Federal Bar Council News

April 2001 Vol. VIII, No. 2

From The President

Making Strides

By P. Kevin Castel

We are making great strides in attracting a new generation of members. To paraphrase, "this is not your father's bar association" — that is, unless your name is Lew Liman or Stephanie Kupferman.

For those on the threshold of their professional lives, there is a generalized hope for a "successful career." Some will define it as the continuous achievement of great outcomes in interesting cases for worthy clients willing to pay one's fees. For others, it is the opportunity to make a meaningful contribution to the betterment of society through public service. For nearly all, the

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Developments

Whitney North Seymour Award Goes To Nussbaum At Council's Winter Meeting

By Steven M. Edwards

The Federal Bar Council held its annual bench and bar meeting at the Westin St. John in the U.S. Virgin Islands from February 17 through February 24, 2001. The meeting was chaired by Paul Hanly and included panel discussions, sports and various events that gave the 240 attendees ample opportunity for social interaction. The program committee, chaired by Second Circuit Judge Dennis Jacobs, put together a series of spectacular panel discussions on criminal law, the Internet, private investigative techniques, closing statements, international law and ethics.

Balance Of Power

Judge Shira Scheindlin led off a stimulating discussion of "the balance of power between prosecution and defense" by observing that the title of the panel implies that there is a balance when in fact there is not. She quoted from an article by Judge Gerard Lynch in which he suggested that prosecutors have taken over all of the roles in the criminal arena, and she posed a hypothetical in which an employee of a fictitious Internet company is being investigated for insider trading.

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A Conversation With:

Chief Judge Walker

By Stacey Creem and Stephen Ratner

On October 1, 2000, Judge John M. Walker, Jr., became the Chief Judge of the U.S. Court of Appeals for the Second Circuit after Chief Judge Ralph K. Winter assumed senior status. Five months later, Chief Judge Walker finds his new role interesting and challenging. But he cannot hide his surprise at the amount of work and number of administrative details that come with the job. Although the Chief Judge carries only 80 percent of the caseload of other judges on the court, Chief Judge Walker says his

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From The President

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hope and expectation is that this "successful career" can be enjoyed without neglecting other aspects of one's personal life. Please allow me to welcome the newly admitted to the long line of experienced practitioners still in search of this Holy Grail.

With apologies for being pedantic (or worse), I thought I would try my hand at some ideas for lawyers in the beginning years of practice. One-size-fits-all advice rarely works but the alternative of no advice seems too easy and too empty. I do not claim that I have always practiced what I now preach. Experience teaches us all.

1. **Attitude counts**. Show overt enthusiasm. Brains, hard work and a "can do" attitude are most of what you need in this profession. You will be hired and admired for a spirit of professionalism which does not accept merely a good effort or a decent effort but complete and absolute unrest until the very best work product is produced for your client.

2. **Be efficient**. To those in the private sector, excellence must come without presenting your client with an unworkable bill. This is an added pressure on today's lawyers which was not a major factor years ago. Stretch yourself to work on as many matters as possible. Your interest level will remain high and downtime can be put to use on other cases.

3. **Anticipate needs and ask questions**. What potential problem could derail success? What project need to be done next? Also, the lawyer who returns for further explanation of an assignment is showing good judgment which will be appreciated.

4. **Seek out mentors both inside and outside the firm**. To this end, leave some time in your schedule for participation in organized professional activities. From the standpoint of pure self-interest, it will give you the chance to interact with potential employers and sources of referrals. Start now. It is much more difficult to wake up mid-career and attempt to build a network of contacts. Attending a committee meeting or a session of an Inn of Court is likely to be more productive than staying home to watch *Survivor Outback*. If you cannot bear to miss it, tape it and watch it later.

5. **Find the time to use your legal talents to help those less fortunate**. Early in your career it is a way to build skills. Later in your career, it is a means for your own personal renewal and redemption. Long calendar calls and linoleum floors in Family Court are good

From Circuit Clerk Roseann B. MacKechnie

Second Circuit Practice Tips

Here is some information relating to scheduling in the Second Circuit:

The Scheduling Order

1. Soon after the Notice of Appeal has been filed in a case, the Clerk's Office will issue a Scheduling Order which will inform the parties when the Record on Appeal, Appendix and respective briefs are due. Generally, appellant's brief and the appendix are due 30 days after the record on appeal is due. The due date for appellee's brief is generally 30 days after appellant's brief is due. If appellant elects to submit a reply brief, it must be served within 14 days after service of appellee's brief, but not less than 3 days before argument.

2. The Scheduling Order also provides that the appeal will be ready for argument during a particular week, although the appeal frequently is calendared sometime after (but never before) the week specified in the order.

3. Once the appellant's brief is filed, the attorneys will be required to file a Notice of Appearance. In the Notice of Appearance form, counsel must inform the court of particular dates on which they are not available for oral argument. Thereafter, counsel must advise the court promptly of any change in availability. Because the case is usually set for argument sometime after the week originally noted in the scheduling order, counsel should note unavailability dates subsequent to the date in the scheduling order.

Calendaring A Case

1. Subsequent to the scheduling order, parties will be notified of the "firm date for argument." Generally, this notification is mailed to the parties three weeks in advance of the set argument date.

2. Once a case has been assigned a "set" date for oral argument, adjournments are rarely granted. This is because the three judges assigned to decide the case have already begun work on the appeal and it is very difficult and inefficient to move the case to another day and to another set of judges. Obviously, in a genuine emergency situation, the court will consider a motion to adjourn; it might also conclude that submission of the briefs is sufficient to decide the case and that oral argument is not necessary to disposition.

for the heart and soul of a Wall Street lawyer. The private, voluntary nature of pro bono adds to the satisfaction derived therefrom.

6. **Personal or professional setbacks occur for most successful lawyers.** It is how you bounce back that counts. Assess the situation as objectively as you can, talk to friends and mentors, develop a new plan and move on.

7. **When in Rome, read what the Romans read.** If you join an entertainment firm, do not wait until you are there six months to figure out that you should be reading *Variety* and *Billboard*. Likewise, if you are in a securities or white collar practice, develop the habit of reading the *Wall Street Journal*. Also, excellence in legal writing remains one of the most prized skills in this profession. Find persuasive writing styles that you admire, study them and emulate them.

8. **Treat with dignity all whose paths you cross.** Maintain a courteous professional demeanor even with your adversaries. This rule also applies to your dealings with mailroom clerks, secretaries, paralegals and court reporters. As Judge Kevin Thomas Duffy told one young lawyer, "Be kind to the court reporter or he will take you down verbatim — 'ums' and 'ahs' included."

9. **Your mother was right: you need to take care of your body and your mind.** Pace yourself or you will burn out physically and mentally. Two suggestions to insure that you will actually take a vacation: (1) schedule it months in advance so that those working with you will know early on of your plan; and (2) take your vacation in traditional down periods such as the Summer or around holidays (announcing that you will be on holiday for the entire month of October is not likely to be greeted warmly).

10. **While you are juggling hard but efficient work-bar association activities, pro bono work and professional reading, do not neglect your family or your friends.** You need them and they need you — in good times and in bad. Work pressures may place your priorities out of balance from time to time. It happens to be a hazard of this profession. Like the keel of a boat, it is your family and friends who can keep you from capsizing.

In the sphere of more concrete advice, the Federal Bar Council has planned a series of presentations in three areas of the law — Securities, Antitrust and Class Actions — for judicial law clerks. They are scheduled for this Fall under the direction of Mark Zauderer. We offer federal judicial law clerks free membership in the Council. Others who are admitted fewer than five years may join for $100. To those newer lawyers who have joined the Council, I welcome you and invite you to contact me at castel@cahill.com

Finally, regardless of your length of admission to the bar, we will experiment with special seating for new members at the Law Day Dinner. If you would like to take advantage of this special seating, please so indicate when you return your response card for the May 1 Law Day Dinner.

Clarification

Court Of Appeals Courtroom

The Court of Appeals has dedicated the new Court of Appeals Courtroom on the 15th Floor of 40 Foley Square as an official Court of Appeals Courtroom, and has accepted a gift of photographic portraits of five judges, including Judge Learned Hand. To clarify an article on page 9 of the December 2000 issue of the *Federal Bar Council News*, the courtroom has not been dedicated or named in honor of any judge.

Second Circuit Decisions

Apprendi At One

By Elizabeth Cronin and Rachel Dimitruk

As decisions go, last June's United States Supreme Court decision in *Apprendi v. New Jersey* seemed fairly straightforward. However, the blip on the radar screen when *Apprendi* was issued became a call to action once its potential ramifications were considered.

