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Provocative, Human, Eclectic

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We invite you to connect with us on LinkedIn.

From the President

Reflections

By Vilia B. Hayes



As I sit down to write my last letter as president, I am filled with a sense of thankfulness for the experience of serving as president, specifically the opportunity to work with so many wonderful people and develop new friendships. The leaders of the Federal Bar Council have been unanimous in recognizing the benefits of membership in the Federal Bar Council and striving to include more people in active participation. Our committees play an important role in promoting the values and goals of the Council and giving our members the opportunity to participate. The amazing group that publishes this *Quarterly* brings our news to all of our members.

Two new committees were formed as I took office. Now in its second year, the Bankruptcy Litigation Committee, chaired by Christopher Kiplok, is composed of attorneys involved in bankruptcy court litigation. The committee has incorporated meetings with U.S. Bankruptcy Judges on topics of interest into monthly meetings, and is planning for future CLE projects. The Intellectual Property Committee, chaired by Peter Sloane, is composed of members who practice intellectual property law. I sampled two meetings each with an interesting speaker and Q and A.

Our newly-created Diversity Committee, co-chaired by Patricia Miller and Jason Canales, is off to a strong start in working toward its goal of promoting diversity within the Council and the profession at large. They sponsored a breakfast conversation with Judge Pamela K. Chen of the Eastern District of New York in celebration of Asian American and Pacific Islander Heritage Month, and a breakfast with Judge Edgardo Ramos in celebration of Hispanic Heritage Month. They organized a well-received presentation on the timely topic of "Implicit Bias," which was presented at the Fall Retreat, as well as an earlier CLE on "Jury Trials, Staffing Trial Teams and Stereotypes." They are sponsoring membership drives at government law offices, starting with the NYC Law Department.

At the recent Inn of Court Professionalism Award ceremony, Pete Eikenberry, the awardee, talked about the creation of the Council's Public Service Committee, of which he was the first chair, and the committee's efforts to address the city's homelessness issues. The Public Service Committee, chaired by Lewis J. Liman, has continued the great work of the committee. It facilitates our *pro bono* work with the courts in the Second Circuit, through the Southern District of New York's Limited Representation Project and Asylum Representation Project, among others. The Public Service Committee also reviews the nominations and recommends the award winners of the Thurgood Marshall Award, which is awarded at a Summer Kick-Off Reception, co-sponsored with the First Decade Committee, and which was attended by over 100 people at Battery Gardens.

The Committee on Sentencing and Alternatives to Incarceration, chaired by Larry Krantz, has presented innovative programs that have brought to life for the attendees issues from the perspective of the incarcerated: President Obama's Clemency Initiative, which included perspectives from clemency recipients and their advocates, and a prior program on "A Day in the Life of a BOP Inmate."

We are about to launch two new committees: The Employment Litigation Committee, co-chaired by Keisha-Ann Gray and Valdi Licul, and the Securities Litigation Committee, chaired by Scott Musoff.

At the same time as we embraced new projects, we have continued the Federal Bar Council's long-established events, which foster professional development and collegiality between the bench and the bar. Our yearly Winter Bench and Bar Retreat and the

weekend-long Fall Retreat present timely CLE programs in beautiful settings with enthusiastic participation. We have a hard-working committee planning for our next Winter Retreat at the Westin Rancho Mirage in Palm Springs, CA, which will be held from February 18 to 25, 2017. I encourage you to join us. The recent Fall Retreat at Skytop in October was a joint effort by the Second Circuit Courts Committee and the First Decade Committee with cutting-edge CLE programs, perfect fall weather, beautiful foliage, and very happy children.

We are about to launch two new committees: The Employment Litigation Committee, co-chaired by Keisha-Ann Gray and Valdi Licul, and the Securities Litigation Committee, chaired by Scott Musoff.

Our Thanksgiving Luncheon and Law Day Dinner continue to be signature events. I look forward to presenting the Emory Buckner Award for Outstanding Public Service to Judge Barbara S. Jones (ret.) at this year's Thanksgiving Luncheon at the Waldorf-Astoria.

We have also had the opportunity to work with the courts for the Southern District of New York and the Eastern District of New York on their recent anniversaries. The Program Committee, in addition to organizing the Council's regular CLE programs, will be working with the Second Circuit to organize special CLE programs: "Conversations with Members of the Bench and Bar" on timely legal topics of interest in celebration of the 125th anniversary of the U.S. Court of Appeals for the Second Circuit, which will take place in 2017.

The Federal Bar Council Inn of Court continues to be in high demand. Led by a new president, Magistrate Judge Peggy Kuo, its teams, made up of a judge and both senior and junior members of the Council, present an intellectually stimulating CLE program monthly. Most importantly, it provides a unique opportunity for mentorship.

I am very appreciative of Joan Salzman, the Executive Director, and the rest of the staff for their efforts that have contributed greatly to the success of the Council. I also thank all of the past presidents, and current officers and trustees and members of the Council, for their assistance to me and many contributions to the Council, and particularly for their friendship.

As I pass the torch onto our next President, David Schaefer, I am confident the Federal Bar Council will continue to provide opportunities for public service, professional development, and continuing legal education, at the same time as it strives for diversity and collegiality.

From the Editor

Women in the Workplace

By Bennette D. Kramer



News reports and legal blogs are buzzing with news of several recent surveys and reports on women in the workplace. First, McKinsey & Company and LeanIn.org published a *Report on Women in the Workplace 2016* (the "McKinsey/LeanIn Report"), which examined workplace equality and concluded that programs to create gender diversity are not working to advance women's careers.

Second, the New York City Bar published *Diversity: Benchmarking Report 2015* (the "City Bar Report"), which concluded that women lawyers had made strides in attaining leadership roles in law firms, but overall representation of women, along with minority attorneys, has stalled or decreased.

Finally, a research report from Glassdoor, *Demystifying the Gender Pay Gap* (the "Glassdoor Report"), concluded that men earn

24.1 percent higher base pay than women on average. In the legal world, a recent survey of law firm partners by Major, Lindsay & Africa (the "Major, Lindsay & Africa Survey") showed that male partners make on average 44 percent more than female partners.

The good news for women lawyers is that they are obtaining more leadership positions. Otherwise, in number and pay, they are seriously lagging. What do these reports show and what can be done to improve opportunities for women and other minorities?

McKinsey/LeanIn

The McKinsey/LeanIn Report about women in the workplace concluded that workplace equality is a long way off for women and minorities. For the survey on which the report is based, researchers gathered data from 34,000 men and women at 132 global companies. The McKinsey/LeanIn Report disclosed that, although many, if not most, of the companies surveyed had instituted programs intended to create gender diversity, "women are less likely to receive the critical promotions to manager … and they are less likely to be hired into more senior positions," because women have less access to opportunities that advance careers.

On September 27, following issuance of the McKinsey/LeanIn Report, *The Wall Street Journal* published a special section entitled "Women in the Workplace," which examined the McKinsey/LeanIn Report and explored what companies could and should do to improve diversity. The *Journal* views gender diversity as good for business and the economy. In addition, clients look around at meetings attended only by men and make note of the lack of diversity and then exert pressure on companies to diversify. Vivia Chen in her October 6 column, *The Careerist*, discussed The McKinsey/LeanIn Report and the articles in the *Journal*'s special section and noted that law firm gender statistics show the same problems.

The McKinsey/LeanIn Report examined employee progression through the "employee pipeline" and concluded that women were hired and promoted at lower rates than men. The result is fewer women at senior levels. In addition, the women who reach senior levels shift from line to staff jobs, with few ending up as chief executive officers. Although women start out with 45 percent of entry level positions, they only have 19 percent of the "C-Suite" positions – the same percentage (19 percent) as female equity partners in large law firms.

Women get less access to people who could advance their careers and fewer opportunities to take on career enhancing assignments. Women are more likely to question the fairness of the workplace because, in comparison to their male colleagues, they are not able to participate meaningfully in meetings, have not gotten challenging assignments, do not believe their contributions are valued and are not consulted on important decisions.

A large area where women are at a disadvantage is in negotiations: women are now negotiating for promotions and raises as often as men, but women who negotiate are likely to receive feedback that they are "intimidating," "too aggressive," or "bossy." In the end, women are less likely to be promoted than men. Even though both men and women view sponsorship by senior leaders as essential, women report less interaction with senior leaders who could help with a promotion or challenging assignment. Men and women ask for feedback with the same frequency, but women are less likely to receive it.

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Finally, only 40 percent of women are interested in becoming CEOs compared to 56 percent of men. Many have concerns about balancing work and family.

Seventy-eight percent of companies report that gender diversity is a top priority for their CEO, but more than half of employees do not perceive that top management is doing what is

necessary to improve gender diversity. Employees say that they do not prioritize gender diversity because:

(1) It means placing a lower priority on individual performance;

(2) It means showing favoritism to some people and not others;

(3) Other issues require attention;

(4) Diversity efforts highlight differences; and

(5) They do not see the value of it.

In the *Journal* report, Dominic Barton, Global Managing Director of McKinsey & Co., discussed why gender equality efforts are not working. First, even though nearly all companies have "flexibility, mentorship and paternal-leave programs," only 45 percent of employees think that this is enough to improve diversity.

Second, although companies say they are committed to diversity, employees do not think their senior leaders "are held accountable for improving gender outcomes."

Third, neither men nor women call attention to gender bias or challenge gender bias language or behavior.

Fourth, managers are not recognized for meeting gender-diversity goals.

What is needed, according to Barton, is persistent execution of programs, such as those to encourage promotions; more comprehensive family-leave programs; counseling in connection with return from family leave; and tracking of promotion for three-years after family leaves. Sponsorship programs also should be institutionalized. Fresh thinking is needed in designing flexibility, pay equity, and reduction of bias in resume screening. Finally, leadership and effective communication are needed to make sure all employees at every level understand how important improving gender outcomes is to the company.

The McKinsey/LeanIn Report urges companies to take the following steps to create a more inclusive environment:

(1) Communicate effectively, particularly through senior leaders, that gender diversity matters and benefits everyone;

(2) Ensure that hiring, promotions and reviews are fair;

(3) Invest in more employee training; and

(4) Focus on accountability and results.

City Bar Report

The City Bar Report focused on diversity in law firms. The

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City Bar Report concluded that women showed gains in representation on firm management committees and as practice group heads. Women partners are 19 percent of partners overall, but 85 percent of those women are white and only three percent of partners overall are minority women.

