein shows no sign of slowing down: He is still an active district judge, teaches at Brooklyn Law School, and publishes scholarly articles at a steady pace. Judge Weinstein is a truly remarkable person with a fearsome list of accomplishments, and yet he seemed humbled by the kind words of the speakers at the celebration.

To begin the ceremony, Karen Greve Milton, the Second Circuit's executive, sang the national anthem. I, for one, was moved by Ms. Milton's beautiful voice. This was a lovely way to start what became a remarkable ceremony.

In her opening remarks, Chief Judge Dora Irizarry provided a biography of Judge Weinstein, highlighting his contributions to the Eastern District. Born to an immigrant family in Wichita, Kansas, Judge Weinstein grew up in Brooklyn, New York, earned a B.A. at Brooklyn College, and then served in the Navy during World War II from 1943 to 1946. After he got out of the Navy, he went to Columbia Law School on the GI Bill, graduating in 1948, followed by a clerkship on the New York Court of Appeals. Judge Weinstein worked on the NAACP legal team that successfully litigated *Brown v. Board of Education*. He also was County Attorney of Nassau County from 1963 to 1965, under the late Judge Eugene Nickerson as County Executive. Judge Weinstein taught at Columbia Law School from 1952 through 1967, continuing as an adjunct until 1998.

Judge Weinstein was sworn in as a judge of the Eastern District on April 15, 1967, serving as chief judge from 1980 to 1988. Among the many books Judge Weinstein has written are *Weinstein's Evidence* and *New York Civil Practice* (Weinstein, Korn and Miller). Judge Weinstein told Judge Irizarry that he owes his success as a judge to the lessons he learned in the Navy about leadership, teamwork, developing vision, and the ability to realize the vision and turn it into action, innovation, boldness, and courage.

Transformed the Court

As chief judge, Judge Weinstein transformed the court and made it a model of innovation for federal courts nationally. His driving impetus is to protect the rights of all litigants, and to make sure that they all have due process and equal protection. Judge Weinstein also has been a champion of judicial independence, criticizing mandatory minimum sentences because they take away judicial discretion. As an example of Judge Weinstein's many innovations in the Eastern District, he was instrumental in transforming how magistrate judges were utilized. Previously, magistrate judges only performed criminal duties. Now they handle almost all pretrial matters and many motions for all types of cases, which has resulted in the attraction of increasingly qualified magistrate judges. Former Chief Judge Carol Amon was one of the first judges who became a district judge after serving as a magistrate judge.

Judge Weinstein also was instrumental in creating case management models for handling natural disasters. He expanded the Eastern District's arbitration and mediation program, which became a national model, as were other programs such as the Eastern District Pro Bono Panel and the Eastern District Civil Litigation Fund. (This author is a board member of the fund,

which provides support through payment of disbursements (approved by a judge and the fund's board) to pro bono attorneys representing pro se litigants.) Judge Weinstein also set up the Criminal Justice Act Committee, the only standing committee of the court, which oversees the administration of the CJA Panel whose members provide counsel to indigent defendants.

After Judge Weinstein stepped down as chief judge, he proposed additional justice-related programs that have been adopted by the court. For example, the Special Options Services Program for defendants ages 18 to 25 provides alternatives to pretrial detention.

Chief Judge Irizarry said that Judge Weinstein acts as a mentor to his fellow judges. He is always the first judge to offer to help colleagues and ready to talk over legal questions, life, or nature. He is famous for his notes to colleagues and others. He volunteers to try cases or otherwise lighten his colleagues' loads. He has volunteered to clear the backlog of habeas petitions. And every holiday, he visits every chambers and court staff. He is a true Renaissance man.

While Judge Irizarry talked, Judge Weinstein shook his head. He seemed overwhelmed by her praise.

Associate Justices

The next part of the program featured brief remarks presented by video, from Associate Justices Ruth Bader Ginsburg, about Judge Weinstein's concern for the health and welfare of society, and Sonia Sotomayor, about Judge Weinstein's sense of integrity, fairness, and kindness and his efforts to do justice and the right thing. Second Circuit Chief Judge Robert Katzmann spoke about Judge Weinstein as a role model in public discourse. Each also shared personal remembrances of Judge Weinstein.

On Behalf of His Clerks

One of his former clerks, Les Fagen, a partner at Paul Weiss, spoke on behalf of all of Judge Weinstein's clerks. Fagan said that all his clerks were in awe of Judge Weinstein, who was freaky smart, formidable, intimidating and "unfamiliar with self-doubt." Judge Weinstein's clerks are an extraordinary group of lawyers who have been mentored by the judge. Fagan said that Judge Weinstein was perplexed by the awards and honors he was receiving because he was just doing his job. Fagan described Judge Weinstein's life work as the pursuit of justice coupled with disregard for popularity.

Before Judge Weinstein had the opportunity to respond to everyone who had spoken about him, two of his clerks and Chief Judge Irizarry unveiled a large photograph of a plaque, installed outside the courtroom during the ceremony. The plaque named the Eastern District ceremonial courtroom as the "Honorable Jack B. Weinstein Ceremonial Courtroom." What a wonderful tribute to a man who has served the court for 50 years!

Judge Weinstein spoke briefly following the revelation of the naming of the courtroom. He was deeply moved by the honor. He said that in 1949 he had argued his first motion in a post office courtroom (across the street from the present courthouse). About 20 years later, in 1967, he took the oath of office in this courtroom, now named after him. He found it hard to believe the dedication.

When he first became a judge, his chambers on the sixth floor of the courthouse overlooked an industrial area, which is now a park. The six active and three senior judges were all white males. They all met for breakfast every day.

Today there are 45 district judges and magistrate judges balanced by gender and reflecting every segment of the country's population. (The informal meeting of the judges is a tradition that still exists in the Eastern District. Some, if not all, of the district judges still meet for breakfast on the 14th floor of the new courthouse every day.)

Judge Weinstein said that he worked without a robe from the beginning because it was more comfortable and practical. He has made trips outside the courtroom and held hearings all over the country, because some situations were foreign to the knowledge of judges and he wanted to learn more. He made trips with Kenneth Feinberg to learn about the facts of the Agent Orange case. He has visited the projects

to find out about drugs. He has held mini-trials at the beginning of cases to get a better feel for them and a sense of the litigation. He feels the need to get beyond the printed page and argument to see real people.

For Judge Weinstein, the best part of being a federal district judge is working with law clerks. He observed that the work is always expanding. He aims for sensible sentences and to protect the Fourth Amendment. He said that it was a great privilege to have a role in preserving the rule of law and a free society for 50 years.

I have been to many ceremonies at the Eastern District. I was a clerk in the courthouse, and have held Judge Weinstein in awe since then. I do not believe that I have ever been as moved as I was on July 13 by the outpouring of respect and affection for Judge Weinstein, his modest response, and the remarkable honor of naming the courtroom after him. I, along with everyone else who enters that room, will remember Judge Weinstein for a long time to come.

Developments

Law Day 2017: Judge Richard C. Wesley Awarded the Learned Hand Medal

By Steven Flanders

A crowd of well over 800 Federal Bar Council members and guests convened the evening of May 9 to celebrate Law Day and to honor Second Circuit Judge Richard C. Wesley "for excellence in federal jurisprudence." A standing ovation from an audience that included as many as 70 judges from around the circuit concluded the evening. Federal Bar Council President David Schaefer described Judge Wesley as "an outstanding jurist in the tradition of Learned Hand because of his respect for the rule of law, his passion for judging, his superb analytical skills, his judicial restraint, and his ability to write opinions in a clear and accessible way."

The social aspects of the event unfolded in an unusual fashion from the outset. Because the event convened less than two hours after news hit of President Trump's firing of one-time Southern District U.S. Attorney James Comey as FBI chief, conversation over drinks ranged much less than usual. At least in the experience of this attendee, most conversation during the cocktail hour that went beyond greetings and exchanges of personal pleasantries zeroed in on the events of the day and their implications for the future.

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In a group that included so many who both knew Mr. Comey and had conducted or participated in major investigations, these topics seemed irresistible. The buzz was palpable and general.

