Federal Bar Council News

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Commentary

John André a/k/a John Anderson: Unlawful Combatant

By P. Kevin Castel

The American forces were engaged in combat with the armies of their former monarch, in part because he had forced their cases to be heard in Vice-Admiralty Court where they were denied the right to trial by jury. Yet, in Orangetown, New York, an American military tribunal sat in judgment of one John André and refused to grant him the privileges of his rank as a Major in His Majesty's Service. He was convicted and ordered executed. Appeals were made to the American Commander-in-Chief to allow André,

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Developments

Council Has Winter Meeting In Puerto Rico; Evan A. Davis Receives The Seymour Award

By Steven M. Edwards

The Federal Bar Council held its 34th annual winter bench and bar conference at the Westin Rio Mar in Puerto Rico from February 16 through February 23. A planning committee chaired by Second Circuit Judge Pierre Laval put together a program consisting of panels on ethics, copyright, securities litigation, Enron, the legal status of Puerto Rico, academic freedom in high schools, constitutional law and the Supreme Court's decision in *United States v. Apprendi*. On the final evening of the meeting, Federal Bar Council President Kevin Castel presented the Council's Whitney North Seymour Award for Public Service by a private practitioner to Evan A. Davis, President of the Association of the Bar of the City of New York.

Ethics Panel

A panel chaired by Judge Frederick Scullin of the Northern District of New York discussed a series of hypotheticals illustrating a number of new provisions to the ABA's Model Rules. In the first

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9/11

Mid-Life Military Service

By Brian M. Cogan

Shortly after Sept. 11, I applied to join the New York Guard. It is not the New York National Guard because, being in my mid-40s, I had long ago "aged out" of that and other regular military service. But the New York Guard presents an interesting opportunity for most New Yorkers, especially lawyers and other professionals, to support the country's military effort.

With the country's entry into World War I, the National Guard was

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Developments

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hypothetical, panelist Michael Armstrong received a telephone call from an Enron employee looking for representation. In the midst of their discussion, Armstrong urged the employee "tell me more" and the employee confessed that he had destroyed documents. Before the firm agreed to represent the employee, it received a telephone call from Enron's law firm seeking representation in a variety of matters that were clearly going to be far more lucrative than representing the employee. Can the firm decline to represent the employee and represent the law firm?

Ethics expert Larry Fox, who was a co-author of the ABA's Ethics 2000 Report, led the discussion with participation from the audience. Proposed Rule 1.18 of the ABA's Model Rules suggests that the firm could represent the law firm provided that Armstrong is subjected to an ethical screen. Panelist Hal Lieberman noted that ethical screens are generally not recognized by New York courts. Panelist Carol Ziegler observed that, where an attorney with a conflict does not have confidential information (e.g., where the conflict is imputed), New York courts will accept ethical screens, but where the attorney has confidential information, an ethical screen may not be sufficient to eliminate the conflict.

Copyright

Ken Plevan moderated a panel on "The Wind Done Gone" and "Lo's Diary." The issue was the circumstances under which an unauthorized sequel may violate the copyright laws. Laura Chapman Hruska, founder of the Soho Press, gave what she characterized as a book report on "Gone With The Wind"

From Circuit Clerk Roseann B. MacKechnie

Second Circuit Practice Tips: The Circuit's Web Site

The Second Circuit Web site is up and running. Its address is www.ca2.uscourts.gov.

Although the Web site undoubtedly will undergo many changes and improvements over the next several months, lawyers already can access all sorts of information about the Second Circuit. The Clerk's Office component provides a directory, in addition to the "Everything You Ever Wanted to Know About the Second Circuit" manual, which probably contains more than anyone ever wanted to know about the Second Circuit! For those who are unfamiliar with lower Manhattan, the Web site provides instructions on how to get to the court.

In addition, lawyers can check the court's annual sitting schedule and weekly calendars. Lawyers can find out which judges will be sitting during a particular week. The judges' sitting schedule — which includes assignments for a full week — will be posted on the Thursday afternoon preceding the sitting week. There also is a "Day Calendar," which is the final version of a single day's sitting; it includes the cases for that day, the order in which they will be called and the time allotted to each case for argument. The "Day Calendar" generally is posted to the Web site on the afternoon preceding the actual sitting date.

Lawyers also may access the court's opinions and summary orders, generally on the date of filing. To access a case, a lawyer needs a docket number or the names of the parties, although the program will attempt to search for a case on less than complete information. One also is able to search opinions for words or free text. Keep in mind that the decisions included on the Second Circuit Web site date back approximately two years.

PACER subscribers may access PACER off the Second Circuit Web site. In addition, lawyers can browse through the Federal Rules of Appellate Procedure and the circuit's local rules if they have a question about Second Circuit practice. The text of the FRAP is printed in blue on the Web site and the text of the local rules is printed in green.

All of the important court forms, CJA materials and attorney admission information — including an application form — is on the site, along with a list of all members of the Second Circuit bar with their dates of admission.

There also is a "Feedback" selection on the main menu that permits visitors to send comments. Please let us know what you think.

and "The Wind Done Gone." The former work, by Margaret Mitchell, is widely regarded as a story of a feminist heroine who overcomes substantial hardship to keep her home and her family together. In fact, it is a "perniciously and pervasive racist work," according to Hruska. In "The Wind Done Gone," Alice Randall retells the story from the standpoint of the slaves, imbuing her version with stinging social criticism. In a lawsuit by the trustees of the Margaret Mitchell estate, the district court found that "The Wind Done Gone" violated the author's right to derivative works. On appeal, however, the Eleventh Circuit reversed, holding that "The Wind Done Gone" was a protectable parody.

Richard Dannay of Cowan, Liebowitz & Latman expressed the view that publishers will someday rue this decision. "Every retelling can imply a criticism or a commentary," and the Eleventh Circuit's decision effectively grants an ongoing mandatory license to anyone who follows that formula, in his view. William Patry of Skadden, Arps, Slate, Meagher & Flom explained the Eleventh Circuit's decision on the basis of economics — there was no basis for a finding of economic harm because the readers of "The Wind Done Gone" were not likely to be the same as the readers of an authorized sequel to "Gone With The Wind." With "Lo's Diary," a retelling of "Lolita," the audience would essentially be the same, and the publishers of that book agreed to withdraw it when Nabokov's heirs objected to its publication.

Developments Under The PSLRA

Judge William Pauley led a panel on the Private Securities Litigation Reform Act of 1995. Judge Pauley began the discussion with a quote from Bill Lerach: "I have the greatest practice in the world because I have no clients." The PSLRA was designed, in part, to deal with this situation by making the lawyer with the largest client the lead counsel in class action securities litigation.

The Eleventh Circuit found that "The Wind Done Gone" was a protectable parody.

Robert Giuffra, the author of the PSLRA, explained the statute and noted that it was necessary to obtain bipartisan support to overcome a veto. Arthur Abbey commented that the PSLRA has not really inhibited class action litigation and, if anything, the cases have more money at stake than ever before. Kim Hogrefe of Chubb Insurance noted that, in his view, there are fewer frivolous lawsuits because class action lawyers now have real clients. Sheldon Elson stressed the importance of securities class actions in obtaining corporate compliance.

SEC Enforcement

The Council was fortunate to have SEC Chairman Harvey Pitt on the SEC Enforcement panel, and he used this occasion to deliver a major speech on the lessons to be learned from Enron. After being introduced by Judge Jed Rakoff, Pitt observed that "the tragedy that Enron reflects is breathtaking in its reach." In his view, Enron has revealed major systemic flaws. Among other things, he suggested that it is inappropriate for lawyers to find ways to avoid compliance with the law, even if it can be done within the letter of the law. Lawyers must be satisfied that management's objectives further the interests of the corporation and its shareholders, said Pitt. He added that the government acting alone cannot solve this problem; lawyers must address it through professional standards.

Accountants, in Pitt's view, are different. An accountant may not act as an advocate for a client. The job of the accountant is to give the public confidence that a company's financial statements are reliable. Among the remedies that Pitt would propose are:

- improved standards for detecting fraud;
- simpler accounting principles;
- more SEC influence on the Financial Accounting Standards Board;
- a private sector regulatory body for accountants; and
- recognition that if literal compliance with GAAP creates a misleading impression, accountants can and should be held liable.