The *Apprendi* case concerned a New Jersey state conviction where the sentence was enhanced because the sentencing judge ruled that the underlying weapons crime was bias-related. The defendant, who is white, was convicted of having fired several bullets into the home of an African-American family that had recently moved into the defendant's neighborhood. He admitted to the police that he knew the victims were "black in color" and did not want them in his neighborhood.

After Apprendi pleaded guilty to second degree possession of a firearm for unlawful purpose, the prosecutor filed a motion with the court requesting an extended term of imprisonment based upon a New Jersey statute that allowed enhanced punishment for bias or hate crimes by qualifying it as a "sentencing factor" rather than as an element of the underlying offense.

The sentencing judge held a hearing after which he determined, by a

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preponderance of the evidence, that the crime was bias-related. The judge sentenced Apprendi to a twelve year term of imprisonment, a term two years longer than he would have received without the enhancement.

The New Jersey state appellate court upheld the sentence, finding that the bias enhancement was akin to finding motive, and describing it as a traditional sentencing factor rather than an element of the underlying crime. A divided New Jersey Supreme Court affirmed. That court determined that the bias crime statute did not allow impermissible burden shifting.

U.S. Supreme Court Ruling

Simply put, the U.S. Supreme Court, in its five to four decision, ruled that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

The deceptive simplicity of the majority's holding belies the practical effect it has had in the federal courts, both district and circuit. Based in large part on the concerns raised by the dissent in *Apprendi*, district and circuit courts across the country were confronted with a deluge of direct appeals and habeas corpus petitions arguing that a defendant's sentence was illegal under *Apprendi*.

While the *Apprendi* majority recognized that a distinction exists between an element of a crime and a sentencing enhancement factor, the dissenting justices intimated that the principle underlying the majority's holding could undermine the application of the federal Sentencing Guidelines. The dissenting opinion suggested that "the principle thus would apply . . . to all determinant-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (e.g., the federal Sentencing Guidelines)."

Consequently, given that the Sentencing Guidelines allow for considerable fact-finding by the sentencing judge concerning sentence enhancements, this comment in the dissent was seized upon by petitioners, and the race began to file petitions claiming that sentences should thus be invalidated, even if the sentence was below the statutory maximum.

The majority of circuits have rejected this argument and held fast to the rule articulated by the *Apprendi* majority that a judge, and not a jury, may determine sentencing guideline factors, unrelated to a sentence above a statutory maximum or to a mandatory minimum. In fact, the Second Circuit recently ruled in two cases, *United States v. Garcia* and *United States v. White*, that *Apprendi* does not alter a sentencing judge's traditional authority to determine fact relevant to the selection of an appropriate sentence within the statutory maximum.

A different question arose in the context of successive habeas corpus motions. The Antiterrorism and Effective Death Penalty Act of 1996 restricts the ability of circuit courts to authorize the filing of second or successive habeas petitions. Courts may grant leave to file if the application "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." While half of the circuits are still wrestling with the questions of whether *Apprendi* is a new rule of law or is retroactive, at least six circuits have determined that *Apprendi* cannot be a basis for a successive habeas motion.

In addition to the procedural questions raised, *Apprendi* has been drawn into various substantive issues. Drug convictions were obvious targets for those who received sentence enhancements under the Sentencing Guidelines. However, questions also

Calendar of Events

May 1

Law Day Dinner and presentation of Learned Hand Medal to Justice Kennedy, Plaza Hotel

May 17 - 19

Federal Criminal Practice Institute at New York County Lawyers

June 13

CLE program on the Pentagon Papers

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For further information about any of these events, please call the Federal Bar Council office at 212-883-1777.

arose in cases involving money determinations, such as fraud and money laundering.

There also was some debate about *Apprendi*'s applicability to convictions for illegal reentry after deportation. In 1998, the Supreme Court in *Almendarez-Torres v. United States* upheld a federal statute that mandates that any alien who illegally returns to the United States after having been previously deported following conviction for an aggravated felony is subject to twenty years imprisonment, as opposed to two years where there was no underlying aggravated felony conviction. The Court determined that the statute was merely providing a penalty provision and the government was not constitutionally required to charge the prior aggravated felony conviction or prove it beyond a reasonable doubt.

In *Apprendi*, the Supreme Court reaffirmed *Almendarez-Torres* as a specific exception to the rule in *Apprendi* while simultaneously calling the exception into question by suggesting that *Almendarez-Torres* was arguably "incorrectly decided." However, circuit courts addressing the issue agree that, at least for now, *Almendarez-Torres* remains good law. In fact, just this past February, the Second Circuit, in *United States v. Latorre-Benavides*, concluded that *Apprendi* had not overruled *Almendarez-Torres* and held that the statute does not set out a separate offense but rather is a penalty provision. However, given the questionable future of *Almendarez-Torres*, most circuit courts are allowing the argument to be raised for the sake of preserving the issue on appeal.

So, what's the upshot? Well, in the Second Circuit, *Garcia* and *White* make it clear that unless the sentence is above the statutory maximum, there is no *Apprendi* issue. And while the *Almendarez-Torres* issue has been answered for the time being, the biggest open issue is that there has been no Supreme Court decision on retroactivity in the context of successive habeas cases. Stay tuned for further developments.

Editor's Note: Elizabeth Cronin is the Second Circuit's Assistant Circuit Executive for Legal Affairs; Rachel Dimitruk is a Staff Attorney Law Clerk in that office.

New Appointments

Debra Freeman Sworn In As Magistrate Judge

By Stacey Creem and Matthew Gray

Debra Freeman was sworn in as a Magistrate Judge in the U.S. District Court for the Southern District of New York on March 2, 2001. Prior to her appointment, Judge Freeman worked in private practice. Since 1987, she was associated with the law firm of Morrison & Foerster, first as an associate and later as a partner. From 1986 to 1987, Judge Freeman was an associate at Parker Auspitz Neeseman & Delehanty P.C.

Judge Freeman has had a successful and multi-faceted career as a litigator. Her litigation practice has involved

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Federal Bar Council News (ISSN 1075-8534) is published February, April, June, October, and December for $7.50 per year by the Federal Bar Council, 370 Lexington Avenue, Suite 1012, New York, N.Y. 10017-6503, (212) 883-1777. Periodicals postage paid at New York, N.Y. POSTMASTER: Send address changes to Federal Bar Council News, 370 Lexington Avenue, Suite 1012, New York, NY 10017-6503. Copyright 2001 by Federal Bar Council. All rights reserved. This publication is designed to provide accurate and authoritative information but neither the publisher nor the editors are engaged in rendering advice in this publication. If such expert assistance is required, the services of a competent professional should be sought.

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complex commercial disputes in both federal and state courts, as well as in private arbitration. Judge Freeman has litigated cases in areas as diverse as intellectual property, securities and consumer class actions, civil RICO, environmental insurance coverage, employment discrimination and general commercial disputes. For more than two years, Judge Freeman authored a monthly column entitled "Selected Intellectual Property Law Developments," in Electronic Banking Law and Commerce Report. Prior to her appointment, she also spoke frequently on the subject of e-commerce patent litigation.

In addition to her private practice, Judge Freeman has been committed to public service. She has served as the New York representative on Morrison & Foerster's Pro Bono Committee. In 1998, she was awarded the Thurgood Marshall Award by the Association of the Bar of the City of New York in connection with her firm's representation of a death row inmate in Georgia. Most recently, Judge Freeman supervised a number of Morrison & Foerster associates handling criminal appeals as part of The Legal Aid Society's Volunteer Attorney Program. In past years, she coordinated the efforts of eight amicus organizations in a New York case concerning HIV antibody testing and insurance, and helped negotiate the procedural requirements of a South Carolina statute requiring parental consent to abortion.

From 1993-1999, Judge Freeman served on the Board of Directors of The Legal Aid Society. Since 1996, Judge Freeman has been a member of the Federal Bar Council's Program Committee, where she chaired a subcommittee to organize a program on proposed changes to the Federal Rules of Evidence relating to expert testimony. Judge Freeman was also a member of the Lawyers Advisory Committee of Sanctuary for Families from 1999 to 2001.

Judge Freeman received her B.A. degree, summa cum laude and with distinction, from Yale University in 1979, where she was also elected to Phi Beta Kappa, and she received her J.D. degree from the New York University School of Law, cum laude, in 1986, where she was elected to the Order of the Coif.

New Appointments

Gabriel W. Gorenstein Becomes Magistrate Judge

By Stacey Creem and Matthew Gray

On March 2, 2001, Gabriel W. Gorenstein was sworn in as a United States Magistrate Judge for the Southern District of New York. Judge Gorenstein comes to the bench with a varied career in both private and public service.