Judge Wesley has more in common with the Hand cousins, at least geographically and perhaps also culturally, than do most judges of the Second Circuit. (The Hands grew up in Albany and Elizabethtown, New York.) Also an upstate lawyer, though from near the opposite end of the state, Judge Wesley's early practice was in Geneseo and Rochester. After serving the New York Assembly, first as a staffer to the Republican minority leader and then as his successor in the Assembly, Judge Wesley was elected in 1986 as a justice of the New York Supreme Court. He served at essentially every level of the New York judiciary, from that court to the New York Court of Appeals, at which point he was was nominated in 2003 by President George W. Bush to the Second Circuit, achieving unanimous Senate confirmation in July of that year. Schaefer quoted Senator Charles Schumer's statement in support: Judge Wesley was a conservative in nature who became "best known for his thoughtful, scholarly approach that united judges behind unanimous opinions; truly a uniter and not a divider."

Schaefer went on to note a remarkable confirmation of this view as Judge Wesley's career on the Second Circuit unfolded. "An impressive reflection of Judge Wesley's skill as a consensus builder and his judicial philosophy as a common law incrementalist is the fact that he and Judge Guido Calabresi have been sitting on panels together for the last 16 years and, despite the fact that their backgrounds and philosophies could not be more different, they have never been on a panel where one of them dissented from an opinion issued by the other."

Judge Wesley's Remarks

Judge Wesley's remarks in accepting the award confirmed multiple descriptions of him as a humble yet effective consensus builder. He credits family, friends, and mentors for helping to shape his career. He specially appreciates the Federal Bar Council: "Over the years I have come to know and enjoy rich friendships with many of you here tonight. What has always struck me is how much you like each other. I mean after all you are lawyers and some of you are even married to lawyers.... I think it says a lot about you and this organization in its commitment to building relationships among members of the bar through social gatherings and excellent continuing education opportunities."

Judge Wesley's generous remarks were devoted in large part to describing the contributions of those who have supported him. He began with his parents, who provided a richly supportive, if modest, setting for his upbringing in Hemlock, New York – nearby Lavonia was "the big apple." His judicial assistant and his clerks came in for special appreciation, and were asked to stand. Three chief judges, Delores Denman on the Fourth Department and Judith Kaye on the Court of Appeals (both now deceased) and Dennis Jacobs of the Second Circuit, all received special mention. And then he returned to Learned Hand, for whom the award is named. As chair of the committee planning events celebrating his court's 125th anniversary, he came upon the fact – perhaps known to many in the room but not to this observer – that Learned Hand had been the Progressives' candidate in 1913 for the New York Court of Appeals. "The 1913 election proved to be disastrous for the party and Hand would remain in Manhattan as a federal judge." Judge Wesley went on to ruminate on the greatness Learned Hand achieved on the Second Circuit. "What would Hand's life have been like had he won that election? How would his time on the New York Court of Appeals have affected New York jurisprudence? We will never know."

For the first time in many years, the Law Day Dinner was held not at the Waldorf but at the Grand Hyatt, adjacent to Grand Central. (The shell from which the Grand Hyatt was constructed was formerly the Commodore, named for Commodore Vanderbilt and constructed by the New York Central as part of the station complex.) Though the Council's change was involuntary – the

Waldorf is undergoing a massive renovation, and for now is out of the banquet business – it seemed salutary in any case. The council's newly-installed executive director, Anna Stowe DeNicola, got a baptism by fire, managing this major event barely two months into her new post. She reported considerable positive feedback from the change to the Grand Hyatt, and sees the change as an opportunity to refresh how the Council does its business in this respect.

Legal History

Filling Justice Baldwin's Seat

By C. Evan Stewart



We have all recently witnessed two bruising nominations to the U.S. Supreme Court: first came President Obama's 2016 nomination of Judge Merrick Garland, upon which the Senate never took action; and next up was President Trump's nomination of Judge Neil Gorsuch, who was confirmed (after the "nuclear option" was invoked) by a 54-45 vote in the Senate on April 7, 2017 (he is now the 101st Associate Justice of the Court). There have been lots of other contentious nominations, of course (*see, e.g.*, "The Legal Battle Over Brandeis," *Federal Bar Council News* (December 1997)). One such battle – about which little is known – concerns the seat of Justice Henry Baldwin.

Baldwin was nominated to the Court by President Andrew Jackson and confirmed by the Senate on January 6, 1830. Previously, he had been a prominent Philadelphia lawyer, a congressman, and a trusted political ally of Jackson. As for his jurisprudential legacy, Professors G. Edward White and Gerald Gunther have labeled Baldwin an "incoheren[t] …jurist." With his death on April 21, 1844, a vacancy on the Court needed to be filled.

Because Baldwin's seat was considered a "Pennsylvania" seat, President John Tyler sought to replace Baldwin with another Keystoner. Tyler, the first vice president to succeed to the presidency after the death of his predecessor (William Henry Harrison), was wildly unpopular with both the Whig and Democratic parties. So how did "his Accidency" do in getting someone through the Senate? Not so well. Tyler first offered the seat to Pennsylvania's senator, James Buchanan, who declined. Tyler then nominated Edward King, the presiding judge of the Philadelphia Court of Common Pleas, on June 5, 1844. After the Senate postponed considering King's nomination (for, among other reasons, deference to Buchanan, who a number of senators thought wanted a seat on the Court), King withdrew his name. Undeterred, Tyler nominated King again on December 4; after the Senate once again postponed consideration of King's nomination, Tyler pulled the plug on February 7, 1845.

In the weeks remaining in the Tyler Administration, the lame duck president put forward a second candidate: John M. Read, yet another prominent Philadelphia lawyer. Perhaps this would get through because Read was a friend of Buchanan (and Buchanan was widely viewed as a likely cabinet member of the next president). Since nothing happened by the end of Tyler's term, however, the nomination was still-born when James Polk ("Young Hickory" – so named as Andrew Jackson's protégé) took the presidential office on March 4, 1845.

Buchanan became Polk's secretary of state, but the vacant seat just sat there, as the president took no action (with Congress not meeting in session until December of that year). In September 1845, Thomas Ritchie, editor of the *Washington Union* (the Democratic Party's national organ), informed Polk that Buchanan wanted to go on the Court. Shortly thereafter, Buchanan met with the president to discuss the vacant seat. Buchanan played political Cassandra with Polk, acknowledging that he had long been interested in being on the Court, while at the same time em-

phasizing his importance to the new administration in overseeing the nation's foreign affairs. Two months later, he opted to stay in the Cabinet, which suited Polk just fine. That left the issue of what to do with the vacant seat. Buchanan "was most anxious" to have Read appointed to the Court, and urged his nomination on Polk. But Polk was not buying. Why? Although Polk told another colleague that the reason was because he was "determined to have a *first rate man* there," the real reason was that Read, at an earlier point in his political career, had been a Federalist (the predecessor party to the Whigs). As Polk confided in his Diary:

> I have never known an instance of a Federalist who after arriving at the age of 30 professed to change his opinions, who was to be relied on in his constitutional opinions. All of them who have been appointed to the Supreme Court Bench, after having secured a place for life [,] became very soon broadly Federal and latitudinarian in all their decisions involving questions of Constitutional power…. I resolved to appoint no man who was not an original Democrat & strict constructionist, and who would be less likely to relapse into the Broad Federal doctrines of Judge Marshall & Judge Story.

Instead, based upon the advice of Buchanan's rival Pennsylvania Democrats (including Vice President George Dallas, Andrew Beaumont ("with whom I served in Congress and in whom I have great confidence"), and Congressman David Wilmot (author of the famous "Wilmot Proviso" in 1846)), Polk sent George Woodward's name to the Senate on December 23, 1845. Woodward, who had been a Wilkes-Barre lawyer before becoming a judge on the Fourth Judicial District Court of Pennsylvania, was (in Polk's words) "a sound, original, & consistent democrat, of the strict construction school,…[and] a man of fine talents & well qualified." But that was not really the complete story.

The Complexities of Pennsylvania's Democratic Party

Polk's public announcement that he would serve only one presidential term was intended to free him to unite the Democratic Party; it had the opposite result, as likely and unlikely competitors for the 1848 nomination proliferated and caused no shortage of headaches. This was particularly true when it came to making patronage decisions – with fractured groups under the party's tent, any decision favoring one would upset the other(s). As Polk confided to one party leader, the process cost him so much "labor and trouble" that "I sincerely wish I had no office to bestow." And of all the states, Pennsylvania was most problematic in this regard.

