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Provocative, Human, Eclectic

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From the President

Overcriminalization: A National Problem in Need of Reform

By Robert J. Anello



"Out of sight; out of mind" is an unfortunate cliché when applied to our nation's massive prison population. All too often as lawyers we deal with criminalization and sentencing as theory or an argument affecting an individual defendant, but without any real understanding of the conditions of confinement, the impact of those conditions on individuals, or of the economic and collateral cost of mass incarceration on our country. In 2009, the Federal Bar Council established a committee – the Special Committee on Sentencing Reform and Alternatives to Incarceration – to examine such issues. Made up of judges, correction experts, and lawyers with experience in diverse aspects of the criminal justice system, the committee has had the opportunity to hear from those who run prison facilities and those who have been housed in them. Rather than theory, they have provided informed and personal insight into the effects of our culture of incarceration. Surprising to me has been the view expressed by individuals such as an official of the U.S. Bureau of Prisons, who, in an appearance before the committee, asserted his feelings that our growing prison population was too expensive and that sentences for many classes of violators – for example, non-violent criminals and individuals convicted of pornography possession – were too long and were unnecessary to achieve the goals of our penal system. Some of these views, from those inside the system, finally appear to be being heard more broadly.

On May 7, 2013, the House Judiciary Committee created a historic bipartisan Task Force on Over-Criminalization, a measure that was supported by staunch conservatives and liberal progressives equally. This represents the latest step in what is developing to be a consensus across ideological lines that over-criminalization and over-incarceration in the United States have resulted in too many criminal laws with too stiff criminal penalties leading to an extraordinary number of individuals in prison for too long.

Just a week earlier, on May 1, the Federal Bar Council honored Judge Barrington "Daniel" Parker, Jr., with the Learned Hand Award for Excellence in Jurisprudence during our Law Day celebration. Judge Parker noted during his address on Law Day that, "over the past 35 years, the federal criminal justice system ... has, before our very eyes, evolved into the most punitive in the world." Throughout his 19 years on the bench, Judge Parker has addressed issues of over-incarceration with thoughtful consideration. In *United States v. Dorvee*, for example, Judge Parker wrote for a unanimous panel of the Second Circuit, reversing a 20 year jail sentence for possession of child pornography. Rejecting the idea that a sentence within the sentencing guidelines should be considered presumptively reasonable, Judge Parker wrote that mechanically applying the guidelines without using discretion can "easily generate unreasonable results."

Over-Criminalization

Looking at nationwide statistics, over-criminalization and mass incarceration can seem like runaway trains that cannot be stopped. Between 2000 and 2007, Congress created, on average, 56 new crimes per year. *See* Brian W. Walsh & Tiffany M. Joslyn, Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law 6 (2010). Congress increasingly has directed the Sentencing Commission to revise the guidelines to raise penalties for numerous crimes, including tax fraud, securities fraud, and child pornography possession. Over 200 federal offenses now have mandatory minimum sentences, many of which were created in the last decade. The United States cur-

rently incarcerates 2.3 million people. Of that population, thousands are held in solitary confinement, under conditions that have been defined as torture by the United Nations' Special Rapporteur. *See* Juan Mendez, Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Aug. 5, 2011).

How can we look at these bleak numbers without resigning ourselves to the status quo, overwhelmed by futility? One area from which to draw inspiration is the burgeoning reform movement building in state legislatures and correctional systems to address these issues. The tremendous results these efforts have achieved in just a few years can be a roadmap. The *New York Times* recently reported that over the last five years, "29 states have managed to cut their imprisonment rates, 10 of them by double-digit percentages." In Mississippi, Christopher B. Epps, the Commissioner of Corrections, led a massive effort to reform the state's solitary confinement policies. According to his testimony before the Senate Judiciary Committee last June, Commissioner Epps worked with lawyers from the American Civil Liberties Union and other prisoners' rights organizations and with correctional experts to develop a new classification model for placing inmates in solitary confinement and to create step-down programs that allowed inmates to obtain release from solitary confinement. The reforms also instituted group counseling, alcohol and drug treatment, life skills, and anger management programs for inmates in solitary confinement. As a result, the state reduced the population in segregation from over 1,300 in 2007 to slightly more than 300 in 2012, a decrease of 75 percent. Maine and Colorado have both undertaken similar efforts and reduced their solitary confinement populations by 50 and 36.9 percent respectively. These results show us that reform is possible now. They also show how important it can be for prosecutors, judges, and defense counsel alike to take into account the perspectives of new voices, such as prison administrators who can be invaluable resources for understanding the impact of mass incarceration.

Mass Incarceration

It can seem difficult for individual lawyers, prosecutors, and judges to act on these issues. In a criminal case, a court typically addresses the case before it – the individual defendant and his or her circumstances and the specific facts of the alleged offense. Sometimes it can seem like "the systemic nature of mass incarceration presents challenges beyond common legal claims." Anne Traum, *Mass Incarceration at Sentencing*, 64 Hastings L.J. 423, 440 (2013). As attorneys, however, we have a responsibility not only to our individual clients but to our communities and our profession to address these issues not only on a case by case basis but systematically and institutionally. As Judge Parker said during his Law Day comments, a nation that currently incarcerates 2.3 million people "is not who we are. These are circumstances that none of us can justify and none of us can be complacent about." I encourage my fellow lawyers to take inspiration from Judge Parker's words and endeavor to improve the system to which we owe so much.

From the Editor

The Exonerated

By Bennette D. Kramer



Since the advent of DNA testing 24 years ago, defendants and their representatives have redoubled efforts to exonerate and free those who have been wrongly convicted. Recently, there have been several high-profile cases in the press, but my renewed in-

terest in the subject began with a recent reenactment of *The Exonerated* by the Federal Bar Council Inn of Court.

The Exonerated

On April 9, Judge Frederic Block's Inn of Court team presented an adaptation of *The Exonerated: In The Words of the Wrongfully Convicted*, written by Jessica Blank and Eric Jensen, at the Irish Repertory Theatre. The actors were all Inn of Court members. *The Exonerated* tells the stories of six exonerated defendants who had been sentenced to death and spent two to 22 years on death row. The interwoven stories start with the lives of the exonerated defendants before the crimes were committed and progress through crime, arrest, questioning, trial, and exoneration efforts to post-exoneration struggles. The stories are told in the defendants' own words.

The Exonerated is very powerful because it provides a glimpse into the human stories behind innocent defendants who had been sentenced to death primarily as a result of coerced confessions, false testimony, and prosecutorial and police misconduct. Although the stories of their arrests, convictions, and incarceration are harrowing, the impacts on their lives following release are heartrending, because most of the defendants cannot get over their experiences. The Inn of Court team did a masterful job of bringing these stories alive.

Update: 2012, The National Registry of Exonerations

In early April 2013, the National Registry of Exonerations, a collaboration between the University of Michigan Law School and the Center on Wrongful Convictions at Northwestern University School of Law, issued a 2012 Update to their February 2012 report, *Exonerations in the United States, 1989-2012*. The 2012 Update added 198 cases to the Registry for a total of 1,089 exonerations and described the trends and new developments as of the end of 2012. The exonerations added to the list included both exonerations that took place in 2012 (one third) and ones that occurred in earlier years (two thirds), but that had not been previously identified.

The major discovery was a dramatic increase in the participation of prosecutors or police in exonerations. In 2012 prosecutors or police participated in 34 exonerations – 54 percent. In comparison, over the preceding 24 years, prosecutors had participated in 317, or 30 percent, of the known exonerations. The report attributes this jump to "changes in state laws that facilitate post-conviction DNA testing, the emergence of Conviction Integrity Units in several large prosecutorial offices [including New York and Kings Counties], and, perhaps, a change in how law enforcement officers view the possibility of false convictions at trial." 2012 Update, at 3. The majority of the 2012 exonerations are homicide cases (36, or 54 percent), including two defendants who had been sentenced to death, and sexual assault cases (15, or 24 percent). Thirty percent of the cases involved exoneration resulting from DNA testing; eight percent of the defendants were women, and 57 percent were African American.

The 2012 Update noted several other trends. First, prosecution and police cooperation is least common for high profile crimes such as murders with death sentences and child sex abuse prosecutions and most common for robberies and drug crimes. The number of exonerations in cases where the defendant pled guilty has increased. The proportion of rape and murder exonerations is down from 83 percent to 80 percent. As the date of the first use of DNA recedes further into the past, the proportion of DNA cases continues to decline. Finally, the number of exonerations where no crime has occurred has increased.

The 2012 Update also examined the causes of false convictions, which parallel the causes that emerge from *The Exonerated*. The leading causes of false conviction in homicide convictions are perjury or false accusations, official misconduct, and false confessions. False sexual assault and robbery convictions arise from mistaken eyewitness identification and bad forensic evidence. Child sex abuse exonerations primarily involve false testimony by witnesses who fabricated crimes

that never existed, and drug crime false convictions have a high rate of deliberate misidentifications in crimes that did not occur.

The 2012 Update concluded with profiles of nine cases of people exonerated in 2012. Of these, two were DNA exonerations, three were cases in which no crime occurred, and in several cases prosecutors assisted in the exoneration. I recommend finding the report and reading the case histories.

Recent Exonerations

Three recent exonerations are notable for various reasons. Two are from Kings County, New York, and the third from Texas.

Jabbar Collins

In the first, Jabbar Collins was incarcerated by New York State for more than 16 years. In February 1994, Abraham Pollack of Williamsburg, Brooklyn, was shot and killed during a robbery. Witnesses described the perpetrator as a young black man suffering a stab wound and police received an anonymous phone call naming Collins. He was arrested by two officers who found no evidence of a knife wound. None of the eyewitnesses recognized Collins in a lineup. The same two officers coerced a drug addict into signing a written statement implicating Collins, which they used to initiate a criminal complaint against Collins. The complaint also stated a second witness had identified Collins, whereas the second witness had told police he did not recognize Collins. Collins was charged with murder and robbery. Two other witnesses testified before the grand jury that they had observed Collins in or near the building where shots had been fired.

Virtually all of the witnesses subsequently recanted and told Assistant District Attorney Michael Vecchione that their statements had been coerced. Through illegal procedural steps, the ADA was able to threaten and coerce the witnesses to testify at trial. He even obtained an order authorizing one witness to be involuntarily returned to New York from Puerto Rico. The ADA never disclosed that one witness had recanted and others had been coerced. The factual background is set forth in a Memorandum and Order issued by District Judge Frederic Block in *Collins v. City of New York*, 11 CV 766 (E.D.N.Y. Feb. 15, 2013).

The events described above came to light during a hearing on Collins' *Habeas Corpus* petition held by District Judge Dora L. Irizarry. Judge Irizarry was particularly upset that the District Attorney's office would not admit that it had done anything wrong in connection with the prosecution of Collins. She stated:

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> It is, indeed, sad that there is nothing in what has been said in the statement of the D.A.'s office that says we see there were a number of things that were done here that were, perhaps, done incorrectly, and we are going to take steps to make sure that none of this ever happens again. We are going to make sure to train our assistants to make sure they understand that.
>
> * * *
>
> [B]ut by standing by everything that you did, and not acknowledging that there were documents that should have been turned over that weren't turned over, acknowledging that there was information – not acknowledging that there was information that should have been given that wasn't given, you stand by all of that, I think that that's shameful. I think that that's shameful, and what I hope will come out of this is that there will be some more significant training in this area with respect to the trial assistants, so that something like this just doesn't happen again.

Collins v. Ercole, 08 CV 1359 (E.D.N.Y.), Transcript of Proceedings before the Honorable Dora L. Irizarry, June 8, 2010, at 122, 133. ("Irizarry Transcript"). Judge Irizarry concluded that the disclosure of the information relating to Collins' prosecution might never have seen the light of day without the persistence of Collins' counsel and her own tenacity in conducting the proceedings:

> But for the fact that this court ordered a hearing, there would not have been such a close examination, and but for the fact that the court pressed respondent to make sure that we had a complete record that forced a more thorough search of the record here, that granted petitioner leave to expand the record in this case, but for all of those things, I'm not so sure that we would be here reaching this decision necessarily, which is the right and proper decision. And we talk about justice. It's very difficult to talk about justice in the situation that we're confronted with now, 16 years later.

The major discovery was a dramatic increase in the participation of prosecutors or police in exonerations. In 2012 prosecutors or police participated in 34 exonerations – 54 percent. In comparison, over the preceding 24 years, prosecutors had participated in 317, or 30 percent, of the known exonerations.

Irizarry Transcript, at 137. Collins' conviction arose from prosecutorial misconduct, and his exoneration resulted from the combination of his and his counsel's persistence, and Judge Irizarry's efforts to force the D.A.'s office to produce documents that Collins had been seeking through FOIL requests during the 16 years he was incarcerated.

