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We invite you to connect with us on LinkedIn.

From the President

…of the Federal Bar Council's Inn of Court

By Marjorie E. Berman



The Federal Bar Council's Inn of Court, now in its 19th year, reflects the highest values of the Council: collegiality, community, and excellence in the practice of law. Joined by Southern District of New York Judges Broderick, Daniels, Englemeyer, and Ramos, and Eastern District of New York Judges Chen, Cogan, Matsumoto, and Donnelly, the Inn's more than 100 active members have presented six smashing educational programs in celebration of this year's theme, "Women and the Law: Precedent, Pioneers and Progress."

As we approach the centennial of women gaining the right to vote, these programs dramatically convey the stories of the pioneers and the precedents that have advanced the progress of women's legal rights. While each program is worthy of its own column, I hope the highlights and insights below will inform and inspire additional study.

Myra Bradwell

The inspiring Myra Bradwell story opened the term. Likely an unfamiliar name to many, she was instrumental to the admission of women to the bar. Bradwell founded the renowned *Chicago Legal News* in the 1860s and was a vocal advocate for women's suffrage and equality. When she was denied admission to the Illinois bar under the doctrine of coverture (a principle that a woman had no legal existence apart from her husband), she challenged the decision before the U.S. Supreme Court. Decided at the same time as the *Slaughterhouse* cases, she lost her fight in an 8-1 decision (*Bradwell v. Illinois*, 83 U.S. 130 (1872)) that held that the right to practice law in the states was not a privilege and immunity of citizenship protected by the 14th Amendment.

Justice Bradley infamously concurred, noting that the "timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." 83 U.S. at 141.

Rebounding from the setback, Bradwell continued her work to advance women's rights and, in 1890, was retroactively granted a license to practice law. Thus, some recognize Bradwell as the first female lawyer in the United States.

Norma McCorvey

The following month, the Inn explored a different kind of maverick in telling the compelling back-story behind *Roe v. Wade*, featuring Norma McCorvey, the woman known as "Roe."

McCorvey spent most of her life running from crisis to crisis. She was not looking to challenge the law. Rather, when she was introduced to lawyers Linda Coffee and Sarah Weddington (at the time only two years out of law school), she was pregnant with her third child and looking to undergo an abortion. (McCorvey gave birth during the pendency of the case and placed the child for adoption). Beyond the drama that informed the case, the program re-enacted the arguments before the Supreme Court and the behind-the-scenes deliberations of the members of the Court.

Prison

December's program, aptly entitled *Orange is the New Black*, focused the Inn's attention on the specific issues impacting women in the criminal justice system. The program highlighted the unique challenges for female defendants and inmates by exploring issues such as prosecutorial efforts to compel cooperation by leveraging a woman's obligations as a mother, medical issues while incarcerated (such as pregnancy), sexual assault in prison, and public perceptions of female defendants often based on their physical appearance and dress.

The ERA

The New Year began with the Equal Rights Amendment. This program traced the history of this proposed amendment to the U.S. Constitution intended to guarantee equal rights for all citizens, regardless of sex. The lively program highlighted the efforts of women such as Alice Paul, who introduced the ERA in 1923, through the ERA's revival in the 1960s by figures such as Gloria Steinem, Betty Friedan, and Bella Abzug – as well as the fierce opposition led by Phyllis Schlafly.

The Senate approved the amendment in 1972, but it did not become law as it was three states short of the 38 needed for ratification by the seven-year deadline (subsequently extended for an additional three years). The ERA was re-introduced in 1982 and has been introduced before every session of Congress since then. In 2017, Nevada, and in 2018, Illinois, became the 36th and 37th states, respectively, to ratify the ERA. The ERA story is living history.

The Court

No women's theme would be complete without celebrating the four female justices of the Supreme Court. In a program entitled "Behind the Jabots: The Notorious R.B.G. and the Other 3", the Inn explored the remarkable lives of Justices Sandra Day O'Connor, Sonia Sotomayor, Elena Kagan, and Ruth Bader Ginsburg and their achievements, challenges, and contributions to the advancement of legal principles to protect women. Now here's something interesting to share at your next legal cocktail party: Rehnquist and O'Connor dated while law school classmates at Stanford and after graduation Rehnquist proposed to O'Connor – by letter no less! And if you do not know what a jabot is, just take a look at Justice Ginsburg's collar.

Anita Hill

The March program featured an in-depth view and analysis of the 1991 Clarence Thomas hearings. The famous testimony that spellbound the nation came only *after* the Judiciary Committee already had voted to send then-Judge Thomas' nomination to the full Senate. When Anita Hill's affidavit, which alleged inappropriate conduct, was leaked to the press, the Senate hearings were reopened. The conflicting and compelling testimony of Hill and Judge Thomas opened a nationwide discussion about sexual harassment in the workplace.

The Inn's programs reflect the commitment and talent of the Inn's members, who work with enthusiastic dedication. The scripts and power points for these remarkable programs are housed by the Federal Bar Council and available for use and review. We invite members of the Council's community to explore them.

The year's programs concluded on April 10 (exploring Susan Glaspell's 1917 novel *A Jury of Her Peers*) and May 7 (the Title VII case of *Price Waterhouse v. Hopkins*).

From the Editor

A Talk with Steven Peikin

By Bennette D. Kramer



At the Winter Bench and Bar Conference on February 22, 2019, Second Circuit Judge Raymond J. Lohier, Jr., the judicial chair of the Winter Conference Planning Committee, interviewed Steven Peikin, co-director of the Securities and Exchange Commission's Division of Enforcement.

Peikin, a frequent attendee at Winter Meetings, has been at the SEC since June 2017. His job as co-director of enforcement is to manage, along with the other co-director, Stephanie Avakian, over 1,200 staff nationwide who are dedicated to investigating and prosecuting violations of the

federal securities laws. He talked about what he was doing and about the division's structure.

The Cyber Unit

In 2017, the division formed a cyber unit. Peikin sees cybercrime as one of the greatest threats to the economy. The cyber unit consolidates nationwide expertise on cyber-related matters, which include intrusions and attacks. In a recent case brought by the SEC, hackers based in the Ukraine infiltrated the SEC's EDGAR system, identifying areas where companies make test filings. They found the information in the SEC system and disseminated it to traders. The hackers, along with some traders in California and elsewhere, were indicted in the District of New Jersey.

Some SEC cases are based on a failure to have adequate safeguards against cyber intrusions and failure to disclose intrusions. Companies sometimes fear reputational injury if they disclose intrusions, but people now know that their information is vulnerable.

Insider Trading Unit

Insider trading is a violation that has a corrosive effect on investor confidence. The motivation is greed. The SEC has sophisticated tools to uncover insider trading and has become good at catching people. Insider trading is depressingly prevalent.

As a result of the Second Circuit's decision in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), tippees need to know a benefit is conferred to the tipper in order to be liable or guilty. This happens when a tipper receives a benefit through a self-interested disclosure or some other reason. In *United States v. Martoma*, 869 F.3d 58 (2d Cir. 2017, opinion amended and superseded, No. 14-3599 (2d Cir. June 25, 2018), the Second Circuit retreated from *Newman*.



Drawing by Julie Anello.

ICOs

An initial coin offering ("ICO") is a method of capital raising similar to an investment in the stock market, but a company issues a token instead of stock. In 2016, $100 million was raised through ICOs and, in 2018, $11 billion. Investors are investing in securities without the protections the federal securities laws provide. The SEC wrote a 21(a) report that analyzed whether an ICO met the test for a security and concluded that it could. There have been a series of charges involving ICOs sold without first registering with the SEC. In addition, scam artists are cheating investors. The SEC does not have direct jurisdiction over bitcoin or other cyber currencies, but it does have jurisdiction over securities transactions.

Tesla/Elon Musk

On August 27, Elon Musk announced that he was thinking of taking Tesla private and that he had the funding to do so. One month later, the SEC brought charges based on the fact that Musk had not secured funding. He settled two days later. The penalties consisted of a package of remedies that focused on the particular facts, including a $20 million fine – one of the largest penalties ever for an individual.