On the one hand, Polk's vice president, George Dallas, was a Keystoner, and he was an obvious contender for 1848, who wanted as many friends taken care of as possible. On the other hand was Buchanan, who now held the premier cabinet position, but who also eyed the presidency and was ever vigilant about his Pennsylvania power-base. There was also a third "hand" who needed to be factored in as well: Simon Cameron.

Cameron had been a very successful businessman in Pennsylvania for over two decades and, prior to 1845, he had also been very active in the Pennsylvania Democratic party. When Buchanan vacated his Senate seat on February 17, 1845 (in anticipation of becoming Polk's Secretary of State), Cameron threw his hat into the ring to succeed him. Cameron's opponent? None other than George Woodward. Woodward, in fact, was the party establishment's candidate. But he lost out to Cameron when the state legislature voted: 16 Democrats, together with 44 Whigs and seven Native Americans (the nativist party), supported Cameron, who defeated Woodward 67 to 55.

Woodward, Dallas, and Polk (and many other party elders) were very upset with the result. Polk (and Dallas) were thus determined not to be helpful to Cameron on patronage matters, in which the new senator was a skilled operator (he once observed that patronage served either of two objectives: "love or fear"). Buchanan played a somewhat more cagey patronage game with the new senator,

who in frustration blurted out to Buchanan in September 1845: "I wish you would tell me whether there is to be peace or war." To the president, Cameron professed to be eager to work with the administration on its priorities; in reality, however, he was lying in wait to deliver a body-blow to Young Hickory.

Dallas was obviously pleased with the Woodward selection. Buchanan was not, and made clear his views to Polk on Christmas Day. Visibly agitated, Buchanan told Polk he had not slept the two nights since the nomination. His complaints were (i) that Polk "had not informed him of [Polk's] intention to nominate" Woodward; and (ii) "his friends in Pennsylvania" believed that Polk was wielding patronage to his disfavor (one politician opined that "Dallas . . . [had] prevail[ed] over 'Pennsylvania's favorite son,' yet the ass bears his burden & still shakes his ears, & is Secy of State!"; another wrote that "We hear that the Secretary of State was not advised of the nomination of Woodward until after it was sent to the Senate! Modern politicians are like spaniels; the more they are beaten, the more they love their masters."). Polk was rather dismissive of Buchanan's concerns, stating it was his prerogative to make such a nomination, that he had heard Buchanan out on his preference (Read), but he – the president – preferred Woodward. As for patronage matters generally, Polk went on to review his other Pennsylvania appointments, a review which (according to Polk) "entirely satisfied" the Secretary of State.

Not surprisingly, that was not the case; and to make matters worse, a fuming Cameron was waiting to meet with Buchanan to discuss how to block Woodward's elevation to the Court. Buchanan, however, took the position that he would take no part in the nomination, pro or con. At the same time, Buchanan did nothing to dissuade Cameron from using every tool in his political tool box to hurt the Dallas wing of the party (and obviously Polk, as well).

The local media in Pennsylvania was mobilized to dredge up Woodward's nativist remarks from his formative political days; also highlighted was Woodward's wobbly tariff record – Woodward had vacillated between tariff support (a very important state issue) and espousing free trade (a position widely viewed as pro-South). More troubling for the nomination was the fact that he had no senatorial rabbi. Without a Pennsylvania Democratic senator to lead the charge, Woodward tried to get Massachusetts Whig, Daniel Webster, to help out; but that did not work. Indeed, the entire Whig senatorial caucus was determined to vote en masse against the nominee; that would not be a problem, however, assuming the Democratic majority held steady for the president's nominee.

Polk knew that Cameron was "active in his exertions to have Mr. Woodward's nomination… rejected." And he suspected that Buchanan was also working to that end: "It will be deeply painful to me, if I ascertain that my suspicions are correct, but if I do so ascertain, I will act with promptness and energy towards Mr. Buchanan, whatever the consequences to myself or my administration may be."

The Senate's Advice and Consent on Woodward's Nomination

On January 20, 1846, the Senate (in closed session) began debate on Woodward's nomination. Two days later, Woodward was rejected by a vote of 29 to 20 – six Democrats defected to join 23 Whigs in denying Woodward a seat on the Court. That night, Polk was told the bad news, and he reflected on what had gone wrong in his diary. His first focus was on Buchanan – perhaps Buchanan had helped deep-six the nomination because he wanted the seat for himself: "This I hope is a mistaken impression."

Then, together with Dallas and other political intimates, Polk reviewed how they had lost the six Democratic Senators. Polk dismissed Senator James Wescott of Florida with his ultimate put-down – he was "a Whig in disguise." Senator David Yulee (Florida) was a "pseudo Democrat," and he termed Cameron "at heart a Whig". Polk also thought that because Buchanan was "intimate" friends with Cameron, Ambrose Sevier (Arkansas) (he "almost lived at Buchanan's"), and Wescott, the

Secretary of State, could have prevented those senators (and Thomas Hart Benton (Missouri) as well) from voting against Woodward. The president continued to suspect Buchanan's hand was behind Cameron's open and notorious activities; and if he could prove it he "would instantly dismiss him." Buchanan subsequently sent on an emissary (John Mason, the attorney general) to Polk (i) to deny that he had played any role in the rejection of Woodward, and (ii) to re-change his mind about wanting to be appointed to the Court. This last bit of news only confirmed Polk's worst suspicions of Buchanan's motivations and behind the scenes actions. Polk told his Attorney General that "Mr. Buchanan had brought all his troubles on himself; that I would take my own time, and receive further developments before I made another nomination." Polk also told Mason that if "any member of my cabinet" is found to be working with the Whigs to reject his nominations, he would find "a lion in his path." Polk's "further developments" mainly related to the president's nomination of his friend and former congressman Henry Horn to be the Collector of the Port of Philadelphia. Were Horn to receive a similar fate, the president told Ritchie that "the chain would be snapped."

And if the president were not angry enough at his Secretary of State and the defection of the six Democratic senators, Congressman Wilmot visited him at the White House on January 28 to report on hearsay from one of his congressional colleagues. According to Wilmot's colleague, Cameron had quoted Wescott as saying – vis-à-vis Polk's nomination of Woodward: "the only way to treat an ugly Negro who was unruly, was to give him a d____n drubbing at the start and he would learn to behave himself." It was further reported to Polk that Wescott had not only subsequently affirmed he made this "low and vulgar" remark, but he also repeated it. The next day, Wilmot wrote the president to correct his hearsay report: Wescott had made the remark *only* in the context of "dealing with obstinate negroes" generally; it was Cameron who had appropriated the remark as to how to deal with presidential nominations. Polk's ultimate verdict? "I consider both [Cameron and Wescott]…guilty of gross rudeness & vulgarity."

The Immediate Aftermath of Woodward's Defeat

While Buchanan moped around in a "melancholy and dissatisfied manner," Cameron was actively plotting to humiliate the president again – this time on Horn's nomination. The Keystone senator decided to make no pretense at playing possum. Instead, Cameron called on Polk and told the president he would withdraw his opposition to Horn if Polk would tell Horn to play patronage ball with him. An obstinate Polk refused. Rebuffed, Cameron chose to bide his time until seven Democratic senators were absent from the Capital attending a funeral on May 25, 1846; he then called up Horn's nomination and, with a unanimous Whig voting bloc and a handful of Democrats, it went down to defeat.

A furious Polk resubmitted Horn's nomination to the Senate. Cameron, however, was able to peel away a larger number of Democrats and the Senate rejected Horn for a second time on June 24, 1846. Polk cussed out Cameron in his diary as "a managing tricky man, in whom no reliance is to be placed,…. I consider him little better than a Whig."

Yet Another Nominee, Eventually

Having seen how effective Cameron had been in cobbling together a handful of Democrats with a unified Whig bloc in the Senate, Polk decided that he would not do anything vis-à-vis the open seat for a while. Then, upon concluding that Buchanan had *not* in fact "taken affirmative action" against Woodward's nomination, the president on June 10, 1846 offered the seat (once more) to his Secretary of State (having been told that Buchanan really did want a seat on the Court). Two and one half weeks later, Buchanan accepted. But he wanted to be nominated immediately, fearing that his political foes (e.g., Dallas & Cameron) would be able to generate sufficient opposition if given enough

time. Polk, however, wanted to wait until just before Congress adjourned. After weeks of fretting, Buchanan went to the president on August 1, 1846 and said (once again) he would pass on the Court, wishing instead to "remain in the Cabinet" until the end of Polk's term.