David Ranta

David Ranta spent 23 years in maximum security prisons in New York for the 1991 shooting of a Hasidic rabbi following a botched robbery of a jewelry courier. His exoneration followed an investigation by the Conviction Integrity Unit of the Kings County District Attorney's Office. The primary trial witness, Menachem Lieberman, who was 13 at the time of the robbery and murder, had testified that he had seen Ranta near the murder site. He now says that Detective Louis Scarcella told him to identify Ranta in the lineup. None of the four other witnesses, including the jewelry courier who was the robbery target, identified Ranta in the lineup. Two other witnesses admitted fabricating stories implicating Ranta. Although Detective Scarcella had another suspect, he never showed a photograph of him to witnesses. Moreover, prosecutors convinced the judge that the wife of the suspect, who died in a police chase, was an unreliable witness.

The investigation began after Lieberman confessed to Ranta's former defense lawyer. Lieberman, who felt guilty about his testimony, had encountered the courier who accused him of lying. He then went to Ranta's lawyer, Michael Baum. Coincidentally, Baum was contacted by the newly formed Conviction Integrity Unity and asked if he knew of any cases needing reexamination. Baum told the Integrity Unit representatives about the Ranta case; they investigated and asked the court to dismiss the charges. Ranta's conviction arose from an overzealous police officer, but his exoneration was prompted by the joint efforts of the principal witness and the Conviction Integrity Unit of the Kings County D.A.'s Office.

Michael Morton

The third case is the strangest one. Michael Morton served nearly 25 years of a life sentence for killing his wife before he was exonerated. The prosecution had concealed two pieces of evidence that could have helped him at trial and that under *Brady* it had an obligation to turn over. The first evidence was a transcript of a police interview with Morton's three-year-old son who witnessed the murder and described a monster with a big mustache. He also said that Morton was not home at the time. The police dismissed the child's story, told through his grandmother, as unreliable. The second piece of evidence was a police report about a suspicious man who parked a green van near the Morton home several times.

Morton knew he was innocent and spent his entire time in prison seeking to prove his innocence. After his wife's murder, the police focused only on Morton, ignoring other evidence. Morton finally convinced the prosecutor's office to perform DNA testing on a bandana found near the Morton home by Mrs. Morton's brother. DNA testing linked material on the bandana to both Mark Alan Norwood and Mrs. Morton. In October 2011 Morton was released. Norwood was tracked through a national DNA database and then linked to a murder of another woman that was similar to that of Mrs. Morton. Norwood also was linked to the gun involved in Mrs. Morton's murder. He was convicted of Mrs. Morton's murder and sentenced to life in prison

The twist in this case is that in April 2013, former Williamson County District Attorney Ken Anderson (currently a state judge) was arrested after a judge determined that there was enough evidence to support charges that he had intentionally hidden evidence and lied to a trial judge to win the Morton conviction. Anderson allegedly had failed to turn over potentially exonerating material to the court, as well as to defendant, and had disobeyed a court order to turn over the lead investigator's notes and reports for the court's review. The Anderson prosecution is pending.

Legal History and Ethics

Simon Rifkind and the Lawyer's Role and Responsibility

By C. Evan Stewart



Horace Greeley, editor (and founder) of the *New York Tribune*, once famously remarked: "Fame is a vapor, popularity an accident, and riches take wings. Only one thing endures and that is character." The truth of Greeley's words can be proven many ways; this article will focus on one.

In the 20th century, Simon H. Rifkind was one of this country's legal giants. Yet, to the law students I teach every year, his name draws blank stares. In 1975, Judge Rifkind wrote a seminal article in the New York City Bar Association's publication, *The Record*, entitled "The Lawyer's Role and Responsibility in Modern Society." Each semester I start off class having the students read this wonderful essay, to help



Photo courtesy of the Simon H. Rifkind Center at The City College of New York

them understand what those roles and responsibilities were in 1975 and what they are today.

The Adversary System

Rifkind's overall focus was on the workings of the adversary system, and by that focus he stressed at least eight important concepts to his readers. The first concept concerned his response to the frequent question: "How could you represent so-and-so?" To explain his answer he used the example of law students publicly picketing Washington lawyer Lloyd Cutler concerning his representation of General Motors; more specifically, the law students were upset that Cutler was helping GM "obstruct" proposed safety regulations for cars. Rifkind's response: "Had they [the law students] mastered the meaning of the adversary system they would have known their conduct was subversive of the central tenet of the profession they were about to enter." Rifkind's disdain for the clueless law students was striking: in the aftermath of the 1960s and the Vietnam War, the term "subversive" had a particular charge to it. One other interesting note is that one of the "safety" features at issue



Swearing-in ceremony for Simon H. Rifkind as chairman of the President's Railroad Commission. President John F. Kennedy watches as White House Administrative Officer Frank K. Sanderson administers oath in the Oval Office.

at the time turned out to be anything but safe: airbags for babies and small children (and one of the government's leading "safety" proponents in fact knew them to be unsafe).

The next concept Rifkind tackled was what to do about the "inequality of resources between contestants [and] the disparity of talent" between opposing counsel. Without a perfect answer to those facts of life, Rifkind fell back on the "sage words" of Oliver Wendell Holmes ("the Yankee from Olympus"): "The life of the law has not been logic; it has been experience." The point being that our jurisprudential system, while not perfect, has worked well over a long period of time in resolving controversies to the general satisfaction of the public. I also use Rifkind's answer to tell students that, when backed into a corner and without anything else to cite or say, they (like Rifkind) can always pull out this old chestnut from the Yankee from Olympus (it is certainly better than using a "cf" cite!).

Rifkind's third point was to respond to those who say a lawyer has conflicting duties to the client and to society. To Rifkind, such a contention was completely wrong. Not only do lawyers owe no duties to society, but lawyers are not to judge their clients *or* the wisdom of the argument or arguments they make on their behalf. To illustrate this point, Rifkind relied on the famous interchange between Johnson and Boswell:

> Boswell: "But what do you think of supporting a cause which you know to be bad?"
>
> Johnson: "Sir, you do not know it to be good or bad till the judge determines it…. An argument which does not convince yourself may convince the judge to whom you urge it; and if it does convince him, why then, sir, you are wrong and he is right. It is his business to judge; and you are not to be confident in your opinion that a cause is bad, but to say all you can for your client, and then hear the court's opinion."

Rifkind called this espousal "radical doctrine today." But as we will see shortly, it is far more "radical" today.

Rifkind next took on the "body of lawyers who call themselves public interest lawyers." He called such lawyering "unctuous" (even if you do not know what that word means, it sure sounds bad!), and then went on to observe: "[T]he most baffling problem of substance is how to locate the public interest." Is the landlord always wrong, the tenant always right? "Oh, if only life were that simple!"

The fifth point addressed was whether a lawyer is merely a "hired gun" (or a "menial servant"). Acknowledging that the client may give appropriate instructions, Rifkind opined that in all other respects "the lawyer is in command." Of all of Rifkind's guideposts, this one seems perhaps the most out-of-date given the undeniable transformation of the legal profession over the last four decades. Maybe in Judge Rifkind's time he could follow Elihu Root's famous maxim ("about half of the practice of a decent lawyer is telling would-be clients they are damned fools and should stop"), but anyone telling this to a would-be client today (as opposed to 1975 or 1905) would most likely be turning that would-be client into a client for an eager competitor across the street.

Rifkind's sixth point was to stress the lawyer's duty of zealous advocacy, subject only to the applicable rules of ethics. To Rifkind, this clearly was part of what made lawyering great fun; it allowed the lawyer to engage in the "muscular stretch" of being an "inventor and innovator." Contrast that to today where a number of states, when enacting ethics "reforms," take seeming pride in announcing that the word – indeed the very concept of – "zealousness" has been purposefully banished from any trace of their code of professional responsibility.

A Stool Pigeon?

Rifkind's seventh concern was the solution proposed by some for the ethical problems faced by lawyers: "the attempt to convert the lawyers routinely into an informant against his client." This "solution" brought on Rifkind's strongest condemnation: "The merest suggestion that the lawyer become a stool pigeon against his

client fills us with abhorrence…. [O]ur revulsion is instantaneous, if not instinctive." He went on to opine that such a result would threaten our "free society and a democratic government," both of which depend upon an "uncensored and uninhibited" relationship between attorneys and their clients. Of course, today, with one of the SEC's Sarbanes-Oxley "reforms" targeting capital markets attorneys to disclose client confidences and with many states having multiple grounds for allowing for permissive disclosure of client confidences (and some states having circumstances in which mandatory disclosure is required), query what Judge Rifkind would say about the current state of our "free society" and "democratic government."

Rifkind's final point was to disabuse those who believe trials are a search for metaphysical truth. Hogwash! For Rifkind, a trial was instead a "game," with rules (*e.g.*, procedure, evidence) to filter out all sorts of information from being considered. And the point of the game was not to determine "absolute truth," but rather to resolve "controversy by the principled application of the rules of the game." This final point is, of course, as true today as when Judge Rifkind wrote it four decades ago. To my law students, at first blush, it sounds very cynical; it is my hope that over the course of the semester they come to embrace this insight, as well as Judge Rifkind's other timeless pieces of wisdom.

Postscript

In the next issue of the *Federal Bar Council Quarterly*, we will see Judge Rifkind in action, in his most famous (best known) case.

Legal History

Pauli Murray: Fighting for Her Rights

By Molly Guptill Manning



Everyone goes to law school for a reason. Some seek wealth and prestige. Others look to law as a way to serve their civic duty. And there are still others, like Pauli Murray, who are driven to the law to battle injustices experienced first-hand. Growing up in Durham, North Carolina, during the 1910s and 20s, Murray attended segregated schools and understood what race discrimination was from a young age. She also understood that she needed to do something about it.

After earning a bachelor's degree at Hunter College, Murray briefly worked as a teacher in New York. Although she felt pressure to return to her family, Murray resisted leaving Manhattan because of her "increasing inability to endure the system of segregation," especially when it came to public transportation. "The bus," she explained, "was the quintessence of the segregation evil, because ... [t]he intimacy of the bus interior permitted the public humiliation of black people to be carried out in the presence of privileged white spectators, who witnessed our shame in silence and indifference." However, Murray's sense of obligation to challenge the system she so despised prompted her to apply to the graduate program at the University of North Carolina at Chapel Hill – a school considered to be "liberal" – to study sociology and race relations. She was rejected – "members of your race are not admitted to the University," the letter stated. Furious, Murray wrote letters to the university administrators, President Franklin D. Roosevelt and Mrs. Roosevelt, and the NAACP. Her correspondence to the NAACP was referred to then-assistant special counsel, Thurgood Marshall, who took an active interest in Murray's plight. Murray had also attracted the attention of Eleanor Roosevelt, who responded to Murray's passionate letter; the two became lifelong friends. The university was unyielding.

The Odell Waller Case

Murray's rejection from the University of North Carolina only fueled her desire to change racially discriminatory policies. After being arrested and jailed in 1940 for refusing to sit in the back of a segregated bus, Murray became involved in the Workers' Defense League (which paid a fine to obtain her release from prison). One of Murray's first assignments was to raise funds for the defense of Odell Waller, an African-American who had been arrested after he shot and killed his white landlord, Oscar Davis. Murray learned that Davis had taken Waller's share of the wheat crop they had jointly planted, and the shooting occurred when Waller approached Davis—who was known to carry a gun—to ask for his portion of the wheat crop (which was one bag of wheat for every three going to Davis). According to Waller, Davis refused to give him any wheat, and "r[an] his hand in his pocket like he was going to pull out something," which prompted Waller to reach for his pistol and shoot Davis, believing Davis was about to shoot him.

Waller's attorney moved to dismiss the indictment on the ground that the grand jury had been selected from a list composed exclusively of poll tax payers, in violation of Waller's constitutional right to stand trial before a jury of his peers. The motion was denied. Waller was tried by an all-white jury of 10 farmers, one businessman, and one carpenter. Within two weeks, Waller was indicted, tried, convicted of first-degree intentional murder, and sentenced to death.

Murray worked to raise awareness of Waller's case and money to appeal his conviction, with the goal of having Waller's sentence reduced to life imprisonment. Murray visited Waller as he sat on death row, and after speaking with him, Murray felt certain that Waller formed no intent to kill Davis; he had a split-second reaction to a threatening movement by an angry man who was known to carry a weapon. Believing Waller was guilty of manslaughter, not first-degree murder, Murray tirelessly campaigned on Waller's behalf—traveling through countless states—and secured more than $3,000 in donations. At one of Murray's speeches, Dr. Leon Ransom, of Howard Law School, and Thurgood Marshall, of the NAACP, were among those in the audience. Dr. Ransom, a recruiter for Howard, was so impressed that he encouraged Murray to apply to law school.

Murray watched as Waller's conviction was affirmed on appeal, his collateral challenges were denied, and the Governor of Virginia refused to commute his sentence. On July 2, 1942, Waller was executed. Believing Waller's execution was fueled by race rather than reason, Murray applied to Howard Law School "with the single-minded intention of destroying Jim Crow."

