# Federal Bar Council News

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## From The President

### Our Senior Judges

**By P. Kevin Castel**

Today, there are 43 judges on senior status on all courts within the circuit. In 1975, the *Second Circuit Redbook* reported 14 senior judges on those same courts. True, much else has changed in terms of numbers of judgeships and case filings. But it is no exaggeration to state that without these self-sacrificing individuals, the judicial business of the circuit could not be done with the present combination of wisdom, thoughtfulness and speed. The contribution to the sense of continuity of our judicial institutions is immeasurable. Active judges are the beneficiaries of their efforts but so, too, are litigants and lawyers.

(continued on p. 13)

## Developments

### James B. Comey Is New United States Attorney For The Southern District Of New York

**By Marjorie J. Peerce**

James B. Comey was sworn in as the United States Attorney for the Southern District of New York on January 7, 2002, succeeding Mary Jo White, the U.S. Attorney for the previous eight years. Comey's return to New York as the U.S. Attorney is one that he did not apply for and never expected. The call from the White House to offer the position was a "bolt out of the blue," he says. "I thought a friend was playing a joke."

A native of New York, and an alumnus of the Southern District of New York U.S. Attorney's Office, he returns to supervise people who previously supervised him. He expressed great excitement and awe at being the U.S. Attorney, and sitting in what he calls "Rudy's chair," since he started out his tenure as an Assistant United States Attorney under Rudy Giuliani. He does not expect there to be any difficulties created by his age (41) or his supervision of those who had been his senior because it is not his style to "lord over people" in any facet of his life, even though he stands 6'8" tall.

A father of five, James Comey graduated from the College of William

(continued on p. 12)

## Sept. 11

### Pro Bono Efforts

**By Bennette Kramer**

The Federal Bar Council has participated in the creation of a virtual law firm to provide pro bono legal services to the families of firefighters, police officers and other uniformed personnel who were killed at the World Trade Center. Through the newly created WTC Subcommittee of the Public Service Committee, chaired by Aaron Marcu, the Federal Bar Council recruited a pool of lawyers from major firms to provide legal representation to the families of these WTC victims. Kevin Castel and Richard Rothman have been terrific in

(continued on p. 2)

*Inside:*

*Second Circuit Practice Tips* . . . . . 2
*Circuit Adopts FBC's View On Apprendi* . . . . . 3
*Two New CHIPs Units In New York* . . . . . 5
*Revisiting Florida, One Last Time* . . . . . 7
*Campaign Seeks To Save Courthouse* . . . . . 8
*FBC Conference Held In Connecticut* . . . . . 10
*Judge Katzmann Is Committee's Guest* . . . . . 10
*In Memoriam: Edmund F. Maxwell* . . . . . 11
*Southern District's Sept. 11 Jurisdiction* . . . . . 13
*A Statistical View Of Second Circuit Cases* . . . . . 16

## Sept. 11

(continued from p. 1)

supporting the effort begun by Covington & Burling and throwing the resources of the Federal Bar Council into the project.

About two weeks after the Sept. 11 attack, Mayor Giuliani asked Marcu and Covington & Burling to assist these families with any legal problems that resulted from the family member's death, including obtaining death certificates when no body could be found, estate administration, negotiating the maze of public and private benefits available, and any ancillary needs such as dealing with debts or other businesses or property of the deceased. Affirmative lawsuits were not included in the representation.

Marcu and Covington & Burling did not know how many families would take advantage of their services. The potential client population included the families of the 417 uniformed workers lost at the WTC—343 FDNY firefighters; 2 FDNY EMS workers; 26 NYPD police officers; 6 voluntary or private EMS workers; 37 Port Authority police officers and 3 uniformed NYS court officers — plus another 37 civilian Port Authority personnel who died at the WTC. The firm set up a hotline in its New York office, staffed by its own personnel, and the fire and police commissioners and the Port Authority notified the victims' families that legal services were available through the hotline. The firm began receiving calls in October; as of January 8, it had arranged for 82 families to be represented.

The firm first assigned each New York client to a lawyer in its New York

### From Circuit Clerk Roseann B. MacKechnie

## Second Circuit Practice Tips: Appendix On Appeal

When handling an appeal in the Second Circuit, the form and content of the appendix are very important. Under FRAP 30(a)(1) (A-D), the appendix, which is simply a subset of relevant materials from the entire record on appeal, must contain:

(A) the relevant docket entries in the proceeding below;
(B) the relevant portions of the pleadings, charge, findings, or opinion;
(C) the judgment, order, or decision in question; and
(D) other parts of the record to which the parties wish to direct the court's attention.

Second Circuit Local Rule 30(d) also requires that the notice of appeal be included in the appendix. Memoranda of law from the district court should not be included unless they have special relevance to the case. FRAP 30(a)(2).

Although it is the appellant's obligation to prepare, file and underwrite the cost of the joint appendix, all parties are encouraged to agree on those portions of the record on appeal that should be included. FRAP 30(b)(1-2).

The decision over what parts of the record should be included in the appendix is an important one. In fact, Second Circuit Senior Judge Roger J. Miner, in a recent and very practical and interesting article about the use (and abuse) of the appendix in appellate practice, writes that "preparation of the brief, compilation of the appendix, and presentation of oral argument" are "co-equal in importance." Roger J. Miner, Common Disorders of the Appendix and Their Treatment, The Journal of Appellate Practice and Process, Vol. 3, No. 1, 39-40 (Spring 2001) (hereinafter "Miner"). And, although a party may rely on materials from the record that have not been included in the appendix, FRAP 30(a)(2), "[s]uch an omission causes the [appellate] judge to scurry back to the full record to look for the material omitted from the appendix. Sometimes, the judge discovers the material quickly and sometimes not. In neither case is the judge satisfied with the conduct of counsel." Miner at 41.

Should attorneys have questions about the appendix, they may call the case manager, whose name and telephone number were noted on the Docketing Sheet the attorneys received from the court soon after the notice of appeal in the case was filed. Also note that a number of interim local rules will take effect on March 25, 2002, two of which relate to the creation of a Special Appendix which will be required when a joint appendix exceeds 300 pages and which will be permitted in lieu of an addendum at the end of a brief. Attorneys who would like information about the proposed changes or copies of the proposed revisions may call me at 212-857-8585 or e-mail me at Roseann_MacKechnie@ca2.uscourts.gov.

office, but soon found that the volume of potential clients required enlisting other firms in the representation. Covington continues to operate the hotline, obtain all initial information for the clients and coordinate the representation of all clients who call the hotline, but refers most clients to six other firms for individual representation. As of January 8, Covington represented 27 clients; Weil, Gotshal & Manges, 18; Cadwalader, Wickersham & Taft, 10; Davis Polk & Wardwell, 8; Debevoise & Plimpton, 3; Wilmer Cutler & Pickering, 3; and Cleary, Gottlieb Steen & Hamilton, 3. As of January 8, there were a few clients waiting to be assigned to lawyers.