Polk now turned to yet another Pennsylvania state court judge, one who had been considered (and passed over) during the run-up to Woodward's nomination: Robert C. Grier, a Jacksonian Democrat who wore judicial robes in Allegheny County. Perhaps out of fatigue, but more likely due to the fact that Grier had not chosen sides in fractious/tribal state politics, both Cameron and Buchanan blessed the president's nominee. On August 3, 1846, the president submitted Judge Grier's name to the Senate, and the next day a unanimous Senate approved Grier as an Associate Justice of the Supreme Court. The 28 month odyssey to find a replacement for Henry Baldwin was over.

Postscripts

- Grier's tenure on the Court (1846-70) is mainly known for his infamous concurrence in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (agreeing with Chief Justice Taney's ruling that, because the Missouri Compromise of 1820 violated fundamental property rights "found" in the Fifth Amendment, the statute was unconstitutional – thus, creating the doctrine of substantive due process). Grier had perhaps foreshadowed his sympathies with his Southern judicial brethren when he co-presided over a trial in 1851 (with U.S. District Court Judge John K. Kane) that dealt with criminally enforcing the terms of the Fugitive Slave Law: *United States v. Hanway*. Because of Grier's charge to the jury regarding the legal definition of "treason," the jury (after 15 minutes) acquitted the defendant. Nonetheless, during the proceeding Grier had also referred to abolitionists as "infuriated fanatics and unprincipled demagogues" who "denounced the constitution, the laws, and the Bible." *See also Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852) (upholding Illinois law that made it a crime to hide runaway slaves). More importantly and problematic (as readers of the *Federal Bar Council Quarterly* know (*see* "*The Worst Supreme Court Decision, Ever!*" May 2016), Grier engaged in *ex parte* communications with President-Elect James Buchanan prior to the release of the *Dred Scott* decision; not only did Grier accede to Buchanan's lobbying for Grier to concur in Taney's odious opinion, but Grier also tipped off Buchanan as to the decision itself, which enabled Buchanan to reference the "likely" outcome in his inaugural address on March 4, 1857 (*Dred Scott* was handed down on March 6, 1857).

  Interestingly, Grier later upheld the constitutionality of President Lincoln's naval blockade of Southern ports in the *Prize Cases*, 67 U.S. 635 (1863). Notwithstanding the fact that Congress had never declared war on the states that seceded, Grier wrote that "[a] civil war is never solemnly declared," and held that Lincoln's power(s) as commander-in-chief allowed him to use the army and navy as he saw fit to ensure the survivability of the Union.

- Polk's criticism of Cameron's fealty to the Democratic Party was spot-on. When he ran for re-election to the Senate, Cameron sought the nomination of the Know-Nothing Party (which he did not secure). Thereafter, he joined Pennsylvania's People's Party, which morphed into the Republican Party. With that party's backing, Cameron was returned to the Senate in 1857. Three years later, he was a favorite son candidate for the Republican presidential nomination (one of my ancestors, William M. Stewart, was pledged to him on the first ballot, and (as instructed) switched to support Abe Lincoln on the second and third ballots). In exchange for Cameron's support for Lincoln on those later ballots, the Keystone senator was nominated to serve as Secretary of War in the new presi-

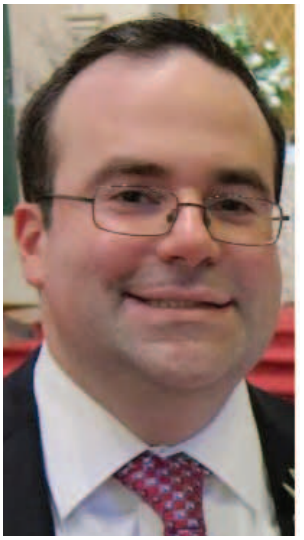
dent's cabinet. Cameron was a poor choice, however, and in 1862 he was moved out of the cabinet and shipped off to Russia as the American minister. His tenure in Russia was also short-lived. After the Civil War, Cameron was once more sent to the Senate in 1867, where he served for another 10 years (he was succeeded by his son).

- The starting point for those who want to understand the Polk presidency is his four volume presidential diary: Milo Quaife, ed., *Diary of James K. Polk* (Chicago, 1910). Probably the best (but limited) biography of Polk is Charles Sellers' *James K. Polk Continentalist, 1843-1846* (Princeton, 1966); and the best biography of Buchanan (our *worst* president) is Philip Klein's *President James Buchanan: A Biography* (Pennsylvania, 1962). The starting point for understanding more about the Senate's rejection of Woodward's nomination is Daniel Curran's "Polk, Politics, and Patronage: The Rejection of George W. Woodward's Nomination to the Supreme Court," *The Pennsylvania Magazine of History and Biography* (July, 1997). Finally, the best compendium of current, scholarly work on this era of American history can be found in Joel Silbey's *A Companion to the Antebellum Presidents 1837-1861* (Wiley, 2014).

Legal History

Nixon the Lawyer

By Joseph Marutollo



This year marks the 45th anniversary of the Watergate burglary. At the time, few would have imagined that the five men arrested for the botched break-in at the headquarters of the Democratic National Committee would create a sequence of events culminating in the resignation of the sitting American president, Richard M. Nixon. Today, Watergate remains a watershed moment in American politics, and Nixon remains one of the most analyzed leaders in American history. Indeed, decades after he left office, best-selling books continue to be written about Nixon, his psyche, and the Shakespearian tragedy of his career.

Often overlooked in the study of Nixon, however, is Nixon's role as a lawyer. As discussed below, three distinct periods in Nixon's legal career – his education at Duke Law School, his time as a young attorney not yet involved in politics, and his work as a law firm partner here in New York City – played critical roles in shaping Nixon as president. These periods laid the foundation for the best characteristics of President Nixon, *i.e.*, the brilliant and hard-working leader devoted to peace, as well as the worst characteristics of President Nixon, *i.e.*, the cynical and paranoid man bent on destroying his enemies.

One recent book – Evan Thomas's single-volume biography, *Being Nixon* – takes a close and evenhanded look at Nixon's life, including his legal career. Thomas, a reporter, writer, and editor at *Newsweek* for 24 years, graciously agreed to an interview for this article.

"Old Iron Butt" Nixon at Duke Law School

Born in 1913, Nixon grew up in Yorba Linda, California. Nixon would later say that his family was "poor, but the glory of it was we didn't know it." Nixon, the second of five children, had a challenging upbringing. His father, Frank, operated a failed lemon farm in Yorba Linda. Nixon's father later ran – with the help of his wife and sons – a combination grocery store and gas station. Nixon experienced tragedy twice in his early life: his younger brother, Arthur, died in 1925 after a short illness, and his older brother, Harold, died of tu-

berculosis in 1933.

Nixon worked hard in school and set his sights on becoming a lawyer. When the Teapot Dome scandal erupted in the administration of President Warren G. Harding, the pre-teen Nixon told his mother that he "would like to become a lawyer – an honest lawyer, one who can't be bought by crooks."

Upon graduating at the top of his Whittier High School class, Harvard University offered Nixon a scholarship. Nixon's family, however, could not afford the travel and living expenses that would be required to send him across the country to Harvard. As a result, in 1930, Nixon enrolled in nearby Whittier College. Nixon excelled at Whittier, both in the classroom and on the football field.

After graduating from Whittier in 1934, Nixon received a full scholarship to Duke University School of Law. At the time, Duke was an up-and-coming law school that sought the best and brightest students. Nixon certainly fit the bill.

As Thomas reports in *Being Nixon*, when Nixon learned that he received a full scholarship to Duke Law School, his girlfriend at the time, Ola Franklin, described Nixon as "joyous, abandoned – the only time [she] remember[ed] him that way." Nixon even shared with Franklin his seemingly impossible dream: to become Chief Justice of the United States.

Upon entering Duke Law School, Nixon embodied a Spartan work ethic. During his first year at Duke Law, Nixon lived in a tool shed without heat or plumbing. Nixon's breakfast was often just a Milky Way candy bar. As reported by Thomas, Nixon avoided study groups at Duke and worked alone; Nixon was concerned that if he spent time socializing in study groups, he would not obtain top grades and would lose his full scholarship. Upperclassmen quickly saw Nixon's potential. One student told Nixon – who spent seemingly every waking hour in the library – "you have what it takes to learn the law: an iron butt." The nickname, "Old Iron Butt," stuck with Nixon throughout his time at Duke.