Pitt also emphasized the need to improve corporate governance standards.

Dan Fischel of the University of Chicago Law School and Lexecon responded by suggesting that the Enron situation may result more from bad behavior and market forces than systemic problems. He analogized Enron to the savings and loan scandal, where a lot of the concerns were overblown, in his view. Fischel noted that there were few structural changes in the wake of the S&L scandal, and one of the greatest bull markets in history followed it.

Bob Morvillo observed that there always has been significant enforcement in the area of financial statement fraud. He suggested that law enforcement officials are excited by Enron because they like to do the easy things. He took issue with Pitt's view of a lawyer's role and stated that literal compliance with the law should be a safe harbor.

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The Legal Status Of Puerto Rico

Second Circuit Judge José Cabranes led a discussion on the constitutional and legal status of Puerto Rico. He noted that only five per cent of the population of Puerto Rico favors independence; the other 95 per cent is split more or less between commonwealth and statehood. Judge Cabranes described the history of the relationship between the United States and Puerto Rico and noted that, while decolonialization usually means independence, with Puerto Rico it is different.

Edward Bhatia, who stressed the need to resolve the status of Puerto Rico, favors the commonwealth approach.

Eduardo Bhatia, a lawyer and chairman of a political party in Puerto Rico, presented the case for commonwealth status. He observed that Puerto Rico does not have conservative or liberal political parties; the issue of commonwealth or statehood defines the parties and there are liberals and conservatives in each. He stressed the need to resolve Puerto Rico's status, and he favors the commonwealth approach because he believes it is a practical compromise that enjoys widespread support.

Christina Duffy Burnett, a visiting scholar at Princeton, agreed that the question of Puerto Rico's status should have been solved a long time ago. However, she believes that statehood is the best way to decolonize Puerto Rico. She describes commonwealth status as "statehood in denial" because most of the relationships with the United States would remain but its people would not have the right to vote as they would if it were a state.

Free Speech In Schools

A panel chaired by Judge Nina Gershon discussed the issue of First Amendment rights in high schools. Professor Kate Stith reviewed the case law, noting that *Tinker* established that students have First Amendment rights, except where there may be a "material disruption"; *Bethel* established that schools can prohibit vulgar and lewd speech; and in *Hazelwood* the Supreme Court ruled that a school may censor articles in a newspaper where it has a "legitimate pedagogical concern."

Robert O'Neil of the University of Virginia Law School and Jay Worona, who frequently represents school districts, explored the boundaries of these principles through a series of hypotheticals. Worona emphasized the importance of establishing policies before incidents arise, and O'Neil stressed the benefits of counseling over discipline. Worona noted that there is a tension between the two, because if a student is counseled, the student may be viewed as having a disability, making discipline difficult. O'Neil observed that zero tolerance policies have the seeming advantages of simplicity and comprehensive coverage, but they generally do not work.

Constitutional Review

Former Solicitor General Seth Waxman was the highlight of a panel on constitutional law, chaired by Judge John Koeltl. Waxman noted that federalism is the signature doctrine of the Rehnquist court. Many of the Court's decisions in this area have been 5 to 4, and the 4 dissenters have indicated that they may not attribute *stare decisis* to the Court's decisions on this subject.

The Rehnquist court has dealt with two types of federalism: structural federalism and sovereign immunity. With respect to structural federalism, there have been significant decisions limiting the doctrine of preemption; prohibiting Congress from telling the states how they should legislate; and limiting Congress's power under the Commerce

Calendar of Events

Law Day Dinner
New York
May 1

Celebrate Law Day, May 1, at the Federal Bar Council's black-tie dinner at the Waldorf-Astoria. The Learned Hand Award for Excellence in Federal Jurisprudence will be presented to the Honorable John M. Walker, Jr., Chief Judge of the United States Court of Appeals for the Second Circuit. Honorable Barrington Parker, Jr., will read the Law Day Proclamation of the President of the United States. Honorable James B. Comey, United States Attorney for the Southern District of New York, will chair the Dinner.

For further information, please contact the Federal Bar Council office at 212-883-1777.

Clause. With respect to sovereign immunity, the Court has steadily reduced the circumstances under which states may be sued without their consent. There are a number of cases coming up in the next term in which the Court may have further opportunities to expand sovereign immunity.

Constitutional lawyer Charles Cooper discussed the *Zelman* case, which was recently argued before the Supreme Court. The issue is whether the establishment clause prohibits states from issuing vouchers for students to enable them to escape bad schools. The critical question is whether the state, in fact, is supporting religious schools, or whether the parents who received the vouchers are making independent decisions to send children to religious schools. It is anticipated that Justice O'Connor will cast the swing vote on this issue.

Apprendi

Judge David Trager led a discussion on the Supreme Court's decision in *Apprendi v. New Jersey*, where the Court ruled that a defendant has a right to a jury trial with respect to any factor that may increase his or her sentence above the maximum. Tom Engel reviewed the *Apprendi* case and legal issues that surround it. Zachary Carter discussed the ways in which *Apprendi* has been applied in other contexts. The panel agreed that *Apprendi* may foreshadow an attack on the guidelines themselves. Judge Trager observed that this may backfire on defendants if juries are exposed to facts that they never would have heard before.

Seymour Award

At the closing banquet, Federal Bar Council President Kevin Castel presented the Seymour Award to Evan Davis. Among other things, Castel described the programs that Davis has established in the aftermath of 9/11, including training more than 2,000 lawyers who represent the families of victims as well as small businesses. Castel also noted that, in November of last year, Davis hosted a conference of bar leaders from around the world.

Castel described the programs that Davis has established in the aftermath of 9/11.

In accepting the award, Davis stated that, when Whitney North Seymour was an Assistant Solicitor General in the early 1930s, he attended teas at the Supreme Court and got to know Justices Landis, Holmes, Roberts and Cardozo. This spirit of collegiality between the bench and the bar is missing in some countries, said Davis. He cited France as an example, where judges are not drawn from the bar, and one function of the president of the Paris bar is to intercede in court for lawyers whose conduct is being questioned by judges. Davis observed that, as President of the City Bar, he is much more likely to be called on to come to the defense of a judge. Bar

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associations in this country are strongly supportive of the independence of the judiciary, he noted.

Davis described a proposal made by a City Bar committee several years ago to provide confidential feedback on the performance of state court judges. The New York State Association of Supreme Court Judges reacted very negatively, and the Executive Committee of the City Bar decided not to go forward because the program could not operate successfully without judicial cooperation. At the same time, the City Bar Association and the Federal Bar Council have established a joint committee to receive complaints from lawyers about conduct of federal judges, and the work of that committee has been warmly received by the federal judiciary.

"Judges are uniquely suited to help policy makers improve the law," Davis stated.

Davis expressed the view that judges, from time to time, should become involved in efforts to improve the system and should not limit their participation to rulings and opinions. He stated:

"In fact judges are uniquely suited to help policy makers improve the law. They do not represent clients and therefore do not have to face the problem of leaving the interests of clients at the door. They are, at least in the federal system, insulated from political pressure and therefore can speak to the public interest with considerable objectivity."

Davis cautioned against excessive public advocacy, but he emphasized that judges, "with reasonable circumspection can help us find our way through difficult waters," and he expressed the hope that the Federal Bar Council will continue to be a catalyst in that regard.

The Winter Conference

The Judicial Perspective

By Bennette Kramer

Following the Winter Bench and Bar Conference, we asked several district judges who attended the conference for their reactions. Specifically, we asked what, from a judge's point of view, were the benefits of the conference. All agreed that the relaxed setting, the informal interaction between judges and lawyers, the opportunity to discuss current legal issues and the length of time over the week for discussion were the primary benefits of the conference. Each pointed to law practice in New York with a large bar divided into many segments as a handicap to development of a cohesive bench and bar community in contrast to many smaller cities where judges and lawyers interact on a regular basis and know each other well. The judges we spoke with were Hon. David G. Trager, a former president of the Federal Bar Council who has attended numerous Winter Conferences; Hon. Nina Gershon, who has attended several prior conferences as a magistrate judge; and Hon. William Pauley, who was attending his first Winter Conference.

