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Provocative, Human, Eclectic

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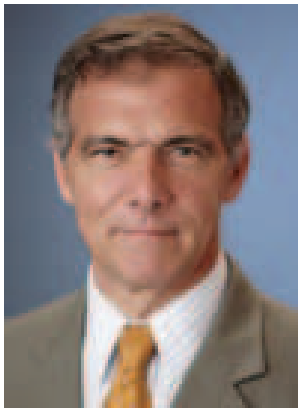
From the President

Honoring Justice Marshall and His Inspiration for Pro Bono Service

By Robert J. Anello



This year while we celebrate the fiftieth anniversary of the Federal Bar Foundation, and its commitment to the administration of justice and the study of law, the Federal Bar Council is planning the inaugural presentation of the Thurgood Marshall Award for Exceptional Pro Bono Service. The award in Justice Marshall's name is being established by the Federal Bar Council to encourage attorneys and their firms to devote time to pro bono work. The award will recognize lawyers who have gone above and beyond in making an extraordinary contribution in the area of pro bono service. Named after perhaps the most inspirational of service-minded jurists, the Thurgood Marshall Award for Exceptional Pro Bono Service distinguishes those attorneys who persistently dedicate time to meet the needs of vulnerable communities, have a vision for creative ways in which to provide pro bono service, and inspire and mentor fellow lawyers to volunteer their professional expertise to help others.

The Federal Bar Council did not act lightly in invoking Justice Marshall's name for this purpose. Instead, we hoped to set this pro bono award apart from others bestowed in our field by embracing the path blazed by the Supreme Court's 96th justice, its first African-American justice, and one of the Second Circuit's own. Justice Marshall had a close association with our organization. During his tenure on the nation's highest court, where he was the Circuit Justice of the Second Circuit, Thurgood Marshall attended numerous Federal Bar Council Winter Bench and Bar Conferences.

The award in Justice Marshall's name is being established by the Federal Bar Council to encourage attorneys and their firms to devote time to pro bono work.

Early Career

Thurgood Marshall spent his early career working for the public good as head of the Legal Defense and Education Fund of the NAACP. He held this position at a time when the NAACP was held in low regard by some. He earned a meager living and juggled hundreds of cases while traveling to areas of the country that did not welcome a black man advocating for civil rights. Despite countless roadblocks that would discourage even the heartiest among us, Thurgood Marshall deployed the Constitution to tear down the notion of "separate but equal," amassing a near flawless record before the Supreme Court, including the landmark decision in *Brown vs. Board of Education*.

Working with other future federal judges Constance Baker Motley and Robert C. Carter, Justice Marshall used the legal system to dismantle government-sanctioned discrimination. The Supreme Court's holding 60 years ago in *Brown v. Board of Education* declaring unconstitutional state laws that established separate public education for black and white students paved the way for integration. Just as this decision inspired and buoyed the civil rights movement, Justice Marshall's efforts have inspired countless other attorneys to public service and pro bono work.

A Second Circuit Judge

In 1961, President John F. Kennedy named Thurgood Marshall to the U.S. Court of Appeals for the Second Circuit. Justice Marshall endured a year-long confirmation process during which his credentials and intel-

lect were challenged by Southern senators. Standing firm in the face of these attacks, Justice Marshall went on to serve as a Second Circuit Judge for four years, issuing more than 100 decisions – none of which ever was reversed by the Supreme Court. His colleague on the Second Circuit, Judge Irving R. Kaufman, once stated that Marshall's opinions "bore eloquent testimony to his concern for the dignity and inviolability of the individual." (Charles L. Zelden, "Thurgood Marshall: Race, Rights, and the Struggle for a More Perfect Union," Routledge (2013).)

On the Supreme Court

After later serving as the Solicitor General for two years under President Lyndon B. Johnson, during which time he won 14 of the 19 cases argued before the High Court, Thurgood Marshall was nominated in 1967 to serve on the U.S. Supreme Court by President Johnson. During his tenure on the Court, Justice Marshall continued to advocate for those without a voice, insisting that the Constitution be applied equally to all citizens regardless of race, gender, or socio-economic status. Birthed in the era of racial discrimination, Marshall's sensitivity to and work on behalf of individual rights is unparalleled.

The FBC's Marshall Award

With great pride the Federal Bar Council annually will present the Thurgood Marshall Award for Exceptional Pro Bono Service to recognize lawyers in private practice who demonstrate exemplary commitment to pro bono legal services, and who provide or facilitate the provision of pro bono services in federal courts or agencies within the Second Circuit. We look forward to celebrating and supporting the continued service to those in need by lawyers practicing within the Second Circuit in the same vein championed by Justice Thurgood Marshall so many years ago.

From the Editor

Frank Wohl Receives Whitney North Seymour Award

By Bennette D. Kramer



In February at the Federal Bar Council's Winter Bar and Bench Conference in Costa Rica, Frank Wohl received the Whitney North Seymour Award for excellence in public service by a private practitioner. Frank, in his understated and unassuming way, explained how he started his first public service experience: He just had graduated from law school and was about to be drafted so he joined the Navy Judge Advocate General's Corps. In his first posting as a JAG officer, Frank was counsel for servicemen who appeared before a physical evaluation board set up to determine whether a sailor or marine was fit for duty after an injury or the extent to which that serviceman was disabled. Most of Frank's clients were clearly unfit for duty, but one stood out.

A Marine Corps pilot named Ben had lost an eye while piloting a helicopter during a medivac mission. Ben wanted to challenge findings that he was unfit for duty despite the Marine Corps' eyesight requirement. In addition, he wanted to continue to fly. The two marine officers on the reviewing board overruled the board chair's denial of a hearing after Frank asked that Ben be allowed to testify as to why he was a better pilot with one eye than most other pilots with two.

Ben's Testimony

In his testimony, Ben described his medivac mission in Vietnam and how they had come under fire as they were trying to load wounded Marines aboard the helicopter. Ben was hit in the face and he could not see through

all the blood. His co-pilot was incapacitated, so Ben broke the glass on the gauges and flew the helicopter by feeling the needles. His wingman in another helicopter talked him to a base and down to make the landing. Navy surgeons were able to save one of his eyes. The helicopter had taken over 500 hits.

The two Marine officers outvoted the chairman and found Ben fit for duty. The chairman told Frank the ruling would be reversed by a reviewing board. It was not. And when Frank Googled "one-eyed Marine Corps pilot" just before attending the Winter Meeting, he found that Ben Cascio had become a Marine Corps legend who had flown for the Marine Corps for one more year, retiring in 1969. For Frank, Ben's story defines public service and the humanity the law is capable of.

The Rest of the Story…

Following Frank's return from Costa Rica, he reached out to Ben Cascio. Here is the rest of the story from Frank:

> In my speech at the Winter Bench and Bar, I talked about my most inspiring client, Marine Corps Captain Ben Cascio, known in Marine Corps legend as The One-Eyed Ugly Angel because of his more than 850 combat missions in Vietnam, including his helicopter medivac rescue of eight wounded Marines on the night of April 30, 1968, in which he lost an eye and piloted his helicopter from a firefight to safety while quite literally blind from having been shot in the face. It was my privilege as a Navy JAG officer to represent Ben before a Physical Evaluation Board, in 1969, after his recuperation from his wounds, and help him be found fit for duty so that he could stay in the Marine Corps.

After my speech, several Federal Bar Council members suggested that I try to find out what happened to Ben, whom I had not seen or spoken to in 45 years. With the help of Google, I quickly located Ben and found that he is, of all things, a lawyer practicing real estate law in New Jersey.

Last month, Lisa and I had a delightful dinner with Ben and his wife, Ailene, and his Fordham Law School classmates and good friends Chief Judge Loretta Preska and Tom Kavaler. At the dinner, Ben presented me with a wonderful framed photograph of the World Trade Center taken two weeks before 9/11 from a restored Marine Corp 1951 L-17 propeller plane piloted by (who else?) Ben himself. Further research discloses that Ben's Marine Corps exploits, for which he received the Silver Star and the Distinguished Flying Cross, have been featured in the book "The Magnificent Bastards" by Keith Nolan and the Discovery Channel documentary, "Marine Helicopter Heroes." In 2000, he was inducted into the New Jersey Aviation Hall of Fame. Ben's personal résumé describes him as a "World Traveler, Bon Vivant, Raconteur, Master Gourmand, and Singer of Bawdy Songs."

FBC News

The Federal Bar Foundation Turns 50

By Thomas E. Bezanson



On June 19, 1964, a group of public spirited lawyers filed the Certificate of Incorporation of the Foundation of the Federal Bar Association of New York, New Jersey and Connecticut, Inc., which later became the Foundation of the Federal Bar Council, Inc., and in 1991 the Federal Bar Foundation of familiar name today. This June, Thursday the 19th, is auspicious as it marks the Foundation's fiftieth anniversary and the beginning of the next 50 years of service to our legal community.

The Court Visits Program

Thanks to the generosity of

its contributors, the Federal Bar Foundation has been able to support the Federal Court Visits Program administered by the Justice Resource Center through which nearly 4,000 middle and high school students have been able to observe courts in session, tour the courthouse, and meet with a federal judge. The Foundation also has been able to grant financial support to student interns benefitting from the U.S. Attorneys' Offices Student Internship Program. The Foundation's marking of its fiftieth anniversary by celebrating access to the courts reflects its enthusiasm for these programs and forward looking hopes to expand upon them.

The Foundation, working with the Federal Bar Council, also supports many continuing legal education programs throughout the year, including those of the Fall Bench and Bar Retreat and Winter Bench and Bar Conference of the Council and law clerk video conferences, most recently focusing on 42 U.S.C. § 1983 litigations, which was attended by 94 law clerks in 12 locations in every district of the Second Circuit.

In preparation for presentation later this year is "Courthouses of the Second Circuit," a book surveying the architecture and history of these courthouses through photographs, landmark cases, and interesting personalities who brought the law to life in those precincts.

So too, we look forward to opportunities to support the expanding, innovative work of the Federal Bar Council's Public Service Committee, which was excellently described in the last issue of the *Federal Bar Council Quarterly* in an article by Lewis Liman and David Olinenstein. In sum, this committee has worked to support the Second Circuit's courts and has advanced the causes of expanding access to justice, providing counsel for immigrant litigants and other pro se litigants, and providing practical CLE training.