Prior to his appointment, Judge Gorenstein was a judge on the Criminal Court of the City of New York from 1998 to 2001. One of his most significant published opinions is a decision holding that proper service may be made by mail on counsel, and is effective the date of mailing. Prior to assuming the bench, from 1994-1998, Judge Gorenstein was General Counsel and Deputy Commissioner for the New York City Human Resources Administration.

From 1987-1994, Judge Gorenstein served as an Assistant U.S. Attorney for the Southern District of New York. In 1990, he became Chief of the Civil Rights Unit for the U.S. Attorney's Office, and the following year he was named the Chief Appellate Attorney, a position he held until 1994. From 1985-1987, Judge Gorenstein worked as an associate at the New York offices of Debevoise & Plimpton.

Judge Gorenstein received his B.A. degree, magna cum laude, from Yale University in 1979 and his J.D. degree from Columbia University School of Law in 1984. While attending law school, Judge Gorenstein was a Harlan Fiske Stone Scholar and an editor of the Columbia Law Review. After graduating from law school, Judge Gorenstein spent a year as a clerk for Chief Judge Spottswood W. Robinson, III, of the U.S. Court of Appeals for the District of Columbia Circuit.

In addition to his judicial responsibilities, Judge Gorenstein continues to serve as an Adjunct Associate Professor of Law at Brooklyn Law School, where he teaches Appellate Advocacy.

Judge Gorenstein's advice for lawyers is, "Don't assume your adversaries are making arguments you expect them to make. Instead, listen carefully to their arguments so that you can tailor your responses appropriately. The same goes for inquiries by the court. Be sure to give direct responses to the court's questions before addressing any issues you believe to be important."

FBC News

Fall Bench & Bar Retreat

By Michael Considine

Approximately 20 lawyers and their guests joined distinguished federal judges in the Federal Bar Council's first Fall

Bench and Bar Retreat, held at the Doral Forrestal Conference Center in Princeton, New Jersey, last November. Judges George M. Daniels, Sidney H. Stein and Laura T. Swain from the Southern District of New York and Magistrate Judge Steven M. Gold from the Eastern District of New York served as moderators for the Legal Education Program, entitled "The Cutting Edge: New Developments in Ethics, Securities Laws, E-Discovery and Internet Crime and Fraud." The judges, accompanied by a distinguished faculty, explored the ABA Model Rule proposals, emerging Internet crime activities and related investigative techniques, discovery issues in the computer age and recent developments in the securities laws.

Historic Tours

In addition to securing continuing legal education credits, the participants and their guests engaged in various activities, including historic tours and museum visits, as well as expeditions to shopping outlets and a college football game. The conference center also offered opportunities for sporting and leisure activities.

Evening activities included great food in open dining facilities, which created a special ambiance to the weekend. It gave members of the bar and their guests an unusual opportunity to interact with the distinguished judges and faculty in an informal yet personal setting for extended periods of time. The weekend retreat was chaired by Judith T. Kramer, Brooks Burdette and Michael Considine.

Plans are already underway for the Second Fall Retreat, to be held in October 2001. This event will be chaired by Vilia Hayes, Kiyo Matsumoto, Dan Goldberg and Richard Lawler.

Legal Developments

Bush v. Gore

By C. Evan Stewart

"Great cases like hard cases make great law." Northern Securities Co. v. U.S., 193 U.S. 197, 400-01 (1904) (Oliver Wendell Holmes)

"We agree that this is a hard case, but we cannot agree that it should be allowed to make bad law." American Communications Comm. v. Woko, 329 U.S. 223, 229 (1946) (Robert H. Jackson)

"I do not think we can run away from the case just because Eisler has." Eisler v. U.S., 338 U.S. 189, 196 (1949) (Robert H. Jackson)

No one (or perhaps that should be amended to no reasonably informed person) is neutral on the United States Supreme Court's decision in *Bush v. Gore*. By reversing the Florida Supreme Court's ruling to recount "undervotes" by hand, the decision has been attacked by many — some have even catalogued it in the same league as the Dred Scott decision (or worse). Was the Court engaged in a ruthless political act, or can its decision be justified on legal and/or policy grounds? This essay will attempt to address that two-sided coin, as well as offer some prognostications as to the long term impact of the Court's decision.

Seven "Easy Pieces"

The December 12 decision by the Court, of course, did not take place in isolation. Indeed, it cannot be properly analyzed without an understanding of the seven key judicial decisions that predated it: (1) Florida Circuit Judge Lewis's decision upholding the Florida Secretary of State's refusal to extend the deadline for hand recounting beyond November 14 (November 17, 2000); (2) the Florida Supreme Court's reversal of Judge Lewis (November 21, 2000); (3) the U.S. Supreme Court's vacation of the Florida Supreme Court's decision (December 4, 2000); (4) Florida Circuit Judge Sauls' decision dismissing the contest proceeding brought on by Vice President Gore (December 4, 2000); (5) the Florida Supreme Court's reversal of Judge Sauls (December 8, 2000); (6) the U.S. Supreme Court's stay of the Florida Supreme Court's December 8 decision (December 9, 2000); and (7) the Florida Supreme Court's decision "clarifying" its November 21 decision (December 11, 2000).

Under Florida law, vote totals had to be submitted to the Secretary of State by November 14 (seven days after the election). Within that seven day period, a "protest" could be interposed, with a hand recount ordered; if a recount is undertaken but not completed within that period, the Secretary of State "may . . . ignore" the incomplete results. Once the Secretary of State certifies the election winner, a "contest" can be interposed by means of litigation.

By November 14, only one Florida county in which Vice President Gore interposed a protest had completed a recount. Counting an additional 98 Gore votes, the Secretary of State certified Governor Bush the winner of Florida's electoral votes by a 930 vote margin. With respect to the incomplete recounts, the Secretary of State refused to waive the deadline, absent evidence of fraud or some other calamity (e.g., an act of God) interrupting the recount. Although Judge Lewis upheld the Secretary of State's discretion and decision, the Florida Supreme Court

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did not, extending the protest period to November 26.

This latter action was wrong on the law, and had profound consequences. As a practical matter, it meant that the inevitable contest period could not begin until after November 26, which rendered the amount of time for that process to an almost certain to be too short a period; the political, as well as legal, fallout from the resulting compressed contest period had much to do with the crisis(es) that ensued (both actual and perceived). Legally, the decision was at odds with the Florida statute because it essentially re-wrote "error in the vote tabulation" (the only statutory grounds for a hand recount — an error of that sort had clearly not occurred) to mean "error by the voter," with the latter constituting the basis for extending the certification deadline. The Florida Supreme Court explicitly acknowledged its ex post facto handiwork — criticizing "sacred, unyielding adherence to statutory scripture," and "hyper-technical reliance upon statutory provisions," and citing to "the will of the people [as expressed in the Florida constitution] . . . [as the] fundamental principle . . . guid[ing] our decision today."

On December 4, the U.S. Supreme Court unanimously vacated and remanded that decision back to the Florida Supreme Court. Although perhaps it was too oblique (or restrained, or unable to agree on a unifying reason), the U.S. Supreme Court's decision signaled to the Florida Supreme Court that its reliance on the Florida constitution could not be a vehicle to negate or limit the power granted to the Florida legislature by Article II of the U.S. Constitution (each state shall pick Presidential electors "in such manner as the Legislature thereof shall direct"). The U.S. Supreme Court, besides seeking clarification of the Florida Supreme Court's interpretation of Florida's election law, also sought that court's view of whether the Florida Legislature had wanted to come within the so-called "safe harbor" provisions set forth in the U.S. Code. This latter inquiry was a stickier wicket than most observers understood at the time. A precondition of the safe harbor is the application of the state law existing as of the date of the election (i.e., November 7, not November 21 or November 26). If the Florida Supreme Court persisted in its view(s) in re-writing the election law, the safe harbor could be forfeited; if, on the other hand, the Legislature wanted the safe harbor, then the Florida Supreme Court's November 21 decision could well be at odds with state law and Article II of the U. S. Constitution.

On the same day as the U.S. Supreme Court's decision, Judge Sauls handed down his decision rejecting Vice President Gore's "contest" action, which had been brought against Palm Beach and Miami-Dade Counties. After a two day trial, the judge ruled that the two canvassing boards had not abused their discretion — Palm Beach in its recount methodology, and Miami-Dade in deciding not to complete a recount that it had started. There was no evidence of voter fraud or similar kinds of shenanigans put before Judge Sauls; rather, the trial focused on the questions of voter error(s), the nature thereof, and the methodologies by which recounts to ascertain voter intent could be/would be/should be employed.