Judge Trager

Judge Trager, appointed to the Eastern District of New York in November 1993, enjoys the interaction with lawyers at the Winter Conferences. Judge Trager was United States Attorney for the Eastern District of New York, a professor at Brooklyn Law School and Dean of Brooklyn Law School prior to his appointment to the bench. He finds lawyers that he has met socially are more credible when they appear before him after he has interacted with them. Judge Trager believes that after meeting a judge, a lawyer is more likely to be straightforward and less likely to attempt to make an effort to impress the judge. On the other hand, Judge Trager noted that in social situations judges have to be careful about making comments about issues that might come up before them, because of the danger of appearing to have prejudged an issue. Judge Trager thought that the programs in Puerto Rico were well thought out and informative.

Judge Gershon

Judge Gershon of the Eastern District of New York was appointed to the bench in August 1996. Prior to her appointment to the district court, Judge Gershon was a magistrate judge in the Southern District, including a two-year term as chief magistrate judge. She appreciates the Winter Conferences because they provide a place where judges and lawyers can interact easily and comfortably and informally discuss important current legal issues. She finds no awkwardness presiding over cases after she has met the lawyers socially. To the contrary, Judge Gershon finds the socializing between judges and lawyers very valuable because it results in humanizing the judges for lawyers. While Judge Gershon finds it difficult to get away for a week, the long time allows for normal interaction and casual, spontaneous conversations as well as longer, more substantive discussions.

Judge Gershon thoroughly enjoyed the preparation for the panel she moderated on the First Amendment and Free Speech in High School. She said that the committee looked for a subject that would be new to most of the conference participants, judges and lawyers alike, and would interest teenage children and spouses of lawyers.

Judge Pauley

Judge Pauley, appointed to the Southern District of New York in October 1998, had not previously attended a Winter Conference. Prior to his appointment to the bench, Judge Pauley was in private practice in New York. Judge Pauley sees a huge benefit in the conference because the practice of law today hanges so quickly, the only way to keep nformed is to discuss issues with practitioners. Judge Pauley finds that, as a judge, he has few opportunities for such discussions and must follow current legal issues by reading the newspaper and on the Internet. Thus, he appreciates any occasion to talk about the elements of practice and the pressures lawyers face today in conducting a practice. The Winter Conference provides that opportunity with its relaxed setting and opportunity for spontaneous discussion.

In Judge Pauley's opinion, the greatest benefit of the Winter Conference is its informality and length, providing the chance to have discussions that continue from day to day over the week. As an example, he pointed to the luxury of having a conversation at breakfast about topics being discussed at the programs with a random selection of people who have chosen to breakfast at the same ime. He also noted with pleasure that if he met someone at coffee or in a buffet line, the conversation that started would be continued the next time that he happened to meet that person. He also welcomed the opportunity to get to know lawyers whom he previously had known only by sight.

Judge Pauley and his committee worked hard to put together the program on developments under the PSLRA of 1995. Judge Pauley enjoyed the challenge of learning in depth about an area of law and the opportunity to work with people who are experts on securities issues.

Circuit News

Vermont: Not A District Apart

By Steven Flanders

The District of Vermont is different from other districts in the Second Circuit, and from the federal judiciary as a whole. Beyond the obvious characteristics of geography and demographics, the district has faced problems and experienced changes that are unlikely to have counterparts anywhere else. Still, notwithstanding such facts as its relative geographical isolation from the rest of the Second Circuit — its one common border, with New York State, is shared basically with the Adirondack region, where the Northern District has no active court locations north of Albany — Vermont is as influential for its size in national and international affairs of the judiciary as any district.

When the two incumbent district judges, Chief Judge J. Garvan Murtha and Judge William K. Sessions III, were appointed by President Clinton in 1995, there were no active district judges in the district at all; both of the two judgeships were vacant. The docket had been kept current to the degree possible by departing district judges Fred I. Parker, who was appointed to the Second Circuit in October 1994, and Franklin S. Billings, Jr., who briefly took senior status and was in the process of full retirement from the bench, as well as by Magistrate Judge Jerome J. Niedermeier, who, in 1982, was the first

Vermont is as influential for its size in national and international affairs of the judiciary as any district.

(and only) person to have been appointed as a full-time magistrate judge for the district. Major assistance was provided also by Circuit Judge James L. Oakes, who had served as district judge during 1970-71 before his circuit appointment, and considerable help was received from visiting judges from the District of New Hampshire, other First Circuit courts and some courts elsewhere.

Unusual Transition

Judge Murtha thus became Chief Judge upon the instant of his appointment, not a common occurrence in a system based upon seniority. This unusual transition may have been facilitated, at least in small part, by the fact that he made possibly the shortest move in the history of the federal judiciary when he assumed office: his former law office, now the firm of Kristensen, Cummings, Phillips and Carroll, is directly adjacent to the courthouse in Brattleboro where he maintains his chambers. It's a good bet that even federal judges in other districts who formerly served as United States Attorney have had, in nearly every

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instance, a longer walk from the old office to the new.

The new docket was pretty overwhelming at first, according to Chief Judge Murtha. The new judges met in the courthouse in Rutland (Judge Sessions has his main chambers in Burlington, so Rutland is a good meeting place), and divided the docket. For the first few months, only criminal matters could be reached for more than status conferences and emergency proceedings. But by the end of a year, they were able to establish a degree of control, and now the docket is manageable enough that Judge Murtha and Judge Sessions have been able to provide occasional assistance to beleaguered districts in other parts of the country. Moreover, both have major national assignments within the federal judiciary: Judge Murtha serves on the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, and Judge Sessions serves on the United States Sentencing Commission. Notably, Judge Sessions is the first judicial member ever to undertake this work whose prior legal practice was primarily representation of defendants in criminal cases.

Demanding Assignments

Judge Murtha has taken demanding assignments in such difficult and unlikely locations as Pecos, in the Western District of Texas, the sort of effort that gives the lie to the common charge that visiting judges are off on "junkets." Speaking of this remote outpost of the federal judiciary, he says that he was impressed with the quality of the lawyering. The Western District of Texas, like other border districts, has suffered extreme increases in caseloads, especially drug cases and immigration-related matters, and the U.S. Judicial Conference has long sought assistance in these areas.

A novel development is the establishment with the Northern District of New York of a joint Federal Public Defender Office, the first in the circuit crossing district lines.

Within the circuit, the District of Vermont has provided assistance to other districts as well that are in need of additional judicial resources, even as the district's own case load has increased significantly. A video connection is being established that will permit Judge Murtha in Brattleboro to hear proceedings in the Northern District of New York at Albany, which will lend far greater flexibility to his efforts to assist there while staying abreast of his own docket. This video hook-up is used within the district as well; one recent day, a hearing was held in Brattleboro in which the defendant and his lawyer were present in his courtroom, while the Assistant United States Attorney was at the other end of the district in the main office in Burlington.

Public Defender Office

A novel development is the establishment with the Northern District of New York of a joint Federal Public Defender Office, the first one in the circuit that crosses district lines. The head of the office is in Albany, and there are two full-time assistant federal defenders in the District of Vermont, both located at Burlington. Reportedly the system has worked seamlessly; there are few complaints, or none, that the primary loyalties and obligations of the office are outside the District of Vermont.

Extending the longstanding Vermont tradition of involvement in international matters, this border district has taken on the unique role of administering probation connections with Canadian authorities for many probation offices throughout the United States. This relationship was first established by former Chief Probation Officer James Dean, who once had served in the Eastern District of New York. The system appears to work smoothly, providing Canadian authorities with a single and consistent point of contact. Also, Vermont judges, state and federal, are much involved in the international programs of the Judicial Conference of the United States.

Although the District of Vermont receives fewer cases than many, with a weighted filings figure per judgeship that is 80th among the 94 districts in the United States, it has regained full control of its docket after a very difficult transition. And the district serves as a major resource for the judiciary as a whole. The district now has the fewest three-year-old civil cases in the circuit as a percentage of the total pending, at only eight per cent.

FBC News

Judge Straub Meets With FBC Committee

By Jonathan E. Richman

Second Circuit Judge Chester Straub recently met with the Federal Bar Council's Committee on Second Circuit Courts, chaired by Peter Eikenberry. Judge Straub began his legal career at Willkie Farr & Gallagher, where he

became a partner in 1971. While at Willkie Farr, he also served as a member of the New York State Assembly from 1967-1972 and the New York State Senate from 1973-1975. After years of service on Governor Cuomo's New York Statewide Judiciary Screening Committee, the First Department Judicial Screening Committee and Senator Moynihan's Judicial Selection Committee, Judge Straub was sworn in as a Second Circuit Judge in July 1998.

