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Provocative, Human, Eclectic

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From the President

Our Judges

By Frank H. Wohl

This year seems to be a very good year for the federal courts of our circuit. Over the first 10 months of 2011, eight new Article III judges have been confirmed for the courts of the Second Circuit – Circuit Judge Susan L. Carney of the Court of Appeals; District Judges Vincent L. Briccetti, J. Paul Oetken, Paul A. Engelmayer, Katherine B. Forrest and Alison J. Nathan of the Southern District of New York; Judge William F. Kuntz, II, of the Eastern District of New York; and Judge Mae A. D'Agostino of the Northern District of New York. These new judges comprise the largest contingent of new judges in this circuit since 1994. Still, however, the circuit has 10 vacancies, down from 14 vacancies in May of this year. While vacancies remain, we are fortunate that many senior judges continue to share the load.

We are especially fortunate in the varied professional backgrounds of our eight new judges. They come from high levels of private law practice, business, government service and academia. Together with their distinguished colleagues already on the bench, these new judges reflect the best of our profession.

And that is as it should be. Their job is hard. Federal judges decide the most difficult problems that our culture can generate. The rights they are entrusted to protect are among our most precious, and the property involved in the cases they decide is often our most valuable. Their decisions directly affect the litigants before them, sometimes even to the point of life and death. Often their decisions have significant ramifications far beyond their courtrooms.

Their job is also lonely. With limited review, judges are responsive mostly to themselves, not to voters and constituents. They cannot find the answers in public opinion polls or by conferring with party leaders, or lobbying groups. Their opinions are not the product of committees but rather their own scholarship and introspection. In Tony Kushner's words,

> It's the judge in his or her chambers, weighing, books open, pondering the evidence, ranging freely over categories: good, evil, innocent, guilty; the judge in the chamber of circumspection, not the judge on the bench with the gavel.

Angels in America, Part One: Millennium Approaches, Act 1, Scene 8.

While judges may be aware of public opinion, their independence, enshrined in Article III's provision of life tenure, requires them to adhere to the law and the facts as they find them, often despite popular views. As Andrew Jackson said, "All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary." Letter from Andrew Jackson to Andrew Jackson Donelson (July 5, 1822).

It seems at least somewhat ironic that the judicial branch, which is least responsive to public opinion, receives the highest public approval ratings of all branches of government. In a recent Gallup poll, when asked to rate their trust and confidence in the three branches of government, 66 percent of the responders indicated a great deal or a fair amount of trust and confidence in the judiciary. Corresponding results were 49 percent for the executive branch and 36 percent for the legislative branch.

Judicial Compensation

Given the importance of the judiciary to our constitutional democracy and the public respect in which it is held, the poor financial treatment of the judiciary is indeed strange. Chief Justice Roberts dedicated his entire 2006 Year-End Report on the Federal Judiciary (and part of his 2008 Year-End Report) to the issue of judicial compensation. The Chief Justice observed that while judges "willingly make substantial sacrifices in support of public service," they are "being asked to bear unreasonable burdens." 2006 Year-End Report at 5-6.

Today, a district judge earns an annual salary of $174,000 and a circuit judge earns $184,500. In real purchasing power, these figures represent a 24 percent decline over the last 40 years. CRS

Report for Congress, Judicial Salary: Current Issues and Options for Congress, September 16, 2008 at 22 (the "CRS Report"). As we all know, these figures place federal judges' salaries below the earnings of junior associates in many large law firms.

During his Senate confirmation hearing, Chief Justice Roberts compared judges to baseball umpires, calling balls and strikes. Interestingly, a Major League Baseball umpire earned on average $21,000 in 1970 (approximately $118,000 in today's dollars), while an umpire today can earn more than $300,000, a 250 percent increase. Forty years ago, top law school deans earned about the same as district court judges, approximately $40,000 ($238,000 in today's dollars). Today, a dean at a top law school earns approximately $430,000, an 80 percent increase compared to the 24 percent decline seen by federal judges. CRS Report at 24.

Chief Justice Roberts' position has not gone unchallenged. Judge Posner of the Seventh Circuit and others have responded with an economic analysis, arguing that the current salary level allows the judiciary to attract and retain enough qualified judges. *See generally* Richard A. Posner, How Judges Think (2008); Richard Posner, *Judicial Salaries*, The Becker-Posner Blog, (Mar. 18, 2007, 8:42 PM), http://www.becker-posner-blog.com/2007/03/judicial-salaries--posner.html; *see also* Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Are Judges Overpaid?: A Skeptical Response to the Judicial Salary Debate*, 1 J. Legal Analysis 1 (2009); Albert Yoon, *Love's Labor's Lost? Judicial Tenure Among Federal Court Judges: 1945-2000*, 91 Calif. L. Rev. 1029 (2003).

In my view, this simple supply-and-demand analysis overlooks the importance of a strong and independent judiciary. We have a strong societal interest in making sure that our judges are treated commensurately with the importance of their function in our constitutional framework. While we are indeed fortunate that we have devoted jurists with the skill and dedication to fulfill the important responsibility entrusted to them, our society should not engage in some form of "price discovery" designed to determine the minimum wage at which the judicial branch may be able to function.

The Ethics Reform Act of 1989 was supposed to take a step toward solving this problem. It gave the federal judiciary a 33 percent pay increase over a two-year period – the first since 1969 – and provided that federal judges should receive an automatic cost-of-living salary adjustment whenever federal civil servants receive a similar adjustment. Blake Denton, *The Federal Judiciary Salary Crisis*, 2 Drexel L. Rev. 152, 157 (2009). At the same time, the Act prohibited active judges from receiving honoraria, speaking or lecture fees, payments for articles, or other income earned except for teaching or writing books. The Act also imposed a dollar limit – 15 percent of a judge's salary – on the income a judge could earn through classroom teaching. *See* 5 U.S.C.A. App. 4 §§ 501-502.

Congress, however, has not fulfilled its promise. In seven of the last 18 years – 1994, 1995, 1996, 1997, 1999, 2007 and 2010 – Congress has denied annual cost-of-living increases to federal judges. *See* U.S. Courts, Federal Judicial Pay Increase Fact Sheet, available at http://www.uscourts.gov/JudgesAndJudgeships/JudicialCompensation/JudicialPayIncreaseFact.aspx. These denials mean that a district judge on the bench since 1993 has been deprived of a total of $283,100 in statutorily promised salary. *Id.*

Constitutional Concerns

These denials of cost-of-living increases raise constitutional concerns. The Compensation Clause in Article III prohibits reduction of judges' salaries. The Framers recognized that a failure to adjust judicial salaries could accomplish an unconstitutional diminution. Alexander Hamilton wrote in Federalist No. 79:

> It would readily be understood that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant today might in half a century become penurious and inadequate.

See American College of Trial Lawyers, *Judicial Compensa-*

tion: Our Federal Judges Must be Fairly Paid, at 2 (March 2007).

Congress's repeated denials of cost-of-living increases have caused some judges to seek redress in federal court. In 1997, a group of federal judges filed suit alleging that Congress's legislation divesting judges of the salary increases promised under the Ethics Reform Act was unconstitutional under the Compensation Clause. *See Williams v. United States*, 48 F. Supp. 2d 52 (D.D.C. 1999), *rev'd* 240 F.3d 1019 (Fed. Cir. 2001). The judges won in the district court, but that decision was reversed on appeal by a split decision. In the Supreme Court, the judges fell one vote short of obtaining certiorari. *See Williams v. United States*, 535 U.S. 911, 911 (2002). More recently, a group of current and former federal judges brought a case under the Tucker Act, 28 U.S.C. § 1491, alleging that Congress violated the Compensation Clause by withholding the salary adjustments established by the Ethics Reform Act and by improperly calculating salary adjustments without reference to other wrongfully withheld salary adjustments. *See* Petition for Writ of Certiorari, *Beer v. United States*, 09-1395 at 13. The Federal Circuit declined to hear the case on the merits, citing the earlier decision in *Williams*.

Possible Solutions

Several possible solutions to this problem come to mind. At the very least, Congress should fulfill its promise under the Ethics Reform Act by approving cost-of-living increases for members of the judiciary. I recognize that we are living in fiscally challenging times, but the promised cost-of-living adjustments for the judiciary would be insignificant compared to other items in the federal budget. Moreover, even in the 1990s, when the federal government was fiscally strong, running a surplus in 1999, Congress several times declined to grant judges cost-of-living increases. Congress cannot credibly use the budget as an excuse now.

Another simple step in the right direction would be for Congress to enact locality pay differentials. Most other federal employees, including Department of Justice attorneys and judicial law clerks, receive locality pay differentials. Because the cost of living in the New York City metropolitan area is more than double the national average, a judge in New York effectively earns half of what his or her counterpart earns elsewhere.

A pay differential among federal judges in different districts or circuits is not a strange idea. Federal judges have not always earned the same pay throughout the country. Before 1891, judicial salaries varied according to estimated caseloads around the country. I suspect judges in our circuit would benefit from such a system, since our courts consistently maintain some of the highest caseloads in the country.

Congress might also benefit by reviewing the recent process involving judicial salaries in the New York State system. After years of litigation, the New York Court of Appeals struck down the state legislature's insistence that judicial salaries be linked to salaries of legislators, a circumstance similar to the congressionally-imposed parity between the salaries of federal judges and members of Congress. The Court of Appeals' ruling led to the creation of the Commission on Judicial Pay, which in turn recommended pay increases for judges. While the salary increases resulting from the Commission's work do not please everyone, it is undeniable that the process broke a longstanding stalemate and caused the issue of judicial salaries to become the subject of serious analysis and deliberations.

Throughout my career, I have often contemplated how fortunate we are that so many highly qualified lawyers serve as federal judges. Alexander Hamilton and the other Framers recognized, however, that the independence of our federal judiciary depends on protection against financial abuse. The judiciary's ability to advocate for itself is limited. It falls to the organized Bar to continue to encourage other branches of government to protect and preserve our independent judiciary. I join the call of past presidents of the Council in asking our members to urge members of Congress to treat our judiciary fairly.

Editor's note: Michael Longyear and Joseph Patrice, associates at the author's firm, assisted in the preparation of this column.

From the Editor

Judge McBryde, Once Again

By Bennette D. Kramer

Imagine my surprise when I received a call recently from a lawyer in Texas who wanted to talk about an April 2000 article I had written for the *Federal Bar Council News* (as this publication then was called). The article, entitled "Judicial Sanctions: The Saga of Judge McBryde" and available on the Federal Bar Council Web site, related the story of U.S. District Court Judge John L. McBryde of the Northern District of Texas, who frequently had sanctioned attorneys appearing before him, including the caller, Claude D. Brown, a former Assistant U.S. Attorney. Brown wanted to let me know that the Fifth Circuit had exonerated him and that Judge McBryde still was imposing sanctions on attorneys and litigants he perceived were violating court or chambers rules or lying to the court.

After my conversation with Claude Brown, I started thinking about readers of articles in the *Federal Bar Council Quarterly* (as this publication is now known). From time to time, someone will come up to me and say that she or he enjoyed a particular article or issue, but these are people I know and the exchange often occurs as a result of a chance encounter. Brown, in contrast, found the article about Judge McBryde through a Google search, which led to my firm's Web site. It had never occurred to me that the *Federal Bar Council Quarterly* had readers outside of the Federal Bar Council community. I must say, I was touched and pleased that Brown not only had read my article, but had reached out to talk to me. And I decided to take another look at Judge McBryde.