**Various Services**

The largest number of clients are firefighters' families, mostly widows, often with children, but also parents, siblings, unmarried domestic partners, ex-spouses seeking representation for their children, and others. The law firms and individual lawyers involved have been learning on the job, obtaining information from numerous organizations and firms, and where necessary referring clients to specific experts. Covington has performed other legal services at the request of the mayor, including negotiations of legal and other issues with representatives of artist Jamie Wyeth to coordinate the auction of an original painting of the raising of the flag at Ground Zero and the contribution of the proceeds to the Twin Towers Fund and tax advice with respect to the distribution of an initial $40 million in benefits from the Twin Towers Fund to families of the victims.

Many organizations have contributed to the success of the project. The Deputy Mayor and the Mayor's Deputy Counsel have left with Mayor Giuliani, but Aaron Marcu is certain that Mayor Bloomberg's administration will continue the relationship and support the legal project. The FDNY has cooperated and supported the project from the beginning, and legal services have been coordinated between the FDNY and the individual lawyers. The FDNY administration and firefighters have consulted Covington as a resource for referrals. The Uniformed Firefighters Association, the firefighters' union, provided the project with a substantial amount of information concerning benefits available to family members and other survivors.

**Other Support**

In addition to the Federal Bar Council, other bar associations and groups have generously provided training and support. The Legal Referral Service, jointly sponsored by the Association of the Bar of the City of New York and the New York County Lawyers' Association, has given significant assistance by referring clients on short notice to plaintiffs' lawyers who are prepared to counsel them on the advisability of affirmative lawsuits. The City Bar Fund has been supportive and generous, providing training and training materials to lawyers representing individual clients. The New York State Bar Association has provided, on a pro bono and expedited basis, a computerized collection of New York State Surrogate's Court forms. And the Association of Trial Lawyers of America and its non-profit organization, Trial Lawyers Care, will make pro bono assistance available for submitting claims to the federal Sept. 11 Victim Compensation Fund, and it has shared information concerning discussions with the fund's Special Master.

John Reddy of Bekerman & Reddy, a trusts and estates lawyer, has given the lawyers representing individual clients mini-seminars on the basics of trusts and estates law. He has volunteered to prepare wills on a pro bono basis for any clients who want them. Furthermore, he has volunteered to review all papers in support of applications for Letters of Administration before submission to the Surrogate's Courts. A Merrill Lynch unit has offered to provide financial planning to families of firefighters at no cost and PricewaterhouseCoopers agreed to provide pro bono tax, accounting and financial services to all clients.

The current concern of the families of the victims of the WTC attack is how to respond to the federal Sept. 11 Victim Compensation Fund regulations, which have generated substantial controversy among the victim families. Marcu says that it is important that the federal program is perceived to be a generous and compassionate response and not another bureaucratic program.

The lawyers involved with representation also are tracking pending legislative initiatives concerning income tax relief, forgiveness of student loans, college scholarships and Mayor's Office initiatives to simplify the process of distributing benefits.

## Criminal Practice

# Circuit Adopts FBC's View

Last Spring, the U.S. Court of Appeals for the Second Circuit ordered an en banc hearing in the case of *United States v. Ramse Thomas*, No. 98-1051, after the U.S. Supreme Court granted Thomas's petition for a writ of certiorari and remanded the case for further

(continued on p. 4)

(continued from p. 3)

consideration in light of the Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). In its en banc order, the Second Circuit expressly invited amicus participation by the Federal Bar Council, the New York Council of Defense Lawyers, and the Association of the Bar of the City of New York. The Federal Bar Council asked John P. Cooney, Jr., of Davis Polk & Wardwell, Thomas E. Engel, of Engel & McCarney, and Mark F. Pomerantz, of Paul, Weiss, Rifkind, Wharton & Garrison, to submit a brief on behalf of the Federal Bar Council. (Davis Polk & Wardwell associates Joseph F. Warganz, Jr., Lorilee A. Vaughan, and Jill S. Mahonchak also assisted in the preparation of the amicus brief.)

**Apprendi**

In *Apprendi*, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The defendant in Thomas was charged with and convicted of conspiring to distribute and possess with intent to distribute, cocaine and cocaine base, in violation of 21 U.S.C. Section 841(a)(1). Based on its own findings that Thomas's criminal activities involved 12 kilograms of cocaine and 1.2 kilograms of crack cocaine, the district court imposed a sentence of 292 months pursuant to 21 U.S.C. Section 841(b)(1)(A), which provides for enhanced penalties—based on drug quantity — above the statutory maximum of 20 years (240 months) established in 21 U.S.C. Section 841(b)(1)(C).

The Second Circuit had asked that the parties and amici answer three questions: (1) whether drug quantity under 21 U.S.C. Section 841, when it increases a defendant's sentence above the statutory maximum, constitutes an element of the offense under the analysis used in *Apprendi v. New Jersey, Castillo v. United States*, 530 U.S. 120 (2000), and *Carter v. United States*, 530 U.S. 255 (2000), such that it must be alleged in the indictment; (2) assuming that an indictment's failure to allege drug quantity is error, under what circumstances is that error subject to harmless or plain error review; and (3) should the Second Circuit's analysis in *Thomas* be governed or influenced by *United States v. Tran*, 234 F.2d 798 (2d Cir. 2000), and if so, is the reasoning of *Tran* sound?

**Amicus Brief**

Last June, the Federal Bar Council submitted an amicus brief, in which it argued that: (1) in light of the U.S. Supreme Court's holding in *Apprendi*, drug quantity and type are elements of an offense charged under 21 U.S.C. Section 841 and therefore must be alleged in an indictment; (2) sentencing a defendant under Section 841(b)(1)(A) or Section 841(b)(1)(B), in the absence of an allegation of drug quantity or type in the indictment, is an error that is subject to plain or harmless error review; and (3) the Second Circuit's analysis should not be governed by *United States v. Tran* because the omission of an element of an indictment is not a "jurisdictional defect" as held in *Tran*, but rather deprives the sentencing court of the authority to sentence a defendant under the enhanced penalties found in 21 U.S.C. Section 841(b)(1)(A) or Section 841 (b)(1)(B).

Significantly, the Federal Bar Council argued that there is a per se violation of a defendant's substantial rights where the indictment lacks an allegation of drug quantity, yet the defendant is sentenced above the statutory maximum in 21 U.S.C. Section 841(b)(1)(C). This argument ran contrary to the holdings of several district court opinions from other circuits.

In addition, the Federal Bar Council argued that a reviewing court should focus on the fourth prong of the plain error review test, namely, whether the error seriously affects the fairness, integrity or public reputation of the judicial proceedings.

## *Calendar of Events*

***Reception to Honor Senior Federal Judges Within the Circuit***
***Union League Club***
***April 4, 2002***

***United States Supreme Court Admission Ceremony***
***Washington D.C.***
***March 4, 2002***

***Law Day Dinner***
***New York***
***May 1, 2001***

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

**Court Ruling**

On December 12, 2001, in an opinion authored by Judge José Cabranes, the Second Circuit held, consistent with many of the arguments set forth in the Federal Bar Council's amicus brief, that: (1) after *Apprendi*, drug type and quantity are elements of an offense under 21 U.S.C. Section 841 that must be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt; (2) where drug type and quantity are used to authorize a sentence above the otherwise applicable statutory maximum, the failure to either charge drug type and quantity in the indictment or to submit the question of drug type and quantity to the jury is subject to plain error review pursuant to Fed. R. Crim. P. 52(b) when the defendant raised no objection before the district court; (3) the imposition of a 292-month sentence pursuant to 21 U.S.C. Section 841(b)(1)A)—52 months beyond the statutory maximum penalty for the offense charged, 21 U.S.C. Section 841(b)(1)(C) — where the indictment contained no allegation regarding drug quantity and the district court failed to submit the issue of drug quantity to the jury, constituted error, which was plain, and which affected the defendant's substantial rights; (4) the imposition of a 292-month sentence, over the defendant's objection as to the standard of proof used by the court to determine drug quantity, seriously affected the fairness and public reputation of judicial proceedings; and (5) the "proper remedy for the error in this case is to vacate the defendant's sentence and remand the cause to the district court for resentencing pursuant to 21 U.S.C. Section 841(b)(1)(C) to a term of imprisonment not to exceed twenty years."