Meeting Jane Crow

In the 1940s, attending law school was something men did. Murray was one of two women in her entire law school class (until the other woman dropped out). Believing race discrimination was her chief enemy, Murray was surprised when one of her professors stated "in his opening remarks that he really didn't know why women came to law school, but that since we were there the men would have to put up with us." To Murray's horror, the classroom erupted with laughter. And thus Murray discovered "the twin evil of discriminatory sex bias," which she dubbed "Jane Crow." Upon graduating, Murray noted that she had "entered law school preoccupied with the racial struggle and [was] single-mindedly bent upon becoming a civil rights attorney, but [she] graduated an unabashed feminist as well."

This spirit was only strengthened when, in 1944, Murray decided to apply for the Rosenwald Fellowship to fund her anticipated studies at Harvard Law School. To her delight, Murray was selected for the fellowship, but when she applied for admission to Harvard Law School, she was rejected because she was "'not of the sex entitled to be admitted to Harvard Law School.'" Murray fought Harvard's policy "by typewriter," noting in her letters that "[w]omen are practicing before the Supreme Court, they have become judges and good lawyers, [and] they are repre-

sented on the President's Cabinet." Murray sent a copy of her letter to Eleanor Roosevelt and was amazed to learn that President Roosevelt was moved to write the president of Harvard University on Murray's behalf. Unfortunately, Murray learned that it would "take more than one of [Harvard's] most illustrious graduates to overturn a three-hundred-year tradition of male exclusiveness."

Practicing in New York and Beyond

Once Murray began to practice, she found that there were few job opportunities for an African-American woman in the 1940s in the field of law. After clerking – a position described by Murray as the lowliest in the profession – in two small law firms, Murray decided to open her own firm. Perhaps the most gratifying work she encountered in her solo practice was a research project for the Women's Division of the Methodist Church, which asked Murray to write a report on race laws in the United States. The final product became Murray's first published book, *State's Laws on Race and Color.*

In the 1950s, Murray joined Paul, Weiss, Rifkind, Wharton & Garrison, but, after two women left the firm, she became the "solitary female on the legal staff in the New York office." A sense of alienation weighed heavily on Murray, for she "was neither 'my girl' – a condescending reference to a female secretary – nor fully accepted as 'one of the boys.'" As she worked with different associates and partners, Murray made a name for herself and earned the respect of her coworkers. In time, Murray felt accepted amongst the attorneys at the firm, and when she left Paul Weiss, she was grateful for "having been tested by the most exacting standards of the legal profession." Murray went on to teach law at the Ghana Law School, in Accra, Africa, and later Brandeis University.

Over the years, Murray never forgot why she went to law school: to bring change to the world. And, although she did not always meet success when or how she had hoped, change did come. Despite Murray's rejection from the University of North Carolina based on her race, the university admitted its first African-American student in 1951. Although she was rejected based on her sex, Harvard Law School began to accept women in 1947. In 1954, Thurgood Marshall and other counsel for the NAACP successfully argued in *Brown v. Board of Education*, 347 U.S. 483 (1954), that "separate but equal" was inherently unequal (it is said that part of the NAACP's brief was based on a piece that Murray had written on why *Plessy v. Ferguson*, 163 U.S. 537 (1896), should be overturned). And, in 1966, the Supreme Court, in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), held that a state could not condition the right to vote on the payment of a poll tax. Murray stated that, with *Harper*, "[t]hose who remembered Odell Waller felt that his cause had at last been vindicated."

Author's Note:

Works consulted for this article include *Pauli Murray: The Autobiography of a Black Activist, Feminist, Lawyer, Priest, and Poet* (previously published under the title *Song in a Weary Throat*) and *The New York Times*.

Legal History

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 bi-partisan 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 record-

ing 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.

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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 with 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 others' 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. By this time, the House Judiciary Committee also had subpoenaed a large number of additional tape recordings. Burning them, at this point, of course, was not an option; instead the president resorted to the opposite approach. He publicly released his version of 42 of the sought after tapes in a publicly televised address.

The release of these hurriedly prepared transcripts did not help the president. The transcripts revealed sordid conversations about politically motivated activities generally considered beneath the presidency. John Dean's earlier testimony about an "enemies list" paled in impact when a transcript revealed presidential conversations of that nature. The transcripts also revealed ethnic slurs and deleted "expletives." Some expletives are worse than others but the hurried manner in which these transcripts were prepared and released permitted the reader to assume the worst with respect to all. The release of these transcripts with numerous "expletives deleted" was a sufficient stain on the Nixon presidency to warrant an iconic "Republican" newspaper and bastion of midwest conservatism – the *Chicago Tribune* – to call for the president's resignation.

But the real problem, of course, was the subpoena. Jaworski's subpoena was issued under Rule 17(c) of the Federal Rules of Criminal Procedure, which the Supreme Court, in *Bowman Dairy Co. v. United States,* 341 U.S. 214 (1951), said was a rule designed to expedite trial by providing for inspection of documents prior to trial; the rule, the Court made clear, was not intended to provide a means of discovery in criminal cases.[3] Again, Judge Sirica denied the motion to quash. The president then appealed to the court of appeals. In an unusual move permitted under 28 U.S.C. §§ 1254(1) and 2101(e), Jaworski asked the Supreme Court to review the case, bypassing the court of appeals, and the Court agreed. This brings us to the second Judge Weinfeld decision affecting Watergate.

Weinfeld's Second Ruling

Initially the Supreme Court dealt with a justiciability issue: Did the courts have jurisdiction over a dispute between two persons in the executive branch of government –the president and a subordinate of the attorney general? Augmenting the precedent favorable to Jaworski that the Court cited, the Court relied on the Code of Federal Regulations, which guaranteed the independence of the Special Watergate Prosecutor and permitted him to challenge claims of executive privilege, as well as the unusual provision that his removal required the consensus of eight congressional leaders. *United States v. Nixon,* 418 U.S. 683, 694-95, n.8 (1974).

Having resolved that question against the president, the Court then turned to the validity of the subpoena under *Bowman Dairy*, which set forth very general principles governing a Rule 17(c) subpoena. The Court then noted that both parties agreed that "cases decided in the wake of *Bowman* have generally followed Judge Weinfeld's formulation in *United States v. Iozia* ,13 F.R.D. 335 (S.D.N.Y. 1952), as to the required showing." 418 U.S. at 699.

Iozia was charged with income tax evasion. He issued a subpoena under Rule 17(c) asking the government to produce a number of documents in its files that related to the financial dealing of others. Iozia urged that, under *Bowman Dairy*, the same standard that applied to Rule 16 discovery – documents that may be material to the preparation of the defense – applied to Rule 17(c). Relying on the language of *Bowman Dairy*, decided just one year earlier, Judge Weinfeld disagreed and stated that a "good cause" requirement attached to Rule 17(c) production. His analysis did not, however, end with the ill-defined concept of "good

cause," but went on to explain that in his opinion "good cause" meant a showing that:

(1) the documents were relevant and evidentiary,

(2) they were not otherwise procurable in advance of trial through due diligence,

(3) the litigant seeking Rule 17(c) assistance could not properly prepare for trial without the documents and the failure to obtain them in advance of trial would risk delay at the trial, and

(4) the Rule 17(c) application was made in good faith and was not a fishing expedition. 13 F.R.D. at 338.

Applying this test, he ruled that Iozia was entitled to some but not all of the documents he requested.

In *United States v. Nixon,* after noting agreement that Judge Weinfeld's formulation for the issuance of a Rule 17(c) subpoena governed, the Court referred to the four criteria, spelling them out almost in *verbatim* fashion as articulated in *Iozia.* The bulk of the Court's discussion then focused on whether the tape records satisfied the first of the *Iozia* requirements: whether the tape recordings were relevant and evidentiary. It noted the obvious proposition that because the tape recordings contained statements by one or more of the defendants named in the indictment, under the rules relating to conspiracy trials, if such statements were in furtherance of the conspiracy, they would be admissible evidence. Clearly focusing on the president without naming him, the Court added, "The same is true of declarations of coconspirators who are not defendants in the case on trial." 418 U.S. at 701. The Court then summarily concluded that the remaining *Iozia* requirements were met: "[T]he subpoenaed materials are not available from any other source and their examination and processing should not await trial in the circumstances shown [citing *Bowman Dairy* and *Iozia*]." 418 U.S. at 702. End of discussion. Judge Sirica's order denying the motion to quash was affirmed. The tapes had to be provided.[4]

The Saturday Night Massacre stands as a pivotal point in the Watergate saga, a turning point that could only exist if there were tapes in existence that could be the subject of litigation. Both at this turning point and in the final denouement of the Nixon presidency, Judge Weinfeld's decisions are the hidden player.

One of the tapes contained a June 23, 1972, conversation between President Nixon and Haldeman, the president's closest advisor. The tape revealed that the two agreed that Haldeman would contact the CIA to ask it to ask the FBI to stop a pending inquiry in Mexico by telling the FBI that if its investigation continued, it would expose a CIA operation – a complete fabrication. This bogus use of the CIA to stop an FBI inquiry was done because both the president and Haldeman knew that if the FBI investigation in Mexico continued, it would reveal a financial connection between the Watergate burglars and the Committee to Re-Elect the President. While the conversation between the president and Haldelman was inferable from the sequence of events on June 23, the tape provided direct evidence of that conversation and was deemed the "smoking gun" that provided additional and unambiguous proof of the president's involvement in a conspiracy to obstruct justice. The House Judiciary Committee, which had voted 27 to 11 to impeach the president on the Watergate article, six Republicans joining all 21 Democrats, then changed its vote on the Watergate article to a unanimous 38 to 0 vote, portending certain impeachment by the House of Representatives and virtually certain removal by the Senate. When the president was advised of the erosion of his support in the Senate, he resigned, fewer than two weeks after release of the June 23, 1972, tape recording.

Richard Nixon had been re-

elected overwhelmingly in 1972. Only Massachusetts and the District of Columbia voted against him. Yet within one year of his re-election, his presidency was tottering. What accounts for this extraordinary erosion in support for a president re-elected with an almost unanimous electoral margin? The Saturday Night Massacre stands as a pivotal point in the Watergate saga, a turning point that could only exist if there were tapes in existence that could be the subject of litigation. Both at this turning point and in the final denouement of the Nixon presidency, Judge Weinfeld's decisions are the hidden player.

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.

[3] The House Judiciary Committee felt that, in light of its constitutional power to impeach, it did not need the assent of the courts with respect to documents subpoenaed as part of the impeachment process. Hence, it did not litigate the validity of its subpoena and ultimately based an impeachment charge on the president's failure to comply with the subpoena. The vote on this article of impeachment, 21 to 17, did not portend the removal of the president on these grounds since a two-thirds vote in favor of removal in the Senate is required.

[4] The final issue addressed by the Court was the president's claim of executive privilege. The Court ruled that, while such a privilege existed and would presumptively apply, under the circumstances of this criminal case, the president's claim of executive privilege was correctly overridden by Judge Sirica. 418 U.S. at 703-17.

Speaking With:

Judge William F. Kuntz, II

By James L. Bernard



I recently sat down with Judge William F. Kuntz, II, Eastern District of New York, who was sworn in on October 5, 2011, to discuss his new job, the practice of law and to get a better sense of the judge's thoughts and insights on various aspects of being a judge.

Question: For the few people in the Federal Bar Council who do not know you, tell us a bit about your background, where you grew up and went to school?

Answer: My mother and father were married in 1946. My father was a mail carrier, and my mother a nurse. I was born in Bedford Stuyvesant, Brooklyn, in 1950. A year later, my family moved to a then new public housing project in Harlem then called the Colonial Park Projects, now known as the Rangel Projects. From my bedroom window I could see two iconic New York sites: The Bronx courthouse and Yankee Stadium. I attended Resurrection Grammar School in Harlem, and thereafter attended the Jesuit institution known as Fordham Preparatory School in the Bronx. I graduated in 1968, and attended Harvard College (A.B. 1972), Harvard Law School (J.D. 1977), and the Graduate School of Arts and sciences, where I was part of the joint J.D./Ph.D. program. I earned my Masters in History in 1974 and my Ph.D. in American History in March 1979. I had taken and passed the New York Bar in the summer of 1977 and was admitted to practice law in the Appellate Division, Second Department, in March 1978.

Question: And how about your non-academic background; what did you do in the practice of law before becoming a judge?

Answer: My practice was as a civil litigator. From 1978 until 1986, I was an associate in Shearman & Sterling. From 1986 until 1994, I was a partner in Milgrim Thomajan Jacobs & Lee, and from 1994 until 2001, I was a partner in Seward & Kissel. From 2001 until 2004, I was a partner in Torys LLP, and from 2004 until 2005, I was counsel at Constantine & Cannon. From 2005 until my appointment to the bench I was a partner at Baker & Hostetler.

Question: Back to your academic background, what was your dissertation about?