Sanctions Imposed

Brown had represented the government in a prisoner Federal Tort Claims Act case arising from injuries suffered during a prison softball game. Judge McBryde imposed sanctions against Brown and fellow Assistant U.S. Attorney R. Wayne Hughes because they did not propose a specific settlement number during a settlement conference. Judge McBryde found that, as a result, the government lawyers did not participate in settlement negotiations in good faith. While the underlying action was dismissed for lack of prosecution on March 23, 1993, the sanctions proceedings continued until Judge McBryde imposed sanctions in July 1994. Judge McBryde issued a 33 page

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opinion imposing a strong reprimand on Hughes and requiring him to attend a 15 hour course on ethical responsibilities. "The court found Brown's conduct less serious; but, because he joined in 'the charade that appears to have been orchestrated by Hughes at the two settlement conferences', the court found that he should be sanctioned by 'a strong reprimand that his conduct in relation to the settlement negotiations in this case was highly inappropriate and unacceptable.'" *Dawson v. United States and R. Wayne Hughes and Claude D. Brown*, 68 F.3d 886, 894 (5th Cir. 1995). The Fifth Circuit reversed Judge McBryde's findings and conclusions of bad faith and vacated the order imposing sanctions. *Id.* At 898. However, Messrs. Brown and Hughes were under the cloud of sanctions and allegations of unethical behavior for two and a half years, not to mention what the whole proceeding cost the government.

In my April 2000 article, I described the report of the Special Committee of the Fifth Circuit Judicial Council, which issued an order on December 31, 1997, publicly reprimanding Judge McBryde and ordering that he be assigned no new cases for a year and that for three years he not participate in any cases involving attorneys who had testified during the Special Committee's investigation. Judge McBryde challenged the order in the District Court for the District of Columbia, which upheld the Special Committee's report in a decision in December 1999 (also discussed in my prior article).

Judge McBryde appealed to the Court of Appeals for the District of Columbia, which affirmed the district court in an opinion issued on September 21, 2001. The circuit panel dismissed as moot the appeal of the suspension from taking new cases for a year and the three year prohibition from hearing cases involving attorneys who had participated in the investigation because those suspensions were finished. The circuit court affirmed the reprimand, considering each of the arguments raised by Judge McBryde and reaching the same conclusions as the district court.

Two cases provide a footnote to the Special Committee's investigation. In both, *United States v. Anderson* and *United States v. Avilez-Reyes*, Judge McBryde denied motions by the defense seeking his recusal on the ground that the attorney in question had testified during the investigation. The Fifth Circuit vacated the sentences imposed by Judge McBryde and remanded both cases because of Judge McBryde's refusal to recuse himself.

Judge McBryde Today

You might ask what Judge McBryde is up to today. Well, it appears that he still is sanctioning parties and lawyers, and the judicial system still is trying to counteract the damage. Quite recently, Judge McBryde imposed sanctions in connection with a motion to recuse him from presiding over a case based on his behavior at a conference in a previous case involving the same parties. Judge McBryde contended that affidavits in support of the motion to recuse that described the conference at which they claimed that Judge McBryde had exhibited bias and prejudice were false statements and subject to sanctions. The judge held a two day hearing on the "disciplinary matter" and issued a 114 page memorandum opinion and order setting forth his commentary and conclusions on the sanctions he assessed. Judge McBryde found that the individual party had violated Rule 11 by preparing a declaration describing the conference with the court and committed perjury by testifying about it. He referred the individual to the U.S. Attorney for prosecution. *See In re Disciplinary and Sanction Proceedings against John P. Gillig, Tripple Tee Golf, Inc., S. Tracy Long, Melvin K. Silverman and Joseph F. Cleveland*, ___ F. Supp. 2d ___, Misc. Action No. 4:10-18, 2011 WL 3837053, *8 (N.D. Tx. Aug. 29, 2011).

Judge McBryde determined that one of the lawyers had acted unethically by submitting the declarations to the court and

(i) prohibited him permanently from seeking admission to the bar of the Northern District of Texas;
(ii) ordered him to attend 30 hours of ethics classes;
(iii) required him to send a copy of the order to the New Jersey state bar disciplinary authorities; and

(iv) ordered him to reimburse the court for half of the work performed by a lawyer hired by Judge McBryde in connection with the sanctions proceedings.

According to Judge McBryde, the other lawyer had violated Rule 11, and the judge imposed the following sanctions: "(i) prohibiting him from seeking admission to the bar of the Northern District of Texas for ten years; (ii) requiring him to attend thirty hours of ethics classes at an accredited law school; and (iii) requiring him to send a copy of the order to the Florida state bar disciplinary authorities." Judge McBryde also referred both lawyers to the U.S. Attorney for prosecution.

The third lawyer had been admitted to the Northern District of Texas and was attorney of record, so Judge McBryde suspended his membership in the Northern District of Texas bar for two years; required him to attend 30 hours of ethics courses; and ordered him to reimburse the other half of the fees incurred on behalf of Judge McBryde.

On appeal, the Fifth Circuit vacated and remanded the sanctions order and disqualified Judge McBryde from presiding over the sanctions proceeding on remand. After all the Northern District of Texas judges recused themselves on remand, Fifth Circuit Chief Judge Edith Jones assigned the case to Senior District Judge David Hittner from the Southern District of Texas. Judge Hittner determined that the respondents had "presented the pleadings for a proper purpose, with some evidentiary support, and after conducting an objectively reasonable prefiling inquiry," and, thus, the pleadings had not been improper. *Id.*, at *18. He found that the respondents had not violated Rule 11(b) or Rule 83.8(b) of the Northern District of Texas Local Rules. Judge Hittner then dismissed the disciplinary and sanctions proceeding as to all respondents, with prejudice.

Many thanks to Claude Brown for reaching out to me about Judge McBryde and letting me know that the judge is still imposing sanctions. Hearing about a judge like Judge McBryde makes us all grateful for all the thoughtful and courteous district judges we deal with on a daily basis. It is sobering to consider, however, that a judge like Judge McBryde can continue a practice of abusing litigants and parties for nearly 20 years. He has been the subject of numerous complaints by the bar and his fellow judges and critical decisions issued by the District of Columbia Circuit, the Fifth Circuit and the Judicial Council. Yet, he continues to refuse to recuse himself when he has exhibited clear bias, imposes unwarranted sanctions on attorneys and litigants and wastes huge amounts of government resources. One wonders what can be done about him; maybe at this point only impeachment would work.

From the Courts

Mission in Baghdad: Judge Gardephe in Iraq

By Steven M. Edwards and Collin J. Peng-Sue

Many lawyers think that being a federal judge is one of the most interesting jobs you could possibly have; after all, what most lawyers do is a lot of reading and writing. Not necessarily true for Southern District Judge Paul G. Gardephe. When he was a litigation partner at Patterson Belknap Webb & Tyler, Judge Gardephe had an experience that could easily be the subject of an action movie. The only open question is who should play the role of Judge Gardephe: Harrison Ford? George Clooney? Brad Pitt? Judge Gardephe declines to express a preference.

It all began in November 2006. Judge Gardephe, a former Assistant U.S. Attorney who also had spent six years in-house at Time Inc., was sitting at his desk reading and writing. The phone rang; it was David Tomlin, an in-house lawyer at the Associated Press. Judge Gardephe knew Tomlin from a trial advocacy course that Judge Gardephe had taught at New York Law School, which Tomlin had attended after a long career as an AP journalist and speech writer.

Tomlin asked Judge Gardephe whether he would be

willing to represent Bilal Hussein, an AP Pulitzer Prize-winning photojournalist who had been detained by the U.S. military in Iraq. Bilal was a "stringer," journalistic parlance for a local person who works for a national or international news organization. Bilal had been arrested in Ramadi, scene of some of the most intense fighting in the Iraqi conflict, on suspicion of having "crossed the line" between photojournalist and insurgency participant. The AP wanted a lawyer to investigate the facts and to represent Bilal in the event of legal proceedings in Iraq. Judge Gardephe agreed to take the case.

Factual Underpinnings

Bilal had grown up in Fallujah in Anbar province, a predominantly Sunni region west of Baghdad. In 2004, Fallujah was a hotbed of insurgent activity and the scene of an iconic photograph that depicted the bodies of contractors strung up over a bridge that appeared on the front pages of newspapers around the world. Bilal came from a prominent family in Fallujah and had been interested in photography since he was a young boy; he had an uncle with a darkroom who had trained him on an old camera. Bilal came to the attention of the AP as a result of assisting AP personnel in obtaining access to Fallujah during the summer of 2004, when the town was subject to aerial bombardment by Coalition Forces.

The AP initially hired Bilal to take photographs on a freelance basis and paid him $50 for each photograph that the AP decided to use. Bilal received training on what it means to be a photojournalist, including how to relate to subjects and the military and how to avoid becoming a participant in the underlying events. Bilal had natural talent as a photographer, and the AP decided to use so many of his photographs that it made sense to make him a salaried employee.

In early November 2004, Coalition Forces began preparations for a second invasion of Fallujah. The invasion was preceded by aerial bombardment, and many residents fled the city. Bilal, along with stringers working for Reuters and Agence France-Presse, decided to stay and record the events. Over three days of intense fighting, Bilal transmitted by satellite photographs of the fighting and its effects to the AP's Baghdad bureau. Bilal's photos included several close-ups of insurgents engaged in battle. One of these photographs was included in the AP's successful submission for the 2005 Pulitzer Prize in breaking news photography. After photographing the action, Bilal escaped from Fallujah by wading up the Euphrates River with the town completely encircled by troops.

The AP later assigned Bilal to Ramadi, another center of insurgent activity in Anbar province. One morning in April 2006, he went out to a bakery to buy bread. There was an explosion on the street and pandemonium ensued. He ran home and went back to sleep while he waited for the authorities to give the all clear. When he awoke, there were U.S. soldiers in his room searching his belongings. They found his archive of AP photographs, all of which were stored on discs. The photos included close-ups of masked, armed insurgents with various kinds of weapons. The soldiers decided to arrest Bilal on suspicion of aiding the insurgents. He was brought to a detention center in Ramadi, then to Abu Ghraib prison, and ultimately to Camp Cropper, a U.S. military base near the airport outside Baghdad.

Judge Gardephe is Retained

The AP initially hired a local Iraqi lawyer to represent Bilal. After several months of no progress, the AP reached out to Judge Gardephe. Together with Yassin El-Ayouty, a lawyer admitted in both Egypt and the U.S. who was fluent in Arabic and an expert in Islamic law, Judge Gardephe set about trying to learn the facts underlying Bilal's arrest.

Judge Gardephe and El-Ayouty spent a number of weeks conducting lengthy telephone calls with the local Iraqi lawyer in an attempt to gather the facts, without much success. In January 2007, both decided to travel to Iraq to conduct an investigation. They flew first to Amman, Jordan, where they met the local Iraqi lawyer. Over dinner, it became clear that the Iraqi lawyer knew little about the facts and saw his role as merely exploiting his relationship with the Iraqi ju-

diciary in the event that Bilal was transferred to Iraqi custody.

The next morning, Judge Gardephe and El-Ayouty flew to Baghdad on Royal Jordanian Airlines. The plane was filled with military contractors and was painted white with no markings, presumably to avoid attribution if the plane was shot down. The flight was harrowing, including a sudden descent directly into Baghdad's airport to avoid anti-aircraft fire. Judge Gardephe and El-Ayouty were met at the airport by the AP's security force, made up largely of former British special forces personnel. As they were walking through the airport's parking garage, a bomb exploded. Judge Gardephe and El-Ayouty got into an armored car for the trip to the AP's villa, which was located across the Tigris River from the Green Zone. The road from the airport was essentially a gauntlet with burned out vehicles resting on the side of the road. A foul smell permeated the air.

Welcome to Baghdad, Have a Nice Day

The AP villa was a large house located on a street where many of Baghdad's wealthy families once lived. Other major news organizations, such as the New York Times, the BBC and Reuters, also had villas on this street. Each villa had been converted into a fortress protected by walls made up of 14 foot concrete pillars. The AP's facility had machine gun emplacements at each corner, as well as on the roof. The AP's editors, reporters and photographers all ate and slept in the villa, and Judge Gardephe and El-Ayouty only ventured outside for trips to Camp Cropper, for meetings with witnesses and Iraqi government personnel, for court appearances and for meetings with local counsel. They always traveled in an armored vehicle accompanied by heavily armed security guards. According to Judge Gardephe, the scene was very similar to the depiction of Baghdad in "The Hurt Locker."

When Judge Gardephe arrived at the AP villa, there were a number of televisions that were tuned to the news. He looked up and thought he saw someone who resembled local counsel, with whom they had dined the previous night. El-Ayouty told Judge Gardephe that the local lawyer was holding a press conference to announce that he was seeking asylum in Jordan. So much for local counsel.