The Division of Enforcement saw a pattern of reckless disclosures by the chief executive officer without much oversight from the board, so the settlement provided for an independent chairperson, additional independent directors, and a requirement for oversight of Musk's communications. The SEC usually is not involved in the corporate governance area, but it does have a broad range of things it can ask for in the form of undertakings in settlement including the remedies and relief obtained here.

Enforcement Proceedings/ Remedies

In *Lucia v. SEC*, the Supreme Court decided that the SEC's administrative law judges had not been appointed in a manner consistent with the Appointments Clause of the U.S. Constitution because they were not accountable to a principal officer. Following *Lucia*, the SEC reappointed all its ALJs and remanded hundreds of cases for rehearing. The SEC has decreased its use of ALJs, bringing administrative cases principally when it only can get relief administratively. The SEC brings the rest of its cases in federal court, which is more time consuming and takes longer.

Disgorgement

In June 2017, the Supreme Court in *Kokesh v. SEC* ruled that the SEC's claims for disgorgement were subject to a five

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year statute of limitations. The Division of Enforcement is trying to move faster and be more selective in the cases it brings. The SEC is trying to keep track of the money it is not able to get under *Kokesh* and, to date, has estimated that the decision may cause the SEC to forego up to approximately $900 million in disgorgement, of which a substantial amount likely could have been returned to investors.

Unfavorable *New York Times* Article

A *New York Times* article said that there had been a decline in SEC penalties and a lighter touch in favor of big business in the Trump administration and that penalties under President Barack Obama were higher than under President Donald Trump. Peikin said that the *Times* methodology was deeply flawed and the performance, effectiveness, and activity level of the Division of Enforcement during the tenure of Peikin and his co-director compared favorably with any period in the commission's history.

Peikin said that the SEC's chairperson, Jay Clayton, was a big believer in vigorous enforcement and had not received a mandate to slow down enforcement. The Division of Enforcement is continuing to bring significant cases against Wall Street entities. The focus is on retail investor protection and returning money to retirees.

Wrapping Up

Peikin noted that there are only four commissioners now, and that has led to some challenges, but the chairperson was very supportive of enforcement. Peikin is glad to have returned to government, because he truly believes in the need for a vigorous enforcement program.

Developments

Council Holds Winter Meeting in Maui; Ernest Collazo Receives Seymour Award

By Bennette D. Kramer

The Federal Bar Council held its annual Winter Bench and Bar Conference at the Grand Wailea Resort Hotel in Maui, Hawaii, from February 16 through February 23, 2019. Second Circuit Judge Raymond J. Lohier, Jr., headed the Planning Committee and Russell Yankwitt chaired the meeting. Ernest Collazo received the Whitney North Seymour Award for public service by a private practitioner. The programs presented are described below.

Sexual Harassment/#MeTo

The first program, chaired by Eastern District Judge Carol Bagley Amon, explored issues related to sexual harassment in the workplace. The focus was on the serious questions raised by harassment allegations in which the accused feels that there is no due process and the accuser believes that she is not being taken seriously. Judge Amon introduced the panelists: Ellen Davis of Sard Verbinnen & Co., a public relations firm; defense lawyer Lynn Hermle, of Orick, Herrington & Sutcliffe; Joan McPhee of Ropes & Gray, who defends firms accused in harassment claims; and Milton Williams of Walden Macht & Haran LLP, who has represented plaintiffs and defendants in harassment cases and has served in-house.

The hypothetical, based on a real case, was presented in a series of videos. In the first video the accuser talked about an incident of sexual harassment that occurred four years before. A human resources employee overheard that conversation.

Hermle said that under EEOC rules, an employer who knows or should know about any sexual harassment allegation has to take prompt remedial action by conducting an investigation. A manager has the same obligation.

Williams said that the accuser has to cooperate with the investigation, but the employer has to be very careful not to be too forceful.

The next step in the investigation is to look at the accused's emails to determine if he is a recidivist. The wild card is who holds the power in the company – the chief executive officer, the general counsel, or human resources. A company often will ignore the harassment if the accused

is a big producer for the company.

Davis said that her job is to consider the risk to the company if it does not come forward. Although the accuser said that she did not want to come forward, she could change her mind. McPhee said that the environment had changed in the last three years when such allegations might have been handled internally and privately. The company faces significant risk of reputational harm if the information gets to the media.

Hermle said that an investigation could be performed without reputational harm if a skilled investigator who focuses on human resource issues is used. The board should be told "when you know the board would want to know," but before the news breaks in the media, or if the allegation involves someone at the corporate management level. Davis said that the company needs to put together a team of people from different areas of the company, including a member of the board, to oversee the investigation.

The accused in this hypothetical contended that no sexual assault had happened. Hermle and Williams said they would not recommend suspending him under the circumstances. McPhee said that the allegations of sexual assault put the accused in a difficult position. If cooperation with the company is a condition of continued employment, he may make admissions with no control over the process. Ninety-nine percent of the time the accused would be fired. Williams said that if there are criminal implications, the company only will take an attorney proffer and will not require a statement from the accused. Hermle said that 10 years ago no one could bring a lawyer into an interview, but now it is more common.

McPhee said that the process set up by the company was thorough but that the accused was going to lose his job and become an untouchable. The focus of the investigation was whether there was inappropriate conduct in light of a company policy but that is not a legal standard. Hermle agreed that the HR supervisor made a mistake by not investigating when the accused first disclosed her allegations four years earlier.

The panel discussed whether there should be a written report. Hermle said that she always requests oral reports to deprive the other side of damaging cross examination, while McPhee said that her clients want some level of report for any investigation. The goal is to reestablish trust and confidence through a report on the process.

Davis said that she drafts statements after contact from the press. At that point, the board must be told, and decisions must be made as to who else the company must notify, such as shareholders or customers. Hermle said that a settlement agreement in California cannot prohibit a party from talking about a sexual harassment or gender discrimination settlement, and a company cannot say no comment in response to inquiries.

Davis said that the media seizes on negative facts and does not bother with nuance or gray areas. The bottom line is to figure out how to protect the company.

Williams said the lesson here is that people must understand that the workplace is no longer a place to pick up women. McPhee said that the #MeToo backlash is a very real concern, because men say they are uncomfortable being alone with women. This behavior creates a real concern. The real advice is "don't be a jerk."

Unconscious Bias

A program chaired by District of Connecticut Judge Robert N. Chatigny explained unconscious bias and how to remove bias from the decision-making process.

First, Dean Song Richardson of the University of California, Irvine, discussed the way the brain works and why everyone is biased. She said that, despite conscious beliefs and identity tests, we all perform automatic profiling by race, gender, and other characteristics. She gave examples of situations in which identical resumes with supposedly black and white sounding names had been given to hiring persons, and the white sounding names got twice the call backs. There were similar results with men and women, and where male candidates were offered $5,000 more than the women.

Professor Rachel Godsil of Rutgers Law School then talked about racial anxiety and the stereotype threat. She said that everyone needs to recognize the

risks of unconscious bias. People with racial anxiety worry about being racist and how that would influence any decision. Godsil explained that racial anxiety makes interaction difficult, but it is very difficult for our brains to be colorblind. She said that different ethnic groups have different goals in interacting. Whites and Asians want to be liked; blacks and Latinos want to be respected. Asians presume that they are competent so interactions with whites are more successful. Godsil said that the stereotype threat can affect work performance. The goal is to create an environment in which everyone is comfortable.

Richardson talked about how to safeguard ourselves from acting on implicit bias, which is not reduced by good intentions, suppression, avoidance, or self-perceived objectivity. To approach reducing implicit bias, begin by actually listening to the person toward whom you may be biased and engage in more interactions with that person. Start with acknowledgement of race or gender; prepare objective criteria for evaluation such as specific valuation criteria and check lists; eliminate distractions; and write opinions. Before performance evaluations, consider the opposite side of your opinion, take time, and do not trust your gut.