Answer: Criminal sentencing in three U.S. cities (New York, Boston, and Philadelphia) in the period roughly between 1830 and 1880. My focus was on the three different models or approaches each used for sentencing. In Philadelphia, owing to the Quaker influence, the idea was to place each inmate alone in a cell, to provide counseling with a spiritual leader or the warden, and to seek to have the inmates reflect on their sins and hopefully find reform as a result. In Massachusetts, the model was based on the thinking that prisoners need to develop good work habits and to learn a trade. And in New York, there was a combination of the Philadelphia and Massachusetts approaches. Each eventually broke down for different reasons, lack of funding, discontent among the non-prison labor force, and overcrowding.

Question: Has this interest in sentencing influenced your judicial thinking?

Answer: I think about the period in which an individual matures: how that influences who we are; who we become. But the perceptions we bring depend on where you are in the timeline of American history, your boundaries shift as a result. Let me give you an example. I taught legal history at Brooklyn Law School, and at the beginning of each year I ask the students to read *Faith & Treason: The Story of the Gun Powder Plot*, Anchor Press (1997), by Antonia Fraser. In her author's note at the beginning of this important historical treatise, Lady Antonia Fraser wrote the following: "By accepting that there was a Plot, I have also accepted that the conspirators were what we would now term terrorists. Certainly, the questionable moral basis for terrorism – can violence ever be justified whatever the persecution, whatever the provocation? – is a theme which runs through my narrative. And there is an additional problem: is terrorism justified only when it is successful? These are awkward questions, but for that reason, if no other,



Judge William F. Kuntz, II

worth the asking." When I read that to the students back in 2001, it was days before September 11. After, I asked them to re-read it. In light of what had happened, those words had a remarkably different resonance. I think this is true in many aspects of our experience. So much about our perceptions depend on the times in which we have come to maturity.

Question: And has your thesis had any impact on how you think about sentencing issues?

Answer: I studied the 1850s, so I cannot really draw a direct connection. But our life experiences shape how we judges think about the right sentence to impose. I recently sentenced a mortgage broker who pleaded guilty to mortgage fraud by lying about income levels on loan applications. He had cooperated, so he had a 5K letter, the statutory maximum was 30 years, and the guidelines' range was between 27 and 41 months, or something close to that. The defendant was asking for probation, but when I directed counsel to point to statutory authority for me to impose probation, that review revealed probation was not a possibility; his counsel requested a sentence of one day. I recall that when my aunt needed to sell her home to cover the costs of having to live in a nursing home, one of her friends wanted to buy the home to "flip it." This friend was also in her late 80s or early 90s, a pensioner of very modest means, with a similarly aged and quite ill husband. When I expressed some reluctance to consider her in a position to make an offer, this friend smiled and said, "Relax Billy, I already have three offers from mortgage brokers who were prepared to lend me 110 percent of the appraised value of the home, provided I pledge my mortgage free home as additional collateral." This was in early 2008, and I thought to myself at the time, something is wrong with this picture. Well of course it turned out a great deal was very wrong, and this was the bell ringing before the bubble burst. Fortunately, another more suitable bidder acquired my aunt's property at a higher price. But I saw the acknowledged illegal actions engaged in by this defendant as part of a pernicious pattern of predatory lending. He knew what he was doing when he did it and profited from it. I sentenced him to one year, and when the defense attorney asked me to sentence him to a year and a day, I declined to do so. Banks were not the only victims of these fraudsters.

Question: Do you think the discretion judges have post-*Booker* is a good or bad thing?

Answer: I am comfortable in this post-*Booker* landscape, exercising my discretion fairly and rationally. I came to the bench from an essentially civil practice background. The post-*Booker* world is the only environment in which I have imposed sentences, although I am well aware that some of my colleagues expressed much concern about how sentencing was conducted pre-*Booker*.

Question: I've heard many district court judges say that sentencing is the hardest part of the job, have you found that to be the case?

Answer: Yes, and also, surprisingly, taking guilty pleas. I did not anticipate this. You have to go through, line by line, all of the rights someone is giving up and be sure they understand those rights. I also always ask the defense attorneys after completing that questioning if defense counsel is aware of any viable legal defenses to the charges to which the defendant is prepared to plead guilty. Some counsel are uncomfortable answering that question, but I insist on it. I also ask the defendant to describe in his or her own words the crime he or she committed and where they committed that offense. I recently had a case where a police officer said, at a guilty plea, that he did not commit a crime. I could not take the plea. Later, after consulting with his defense attorney, he explained what he did and why it was a crime. I had another case where I asked the defendant, who entered the country illegally, whether he had entered the country by plane, boat, or train. The defense attorney said that she did not think that was relevant because her client admitted to entering illegally and she was

therefore instructing her client not to answer that question. I got the sense that answering my question might have jeopardized other matters that were being investigated, so I did not require an answer and I allowed the defendant to plead guilty. But my point is that guilty pleas are surprisingly difficult.

As one of my colleagues said, this is a bi-polar job. I go from handing down sentences to taking guilty pleas, and then I get to do weddings and naturalizations, and the naturalizations in particular are a joy to do.

Question: What has surprised you about the job so far?

Answer: The disparate quality of lawyering. In my general commercial litigation practice, for the most part I saw excellent to very good lawyers. I've seen here, however, such a wide range of lawyering skills. And some of it is not necessarily what you would expect. I've seen lawyers on the smallest cases who were on top of the law, the facts, and everything relevant to their case. Unfortunately, I have also seen some lawyers, even on large and significant cases, who were clearly in over their heads. What is also amazing to me is how judges switch from handling a sentencing, to hearing a discovery dispute, to addressing a potential motion, to taking a guilty plea. The breadth of matters we handle across the range of subjects is wonderful. We are constantly shifting gears.

Question: How many cases did you have when you started?

Answer: Because the Eastern District of New York was in an emergency situation, I was initially assigned 500 civil cases. I decided I would call counsel for each of them in for a status conference. I found that you never know what happens when you call in an old case for a status conference. All of a sudden I received stipulations of dismissal, discontinuance, or withdrawal of actions because a case had been resolved by the parties. By the end of my first year, my clerks had a cake made for all of us in chambers with the number 268 written on it because that is the number of cases we resolved the first year.

Based on my years as a civil litigator, I think the lawyers need to know that the district court judge is paying attention to a case. Some judges have the perfectly respectable view that if the civil litigators are not pushing a case, and no infant or other exigent circumstances exist, there is no harm in waiting for the litigants to seek court action. Perhaps that is so. However, I've found from my practice that civil cases need proactive management. I've got wonderful magistrate judges who handle discovery disputes while moving cases towards trial or settlement and I would be lost without their guidance and support. Their case management orders, together with my firm trial dates, have resulted in a successful team effort.

Question: Are you tough on granting adjournments?

Answer: I think I'm fair. Let me tell you how I handle this on the civil side. I ask the lawyers, tell me how much time you need and I'll give it to you, within reason of course, but in general, I give you as much time as you request. I do that at the pre-motion conference I require for almost all motions. By then, the lawyers should know the case and know the issues. I find that doing it that way, I receive many fewer requests for adjournments. I'll consider an adjournment if something unexpected arises, and our chambers tries to be user friendly. Experience shows that if the dates set on the front end are reasonable, you get much less back and forth over scheduling.

Question: Pre-motion conferences are somewhat controversial with lawyers, and I personally do not find them very helpful. I think they add another layer to the process that does not result in much benefit. Why do you require them?

Answer: I've found that in some instances, flushing out a lawyer's position on an issue in advance of having to make a motion can lead to settlement discussions and, in some instances, withdrawal of a motion or even a pleading. It does not happen all the time, especially in bigger cases where the stakes are higher, but it does hap-

pen in the smaller cases. I often find that I then also do not need oral argument, so the lawyers are only making one trip. I can decide the cases on the papers. Finally, I think the process also makes for more efficient scheduling and deadline setting. I also use the pre-motion conference as an opportunity to educate the client and to make the lawyers and their clients confront the strengths and weaknesses of their respective cases. I try to structure the process in ways that enhance rationality between and among the litigants.

Question: What impact has your years as a civil litigator had on your judicial thinking?

Answer: I learned many valuable lessons as a litigator. The greatest joy as a lawyer comes from appreciating that there is no small case, each is important. And growing up as a litigator, I've seen how a case is put together. How every element matters. I think I also appreciate creative thinking and lawyering. Like everything else, it has its limits. It is not so much thinking outside of the box. The box is there to serve you 99 out of 100 times. But there are occasions where it may be appropriate to go outside of that box. Developing that instinct and judgment is invaluable. I hope I developed a bit of that in my years of practice.

Question: Thinking about today, and all the changes occurring, what strikes you as an issue that is perhaps only percolating now but which will occupy much of our time and energy in the future?

Answer: I think privacy issues will become increasingly important. If you think about everything that is happening on the internet, with Facebook and the like, and what it means to live in an electronic fishbowl, those sorts of things have profound ramifications for how we live our lives. And I think we are only starting to sort through all of it. I mean, if the '60s generation had Facebook, can you imagine what that would be like? What would be known about so many people in public life? If we all end up being more cognizant of that fish bowl effect, how will that change how people live their lives?

Author's Note: At this point in the interview, the judge invited his three clerks to join us and to discuss their role. As I was soon to find out, the judge inviting the clerks to join the discussion is indicative of how he runs his chambers.

Question [to the clerks]: How are cases assigned in Judge Kuntz's chambers?

Answer: Each clerk gets randomly assigned to a case. When a motion is filed, the clerk responsible for that case will have primary responsibility to work with the judge on that particular opinion, but the draft opinion will be circulated to the other two clerks to get their feedback and views on whether the outcome is correct. So each clerk participates in the decision making process and gets to voice his or her views.

Question [to the clerks]: Is there ever disagreement?

Answer: Yes, but that is part of the process and part of the reason the process exists.

Question [to the judge]: Why did you adopt this process?

Answer: I figured if you are going to hire three very smart people, this is the best way to get the collective benefit of their views. I've told the clerks that on some motions, I only want to review the draft after they have vetted their thinking with each other. This way the work product I review reflects the collective wisdom of all three of my clerks. It means more work for them, but I think it creates a better work product, one that results in chambers speaking with a better informed, more consistent voice. It is too easy for me to morph into my Lord Vader mode, and that is what I want to avoid. I want to hear what my clerks are thinking, not just have them endorse my views. We do the same thing after every event in court; we sit at this round table and discuss what worked and what did not work, and what we thought of the arguments or conference.

Question [to the judge]: Do you

apply this process to all matters?
Answer: All save one: I treat sentencing differently. I seek my law clerks' guidance on the legal parameters available, but in terms of where within a range to sentence, that decision rests on my shoulders alone.

Question [to each clerk]: What are your suggestions for lawyers appearing before the judge?

Answer: One, pay attention to the judge's cues. Do not just press through your line of argument or questions. The court often signals when a point does not need to be pressed further, or when the questioning of a witness has gone on long enough. Pay attention to these things because they can influence how a court thinks about a lawyer. Two, attorneys are often not prepared on basic things they should know. Has the complaint been served? Does the plaintiff seek a jury trial? Lawyers should read the judge's individual rules and the local rules of the E.D.N.Y. and be prepared. The judge is patient, but there is no need to waste the court's time with things lawyers should know before coming to court. Three, listen to the judge's question and answer that question. Some questions are open ended, and some call for a very specific piece of information. Don't confuse the two. If the judge needs to know a specific thing, tell the judge that thing, don't go off on a tangent about something else and treat the question as an open ended one.

Speaking With:

Douglas Palmer

By Andrew Harris



After graduating from college with a degree in accounting and business systems, Douglas C. Palmer, Clerk of the Court of the Eastern District of New York, worked in information technology for the Administrative Office of the U.S. Courts for several years before becoming the chief deputy clerk in the Eastern District of New York five years ago. When Robert Heinemann, the previous clerk of the court, retired in 2011, Palmer applied for the position. As part of the application process, Palmer was interviewed by the judges of the court whom he had gotten to know in the five prior years and who had to approve his appointment.
Palmer is only the 10th clerk of the court and the first non-attorney to serve in the position. In a recent conversation, Palmer noted that prior to civil service reform in the early twentieth century, clerk of the court was not so



Douglas C. Palmer

much a public service as a plum patronage job, as the clerk would collect the court fees himself out of which he would run the court and then pocket the surplus.

Palmer discussed the current budget challenges to the operations of the court in light of sequestration, the congressionally mandated $1.2 trillion across-the-board cuts over nine years. The cuts were intended to be so draconian that they would force Congress and the president to come up with an alternative budget, which has unfortunately not yet worked as planned. Sequestration has cut the federal judiciary's overall funding by approximately $350 million from the level provided in fiscal year 2012, to about $6.6 billion. Exacerbating matters, all the cuts must be implemented in the last six months of fiscal year 2013. Unlike other executive agencies, the federal courts cannot easily control their workload and eliminate lower priority tasks.