After a few days, Judge Gardephe was given access to his client at Camp Cropper, and he and El-Ayouty then interviewed Bilal for more than 40 hours over several days. Judge Gardephe and El-Ayouty then interviewed other witnesses, including Bilal's co-workers and supervisors at the AP, members of Bilal's family and journalists working for competing news organizations who had been active in Anbar province during the relevant time period. Judge Gardephe was able to construct a running account of Bilal's activities through a four inch thick binder of his photographs, all of which were dated and had captions. There was no evidence of insurgent activity in this comprehensive collection.

Judge Gardephe's military contacts at Camp Cropper were JAG officers, many of whom were Assistant U.S. Attorneys in civilian life. Judge Gardephe was able to capitalize on his experience as an Assistant U.S. Attorney to seek certain accommodations from the military, including the ability on some occasions, but not always, to meet with his client in private. There were constant changes in Judge Gardephe's contacts as the JAG officers finished their tours of duty or were reassigned.

The U.S. military had made a variety of allegations against Bilal, including association with known insurgents, dissemination of insurgent propaganda, having advance knowledge of insurgent attacks and possible involvement in the kidnapping of other journalists. Judge Gardephe presented the findings of his investigation to a JAG major, addressing each allegation in turn. The major conceded that there was no real evidence supporting most of the allegations against Bilal. As to two of the military's claims, however, the major asserted that he had seen evidence but could not share it with Judge Gardephe, because the evidence was classified. Judge Gardephe protested that he still had high level security clearances as a result of work for the Department of Justice that had continued until May 2003, but the major said that the evidence he had seen could not be disclosed.

Bilal Is Brought to Trial

After completing his investigation, Judge Gardephe returned to the U.S. and prepared a detailed report, which is still available on the Internet. In addition to discussing the lack of evidence to support the military's allegations, Judge Gardephe noted that the claims had changed over time, thus casting doubt on their credibility. He pursued multiple avenues for Bilal's release, including direct appeals to the Pentagon, and numerous media outlets published articles arguing that Bilal should be let go. None of those efforts proved successful.

In the summer of 2007, an officer was quoted in the press as saying that the U.S. military had decided to transfer Bilal to Iraqi custody. By that time, Bilal had been held in custody, without charges, for more than 15 months. While many Iraqi stringers working as photographers and video cameramen for news organizations in Anbar province had been detained by the U.S. military, none had been detained as long as Bilal.

The U.S. military ultimately informed Judge Gardephe that Bilal would be tried by an Iraqi court. Judge Gardephe decided to return to Iraq and immediately began to prepare for trial, studying the Iraqi rules of criminal procedure, which had been amended after the invasion of Iraq to include many of the key elements of due process.

Trial In Baghdad

The trial was held in the Central Criminal Court of Iraq, which was located in what had been one of Saddam Hussein's war museums. In the halls of the court, there were far more U.S. soldiers and contractors than judges and lawyers. Judge Gardephe learned that there would be a two stage process. First, there would be an evidentiary proceeding before a single judge to determine whether there was sufficient evidence to charge Bilal. The standard for that determination was not clear. In the event that the investigating judge found sufficient evidence, Bilal's case would be heard by a three judge panel. Judge Gardephe and El-Ayouty set out to find new local counsel, settling on a tribal leader who also claimed to have good connections with the judiciary.

The trial took place in a small conference room. The participants included members of the U.S. military. Various contractors and translators were also present. Judge Gardephe and El-Ayouty appeared for Bilal, who was not allowed to attend most of the trial. Local counsel arrived about two hours after the proceedings began but said nothing. There was no Iraqi prosecutor; the representatives of the U.S. military served that function. Testimony was offered and various documents, none of which was shared with the defense, were presented to the court. The presiding judge conducted the proceedings with a copy of the Koran close at hand. There was no verbatim transcript. The judge's veiled female clerk took notes in longhand, some of which were dictated by the judge.

Many rights that we would consider fundamental to due process, such as disclosure of evidence at trial and the right to confront witnesses, were not observed. The judge permitted the defense to ask witnesses only a single question on cross-examination. Bilal appeared only for purposes of questioning by the judge. The judge's questioning of Bilal began with a stern warning: "I shall know when you are lying."

The judge was extremely hostile to Judge Gardephe and the defense from the outset, and appeared concerned that Judge Gardephe intended to disrupt the proceedings. At one point, Judge Gardephe asked to see a photograph that the judge was using in questioning Bilal. This request infuriated the judge, who then announced that Judge Gardephe would be barred from the proceedings. It was only at the urging of the U.S. military that the judge relented and permitted him to stay.

In his questioning of Bilal, the judge focused on why his photographs were so negative. The judge made the point that the Iraqi government was attempting to rebuild the country, and Bilal's photographs showed only death and destruction. In the judge's view, these photos, which had been transmitted and published all over the world, hurt Iraq. It became obvious that the values

embodied in the First Amendment, including the belief that the press serves an important function in disseminating information, were not shared by the judge. What we view as freedom of the press and the dissemination of truthful images, the judge saw as propaganda that aided the insurgency.

At the end of the day, the judge announced that the trial was over and there was sufficient evidence to move to the next stage of the process. Judge Gardephe protested that he had not been permitted to put on any evidence. The judge indicated that this would not be necessary.

The next day, during a visit with his client at Camp Cropper, Judge Gardephe complained to a JAG officer that he had not been given access to the proof against his client or an opportunity to put on evidence in his defense. The JAG officer agreed to look into this, and subsequently informed Judge Gardephe that the Iraqi judge would be happy to hear any evidence he wanted to offer. Judge Gardephe, El-Ayouty and the judge also shared a meal together, which seemed to clear the air, at least temporarily.

Before the second day of trial, however, CNN issued a story in Arabic about the case in which the judge's name was used. The judge was infuriated by the article, which he believed presented a risk to his personal safety. Although Judge Gardephe had nothing to do with CNN's release of the article, his name was mentioned in it. In the judge's view, because Judge Gardephe's name was mentioned in the article, he was responsible for its contents. According to El-Ayouty, the judge seriously considered having Judge Gardephe arrested. Judge Gardephe hunkered down and prepared for the second day of trial by obtaining affidavits from all of the defense witnesses so that there would be an accurate record of their testimony. The affidavits and the testimony went in, but had no effect on the outcome. The judge subsequently prepared two sets of charges against Bilal, and the case proceeded to the second stage.

Justice Iraqi Style: Bilal Is Released

In preparation for the hearing before the three judge panel, Judge Gardephe and El-Ayouty appeared before the panel's presiding judge. Judge Gardephe complained that it was very difficult to represent Bilal effectively without access to the court file or any of the evidence offered against him. The presiding judge agreed to make the court file available to the defense the next morning.

When Judge Gardephe and El-Ayouty returned to court the next day to review the court file, the presiding judge provided the materials and asked whether they had applied for amnesty for Bilal, pursuant to a program that the Iraqi legislature had enacted earlier that year. Judge Gardephe said he had applied for amnesty but was not holding his breath. He also noted that the U.S. military had indicated that no matter what happened during the Iraqi criminal justice process, Bilal might still be detained.

The presiding judge encouraged Judge Gardephe and El-Ayouty to pursue the amnesty process and suggested that the court file be transmitted to the amnesty committee, which consisted of a number of Iraqi judges from all levels of the court system. Judge Gardephe agreed with that approach. The forces of Muqtada al-Sadr then mounted an attack on the Iraqi government, during which everything ground to a halt. Sadrist forces in Sadr City, located behind the neighborhood in which the AP villa was located, began lobbing rockets and missiles into the Green Zone. Many of the mortars and rockets missed their target, landing on the AP's side of the Tigris River. The AP issued helmets and flak jackets to everyone at the villa.

The amnesty committee ultimately issued two decisions granting amnesty to Bilal on all of the charges issued by the investigating judge. Judge Gardephe immediately informed the JAG officer with whom he had been dealing of the amnesty committee's decisions, and asked whether the U.S. military was going to continue to hold his client. The next day, the JAG officer called Judge Gardephe and told him to make arrangements to pick up his client. Bilal was released from Camp Cropper after two years of imprisonment. After a celebration at the AP villa, Bilal was whisked

out of the country to another location, where he lives today. Bilal is now married, has two children and he still works for the AP.

Lawyers' Skills

There are many morals to the story. One of them is that the skills of good lawyers can be effective in any context, especially if those lawyers are persistent. Another is that media outlets like the AP are willing to stand by their people.

We asked Judge Gardephe whether he was concerned about his physical safety, and he responded that he is pretty fatalistic and was not about to miss out on an exciting and interesting case. He described the experience of being in Iraq as "surreal," with hordes of military contractors and security checkpoints at every turn manned by heavily armed people from countries all over the world, as well as some of uncertain provenance. Judge Gardephe and El-Ayouty were just lawyers wearing their flak jackets, trying to do their job.

In the Courts

Raymond Lohier, Jr., Appointed to the Second Circuit

By Robin Nunn

On December 19, 2010, the U.S. Senate confirmed Raymond Lohier, Jr., by a vote of 92-0 for a seat on the U.S. Court of Appeals for the Second Circuit. Judge Lohier received his commission on December 21, 2010, and was sworn in at a ceremony on January 3, 2011. Second Circuit Chief Judge Dennis Jacobs administered the oath at the Daniel Patrick Moynihan U.S. District Courthouse in Manhattan, where the circuit court currently sits. Judge Lohier filled the vacancy created when Justice Sonia Sotomayor was elevated to the U.S. Supreme Court.

"A Wonderful Life"

Judge Lohier was born in 1965 in Montreal, Canada, to Haitian parents, and is the first lawyer in his family. He is the 69th judge appointed to the Second Circuit, and the circuit court's fifth African-American judge, following Thurgood Marshall, Amalya Kearse, Lawrence Pierce and Barrington Parker, Jr.

Judge Lohier's personal mission has always been "service," he said in a recent interview, recognizing very early in his legal career that he wanted to dedicate his life to serving the public. "One of my favorite movies is 'It's a Wonderful Life,'" Judge Lohier said, which he believes reaffirms the importance of helping others, and the profound and lasting impact that good deeds produce.

From 1992 to 1993, Judge Lohier was a law clerk to Judge Robert P. Patterson, Jr., of the U.S. District Court for the Southern District of New York. The clerkship initiated the beginning of a 19 year relationship between Judge Lohier and Judge Patterson, first as protégé and mentor, and then as prosecutor and judge in the same court. In many ways, their relationship shaped Judge Lohier's career and led to his own nomination to the Second Circuit.

"I never made a move without talking with him," he said. Although Judge Lohier acknowledges many other mentors, Judge Patterson has played a variety of critical roles in Judge Lohier's life: guide, role model, supporter and critic. A photograph of Judge Patterson hangs in Judge Lohier's chambers. During his clerkship, Judge Lohier witnessed Judge Patterson's dedication to public service, great intellect and high standard of excellence. The photograph serves not only as a picture but as an object of admiration. "Judge Patterson is the hardest working judge you will ever meet," Judge Lohier said. Judge Patterson's dedication may reflect his own father's influence. Robert P. Patterson, Sr., was a judge on the Second Circuit, as well as the U.S. District Court for the Southern District of New York. On the Second Circuit, Judge Patterson Sr. sat with legendary judges Learned Hand, Augustus Hand and Thomas Walter Swan. During his legal career, Judge Patterson Sr. participated in the desegregation of the armed forces, and the creation of the African-American fighter group known as the Tuskegee airmen.

Prior to his clerkship, Judge Lohier graduated *cum laude* from

Harvard College in 1988 and earned his J.D. in 1991 from New York University School of Law, where he was Editor-in-Chief of the Annual Survey of American Law and recipient of the Vanderbilt Medal. After graduating, Judge Lohier was an associate at Cleary, Gottlieb, Steen & Hamilton in New York from 1991 to 1992. He returned to Cleary after his clerkship from 1993 to 1997. In private practice, Judge Lohier specialized in commercial litigation and *pro bono* matters.

