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Provocative, Human, Eclectic

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We invite you to connect with us on LinkedIn.

From the President

Our Events

By Vilia B. Hayes



As we celebrated Law Day and the award of the Learned Hand Medal for Excellence in Federal Jurisprudence to the Hon. Gerard E. Lynch, U.S. Circuit Judge for the Second Circuit Court of Appeals, I was reminded of the importance of the rule of law and how much access to justice depends on access to an attorney. The Federal Bar Council's Public Service Committee, chaired by Lewis Liman, has been working steadily to increase access to justice by developing *pro bono* programs to meet the need for representation in immigration court and federal court. The Federal Bar Council also seeks to encourage and honor *pro bono* service through its Thurgood Marshall Award for Exceptional *Pro Bono* Service, which recognizes and celebrates lawyers in private practice who have demonstrated an exemplary commitment to *pro bono* legal services and provided or facilitated the provision of *pro bono* services in federal courts or agencies within the Second Circuit.

I invite you to join us to celebrate the Award, learn more about the *pro bono* work being done in the Second Circuit, and welcome summer.

On June 16, 2016, the First Decade Committee and the Public Service Committee will sponsor a Summer Kick-Off Reception and the presentation of the Thurgood Marshall Award at Battery Gardens in Battery Park from 6:30 to 8:30 p.m. The event is open to all, including summer associates. Last year's party combined a beautiful evening, great food, an outdoor view of the Statue of Liberty, and inspirational descriptions of *pro bono* work. I invite you to join us to celebrate the Award, learn more about the *pro bono* work being done in the Second Circuit, and welcome summer. To attend this event, please register here: http://bit.ly/1SAKFxT.

June also brings three very interesting CLE programs:

- June 21: "Whistleblower Update 2016: Strategies for Litigation, Investigations and Best Practices";
- June 28: "Up Close With FISA: Discussing the Intersection of Law and Intelligence Gathering"; and
- June 29: "Jury Selection, Trial Team and Staffing Stereotypes."

Check the Federal Bar Council calendar for more information. I hope you will join us at one or more of these events.

From the Editor

The Winter Meeting

By Bennette D. Kramer



The Winter Bench and Bar Conference, known as the Winter Meeting, was held the first week in February this year at the Four Seasons Resort on the Big Island of Hawaii. I always enjoy the Winter Meeting, especially the opportunity to meet with the judges who attend and to spend time with friends I have made over time. It is a wonderful opportunity to work with judges and other lawyers to put together pro-

grams and dinners. This year was special for two reasons. First, Justice Sonia Sotomayor attended the Winter Meeting and participated in all the activities and, second, Sean Coffey set up an extraordinary trip to Pearl Harbor.

Justice Sotomayor

Justice Sotomayor not only attended all the activities at the Winter Meeting – programs, dinners – but she always was willing to talk to curious participants about the Court, her life on the Court and before, and really anything else. She participated in two programs with enthusiasm, one on "Current Issues in Statutory Interpretation" and the other a "Conversation with Second Circuit Judge Richard Wesley." In both programs (which we discuss below) she interacted with judicial friends in a relaxed way. In fact, during her discussion with Judge Wesley, Justice Sotomayor walked around, making each and every attendee feel that the Justice was speaking to him or her. Justice Sotomayor's warm personality draws people into conversations so that all who spoke with her felt that they were speaking to a person interested in what they were saying.

Justice Sotomayor is also a big fan of Hawaii and traveled from one end of the Big Island to the other during the afternoons and off days. She talked enthusiastically about her trip to Hilo for the big Saturday market, which includes craft sellers, and demonstrated her purchase. My husband and I ate lunch at the Bamboo Restaurant in Hawi at the Northern tip of the island the day after the conference ended. As we were leaving the restaurant, the owner stood up and demanded everyone's attention. She said that several days before the restaurant had been visited by a Supreme Court Justice who had eaten lunch and had warm greetings for those who came up to talk to her. The owner was so excited to have had the opportunity to meet Justice Sotomayor.

Everyone at the Winter Meeting spoke enthusiastically about conversations and interactions with Justice Sotomayor. From my point of view, her generosity with her time and willingness to participate in all phases of the Winter Meeting made this Winter Meeting special.

This year was special for two reasons. First, Justice Sonia Sotomayor attended the Winter Meeting and participated in all the activities and, second, Sean Coffey set up an extraordinary trip to Pearl Harbor.

Pearl Harbor Trip

Several months before the Winter Meeting, Sean Coffey said that he would try to arrange a trip to Pearl Harbor with his Naval Academy friend, Admiral Harry Harris. Little did we know at the time how special this trip would be. Admiral Harris is the Commander, U.S. Pacific Command, covering the Indo-Asia-Pacific Region, headquartered in Oahu, Hawaii, near Pearl Harbor. Admiral Harris, our host during the visit, went out of his way to make us feel welcome and spent a great deal of time with us.

To get to Pearl Harbor from the Big Island, 24 of us left the hotel at 6 a.m., armed with boxed breakfasts. When our flight arrived in Oahu we were escorted to the Commander, U.S. Pacific Fleet Boathouse, where we watched a documentary on Pearl Harbor, visited a small museum, and received a briefing on the December 1941 attack. After the briefing, we embarked in two groups on the Commander's Barge and the Deputy Commander's Barge to tour the harbor with Admiral Harris and Army Lieutenant General Anthony G. Crutchfield, Deputy Commander, U.S. Pacific Command.

We were with Admiral Harris on the Commander's Barge, a lovely yacht that is kept in pristine condition. We cruised around Pearl Harbor, past the U.S.S. Arizona Memorial and the markers for other battleships that were sunk during the attack. The combination of the documentary and the view of the locations of the ships was very moving. We could imagine the terrible day of the Japanese attack.

After the "Barge Tour," the group was escorted to the U.S. Pacific Command Headquarters, where Admiral Harris gave

us a briefing about the Pacific Command and the threats to the United States from North Korea and China in the area under his command. Those of us on the trip felt very fortunate to have the opportunity to hear what Admiral Harris had to say, and we probably will not be able to hear about either North Korea's or China's activities in the area without feeling a shudder of apprehension. Admiral Harris also patiently answered all of our questions.

Following the briefing, Admiral Harris took his leave, and Lieutenant General Crutchfield hosted a luncheon at the U.S. Pacific Command Flag Mess. A number of Army, Navy, and Air Force lawyers also attended the lunch, providing an opportunity for us to ask questions about the work of lawyers connected to the Pacific Command. All of the lawyers practice law over a tremendous territory and deal with issues involving personnel and international relations. It was fascinating to talk with them.

After lunch we flew back to the Big Island to continue the Winter Meeting programs and other activities. We all felt that we had been given a remarkable opportunity to see what our military is doing in the Pacific. Thanks to Admiral Harris and Lieutenant General Crutchfield for their time and hospitality. Thanks to Sean Coffey for asking Admiral Harris to make this unforgettable day possible. And thanks to Ryan Wischkaemper and S.S.G. Shavon Claxton, our guides for the day.

Developments

Council Holds Winter Meeting; George A. Davidson 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 on the Big Island of Hawaii from January 30 through February 6, 2015. Sharon L. Nelles of Sullivan and Cromwell chaired the meeting, and Second Circuit Judge Richard C. Wesley headed the Planning Committee. George A. Davidson of Hughes Hubbard & Reed received the Whitney North Seymour Award for public service by a private practitioner. Below, we describe the programs presented.

Corporate Accountability

Eastern District Judge William F. Kuntz, II, chaired a panel including Neil M. Barofsky, Jenner & Block, Professor Marshall L. Miller, New York University Law School, and Audrey Strauss, Alcoa Inc., that discussed the application of the Foreign Corrupt Practices Act and corporate accountability for employee wrongdoing. The program consisted of skits followed by panel discussions. The skits focused on a company that entered into a consulting contract with the sister of the Minister of Homeland Security of an unnamed country, who obtained contracts for the company.

Professor Miller explained the FCPA. In order to avoid liability for bribes by employees, a company must keep careful accounts and records of work done and have strong internal control provisions. It is legitimate to use a relative of a foreign official to get business, but the relative actually must perform work for the company.