Professional Lifestyle

Judge Straub began by discussing the change in lifestyle accompanying his new job. The phone no longer rings as frequently as it did when he was in private practice, and he no longer fills his week with meetings. He now has the luxury of looking at issues a number of different times and from different vantage points, without being locked into the fixed positions that litigators sometimes must adopt. He finds that he must be more deliberative in reaching even tentative conclusions; he cannot be "quick on the draw." And, of course, he no longer needs to account for his life on daily timesheets.

But the more contemplative lifestyle is by no means a more leisurely one. Judge Straub said he works even harder than he did in private practice and has managed to take only one week of vacation each year. The Second Circuit's workload is very heavy, with more than 4,000 filings and approximately the same number of dispositions each year. In his more than three years on the bench, Judge Straub himself has written 55 signed opinions, 20 per curiam opinions, 6 dissents and 216 summary orders.

Judge Straub also observed that circuit court judges might have less control over their lives than district court judges. Appeals are filed, calendars are prepared months in advance and the judges must respond. They cannot turn off the case-flow or reschedule sittings.

The excitement of the work, however, more than compensates for the time commitments. Judge Straub said that he continually is impressed by the superb quality of work from colleagues on the court, by the intellectual challenge of the job and by the surprising number of issues of first impression, which arise almost every day.

Concerns About The Judicial System

Judge Straub expressed two concerns about the federal judicial system. First, he is concerned that the financial gap between salaries for federal judges and for private practitioners has become so large that it deters qualified attorneys — especially younger lawyers and those with family obligations — from seeking appointment to the bench. He suggested that bar groups might wish to study this problem.

Second, he is concerned about the lack of communication between the federal judiciary and Congress. Judicial opinions very often make points that Congress should hear, but Judge Straub says he is not sure that Congress is listening.

Judge Straub noted that, when he was a New York State legislator, lawmakers looked to reports issued by the Legislation Committee of the Association of the Bar of the City of New York. He suggested that the Federal Bar Council might want to call particular issues to Congress' attention.

Bench/Bar Interaction

Judge Straub said judges want to talk with attorneys during oral argument and that attorneys should listen and respond to the court's questions. Attorneys sometimes are too anxious and want to participate by speaking; they do not want to listen. He advised attorneys to relax and to try to have a dialogue with the judges.

Attorneys too often do not want to listen. Judge Straub advised attorneys to relax and to try to have a dialogue with the judges.

Judge Straub goes to sittings with inclinations about results. However, on many occasions, he changes his mind based on questions and answers at oral argument or on comments during the judges' post-argument conferences. Judge Straub noted that his colleagues always are well-prepared for oral argument.

After the post-argument conferences, the judges usually communicate in writing, through memoranda or draft opinions. Judge Straub admitted that he was not accustomed to this procedure from private practice, but he said that exchanging writings can be more useful than oral conversations. The judges do not write until they have done their research and thinking, so the presentations are perhaps sounder than they would be if they were oral.

Summary Orders

Judge Straub also discussed the appellate practice of issuing summary orders that are not officially reported and that may not be cited. He said that, if the Second Circuit decided every case with

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a full opinion or even a per curiam opinion, the court would not be able to keep up with its docket. He noted that all (or almost all) of the court's orders now are published or electronically available; the only issue is the weight they should be accorded.

Editor's Note: Jonathan E. Richman is counsel to Debevoise & Plimpton.

Second Circuit Decisions

Actions Under the Investment Company Act

By Stephen M. Kennedy

The United States Court of Appeals of the Second Circuit recently held, in *Olmsted v. Pruco Life Insurance*, that variable annuity contract owners do not have a private right of action under Sections 26(f) and 27(i) of the Investment Company Act of 1940 to recover "excessive or unreasonable" fees charged by variable annuity companies. The amicus curiae brief submitted by the SEC in *Olmsted* suggests, however, that such claims will soon be asserted under another section of the Act — Section 47(b).

The plaintiffs in *Olmsted* were owners of variable annuity contracts issued by defendant insurance companies, Pruco Insurance Company of New Jersey and Prudential Life Insurance Company. On March 8, 2000, plaintiffs commenced a class action against the defendant insurance companies alleging that they had violated Sections 26(f) and 27(i) of the Act by charging variable annuity fees that were "excessive and unreasonable in relation to the services provided, the expenses to be incurred and risk assumed." On October 30, 2000, the United States District Court for the Eastern District of New York granted the defendants' motion to dismiss the plaintiffs' complaint on the ground that the Act did not provide a private right of action for violations of Sections 26(f) and 27(i).

Congressional Intent

In affirming the district court's decision, the Second Circuit noted that to determine whether a private cause of action exists under a federal statute, courts must look to the intent of Congress. The court stated that the "text and structure" of the statute must first be examined to ascertain Congressional intent. The court explained that courts "cannot ordinarily conclude that Congress intended to create a right of action when none was explicitly provided."

The court found that because no provision of the Act expressly creates a cause of action under Sections 26(f) and 27(i), Congress must be presumed not to have intended to create one. The court stated that this presumption was strengthened by the following three factors:

- Sections 26(f) and 27(i) do not contain any rights-creating language.
- The Act explicitly provides for its enforcement by the SEC through investigations and civil suits.
- Because the Act provides for a private cause of action under another, unrelated section of the statute, the omission of an explicit private remedy under Sections 26(f) and 27(i) must be considered intentional.

The court concluded, based on its "text and structure" analysis of the Act, that there was a strong presumption that Congress did not intend to create a private remedy under Sections 26(i) and 27(f).

To overcome this presumption, the plaintiffs argued that a refusal by the court to recognize a private remedy under Sections 26(f) and 27(i) would constitute an improper break with past decisions that found implied causes of action under other sections of the law. The plaintiffs also argued that certain legislative history, including two House of Representatives committee reports, supported a finding that Congress had intended to create a cause of action under Sections 26(f) and 27(i).

The Second Circuit will have to decide a case in the future focusing on the validity of Section 47(b) claims.

The court rejected the plaintiffs' arguments. The court found that the cases cited by the plaintiffs represented a no longer valid "judicial willingness" to effectuate statutory purpose through implied rights. The court stated that in the absence of express "rights-creating language," a private remedy under Sections 26(f) and 27(i) could not be inferred. Likewise, the court found the "plaintiffs' appeal to legislative history" lacking in merit because the text of the statute is unambiguous, thus making "judicial inquiry . . . complete." The court stated that although legislative history of an unambiguous statute may be considered in rare instances when the history constitutes an "extraordinary showing" of contrary legislative intent, the legislative history relied on by the plaintiffs did not reflect such an "extraordinary showing."

Section 47(b)

The amicus curiae brief submitted by the SEC in *Olmsted* suggests that the Second Circuit likely will have to revisit the issue of whether a cause of action to recover "excess and unreasonable" variable annuity contract fees exists under the Act. In its brief, the SEC stated that a private remedy to recover such fees exists under Section 47(b) of the Act, which permits rescission of the portion of any contract that establishes an unreasonable price, together with the restitution of the excess amounts paid. According to the SEC, violations of Sections 26(f) and 27(i) would create a cause of action under Section 47(b). Courts, therefore, could rescind just that part of the variable annuity contract that creates the unreasonable fees and order insurance companies to reimburse variable annuity owners for previously paid overcharges.

The *Olmsted* court declined to consider whether Section 47(b) provided a basis for the plaintiffs' claims because that theory of recovery was not advanced by the plaintiffs. The Second Circuit therefore will likely be faced in the not too distant future with a case in which the validity of Section 47(b) claims must be decided. The court's decision in that case will be interesting to see in light of *Olmsted*.

A Debate

Military Commissions

On November 13, 2001, President Bush issued an executive order calling for the establishment of military commissions to try members of Al Qaeda and international terrorists, as well as those who harbor them, for violations of the laws of war and other applicable laws. The order cited 10 U.S.C. Sections 821 and 836 as authority for this action. Neither of those sections specifically authorizes military commissions, however; Section 821 simply recognizes that the existence of courts martial does not deprive military commissions of concurrent jurisdiction, and Section 836 authorizes the President to prescribe rules for military commissions.