The Second Circuit emphasized, as did the Federal Bar Council in its amicus brief, that the rule of *Apprendi* does not apply where the sentence imposed is not greater than the prescribed statutory maximum for the offense of conviction. In addition, because it concluded that a defendant's substantial rights are violated when he is sentenced above the statutory maximum in 21 U.S.C. Section 841(b)(1)(C) in the absence of an allegation of drug quantity in the indictment, the Second Circuit focused on the fourth prong of the plain error review test in determining whether to notice the error in *Thomas*. As set forth above, the Federal Bar Council advocated this approach to an *Apprendi* error in its amicus brief.

## Computer Law

# Crimes And Violations

**By Nancy L. Savitt**

Federal law enforcement in the New York area is now more equipped than ever to handle computer crimes and intellectual property violations. Lawyers need to be aware of these increased resources so they can best serve their clients.

In July 2001, Attorney General John Ashcroft announced the establishment of 10 Computer Hacking and Intellectual

(continued on p. 6)


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(continued from p. 5)

Property ("CHIPs") units across the country. Based on a program established in the U.S. Attorney's Office in San Francisco by then U.S. Attorney (and now F.B.I. Director) Robert Mueller, the Justice Department expanded its scope to those jurisdictions with a high concentration of high tech industry, trained law enforcement resources, and significant existing computer and intellectual property cases. While each U.S. Attorney's Office in the country has at least one designated computer crime specialist, these new units greatly expand the resources dedicated to investigating and prosecuting these kinds of crimes in the CHIPs districts. Of the 10 districts that have these new CHIPs units, two are in New York. Both the Southern District and the Eastern District of New York have their units staffed and fully functioning.

In the Southern District, CHIPs is part of the Major Crimes unit, and is staffed with five full-time prosecutors. Joseph DeMarco and Robert Strang run CHIPs. Each of them has several years of experience in the computer crime arena, having served as the SDNY's Computer and Telecommunications Coordinators prior to the establishment of CHIPs and having prosecuted many important computer-related cases.

In the Eastern District, U.S. Attorney Alan Vinegrad set up the Computer Crime and Intellectual Property Section as a separate section in the Criminal Division, the first time in eight years that a new section had been established in that office. It is run by two seasoned prosecutors with extensive experience in complex investigations: James Walden, Chief of the section, and Lauren Resnick, Deputy Chief. In addition, there are two other full-time prosecutors in the section. The EDNY has also had a number of significant computer-related cases prior to the establishment of the CCIP Section.

These units focus on two separate areas of law (which, in certain cases, may overlap). One is computer crime. The second is intellectual property criminal violations, whether or not there is any computer or electronic connection.

Attorneys need to know about these new units so they can adequately advise their clients. Clients typically have a computer infrastructure that can be compromised or used for illegal purposes, and they have copyrights, trademarks, and trade secrets that could become the object of criminals. Clients need to be instructed to contact their counsel as soon as problems are discovered, and counsel needs to know that the resources of the federal government may be available to redress any wrongs.

**Computer Crime**

Federal law has several provisions that prohibit cybercrime. Among them are those that constrain computer intrusions/hacking, viruses, electronic eavesdropping, and fraud. These laws form the core of the new units' computer crime jurisdiction.

The prosecutors assigned to these units undergo specialized training in cybercrime investigation and procedures. As a result, they also serve the important function of acting as in-house consultants and resources to deal with computer issues that may arise in other areas of law enforcement—for example, advising how to search a Palm Pilot seized in a drug case.

Their mandate does not only vindicate economic interests. Privacy interests, too, can be protected by these units, as they address intrusions that steal private information. For example, the unauthorized installation of "sniffer" programs, which can capture and record all data transmitted over a network, including passwords and e-mail, can be subject to federal criminal investigation.

In appropriate cases, computer crimes may include computer-related child pornography, internet-pedophile rings, and cyberstalking and harassment, which do not necessarily involve hacking or intrusion into computer hardware or software.

The CHIPs units can achieve results that are unavailable to private parties. Offenders can be arrested and punished with prison sentences. For example, the Southern District secured a 27 month prison sentence against a hacker. Restitution can be obtained through the criminal process, and the harm caused can be redressed. The deterrent effect of a government investigation and prosecution cannot be overemphasized.

Under the USA PATRIOT Act, prison sentences can be even more extensive, and the sentencing guidelines have been increased to include consequential losses. The new investigative tools in the Act will allow these crimes to be investigated more aggressively and result in stiffer sentences.

**Intellectual Property**

In addition to computer crimes, the CHIPs units also focus their resources on intellectual property violations. At times there is some overlap between the two, such as in software piracy cases, but that is not a requirement. Any criminal intellectual property violation falls under the jurisdiction of the CHIPs units. For example, the Eastern District is currently prosecuting a case involving the largest seizure of counterfeit DVDs in U.S. history. Statutes the units enforce include the criminal provisions of the copyright

and trademark acts, and the Economic Espionage Act, including some coverage for theft of trade secrets. Prosecutorial discretion will determine which cases the units choose to investigate, and which they prosecute. In general, the offices will consider the number of victims, the nature of the wrongdoing, whether a recidivist offender is involved, and the magnitude of the loss.

The increased resources devoted to intellectual property cases in the Southern and Eastern Districts has been matched by increased penalties for wrongdoing. For example, the sentencing guidelines relating to counterfeit merchandise have been adjusted to lower the amount of loss required and consequently increase the sentences that can be imposed.

**What To Do**

One of the biggest challenges facing these new units is the industry's failure to report problems, particularly computer intrusions. This is problematic for several reasons. One is that even a delay of as little as two weeks can result in the loss or destruction of necessary electronic leads. Another is that often a seemingly aberrant incident handled "in-house" can be the prelude to continuing hacking crimes and escalating losses perpetrated by the same wrongdoer. In addition, the full picture of a hacking incident targeting numerous companies cannot be discerned without reports from all victims.

The prosecutors emphasized that so many companies have been the subject of computer intrusions that there is no shame in coming forward to them. Moreover, they made clear that companies who do so will not be victimized second time by unwanted publicity, and they will be sensitive to companies' needs for confidentiality. Investigations can be carried out without disrupting business. The important point is to catch the perpetrators and prevent further loss, and that goal is best served by prompt reporting to the CHIPs units.

Prosecutors in both the Southern and Eastern Districts offered the following advice for attorneys and their clients:

*Take Precautionary Steps.* Companies should ensure they have adequate safeguards in place, commensurate with the nature of the information they are protecting, such as by installing firewalls and/or other security devices and making sure passwords are changed frequently. Automatic network logging features should be turned on so that if anything does happen, it will be easier to discover and trace. Maintain records as long as possible for the same reason.