All of this is made possible by the generosity of the Foundation's contributors. Through the alchemy of philanthropy, they were able to convert money into programs that bring concrete benefits to so many. In recent years, the Foundation has received sufficient, or sometimes nearly sufficient, annual contributions to support its programs. About one half of the contributions come from only 20 donors, so there is encouraging room for growth. As noted above, expanding access to the courts and providing advice to litigants in need of assistance are high priorities and are in keeping with our shared commitment to lawyerly public service.

The fiftieth anniversary of the Foundation is an occasion to reflect with pride upon its accomplishments, but, more importantly, to look forward to vigorous years of service to come.

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Legal History

The U.S. Custom House at Bowling Green

By Steven Flanders

The Custom House at the foot of Manhattan is one of New York's most distinguished works of architecture. But from its origins in 1899 all the way to the present, nothing in its history has been simple. Designed by Cass Gilbert, an unknown provincial architect at the time, the Custom House essentially established the reputation of the architect who created our Thurgood Marshall Courthouse as well as the U. S. Supreme Court building, and was described by *The New York Times* when he got the Foley Square contract as the most important architect working in America. But the magnificent Custom House fell upon evil days when the World Trade Center went up 70 years later, and faced multiple uncertainties before the curious compromise was reached that led to its present uses: It is shared by the most unlikely possible pairing, of the U.S. Bankruptcy Court for the Southern District of New York and the National Museum of the American Indian.

The Tarsney Act

The Custom House was the first federal building created under the Tarsney Act, an 1893 "reform" that had been urged upon Congress for decades by the American Institute of Architects, among others. Essentially all federal construction up to that time had been designed by the Supervising Architect of the Treasury, so the role (and opportunity for government business) for private architects was minimal. Though today the work of that office is regarded fondly (I urge well-traveled litigators to recall the magnificent 19th century federal courthouses in Milwaukee and Indianapolis, among others, as examples), the argument of the day was that the work of those government hacks should be enriched through competitions that brought in top firms.

The Custom House at the foot of Manhattan is one of New York's most distinguished works of architecture. But from its origins in 1899 all the way to the present, nothing in its history has been simple.

The prospect of a much-expanded Manhattan Custom House was the ultimate prize. Though Democratic President Grover Cleveland had permitted his Treasury Secretary to ignore the Tarsney Act, President McKinley implemented it, in New York and elsewhere. The Customs Service of that day was the prime source of government revenue, exceeding 50 percent, and most of that came through the Manhattan office. The "short" list of competitors included 15 from New York, two each from Boston and Chicago, and a lone outlier, Cass Gilbert from St. Paul, Minnesota. Knowing that the Customs Service had an all-but-unlimited budget for this landmark project – in an amusing bureaucratic quirk of the day, the Customs Service expenses, including real estate, came off the top; revenues went to the Treasury *after* expenses were deducted – Gilbert created a monument with a monumental and expensive sculpture and mural program.

Gilbert's selection created a "Manhattan firestorm." Senator Platt, probably the most powerful man on Capitol Hill of the day, charged off to the White House to object to the choice of this provincial over such distinguished New York competitors as co-finalist Carrère and Hastings. But Gilbert had a bit of help. His former partner James Knox Taylor was McKinley's Supervising Architect, in charge now of implementing the Tarsney Act. Though Taylor did not vote on the final selection, he did advise Gilbert at several points along the way. And another unknown Midwestern "provincial," Thomas Kimball of Omaha, known to Gilbert but to none of the others among the 20 finalists, was a member of the three-man committee. A huge lobbying effort began on all sides,

Gilbert spending some $5,000 – a considerable sum in those days – on legal fees. In the end, President McKinley and Treasury Secretary Lyman Gage were unwilling to upend this first implementation of the Tarsney Act, and we all are the beneficiaries.

A Great Building

The late Paul Spencer Byard, architect and preservationist, described the Custom House (after noting that some of Gilbert's competitors for this job perhaps were better than he was): "The Custom House is a great building, rich, compact, with an almost anatomical fitness of its plan to its purpose – a representation in the nation's greatest seaport, of the fecundity of its wealth, the showering coin of customs collections that entered its front door and begat the capacity of the federal government to push and steer the growth of the nation." The mural program and especially the Daniel Chester French sculptures of the continents that guard the entrance are the ultimate monument to American imperialism, created just as victory was achieved in our "splendid little war" against Spain. Professor Geoffrey Blodgett said, "The War turned the Caribbean into an American lake and broke open the Asian rim of the Pacific to American commerce. American power now was not only global but self-conscious and assertive. Of all the memorials to the mood of that war and its momentous consequences, the Custom House can be regarded as the most compelling."

The Custom House served its intended purpose for nearly 70 years. Some complained of the incessant clattering of the typewriters in the huge Rotunda, where duties were actually calculated and receipts issued, but perhaps this was the price of prosperity. Gilbert had left the mural openings in that space blank; they were filled under the WPA by the more modern Reginald Marsh murals we see today. They portray the busy seaport, and such events as an arriving Marlene Dietrich holding court before the adoring press. But for whatever reason, perhaps in part because Beaux-Arts Classicism became thoroughly fusty and out of style, the Custom Service removed to the World Trade Center in the 1970s, leaving the building vacant, unused, and mostly unloved. It came close to demolition a couple of times before Brendan Gill and others mounted a determined effort to preserve it. Congress appropriated funds to stabilize and renew the building, and the judiciary in the early 1980s developed plans to move the bankruptcy court from grossly inadequate quarters on the second floor at Foley Square to Bowling Green.

That plan nearly came entirely unglued as a result of wholly unexpected and improbable events. David Rockefeller, a sort of neighbor as head of the Chase Manhattan Bank, had long regretted the seeming abandonment of the Custom House, a derelict relic at one of New York's most prominent locations. At a White House dinner he urged President Ronald Reagan to offer this architectural orphan – as far as he knew – to the impecunious Museum of the Heye Foundation, whose magnificent collection of Indian artifacts languished in what had seemed an inaccessible location uptown. Observing that when the Heye Foundation had mounted a temporary exhibit at the Custom House, it drew more visitors in a few weeks' time than its 155th Street museum did in a year, Mr. Rockefeller persuaded President Reagan that a gift to the Foundation was the answer.

The Senators Act

It is not easy to correct or modify an action of the President of the United States. Thankfully, Senators Daniel Patrick Moynihan and Alfonse D'Amato, working together, were up to the task. Following a hearing over which they presided jointly, the present compromise was worked out. The bankruptcy court occupies the top floors, and its spaces are accessed via the ground floor doors that lead to the elevators. The grand entrance that leads to the rotunda and the intended public spaces, truly a natural for a museum, are the New York outpost of the National Museum of the American Indian, whose headquarters now occupy a major new building on the Mall in Washington. The courts and the museum have been comfortable neighbors now for more than 20 years.

Developments

At Winter Meeting in Costa Rica, Frank Wohl Receives Whitney North Seymour Award

By Bennette D. Kramer and Steven M. Edwards





The Federal Bar Council held its annual Winter Bench and Bar Conference at the Four Seasons Resort Costa Rica at Peninsula Papagayo from February 8 through February 15, 2014. Sheila Boston chaired the meeting and Second Circuit Judge Rosemary Pooler headed the planning committee. Former Federal Bar Council President Frank Wohl received the Whitney North Seymour Award for public service by a private practitioner. There were programs on government surveillance, exoneration, class actions, asset forfeiture, the Supreme Court, copyright law, legal ethics, and the Voting Rights Act.

Government Surveillance

Judge Vanessa L. Bryant of the District of Connecticut moderated a program on the various government intelligence gathering practices. Judge Bryant began by asking whether we were heading toward an Orwellian dystopia or a safer world.

Panel member Harriet Pearson of Hogan Lovells discussed Edward Snowden and the troubling ease with which someone working for a contractor for a few weeks could take and share so much material with the press. Also, Pearson described the programs that authorized the government collection of information and the type of data that has been collected. She said that in addition to creating a public outcry two additional impacts have resulted from the disclosures: (1) U.S. businesses abroad – particularly telecommunications and intelligence agencies – face a more hostile environment, and (2) a vigorous public debate began about how to control the use of data.

Mark Rosen of Mark B. Rosen, Esquire, P.C., explained the statutory framework for data collection and said that oversight was provided through reports to Congress and the FISA Court. Kevin O'Connor from United Technologies Corp., explaining the government position on the surveillance, said that there was no debate about the sufficiency of oversight, but maybe the quality was not quite what it should be. The extent of the surveillance was not a secret to the President, the FISA court, or many in Congress who received many reports. Steven Hyman of McLaughlin & Stern explained the conflicting case law on the application of the Fourth Amendment to the gathering of data.

The panel had a lively discussion about the perils of living in the era of big data and the extent an expectation of privacy for the data we transmit and store in the cloud is realistic. The Fourth Amendment only applies to the collection of data by the government from its citizens. The panel finished with a discussion of President Obama's speech and promised review of the government's surveillance program and what would provide a fix to government overreaching.

Exoneration

Judge Ronnie Abrams of the Southern District of New York moderated a panel on exoneration – i.e., the extent to which people accused of crimes and sentenced to jail are later found to be innocent. The program began with excerpts from the play, "The Exonerated," featuring a cast of characters that included (in order of appearance) Jerome Robinson,

Rita Warner, Julie Anello, Hallie Levin, Mark Zauderer, Ken Warner, Steve Marshall, Pete Eikenberry, Eliot Long, Eric Franz, Michael Patrick, Miya Matsumoto Lee, and Sandy Samberg. The play is comprised of a series of gripping vignettes based on true stories of people who were sentenced to lengthy prison terms, and in some cases to death, for crimes they did not commit.

In a discussion after the play, Judge Abrams noted that there is a National Registry of Exonerations that includes 1,800 exonerations. Panelist Glenn Garber, who has worked with the Innocence Project, observed that 25 percent to 33 percent of exonerations involve situations where an eye-witness identification was mistaken, and 25 percent of exonerations based on DNA tests involve convictions based on false confessions. Manhattan District Attorney Cyrus Vance said that there is greater awareness today of individuals who are convicted of crimes they did not commit, and he described the work of his office's Conviction Integrity Unit, which focuses on post-conviction review as well as checklists that must be followed from the outset during a prosecution in an effort to avoid mistakes. Panelist Chris Jensen of Cowan Liebowitz & Latman described his work on behalf of Edward Lee Elmore, a death row inmate in South Carolina, whom Jensen represented for 20 years through numerous trials and appeals before finally obtaining his release as a result of a decision by the Fourth Circuit that found that Elmore had been denied effective assistance of counsel. For that effort, Jensen received the Thurgood Marshall Award from the City Bar.