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The number of women in the partnership pipeline has leveled off, while the percentage of minority women has declined. Women attorneys comprise 35 percent of all attorneys even though they represent almost 50 percent of law school graduating classes. Minority and women partners are concentrated at the salary level rather than at the equity partner level – white men represent 77 percent of all equity partners.

The City Bar Report pointed to flexible work programs and management acknowledgement that diversity was important to the firm as important factors in retaining women and diverse attorneys. In addition, law firm partners should take an active role in encouraging and mentoring diverse associates by giving them assignments on matters that are important to the firm, mentoring them, providing effective feedback, and advocating on their behalf with firm leadership. Associates can seek out meaningful work, professional development activities and constructive feedback, and seek out a network of mentors.

Glassdoor Report

The Glassdoor Report looked at the gender pay gap "using a unique data set of hundreds of thousands of Glassdoor salaries shared anonymously by employees online." In every country Glassdoor looked at, men earned more than women on average for comparable work in comparable jobs.

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In the United States, men have a pay advantage of 24.1 percent when adjusted for personal characteristics, job title, company, industry, and other factors to make situations comparable. The Glassdoor Report stated that the main cause is "occupation and industry sorting of men and women into jobs that pay differently throughout the economy." The gap is not explained by differences in education, age, and experience levels.

Major, Lindsay and Africa Report

The Major, Lindsay and Africa Report showed that male law partners are paid 44 percent more than female law partners on average. The average male partner makes $949,000 compared to $659,000 for the average female partner. The consensus seems to be that basing partner compensation for the most part on origination and hours handicaps women over the span of their careers.

The Major, Lindsay and Africa Report showed that male law partners are paid 44 percent more than female law partners on average.

Conclusions

All the reports and surveys discussed above concluded, as prior surveys have similarly concluded, that there is widespread discrimination against women in the workplace, and particularly in large law firms. The discrimination creates pay disparity and management and partnership opportunity disparities. Law firms are particularly vulnerable to pay disparities at the partner level be-

cause women are excluded from leadership rolls and compensation committees in addition to taking maternity leave (compared to the fewer, but increasing, men who take paternity leave).

The common theme running through the reports and comments on them is that management, including law firm managing partners, must do more than provide lip service to diversity goals. They must demonstrate that diversity goals are important to the company or law firm. In law firms, managing partners must make sure women and other minorities are provided meaningful opportunities for plum assignments, mentoring, and feedback.

The gender pay gap arises from the law firm model of basing partner compensation on origination credit. Gender bias affects how origination credit is attributed because:

(1) Women do not have the same access to networks and sponsors;

(2) While men are admitted to partnership on their business development potential, women actually must have business generating clients;

(3) Women often are encouraged to remain service partners for male partners;

(4) Women are discouraged from bringing in business that might possibly conflict a male partner out of accepting work from a different client even when the woman's client promises to be more lucrative;

(5) Women may not get credit for the business they do bring in;

(6) Male counterparts receive credit they did not earn because partners assume they have families to support or older partners want to establish relationships with the young male partners;

(7) Firms lack formal succession planning, which hurts women; and

(8) Women who have babies are penalized by receiving no credit for the time they were out on maternity leave thus depressing their compensation over several years.

Joan C. Williams and Marina Multhaup, in their article, *What the Partner Pay Gap Tells Us About Bias*, published in *The National Law Journal*, suggested the following steps to get out of this bias trap:

(1) Eliminate artificial penalties for women who take maternity leave;

(2) Establish a forum to settle origination credit disputes;

(3) Establish clear rules for splitting origination credit;

(4) Establish a formal succession planning process for passing clients onto other attorneys; and

(5) Share profits among everyone who creates value for the firm and its clients.

Lizzy McLellan, in her article on law.com, *Law Firms a "Petri Dish" for Bias, Gender Inequality*, pointed out that law firms can move toward improved pay equity by putting more women on compensation committees, developing more objective criteria for determining compensation levels, challenging those in charge to look at a broader range of people, and making bias training mandatory.

All the reports and surveys discussed concluded, as prior surveys have similarly concluded, that there is widespread discrimination against women in the workplace, and particularly in large law firms.

Firms have tried to put programs into place to remedy the gender and minority discrimination, but they do not appear to be successful against the ingrained "old boy" and "take care of those like you" mentalities. Male partners do not pass important clients to female partners. Women are diverted to less lucrative practices (for example, employment or family law rather than mergers and acquisitions). Women are perceived as too passive or too aggressive. Women's behavior is criticized even when that behavior is the same as the man standing next to her or playing

the same role in the organization. There have been thousands of programs studying what to do and how to improve things. Why is any improvement infinitesimal? Maybe it is very difficult for the predominately male compensation committee members and other firm leaders to face up to the fact that gender bias is prevalent in the big law firm structure. Maybe the methods for calculating compensation, although seemingly objective, are simply a smokescreen for hiding underlying bias. There is certainly a lot of information floating around, but the major question is whether law firms can take that information and develop fair methods of determining compensation that eliminate bias from the equation.

Developments

Council Holds Fall Retreat at Skytop



By Steven M. Edwards

The Federal Bar Council held its annual fall retreat at Skytop Lodge in Pennsylvania on October 14-16, 2016. The retreat was organized by the First Decade and Second Circuit Courts Committees and was chaired by Mark Berman and Damian Cavaleri. Approximately 150 people attended the retreat, which included six CLE panels and a host of recreational and social events.

Federal Rules Challenge

As is customary, the retreat began with the Federal Rule Challenge chaired by Eastern District Judge Ann Donnelly. Teams of contestants fielded mindboggling questions on such topics as bankruptcy procedure, judgments, criminal procedure, removal, appellate procedure, professional responsibility and local rules. They also covered substantive areas such as Section 1983's prohibition of conduct carried out under color of state law, habeas corpus, privileges and notable Supreme Court cases.

Encryption and Law Enforcement

A panel chaired by Eastern District Magistrate Judge Arlene Lindsay addressed the issues raised by smartphone encryption, particularly the *Apple v. FBI* case. Daniel Andriulli of TransPerfect Legal Solutions led off the discussion by providing a tutorial on encryption techniques. He began with substitution cipher and then addressed shift cipher, the Enigma Machine, block cipher and more modern techniques, such as private key, public key, hard drive, eDoc, and cellphone encryption. He noted that although encryption can have many benefits, it can cause data obfuscation.

Joe DeMarco of DeVore & DeMarco discussed the *Apple v. FBI* case, where Apple was ordered to take certain steps to facilitate access to a cellphone used by one of the San Bernardino terrorists. DeMarco noted that Apple was not required to do as much work as is popularly thought; its obligations were limited to disabling the feature that erased the memory after 10 password tries, permitting remote access to the passcodes and ensuring that the software on the device did not introduce any additional delay between passcode attempts. The matter became moot when the FBI managed to circumvent the passcode with the assistance of hackers.

A panel chaired by Eastern District Magistrate Judge Arlene Lindsay addressed the issues raised by smartphone encryption, particularly the *Apple v. FBI* case.

Linda Clark of RELX, which owns Lexis-Nexis, discussed the steps her company takes to secure its data. Among other things, they try to encrypt their information at both the data and device levels, and they are very careful to com-

ply with their legal obligations under federal and state laws. At the end of the day, her company asks itself the following question – would you let someone access this information by wandering unescorted through the hallways – and proceeds accordingly.

Securities and Exchange Commission Regional Director David Glockner discussed the issues from an SEC perspective. The SEC has two roles, which sometimes conflict: On the one hand, it seeks to encourage companies to adopt security measures in order to prevent insider trading; on the other hand, it promotes transparency in order to combat practices such as market manipulation. Glockner pointed out that there is no SEC rule that requires encryption, but he noted that there is pending legislation on this subject.

Marshall Miller of Wachtell, Lipton, Rosen & Katz expressed the view that describing the issue as a debate between national security and privacy ignores the nuances. To a great extent, the position of Apple is driven by business necessities and the recognition that foreign companies will take over the smartphone market if the United States outlaws end-to-end encryption. He suggested that a legislative solution might make sense, but the Obama Administration has not proposed one, opting instead for a cooperative solution. He noted that there are legislative proposals pending that support the positions of both sides, and some have proposed the creation of a "commission" to study the issue. DeMarco expressed some skepticism that a legislative solution is possible and suggested that the issue will probably be decided by the courts in civil cases.

Municipal Bankruptcies

Bankruptcy Judge Martin Glenn moderated a panel on municipal bankruptcies, with special emphasis on the Detroit and Puerto Rico situations. The discussion began with a tutorial on municipal bonds by Martha Kopacz, Senior Managing Director of Phoenix Management Services. She pointed out that, for the most part, municipal bonds are not governed by federal law. Questions such as priority and subordination are yet to be decided, and the aftermarkets for municipal bonds are different from the aftermarkets for corporate bonds. She noted that there are two types of municipal bonds – general obligation and special revenue bonds – and the bankruptcy laws differ for each. In Kopacz's view, the consequences of municipal failure can be catastrophic. Two of the biggest problems are pensions and healthcare. At the present time, local governments in the United States have over $3.5 trillion aggregate pension liability, assuming a seven to eight percent return on investment, or $7 trillion assuming no return. Considering that the entire economy is $16.5 trillion, pension liabilities alone may be a ticking time bomb.

Thomas Mayer of Kramer Levin discussed the alternatives available to municipalities if they default on their obligations. For a period of time, there were questions about whether Chapter 9 is even constitutional, and there are still questions about whether the impairment of contracts under Chapter 9 is constitutional. A municipality filing for Chapter 9 protection must demonstrate that it is insolvent, it has bargained with its creditors in good faith and bankruptcy is authorized by state law. At the present time, municipal bankruptcy is not authorized by 22 states. Furthermore, Chapter 9 protection applies only to general obligation bonds and does not cover revenue bonds, so revenue bonds are not subject to the automatic stay.

Bankruptcy Judge Martin Glenn moderated a panel on municipal bankruptcies, with special emphasis on the Detroit and Puerto Rico situations.

Jones Day's Kevin Orr discussed the bankruptcy of Detroit, where he was appointed Emergency Manager by the State of Michigan, which had taken over control of Detroit's finances. The bankruptcy proceeding involved many difficult issues, including the money owed to pensioners, the collapse of the city's infrastructure and the question whether

to sell the collection of the Detroit Institute of Art, which is one of the top art museums in the world. The controversy took on racial and class overtones, and the priorities of inner-city residents and suburbanites – who had a seat at the table as a result of the involvement of the state – were in direct conflict. Ultimately, Orr forged what he called the "Grand Bargain," in which the state and the museum committed additional money, and the pensioners made accommodations, so that the City could emerge from Chapter 9. Whether the plan works in the long run remains to be seen.