Including judges (27 district judges and 16 magistrate judges), the Eastern District of New York has approximately 330 employees in all. Excluding judges, 177 employees are inside judges' chambers and 100 are outside of chambers. If the current budget cuts remain in place, the court will only be able to afford 19 employees outside of chambers by 2018, and judges would no longer have their own courtroom deputies. In the short term, Mr. Palmer said that the Eastern District is trying to transfer work to attorneys by enabling them to accomplish more filing on line.

Mr. Palmer noted that the court will run out of jury money for September and, consequently, there will be no civil jury trials in September. Criminal trials cannot be suspended because speedy trials are constitutionally guaranteed. In addition, federal defenders face a 15 day furlough this year and will have to reduce staff if the budget cuts remain in place. During the last 15 days of this year, payments to CJA attorneys will be deferred until next year.
Mr. Palmer noted that the number of criminal cases has gone down by approximately 40 percent in the last two years, from approximately 1,280 in 2011-2012 to 900 this year. The number of multi-defendant criminal cases has also declined. Civil cases have continued to slightly increase, with 6,356 cases filed in 2011 and 6,500 in 2012. Overall, Eastern District judges handle about 100 more cases than the national average for federal district court judges. There is a congressional proposal to add two more judges to the Eastern District, which would reduce the district caseload to the national average.

Palmer had previously worked on the design of ECF and helped develop the architecture of the new CM/ECF, which will have a more intuitive interface that will eliminate the current need to flip through many different screens. The new system should be more responsive, more stable, and have a higher bandwidth. It is currently planned to be implemented next spring.

The Eastern District of New York has been designated one of 14 federal district courts selected to participate in a 10 year pilot program designed to enhance expertise in patent cases among U.S. district judges. Six of the Eastern District's district judges and nine of its magistrate judges are participating in the pilot program. The participating judges in the Eastern District are District Judges Brian M. Cogan, John Gleeson, William F. Kuntz, II, Kiyo A. Matsumoto, Joanna Seybert, and Jack B. Weinstein and Magistrate Judges Joan M. Azrack, Gary Brown, Marilyn D. Go, Steven M. Gold, James Orenstein, Cheryl L. Pollak, Ramon E. Reyes, Jr., Kathleen A. Tomlinson, and William D. Wall. Under the program, patent cases filed in the Eastern District will continue to be assigned at random to district and magistrate judges. District or magistrate judges who are not participating in the pilot program will have a brief period during which they may elect to reassign qualified cases to the program. Those cases then will be assigned at random to a participating judge.

Palmer said that the Eastern District's alternate dispute resolution program has a high success rate; in the last year, out of 131 cases that went to mediation, 109 cases settled. The district soon will permit parties to file mediation statements online that will be sealed from judicial review so the judge assigned to the case will

not be able to see them.

Finally, Palmer noted that after the district court in Los Angeles, the Eastern District of New York swears in the most new citizens. The Eastern District averages seven naturalization ceremonies a week; in each, hundreds of petitioners take the oath of allegiance before a district judge. By way of comparison, Palmer said that during a clerk conference in Memphis, he learned that the federal court there may only have two or three naturalization ceremonies per year.

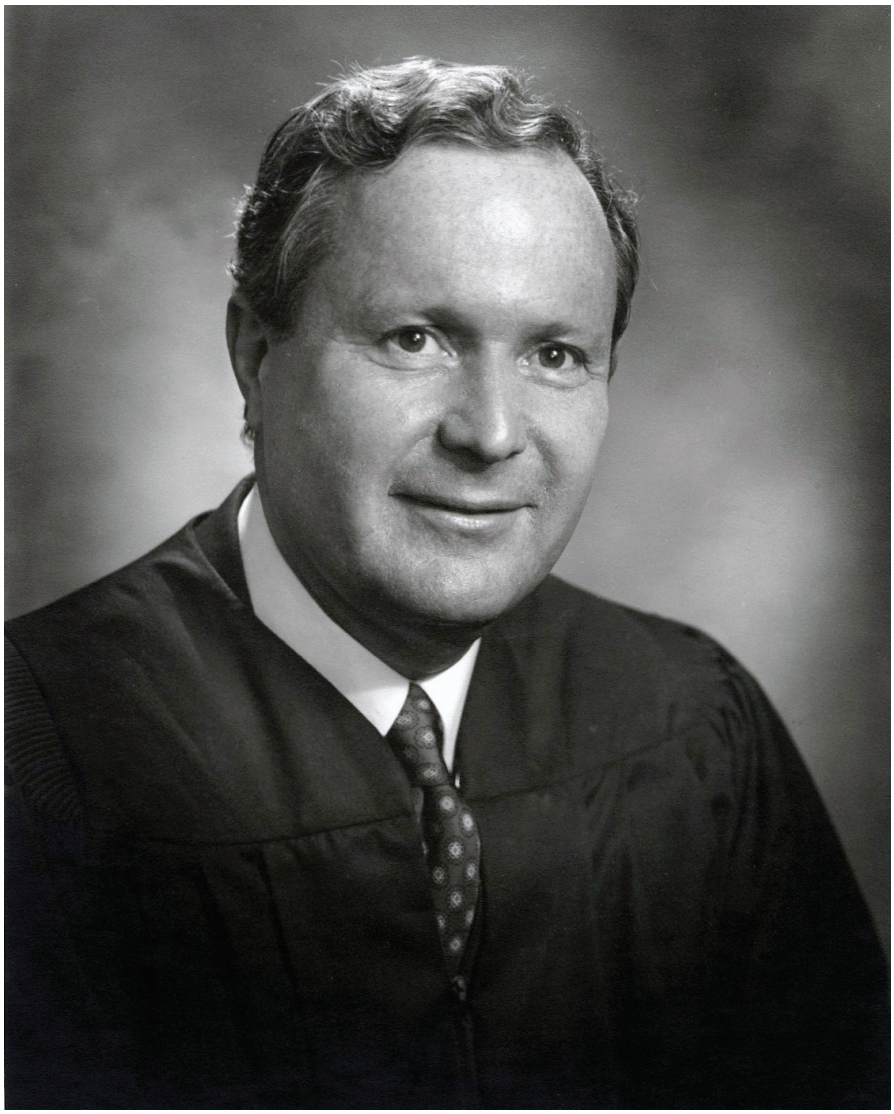
In the Courts

In Memoriam: The 1988 Murder of Judge Richard Daronco

By Steven Flanders

On May 17, the Southern District of New York held a memorial event at the White Plains courthouse honoring the memory of Judge Richard J. Daronco. Appointed to the Southern District bench only 11 months before his murder by the father of a disappointed litigant in May 1988, 25 years ago, Judge Daronco today is remembered as an outstanding and compassionate jurist and a warm and remarkable human being. Chief Judge Loretta Preska presided at the memorial event, and provided a touching remembrance in her brief remarks. Other speakers were County Executive Robert Astorino, Southern District Judge John F. Keenan, New York State Supreme Court Justice W. Denis Donovan, and Judge Daronco's brother, Paul.

Each speaker confirmed and reinforced the recollections of this writer and others present: Beyond his professional accomplishments, including outstanding judicial service, Judge Daronco was one of the easiest people to like that anyone in the courtroom has known. According to Chief Judge Preska, he was "one of the few judges in Foley Square who wasn't in love with himself." Judge Keenan, his neighbor on the fourth floor of the courthouse at Foley Square, speedily became a close friend who greatly valued Judge Daronco as a delightful and respected colleague.



Judge Richard J. Daronco

Chief Judge Preska briefly mentioned the circumstances of Judge Daronco's horrific murder. Upon appointment, Judge Daronco received from other judges an initial docket—judges have sometimes described this process as a selection of "old dogs:" the least appealing cases on each judge's docket. In April 1988, Judge Daronco presided over a bench trial in a 1981 employment discrimination suit against Chase Manhattan Bank, filed by a former vice president. This case had wandered from the dockets of one judge to another, ending with Judge Daronco. After firing a succession of attorneys, the plaintiff proceeded *pro se*. "Among other things [plaintiff Carolee] Koster alleged that Ross, her supervisor, threatened her career at the bank if she did not continue an intimate affair with him." "By all reports, Judge Daronco gave plaintiff wide latitude in trying her case, which she did with the assistance of her mother and father, the latter a former policemen."

Former Federal Bar Council President Bettina Plevan, who represented the bank at trial and was present at the memorial event, confirms that Judge Daronco had achieved a generous offer of settlement. This was rejected by the plaintiff, who refused to be bound by any order of confidentiality. (Reportedly, she envisioned creating a screenplay.) The bank had no intention of paying a substantial sum without protection from possible one-sided publicity, so the case went to trial.

Judge Preska described Judge Daronco's May 19, 1988, decision as thorough and well-reasoned. Ms. Plevan, stating that this probably was the only trial she has ever undertaken against an opposing *pro se*, described the judge's conduct of the trial as firm and fair, requiring plaintiff to ask herself explicit questions, so the bank would have an opportunity to object. But two days after the decision was filed dismissing the case, Judge Daronco was hunted down in his yard in Pelham, New York, by the plaintiff's father, who fatally shot first Judge Daronco and then himself.

Judge Keenan stated that, "Richard Daronco embodied the best characteristics and traits of our profession. He was intelligent. He was loyal. He was honest. He was thoughtful. He was what most judges should be but a lot of us aren't. He was compassionate and patient. He had an uncommon amount of common sense and a keen sense of humor. He thrived on the bench and approached the diverse work of our court with enthusiasm and dedication."

Honoring Judge Daronco's many years as a state judge in addition to his federal judicial service, the event opened with Posting of the Colors by the New York State Courts Color Guard. The proceedings concluded with a dramatic recessional led by the New York State Courts Pipes and Drums Corps.

Personal History

Revisiting the Murders of Two Lawyers in Ireland

By Pete Eikenberry



In May 1987, two weeks before a New York City Bar Association human rights mission arrived in Belfast, Northern Ireland, Lord Justice Gibson and his wife were killed by a bomb while riding in their car. The 1987 mission's report described Belfast as a "fallen" city where "parts of the city … exist as armed camps with homes and shopping areas bombed out or blackened by recurrent fires … In the hate ridden areas of the city, and in the central shopping district the ... Army patrol[s] the streets in armored vehicles."

The climate of violence in 1987 was a continuation of 400 years of political and religious strife. Historically, the northernmost of Ireland's four ancient provinces was the most fiercely militant Catholic and Celtic region. In 1603, Queen Elizabeth defeated Irish earls from the region, and her successor, James I, encouraged Scottish Presbyterians

to settle in the northern region; eventually the Protestants suppressed the Catholic population. On July 12, 1690, the Protestant Prince, William of Orange, defeated deposed Catholic monarch James II, cementing protestant English rule and Catholic subjugation for centuries to come. After the United Kingdom granted the 26 southern counties of Ireland independence in 1959, the Northern Ireland government was dominated by a Protestant majority, and religious discrimination in employment, housing, and education was commonplace.

In the summer of 1998, I was a new appointee to the City Bar's International Human Rights Committee. On April 2, 1998, former U.S. Senator George Mitchell had mediated the "Good Friday" agreement between the Republic of Ireland and the United Kingdom of Great Britain and Northern Ireland (the latter of which we know as "Great Britain"). At a meeting, I suggested that, perhaps, the committee could sponsor a new mission to follow up the 1987 mission and the "Good Friday Agreement." The committee agreed and its chair, David Nachman, asked if I would work with him to put together a group for such a mission.

Judge Sidney Stein, a former law partner of David Nachman and a long time colleague of mine in bar activities, was our first recruit. Gerald Conway of the committee volunteered for the mission, and we had three. We approached former City Bar president Barbara Robinson, a partner at Debevoise, and she accepted. Then, Judge Barbara Jones accepted; both she and Conway had criminal prosecutorial experience, which the other three of us lacked.

The climate of violence in 1987 was a continuation of 400 years of political and religious strife.

Prior to our trip to Ireland, the members of the mission received extensive training, primarily in interviews with lawyers and N.G.O officials with significant experience in the human rights climate of Northern Ireland. We also talked with now Judge William Kuntz because of his long term experience with the New York City Civilian Complaint Review Board. In September 1998, I traveled to Washington for a reception where I met Northern Ireland solicitor Rosemary Nelson, whom U.S. Congressman Peter King had invited to the U.S. to testify in Congress about police harassment of defense lawyers. Rosemary told me of the hostile and threatening climate in which she practiced law representing clients accused of terrorism-type offenses in the Northern Ireland courts. She informed me that she received frequent death threats transmitted to her from clients who had been asked to pass along the threats of police and detention facility officials.