There were programs on government surveillance, exoneration, class actions, asset forfeiture, the Supreme Court, copyright law, legal ethics, and the Voting Rights Act.

Class Actions and Aggregate Litigation

Led by Second Circuit Judge Raymond J. Lohier, Jr., a panel discussed the latest developments in class actions. Professor Myriam E. Gilles of Cardozo Law School presented a primer on class action law, noting that the most important issues in damage actions under Rule 23(b)(3) are predominance and superiority. While the law is somewhat complex, John Beisner of Skadden, Arps, Slate, Meagher & Flom suggested that it basically comes down to fairness – will class certification be fair both to the defendants and to the members of the class, who could be bound by an adverse decision over which they have little control. Analyzing some of the most important recent Supreme Court decisions, Beisner expressed the view that *Wal-Mart v. Dukes* is important to defendants because the Court refused to certify a class in an employment discrimination case under Rule 23(a) – where the requirements are supposedly easier to satisfy than Rule 23(b) – absent persuasive proof of a class wide discriminatory policy. The Court's recent decision in *Amgen,* on the other hand, is important for plaintiffs because the Court ruled that they do not have to prove materiality in a securities case at the class certification stage. *Comcast v. Behrend,* however, was a defense victory because the Court suggested for the first time that a plaintiff must establish that it can prove damages as well as liability through common proof.

Gregory Arenson of Kaplan Fox & Kilsheimer observed that there is a tension between *Amgen* and *Comcast* over how deeply a court must delve into the merits on class certification. The panel also discussed the Supreme Court's recent decision in *American Express v. Italian Colors,* where the Court made it clear that arbitration clauses that bar class actions will be enforced. In addition, the panel discussed the issues in *Haliburton*, argued this term, where the Supreme Court will consider whether to do away with the fraud on the market theory used in securities cases.

Asset Forfeiture

Judge Alison J. Nathan of the Southern District of New York led a panel discussion of various issues related to asset forfeiture in criminal and civil cases. Judge Nathan stated that since 2006 in the Southern District of New York asset forfeitures have resulted in $8.5 billion in forfeited assets with $6 billion returned to victims. Sharon Cohen Levin, Chief of the Asset Forfeiture Unit in the Criminal Division of the Southern District U.S. Attorney's Office since 1996, described the structure of the forfeiture program. She discussed the difference between civil or *in rem* and criminal forfeiture, the government's ability to restrain assets pre-trial, the restraint of assets outside the U.S., procedures for forfeiture in both criminal and *in rem* cases, and how the U.S. Marshals dispose of the property and what happens to the proceeds. The purpose of forfeiture is to take the profit out of crime.

Next, New York County District Attorney Cyrus Vance talked about the close cooperation between the federal and state authorities and the differences between federal and state law forfeiture procedure. First, under the state forfeiture statutes the D.A. must file a civil action apart from the criminal action with a different judge, whereas in federal court the forfeiture demand may be part of an indictment and is heard by the same judge. Second, the D.A. may seize traced substitute assets pre-conviction, but federal prosecutors may not. Third, federal prosecutors may seize out-of-state assets, while the D.A. may not. The D.A.'s office works with federal prosecutors to attach out-of-state assets. D.A. Vance said that the theory underlying forfeiture was to penalize people who commit crimes and thereby deter future criminal activity and to make victims whole.

Scott Morvillo of Morvillo LLP, representing the defense position, stated that forfeiture is heavily skewed in favor of the government. The process allows the government to freeze assets at the beginning of a case, including monies that could be used for attorney's fees. Defendants are therefore deprived of the means to hire defense attorneys. Cohen Levin countered that it was not in the government's interest to deprive defendants from hiring lawyers and that the U.S. Attorney's Office was flexible in its approach to money for attorneys, but its underlying policy was that victims come first. The government uses forfeiture tools to make sure that funds are available for restitution to victims. If there is not sufficient money available for restitution, forfeited money will be applied to restitution as part of the forfeiture order.

Panel members then presented and discussed a hypothetical to illustrate some of the forfeiture issues.

Supreme Court Review

For the second year in a row, Neal Katyal of Hogan Lovells and Kannon Shanmugam of Williams & Connolly discussed the upcoming term of the Supreme Court. The panel was chaired by Second Circuit Judge Rosemary S. Pooler. Katyal noted that the Court will decide 70 cases this term, and most of them come from the Ninth and Eleventh Circuits. Katyal pointed out that the Sixth Circuit is the most reversed circuit, having had its decisions rejected by the Court 24 out of the last 25 times. Shanmugam described the Court's docket as the "year of the sequel," with cases revisiting prior decisions on affirmative action, fraud on the market, and cellphone services. He also observed that while the circuits are moving in a more liberal direction, there should be no profound changes in the leanings of the Supreme Court.

Taking a cue from the Academy Awards, the panel dubbed *United States v. Bond* "the case most likely to be optioned by Lifetime." That case involves the prosecution of a woman under the statute enabling the Chemical Weapons Treaty for poisoning a friend who was having an affair with her husband. The question is whether the defendant has standing to challenge the statute under the Tenth Amendment because it infringes on powers reserved for the states.

Riley v. California was christened "Best Picture" by the panel.

In that case, the police searched a suspect's cellphone without a warrant after an arrest. The police were concerned that the contents of the cellphone might be wiped clean, but the cellphone also contained an enormous amount of personal information, implicating the right to privacy. Katyal predicted that the Court may impose some limitations in this area, noting that privacy is not necessarily a left versus right issue among the justices of the Court.

The panelists suggested that *Haliburton*, in which the Court is revisiting the fraud on the market theory, and *Schuette,* which involves affirmative action, should tie for the award of "Best Sequel." Shanmugam suggested that the Court will be reluctant to overrule *Basic v. Levinson,* where the fraud on the market theory was introduced. Katyal expressed the view that *Schuette,* where the Sixth Circuit struck down a state statute prohibiting affirmative action, will be reversed; the Court did just that after the Winter Meeting.

Town of Greece v. Galloway won the "Best Documentary" award. That case involves prayers at the beginning of legislative sessions, which the Supreme Court has permitted since it decided *Marsh v. Chambers* 30 years ago. Even though the prayers in this case are predominantly Christian, Shanmugam thinks the Court will not find that they violate the Establishment Clause because Congress has always begun its sessions with prayers since the adoption of the Constitution. In a decision that came down after the Winter Meeting, the Court permitted the prayers.

The "Outstanding Special Effects" award went to *NLRB v. Noel Canning,* which challenges the President's right to make recess appointments. The question is whether a recess occurs when the Senate is out of town but still in session. The Solicitor General argued that an intra-session adjournment is a recess, but the panelists agreed that the text of the Constitution may suggest otherwise. This case marks the first time that the Court has interpreted the Recess Appointments Clause.

In *Sebelius v. Hobby Lobby,* which was designated "Best Adapted Screenplay," the Court will decide whether the contraceptive-coverage mandate in the Affordable Care Act violates the Free Exercise Clause. In addressing that issue, the Court will have to consider whether a corporation is a person under the First Amendment. Since the dictionary defines corporations as persons under the law, Katyal thinks the Court is likely to rule that this aspect of the Affordable Care Act is unconstitutional.

Finally, in *McCutcheon v. Federal Election Commission,* the Court will decide whether two-year aggregate campaign contribution limit is constitutional. Suggesting that this case should receive the "Humanitarian Award," Shanmugam felt that the Court is likely to hold that the limit is unconstitutional. In a decision that came down after the Winter Meeting, Shanmugam proved to be correct.

So You Want to Be a Rock Star

The program started with the recording of a song written and performed by Judge Frederic Block of the Eastern District of New York. The audience followed Judge Block as he asked the panel members questions about copyright, earning opportunities, collection of money, and ethical issues involved with producing and distributing music in our digital age.

Eleanor M. Lackman of Cowan, DeBaets, Abrahams & Sheppard explained the basics of copyright law, telling Judge Block that he had a copyright on the song as soon as it was written. She then described the benefits of copyright registration, particularly the ability to sue and receive statutory damages. Judge Block then asked J. Christopher Jensen of Cowan, Liebowitz & Latman how to make money from his song. Jensen said that every recorded song has two copyrights: one for the sound recording and the other for the musical composition. The first step is to contact a record company (which will then have its own copyright) and negotiate a recording contract that provides as much as possible up front plus a percentage of sales of CDs, albums, digital recordings, and licensing for tele-

vision and movies, video games, and jukeboxes.

Steven M. Edwards of Hogan Lovells provided the history of performers' efforts over the years to collect money from performance and distribution of their songs and the role ASCAP has played in protecting copyright holders. Kenneth Plevan of Skadden, Arps, Slate, Meagher & Flom told Judge Block about copyright infringement and how similar another song has to be to infringe on a copyright. With examples, Lachman explained when a parody fell into the fair use exception to copyright. Judge Block asked if he could make money on ancillary rights or sue if someone else used his image on a tee shirt. Pleven said that the determination of infringement also rested on a "fair use" analysis.

Surprise panel member Professor Stephen Gillers of New York University School of Law addressed ethical issues relating to the amount of outside income a sitting federal judge could earn. The limit is 15 percent of total income, but a judge also must be aware of the Code of Judicial Conduct, which prohibits extrajudicial activities that distract from the dignity of the judicial office. Professor Gillers noted that the racy references in Judge Block's song would not at first blush fit into that requirement.

The program ended with a discussion of the music world today and how to police it on the Internet. Edwards explained that the music business is very fragmented today and it is far more difficult to earn money from recorded music. The people earning money today are the big stars, and small performers find it more and more difficult to earn a living. In a finale, the panel members sang Judge Block's song wearing tee shirts carrying a picture of his face.