Four days later, the Florida Supreme Court (by a 4-3 vote) reversed Judge Sauls. In a remarkable decision, the Florida Supreme Court (i) stripped the county canvassing boards of their discretion in the contest period (having already done so previously to the Secretary of State in the protest period), (ii) ordered recounted votes that Vice President Gore had gained in Palm Beach and Miami-Dade to be added to the totals, and (iii) ordered a hand recount of all remaining "undervotes" throughout the entire state (but not any "overvotes").

The Florida Supreme Court's decision offered no standard for how the recounts were to be determined, notwithstanding that the trial before Judge Sauls indisputably demonstrated that the various counties employed wildly different standards (with attendant disparate results). This was but one critical flaw in the court's decision. Another was to focus only on undervotes, to the exclusion of overvotes. A third was its mandate that the process be completed and certified as of December 12 (to preserve the safe harbor); there was simply no way the approximately 60,000 undervotes could have been recounted (with the certain legal challenges to follow) by that date. The Florida Supreme Court's Chief Justice pointed out those (and other) flaws in his vociferous dissent. He went on to predict (presciently) that the inevitable review his court's decision would receive would not be a pleasant one.

The next day (December 9), the U.S. Supreme Court stayed the recount ordered by the Florida Supreme Court. The ground for issuing the stay was "irreparable harm" to the petitioning party (Governor Bush). Some have argued that only "political" harm would have accrued to Governor Bush if the stay had not been granted; certainly harm of that type might well have been suffered by him, as well as possible harm of that nature to the U.S. Supreme Court itself (if it had waited until after a standardless recount of only the undervotes, and then reversed the Florida Supreme Court). But other "real" harm also loomed for

Governor Bush if the contest period were to be deemed completed and the aforementioned recount (with all of its flaws) had pushed Vice President Gore's totals across the finish line. I believe another reason underlay the U.S. Supreme Court's quick action: the Florida Supreme Court had acted on December 8 without any reference, or response, to the U.S. Supreme Court's earlier ruling. Such institutional insubordination, directly manifested in such a charged atmosphere, may well have prompted the Court's desire to weigh-in at that point.

On December 11, the Florida Supreme Court (the day oral argument in the U.S. Supreme Court took place) responded to the U.S. Supreme Court's decision of December 4. The Florida Court's "clarifying" opinion set forth: (i) it had engaged only in everyday statutory construction in its November 21 decision; (ii) it had not changed the Florida statute after the election; (iii) it had not based its decision on the Florida constitution; and (iv) in its view, the Florida legislature wanted to take advantage of the safe harbor. Those first three assertions (as we have seen) are dubious, at best; and the final assertion meant that that court believed everything was required to be wrapped-up the next day—an obvious impossibility (thanks in large part to its earlier extension of the protest period).

The Supreme Court Rules

On December 12, the Supreme Court decided *Bush v. Gore*. We know that seven of the nine Justices believed that the Florida Supreme Court's December 8 decision was unconstitutional because of the recount procedure ordered. We also know that five of the nine Justices basically shut down any further recounts, because time had run out. And because of those rulings, Governor Bush's lead in certified votes was allowed to stand; he was subsequently awarded Florida's 25 electoral votes, and thereafter was sworn in as President.

The constitutional ground on which seven Justices agreed was that the standardless recount (on the basis of the widely disparate interpretations in play on the ground in Florida) constituted a violation of equal protection. In my view, this was not a persuasive constitutional argument. Throughout our history, localities have controlled the electoral process, and they will continue to do so after November 2000. And localities have and will continue to use different methods of voting, etc. going forward (which will lead to counting differences, as well). I think it is thus fair to predict that *Bush v. Gore* will be cited with some regularity in the litigation challenges that will likely ensue from close elections in the future.

So why did the Court focus on this? First, I would surmise that the well-publicized and widely-disparate standards being used to decide the Presidency (and the Florida Supreme Court's blithe sanctioning of that process) struck the seven Justices as something that could not be tolerated under the unprecedented (and, hopefully, sui generis) crisis. Perhaps more importantly is my supposition that the core group of five Justices, who were persuaded more by Article II concerns, were also persuaded that having seven Justices agree that what the Florida Supreme Court did was wrong was more important than "doctrinal purity" under the circumstances. Parenthetically, Article II, in my view, would likely have been a far better ground upon which to base the decision. But given the immense time (and other) pressures involved, and the importance of cobbling together as many votes as possible, putting together a coherent, "doctrinally pure" decision on that basis was probably close to impossible.

The remedy ordered by the U.S. Supreme Court has taken the biggest hit from critics. Ironically, in my view, this is the least objectionable part of what the Court did. First, the Florida Supreme Court had indicated that December 12 was the drop dead day for the safe harbor; and December 12, of course, was the date of the Court's decision. Second, even if December 18 was viewed as the alternative date (the date on which the Electoral College met and voted for President), there is no way a recount (based upon a single standard — acceptable to both candidates, or ordered by a court — after the issue had been litigated), with subsequent litigation challenges, etc., could have been completed by December 18. Third, if the issue went unresolved by December 18 and/or competing slates of electors had been submitted to Congress, the country would have been faced with the very likely result of the Speaker of the House (Dennis Hastert) or the President Pro Tem of the Senate (Strom Thurmond) becoming Acting President of the United States while Congress decided the winner — a complicated (to say the least) process, for which the 1876-77 precedent provides little historically helpful guidance.

The two Justices who found an equal protection violation dissented on the remedy, in large measure because they saw nothing magical about December 12 and believed that it was possible to meet the December 18 date. As set forth above, however, and even putting aside Florida's view of the safe harbor, it just seems a virtual impossibility that an accepted, orderly recount process (with subsequent challenges thereto) could in fact have been finalized in six days.

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Especially regrettable was the bitter tone of parts of the dissenters' opinions. Casting aspersions upon the good faith of the five Justices' reason(s) for the decision certainly did nothing to help the dissents; and to the extent they predicted negative fallout to the Court's authority and prestige (both actual and perceived), such a "self-fulfilling" prophesy serves no one well (on or off the Court). Perhaps (again) if there had been more time in which to consider and write the opinions, the dissenters' soothsaying of apocalyptic doom would have been tempered or eliminated. In any event, it is highly unlikely that the Court's authority and prestige will be adversely affected by this case in any material way—this was not Dred Scott!

Conclusion

That the Court's decision saved the country from what could have been an immense political and constitutional crisis seems clear. That it did so with less than a perfectly coherent, for-the-ages constitutional rationale, also seems clear. But given the gross liberties the Florida Supreme Court took with its own state's election law, if that court's decisions had been allowed to stand Vice President Gore would have become President Gore because of judicial re-writings of the election law after the election. That kind of precedent would have been far worse than the one with which we have been left; and we should thank the Court (a la Justice Jackson) for not "run[ing] away" from the case which was presented to it.

Postscripts

Richard Posner, who is not only a legendary judge (of the Seventh Circuit U.S. Court of Appeals) but is also one of the country's most profound and prolific writers on legal (and other) topics, has a forthcoming article in the *Supreme Court Review* which analyzes the 2000 election from both a legal and statistical perspective. I have had the benefit of reviewing Judge Posner's brilliant article in draft form in the course of preparing this essay, and commend it to any reader who wishes insight into this entire saga.

For readers who thirst for even more on this subject, a compendium of the *Bush v. Gore* judicial decisions, along with contemporaneous columns from a variety of perspectives, has recently been published by the Brookings Institution: Bush v. Gore: The Court Cases and the Commentary (E. J. Dionne, Jr. and William Kristol, Editors).

Conversation With:

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administrative responsibilities—which include the administration of the circuit and its six districts—take up about one-half of his time. The chief judge heads the case management committee, creates the sitting schedule for arguments, acts as the court's official spokesperson, deals with problems involving court facilities, handles renovation requests and presides as head of the Judicial Council for the Second Circuit.

Increasing Public Awareness

One of Chief Judge Walker's primary goals is to make the court more accessible to the public. "I want to demystify the court by making it better understood by the public in terms of its role in society and the judicial system," says Chief Judge Walker. "There are many highly intelligent and educated people who do not understand the difference between the federal and state system. They do not understand why there is a need for the federal court and what it does. I am interested in improving the level of public awareness and understanding about the federal court as a whole."

Chief Judge Walker is putting his priorities to work in overseeing several initiatives to increase access to the court. For example, the court is developing a new case management computer program. "The program will allow the bar direct access to the court's docket sheet and will reduce the possibility for docketing errors," says Chief Judge Walker. "The next step will be electronic filing."

The court is also updating its video conferencing system, which allows a lawyer to argue an appeal in real time from one of nine remote sites located throughout the circuit. The system also allows attorneys to watch an oral argument from the court's lawyers' lounge in the event that the courtroom is overcrowded.