While Nixon's formidable intellect and grinding work habits were on full display at Duke, his tender side often was also shown to others. Thomas wrote that Nixon used to carry a classmate disabled with polio up the steps to class every day. Another student – Charles Rhyne – was hospitalized for months, and Nixon showed up by his bed every night to read him that day's lecture notes. (As a future politician, Nixon maintained connections with everyone he met; in a fascinating twist of history, Rhyne would later serve as the lawyer for Nixon's secretary, Rose Mary Woods, when she testified before a federal grand jury during the Watergate scandal.)

As Nixon himself stated in *RN: The Memoirs of Richard Nixon*, Nixon joined three friends in his 3L year at Duke and moved into a small house – "a one-room clapboard shack without heat or inside plumbing." Nixon's diligence and austere living paid off: he finished third in his class at Duke Law and was named a member of the prestigious Order of the Coif. And this dedication planted the seeds for the focus Nixon needed to become a successful politician – and later president.

Nixon the Newly-Minted Lawyer

In his final year at Duke Law School, Nixon went to New York City to try to obtain a position at the prominent law firm, Sullivan and Cromwell. But as Thomas explained, at the time Nixon graduated from law school, Duke was not the prestigious institution it is today. Duke did not have the alumni network to help Nixon access the rarified world of Wall Street law firms. Indeed, Nixon knew that acquiring such a position was unlikely; he later recalled that these "firms were virtually closed shops, which only hired from the establishment elite of the Ivy League law schools."

Nixon refused to be defined by his rejection from the big city law firms. Nixon went back to Whittier and, with the help of his mother, obtained a job at a local law firm, Wingert and Bewley. But along with his resilience came, unfortunately, resentment, as Nixon's stinging rejection by Sullivan & Cromwell helped to lay the foundation for his bitterness towards the "elites" while in the White House.

As a new lawyer at Winger and Bewley, he worked on wills and divorces. Nixon, like many new attorneys, made a few blunders at the firm. He even became entangled in a malpractice action after he made a mistake filing a deed; the firm had to settle the case for twice Nixon's salary. Despite these errors, the firm knew that Nixon was a diligent worker. As Stephen Ambrose reported in his seminal three-part biography, *Nixon: Volume 1 – the Education of a Politician*, Thomas Bewley, one of the named partners at the small firm, asserted that Nixon would work "sixteen hours a day for days on end." Bewley would often see Nixon, late at night, "with his shoulders hunched over in his characteristic fashion . . . pacing up and down the room. This was his habit when he was mulling over a problem, or dictating to a secretary." Bewley noted that Nixon "never joked or told stories…or was profane. He was just vitally interested in his work and had little time for anything else." Nixon stated in his memoirs that he "always tried to talk [his] clients into a reconciliation but seldom succeeded."

Although Winger and Bewley did not have a large trial practice, the firm often needed a trial lawyer – and Nixon jumped at the chance to appear in the courtroom. Bewley has stated that Nixon "always seemed to be way ahead of the witness, and could anticipate what answers the witness would make." Nixon's thorough preparation became a hallmark of his political career.

In 1939, Nixon became a partner at the firm. In his memoirs, Nixon still recalled the pride he felt upon being named partner. "Now for the first time I was no longer Frank and Hannah's son – I was Mr. Nixon, the new partner in Wingert and Bewley." But as Ambrose explains, "the dullness of a small-town law practice, coupled with the lack of enough work, could not begin to satisfy Nixon's yearning for success, nor his need to be constantly improving himself and his position. Consequently, he threw himself into civil affairs, his stated reason being that 'young lawyers trying to get business for their firms are expected to join local clubs.'" Nixon became president of four local organizations in his first three years as a lawyer, and the youngest member of the Whittier College board of trustees.

Nixon later left Whittier to take a job in Washington, D.C., where he worked as a lawyer in the Office of Price Administration's tire rationing division. The work was hardly thrilling. With the outbreak of World War II, Nixon decided to join the Navy – and began his steady rise in politics thereafter.

Interestingly, in the early stages of his legal career, Nixon applied for a job with the FBI, but did not receive a response. Historians later determined that his application was approved, but, due to changes in FBI budgeting, no job offer was made. Nixon wrote in his memoirs that if he had received the FBI job, he "might have had a career as a G-man for the FBI" – and history, of course, would have been very different.

The "New" Nixon: the Big City Litigator

Nixon's rise in politics was truly astounding – he ascended from congressman to senator to vice president in a span of six years. Indeed, Nixon was only 39 years old when he became President Dwight Eisenhower's vice president. But, after losing the 1960 presidential election to John F. Kennedy, and losing the 1962 California gubernatorial election to Pat Brown (and famously telling reporters "you won't have Nixon to kick around anymore"), Nixon moved to New York City in 1963.

Once in New York, Nixon resumed his work as a lawyer and joined the Wall Street law firm, Mudge, Stern, Baldwin & Todd – which was quickly renamed Nixon, Mudge, Rose, Guthrie & Alexander. Nixon told the *Los Angeles Times*, "New York is very cold and very ruthless and very exciting. It is a place where you can't slow down."

Nixon became involved in significant legal work while at Nixon Mudge. He served as a rainmaker for the firm. He took on Pepsi-Cola as a client, which permitted him to work closely as a legal advisor to Pepsi's chief executive officer, Donald Kendall, and to travel the world in Pepsi's quest for new markets, which helped him remain attuned to foreign policy.

Nixon even argued a case

before the U.S. Supreme Court, *Time, Inc. v. Hill*, 385 U.S. 374 (1967), in which he represented the Hill family, which was suing Time, Inc., for sensationalizing, in *Life* magazine, a home invasion that the family suffered. As Thomas reported, "Old Iron Butt" Nixon did not pass along the work to underlings at the firm; Nixon actually did the work. Nixon did the reading and was not afraid of getting into the details of the case. Although Nixon virtually committed the trial record to memory and, by all accounts, shone at the oral argument, Nixon lost the case in a 5-4 decision. Nixon later commented that he "always knew [he] wouldn't be permitted to win a big appeal against the press." Again, this press resentment would become a deeper issue in the Nixon White House.

Despite taking part in significant cases, Nixon was not content with his firm work. Nixon needed to go back "in the arena." As Nixon would later state in his August 8, 1974 resignation speech, Nixon always took to heart "what Theodore Roosevelt once said about the man in the arena, 'whose face is marred by dust and sweat and blood, who strives valiantly, who errs and comes short again and again because there is not effort without error and shortcoming, but who does actually strive to do the deed, who knows the great enthusiasms, the great devotions, who spends himself in a worthy cause, who at the best knows in the end the triumphs of high achievements and who at the worst, if he fails, at least fails while daring greatly.'" While Nixon enjoyed his law practice, his life needed to be in the arena. As a result, Nixon left the law for a then-improbable run for the presidency in 1968.

Conclusion

As Thomas pointed out, the very qualities that made Nixon a strong lawyer – a healthy skepticism of facts, a desire to address flaws in one's own case – ultimately led to weaknesses in Nixon's presidency, where his emotions spiraled out of control in Watergate. Nixon's legal career provides a fascinating insight into this singular figure in American history.

Breaking the Rules

A Legal/Literary Career

By Steven Flanders

Busy lawyers often dream of undertaking an entirely different and parallel career, if only time permitted. Many have talents and accomplishments that had to be abandoned along the way: theater in college or law school, music from childhood on, writing fiction and non-fiction as avocation or even as an abandoned profession, and so on. For nearly all, the dream of renewed professional achievement in such endeavors can only remain that – a dream.

Alan Hruska, a former president of the Federal Bar Council, broke all the rules. Beginning while still an active partner at Cravath, Swaine & Moore, and continuing in heightened form since he took of counsel status shortly after the turn of the century, he has had successful careers as publisher, novelist, playwright, filmmaker, and director of films as well as plays. Most recently, his play *Ring Twice for Miranda* enjoyed an excellent three-month run at New York City Center Stage II. Not only was this merely the latest of several successfully staged plays in New York's crowded and cutthroat theater world, it followed more than a dozen substantial literary successes.

How is this possible? Alan said that he never left the worlds of literature that engaged him as an undergraduate at Yale. And finding his way to Yale's law school was not much more than an accident. He was on his way to a seminar with Robert Penn Warren during his senior year when he found himself passing the law school and wandered in, wondering what this might be all about. After spending a half hour-plus with the dean of admissions, Alex Tate, he was told, "I see no reason why you should not be admitted." (Those were the good old days!) Like many fledgling law students, he found the work arduous and unfamiliar at first, and did poorly at the outset, especially in his first semester. But that changed in a hurry, and he made his way onto law review, finishing as notes and comments editor, and went on to

Cravath.