Critical Current Issues in Legal Ethics

A panel composed of the Honorable Andrew L. Carter, Jr., of the Southern District of New York, Professor Gillers, Sean Coffey of Kramer Levin Naftalis & Frankel, Ronald P. Fischetti of Fischetti & Malgieri, Neil V. Getnick of Getnick & Getnick, Richard J. Morvillo of Morvillo LLP, Audrey Strauss of Alcoa Inc., Mary Kay Vyskocil of Simpson Thacher & Bartlett, and James Q. Walker of Richards Kibbe & Orbe addressed current legal ethics issues using a hypothetical. The first issue concerned a lawyer's responsibility for real evidence that would certainly inculpate his or her client, but posed a danger to others in its present location. The conclusion was that a lawyer had to retrieve the evidence and ultimately turn it over to the police.

The second issue related to a lawyer's obligation when he or she knows that the client has given false testimony. The rules require a lawyer to reveal information to the court if the information before the court will mislead it. If the client refuses to clarify his or her responses, the lawyer should go to the tribunal or maybe tell the tribunal that it cannot rely on what the client has said.

The final ethical question was whether lawyers can be whistleblowers under the Dodd-Frank Act using confidential client communications. Disclosure of confidential communications is permitted under the SEC rules but prohibited under the New York State ethics rules, which do not allow violation of a confidence to get a bounty. The Second Circuit has held that Dodd-Frank does not preempt state ethical rules. The rule is that attorneys are entitled to compensation for whistleblowing only if they are compliant with their ethical obligations.

Voting Rights

Judge Kiyo A. Matsumoto of the Eastern District of New York began this discussion with a description of the Voting Rights Act, which was passed in 1965 and has been reauthorized a number of times. The audience then was treated to a video on the conditions that led to the passage of the Voting Rights Act. Perennial panelist Neal Katyal then described the history of voting rights prior to 1965. At that time, it was difficult to get adequate relief because an election cannot be enjoined on Election Day. Section 4 of the Voting Rights Act provided prophylactic relief by requiring 16 jurisdictions to seek permission before enacting any law relating to voting. In *Shelby*

County, Alabama v. Holder, decided on June 25, 2013, the Court concluded that § 4 was unconstitutional because it violated the doctrine of "equal sovereignty" among the states and the impetus for its passage had changed.

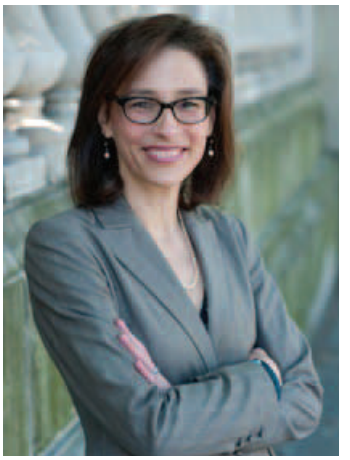
Appearing by video link, panelist Wendy R. Weiser of the Brennan Center noted that a number of states made changes to their voting laws immediately after *Shelby County* was decided. She also observed that most changes are made at the local level, and as a result of *Shelby County* there is less transparency into those changes before they happen and, therefore, less ability to stop them by obtaining a temporary restraining order. Will Consovoy of Wiley Rein countered that the Voting Rights Act was passed as an emergency response to an emergency situation that no longer exists. There have been massive changes in the percentage of minority registered voters. He posed the following question: "Is the South so much different than the rest of the country in 2013 that it should be put in federal receivership?"

Weiser responded by stating that the world has changed but discrimination still exists, and voter identification laws are an example of that. Consovoy suggested that voter identification laws deter voter fraud, and it is hard to find an actual plaintiff who was unable to vote because of that requirement. All of the panelists agreed that the voter identification laws are likely to be tested in the Supreme Court.

FBC News

Farewell to Jeanette Redmond

By Marjorie E. Berman and Steven M. Edwards





As we bid farewell to Jeanette Redmond, the executive director of the Federal Bar Council since 2002, we sat down with Jeanette to reflect on her tenure, learn about the path that brought her to the Council, and talk about the road forward.

Clerical Work

Jeanette's route to the Council was anything but usual. She grew up in Spanish Harlem in a three-bedroom apartment where she lived with eight relatives. She lived with her mother, aunt, and six other children, including her siblings and cousins. Her mother, whom Jeanette says was incredibly hardworking and frugal, did not work outside the home and Jeanette's prime "professional" role model was her aunt who did clerical work. It was not glamorous by any means, but in the eyes of a child it was wonderful and securing a similar job became Jeanette's goal.

When Jeanette graduated from high school, she never had a thought of attending college. In Jeanette's words "it was not a concept in my universe." She immediately achieved her goal of securing a clerical position and, after holding a few different entry-level jobs, she answered an ad for a temporary position at the Metropolitan Transportation Authority, which remarkably turned into a 12-year career at the Authority. It was also the place where Jeanette's life took a decided turn toward higher education.

At the MTA, Jeanette ultimately was assigned to administrative support work in the general counsel's office. Based on the work she was doing there, including taking minutes for the very public MTA board meetings, proofreading legal briefs and serving as the FOIL officer, and with the great encouragement of the attorneys, Jeanette enrolled in a nine-month paralegal course at Adelphi University. Soon

enough, however, Jeanette realized she wanted greater challenges and responsibilities. With the support of the MTA's generous tuition reimbursement plan, Jeanette enrolled in evening classes at N.Y.U. to earn her college degree (summa cum laude) and then continued her education by attending Fordham Law School's evening division. After nearly a decade of working full time and attending school at night, Jeanette graduated from Fordham Law School in 1997.

During law school and while on leaves of absence from the MTA, Jeanette was a summer associate at O'Melveny & Myers and Proskauer. Upon graduation, she accepted a one-year clerkship with Eastern District of New York Judge Thomas C. Platt, and thereafter she joined Davis Polk & Wardwell. Davis Polk assigned her to its Hong Kong office, where she found her legal niche in business and securities transactions, mergers, and joint ventures. Jeanette enjoyed the diverse practice and working in Asia despite the frenetic pace and seemingly endless hours due to the time difference with the States. While working in Hong Kong, she was temporarily assigned to the Tokyo office for a few months. She was in process of exploring a permanent relocation to Tokyo when everything abruptly changed once again. This time it was 9/11 – an event that changed the lives of too many.

9/11

Jeanette was deeply affected by 9/11. She had worked on the 97th floor of the World Trade Center and felt that she needed to be on American soil and in New York City to process the events with family and friends who un-



Council President Anello with Jeanette Redmond.

derstood the dimension of the disaster because they, too, were part of it. She returned immediately to New York.

Once back in New York City, Jeanette returned to the practice of law but found that she was growing tired of the frenetic life of a law firm. She saw an ad in *The New York Times* for a job as executive director of the Federal Bar Council and decided to follow up. After interviewing with Kevin Castel, then president of the Federal Bar Council, and Jerry Walpin, then president-elect, as well as several board members, Jeanette was offered the job. Excited by the prospects of pouring her energy into this organization, which she saw for all its potential, she began her tenure on April 15, 2002.

In the Council's tiny office on 43rd Street and Lexington Avenue, Jeanette began an intense process of learning about the organization. She had a month overlap with the outgoing executive director, Peggy Brown, to begin that process, and then she was on her own. At that time, the staff consisted of only one full-time employee in addition to the executive director, a part-time clerical assistant and bookkeeper who worked one evening a week. The organization had only three stand-alone computers and no network. Today, there are nine full-time staff members, and the Council has embraced the digital age – although in Jeanette's view it still has a long way to go.

Prior to Jeanette's arrival, many Council activities were managed by the lawyers themselves, with little or no help from the executive director. Under Jeanette's direction, the staff became involved in all aspects of the Council, and today there are no activities that do not involve the staff. That has enabled the lawyer-volunteers who are active with the Council to do what they do best – practice law – and it has contributed to the organization's growth from about 1,600 members in 2002 to 3,700 members today.

Jeanette also has overseen the challenge of navigating the Council into the Internet world. A major change in the organization has been transforming the website from a static information site to an interactive site where payments, registration for events, and CLE programs and member updates can occur in real time online. That change has led to a huge increase in membership participation in events and CLE programs.

Looking back, Jeanette's fondest memories are those on the personal level. During the last 12 years, she has watched young associates become partners and partners become federal judges. She has observed the growth and success of the Inn of Court and the Fall Bench & Bar Retreat. She has enjoyed the experience of working with seven presidents: Kevin Castel, Jerry Walpin, Joan Wexler, Mark Zauderer, Bob Guiffra, Frank Wohl, and Bob Anello, each of whom has brought his or her own style and focus to the job. Working with them, she feels she has learned how very successful people can achieve their goals in different ways.

Solving Crises

There are a hundred anecdotes about the innumerable crises that needed to be solved along the way – including one particularly poignant scene at a Winter Bench & Bar Conference where a member arrived at the event without any of his medication. She recalls the attendees scrambling to find others with the same medication who were able to pitch in until supplies could be found. She has enjoyed the "warm and fuzzy" feeling that characterizes so many Council events.

When asked about the aspects of her job that she found most challenging, Jeanette responded without reservation that it is keeping member volunteers motivated and involved given their incredibly busy lives and the extensive commitments they have in addition to the Council – volunteers, she joked, "who promised something to the Council in a moment of weakness." Jeanette marvels at the commitment of the membership and the endless hours spent by many lawyers who have made the Council a premier organization.

The biggest challenge facing the Council now, in Jeanette's view, is how to make the most use of technology to address mem-

bers' needs and to be responsive to increased competition for our members' time and money. She recognizes the strong need to continue to engage the younger members of the Council and to use social media in that process. Figuring out how to do that and what will work will take time, energy, creativity, and a healthy dose of experimentation. In that process, she hopes that the Federal Bar Council will remain committed to the personal, social human interactions that always have characterized its events. In Jeanette's words, "Technology can increase participation from afar, but the value of staying close should not be lost."

Hawaii!

As Jeanette prepares for the future, her path is taking another exciting turn. After her last day on April 30, 2014, Jeanette and her husband of 23 years took a cruise in the Caribbean, and she and her husband will move on to a new adventure in Honolulu, Hawaii. Honolulu offers some of the attraction of a new culture that she recalls fondly from her days in Asia, while also providing the comfort and familiarity of the States. Having spent a good deal of time in Hawaii as part of her work with the Council, she grew to love it and is looking forward to making a life there. She does not yet know what work she will do, but has confidence that she will find work there as meaningful and as important as the work she has done for the Council.

As to her successor, Jeanette believes that a new executive director, with a fresh outlook and new ideas, will be very positive for the organization. She has no doubt that her "amazing" staff, who are "full of energy" and "passionate about the quality of their work," will create a smooth transition into the future.