From 1997 to 2000, Judge Lohier served in the Department of Justice in the Civil Rights Division's Employment Litigation Section, first as a Trial Attorney and then as a Senior Trial Attorney. While at the Justice Department, he directed and participated in investigations, litigation and trials involving alleged Title VII violations by public entities. In 2000, Judge Lohier received the Attorney General's Award for Outstanding Legal Achievement in recognition of his exceptional work as a litigator.

After working at the Department of Justice, Judge Lohier spent 10 years as an Assistant U.S. Attorney in the Southern District of New York. At the U.S. Attorney's office, Judge Lohier supervised several major investigations and prosecuted high profile, complex criminal cases. He was Deputy Chief and then Chief of the Securities and Commodities Fraud Task Force, investigating and prosecuting some of the highest profile offenses on Wall Street, including those involving securities fraud, insider trading, Ponzi schemes and commodities fraud. Judge Lohier successfully prosecuted Marc Dreier, who defrauded investors of approximately $400 million from investors. Dreier was convicted and sentenced to a 20 year prison term. Judge Lohier also helped to oversee the Bernard Madoff and Galleon insider trading investigations and prosecutions.

Judge Lohier also supervised the investigation and prosecution of most of the federal domestic narcotics cases in the Southern District of New York as Deputy Chief and then Chief of the Narcotics Unit. His responsibilities included coordinating investigations and prosecutions with other government agencies, including the Drug Enforcement Administration, the Department of Homeland Security, the Federal Bureau of Investigation and the New York City Police Department. Judge Lohier also prosecuted individuals for immigration-related offenses. In 2010, Judge Lohier was appointed Special Counsel to the U.S. Attorney for the Southern District of New York.

"Exceptional Choice"

Recognizing Judge Lohier's commitment to justice and extensive experience, New York Senator Charles E. Schumer stated, "[i]t is rare to find a candidate with both the raw intelligence and the practical experience of [Judge Lohier]." Senator Schumer also called Judge Lohier an "exceptional choice" for the Court of Appeals for the Second Circuit: "His outstanding leadership skills, his intellect, his commitment to justice, his deep connections to Brooklyn and his extensive experience make him an exceptional choice for a position on the United States Court of Appeals for the Second Circuit."

Judge Lohier has dedicated significant time to community service as well. He has been a member of the National Bar Association, the National Black Prosecutors Association and the Association of the Bar of the City of New York, where he has participated on various committees. He received the Distinguished Service Award of the Black, Latin, Asian Pacific American Law Alumni Association in 2008. In 1991 and 1992, Judge Lohier was a staff member of the New York State Gubernatorial Task Force, which reviewed whether that state's method of selecting judges violated the Voting Rights Act.

From 2006 until his appointment to the bench, Judge Lohier served on Brooklyn Community Board 6, the official municipal body that advises elected officials and government agencies on matters affecting the district. He also was a member of the Board for the Friends of the Brooklyn Community Board 6, a registered nonprofit organization established to support the municipal body.

Judge Lohier is a member of the Board of Directors for the New York University Law School Alumni Association. He also frequently teaches CLE programs on securities fraud, includ-

ing those sponsored by the United State Securities and Exchange Commission, the New York Lawyers Association and the New York City Bar Association.

Although Judge Lohier is well known in legal circles for his sharp legal mind, even temperament and outstanding trial skills, he has enormous pride in his family. He lives in Brooklyn with his wife, Donna Hae Kyun Lee, a law professor at City University of New York School of Law, and their two sons.

He enjoys playing soccer with his kids and listening to them play musical instruments, and acknowledges that he is fortunate to have both a family and career.

Judge Lohier's life is devoted to commitment to public service and goodness. "It's a Wonderful Life" comes to mind again.

Focus On:

Judge Gerald Lynch

By Lisa Fried and Pete Eikenberry

Judge Gerard E. Lynch is two years into his tenure on the Second Circuit Court of Appeals; he served in the District Court for the Southern District before being elevated in 2009. We recently spoke with Judge Lynch about his experiences on these courts.

Early Influences

Invoking a theme he would return to when describing various points in his career, Judge Lynch recalled that at his Catholic high school, humility was preached as a "major virtue." Following law school, Judge Lynch's first "real job" was clerking for Judge Wilfred Feinberg of the Second Circuit. (Judge Lynch would go on to clerk for U.S. Supreme Court Justice William J. Brennan, Jr., before teaching at Columbia and practicing criminal law as both a prosecutor and a defense attorney.)

Judge Lynch said he did not think he could have had a finer role model than Judge Feinberg, whom he described as "a man who has no ego." He recalled Judge Feinberg saying, "We're just trying to get this right," describing him as a jurist who always was prepared to change his mind if somebody persuaded him that he was incorrect. Judge Lynch said Judge Feinberg was "very meticulous" and interested in shortening opinions. He "didn't believe in grand pronouncements."

Judge Lynch recalled Judge Feinberg's "ritual" when an opinion they were drafting was nearly complete: Judge Feinberg would ask why the opinion did not include a citation for a particular proposition. Judge Lynch might respond, "It's common sense." But often Judge Feinberg's next step would be to eliminate the passage altogether, concluding that it need not be said.

Judge Lynch also was struck by the fact that Judge Feinberg was cautious about being critical of lawyers. Judge Feinberg might criticize an advocate during oral argument, but he would only commit criticism to print in an opinion – something that had the potential to affect an attorney's reputation – in very extraordinary circumstances.

Looking back on those days from his current position, Judge Lynch said it is challenging to be as meticulous as Judge Feinberg was, given the time constraints of modern legal practice. "I tell my law clerks there is a balance to strive for," he said. Their goal is perfection, but another goal is getting a decision out in a reasonable amount of time.

The Two Courts

Following his appointment to the Second Circuit, Judge Lynch recalls a colleague saying to him, "Congratulations, you've now become one third of a judge!" The statement rang true. Judge Lynch recalls having "enormous" authority and responsibility as a district court judge, but as a judge serving on the court of appeals, in contrast, Judge Lynch appreciates that "you can't do much more than get an extension of time" without getting at least one more judge's vote.

So he had to return to being an advocate, which he enjoys. But he notes that it is a "very specialized kind of advocacy. You are speaking to somebody who already has had a very good lawyer write a very good brief. So the question is, 'What can I do to try to persuade somebody in just a few minutes or in just a short memo?'" Serving as one member of a panel of three has also required Judge

Lynch to consider, "What if I'm wrong?" As a district court judge, he observed, you do not have the check of two other judges on you, which can and does give rise to "a direct challenge to your thinking that you have to take very seriously." On balance, Judge Lynch is convinced that "three heads are better than one. It is quite common that one of my colleagues sees something that I did not see." He recalled that, at the trial court level, "there is often a lot of initially figuring out what the issue is." At the appellate level, the issues tend to get posed in a clearer and more refined fashion. In the district court, "there is only one shooting position, from the hip." At the appellate level, there is more time to reflect.

Judge Lynch still is struck by how often decisions come down to "a matter of judgment." He notes that that is the case because the law often poses questions such as, "What is reasonable?" Judges are able to refer to precedents that are benchmarks, but the precedents rarely dictate a "clean," mechanically-reached outcome. Much of the law falls into this category, in Judge Lynch's view. What judges do "doesn't always involve major clashes of principle. More often, precedents can be read one way or another," and he and his colleagues are required to exercise judgment because neither potential outcome can be ruled out altogether. "There are an awful lot of cases that are difficult to decide," he said. "The cases that are easy get decided in your office."

As somebody who tends to focus intensely on the matter at hand but not necessarily recall in encyclopedic detail cases over which he presided in the past, Judge Lynch says that one of his biggest challenges is effectively preparing for the weeks when he is sitting at the court of appeals. Ideally he will receive the briefs for a week's worth of appeals – 30 cases – six weeks before oral argument. Striking a balance is difficult: "You cannot let the reading drift until the last minute and need to start early, but you will have read a fifth of the cases five weeks ago." Judge Lynch said he prepares for oral argument in two or three phases. He initially reads the briefs and then convenes a series of sessions a week before the sitting with his law clerks. He prepares again the night before oral argument. Overall, he has found the work to be "great fun."

Judge Lynch does, however, miss the rhythms and relationships of life in the district court. As a trial judge, he had the opportunity to develop relationships and have daily interactions with counsel, other court employees and potential jurors. During the many pockets of downtime that punctuated the multiple matters over which he presided each day, he had an opportunity to "schmooze – one of the things I love about the courthouse culture" – which is less common in the more formal environment at the court of appeals. Judge Lynch misses the day-to-day contact he had with those who came through his courtroom. He recalls "meeting people from all walks of life, people I otherwise would have seen but not necessarily engaged with."

Although "just keeping up with Second Circuit slip opinions is a significant job," Judge Lynch manages to indulge what he describes as his eclectic taste in pleasure reading. Over the summer, he enjoyed David Foster Wallace's *Infinite Jest* on his Kindle.

Summing up the ways in which his current mission differs from the one he had in the district court, Judge Lynch observed that, as an appellate judge, "you are there not to solve the case; you are there to answer the question." As somebody who by his own admission "like[s] people to give me an assignment, to bring me a problem," Judge Lynch appears to be enjoying his latest role very much.

In the Courts

District Court Judge Vincent L. Briccetti

By Russell Yankwitt

On November 17, 2010, President Obama nominated Vincent L. Briccetti to the seat on the U.S. District Court for the Southern District of New York vacated by Judge Kimba Wood, who had taken senior status. Judge Briccetti received a rating of "Unanimously Well Qualified" from the American Bar Association, and was confirmed by unanimous consent on April 12, 2011. Judge Briccetti has the privilege and

pleasure of sitting in the White Plains courthouse.

Background

Born and raised in Mt. Kisco, Judge Briccetti is a graduate of Columbia University and Fordham Law School. At Fordham, he was Articles Editor of the Law Review. Upon graduation, he served as a law clerk to the Honorable John M. Cannella, U.S. District Judge for the Southern District of New York. With the exception of college and law school, Judge Briccetti has lived in Westchester his entire life.

After two years in private practice, Judge Briccetti served as an Assistant U.S. Attorney in the Southern District of New York from 1985 to 1989. During his nearly five years as a federal prosecutor, he investigated hundreds of cases and tried approximately 25. Judge Briccetti comments that during those years he felt as if he was working for the best law firm in America. He regularly reflects on the joy and excitement of working with those extraordinary lawyers and people. Before leaving the office, he was promoted to Deputy Chief Appellate Attorney. During his last trial for the government, his co-counsel was a newly-minted Assistant U.S. Attorney, Stephen C. Robinson, who recently joined Skadden, Arps, Slate, Meagher & Flom, in New York City, after serving for seven years as a district judge in White Plains.

In 1989, Judge Briccetti returned to private practice, at the firm of Paul Hastings. In 1992, he formed his own firm in White Plains, most recently known as Briccetti, Calhoun & Lawrence, which became a well-known criminal defense firm. He also tried civil cases and argued numerous appeals. During his illustrious career as a trial lawyer, Judge Briccetti handled cases charging mail, wire, tax and bank fraud, as well as public corruption, embezzlement, criminal antitrust, identity theft and narcotics trafficking.

In addition, Judge Briccetti served for 18 years as a member of the Criminal Justice Act panel in White Plains, handling numerous cases as court-appointed counsel for indigent criminal defendants. He is perhaps best known for his representation of an alleged terrorist in a difficult and highly publicized case, while simultaneously negotiating the confirmation process.

Judge Briccetti also was active in civic affairs and bar associations. He is very likely the only federal judge in the nation who spent 10 years as the commissioner of a local water board. He also served as a member of the Board of Directors of the Federal Defenders of New York from its inception until his appointment to the bench.

Lessons Learned

Judge Briccetti fondly recalls his days clerking for Judge Cannella. Now, as a federal judge himself, he often thinks about the lessons he learned in those two years. Judge Briccetti took to heart Judge Cannella's oft-repeated remark that for the litigants involved, their case is the single most important thing in their lives. This lesson, learned more than 30 years ago, has been Judge Briccetti's guiding principle as a prosecutor and private practioner and now as a judge. Of course, some cases take more time than others, and some might be of greater public interest, but Judge Briccetti affords every case and every litigant the same careful thought and attention. As a judge, he recognizes that every litigant must feel his or her case is being taken seriously and being given a fair hearing. In fond remembrance of his former mentor, Judge Briccetti had the desk he once used as a law clerk transported to his chambers.