The court is also adding a new position to the Circuit Executive's Office. The new position, Assistant Circuit Executive for Public Affairs, will be the Second Circuit's public representative. The position will be responsible for handling all media inquiries and community outreach. And, it will oversee the establishment of the Federal Courts Learning Center, a facility to educate children about the court system, which will be located at 40 Foley Square.

Chief Judge Walker is also involved in developing a Web site for the Court of Appeals, which he hopes will be operational by the end of this year. The Web site will provide lawyers with useful information including local rules, directions, days that the court is sitting, judicial panel composition, attorney admissions information, pro bono forms, recent decisions, judicial biographies and



Chief Judge Walker

frequently used telephone numbers. It also will include frequently asked questions and answers, and attorneys will be able to download forms for court filings.

Chief Judge Walker comes to the job after serving almost 16 years as a federal judge, five as a District Court Judge and 11 as a judge on the Court of Appeals. Chief Judge Walker received his law degree from Michigan Law School in 1966, and then went to work in the Attorney General's Chambers in the Republic of Botswana. After that he went into private practice, served as an Assistant U.S. Attorney in the Southern District and then became an associate, and later a partner, at the law firm of Carter Ledyard & Milburn, where he specialized in commercial litigation. From 1981 to 1985, Chief Judge Walker was Assistant Secretary of the Treasury, where he was responsible for Treasury policy in law enforcement, regulatory and trade matters and for the management and operations of Treasury's law enforcement bureaus.

In addition to his judicial and administrative responsibilities on the court, Chief Judge Walker teaches a course in constitutional litigation at New York University Law School and Yale Law School.

"A Prince Of A Judge"

Attorneys who have worked with Chief Judge Walker throughout his career describe him as fair and honest. James Rayhill, a partner at Carter, Ledyard & Milburn, worked with Chief Judge Walker at the U.S. Attorney's office and at Carter, Ledyard & Milburn. "Judge Walker was an outstanding trial lawyer. He earned a reputation for fairness, civility and evenhanded dealings with the courts and opposing counsel," says Mr. Rayhill.

"Judge Walker is a real class act; he is extraordinarily conscientious, honest and courteous," says Second Circuit Judge Pierre N. Leval. Judge Leval recalls that Chief Judge Walker won Judge Leval's respect and admiration during their first encounter as adversaries in a criminal case. When the trial judge unjustly criticized Judge Leval, who was then in private practice and representing the defendant, Chief Judge Walker, who was prosecuting the case, came to his

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defense by confirming that the trial judge's criticism was wrong. "He was willing to do the right thing, notwithstanding that it was against his interest," says Judge Leval.

Judge Leval's admiration for the Chief Judge extends to his role as Chief Judge. "Judge Walker is not heavy-handed with his power as Chief Judge," says Judge Leval. "He has a way of involving everyone in the decision-making process, rather than arrogating the power to himself. He is a prince of a judge."

Gender Bias Task Force

In 1997, Chief Judge Walker served as the Chair of the Second Circuit Task Force on Gender and Racial Bias, which investigated and reported on gender and racial bias at the court. Sheila Birnbaum, a partner at Skadden, Arps, Slate, Meagher & Flom LLP in New York, was the Executive Director of the task force. "There are not enough superlatives to describe Judge Walker's activities in connection with the task force," says Ms. Birnbaum. "He was committed to the project, intimately involved in all of the activities and spent an enormous amount of time and energy to help get the investigation done and the report issued." The task force report was accepted by the Second Circuit Judicial Conference and many of its recommendations were put into effect. In addition, a committee was formed to follow up on the report and enforce the changes.

More Second Circuit Cases

After spending almost 16 years on the federal bench, Chief Judge Walker has noticed that the judges have gradually faced more work over time. Although the Court of Appeals has maintained the same number of judges over the years — 13 — the number of cases before the court has dramatically increased. As a result, Chief Judge Walker has seen an increased use of summary orders, which are short, unpublished decisions without precedential value. "Today, I would estimate that two-thirds of all cases before the court are disposed of by summary order. Although this does not mean that the cases get less attention, it does mean that less time goes into writing a decision," says Chief Judge Walker.

Although Chief Judge Walker does not believe the court faces any current crises, as it did five years ago when vacancies remained unfilled, he does hope that the Congress will approve a longstanding request for two additional judgeships. The court relies on visiting judges from other courts to fill panels. Currently, over one-third of all panels have visiting or acting judges in addition to the active or senior judges.

Developments

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The hypothetical featured various video clips, including one in which prosecutors urge the company's counsel to refrain from entering into joint defense agreements with the attorneys for the employee and to defer interviewing the employee until the prosecutors have met with her.

Jack Cooney of Davis Polk observed that the bar for cooperation has been raised in the last 20 years. The government now has the upper hand and can redefine what it means to be a good citizen. The sentencing guidelines have increased the government's leverage and have given it the ability to force companies to waive privilege and refuse to indemnify their employees, as suggested by a recent memorandum by Eric Holder of the Justice Department.

Shirah Neiman of the U.S. Attorney's office disagreed, noting that the Holder memorandum simply put in writing what prosecutors have always done. In her view, the defense bar is overreaching. Compliance with a subpoena, without more, has never been enough to be viewed as a good corporate citizen.

Judge John Gleeson suggested that there is a difference, because 20 years ago a defense attorney could seek leniency from the judge; now defense lawyers must seek leniency from prosecutors. Judge Gleeson observed that Congress gave this power to prosecutors because it thought judges had too much discretion, but he questioned whether the concern over judicial discretion justified the dramatic shift in power.

Eastern District U.S. Attorney Loretta Lynch suggested that it is an overstatement to say the bar has been raised. She pointed out that Congress has decided to federalize more crimes, Congress has decided that disclosure of all criminal activity is a condition for lenient treatment, and Congress has decided that the American public wants more uniformity in sentencing. No innocent person has to plead guilty as a result of these changes, and if the system has become more efficient by forcing the guilty to plead guilty, that is a good thing.

Sara Moss, general counsel of Pitney-Bowes, expressed the view that it is "outrageous" for the government to interfere with a corporation's relationships with its employees. A corporation has an obligation to investigate alleged wrongdoing and report on it to the board of directors. Requiring that the results of that activity must be turned over to the government will simply chill internal investigations, in her view.

U.S. Attorney Lynch responded by saying that the government has no desire to inhibit internal investigations. At the

same time, if a corporation wants leniency, it must do something to deserve it. A corporation desiring leniency may well decide that it is in its interests to cooperate with the government by disclosing the results of an internal investigation.

Federal public defender Leonard Joy expressed his belief that cooperation has become the only game in town because the guidelines make it unattractive to go to trial. The guidelines not only give a defendant a good indication of what will happen if the defendant loses, but if the defendant testifies and loses, the guidelines require the sentence to be more severe. Cooperation, and a recommendation of leniency from the prosecutor, is the only way to return some discretion to the judge.

Judge Gleeson closed the session by suggesting we should be troubled by the change in the balance of power between the prosecution and the defense. In his view, there has been a reallocation of power that has caused the process to evolve into something close to an administrative system of law.

Privacy And The Internet

A panel of distinguished experts, led by Judge Denise Cote, discussed the emerging issue of privacy and the Internet. After a description by Alan Brill of Kroll & Associates of the ways in which personal information can be obtained over the Internet, the issue was framed by Howard Sollins of Ober, Kaler, Grimes & Shriver of Baltimore as a conflict between privacy and property rights. Is information communicated by a consumer to a company over the Internet owned by the consumer or the company?

Professor Yochai Benkler of New York University Law School described the approaches that are currently being taken to address this issue. The European Union has generally taken a centralized approach in which privacy rights are established and enforced through regulation, while the United States has taken a free market approach in which Web site owners may articulate their own privacy policies, which are then enforced by the FTC. A major exception to that is healthcare records, which are now the subject of regulation by the Department of Health and Human Services.

Professor Paul Schwartz of Brooklyn Law School attributed this inroad to the proliferation of healthcare records, the interstate nature of data used in the healthcare industry, the existence of third party payers and the demise of deference to the medical profession. Janlori Goldman, director of the Health Privacy Project at Georgetown University, added that there is a risk that, absent privacy protections, people may lie to their doctors. She noted that whenever the information can be personally embarrassing, it is not difficult to get Congress to act, and she gave as an example the Video Rental Bill, which was passed after a list of videos Robert Bork had rented became public during his confirmation hearings. Melinda Hattan, who is Washington counsel for the American Hospital Association, also cited the Children's Online Privacy Protection Act as an example of Congress' willingness to protect groups that are vulnerable.

Lee Peeler, the FTC's Associate Director of Advertising Practices, described that agency's enforcement policy on privacy. The FTC's view is that companies must comply with their privacy policies as posted on their Web sites. If a company fails to adhere to its stated policy, the FTC will take action on the theory that the policy is deceptive. The interesting questions are whether the lack of a policy is a deceptive act or practice, and where a policy is set forth, how much detail is required.