In The Courts

Speaking with Judge Frank Paul Geraci, Jr.

By Brian M. Feldman



Just two items grace the walls of the chambers of the Honorable Frank Paul Geraci, Jr., in the U.S. District Court for the Western District of New York. On the wall to the judge's left hang his appointment papers. They reflect his nomination to the bench on May 12, 2012, by President Barack Obama, and his confirmation by the U.S. Senate on December 13, 2012. On the wall to the judge's right hangs an iconic photograph of the Kennedy brothers.

Judge Geraci was raised in Rochester, without any brothers of his own, but with four sisters. The judge and his sisters went to Catholic school. Their mother was feisty; their father, strict. Judge Geraci's father was in the hospitality business, as the manager of hotels in the Rochester area. He often worked from late morning until the early morning of the next day. The highlight of his career was when John F. Kennedy dined at his hotel in Rochester, and Judge Geraci's father personally attended to him. One knew better than to insult the Kennedys in the Geraci home.

Judge Geraci's father imparted to his son a fidelity to the Kennedys and a strong work ethic. Both can be seen in chambers. The Kennedy photograph, of course, hangs on the wall. Judge Geraci's work ethic is apparent from the long hours he has logged in his chambers since his appointment. At that time, his seat on the district court had been vacant for nearly four years. The judge has focused on clearing out the backlog of cases he inherited. In a single year, he held 10 jury trials, including nine civil trials.

Judicial and Government Experience

The judge came to the federal bench with the judicial experience needed to serve the bar and community and bring the court's docket current. Senator Schumer explained that, "rarely – if ever – have I encountered a candidate who so perfectly combines judicial experience, judicious temperament, and complete dedication to his community as Judge Geraci." Prior to joining the district court, Judge Geraci served for six years as a Rochester City Court Judge and 13 years as a Monroe County Court Judge, as an acting Supreme Court Justice for seven of those years.

Beyond his substantial judicial experience, Judge Geraci has practiced in both the public and private sectors. His career began as a prosecutor in the Monroe County District Attorney's Office. Following five years in that office, he became an Assistant U.S. Attorney in the Office of the U.S. Attorney for the Western District of New York. As an AUSA, Judge Geraci handled a mix of civil and criminal cases. Judge Geraci thus gained first-hand experience litigating civil and criminal cases and appearing before state and federal judges.

Geraci & Feldman

Judge Geraci left the U.S. Attorney's Office to hang out his own shingle. His practice really did start from scratch, as he had no clients to follow him to private practice from his career in government. What he could bring with him, however, was what he considered most important: his new partner, with whom he had served in the U.S. Attorney's Office, now-Magistrate Judge Jonathan W. Feldman (no relation). Judge Geraci and Judge Feldman opened their firm, Geraci & Feldman, in 1987, operating out of a series of motel rooms. From those humble beginnings, their firm grew into a success. Both partners loved the experience.

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At Geraci & Feldman, Judge Geraci was an early proponent of alternative dispute resolution. He found that mediating cases helped him understand the psychology of disputes, and proved vital – then and now – in teaching him techniques for bringing parties together to settle cases. Judge Geraci believes every attorney should be taught mediation, and that the experience has particularly important lessons for litigators trying to resolve cases in the best interests of their clients.



Judge Frank Paul Geraci, Jr.

Appearing Before Judge Geraci

Another tip Judge Geraci offers is that lawyers appearing in his courtroom will face a hot bench. The judge reminds litigants that he is fully prepared and has no need for a recitation of facts. Lawyers should also be prepared for requests for additional briefing, which Judge Geraci will make when he believes additional briefing would assist him in resolving an issue. Although the judge understands the nature of private practice, including the stress on lawyers juggling matters, worrying about their cases, and dealing with difficult clients, he is unlikely to provide long adjournments or extensions, even when requests are made on consent. Based on his experience, the judge believes that deadlines are often vital in helping parties focus and resolve cases.

The judge enjoys what he considers the excellent level of lawyering among the federal bar in the Western District of New York. He believes that pro bono assignments are important for the court and for otherwise pro se litigants, and he commends the bar for accepting those assignments when requested.

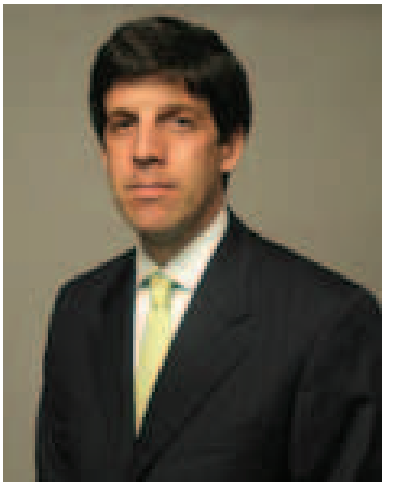
A Superb Addition

For members of the bar, Judge Geraci is a superb addition to the U.S. District Court for the Western District of New York. He brings with him a rich background, replete with judicial, public service, and private practice experiences, in both state and federal courts. Those experiences provide the judge with the ability to appreciate a wide range of perspectives. They also provide him with a keen sense of fairness in criminal sentencing matters, based on his familiarity and facility with the different sentencing practices in federal court compared to state court. Federal practitioners are extremely fortunate to have such a well-rounded and dedicated judge on the bench.

The Interview

U.S. Attorney Loretta E. Lynch

By James L. Bernard



Soon after one of the many snowstorms we suffered this past brutally cold winter, Steve Edwards and I sat down for a warm chat with Loretta E. Lynch at the U.S. Attorney's Office in the Eastern District of New York (which was open and ready for business despite the weather). Loretta Lynch has had an exciting and dynamic legal career. After graduating from Harvard for both her undergraduate and law degrees, she worked at Cahill, Gordon & Reindel, and then joined the U.S. Attorney's Office in the Eastern District of New York, eventually rising to become U.S. Attorney from 1999 to 2001. She then became a partner at Hogan & Hartson, where she remained until May 2010, when she was confirmed by the Senate to once again become the U.S. Attorney. While at Hogan, she also served as Special Counsel for the International Criminal Tribunal for Rwanda, and helped investigate allegations of witness tampering and perjury.

Question: It seems the business of prosecuting and judging is more in the public eye than it ever has been. What do you think when you read blogs and other postings about the activity of this office or other prosecutors?

Loretta Lynch: In general, it is a good thing to have more information out there, to inform the public about what we do and to get the public active in these issues, but it can be a challenge to get things right. People outside the system looking in often do not have the benefit of the data and analysis that goes into certain decisions.

Question: Are there any instances where you thought that problem was particularly pronounced?

Loretta Lynch: By way of example, a federal judge in Iowa recently wrote an article about what he viewed as the arbitrary and often harsh application of sentencing enhancements for repeat offenders. When he reviewed the sentencing data that he had, he was very concerned. The data he relied upon, however, was several years old, and not reflective of current practice. DOJ policy has been changed to permit more discretion to be used in applying enhancements, as well as in determining how to plead out a case. Data by itself also does not tell the full story of why some cases are charged or disposed of in a particular manner. Raw data does not capture the impact of a crime on the community, which can differ from place to place. It also does not effectively capture instances where we do not bring certain enhancements. I think it is healthy and good to have a public discussion of these issues, but the government often has to refrain from public comment, especially about pending cases, and that can make it difficult for everyone to have a fully informed discussion.



Loretta Lynch

Question: How do you view the changes in sentencing since your first tenure as U.S. Attorney? Are they changes for the good?

Loretta Lynch: The Department supported the reduction in the disparity between crack and cocaine sentencing, and that was needed change. The recent Smart on Crime initiative, announced last August, emphasized individualized charging and sentencing decisions, actually hewing closely to the E.D.N.Y. practice over the years. This greater discretion does not just redound to the government's benefit, but also allows the defense bar greater space in which to advocate for their clients. There sometimes appears to be the perception that prosecutors want to lock up everyone for as long as possible. That is not true. Our positions on sentences are much more nuanced than that. In any event, we as a society cannot afford such thinking.

Question: In movies and television, local prosecutors are often portrayed as hard working and focused on the community, whereas the feds are seen as something of the bad guy, trying to take over from local prosecutors and interfering. From your perspective, how do you see it?

Loretta Lynch: I see it as a partnership. Let me give you an example – gun violence. This is a huge problem in communities such as Brownsville, here in Brooklyn. We will team up with ATF and local police units, followed by social services to try and help the community.

We also have a very strong gang practice, and work well with the police and district attorneys in all of our counties to identify gang activity that also implicates the federal interest. On Long Island in particular we work with an outstanding task force of state and federal law enforcement officers and have made real inroads into a difficult gang problem there.

Question: So turf battles are not as frequent as people think?

Loretta Lynch: In an area like New York, where you have a plethora of talented prosecutors' offices as well as law enforcement agencies you will find overlap in matters and disputes that have to be worked out. More of-

ten than not, however, we're all focused on the best way to solve the particular problem. When problems do arise, I have always found the best way to solve them is through effective communication and a focus on the victims. The bottom line is that you never want ego to determine where or how a case gets charged.

Question: You've worked with Ken Thompson, the Brooklyn District Attorney.

Loretta Lynch: We tried the Abner Louima case together when Ken was an AUSA. There, the federal government came in at the request of the district attorney's office. Often, in a police brutality case, the district attorney's office starts the investigation, but we work with them to determine the best venue for charges that may result. Everyone works together. Ken comes from that background and we have a very good working relationship.

Question: Changing gears, do you think the system incarcerates too many people?

Loretta Lynch: That is really an impossible question to answer. It presupposes that there is a right number. I think the better question to ask is whether we are putting people in jail for the right reasons. Who is it that needs our protection? A major focus in our office is on crimes involving vulnerable victims, from crimes against the elderly to human trafficking rings. In this district we've seen people target their neighbors, elderly people, or discrete groups such as the deaf community with Ponzi and other fraud schemes and literally wipe them out. We've seen crime families target young girls in other countries and lure them to the U.S. with the promise of romance and a better life and then sell them into sexual slavery. We also have a violent crime and gang problem on Long Island. I think the right questions to ask involve – what are the crime problems in your area and how should you focus on them. Then you have to see how incarceration and other remedies fit into that framework.

Question: We've heard it said, and the numbers may not be precisely right, that the U.S. has less than five percent of the world's population, but it has almost a quarter of the world's prisoners. Doesn't that suggest we are over criminalizing activity?

