Federal Bar Council News

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From The Bench

Looking Back On 25 Years As A District Judge

By Judge William C. Conner

Time flies when you're having fun. That's why it seems much less than a quarter century ago when, after 28 years of trying patent and trademark infringement cases, I took the vows of poverty and chastity as a U. S. District Judge in the Southern District of New York. I said many times that being a district judge is the greatest job in the world, if you can afford it; but I have now learned that is not quite right. It is only the second best; the best job is being a Senior District Judge. As enjoyable as movies and TV shows portraying court trials may be, it is infinitely more exciting to

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Developments

Zachary Carter Receives Emory Buckner Award At Federal Bar Council Thanksgiving Luncheon

Zachary Carter, the United States Attorney for the Eastern District of New York, received the Federal Bar Council's Emory Buckner Medal for outstanding public service at the Annual Thanksgiving Luncheon, held November 24 at the Waldorf-Astoria in Manhattan. Excerpts from the remarks of Council President Steve Edwards introducing Mr. Carter, and from Mr. Carter accepting the award, follow.

Zachary Carter is one of those people who makes you proud to be a lawyer. He is honest, decent and thoroughly professional. He is a person of great integrity. He is a person who inspires trust. He has no hidden agenda; rather, his agenda is always perfectly clear: to help others, and to do the best that he possibly can.

Zach grew up in Washington, D.C. While in high school, he was president of Washington's Junior Federation of Civic Associations. In that capacity, he began a long career of working for the public interest, lobbying the city for better playgrounds.

Life Magazine

As a freshman at Cornell University, he became involved in a famous demonstration in which African-American students took over the student union following a cross-burning in front of a residence for black women students.

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In Memoriam

Judge Lumbard's Leadership Celebrated

By Steven Flanders

The Second Circuit Court of Appeals held a memorial session of court September 22 to honor the memory of Judge J. Edward Lumbard, who died this summer just short of his 98th birthday. Chief Judge Ralph K. Winter presided. Brief remarks were heard from former Federal Bar Council Presidents Robert B. Fiske and Harold R. Tyler, Jr., Second Circuit Judge Thomas J. Meskill, Southern

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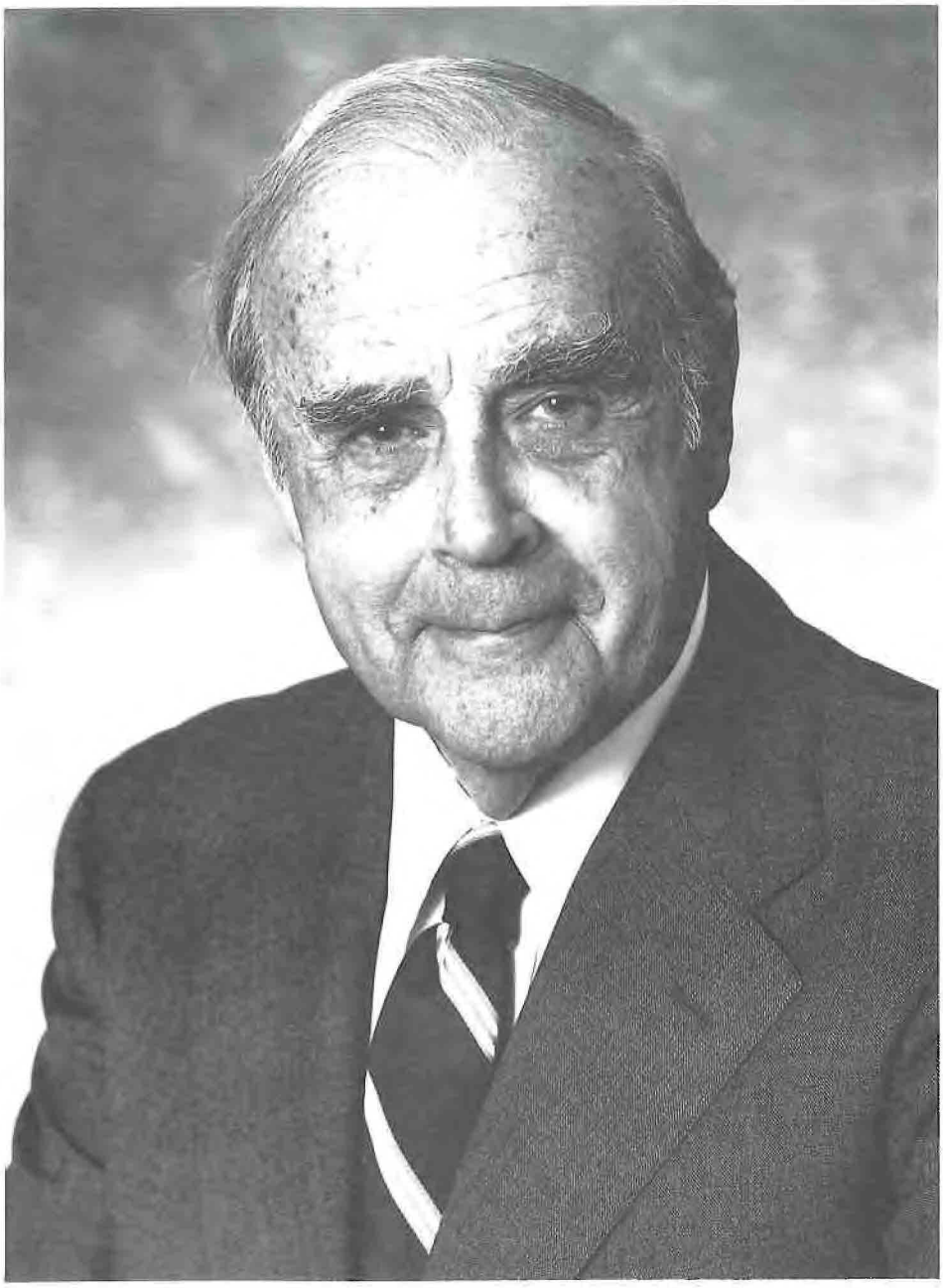
witness real trials, where real people and companies are fighting about matters which seriously impact their lives and fortunes, and to be not a mere spectator but a controlling umpire. Also it is no small comfort to have the only job in the country where your tenure is guaranteed by the U. S. Constitution, where your salary, though modest, continues for life, and where, after you reach senior status, you need not retire and vegetate but may continue to work as much or as little as you desire.

I had never expected to become a judge, because no patent attorney had ever been appointed to a court of general jurisdiction. But C. Dickerman Williams, the New York attorney who was head of Senator James Buckley's Judicial Selection Committee, convinced the Senator that a court the size of the Southern District should have an attorney experienced in patent litigation so that the other judges on the court would have a colleague with whom they could consult if they wanted guidance in any cases they had in that arcane branch of law. Williams and I had been friendly adversaries in a famous trade secret case, *Painton v. Bourns*, and he invited me for an interview with his committee, which ultimately recommended me to the Senator.



Judge William C. Conner

"Least Qualified?"

The prospect of appointment of such a parochial specialist to be a district court judge was not greeted with uniform acclaim by the bar. When I was interviewed by the Judiciary Committee of the Association of the Bar of the City of New York, most of the committee members were very cordial and supportive, but one actually asked me, "Would you agree that, of all the candidates we've ever interviewed, you are the least qualified?" I was so stunned by the question that I could merely murmur, "Yes." I called Williams the next day and told him that after that interview he could forget my candidacy. He responded, "We don't care what those guys think. We still want you and hope you're still willing to accept the appointment."

I was as much aware as anyone of the gaps in my legal experience and was determined to study hard and fill them in as quickly as possible. But after a few years on the bench, during which I handled almost every type of case that

comes before the court, I began to enjoy what I referred to as "delusions of adequacy." And David Edelstein, the Chief Judge at the time, gave me what I'm sure he intended as a great compliment, but which I joked could have been construed as just the opposite. He said, "Because of the experience we have had with a patent attorney on the court, the next appointee is going to be an admiralty lawyer." The admiralty lawyer, of course, was "Terry" Haight, who has repeatedly and graciously told me that he credits his appointment to the fact that I had proved that a legal specialist could succeed on the court.

When I was practicing, patent lawyers avoided the Second Circuit whenever possible because of a common perception that in other circuits patents were given more favorable treatment. I thus had appeared in federal courts in almost every part of the country, but seldom in New York. Most of the judges I confronted were not only able and fair but considerate of attorneys, but I encountered enough judges who were not to make me vow as a judge to follow the Golden Rule and treat all those who appeared before me with the same respect and courtesy which I had wished to receive. As a result, I have enjoyed the most cordial of relations with attorneys. Almost never have I had to rebuke any attorney for improper conduct, and only once did I impose sanctions, and then only after the court of appeals had directed me to do so (I had declined to sanction a young associate attorney for falsely denying the existence of a document I had ordered to be produced, because his senior partner had discovered the document and produced it well in advance of the trial, so that no prejudice had resulted. I later learned, to my deep regret, that the associate attorney was disbarred because of the incident).