Godsil suggested that to reduce racial anxiety, practice positive priming by bringing up a positive memory before an interaction; practice emphatic listening, focusing on the other person's experience; be mindful of body language; and use individualization to form a bridge through common experiences rather than attempting to create an immediate bond. During the interaction, talk about race and show respect for the other person. When giving feedback, explain why you think the person is capable of excellence, share specific actionable feedback, and encourage the person to do well.

AI, Law, and the Legal Profession

Chief Judge Colleen McMahon of the Southern District of New York chaired a panel that explored the future of the legal profession in the age of artificial intelligence. Panelist Cari Robinson, assistant general counsel for investigations at IBM, explained AI and how it can help the legal profession. She said that AI is a mechanism for analyzing huge data sets that needs to be trained to recognize images and patterns, predict outcomes, and then learn on its own. AI goes through the process of learning, correcting, and improving as it trains systems to learn and understand. AI has great promise for problem solving in many areas, including medicine.

In the legal profession, the current and potential uses of AI are varied. AI will be able to do contract analysis and legal research memos. Judges can use AI to manage dockets. Practitioners will be able to use AI to predict how judges will decide cases, doing in seconds what takes an associate a couple of days. In-house counsel can use AI to keep tabs on outside counsel. But computers will not replace people, because they do not have judgment.

Panelist Anthony E. Davis of Hinshaw & Culbertson pointed out that AI software can do in seconds what it takes a lawyer many hours to accomplish. AI can do legal research, e-discovery, contract analytics, and case outcome predictive analytics. Large corporations will be able to reduce use of outside counsel by using specific software developed by analytic companies for in-house legal departments to analyze their data. The direct relationship between software developers and in-house legal departments will change what lawyers do. The amount spent on outside lawyers by corporations is already decreasing. Lawyers will be needed for judgment and adaptability, but these skills exclude junior and mid-tier associates from the economic equation. Law firms will have to hire lawyers with different kinds of backgrounds and skills, focus on working with AI and developing judgment.

Shireen Barday of Gibson, Dunn & Crutcher said that her firm is in the business of selling the best legal services. It is facing an immense amount of data and there are not enough associates in the world to keep up with the amount of data. Gibson Dunn has created an AI and Automated Systems Committee. The firm does not develop AI but uses products developed by others. She agrees that law firms have to be smart in

the way they use associates. Now associates review documents and oversee people who review them. AI makes the job easier and faster.

Maxim Price of Pierce Bainbridge Beck Price & Hecht agreed that there is a giant data storm. He believes that AI empowers young attorneys and enables them to organize data and make it more beautiful. AI will never stop evolving. Price said that associates in the future will not be reviewing documents. They will be doing more substantive work. Associates do not have to be technically savvy to use AI because they are the user end and not at the development end of the software.

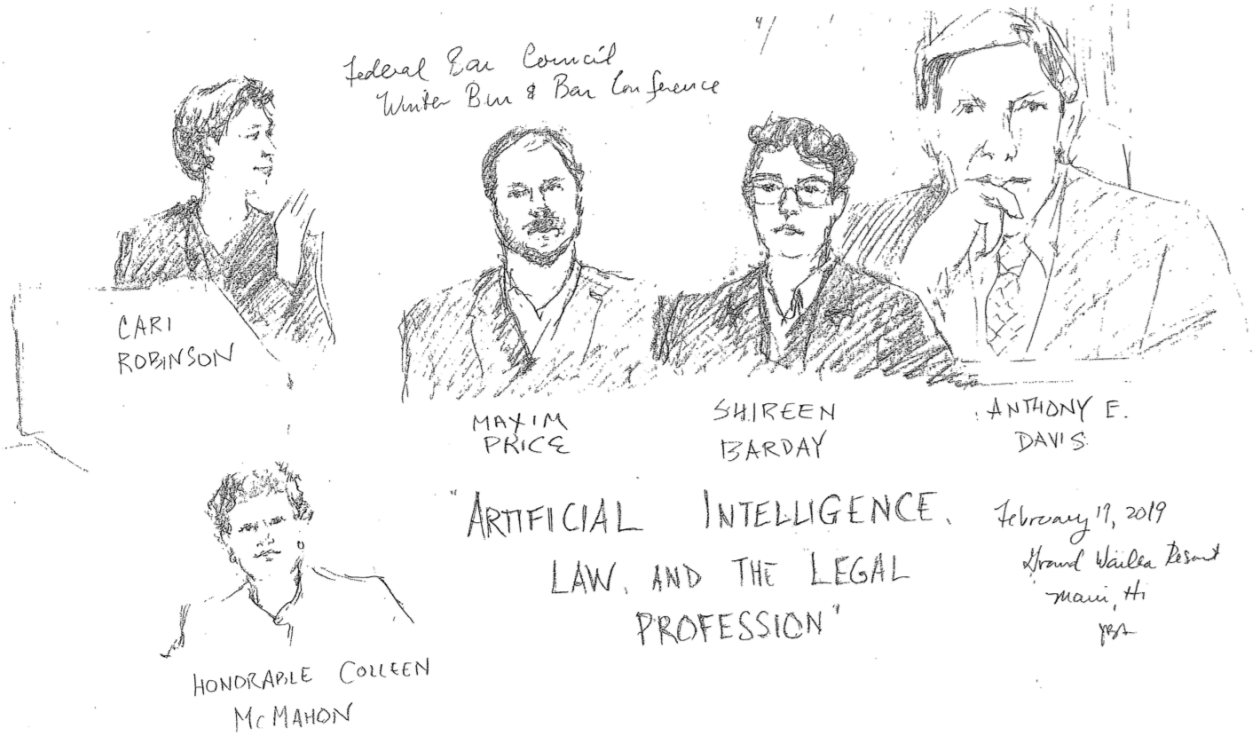
Robinson said that firm clients will force firms to use AI because they want fast results and an understanding of the data as quickly as possible. The legal profession and law schools will shrink and younger lawyers will develop different skills. In smaller cases, AI will resolve suits for people who cannot afford lawyers. All these changes will be driven by the need to get a handle on the explosion of data.

NFL National Anthem Controversy

Second Circuit Judge Reena Raggi led a panel including Major (Retired) Louis James Boston, Jr., Army Judge Advocate General's Corps; Jameel Jaffer, Knight First Amendment Institute at Columbia University; and Elena Paraskevas-Thadani, EPT Legal, in a discussion about the National Football League's national anthem controversy.

Judge Raggi began by introducing the panelists. She explained that the tradition of playing the national anthem at sports events began after World War I and it became more the norm after World War II. On September 12, 2001, the Star Spangled Banner was played at Buckingham Palace.

Boston went through the time line of Colin Kaepernick's protest of the killing of black men by police during the national anthem beginning in August 2016. His protest went from sitting during the anthem to kneeling. Following comments by President Donald Trump in September 2017, many more NFL players kneeled. Although the NFL changed its anthem policy in May 2018 with-



Drawing by Julie Anello.

out consulting the players or the National Football League Players Association to give players the option of staying in the locker room during the singing of the national anthem, that policy has been frozen since July 2018.

Judge Raggi then asked the panelists for their individual definitions of patriotism, giving the definition that patriotism is "love for country and willingness to sacrifice for it." She then asked if it is appropriate to question Kaepernick's patriotism. The panelists agreed that you can question Kaepernick's patriotism, but it is necessary to preserve tolerance.

The panelists pointed out that Kaepernick's protest did not raise First Amendment issues because he was protesting in a workplace against a private authority. The First Amendment prevents the government from retaliation for the exercise of constitutional rights, but it does not prevent a private authority from acting unless there is an entanglement of state and private action. A better argument might be that Trump's tweets were coercive and affected the actions of the NFL.