The panel also discussed the Puerto Rico situation. The Supreme Court has held that Puerto Rico is not a state, so it cannot take advantage of Chapter 9. In response to the Supreme Court's ruling in June of this year, Congress passed the Puerto Rico Oversight, Management and Economic Stability Act, or PROMESA, which provides for the appointment of a seven person board to manage Puerto Rico's economy. This move has drawn complaints from Puerto Rico's citizens, who view it as an infringement of their sovereignty. The PROMESA board is attempting to find a negotiated solution similar to the Detroit experience. There was a consensus among the panelists that municipal bankruptcies should be avoided if at all possible.

Sexual Assault on Campus

This program began with a dramatic skit in which Marjorie Berman and Eric Franz portrayed the aftermath of a campus sexual encounter from opposite points of view. This was followed by a second skit in which Larry Krantz, Sheila Boston, Sammi Malek, and Phyllis Malgieri played roles of college administrators considering what to do. Ron Fischetti, who organized the program, made some introductory comments, and Southern District Judge Katherine Failla moderated the panel discussion.

Frederick Schaffer, general counsel of the City University of New York, described the regulatory background, noting that the U.S. Department of Education's Office of Civil Rights ("OCR") has issued a guidance and several letters stating that Title IX required that CUNY have a disciplinary process for investigating and adjudicating sexual assault complaints. New York and a number of other states also have passed laws requiring colleges to establish policies that require affirmative consent at every stage of a sexual encounter and provide that consent cannot be given if a person is incapacitated as a result of intoxication. As a result of these requirements, colleges have adopted policies and procedures that often provide few of the due process protections of legal proceedings, such as the right to counsel and a right to confront and cross-examine the accuser.

Bob Anello of Morvillo Abramowitz Grand Iason & Anello, who has represented respondents in these cases, observed that recently there has been some backlash against these procedures on the ground that they are unfair to the accused. He noted that in April of this year the Second Circuit reversed the dismissal of a complaint that alleged that Columbia University's sexual assault procedures violated Title IX because they were unfair to the accused. Then in October of this year the OCR found that Wesley College in Dover, Delaware, had violated Title IX because its procedures for adjudicating these disputes were unfair.

Schaffer pointed out that one of the problems is that the OCR provides very little guidance other than to say that the procedures must be fair. As a result, colleges have taken wildly disparate approaches. Schaffer noted that CUNY has received very little criticism of its procedures because they are heavily weighted toward due process.

Unconscious Bias

A panel led by Judge Donnelly discussed the issue of unconscious bias in the workplace. Paula Edgar of PGE LLC asked the audience a series of questions that revealed implicit biases. She also described the famous "Thomas Meyer" study where the same memorandum was graded differently by partners in a law firm depending on whether the writer was identified as white or black. In her view, the only way people can overcome unconscious bias is to force themselves to do things that make them uncomfortable.

Michael Cardozo of Proskauer Rose discussed the diversity issues that confront law firms today. In his view, the first step is to decide that diversity is a goal. Once that goal is acknowledged, special mentoring programs for minorities are important. Affinity groups are also helpful. Cardozo emphasized that law firms have to be prepared to confront unconscious bias every day, and that efforts to combat unconscious bias should begin in law school.

A panel led by Judge Donnelly discussed the issue of unconscious bias in the workplace.

The panel discussed the New York City Bar Association's recent study on diversity. That study shows that about 75 percent of the partners in law firms are white males, even though only 44 percent of the associates fall into that category; and 20 percent of the partners are women compared to 44 percent of the associates. Similarly, about eight percent of the partners are racial and ethnic minorities, while 26 percent of the associates fit that description. These figures suggest that there is significant attrition among women and minorities as they move up through the ranks.

Panama Papers

The last program addressed the Panama Papers case, where 11.5 million documents from the Panamanian law firm Mossack Fonseca were leaked to the press. Many of the documents evidenced illegal offshore activities. Eastern District Judge Brian Cogan discussed the ethical implications of this situation with a panel that included Mark Cohen of Mayer Brown, Michael Ross of the Law Offices of Michael Ross, Bryan Skarlatos of Kostelanetz & Fink, and Kennet Westby of Coalfire.

The last program addressed the Panama Papers case, where 11.5 million documents from the Panamanian law firm Mossack Fonseca were leaked to the press.

The key issue for the panel was whether lawyers should be gatekeepers or whether they play a more passive role. Model Rule 1.2(d) provides that a lawyer may not knowingly aid a client in the commission of a crime, but it also states that a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law. Deciding where to draw the line between the permissible and the impermissible often becomes a difficult task for the lawyer.

Another issue relates to the concept of knowledge. In many parts of the world, lawyers are required to conduct due diligence before agreeing to represent a client, but the United States does not impose that requirement. Nevertheless, a lawyer can get into trouble if it can be shown that the lawyer was willfully blind to the client's activities.

At the end of the day, a lawyer has to make a personal choice about how he or she is going to handle this difficult issue. The panel suggested that lawyers should always consider how it will look after the fact. The panel also discussed the risks of being hacked and the rules governing the use of stolen privileged documents.

Inn of Court Players

On Saturday night, a group from the Federal Bar Council Inn of Court, led by Marjorie Berman, performed "Election Reflection," a spoof of the current election. Larry Krantz, playing Ted Cruz, sang "It Should Have Been Cruz" to the tune of "I Gotta Be Me." The author played Donald Trump and sang "Talking Crudely" to the tune of the "59th Street Bridge Song." Sammi Malek as Hillary Clinton and Andrew Mancilla as Bernie Sanders debated the benefits of socialism to the tune of "Whole New World" from the movie Aladdin. Margie Berman, Sheila Boston, Lia Brooks, and Phyllis Malgieri turned Beyonce's hit, "All the Single Ladies," into "All the Undecided." Rounding out the

cast were Monica Nejathaim as Huma Abedin and Jason Canales as himself.

New Appointments

LaShann DeArcy Hall in the Eastern District of New York

By Stephen L. Ratner and Steven H. Holinstat





On November 12, 2014, President Barack Obama, on the recommendation of Kirsten Gillibrand, the junior U.S. Senator from New York, nominated LaShann Moutique DeArcy Hall to serve as a U.S. District Court Judge for the Eastern District of New York. On December 16, 2014, Judge Hall's nomination was returned to President Obama due to the sine die adjournment of the 113th Congress.

On January 7, 2015, President Obama re-nominated Judge Hall to the same position, and she received a hearing before the U.S. Senate Judiciary Committee on May 6, 2015. On November 16, 2015, the Senate voted in favor of final confirmation by a vote of 93-1, and Judge Hall received her judicial commission on November 17, 2015. Judge Hall fills the seat vacated by Judge Nicholas Garaufis, who took senior status on October 1, 2014.

Born in 1979 in Hollywood, California, Judge Hall received her B.A. from Antioch College in 1992. Judge Hall graduated *magna cum laude* from Howard University School of Law, receiving her J.D. in 2000. Judge Hall worked as an associate at Cravath, Swaine & Moore from 2000 to 2005 and at Gibson, Dunn & Crutcher from 2005 to 2010. In 2010, Judge Hall joined Morrison & Foerster, where she became a partner in January 2014.

Judge Hall has over a decade of experience as a trial lawyer, representing Fortune 500 companies in high stakes, complex commercial litigation in antitrust, class action, contract, business tort, trade secret, and bankruptcy matters. The chair of Morrison & Foerster, Larren M. Nashelsky, described Judge Hall as "a highly regarded and respected lawyer," who "has been a tremendous asset to the firm, and we are proud of the accomplishments that led to her nomination."

Judge Hall also has demonstrated a deep commitment to public service. From 1995 to 1997, Judge Hall served in the U.S. Air Force as a Senior Airman. She was also twice appointed by former New York City Mayor Michael Bloomberg to serve as a commissioner on the New York City Taxi and Limousine Commission, and served in that capacity from 2011 to 2015.

From 2012 to 2014, Judge Hall served as a commissioner on the New York State Joint Commission on Public Ethics, which has oversight over the state's executive and legislative branches' compliance with ethics and lobbying laws, regulations, and guidance. Judge Hall also served on the board of trustees for the Neighborhood Defender Service of Harlem and the board of visitors for Howard University School of Law.

In 2009, Judge Hall was awarded the Diversity Champion Award by the New York City Bar Association and, in 2013, she was the Women's Veteran Honoree by the Metro-Manhattan Chapter of the Links, Inc.

In nominating Judge Hall to the federal bench, Senator Gillibrand stated that Judge Hall "is an accomplished attorney, who is extremely well qualified to serve as a federal court judge.… Throughout her career, Ms. DeArcy Hall has served with integrity and distinction, and has

remained committed to ensuring justice. I believe LaShann DeArcy Hall has the right judicial temperament that will allow her to serve as a fair and honorable Eastern District Judge for New York." In addressing Congress, Senator Gillibrand stated that Judge Hall's "credentials are absolutely worthy of this position on the federal bench, and we would be a stronger nation with more women like Ms. Hall serving as judges in our federal court system.… She has devoted her entire career to various forms of public service. She is dedicated to her community, and she cares deeply about this country. LaShann DeArcy Hall would make an excellent federal judge, and she would add much needed diversity and another female voice to the federal bench."

In nominating Judge Hall to the federal bench, Senator Gillibrand stated that Judge Hall "is an accomplished attorney, who is extremely well qualified to serve as a federal court judge.…"

When asked by Senator Grassley, as part of the judicial confirmation process, about the most important attribute of a judge and whether she possessed it, Judge Hall stated, "The most important attribute of a judge is the ability to fairly and impartially apply the rule of law. I am committed to strict adherence to the rule of law, and, if confirmed, I would base my rulings on applicable law without regard to my personal views."

Similarly, when asked about the appropriate temperament of a judge, she replied, "A judge should be deliberate, thoughtful, patient, and fair. A judge should serve with integrity and humility. I believe I have demonstrated each of these qualities through my service on the New York State Joint Commission on Public Ethics, the New York City Taxi and Limousine Commission, and in the United States Air Force. If I am confirmed, I will continue to exemplify these qualities."