*Establish Communications Between IT And Counsel.* Those responsible for maintaining the computer system need to be instructed to contact their legal departments or outside counsel as soon as they suspect they are the target of an intrusion or related matter. Often, the IT departments attempt to handle such matters on their own, and do not contact their counsel until the problems have mushroomed.

*Don't Touch Anything.* If anything does happen, valuable information can be lost even by doing something as simple as turning off a computer. Let the experts handle it.

*Call The CHIPs Units Immediately.* Prompt reporting results in the best chance to preserve evidence and investigative leads, and prevent continued losses and intrusions. Even if it turns out that the matter should be handled elsewhere, these prosecutors work closely with other federal, state and local law enforcement authorities that deal with cybercrime and intellectual property issues, and thus serve as valuable resources for referral of matters.

*Think CHIPs For Intellectual Property.* If clients' intellectual property rights are substantially violated, government resources may be the best way to vindicate those rights. The CHIPs units can employ their substantial expertise and use techniques and resources in an investigation that are not available to private parties.

Both offices are eager to be of assistance to the victims of computer and IP crimes. It would be a crime not to take advantage of what they offer.

## Election Law

# Revisiting Florida, One Last Time

**By Kevin J. O'Brien**

Not long ago — prior to Sept. 11 to be precise — the conventional wisdom was that George W. Bush, having failed to win the popular vote and having needed the questionable intervention of the U.S. Supreme Court to defeat Al Gore, would be a wounded president. His moral legitimacy, the pundits said, was paper-thin, which meant that his only hope for a successful term lay in a combination of luck (the good times continuing to roll) and timidity (governing consensually with the Democratic minority in Congress). Bush could succeed if he hewed to his campaign persona of a benign, hands-off, vaguely nonpartisan figure presiding over continued peace and prosperity, but a serious crisis, we were warned, would change the equation. In that event the arbitrariness of Bush's victory would come home to roost, for he would lack

(continued on p. 8)

(continued from p. 7)

the store of goodwill or moral capital necessary to assert and maintain his authority under conditions of adversity.

Fortunately, it hasn't turned out that way. Crises have a way of upsetting leadership expectations, of exalting valleys as well as leveling mountains, and Bush may be a sleeper in the mold of Harry Truman. But the dogma that Bush lacked some measure of legitimacy was dubious from the start. The election issue disappeared without a ripple as soon as the Florida contest was decided; not even the efforts of major news organizations, which conducted expensive and painstaking studies of the Florida ballots to determine the "real" winner (an effort that was, predictably, inconclusive), could bring the controversy back to life. Likewise swept aside were calls for Electoral College reform and various suggestions for two-party government in the new administration, such as a bipartisan cabinet.

Evidently, ordinary Americans understood what some in the chattering classes did not: that a presidential candidate elected under a basically valid set of rules is the president, period. Because a tabulation of votes only can approximate "the will of the voters" in very rough terms, any honest electoral system enjoys a considerable margin for error. Our system, by staying safely within that margin, confers full legitimacy on any candidate who wins according to its rules, as Bush did. A duly elected official cannot be partially legitimate, any more than an expectant mother can be partially pregnant.

Most Americans, exhibiting the pragmatism that is the key to America's enduring political culture, accepted the necessary limitations of our electoral system without doubting the legitimacy of the results in Bush v. Gore. Once the presidential election was over, they wanted to move on to concrete challenges, and they were willing to give Bush the benefit of the doubt in his attempts to meet them. Sept. 11 did not create this general sense of resolution, but brought it into sharper relief.

And so, facing the greatest external threat since Pearl Harbor, President Bush has acted firmly but deliberately, and the country has responded with overwhelming support. Wartime always engenders solidarity, initially at any rate, but the nation's comfort with the present leadership is striking. The issue of the president's "mandate" now has a distinctly academic ring. As Bush's critics used to say, the proof is in the pudding.

## Second Circuit News

# Campaign Seeks To Save Courthouse

**By Stephen Young**

The landmark Thurgood Marshall United States Courthouse at Foley Square has seen a panorama of legal history take place within its walls: the trials of Alger Hiss and Julius and Ethel Rosenberg, the judicial eloquence of Learned Hand, Henry Friendly and Edward Weinfeld, the high drama of the Pentagon Papers case, and so much more. But the courthouse is also the home of bursting pipes, dangerously frayed wiring, and heating and air conditioning systems that have outlived their life expectancies.

Faced with a crumbling infrastructure that could cripple the building at any time, Chief Circuit Judge John M. Walker, Jr., launched a multi-faceted effort to prevent disaster and save this treasured building for future generations. On December 14, the Chief Judge and Southern District Chief Judge Michael B. Mukasey held a press conference to announce two initial mileposts of the Chief Judge's effort to secure the necessary funds for the courthouse's restoration.

**Blue Ribbon Panel**

First, Chief Judge Walker released the Executive Summary of a technical report prepared by an independent consultant outlining the courthouse's woes and what it would take to fix them. Second, he announced the formation of a blue ribbon panel, co-chaired by former Senator Daniel Patrick Moynihan and renowned architect Richard Meier, to spearhead the campaign's efforts.

Vitetta Associates, a Philadelphia-based architectural and engineering firm retained by the Administrative Office of the United States Courts, prepared the written structural assessment of the building's needs. Vitetta, which specializes in rehabilitating historical structures, reported that it would take about $168 million to make much needed repairs to the courthouse, 75% of which would be spent rebuilding its fragile infrastructure.

Chief Judge Walker, aided by a series of dramatic blown-up photographs showing ruined ceilings and walls, made it clear to reporters that the restoration efforts would come none too soon. "The phalanx of stairs you climbed to enter the courthouse this morning are in fact held up by temporary wooden supports," he told the press, pointing to a photograph showing the rickety rows of wood beams supporting the Centre Street steps. "The concrete supports have weakened to the point that without these wooden supports this massive staircase threatens to

collapse." The Chief Judge vividly described pipe bursts, such as one in early 2001 just above an electrical supply panel to the court of appeals computer room, which very nearly knocked out the whole circuit's computer system. "Two years ago," he added, "a pipe burst and flooded the court of appeals robing room." Making matters worse, the fragile and ancient pipes throughout the building are wrapped in asbestos and are frequently positioned beside frail and equally-old wiring systems. "It's a recipe for major trouble that plagues this entire building," Chief Judge Walker concluded.

**Systems Suffering**

The Vitetta study found that the entire system of rain water pipes hroughout the courthouse — those that drain into the municipal storm water system — needed to be replaced. It also stated that the entire electrical system — panel board, switchgear, wiring and devices — needed replacing, as did the heating, ventilating and air conditioning systems, which are already operating beyond their life expectancies. "The Thurgood Marshall Courthouse is a major public asset," Chief Judge Walker observed, referring to the building's official new name conferred by an Act of Congress on August 20, 2001. "Just as we don't allow it to be vandalized with a sledgehammer or an ax, it is unacceptable to allow neglect to achieve the same results."