Paraskevas-Thadani said the important fact here was that the protest was done in the workplace and there is no right to protest in the workplace. The rights of the employees (the players) and the employers (the individual teams) are set forth in the collective bargaining agreement. Boston said that it is a crime in the military not to stand and salute during the national anthem. Panel members disagreed whether the protest was disrespectful.

Jaffer pointed out that many football players had reacted to the issue of the killing of black men by police in different ways. They went out to schools and tried to get media attention for the issue, but were not very successful. There was very little media attention until Kaepernick knelt. The protests have spread to high schools and colleges. Students, at least those in schools run by a government, have a First Amendment right to protest.

The arbitration brought by Kaepernick against the NFL (which was settled recently) was brought under the collective bargaining agreement. Paraskevas-Thadani pointed out that the collective bargaining agreement has 18 sections on collusion, and Kaepernick claimed that the NFL teams had gotten together and colluded by deciding that no team would hire him.

Executive Branch Power

Second Circuit Judge Raymond J. Lohier, Jr., chaired a panel that examined the scope of executive branch power. On the panel was Beth George of Wilson Sonsini Goodrich & Rosati, who from 2011 to 2016 served as a lawyer in various national security and intelligence roles during the Obama administration. She also served as associate counsel in the Office of the White House Counsel on detail from the Department of Justice and as a professional staff member and counsel to the U.S. Senate Select Committee on Intelligence. George considered, among other things, the ability of the president to deliberate and keep the deliberations secret. She worked on the process of decision-making under privilege, which Congress never challenged. The president wanted a bigger policy and no one else wanted to be the ultimate decision-maker. Congress asked the executive for documents, the president raised the issue of executive privilege, Congress issued a subpoena, and the executive refused to abide by it, so Congress went to court. *See Committee on Oversight and Government Reform, United States House of Representatives v. Holder*, No. 12-1332 (ABJ) (D.D.C. 8/20/14) (Document 81).

Dean Aviam Soifer of the University of Hawaii at Mānoa, William S. Richardson School of Law, looking at presidential orders, pointed out that it was the 77th anniversary of the internment order for Japanese Americans. The order did not result in many internments in Hawaii, where 50 percent of the population was Japanese-American. In *Korematsu v. United States*, 323 U.S. 214 (1944), the Supreme Court upheld the internment, even though it knew that the Japanese Americans were not a threat to the security of the United States. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (known as *Youngstown Steel*), the Justice Department argued that President Harry Truman's order was unreviewable. Congress had passed the Taft-Hartley Act five years before. President Truman

had checked with the chief justice before issuing the order, who said it would be okay. Even so, the Supreme Court overturned the order. The president has the broadest powers when the executive and Congress agree and the lowest power when they disagree, as in *Youngstown Steel*. In *Trump v. Hawaii*, Chief Justice John Roberts said that *Korematsu* had been overruled by the "court of history" but he did not discuss *Youngstown*.

District Judge Derrick K. Watson of the District of Hawaii said that the majority in *Trump v. Hawaii* rejected *Korematsu*, but no one explained why. He is optimistic after reading *Trump v. Hawaii*. He said that the Court looked at two issues: (1) the president's statutory authority to issue an order and (2) whether the order violated the First Amendment's Establishment Clause. The Court had other options. It could have considered and decided standing and justiciability. It could have taken easy outs and limited review, but it decided instead that it could look behind the face of an executive order. The Court's conclusion was that the judiciary must subject presidential orders to some kind of scrutiny. *Korematsu* demonstrates that it is essential to have limits to the discretion exercised by presidents.

George said that the executive wants to avoid all judicial review and oversight. In the executive branch battles, national security issues and terrorism make the most compelling cases.

Professor Zachary Price of the University of California, Hastings College of the Law, said that the current political environment with its intense politicization will lead to increasing challenges. The parties are moving further apart and have increased intolerance for the other side. There has been a steady increase in polarization since the 1970s. The environment explains why self-restraint is going out the window. Each party is pushing for policy goals – the recent shutdown and emergency declaration are examples of the push. Judges are aware of the fraught environment. Courts strive for practical outcomes. It is important for the courts to ensure confidence in the rule of law.

Supreme Court Review

Erin E. Murphy of Kirkland & Ellis and Neal Katyal of Hogan Lovells were members of the Supreme Court review panel, chaired by Second Circuit Judge Raymond J. Lohier, Jr.

Judge Lohier introduced the panel members, pointing out their connections to the Second Circuit: Katyal clerked for Second Circuit Judge Guido Calabrase and Murphy clerked for Chief Justice John Roberts, who clerked for Judge Henry Friendly. Katyal then provided some statistics from the last term.

Murphy examined the two gerrymandering cases, *Rucho v. Common Cause* from North Carolina and *Lamone v. Benisek* from Maryland, which are before the Court this term. She said that the Supreme Court has not yet answered the question of how the map that accomplishes the gerrymandering can be challenged. It is a justiciability issue relating to the courts' power. The Court has rejected the idea that gerrymandering is unconstitutional per se. The Constitution gives the legislature the power to draw districts, putting the Court in the position of drawing the line of how much oversight is too much. The Court is concerned that it will have to make purely political decisions. The North Carolina case is a traditional gerrymandering claim involving an entire map drawn to give the Republicans an edge and is based on equal protection and fairness to voters claims. The Maryland case is a challenge to one district based on a First Amendment argument that the district was drawn as retaliation against Republican voters in the district.

Katyal discussed *Maryland-National Capital Park and Planning Commission v. American Humanist Association*, a challenge to a cross in Maryland that is part of a war memorial erected in 1919 to honor war dead who could not be brought back to the United States. The American Legion provided the money for the memorial, which is now in a traffic circle managed by a Maryland agency. There is not a word relating to religion on the memorial and the American Legion still conducts ceremonies there. Katyal, who argued the case on behalf of the supporters of the memorial, said that there are 40 memorials in the United States in the shape of the cross. The plaintiff says that honoring soldiers

with the shape of the cross shows an underlying religious message. The Trump administration wants to use the case to overrule the existing test that looks at the objective purpose of the symbol as understood by people and whether there is excessive entanglement with religion. The administration wants a test that only would overturn a symbol if there was religious coercion with the way the symbol was being used. Katyal said that Chief Justice Roberts does not like to overturn precedent and that the Court can protect the cross without doing so.

Murphy looked at *New York State Pistol & Rifle Association v. the City of New York*, a gun control case from the Second Circuit, which concerns the ability to transport firearms within the City of New York. A person holding a "premises license" only may transport a gun to an approved shooting range, and the gun and ammunition must be locked up separately. The license holder only may transport the gun to an approved shooting range within New York City itself – not to a second home or unapproved range. The plaintiffs argue that the Court should take the case because this law is an extreme outlier. However, this case might not resolve all cases dealing with restrictions on the right to carry firearms, so the Court has scheduled the argument for next year, indicating that it may be looking for a better case.

Katyal examined *Department of Commerce v. New York*, the case challenging the citizenship question that the Trump administration wants to add to the census, alleging that the question will help to make certain there is compliance with voting. The Court granted certiorari on a discovery question but let the trial proceed. Judge Jesse Furman of the Southern District ruled against the government in a 277-page opinion. The government skipped the court of appeals, arguing that the case was urgent and important (but not an emergency) because the census papers have to be printed by June so there is only time for one court to decide. Judge Furman found that the addition of the census question was arbitrary and capricious and a violation of the Administrative Procedure Act. The plaintiffs contend that Commerce Secretary Wilbur Ross cherry-picked the evidence to reach the result the administration wanted. The government's main argument is that the issue is unreviewable.

Murphy discussed *Gundy v. United States*, which deals with the non-delegation doctrine. The rule is that Congress can delegate its powers as long as it provides an intelligible principle. *Gundy* deals with the Sex Offender Registration and Notification Act, which gives prosecutors full authority to determine whether the law applies retroactively and provides no guidance to the prosecutor. Murphy said that the justices are looking for a way to punt on the issue of how much delegation is too much because it is hard to develop a good test of what amount of delegation is over the line.