Loretta Lynch: It depends upon your perspective. We federalize carjacking, along with the failure to pay child support. I can say that from where I sit, these crimes are not causing the bubble you referred to. It is narcotics sentences that are creating the bubble. The irony is, however, that some have expressed the view that we are not putting enough people in jail, in particular for white collar crimes.

Question: Can you tell us about the re-entry programs your office is running?

Loretta Lynch: The Center for Court Innovation has been doing great things in this area, along with the district attorneys' offices. They have expanded their program to include women, not just men. It has worked for 10 years, to help people finishing their prison terms reintegrate into society. Literacy is a large core of the problem, and fixing it is a big need. If you cannot read, you are marginalized in our society and you cannot succeed. For our part, we work with them to educate people about the penalties for re-offending, and how that can be a federal crime with serious consequences.

Question: Crime prevention is no doubt important, but why should prosecutors, trained to argue in court, be doing that as opposed to social workers or other trained professionals?

Loretta Lynch: We do more than that. Our job is more than just arresting people. You cannot arrest your way out of the crime problems that we have. My job is to protect the people in this district. We have eight million people in the Eastern District of New York. And when I send someone to jail, I think about the people they leave behind, in particular the children, as well as the fact that they will come out of jail one day. I think part of our responsibility is to think about those issues. One of

the things I did upon returning to the Office was to create a requirement that my AUSAs perform one community service event each year. For example, My Organized Crime section works with the Brownsville re-entry program. We also spend a great deal of time working with student groups, educating them about the legal system and what we do. We talk with community groups about fraud prevention, we meet with schools and industry groups about prescription drug abuse, and a host of other projects. All of this is part of our crime prevention function.

Question: Can you tell us a bit about the Arab American and Muslim Outreach Program?

Loretta Lynch: This was a policy initiative that came from the White House. We wanted to be active in our outreach to this community because of the backlash after 9/11. We saw numerous attacks on people as well as religious institutions that were or were perceived to be Arab or Muslim. The first reported incident of 9/11 backlash was the murder of a Sikh individual by someone who believed him to be Muslim.

Question: Many people are strongly opposed to imposition of the death penalty. How do you deal with that?

Loretta Lynch: It can be the hardest part of the job. The focus has to be on the nature of the crime and the impact on the victims. After extensive review of a death eligible case, I make a recommendation to the Attorney General and it is ultimately his decision. The conduct must be well outside the boundaries of human behavior to argue that someone has forfeited the right to live. In the *Wilson* case, the Second Circuit had reversed imposition of the death penalty because of arguments that were made during closing. We reviewed it again after the reversal and decided to re-seek the death penalty. That was not an easy decision. But it was based upon the nature of the crime. The defendant showed no remorse for the execution of two undercover police officers, one of whom pleaded for his life for the sake of his children just before he was shot in the back of the head. It was a cold-blooded execution done as part of a robbery. Afterwards, the defendant wrote a rap song about it. Even with all of that, it was still a very difficult decision.

Question: Looking forward, what are some important areas for your office?

Loretta Lynch: We have a very strong focus on national security and terrorism related cases. In fact, since 9/11 the E.D.N.Y. has tried more terrorism related cases in Article III courts than any other district. Our white collar practice is strong and varied, and runs the gamut from securities fraud to the Foreign Corrupt Practices Act to health care fraud. We have been very active in cybercrime, focusing on international hacking rings, and have an active program to combat gang violence. Our public corruption program is also very strong. On the civil side, we work on complex civil frauds such as our 2012 $1 billion settlement with Bank of America/Countrywide over its FHA underwriting practices. We continue to have a strong focus in that area. I am tremendously proud of the hard work and dedication of the Assistants and staff in the E.D.N.Y.

Legal History

Reflections on Watergate after 40 Years



By Pete Eikenberry

August will mark the 40th anniversary of the resignation of

President Richard Nixon. Former Federal Bar Council President Bernie Nussbaum told me recently that he will be hosting a reunion in August of the House Judiciary Watergate Committee legal staff headed by John Doar, where Bernie was a chief deputy and Hillary Clinton a young law school graduate recruit. For those of us with dim memories and for others who were not yet born:

On June 17, 1972, a scandal impacting the Nixon presidency began to unfold with the arrest of five men whom the Washington, D.C., police found burglarizing the Democratic National Committee office in the Watergate apartment complex.

The scandal arose out of a background of "dirty tricks" emanating out of the Nixon White House in the early 1970s. Richard Nixon was old school in his partisanship – especially around elections, where winning at any cost was the first priority and punishing enemies was a close second. (Remarkably like how I experienced Brooklyn politics during the same time period.) In 1970, Tom Hudson, a young lawyer and junior member of the White House staff authored the "Hudson Plan." The plan's intent was to harness all of the various government intelligence agencies under one roof to carry out surveillance tactics such as opening mail, infiltration of activist groups, and burglaries to develop domestic intelligence, which would further Nixon's political goals. The plan was "Nixon's doing" according to CIA Director Richard Helms. Hudson had gained notice from Nixon when Hudson used the IRS to audit people on Nixon's "enemies list." The White House was deeply concerned with the activities of the Black Panthers, the Students for a Democratic Society, and other left leaning activist groups, a view that grew out of a 1950s Cold War mentality. The White House occupants and others believed that the activist groups were inspired by foreign radical groups.

Richard Nixon was old school in his partisanship – especially around elections, where winning at any cost was the first priority and punishing enemies was a close second.

The plan, though instituted with Hudson as its director, died a quick death at the hands of FBI Director J. Edgar Hoover. He stated that he feared that exposure of any of the plan's activities by the liberal press would place the White House on the defensive. Hoover, of course, already carried out the same type of activities and obviously wished to control the use of such illicit tactics without supervision by Hudson. However, the tactics were implemented by successor groups. One, the "Special Investigative Unit," became known as the "Plumbers," since the initial purpose was to plug leaks. The Committee to Re-Elect the President ("CREEP") was another entity that engaged in such tactics. During this era of dirty tricks, several officials each drew up their own enemies lists. IRS audits were instigated or planned, for instance, for Washington lawyer Edward Bennett Williams, Democratic National Committee Chair Larry O'Brien, and the Ford Foundation. The Plumbers compiled "dirt" on over 400 groups and 1,000 individuals.

After the five burglars were arrested on June 17, 1972, the police immediately brought in the FBI. The police had found commercial telephone bugging equipment in addition to lock picking instruments and Mace in the possession of the burglars and were concerned about possible violations of federal laws against intercepting telephone conversations. The FBI investigation revealed that one burglar, James McCord, was Chief of Security for CREEP and the four others were former CIA employees with a lot of cash in their hotel rooms. (Later investigation revealed that the burglary was financed with money from CREEP.) The FBI early learned that the break-in was being monitored from another hotel room by Howard Hunt and G. Gordon Liddy. Liddy was counsel to CREEP, which was headed by Attorney General John

Mitchell. Hunt was a former long term CIA employee and a White House employee under presidential aide Charles Colson.

Dean and Haldeman

Presidential Counsel John Dean learned within days of the burglars' arrests that the President's chief of staff, H. R. Haldeman, had received logs of wiretaps of the Democratic National Committee. The presidency was, perhaps, in jeopardy but the odds were that the Watergate arrests would not ordinarily have resulted in any threat to the White House. Although there were incriminating tapes, since Nixon recorded almost everything that occurred in the Oval Office, the existence of the tapes was known but to a few. A plethora of lawyers participated in or were knowledgeable about much of the relevant misconduct that had occurred prior to August 1973, yet none felt any ethical duty to come forward.

However, the presence of the FBI did bring concern to the President and senior White House staff members. Among Nixon's almost immediate directives was to ask the head of the CIA to slow down the FBI investigation on grounds of purported national security concerns. At this stage in the course of events, the Watergate arrests had just occurred but the "cover up" had already commenced. Thereafter, a series of highly unusual legal proceedings occurred during which many lawyers acted in questionable ways. The next part of this article will carry the Watergate story forward with the cover up and related legal proceedings as well as the congressional investigative activities.

Legal History

Jeffrey MacDonald and the Unavailable Witness

By C. Evan Stewart



Jeffrey R. MacDonald, a Princeton-educated, Green Beret doctor, was convicted in 1979 of killing his pregnant wife and two young daughters at Fort Bragg, North Carolina, on February 16, 1970. In the family's Army apartment, MacDonald's wife had been repeatedly clubbed with a blunt object (both her arms were broken) and stabbed 37 times; his five year old daughter also had been clubbed (in the head) and stabbed in the neck between eight and 10 times; his two year old daughter had been stabbed 48 times. MacDonald was found lying next to his wife with some minor cuts and bruises on his face and chest, along with a stab wound in his chest (which a treating doctor described as a "clean, small, sharp" incision that caused one of his lungs to partially collapse); he was taken to a hospital, was up in bed the next day eating a tasty meal, and was released a week later.

After the jury's verdict, MacDonald was sentenced to three consecutive life sentences, which means that he is scheduled to be released on April 5, 2071 (when he would be 128 years old). Although the evidence of MacDonald's guilt is massive and overwhelming, he has consistently argued that he is innocent and has continuously sought to have his conviction overturned (even today).

New York, New York

The main reason he was brought to justice was an event that took place in New York City. On December 15, 1970, after the U.S. Army had botched an Article 32 hearing concerning the murders, MacDonald appeared on *The Dick Cavett Show*. Rather than focus on the tragedy that had befallen his family, MacDonald instead cracked jokes at the expense of the Army, claimed he had sustained 23 wounds ("Some

of which were potentially fatal. I could have died very easily. I was in an intensive care unit for several days, and had surgery – you know, chest tubes in my chest."), and complained about how *he* had been treated. (Cavett: "His affect was wrong, totally wrong…, very like Bob Hope.")

Watching Cavett's show was MacDonald's father-in-law, Freddie Kassab, who theretofore had been a fierce advocate of MacDonald's innocence. No longer. Kassab soon began a tireless review of the evidence, a dogged process that began to unsettle MacDonald. The month before, MacDonald had told Kassab he had tracked down one of the "real" killers and had avenged his family. When that lie was subsequently exposed, Kassab only became more determined ("That was the beginning of the end for him."). Kassab eventually got the Justice Department interested in prosecuting the case and, ultimately, a jury convicted MacDonald of his heinous crimes.