Panel members discussed the difference to a company between a guilty plea and a DPA ("Deferred Prosecution Agreement"). With a guilty plea, a company can put the matter behind it. With a DPA, the court appoints a monitor and the company has a probation period with a monitor overseeing its operations along with the involvement by the court. Both guilty pleas and DPAs have the collateral effect of the admission of factual guilt. While providing facts to the Justice Department, the company has to be careful not to violate the laws of foreign countries relating to data collection and secrecy, yet the more information provided the better the relationship with Justice

will be. The government will look to see if companies have put remedial measures into place as soon as possible.

Professor Miller talked about the Yates Memo on Individual Accountability for Corporate Wrongdoing, which is a message to the Justice Department, companies, and the press, but which does not represent a change in policy or practice. The Justice Department expects complete cooperation and that companies will provide all information. A company that does not provide all the facts will get no credit. Audrey Strauss said that it was incumbent on a good defense attorney to bring forward all facts. The company's lawyers must hand up individuals who are guilty.

Neil Barofksy said that a monitor can be onerous or helpful with either an adversarial, slash and burn, or tough but fair attitude. The real responsibility of the monitor is to put in a "gold plated" compliance system, because a company's wrongdoing often results from an inadequate compliance system. The responsibilities of the monitor are set forth in the contract between the company and the government entity involved. The agreement should describe the monitor's duties clearly and the parties should agree on the scope. Professor Miller said that companies want the monitorship to succeed.

Audrey Strauss believes that it is better for the company to fix the compliance system itself as early as possible, rather than to have one imposed from outside. Corporate liability is based on respondeat superior, as long as the employee acted within the scope of duty. There is a real question whether respondeat superior should be applied in criminal cases.

Sexual Assault Investigations on Campus

The program began with a performance of a skit originally performed at the Federal Bar Council American Inn of Court. Marjorie Berman and Eric Franz starred in the skit, which demonstrated the complexity of the issues raised by sexual assault accusations on college campuses. Following the skit, Southern District Judge Katherine Polk Failla chaired a panel consisting of Harlan A. Levy, Boies, Schiller & Flexner, formerly the chief deputy attorney general of New York State, and Frederick P. Schaffer, general counsel and senior vice chancellor for legal affairs at the City University of New York.

Judge Failla discussed the background of the U.S. Department of Education requirements for universities to comply with Title IX. Harlan Levy explained that there were two overarching themes: greater justice for women and accountability for men. Frederick Schaffer explained that Title IX began as a vehicle for creating comparable sports programs for men and women. In 1999, the Of-

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fice of Civil Rights of the Department of Education sent a "Dear Colleague" letter to colleges and universities stating that Title IX covered sexual discrimination, including both quid pro quo discrimination and sexual harassment. When students complain about other students, a university has an obligation to act. If a university ignores sexual discrimination, it can be held liable.

In 2011, the Office of Civil Rights issued another "Dear Colleague" letter with no notice or rule making. The 2011 letter imposed an affirmative obligation on universities to support victims, educate the student body, investigate, and adjudicate. The letter contained an extraordinary level of detail, including a standard of evidence and who gets to participate. Each university must comply or risk the loss of federal funding. Any party who is dissatisfied can appeal to the Department of Education, which can investigate and bring pressure on the university.

Harlan Levy spoke about specific examples and the status of litigation and legislation. He discussed the student dissatisfied with the outcome of an investigation carrying around a mattress at Columbia, Harvard Law School professors criticizing the guidelines and the denial of confrontation, and an erroneous *Rolling Stone* article based on a single source with no corroboration. Levy also spoke about the film "The Hunting Ground," which presents sexual assault on campus as a civil rights issue. Governor Andrew Cuomo referenced the film in connection with sponsoring the "yes means yes" legislation covering the standard for sexual assault in New York State. Levy said that there must be training at schools that makes the "yes means yes" standard clear. There must be consent by words or actions, indicating clear permission to proceed.

Schaffer said that the City University of New York has put full blown due process procedures into place, including witnesses, cross-examination, lawyers, and students sitting on the panels, even though the "Dear Colleague" letter discourages that. The New York and California "yes means yes" statutes provide that a person who is intoxicated to the point of impairment cannot consent.

Schaffer and Levy indicated that these issues are more than theoretical for them. They both have boy/girl twins.

Recent Prosecutions of Elected Officials

Eastern District Judge Nicholas G. Garaufis chaired a panel that examined various aspects of political corruption. The panel members were Professor Richard A. Briffault, Columbia University School of Law and an advisor to Mayor Bill DeBlasio; Margery Bronster, Bronster Fujichaku Robbins in Honolulu and former Attorney General of Hawaii; Lisa J. Demsky, Munger, Tolles & Olsen in Los Angeles; and Michael Jay Green, Law Offices of Michael Jay Green in Honolulu.

Professor Briffault provided an overview of the development of federal political corruption law. He explained that, in connection with prosecutions for theft of honest services, the current focus is on bribery and proof of a quid pro quo. The "quid" requires a benefit from the private person to the official, which can be anything – cash, vacations (McDonald), employment (Silver), a benefit to a third person (Skelos). Next, there must be a "quo" – an official act or use of influence to affect an outcome. The "pro" means that there must be a connection between the official act and the bribe. The official act does not have to be illegal. Lisa Demsky said that the facts of each particular case – i.e. the circumstances, timing, intent – are important to determining whether an official has crossed the line from friendship or a non-criminal employment relationship to criminal activity. Panel members discussed specific cases to try to define what constitutes theft of honest services, using a continuing hypothetical. The panel concluded that it comes down to arrogance and a sense of entitlement by public officials.

Michael Green, a personal injury lawyer, said that when people are elected they become arrogant. The way to curtail public corruption is to create transparency in campaign spending. Candidates raise millions of dollars to be elected to offices where they are paid $100,000. There must be a will among those in office to

make a change.

Margery Bronster described her experience as Hawaii's Attorney General from 1995 to 1999 investigating the Bishop Trust. The Bishop Trust was created as part of one of the biggest estates in the country and currently is the largest landowner in Hawaii. Bronster said that she confronted a cozy relationship among the Bishop trustees and the government, which enabled the trustees to pay themselves a huge amount of money by spending many hundreds of thousands of dollars on providing benefits to elected officials. Bronster said that she ran into roadblocks set up by the Hawaii Supreme Court, but eventually was able to interest the Internal Revenue Service in an investigation. Bronster was reappointed Attorney General by the governor, but not confirmed by the state legislature. Eventually, as a result of the IRS investigation, the Bishop Trustees were replaced and new rules were put into place, she said.

Sovereign Nations in a Global Economy

A panel led by Judge Jeffrey Meyer of the District of Connecticut discussed the conflicts between extraterritorial jurisdiction and sovereignty. Judge Meyer, who has written about and taught that subject, led off with a tutorial on the subject area. There then were three skits that illustrated some of the issues: (1) a skit loosely based on the FIFA prosecution; (2) a skit concerning inconsistencies between the United States and European Union in their approach to antitrust enforcement; and (3) international cartels.

Neil Barofsky led off with a discussion of the FIFA case and the bases for jurisdiction in that case. The key in that case is that the defendants actually engaged in conduct in the United States. If the conduct had occurred exclusively overseas, and the conduct was legal in the jurisdictions in which it occurred, it might be difficult for U.S. authorities to assert jurisdiction – but those are not the facts in FIFA, notwithstanding press articles to the contrary. A major concern is that if the United States tries to become the world's police officer, other countries might attempt to exercise jurisdiction over conduct occurring here.

Steven Holley of Sullivan & Cromwell and Harry First, a professor of law at New York University Law School, discussed inconsistencies between U.S. law and EU law in the context of the Microsoft litigation. Holley was part of the team that represented Microsoft in that litigation, and First has written a book about it. Holley explained that in the EU, there is no discovery, no trial, and no ability to cross-examine witnesses, and the EU does not recognize the attorney-client privilege for in-house counsel. In addition, the EU has insisted on certain types of relief that have been rejected in the United States, and it is not unusual for a disgruntled U.S. litigant to seek relief from the EU. First was of the view that EU procedure is not that different from the procedure before the Federal Trade Commission or the Securities and Exchange Commission, which act as prosecutor and judge in conducting an investigation. He noted that substantive conflicts between U.S. enforcement policy and EU enforcement policy were more common in the past than today, and he does not think it will be a significant problem going forward.