The broad spectrum of cases which come to our court keeps the work fascinating, challenging and, best of all, educational. It has given me the opportunity to learn at least a little about an infinite variety of subjects, including how not to perform a cataract operation or an audit of a major corporation and how not to design an angle polisher or a pop-up food thermometer.

Live Models

The most highly publicized case I ever tried was an action for infringement of a patent on the Playtex "Cross Your Heart" brassiere. Live models demonstrated the features of the patented and infringing products, and the courtroom was packed with spectators every day. Newspapers throughout the country reported on the trial, and the *New York Daily News* published a cartoon showing a model parading in front of the bench in her brassiere, with the judge ogling the spectacle with eyes projecting from his head like twin telescopes (only a slight exaggeration). I later received a telephone call from a young woman reporter for the *Trenton Times* who asked whether she could interview me by long distance. When I agreed, she questioned me for about 15 minutes about the trial. She finally asked, I'm sure with no conscious double entendre, "When the model came into the courtroom the first time wearing nothing above the waist but a brassiere, were there a lot of titters in the audience?" I answered, "Yes, and leg men, too." She roared with laughter and asked if she could use that in her story. I said she could as long as she didn't attribute it to me.

The longest trial I ever conducted was the five-month trial of an antitrust action by Litton Industries against AT&T. Litton had imported state-of-the-art transistorized telephone switchboards from Japan, but AT&T wouldn't allow them to be connected to their telephone system except through an isolating circuit that AT&T took months to design and construct, and priced exorbitantly, and which often malfunctioned. As a result, Litton was able to sell few of its switchboards and, after losing some $80 million, went out of the business. Before trial, I required each party to submit a written statement of every fact it intended to prove, with footnotes identifying all its supporting evidence. I said that neither party would be allowed to prove any fact which was not included in its statement. Litton's statement covered 1,200 pages and AT&T's 800. I took these summaries with me on vacation and read them. Then I called a settlement conference, directing attendance by an executive of each party with authority to make a final decision. When I spoke separately with the Vice Chairman of AT&T, I told him that I believed that if the jurors understood Litton's evidence, it was highly likely that they would rule in Litton's favor. I indicated that, with treble damages and attorney's fees, the judgment could be roughly $250 million. I told him that I believed if he could settle the case for one-half of that amount, or $125 million, it would be a smart deal for AT&T. He could scarcely conceal his wrath at that suggestion, but both he and Litton's CEO, "Tex" Thornton, said that they would let me know within a week whether they would be willing to settle at the figure I had suggested. AT&T declined and, to my surprise, so did Litton.

The jury returned a verdict in favor of Litton, finding damages of $92.2 million, or $276.6 million after trebling (10% more than I had predicted). With interest, the judgment came to roughly $450 million. After the Court of Appeals affirmed,

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AT&T's attorney told one of my fellow judges, who was his former partner, that he knew all along that I was right about the likely outcome. It was regrettable he didn't convince AT&T.

Mood Rings

The quickest trial I ever had was in an action for declaratory judgment of invalidity and non-infringement of a patent on the "mood rings" which change color in accordance with the skin temperature of the wearer. The defendant patent owner had placed a full-page ad in a trade publication charging that the plaintiff's rings infringed its patent and threatening to sue anyone distributing those rings, causing Gimbel's to cancel a large order. Because the market for such "fad" items is short-lived and because the annual trade show at which the buyers would be placing their orders for the Christmas market was coming up in less than a month, the plaintiff sought immediate relief through a TRO. I called the attorneys in for a conference about three days after the complaint was filed. In the meantime, I studied the patent in suit and its prosecution history and examined the plaintiff's ring. I learned that the claims of the patent application as originally filed had clearly covered the accused ring, but those claims had been rejected as fully anticipated by a prior patent and had been amended to incorporate a limitation which was clearly inapplicable to plaintiff's ring. This created a classic prosecution history estoppel which barred any claim of infringement in the case. At the conference, I informed the attorneys of this discovery and suggested that the case be settled by a consent decree of non-infringement, with the plaintiff waiving damages. The plaintiff agreed, on condition that the defendant pay the cost of a full-page ad in a trade publication announcing the settlement. The defendant refused, protesting my "pre-judgment" of the case. I set the case for trial the following week on the issue of infringement. The trial lasted less than a day. I gave the parties ten days for briefing and filed my opinion the day after I received the briefs. To the surprise of no one, I ruled that the patent was not infringed and dismissed the action. The total time from filing through trial to final judgment was 21 days. The defendant appealed, claiming that my unseemly haste had deprived it of due process. The court of appeals, in an opinion by Judge Henry Friendly, affirmed with a comment I'll never forget: "When, as here, justice can be swift as well as sure, it achieves its finest."

I conducted the first federal trial which was televised, an action for infringement of the copyright in photographs of the late actor James Dean. But I spoiled the suspense by settling the case on the final day of the trial. That apparently didn't sour Court TV on me too much because shortly thereafter it televised a second trial of mine, an action brought by Avis against Hertz alleging false advertising. However, I also settled that case during trial and Court TV understandably never came back.

Settlement of cases is a necessary function of judging. Each active judge in the Southern District receives from the assignment wheels an average of some 25 civil cases every month (not counting the criminal cases, which have statutory priority). As there are only 21 working days in the average month, each judge must terminate more than one civil case every working day. Since the average trial takes one or two weeks, it is obvious that unless at least 85 to 90 percent of a judge's cases are settled, the judge will soon drown in a flood of cases. I never hesitated to take an active role in settlement, even, when the attorneys consented, in non-jury cases which I would ultimately have to decide. I didn't stop trying to settle when the trial started; indeed attorneys are often more receptive to settlement after they have seen the principal witnesses on the stand.

During the trial of a breach of contract suit between the fight promoter Don King and the former heavyweight champion Mike Weaver involving a championship fight that hadn't come off, I suggested that the case be settled by entering into a contract for another fight. We spent most of the day in my robing room threshing out all the details, such as the TV rights, the syndication rights, and the undercard. Finally, Don King impatiently announced, "Just let Judge Conner write the contract. Whatever he puts in it is OK with me." Needless to say, the settlement was finalized shortly thereafter. But the fight, which I watched on HBO, was an incredible fiasco. At the opening bell, Weaver was hit in the face with a powerful right-hand lead. He backed against the ropes, put both gloves in front of his face, and never took them down while his opponent flailed at him with both hands until the referee stopped the fight and awarded a TKO. My brief career as a fight promoter was mercifully ended.

I had many other cases involving celebrities, including Pele, the greatest soccer player of all time, Billy Cunningham, the basketball star of the 76ers, Mickey Rooney, and Imelda Marcos. What a glamorous job for a guy from a small town in Texas!

The Marx Brothers

In another case, the estates of the Marx Brothers sued to prevent imitation

of their theatrical personalities in the Broadway show, "A Day in Hollywood/ A Night In The Ukraine." I ruled that the right of publicity in those personae had descended to their heirs. The court of appeals reversed, ruling that California law should govern because all of the Marx Brothers had died in that state. Although the California courts had not yet ruled on the matter, the court of appeals predicted that they would rule that the right of publicity is not descendible. But within a couple of months the California legislature enacted a statute expressly providing that the right of publicity is descendible. Vindication is a sweet dessert.

When "Ace" Tyler resigned his judgeship on our court to become Deputy Attorney General, he asked me to take over supervision of the consent decree that had been entered into years earlier in settlement of the government's antitrust suit against ASCAP, which controls licensing of several million musical compositions in its repertoire and distribution of the royalties to member composers and publishers. Thus for 23 years, I have served as the "rate court," setting reasonable royalty rates when ASCAP and its licensees cannot agree on terms. Fortunately, most of the time they do agree, but occasionally I have to conduct hearings to determine the royalties that the radio and television networks, for example, must pay for a blanket license to use any of the ASCAP compositions as often as they please. It has been a substantial, continuing responsibility on top of my regular case load, but it has opened up another fascinating world for me.

I was almost drawn into another endless conflict when I tried my first case in which the makers of Advil and Tylenol were each accusing the other of false advertising as to the efficacy and adverse side effects of those pain remedies. It was just the kind of trial I enjoy, with testimony from the world's top experts in neurology, gastroenterology, pharmacology, hepatology, nephrology, and epidemiology. I ruled that both parties had stretched the envelope of truth a bit and told them what changes they would have to make in their ads. I began the opinion by remarking, "Small nations have fought for their very survival with less resources and resourcefulness than these titans have brought to their epic struggle for primacy in the over-the-counter analgesic market." I was surprised later to find that passage quoted in the book "The Aspirin Wars," in a chapter entitled "Small Nations." Both parties accepted my decision without appeal and for several years thereafter they kept coming back to me to resolve every dispute involving a new advertisement. Finally, I told them that I had jurisdiction only over actual cases and that I did not believe I should continue to act as the unpaid czar of OTC drug advertising.