There is no specific legislation authorizing military commissions. Military commissions are considered to be creatures of the "common law of war." *Application of Yamashita*, 327 U.S. 1, 19-20 (1946). They have existed for hundreds of years and were used by the United States in connection with the American Revolution (e.g., Major John André), the Civil War (e.g., Dr. Samuel Mudd) and World War II (approximately 1,600 Germans and 1,000 Japanese were tried by military commissions).

"Unlawful Combatant"

There appears to be widespread agreement that, to qualify for trial by a military commission, a person must be deemed an "unlawful combatant." *Ex Parte Quirin*, 317 U.S. 1, 12 (1942). An unlawful combatant generally is defined as a belligerent who does not have a distinctive insignia and does not carry arms openly, or a person who does not comply with the laws of war. Generally, a person who operates as part of a command structure, has a distinctive insignia, carries arms openly and complies with the laws of war is considered — when detained — to be a "prisoner of war" under the Geneva Convention Relative To The Treatment Of Prisoners of War. Such a person is entitled to certain protections, including a limitation on any questioning to name, rank and serial number (Article 17); treatment consistent with the way the detaining power treats its own armed forces for violations of war (Article 82); trial by an independent and impartial tribunal (Article 84); and repatriation after hostilities cease (Article 118).

There appears to be agreement that, to qualify for trial by a military commission, a person must be deemed an "unlawful combatant."

According to reports in the press, when President Bush's executive order was issued, a preliminary decision was made not to apply the Geneva Conventions to detainees subject to the order. It was thought that this would give the United States more flexibility in questioning, trying and punishing those individuals. On February 7, 2002, reportedly at the urging of Secretary of State Colin Powell, the President reversed himself and announced that the Geneva Conventions would be applied to the Taliban, but not to members of Al Qaeda. This may be a distinction without a difference because a person still may be deemed an unlawful combatant under the Geneva Conventions. In fact, this appears to be the intention of the Administration, which has indicated that the Taliban will be denied prisoner of war status. Under the Geneva Conventions, however, if there is any "doubt" about their status (whatever that means), the Taliban would be entitled to be treated as prisoners of war until their status is determined by a "competent tribunal."

According to President Bush's executive order, the determination as to whether a person will be subject to the

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order will be made, in writing, by the President himself. Trial will be before a military commission, and the penalties may include life imprisonment or death. The order directs the Secretary of Defense to issue orders and regulations providing for "a full and fair trial"; admission of evidence that would "have probative value to a reasonable person"; a right to counsel; conviction and sentencing on the concurrence of two-thirds of the members of the commission; and review by the President or Secretary of Defense, with no other remedy or review in either the U.S. courts, a foreign court or an international tribunal.

Regulations provide for a presumption of innocence, guilt beyond a reasonable doubt and a unanimous verdict before the death penalty can be imposed.

On March 21, the Secretary of Defense issued regulations providing for public hearings in most cases, the presumption of innocence, guilt beyond a reasonable doubt, a unanimous verdict before the death penalty can be imposed and military lawyers (at government expense) and civilian lawyers (at their own expense) for defendants. All appeals are to a military court.

The Case For Military Commissions

By Steven M. Edwards

Any analysis of a legal issue should begin with a discussion of the facts. There are a number of facts that are significant here, including: (1) the number of people who may be subject to trials by military commissions could easily exceed 1,000; (2) Al Qaeda's basic approach appears to be the use of covert tactics to inflict massive casualties on civilians; and (3) it is not likely that Al Qaeda's members will assume a peaceful civilian existence when hostilities cease. These factors make trial by military commissions the best alternative, in my view.

Trial by civilian courts does not seem practical because the system would be overwhelmed. The trial of a handful of terrorists has turned the federal courts in Manhattan into a virtual war zone in the last five years. A thousand trials, or even hundreds of trials, would substantially diminish the quality of justice for civilians who already face an overburdened court system.

Trial by international tribunals is also unattractive. The international tribunal for war crimes in Yugoslavia has only managed to deal with 31 defendants in eight years at a cost of more than $400 million. Furthermore, the possibility that some of these defendants might be released and permitted to inflict further acts of terror on the United States is simply unacceptable.

That risk would be even greater if the members of Al Qaeda and the Taliban were tried in foreign national courts. Moreover, in which country would these people be tried: Afghanistan? Saudi Arabia? France? England? The American public would never accept trials in a country with a history of sympathy to Al Qaeda and the Taliban, and it is doubtful that any other country would want to take responsibility for such trials—much less for incarceration or other punishment.

Practical Alternative

Trial in a U.S. jurisdiction other than civilian courts is the most practical alternative, and the only real question is what those trials should look like. Much of the criticism of military commissions has been directed at the inapplicability of the rules of evidence. But most jurisdictions throughout the world do not observe standards as stringent as the federal rules, and as a practical matter a competent and creative prosecutor can obtain the admissibility of any evidence that has "probative value to a reasonable person" — the standard set forth in President Bush's order.

There also has been criticism of President Bush's refusal to give Al Qaeda fighters the protections of the Geneva Conventions. There is no legal reason to do so, however, because they do not in fact qualify for prisoner of war status. Furthermore, given the danger that these people pose now and in th future, it is imperative that we be able to question them thoroughly and keep them from returning to the fray indefinitely.

The most serious criticism is the lack of an adjudication by an independent and impartial tribunal (assuming military commissions are not "independent"), as specified in the Geneva Conventions. While this may not be required for persons who are unlawful combatants, it is easily achieved. It would be a simple matter to provide for review of any conviction by a standing three judge civilian court, and it would answer many of the concerns expressed throughout the world without any sacrifice in effectiveness.

No one wants to convey the impression—to the world or to ourselves — that the fate of these people will be determined by kangaroo courts. The fact that we are having this debate is reassurance that our system (at least going forward) will never succumb to th kind of hysteria and injustice that have plagued other supposedly civilized societies throughout history. Treating

the Taliban and Al Qaeda fighters as unlawful combatants whose fate may be determined by military commissions is consistent with international law, constitutional due process and common sense.

The Case Against

By Diana Parker and Marjorie J. Peerce

"The Case For Military Tribunals" defends the use of military tribunals authorized by President Bush's November 13 Executive Order to try alien unlawful combatants captured in Afghanistan and held offshore at Guantanamo Bay. We respect that view, but disagree that sufficient evidence has been presented to the public to justify exchanging military tribunals for the system of justice that we have effectively used to try accused terrorists in this country for the past several decades or for our system of military courts martial.

One fundamental problem with the use of military tribunals is the statement it makes about our lack of faith in our justice system. Our justice system successfully tried the terrorists accused of the 1985 hijacking of a Royal Jordanian Airlines jet in Beirut and the first World Trade Center attack, among others. The Department of Justice recognized that fact when it indicted both Zachiaris Mousolli and John Walker in our courts.

The treaties to which the United States is a party are also part of our justice system and must be honored if we are to continue to hold and expand our support from the international community. We suggest that the combatants held at Guantanamo Bay have not yet even been proven to be unlawful combatants not entitled to the rights of prisoners of war. Their "insignia" must have been sufficiently distinctive for U.S. troops to tell them apart from our Afghan allies; they must have been carrying arms openly because there is a war going on there; and a determination of compliance with the "laws of war" often depends on who is fighting whom, where the fighting is taking place and the century and decade in which the fighting occurs. Indeed, *The New York Times* reported on March 16 that the Deputy Camp Commander at Guantanamo Bay said that some of the prisoners were "'victims of circumstance' and probably innocent."

Rule of Law

Even if those detained at Guantanamo Bay are unlawful combatants, the primary interest of the United States should be to expand the rule of law, particularly at this point in history. The United States should, therefore, aspire to more than the internationally accepted minimums that include public trials, choice of counsel, independent judges and a high burden of proof. For example, in contrast to the military tribunals established by the President's Order even as amended by recent Department of Defense rules, to an independent judiciary courts martial include the right to appeal. In further contrast to military tribunals that may ignore "principles of law and the rules of evidence generally recognized in the trial of criminal cases," courts martial do not ignore such principles and rules and might well be attractive alternatives to civilian trials for combatants caught overseas, a result consistent with conclusions reached by the Committee of Military Affairs and Justice of the Association of the Bar of the City of New York.

