Federal Bar Council News

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From The President

Rights And Responsibilities

By Gerald Walpin

Free speech and free press have been, and continue to be, at the core of what makes America the country that we love. The Supreme Court wisely recognized that the "basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, [and the] free debate of ideas will result in the wisest governmental policies." But the Supreme Court also has made clear that free discourse is not "an unlimited, unqualified

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Developments

Council Holds Law Day Dinner; Second Circuit Judge Jacobs Receives Learned Hand Award

By Steven M. Edwards

The Federal Bar Council held its Law Day Dinner at the Waldorf Astoria on May 1. Anton Borovina chaired the event, and Second Circuit Judge Dennis Jacobs received the Council's Learned Hand Award for excellence in federal jurisprudence. Newly elevated Second Circuit Judge Reena Raggi read the President's Law Day proclamation.

Borovina began his remarks by suggesting that his participation and the participation of Judge Raggi were part of a plan to assist the Eastern District of New York in its efforts to overthrow the Southern District of New York as the Mother Court. In addition to serving as a judge of the Eastern District, Judge Raggi (and her husband, David Denton) was raised on Long Island. Borovina suggested that next year's Law Day Dinner could be held in Central Islip, and after that it could move to Albany, Syracuse and Connecticut, where the Federal Bar Council is active.

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Second Circuit News

40 Foley Named For Thurgood Marshall

By Stephen Young

It took a while to name the place, considering the federal courthouse at 40 Foley Square was opened in 1936. But for the more than 300 people who jammed its lobby in the afternoon of April 14, 2003, it was well worth the wait. The Cass Gilbert classic will forevermore be known as the Thurgood Marshall United States Courthouse, a title that perfectly embodies the nobility of its mission.

The new name results from Public Law 107-33, signed by President Bush in August 2001. Representative Eliot Engel — the House sponsor of the bill —

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From The President

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right." Thus, free speech and free press do not mean that the media can, without suffering adverse consequences, falsify and conceal facts for that media's benefit. Nor does it mean that a person publicly expressing an opinion on a controversial current issue can immunize himself or herself against attacks from those who disagree and the adverse consequences that flow from being disliked. With the exercise of one's First Amendment rights comes the rights of others to express their views through dissent, criticism and even economic power.

Recent media events in the wake of the war in Iraq have spotlighted serious deficiencies in some who proclaim their First Amendment rights — but forget that, with those rights, go certain responsibilities and even liabilities.

Peter Arnett

In a now well-publicized television appearance, naturalized American citizen correspondent Peter Arnett appeared on Saddam-controlled Iraqi television on March 31, 2003. But he was not appearing in the capacity as reporter seeking information; rather he appeared as the star interviewee, lifting the morale of the Iraqi people opposed to the U.S.-led war and torpedoing the morale of U.S. soldiers: he told all listeners that the U.S. war plan had "failed" and praised the morale of the Iraqi people and the cooperation of the Iraqi Information Industry (state-controlled).

Walter Cronkite put Arnett's prostitute-like conduct in diplomatic verbiage: "Clearly, Mr. Arnett, in granting the interview, was cozying up to sources he depended on for, first, their tolerance of him in Baghdad, and second, any information he could get." Does the goal of a media representative's continuing ability to report justify any means to that end, including one that violates U.S. laws? Absolutely not.

Was Arnett's statement on the enemy's TV network a crime? The treason statute, 18 U.S.C. § 2381, defines treason as giving "aid and comfort" to the enemy. During the second World War, another American citizen, Iva Ikuko Toguri, more generally known as "Tokyo Rose," broadcast on Japanese government radio her view that the U.S. war effort was failing. After the war, she was prosecuted and convicted of treason.

There is a difference between Arnett and Tokyo Rose: Arnett, because of his supposedly responsible media position, had more of an impact than the unknown Toguri. There is no reason to allow misuse of his free press position, which gave him prestige, to be an automatic immunity from the consequences of his conduct. I do not suggest that our government should waste its time in prosecuting him. But his conduct deserves the adverse economic consequences that he has experienced.

CNN

In a *New York Times* Op-Ed piece, "The News We Kept to Ourselves," published on April 11, 2003, Eason Jordan, chief news executive of Arnett's former employer, CNN, acknowledged that he suppressed accounts of the Iraqi regime's systematic use of torture and murder for years, in order, he says, to protect the lives of Iraqi citizens. Jordan reported many atrocities in the article, including that secret police abducted an Iraqi cameraman employed by CNN and subjected him to electric shock torture in the mid-1990s because the Iraqi government suspected a CNN connection to the CIA. In Jordan's words, "CNN had been in Baghdad long enough to know that telling the world about the torture of one of its employees would almost certainly have gotten him killed and put his family and co-workers at grave risk." Although Jordan reported that he "felt awful" about not revealing the stories, he nonetheless made 13 trips to Baghdad over the last 12 years to lobby the Saddam government to keep CNN's Baghdad bureau open.

Does freedom of the press allow false reporting by extortion? The privilege of freedom of the press carries with it the responsibility of objective, truthful reporting. The simple answer would have been for CNN to leave Iraq if it could not truthfully report events transpiring there. By remaining in Baghdad, CNN censored itself for its own selfish purposes and compromised the integrity of its reporting for over a decade, all in the service of media profit. In so doing, CNN became no more than a mouthpiece for Saddam Hussein himself, arguably extending his rule by withholding the true extent of his brutality from the international community for over a decade.