When I became a senior judge, I decided to cease taking criminal cases. I had enjoyed some of the criminal trials, particularly in white-collar cases, where I marveled at the ingenious ways which had been devised to cheat one's fellow man or the government.

But after trying maybe fifty cases involving the sale of a dime bag of crack or the like, I had lost my appetite for that

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diet. Besides, at about that time, the Sentencing Guidelines were adopted and I believe (along with many other judges) that they too often result in grossly inappropriate punishment.

Great Changes

Over the 25 years I have been on the bench, there have been great changes in the work of the court. One is the almost complete disappearance of admiralty cases. As an old Navy man, I always relished a trial involving a ship collision, grounding, or fire. I even enjoyed the COGSA cases involving loss or injury to cargo and the Jones Act cases involving injuries to seamen. But the U. S. merchant marine fleet has dwindled almost to nothing, due to the less onerous regulations and cheaper crews for foreign-flag vessels. Even the longshoremen cases now are rare, as cargo movement through the New York terminals dried up due to high union wages and the shift to containerization.

The void created by the loss of these cases has been more than filled by a tidal flood of cases charging employment discrimination on the basis of gender, race, age, or disability, hostile work environment, and violations of the civil rights laws by false arrest, excessive force, or unreasonable search. The first 20 years I was on the bench, those cases constituted less than ten per cent of my caseload. For the last five years, they have represented more than a third. They are not fun to try. It is painful to watch a plaintiff squirm while listening to testimony that he or she was fired not because of gender, race, or age but because of incompetence, dishonesty, or an abrasive personality.

But, everything considered, the job has always been and still is a "blast." On top of all the other advantages I've mentioned, I've been privileged to associate, as a fellow judge, with the ablest, most dedicated and, yes, classiest group of people I have ever known. Thanks for the memories!

New Appointments

Robert A. Katzmann Appointed Second Circuit Judge

By Stacey B. Creem and David M. Powers

When Robert A. Katzmann was sworn in recently as a federal appeals court judge for the Second Circuit, the oath was administered by Judge Katzmann's friend, United States Supreme Court Justice Ruth Bader Ginsburg. Judge Katzmann, who fills the final vacancy on the 13-judge court, is the 61st judge to serve on the Second Circuit.

Prior to assuming the bench, Judge Katzmann was a distinguished scholar and professor in the areas of law and judicial process. He was a Fellow in the Governmental Studies Program at the Brookings Institution in Washington, D.C., and was President of the Governance Institute, a non-profit organization devoted to research in the area of government institutions. Judge Katzmann was also the Walsh Professor of Government and Law at Georgetown University, where he taught classes in administrative and constitutional law.

Interpreting Laws

As a scholar, Judge Katzmann has focused on the relationship between the judiciary and the legislature, and the process by which laws are interpreted. Much of his effort at the Brookings Institution and the Governance Institute has been focused on improving the relationship between the courts and Congress, and on finding practical ways of solving legal problems. "My own work has been concerned with applied research," he explained. His most recent books, *Courts and Congress* and *The Law Firm and the Public Good*, are a culmination of this research.

Judge Katzmann's scholarship has been utilized by various leaders in government and law. "He is much admired and singularly looked to in the United States Senate because of his most recent book, *Courts and Congress*," said New York Senator Daniel Patrick Moynihan at Judge Katzmann's induction ceremony. Judge Katzmann's relationship with Senator Moynihan dates back to Judge Katzmann's graduate studies at Harvard, where he was Senator Moynihan's student and teaching assistant.

Senator Moynihan has been a great supporter of Judge Katzmann's scholarship. "I taught Bob Katzmann for three years, and I have learned from him for 30," he said at Judge Katzmann's induction ceremony. Senator Moynihan also played an instrumental role in Judge Katzmann's appointment to the judiciary. "What really made this job possible was the intense interest of Senator Moynihan," Judge Katzmann said.

In 1993, Senator Moynihan asked Judge Katzmann to serve as special counsel for the confirmation of Justice Ginsburg. From the time she was nominated, Judge Katzmann worked with Justice Ginsburg in preparation for the confirmation process and for her meetings with various senators. Judge Katzmann insists, however, that Justice

Ginsburg was "so expertly qualified that she didn't need any counseling."

At Judge Katzmann's induction ceremony, Justice Ginsburg praised Judge Katzmann for his inquisitive mind, his diligence and patience, as well as for his friendship. "He will thrive in the work of appellate judging," she said.

Governance Institute

In 1984, Judge Katzmann participated in the United States Judicial Conference Committee on the Judicial Branch, commissioned by the Honorable Judge Frank M. Coffin of the First Circuit. Judge Katzmann assisted in designing the committee's research agenda, and his work with Judge Coffin led to the formation of the Governance Institute.

From 1980-81, Judge Katzmann clerked for the Honorable Hugh H. Bownes of the United States Court of Appeals for the First Circuit, who also was present at Judge Katzmann's induction ceremony. "He is a legal scholar of the highest magnitude," said Judge Bownes. Judge Bownes recalled that Judge Katzmann's scholarship was evident from their first meeting. "When I asked him for a writing sample, he handed me his recently published book," Judge Bownes said. "It was his Ph.D. thesis from Harvard."

Judge Katzmann received his J.D. from Yale Law School in 1980, where he was the Articles and Book Review Editor of the Yale Law Journal. He received his A.M. and Ph.D. in Government from Harvard University in 1975 and 1978, respectively.

Born and raised in Queens, New York, Judge Katzmann earned his A.B. in Political Science from Columbia College in 1973.

Judge Katzmann views his career as a professor and scholar as an excellent background for his judgeship. "I think that there are no two areas more alike in law than teaching and appellate judging." Furthermore, he believes a diverse set of experiences is an important element for a strong panel of judges. "There are many different routes to the court of appeals, and what makes for an interesting court is a collection of people with different backgrounds who bring different strengths to appellate judging."

Judge Katzmann's books also include *Judges and Legislators: Toward Institutional Comity*, ed. (1988), *Managing Appeals in Federal Court*, co-editor (1988), and *Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy* (1980).

New Appointments

Stefan Underhill Joins District Of Connecticut

By Stacey B. Creem and David M. Powers

Stefan R. Underhill was publicly sworn in as a District Judge for the District of Connecticut on September 17, 1999. This followed a private swearing-in ceremony performed by Judge Jon O. Newman on September 1, 1999.

Prior to his induction, Judge Underhill was a partner in the Stamford, Connecticut, office of Day, Berry, & Howard LLP, where he practiced general commercial litigation and appellate advocacy. After being elected to the partnership in 1991, Judge Underhill concentrated in intellectual property matters, eventually chairing the firm's Intellectual Property Practice Group.

Judge Newman's Clerk

Before entering private practice, Judge Underhill clerked for Second Circuit Judge Newman. As a clerk, Judge Underhill was inspired by Judge Newman's compassion and respect, and by his concern for being fair to the parties who came before him.

Judge Underhill graduated from Yale Law School in 1984, where was the Articles and Book Review Editor of the Yale Law Journal and a member of the Moot Court Board of Directors. While at Yale, Judge Underhill also co-authored an article entitled "Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws," which was published in the University of Virginia Law Review.

Before attending law school, Judge Underhill was a Rhodes Scholar and studied philosophy, politics, and economics at Oxford University from 1979 through 1981. Prior to receiving this scholarship, Judge Underhill worked as a paralegal at Fulbright & Jaworski L.L.P. in Washington, D.C.

In 1978, Judge Underhill earned his undergraduate degree in Interdisciplinary Studies at the University of Virginia, where he was an Echols Scholar. Born in Battle Creek, Michigan, on June 9, 1956, Judge Underhill spent most of his childhood in Richmond, Virginia, where his mother was a professor in medieval history and his father a professor at the University of Richmond.

Judge Underhill, who lives in Fairfield, Connecticut, with his wife and four children, brings to the bench a sense of community and a love for the legal profession, which should serve him well in his role as judge. From 1995 to 1999 he served as a Cubmaster for Cub Scout

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Pack 197, a group of children aged seven to nine, which included his own two sons. In 1996, Judge Underhill wrote a short book, *Majoring in Law*, designed to give high school students and first year college students perspectives on life as a lawyer. In his view, an early understanding of the day-to-day experiences of a lawyer can make a big difference in whether a student chooses to pursue a career in law. "My belief is that law school is a place that many people go by default, and it shouldn't be. You can do so many things with a law degree, that it's very important to find your proper place in the law."

Judge Underhill is excited about assuming the bench. "I very much like being a judge. There's a wonderful freedom in terms of trying to do the right thing. What I am very excited about is simply learning about new things."

Judge Underhill hopes to bring to his own bench the same type of courtesy and respect he sees in Judge Newman. "I do have a very strong sense of justice. I hope that, looking back, one will be left with the impression that, in looking at the aggregate of the hundreds of cases that came before me, I was a fair judge."