We acknowledge the hardships imposed on those who participate in the conduct of such trials. The horrific acts of Sept. 11 have wrought uncountable changes in our country; our system of justice should not become yet another victim if our society is to remain free, just and tolerant.

Our system of justice should not become yet another victim of Sept. 11 if our society is to remain free, just and tolerant.

Finally, while we recognize that "The Case For Military Tribunals" defends their use only for the trials of alien unlawful combatants captured in Afghanistan and held offshore, we are compelled to point out that the President's Executive Order is not so limited. The Executive Order on its face would apply to resident aliens who have lived in the United States for years and who are entitled to constitutional protections wholly abrogated by the Order. The Order authorizes the detention of those subject to the order for an unlimited time without charges and without a trial of any kind, even by a military tribunal. Secretary of Defense Donald Rumsfeld was quoted in *The New York Times* on February 27 as saying that among the options being considered with respect to those detained in Cuba was "to just keep them" so they could not go out and join the battle.

The most egregious aspect of the Order is that any individual subject to the Order is stripped of the guarantee of the writ of habeas corpus that an Article III court will determine whether sufficient evidence exists to justify the denial of liberty, even though only Congress may suspend that right — and Congress has not done so. Indeed, the Supreme Court

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has held that even alien members of the German armed forces were entitled to the writ after landing in the United States. Since the detention of people of Japanese heritage during World War II, of which we are all immeasurably ashamed, this country has never supported such wholesale denials of fundamental constitutional rights.

This abrogation of fundamental constitutional rights is, on the face of the Executive Order, of unlimited duration — as is our war on terrorism. It is therefore not sufficient for future Department of Defense regulations to attempt to save it by adding a procedural right here and there or even by applying the Order only to unlawful combatants captured, as the Department of Defense is currently doing, in other countries and held offshore. This Executive Order must be voided for the sake of our pride in our country and our constitutional principles, which should never be abrogated.

Commentary

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the British Adjutant General, to be held as a prisoner of war and, thus, eligible for a future exchange. General Washington rejected the pleas because André was not, in fact, a prisoner of war, and personally signed the order that he be hanged as a spy.

A Meeting

On September 21, 1780, André had sailed up the Hudson aboard the *HMS Vulture*, which anchored south of West Point. He came ashore in uniform to meet Benedict Arnold at the home of Joshua Hett Smith, a loyalist. The financial terms of Arnold's treasonous acts were agreed upon, and sensitive military documents were delivered to André. Before André left Smith's home, it was discovered that the *Vulture* had been fired upon by American forces and had departed further down river. André would have to travel over land to return to British lines. He changed into civilian clothing and received a permit of passage from Arnold issued to one "John Anderson."

Following a one-day trial, the tribunal unanimously concluded that André "ought to be considered a spy from the enemy" and be put to death.

In the course of his journey, André was stopped by three American militia men separated from their unit, who appeared to have been preying on Tory travelers. Whether he mistook them for loyalists and confessed his true identity (as one version has it) or they figured it out from a reading of papers in his boots, André was captured and Arnold's treachery discovered. An American officer, not fully understanding the import of the documents in André's possession, alerted Arnold to André's capture, which caused Arnold to flee on the very morning Washington was traveling to West Point to meet with him.

During André's brief period of captivity (nine days in total), he was permitted to correspond with his commander, Sir Henry Clinton. There is no record of André seeking, nor of anyone offering him, legal representation.

Military Tribunal

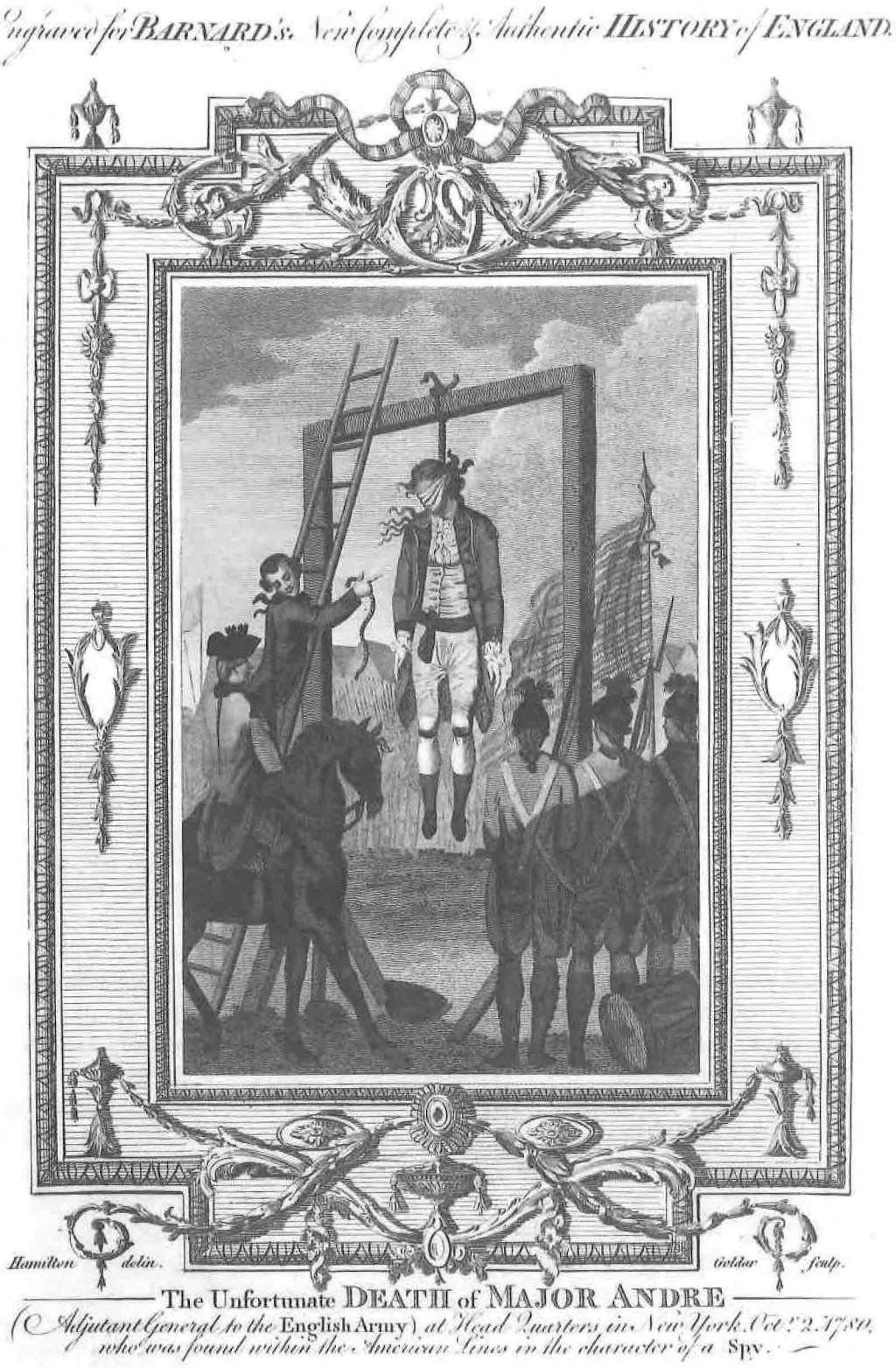
On September 29, 1780, in Orangetown, not far from Washington's Headquarters in Tappan, a military tribunal was convened, with Major General Nathanial Greene as president. Generals Lafayette and Steuben were members of the court, as were at least four other officers. Colonel John Laurens was charged with the task of cross-examining André.

In modern legal parlance, André was given his *Miranda* warnings. As Chief Justice Marshall phrased it in his biography of Washington: "[F]rom a sense of justice, as well as delicacy, [André] was informed on the first opening of the examination that he was at perfect liberty not to answer any interrogatory which might embarrass his own feelings."

André was eager to speak. He advanced the legalistic (and factually untruthful) defense that he had entered an enemy post in the uniform of a Britis officer against his will and thus was a prisoner of war. Once a prisoner of war, he was permitted to try to escape in civilian clothes and it was in that context that he was captured. It did not help André that the now disgraced Arnold had the audacity to have an intermediary submit a letter in André's defense offering an inconsistent and equally implausible story that André crossed the American lines under a flag of truce.