Judge Briccetti also has incorporated into his judicial philosophy lessons learned from private practice. He understands the pressures and demands of working at small firms, which he takes into account when setting deadlines and deciding whether to grant extensions or adjournments. He is sensitive to the needs of the typical "working stiff" lawyer and says: "I was one of them for 20 years – I am acutely aware of their needs." In six months on the bench, he has garnered a reputation for being reasonable, compassionate and fair to plaintiffs and defendants alike. At the same time, he is determined that every case be resolved as expeditiously and inexpensively as possible.

Judge Briccetti has proven

Senator Charles Schumer correct: "Vincent Briccetti has had a varied and distinguished career in the law and public service on behalf of the people of New York and the nation. He is universally respected by his peers in the legal community due to his sharp mind and exemplary professionalism. His outstanding leadership, his intellect, his commitment to justice, his deep connections to New York and his extensive experience make him an exceptional choice as a federal judge in the Southern District."

Judge Briccetti affords every case and every litigant the same careful thought and attention.

The White Plains Courthouse

During the nomination process, Judge Briccetti said that if he were fortunate enough to be confirmed, he hoped to be assigned to the White Plains courthouse. In addition to being born in Westchester and having practiced law in White Plains for almost 20 years, Judge Briccetti always enjoyed appearing before the White Plains federal judges. Judge Briccetti comments that his cases are every bit as sophisticated and challenging as cases at the courthouse in Manhattan, and that he enjoys working in a place where even before his appointment he knew the names of the marshals, court security officers, courthouse staff and many of the lawyers who now appear before him on a regular basis. In contrast to the sister courthouse at 500 Pearl Street, where judges might be surprised when they see the same lawyer twice, the judges in White Plains are surprised when they do not.

Judge Briccetti adds that one of the great things about working in White Plains is the extraordinary contributions of the three magistrate judges who each carry a heavy caseload, try many cases a year on consent and most importantly are wonderful people with whom to work. Friday lunches with the three district judges, three magistrate judges and one bankruptcy judge are always a highlight of his week. Judge Briccetti expresses special gratitude to his colleagues, Judges Kenneth M. Karas and Cathy Seibel; he regularly sought their counsel when he started as a judge and continues to do so.

Personal Time

In his personal time, Judge Briccetti is an avid golfer and enjoys baseball and Italian opera. He has been married for 33 years and is the proud father of three children – a hard-working young attorney in Manhattan, a recently returned Peace Corps volunteer, and a college senior. Judge Briccetti is ready and eager to take on the challenges of his position.

From the Courts?

Backward Ran The Sentences – 'til 1600

By Ronald W. Meister

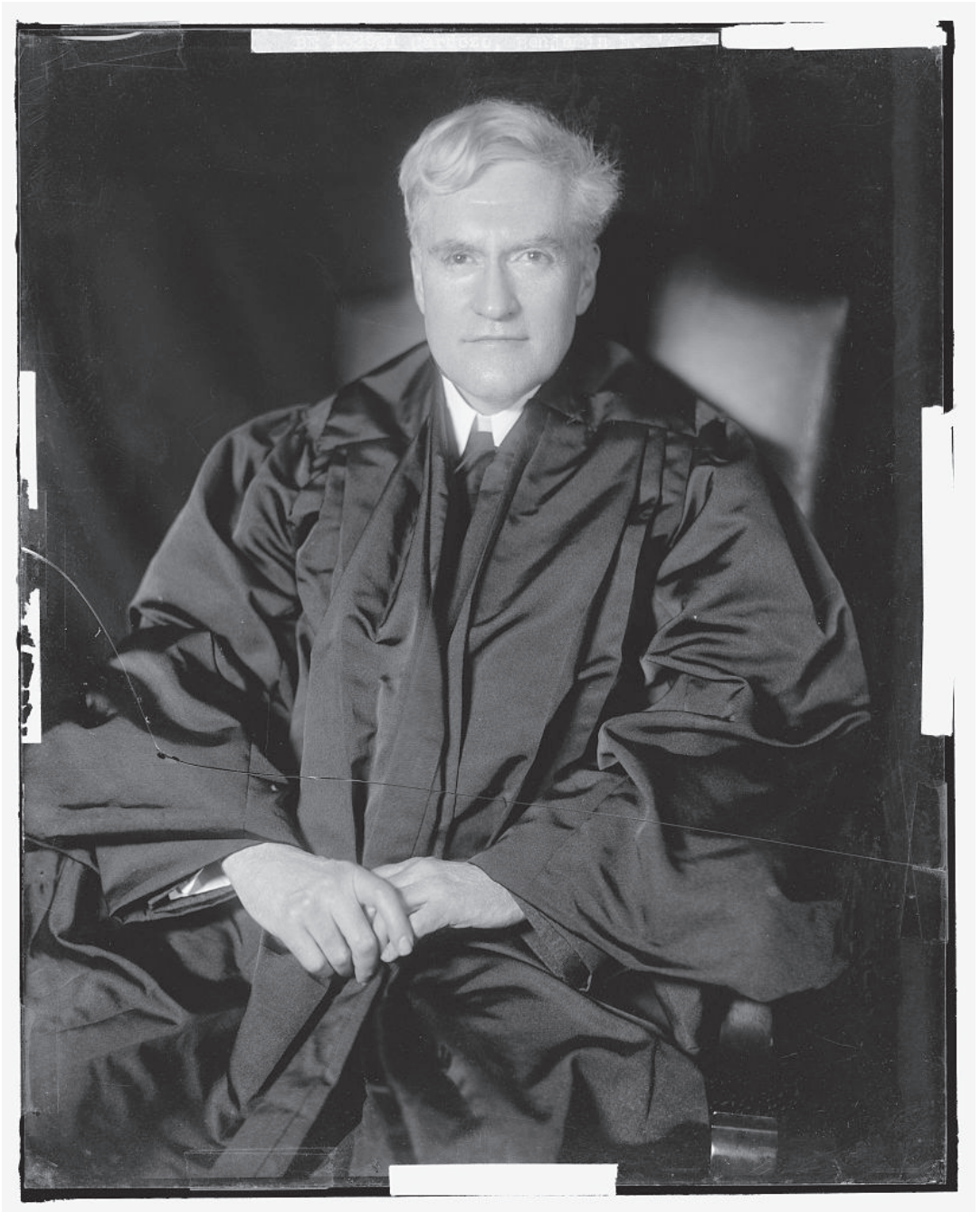
The release of Roland Emmerich's film *Anonymous*, and the recent publication of Arthur Phillips's *The Tragedy of Arthur*, have renewed the debate over who wrote Shakespeare's plays. Scholars have long puzzled over how the unlettered son of an undistinguished Midlands glovemaker could write poetry of such beauty. From Mark Twain's conclusion that the plays were written not by Shakespeare, but by someone else with the same name, to Emmerich's claim for the Earl of Oxford, many candidates have been put forth as the Bard, his collaborator, his literary agent, or his alter ego.

It seems, however, that we are looking at this problem from the wrong end of the telescope. Whoever wrote the plays, they are undoubtedly among the highest achievements of the English language. What we should be looking for is not who wrote Shakespeare's plays, but what else Shakespeare wrote: what other writings are so good, and bear the unmistakable influence of the Bard, that they should be attributed to him, and not to their ostensible authors?

Lawyers, with their tradition of persuasive writing, have a special stake in this issue. We harbor little doubt over the identity of the greatest legal stylist of mod-

ern times: Benjamin Nathan Cardozo, Associate and then Chief Judge of the New York Court of Appeals, and later Associate Justice of the U.S. Supreme Court, whose opinions in *Meinhard v. Salmon*, *Palsgraf v. Long Island Railroad*, and *Palko v. Connecticut* are rightly held out as examples of literary, as well as judicial, art. His Storrs lectures at Yale, collected as *The Nature of the Judicial Process* and *The Growth of the Law*, have been regarded as without peer for "facility of expression, breadth of imagination, and lucidity of thought."

Yet, from whence did this eloquence spring? The young Cardozo gave hardly more promise as a literary stylist than the young Shakespeare. He had little formal schooling before entering college, and never graduated from law school. His father had, if anything, less stature than Shakespeare's, having served as a Tammany henchman of Boss Tweed's, and resigned his judicial post in disgrace. It seems inconceivable that, from this undistinguished background, could come a literary output that Charles Evans Hughes described as "a mighty arsenal of forensic weapons." We must accordingly look elsewhere for the source of these great writings. And where more likely to look than to Shakespeare?



Benjamin N. Cardozo, photographed by Harris & Ewing. Photo courtesy Library of Congress Prints and Photographs Division, LC-DIG-hec-21519.

Fortunately, we can do more than speculate about Shakespeare's authorship of Cardozo's

works. The science of stylometry provides us with tools to attribute works to their proper authors. By examining similarities in works attributed to Shakespeare and to Cardozo, we can form rational conclusions about their sources.

Iambic Meter? Check

To begin, we examine the stylistic features most readily identifiable in each purported author's writings, and look for similarities in the other's. For Shakespeare, that is easy. If he is known for anything, it is iambic meter: "The play's the thing wherein I'll catch the conscience of the king;" "A horse! A horse! My kingdom for a horse!" Iambic meter not being a common feature of judicial writing, it would be a significant surprise to find it there. And yet, there it is, prominently, in Cardozo's most important works: in *Palsgraf,* "The risk to be perceived defines the duty to be obeyed;" in *The Growth of the Law*, "The inn that shelters for the night is not the journey's end;" and in *The Nature of the Judicial Process*, "Law never is, but is always about to be."

Cardozo's most often-quoted maxim, from *Meinhard v. Salmon* – the "To be or not to be" of his judicial writing – provides two additional clues: "Not honesty alone," it holds, "but the punctilio of an honor the most sensitive, is then the standard of behavior." The opening phrase, of course, is iambic. But even more telling is Cardozo's use of *punctilio*, a term not previously found in the lexicon of the New York Court of Appeals. It will come as little surprise to the reader who has followed this argument so far that the first appearance of the word in English can be traced to a startlingly similar quotation ("standing upon the punctilio of honour") in Harington's *Metamorphosis of Ajax*, published in 1596, exactly when Shakespeare was enjoying the successes of *Romeo and Juliet* and *A Midsummer Night's Dream*.

Taken together, this constitutes strong evidence that Shakespeare was in fact the true author of *Palsgraf*, *Palko* and *Meinhard v. Salmon*, and adopted the pseudonym "Cardozo" merely to disguise his work.

Inversion? Check

Approached from the other end, "Cardozo's" (if we can still call it that) most prominent stylistic feature is a backwards course of construction familiarly known as the "Cardozo inversion" – as in *Palsgraf*, where he (or was it he?) famously wrote, "Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers, only because the eye of vigilance perceives the risk of danger." Or in *Palko v. Connecticut*: "Fundamental too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial." What are the chances that this stylistic tic appears as well in Shakespeare? As it turns out, quite high: "The better part of discretion is valour" (*As You Like It)*; "How sharper than a serpent's tooth it is to have a thankless child" (*King Lear*). Unless both Shakespeare and Cardozo studied English at the feet of Yoda, the similarity is too strong to attribute to coincidence.

Other suggestive usages abound. The word "glove," a reflection of Shakespeare's father's trade, appears no fewer than 24 times in Cardozo's opinions, surely out of all proportion to the need. By contrast, while a stylist as accomplished as pseudo-Cardozo (as we by now may call him) might be expected to cite the Bard frequently, references to Shakespeare appear *not once* in his opinions – most likely out of concern lest the author reveal the true source of his writing.

Taken together, this constitutes strong evidence that Shakespeare was in fact the true author of *Palsgraf*, *Palko* and *Meinhard v. Salmon*, and adopted the pseudonym "Cardozo" merely to disguise his work. Determining why he adopted that disguise, as well as identifying other works of his that have been misattributed, will be the work of future scholars.