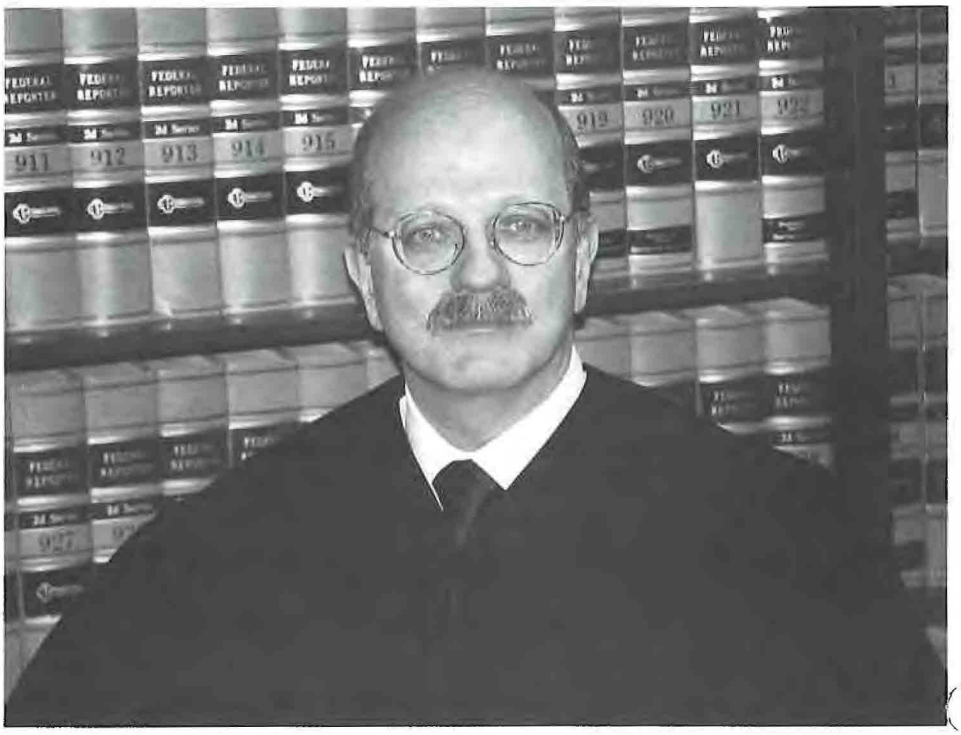
New Appointments

Frank Maas Sworn In As Magistrate Judge

By Stephen R. Ratner and Stacey B. Creem

Frank Maas was sworn in recently as United States Magistrate Judge for the Southern District of New York.

Magistrate Judge Maas comes to the bench from a distinguished career in both the private and public sectors.



Magistrate Judge Frank Maas

Immediately prior to his appointment, Magistrate Judge Maas worked for the New York City Department of Investigation, the law-enforcement agency that investigates and refers for prosecution city employees and contractors engaged in corrupt or fraudulent activities. At the Department of Investigation, Magistrate Judge Mass served as First Deputy Commissioner from October 1996 to May 1999 and Deputy Commissioner from June 1995 through September 1996.

Commercial Litigator

Prior to working at the Department of Investigation, Magistrate Judge Maas was affiliated with the law firm of Phillips, Lytle, Hitchcock, Blaine & Huber, where, in 1986, he began as an associate in the litigation department and, in 1988, was elevated to partner. Magistrate Judge Maas had a diverse private practice, which included broad commercial litigation experience. He concentrated his practice, however, on representing individuals and corporations in white-collar criminal investigations and trials.

From February 1980 to October 1986, Magistrate Judge Maas was an Assistant United States Attorney in the Criminal Division of the Office of the United States Attorney for the Southern District of New York. During his tenure with that office, Magistrate Judge Maas worked in the Securities and Commodity Frauds Unit and the General Crimes Unit. He also lectured for the Attorney General's Advocacy Institute.

From October 1978 to February 1980, Magistrate Judge Maas was a litigation associate at the law firm of Curtis, Mallet-Provost, Colt & Mosle. From September 1976 to September 1978, Magistrate Judge Maas served as a law clerk to District Court Judge Henry F. Werker.

Magistrate Judge Maas received his law degree from New York University School of Law in 1976, and a B.A. degree in 1972 in Political Science from Harpur College, State University of New York at Binghamton.

Magistrate Judge Maas has been an active member of the Federal Bar Council, the Association of the Bar of the City of New York, the New York State Bar Association, and the New York Council of Defense Lawyers. He is married and has two children.

FBC News

Council To Sponsor "Inn Of Court"

By Lee Richards and Arthur Greenspan

Continuing its tradition of bringing together bench and bar, the Federal Bar Council is sponsoring an American-style "Inn of Court" on a pilot basis. Based loosely on the English model, an American Inn of Court is a diverse group of judges and lawyers who meet several evenings per year to socialize and conduct organized educational programs focusing on legal skills, ethics, and professionalism. One of the main purposes of the planned Inn will be the mentoring of young lawyers.

Set to begin in the Fall of 2000, the Federal Bar Council Inn is expected to have about 75 members, of whom seven or eight will be sitting federal judges. The remainder will be a mix of lawyers with varying levels of experience, ranging from seasoned litigators to recent law school graduates. The membership will be drawn from both private practice as well as other segments of the bar such as government, academia, public interest, and in-house.

Substantive Programs

The Inn will be divided into "teams," with one judge per team. Each team will be led by at least one experienced practitioner and will be responsible for organizing and presenting a substantive program at one of the Inn's meetings. Although the precise topics have yet to be determined, the Inn's programs will cover a range of issues arising in civil and criminal litigation. Likely subject areas include litigation management, deposition practice, witness preparation, settlement negotiations, and ethical dilemmas. It is hoped that CLE credit will be available to those participating.

The format of the programs also will vary. Many programs will involve a mock argument or hearing or other role-playing presentation. Other programs will involve panel discussions or demonstrations.

Ultimately, the preparation put in by each team and the commitment of all the Inn's judges and lawyers to participate actively in each session should separate the Inn of Court experience from most other legal educational programs. And beyond its educational function, the Inn will provide an opportunity for lawyers and judges to communicate in a social setting, over dinner, or in cocktail receptions held before or after each educational program.

Basic Framework

The American Inns of Court concept was first championed by Chief Justice Warren Burger, who established the first American Inn of Court in 1980. There are presently over 250 Inns under the auspices of the American Inns of Court Foundation. The American Inns of Court Foundation has developed a basic framework for an Inn, but the specific format and style of each Inn is dictated by its members.

As envisioned by the organizing committee, the Federal Bar Council Inn will promote collegial interaction among judges and lawyers and the fostering of high standards of excellence, professionalism, and ethics. The educational programs will serve to instruct younger lawyers in how federal court practice is — and ought to be — conducted, and will provide judges and more experienced lawyers with an opportunity to air concerns and to learn from colleagues and younger lawyers.

The Inn thus should be a spirited means of promoting the fourfold purposes of the Federal Bar Council: to advance the science of federal jurisprudence; to protect the administration of justice; to uphold high professional standards of the bench and bar; and to encourage friendly relations among members of the legal profession.

To Join

With the aid of Council President Steve Edwards and former Council Presidents Betsy Plevan and John Kenney, the Inn's organizing committee — consisting of Beth Kaufman, Len Novello, Pete Putzel, Minna Schrag, John Siffert, Frank Velie, Paul Vizcarrondo, Richard Ziegler, and the authors — has begun to speak with judges and lawyers who might be interested in participating in the pilot Inn. The membership of the pilot Inn will be finalized by May, thereby allowing time for the teams presenting the first programs in the Fall to get acquainted and begin preparing.

Lawyers and judges who are interested in participating in the pilot Inn should contact a member of the committee. Because space is limited, it

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may not be possible to accommodate everyone who wants to participate. Some or all of the initial membership will rotate out in future years, allowing new lawyers and judges to join. Consideration also may be given to forming additional Inns.

FBC News

MENTOR Moot Court

By Debra Lesser

The Federal Bar Council sponsors the nationally acclaimed MENTOR program, pairing law firms with high schools.

In the basic MENTOR program, each law firm/high school pair agrees to conduct four activities together over a semester or school year: the lawyers visit the MENTOR class at the school; the class visits the law firm; the lawyers take the students to court; and an elective activity is developed by the lawyers for the students.

In New York, the elective activity is the MENTOR Moot Court competition, co-sponsored by Fordham Law School. Students, coached by their MENTOR law firm, present their oral arguments before panels of lawyers and judges with one school emerging as the winner.

MENTOR began with the pairing of five law firms with public high schools in New York City. Since its inception in 1981, MENTOR has grown to more than 60 law firm/school pairs in New York City and over 600 pairs nationally. MENTOR continues to be a successful pro bono activity for lawyers.