Robert Kaplan of Kaplan, Fox & Kilsheimer then discussed international cartels from a plaintiff's perspective and James Warnot of Linklaters addressed the issues from a defendant's perspective. International cartel cases have become a cottage industry and have included massive litigations in such diverse areas as auto parts, computer memory, televisions, air cargo, freight forwarders, and ocean shipping. Often civil litigation and criminal investigations proceed simultaneously. Most countries have amnesty or leniency programs, although in the United States only the first one through the door qualifies, while in other countries various levels of leniency are available to companies that turn themselves in. In the United States, a successful amnesty applicant also can qualify for single damages, as opposed to treble damages, if it cooperates with the plaintiffs. As a result, in many international cartel cases the only issues are whether a class can be certified and damages. U.S. plaintiffs only can

sue for damages suffered in the United States, so many plaintiffs also bring suits in other countries. In the past, many countries have been hostile to rules that favor the plaintiffs – such as broad discovery, class actions, and contingency fees – but there is a growing trend around the world to adopt the U.S. approach.

Judge Meyer concluded the discussion by noting that, as time goes on, international cooperation will be required in order to avoid intrusions on sovereignty and inconsistent results.

Current Issues in Statutory Interpretation

One of the highlights of the meeting was a panel on statutory interpretation featuring Supreme Court Justice Sonia Sotomayor, Second Circuit Chief Judge Robert Katzmann, Second Circuit Judge Richard Wesley, and Eastern District Judge Nicholas Garaufis. Frank Wohl moderated the program and began the discussion with the observation: "When we talk about law, we are talking about statutes, which have to be interpreted."

Chief Judge Katzmann described statutory interpretation as a collision between human beings and language. There are two major approaches to statutory interpretation: the textualist approach, which focuses only on the words of the statute and excludes legislative history, and purposivism, which considers legislative history. In Chief Judge Katzmann's view, the goal of statutory interpretation is to determine Congress' purpose in passing legislation, and there is a "toolbox" of interpretative aids available to courts to assist them in that task, including words, context, technical usage, structure, canons, and legislative history. Chief Judge Katzmann is quick to point out that not all legislative history is created equal, and courts must be careful to consider the reliability of particular legislative history before using it. He credits the textualists with helping to bring some discipline into this area. At the end of the day, however, he does not think that courts should exclude anything that is helpful in determining Congress's purpose.

Justice Sotomayor observed that statutes are written for a reason. Congress uses words to tell us what they want us to do, but human behavior often provides a twist that Congress did not anticipate with its words. The Court nevertheless has to determine how the statute applies, and Justice Sotomayor estimated that 75 percent of the Court's cases involve statutory interpretation. One way to understand the views of the Justices on this issue is to consider the starting point of each Justice. Justice Sotomayor observed that Justice Breyer thinks that the Court should start with the policy, while Justice Scalia thought that the Court should start with the words. The other Justices are somewhere in between those two ends of the continuum. Justice Sotomayor describes herself as looking for the reason the statute was adopted.

Judge Wesley emphasized that sometimes there are gaps in the legislation. Congress cannot anticipate every conceivable permutation. He noted that interpretation of state statutes can be different from interpretation of federal statutes because in New York, at least, there is no legislative history. Sometimes the best interpretative tool is the model code after which the statute is patterned. Sometimes the legislators cannot agree on an issue so they interject "purposeful ambiguity" into a statute so the courts can decide.

Judge Garaufis remarked that administrative agencies interpret statutes all the time, and those interpretations may never be reviewed by the courts. Often the agencies are engaged in a dialogue with Congress and have a much better idea of what Congress is trying to achieve. The Supreme Court has recognized this by deferring to agency interpretation of the relevant legislation.

The panel then discussed the statutory interpretation issues in *Yates v. United States*, 135 S. Ct. 1074 (2015). In *Yates* the question was whether throwing undersized fish back in the water to avoid prosecution could violate the provision of Sarbanes-Oxley that prohibits the destruction of tangible objects. Emphasizing that the purpose of Sarbanes-Oxley is to deal with financial issues, Justice Ginsburg held that destruction of fish did not violate the statute. In dissent, Justice Kagan cited Dr. Seuss' book, *One Fish Two*

Fish Red Fish Blue Fish (1960), in arguing that a fish is a tangible object. Judge Wesley observed that reliance on Dr. Seuss is a sure sign that an opinion does not have five votes. Justice Sotomayor noted that *Yates* was the subject of many bad fish jokes.

The panel also discussed *King v. Burwell,* 135 S. Ct. 2480 (2015), where the Court determined that tax credits under the Affordable Care Act are available to persons in states that rely on a federally created insurance exchange. The statute makes such credits available for state exchanges but is silent on that issue in the case of federal exchanges. In a carefully written opinion, Chief Justice Roberts held that the omission was essentially a typographical error. Even though he considers himself to be a textualist, the Chief Justice ruled that "the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase." Concluding the discussion, Justice Sotomayor observed that the differences among the Justices are largely a question of ordering principles, and each Justice must decide which principles are most important to that Justice in determining the meaning of a statute.



Justice Sotomayor. Photo courtesy Steve Petteway, Collection of the Supreme Court of the United States.

Supreme Court Review

As has become a tradition at the Winter Meeting, Miguel Estrada of Gibson Dunn and Neal Katyal of Hogan Lovells discussed the cases currently on the docket in a panel moderated by Second Circuit Judge Richard Wesley. Katyal began the discussion with some interesting statistics: Justices Breyer and Sotomayor agreed the most;

Justices Thomas and Sotomayor disagreed the most; Justice Breyer was most frequently in the majority; Justice Kagan wrote the fewest opinions; and Justice Thomas wrote the most. Justice Sotomayor asked the most questions – with an average of 22 questions per argument – and Justice Scalia got the most laughs. There were 84 cases this term, 16 of which came from the States. The government lost in six out of seven criminal cases; its only victory was in a case involving the protocol for administering death penalty drugs.

Fisher v. University of Texas, an affirmative action case, is up in the Court for the second time. The argument did not go well for the proponents of affirmative action. In Katyal's view, the Court will either affirm, which is unlikely; eliminate affirmative action, which is possible; or issue a narrow decision on the facts, which is the most likely outcome. Given the success in attracting minorities to a program at the University of Texas that automatically admits the top 10 percent of the graduates of every high school class, the university, in Estrada's view, failed to demonstrate that affirmative action is needed to achieve a critical mass. Estrada described affirmative action as on life support.

Both Estrada and Katyal thought it was likely that the Court would strike down the court of appeals decision in *Friedrichs v. California Teachers Association,* which upheld the right of unions to require non-members to pay union dues even though a portion of that money may be used to fund political activity with which the non-members disagree. With Justice Scalia's death after the conference, however, the Ninth Circuit's decision was left intact.

In *Whole Woman's Health v. Cole,* the question is whether certain restrictions placed on abortion clinics placed an undue burden on the exercise of a constitutional right. The issue comes down to how many miles a woman must travel to get an abortion. Katyal noted that Justice Kagan had voted for a stay, which is an indication that she will probably vote for reversal. Judge Wesley observed that the concept of "undue burden" is so vague that it invites the Justices to rely on their personal experiences in deciding a case.

Undue burden is also the issue in *Zubik v. Burwell,* where the Department of Health and Human Services requires some religious organizations to file an application for an exemption from the Affordable Care Act's requirement that employers provide contraceptive coverage, even though some religious organizations are automatically exempt. The question is whether requiring the form to be filed creates an undue burden. Estrada believes that at least some of the religious organizations involved in the case will win.

In *United States v. Texas,* a number of states brought a lawsuit challenging President Obama's executive order on immigration. The states challenge the order on the ground that it is inconsistent with federal immigration law, and the executive branch failed to follow the Administrative Procedures Act in implementing the order. The states contend that they have standing because they offer certain benefits to immigrants who are the subject of "deferred action" for deportation. Estrada expressed the view that the Obama Administration is probably right on the statutory question, and it is probably wrong on the Administrative Procedure Act question, but it is questionable whether the states have standing.