Katyal addressed *cy pres* settlements in class actions raised in *Frank v. Gaos*. The plaintiff and defendant in the case against Google are on one side defending the settlement of a case alleging violations of privacy under the Stored Communications Act. The settlement in the amount of $8.5 million allocated $2.5 million to lawyers and the rest to a variety of universities. There was no practical way to distribute the very small amount of damages to class members. The parties said that they could not send notices to 100 million people. The parties argued that the settlement was fair, reasonable, and adequate, while the objectors contended that it is not fair. The chief justice is skeptical about *cy pres*, while Justice Sotomayor indicated at argument that this was a rare case where *cy pres* was okay. The Court asked for supplemental briefing on the issue of standing, and then remanded the case for the lower courts to consider that issue.

The panel concluded with a discussion of issues that are percolating. Murphy said that justices were inviting issues to overrule precedent. For example, Justice Thomas issued a challenge to overrule *New York Times v. Sullivan*, the long-time precedent on defamation claims against public figures. Katyal said that preemption and deference cases were in the pipeline. In the long term there are gun cases, challenges to abortion, and affirmative action, among others. He said to watch the chief justice, who cares about precedent and the institution of the Supreme Court. Murphy said to watch race issues and redistricting

– the newest justices are opposed to the use of race in redistricting.

Lawyer Ethics

Southern District Judge Cathy Seibel led a panel composed of Jillian B. Berman of Levine Lee, Carl H. Loewenson, Jr., of Morrison & Foerster, Roy D. Simon, Distinguished Professor of Legal Ethics Emeritus at Hofstra Law, and James Q. Walker of Richards Kibbe & Orbe, which discussed issues raised by hypothetical ethical situations.

First, panel members looked at the responsibility of an in-house lawyer to report illegal behavior. Walker said that the lawyer is not ethically required to disclose the behavior under New York Rule 1.13, but that Sarbanes Oxley requires disclosure, creating a conflict between New York law and Sarbanes Oxley. The lawyer must report the conduct up the chain in the company and may report outside if the issue is not getting resolved. Simon said that if there is a conflict between federal and state law, if the federal law says "must," there is preemption, but if it says "may," state law applies. Walker said that lawyers are excluded from collecting whistle blower bounty when the evidence comes from representations by the client.

An attorney may not disclose attorney-client communications, even if the attorney believes that the communication falls into the crime-fraud exception to the attorney-client privilege. The court, not the attorney, makes a crime-fraud determination based on whether (1) the client is committing a crime, and (2) the communication is in furtherance of the crime. A lawyer making disclosures to the chief executive officer and audit committee is not protected from the anti-retaliation clause of Sarbanes-Oxley because the anti-retaliation protection only applies to whistleblowers who report misconduct to the SEC.

Turning to recording of phone calls, Loewenson said that it is legal under New York and federal law for one party to record a telephone conversation. Fourteen states require that all parties consent, and in New York a person talking to someone in another state can presume that he or she can record the conversation. Simon said that lawyers must be careful when recording a client without consent. Whether it is ethical depends on the purpose for the recording.

The American Bar Association, New York City Bar Association, and New York State Bar Association have different approaches, but the view has evolved over time. In 1974, the New York State Bar Association opined that recording a client was not in keeping with the high standards of the legal profession, and the ABA agreed. Loewenson said that the ABA has issued a new formal opinion on secretly recording a conversation with a client and stated that it is not inherently deceitful but would be unethical if it were illegal. Extraordinary circumstances would be necessary for a lawyer to make an undisclosed recording of clients. Simon said that a City Bar opinion said that it is generally accepted when it satisfies a societal good, but good reasons are few and far between for routinely recording clients without consent. Loewenson said that a Ponzi scheme or industrial pollution would provide extraordinary circumstances. A lawyer probably can record a client who the lawyer suspects of violating federal campaign finance laws but cannot help the client violate the law. If a client asks a lawyer if he or she is recording the conversation, the lawyer cannot give a false answer to the client. Nor can a lawyer ask someone else to call and record a client in a situation where the lawyer could not do it. If a lawyer does record a client, the lawyer must take reasonable steps to safeguard the confidentiality of the evidence and keep the recording in a safe place. A lawyer who is aware the client is violating the law should consider withdrawing from the representation.

The panel discussed joint defense agreements. Berman explained that a JDA is an agreement among defense counsel in a criminal case to communicate and share information under an extension of the attorney-client privilege. When one individual agrees to meet with the government, that individual is no longer furthering the common interest. To determine whether the time has come to pull out of the JDA, the individual looks at (1) the nature of the information provided to the government, and (2) the content of the proffer. If the information is useful to the government and the in-

dividual pleads guilty and agrees to cooperate seeking a 5K-1 letter and a lighter sentence, the individual must withdraw from the JDA. Loewenson said that it would violate the cooperator's Fifth Amendment rights to preclude him or her from speaking to the other members of the JDA.

Under alternative facts, an individual who refuses to talk to the government with the objective of obtaining a pardon may be violating the law. Similarly, lawyers sharing information with the goal of impeding an investigation may be undertaking conduct prejudicial to the administration of justice. Berman said that there is no privilege for post-plea conversations among former parties to the JDA, because the government witness no longer shares common goals, but the JDA survives as to the remaining defendants. A contested issue is whether the remaining parties to the JDA can cross examine the cooperator. Berman said that there are opinions going both ways. Even if there is no joint attorney-client privilege there may be fiduciary and confidentiality concerns.

When Soldiers Speak

A team of players led by Second Circuit Judge Denny Chin repeated the Federal Bar Council's American Inn of Court performance of a script originally written by Judge Chin and Kathy H. Chin. The play dramatizes the story of Specialist David Cortright who protested the Vietnam War while he was serving in the Army as a member of the 26th U.S. Army Band at Fort Wadsworth, New York. Cortright was outspoken about his objection to the Vietnam War and signed a petition protesting it. He was regarded as a problem by the Army and transferred to Fort Bliss, Texas. Cortright challenged the transfer in the Eastern District of New York as an effort to suppress his First Amendment rights. Eastern District Judge Jack B. Weinstein found that Cortright's First Amendment rights had been violated by his transfer to Fort Bliss and rescinded the transfer. The government had argued that the court lacked jurisdiction to hear the case, contending that the acts of the Army were discretionary and therefore unreviewable.

The Second Circuit reversed, concluding that the transfer order was not subject to review by civilian courts despite the contention that the order chilled Cortright's right to free speech.

Cortright is now director of policy studies at the Notre Dame Institute for International Peace. He attended the reenactment in Hawaii, played himself at the end of the performance, and was available for questions following the reenactment.

During the question and answer period, Judge Chin explained how he and Kathy Chin had created the program as part of the Second Circuit 100th anniversary celebration. The original reenactment was one of three in one program so that it was considerably shorter. Then, the Inn of Court enlarged the script and presented the program a year ago. At that time, they got in touch with Cortright and he attended the Inn of Court program. Then, Larry Krantz invited Cortright to come to Hawaii for the Winter Meeting program.

Cortright explained that he never gave in to attempts to silence and intimidate him. There were tense moments and he felt pressure, so the band members did not issue a second petition against the war. They found an Army Judge Advocate General attorney who told them to file an Article 138 administrative proceeding. Cortright said that ironically Fort Bliss was a hotbed of antiwar activity. Many of the leaders were transferred out.

Cortright made a Freedom of Information Act ("FOIA") request for his military records. They contained no actual information about subversion. The Army had interviewed his high school teachers and priests looking for crimes, drugs, or homosexual behavior. The records included photos from high school and of his brother's wedding. Cortright's antiwar activities helped his career at the Institute of Peace in the District of Columbia, which asked him to do his Ph.D. studies there. The Notre Dame Institute for International Peace is one of the largest peace studies institutes in the world.

Cortright said that he read history after he was drafted. He discovered that everything the government was saying about the war was wrong. He made a deal to be assigned to the band before he received his draft notice.