Objection may be made that for Shakespeare to have prolonged his writing career so far into the modern era is wondrous strange. The explanation may be

found in the Bard's own words, "There are more things in heaven and earth, Horatio, than are dreamt of in your philosophy."

Editor's note: Ronald W. Meister, who once had to memorize the second half of Antony's funeral oration, is a partner at Cowan, Liebowitz & Latman, P.C.

Legal History

Lincoln in the Second Circuit

By C. Evan Stewart

Political careers have sometimes been jump-started by one speech. William Jennings Bryan at the 1896 Democratic Convention (the "Cross of Gold" speech) is a classic example. Even more important, however, especially for the future of America (and the world), was a speech Abraham Lincoln made in New York City. Without it, he would never have been President.

A Nascent Candidacy

Having narrowly lost the Illinois Senate race to Stephen Douglas in 1858 (because of the gerrymandered Illinois Legislature), but having gained a fair amount of political notoriety as a result, Lincoln and his allies undertook to keep him in the public eye so that he could be "available" for office in the future. Besides corresponding widely with Republican leaders throughout the North, Lincoln traveled to Ohio, Indiana, Wisconsin, and Kansas; in each, he gave speeches that were well-received and prompted many to propose him for a spot on the 1860 Republican ticket. To one Pennsylvania politico who wrote Lincoln, promoting the Pennsylvania Governor (Simon Cameron) for President and Lincoln for Vice President, Lincoln responded in part: "I shall labor faithfully in the ranks, unless, as I think not probable, the judgment of the party shall assign me a different position." And with his sharp political instincts "Old Abe" also knew that, before he could make a claim to either spot on a national ticket, he would have to ensure that the factious Illinois Republicans would be a solid block for their "favorite son." As such, Lincoln spent much of 1859 and 1860 addressing various feuding personalities (both great and small) in order to keep their eyes on the bigger prize.

An Invitation to Speak in Brooklyn

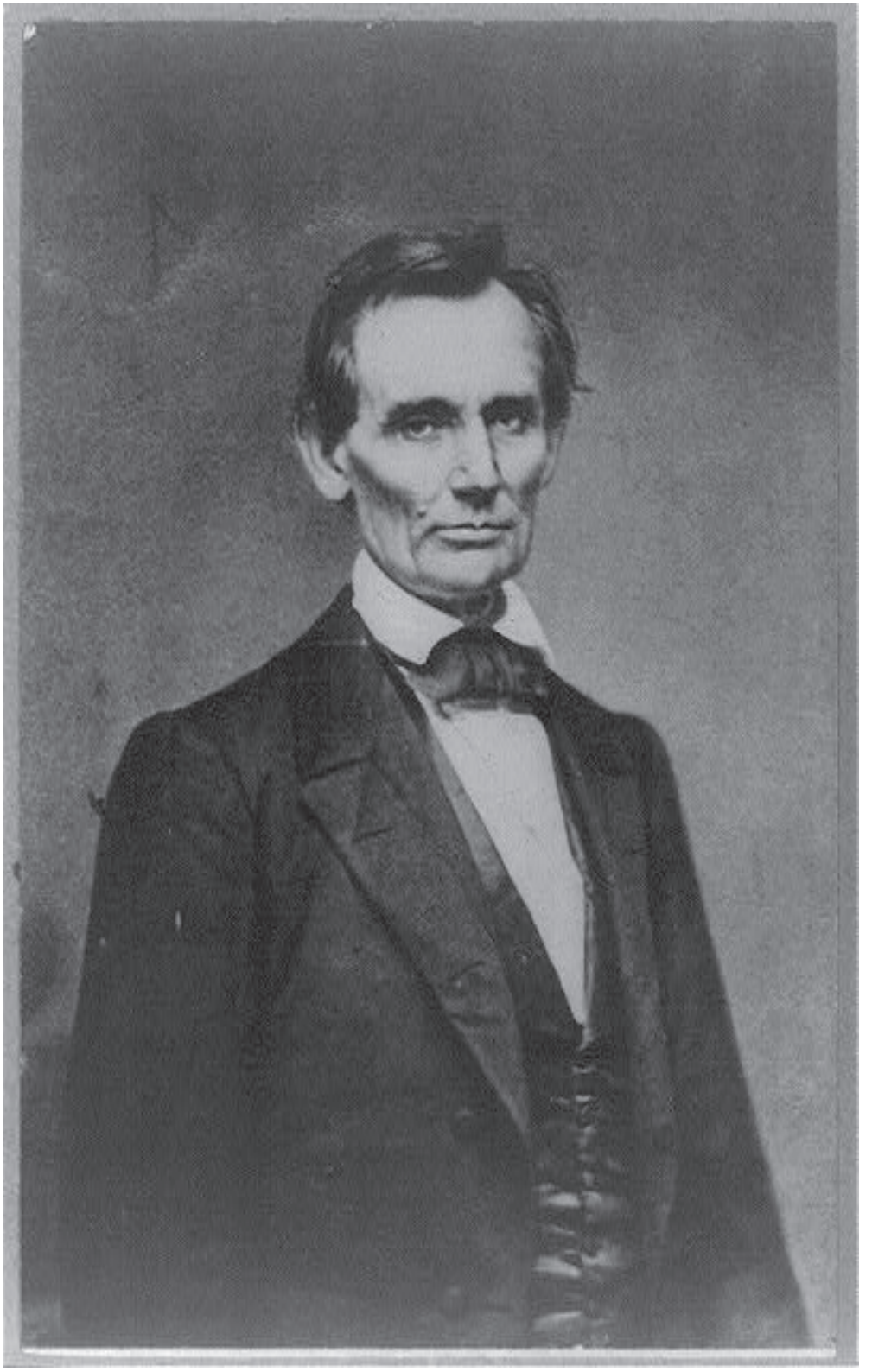
On October 12, 1859, James A. Briggs, a New York based lawyer and ally of Ohio Governor Salmon P. Chase (who desperately wanted to be President – *see Federal Bar Council News* (December 2000)), sent a telegram to the "Hon. A. Lincoln" that asked, "will you speak in Mr Beecher's church Broolyn [sic] on or about the twenty ninth (29) November on any subject you please pay two hundred (200) dollars."

Lincoln instantly recognized that speaking in Henry Ward Beecher's Plymouth Church in Brooklyn – the "Grand Central Station of the Underground Railroad" – would be a perfect opportunity for the "prairie statesman" (as New York Senator William Henry Seward referred to Lincoln) to widen his contacts and establish his bona-fides with influential Republican leaders in the East. Of course, there were significant risks, not the least of which was whether his frontier style of oratory would play well before the "wealthy and fashionable society of the great city." And Briggs was not interested in promoting Lincoln's candidacy, *per se*; rather, he hoped to use Lincoln as a means to undercut Seward (the presumptive Republican front-runner) in his home state, to the benefit of Chase. (Ultimately, the sponsorship of the event was taken over by the Young Men's Republican Union of New York, which was showcasing various candidacies in an effort to weaken Seward.)

Because of Lincoln's legal and political commitments, the November 29th date proved impossible. As a result, Monday, February 27, 1860, was eventually agreed upon as the date for Lincoln's speech. And on February 22, he boarded a train in Springfield to make the trek eastward.

Preparing the Speech

In the September 1859 issue of *Harper's*, Lincoln's arch-rival, Douglas, had published a lengthy



Abraham Lincoln photographed by Matthew Brady before delivering his Cooper Union address in New York. Photo courtesy Library of Congress Prints and Photographs Division, LC-USZ62-1891.

tract entitled "The Dividing Line Between Federal and Local Authority: Popular Sovereignty in the Territories." The main thrust of Douglas's article was that the Founding Fathers had specifically intended for the federal government to have no jurisdiction with respect to slavery in the territories; consistent with Douglas's espousal of "popular sovereignty," that authority resided only in the territories themselves. Thus, slavery could expand throughout the territories, if those in the territories so desired it. It was this contention that Lincoln committed himself to rebut before his New York audience.

As he began his research, Lincoln wrote notes of his thoughts, one of which concluded: "[The Founding Fathers] *did*, through the federal government, control slavery in the federal territories. They did the identical thing which D[ouglas] insists they understood they ought not to do." (emphasis in original) And to prove this point, Lincoln did prodigious research into the Constitutional debates, the papers of Washington, Jefferson, and Madison, as well as

the earliest Congressional votes on slavery. The results of that research would provide the core for his speech, as well as powerful political ammunition for the 1860 campaign that lay ahead.

Lincoln then took to writing, re-writing, and re-writing again his speech. His law partner, William Herndon, later observed that "[n]o former effort in the line of speech-making had cost Lincoln so much time and thought as this one." Lincoln even walked the streets of Springfield, speaking aloud various passages to see how they sounded – sometimes to the puzzled amusement of his neighbors. Finally, Lincoln was satisfied with his work product; Herndon was, as well, sure that "it would be the crowning effort of Lincoln's life."

Only one more thing needed to be done before boarding the train. Lincoln ordered a new black suit from a local tailor, as well as a new pair of boots to go with his suit. The "prairie statesman" wanted his sophisticated audience to believe he could meet them at least half way, couture-wise.

The Big Apple

The train took three entire days to zig and zag its way across the country. On the last leg of the journey (Philadelphia to New York), Lincoln learned for the first time that his speech would be taking place at the Cooper Institute in New York, as opposed to the Plymouth Church in Brooklyn. Conventional wisdom/history is that Lincoln was overwhelmed when he set foot in the bustling metropolis and that his fear of failure was renewed by the shift of forum to the big city. That might be partially correct, but "Old Abe" was also thinking with great clarity about how to advance his chances for the national stage.

One example of this is that he made a point to have his portrait captured by the increasingly famous photographer, Mathew Brady. Lincoln, who had previously been photographed at other key moments in his career, was carefully posed by Brady as a thoughtful statesman, with a table of books and a pillar. Then the photographer, worried about his gangly and mis-proportioned subject, began to rearrange Lincoln's collar; Lincoln retorted: "Ah, I see you want to shorten my neck." To which Brady later recalled replying: "That's just it – and we both laughed." The flattering picture that Brady took would turn out to be the key photographic representation of candidate Lincoln for the remainder of the 1860 election cycle (and beyond).

The "Speech"

A crowd of fifteen hundred distinguished New Yorkers showed up at Cooper Union on the evening of February 27 to hear the "prairie statesman." Warmly introduced to the crowd by literary giant William Cullen Bryant, the seated Lincoln stood up and slowly walked to the podium. Visually, the crowd was taken aback by the extremely tall, thin man with ill-fitting, wrinkled clothes and a "long, gaunt head capped by a shock of hair that seemed not to have been thoroughly brushed out." And if that were not enough, his first words were: "Mr. Cheerman." Not a great start.

Nerves undoubtedly played a part, but so did the fact that Lincoln chose to employ a speaking style different from the style he had employed so effectively on the political stump in Illinois. As one of Lincoln's friends recounted, Lincoln did not proceed "in so familiar a way, walking up and down, swaying about, swinging his arms, bobbing forward, telling droll stories and laughing at them himself." Instead, he stood "stiff and straight, with hands quiet, pronouncing sentence after sentence, in good telling English, with elaborate distinctness,… and casting at each finished period, a timid, sidelong glance at the formidable army of Reporters who surrounded the table close at his elbow, as if conscious, that after all the *world* was his audience,… and that for the time being, these little busy fellows were the arbiters of his fate." Not only did this style start to win over the media present, but the general audience as well.

As Caesar did with Gaul, Lincoln divided his presentation into three parts. The first part was a historical argument, crafted in a legal structure, refuting Douglas's argument and demonstrating with piece after piece of evidence that the Founding Fathers believed the federal government was em-

powered to restrict slavery in the territories. The second part was directed to being conciliatory to the South (i.e., more moderate than Seward), while also tagging Southern "fire-eaters" for the blame for any challenge to the sanctity of the Union. And the third part was directed to the base of the Republican Party – to not waver as to its core beliefs.