Following a one-day trial, the tribunal unanimously concluded that André "ought to be considered a spy from the enemy and that, agreeable to the law and usage of nations, it is their opinion he ought to suffer death." An appeal was permitted to the Commander-in-Chief but not to any other appellate tribunal. Washington concurred and signed the death warrant. The execution was originally set for October 1 at 5 p.m., then for noon on October 2. Washington communicated to the British a willingnes to trade André's life but there was only one person acceptable in the bargain: the

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"The Unfortunate Death of Major Andre," courtesy of the Clements Library, is a photo of an engraving originally made in 1783 for Barnard's New Complete Authentic History of England.

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traitor, Benedict Arnold. Sir Henry Clinton refused.

André Hanged

André, handsome and gallant at age 31, was hanged per the adjourned schedule. He was denied the privilege of execution by firing squad, which was reserved for military prisoners. André, whose remains were ultimately interred in Westminster Abbey, was said to have taken his fate with great dignity. Clinton described Washington as a "murderer."

The abbreviated military trial process was conducted in an era in which criminal trials in civilian courts were quite different. It was 10 years before the André trial when British soldiers accused in the Boston Massacre were able to retain John Adams to represent them with considerable success before twelve person juries instructed under a guilt beyond a reasonable doubt standard in a Crown Court.

Meaning For Today

So what do we take from all of this? For one thing, the recent claim that any use of military tribunals to prosecute unlawful combatants is antithetical to our core values as Americans is hysterically overblown. The exigencies of war require a process that is consistent with the need to prosecute a battle plan. General Washington could not afford to have foreign agents cross American lines to negotiate treason. As a commander, he had to act swiftly and decisively lest the cause be lost.

It is a worthy subject to consider and debate the fact-specific circumstances which justify the use of military commissions. How do the powers of the Commander-in-Chief in times of war come into play? How do the nature and locus of the act and citizenship of the actor factor into the determination? As lawyers, we should be particularly resistant to efforts to wrap the issue in rhetoric and bluster. My appreciation to Steve Edwards and Margie Peerce and Diana Parker for their thoughtful debate of this topic in this issue of the *Federal Bar Council News*.

Please note that the views that I express in this column are strictly my own. I say this not as a reluctant disclaimer but with the fervent belief that personal viewpoints on contentious issues of the day should not be paraded by bar leaders as if they were pronouncements by their organizations. Look, most of us have views on Enron, campaign finance and alternate-side-of-the-street parking and, yes, in some sense they all deal with law. But it is precisely because we are men and women of strongly held opinions that it is imperative that the personal views of the leader *du jour* never be mistaken for that of the organization.

9/11

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nationalized, leaving no home-based defense force in the State. Concerned with potential sabotage, the State, in 1917, organized the New York Guard to replace the National Guard during the War. After the War, the New York Guard almost entirely disbanded, although a few units remained attached to the National Guard units they had replaced.

World War II saw the revival of the New York Guard and the repetition of the process for the same reason that it had originally occurred. This time, however, when the War ended, these old soldiers did not fade away. The New York Guard continues to perform duties in support of the National Guard and U.S. Military Reserve units. Today, it comprises one of the four components of New York's military forces (the others are the New York Army National Guard, the New York Air National Guard and the New York Naval Military Forces).

The New York Guard has three Divisions: Army, Air, and Civil and Military Affairs. Based on my 20-plus years of legal practice, albeit civilian legal practice, I received a Commission as a Major. As far as I can tell, my Regiment, under the command of Col. Louis J. Marrero (who is a Justice of the Supreme Court in civilian life), is comprised almost entirely of professionals and para-professionals, and most of them, women as well as men, are lawyers or judges. Most have prior military service, and while that is preferred, it is not required; I had no such experience Although the atmosphere at drills and missions is friendly and casual, it is unmistakably military. Appropriate uniforms and authorized insignia, corresponding to National Guard and U.S. Army issue, are required, and military formalities are fully observed.

I applied for my Commission with what seems, in retrospect, to have been surprisingly little knowledge of the extent of the commitment I was making and the specific tasks that I would be asked to undertake. However, I have found that the commitment is not onerous. We drill one evening a month (because the drill consists of educational presentations and discussion, civilian lawyers would call it a "meeting"). We perform one weekend-long mission each month (described below). And we spend one week each summer at what seems invariably to be referred to as "the Beautiful Camp Smith" in Peekskill. I do not yet know everything that happens during that week, but I have heard enough to know that it involves CLE credit, and that I will not be allowed

to draw a weapon unless I bring my own. (Because I do not own a weapon, this rule is a good thing for everyone within firing distance of the Beautiful Camp Smith.)

The weekend missions consist of helping to get National Guard troops and U.S. Military Reservists who have been or are about to be activated ready for active duty by attending to their legal needs. There are two components to this. First, we advise soldiers of their rights as soldiers under federal law. I knew from my experience as a federal law clerk many years ago, and from the formulaic recitation in the Blumberg form, that a plaintiff cannot take a default judgment against a soldier on active duty. But federal law goes far beyond that. Under the Soldiers and Sailors Civil Relief Act, 50 U.S.C. Section 501 et seq., Congress has provided active military personnel with a significant buffer against the financial hardship that military service can entail. Under defined circumstances, active military personnel have the right to terminate apartment leases, reduce interest rates on most real estate and consumer debt to six per cent, obtain a stay of mortgage foreclosure proceedings and prevent termination of any installment contract for the purchase of personal or real property. Creditors who fail to observe these rights (this happens rarely, especially in periods of heightened patriotic awareness like the present), after receiving proper notice, have committed a federal crime.

Faced with soldiers returning from the Gulf War to find their jobs given to someone else, Congress also has acted to protect soldiers' employment positions during the period of their active service. Under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. Section 4301 et seq., under defined circumstances, an employer must reemploy a returning soldier to the same position he or she left, with uninterrupted seniority rights and benefits and vacation accrual. The rights are triggered by notice, oral or written, to the employer, but in counseling soldiers, we generally advise written notice for obvious reasons.

The second part of the missions is the preparation of necessary legal documents for each soldier. Depending on each soldier's needs, we prepare wills, living wills, health care proxies, and powers of attorney. Although my legal experience qualified me for a Commission, and although I had been involved in a couple of will contests, my career has been spent as a commercial litigator. It caused me some apprehension that I never before had to sit with a client to give this kind of counseling or to prepare this kind of documentation.

Nevertheless, after watching my colleagues interview a couple of soldiers and prepare the documents, and after preparing documents myself for a hypothetical soldier to make sure I could do it for a real one, I was good to go. We use a highly intuitive software program that guides you through the process, and although we sometimes receive esoteric inquiries about soldiers' legal rights and obligations, most of the judgment calls we are required to make are not difficult. We know, for example, that a 19 year old with no money or property often will not need a will. We also try to talk soldiers out of giving a general power of attorney to the girlfriend or boyfriend they met three weeks ago, even though they swear they will get married when they come off active duty.

Although I have not seen statistics, my impression is that the U.S. military suffers from a shortage of Legal Affairs Officers, one of the results of which is the expansion of our Regiment's responsibilities from the National Guard to Reserve units of the U.S. Army, Air Force, Navy, Marines and Coast Guard. The need seems unlikely to decrease under the present wartime conditions. As of March 27, 2002, there were activated Army National Guard, Army Reserve, Naval Reserve, Air National Guard and Air Force Reserve, Marine Corps Reserve and Coast Guard Reserve totaling 81,193 from across the country.

For every soldier on the battlefield, there are dozens if not hundreds of others backing up that soldier and making it possible for him or her to be there. The men and women in my Regiment are doing this job because they want to be doing it. There is no pay; indeed, we pay for our own uniforms, and we each bring our own computers and printers to each mission. We go anywhere in New York that we are asked. As a pro bono activity, it is about the most that a middle-aged lawyer with substantial professional and family responsibilities can do, and it enables me to think of myself as one link in the long chain that facilitates our nation's military response to 9/11.

Editor's Note: For further information, on a no-obligation basis, regarding potential part-time service as military legal officers in the New York Guard, readers may contact the author at bcogan@stroock.com.