Addressing the cost issue, Chief Judge Mukasey pointed out that there was no real choice but to fix the present courthouse. Because it is attached to the Federal Metropolitan Correctional Center and to the United States Attorney's Office by secure bridges, relocating to another site is out of the question. "Since we must have a courthouse here, the real comparison in my view is between the cost of fixing this one up, or knocking it down and building a new one." He proceeded to point out that based on the gross area of the courthouse, building a new one would cost about $359 per square foot as opposed to $230 per square foot for this major restoration project. But Chief Judge Mukasey added two caveats to this comparison. He noted that the cost of new construction did not include the added expenses of temporary re-location, or the cost of demolishing the present structure, and that the $359 figure was simply an estimate for new highrise courthouse construction in Manhattan. Moreover, it would be impossible for any new structure to duplicate the unique Cass Gilbert design and the materials of the Thurgood Marshall Courthouse, which was built in 1936. As he explained, "In today's economy, a building of this detail could not be constructed."

The blue ribbon panel is called the Committee to Restore the Thurgood Marshall Landmark Courthouse. Its 18 members will be writing, speaking and lobbying for the needed funds; past efforts to acquire adequate prospectus funding have failed.

Like most federal buildings, the Thurgood Marshall Courthouse is owned and operated by the General Services Administration, which is responsible for construction and maintenance of these facilities. In 1994, 1995, and 1996 GSA requested, without success, a prospectus-level rehabilitation project for the courthouse, albeit at a much less inclusive level of around $40 million. Since then, GSA had adopted a band-aid approach to address the building's fundamental and dreadful problems. These efforts, however, have proved insufficient to remedy the many structural needs of the courthouse. Chief Judge Walker lamented the conditions court employees and others have to bear: "At present they can only be sure another physical crisis is just around the corner."

**Irreplaceable Location**

The Thurgood Marshall Courthouse has approximately 730,000 square feet of space devoted to chambers, offices for support staff, public corridors and lobbies, and courtrooms — in fact, about 30% of all federal court space in Manhattan. This latter fact, combined with its irreplaceable location, make the danger of its problems all the more acute. With the first steps now taken, the race against time has begun.

In addition to Senator Moynihan and Mr. Meier, the committee members are Herman Badillo of Fishbein, Badillo, Wagner & Harding of New York; Roland W. Betts, Chair of Chelsea Piers Management, New York; Peg Breen, President of the New York Landmarks Conservancy; Robert J. Giuffra, Jr., of Sullivan & Cromwell, New York; Terrence C. Golden, Chair of Bailey Capital Corporation, Washington; Conrad K. Harper and John J. Kenney of Simpson, Thacher & Bartlett, New York; Rita E. Hauser, President, The Hauser Foundation, New York; Philip K. Howard, Covington & Burling, Washington; Mark H. O'Donaghue, Curtis, Mallet-Prevost, Colt & Mosle, New York; Richard D. Parsons, Chief Executive Officer, AOL Time-Warner, New York; Robert A. Peck, President, Greater Washington Board of Trade; Philip J. Purcell, Chair and CEO, Morgan Stanley Dean Witter, New York; Joan Wexler, Dean, Brooklyn Law School; and Mary Jo White, former United States Attorney for the Southern District of New York.

*Editor's Note: Mr. Young is Assistant Circuit Executive for Public Affairs.*

FBC News

# Fall Conference Held In Connecticut

**By Peter Eikenberry**

The Federal Bar Council recently held its Second Annual Fall Conference, at the Dolce Heritage in Southbury, Connecticut. The judicial faculty for the conference included Chief Judge John Walker, Jr., of the Second Circuit, Edward Korman, Chief Judge, E.D.N.Y., District Court Judges Stephan Underhill, District of Connecticut, and Denise Cote, Gerard Lynch, Loretta Preska and Barbara Jones, S.D.N.Y., and Magistrate Judge Robert Levy, E.D.N.Y.

Vilia Hayes, Dan Goldberg and Kiyo Matsumoto planned the conference as a subcommittee of the FBC Committee on Second Circuit Courts. During the conference, the FBC Inns of Court presented a mock trial of Galileo with young lawyers acting as the trial advocates. Judge Cote played Galileo and Judge Jones was the prosecutor for the church. The conferees were informed that the Vatican had recently reversed the result of the actual trial.

**Appellate Panel**

The presenters for the panel on "Federal Appellate Practice" were Barbara D. Underwood and Mark R. Kravitz. Underwood is the Chief Assistant United States Attorney for the Eastern District of New York and is former Solicitor General of the United States. Kravitz heads the Appellate Practice Group of Wiggin & Dana LLP. The panel was moderated by Chief Judge Walker and Chief Judge Korman, both of whom commented during the panel presentations.

Judge Walker revealed that the circuit is reviewing its policy as to whether to permit all opinions to be cited as opposed to the current practice of some decisions being designated as "summary orders" without precedential value. He stated that the current policy had helped to conserve judicial resources, i.e., it helped the Second Circuit continue to maintain its practice of permitting oral argument of all appeals. Barbara Underwood observed that although motions for an en banc proceeding were almost never granted, Second Circuit opinions are sometimes corrected as a result of the motion just being made.

The discussion focused primarily on brief-writing and oral advocacy. The major theme of the brief-writing presentation was: keep it short and focused. A more persuasive brief avoids adverbs and is terse and to the point. The effective advocate should frame the issues early — using the questions presented section of the brief — to state the issues in a favorable light to the advocate's client. The brief also must adhere to all the procedural rules of the court, e.g., the brief should be filed in a timely fashion and adhere to the applicable page limit.

Judge Walker stated that a very high percentage of oral arguments in the Second Circuit help determine which side eventually prevails. The Second Circuit is one of the few federal appellate courts not restricting oral argument. A special emphasis was placed on being responsive to the judges' questions during argument — but the speakers agreed that preparation is the key to good oral advocacy. It was strongly recommended that the preparation include submission to several rounds of mock questioning.

The panel on ethics in discovery struggled with questions including the duty of lawyers in situations involving the accidental receipt of privileged material from an adversary, the client witness who testifies contrary to the facts as his or her counsel understands them, and joint defense agreements. Judge Lynch and Magistrate Judge Levy were joined on the presentation by Professor Bruce Green, Celia Borenthal, Kevin Castel, Jonathan Lerner and Mary Kay Vyskocil

In a presentation on "Literature and the Law," Judges Preska and Underhill were joined by Professors Maryanne T. Arons and Leonard Baynes. This lively and learned presentation was the favorite of the conferees.

FBC News

# Judge Katzmann Is Committee's Guest

**By Suzanne Kerrigan**

On December 18, Judge Robert A. Katzmann of the Second Circuit Court of Appeals was the guest of the Committee on Second Circuit Courts of the Federal Bar Council chaired by Peter Eikenberry.

A native of New York, and a product of its public schools, Judge Katzmann was appointed to the Second Circuit in 1999. Prior to his appointment he was Walsh Professor of Government, Professor of Law and a Professor of Public Policy at Georgetown; a Fellow of the Governmental Studies Program of the Brookings Institution; and President of the Governance Institute. Judge Katzmann clerked on the First Circuit for Judge Hugh H. Bownes. He also worked

with Justice Ruth Bader Ginsburg during her confirmation.