Subsequently, in October 1998, when we were in Belfast, Rosemary met with the members of the mission at a pub for lunch after she had driven 23 miles from her home in Lurgan. At the luncheon, Rosemary drew a small violet envelope from her purse from which she extracted a small violet piece of stationery with a handwritten note that read: "We have you in our sights you republican bastard-RIP." It was obvious that she somehow hoped that we might be able to help protect her, just as she previously had sought help from the U.S. House of Representatives. We experienced a sense of helplessness, but I did at least ask in our interview with Lord Chief Justice Carswell whether he had a duty to try to protect her, a member of his justice system. Judge Carswell remarked only that "she should complain to Ronnie Flannigan," then chief of the Royal Ulster Constabulary Constable of Northern Ireland (the "RUC.") I pointed out that Rosemary had complained of intimidation to Chief Constable Flannigan on more than one occasion without any lessening of the threats against her, including those emanating from the police. Five months after our interview, on March 15, 1999, Rosemary was killed by a car bomb. The explosion was heard by one of her children, who was attending an elementary school nearby.

Rosemary's death was reported three days later in a major ar-

ticle in the *Economist*, where her success in client representations was described in part as follows:

Tragedy of a death foretold

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It was a flashback to the worst of times; the smoking wreckage of a car, a woman maimed and dying. Responsibility for the booby-trap bomb which killed Rosemary Nelson, a lawyer, on March 15th, was claimed by a group of Protestant loyalist paramilitaries who reject the peace process.

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Sir Ronnie Flanagan, the chief constable of the RUC, rushed to bring in the chief of police of Kent to supervise the Nelson murder investigation, and in addition asked the FBI for help and advice.

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When police in 1997 forced the Orange march through the Garvaghy Road, she was on the scene, having applied for a judicial review of the police decision on the march.

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Orangemen resented Mrs. Nelson's work and the people she represented. They argue that Sinn Fein agitation has stoked up objections to their march. Many were also outraged when Mrs. Nelson's legal work secured the acquittal of Colin Duffy, a leading local republican, accused of murdering two policemen in Lurgan in 1997. She had also got him acquitted on appeal, on an earlier charge of murdering a local soldier of the Ulster Defense Regiment.

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During that case loyalist gunmen attacked Mr. Duffy and two others as they left a police station after fulfilling bail conditions, killing one. When Mr. Duffy was acquitted in 1997 and lifted high in triumph by supporters, Mrs. Nelson was televised at his side and told reporters his arrest had been a disgrace.

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Mrs. Nelson's most controversial case is unfinished. In April 1997, a Portadown Catholic called Robert Hamill was fatally injured by a loyalist crowd on his way into the Garvaghy Road district from the town centre. According to his family this happened in full view of a police Landrover whose occupants did nothing. Mrs. Nelson was advising the Hamill family on civil prosecution....

Although in the U.S., we tend to think of only barristers appearing in court, the Northern Ireland solicitors handle all the important pre-trial procedures of the criminal justice system and conduct the investigation for trials as well. While in Dublin, we also met with Michael Finucane, one of the three children of Patrick Finucane, a Catholic solicitor who, in February 1989, was murdered at dinner by gunmen in front of his wife and three young children in the kitchen of the family home. In October 2012, there was yet another official report on the circumstances of his death. In 1998, in Belfast, we had also met Patrick Finucane's law partner, Peter Madden, in the Madden & Finucane solicitor offices. I have a vivid recollection of a large caricature on the wall depicting Peter Madden at the steering wheel of a fishing boat, with Patrick landing a giant fish on to the shore, where other such fish are being stacked into a wheelbarrow by a barrister, *i.e.,* Peter ran the law firm, Patrick was the "rain maker," and the barrister got most of the money. Thus, I could think of Finucane as a working lawyer trying to bring in business, rather than as the zealot the police we interviewed portrayed and whom they somehow seemed to say may have deserved what he got.

Neither the 2011 Rosemary Nelson Inquiry report, nor the 2012 Patrick Finucane report, found evidence of high level collusion in the murders by police or government officials, but both reports made clear findings of high level official indifference to the obvious risks to the lives of both. Lower level officials were found to have been compliant to threats made to Rosemary or, in the case of Finucane, facilitating the leak-

age of significant stores of guns from police to acknowledged terrorist organizations. Available intelligence was not organized so as to acknowledge the risks to the lawyers in order to warn them or to try to protect them. British Prime Minister David Cameron commented as follows in the House of Commons on October 12, 2011, when the 2012 Finucane enquiry was initiated:

> I profoundly believe that the right thing for the Finucane family, for Northern Ireland and for everyone in the United Kingdom is … for the British government to do the really important thing, which is to open up and tell the truth about what happened 22 years ago. Frank acknowledgment of what went wrong, an apology for what happened- that is what is required.

Yet, in the face of the 2012 report, the British government has yet to issue a "formal acknowledgment of what went wrong" or an "apology for what happened," according to comments to me by another of Patrick's sons, John Finucane, in New York this spring.

Since there is almost no chance that any lawyer in the U.S. will be murdered for just being an effective lawyer, I try to remember each year around St. Patrick's Day to pay homage to two lawyers who just did their job in the face of the considerable risk that they might be killed for doing so.

FBC News

Solitary Confinement: Perspectives From Inside and Out



By Carine M. Williams and



Marjorie Berman

A standing-room only crowd gathered February 7, 2013, in the ceremonial courtroom at the Southern District of New York, for one of the Federal Bar Council's most well-attended continuing legal education programs offered to date. The turnout of over 200 was for a panel discussion on the use and overuse of solitary confinement, organized by the Special Committee on Sentencing Reform and Alternatives to Incarceration. The panelists included luminaries of diverse backgrounds. Anthony Graves, an exoneree who served 16 years in solitary confinement as an innocent man, and who now works with at-risk youth, provided an insider's view of the human consequences of solitary confinement. Yale Law School professor Steven Bright, who is also president and senior counsel of the Southern Center for Human Rights, contributed his perspective as a practitioner who has litigated the misuse of solitary confinement. Psychiatrist Stuart Grassian, a frequently appointed court expert in such cases, elaborated on the clinical impact of solitary confinement on prisoners. Commissioner Dora Schriro, of the New York City Department of Corrections and co-chair of the American Bar Association's Subcommittee on Solitary Confinement, shared her insights as a corrections administrator.

Moderator Michael Mushlin, a professor at Pace Law School and visiting professor at Brooklyn Law School, posed questions to the panelists in three subject areas: How is solitary confinement defined; the need for alternatives to solitary confinement; and reform efforts.

Defining Solitary Confinement

Graves described his intimate familiarity with solitary confine-

ment. Recalling his 12 years on Texas's death row (where all cells are isolation cells), and four subsequent years under lockdown, he summarized solitary confinement as "slow motion torture." Graves, who was in solitary confinement solely because he was on death row, rather than for any offense committed while incarcerated, lived alone in a cell no bigger than 100 square feet furnished only with a pallet for a bed, a small stainless steel sink, a toilet, and a concrete stool. Lockdown was constant, except for one hour each weekday when he was permitted to exercise in an outdoor cage, still isolated from other prisoners. Always, Graves explained, there was the din of men screaming and losing their minds. He witnessed the stress of solitary drive men to want to die, and indeed, to sometimes succeed in killing themselves. Graves noted the extreme stress on his family, who, for 16 years, could only visit with him on a strict non-contact basis, speaking with him through a plexi-glass window. Poignantly, when asked how he had managed to remain sane, Graves humorously countered, "Am I sane?" He elaborated, supposing that his maturity at the age of his incarceration proved a help. "I was 29. I was not going to allow a system to define me. I knew I was someone's child, someone's brother…. I knew who I was."

Dr. Stuart Grassian detailed clinical observations of how solitary confinement impacts prisoners psychologically. Echoing Graves' sentiment that, "solitary confinement breaks men," Grassian explained that the experience of extended isolation leaves prisoners either in a mental fog and stupor or drives them out of control, to the point where they act out, for example, by throwing feces, as a means of stimulation and engagement. He discussed the phenomenon of suicide by execution, noting the incidence of death row prisoners giving up on appeals because they want to be executed rather than live in a persistent condition of isolation. Pointing out that the judicial system has long recognized the extreme nature of solitary confinement, Grassian cited *In re Medley*, an 1890 U.S. Supreme Court case where the Court observed the "painful character" of solitary confinement. Noting that "a considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community," the Court further remarked that "some changes must be made in the system…." *In re Medley*, 134 U.S. 160 (1890).



Anthony Graves

Alternatives to Solitary Confinement

The pendulum in corrections practice, however, has swung decidedly back, and the use of

solitary confinement has become routine. As Grassian and Bright observed, in addition to the harsh consequences to individual prisoners, profound systemic problems with solitary confinement – and the need for changes in the system – have again become clear. Notably, all the panelists commented that the prisoners least equipped to handle the hardship were most frequently among those who populate lockdown tiers. The mentally ill, the special needs population, and youthful offenders were too often sent to solitary essentially as a short cut to behavior management. Medical and social science research has established, however, that isolation often only exacerbates the underlying problems in these populations. Professor Mushlin further pointed to a documented disproportion in the use of solitary to confine African-American prisoners, in degrees even greater than the disproportionate incarceration of blacks systemwide. Panelists concurred that, as the deleterious impact of solitary becomes increasingly clear, there is a growing push for stakeholders in the criminal justice system to explore alternatives to the use of isolation.

Pathways to Reform

Mushlin noted the will among corrections administrators to keep correctional institutions safe without harming prisoners. Commissioner Schriro discussed some of the impediments that frustrate corrections administrators as they question the utility of isolation and contemplate reforms. Specifically, she noted the challenge of working under the parameters of the physical plant, given that the architecture of prisons around the country was designed to accommodate the increasing use of solitary. Bright talked about needed reforms to help prisoners plan for transition upon release, by moving them into increasingly less restrictive environments as they approach their release dates. Currently, too often, prisoners are released straight to the streets after years, and even decades, in isolation, leading to high recidivism rates. Schriro noted that classification must be improved so that solitary confinement is strictly limited to those for whom it is warranted for punishment or as a means of deterrent, and even then only for such durations as are strictly necessary. She also noted that professional organizations, such as ABA, the APA, and even architecture and design organizations, are contributing to reform by authoring guidelines and taking policy positions in favor of curbing the use of isolation. Panelists discussed as well a need to reform protective custody that, though not intended to be punitive, often ends up being so by the placement of those prisoners in solitary confinement. Finally, the consensus among panelists was that the mentally ill should almost never be held in solitary for extended periods of time. Bright took the time to remind the audience that, regardless of what pathways to reform are pursued, courts and congress must step in to do more. In his view, lack of meaningful access to counsel, and lack of will among jurists to hold prison administrators constitutionally accountable, were key reasons the overuse of solitary confinement is endemic in our penal institutions.

A lively Q&A followed the formal program, with many inquiries directed to Schriro about issues specific to New York City correctional facilities. The comments and questions reflected a sentiment that solitary confinement is a critically important issue which demands continued attention and reform.

The program was organized by Carine M. Williams, Martin Horn, and Harry Reed, and by committee chair Larry Krantz.

FBC News

Public Service Committee's Pro Bono Commitment to Immigrants in Need

By Lindsay Nash

Even for experienced lawyers, immigration law can be difficult. The complex statutory scheme, procedural hurdles, and jurisdictional bars create a thicket that is, for *pro se* immigrants, often impenetrable. The consequences of these barriers to justice are profound and irreme-

diable; misunderstanding a single technicality can easily mean deportation and permanent exile from family members – even children – in the United States.

While a robust movement to remedy the crisis in immigration representation is underway in New York City, the current need for counsel far outstrips the demand. Although it is well established that representation is often critical to winning a deportation case, even immigrants with meritorious claims for relief are turned away because non-profit providers simply lack the resources to represent them. As a consequence, thousands of New Yorkers are deported each year without the aid of an attorney to help them make their case in any meaningful way. Many New Yorkers are deported without even realizing that they have options for relief.

In January, the U.S. Court of Appeals for the Second Circuit identified a group of *pro se* asylum-seekers, with cases pending before the court, who needed access to counsel. Each had filed a petition for review to challenge his or her order of deportation. While these asylum-seekers had options to prevent their deportations, there was widespread concern about their ability to understand their legal options and pursue relief. Moreover, these immigrant petitioners, with no legal training or familiarity with the legal system, faced experienced government attorneys. At the same time, there was little likelihood that the non-profit deportation defense providers – who already are stretched thin – had the capacity to take on these cases.

It was at this point that, at the suggestion of Judge Robert A. Katzmann, the Federal Bar Council Public Service Committee stepped in. A unique partnership developed between the Public Service Committee and the Study Group on Immigrant Representation ("Study Group"), which is a coalition that was convened by Judge Katzmann that consists of attorneys, government officials, and judges who work in the field of immigrant representation. Lewis Liman, chair of the Public Service Committee and a member of the Study Group's steering committee, brought together firm attorneys and immigration law experts from the Study Group to create a cadre of highly skilled lawyers that has been able to offer *pro bono* representation to each of the 15 to 20 *pro se* litigants.