Judge Hall was sworn in as the sixty-second judge of the Eastern District of New York by Chief Judge Carol Bagley Amon. At her investiture ceremony, Chief Judge Janet DiFiore of the New York State Court of Appeals stated, "This is a great day for Judge Hall, her family, and her friends and colleagues. Most of all, this is a great day for the public she serves so ably on the bench. Her years as a commercial litigator without a doubt prepare her to preside over the complex and varied cases." Judge Amon also stated, "LaShann DeArcy Hall brings to our bench her sharp inquisitive mind, her no-nonsense approach to conducting proceedings, her kindness and her ability to make all around her reach for higher heights. I feel very blessed to have her as my newest colleague."

Legal History

Yet Another *Awful* Decision by the U.S. Supreme Court

By C. Evan Stewart



In the last two issues of the *Federal Bar Council Quarterly*, we have explored the *worst* decision *ever* by the U.S. Supreme Court (*Dred Scott v. John F.A. Sanford*, 60 U.S. (19 How.) 393 (1856)), as well as the *second worst* (*Plessy v. Ferguson*, 163 U.S. 537 (1896)). Now let's add another decision to this un-august group: *Korematsu v. United States*, 323 U.S. 214 (1944). In *Korematsu*, the Court held that widespread racial discrimination aimed at one group of American citizens – Americans of Japanese descent – was justified by wartime necessity.

A Date Which Will Live in Infamy

At 7:48 a.m. (Hawaiian time) on December 7, 1941, forces from the Imperial Japanese Navy began their attack on the U.S. Pa-

cific Fleet headquartered at Pearl Harbor. All eight U.S. battleships were damaged (four were sunk); 188 planes were destroyed; 2,403 Americans were killed and 1,178 were wounded. That same day (although it was actually December 8 in Asia), Japan also attacked U.S. bases in the Philippines, Guam, and Wake Island, as well as attacking the British-held colonies of Hong Kong, Singapore, and Malaya.

Also taking place on December 7 was a meeting in Pittsburgh's Soldiers and Sailors Memorial Hall. With a seating capacity of 2,550, the arena was packed with supporters of the America First Committee ("AFC"), eager to hear Senator Gerald Nye (and others) speak against America getting involved in the armed conflicts raging in Europe and Asia. AFC had been started on September 4, 1940 by Yale Law students (among them, Gerald Ford, Sargent Shriver, Potter Stewart, and Kingman Brewster) and quickly grew into a national movement (800,000 paying members, with supporters such as Walt Disney, John F. Kennedy, Frank Lloyd Wright, e.e. cummings, and Alice Roosevelt Longworth).

The national spokesman for the group was the famed aviator, Charles Lindbergh. Lindbergh, who had publicly opposed the Roosevelt administration for years (and had also announced to the world how impressed he was with the growing might of Germany's air force), turned up the nature and heat of the isolation debate at an AFC rally in Des Moines, Iowa, on September 11, 1941. Blaming the British, Roosevelt's administration, and American Jews for leading America inexorably into the world's conflicts, Lindbergh went on:

> It is not difficult to understand why Jewish people desire the overthrow of Nazi Germany. The persecution they suffered in Germany would be sufficient to make bitter enemies of any race. No person with a sense of the dignity of mankind can condone the persecution the Jewish race suffered in Germany. But no person of honesty and vision can look on their pro-war policy here today without seeing the dangers involved in such a policy, both for us and for them.
>
> Instead of agitating for war the Jewish groups in this country should be opposing it in every possible way, for they will be among the first to feel its consequences. Tolerance is a virtue that depends upon peace and strength. History shows that it cannot survive war and devastation. A few farsighted Jewish people realize this and stand opposed to intervention. But the majority still do not. Their greatest danger to this country lies in their large ownership and influence in our motion pictures, our press, our radio, and our government.

It was in this type of environment that Senator Nye took the stage at 4:45 p.m. and proclaimed, "Never, never, never again must America let herself be made such a monkey of as she was 25 years ago." During his speech, Nye was handed a note that read, "The Japanese Imperial Government and Tokyo today at 4:00 p.m. announced a state of war with the U.S. and Great Britain." He told the crowd about the note, but added, "I can't somehow believe this. I can't come to any conclusions until I know what this is about."

It turned out that Nye had known of the attack on Pearl Harbor before he had gotten up to speak. The next day, the *Pittsburgh Press* denounced the meeting in an editorial: "Never has there been such a disgraceful meeting in all Pittsburgh's history. Those who participated in it should forever hang their heads in shame." More importantly, President Roosevelt addressed Congress that same day, proclaimed that December 7th was "a date which will live in infamy," and asked Congress to declare war against the Empire of Japan. Within 40 minutes, Congress did just that (the Senate: 82 to 0; the House 388 to 1 – Jeannette Rankin (R. Montana) was the one negative vote; she in fact had also voted against United States participation in World War I). Stung by the surprise and enormity of the Japanese attacks, the nation reflexively followed suit, pivoting from isolationism to full support for a vengeful war; not surprisingly, on December 11, the leaders of AFC disbanded the organization.

Panic on the West Coast (and Beyond)

In very short order the vengeful American public and their political representatives focused on the approximately 120,000 Japanese Americans who lived among them, almost all of whom were located on the West Coast. One who led the charge was Earl Warren, California's then Attorney General (and who later became a liberal icon as Chief Justice of the United States). Warren publicly proclaimed, "I have come to the conclusion that the Japanese situation, as it exists today, may well be the Achilles Heel of the entire civil defense effort. Unless something is done it may bring about a repetition of Pearl Harbor." And the Mayor of Los Angeles, Fletcher Bowron, invoked America's greatest president. "There isn't a shadow of a doubt but that Lincoln … would make short work of rounding up the Japanese and putting them where they could not do harm."

The reported sightings of purported enemy ships and imminent invasions threatening the West Coast exploded. But it was not all frantic fantasy. In late December, three ships were in fact torpedoed off the California coast by a Japanese submarine or submarines. And, on February 23, 1942, a Japanese submarine fired some shells at an oil refinery in Galeton, California, causing $500 of damage. The next night brought on "The Battle of Los Angeles," with hundreds of army anti-aircraft rounds fired at the off-shore enemy – a U.S. Navy weather balloon (five people died – two of heart attacks, three in car crashes of locals fleeing the City of Angels).

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The federal government's team charged with handling this existential threat to the homeland was led by Lieutenant General John DeWitt of the Western Defenses Command. DeWitt's basic, bottom line was as follows: "A Jap is a Jap! There is no way to determine their loyalty." DeWitt found an ally in Assistant Secretary of War John J. McCloy (*see, Federal Bar Council Quarterly* (September 2012)), who opined: "We can cover the legal situation … in spite of the Constitution. Why the Constitution is just a scrap of paper to me." Together, they pressed for an executive order to round up every person on American soil deemed to be of Japanese lineage. McCloy's boss, Secretary of War Henry L. Stimson (*see, Federal Law Council Quarterly* (May 2009)), was not comfortable with that approach; Attorney General Francis B. Biddle actually publicly opposed such an action on the ground that it was unconstitutional.

Nonetheless, on February 19, 1942, President Roosevelt signed Executive Order 9066. Roosevelt, however, did not want to publicly embrace this tar baby and issued the order without comment. The order read, in part:

> I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area herein above authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

Importantly, the order did not mention race or national origin. One reason for that was there was significant sentiment to round up on a whole-sale basis German-Americans and Italian-Americans as well. General DeWitt, in fact, wanted to intern Joe DiMaggio's parents, who were based in San Francisco and had never applied for American citizenship. (He did not get his wish; but they were barred from using their fishing boat and from visiting the restaurant they owned.)

To the "Camps"

Initially, Japanese-Americans were allowed to "voluntarily" leave the West Coast states – if they relocated east of the Sierra and Cascade mountain ranges. Very few availed themselves of this offer. On March 27, 1942, General DeWitt shut down that option.

Mass departures by bus and train then began in earnest. People were allowed to bring "only what you can carry." A number of "Assembly Centers" were established (mostly in California); these were created to process the deportees on their way to "Relocation Centers" – ultimately, there were 10 such "Centers" (two in



Roger Shimomura
American, born 1939
Desert City, 2010
Acrylic on canvas. This painting depicts the Minidoka Relocation Center, Idaho, where the artist spent his early childhood.
Collection of the Herbert F. Johnson Museum of Art
Acquired through the George and Mary Rockwell Fund; 2014.005
Courtesy of the artist

California, two in Arizona, two in Arkansas, and one each in Idaho, Utah, Wyoming, and Colorado). These "Centers" were, in fact, concentration camps, surrounded by barbed wired and guarded by armed troops. The government's official line was that the "Centers" had been set up to protect the Japanese Americans from violence by other Americans; but the people cluttered inside the "Centers" noticed that the armed troops, perched on the various guard towers (with search lights), were pointing their machine guns at them, rather than at access routes leading to the "Centers."

Fred Korematsu and Military Order No. 34

Fred Korematsu was an American citizen; his parents had emigrated from Japan. He worked in a shipyard in California, but was fired after Pearl Harbor. He twice tried to enlist, but was rejected. He then procured a forged draft card with the name of Clyde Sarah, claiming Spanish and Hawaiian lineage. Based on his new identity, he was hired at another shipyard in California; and "Clyde" did well there, being promoted to foreman.

During this same period, General DeWitt was busy issuing a whole series of orders, based upon the authority delegated to him by Executive Order 9066. On March 27, 1942, for example, he issued Proclamation No. 4, which forbade all persons of Japanese ancestry from leaving Military Area No. 1 "for any purpose." Then, on May 3, the general issued Order No. 34, which excluded all persons of Japanese ancestry from Military Area No. 1. Failure to obey any of the directives issued pursuant to Executive Order 9066 had explicitly been made a crime by a recent act of Congress.

On May 30, Korematsu was arrested on a street corner in San Leandro, California. He subsequently was convicted for violating Order No. 34 and the aforementioned Congressional statute. A local lawyer, Wayne Collins (at that point a lawyer for the American Civil Liberties Union), urged Korematsu to test the constitutionality of Executive Order 9066. Korematsu agreed, and the case ultimately made its way to the U.S. Supreme Court.

In the Supreme Court

Writing for a six Justice majority (Chief Justice Stone and Justices Black, Reed, Douglas, Rutledge, and Frankfurter), Justice Hugo Black ruled that Executive Order 9066 and the Congressional statute that made a violation thereof a crime were constitutional. Black, who as a young lawyer in Alabama had been a member of the Klu Klux Klan, began his opinion by laying out – for the first time in the Court's history – that "legal restrictions which curtail the civil rights of a single racial group are immediately suspect ... [and are subject] to the most rigid scrutiny."