MENTOR served as the catalyst for many other law-related programs, engaging many more legal professionals to work with the school-age population. Programs became so successful that a group of attorneys created the Justice Resource Center to administer National MENTOR and all law-related education programs in New York City.



An awards ceremony following a recent MENTOR moot court.

Second Circuit Opinions

Loss Causes

By Charles C. Platt

In a recent decision entitled *Moore v. PaineWebber*, the Second Circuit clarified the distinction between materiality and loss causation in cases alleging fraud. The decision is noteworthy not only for its analysis of that distinction, but also for its scholarly concurrence on causation theories in general.

Plaintiffs' Complaint

The plaintiffs in *Moore* complained that defendant PaineWebber had committed fraud when it "disguised a life insurance policy as an investment package similar to an individual retirement account" and thereby "trick[ed] them into buying life insurance" with funds that the plaintiffs otherwise would have used for other investments. The plaintiffs claimed damages because they were "charged insurance premiums and commissions and because they forewent the allegedly greater benefits that they would have received" had they put their money into other investments.

Judge Keenan dismissed the complaint in the district court. He concluded that the plaintiffs had failed to allege "loss causation," or the causal relationship between PaineWebber's deception and any losses that the plaintiffs had sustained. Judge Keenan relied in particular on a chart that the plaintiffs received at the time of sale, which was incorporated by reference in the complaint. That chart showed that the projected value of the plaintiffs' life insurance policies would be less than the amount they deposited for seven years.

In Judge Keenan's view, this chart "fully and accurately disclosed the economic aspects" of the plaintiffs' investment, and thus PaineWebber could not be responsible for any losses suffered by the plaintiffs once those values were fully disclosed.

Question of Materiality

The Second Circuit reversed in a decision written by Judge Calabresi. The court concluded that the issue was whether PaineWebber had made a material misrepresentation, not whether PaineWebber's misrepresentations caused the plaintiffs to suffer economic loss.

In particular, Judge Calabresi found that loss causation was sufficiently pleaded when plaintiffs alleged that they suffered losses (i.e. premium payments made and unrecognized returns foregone), and that those losses were "sufficiently linked and proximate" and were unimpaired by any "unlikely, extraneous, or intervening causes."

Regarding Judge Keenan's point that PaineWebber had fully and accurately disclosed the value of the investment, the court opined that this issue was "best considered under the rubric of material misrepresentation, and not under that of loss causation." The Second Circuit explained that the falsehoods that PaineWebber was alleged to have made would not have been material "unless they conveyed misstatements of the investment's economic value."

In this case, the court found, the complaint did allege misstatements by PaineWebber that "misdescribed the economic value of the bargain." Those alleged misstatements included PaineWebber's characterization of the life insurance policy as a "savings" plan and the policy premiums as "deposits," and PaineWebber's suggestion that the life insurance policy was an "added benefit" rather than the investment itself.

Causation Concurrence

Having concluded that loss causation was not the relevant issue in the case, Judge Calabresi then followed his 12-page majority opinion with a concurrence of equal length on that very subject. The concurrence posed a hypothetical about a farmer named Marshall purchasing cabbages from a wholesaler named Taney, and offered an extended tutorial on causation theories in general, and the differences between causation elements in statutory and common law actions.

Federal practitioners may read this case more for the issue avoided — loss causation — than for the issue decided. Judge Calabresi's concurrence suggests that those loss causation issues are sufficiently complex to require considerable study, and may be the topic of future Second Circuit opinions.

Legal History

LBJ And Abe Fortas

By C. Evan Stewart

Lyndon Johnson, at first, liked the nickname "Landslide Lyndon," which reflected his narrow victory over Coke Stevenson in the 1948 run-off Texas Democratic primary for the Senate. In time, however, he grew to dislike the moniker immensely because it reinforced widespread notions that his victory was due to less than honorable political shenanigans.

The politics of that incredible race — a race that had he not won would likely have had an immense impact on this nation's polity (e.g., Vietnam, Civil Rights legislation, the Great Society, NASA, etc.) — are told well in Ronnie Dugger's *The Politician: The Drive for Power from the Frontier To Master Of The Senate* (New York, 1982), Robert Caro's *The Years of Lyndon Johnson: Means of Ascent* (New York, 1990), and Robert Dallek's *Lone Star Rising: Lyndon Johnson And His Times, 1908-1960* (New York, 1991). This article will highlight a perhaps lesser known part of that political drama: how the brilliant legal maneuvering of Abe Fortas made Johnson's victory possible.

87 Votes

Six days after the primary election, George Parr, the "Duke" of Duval County, delivered the famous, just discovered votes from Precinct 13 in Alice, Texas. The final tally ended with Johnson receiving 494,191 votes and Stevenson netting 491,104. A week later, the State Democratic Executive Committee endorsed Johnson's 87-vote victory by a single vote margin. The next day the party's convention ratified that decision.

Stevenson was not to be put off so easily, however. Following an all-night drive to the federal district judge his supporters believed would be most favorably disposed, Stevenson's attorneys arrived at Whitfield Davidson's private home near the border of Louisiana and petitioned for a temporary restraining order, barring the putting of Johnson's name on the November ballot. Judge Davidson (a Stevenson friend and conservative anti-New Dealer) issued the order at 6:25 that morning, and scheduled the hearing on Stevenson's claims under the federal civil rights statute for the following week (September 21) in

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Fort Worth. The hearing went as Stevenson and his attorneys had hoped, with Judge Davidson on September 22 rejecting Johnson's argument that the court was without jurisdiction to intervene in a state election and keeping the temporary injunction in place until investigations were completed into the allegations of voting fraud.

Time was now a critical factor. The deadline under Texas law for placing names on the printed ballot was October 3. And although Judge Davidson had ordered the investigators to report back to him on October 2, from Johnson's perspective (especially given the likely findings of the investigators) that provided only a small technical chance for getting his name on the ballot, and an even smaller realistic one. The question on the table was: What to do?

"Where's Abe?"

A roomful of top legal talent debated the possible options on the evening of September 22. While the object was clear — dissolve the injunction and get Johnson's name on the ballot — no one, in the words of one of Johnson's lawyers, "could agree on how to do it." Johnson, frustrated but knowing instinctively what he needed to do, asked: "Where's Abe?"

Abe Fortas, it turned out, was in Dallas taking depositions. He immediately came to Fort Worth and joined the discussions of Johnson's options. After listening to various descriptions of what had taken place and possible avenues of legal attack, Fortas told the group what he thought should be done. What he proposed was a risky gamble that ran counter to the collective wisdom Johnson had heard up to that point.

The key to Fortas' plan was to get the matter up to the Supreme Court Justice who had administrative responsibility for the Fifth Circuit Court of Appeals — Hugo Black — as quickly as possible.

Thus, rather than exhaustively pursuing all available legal remedies, which was the seeming consensus of the assembled lawyers (which, Fortas believed, would achieve ultimate victory as a matter of law, but would come far too late to get Johnson's name on the ballot), Johnson's legal case would promptly be put in front of that court of appeals judge *least* likely to be persuaded by Johnson's jurisdictional argument, to lose there, and then press the appeal immediately to Justice Black, who (presumably/hopefully) would agree to



President Johnson with Abe Fortas and John Chancellor at the conclusion of a news conference in the East Room of the White House in 1965. Photo courtesy Archive Photos.

hear the matter as a single Justice and then rule in favor of Johnson.

Fortas outlined his plan to the assembled group, acknowledging that it was a "one-shot" strategy and that, if it was unsuccessful, "[y]ou lose everything." But, in Fortas' mind, this was the only legal strategy available to achieve the desired result before October 3.

When Fortas finished outlining his plan, none of the assembled lawyers spoke. As Fortas later recalled: "Everyone was delighted to have me take the responsibility." It was at that point Johnson weighed in: "Let's do what Abe says."

Fortas left the group and went into a separate room with a secretary. He shortly returned with a single page document, stating: "That's all you need." One of the other Johnson lawyers years later observed that "[i]t was a thing of beauty to watch the way he handled it."

The following day Fortas' document was put into a brief-like format, and a Johnson lawyer was dispatched by plane to New Orleans, where the Fifth Circuit was located. Johnson's legal team had decided that the Circuit Judge least likely to be helpful was Joseph C. Hutcheson; Hutcheson in a prior case had held that to lift a lower court injunction would require the concurrence of at least three circuit court judges. The Johnson team thus applied to Hutcheson for relief, and he agreed to hear the matter.

A four-hour hearing was held on Friday, September 24. At first, Hutcheson told the parties he would take the matter under advisement; that threatened to deep-six Fortas' strategy. Fortunately, however, Hutcheson's period of indecision lasted only five hours. The judge called both sides into chambers and announced that he did not believe he could act independent of the other members of the court and was thus forced to rule that he had "no power and ought not to set aside or stay the injunction."