Developments

Ernest Collazo Receives Whitney North Seymour Award

By Pete Eikenberry



At the Federal Bar Council's Winter Bench & Bar Conference in Hawaii, my friend of 45 years, Ernest Collazo (whom I first knew as a fine point guard on a lawyer's league basketball team) was awarded the Federal Bar Council's Whitney North Seymour Award. In presenting the award, Counsel President Mary Kay Vyskocil gave tribute to the award's namesake, Whitney North Seymour.

For decades, Seymour was one of two or three most prominent New York City lawyers. Judge Vyskocil stated:

> He was an expert in antitrust laws and a recognized authority in the field of civil liberties, arguing more than 50 cases before the United States Supreme Court. Mr. Seymour fought for justice for all litigants. In 1937, he won an appeal overturning the conviction of Angelo Herndon, a young Black communist, convicted of violating Georgia's anti-insurrection law, largely because he had communist literature in his room.

As the president of the ABA and numerous other bar, civic, and human rights organizations, Seymour took time to mentor individuals, including Judge Vyskocil and Collazo, both of whom became his partners at Simpson Thatcher. Collazo recalled being invited to confer with Seymour "on how he was doing" when Collazo had been an associate at the firm for only four months.

Judge Vyskocil noted that Collazo's career as early president of the Puerto Rican Legal Defense and Education Fund, his long term service on the First Department Grievance Committee, and his numerous civic and bar services as well as his mentoring of young students in the South Bronx emulated Seymour.

As to mentoring, Collazo stated that:

> One of the most satisfying activities I have undertaken over these many decades has been the teaching of leadership skills to young boys and girls in the South Bronx. I did that for the spring semester of 1971 when I graduated early from college. Last year, almost 50 years later, I again taught leadership skills, to 10 very bright 11 and 12 year old boys and girls at a south Bronx elementary school. I met with my class weekly for an hour; and every other week, I would bring with me an African American or Hispanic partner to show them how each of these partners broke the barrier to become a successful big-time lawyer. Each individual I brought with me was peppered with questions and each had a great time regaling them with their individual stories.

In his remarks, Collazo expressed gratitude for his nomination, first to his wife, Denice, then to Judge Dennis Jacobs, former partner George Davidson, and Judge William Kuntz.

Legal History

The Supreme Court Wrestles with the Gold Clause

By C. Evan Stewart



The greatest economic disaster in our country's history was undoubtedly the Great Depression. It also destroyed Herbert Hoover's presidency, and made Franklin Roosevelt's election in 1932 to replace him a certainty. It is interesting that Roosevelt's campaign rhetoric on how to dig out of the crisis was vague and sometimes contradictory (for example, one of his central tenets for economic revival was to balance the federal budget).

Desperately trying to win re-election, Hoover directly attacked Roosevelt, warning the country that, if elected, his oppo-



Franklin D. Roosevelt campaigning in 1932. Photo courtesy of the Franklin D. Roosevelt Library archives.

nent would follow William Jennings Bryan's opiate and "issue greenback currency."

Hoover further warned that that would inevitably lead to the country going off the gold standard, which would create "one of the most tragic disasters to…the independence of man."

Roosevelt, recognizing the danger of this attack, replied that Hoover was conducting a "campaign of fear," that he (Roosevelt) was not a "devolutionist," and that he (Roosevelt) believed in "sound money." This reply was carefully chosen to obfuscate the fact that Roosevelt (and his "Brains Trust") really did not have a set of definitive plans. What was more candid and revealing was what Roosevelt voiced publicly as his overriding, governing principle: "The country needs and, unless I mistake its temper, the country demands bold, persistent experimentation. It is common sense to take a method and try it. If it fails, admit it frankly and try another. But above all, try something."

Once he became president on March 4, 1933, Roosevelt lived up to his promise of experimentation. One result of that was immensely consequential litigation up to the Supreme Court that is little remembered today.

First We Must Devalue the Currency

One of Roosevelt's first priorities was to get monetary relief for the country's farmers – to raise (somehow) the price of farm commodities. Although there were many ways to perhaps achieve that goal over the mid- to long-term, the way to do that quickly was to (i) give up the gold standard, and (ii) devalue the dollar.

This first step came with Executive Order No. 6102 on April 5, 1933, in which the president decreed that all gold held by private citizens had to be sold to the Federal Reserve. This was followed by Executive Order 6111 on April 20, which prohibited (indefinitely) all exports of gold from the United States. By these two actions, the United States effectively went off the gold standard. (Roosevelt's budget director, Lewis Douglas, said privately that this was "the end of Western civilization.")

At the same time, legislation was moving through Congress to give the president the authority to end deflation by, *inter alia*, doing exactly what Hoover had warned of: issuing greenback currency and monetizing silver (at a 16 to 1 ratio to gold – one of Bryan's campaign slogans in 1896). And while these steps would likely help to jump start farm commodity prices by devaluing the dollar, there was one last leg of the monetary stool that also had to be fixed, and that was the gold clause.

Deep Sixing the Gold Clause

In virtually all private contracts, as well as in government issued securities (and World War I debt incurred by foreign countries), there was a provision known as the gold clause. This meant that the contracting parties agreed to all debts being paid in gold or gold-equivalents. If these clauses remained in place, devaluation of the currency would make matters exponentially worse: the dollar would be worth much less, but all debts would have to be repaid at the official price of gold: $20.67 per ounce (set by the Gold Act of 1900). In other words, farmers (and others) would have even less money (in terms of value) to make good on their fixed contractual obligations; the bankruptcies prior to Roosevelt's election would be a trivial number if this state of play was allowed to exist. Roosevelt's advisors (principally George F. Warren, a professor of agricultural economics at Cornell) were aware of this danger, but believed there was an easy answer: if Congress could devalue the dollar, it could also void the gold clause in contracts.

On May 7, 1933, Roosevelt gave his second "Fireside Chat" to the nation over the radio. Still within the famous, first 100 days of his administration, the president recounted all that had already been done to tackle the Great Depression. He also addressed the country's currency and, in particular, the fact that the government and public had approximately $120 billion in debt that was subject to the gold clause. Roosevelt explained that this was much ado about nothing, since "all the gold in the United States amounted to only between three and four bil-

lions and that all of the gold of the world amounted to only eleven billion." Thus, according to the president, very few could really be repaid in gold; instead, virtually all debtors would repay in paper currency, and every creditor, therefore, would have no recourse but to accept that paper.

Like much of his campaign rhetoric, Roosevelt was dissembling in his Fireside Chat. The gold clause did not actually require a physical delivery of gold; rather, it required that the debt be repaid in gold or in currency valued at the price of gold (*see* the "Legal Tender Cases," decided by the Supreme Court after the Civil War; *e.g.*, *Knox v. Lee*, 79 U.S. 457 (1871); *Juilliard v. Greenman*, 110 U.S. 421 (1884)). Thus, the problem still remained – notwithstanding the president's facile dismissal – and it had to be addressed pronto.

On May 26, the administration – contemplating the issuance of new government securities in June *without* the gold clause – asked Congress to void (permanently) the gold clause for all future *and past* contracts. There was immediate (and strong) push back. Carter Douglas, Democratic Senator from Virginia (and someone who had been a key ally in repelling Hoover's economic attacks on Roosevelt during the 1932 campaign) publicly denounced "the proposal to repudiate all outstanding gold contracts [as] unconstitutional and the courts will so hold if there is any integrity left in the courts with respect to the sanctity of contracts." He subsequently attempted to exempt government securities and debts owed to the United States arising out of World War I, but that failed to carry the day in the Senate.

Notwithstanding predictions that foreign governments owing America many billions in World War I obligations would default on their debts if the legislation became law, the House of Representatives overwhelmingly approved the measure on May 29; the Senate quickly followed suit on June 3. Two days later, Roosevelt signed the legislation. Where people stood on this law depended upon, among other things, their political party, not to mention their status as creditor or debtor. Although the executive and legislative branches had spoken and acted, the issue had to be resolved by the courts and, ultimately, by the Supreme Court.