Notwithstanding such strict scrutiny, Black believed he was controlled by the Court's prior decision – *Hirabayashi v. United States*, 320 U.S. 81 (1943) – in which the conviction of a Japanese-American for violating a DeWitt curfew order was upheld. Quoting from the earlier decision, Black wrote:

> We cannot reject as unfounded the judgment of military authorities and of Congress that there were disloyal members of that population.... We cannot say that the war-making branch of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.

Writing for a six Justice majority, Justice Hugo Black ruled that Executive Order 9066 and the Congressional statute that made a violation thereof a crime were constitutional.

If that were not bad enough, incredibly, Black then wrote that, while it would be a different case if it involved imprisoning a loyal citizen in a concentration camp

because of racial prejudice ("our duty [would be] clear"), "we are dealing specifically with nothing but an exclusion order." Of course, that was simply not true; indeed, once Korematsu was arrested he was put into just such a camp (as were nearly 120,000 others). Compounding this strange analysis, Black then wrote that casting "the case into outlines of racial prejudice ... *merely confuses* the issue. Korematsu was *not* excluded from the Military Area because of hostility to him or his race." (Emphasis added.)

Black then concluded this train of thought as follows:

> There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot – by availing ourselves of the calm perspective of hindsight – now say that at that time these actions were unjustified.

Justice Felix Frankfurter, while he concurred with Black's opinion, felt compelled "to add a few words of [his] own." Opining that the Constitution is "an instrument for dialectic subtleties," Frankfurter could "find nothing in the Constitution which denies to Congress the power to enforce such a valid military order by making its violation an offense triable in the civil courts." And just to sharpen that point, he ended with this thought: When it comes to war, "[t]hat is their [the Executive's and Congress's] business, not ours."

There were three dissents, the first by Justice Owen Roberts. Roberts, as an initial matter, noted that the issue was not "keeping people off the streets at night" (*Hirabayashi*), but rather the conviction of someone who refused to submit to imprisonment in a concentration camp based upon his race or national origin. Laying out the history of Executive Order 9066 and General DeWitt's various directives pursuant thereto, Roberts laid bare the absurd dilemma Korematsu faced: "The earlier of [DeWitt's] orders made him a criminal if he left the zone in which he resided; the latter made him a criminal if he did not leave." The only escape from this trap was to voluntarily go to one of the concentration camps. Thus, the internment program itself was indeed at the heart of what was at issue and the whole shebang was clearly unconstitutional.

Justice Frank Murphy was up next, writing that constitutional power had been abused and the internment program fell "into the ugly abyss of racism." Murphy focused on deconstructing the case the government had put forward to justify the "military necessity" for excluding "'all persons of Japanese ancestry, both alien and non-alien,' from the Pacific Coast area." That case was based exclusively on General DeWitt's *Final Report, Japanese Evacuation from the West Coast, 1942* (dated June 5, 1943; made public in January 1944). As Murphy made clear, there was "no reliable evidence" cited anywhere in DeWitt's report that the general population of individuals of Japanese descent were disloyal or had done anything wrong. Instead, the report just set forth a litany of racist suppositions, strung one-after-another ("an accumulation of ... misinformation, half-truths and insinuations"), without any factual basis for support. Murphy then observed that many of these same charges of treason, etc., had been lodged against German-Americans and Italian-Americans, without any wholesale evacuation of those very large groups of citizens to concentration camps. He also noted that not one person of Japanese ancestry had been accused or convicted of any activities relating to the attack on Pearl Harbor. Finally, he demonstrated the Alice-in-Wonderland logic of the DeWitt Report, citing its "amazing statement": "The very fact that *no sabotage* has taken place to date is a disturbing and confirming indication that such action *will be taken*." (Emphasis added.) He concluded by abhorring the Court's "legalization of racism," which should never have a place "in our democratic way of life."

Justice Robert Jackson then weighed in with a historic dissent. Initially, he noted that Korematsu's crime "consists merely of being present in the state whereof he is a citizen, near the place he was born, and where all his life he has lived." The legal dilemma he faced (which could only be solved by agreeing to placement

in a concentration camp) was due solely to the birth place of his parents, notwithstanding that the "fundamental assumption" of our system is that "guilt is personal and not inheritable."

Jackson next turned to the Court's role in passing on DeWitt's various orders. Given the "evidence" in the record, Jackson said he could not judge whether or not the orders were "reasonably expedient military precautions." But to Jackson that was not the issue; the issue was whether or not the orders were constitutional. Making this even more problematic was the DeWitt Report itself, over which there was "sharp controversy as to [its] credibility":

> So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. And that it will always be when courts try to look into the reasonableness of military orders.

Jackson's real concern, however, was not with DeWitt's orders, per se, because a military commander's order can always be revoked after the military emergency. Rather, his concern was the majority's giving constitutional imprimatur to such orders; for now "the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens." In his dissent's most famous line Jackson then wrote: "The principle then lies about like a *loaded gun* ready for the hand of any authority that can bring forward a plausible claim of an urgent need." (Emphasis added.)

The Justice Department had done its best to time the case before the Supreme Court to ensure that it would have no impact on Roosevelt's campaign for a fourth term. And that effort worked: oral argument took place on October 11 and 12, 1944, and the decision was handed down on December 18, 1944. Not only had Roosevelt been re-elected by that time, but Korematsu had been released and was working as a welder in Salt Lake City.

The Aftermath of Korematsu

For many decades this shameful episode in our nation's history was not widely discussed or acknowledged. But by the 1970s, books began to be written, and President Ford issued Proclamation 4417 in 1976, which repudiated Executive Order 9066; in doing so he said, among other things: "We now know what we should have known then, not only that evacuation was wrong, but Japanese-Americans were and are loyal Americans." Congress thereafter published a report in 1982; it concluded that "Executive Order 9066 was not justified by military necessity" and that it and DeWitt's various orders were the result of "race prejudice, war hysteria, and a failure of political leadership." Six years later, Congress passed the Civil Liberties Act of 1988. That legislation not only included a formal apology for the evacuations and internments, it also provided payment of $20,000 to each of the approximately 80,000 citizens subject to such treatment who were still living.

For many decades this shameful episode in our nation's history was not widely discussed or acknowledged. But by the 1970s, books began to be written, and President Ford issued Proclamation 4417 in 1976, which repudiated Executive Order 9066

More important for Fred Korematsu was that Peter Irons, a professor at the University of Massachusetts at Amherst, and Aiko Yoshinaga-Herzig, a California housewife, independently discovered that Justice Department lawyers had withheld, altered, and/or destroyed evidence while Korematsu's case was winding its way to the Supreme Court. They pooled what they had learned, and a group of Japanese-American lawyers subsequently brought on a *coram nobis* petition to overturn Korematsu's conviction. In the course of that

litigation, Korematsu's legal team proved that:

(1) The government had withheld intelligence reports from 1942 documenting that Japanese-Americans, as a whole, were loyal;

(2) DeWitt's Final Report had been materially altered (and it was the altered version that had been submitted to the Supreme Court as "evidence"); and

(3) DeWitt's various suppositions of treasonous acts by Japanese-Americans were not only false, they were *known to be false* by government attorneys at the time the Court was rendering its decision.

Based upon that evidentiary record, Judge Marilyn Hall reversed Korematsu's conviction, finding that a "manifest injustice" had been done to him and to all who had been interned. *See*, *Korematsu v. United States*, 584 F. Supp. 1406, 1416-17 (N.D. Cal. 1984).

Congress thereafter published a report in 1982; it concluded that "Executive Order 9066 was not justified by military necessity."

Postscripts

- Apropos of Justice Jackson's "loaded gun" imagery, the Supreme Court's decision in *Korematsu* has never been expressly overturned. Governmental policy in the aftermath of 9/11 certainly has some antecedents from that precedent. And one of this year's presidential candidates cited *Korematsu* with approval vis-à-vis dealing with specific immigrant groups that may (or may not) pose terrorist threats to this country.
- Ironically, Senator Nye sponsored the Nye-Lea bill in 1935, which granted citizenship to American veterans of Asian ancestry.
- The famed Western photographer, Ansel Adams, was granted access to Manzanar. His photographs have all been digitalized and are available online at the Library of Congress' website.
- By 1943, the federal government had changed its tune, at least insofar as allowing Japanese-Americans to serve in the military. Segregated units were formed, bound for service in Europe; a number of Japanese-Americans also served in the Pacific, most often as translators/interrogators (Major General Charles Willoughby paid tribute to those men as follows: "Never before in history did an army know so much concerning its enemy.... Those translators saved over a million lives and two years."). The almost entirely Japanese-American 442nd Regimental Combat Team, which ferociously fought the Germans in Italy, became the most decorated combat unit (per capita) in American history. Yet when Daniel Inouye (who later represented Hawaii in the U.S. Senate for 50 years) returned from the war (minus his right arm), he went into a San Francisco barbershop in his full dress uniform (bedecked with medals – he won, *inter alia*, the Medal of Honor), Lieutenant Inouye was told: "You're a Jap and we don't cut Jap hair."
- The hysteria that gripped California in the aftermath of Pearl Harbor is captured well in Steven Spielberg's 1979 movie "1941." One of the high points of "1941" is the greatest jitterbug dance scene in movie history."
- The best, most comprehensive book on the treatment of Japanese-Americans in World War II is Richard Reeves' *Infamy: The Shocking Story of the Japanese-American Internment in World War II* (Picador 2015). An excellent review of the *coram nobis* petition can be found in S. K. Serrano & D. Minami's "*Korematsu v. United States*: A Constant Caution in a Time of Crisis," 10 *Asian American Law Journal* 37 (2003). For a contemporaneous critique of the Supreme Court's handling of *Korematsu*, *see*, E.V. Rostow's "The Japanese American Cases – A Disaster," 54 *Yale Law Journal* 489 (1945).

In the Courts

Making the Most of Automatic Mediation

By Rebecca Price

I have been assured by some illustrious members of the bar that if I tell you in this first sentence that approximately 60 percent of cases referred to mediation in the U.S. District Court for the Southern District of New York settle you will keep reading this article. How about the oft-cited statistic that fewer than two percent of federal civil cases go to trial? Might that also inspire you to think of mediation – early mediation in particular – as a useful adjunct to litigation?