The next day, Johnson's legal team phoned Justice Black at his home in Virginia. He agreed, ex parte, to hear their application for a stay of the injunction; Tuesday, September 28, was set as the hearing date (allowing Stevenson's lawyers a chance to prepare and appear).

Jurisdiction And Procedure

At 9:30 on Tuesday morning, lawyers for Johnson and Stevenson assembled in Justice Black's chambers. Former Texas Governor Dan Moody, on behalf of Stevenson, stressed the facts (i.e., the alleged fraud). Fortas stressed jurisdiction and procedure (such primary elections were "irrevocably and incontestably vested" in Texas state law, beyond the purview of a federal court). Another Johnson lawyer brought in the possible political ramifications of allowing the injunction to stand: "There will be no name of a Democratic nominee. The Republican nominee . . . will be the only candidate on the ticket." (Black had been a fiercely partisan Democratic Senator prior to his elevation to the Court, and control of the Senate was a major political consideration in 1948.)

The session in front of Justice Black went on for more than three and one-half hours, with Black then retiring to consider the matter. A short time later he reconvened the group of lawyers to announce his decision, ruling in Johnson's favor: "It would be a drastic break with the past, which I can't believe Congress ever intended to permit, for a federal judge to go into the business of conducting what is to every intent and purpose a contest of an election in the state." He went on to tell Moody that his client had options beyond the federal courts, including the Senate itself, as well as the criminal justice system (i.e., to prosecute fraud). The following day, September 29, Justice Black signed an order directing that all proceedings be stayed "until further order of the Supreme Court." That signed order had two immediate effects: first, it stopped in mid-hearings the fact finding proceedings ordered by Judge Davidson (indeed, with only minutes to spare before all the ballot boxes would be opened and/or examined, including the box containing the "votes" from Precinct 13); and second, Johnson's name was allowed to be placed on the printed ballot.

Fortas' plan had worked.

On October 5, the full Supreme Court refused to hear Stevenson's petition to review Justice Black's decision. Johnson went on to defeat the Republican candidate (Jack Porter) by a vote of 702,985 to 349,665, and was sworn in as the junior Senator from Texas on January 3, 1949. The Supreme Court, on January 31, 1949, rejected Stevenson's petition for a trial on the merits. And the Senate's Subcommittee on Privilege and Elections — in response to Stevenson's challenge — declared on June 21, 1949 that "no evidence has been disclosed which would establish Stevenson's allegations," concluding that Johnson was "a duly elected Senator of the United States from the State of Texas."

Postscript

During the period Johnson liked to joke about his nickname, he enjoyed telling a story about a young Mexican boy who lived in Alice, Texas. A passerby, seeing that the boy was crying, stopped and asked him, "Son, are you hurt?" The boy said, "No, I no hurt." "Are you sick?" "No, I no sick." "Are you hungry?"

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"No, I no hungry." The passerby then asked: "What's the matter? What are you crying for?" The boy replied, "Well, yesterday, my papa, he been dead four years, yesterday, he come back and voted for Lyndon Johnson, and he didn't come by to say hello to me."

In Memoriam

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District Judge Kevin T. Duffy, and Thomas E. Bosworth, a grandson.

Judge Lumbard's busy career, extending over fully two generations, covered so much of the century that many practitioners of today could well benefit from the reminder offered on September 22 concerning his importance in the development of institutions with which Federal Bar Council members work every day. Because Judge Lumbard took senior status as long ago as 1971, he mostly is remembered now as an active but relatively silent participant in innumerable Second Circuit panels. His long and remarkable tenure as Chief Judge from 1959 to 1971, and as the United States Attorney from 1953 to 1956 who did so much to establish the office's reputation for professionalism and independence, are remembered, generally speaking, only secondhand.

40 Years

Chief Judge Winter opened the proceedings by reminding the audience of how far this remarkable career extended through the judicial histories even of such relatively senior members of the court as himself. Noting that Judge Lumbard sat for over 40 years, Judge Winter pointed out that when he served as a law clerk in the early 1960s, Judge Lumbard already was Chief Judge, having served with such notable figures of the earlier years of the century as Learned Hand, Thomas Swan, and Charles E. Clark. Judge Lumbard continued to sit regularly and energetically through the tenures of every Chief Judge up to Judge Winter's immediate predecessor. For most of this time he regularly sat by designation as a Southern District judge, on the D. C. Circuit, and elsewhere as well.

While speakers focused on a variety of dimensions of Judge Lumbard's extraordinary career, his caring leadership in personal as well as institutional settings was a common theme that united the proceedings. Listeners were reminded not only of the judge's famous role as a reforming United States Attorney and a chief judge who helped establish the Second Circuit's reputation for leadership, but also of his contributions as a mentor for young lawyers — and not-so-young ones as well. Examples included the first program in a U.S. Attorney's office to bring in summer trainees, and his conversion of the old position of "bailiff" to a circuit judge from a resting place for a retainer into a respected law clerk post for a young lawyer. Another theme emphasized by Chief Judge Winter and several other speakers was that "although Ed had been a prosecutor, he was the fastest gun on the court when it came to prosecutorial misconduct. He had no tolerance for overreaching by those wielding the sovereign power of the United States Government."

Public Servant

Bob Fiske focused primarily on Judge Lumbard as lawyer for the public service. After a year of practice, Judge Lumbard was recruited by Emory Buckner to the U.S. Attorney's office, and then to a special unit investigating corruption in the awarding of Queens sewer contracts. Convictions of several high public officials resulted. General Donovan's City Bar investigation into irregularities in the Bankruptcy Court followed. Lumbard returned to head the Criminal Division of the U.S. Attorney's office before leaving to participate in founding the firm of Donovan, Leisure, Newton, & Lumbard.

Fiske stated that when appointed U.S. Attorney in 1953 after several other moves between private practice and public service, "he immediately revolutionized the office. It is hard to believe today, but back then in the years immediately preceding his appointment, being an Assistant U.S. Attorney was a part-time job. People were appointed as political patronage. Judge Lumbard changed all that." The speaker went on to describe the exacting and broad-based recruitment of outstanding lawyers that followed. Judge Lumbard and colleagues "taught them the skills of trial and appellate practice, gave them enormous responsibilities . . . and instilled in them a lifelong commitment to public service that they carried with them when they left office.

"I was privileged to be a part of the first summer program that he created in 1954. It was the first such program anywhere in the country, and it was a typically imaginative Lumbard idea. . . . It was an extremely heady experience for all of us. Judge Lumbard became a mentor and role model for every position in public life I have held since."

Harold Tyler reminded the audience of just how influential the Lumbard model of recruitment and leadership as mentor became. "There are many persons in this room who were hired by Lumbard . . . 1953 and 1954 when he put together one of the most talented and successful staffs [in office history]. A very important

feature was, long before others did so, he persevered in seeking to appoint women and black Americans, and he succeeded." Tyler went on to enumerate the successes of so many of the 85 outstanding assistants Judge Lumbard recruited, including ten who have served as U.S. District Judges.

Judge Meskill opened his remarks by noting that his history with Judge Lumbard, though long by most standards, dated only to 1975 when he joined the court.

"During the following 20-plus years I had the pleasure of working with him and learning from him." Focusing on the cases in which they sat together, he stated that "[i]n his own quiet way, he was a great teacher of restraint. He taught me, as a young, inexperienced judge, that we must limit ourselves to the issues before us, not try to change the world, and to be attentive to our scope of review. Rather than say that someone was right or wrong, Ed would prefer to say that from the evidence the jury could have found that something was fact, or that the moving party's burden had not been met."

Noting that Judge Lumbard was always at pains to avoid any language concerning the decision under review "that would embarrass the judge or cause the reader to think less of the district court," Judge Meskill went on to state that "Ed Lumbard was as practical as he was thoughtful." A description followed of an episode in which a potentially embarrassing situation was resolved by informal suggestion that a district judge recuse. This avoided a court of appeals decision that would have had to emphasize a colloquy that had taken place years earlier that "on a cold record might be misinterpreted. And it was obvious that if this were something splashed across the pages of some tabloid, it would create quite a stir and might bring the court into some disrepute . . . .

"Ed Lumbard was my good neighbor on the 24th floor of this courthouse for several years. . . . One day, shortly after Ed turned 90, we rode up together from the courtroom on the 17th floor to our chambers on the 24th. We were complimenting each other on the pleasure of sitting next to each other. Ed mentioned cutting back on his schedule in a somewhat apologetic way." Judge Meskill went on to marvel at Judge Lumbard's vigor, doubting his own likely capacity at a similar age.

Night Law Students

The audience learned that Judge Duffy was the first of a series of night law students for whom Judge Lumbard was mentor and friend through the program to convert the former bailiff position into a substantive law clerk post. Especially notable in the Duffy comments were several stories of Judge Lumbard's care and personal concern for his proteges. "I want to talk about J. Edward as a friend. One day I was visiting Ned in his home. We fell into a conversation about a book written by Lawrence Edward Walsh. I asked about how old Ed Walsh was, and he replied, 'Ed Walsh was born January 8, 1912. You figure out how old he is.' Ned Lumbard knew the birth dates of his many friends, his assistants, and of every one of his law clerks. He also knew lots of other such statistics.