Truth Telling

Judge Christopher Droney moderated a discussion of truth telling and fact gathering devices. Ernie Brod of Kroll & Associates began with a lecture on psycholinguistic techniques, which involves the analysis of speech patterns in an effort to develop a profile of the speaker. Letters written by various meeting participants were used to illustrate this approach.

Ralph Nieves, a retired New York City police detective, demonstrated a lie detector test using Jack Vaughan as a subject. Unfortunately, the test was limited to determining (correctly) a number that Vaughan had been given. The audience was left to imagine what would happen if a real test were administered to Vaughan, especially if it focused on his legendary experiences as a fisherman.

Harlan Levy of Boies, Schiller & Flexner discussed DNA testing. In the 1980s and early 1990s, the issue was the statistical reliability of DNA testing. According to Levy, that issue has now been resolved, and the current issue is databanking — should we get a DNA sample from every person in the population? Levy also noted that the recent finding that there are only 30,000 human genes — compared to 20,000 in a worm — may have a significant impact on law enforcement. "This suggests that we are not as hardwired as some people have thought," said Levy.

Paul Fishman of Freedman Kaplan Seiler & Adelman discussed the legal issues surrounding the use of investigative results. Among other things, he explained

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the *Daubert* factors and noted that they now apply to all experts after *Kumho Tire*. While some view *Daubert* and *Kumho Tire* as limiting the use of expert testimony, those decisions have also been cited as a justification for permitting the use of evidence previously deemed inadmissible, such as the results of lie detector tests — although courts on the east coast have resisted this trend.

Closing Statements

Judge Stefan Underhill chaired a discussion of closing statements. The program began with a recreation of a portion of Tom Murphy's closing statement for the prosecution in the Alger Hiss case. Faced with the daunting task of dealing with character witnesses such as John Foster Dulles and John W. Davis, Murphy reminded the jury that it should focus on the facts and neither convict nor acquit the defendant on the basis of "gossip."

Cathy Seibel of the U.S. Attorney's office and Gary Naftalis of Kramer Levin Naftalis & Frankel then gave a simulation of closing statements for the prosecution and the defense in a criminal case. Naftalis noted that he does not, as a general rule, like to object during closings because it encourages the judge to take the ball out of the players' hands. Seibel observed that there is no reason for the government to object, since the government cannot appeal, so she normally does not object unless the closing is "over the top," and when that happens she does her best to convey a sense of outrage to the jury.

Jane Conroy and Henry Miller simulated the closings in the civil case of *Nebbish v. Herbicide Homicide*. Miller (for the plaintiff) emphasized the importance of telling the jury what you want in terms of a dollar amount. Conroy (for the defendant) stressed the need for the jury to understand the consequences of its verdict in terms of the loss of jobs in the community as a result of an adverse decision.

The panelists also discussed the age-old debate over whether openings are more important than closings. Jo-Ellan Dimitrius, a jury consultant, acknowledged that openings are important, but she believes that closings are critical because they give the jury ammunition to use in arguing about the proper result in deliberations. She also stressed the importance of devices, such as props, that help the jury to remember. In addition, she mentioned the rule of three — i.e., making points in groups of three — as a technique for making things easier to remember.

Law As A Business

A panel on the practice of law as a business was headed by Judge Alvin Hellerstein. According to Michigan Law School Professor Carl Schneider, American law firms are astonishingly successful and lawyers are generally as happy about their lives as people in other professions. In his view, there have always been complaints about the practice of law as a business, but some things are different today. Competition is more intense; there is greater instability; and salaries are higher than ever before.

Reporting on surveys he has done, Schneider stated that many people go to law school to keep their options open. Law students often come from professional families and are very competitive people. They are ambitious, but only in a general sense, and they are very risk adverse. They also tend not to be planners, assuming that once they have gotten a high LSAT score everything will "work out" for them. For today's typical law student, "winning" is getting good grades and landing a job at a large firm in a large city.

For a variety of reasons, the job in a large firm in a large city is disappointing to law students once they get there. There are long hours and bad work, and they realize that they are only helping businesses to make money. Money is only relevant insofar as it relates to competition, and more money means that the lawyer is "winning the game." The increasing competition within law firms, together with the absence of any reason for pursuing law other than winning, in Schneider's view, has placed young lawyers and law firms on a collision course.

Mary Lu Bilek, Associate Dean for Academic Affairs at CUNY Law School, suggested that her students were very different from Schneider's model. There are still students for whom ideals count, she said. She added that the most important thing the profession can do for idealistic students is to provide mentors and teach them the importance of being fair.

Hal Lieberman, former chief counsel to the Disciplinary Committee of the Appellate Division, First Department, in New York, discussed the ethical constraints on lawyers considering changing firms. Among other things, he suggested that a lawyer should only solicit clients after giving notice of his or her departure to the firm, and it should be made clear to the client that it is free to choose whether to go or stay. He also stressed the need to maintain client confidences and the importance of avoiding conduct that could be characterized by either the old firm or the new firm as deceit.

Michael Rosen of Robinson Silverman and Ted Lynn of Stroock & Stroock & Lavan addressed the issue of

receiving stock in lieu of fees. Lynn noted that the Code of Professional Responsibility permits lawyers to invest in clients, so the acceptance of stock in lieu of fees should be acceptable. Rosen agreed but pointed out that there are cases which suggest that the arrangement must be fair and reasonable, the client should be advised to seek advice of independent counsel on the arrangement, and the firm should carefully disclose all potential conflicts of interest that the arrangement entails.

Impact Of Treaties

The final panel, led by Judge Jacobs, considered the impact of international treaties on domestic law.

Professor Ruth Wedgewood of Yale University gave a thumbnail sketch of the history of treaties in our system of law, pointing out that the treaty power came about as a result of the inability of the government to enforce a treaty with England under the Articles of Confederation. Article VI of the Constitution states that the Constitution, the laws of Congress and treaties "shall be the supreme Law of the Land," but the Supreme Court has held that the Bill of Rights, as well as subsequently passed statutes, can trump treaties. Similarly, during the Carter administration certain treaties were sent to Congress for ratification with provisos that stated that they were not self-executing. Recently, the human rights community has challenged the effectiveness of such provisos and has taken the position that international bodies should be the judge of the effectiveness of any provisos. Professor Wedgewood characterized the current state of affairs as a conflict between the post-war philosophy that international human rights treaties should be imposed on countries whether they want them or not, and the more recent view in academia that almost every treaty should not be self-executing.

Kenneth Roth of Human Rights Watch discussed the International Criminal Court, which was recently established by the Treaty of Rome. For most of the 20th century — with the exception of Nuremberg — genocidal killers have not been held accountable for their acts because local systems could not be counted on to take action. In the early 1990s, specific courts were set up to deal with war crimes in Bosnia and Rwanda, but many in the international community feel that a more permanent body is needed. The United States has been quite skeptical of this effort — the Clinton administration did not sign the treaty creating the International Criminal Court until the last possible day. The treaty has not been ratified, the Bush administration is against it in its present form, and Senator Jesse Helms has vowed to kill it. Among the objections to the International Criminal Court are the absence of a right to a jury trial; the broad definition of what constitutes genocide and aggression; and the fear that it will discourage the United States from deploying troops where they are needed. Roth believes that the risk of unfair prosecution of Americans is minimal because the International Criminal Court would only have secondary jurisdiction (it could only act if the country of which the accused is a citizen is unable to take action), and the rest of the world understands that the court is unlikely to be successful without U.S. support. Accordingly, the risk of politically motivated or groundless prosecutions, in Roth's view, is small.

Turning to the commercial area, Lewis Leibowitz of Hogan & Hartson discussed the impact of treaties on international trade. He pointed out that in the commercial area treaties are somewhat rare today and are being replaced by international agreements. Where treaties and international agreements directly conflict with U.S. law, the general rule is that U.S. law prevails. Where the conflict is only indirect, however — which is what happens in most cases — a number of doctrines provide that the statute should be construed in a way that avoids any conflict with the treaty or agreement. As a result, international treaties and agreements have a substantial impact on U.S. law. Terrence Stewart of Stewart & Stewart in Washington, D.C. provided a compendium of the treaties and agreements that affect U.S. trade.

Environmental lawyer Stephen Kass of Carter Ledyard & Milburn concluded the program by advancing four propositions: (1) international treaties on environmental issues are growing; (2) the distinction between environmental law and commercial law is eroding; (3) in the past we have been more concerned with rights than with resource protection, but in the future we will turn more to the international allocation of scarce resources; and (4) people from all over the world will be able to bring civil actions in U.S. courts. He cited a number of examples of these developments, including the Montreal Protocol, the Climate Change Convention, the Kyoto Protocol and various actions of the WTO and NAFTA.