The Southern District has had a mediation program for over 30 years. Judges may refer any civil case (except tax, Social Security, and habeas) to mediation at any point in the litigation process. Starting in 2011, the court instituted two programs of early automatic referral to mediation – one in counseled employment discrimination cases and the other for counseled 42 U.S.C. § 1983 misconduct cases against the New York City Police Department.

The automatic programs recently have been expanded to include counseled Section 1983 police cases in the White Plains courthouse, and Fair Labor Standards Act cases assigned to seven of the court's judges, two in White Plains and five in Manhattan.

There are a number of principles driving the court's adoption and expansion of automatic mediation referrals. A substantial number of cases may be settled at an early stage, particularly with limited pre-mediation disclosures and the assistance of a trained neutral. (In 2015, our lowest rate of settlement was in counseled employment discrimination cases, approximately 50 percent of which settled through mediation.) A cornerstone of mediation is that it serve the needs of mediation participants. Although the early automatic referral programs come with discovery and other protocols, mediators and participants may modify the process and/or seek judicial relief to insure that a particular process is applicable and useful in each specific case.

Even when cases do not settle, early mediation is likely to streamline the next stages of the litigation process by narrowing and focusing the issues in dispute, clarifying differences in views of the facts and legal postures, and by setting the stage for effective communication between and among counsel and clients. A deep dive at the start can be a constructive way to get to the facts early and assess how best to advise a client over the long term. Of course, reaping these benefits depends upon active engagement, collaboration, and feedback between litigants and mediators.

No process is universally appreciated, and the Southern District's mediation program is no exception. The primary concern I have heard is with the quality of mediators on the court's panel. Quality, for most litigants, typically refers to knowledge of substantive law and, secondarily, to mediation process skills. Everyone – the court, the mediation program, the mediators, and surely the lawyers and parties – wants every mediation to be of the highest quality. We have undertaken a number of initiatives to support that goal. The mediator evaluation program, developed in collaboration with the New York City Bar Association Committee on Alternative Dispute Resolution, sends specially trained evaluators (themselves mediators) to observe and assess their peers as they mediate actual cases. The feedback provided by the evaluators enables panel mediators to reflect upon and improve their mediation skills and enables the mediation program to provide training and support and, where necessary, to remove mediators who demonstrate significant deficiencies. New applicants to the mediation panel must have had mediation skills training and meet live observation and co-mediation requirements before being assigned matters. Since last year, the court also has hosted practice groups where mediators meet every other month to discuss and strategize about mediation challenges in Southern District cases. In the last three years we have offered mediator trainings in a number of areas including employment discrimination, Section 1983, mediation skills, and implicit bias.

I also must say that although the court's programs for mediator

education and training are an asset, the mediator panel itself includes a large number of extraordinarily talented people, all of whom serve as volunteers. Although the mediation program assigns a mediator based on the nature of the case, litigants may contact the program with specific requests or needs for a mediator. These requests might include areas of legal experience or knowledge, or other traits such as an ability to work with high conflict parties, or comfort with family disputes, or a sensitivity to ethnic or cultural issues. With a panel of over 300 mediators, chances are high that we can satisfy your requests.

Even when cases do not settle, early mediation is likely to streamline the next stages of the litigation process by narrowing and focusing the issues in dispute, clarifying differences in views of the facts and legal postures, and by setting the stage for effective communication between and among counsel and clients.

Some members of the bar may be reluctant or outright refuse to engage in mediation, particularly when the referral comes early in a case. This opposition comes with many messages: a case can only be assessed once discovery is complete; an openness to mediation is a sign of weakness (to one's adversary or one's client); or early settlement means a change in anticipated revenue. There is no question that, along with the advent of electronic discovery and the reduction in civil trials, the integration of mediation and other means of alternative dispute resolution into the civil litigation process creates pressures to change the way many of us practice law. I would encourage those who have these concerns to express them, and then to make the most of the mediation process if you find yourself in it. The right mediator will assist you in developing clarity about the best path forward in any given case. In some situations, that path could include an application to the presiding judge to be removed from mediation if that is necessary and appropriate.

A final request, if I may. If you are in mediation in the Southern District of New York and the assigned mediator or the mediation process do not meet your expectations, please let us know. The court sends post-mediation surveys to counsel of record on every mediated case. The mediation program also welcomes comments by phone, e-mail, fax, or regular mail. There is nothing more disheartening than hearing anecdotally that someone has had a bad experience, without any means for us to investigate and improve. We are a public program, a service of the court, and we are (continually) a work in progress.

Editor's Note: Rebecca Price is director of the ADR program in the Southern District of New York.

Decisions

Ballot Selfies

By Charles C. Platt



In a tumultuous election process that has included everything from the offensive use of social media to claims of "rigged" election outcomes, a new (albeit smaller) battleground has emerged: "ballot selfies." These are photographs that are taken by voters with a mobile device in a voting booth, often show the voters with their marked ballots, and are published widely across the internet.

Proponents of ballot selfies argue that such photographs are more than just the narcissistic

celebration of mundane life that regularly trades on social media. These selfies are touted as a dynamic way for younger voters to get involved in the political process and to promote their support of a particular candidate – a natural outgrowth of the use of social media in our elections. Opponents remind that secrecy and confidentiality in the voting booth have served for more than one hundred years to preserve the integrity and reliability of elections, and to protect against vote buying and voter coercion. Publicizing marked ballots could undercut those important objectives.

The lines are evenly drawn on this issue in state statutes around the country. According to the *Washington Post*, 19 states allow ballot selfies, 18 states (including New York) prohibit them, and the remaining states do not have rules that are entirely clear. Into this divide have rushed the proponents of the First Amendment, who proclaim that state statutes prohibiting ballot selfies are content-based restrictions of speech that on their face violate the first amendment. Two cases have recently been decided that address these claims.

Rideout v. Gardner

The first case, titled *Rideout v. Gardner*, was brought in New Hampshire federal court by three voters (two of whom were candidates on the ballot) who posted photographs of their marked ballots and included comments on why they thought their vote was important. Those posts generated an investigation by the state Attorney General's office into whether these voters had violated New Hampshire law, Section 659:35, I. That statute had for more than 100 years prevented voters from allowing others to see their ballot "with the intention of letting it be known how [they] intend to vote." However, the statute had recently been revised to expressly prevent voters from taking photographs of marked ballots and sharing that image through social media.

According to the *Washington Post*, 19 states allow ballot selfies, 18 states (including New York) prohibit them, and the remaining states do not have rules that are entirely clear.

In response to that investigation, the three voters commenced an action challenging the constitutionality of the New Hampshire statute. Judge Paul Barbadoro in the District of New Hampshire held, in a thoughtful opinion, that the statute was a content-based restriction of speech that violated the First Amendment. He applied a strict-scrutiny analysis, concluding that "neither the legislative history nor the evidentiary record … provide any support for the view that the state has an actual or imminent problem with images of completed ballots being used to facilitate either vote buying or voter coercion."

The First Circuit affirmed, finding that the New Hampshire statute was facially unconstitutional even if it was content-neutral, and only intermediate scrutiny were applied in the analysis. The court reasoned that the statute could not be found to be narrowly tailored to serve a significant governmental interest given the lack of any "actual problem" with vote buying or voter coercion in the record.

Crookston v. Johnson

The second case, *Crookston v. Johnson*, was brought in Michigan federal court, by a voter challenging a one hundred and twenty five year-old statute that forbids exposing marked ballots to others. The district court preliminarily enjoined the state from enforcing the law, so that voters could take ballot selfies on their cell phones and post them on the internet in the election held on November 8, 2016. The Sixth Circuit stayed the preliminary injunction, concluding that the voter bringing the case had waited too long to file the action, and would have ample opportunity to litigate his claim after the election. The state's interest in holding orderly elections was greater than the "last-minute" challenge based on the First Amendment, particularly because any change in the se-

cret ballot rules would require nuanced policy decisions that should not be made at the eleventh hour before an election.

The Sixth Circuit was "skeptical" of the voter's chance of success on the merits. It viewed the ban on ballot selfies as a content-neutral regulation that reasonably protects voters' privacy, honors the long tradition of protecting the secret ballot, and furthers the state's compelling interest in protecting the right of its citizens to vote freely in an election conducted with reliability and integrity. Voters who wish to announce who they voted for and why can post thousands of words without displaying the picture of their ballot.

So the debate about ballot selfie issues will apparently continue, pitting voters' First Amendment rights against the states' historic interests in secret ballots. Can the debate about courtroom selfies be far behind?

Personal History

Beware the Runaway Juror

U.S. Magistrate Judge Lisa Margaret Smith

Many years ago, before I became a U.S. Magistrate Judge, I was an Assistant U.S. Attorney for the Southern District of New York. In that position I had occasion to try a case in the Western District of Missouri after Judge Charles L. Brieant granted the defendant's motion for change of venue. When I suggested to the U.S. Attorney that I was sure there were very competent Assistant U.S. Attorneys in Kansas City, I was told that this was a Southern District of New York case, and that an Assistant U.S. Attorney from the Southern District of New York therefore would try it. Little did I know that the trial experience would be unlike any other case I had ever tried.

It was just after Thanksgiving when I travelled to Kansas City to make my final trial preparations. Although the folks at the U.S. Attorney's Office were polite to me, they provided me with little support, just an office from which to work and a secretary to answer the phone. I was accompanied by two FBI Special Agents, who had investigated the case from the outset, and while their presence was very helpful, none of us could have envisioned what would happen during trial.

The Underlying Crimes

The defendant – I will call him Thomas King – had been charged with Extortion, Interstate Communication for the Purpose of Extortion, Money Laundering, and Threatening to Tamper with Consumer Products (this last charge was dismissed during trial). The crime was fairly convoluted, and involved a series of communications, both letters and phone calls, from Kansas City, Missouri, to a large food and beverage manufacturer located in the Southern District of New York, which I will call ABC Corporation. The first letter purportedly had been sent to ABC by an anonymous person and demanded that $350,000 should be sent to King in Kansas City, to reward King, because King purportedly had saved the letter author's life on some previous occasion. The letter writer threatened that if the money was not sent, or if King was detained or questioned, then the author would publicize that several products manufactured by ABC Corporation had been tampered with.

The original letter to ABC also enclosed a copy of a second letter, purportedly sent to King from the anonymous person, that supposedly informed King that "A Grateful Friend" had arranged to send him a gift in the mail. ABC Corporation considered the communication to contain a serious threat, and contacted the FBI.