As recounted in a recent portrait in *Forbes,* he squeezed an active literary career into his busy life as a partner. He rose early each morning, writing for a couple of hours before going to the office, and clearly enjoying the separate world of his practice immensely, notwithstanding a professional life that must have been highly stressful as well as rewarding. Interestingly, at a recent lunch with this author, he fell far more naturally into lawyer's talk about clients, triumphs, reverses and reversals, and the quirks of judges we both have been close to than to his literary accomplishments. Yet indeed it was while still a partner that he published *Borrowed Time*, his first novel.

And long before he departed his partnership, back in 1986, he founded Soho Press in concert with his late wife Laura Chapman Hruska and Juris Jurjevics, the former editor-in-chief of Dial Press. Soho was founded with an ambitious goal that has been realized in spades: to discover, publish, and publicize undiscovered authors. Among their many triumphs is Haitian-American novelist, essayist, and short story writer Edwidge Danicat, beginning with her 1994 debut novel *Breath, Eyes, Memory*, which became an Oprah Book Club selection four years later. Now managed by Mr. Hruska's daughter, Soho publishes as many as 100 books a year.

I began my preparation for this article with an email to Alan Hruska, describing an intention to present him as a model. After a delightful meal together and a good bit of poking around the internet, I'm not so sure. How many of us have either the talent or the determination to match these achievements in a single lifetime? The career of Alan Hruska certainly demonstrates that undertaking a significant second career is possible. Whether it is achievable by any but a handful of mere mortals is another matter entirely.

FBC News

Honoring the Council's Legacy of Inclusion: The Diversity Committee Is Keeping Busy

By Jason Canales and Patricia Miller

The Federal Bar Council's Diversity Committee was formed two years ago to honor the Council's legacy of inclusion and advancing equality in the legal profession by promoting diversity. As set forth in the committee's mission statement: "[D]iversity encompasses, without limitation, race, color, creed, ethnicity, gender, gender identity and expression, sexual orientation, religion, national origin, age, disability, and marital or partnership status. It also extends to all practice areas, such as government service, not-for-profit, private practice, solo practice and specialty fields, among others."

Since its formation, the committee has sought to increase diversity both in the legal profession and in the membership of the Federal Bar Council. To that end, the committee has hosted a series of breakfast conversations to both acknowledge and celebrate the diversity that presently exists within the federal bar and bench; has put together three continuing legal education programs aimed at educating membership about diversity in the profession and the justice system; and has partnered with the Council's membership committee to host a membership drive.

Heritage Month Celebrations

The committee has hosted four breakfast conversations that coincided with specific heritage month celebrations. In celebration of Asian Pacific Heritage Month, Judge Pamela Chen of the U.S. District Court for the Eastern District of New York spoke of her experiences as an Asian American lawyer and led a discussion on the evolution of affirmative action case law.

In celebration of Hispanic Heritage Month, Judge Edgardo Ramos of the U.S. District Court for the Southern District of New York spoke about his path to the bench and told the story of the first Hispanic judge on the federal bench.

For Black History month, the committee was joined by Judge LeShann DeArcy Hall of the U.S. District Court for the Eastern

District of New York and Robert Capers, former U.S. Attorney for the Eastern District of New York. Judge DeArcy Hall spoke about her unexpected path to the bench, which included serving in the Air Force, as a partner at a large law firm, as commissioner of the New York City Taxi and Limousine Commission, and as commissioner on the New York State Joint Commission on Public Ethics. Mr. Capers spoke about his career in public service, which was inspired by his family's dedication to the law enforcement profession.

Finally, in celebration of Gay Pride month, Judge Alison Nathan of the U.S. District Court for the Southern District of New York (along with her twin boys), spoke about her path to the bench and the importance of being authentic in one's professional life.

The committee will continue to host heritage month celebrations throughout the year, and encourages all to attend.

CLE Programs

The committee has held three continuing legal education programs involving diversity issues in the legal profession and the justice system. The first program, "Jury Trials, Staffing Trial Teams, and Stereotypes" was moderated by the committee's co-chair, Patricia Miller. Panelists included Southern District Judge Denise Cote; New York City Corporation Counsel Zachary Carter; and Professor Michael Martin of Fordham Law School. Based on a hypothetical involving the use of deadly force by a police officer as a guide, the panel addressed stereotypes sometimes used in federal jury selection, diversity in trial teams appearing in federal court, and related ethical questions.

The second program, titled "Unconscious Bias: What Is It and Does It Impact Our Professional Experiences as Lawyers Practicing in Law Firms?," was moderated by Jason Canales, co-chair of the committee, and featured a visual discussion on unconscious bias in the profession led by Professor Kimberly Jade Norwood of Washington University School of Law and Leslie Richards-Yellen, director of inclusion for the Americas at Hogan Lovells.

The committee also presented a panel on unconscious bias at the Council's 2016 Fall Retreat, moderated by Eastern District Judge Ann Donnelly, who was joined by Michael Cardozo of Proskauer Rose LLP and Paula Edgar, president of the Metropolitan Black Bar Association.

Future committee CLE programs will aim to satisfy New York's recently announced diversity, inclusion, and elimination of bias CLE requirement.

Membership Drive

In September 2016, the committee joined forces with the Council's membership committee to host the diversity committee's first ever diversity-related membership drive with a presentation/reception at New York City's corporation counsel's office. Presenters included Stephen Robinson, formerly a judge of the U.S. District Court for the Southern District of New York, and Sheila Boston of Arnold & Porter Kaye Scholer. Turnout was quite impressive.

The committee certainly has kept busy. Future programing will include a roundtable for diversity professionals at law firms to discuss how they can collaborate to continue to move the diversity needle in the private sector, and co-sponsored events with other Council committees. The recognition, promotion, and celebration of diversity within our membership, and the profession more broadly, has never been so important. The committee is excited to continue its work.

A Correction

The article in our last issue about Roy Reardon's receipt of the Whitney North Seymour Award for public service by a private practitioner indicated that he had been drafted by Syracuse University before going to St. John's Law School. Actually, he had been drafted by the Syracuse Nationals, the professional basketball team that subsequently became the Philadelphia 76ers.

The Quarterly regrets the error.

From the Archives (March/April/May 2013)

Part I: Judge Weinfeld and Watergate: The Critical Connection

By Frank Tuerkheimer

In 2013, we note two entirely separate anniversaries: it is 40 years since the pivotal event in Watergate, the Saturday Night Massacre, and 25 years since Judge Edward Weinfeld died.

Judge Weinfeld did not preside over any Watergate related cases. Nevertheless, his decisions had a major impact on the Watergate story, an impact that is not generally known. One of his decisions was instrumental in the process that led to the release of tape recordings that revealed President Nixon's involvement in a conspiracy to obstruct justice and resulted, ultimately, in a bipartisan House Judiciary Committee vote to impeach him.

Another decision was instrumental in the disclosure of additional evidence of presidential involvement, which led to a unanimous Judiciary Committee vote to impeach and to the president's certain impeachment and removal, thus resulting in his resignation.

The Ervin Committee

In the spring of 1973, John Dean, recently resigned counsel to the president, testified before the Senate Select Committee on Presidential Campaign Practices, commonly known as the Ervin Committee. Dean described his central role in the massive efforts undertaken to separate the Watergate burglary of a year earlier from the president's re-election campaign and from persons high in the Nixon administration who had reason for grave concern if the full story were known. Dean's role included assisting in the process by which those originally charged with the Watergate burglary were paid in an effort to keep them from revealing the truth. While this was difficult enough during the election campaign, once the president was re-elected and public reports on campaign finances revealed that the Committee to Re-Elect the President had a surplus, the problem of raising money became even more difficult. Dean's testimony about these difficulties to the Ervin Committee included his description of a meeting with the president on March 21, 1973, in which he advised the president of a "cancer on the presidency."

Dean mistakenly believed that the president was unaware of high level involvement of persons in his then and past administrations. Dean hoped the president would bite the bullet, cut his losses, and bring the matter to an end before it engulfed his presidency. Much to Dean's astonishment, the president encouraged Dean's further involvement and asked Dean how much money would be needed.