Whitney North Seymour Award

At the final banquet, Federal Bar Council President Kevin Castel presented the Whitney North Seymour Award for public service by a private practitioner to Bernard W. Nussbaum. Castel pointed out that the first Seymour award was

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conferred upon Joe Flom, who was at the meeting this year, at a winter meeting in St. John 12 years ago.

Introducing Nussbaum as "our very own W," Castel described his life and career, beginning as a child growing up on the lower East Side and speaking only Yiddish until age four; attending Stuyvesant High School and then Columbia University, where Nussbaum was a student journalist and rose through the ranks to become editor-in-chief of the *Daily Spectator*; and then going to Harvard Law School where he was notes editor of the Harvard Law Review and recipient of a Sheldon Traveling Fellowship.

Nussbaum's first journey into public service was as Assistant United States Attorney under Robert Morganthau. He then joined Wachtell Lipton and in 1974 left the firm to serve as Senior Associate Special Counsel to the Impeachment Inquiry of the House Judiciary Committee, working with Hillary Clinton. After returning to private practice at Wachtell, Nussbaum later served as President of the Federal Bar Council from 1990 to 1992 which, according to Castel, led to his appointment as White House counsel in January 1993.

During his tenure as White House counsel, Nussbaum played a significant role in the selections of FBI Director Louis Freeh and Supreme Court Justice Ruth Bader Ginsburg. He also played a direct role in the appointment of more than 60 other federal judges. Castel concluded his introduction by stating:

"Bernie is special because he is an engaged participant in the lives of the people around him. Many in this room have been assisted by Bernie in ways known only to a few. His devilish grin and the twinkle in his eye can light up a room. But beyond the image of Bernie, the raconteur, with a cigar in one hand and a brandy snifter in the other — is a person of substance. His heart is enormous and he has always been open to the needs of the world around him. Even while in private practice, Bernie has maintained his public spirit in the



Drawing courtesy Julia B. Anello

finest tradition of Whitney North Seymour."

Accepting the award, Nussbaum stated that he has always enjoyed being a lawyer and has always enjoyed being with lawyers, and he repeated a quotation from Harrison Tweed that is carved above a portal in one of the grand conference rooms at the City Bar Association:

"I have a high opinion of lawyers. They're better to work with, or play with, or fight with, or drink with, than most other varieties of mankind."

"That is the way I feel," stated Nussbaum, but he went on to express concern about certain trends that he believes lawyers have to fight against if they, in the tradition of Whitney North Seymour, are to remain effective champions for their clients.

First, Nussbaum expressed concern about attacks on the attorney-client privilege, as well as on the role of lawyers generally, which have been made by independent counsels, prosecutors and litigants in private actions. In particular, he pointed out the efforts of the Office of Independent Counsel, during the Lewinsky investigation, to determine the reasons various people on the White House staff thought they needed a lawyer before testifying. He observed that government lawyers, as well as lawyers working for corporations, can no longer rely on the attorney-client privilege as a practical matter, and said this will discourage candor and truthfulness on the part of clients and will reduce the ability of lawyers to make sure that clients act sensibly and obey the law.

Second, Nussbaum expressed concern about the growing disparity between judicial salaries and the compensation of lawyers in private practice, particularly in metropolitan areas. He pointed out that in 1935, when Whitney North Seymour was a junior partner at Simpson Thacher, a judge earned $25,000 a year, which was approximately the same amount of money that a typical senior partner at a successful New York firm made. Today, judges not only do not have parity with senior partners, in many cases they do not have parity with first year associates. In Nussbaum's view, tying judicial salaries to congressional or executive branch salaries is "sheer folly" because individuals in those positions often move back into the more lucrative private world, whereas judges are supposed to serve for life.

Third, Nussbaum expressed concern about the refusal of government to provide those who cannot afford it a meaningful right to counsel. He quoted Evan Davis, President of the City Bar Association, who recently wrote:

"What would the visitor from Mars say about a society where 1) top business lawyers have billing rates well in excess of $500 per hour, 2) billing rates for normal individual work range well in excess of $200 per hour yet 3) lawyers assigned to represent indigent clients who have a right to counsel under the law are fixed by the State at $25 per hour for out-of-court time and $40 for in-court time? The visitor from Mars would say that in that society the right to counsel is a cruel joke that exists on paper only. With respect to the State of New York, the visitor from Mars would be absolutely right."

He urged those present to fight back against the attacks on lawyers, on judges and on the system of justice.

In closing, Nussbaum thanked his partners for sending him to Federal Bar Council Winter Meetings for the last 30 years ("It is a dirty job, but somebody has to do it"). He also paid tribute to those who frequently attended the meetings but are no longer with us, including Paul Bernstein, Larry Milberg, Milt Gelman, Norman Ostrow and Milton Gould. Finally, he thanked all of those in attendance "for being better to work with, play with, fight with and drink with than most other varieties of mankind."

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subcontractors that intentionally falsify information.

The New York City legislation follows a trend toward anti-sweatshop efforts at the local, university and federal level. Similar legislation has been enacted in more than 30 cities, towns and counties throughout the United States, including Suffolk County, San Francisco and Pittsburgh. Among student initiatives to improve conditions for garment factory workers all over the world is one by high school students in Northport, New York.

The Northport Example

The Northport initiative began with visits by a student human rights club, "Students for 60,000," to Nicaragua, where the students witnessed working and living conditions in a garment industry sweatshop. The proposal drafted by the students would require all bidders to supply textiles or apparel to the district to certify that each subcontractor meets certain standards, including: (1) the company "respects workers' rights to speak out about working conditions without fear or retaliation and to form unions of their own choosing without employer resistance"; (2) the company complies with all applicable laws, regulations and standards concerning the workplace; (3) the company does not use child labor, forced labor or corporal

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punishment and does not discriminate in hiring, promotion or compensation based on race, national origin, religion, gender, sexual preference, union affiliation or political affiliation; (4) wages and benefits must be sufficient to meet basic needs and provide a living wage appropriate to the community; and (5) the company must provide a safe and healthy work environment. This proposal was identical to a resolution enacted by Suffolk County in April 2000. Other school districts in New York, including Albany, Central Islip, Troy, Hamburg and Patchogue-Medford, have taken a stand against purchasing school apparel made by child and sweatshop labor.

The Northport-East Northport Board of Education had passed the resolution in December at the urging of the students, but rejected it on a required second reading in January. The board reportedly was concerned that the resolution would not survive a challenge under New York General Municipal Law Section 103, which generally requires that all contracts for public work involving an expenditure of more than $20,000 and all purchase contracts involving an expenditure of more than $10,000 are subject to competitive bidding and awarded to the "lowest responsible bidder." Proponents of the resolution argued that "responsible" in this context included both financially and morally responsible bidders and those bidders whose products resulted from sweatshops were not morally responsible. This position was supported by a letter from the Chair of the Committee on International Human Rights of the Association of the Bar of the City of New York, but the district's attorneys had a different view. The board has sought the opinion of State Comptroller Carl McCall on whether the resolution is permissible under the law.

Student and University Initiatives

Student initiatives against sweatshops are several years old. By 1999, the United Students Against Sweatshops was active on 150 U.S. campuses. By demonstrations and sit-ins, students had demanded and gotten agreement to codes of conduct guaranteeing protection of the basic human rights by workers producing gear sold by universities.

The codes of conduct sought by students aimed to protect workers' basic rights by requiring (1) full public disclosure of all factories producing goods; (2) enforcement of the rights of women; (2) independent monitoring of factories; and (4) a living wage. As of 1999, 15 major universities achieved full public disclosure of factory locations where garments were produced.

At the University of Arizona, for example, students won a code of onduct after a demonstration and eight day sit-in. The students secured full public disclosure of factory sites, enforcement of the rights of women workers, a living wage provision, independent monitoring of factories, including unannounced visits, and enforcement of women's rights. Similarly, at the University of Michigan, which earns $5.7 million in profits from sales of college apparel, 350 students marched seeking a code of conduct and 30 persons staged a sit-in that resulted in the University of Michigan adopting a code of conduct including full public disclosure, independent monitoring, living wage, and commitment to women's rights.

The University of North Carolina at Chapel Hill, the University of Wisconsin at Madison, the University of Illinois at Urbana-Campaign, Duke University, Georgetown University and the University of California System adopted some form of anti-sweatshop code by the end of the 1999 school year. In addition, Harvard, Brown, Princeton, Cornell, University of Connecticut, Columbia, Swarthmore, Bard, Middlebury College, Hampshire College and Occidental College won full public disclosure.