Not even citing Douglas's article in *Harper's* by name (although he repeatedly invoked Douglas's line "our fathers who framed the Government under which we live"), Lincoln systematically analyzed the thirty-nine signers of the Constitution, carefully detailing votes by twenty-three signers on the Northwest Ordinance (in 1784, 1787, and 1789), a 1798 statute barring slaves from moving into the Mississippi Territory, a bill enacted in 1804 regulating slavery in the Louisiana Territory, and the Missouri Compromise of 1820. As to the sixteen signers who did not have revealing voting records one way or another, Lincoln demonstrated that many influential leaders (e.g., Franklin, Hamilton, Morris) had been forceful critics of slavery. By his compelling presentation of the evidence, Lincoln left the audience no room to doubt that Douglas's thesis was neither correct nor historically well-founded.

Deftly inserting the knife into Douglas's side, Lincoln closed this section by saying, among other things:

> If any man at this day sincerely believes [that the Founding Fathers did not want to control slavery in the territories], he [has a] right to say so…. But he has no right to mislead others, who have less access to history, and less leisure to study it, into the false belief that 'our fathers who framed the Government under which we live' were of the same opinion – thus substituting falsehood and deception for truthful evidence and fair argument.

In the second part of his speech, Lincoln said he would speak directly to the Southern people, "if they would listen – as I suppose they will not." Embracing the mantle of conservatism (in large part to deflect John Brown's raid in Harper's Ferry), Lincoln put the "radical" label on those Southerners already calling for secession if the Republicans were to prevail in the 1860 election:

> But you will not abide the election of a Republican President! In that supposed event, you say, you will destroy the Union; and then, you say, the great crime of having destroyed it will be upon us! That is cool. A highwayman holds a pistol to my ear, and mutters through his teeth, "Stand and deliver, or I shall kill you, and then you will be a murderer!"

And in his concluding section, Lincoln urged his Republican colleagues to "do our part" to ensure that "all parts of this great Confederacy shall be at peace, and in harmony, with one another." At the same time, there were limits to what party members could or should do. Citing Douglas's proposed legislation to bar public criticism of slavery (the South would be placated only if we "cease to call slavery *wrong*, and join them in calling it *right*. And this must be done thoroughly – done in *acts* as well as in *words*."), Lincoln told the audiences that "true Union men" could not shrink from their "moral, social, and political responsibilities," nor could they agree with the South "that slavery is morally right, and socially elevating." Slavery was a moral wrong, and "true Union men" had to ensure that it not expand beyond those Southern states in which it was well-established. That led to Lincoln's stirring conclusion:

> Neither let us be slandered from our duty by false accusations against us, nor frightened from it by menaces of destruction to the Government nor of dungeons to ourselves. LET US HAVE FAITH THAT RIGHT MAKES MIGHT, AND IN THAT FAITH, LET US, TO THE END, DARE TO DO OUR DUTY AS WE UNDERSTAND IT.

Upon his conclusion there were roars of "cheers and shouts of applause" that rocked Cooper Union. One eyewitness exclaimed that Lincoln was "the greatest man since St. Paul." William Cullen Bryant opined that Lincoln had

made "the best political speech he ever heard in his life;" and this was an assessment with which Horace Greeley publicly agreed.

But while Lincoln had wowed his audience of 1,500 people, he knew there was a greater audience he had to reach. There is persuasive (but not irrefutable) evidence that Lincoln allowed Greeley's *New York Tribune* to borrow the speech's manuscript earlier in the day so that it could be set in type and have proofs sent to three other New York papers (the *New York Times,* the *New York Herald*, and the *New York Evening Post*). What is indisputable is that, after a celebratory dinner with various Republican leaders at the Athenaeum Club, Lincoln visited the *Tribune*'s offices around midnight to go over the "proof slips." The chief proofreader for the *Tribune* later attested to Lincoln reading "each galley with scrupulous care. When these words were read and corrected, he waited until the revised proof was prepared and brought in, and these he read and made corrections himself." We do not know what the original manuscript looked like, because Lincoln discarded the pages after being satisfied with the *Tribune*'s proofs. We do know that he approved capitalizing the last sentence of his speech.

The next day, there were at least 170,000 copies of Lincoln's speech set out in the four New York newspapers (with the *Tribune*'s version being the most accurate and complete). And the color commentary on Lincoln's performance was overwhelmingly enthusiastic (except for some partisan Democratic sniping). Greeley's *Tribune*, for example, opined that "No man ever before made such an impression on his first appeal to a New-York audience." Other newspapers across the country also strongly praised Lincoln's address; and subsequently, the Republican Congressional Document Committee mailed out 100,000 reprints of the speech (with annotations to the sources of Lincoln's historical assertions).

A Speaking Tour

Lincoln had originally planned to travel on just to visit his son, Robert, at Phillips Exeter Academy in New Hampshire and then return to Illinois. But based upon his instantaneous notoriety, he was pressed into giving speeches in Rhode Island (Providence and Woonsocket), New Hampshire (Manchester, Exeter, Concord, and Dover), and Connecticut (Hartford, New Haven, Bridgeport, Norwich, and Meriden). In these appearances, Lincoln basically reiterated his Cooper Union remarks. Besides the extremely positive public reaction he received at each of his stops, Lincoln impressed/won over key Republican leaders and media moguls who, prior thereto, had no feelings positive or negative about the "prairie statesman;" many of these influential individuals (e.g., James G. Blaine, Edward H. Rollins, James Babcock, Gideon Welles, George G. Fogg) would prove to be very helpful at the Republican Convention and in the general election.

Writing to his "Dear Wife" from Exeter, New Hampshire, Lincoln reported that he thought the Cooper Union speech "went off passably well." As for the "little speech-making tour" thereafter, however, he found it exhausting, writing that if he could have foreseen "this toil.… I think I would not have come East at all." Whether that was merely tired bones speaking, in truth Lincoln returned home to Illinois with a general perception across the North that he was now not only a serious, legitimate contender for the Presidency, but in the minds of many he was likely the strongest Republican candidate in the key states the party needed to carry in November (Illinois, Indiana, and Pennsylvania).

Postscripts

- On May 18, 1860, Lincoln defeated Seward on the third ballot at the Republican National Convention in Chicago, Illinois. One of my ancestors, William M. Stewart, was a Pennsylvania delegate pledged to support the state's governor (Simon Cameron) on the first ballot. On the second and third ballots, Stewart switched his vote to "Honest Abe."

- Lincoln, after his election, was quoted as saying "Brady and the Cooper Union speech made me President." There is

a great deal of truth to that observation; the Brady picture, however, really did not get wide distribution until after the Republican National Convention and thus was more of a factor in the general election. But as for the "speech," Lincoln would never have been his party's nominee without it.

- The best single volume on Lincoln continues to be David Donald's *Lincoln* (Simon & Schuster 1995). The most comprehensive analysis of our 16th President, however, is set forth in Michael Burlingame's magisterial, two volume *Abraham Lincoln: A Life* (Johns Hopkins 2008). Harold Holzer's *Lincoln At Cooper Union* (Simon & Schuster 2004) is the best scholarly work explaining the speech and its historical context. And for those who want a recently published, comprehensive review of the political dynamics of 1860, see Douglas Egerton's *Year of Meteors* (Bloomsbury 2010).

FBC News

Fall Retreat a Success Despite the Snow

By Michelle Skinner

The Federal Bar Council's Fall Bench & Bar Retreat, co-sponsored by the First Decade Committee and the Second Circuit Courts Committee, was held on October 28 through October 30 at Mohonk Mountain House in New Paltz. This year's sold-out event rewarded those who

braved the ominous weather forecast with beautiful snow-covered scenery and a diverse slate of programs covering topics from forensics to Facebook. The attendees also were treated to an old favorite, the Federal Rules Challenge, as well as numerous opportunities to mix and mingle.

"Judge Knows Best"

The weekend kicked off on Friday afternoon with the game-show format CLE, "The Federal Rules Challenge," presented by the First Decade Committee and hosted by District Court Judges Lawrence E. Kahn and Edward R. Korman. It was a close race in the first two rounds, with categories such as "What's Your Number," "I Second that (e)Motion," and everyone's favorite, "Judge Knows Best." Two teams leapt ahead in the third round with their knowledge of Second Circuit history and multi-district litigation, only to face a surprise upset by a third team in the "Final Jeopardy" round. All in all, the session may have marked the most fun ever had while learning about joinder.

Saturday morning started with a spirited discussion of the admissibility of polygraph evidence. District Court Judge John Gleeson noted that this was one of the rare issues about which judges and the press were on the same side. In the remainder of the session, which focused on forensic techniques, the participants learned about handwriting analysis and received a "straightforward and simple" explanation of DNA random match probabilities. (Thankfully, there was no quiz.) Saturday's second session explained the mysteries of "cloud computing" and the alarming – or promising, depending on one's perspective – amount of data available on social networking sites. Having now learned that such practices are unseemly, the participants immediately un-friended the moderators, District Court Judge Paul A. Crotty and Magistrate Judge Lisa Margaret Smith.

On Sunday morning, District Court Judge Paul G. Gardephe and Magistrate Judge James Orenstein moderated a panel on ethical issues in internal and external investigations, which came together nicely despite last-minute substitutions for two panelists diverted by the extreme weather. Fortunately, the Federal Bar Council has a deep bench. To round out the weekend, participants brushed up on their knowledge of legal history and Billy Joel in a re-enactment of the trial of Alger Hiss. District Judge Victor Marrero narrated the re-enactment, while Chief District Judge Carol Bagley Amon had the audience in stitches with her performance as an expert psychiatrist.

A Lawyer's Life

The Meredith March: Mississippi 1966

By Pete Eikenberry

On June 5, 1966, in Memphis, Tennessee, Columbia Law student James Meredith commenced his planned 220 mile "March Against Fear" to Jackson, Mississippi. On June 6, 1966, he covered the first 14 miles in Mississippi before being wounded three times with a 16 gauge shotgun. After Meredith's body was taken from the road to the hospital, civil rights leaders with disparate philosophies, including Martin Luther King Jr. of the Southern Christian Leadership Conference ("SCLC"), Stokely Carmichael of the Student Nonviolent Coordinating Committee ("SNCC") and Floyd McKissick of the Congress of Racial Equality ("CORE"), literally joined arms and carried the march forward.

During the march, Carmichael first uttered his "Black Power!" chant, which competed on the march with SCLC's Hosea William's chant for "Freedom Now!" The media reception to the march was described by Paul Good in *New South* in the Summer 1966 issue:

> So a march that should have been an epic emerged, in much of the nation's press, as an irritant, an ill-considered excursion by competing civil rights groups bent on organizational aggrandizement … the march lacked the clean lines of purpose, national backing and surface unity of the Selma-to-Montgomery March. But the Negroes who led it were one year deeper into frustration and disillusion and this created a desperate atmosphere that encouraged vindictiveness and distrust of

the nation's institutions and the men who controlled them.

Flag Day

The march entered Grenada, Mississippi, on Highway 51 on National Flag Day, June 14. King spoke in Grenada to an audience of thousands, and 1,300 black citizens were registered during the passage of the march through Grenada. I arrived in Grenada from Jackson on July 10 to interview a group of black citizens who had been beaten by highway patrolmen while observing activists picketing the jail to protest the arrest of civil rights workers. Subsequently, as I have previously reported, I stayed full time in Grenada for three weeks to assist Marian Wright Edelman and Henry Aronson of the NAACP Legal Defense Fund in preparing suits in support of the Grenada civil rights movement to enjoin the police, the sheriff and the highway patrol and suits to integrate the schools, the library, the swimming pool, the movie theatre and even the restrooms at a filling station and in a restaurant.

While there, I had two law student assistants, Ollie Rosengart and Mal Gissen. Mal was a law student at the University of Wisconsin and Ollie at NYU Law. In Grenada, I succeeded another volunteer New York lawyer, Peter Swords, later an assistant dean at Columbia Law School. King had left about a dozen organizers in Grenada and the civil rights movement had high hopes for their efforts there. In September, King came back to Grenada and with Joan Baez marched with the school children who actually integrated the white schools in the face of brutal attacks by white mobs.