Dean, not expecting this kind of a response, pulled a $1 million figure out of the air; the president said that should not be a problem.

When Dean had walked into the meeting, the purpose was to end the scandal; when he walked out, the president had recharged him to continue it.

In a later meeting with the president, Dean noticed that the president pulled him aside to a remote corner of the oval office, giving Dean an intimation that perhaps there was a recording system in place that the president was trying to avoid. It was pure guesswork on Dean's part and he alluded to it in his testimony before the Ervin committee. This hint was noted by the staffers on the committee and later in the summer of 1973, when preparing Lt. General Alexander Butterfield for his testimony, Don Sanders, a minority staffer, almost as an afterthought, asked whether Butterfield was aware of any taping system in the White House. As luck, or the president's ill-luck, would have it, Butterfield was one of the few persons aware of the White House taping system, which had been in place since early 1971. He answered truthfully. Butterfield then was called to testify publicly about the taping system the following Monday, July 16, 1973.

For a short time it seemed that it would be a simple matter to resolve the differences between Dean's version, which described a massive conspiracy to obstruct justice at the highest levels of the executive branch, and a denial of such a conspiracy by those allegedly involved. Indeed, if there

were no tape recordings, then Dean's word against presidential staffers H. R. Haldeman, John Ehrlichman, and the president himself would not have presented a strong criminal case and certainly not a case for impeachment and removal. But Sanders did ask the question and Butterfield responded truthfully. He testified similarly when called before the full committee, which meant before the entire nation, which was following the televised hearings closely.

On July 16, 1973, the date the existence of the tape recording system was made known to the nation, the Special Watergate Prosecutor – Archibald Cox – had already been appointed to conduct the Watergate investigation by Attorney General Elliott Richardson. Richardson had been confirmed in May, following the resignation of Attorney General Richard Kleindienst. At his confirmation hearings before the Senate Judiciary Committee, Richardson had promised the committee that he would appoint a special prosecutor to investigate 1972 presidential campaign practices – which obviously included the Watergate burglary and any attempted cover-up related to the burglary – and that the special prosecutor would be removed only if he engaged in "extraordinary improprieties." The deputy attorney general designate, William Ruckelshaus, told the committee he agreed with those terms. Both were confirmed and Richardson appointed Cox.

On July 23, 1973, a week after Butterfield's public testimony, both the Ervin Committee and the special prosecutor issued subpoenas for presidential tape recordings. The Ervin Committee subpoena was broader than the subpoena issued by Cox, whose subpoena was on behalf of the grand jury and ultimately asked for nine tape recordings, including the tape recording of the March 21, 1973, meeting between Dean and the president. Could President Nixon lawfully have destroyed these tapes during the week between their divulgence and their subpoena? This is a critical question in the Watergate story because without the tapes, Dean's word, largely otherwise uncorroborated in connection with presidential conversations, would not have been enough for impeachment and removal to have been serious possibilities.

Weinfeld's First Ruling

Len Garment was a legal advisor to the president and spoke with him about the tape recordings. In *Crazy Rhythm: From Brooklyn and Jazz to Nixon's White House, Watergate and Beyond* ("Garment"), Da Capo Press (2001), Garment described one of these conversations. This description revealed that on the evening of July 16, the date Butterfield testified before the full Ervin Committee and the nation, Garment was with the president at the Bethesda Naval Hospital where the president had been confined with viral pneumonia since the prior Thursday.

Obviously, the then-unsubpoenaed tape recordings were a major item of their discussions and the option of destroying them was on the agenda. Garment had some time to research the law on the question since he knew of Butterfield's disclosure to the Ervin Committee staff the prior Friday and obviously anticipated the question would arise. He and an associate, Doug Parker, reviewed the law so they could advise the president correctly. That review led them to Judge Weinfeld's decision in *United States v. Solow*, 138 F. Supp. 812 (S.D.N.Y. 1956).

In *Solow*, the defendant was charged under the catch-all clause of the federal obstruction statute with endeavoring to obstruct the administration of justice, Section 1503 of Title 18, the federal Criminal Code. The acts of obstruction alleged were the destruction of four letters that Solow had reason to believe would be sought by a grand jury investigation.

The destruction occurred before the documents were subpoenaed. In fact, a subpoena was never issued; Solow appeared before the grand jury by consent. In urging that the indictment against him be dismissed, Solow argued that since the documents he allegedly destroyed had not been subpoenaed, their destruction could not constitute obstruction of justice.

Judge Weinfeld, in denying the motion to dismiss, disagreed. The denial of the motion was based on both existing case law

and logic. Judge Weinfeld relied on five cases where charges of obstruction were sustained in instances where witnesses were threatened before they had been subpoenaed. *Samples v. United States,* 121 F.2d 263, 266 (5th Cir. 1941); *Walker v. United States*, 93 F.2d 792, 795 (8th Cir. 1938); *Kloss v. United States*, 77 F.2d 462, 466 (8th Cir. 1935); *Smith v. United States,* 274 Fed. 351, 353 (8th Cir. 1921); and *Heinze v. United States,* 181 Fed. 322, 324 (2d Cir. 1910). He also relied on *United States v. Russell,* 255 U.S. 138 (1921), in which the U.S. Supreme Court upheld an obstruction charge where an effort was made to bribe a prospective juror who had not been selected or sworn. The only case directly on point was a Kentucky case where a corporation caused key documents to be taken out of Kentucky and beyond Kentucky's subpoena power prior to the actual service of a subpoena.

The lower court dismissed an indictment charging obstruction of justice on the ground that a subpoena for the documents had not been issued at the time they were taken out of Kentucky; the appellate court reversed, *Commonwealth v. Southern Express Co.,* 160 Ky. 169, 169 S.W. 517 (Ky. Ct. App. 1915), holding that obstruction of justice was alleged.

Typically, Judge Weinfeld relied on more than just cases, all of which pointed to his conclusion but only one of which, the decision by an intermediate appellate court in Kentucky, dealt with the identical issue. He noted that if the catch-all clause of the obstruction statute were interpreted otherwise, this would "result in a race between the Marshal to serve process for the production of documents and those bent on their destruction in their endeavor to obstruct the administration of justice." *Solow*, 138 F. Supp. at 815.

It is not surprising, therefore, that Garment in explaining his advice to the president said the answer as to destruction "was plain" both to him and to co-counsel Fred Buzhardt: "The key decision, *United States v. Solow*, had been written by one of the most respected jurists in the country . . . and there was no court holding to the contrary. So the tapes could not lawfully be destroyed." Garment, at 278.

Garment's advice to the president that it would be unlawful to destroy the tapes was not the sole input on the question. Secretary of State Henry Kissinger, Secretary of the Treasury John Connally, New York Governor Nelson Rockefeller, and possibly others urged that the tapes be destroyed. Garment, at 279. We will, of course never know what the president would have done had Garment been less certain in his report to the president on the state of the law with respect to unsubpoenaed material clearly to be the subject of a subpoena. Without the *Solow* decision, Garment's only on-point authority would have been the decision of a Kentucky intermediate appellate court. Clearly this would have diluted the strength of any advice on the unlawfulness of the tapes' destruction in the period between July 16 and July 23. With no direct federal authority on point and with a cascade of advice from persons as influential as Kissinger, Connally, and Rockefeller, the president might well have decided to destroy the tapes. Had he done so, the story that followed would have been very different and likely would have had a different outcome.

Garment's advice based on the *Solow* decision was clearly correct. The president, however, provided a different slant on the critical decision to preserve the tapes, a decision crucial to the Watergate story. In a June 10, 1983, taped interview with Frank Gannon, he said it was stupid not to burn the tapes but there were several reasons they were not burned. First, he said he was in the hospital with pneumonia and he "just couldn't make a tough decision like that." Second, "I had bad advice, bad advice from well-intentioned lawyers who had the sort of cockeyed notion that I would be destroying evidence. But these tapes at that point hadn't been subpoenaed by anybody." The president's third reason somewhat contradicted the second. He said that, "I felt that the tapes were probably an insurance against people who had participated in meetings and who, in light of the Watergate thing, might go out and lie about what had been said." If indeed the president felt that the tapes would provide a favorable truth to oth-

ers' lies, then presumably he told that to Garment, in which case, *Solow* aside, it would make no sense for Garment to advise other than to preserve the tapes.