Was the Law Constitutional?

In short order, there were a number of legal challenges to the retroactive voiding of the gold clause; four of them ultimately were consolidated together before the Supreme Court – and they became known as the "Gold Clause Cases": *Norman v. Baltimore and Ohio Railroad* (New York State); *U.S. v. Bankers' Trust Co.* (8th Cir.); *Perry v. United States* (Court of Claims); and *Nortz v. United States* (Court of Claims). The key issues teed up by these cases were:

(1) Was the party relying on the gold clause entitled to receive in legal tender what was owed at the equivalence of the legal price of gold; and

(2) Was the party relying on the gold clause entitled to money damages as a result of Congress' abrogation of the gold clause.

In the government's briefs, the principal argument was that Congress's action was based upon a national "necessity"; as articulated by Assistant Solicitor General Angus MacLean: "[I]f the gold clauses were maintained [at the same time the other steps were taken to devalue the currency]…, this meant bankruptcy on a national scale." (It had been estimated that it would take $1.69 to make good on a gold clause's $1.00 value.) Thus, Congress *had* to act and the Supreme Court was *obligated* to uphold that action "in order to save the country."

The government also argued (in addition to Roosevelt's specious contention that this was all no big deal because there was not enough actual gold to make good on $120 billion in contractual obligations) that the plaintiff had suffered no actual (and actionable) damages – because of wide-scale deflation, the same amount of paper currency actually had far more purchasing power in 1934-35 than it had prior to October 1929. As precedent for its various positions, the government cited to the Legal Tender Cases, where the Court, *inter alia*, had written: "Whatever power there is over the currency is vested in Congress."

Oral argument on the consolidated "Gold Clause Cases" took place on January 8, 9, and 10, 1935. The general consensus was that the government had not done well before a very skeptical Court, and there were apocalyptic predictions of what would happen if the Court struck down the legislation. Not surprisingly, financial markets reacted negatively, as did commodity prices. Foreign nations, owing huge sums to the United States in World War I obligations, publicly fretted about what to do. According to a report in *The New York Times*, unnamed members of the Senate were studying increasing the number of Supreme Court Justices to get to whatever number of votes were needed to sustain such a law (shades of Roosevelt's Court-Packing Scheme of 1937! See, "Sick Chickens in the Second Circuit Threaten FDR's New Deal," *Federal Bar Council Quarterly*, February 2008). Subsequently, the New York Stock Exchange (fearing the worst) publicly announced that it would (if necessary) suspend trading upon the Supreme Court's decision. Also fearing the worst, Roosevelt's administration began thinking up a "Plan B" – among the contingencies contemplated in the face of an adverse decision were:

(1) The declaration of a national emergency by the president for 90 days (or longer, up to a year), staying payment of any debts greater than the nominal dollar amount of the obligation;

(2) New legislation voiding any counterparty's rights to sue the government based upon the gold clause;

(3) New legislation changing the jurisdiction of the Court of Claims (so no gold clause claims could be brought therein); and

(4) An unprecedented attack by the president on the Supreme Court over the airwaves.

While Roosevelt and his advisors pondered these and other scenarios, they, the nation, and the world waited for the Supreme Court to render a decision.

The Supreme Court Decides

On February 18, 1935, Chief Justice Charles Evans Hughes announced the Court's decisions in open court. In the two cases involving private debt (*Norman* and *Banker's Trust*), by a 5 to 4 vote the Court ruled that Congress's nullification of the gold clauses was constitutional – that Congress had been granted power over such matters by the Constitution. ("We are not concerned here with the wisdom of [Congress's enactment]. We are concerned with power, not with policy.")

But with respect to the two cases involving public debt (that is, government bonds, *Perry* and *Nortz*), by an 8 to 1 vote the Court ruled that Congress' nullification of the gold clauses was unconstitutional – that Congress, having been granted the power to authorize such debt, had "not been vested with authority to alter or destroy those obligations." Notwithstanding, by a 5 to 4 vote the Court went on to rule that the public debt holders (for example, *Perry*) had not suffered "any loss whatsoever" – that to permit "payment to the plaintiff…would appear not a recoupment of loss…, but an unjust enrichment."

In other words, the law was unconstitutional as applied to government bonds (only), but there would be no actionable remedy in money damages.

On behalf of the "Four Horsemen" (Justices Butler, Sutherland, and Van Devanter), Justice James Clark McReynolds issued a vociferous dissenting opinion (although it obviously concurred with the first holding in *Perry* and *Nortz*): "Just men regard repudiation and spoliation of citizens by their sovereign with abhorrence; but we are asked to affirm that the Constitution granted power to accomplish both." According to Justice McReynolds, the Founding Fathers never "intended that the expected government should have the authority to annihilate its own obligations and destroy the very rights which they were endeavoring to protect." Noting that the "so-called gold clause-promise" had existed for more than 100 years in U.S. contracts, both private and governmental, what Congress had done was contrary both to the sanctity of contracts (private and public) and the country's most solemn obligations: "[I]t destroys directly" and thus violates the Fifth Amend-

ment, there being "no provision for compensation" – i.e., "[o]bligations cannot be legally avoided by prohibiting the creditor from recovering the thing promised."

Then, invoking Alexander Hamilton (regarding the government's moral and constitutional obligations to honor matters of contract), as well as the fact the sanctity of contracts had built America into the greatest nation in the world, Justice McReynolds questioned who would do business in the future with such a government. He ended the opinion as follows: "Loss of reputation for honorable dealing will bring us unending humiliation; the impending legal and moral chaos is appalling." (When he read his opinion in open Court on February 18, Justice McReynolds started off by saying, "The Constitution as many of us understood it, the instrument that has meant so much to us, is gone." He ended with these words: "Shame and humiliation are upon us now. Moral and financial chaos may be confidently expected.")

The subject of little focus at the time was Justice Harlan Stone's separate opinion on the public debt cases (*Perry* and *Nortz*). It was Justice Stone's view that, once Justice Hughes had opined that the debt holders had no damages, the Court should *not* have then gone on and ruled (unnecessarily, in his opinion) that the law – as it applied to public obligations – was unconstitutional (having determined the opposite for private obligations). By that extra step, the Court had "imposed restrictions upon the future exercise of the [Congress'] power to regulate the currency." Even so, in Justice Stone's mind the formality of said "restrictions" perhaps did *not* in fact kick in because the Hughes opinion on the constitutionality of cancelling the gold clause vis-à-vis public debt had gotten only four votes (he dissented on that ruling, and Justice McReynolds' opinion had a different rationale vis-à-vis Congress' statute); Stone privately wrote that the "Court has not declared, decided, or adjudged that the Government is bound by the Gold Clause."

The media's immediate reaction to what the Court decided was, to say the least, "confused." The Associated Press announced that the government had "lost." The *Atlanta Constitution's* headline read: "'New Deal' Upheld in High Court." Closer to what actually happened was headlined by *The Wall Street Journal*: "Moral Defeat, Practical Victory, for Government." Similarly, the *Times of London* opined that "[y]esterday's judgement…leaves the Administration free to act as if what is declared unconstitutional were in fact constitutional." And as Walter Lippmann wrote a week later, the decision constituted "a victory but not…a vindication of the government…. The abrogation destroys a vested right. It repudiates a contract…. And unless one is prepared to agree that legitimate rights can never be extinguished, the gold clauses cannot be dealt with on the theory that contracts are absolute."

Irrespective of the media's confusion, Roosevelt and his advisors were relieved and "very jolly." While they could not foresee the New Deal's setbacks in the Court that would lead to the Court-Packing Scheme in 1937, for now they had radically devalued the currency and gotten the Court to uphold Congress's retroactive invalidation of the nation's contracts. As for the financial markets – which had been braced for bad news – they reacted positively; not so much for the Court's validation of the nation acting like a banana republic (i.e., repudiating its legal obligations), but rather for the certainty that seemed the clear result of the Court's decisions.