The Back Page

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Richard C. Levin, the 22nd President of Yale University, spoke of Judge Parker's distinguished family history, starting with his paternal grandfather. George A. Parker, an attorney, in 1931 founded the Robert H. Terrell School of Law, a night school for African-American law students in Washington, D.C. Judge

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Parker's father, Barrington D. Parker, Sr., joined his own father's law practice, and was appointed a United States District Court Judge for the District of Columbia by President Richard Nixon in 1969, a position which he held until shortly before his death in 1993. Judge Parker's maternal grandfather, John L.S. Holloman, had been pastor of the Second Baptist Church in Washington, D.C., for 53 years, and had sent a son to medical school, as well as four daughters to college and graduate school. Among those daughters was Judge Parker's mother, Dr. Marjorie Holloman Parker. Dr. Parker, a professor, scholar and author, was the second African-American woman to be awarded a Ph.D. from the University of Chicago. Judge Parker attended Yale University, which awarded him a B.A. in history in 1965, and Yale Law School, which awarded him an L.L.B. in 1969 — the same year that his father was appointed to the federal bench. After law school Judge Parker clerked for the Honorable Aubrey E. Robinson, Jr., Judge of the United States District Court for the District of Columbia.

High Profile Trials

President Levin noted that Judge Parker had a distinguished career in private practice, first as an associate with Sullivan & Cromwell, then as a founding partner of Parker, Auspitz, Neeseman & Delehanty, P.C. Judge Parker subsequently became a partner at Morrison & Foerster, and in 1994 he was nominated by President Bill Clinton to serve as a United States District Judge for the Southern District of New York, a position which he held until his appointment to the Second Circuit. As a District Judge for the Southern District of New York, sitting in the White Plains courthouse, he presided over high profile cases such as those involving John Gotti, Darryl Strawberry, the Texaco executive whose tape recorded racial slurs caused a firestorm, and Hasidic Jews from Kiryas Joel. President Levin observed that Judge Parker treated all of these parties in the same way that he treats everyone: "with respect, fairness and impartiality."

President Levin recited the events that led to Judge Parker's elevation. On May 9, 2001, Judge Parker was nominated by President George W. Bush to fill a seat on the Second Circuit that had been vacated when the Honorable Ralph Winter was elevated to senior status. He was unanimously affirmed by the Senate, and was commissioned as a Judge of the United States Court of Appeals for the Second Circuit on October 16, 2001.

President Levin pointed out that Judge Parker's connection with Yale extended beyond his school years. In 1999 Judge Parker was appointed a Successor Trustee to the Yale Corporation, the University's governing body. In addition, Judge Parker's oldest daughter, Christine, is a graduate of Yale in the class of 2000.

President Levin concluded his remarks with a return to the family theme, acknowledging the presence of Christine and her younger sisters, Kathleen and Jennifer. He noted that Toni Trent Parker, Judge Parker's wife, is a successful author and businesswoman. Mrs. Parker is the daughter of Dr. William J. Trent, Jr., a founder and former Executive Director of the United Negro College Fund. The Yale connection was present in the Trent family, too, as in 1948 Yale's Chaplain had invited Dr. Trent to Yale in connection with his work for the United Negro College fund. During Dr. Trent's visit at Yale, he met George H.W. Bush, later the 41st president of the United States, and father of President George W. Bush.

"A Humanist"

The celebration continued with a contribution from Hugh B. Price, President and Chief Executive Officer of the National Urban League, as well as a 1966 graduate of Yale Law School, who has known Judge Parker since their childhood together in Washington, D.C. He reiterated that Judge Parker comes from "good stock," and remarked that he was born and bred for the bench, having been steeped in the demands and duties of serving on the judiciary. Mr. Price concluded that all of us are fortunate that "the administration of justice is in the very wise hands of a humanist, Judge Barrington D. Parker, Jr."

The Honorable Ralph K. Winter, now Senior Circuit Judge, was appointed to the Second Circuit in 1981. In January, 1982, almost 20 years to the day before this occasion, he was sworn in as a circuit judge, also in the Levinson Auditorium of the Yale Law School. Additionally, like Judge Parker, Judge Winter is a graduate of both Yale College and Yale Law School. In his remarks, Judge Winter, who was a full-time member of the Yale Law School faculty before becoming a judge, noted the personal gratification he felt in the fact that his vacancy was being filled by a former student who is now a friend, "a man who will continue to be a great judge." Judge Winter, who clerked for Supreme Court Justice Thurgood Marshall when he was a judge of the Second Circuit, closed his remarks with the observation that "nothing would have pleased Justice Marshall more than to know that Danny Parker now fills this vacancy."

The commission appointing Judge Parker was read to the assembly by Associate White House Counsel Rachel L. Brand. She also conveyed the good wishes and congratulations of President Bush to the newest Second Circuit Judge. Chief Judge Walker then administered the oath to Judge Parker, after which the members of the audience rose to their feet in a standing ovation. During the applause, Toni Parker ceremonially robed her husband, and expressed her own sentiments with a kiss.

Judge Parker, acknowledging the crowd with a broad grin, spoke of all those who had afforded him the honor and privilege of becoming a judge on the Second Circuit, including Connecticut Senators Christopher Dodd and Joseph Lieberman, as well as Utah Senator Orrin Hatch, who is the chair of the Senate Committee on the Judiciary. Judge Parker acknowledged President Clinton, who had first nominated him to the bench, and President Bush, who had nominated him for this position, and asked Associate White House Counsel Brand to tell President Bush that everyone at Yale (the President's alma mater) extends affection and support to the President as he leads our nation in these tumultuous times.

Values

Judge Parker echoed the other speakers' words about the importance of family to him, noting that he had drawn from parents and family a deeply held belief in the values and promise of American institutions. Judge Parker's sense of the history that brought him to this moment resonated through his words. He affirmed that he had known African-Americans who had as much or more ability than he, and equally great dreams, but who had never had the break they deserved, and which he was given. With emotion he said, "I am mindful that I stand on their shoulders, and that I have walked through doors that I did not open, and have crossed bridges that I did not build." The newest circuit judge spoke of the precepts he has always tried to follow: fidelity to principles, kindness to the individual and service to the community. Judge Parker concluded his remarks with this observation: "We are who we are as a nation, and we have achieved what we have achieved, because these values resonate with so many Americans."

The 60th Judge of the United States Court of Appeals for the Second Circuit took his place among his new colleagues to thunderous applause.

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Barrington D. Parker, Jr., Sworn In To The Second Circuit

By Lisa Margaret Smith

During a ceremony punctuated by warm laughter, Barrington D. Parker, Jr., was formally sworn in as a Judge of the United States Court of Appeals for the Second Circuit on February 7, 2002. Rather than being held in the ceremonial courtroom at the Daniel Patrick Moynihan Courthouse in New York City, as is most common for these events, the induction took place at a special session of the Second Circuit in New Haven, Connecticut, at the Law School at Yale University, which is Judge Parker's alma mater.

"Unparalleled Judicial Excellence"

The Honorable John M. Walker, Jr., Chief Judge of the Second Circuit Court of Appeals, presided over the proceedings and welcomed the audience of over 300 that had congregated in the Law School's Levinson Auditorium to celebrate the occasion. Chief Judge Walker noted that Judge Parker is the 60th judge to be appointed to the Second Circuit Court of Appeals, a court that has a reputation for "unparalleled judicial excellence." He described Judge Parker as a man whose life has been steeped in the law, and commented that Judge Parker will add luster to the already sterling reputation of the Second Circuit. Chief Judge Walker's remarks included references to the primary theme of the occasion — the value and importance of family — which, in Judge Parker's case, includes not only his relatives, but also his connections at Yale University and the federal judiciary.

Anthony T. Kronman, Dean of the Yale Law School, also welcomed the celebrants. Dean Kronman observed that Judge Parker is the seventh Yale Law graduate to ascend to the Second Circuit's bench, and that others among the circuit's judges have taught at the Law School; additionally, four former deans of the Yale Law School have served on the court. Dean Kronman quoted Judge Parker as having said that "there is no federal court of appeals in the nation which has a closer relationship to a law school than the Second Circuit does with the Yale Law School." That observation certainly rang true during the ceremony.

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