Firms that volunteered partners and associates to take on these cases included Cleary Gottlieb Steen & Hamilton; Davis Polk & Wardwell; Debevoise & Plimpton; Hurwitz, Sagarin, Slossberg, & Knuff; Morrison Foerster; Sullivan & Cromwell; Wachtell, Lipton, Rosen & Katz; and WilmerHale. "It has been gratifying to see these how these firms have dedicated their resources to meeting this urgent need," Liman said, explaining that it "is a testament to the service the private bar can provide in serving the public interest and in meeting the needs of the less fortunate members of our society."

Study Group members also offered their time and expertise. Members from the Kathryn O. Greenberg Immigration Justice Clinic at Cardozo Law School trained the law firm attorneys, provided technical assistance on the cases as they progressed, and matched firm attorneys with other Study Group members who volunteered to impart their immigration expertise. A wide range of Study Group members – experts in various subspecialties of immigration law – shared their experience and knowledge as the firm lawyers undertook this representation. "Their knowledge of the practice," Liman said, "was critical to the success of this effort."

As a result of this initiative, numerous immigrants, many of whom are long-time New Yorkers with spouses and children, are able to remain with their families. They can return home, contribute to their families, and watch their children grow up. This effort has had an important impact on firm attorneys as well. David Toscano, an attorney at Davis Polk participating in this effort, said that he and his colleagues found it "rewarding to help our client, who is an educated, productive member of society." Moreover, he expressed the hope that the Second Circuit's "creative and practical" approach inspires the bar and the government to reach similar common sense resolutions at other stages of deportation proceedings, which he sees as an area "where *pro bono* representation could have a signifi-

cant effect." Finally, this joint effort has demonstrated the benefits that accrue when the private bar and the non-profit sector join together to increase and enhance access to justice in the field of immigration law. Judge Katzmann thanked this group for its efforts, saying that, "Lewis Liman and colleagues have performed a substantial service to the Second Circuit; their work is a model for how bar and bench can work together to promote the fair and effective administration of justice."

Editor's Note: The author is with the Kathryn O. Greenberg Immigration Justice Clinic, Benjamin N. Cardozo School of Law.

Developments

Council in Curacao as David Schaeffer Receives Whitney North Seymour Award

By Bennette D. Kramer



The Federal Bar Council held its annual Winter Bench and Bar Conference at the Santa Barbara Beach & Golf Resort, Curacao, from February 16 through February 23, 2013. Shawn Regan chaired the meeting and Second Circuit Judge Gerald E. Lynch headed the planning committee. David Schaefer received the Whitney North Seymour Award for public service by a private practitioner. Below, we describe the programs presented.

10(b) or Not 10(b) – That is the Question

Judge Paul Engelmayer, Southern District of New York, moderated a program on securities law violations consisting of a series of vignettes. The vignettes were followed by questions to the audience asking whether the subjects of the vignettes had broken the securities laws. Each conference participant voted and the results were posted on a video screen.

Judge Engelmayer opened the program by describing the statutory framework for securities fraud. Each vignette dealt with a fact pattern taken from a court decision. Conference participants – each of whom is now auditioning for roles on Broadway – acted in the vignettes. Following closing remarks by Judge Engelmayer, Steve Edwards sang *Master of the Universe*, a song that he composed. The cast members gave Steve support by singing the chorus and performing a kick line.

Ethics in the Electronic Era

Judge William F. Kuntz, II, Eastern District of New York, chaired a panel that explored various ethical situations faced by lawyers using social media and engaging in electronic discovery. Each segment was introduced by a video and then panel members Barbara S. Gillers of New York University School of Law, C. Evan Stewart of Zuckerman Spaeder, and James Q. Walker of Richards Kibbe & Orbe discussed the issues raised by the videos. The first issue related to use of social media and the inadvertent creation of an attorney/client relationship. The video showed two partners in a law firm in different offices speaking, respectively to (1) a former client about a new matter and (2) a potential client responding to targeted advertising. Both discussed representation in connection with the same matter, but on opposite sides. Gillers discussed the potential pitfalls of using blogs, Facebook, and Twitter to attract clients. The question here was whether an attorney-client relationship had been formed with the person responding to the advertising. Gillers stated that the key point was that the confusion could have been avoided if the partner with the former client had done a conflict check and alerted the other partners to the existence of a client relationship.

Next, Judge Kuntz discussed judges as bloggers about issues before them. Panel members agreed that judges should not be blogging about confidential information in pending cases, but could provide general information about

the judicial process. They also agreed that prosecutors should not blog about on-going trials either.

How far must lawyers go to protect client confidences? The bottom line is that a lawyer must understand technology and do what is necessary to protect client secrets. On the simple level, a lawyer must shred confidential papers instead of throwing them in the trash. In an electronic age, lawyers must understand what is necessary to delete confidential material and take all steps to do so.

Finally, the panel discussed ethical issues connected with electronic discovery. Because court rules governing electronic discovery differ, lawyers must make sure they understand the rules of each court. Courts also differ in their approaches to inadvertent production of confidential documents. Most court rules impose an obligation to return inadvertently produced documents; some impose sanctions for the failure to do so.

The Roosevelt Court

Mark Zauderer of Flemming Zulack Williamson Zauderer moderated a panel on the Supreme Court under President Franklin D. Roosevelt. The program focused on the Commerce Clause through *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). A video providing background on the New Deal and the *Schechter* case produced by Velia Hayes was followed by excepts of the Supreme Court argument of the *Schechter* case. Judge J. Paul Oetken played Justice Brandeis, Judge Gerard E. Lynch played Justice Van Deventer, and Judge Paul A. Engelmayer played Justice Sutherland. David Ellenhorn of the New York State Office of the Attorney General and Frank Velie, Sullivan & Worcester, argued for the government. Ellenhorn was Solicitor General Stanley Reed and Velie was Donald Rechberg, Special Assistant to the Attorney General. Alan Vinegrad, Covington & Burling, and Vilia Hayes, Hughes Hubbard & Reed, argued for defendants as Joseph Heller and Frederick Wood. The majority opinion held that there was no interstate commerce in the slaughter and distribution of chickens in Brooklyn and therefore no constitutional jurisdiction.

During the following panel discussion, Zauderer moderated with Ellenhorn and the judges as panel members. Zauderer explained that by 1942, after *Schechter*, the Court had changed and expanded the Commerce Clause to the point where it was just before the Affordable Care Act case.

Judge Lynch ended the program by recapping and predicting that there would not be radical changes in Commerce Clause jurisprudence in the near future.

Mediating the Complex Case

Judge Laura Taylor Swain, Southern District of New York, chaired a panel of experienced mediators. Mediators David M. Brodsky, Brodsky ADR, Jonathan B. Marks, MarksADR, and Michael D. Young, JAMS, provided many insights into the mediation process and how lawyers can most effectively represent clients in complex case mediations.

Judge Swain began the program by explaining the basics of mediation. She then introduced the panelists. Marks described the standard mediation model, which views mediation as an event. He said that the more complicated the case, the more a lawyer must do to prepare to increase the chance of getting to a deal. Every lawyer heading to mediation must decide how it will fit into the overall strategy of conducting the case. In connection with the mediation itself, Marks discussed pre-mediation interaction among the various interests, the plenary session, mediation advocacy, and the roles of the attorneys and the mediator.

Using a hypothetical, panel members discussed how to agree to mediation without appearing weak. The conclusions that emerged from the discussion of the hypothetical were:

(1) deep pocket parties do not have to fear appearing weak;

(2) it is vital to include all parties in mediation;

(3) a party or his or her lawyer can use the mediation process as a vehicle to disclose his or her posture;

(4) the attorneys should request a stay of the case during mediation; and

(5) attorneys must decide what type of mediation they want.

Brodsky said that decisions on the structure of the mediation may be important to the case, including whether to address all issues in the case, who the mediator will be, when the sessions take place, the number of days, and who attends.

Young said that the mediator needs help from counsel to conduct the mediation effectively. The more the mediator can learn from counsel about the merits, business issues, personalities, and why the case had not settled, the better job a mediator will be able to do. The mediator will use his conversations with counsel to develop a sense of the case.

Panel members discussed the process of the mediation itself. Young pointed out that mediation was a process not an event and that the attorneys should focus on the lead up and planning as well as the mediation itself.

Supreme Court Review

Supreme Court litigators Neal K. Katyal, Hogan Lovells US, and Kannon K. Shanmugam, Williams & Connolly, joined Second Circuit Judge Gerard E. Lynch to discuss several recent and pending Supreme Court cases. Katyal gave an overview of the last Supreme Court term. He said that the Court had taken 65 cases last term – the lowest in 20 years. The Court issued 10 summary reversals – a large number. The Roberts Court has held in favor of big business 61 percent of the time, compared to an average of 42 percent. Chief Justice Roberts and Justices Thomas, Alito, and Scalia are the pro-business justices. The Court has voted unanimously in 33 cases, which is about average. Justices Scalia and Thomas voted together 93.3 percent of the time, as did the Chief Justice and Alito, whereas Justices Thomas and Ginsburg voted together the least – 53 percent.

Katyal then discussed the Affordable Care Act case: *National Federation of Independent Businesses v. Sebelius*. Katyal, who was involved in the case, said there were two essential Constitutional issues: (1) the individual mandate intended to bring people with pre-existing conditions into the market, and (2) the linkage of state health insurance exchanges and Medicaid funds. With Chief Justice Roberts joining the majority, the Court upheld the individual mandate under Congress' power to tax, rather than the Commerce Clause. The majority concluded that the individual mandate was the opposite of commerce because it forced individuals to purchase a product. This conclusion represented a pulling back of the Court's former enthusiasm for expanding the Commerce Clause. Shanmugam said there was a lot of speculation about the Chief Justice's vote. His view was that the Chief Justice was concerned about the external perception of the Court and that a vote along partisan lines might undermine the stature of the Court.

Shanmugam next discussed the same sex marriage cases. In *Windsor v. United States*, the case involving the Defense of Marriage Act ("DOMA"), the Second Circuit held that DOMA violated the Equal Protection Clause by discriminating against the widow in a same sex marriage. DOMA defined marriage as between a man and a woman, which deprived spouses in same sex marriages from receiving the same federal benefits as spouses in heterosexual marriages. In the case before the Court, the widow had to pay estate taxes, whereas a heterosexual spouse would not have had to pay any estate taxes. *Perry v. Brown* is a challenge to Proposition 8 in California, which overturned a California Supreme Court decision allowing same sex marriage. The parties seeking to overturn Proposition 8, represented by Ted Olsen and David Boise, prevailed at every level. In both the DOMA and Proposition 8 cases, government entities decided not to defend the constitutionality of the statutes, but the federal government is enforcing DOMA and same sex marriages are stayed in California pending the Supreme Court decision on Proposition 8. Common issues in these two both cases are: (1) standing and jurisdiction and (2) how broadly the Court will rule.

The question raised in *Association for Molecular Pathology v. U.S. Patent and Trademark Office* is whether genes can be patented. The Patent Court said genes

to predict breast cancer could not be patented, and the Federal Circuit affirmed. The U.S. Patent and Trademark Office has issued about 20,000 patents on genes since 1984. The future of medicine is at stake in this case and it will have a huge future impact.

Katyal and Shanmugam also discussed *Maryland v. King*, in which the Maryland Supreme Court held that the collection of DNA without a warrant or probable cause violated the Fourth Amendment. DNA testing is a widely used law enforcement tool by the federal government and all 50 states. Katyal and Shanmugam finished by touching briefly on a voting rights case, *Shelby v. Holder*; affirmative action, *Fisher v. University of Texas at Austin*; and antitrust class actions, *In re K-Dur Antitrust Litigation*.

Affirmative Action

Judge George B. Daniels, Southern District of New York, provided background on affirmative action and the Supreme Court. Following vignettes, Kannon K. Shanmugam described affirmative action cases beginning with those brought by Thurgood Marshall in the 1930s that culminated in *Brown v. Board of Education* in 1954. In *Brown*, the Court held that segregation violated equal protection, overturning the holding in *Plessy v. Furgeson*, decided in 1896. Neal Katyal then discussed the four cases leading up to *Fisher v. University of Texas*, now pending before the Court. He started with *Regents v. Bakke* (1978), where the Court held that a university could not have quotas based on race but could have a diversity program. In 2003, the Court decided *Grutter v. Bollinger* and *Gratz v. Bollinger*. In *Grutter* the Court found race as a factor in admission to the University of Michigan Law School was narrowly tailored further a compelling interest in providing educational benefits flowing from a diverse student body whereas in *Gratz*, the Court struck down a University of Michigan undergraduate admission policy because the interjection of race into the admissions policy was not narrowly tailored. Finally, in *Parents Involved in Community Schools v. Seattle School District* in 2007 the Court found a policy awarding points for race in high school admission was an unconstitutional extreme use of race. The Court appeared to be very hostile to any preference on account of race.

In *Fisher v. University of Texas*, the Fifth Circuit upheld the University of Texas affirmative action program providing for guaranteed admission to the University of Texas for students in the top 10 percent of their high school class.