At the direction of the investigating FBI Special Agents, ABC's Assistant General Counsel communicated with King. Investigative efforts by the FBI to identify the anonymous letter-writer, or anyone else involved in the scheme, were completely unsuccessful. In a series of recorded telephone conversations with ABC's assistant general counsel, King claimed that he had received phone calls from strangers who had given him instructions that he was to pass along to ABC. He told ABC's assistant general counsel that the instructions had changed, so that the money could be sent by check rather than in cash, and that the number 3 in the amount should be changed to a 4.

King acknowledged that he was aware that ABC had been threatened. Eventually King directed the assistant general counsel to send a check to him at a hotel in Kansas City. The two discussed the amount of the check as being $350,000. At one point King claimed that he was going to speak with his lawyer to "tell him what's going on." When asked who his lawyer was, King identified two lawyers by name, although the investigation established that no lawyer by either of those names had represented him.

Five days after the original threatening letter was received by ABC a $350,000 check was sent by ABC via overnight delivery to King at the hotel he had identified during the phone conversations. The next day the FBI's surveillance observed King meeting a man later identified as an attorney, whom I shall call Donald Gorman, who was neither of the attorneys previously mentioned by King, although Gorman had, on occasion, represented King in the past. King asked Gorman to assist him with a financial transaction, and after King retrieved ABC's package from the hotel front desk, the two of them went to King's hotel room. Gorman subsequently reported that King had told him that he had received this check from ABC, and that the ABC representative had instructed him not to call the police, although no such instruction had been given to King. King did not mention to Gorman that there had been any discussions of threats with ABC. King and Gorman then left the hotel, managing to elude the FBI's surveillance, and went to King's bank. All of King's accounts at the bank had been delinquent for some time. King negotiated the check and opened several new accounts with the proceeds, deposited some of the money in the existing account, and took the remainder in cashier's checks and cash. (A stop payment on the check was belatedly communicated to the bank.) King paid Gorman for his time, and returned to the hotel, where he was arrested by the FBI.

I was accompanied by two FBI Special Agents, who had investigated the case from the outset, and while their presence was very helpful, none of us could have envisioned what would happen during trial.

The Trial

The trial began in early December. The defense claimed that King was the innocent recipient of some anonymous person's attempt to commit extortion, and that he had not actually engaged in any threatening communications. In addition, the defense argued that King could not be responsible for the charge of money laundering, because he had conferred with an attorney, who had advised him that the transaction was legal. In order to sustain the advice of counsel defense the defendant had to prove that he had acted in good faith while seeking such advice, and that he had made a full and accurate report to his attorney of all material facts prior to receiving such advice. In support of this defense King's counsel called Gorman to testify. Gorman's testimony established that King had lied about certain facts to Gorman during their interaction, and that King had also failed to inform Gorman of certain important facts, such as King's knowledge that ABC had sent the money in response to threats it had received.

After five days of trial we presented our summations to the jury. During my summation I reiterated what every Assistant U.S. Attorney in the Southern District of New York is taught to say in every summation – "if you have any questions at all about any of the testimony, you may ask to have the testimony read back." In fact, I repeated that advice more than once, specifically in the context of Gorman's testimony and the claimed advice of counsel defense. After the jury was sent to deliberate, the trial judge belatedly informed me – too late for me to change my summation – that in the Eighth Circuit, including the Western District of Missouri, they do not conduct readbacks of trial testimony. You can imagine that I wanted the floor to open up and swallow me, but no such salvation occurred. Rather, during that first day of deliberations the jury requested that they be permitted to

rehear the testimony of Gorman. The trial judge graciously did not throw me under the bus by revealing my error in suggesting that the jury ask for readbacks; the judge responded to the jury that the transcript of Gorman's testimony was not yet available. Other notes were sent out with other questions, until, at the end of the day, the jury sent a note announcing it had reached a verdict on two of the counts but were deadlocked on the third count.

The judge informed us of the jury's communication and asked if he should accept a partial verdict. The earlier notes had led both me and defense counsel to believe that the jury was leaning toward acquittal. As a result, I objected to accepting a partial verdict, while defense counsel consented to accepting a partial verdict. The judge, noting a concern that snow overnight might prevent the full jury from returning to continue deliberations the following day, overruled my objection and called in the jury to take a partial verdict. To my surprise the jury returned guilty verdicts on the first two counts. The jury was polled, thereby confirming its verdict, which was entered, and the jurors were instructed to return the next day in order to continue deliberations on the remaining count.

The Runaway Juror

Most readers will appreciate that the guilty verdict on the first two counts ameliorated most of my trial-based tension, so the next morning I wandered into the office, quite relaxed. The secretary, in a state of some excitement, informed me that the trial judge had ordered me to respond to his chambers without delay, and that he was waiting for me. Uh-oh, I thought, what could this possibly mean?

As I rushed into the judge's chambers I was surprised to see one of our jurors in the anteroom. Hmmm. I was ushered into the conference area, where the judge, King, defense counsel, and a court reporter were waiting. Without preamble the judge directed that the juror should be escorted in. What could this possibly be about, I thought?

I will call the juror Sue Waverly. She came into chambers and sat down, at which point the judge suggested that she should tell us in general terms what the difficulty was. Waverly proceeded to tell us that she regretted her vote in favor of the previous day's verdict, that she was the lone holdout on the remaining count, and that she felt intimidated by the other jurors. At this point my mind was reeling. I had no idea what to say if the judge sought my input. I knew there was something in the Rules of Criminal Procedure on this topic, but I had never heard of anything like this happening, and I was not prepared to discuss the issue without consulting the rules. Fortunately for me the judge took control, informing the juror that she could not attack her verdict of the prior day just because of belated regret, assuring the juror that he would instruct the other jurors to behave appropriately during continued deliberations, and calming the juror by telling her that if she felt she could not continue with deliberations, she could send a note to that effect directly to the judge.

The juror returned to the jury room, then the entire jury was brought to the courtroom, at which point the judge gave them a "courtesy" instruction, essentially telling them to voice their views and opinions, but not to be rude or mean to other jurors even if they had different opinions. At about 9:45 a.m. the jury was directed to continue its deliberations.

The judge had informed us that a juror had asked the clerk that morning if the transcript of Gorman's testimony was prepared yet. Shortly after they began their renewed deliberations a note was sent out again requesting the transcript. As the judge discussed this third request for the transcript with counsel, the judge received a note from Waverly, stating that further deliberations would serve no purpose. The judge concluded that Gorman's testimony was highly pertinent to the jury's consideration of the remaining count, which was money laundering, and made the decision to have the transcript prepared. The judge then sent a note to the jury, informing them that the transcript of Gorman's testimony was in the process of being finalized and would be provided shortly. In response to Waverly's note the judge sent a note stating that the transcript that had been requested was being sent in, and

that he would consider releasing the jury in the early afternoon if one or more jurors made such a request. The transcript was provided to the jury at about 10:30 a.m. As the hours passed we continued to expect a note from Waverly, but no note came until 2:20 p.m. when – I promise you I did not make this up – a note arrived that announced that a verdict had been reached. What? Really? Truly, that's what happened.

Fortunately for me the judge took control, informing the juror that she could not attack her verdict of the prior day just because of belated regret.

The judge had the jury brought in, and they returned a verdict of guilty on the remaining count. Not only did the trial judge poll the jurors, each of whom supported the verdict, but he also brought Waverly into chambers in order to further ascertain her feelings about the verdict, away from any pressure by her fellow jurors. Lo and behold, although Waverly expressed regret at finding King guilty, she confirmed that she did agree with the jury's verdict.

Phew, the trial was over, the runaway juror did not prevent a verdict which concluded the case. Well, then again, maybe I should not have jumped to conclusions. Over the next several months Waverly wrote letters to the judge, she showed up at King's sentencing and argued that he should not have been found guilty, and, to the best of my recollection, she appeared at the appellate argument as well. Even after King's conviction was affirmed by the Eighth Circuit, Waverly submitted an affidavit in support of King's post-trial motions to vacate or correct his sentence, and for a new trial. In my imagination I suspect that Waverly was waiting for King when he walked out of prison after serving his sentence of 46 months!

Both of the issues I have mentioned – permitting Gorman's testimony to be sent to the jury, contrary to custom, and continuing the trial despite a juror's discomfort – were presented to the Eighth Circuit on appeal, which affirmed King's conviction, and on post-trial motions, which were denied. This was the last case I tried before being appointed a U.S. Magistrate Judge, and to this day I have never heard or seen anything like my experience with the runaway juror!

Author's note: Although this is a true story, and is based substantially on the court's records, I have changed the names of the participants – with the exception of myself and Judge Brieant – because of concern that my memory might exaggerate some of the facts, and I would not want to misrepresent anything about a particular person, although any such exaggeration would be quite unintentional.

Second Circuit News

Eikenberry Awarded Professionalism Award

By Bennette D. Kramer

Peter Eikenberry was awarded the American Inns of Court Professionalism Award in the Second Circuit on September 27, 2016 in the Second Circuit Courtroom at the Thurgood Marshall Courthouse. The award is presented every year to an attorney whose life and practice display the highest character, integrity, and continuing dedication to the highest standards of the profession.

The moving ceremony was attended by so many people that a number of them had to listen to the proceedings from another room.

Second Circuit Chief Judge Robert A. Katzmann welcomed everyone and introduced Master of Ceremonies Second Circuit Judge Susan Carney. Judge Carney also was a member of the award selection committee. She also explained the selection process.

In presenting the award to Pete, the awards committee highlighted his distinguished record as a mentor to younger legal practitioners in government, private practice, or government service, saying, "A major dimension of mentoring is the guidance, not only by word but also by example, of senior lawyers, whose professional lives reflect civility, competence and ethical attitude in all things."

Judge Carney introduced Michael Patrick and Mary Beth Hogan, who made remarks. Patrick talked about Pete's influence on him and described Pete's public service, which has ranged from working as a civil rights lawyer in the 1960s to chairing the first Federal Bar Council Public Service Committee in the 1990s, to participation in the Immigration Study Group today. The Immigration Study Group, chaired by Chief Judge Katzmann, has been instrumental in generating recruitment and training of lawyers to represent people in immigration proceedings.

Hogan served on the Public Service Committee when Pete was chair and then went on to serve on the Nazareth Housing Board, of which she is now president. The Public Service Committee had identified Nazareth Housing as a non-profit that needed support and board building.