In October 2000 the Independent University Initiative issued a final report following a year-long study commissioned by Harvard, Notre Dame, Ohio State, Michigan and the University of California. The report, resulting from an investigation of conditions under which university-licensed apparel was produced, was prepared by the Business for Social Responsibility Education Fund, Business and Human Rights Program of San Francisco, California, Investor Responsibility Research Center, Social Issue Service, and Dara O'Rourke, an Assistant Professor at Massachusetts Institute of Technology. The group investigated factories in China, El Salvador, Korea, Mexico, Pakistan, Thailand and the United States that produced goods for Nike, Champion, JanSport and Adidas-Solomon. The group found that sub-par working conditions existed in apparel factories in all countries visited; the diffuse nature of apparel production hinders enforcement of labor standards, awareness of codes of conduct and monitoring efforts is currently insufficient to promote effective compliance, trade unions are skeptical about the efficacy of monitoring, and the proliferation of codes of conduct and the resulting duplication of monitoring efforts does not support greater compliance. The investigators voiced concern about violations of regulations on working hours and overtime compensation, limitations to freedom of association and collective bargaining, violations of wage laws,

discrimination against women, widespread health and safety problems, and increased subcontracting and further problems with implementation of codes of conduct. The group pointed to good practices including initiatives by licensees, brands and industry associations to support effective monitoring in all forms, disclosure about factory practices, training of monitors and suppliers, participation in collaborative efforts ranking individual factories, worker input into compliance efforts, industry association efforts to monitor member companies, efforts by some governments to enhance enforcement of laws and other efforts to enhance good practices.

The group recommended that universities consider the following options to contribute to the further development of fair working conditions in the apparel industry: (l) leverage education resources to educate and empower workers; (2) promote effective monitoring and verification; (3) promote transparency (disclosure); (4) support public comparison and learning; (5) centralize licensed apparel production; (6) create greater incentives and sanctions to promote good practice; and (7) support initiatives that go beyond monitoring.

Government Initiatives

In 1996, President Clinton and Secretary of Labor Robert Reich created a presidential task force whose goal was to work toward eliminating sweatshops. The task force, called the White House Apparel Industry Partnership, included companies, trade unions, human rights and religious groups. In November 1998 a subgroup of the Partnership including the Lawyers Committee for Human Rights, the National Consumer League, the RFK Memorial Center for Human Rights, the International Labor Rights Fund, Nike, Reebok, Liz Claiborne, Phillips-Van Heusen, Patagonia, L.L. Bean and Business for Social Responsibility, formed the Fair Labor Association ("FLA"). The FLA Charter Agreement created an industry-wide code of conduct and monitoring system.

According to the FLA Web site, the FLA creates an independent monitoring system that holds companies publicly accountable for their labor practices, as well as those of their principal contractors and suppliers around the world. The FLA accredits the independent monitors, certifies that companies are in compliance with the code of conduct, and serves as a source of information for the public.

Participants in the FLA include 152 colleges and universities that seek "to ensure that companies producing goods under their licenses are operating in accordance with the principles espoused by the FLA." The code of conduct addresses forced labor, child labor, harassment and abuse, discrimination, health and safety, freedom of association and collective bargaining, wages and benefits, work hours and overtime compensation. The FLA requires that affiliated companies implement an internal company monitoring program covering at least one-half of their facilities during the first year and all facilities during the second year. In addition, each company must commit to use independent external monitors accredited by the FLA to conduct periodic inspections of at least 30 percent of the company's applicable facilities during its initial 2-3 year participation period. All reports are to be provided to the FLA.

Criticisms of the FLA at its inception focused around the failure to establish effective standards. Specifically, the unions and the Interfaith Center for Corporate Responsibility stated that the FLA (1) took no meaningful steps toward establishing a living wage; (2) did not adequately protect rights to organize in countries where the right is systematically denied; (3) allowed companies to pick factories to be inspected by monitors chosen and paid for by the companies and excluded up to 95% of a company's manufacturing facilities from inspection; (4) created multiple barriers to access to information; and (5) provided for infrequent monitoring.

Monitoring is the most difficult issue facing the parties that wish to improve sweatshop compliance with labor and human rights requirements. In order to evaluate the performance of independent monitors, Professor O'Rourke of MIT accompanied PricewaterhouseCoopers ("PwC") on factory inspections in China and Korea to inspect factory labor practices. During the inspections, PwC found minor violations of labor laws and codes of conduct, but, according to Professor O'Rourke, missed (1) hazardous chemical use and other serious health and safety problems; (2) barriers to freedom of association and collective bargaining; (3) violations of overtime laws; (4) violations of wage laws; and (5) timecards that appeared to be falsified. Professor O'Rourke attributed PwC's failures to its monitoring methods which included (1) gathering information primarily from managers, (2) allowing managers to control worker interviews, and (3) conducting very limited health and safety inspections. Professor O'Rourke warned universities and companies to consider other monitoring methods. He concluded that independent monitoring can play an important role in improving factory conditions, but it must be much more transparent and accountable, include workers more fully and be verifiable by local NGOs and the workers themselves.

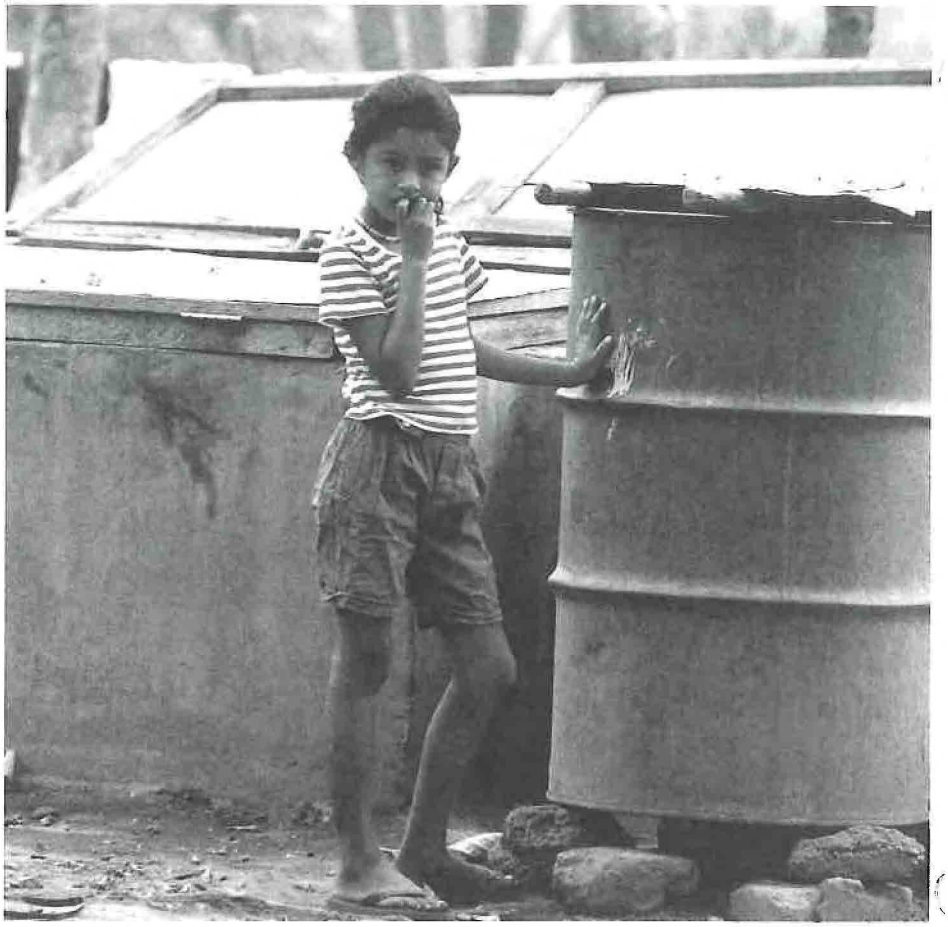
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Anti-Sweatshop Movement Gains Speed

By Bennette Kramer

On March 14, 2001, the New York City Council passed anti-sweatshop legislation to guard against city tax dollars being spent on clothing and goods for uniforms for police officers, firefighters and other public employees manufactured under sweatshop conditions. The legislation provides that contractors will have to submit the names and addresses of all subcontractors to be used during the contract period as well as wages and health benefits for all employees working during the contract period. Contractors also will have to show compliance with international and U.S. labor, environmental, civil and human rights laws. The proposed law would impose civil penalties and sanctions for contractors and

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A 12-year-old Nicaraguan girl standing next to a well, from which she draws water all day long. Student members of Northport High School's "Students for 60,000" are concerned that some Nicaraguan children are being forced into sweatshop labor. Photo courtesy Thomas Baudier.

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