Judge Katzmann defined his principal professional interest as the intersection of law and governmental institutions. Before law school at Yale, he received a Ph.D. in government from Harvard, where his work focused on American government. His dissertation was a study of organizational change, antitrust policy making and the exercise of agency discretion and was written under the supervision of James Q. Wilson. At the Brookings Institution, where he served a term as Acting Director of the Governmental Studies Program, Judge Katzmann examined a wide range of issues, including disability policy, interbranch relations and war powers.

Judge Katzmann continued his examinations of inter-branch relations when asked by Judge Frank M. Coffin to work with the U.S. Judicial Conference Committee on the Judicial Branch to explore the full range of relations between the federal judiciary and Congress. His book, "Courts and Congress," is in large part a result of this work. The Governance Institute also arose out of this collaboration with Judge Coffin — together, they and a few colleagues created the organization to examine challenges confronting governmental institutions, with the objective of proposing workable solutions. His edited volume, "The Law Firm and the Public Good," represents the efforts of law firm practitioners seeking to expand law firm pro bono efforts. Judge Katzmann joked that he has been told that once a person puts one of his books down it is hard to pick up.

Judge Katzmann attributes his current position to good fortune. One piece of the luck he describes was his decision to take a tutorial, at 21, from then Professor Daniel Patrick Moynihan. Judge Katzmann became his teaching assistant. The two kept in touch and continued to work on a variety of projects together throughout the years.

Judge Katzmann has found the Second Circuit to be somewhat like an orchestra — all of the judges play from the same score but bring to the task different instruments. Together, they produce a collaborative (or cacophonous, he supposed, depending on one's point of view) sound. He expressed his joy of learning from judges with very different backgrounds.

He observed that one of the greatest things he has found on the circuit is the way that senior judges are held in the esteem that they deserve. In other circuits, judges who take senior status may lose their office and prerogatives regarding case assignments. He noted that it is far different on the Second Circuit, where senior judges are asked by their panels which opinions they are interested in writing. Judge Katzmann has found that this creates a tremendous learning opportunity and adds to the general sense of collegiality on the circuit. The convergence of generations over time is one of the great strengths of the Second Circuit as an institution, according to Judge Katzmann.

Judge Katzmann's prior work has led to what could be the defining principle of his approach to cases — first, do no harm. He says that he strives to be aware of the complexities of decision-making and of the often unanticipated consequences that a decision may have. He remains sensitive to the realities that he affects as a judge in the process of trying to do the "just and right thing."

In response to a question about the role of the intellectual in the judiciary, Judge Katzmann said that the "intellectual as judge" brought to his mind philosopher kings and queens and he observed that this image worried him. Again, returning to first principles, he observed that doing the right thing might more often be expressed in an appreciation that law is in very human, principled and workable ways the means by which people seek to resolve disputes so that justice is served —not an exercise in philosophy unmoored by Constitution, statute, or precedent.

*Editor's Note: Suzanne Kerrigan is an associate at Davis Polk & Wardwell.*

## In Memoriam

# Edmund F. Maxwell

**By Chief Judge David G. Larimer, W.D.N.Y.**

*United States Magistrate Judge for the Western District of New York, Edmund F. Maxwell, one of the longest-tenured magistrate judges in the federal system, passed away recently after a long battle with amyotrophic lateral sclerosis, often referred to as Lou Gehrig's disease. As a recalled magistrate judge well past retirement age, Magistrate Judge Maxwell continued to serve the Western District of New York as he had since his appointment as a United States Commissioner — the forerunner of a magistrate judge — in 1965. The following remembrance by Chief Judge Larimer was first printed in the Jan./Feb. 2002 issue of "Off The Record," a publication of the U.S. District Court for the Western District of New York.*

Some are unforgettable. In our busy lives in court, we have contact with many judges, lawyers and litigants. Most pass by with little notice. A very few though

(continued on p. 12)

(continued from p. 11)

are unforgettable. They live forever in our memory. Such a person was Ed Maxwell.

At the time of his death, Ed had served the court for 36 years — first as United States Commissioner and then, for 30 years, as United States Magistrate Judge. Prior to his service on the court, he had a distinguished military career in the Air Force, and a similarly distinguished law career in private practice, as well as in the United States Attorney's Office. He won many awards and honors during his long career, including the Distinguished Alumni Award from the University of Buffalo and the Outstanding Jurist Award from the Bar Association of Erie County. The particulars of Ed's career and his many accomplishments are well known and well chronicled, but they are not what I will remember most about Ed Maxwell. Ed was devoted to his wife, Lee, his remarkably talented four children, and his many grandchildren. He was a great husband, father and grandfather. His devotion to his church was deep. His commitment to the less fortunate was real but not ostentatious.

Ed was a most modest, unpretentious man. He wanted no fanfare — even in death. He made his children promise that there would be no eulogies at his funeral. But, as his son, Patrick, said at the Mass, Ed needed no eulogy, his life was testament enough.

Ed loved the law and this court. Although he was very sick this past Summer, he pleaded with me to continue his recall status as a magistrate judge. He wanted to keep doing what he loved to do. Although he was in obvious distress, he attended our last judges meeting on October 10, 2001, and participated with the same practicality and wit that was his style.

I am sure that all who worked with Ed have many fond memories. This is especially true for the many law clerks who worked with Ed and, of course, his devoted secretary of 20 years, Alice Maddigan.

I remember Ed as a person who enjoyed coming to work in the law as a judge every day.

He could be tough and he had opinions, but I never knew him to belittle a litigant or treat counsel in an insensitive or demeaning way.

Ed was interested in many things. How he loved airplanes, especially the beloved P-51 Mustang, which he flew during World War II in Europe. He loved people, he loved to talk politics and all things about Buffalo. He lived his life fully. I remember him being one of the few judges at a conference to try parasailing on Lake George several years ago. He did it with style, in spite of the fact that he was fully dressed, shoes and all. I guess, most of all, I remember his ever-present smile and ready wit. When he came to Rochester to perform judicial duties, he would walk from office to office, coffee cup in hand, with a smile and a quip for all.

On a personal note, I will be forever in his debt. When I first joined the court as magistrate judge in 1983, Ed was the only other magistrate judge. He taught me a lot about being a judge and much, much more.

Thanks Ed, you made this court, and all connected with it, better because of knowing you. Unforgettable . . . indeed.

## Developments

(continued from p. 1)

and Mary, and the University of Chicago Law School. Upon graduation he clerked for Second Circuit Chief Judge John M. Walker when he was on the Southern District of New York. He then spent a year at Gibson Dunn and Crutcher, after which he returned to the courthouse as a prosecutor. While at the Southern District he handled complex narcotics cases, organized crime cases, major frauds, violent crime and terrorism cases. He also served as the deputy chief of the criminal division during a portion of his six-year tenure in the office. One of the extensive cases he handled was with then Assistant U.S. Attorney Pat Fitzgerald, who went on to become Co-Chief of the Terrorist Unit, and is now the U.S. Attorney for the Northern District of Illinois.

After leaving the U.S. Attorney's office, Comey returned to private practice, practicing commercial litigation and criminal defense at McGuire Woods, a large law firm in Virginia. After three years, he left the private sector again to become the Managing Assistant United States Attorney in Richmond, Virginia. There he supervised 15 Assistant United States Attorneys, trying an average of 45 cases per year. Indeed, he said that one of his goals is to get more trials for his assistants in the Southern District, who try far fewer cases than their Virginia counterparts.