Insider Trading: "Tippee" Liability Under *United States v. Newman*

Southern District Judge Analisa Torres led a panel on insider trading. The panelists included Kevin O'Connor, general counsel of Point72 Asset Management, and Scott Morvillo of Morvillo LLP.

O'Connor began the discussion by pointing out that under the case law it is not always illegal to trade on nonpublic inside information, and Congress has shown no appetite to change the law in this area. The key issue under *Newman* was whether the recipient of the inside information knew that the tipper breached a fiduciary duty in disclosing the information. Since a tippee down the line almost never knows anything about the circumstances under which the information was originally disclosed, it is very hard for the government to win those cases,

as *Newman* demonstrates. Nevertheless, there is always the risk that the tippee will be accused of conscious avoidance. Therefore, some companies have protocols for asking about the source of the information when it is received.

The original tipper must also derive a personal benefit from disclosing the information. In that regard, the panel discussed the *Dirks* case, where the original tipper was a whistleblower who had no interest in trading on the information. The Supreme Court determined that a tippee who received the information and traded on it did not violate the law.

The panel illustrated these principles through a series of skits.

Ethics, Work-Product, and Failed Research

Judge Torres also moderated the meeting's ethics panel. The vehicle for the discussion was consumer surveys. Diana Torres of Kirkland & Ellis gave a tutorial on surveys generally. Ken Plevan of Skadden Arps then explained the ethical issues in the context of pre-litigation consumer surveys.

There is always a question whether such surveys can be kept confidential if they do not turn out as expected. To qualify as work product, the survey must be in anticipation of litigation, but if it is in anticipation of litigation, it cannot be destroyed. There is no guarantee that a privilege claim will be upheld. At least one court has held that, where pre-litigation surveys are similar to studies commissioned in the regular course of business, they are not subject to work product protection.

The panel also discussed whether surveys can be taken of class members. Frederick Fox of Kaplan Fox & Kilsheimer expressed the view that pre-certification surveys are permissible, but once a class is certified, such surveys cannot be done without the consent of the other side or permission from the judge.

John Siffert of Lankler Siffert & Wohl discussed whether a Rule 30(b)(6) witness would be required to disclose the existence of surveys, even if the survey was done by a non-testifying expert. The rules require the disclosure of such surveys, without revealing the substance, even if they are considered to be privileged. The witness cannot say no such documents exists. If the witness fails to answer the question correctly, ABA Model Rule 3.3 requires the lawyer to correct the testimony. It is no longer sufficient to tell the client to get a new lawyer if the client has made a false statement in a judicial proceeding.

A Conversation with Supreme Court Justice Sonia Sotomayor

The Winter Meeting ended with a conversation between Supreme Court Justice Sonia Sotomayor and Judge Richard C. Wesley. Justice Sotomayor and Judge Wesley served on the Second Circuit together before her confirmation to the Supreme Court, and they are good friends. Justice Sotomayor spoke about her Court experience and her personal life. Set forth below are some of the topics Justice Sotomayor discussed.

Justice Sotomayor provided some clues to the way the Justices operate within the Court. First, she said that dissents on *cert.* petitions are meant to be read to educate the bar and raise issues for petitioners, the public, and colleagues. Justice Sotomayor is in the *cert.* petition pool along with eight of the (then) nine justices. A clerk from one chambers reviews each of the 8,500 *cert.* petitions and writes a bench memo, presenting both sides, and makes a recommendation. The bench memo particularly helps in *pro se* cases where the petition is hard to understand. The Chief Justice decides which petitions should be discussed, and each Justice has 24 hours to request that additional petitions be discussed. Following the usual protocol, the Chief Justice speaks first and then the rest of the justices speak in descending order of seniority. The current Chief Justice lets the Associate Justices speak out of turn.

Compared to her editing at the Second Circuit, described by Judge Wesley as "legendary," Justice Sotomayor is very careful with her editing at the Court, because each Justice has an individual pride of authorship. Justice Sotomayor talked about the differences in opinion writing at the Second Circuit and the Supreme Court.

Justice Sotomayor said that fractured opinions, resulting

from the inability of the Justices to come to one opinion, shows courts below what each Justice is thinking. Lines of analysis develop through these separate opinions. Justice Sotomayor says *amici* briefs are of varying value to her. Some just rehash points raised by the litigants, but others provide history or expertise that is not in the briefs. The latter can be very helpful and provide a different perspective on the case. For example, Justice Sotomayor drew a concurrence in a tax case from an *amicus* brief. The reality is that the Justices are asked to be experts in areas of the law in which they have no experience and this is very humbling.

Justice Sotomayor talked about the differences in opinion writing at the Second Circuit and the Supreme Court.

In cases of social significance, Justice Sotomayor suggested that dissents provide clues to how strongly the Justices feel on the subject. In intellectual property cases, the Court rules very narrowly because technology is developing very fast. Justice Sotomayor's specialty, to the extent she has one, is intellectual property, which she developed on the Second Circuit.

Judge Wesley asked Justice Sotomayor how the social atmosphere at the Second Circuit and the Supreme Court differ. He remembers her as a social leader in the Second Circuit, bringing people together. Justice Sotomayor said that socializing in Washington is harder work. Her Supreme Court colleagues tend to scatter over the weekend to see grandchildren or go to the opera. Justice Sotomayor does a lot of socializing around Court life, including dinners with other Justices, Congress, and the Supreme Court Historical Society. Justice Ginsburg hosts National Council of the Arts musical recitals two or three times a year at the Court.

Justice Sotomayor said that she had a close relationship with her clerks. Each one is knowledgeable about all cases and they talk together as a group. In contrast, at the district court and Second Circuit, she worked with one clerk on one opinion at a time. She receives about 300 applications for clerkships, compared to 1,000 applications when she was on the district court and 500 to 700 in the Second Circuit.

Justice Sotomayor said that she wrote her book *My Beloved World* as a necessary therapeutic endeavor to get through her first year in Washington and on the Court. Her transition to the Court was life altering and the first year was overwhelming. She was wrenched from a city, court, and life she loved. Writing the book the summer after her first year permitted her to hold onto a sense of self and was part of being honest with herself. It grounded her. She is not unique, she said. All Justices are exhausted after the first year and ask, "why me?"

Justice Sotomayor believes the most important ingredient for people is education. She devotes a lot of her time to talking to kids to inspire them to be curious about the world and their place in it. Justice Sotomayor does not believe that we will reach an equal society until we have equal education.

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The Whitney North Seymour Award

Council President Vilia Hayes presented the Whitney North Seymour Award for public service by a private practitioner to her partner at Hughes Hubbard & Reed, George Davidson. In her introduction, Hayes talked about Davidson's career of exceptional public service similar to that of Whitney North Seymour. Davidson had a leadership role with the Puerto Rican Legal Defense & Education Fund, where he served on the board with Justice Sotomayor. He served as president of the Legal Aid Society and chair of the William Nelson Cromwell Foundation, as Whitney North

Seymour had done. Davidson also served on the board of the Community Law Offices, was founding chair of the Federal Defenders of New York, active in the International Bar Association and the American Bar Association, a Fellow of the American College of Trial Lawyers, a life member of the American Law Institute and chair of Greenwich House. Hayes said she remembers him encouraging associates to perform *pro bono* legal work at Hughes Hubbard and acting as a mentor to all involved in *pro bono* work.

Davidson talked about four reasons he was delighted to receive the award. First, he said that Whitney North Seymour was a personal role model. He first saw him at a program for college seniors who had been accepted by Columbia Law School, where Seymour spoke about the role and responsibility of the lawyer in the profession. Second, Davidson talked about Seymour as a person and his commitment to values, including freedom of thought and expression, advancement according to merit, a just and fair court system, and a commitment to procedural fairness. Third, Davidson said he was happy to join the company of the other recipients of the Award. Finally, he was thrilled that he was receiving the award at a time when his old friend Justice Sotomayor was the guest of honor, his long-time colleague Vilia Hayes was president of the Council, and former colleague Joan Salzman was executive director.