The fact is the tapes were not burned and thus were physically available once subpoenaed. Ultimately the president reached an agreement with the Ervin Committee that in lieu of compliance with the committee's subpoena, the president would provide a transcript of the tape recordings and permit Senator John Stennis, a senior Democrat on the Senate Judiciary Committee, to verify the accuracy of the transcriptions.[1]

Cox did not, however, agree and he chose to litigate the enforceability of the grand jury subpoena.

Chief Judge Sirica, who had assigned to himself the case involving the original Watergate burglars, then considered and denied the president's motion to quash the grand jury subpoena and an en banc Circuit Court of Appeals for the District of Columbia, by a seven to two vote, in a *per curiam* decision, refused the mandamus sought by the president to set aside the denial of the motion to quash. *Nixon v. Sirica,* 487 F.2d 700 (D.C. Cir. 1973). The court of appeals decision was dated October 12, 1973, and the president had a week to petition for certiorari.

He chose not to but instead decided to fire Cox.

The difficulty was that Cox could only be fired by the entity that had hired him: the attorney general. Richardson, when asked to fire Cox, refused to do so, believing that Cox, by litigating the validity of the subpoena and opting not to accept the president's "Stennis" offer, hardly had engaged in an act of extraordinary impropriety. Richardson then resigned.

Deputy Attorney General Ruckelshaus, who also had promised the Senate Judiciary Committee not to remove the special prosecutor unless he engaged in an act of extraordinary impropriety, agreed with Richardson and, therefore, refused to follow the president's direction to fire Cox.

He then was fired. This left Solicitor General Robert Bork as the acting attorney general. Bork had been confirmed as solicitor general long before the Watergate affair took place and, therefore, could not have made any commitments comparable to those made by Richardson and Ruckelshaus to the Senate Judiciary Committee. Bork then fired Cox.

This sequence of events is known as the Saturday Night Massacre and was the beginning of the process that would lead to the end of the Nixon Presidency.

Briefly, the public reaction to the Saturday Night Massacre was to deluge Washington with messages of outrage. Cox had played by the rules and had won.

The president lost and then tried to change the rules. As a result of the outcry to the firing of Cox, Cox had to be replaced. Leon Jaworski was appointed as the second Special Watergate Prosecutor with even greater guarantees of independence. Not only would it take extraordinary improprieties for him to be removed, but any removal would require the consensus of eight congressional leaders – the majority and minority leaders in the Senate and House of Representative and the chairs and ranking minority members of the Judiciary Committees in each body,[2] eight leaders split evenly among the parties. Perhaps even more foreboding, impeachment, which had been raised by only a small fringe of the Democratic Party in the House of Representatives in the period before October 20, then became a viable question and the House Judiciary Committee began to prepare for the impeachment process.

The following nine months marked the rapid decline of the Nixon Presidency. Several of the nine subpoenaed tapes were nonexistent and a highly suspicious 18 and a half minute gap appeared on another tape precisely where, documents made clear, Watergate was discussed. The effort to explain this gap defied common sense and further weakened the presidency. Comments by Judge Sirica, a Republican appointee to the bench, at the trial of two of the Watergate burglars that the full story was not coming out, did not help the president. In addition, one of the convicted burglars, in an effort to soften his sentence, publicly stated that higher-ups were involved. During this period, the president assured the nation that he was not a crook, hardly a sign of presidential strength.

In March 1974, the second

Watergate indictment was returned, this one focusing not on the break-in but on the conspiracy to obstruct justice in connection with the break-in. The information provided by the tapes obtained through the grand jury subpoena played a significant role in this indictment.

The indictment named seven defendants and persons known and unknown to the grand jury. The grand jurors voted unanimously to include the president in the category of known conspirators.

This decision was in large part based on the March 21, 1973, tape recording that completely supported Dean's testimony, as did other tapes. The pending trial of the indictment in September 1974 led Jaworski to issue a trial subpoena for additional tape recordings.

Notes

[1] The tape recording system was installed somewhat crudely and was vulnerable to outside noises. A person in his or her mid-thirties could not hear it nearly as well as a person in his or her mid-twenties. Senator Stennis was 72 years old at the time and it would have taken him a long time certify the accuracy of the transcriptions. A very long time.

[2] 38 Fed. Reg. 30739 as amended by 38 Fed. Reg. 32805. Clearly a straight party-line vote would not constitute a consensus – at least one Democrat would have to concur in removal.

Editor's note: The conclusion of this article will be published in our next issue.

Guantanamo Bay

What's Happening Now

By Pete Eikenberry



As reported by *The New York Times* in June 2017, 5,000 U.S. service people and support staff members are stationed in Guantanamo Bay, Cuba. They are there primarily to support the operations of a prison and court system for 41 alleged terrorists. There are no material base operations other than the prison; before 9/11, only a skeleton staff maintained the base. During his campaign, President Trump advocated filling up the prison with "bad dudes."

Last year, the annual bill for the detention staff force and base operations was over $260 million. This is without factoring in the more than $300 million budgeted for prison related capital expenditures in the last 12 months. Thus, the taxpayers' one-year bill for the last 12 months was over $560 million.

During the last week of June 2017 there was a four-hour hearing at "Gitmo" to determine whether a potential trial witness being repatriated to Saudi Arabia would be deposed in an open or closed deposition. The defendant in question was identified by the prosecution as al Hadi al Iraqi, and identified by his counsel as Nashwan al Tamir. On the day before the hearing began, approximately 100 people flew to Cuba on a military flight from Andrews Air Force Base in Washington, D.C., for the hearings, including the judge and his staff, prosecutors, defense counsel, non-governmental organization ("NGO") observers, court reporters, interpreters and translators, security personnel, IT staff, members of the media, and military assigned escorts. NGO observers are housed in tents where the intense outside heat of the island is ameliorated by such fierce air-conditioning that one frequent observer keeps an electric blanket on the premises.

The media people and the NGO observers viewed the hearing from behind two-way glass through which the audio was transmitted with a 40-second delay to permit censorship of classified testimony or documents. I am told that some judges routinely delay for months in making decisions. Each defendant has at least two lawyers in attendance at every court hearing or trial, one detailed military lawyer and one civilian lawyer. A death penalty qualified lawyer is also required for trials where a death sentence

could be imposed. The government has stated that it permits media and NGO observers to travel to Guantanamo Bay in order to help ensure that the hearings are transparent

The record of the Gitmo prosecutions is underwhelming. As the *Times* reported on June 16, 2017:

> Prosecutors have won about 200 "Jihadist related" terrorism and national security cases [in the U.S.] since September 11, as a federal judge noted in 2015…. [N]ot a single Sept. 11 defendant has been convicted under the Guantanamo military commissions. That system … has led to just eight convictions over all, three of which have been overturned.

A defendant transported to "Gitmo" will probably endure years- to decades-long pretrial detention with little likelihood of a conviction or acquittal. On July 21, 2017, the *Times* reported that an alleged Al Qaeda member, Ali Charaf Damache, had been brought to Philadelphia to be tried in federal court after being extradited by Spain. The United States had to try Damache in the United States because Spain would not extradite him if he were to be sent to Guantanamo Bay. The July 25 *Times* editorialized that it was the "right move" to try Damache in the United States because of the "poor" record of successful prosecutions in Guantanamo.

Speaking only as a citizen and without the benefit of lawyerly analysis of constitutional or other considerations, I agree. Defendants are imprisoned indefinitely, the government almost never gets convictions, and the public pays heavily for a policy that makes no current sense (assuming it did at some point). It is in no party's interest for a terrorist prosecution to be handled at Guantanamo Bay.

Save the Date for These Upcoming Federal Bar Council Events

Fall Bench & Bar Retreat
October 20-22, 2017
Mohonk Mountain House
New Paltz, N.Y.

Law Clerk Reception
October 26, 2017
Theodore Roosevelt U.S. Courthouse
Brooklyn, N.Y.

Thanksgiving Luncheon
November 22, 2017
Grand Hyatt New York
New York, N.Y.

50th Annual Winter Bench & Bar Conference
February 10-17, 2018
Four Seasons Resort Nevis
Nevis, W.I.

Judges' Reception
March 15, 2018
Union League Club
New York, N.Y.

Law Day Dinner
May 2, 2018
Grand Hyatt New York
New York, N.Y.

Summer Kick-Off Happy Hour
June 6, 2018
Battery Gardens
New York, N.Y.

CLE program schedules and committee meeting schedules can be found on the Council's website

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