While in Virginia he developed a program called Project Exile, an anti-gun program that involved the vigorous prosecution of felons possessing guns. As one of its techniques, the program uses advertisements to warn potential defendants of the consequences of gun use. He questions whether such a program would transport well to New York, especially since there is such an effective local law enforcement organization already in place in the New York Police Department.

Comey likely came to the White House's attention because he was tapped to handle the investigation and any prosecutions arising out of the 1996

bombing at the Khobar Tower apartments in Saudi Arabia, which killed 19 American servicemen. His extensive investigation of the matter resulted in a broad indictment in June 2001. During the investigation, he came in close contact with Attorney General John Ashcroft and the White House, and obviously he made an impression, because shortly afterwards the lanky prosecutor from Virginia was asked to fill the U.S. Attorney spot in New York.

Although he has only been in office a short while, Comey confirmed that the priorities of the Attorney General are his as well. The office's highest priority will be the continued pursuit of terrorism cases, as well as cases involving guns, drugs and civil rights. Prosecuting white collar criminal cases, "one of the crown jewels" of the office, he said, will remain another high priority. Once he has settled into the office, he plans to talk to his office mates, judges and others and see whether any of the office's priorities need to be "tweaked" in any way.

He emphasized that the Southern District of New York will continue to play an important role in the prosecution of terrorist cases, with five people still under indictment for the Embassy Bombing case. He firmly believes that the Southern District's experience and expertise will play vital roles in the future.

**Key Aides**

Upon taking office, one of the first things he did was to rearrange slightly the top levels of the U.S. Attorney office. He has promoted David Kelly, most recently co-chief of the Terrorism Unit, who played a key role in the post-Sept. 11 investigation, to Deputy U.S. Attorney, and brought back Karen Seymour to the office as Chief of the Criminal Division. Seymour was most recently a partner at Sullivan & Cromwell. Shirah Neiman will continue to play a key role in the office as counsel to the U.S. Attorney, and John M. McEnany and Frederick E. Virella, Jr. will remain in their respective positions as Associate U.S. Attorney and Executive Assistant U.S. Attorney, he said.

"What makes the Southern District of New York a great place on top of everything else is how good the federal bar is," Comey said. "I want to hear from the federal bar, which I believe has good perspectives and ideas." He noted that Virginia has just formed a federal defenders office, which "gave us someone to communicate with, an organization we can talk to." In the interests of the administration of justice, he would like to see whether there is a better way of doing things, such as with plea agreements. "The prosecution and defense have a lot of common interests. A lawyer may represent a guilty person who has information that the government would be interested in. The government wants to get the 'bad guys' and the defendant wants to get the benefits for providing the information," Comey stated. He hopes to be able to engage in dialogues with people on the defense side, recognizing that there will be many times where "we will disagree," but he believes that the system benefits everyone if there is an ongoing dialogue.

## From The President

(continued from p. 1)

To honor our senior judges, the Federal Bar Council will hold a reception at the Union League Club on Thursday, April 4, 2002. Shawn Patrick Reagan, a former clerk to Judge Duffy, and Kathleen P. O'Connor, a former clerk to Judge Meskill, will co-chair the event. You will be receiving an invitation shortly.

We welcome the return to the Southern District of New York of James B. Comey, as United States Attorney. Jim has accepted our invitation to chair this year's May 1, 2002 Law Day Dinner at which the Learned Hand Medal will be presented to Chief Judge John M. Walker., Jr., for whom Jim clerked.

We extend our thanks to Justice Ruth Bader Ginsburg, our Circuit Justice, who has agreed to meet on March 4 with a group of Federal Bar Council members whose admission to the Supreme Court bar will be moved by Leon Silverman, our friend and fellow member and the incumbent president of the Supreme Court Historical Society. Thanks to the chair of the event, Bob Giuffra, the group will also meet the evening before with Assistant Attorney General Viet Dinh.

Finally, space does not permit me to thank all of the fine panelists who have been assembled for the 2002 Winter Bench & Bar Conference under the leadership of Judge Pierre Leval. Among the outstanding presenters are Harvey Pitt, Chairman of the SEC, who will speak on Commission enforcement policies, and former FBI Director Louis Freeh, who will address us on Homeland Security issues.

We move forward remembering what we witnessed and what we lost this past Fall. We maintain our determination to keep our city, our nation and our legal institutions focused and strong. In that, we are succeeding.

## Federal Practice

# Sept. 11 Jurisdiction

**By Stephen M. Kennedy**

On September 22, Congress passed the Air Transportation Safety and System

(continued on p. 14)

(continued from p. 13)

Stabilization Act. Section 408(b)(3) of the Act provides that "[t]he United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001." The broad language of this provision appears to mandate that all claims related to the Sept. 11 terrorist attacks be brought in the Southern District. Whether Congress intended the Southern District to have exclusive jurisdiction over all such claims, however, is not entirely clear. Based on other provisions of Section 408, it may be argued that the Southern District has exclusive jurisdiction only over claims made against the airlines.

The issue of Section 408(b)(3)'s intended scope has been raised in *World Trade Center Properties LLC v. Ace Bermuda Ltd.*, No.01 Civ. 9781 (S.D.N.Y., commenced November 5, 2001). In this action, the World Trade Center leaseholders seek, among other things, a declaratory judgment that the Southern District has exclusive jurisdiction over their insurance coverage disputes with two of their insurers. In their complaint, the leaseholders contend that the statutory history of the Act supports their position that the Southern District has exclusive jurisdiction over all claims arising out of the Sept. 11 attacks. In so contending, the leaseholders cite to the language of the statute and to statements by certain United States Senators made contemporaneously with the passage of the Act. Prior to commencement of the action, the insurers had demanded arbitration of the disputes in London, purportedly under the insurance policies at issue.

Judicial determination of Section 408(b)(3)'s scope obviously will have a significant impact on the number and type of cases heard by the Southern District in the years to come.

## The Back Page

(continued from p. 16)

For instance, possibly reflecting the drop in crime generally in the 1990s, the number of criminal appeals filed in SY 2001, 717, represents a 22% decline from the 922 filed in SY 2000. Prisoner petitions held steady, with 1,457 in SY 2001, compared to 1,438 a year before — a 1% increase.

Part of the reason for those inmate missives may be attributable to the Supreme Court's June 2000 decision in *Apprendi v. New Jersey*. That is because included among prisoner petitions, as calculated by the Court of Appeals Clerk's Office, are second and successive habeas corpus petitions — of which there were 260 in SY 2001 and 165 in SY 2000. In *Apprendi*, the Court held in a 5-4 vote that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory prescribed maximum must be submitted to a jury, and proved beyond a reasonable doubt."