"On another visit to Fairfield, I was about to leave when, out of the blue, J. Edward looked at me and said, 'How's Irene? Do you have something nice to give her tonight?' I was surprised and asked what he meant. He said, 'Kevin it's your 41st wedding anniversary. You damn well better have something.'" After inquiry about how he knew such things, Judge Lumbard had said, "Kevin, I don't use memory tricks. If you are really interested, you remember such things. I was at your wedding. Why shouldn't I remember it?"

Among many stories of Judge Lumbard's judicial innovations, Judge Duffy noted his concern to limit publication of judicial opinions. "J. Edward insisted that his first law clerk [and] I read one volume of F.2d. He then wanted to know how much of it should have been published. I must admit that I love the man, but that was torture!"

A Grandson's Comments

The proceedings closed with a series of personal vignettes from Thomas E. Bosworth, a grandson. Any lingering doubt that there is a place at court events for reminiscences by family members — there have been some mixed experiences in the past — was dispelled by his account of family settings from the perspective of a very different generation. Bosworth concluded by describing his discovery of an old picture that he had happened upon just after Judge Lumbard's death. "I think it said Chapel Hill Country Club, June 14, 1944. Apparently it was my grandfather. And it struck me for two reasons. One, he was my age, and I had never known him except when he was an old man. The other was, he had this big smile on his face, tennis racket in hand, cigarette — I guess you could do that in those days — and it was a wonderful picture. Here was a man at or approaching the height of his powers. He was physical, he was handsome, he was alive, and he was agile. . . . I want the people here who worked with him to remember the presence he had when he walked into the room, and gave you that smile and got down to work, the work he clearly loved."

Developments

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Zach's picture, along with the other students who occupied the building, appeared in Life Magazine and other national publications, and the incident achieved a certain amount of notoriety. Zach explained it this way:

"It was a frightening experience to some extent. But I think all of us who went in felt very strongly that there was a statement that needed to be made. We couldn't leave unresponded to something as symbolically abhorrent as the burning of a cross."

Rather than shrinking away from this incident as his career has progressed, Zach Carter has embraced it. In an article appearing in *The New York Times* earlier this year, he is quoted as saying: "I am grateful for having had, at that age, an opportunity to make a sacrifice and develop a commitment on an issue that was larger than myself." This demonstrates another outstanding characteristic of Zachary Carter: He is willing to place himself at personal risk to stand up for something he believes in.

Zachary Carter went to N.Y.U. Law School and, after graduating in 1975, went immediately to work in the United States Attorney's office in the Eastern District of New York, where he ultimately became Deputy Chief of the Criminal Division. In 1980, he became an associate at Patterson, Belknap, Webb & Tyler, where he worked with Rudy Giuliani on First Amendment issues, of all things.

Then came a five-year stint as executive assistant to District Attorney Elizabeth Holtzman in Brooklyn. From there, he became a criminal court judge in Queens, where he served with distinction from 1987 to 1991. In 1991 he became a Magistrate Judge in the Eastern District of New York.

Zachary Carter was appointed United States Attorney for the Eastern District of New York in 1993. Upon taking office, Zach immediately established his characteristic low profile, stating that his preference would be for prosecutions that have the most impact rather than those that bring the greatest level of notoriety. He contrasted his job as U.S. Attorney with his job as a criminal court judge, suggesting that as a criminal court judge he dealt with the symptoms of the problem, whereas as U.S. Attorney he could deal with the causes.

Shortly after taking office, Zach visited Wyandanch, a town in Eastern Long Island that was riddled with drugs and violence. He pledged that the focus of his administration would be to deal with crimes of violence at the neighborhood level. To the extent that the quality of life in New York has improved in the last few years, Zachary Carter deserves at least some of the credit.

In his six years in office, Zachary Carter and his team of approximately 150 assistants brought thousands of cases. They brought cases against organized crime, including the Vincent Gigante case, as well as cases against the Russian mob and Chinese gangs. They launched a massive effort to rid the Long Island carting industry of the influence of organized crime, installing a compliance officer who eliminated bid rigging, bribery, and other illegal acts, saving customers millions of dollars annually.

He prosecuted insurance fraud, securities fraud, telemarketing fraud, tax fraud, fraud in the travel agent business, fraud in the GSA, and alien smuggling. He brought a number of significant cases against defense contractors, obtaining convictions or guilty pleas. In one case that must have been pretty interesting, he prosecuted the Pagan Outlaw Motorcycle Club for extorting money from topless bars and conspiring to murder members of the Hells Angels.

In one of his most famous prosecutions, Mr. Carter brought charges against Lemrick Nelson for the stabbing of Yankel Rosenbaum in Crown Heights in 1991. Nelson had been acquitted by a state court jury in 1992 and moved to Georgia. Not only did Zachary Carter bring him back to New York to face federal charges, but he persuaded the court to try Nelson as an adult for civil rights violations. When the jury convicted, Zachary Carter did not gloat. In characteristic fashion, he stated: "What we have witnessed with today's verdict



At the Thanksgiving Luncheon. Photo courtesy Rick Kopstein.

is the final chapter in a series of tragedies."

In 1997, Mr. Carter's office began an investigation that led to the most significant prosecution of his administration — *United States v. Volpe*, a case in which a New York City police officer was accused of brutally attacking Abner Louima. In announcing his decision to step into a matter that would normally be handled at the state level, Zachary Carter noted: "Among the most disturbing aspects of this case is that one or more officers are alleged to have committed an act of almost incomprehensible depravity within the police precinct with the apparent expectation that they could get away with it." He attended the trial almost every day and counseled his assistants to maintain their professionalism in the face of a notoriously flamboyant defense. The case ended dramatically with a mid-trial guilty plea and confession.

At that point, Zachary Carter could have hung it up and left office in a blaze of glory. But he didn't do that. While the Louima case was pending, the office was conducting an investigation of brutality by New York City police officers generally. According to reports in the press, that investigation was completed in June of this year. Once again, in characteristic Carter fashion, he did not release a report amid a fanfare of grandstanding public pronouncements. Rather, he commenced a series of quiet negotiations with the city and the police department about steps that could be taken to make things better. It has been reported that Zach continued to be involved in those negotiations after he left the U.S. Attorney's office for Dorsey & Whitney in July.

In a recent newspaper interview, Zachary Carter had the following to say:

"After Louima, especially, a silent majority of cops is coming to understand that police misconduct is the greatest barrier between them and the people they are there to serve. This is particularly true in minority communities. The fact is that in the distressed communities, the relationship between the people and the cops is a love affair waiting to happen — because minorities bear the burden of crime beyond that borne by better-off citizens elsewhere in the city. And make no mistake about it: The lack of cooperation of citizens, often because they fear police brutality, is the key barrier to further crime reduction."

That is vintage Zachary Carter — thoughtful, eloquent, effective, practical.

The Emory Buckner Award is for outstanding public service. It is a pleasure and an honor to give this award to Zachary Carter — especially given his long association with the Federal Bar Council, as both a member and a trustee. While he has spent almost 25 years in public service, I have a feeling that Zachary Carter's record of outstanding accomplishments has only just begun (as the front page of yesterday's *New York Times* demonstrates).

In accepting the award, Carter noted that Emory Buckner was a dedicated public servant who took an office with limited capabilities and enhanced it by hiring new people on the basis of merit. Carter said that Emory Buckner turned the United States Attorneys' offices into the models of professionalism that they are today.

Carter compared Emory Buckner to Judge David Trager, who was United States Attorney for the Eastern District when Carter was getting out of law school. "There weren't too many people in the office at that time who looked like me," said Carter. Judge Trager and his successor, Judge Edward Korman, had the courage to hire minorities and women long before it became fashionable, Carter observed.

This did not compromise the capability of the office, Carter said.

He pointed to the great accomplishments of the people who had served as assistants in the U.S. Attorney office, including Judges Amon, Dearie, Gleeson, Raggi, and Ross. He noted that Judges Trager and Korman had used "alternative measures of excellence" to make the United States Attorney's office of the Eastern District one of the best in the country.

"If Emory Buckner were alive today, he would be an Eastern District kind of guy," quipped Carter.

Magistrate Judge Marilyn Go presided as chair of the Luncheon.



Zachary Carter addressing the audience. Photo courtesy Rick Kopstein.

The Back Page

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Thursday morning, Susan and I went downstairs to the Points of Light breakfast buffet. While there, we met several of the winners and their guests, among them a 17 year old from North Carolina who had started the anti-dropout program "be cool, stay in school" when he was in 8th grade.