Legal History

The *Worst* Supreme Court Decision, Ever!

By C. Evan Stewart



There are, perhaps, many candidates for the *worst* decision by the U.S. Supreme Court, ever: *Plessy v. Ferguson*, 163 U.S. 537 (1896), for example, or perhaps, *Korematsu v. U.S.*, 323 U.S. 214 (1944). But there really can only be one that ranks at the very bottom: *Dred Scott v. John F. A. Sandford*, 60 U.S. (19 How.) 393 (1856). And it fully deserves that ranking.

Who Was Dred Scott?

Dred Scott was a slave. Born in America, circa 1800, he was owned by several owners. Importantly, in (or about) 1833, Scott was purchased by U.S. Army surgeon John Emerson in Missouri. Transferred to Fort Armstrong in Illinois, Emerson took Scott with him; Emerson also took Scott with him when he was subsequently transferred to Fort Snelling in the northern section of the Louisiana Purchase (now Minnesota). While at Fort Snelling, Scott married another slave also owned by Emerson (this was a legally recognized marriage because it took place in free territory). Scott's wife later gave birth to a daughter in free territory. Ultimately, Emerson moved his family and slaves back to St. Louis, Missouri.

In 1843, Emerson died and his wife inherited Scott and his family. In February 1846, Scott attempted to buy his freedom from Mrs. Emerson, but she refused. Scott, with the encouragement of some white friends in St. Louis, then decided to sue for his freedom, based upon his prolonged residence in a free state and a free territory. That began a lengthy legal odyssey that ultimately resulted in the *worst* decision by the U.S. Supreme Court, ever.

The Lower Courts

Suing in St. Louis county court in April 1846, Scott initially lost because he was unable to prove that he was in fact owned by Emerson and his widow. But a second trial was ordered, a decision that Mrs. Emerson appealed to the Missouri Supreme Court. She lost that appeal, and in 1850 a jury sided with Scott. That outcome was then appealed to the Missouri Supreme Court, which in 1852 rejected prior precedents and overturned the lower court's outcome, ruling that Missouri law governed Scott's status, not the fact that he had resided for a number of years in a free state and a free territory.

With a different set of lawyers, Scott then filed a new suit, this time in federal court. Because Scott's new owner was John F. A. Sandford (Mrs. Emerson's brother – she had transferred legal ownership of Scott and his family over to Sandford), and he was a legal resident of New York, the jurisdictional basis for the federal lawsuit was diversity of citizenship (Scott claimed Missouri citizenship). Scott sued Sandford for battery and wrongful imprisonment and sought $9,000 in money damages. The federal district judge, Robert W. Wells, rejecting Sandford's pre-trial argument that Scott could not be a citizen of Missouri because he was a slave, allowed the case to go to trial in May 1854. Although Sandford conceded he had "gently laid his hands" on Scott, he nonetheless won the case (based upon the prior ruling of the Missouri Supreme Court).

Determined to get his freedom, Scott pressed on, and with two new prominent lawyers (Montgomery Blair and George T. Curtis) leading the charge, he appealed to the U.S. Supreme Court in December 1854. The Court agreed to take the case, first hearing oral argument in February 1856. When the Justices met to discuss the case in April 1856, they were deadlocked four to four on the issue of the Court's jurisdiction, with Justice Samuel Nelson (New York) undecided. The Court then agreed to have four days of re-argument in December 1856.

There are, perhaps, many candidates for the *worst* decision by the U.S. Supreme Court, ever. But there really can only be one that ranks at the very bottom: *Dred Scott v. John F. A. Sandford*.

Politics Affecting the Court?

Many historians believe that the Court took its time deciding the case in order to push the decision beyond the 1856 presidential election. Once the election had been decided, president-elect James Buchanan wrote one of the sitting Justices (his friend, John Catron – from Tennessee), asking whether the decision was going to be handed down before his inauguration on March 4, 1857 (he hoped it would be, thereby putting to "rest" the slavery issue for the entirety of his presidential term). Buchanan later even went further, pressuring Justice Robert Grier (both men were Pennsylvanians) to join the Southern majority on the Court; the president-elect wanted the Court's decision not to be perceived as a sectional one. And it was not just the president-elect. Alexander Stephens, a prominent Georgia Congressman (and later the vice president of the Confederacy) wrote to a friend on December 15, 1856: "I have been urging all the influence I could bring to bear upon the Sup. Ct. to get them no longer to postpone the case on the Mo. Restriction [the Compromise of 1820]…. I have reason to believe they will [decide] that the restriction was unconstitutional." Then, on January 1, 1857, Stephens penned another letter, stating, "[F]rom what I hear *sub rosa* [the decision] will be according to my own opinions upon every point…. The restriction of 1820 will be held to be unconstitutional."

The Supreme Court "First" Decides

In 1851, the Supreme Court had decided *Strader v. Graham*, 51 U.S. (10 How.) 82 (1851). In that case, the Court had refused to take an appeal from a decision by the Kentucky Supreme Court, which had ruled that Kentucky slaves taken temporarily to Ohio nonetheless remained slaves under Kentucky law. On February 14, 1857, a majority of the Court actually voted to re-affirm that precedent without elaboration; and Justice Nelson was tasked to write the majority opinion. (Justice Benjamin Curtis (Massachusetts) had earlier predicted this outcome to his uncle. And Horace Greeley, editor of the *New York Tribune*, had publicly denounced the Court for its likely "convenient evasion": "The black gowns have come to be artful dodgers." At the same time, Greeley understood the problem

of the Court going the other way and embracing slavery; he also warned of "[j]udicial tyranny."

Days later, the majority of Justices reversed themselves and decided to go in a very different direction. What had changed? It would appear that two dissents coming from Justices Curtis and John McClean (Ohio) – in which they planned to opine that Scott was free under the terms of the Missouri Compromise (a law they were also going to opine *was* constitutional) – shook up the Southern Justices. Justice James Wayne (Georgia) asked that the Chief Justice reconsider and issue a broad decision; that petition carried the day. At the same time this was playing out, the Catron-Buchanan-Grier correspondence was going on behind the scenes. (Buchanan's letter to Justice Grier had in fact been encouraged by Justice Catron: "[D]rop Grier a line, saying how necessary it is, and how good the opportunity is to settle the agitation by an affirmative decision of the Supreme Court, the one way or the other.")



Chief Justice Taney. Photo courtesy Steve Petteway, Collection of the Supreme Court of the United States.

On March 4, 1857, Buchanan was sworn in as President at the Capitol by Chief Justice Taney. In his inaugural address, Buchanan (having been prompted by Justice Catron) told the nation that the vexing question of slavery's status in the territories was "a judicial question which legitimately belongs to the Supreme Court of the United States, before whom it is now and will, it is understood, be speedily and finally settled."

Two days later, *Dred Scott v. John F. A. Sandford* was handed down.

The Supreme Court's Real Decision

Chief Justice Roger Taney (Maryland) delivered the opinion of the Court; it was separately agreed to by six other Justices (four Southerners, two Northerners – Grier and Nelson; the latter only concurred based upon *Strader v. Graham*). The Chief Justice's first task was to decide whether the Court had jurisdiction: Was Scott a "citizen" of Missouri? As Taney articulated the issue: "It becomes necessary … to determine who were citizens of the several States when the Constitution was adopted." In page after page of hard to read racism, the Chief Justice listed "evidence" that the Founding Fathers viewed all African-Americans as "being of an inferior order, and altogether unfit to associate with the white race, either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect." According to Taney, African-Americans were certainly not included in the "all men" "created equal" language of the Declaration of Independence, and they also had not been part of the "sovereign people" who were part of the country created by the Constitution. Thus, having ascertained that African-Americans were not citizens at the time of the country's founding ("it cannot be believed that the large slaveholding States regarded them as included in the word citizen, or would have consented to a Constitution which might compel them to receive them in that character from another State"), Taney concluded that Dred Scott "was not a citizen of Missouri within the meaning of the Constitution …, and not entitled as such to sue in its courts." With no jurisdiction, the Chief Justice could have stopped there; but he had even bigger fish to fry: Stephens' *sub rosa* source(s) were right – Taney was bent on invalidating the Compromise of 1820, an act of Congress that had barred slavery north of 36 degrees 30 minutes north latitude for the land bought from France in the Louisiana Purchase.