An Esoteric Rule of Evidence

For over four decades, MacDonald has utilized virtually every legal means possible to upset, reverse, and challenge his conviction – one of the most famous precedents created was the U.S. Supreme Court's determination that MacDonald's Sixth Amendment right to a speedy trial had not been violated by the delay in the Justice Department's bringing on of the indictment. *See* 456 U.S. 1 (1982). This article will focus on a fascinating decision by the Fourth Circuit, also in 1982 (*see* 688 F.2d 224), in which, *inter alia*, that circuit court looked at Federal Rule of Evidence 804(b)(3).

For over four decades, MacDonald has utilized virtually every legal means possible to upset, reverse, and challenge his conviction.

Rule 804(b)(3) concerns hearsay exceptions when a declarant is unavailable. Under the provision at that time, a "statement against interest" may be admitted vis-à-vis the unavailable person if:

> [the statement] at the time of its making [was] so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

The Trial

In 1979, after the first of MacDonald's unsuccessful appeals on speedy trial grounds had been rejected by the U.S. Supreme Court, his criminal trial began in federal court in the Eastern District of North Carolina. Presiding was Franklin T. Dupree, Jr., a Nixon appointee. Jury selection took three days and MacDonald's lawyer was very pleased with the group empaneled, one of whom was (like MacDonald) a former Green Beret. (MacDonald: "That tie is so strong you'd walk across water for one another. There is no stronger bond. So at the very worst, I know I've got at least a hung jury.")

The first few weeks of the trial were gruesome (with pictures and autopsy descriptions setting forth the slaughter), but they were also complex, confusing, and lacking in a thematic narrative. Dupree kept a tight handle on the parties' evidentiary offerings, ruling that determinations from the Army's Article 32 hearing should not be admitted and that allowing conflicting psychiatric experts to testify "would just tend to confuse the issues."

Although MacDonald remained confident he would be vindicated, the forensic evidence was mounting up. A serendipitous anomaly allowed the prosecution to demonstrate exactly what happened at the crime scene: Unknown to MacDonald, each member of his family had a different blood type; thus, the

location of blood in the rooms of the Fort Bragg apartment provided a chronological roadmap of the sequence of events on that horrible night. Then came the testimony of a former FBI laboratory expert, who (i) demonstrated in front of the jury how cuts in the family members' clothes happened, (ii) matched them up with blood types, and, most gruesomely, (iii) showed how MacDonald's wife had been stabbed in the chest 21 times with an ice-pick with his pajama top lying on her. Not only was all of this testimony and evidence directly at odds with MacDonald's version(s) of the events at issue, one of the defense's experts, upon reviewing this presentation, told MacDonald's lawyer: "This is very convincing evidence…, this is like a fingerprint. Holy Christmas!"

Then, the jury heard a tape recording of MacDonald from an April 6, 1970 interview. That also had a big impact. For one juror: "Until I heard that, there was no doubt in my mind about his innocence. All the evidence had just seemed confusing. But *hearing* him turned the whole thing around." For another juror: "There was a cockiness. Arrogance when there should not have been arrogance…. After the tape, I started to believe he *could* have done it. And once you start to believe that – with all the evidence the government had – it's not a big step to believing he did it."

One of the most famous precedents created was the U.S. Supreme Court's determination that MacDonald's Sixth Amendment right to a speedy trial had not been violated by the delay in the Justice Department's bringing on of the indictment.

"Kill the Pigs"/"Acid is Groovy"

From the moment his family was murdered in 1970, MacDonald has consistently maintained that he and his family were victims of a drug-induced attack by local hippies. Among the hippies, according to MacDonald, was a blonde woman wearing a floppy hat and boots. During the same period his family was being slaughtered, MacDonald said he was struggling with the hippies, who supposedly were chanting "Acid is Groovy" and "Kill the Pigs" (on the headboard of his bed was written, in his wife's blood, "pig"). (In the same room where the alleged struggle with MacDonald took place was a recent *Esquire* magazine, which had a cover article on the Manson family's brutal murder of actress Sharon Tate and others in Beverly Hills ("Evil lurks in California. Even Lee Marvin is afraid.")).

Could one or more of the hippies be found and/or provide the jury with a basis for reasonable doubt?

Although she was not a perfect match to MacDonald's description, a local drug-addict named Helena Stoeckley had been located in 1970; then, and for years thereafter, Stoeckley (depending on her sobriety) had given multiple versions of whether she had some involvement, a lot of involvement, or no involvement in the MacDonald family murders. Dupree issued a bench warrant for Stoeckley and, on August 16, 1979, she met with MacDonald's lawyer in advance of her testimony; for hours he did his best to convince her to confess. In response to some dubious representations ("Nothing will happen to you. That I can promise you. The statute of limitations has expired."), Stoeckley replied, "I can't help you. I wasn't in that house. I didn't have anything to do with any of this…. I can't tell you things I don't remember."

On the witness stand, Stoeckley detailed her drug use – in 1970 alone she admitted to injecting heroin and liquid opium intravenously six to seven times a day; smoking marijuana and hashish on a daily basis; taking LSD "almost daily"; taking mescaline "about twice a week"; using barbiturates and angel dust on a regular basis; over the years Stoeckley's drug use had led to (among other things) a stroke, her gallbladder being removed, and

three liver biopsies. On February 16, 1970, the night in question, she specifically recalled taking a tab of mescaline (given to her by a Fort Bragg soldier named Greg Mitchell), but remembered nothing else beyond returning to her apartment at about 4:30 a.m. in a blue car with "two or three" soldiers from Fort Bragg.

On cross-examination, the prosecution elicited from Stoeckley that, while she had a blonde wig, she wore it "infrequently" and had *not* been wearing it on February 16th, because Greg did not like her to wear it. She also testified that she had never been in the Fort Bragg apartment, had never seen MacDonald before testifying, and did not participate in the murders of any of the MacDonald family members.

That testimony (after all the build up by the defense) not only did not provide a basis for reasonable doubt, it was a further weight around the defense's floundering case.

In response, MacDonald's lawyer proffered six witnesses who had had conversations with Stoeckley over the years, in which she had said various things. The premise of this proffered hearsay was that Stoeckley had been "unavailable" (unavailability, for purpose of Rule 804(b)(3), includes a witness testifying she has no memory), and thus the jury should be allowed to hear from the six as to what Stoeckley had told them. Here is what the defense said the six would have said:

- Stoeckley told an Army investigator in 1971 that she was present during the murders, but did not think she had taken part. She later recanted her statements.
- Stoeckley told a Nashville police officer that she had been at the scene of the MacDonald murders and knew who had been involved.
- Stoeckley told a police officer, the day after the murders, that "[i]n my mind, it seems I saw this thing happen," adding she had been "heavy on mescaline."
- A Nashville neighbor of Stoeckley's had been told that she could not return to Fayetteville because she had been involved in murders, in which the victims were a woman and two small children.
- Another Nashville neighbor of Stoeckley's had been told that "[t]hey killed her and the two children…. They killed the two children and her."
- A few days after the murders, a Stoeckley neighbor in Fayetteville had been told that, although Stoeckley did not kill anyone herself, she did hold a light while the murders were taking place. (MacDonald has maintained the female hippie was holding a candle.)

The prosecution opposed any of the six being allowed to testify, arguing that the proffered hearsay statements were "not clearly admissions of guilt," and that Rule 804(b)(3) is premised on the *trustworthiness* of the proffered hearsay – and given Stoeckley's drug use and mental and physical health (and constant interrogation by the authorities and others on this highly publicized matter), "these statements are *not* trustworthy, and they are certainly being offered to exculpate the accused." (Prosecutors said, "What we are talking about here is somebody who is hysterical, perhaps hallucinating. Under these conditions, she makes various statements. Now these statements are never of an unequivocal nature. It can all be drawn back to her lack of an alibi and the fact that she is constantly being interviewed, picked up, hassled by police, and having to account for her whereabouts.")

After both sides had exhaustively argued their positions, it was 4:00 on Friday afternoon. Dupree adjourned the proceedings and said he would rule first thing Monday.

On Sunday, MacDonald's lawyer got a call that someone (Stoeckley's fiancé) had tried to drown her in the pool at the motel at which she was staying. A young female lawyer working for him was sent to the motel; there she found Stoeckley with a black eye (from her fiancé, who subsequently also bloodied her nose). Dispatching the fiancé, the lawyer stayed with Stoeckley, and after a while they started to chat and to bond. Soon Stoeckley started to remember things: "I

still think I could have been there that night…. It's a memory. I remember standing at the couch, holding a candle, only, you know, it wasn't dripping wax. It was dripping blood."

First thing Monday morning, Judge Dupree advised counsel of his ruling:

> I will rule that these proposed statements do not comply with the trustworthy requisites of 804(b)(3). In fact, far from being clearly corroborated and trustworthy, they are about as unclearly trustworthy – or, clearly untrustworthy, let me say – as any statements that I have ever seen or heard…. This testimony… has no trustworthiness at all. Here you have a girl who, when she made the statements, was, in most instances heavily drugged, if not hallucinating…. I think that this evidence will tend to confuse the issues, mislead the jury, cause undue delay, and be a waste of time…. I did not reach [my decision] lightly because I am risking a terrible lot of judge time and juror time down the road if I make an error and it has to be retried. But I am confident of my position on this one.

MacDonald's lawyer then informed the judge what had transpired the prior day and asked that at least his legal colleague be allowed to testify as to what Stoeckley told her. The prosecutor objected, stressing again the trustworthiness point, further arguing that the proffered testimony was also hardly reasonable: "Candles, of course, don't drip blood."

Judge Dupree, calling Stoeckley "one of the most tragic figures that I have ever had appear in court," ruled that she simply had no "credibility at all," regardless of the context or recipient of her "extremely paranoid" comments. He then added that he himself had been contacted twice by Stoeckley over the weekend, expressing "mortal dread of physical harm" by MacDonald's lawyer. The judge then ended the colloquy: "I will exclude the evidence. Let the jury come in."

MacDonald for His Own Defense

It then was left to MacDonald to testify and to convince the jury that he did not commit the murders (and that he could not have done them). In preparing him, his lawyer cautioned MacDonald about the importance of how he presented himself before the jury ("at the grand jury you came across abrupt, cocky, chauvinistic, sarcastic, and callous about women…. You can't afford to come across as arrogant." MacDonald had ended his grand jury testimony with: "You can shove all your fucking evidence right up your ass!"). He also gave MacDonald another piece of very sound advice: "[I] want you to come out of the cross-exam sounding like the same person you were on direct. It's the consistency that will make you believable."