A mock argument followed with Bruce Kaplan of Friedman Kaplan Seiler & Adelman arguing for the petitioner Fisher and Sheila Boston, Kaye Scholer, arguing for respondent University of Texas.

The ensuing discussion focused on what the Court would do. The Fifth Circuit decision in *Fisher* focused on compliance with the *Grutter* court's acceptance of a narrowly tailored use of race in admissions. Katyal said the major questions and factors, evident at oral argument, were: (1) whether the Court will go so far as to overturn *Grutter*; (2) the effect of Justice Kagan's recusal, which could result in a 4-4 decision; and (3) standing and how Abigail Fisher could prove she would have gotten in. Her answer was that she wanted an equal chance to be admitted. Shanmagum believes the Court will invalidate the Texas program and noted that three things trouble the Court: (1) Texas's 10 percent plan is getting the wrong type of minority because many of the minorities are underperforming high school students and many well-educated high school students are not admitted through the program; (2) Asian Americans are over-represented at the University of Texas compared to the general population; and (3) the Texas program is atypical of other Supreme Court cases because of the involvement of blacks, Hispanics, and Asian Americans.

Targeted Killings

Judge Janet Hall of the District of Connecticut chaired a panel on targeted killings by the United States. Panel members included Thomas Bezanson, Cohen & Gresser; Steven J. Hyman, McLaughlin & Stern; Neal Katyal, Hogan Lovells; and Professor Mark B. Rosen, Security Management Institute, John Jay Col-

lege of Criminal Justice. Judge Hall began by providing background beginning with killings in Yemen in November 2002. The killings have continued but in the face of criticism the government has issued a white paper setting forth the legal basis for them.

Professor Rosen explained the statutory and international authority used to determine whether the United States is at war with al Qaeda. The legal framework has two potential sources: (1) the civil law enforcement model based on international human rights law and (2) the military model based on international humanitarian law. The difference between the two is not clear.

During the ensuing discussion, Bezanson took a position against targeted killings, while Hyman took the position in favor of them. The first issue was, if we are at war, where is it. Hyman argued that since al Qaeda was in many countries the United States has to go where they are. According to Bezanson, the slippery slope of fighting a war without a state will mean that targeted killings could occur in the United States. Rosen noted that this dialogue demonstrated the complexity of the issue.

Rosen said that the white paper had recently been leaked. It cites as authority the absence of a prohibition, rather than any authorization. The ultimate justification is found in (1) imminence in connection with the need to target while the subject is in view and (2) the laws of war including proportionality and necessity along with humanitarian law.

Bezanson and Hyman discussed who a suitable target would be. Hyman defined a suitable target as an individual either directly participating in or planning war against the United States. Bezanson noted that it is important to keep in context that this is murder and assassination is illegal. Rosen provided the elements of imminence and proportionality and stated that it was important to weigh the benefit against the impact on the sovereignty of another nation.

Concerning who should make the decision, Rosen said he had no answer. Some decisions are made by the CIA, a civilian agency, and some are made by the military. There are many questions which have not been answered, for example, what is the verification process, what are considerations, what expertise is necessary.

Katyal and Rosen concluded by discussing the review necessary and who should perform that review.

Ethics and Federal Criminal Discovery

Judge Dora L. Irizarry, Eastern District of New York, chaired a panel discussion of ethical issues in federal criminal discovery. The panel included Stephen Gillers, New York University School of Law; Carolyn Pokorny, Deputy Chief Criminal Division, U.S. Attorney's Office, Eastern District of New York; and Alan Vinegrad, Covington & Burling.

Judge Irizarry began with an overview of *Brady* and *Giglio* obligations and the rules and cases upon which those obligations are based. Panel members then discussed the differences between search warrants and subpoenas from the government and defense points of view. Pokorny said using a subpoena was simpler because she did not need to lay out her case or get a judge to sign off as with a search warrant, but a subpoena left the evidence gathering in the hands of her adversary. With a search warrant the government gains an element of surprise and the evidence gathering is protected by secrecy. Privileged materials, however, present a problem, because the government must develop a strategy to separate them from everything else. Computer searches in particular require a lot of prosecutorial resources.

Vinegrad, speaking as a defense lawyer, said that he likes subpoenas because the situation is more controlled for the defense and there is less surprise. In addition, the defense attorney can keep copies of materials produced and can sort out privileged materials. With a search warrant, the defense lawyer loses all control, unless he can convince the agents executing the search warrant to allow him or her to make copies of documents and hard drives.

Gillers said that the government has an obligation to respect work product and privileged materials, pursuant to the same ethics rules as other lawyers in the

jurisdiction. Pokorny said that U.S. Attorneys consult in-house attorneys. Some solutions to protect the privilege following seizure under a warrant include appointing a special master to review documents or setting up a taint team to identify privileged materials. These reviews are very burdensome on the office.

The panel turned next to government responsibilities under *Brady*, which requires that the government turn over to the defense all material that tends to negate or mitigate the guilt of the accused. *Giglio* holds that the government has liability for *Brady* violations irrespective of good or bad faith. For example, if one prosecutor takes over for another and does not know about the violation, that prosecutor has the obligation to review the file and determine if *Brady* material exists that has not been turned over to the defense. Gillers said that there are many disciplinary complaints but few proceedings. Pokorny said that there is a self-reporting requirement within the DOJ that requires reporting of *Brady* violations to the OPR or internally at the DOJ.

The final issue discussed was how to handle parallel SEC and DOJ investigations. Pokorny said that criminal prosecutors cannot direct a civil agency's discovery so as to get materials to which they were not otherwise entitled. Vinegrad said that he would want civil discovery, but not to have the client deposed.

In response to Gillers' statement that a prosecutor has little incentive to turn materials that might harm the prosecution and lead to a loss of the case, Pokorny said that prosecutors want to do the right thing. *Brady* violations are harmful to careers and damaging to the government's reputation, so the goal is to have zero violations. Although she did point out that it is the defense obligation to seek *Brady* materials. There is a bill pending in Congress that would require *Brady* material to be turned over without delay after arraignment and before any plea agreement or waiver of *Brady* rights.

Developments

Seymour Award Presented to David Schaefer

By Steven M. Edwards



On the final evening of the conference, Federal Bar Council President Bob Anello presented the Council's Whitney North Seymour Award for outstanding public service by a private practitioner to David Schaefer. Describing Schaefer as an accomplished lawyer with a devoted family, Anello discussed what he characterized as "an exceptionally long list" of Schaefer's accomplishments in the areas of national politics, community leadership and preservation projects. Among other things, Schaefer was president of the student body at the University of Wisconsin and was named as the "Outstanding Graduate" of his law school class at NYU. After graduating from NYU, he went to work for Senator Abraham Ribicoff of Connecticut and served as counsel for the U.S. Senate Governmental Affairs Committee. He also was a member of the National Executive Committee of the Anti-Defamation League and chair of its Civil Rights Committee. In addition, he served as president of the New Haven County Bar Association, president of the New



David Schaefer

Haven Jewish Federation, Director of the Community Foundation for Greater New Haven, and chair of the Hamden-Farmington Canal Commission. Throughout his career, Schaefer also has engaged in a number of efforts to condemn intolerance and defend the rights of immigrants.

In receiving the award, Schaefer described Whitney North Seymour as "an extraordinary attorney, leader of the bar, champion of civil liberties, and courageous defender of the unpopular." He noted that Seymour also was a graduate of the University of Wisconsin. After discussing his time in Washington, where he dealt with the White House, cabinet members, senators, and lobbyists on many important public policy issues, Schaefer recounted some of the highlights of his career at the New Haven firm Brenner, Saltzman & Walman, where he has been the managing partner for the last 25 years. He emphasized that everyone has an obligation to leave their community and the world a little better than they found them, and he stated: "I even believe that volunteering in political campaigns, without any expectation of personal reward, just to support those whom you believe will make our country stronger and fairer, is a public service."

Schaefer acknowledged that many of the people in the audience work tirelessly in public service activities, and he recognized the challenge that people face in finding the time to do that critical work, especially young lawyers with children. He added, however, that "once you take on responsibility for important public service organizations and causes, I trust you will find, as I have, that we as lawyers have the skills, credibility and ability to make a difference in furthering the public interest – and, as important, no other work will be more fulfilling." Schaefer also encouraged senior attorneys to mentor younger lawyers in the opportunities to do public service work and the personal satisfaction in doing so. While indicating that he was reluctant to receive an award that might be viewed as the lifetime achievement award given at the end of one's career, Schaefer promised to treat the award as an obligation to live up to in the years to come.

Developments

Council Honors Judge Barrington D. Parker, Jr., at Law Day Dinner



By James L. Bernard

On May 1, 2013, the Federal Bar Council held its annual Law Day Dinner. Barry Berke, partner and co-chair of the litigation department at Kramer Levin, acted as master of ceremonies. Introducing the theme of this year's Law Day Dinner, equality for all, Berke emphasized the important role the judiciary has played in securing that most important of goals. He introduced Judge Katherine Polk Failla, recently confirmed as U.S. District Court Judge in the Southern District of New York, who read the president's Law Day Proclamation.

After dinner, Berke introduced Bob Anello, President of the Federal Bar Council, who presented the Learned Hand Medal for Excellence in Federal Jurisprudence to Second Circuit Judge Barrington D. Parker, Jr. Anello noted that at a time and place when terrorist activity threatens our way of life, Judge Parker has reminded us all that terrorism cannot prevail if we stay true to the time-tested principles of our constitution. After graduating from Yale College and Yale Law School, Judge Parker was in private practice for many years before following in the footsteps of his father, a district court judge in the District of Columbia. Anello recounted how at a time of sometimes divisive political positioning in the judicial confirmation process, Judge Parker stands among the very few who have been nominated by presidents of both parties: President Clinton nominated

Judge Parker to become a District Court Judge in the Southern District of New York and President George W. Bush nominated him to the Second Circuit. As Anello said in closing his remarks and presenting Judge Parker with the Learned Hand Award, the Federal Bar Council unanimously chose to grant the award to Judge Parker in recognition of his thoughtfulness, his energy, and his commitment to the rule of law.

In accepting the award, Judge Parker thanked the Council for the honor, spoke of his deep respect for the Council, and gave a special thanks to Jeanette Redmond and her staff for all of their work and dedication. In his remarks, Judge Parker focused on the role trial lawyers play in giving meaning to our Constitution. He recalled his friend and mentor, the Hon. William Bryant, chief judge of the U.S. District Court for the District of Columbia. Judge Bryant had once remarked that when he first started practicing law, the Constitution was "over there" and "reality was someplace else." As Judge Parker remembered, Judge Bryant had observed that the people who "joined reality and the Constitution were trial lawyers."

For Judge Parker, that joining of reality did not just happen in the abstract or to others in their litigations. It struck much closer to home. He told the story of having attended high school with a brother and sister from a family named Hurd. The Hurd family attempted to purchase a home in Northwest Washington, D.C., but the home was subject to a racial covenant that permitted whites to block the sale of the home to the African-American Hurd family. The family sued to obtain a declaration that the covenant violated the Constitution, and another neighbor and friend, Charles Houston, argued the case, *Hurd v. Hodges*, in the Supreme Court and won. As Judge Parker put it, "[t]he Hurds kept their home and Washington was rid of restrictive covenants because trial lawyers had done their work." Judge Parker also recounted that the plaintiff in the case of *Henderson v. United States*, which eliminated racial discrimination in dining cars on the Southern Railroad train out of Washington, D.C., was a close friend of his mother and father, and that it was because of trial lawyers that this practice was eliminated.

But as Judge Parker observed, the great work of trial lawyers is not relegated to the past. Noting the parallels between the great case of *Loving v. Virginia* and the recent decisions striking down the bans on same-sex marriage, Judge Parker reminded us all that it was because of the courageous work of trial lawyers that these victories had been achieved. He told the story of how Bernard Cohen, one of the lawyers in the *Loving* case, likely sealed victory when he told the Court that Richard Loving had asked him to tell the court that, "I love my wife, and it is just unfair that I can't live with her in Virginia."

Judge Parker also noted the extensive work done by members of the bar on immigration issues, and thanked all lawyers for their time and efforts. In these and other matters, Judge Parker remarked that he "never cease[s] to be amazed at the extraordinary intellectual quality of [the profession's] work." We of course still have more work to do in closing the gap between reality and the Constitution, and as Judge Parker reminded us, there will always be gaps. He highlighted the fact that we incarcerate more people than any other nation, and nearly as many as many as the next three countries – China, Russia, and Brazil – combined. In a call to do better, Judge Parker reminded us that this is "not who we are" and that these are circumstances "none of us can justify and none of us can be complacent about." Returning to his theme of the role of trial lawyers, Judge Parker closed with this moving observation: "The transcendent moral merit in what you do as lawyers is that you invest this nation with a conscience and then require the nation to follow it."