According to Taney, African-Americans were certainly not included in the "all men" "created equal" language of the Declaration of Independence, and they also had not been part of the "sovereign people" who were part of the country created by the Constitution.

Although the Constitution gave Congress the power to "make all needful rules and regulations" for the territories (Article IV, Section 3), Taney wrote that that power was limited to merely "rules and regulations" and did *not* cover basic, fundamental rights bestowed under the Constitution (e.g., right to bear arms, freedom of the press, etc.). And one of those basic, fundamental rights was the "rights of private property":

"[T]he rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law."

By those words, the Compromise of 1820 was ruled unconstitutional: all of the territories were now open to slavery and its expansion – without congressional interference; and, *beyond that*, the doctrine of substantive due process had been created – a doctrine that continues to vex legal and political debate over the Court's proper role today. And if that were not enough, Taney then went on to dust up the political doctrine that Stephen Douglas hoped would solve the contentious public debate over the expansion of slavery – popular sovereignty:

"And if Congress itself cannot do this – if is beyond the powers conferred on the Federal Government – it will be admitted, we presume, that it could not authorize a Territorial Government

to exercise them. It could confer no power on any local Government, established by its authority, to violate the provisions to the Constitution."

The dissents of Justices Curtis and McClean vivisected Taney's historical "evidence," as well as his constitutional limitations on Congress' powers vis-à-vis the territories. Curtis, for example, proved beyond a shadow of doubt that there were many free African-American "citizens" of New Hampshire, New Jersey, New York, North Carolina, and Massachusetts at the time of the Constitution and that they had in fact *voted for its ratification*!

Beyond the obvious point that the Court's invalidation of the Compromise of 1820 was unnecessary (Curtis attacked it as obiter dicta), both Justices argued that the statutory invalidation was based upon sophistry and an explicit repudiation of American history. First of all, "[a]ll needful rules and regulations" obviously meant legislation just like the Compromise of 1820. Furthermore, there were numerous other acts of Congress limiting/banning slavery prior to 1820 that many Founding Fathers *voted for* while in Congress (or *signed* into law as President), and none had ever expressed any public view that any of those laws were unconstitutional. Furthermore, as posited by Curtis, if this law violated due process, did not the 1807 law banning the importation of slavery from Africa also run afoul of that same property right? And what about the laws in the Northern States that banned slavery? Finally, preventing a slave owner from taking a slave into a territory did not *deprive* the slave owner of that property, it only limited as to where the slave owner could take his "property."

Of course, the dissents only garnered two votes. Nonetheless, the *Dred Scott* opinion ignited a volatile firestorm, and Buchanan's hoped-for peaceful presidential term went the other way in a hurry. It is clear that Taney's decision helped precipitate the Civil War. And, of course, we are still debating the application of substantive due process today (*e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965), etc.). The *worst* decision by the Supreme Court, ever? It is not even close.

Postscripts

The Compromise of 1820, the legislation ruled unconstitutional by the Court in 1857, had already been repealed by Congress when it enacted the Kansas-Nebraska Act of 1854.

After years of wrangling (*e.g.*, the Wilmot Proviso), Congress had tried to legislatively kick the irresolvable political issue of the enforcement of slavery in the territories over to the courts under the terms of the Kansas-Nebraska Act of 1854: "all cases involving title to slaves and 'questions of personal freedom' are referred to the adjudication of local tribunals, with the right of appeal to the Supreme Court of the United States." Ironically, none of the territorial areas that had been the focus of Congress' hand-to-hand combat over the years – New Mexico, Utah, Kansas, and Nebraska – were areas directly at issue in *Dred Scott*.

It is clear that Taney's decision helped precipitate the Civil War. And, of course, we are still debating the application of substantive due process today.

The political blowback to *Dred Scott* was instantaneous and fierce, and it severely damaged the Court's status as the nonpartisan wing of the federal government. Republicans publicly refused to recognize the legitimacy of the ruling and pledged to "reconstitute" the Court after the election of 1860 to ensure that *Dred Scott* was reversed. Leading Republicans William Henry Seward and Abraham Lincoln deftly turned the decision into a symbol of a slave-power conspiracy that was running/ruining the nation. In 1858, Seward cited the "whisperings" between Taney and Buchanan at the latter's inaugural, followed up by the "salutations" the Justices had paid to the President "in the Executive Palace" on March 5, where Buchanan had "received them as graciously as Charles the First did the judges who had, at his insistence, subverted the sta-

tus of English Liberty." (Taney was so outraged by Seward's attacks that he vowed not to administer the oath of office in 1861, if Seward were to win the presidency.) Lincoln (who Taney did swear in) publicly spoke about the four "conspiring carpenters" who created the *Dred Scott* monstrosity: "Stephen [Douglas], Franklin [Pierce], Roger [Taney], and James [Buchanan]." Lincoln prophesied the conspirators behind *Dred Scott* were planning a sequel: "It is merely for the Supreme Court to decide that no State under the Constitution can exclude it, just as they have already decided that … neither Congress nor the Territorial Legislature can do it…. [W]e shall lie down pleasantly dreaming that the people of Missouri are on the verge of making their state *free*; and we shall awake to the reality, instead, that the Supreme Court has made Illinois a *slave State*."

Lincoln built upon these notions, as well as the dissents in *Dred Scott*, and made them the central tenet of his Cooper Union speech in 1860, a speech which was critical to his getting the Republican presidential nomination (*see Federal Bar Council Quarterly* (Sept./Oct./Nov. 2011, at 20)).

The ruling also led to important fissures in the Democratic Party, which ultimately caused it to split into Northern and Southern wings with different candidates for the presidency in 1860 – Stephen Douglas (for the Northern wing) and John Breckenridge (for the Southern wing). After Douglas conceded in his 1858 debates with Lincoln that slavery could in fact be kept out of the territories by the "will and the wishes of the people" of said territories (the Freeport Doctrine), Southern Democrats saw that *Dred Scott* might have given slaveholders an unenforceable property right; as such, a slave code was necessary to govern the territories, to be enforced (as required) by the U.S. Army. Senator Albert Brown (Mississippi): "[If the North] den[ies] to us rights guaranteed by the Constitution … then, … the Union is a despotism [and] I am prepared to retire from the concern."

After the decision was handed down, it was revealed that Dred Scott was still in fact owned by Emerson's widow, who was now married to an anti-slavery Congressman from Massachusetts. The Congressman's wife quickly transferred ownership of Scott and his family over to the son of Scott's original owner on May 26, 1857. The new owner thereafter manumitted the entire family. Scott, now free, lived one more year.

Of Scott's advocates before the Supreme Court, George Curtis was the brother of Justice Curtis, but no one seemed to care. Montgomery Blair was the scion of a very powerful Democratic Party family, who had shifted over to the Republican Party because of slavery. He later became a member of Lincoln's cabinet as Postmaster General, resigning in 1864 as part of a deal to ensure that John C. Frémont (the Republican's 1856 standard-bearer) would drop his third party challenge to Lincoln's re-election.

Ironically, as a young Maryland lawyer in private practice Taney had taken a very different position on slavery when he defended Rev. Jacob Gruber. In 1819, Gruber had been indicted for a sermon he gave in which he attacked slavery and thus was accused of fomenting a social revolution. Arguing to the jury in defense of his client, Taney said that slavery was "a blot on our national character, and every real lover of freedom confidently hopes that it will effectually, though it must be gradually, wiped away." *See* Timothy Huebner, "Roger B. Taney and the Slavery Issue: Looking beyond – and before *Dred Scott,*" *The Journal of American History* (June 2010). *See also* Michael Schoeppner, "Status across Borders: Roger Taney, Black British Subjects, and a Diplomatic Antecedent to the Dred Scott Decision," *The Journal of American History* (Jan 2013).