MacDonald, on direct, followed his lawyer's lead; he told a sympathetic tale of his family life and forcefully denied killing his wife and daughters. At the conclusion, MacDonald was weeping, as were three members of the jury, as well as many others in the courtroom. Judge Dupree recessed the trial until the next day, when cross-examination would begin.

Unfortunately for MacDonald, he was a different person on cross (caustic, bitter, acerbic, prickly, etc.). Not unlike his experience before the grand jury, MacDonald was taken through all of the physical evidence linking him to the murders and asked if he could explain away any of it; and to each of those questions, MacDonald – who had had years to consider them – was unable to offer any alternative explanation(s). The concluding question was: "Dr. MacDonald, should the jury find from the evidence that has come to be known as the FBI reconstruction of the blue pajama top – suppose the jury with respect to that should find that the 48 puncture holes in your blue pajama top [which MacDonald contended had resulted from his struggles with the hippies] correspond or match up with the 21 puncture holes in [his wife's] chest. Do you have any explanation for that?" MacDon-

ald answered: "No."

After closing arguments and the judge's charge, the jury went out to deliberate. MacDonald was making plans to spend a victory celebration with his girlfriend at the Warwick Hotel in New York when word came back that a verdict had been reached after six and one half hours. Everyone quickly reassembled in the courtroom. As the jury walked in, many were crying, including the former Green Beret.

MacDonald was convicted of second-degree murder in the killings of his wife and eldest daughter, and convicted of first-degree murder in the death of his two year old daughter (the jury believed this last death had been pre-meditated, to support his hastily conceived cover-up story of a hippie assault).

Appeals, Petitions, Appeals, Petitions…

In 1980, the Fourth Circuit Court of Appeals reversed MacDonald's conviction (by a two to one split) on the ground that his speedy trial rights had been violated. Judge Francis Murnaghan, writing for himself and Judge James Sprone, found that the scales of justice tipped "decisively in favor of finding a violation," in light of the nine year delay (one key to his analysis was that Stoeckley ("a light bulb not screwed tight, blinking on and off") might not have had a failure of memory if the case had been prosecuted earlier). Judge Albert Bryan, pointing out that Stoeckley's poor memory related to her prolific drug use in 1970, strongly dissented: "[MacDonald's] guilt and sanity were established to the satisfaction of the trial jury beyond a reasonable doubt. Nevertheless, this absolves him forever of this hideous offense, shockingly laying his release exclusively on the failure of the government to prosecute within a shorter time than it did."

Two years later, as indicated above, the Supreme Court (by a six to three decision) agreed with Judge Bryan.

With that reversal, the same Fourth Circuit panel then took up MacDonald's challenges to what he argued were Judge Dupree's improper trial rulings, including his Rule 804(b)(3) decision. Writing for a unanimous court, Judge Bryan held that the judge had not abused his discretion in that ruling. Furthermore, MacDonald, in the appellate court's judgment, had not demonstrated that the hearsay declarations of a "pathetic," "inherently unreliable" drug addict were "trustworthy." And with respect to MacDonald's over-arching argument that the government had not met its burden beyond a reasonable doubt, the court wrote: "Our canvas of the record … gives ample warrant for the verdict."

Judge Murnaghan wrote a concurring opinion. He felt "obliged to concur" with the restraint an appellate court must observe in reviewing trial judges' evidentiary rulings. He also noted that "[i]t is evident that a basis may be erected for finding the hearsay statements of … Stoeckley untrustworthy." But he believed, given the "virtually unique aspects" of the case, that if he had been the trial judge he would have let the statements in: "If such evidence was not persuasive, which is what the government essentially contends in saying that it was untrustworthy, the jury, with very great probability, would not have been misled by it."

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Judge Murnaghan then concluded: "As Judge Bryan has pointed out, the evidence was sufficient to sustain the findings of guilt beyond a reasonable doubt. Still, ... I believe MacDonald would have had a *fairer* trial if the Stoeckley related testimony had been admitted. In the end, however, I am not prepared

to find an abuse of discretion by the district court, and so concur." (Emphasis added.)

Was Judge Murnaghan right? Well, in the words of a juror: "A confession by a pathetic acid head such as Helena Stoeckley does not deter for an instant from the mountains of evidence against MacDonald at the trial."

Postscripts

- The starting point for anyone wanting to know more about this case is Joe McGinniss's *Fatal Vision* (Signet 1985), which later became a made-for-TV film, starring Karl Malden, Eva Marie Saint, Andy Griffith, and Gary Cole (in the role of his lifetime) as MacDonald.
- Like Alger Hiss (and O.J. Simpson), MacDonald has never acknowledged his guilt and has attracted people to help him in his quest to find the "real" killers. His second wife (who married the imprisoned MacDonald in 2002) has been a tireless advocate. Most recently, filmmaker Errol Morris ("The Fog of War," "The Unknown Known") published a book in defense of MacDonald: *A Wilderness of Error: The Trial of Jeffrey MacDonald* (Penguin-Press 2012).
- Greg Mitchell and each of the other people mentioned by Stoeckley at various times as possibly having something to do with the events of February 16, 1970 all were investigated thoroughly by various governmental authorities and found to have had no involvement whatsoever. Subsequent DNA tests have shown no traces of Stoeckley or any other of the alleged hippies within the MacDonald apartment.
- MacDonald took a lie detector test in April 1970. The person who administered the test – a well known expert in that field – testified in subsequent civil litigation: "The results [of MacDonald's examination] were very unambiguous. They were not borderline at all. In my opinion he was being deceptive … concerning the questions relating to the crime [and so] I told him I could not be of help to him in his defense because he had failed the polygraph test…."
- Although MacDonald was clearly less than a perfect husband (he was a serial adulterer), the prosecution was hard pressed to present a theory as to what motivated MacDonald to kill his entire family; instead, it focused on the overwhelming, irrefutable physical evidence. ("If we can prove that he did it, then we don't have to prove that he's the kind of guy who could do it.") After the conviction, McGuinness, to whom MacDonald had given complete access to all of his papers, found notes MacDonald had written in April 1970, notes that MacDonald had told his lawyer at the time constituted his best recollection of what happened (but had not been seen by anyone in nine years). It turns out that MacDonald had been working out with the base boxing team, and was told by the coach to lose weight. To do that, MacDonald began taking amphetamines and, in the three to four weeks before February 16, 1970, he had lost between 12 to 15 pounds. Amphetamines were not considered a "dangerous" drug in 1970, and thus the Army hospital's testing of MacDonald did not disclose the amphetamines in his blood (a fact that MacDonald knew). However, the levels of dosage to effect such a rapid weight loss could cause (according to a leading medical text): "confusion, assaultiveness, hallucinations, panic states, … and the most severe … psychosis"; as well as "cardiovascular reactions [including] chilliness, pallor or … headache" (all symptoms that MacDonald exhibited in the early hours of February 17, 1970).
- It would appear that before MacDonald hatched his hippie attack scenario (and self-inflicted his "clean, small, sharp" incision), he had another idea. In his bedroom (near his closet), there was a suitcase, around which blood was splattered everywhere,

but upon which there was not a single drop. It looks like packing his bag and making a run for it lost out to the story he has stuck with for 44 years and will continue to stick with (at least) until 2071.

Personal History

An Act of Kindness

By Pete Eikenberry



Jerome Robinson is a "tennis buddy" with whom I play at Federal Bar Council conferences – including the most recent one in February in Costa Rica. In early March, as the news turned bad for my wife, Sue, in the Methodist Hospital in Park Slope Brooklyn, I thought of Jerome. I usually attend the church services he conducts as an ordained minister on Sundays during the winter conferences, including this year. In February, I chuckled with Jerome about singing "Jesus Loves Me" since I had not sung it since Sunday school when I was about six.

Though Sue and I are members of the Unitarian Church in Brooklyn Heights, we have never met the new minister there. So when I told Sue about Jerome, she nodded affirmatively from behind her oxygen mask. I called Jerome on a Monday evening at his home in White Plains where he resides with his wife, Kaye Scholer partner Sheila Boston. The next afternoon, as I was talking to Sue in her bed, I turned to find a large man inches behind me – Jerome! He said hello to Sue, whom he knew. He then pulled out his sheets of hymns and started singing *Jesus Loves Me.* During his and my singing of the first two or three hymns, we could hear Sue belting out the words from behind her oxygen mask. She was smiling, her eyes were gleaming and she was so happy that she, he, and I sang practically all of the 10 or 12 hymns he had with him.

The same night I was back at the hospital. Sue and I talked about the walk we had in the country when our grandson Henry was a young child through trees and bushes with him leading us in singing every verse of "I've Been Workin' on the Railroad." In the hospital room, Sue and I and my daughter-in-law Lynn and our friend Tera then sang it. After that, we Googled the words to "Sentimental Journey," "Anchors Away," "Up in the Air Junior Birdman," "Battle Hymn of the Republic" and "Zip-a-Dee-Doo-Dah"; Sue smiled happily and sang them all with us.

The next day, Wednesday, her friends Laurel and Mary visited her and sang with her as well. The following day, Thursday, I asked my daughter Kris to bring our grandchildren from Brooklyn. They came and brought their guitar, flute, etc., and played for her and she clapped. On Friday, our friend Roberta Weisbrod, whom Sue and I had met at a Federal Bar Council conference decades ago, visited in the morning and, being well prompted, for over an hour sang "Workin' on the Railroad," "All the Pretty Horses," "In the Still of the Night," and the melodies she sang to her children when they were young to put them to sleep. Sue's eyes were open and she was happy, but by that time she was too weak to sing.

Our son David then came with Sue's sister and he played chants by Trappist Monks that Sue liked. On Friday night, March 7, Sue died with me and our three children David, Doug, and Kris around her that evening and Doug holding her hand. Jerome's act of kindness helped us to bring joy to every one of the last four days of Sue's life. After I told my family members about Sue and Jerome, my sister Ellen wrote from Colorado that she wanted to "go out" singing like Sue. Roberta Weisbrod said the same thing after hearing the full story as did my 45 year friend and crusty Vietnam veteran, Mike Carey.