She talked about Pete and his influence on her own public service. "Peter is an instigator for good with an infectious smile," Hogan said. "But he is also someone who follows through, who cares deeply about giving everyone a fair shot and who did so much to help me find my footing in a new city and a new profession. This award is about mentoring and … the selection committee picked well. I think the best way we can honor Peter is to find a young lawyer and give him or her an opportunity to grow, like Peter did for me and, I'm sure, for many others."

Chief Judge Katzmann and Steven Molo, a member of the American Inns of Court awards committee, presented the award to Pete. They described other facets of Pete's public service, making it clear that Pete thoroughly deserved the award.

Personal History

The Rule of Law, Making a Difference, and Civility

By Pete Eikenberry



Upon being awarded the Second Circuit's "Professionalism Award" on September 27, I was supposed to have demonstrated, *inter alia,* an "ongoing dedication to the rule of law." As a lawyer and an American, I generally believe that the rule of law "symbolizes" procedural fairness and equality before the law. I did some reading on the rule of law to determine the quality of my "ongoing dedication." Justice Holmes stated that the "life of the law is not logic – it is experience." Thus, the rule of law is not a static concept.

American philosopher Mortimer Adler posed a question: "What is the ultimate standing of justice in the law?" Let us test a specific situation for compliance with Adler's standard. Without the benefit of legal representation, 800,000 immigrant residents of the United States were deported in the five year period ending 2009. Legal procedures surely were invoked to deport them, but was there adherence to the rule of law? Possibly the legal procedures were tainted if there was not an ultimate standing of justice in the 800,000 deportations.

In observing the absence of legal representation of immigrant litigants before the Second Circuit, Judge Robert Katzmann has recognized that justice did not have an ultimate standing before his court when it came to those immigrant litigants. Thus, Judge Katzmann (now Chief Judge Katzmann) organized the New York Study Group on Immigrant Representation. Seven years later in New York City, there are millions of dollars available so that no detained immigrant facing deportation is without legal representation. There is also now an Immigrant Justice Corps with 25 new law graduates entering its training every year to do immigrant representation.

We, of course, do not have to be judges to apply Adler's standard. Former Fordham Law Dean John Feerick has reminded us that in being admitted to the bar

we swore to uphold the Code of Professional Responsibility. The Code recites an obligation for us to ensure there are legal services for the poor and mandates that each lawyer has a "solemn duty to act as a member of a learned profession, dedicated to public service." Do we all not have the duty to also recognize where justice does not have an ultimate standing in the law – and from time to time dedicate a portion of our efforts towards establishing a higher standard of justice? Thousands of us, of course, do labor to make a difference in giving leadership to a widening range of not for profit activities.

Throughout our profession there are, however, still instances of injustice. In a photograph of White & Case lawyers (including me) at the 1965 annual dinner at the Pinnacle Club in the Chrysler building – one year after I was hired – there is not one black face and not one face of a woman. This was a photograph of injustice.

In 1990, had there been a photograph of the New York City Bar Association members, they would have presented a face similar to the 1965 White and Case photograph. The new president of the bar association that year, Conrad Harper, initiated a requirement that every committee chair had to inform him in a private meeting as to the number of women, minorities, and lawyers with less than three years of experience on their respective committees. Every year for the three years of his term, he sat down with each committee chair and asked the same questions. Thus, he served justice in a material way and an important legal institution became much more just.

In a recent talk, Eric Foner, a history professor at Columbia University, stated that the Constitution, as adopted in 1789, did not contain the word "equality." The word first appeared with the adoption of the Reconstruction amendments. Foner was concerned with a hangover of post-reconstruction discrimination in Supreme Court decisions to the present day. He stated, for instance, that *Brown v. Board of Education* did not overrule any discriminatory Supreme Court precedents and many judicial travesties from the late 1800s remain on the books. Let us apply the "ultimate standing of justice in the law" standard to a reported decision cited by Professor Foner.

In *Utah vs. Strieff,* decided by the Supreme Court on June 20, 2016, the background was as follows:

> Minutes after Edward Strieff walked out of a South Salt Lake City home, an officer stopped him, questioned him, and took his identification to run it through a police database. The officer did not suspect that Strieff had done anything wrong. Strieff just happened to be the first person to leave a house that the officer thought might contain "drug activity." ... As the State of Utah concedes, this stop was illegal.
>
> …
>
> The officer learned that Strieff had a "small traffic warrant." ... Pursuant to that warrant, he arrested Strieff and, conducting a search incident to the arrest, discovered methamphetamine in Strieff's pockets.
>
> …
>
> Utah lists over 180,000 misdemeanor warrants in its database, and at the time of the arrest, Salt Lake County had a "backlog of outstanding warrants" so large that it faced the "potential for civil liability."
>
> …
>
> Utah charged Strieff with illegal drug possession. Before trial, Strieff argued that admitting the drugs into evidence would condone the officer's misbehavior....

What do readers think the U.S. Supreme Court should have done with the appeal by Utah after its Supreme Court unanimously suppressed the evidence? The U.S. Supreme Court reversed the holding of the Utah Supreme Court and permitted the evidence to be admitted at trial. The majority reasoned that the "unlawful stop was [not] part of any systemic or recurrent policy misconduct." The lengthy quotation above is from Justice Sotomayor's dissent. She reasoned as follows in attacking the majority's decision:

> This case involves a *suspicionless* stop, one in which the officer initiated this chain of events without justification. As the Justice Department notes ... many innocent

people are subject to the humiliations of these unconstitutional searches....

[I]t is no secret that people of color are disproportionate victims of this type of scrutiny.... For generations, black and brown parents have given their children "the talk" – instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger – all out of fear of how an officer with a gun will react to them.... [T]his case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state just waiting to be cataloged.

We must not pretend that the countless people who are routinely targeted by policy are "isolated." They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere.... They are the ones who recognize that unlawful police stops corrode all civil liberties and threaten our lives. Until their voices matter too, our justice system will continue to be anything but.

Salt Lake City's police may now routinely stop whomever they wish, secure in the knowledge that the person stopped may well have a warrant, thus excusing any police misconduct. This decision also means that lawyers have plenty to do before we have a just system of criminal prosecution. We are going to need the next generation of lawyers to continue the fight.



Pete Eikenberry with Steven Molo and Chief Judge Robert A. Katzmann.

Making a Difference

Often I talk to young people inspired to go law school with the expectation of being able to "make a difference" someday; they ask how they can "get involved" once they are lawyers. A partner at my first job once told me that I was "almost as competent as [I] was eager." I love eager young people. I tell the young people to ask for help. When I was about one-and-a-half years out of law school in 1965, I asked the senior partner of White & Case if I could go south and be a civil rights lawyer on my vacation. I was disappointed when Orison Marden discouraged me. However, a year later he took me to lunch at a private club and invited me to go to Mississippi that summer as a civil rights lawyer at White & Case expense. This is a sample of how asking for help resulted in my unique opportunity to try to make a difference.

In 2014, I went to Mississippi again, to Grenada, a small town where I had served as a volunteer lawyer in 1966, to determine whether the presence of civil rights organizers, including Dr. Martin Luther King, Jr., and a legal support team, had "made a difference." The answer was a

resounding, "yes." For example, Dianna Freelon informed me that she was 14 years old in 1966, and, for a summer job, she was chopping cotton for $3 a day. She said, "I dropped my hoe, and I never picked it up again when I heard Martin Luther King was coming to town." Dianna later become Mayor of Grenada.

In 1989, as another example of asking, I was requested to form a committee to respond to Judge Lasker's call at the Federal Bar Counsel's Law Day Dinner for lawyers to be involved in the great issues of the day, including homelessness. I put together the committee, but it was going nowhere. We had people come and talk to us about homelessness, but we had accomplished nothing. I telephoned my son David – a first year associate at a large firm. I said, "David, we are not getting anywhere in solving the problems of the homeless; find me some young people with ideas."

David found me Mary Beth Hogan, a first year associate at Debevoise, and Tigren Eldred, a first year associate at Sullivan & Cromwell. In her first weeks on the committee, Mary Beth identified a tiny struggling organization on the lower east side – Nazareth Housing. I thought that perhaps we could accomplish something by building up the board of directors for Nazareth. However, before the committee could organize anything, Mary Beth and others from the committee had gone on to Nazareth's board. Now it is one of the most respected and effective organizations addressing the problem of homelessness in New York City and perhaps the country. It is no surprise that Mary Beth is the president.

In 1989, I was also given the opportunity by the New York City Bar Association to lead a human rights mission to Northern Ireland. I asked my friend Judge Sidney Stein if he would go. He said, "yes," and we often talk of our experiences there. The point is that when you are young, ask older lawyers to help get you involved and when you grow into leadership, ask your friends and young people as well; there are lots of lawyers who want to make a difference. If there is good leadership and a worthwhile endeavor, they will cheerfully join and contribute if they are asked.

Civility

Since the award I received was for "professionalism, I wish to also talk about civility. In my opinion, my old boss Orison Marden, in 1965, the president of the American Bar Association, won the famous Texas Gulf Sulphur case at the trial level because of his enormous credibility as a lawyer with civility. For instance, every time I saw Marden, he asked about my family. White & Case's premier trial lawyer at the time, Chester Bordeau, was another mentor on civility. There were elevators in those days at the N.Y. Supreme Court's Tweed Courthouse at Foley Square. All of the elevator operators, not to mention the clerks, knew Bordeau and said "hello Mr. Bordeau" when they saw him. He advised me that you never knew what influence a clerk might have in deciding your case.

As litigators, we are, of course, competitive and often pretty abrasive. Like most of us, I enjoy working out a productive relationship with a combative adversary. One of my favorites was a now retired partner of a large litigation firm. He was a "thumb in your eye," "give no quarter" kind of guy; and he was an excellent "stand up" trial lawyer. Once, I asked him if he played tennis and he replied, "I do not have personal conversations with my adversaries." Over time, we did have productive conversations and ended up settling a very big case.

Yet the fellow could be just a bit "over the top" with hyperbole. I sometimes called him on what he had said with a quote to the court from a document that was in contrast to his position. Later, after I had another case against the same firm, a partner of his had asked him about me. He reportedly said that, "Eikenberry is a real pain in the tuchus!" (He used a different word than "tuchus.") I have been a real pain in the tuchus for the past 50 years or so – hopefully, effective in "making a difference." I have tried to accomplish "being a pain" with civility.

Editor's Note: This article is taken from and is an expanded version of the author's remarks at the September 27 award ceremony before the Second Circuit.

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