The leading treatise on the *Dred Scott* decision is Don E. Fehrenbacher's *The Dred Scott Case: Its Significance in American Law and Politics* (Oxford University Press, 1978). *See also* David Konig, Paul Finkelman & Christopher Bracey, *The Dred Scott Case: Historical and Contemporary Perspectives on Race and Law* (Ohio Press, 2010); Paul Finkelman, *Dred Scott v. Sandford: A Brief History with Documents* (Bedford Books, 1997).

Second Circuit Decisions

Preempting Avoidance

By Charles C. Platt



The Second Circuit's recent decision in *In re Tribune Company Fraudulent Conveyance Litigation* confirms that Section 546(e) of the Bankruptcy Code preempts state law fraudulent conveyance actions aimed at securities settlement payments made by a debtor in bankruptcy even if they are brought by creditors, rather than by the bankruptcy trustee or other representative of the bankruptcy estate.

Background

The case arose from Tribune Company's 2007 leveraged buy-out – a securities transaction in which Tribune took on substantial debt to pay out more than $8 million to its then-shareholders. When Tribune declared bankruptcy in 2008, Section 544 of the Bankruptcy Code gave its bankruptcy estate the right to bring any state-law fraudulent transfer claim – whether for actual or constructive fraudulent transfer – that a Tribune creditor could have brought before the company went into bankruptcy. Similarly, Section 548 of the Code gave the bankruptcy estate the right to sue under federal law to set aside actual or constructive fraudulent transfers made to the shareholders.

But there was one major problem: Another section of the Code, Section 546(e), provides that a bankruptcy trustee may not avoid a "settlement payment" – in essence, a payment made to settle a securities transaction – under Section 544 or as a constructive fraudulent transfer under Section 548. The payments to the Tribune shareholders for their stock were unquestionably settlement payments. As such, the bankruptcy trustee or other representative of the bankruptcy estate could only sue to avoid them as intentional fraudulent transfers under Section 548. Proving an intentional fraudulent transfer is often more difficult than proving a constructive fraudulent transfer. The former requires proof that the debtor (here, Tribune) made the payments with actual intent to hinder, delay or defraud its creditors, while the latter requires proof simply that the debtor was insolvent at the time (or rendered insolvent by the payments) and did not receive "reasonably equivalent value" for the payments.

To avoid Section 546(e)'s "safe harbor" for securities settlement payments, Tribune's bankruptcy estate brought only an intentional fraudulent transfer claim under Section 548 against the former Tribune shareholders. It disclaimed the right to bring state-law constructive fraudulent transfer claims, and consented to an order entered by the bankruptcy court lifting the "automatic stay" in bankruptcy to allow creditors to bring such claims as if Tribune had not filed for bankruptcy. Many such creditors (the "Creditors") then filed suit against the former shareholders, asserting state law claims for constructive fraudulent conveyance.

The shareholders moved to dismiss, arguing both that the creditors lacked standing to seek to avoid the same payments under state constructive-fraudulent transfer law that the bankruptcy estate was seeking to avoid under federal intentional-fraudulent transfer law and that, in any event, Section 546(e) preempted or otherwise barred the state law claims.

The district court agreed that the creditors lacked standing, but rejected the defense that Section 546(e) of the Code preempted the Creditors' state law avoidance actions.

The Circuit's Decision

The Second Circuit affirmed, but reached the opposite conclusions. It found that the Creditors had statutory standing. But it determined that the Creditors' state-law constructive fraudulent conveyance actions were impliedly preempted because they conflicted with the purposes of

Section 546(e) of the Code: to ensure certainty, speed, finality, and stability in securities transactions, all of which were necessary for the securities markets to attract, retain, and reduce the cost of capital.

The Creditors argued that, as matter of plain language, section 546(e) referred only to avoidance actions brought by a bankruptcy "trustee," and thus did not bar state-law constructive fraudulent conveyance actions brought by Tribune creditors, rather than by a bankruptcy trustee or other representative of Tribune's bankruptcy estate. The Second Circuit acknowledged that the language of the statute was ambiguous on the meaning of *who* was barred from pursuing avoidance actions under 546(e). Nevertheless, the Court concluded that the Creditors' actions were impliedly preempted because the congressional purpose underlying this statute was in conflict with those claims. In particular, the Creditors' actions, if successful, would unwind the securities transactions in the Tribune LBO, and seriously undermine the certainty, stability and finality of securities transactions that Section 546(e) was designed to achieve.

In short, even though Section 546(e) arguably did not on its face bar state-law constructive fraudulent conveyance avoidance actions by the Creditors, its significant statutory purpose of protecting the security markets was broad enough to impose such a bar, regardless of the injuries that the Creditors had standing to redress.

Picture This

A Talk with Ron Fierstein

By Kira A. Davis

The Intellectual Property Committee of the Federal Bar Council recently hosted Ron Fierstein, the author of *A Triumph of Genius: Edwin Land, Polaroid, and the Kodak Patent War*, for a lively discussion about his book and the legendary patent litigation at the heart of the story. We subsequently spoke with Mr. Fierstein about his work.

A Great Inventor

While lawyers and non-lawyers alike can enjoy the tale of Edwin Land – the relatively unknown founder of Polaroid who was nevertheless one of the great American inventors – it is likely only the litigators who will be disappointed to learn that in the editing process, it was the discovery battles that were trimmed the most from the book.

As Fierstein recounted, Land's original invention, which he created when he was age 19, was a plastic polarizer. It was on this invention that Land built Polaroid, long before his invention of the one-step photography for which the company is famous. It was instant photography that led to the war with Kodak, which had initially acted as a partner and mentor to the much-smaller Polaroid. But as Polaroid grew, Kodak came to view instant photography as a threat to Kodak's dominant consumer photography position, and so set out to develop its own instant photography program.

Kodak, however, had not adequately accounted for one thing: Polaroid's strong patent portfolio. At the age of 19, and immediately following his breakthrough with the polarization process, Land began working with a patent attorney – a moment that Fierstein described as pivotal in Land's career. As a result of his early exposure to the patent system, Land became an ardent believer, even when the patent system was under criticism as monopolistic, and during a time when fewer patents were being issued and more were being invalidated in court. Land's investment in his patents paid off. After nine years of litigation, Kodak was held to have infringed seven valid Polaroid patents, three of which were Land's own inventions.

Fierstein explained that he was a young attorney at Fish & Neave during the trial, and an accidental patent attorney. He said that he never intended to practice as a lawyer, but faced with the need to pay back his student loans, he decided to look for a job doing copyright and trademark litigation. His search for an IP firm led him to Fish & Neave, where his biochemistry background got him assigned to patent work and, with it, the Polaroid case.

Fierstein observed that success for Polaroid depended upon a determination that patents involving chemical imaging and particular dye molecules were valid and in-

fringed. Polaroid's plan, from the beginning, was to tell the Polaroid story, even if much of that story went to only secondary factors in the analysis. Kodak, in contrast, focused on the technical. That strategy backfired. For example, while attempting convoluted, technical arguments at the end of a 10-day cross of Land, Kodak allowed Land an opportunity to succinctly and eloquently recount his "aha" moment of invention, made all the more believable for coming out on cross.

As Fierstein detailed it, the story certainly was "a triumph of genius."

To the Editor (of the *New York Post*)

Judge Block

By Gerald Walpin



On December 4, 2015, your editorial headline labeled Brooklyn Federal Judge Frederic Block as a "lunatic." On December 10, Democrat Senate Minority Leader Harry Reid used the label "racist" to describe a question asked in Court by Supreme Court Justice Antonin Scalia. Both uses of personal defamatory words against members of our country's judiciary are a great disservice to our judiciary – the third branch of our government, defending and upholding the United States Constitution, including the rights of all individuals.

Both the *Post* and Reid have the right to criticize any judge's ruling and any judge's question in court. The First Amendment even protects the use of the personally disparaging words "lunatic" and "racist." But, I would have hoped that better judgment would have avoided both words. A judge is not a "lunatic" if he effectively frees a criminal because the Bill of Rights mandated the judge suppress unconstitutionally obtained evidence. Even if he were wrong in his ruling, the response is not to label him "lunatic," but to show he was wrong, and for the prosecutor to appeal.