*Apprendi* has raised many complex issues concerning its scope and meaning with which the circuits have been wrestling. There is little doubt, however, that "jailhouse lawyers" across the country have been urging fellow inmates to challenge their sentences on the allegation that they were fashioned in violation of *Apprendi*. Their advice was likely based as well on the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). That statute generally restricts the ability of circuit courts to authorize the filing of such petitions, but grants them leave to do so 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." Taken together, *Apprendi* and AEDPA may well explain the spike in such petitions which began and continued during the period roughly corresponding to the first anniversary of the *Apprendi* decision, a window of opportunity prescribed by AEDPA. Whereas the number of such second and successive habeas petitions was 12 in April 2001, it increased to 21 in May, and remained at an above normal figure until the Fall: 21 in June, 28 in July, 24 in August, and 19 in September, before dropping back to 12 in October. It is also noteworthy that on August 16, 2001, the Second Circuit held in *Forbes v. United States* that *Apprendi* does not in fact constitute a new, retroactive rule of constitutional law, a decision which one might suppose will continue to discourage such petitions.

To be sure, the upward spike that did occur increased the court's caseload. Yet it represented only a small percentage of the court's total docket and had no appreciable effect on the court's ability to dispose of cases in timely fashion.

**Other Cases**

The 94 bankruptcy appeals filed in SY 2001 constitute a 24% increase over the 76 of SY 2000. Again, whether coincidental or not, this figure went north as the economy was headed south.

Original proceedings, chiefly writs of prohibition and mandamus, increased 17% from SY 2000 to SY 2001, but the raw figures are low: from 86 to 101, respectively.

Other categories declined. U.S. civil cases dipped from 411 to 321, a 22% drop; private civil appeal filings went from 1,714 in SY 2000 to 1,585 in SY 2001, down 8%; and administrative

agency filings dropped 5%, from 284 to 269. The total number of pro se cases almost held steady, declining 2% from 2,063 to 2,030, while the total of counseled cases went down 12%, from 2,868 to 2,514.

When it comes to terminations, there were drops in every category. Some were negligible. For example, original proceedings declined 3%, from 88 in SY 2000 to 85 in SY 2001; and private civil terminations dropped 5%, from 1,634 to 1,558. But terminations of prisoner petition appeals went down 17%, from 1,665 to 1,377; those of criminal cases dropped 19%, from 868 to 707; terminations of U.S. civil case appeals went down 22%, from 426 to 333; and two categories each declined 32%, those being terminations of administrative agency appeals, from 294 to 199, and bankruptcy, from 93 to 63.

Consequently, the number of appeals pending at the conclusion of SY 2001 rose 222, to 3,344, from 3,122 at the end of SY 2000. This contrasts with a decline in appeals pending of 137 at the close of SY 2000, as compared to the end of SY 1999. Still, the "shortfall" — that is, the excess of filings over terminations — was substantially greater at the end of each of the three statistical years prior to 1999 than it was at the conclusion of SY 2001. Those comparable numbers for SYs '99, '98, and '97 were 331, 477, and 357, respectively. Also, the Sept. 11 attack may have played some role in boosting the SY 2001 number, though this remains speculative at this point. Examined in this context, therefore, the SY 2001 figure may not be very significant.

**No Backlog Problem**

In any event, notwithstanding the year-end increase in cases pending, the court continued to serve the public with dispatch. In SY 2001 the median disposition time for cases — from the filing of the notice of appeal until the disposition of that appeal — was 9.1 months. This compares to the national average of 10.9 months. Our circuit was third most expeditious in the nation in this respect. In SY 2000 the comparable Second Circuit figure was also 9.1 months, as opposed to the national average of 11.7 months. Again, our circuit was third fastest among all circuits. Overall, then, it is fair to say the Second Circuit Court does not have a backlog problem.

In one important respect, the court is now poised to function even more efficiently. On October 11, 2001, Southern District of New York Judge Barrington D. Parker, Jr., was confirmed by the Senate to become the 13th active Court of Appeals judge. Along with its nine senior members, Judge Parker's appointment brings the court up to its full complement of jurists. (Incidentally, with two Judges Parker now on the circuit court, Judge Fred Parker will henceforth sign his opinions as F. I. Parker). Also, with its new member, the court of appeals may boost even further the percentage of its panels composed exclusively of circuit judges. In SY 2001 this figure was 69.44%; in SY 2000 it was 71.92%.

**Milestones**

Amidst all the sorrow since Sept. 11, it is worth noting that the circuit continues to observe milestones that reinforce our belief in the system of justice we are defending from terrorist attack. For example, in August 2001 President Bush signed legislation naming the U.S. Courthouse at 40 Centre Street the "Thurgood Marshall United States Courthouse." Justice Marshall served on the Second Circuit Court of Appeals in the early 1960s, before his appointment as a U.S. Supreme Court Justice. A formal dedication ceremony will be held in the Spring of 2002.

The court is operating as routinely as possible through the grit and determination of its judges and staff. But even a casual glance at our courthouse, bound as it is by security perimeters, dispels any notion of normalcy. We simply work around the inconveniences, as we have been doing since Sept. 11.

As noted above, the court was actually back at 40 Centre Street in less than two weeks after the attack, following the execution of health and safety procedures to assure the building's habitability. The staff was back to full complement there shortly afterward. Because the switching center to which its telephone landlines were connected was totally destroyed, cell phones were provided to judges and court staff. Later the telephone system was restored using a satellite dish that by-passes the subterranean wiring system — which in any event may not be fully restored for a good while. Fax and Internet services were similarly resurrected in short order, and filing deadlines extended as appropriate.

The work of the Second Circuit Court continues apace, in the Constitutional framework so revered by Judge Hand and so incomprehensible to the terrorists. The disruption of the court's labors was held to a minimum, all things considered. Although heightened security is one more complication of contemporary life, the court continues its service to the bar and public, unabated and unintimidated.

*Editor's Note: Mr. Young is Assistant Circuit Executive for Public Affairs.*

## The Back Page

# A Statistical View

**By Stephen Young**

In *Otten v. Baltimore & Ohio Railway Company*, in which the appellant complained the union shop was incompatible with his religious beliefs, Judge Learned Hand lay down the parameters of tolerance. "The First Amendment . . . gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. . . . We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within or our expectations for a better world."

The attackers of Sept. 11 sought to impose an order in diametric opposition to Judge Hand's teaching. The response by his heirs on the Second Circuit Court of Appeals was to remain undeterred in the conduct of their business. Despite the human and physical devastation all around them, the court quickly regrouped and continued the orderly process of its mission. Its panels resumed sitting less than a week after the attack — albeit initially at the Association of the Bar of the City of New York headquarters, graciously made available to the court in the emergency. Although not sitting on the panel the first day back, Chief Judge John M. Walker, Jr., appeared specially to reconvene the court on September 17, declaring, "The Second Circuit Court of Appeals is back in business — as is this great nation." He assured the bar and the public, "appeals will be filed, arguments heard, and decisions rendered." Indeed, by the end of that very week, the court was back to business in its Foley Square courtrooms.

Subsequently, in the week ending October 5, 2001, the court opened 141 cases — a 69.9% upward spike from the same period a year before. The court and its dedicated clerk's staff posted such results by cramming three week's worth of filings into one — playing catch-up after the full complement of Second Circuit staff returned to the courthouse two weeks after the attack. So efficiently was the unprecedented trauma handled that the backlog it caused was cleared in just another two weeks. Indeed, by the week ending October 19, new case openings were actually slightly down from the comparable period a year before, and they remained so for the next two successive weeks.

So despite the havoc and trauma, we are already in a position to discuss some important aspects of the Court's work for Statistical Year 2001 (which concluded September 30). Some interesting data emerge.

(continued on p. 14)

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