Despite their efforts and the apparent successes of the movement in Grenada itself, the Meredith march and the "Grenada movement" were looked on with considerable disappointment by civil rights leaders. As reported by Taylor Branch in *At Canaan's Edge* (Simon & Schuster 2006):

> Grenada marked a convergence of what King called "valley moments." On September 19, [the] day he arrived there, the Civil Rights Act of 1966 failed in the U.S. Senate when a 52-41 vote fell short of the margin required to shut off a Southern filibuster.… Lost were mandates for diversified juries and courthouses plus federal protections for civil rights work.… [T]he Justice Department possessed only the poor remedy of an outmoded 1870 Reconstruction statute under which thirteen men in Grenada had just been arrested. All eight Grenada defendants who went to trial would be acquitted the next June, despite fair instructions from Judge Clayton and consistent testimony from eyewitnesses, including a courageous police captain.... For all its grit and tribulation, the Grenada, Mississippi movement created no resonant symbols like Rosa Parks or the four martyred Birmingham schoolgirls, and aroused no groundswell for federal protection. Those themes lost public traction.

A Ripple Effect

Law student Mal Gissen has illustrated by his conduct alone that the Meredith march had a ripple effect resulting in a lasting influence. There also are the successes of, for example, the children who integrated the schools; one, Dianna Freelon, became Mayor of Grenada in 2004, 38 years later. For years, Mal continued to go back to Grenada on his vacations. While still a Wisconsin University law student, he suggested to the president of the university that it displayed little diversity in its student body. As a result, the University of Wisconsin initiated a program whereby over 3,000 black Mississippi high school students, many of them identified and recruited by Mal himself, became students at the university.

Long before he became the successful creator of an international mutual fund, Mal, now a resident of San Francisco, "made a difference." But for James Meredith's quixotic march, Mal might never have had the inspiration of his 1966 Mississippi experience as a volunteer in support of the goals of the march. Martin Adelman returned to New York after a life altering experience as a law student volunteer monitoring the march and then decided to become a criminal defense law-

yer; I left White & Case in 1967 to run for public office and work for John Doar in Bedford Stuyvesant and do other things that I may never have attempted without my Mississippi experience.

Peter Swords, who returned to Grenada more than once, went back in 2010 and with the help of his daughter videotaped interviews with a dozen participants in the Grenada movement of 1966. Ollie Rosengart, a retired NY law professor, also says that the Mississippi experience changed his life. After the red headed Ollie was shot at with a submachine gun in 1966, the Lawyers Committee got him out of town. He told me recently that in his testimony before the grand jury about the shooting incident, he was asked just three questions: Are you Jewish? Are you a communist? How much are you being paid? The shooter was not indicted by the grand jury.

In the future, after I have the opportunity to go again to Grenada and interview the former school children who suffered beatings during efforts to integrate the schools and after I have the opportunity to interview graduates of the University of Wisconsin who were part of the program Mal instigated, I will have other perspectives on the importance of the Meredith march. Yet, I already am convinced that the march was a very significant event. Recently I exchanged notes with John Doar, my boss at Bedford Stuyvesant D&S Corporation from 1968 to 1970. (John headed the U.S. Justice Department Civil Rights Division in years including 1966 where he helped James Meredith become admitted as the first black student of the University of Mississippi.) He wrote to me that he realized that, "we were part of a revolution."

A (Pre-)Lawyer's Life

The Deferment Ramble

By Bradford S. Glick

The term "Mediterranean" often connotes crystal clear waters, moderate temperatures, idyllic coastal towns, classic architecture and casual days, but after six weeks of butting our headsails against winds on our nose through continually changing conditions of squalls, doldrums and fog, while maneuvering among cruise liners and cargo ships in temperatures that now reached no more than 60 degrees Fahrenheit, the word had become derogatory. No matter what conditions we faced, however, one thought prevailed throughout my sail from Greece to Morocco and then across the Atlantic Ocean on to Saint Johns, U.S. Virgin Islands: this is so much better than studying for the Bar Exam.

Like many 2009 graduates, my starting date as an associate was deferred until January 2010. Even though the prospect of several months with no income, coinciding with the ever-shortening grace period for loan repayment, was mildly disconcerting, rather than laying low in my parents' house or scraping by paying New York rents, I used the extended deferment period to venture and explore throughout the Mediterranean and Middle East and to eventually find my way onto the crew of the *S/V Ramble*, a 1960 36 foot wooden yawl, owned and captained by John Reid, that was about to embark on a 12 week sail across the Atlantic.

Travel Time

Shortly after the bar exam, Jack Figura and I, both 2009 Emory Law grads, took off for a month and a half of travel. We landed in Athens, Greece, and from there we island-hopped across the Aegean Sea from Crete to Ios, Santorini and Kos, and then to Turkey. Landing in Bodhrum we followed the coast up to Istanbul, stopping in Selcuk to explore the ancient ruins at Ephesus. After Istanbul we traveled to the Cappadocia region, known for its otherworldly geography and underground cave communities, then on to central Turkey to hike up Nemrut Dag, an isolated mountain top with Easter Island-like heads facing out from the eastern and western sides of the peak. Leaving Turkey, we traveled through Syria, Lebanon, Jordan and then Israel.

As with most itinerant travelers, the value of the trip for Jack and me came from the interactions and relationships we formed with people along the way, more than from the sights or scenery. At the Emory Law School commencement, Professor Dorothy Brown,

noting the toll three years of law school had taken on our personalities and our relationships, encouraged us to find ways to recover ourselves and to reconnect with others. We found this over again during our trip: sitting with a Kurdish shopkeeper in Selcuk listening to his personal experiences living as a relegated minority, spending an hour in a train station in Aleppo speaking with a Syrian literature student who put my knowledge of American literature to shame, celebrating with friends in Damascus as they broke the Ramadan fast, exploring the Baalbek ruins in Lebanon with a group of U.N. workers, joining a Bedouin jam session while camping along the coast of the Red Sea in Jordan, hiking from Nazareth to the Sea of Galilee with a college friend living in the region and being hosted by several friend-of-a-friend contacts throughout the trip who gave us a local perspective of the social, cultural, and political dynamics of the given regions.

The sail, however, was not a planned or anticipated part of the trip. Jack was flying back to the U.S. from Tel Aviv, while I was flying out of Athens two weeks later. Loving to sail, I tried to charter a boat to explore the Greek islands during the remaining time before my flight. Predictably, the cost was prohibitive. As an alternative I began exploring crew websites hoping to find a way to work on a boat for the two weeks. No one needed help for that short an amount of time, but there were numerous people looking for help for the Atlantic crossing. At first, I cursorily ignored these listings, but realizing I had nowhere I had to be until January I decided to skip my return flight and spend the next two and a half months sailing home instead. After emails with a several boat owners, John Reid, a former VP at Associated Press, offered me a spot on *Ramble*. (Although I can write an article on how to spend one's deferment period, John can write the book on how to spend one's retirement: This was his fourth Atlantic crossing in as many years sailing throughout the Caribbean and Mediterranean.) The *Ramble* crew consisted of me; Ava, from Austin, Texas, taking a year off from college; John; and his wife Patty. Later, after we reached Sicily, Patty left the boat to fly home to meet us on the other side of the Atlantic, and a few days later, in Menorca, Spain, we were joined by Lily, an Australian who was one-third of the way through her bike and sail trek around the world.

Through the Mediterranean

The sail through the Mediterranean was phenomenal, even though it was erratic and protracted. After leaving Athens on October 6, five days later we were forced to abandon our anchor at Ithaca and, for eight days, wait out a monster of a squall in the more protected Ionian Islands of Meganissi and Paxoi. Although it was too early in the journey to begin making Odyssean comparisons, on October 21, after finally being given a window to make the two day sail from Greece to Sicily, as I was piloting *Ramble* through the Straits of Messina, the legendary location of Scylla and Charybdis, at one o'clock in the morning, with 20 knot tail winds and little room to jibe, the trip began to take on an "epic" quality. When we finally anchored a few hours later in a protected cove along the coast of Sicily, laser lights and bass music were pumping from a nightclub onshore; even though sleep was our only temptation, the scene was oddly reminiscent of Circe's bacchanal feast with Odysseus' men.

From Sicily, leaving on October 28, we island hopped for several days through Sardinia and the Spanish Balearics, touching off from Majorca on November 8 for what we hoped would be a quick sail to Gibraltar, then Morocco. Instead, for three days we sailed through doldrums making little more than two to three knots, where the only break to the monotony was an occasional migrating bird taking a rest on our deck. Then, for two more days we sailed through 20-35 knot headwinds through storms and 15 foot seas. Even though we would see larger 25 foot waves in the Atlantic, those waves were spaced farther apart and traveled with us, lifting *Ramble* from the stern, allowing us to "surf" down the front side of the waves. In the Med, however, the waves were close together and came on *Ramble's* nose so that with the boat heeled over it felt like I was living and sleeping on a rollercoaster, with my head lifting off the pillow at the crest of each wave, then be-

ing driven back down as the boat rode through the trough. When the storm finally broke and we were less than a day from Gibraltar, fog rolled in, forcing us to stall the boat to slow our pace until we could gain visibility to navigate among the large container ships and cruise liners that moved through the congested shipping lanes. On November 16, we finally landed on the Prudential rock and two days later punched through the mouth of the Med into the Atlantic.

In contrast to the Med, the Atlantic was idyllic. As we moved closer to the Equator, temperatures climbed back into the 80s, the waters warmed, and the skies cleared. Likewise, the sailing was perfect, the trade winds settled in at a near-constant 10 to 25 knots and the *Ramble* stayed near hull-speed at seven knots. During the entire crossing we sailed between downwind and a beam reach, the fastest points of sail, and over a three week period we did not tack once; anyone who has ever sailed will know how remarkable this was. To illustrate the difference between the Med and the Atlantic, to sail approximately 1,000 miles through the Med took six weeks, while to sail approximately 3,000 miles from the Canary Islands to St. Johns took three weeks; in the Med, at times, we sailed no more than 50 miles in 24 hours, while in the Atlantic, we regularly made 140 miles and occasionally 150 miles per day.

There were, of course, several memorable moments during the Atlantic crossing: a pilot whale swam with us one evening, as did countless numbers of dolphins on other days; during a brief lull in the winds we jumped overboard for a swim, with the



Relying loosely on Frank Capra's 1946 movie "It's a Wonderful Life," Judge Reena Raggi's Inn of Court team recently explored John Adams's public service contributions in his roles as revolutionary, diplomat, vice president, president and correspondent extraordinaire, as well as his lifelong love affair with his wife Abigail. In the bottom row, left to right: Robert Begleiter, Mason Simpson, Michael Sloan, Richard Reice, Tina Juntunen, Margie Berman, and Sean Masson. In the top row, from left to right: George Spencer, Jennifer Taiwo, Marcia Henry, Georgia Winston, Judge Raggi, Benjamin Sahl, and Stephanie Sowell.

unnerving yet exhilarating feeling of looking up at the small wooden ship that held our lives, knowing the nearest land was the ocean floor three miles beneath our feet; during the largest storm of the sail feeling a 25 foot wave lifting *Ramble* to its peak, looking across the horizon to see endless mountains of waves, then sliding back down to have the surrounding waves in front and behind, block all visibility.

The greater experience, however, was the cumulative experience of each day: moving across the ocean at seven miles per hour, watching the full arc of the sun from sunrise and sunset, lying in the cockpit at night underneath the rotating dome so thick with stars that I felt like I was sailing among them, the daily attention to the boat and the crew, and knowing that by these increments we were participating in something amazing.

I cannot make too many comparisons between sailing across the Atlantic and the practice of law, but one analogy is this: at first impression each seems daunting; each requires a sacrifice of lifestyle; constant vigilance and painstaking attention to every detail, concern and inkling are vital to moving forward and preventing catastrophe; often the greatest challenge, in the midst of the venture, is the monotony of the process; but through fastidious efforts with an eye on the journey's end, the destination is reached and the sense of accomplishment is both immense and deserved.

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I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties), Jeanette Redmond, Executive Director, November 7, 2010.

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