Nor is a Justice a "racist" for asking an appropriate question: does giving a preference to Blacks through affirmative action necessarily benefit all beneficiaries? One has the right not to agree with the object of the question, but it is the Justice's duty to pose questions that are difficult and even politically incorrect.

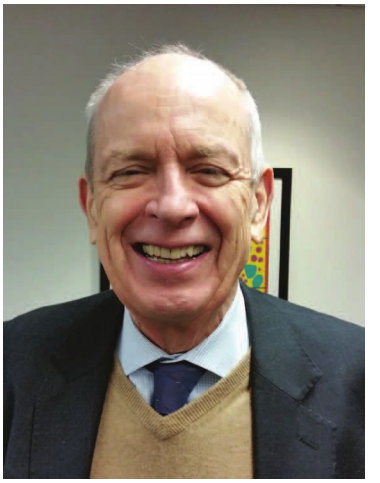
A judge, unlike the media and politicians, has no ready means to defend himself. He cannot issue a statement or call a press conference. Attacks like these on individual judges metastasize into loss of regard for the entire judiciary, and serve as a deterrent against younger judges' willingness to render unpopular decisions called for by the facts and law. Both results are contrary to the interests of all Americans who look upon the judiciary as the protector of our freedoms.

Editors' Note: The author, a former president of the Federal Bar Council, submitted this letter to the *New York Post* but the newspaper did not publish it.

Personal History

A Lawyer Reflects on His "Radical" Youth

By Pete Eikenberry



In the 1970s there were radicals in America. On a recent Sunday I met one of them, my friend, lawyer Earle Tockman, for breakfast in Cobble Hill. Outside the restaurant, he displayed his new touring bike with electronic gears. Over scrambled eggs, he recounted his service, for instance, as a $200 per month community organizer in North Caro-

lina in 1979-82. In 1969, Earle, a superior law student, upon his graduation from law school at Northwestern University, had been granted a Reginald Heber Smith Community Lawyer Fellowship. The fellowship carried a stipend for the new graduate to do community law and Earle was assigned to Compton, California.

At his bar swearing in ceremony, Earle and eight other colleagues stood and unfurled a banner which read "Stand against Oppression" to protest the war in Vietnam. As a result, the protesters were denied California bar entry for several weeks until the ACLU threatened suit. Upon being admitted, Earle and six other recent law graduates formed a self-styled Marxist law collective, "Bar Sinister."

Its purpose was to provide legal support to the "movement," which included the antiwar, feminist, civil rights and gay movements. As a radical new lawyer, Earle had plenty of work. He defended a member of the Black Panthers in a criminal case. For a period, Earle was counsel to the Gay Liberation Front and he tried a case in defense of a gay Unitarian minister who was charged with solicitation in a men's room. For four days, Earle studied a book on how to select a favorable jury in a hostile environment. Upon the opening of the trial, he looked behind him to note dozens of members of the gay community, many in flamboyant attire. Nevertheless, Earle secured a hung jury and upon retrial the minister was found innocent.

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Commencing in 1973, he was for two years a law professor at DePaul University where he taught, *inter alia*, evidence, property, labor law, and trial practice. At DePaul, Earle became advisor to the black law students' organization and a student chapter of the radical National Lawyers Guild. In 1976, Earle and other radical lawyers went to work in factories to organize workers. Earle worked a year building Fords, a year manufacturing Pullman railroad cars and a year as a millwright apprentice for U.S. Steel. When I asked what he accomplished, he said sheepishly that he was able to get some workers to read Marx. Thereafter, Earle returned to the legal field and became an administrative law judge for the Illinois Human Rights Commission in Chicago where he presided over substantial trials.

An event on November 3, 1979, in Greensboro, North Carolina cut short his service as an administrative hearing officer. In 1979, the Ku Klux Klan was involved in anti-union activities in the South since union members were of mixed race. There was a highly publicized anti-Klan rally in Greensboro on November 3 that had been organized by a radical group. The Greensboro police were present in force at the rally. However, after the police were ordered to go on lunch break, a caravan of seven cars pulled up to the rally, men got out of the cars, opened their trunks, took out shotguns and automatic weapons and fired into the people participating in the rally. (Police had followed the caravan all the way to the rally.) Five of the anti-KKK demonstrators were killed and newspapers throughout the country referred to the incident as a "massacre."

Three television stations filmed the rally, including the arrival of the caravan, the guns taken from the trunks, and the resulting killings that had taken place. Seven Klansmen were identified and arrested, yet, the police also arrested 11 of the rally participants for "inciting a riot." Earle was asked by the radical organizers of the rally to leave Chicago to go to Greensboro. For the next three years, at the compensation of $200 per month, he attended every day of the trial, and traveled throughout the South speaking at law schools and bar association meetings to raise money for the defense of the arrested marchers.

At the criminal trial, the Klansmen's defense was that they shot in self-defense. An

FBI agent testified for the Klansmen that the one of the shots had come from the marchers after the first shot by a Klansman. One of the district attorney's questions to the jury was "can you be fair in this case although the victims were Communists who stood for everything we hate in America?" The Klansmen were acquitted. Thereafter, the charges were dropped against the 11 marchers. Earle helped raise money to fund a lawsuit against the city of Greensboro, the police and the KKK members. A judgment was secured against two policemen and three Klansmen; $350,000 of the judgment was paid by the City of Greensboro.

In 1982, while still in South Carolina, Earle received a call from New York and was asked to go to Albany. Two black members of the Communist Workers Party had been arrested for the alleged possession of a gun in their car's glove compartment. They had travelled to Albany from New York City to protest a rugby match by the South African Springboks team, which traveled throughout the world to promote a South African racist agenda. William Kunstler had agreed to represent the CWP members. Upon receiving a call to handle another case, Kunstler asked to withdraw from the representation; he attempted to work out a plea deal to be able to take the other matter. Under the proposed plea deal, one of the men would admit to possession and have to face a possible prison sentence of up to seven years.

Earle was brought in to help Kunstler but he also stiffened his backbone by reminding him that he could not ethically withdraw. Kunstler, with Earle's assistance, tried the case. Their defense was that the police had planted the gun. Earle says that Kunstler was brilliant, *e.g.*, he spent six hours cross examining the policemen on a two page report that he had never seen before. In rural Albany County in upstate New York, Kunstler and Earle secured an acquittal for both defendants.

He then secured a Legal Aid position in New York City, after which he went into private practice where he made a living largely by handling assigned counsel cases. In private practice, he was *pro bono* counsel to the Asian Americans for Equality ("AAFE"). In 1991, Earle was counsel to Margaret Chin, then running to be the first Asian elected to the New York City Council. Following her primary loss, Earle sued the New York City Board of Elections claiming Asians had been systematically discriminated against. In a landmark ruling, the board was for the first time ordered to print ballots in Chinese and other Asian languages. (Ms. Chin currently is a member of the New York City Council.)

Through the AAFE connection, he was retained by a Chinese group to represent them in purchasing a 65 story building at 40 Wall Street. He negotiated the purchase for $5 million with Shearman & Sterling and earned a very substantial fee. Thereafter, he broke up with his partner, his practice dried up, and he became broke.

Then, remarkably, he got a telephone call from Donald Trump, who invited Earle to his very sumptuous office. Trump stated he wanted Earle to become his counsel, or, alternatively, he would retain Earle periodically as his outside lawyer. Although Earle was making little money at the time, he declined the offer. Earle did receive a call from Trump's office asking Earle to give an opinion on whether Trump could assign a lease. Earle determined that Trump could and wrote a letter to support his opinion. He billed Trump $2,400 but said he was never paid; the Trump representative claimed that they had not intended to retain Earle but merely wished to find out what he thought. (Trump later bought 40 Wall Street from the Chinese for $1,000,000, perhaps revealing a possible motive for attempting to retain Earle, counsel of the owners from whom he purchased the building.)

Thereafter, Earle became general counsel for two different construction companies for six years; for over 10 years, he has now been general counsel to a real estate development company. He owns a house on Lake Wallenpaupack in the Poconos where he has a sailboat. He said he has always loved sailing but never had enough money to sail in the years after law school. He does not regret trying to "make a difference" in his youth. Earle supports efforts to bring about change through contributions and is optimistic about the future.

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