All of us then were taken on a bus tour of D.C. with a terrific tour guide. We drove past many of the sites, and stopped at several others. I did not think I would see anything new since I had been to Washington several times in recent years, but there were amazingly enough not one but three new monuments I had never seen — the Iwo Jima Memorial, the Franklin D. Roosevelt memorial, and the Korean War memorial.

After the tour, I had lunch back at the hotel. Susan was invited to have lunch with a Congressman from North Carolina. This was the highlight of Susan's trip. She dined in the Congressional dining room, and the Congressman was able to get her onto the floor of the House of Representatives while the House was in active session (not something that would have been possible for me, because one has to pass for 12 or younger for that honor.)

After lunch, we were taken to one of the Senate office buildings for the Capitol Hill Reception. That was a bit of a bust, because only two Senators were present (Senator Leahy from Vermont and Senator Inouye from Hawaii, which both had winners), but we got to speak with some of the other winners. Then it was back to the hotel for the dinner.

The 1998 winners were announced, but we were not allowed to speak because, we were told, that had been done at the dinner last year, and would take too much time this year. The 1999 winners were each allowed to give a one minute "speech." What I had expected to be a dull evening turned out to be a moving and humbling experience, as the winners explained how they had devoted themselves to a cause that was particularly close to their hearts.

On Friday, the winners gathered in the hotel lobby at 8:50 a.m. to be taken by bus to the White House. When we got there, we handed over our identification and were cleared individually, before passing through a metal detector. We walked up the drive to the door to the West Wing, where a uniformed military officer came to attention to open the door for each group of people that approached.

We were ushered into the Roosevelt Room, right off the Oval Office. When we all gathered, we were advised that the President had a foreign policy briefing scheduled (this was just a day or two after the defeat of the test ban treaty), and that we would have to wait a while. We were told that the rest rooms were down the hall, and even though it was not necessary, there was no way I was not going to use the ladies room at the White House (which was nicely appointed but nothing special). On my way back to the Roosevelt Room, Secretary of State Madeline Albright came down the hall (apparently to give the President his briefing), and said a vague hello to the myriad people gathered in the hall.

The Beret

I had a red Guardian Angels beret that Curtis Sliwa had asked me to wear for the photo with the President but I did not want to do so — when I had tried it on, I thought I looked like an angry French chef. I spoke with Curtis, and we agreed that if the White House let me take two photos with the President, I would wear it for the second one (and in any event, I would wear it for the awards presentation later on Friday).

I previously had asked the Points of Light representatives if they thought we could arrange for two photos, and they said that was not possible. When we were at the White House, I asked the staff member in charge of us if two photos would be possible, and he said no. But then, dropping his voice and murmuring "you didn't hear this from me," he said that if I asked the President directly, there was no way he would say no, and that he was the only one who could arrange for that. So I knew I would be speaking with the President.

We waited in the Roosevelt Room for the better part of an hour (it turned out that the Prime Minister of Norway was waiting in another room for us to finish). Other staff members came in the room from time to time to keep us amused and occupied.

At one point, we were told that the deputy chief of staff, Maria Echaveste, would say a few words. She did, and then left. I had worked with Maria at my first law job at Rosenman & Colin and recognized her and her name immediately, although she did not show any recognition of me while she was addressing the entire group. I did not want to bother her, so shortly after she left, I went up to one of the other staff people in the room, and asked them to give Maria my regards. When they found out we had worked together, I was invited to go to the private area of the West Wing to see her. Maria and I chatted for five minutes or so, much to the envy of one of the other winners, who would have appreciated the chance to chat with Maria, one of the highest ranking Hispanic women in the administration.

I went back to the Roosevelt Room, and we were lined up to meet the

President. We were in order by year, 1998 winners and then 1999 winners, and alphabetically within each year, which put Cyberangels fifth. We were told we would go in one at a time, have the photo, then be led out through Betty Currie's office and back to the Roosevelt Room to wait for all the photos to be finished. While we were waiting, I explained my beret plan to the woman in front of me, who said, "you're going to wear a beret after the Monica thing?!" That had never occurred to me, and got me slightly more anxious than I had been.

The Photo Shoot

The door opened, and the line advanced into the Oval Office. Being fifth, I was able to see into the room almost immediately, and there was President Clinton standing in front of his desk greeting the head of Points of Light, with a photographer facing them and snapping away. I was glad I was not first, because I needed a few moments to get used to the fact that that was really him and that we would be meeting in a minute or two. The Points of Light people introduced us by name and organization, and the President shook hands while saying generic things like "thank you for your terrific work," etc. Shortly before they got to me, the President saw that they were starting to lead the first people out of the office, and he asked whether we could all remain for a group photo. This was a rhetorical question; no one was going to say no.

My turn came, and the President offered his congratulations. I asked, "Mr. President, would it be O.K. if we took another picture with me wearing the beret?" He said, "of course," and as I was putting it on, I said, "Thank you, because Curtis Sliwa would have killed me if I didn't get this photo." Everyone laughed, the President said it looked good on me (what a politician!), he turned us so that we were both facing the camera (rather than being in profile as he had been for all previous photos), and we got the beret photo.

I then joined the others behind his desk, and while, the photo ops continued, got a chance to look around. On the President's desk were photos, all family pictures: Hillary Clinton and Chelsea; a photo of Buddy the dog; one with the President, his mother, and the President's brother, Roger; and a few others. The Oval Office was smaller than I thought it would be — not much more than 20 feet long, with two couches and a few chairs around and behind where the photographer was standing.

A few of the winners chatted with the President, and he became engaged a bit (e.g., reminiscing about time he had spent in some of the places the winners were from), but to me he seemed a bit preoccupied (not surprising) throughout. He made clear that he had read about all our organizations, and instructed his staff to deliver our information to the appropriate Cabinet secretaries. His charisma didn't affect me, although several of the other winners were walking on clouds when we left. When he finished the photos, he joined us behind his desk for our group photo, and we went back to the Roosevelt Room through the same door we had used to enter. I did not get any White House souvenirs, although a few people got something — possibly a little package of peanuts.

Awards Presented

We left the White House and walked out through a secure gate to cross the street into the Old Executive Office Building, and went to the fourth floor to the Indian Treaty Room (where no treaty with India or Indian tribes, or any treaty at all, has ever been signed) for the award presentations. The guests were sitting in the back, and we sat in the same order as the photos were taken, so I was front row on the center aisle. John Podesta, the White House chief of staff, presented the awards. On the way over, one of the other winners told me that she had asked about getting extra copies of the award medal for her steering committee, and was told each would cost $1,000. We thought that was unnaturally high and simply meant to discourage those requests, but when we got the medals, we saw that they had come from Tiffany.

At the awards ceremony, our names and organizations were announced, and as we posed for pictures receiving the medal from John Podesta and the head of Points of Light, the other Points of Light representative was reading off a short description of the winning program. The medal is silver (at least in color). It says "President's Service Award" around the perimeter. On the back, it has the year, states "Presented to Cyberangels," and has the engraved signature of the President. The medal is on a ribbon (although I did not put it around my neck).

We then went to the Points of Light offices for a buffet lunch (it was around 1 p.m.), and that was the end of the planned festivities. We were all pretty jazzed about the morning's events. Before leaving Washington, several of us went to the Planetarium at the Air & Space Museum, and to the Natural History Museum to see the Hope Diamond (which is not as big as I had imagined). Susan and I then returned to New York and our mission to follow-up on the President's expressed hope that these awards would increase funding opportunities for the winners.

The Back Page

At The White House

By Nancy Savitt



President Clinton and Nancy Savitt. Photo courtesy The White House.

From October 13 through October 15 I was in Washington, D.C., to accept (a year late) the 1998 President's Service Award on behalf of Cyberangels, the Guardian Angels program that is the largest online safety and education program in cyberspace (www.cyberangels.org). The award is the highest in the country for volunteers and volunteer organizations, and is administered by the Points of Light Foundation. There are two full days of events surrounding the presentation of the award, including a photo opportunity with the President at the White House.

My law partner, Parry Aftab, who is the Executive Director of Cyberangels, and Guardian Angels' Founder Curtis Sliwa had been in Washington last year for the festivities, but the photo opportunity with President Clinton had been postponed (due to the signing of the Mideast peace accords), so we were invited (along with last year's other 19 winners) to join the 20 winners from this year. Parry and Curtis were unable to attend, so, as the group's Chief Legal Officer, I was nominated to go.

I traveled with Susan, one of our Teenangels, a group of high school students who have been trained by Parry and membe of law enforcement in online safety. The Teenangels travel around the country addressing audiences as diverse as school age children, parents, and members of Congress on online safety and education.

After a wearying trip involving a five hour flight delay, we arrived at the Madison Hotel just before midnight on Wednesday. My distress was considerably alleviated when they put me in a lovely suite that was larger than my apartment in Manhattan. Susan's room was nearby. In those surroundings, we were in the perfect frame of mind for the next two days.

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