Although Milton Friedman and Anna Schwartz would later write that the Supreme Court's rulings retarded the country's emergence from the Great Depression (*A Monetary History of the United States, 1867-1960* (1963)), the U.S. government in fact had no difficulty going back to the financial markets and issuing new debt in short order. Thus, unlike when Third World countries have defaulted on their debts and investors punished them severely, our nation radically changed the rules of the game at half time and seemingly paid no price for it (indeed, benefitted from it). Could this work a second time?

Postscripts

- Like, I presume, most lawyers, I was never taught about the Gold Clause Cases

when I was in law school. Rather, I just learned about them at a recent, fascinating symposium at the Council on Foreign Relations, which featured a presentation by Professor Sebastian Edwards, an economics professor at UCLA. His book – *American Default* (Princeton 2018) – is a must read for anyone seeking more information on this little remembered but fascinating part of our nation's legal and economic history.

- The devaluation of our currency and abrogation of the gold clause did not seem to have a beneficial impact upon foreign countries' willingness to repay their World War I obligations to America. Of the 17 countries that borrowed over $10 billion from the United States (a huge sum in 1914-18 dollars), only Finland paid its debts in full.
- Dean Acheson was undersecretary of the Treasury Department in early 1933, and because of the illness of the secretary he was pretty much running the department on a day-to-day basis. He (like so many establishment figures) considered Roosevelt's plan to go off the gold standard and to devalue the currency, etc., to be improper and illegal. As such (and depending on which version of history you believe), he was either asked to resign or resigned of his own volition. In any event, in doing so Acheson wrote a short letter to Roosevelt, thanking the president for allowing him to serve in such "stirring times." Thereafter, Acheson – despite his views – never expressed them publicly. Roosevelt never forgot Acheson's "appropriate" behavior and, when another subordinate tendered a very different type of resignation, the president told his press secretary, "Return it to him and tell him to ask Acheson how a gentleman resigns." Acheson's actions also had the effect of allowing him back into the government during World War II to a high level post in the State Department (and, later, under President Truman, he became the Secretary of State).
- The last word on the Gold Clause Cases is given to the legendary Harvard Law Professor Henry M. Hart, Jr., who wrote a seminal piece in the May 1935 issue of the *Harvard Law Review* ("The Gold Clause in United States Bonds"). In Professor Hart's view, "Few more baffling pronouncements, it is fair to say, have ever issued from the United States Supreme Court…. Seldom has a legal controversy been touched with ramifications so various and extensive. So much the more astonishing, therefore, is the Delphic character of the Court's utterance in the most difficult of the cases before it.… [With respect to the public debt plaintiffs,] [a]lmost the only thing which is possible to say with assurance is that the plaintiff[s]…did not recover."

What's on Your Wall?

A Rockwell Print

By Lisa Denig



The very first Norman Rockwell print I bought was "The Runaway." I am sure you know it. It depicts a small boy, sitting at a lunch counter, all of his earthly possessions tied up in a bandana at the end of a stick lying on the floor. A kindly looking police officer is sitting next to him, leaning over, presumably attempting to persuade the young man that life on his own will be much harder than life at home with his parents.

I bought this print for my first husband. He was a police officer with the New York Police Department, in the Highway Unit, and the uniform in the painting was remarkably similar to the one he wore every day. However, there was so much more to that

painting, so many emotions, and nuances conveyed through the strokes of Rockwell's brush. I was hooked.

Norman Rockwell's paintings and magazine covers are more than just static drawings. Each and every one of them tells an intricate story without any fancy narration or moving parts. They are simple, yet complicated; unpretentious, yet deeply engaging. I am not ashamed to admit that I have nearly a dozen different Rockwell prints hanging on my walls at home.

The Jury Room

But one very special print looms over my desk at the Westchester County District Attorney's Office, where I serve as bureau chief of special litigation. This one, entitled "The Jury Room" is hands-down my favorite. The scene: a smoke-filled jury deliberations room, the door closed and locked, the floor littered with crumpled ballots. The problem: a seemingly obstinate young woman, arms firmly crossed, chin squarely set, refusing to succumb to the 11 men crowded around her, imploring her to change her mind. (The drawing can be seen at https://prints.nrm.org/detail/261050/rockwell-jury-room.)

When I first saw this painting at the Norman Rockwell Museum in Stockbridge, Massachusetts, I fell in love with the young lady. I saw so much of myself in her – although petite and pony-tailed, she was standing her ground against formidable men, some twice her age. She had her own ideas, her own view of the evidence and, most importantly, her own vote.

Today, my view of this painting has taken on a different meaning. In my role answering appeals for the Westchester County District Attorney's Office, I have encountered more jury selection issues over the last two years than in my entire career. The claims are wide and varied, from discrimination during jury selection to allegations of jury tampering to a court's purported refusal to answer certain jury notes. Every time I answer a jury claim, I glance up at the print on my wall and think how vitally important it is to a lawyer to select just the right jurors. And then I wonder what almost every lawyer wonders at some point: What the heck goes on in that jury room?

One case I recently worked on involved a hung jury in the first trial. Fortunately, the prosecutor who conducted the trial was able to question the jurors after they were excused. Apparently, 11 of them were ready to convict. The lone holdout: a young man who told the prosecutor that he did not believe in the science of DNA. Really? Yep, that was his reason. You can bet the prosecutor asked about that during the questioning of prospective jurors for the retrial!

You might think that now, as a prosecutor, I fear that young lady in the Rockwell print instead of idolizing her. Ah, but you would be wrong. It is not the young woman in the painting that gives me fits – it is the man to the far right. Do you see him, the one slumped over and sleeping? This is the juror that no good lawyer wants on a jury, the ambivalent, the disinterested, the comatose! If only there was some magical way to weed out this juror during *voir dire*, then we all would have a bit more faith in the system.

That, I suppose, is the ultimate message that I take away from "The Jury Room." No, the system is not perfect, and, yes, it often creates a tangled mess during deliberations. But everyone has the right to serve and everyone has the right to their own opinion. A beautiful painting; an even more beautiful and important truth.

Editor's Note: Readers, if you have something special on your wall and would like to tell us about it, please reach out to our editor, Bennette D. Kramer, at bkramer@schlamstone.com, and managing editor, Steven A. Meyerowitz, at smeyerowitz@meyerowitzcommunications.com.

In Brief

About Paul O'Dwyer

By Pete Eikenberry

When I write for the *Federal Bar Council Quarterly*, I sit at Paul O'Dwyer's desk. In my political days in the 1960s and 1970s, attorney Paul O'Dwyer

was a living legend in activist circles. With his white mane of hair and the heavy Irish brogue he never lost, Paul was a captivating sight and presence both at Democratic conventions and other gatherings and as president of the New York City Council.

He also liked to tell a good story.

Once, over lunch, he told me that someone had come to him with the news that there was only one lyre maker left in all of Ireland. Paul related that he and a friend worked hard to raise money for an apprentice program to save the profession. Some time later, Paul was in Ireland on business, and he stopped by the lyre maker's house to see how the apprentice program was working out. No one was home, and Paul found the lyre maker at the local pub with his lawyer; they were drinking up the money that Paul and his friend had raised. Paul said to me, "You know Peter, we had the damndest time getting that money back into the foundation."

Recently, at a book signing in Park Slope, I was telling this story to Brooklyn writer Pete Hamill, when Hamill interrupted me to tell his own Paul story.

Hamill said, "I saw Paul on the street one day and he asked me how I was doing. I said, 'Paul, I don't know, I have writer's block.' Paul exclaimed, 'Come on Pete, you are not a good enough writer to have writer's block.'"

Hamill then said to me, "After what Paul said, I picked up my pen and never put it down again."



Federal Bar Council honors women judges in the Second Circuit at a recent reception.
Photo by Jack McCoy.

Federal Bar Council
150 Broadway, Suite 505
New York, NY 10038-4300

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