Hollywood And Free Speech

Free speech allows you to speak your mind. But it also allows me to react adversely to your views. It allowed many Americans to solicit and support an economic boycott of South Africa to register disagreement with its then-Apartheid policies. Today, it allows many Americans to boycott French products to pressure France to change its anti-American positions.

Yet suddenly some big names in Hollywood and related entertainment names cry foul because members of the

public seek to organize a boycott of those stars in order to register objection to those stars' bad-mouthing America and its President.

For example, in April, Dale Petroskey, President of the Baseball Hall of Fame, canceled a scheduled 15th anniversary celebration of the baseball movie, "Bull Durham," to avoid giving Susan Sarandon and Tim Robbins, who had starred in that movie, a large audience rostrum from which to repeat their already-expressed anti-war views. Petroskey sent a letter to Robbins that stated, in part: "In a free country such as ours, every American has the right to his or her own opinions, and to express them. Public figures such as you have platforms which provide you an extraordinary opportunity to have your views heard — and an equally large obligation to act and speak responsibly. We believe that your very public criticism of President Bush at this important — and sensitive — time in our nation's history helps undermine the U.S. position, which ultimately could put our troops in even more danger." In a similar incident, director Michael Moore came under fire for critical remarks he made about President Bush and the war on Iraq while accepting an Academy Award. And likewise, the Dixie Chicks' insertions of a crass attack on President Bush and his war policy into a musical concert in England triggered an economic boycott of the group's music in the United States.

Amazingly, in a warped sense of what the First Amendment means, Petroskey and similar pro-government activists have been attacked for expressing their views as a new era of McCarthyism. For example, the Screen Actors Guild issued a statement that any suggestion that "well-known individuals who express 'unacceptable views' should be punished by losing their right to work" was a "shocking development" which recalled the 1950s House Committee on Un-American Activities.

That is a total misunderstanding of McCarthyism as I lived through it and opposed it. McCarthyism did not rely on facts to pillage individuals, but on innuendo, guilt by association and even the simple refusal to participate in witch hunts. What we have here are undisputed facts that these stars took a public position contrary to the beliefs of those held by the pro-American position. The only reason these artists have the ear of large audiences is because they are popular stars. Those who disagree with the views these stars expressed have the free speech right to work to withdraw their "star" attraction by boycotting their music, concerts, performances, movies, etc.

That's not McCarthyism. That's simply good old American free speech used to derail support for a disliked view. The First Amendment merely guarantees the right to express a point of view; it does not guarantee that there will be no negative consequences for holding that point of view. As the well-used and apt adage goes, I will defend your right to speak freely even if I view your position as wrong; but I will also defend the free speech right of those who disagree with you.

Conclusion

Martin Luther King, Jr. understood well that the exercise of rights of freedom entails consequences. In his famous 1963 "Letter From a Birmingham Jail," Rev. King wrote that "an individual who breaks a law that conscience tells him is unjust" must be willing to accept the consequences of imprisonment. That was one price of freedom. The price of freedom of speech and freedom of press must encompass a responsibility to express the truth as you know it, recognizing that others may disagree and exercise their freedom by acting to reduce the popularity of what you say and do. It is nothing more than the law of supply and demand — if I do not like what you are supplying, I will work to reduce the demand for it. This is as American as apple pie.

Second Circuit News

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presented a framed copy to Justice Marshall's widow, Cecilia, and said another would soon be on its way to Second Circuit Chief Judge John M. Walker, Jr. to grace the courthouse itself.

Those assembled were treated to a program of celebration featuring an array of distinguished speakers from the three branches of government. Together, the speakers and their listeners ruminated on the significance of the occasion.

Statement Of Faith

One of those who appeared at the podium, GSA Regional Administrator Karl Reichelt, related that the courthouse had been completed around the time that Thurgood Marshall began his legal career with the NAACP, initially in Baltimore, but soon afterward in New York. At that time this city was, in its own way, very much a Jim Crow place, and in being so it reflected the bigotry enshrined in law and custom throughout the country. Though the building was constructed during the Depression as a statement of faith in America, Chief Judge Walker reminded the audience, "It was also symbolic of a legal system that had not fulfilled its purpose of equal justice under law."

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But Thurgood Marshall's legal career — including 29 victories out of 32 cases in the U.S. Supreme Court, among them *Brown v. Board of Education* — brought revolutionary change in a methodical and peaceful way. One after another, the speakers focused on the enormity of Marshall's achievements. U.S. Deputy Attorney General Larry D. Thompson declared that in the 70 years since Thurgood Marshall started as a lawyer the legal system has become "unrecognizable in many important ways — and thank goodness." Representative Jerrold Nadler commented, "Today's young people have no concept . . . can have no concept . . . of what a legal apartheid system was like in this country." Southern District Chief Judge Michael B. Mukasey marveled that Marshall's accomplishments were achieved through a peaceful strategy — changing the legal system. Many more lives, he said, would have been lost had the struggle for equal rights been waged outside the law. "It could have been otherwise. And as the sad experience of other parts of the world teaches us, it could have been ghastly." That is why, Judge Mukasey concluded, "It is difficult to think of a name that could add more authority to the name 'U.S. Courthouse' other than Thurgood Marshall." Senator Charles Schumer noted that many things could be said, all of which "risk bordering on hyperbole — were it not for his remarkable record of achievement."

Magazine Cover

At the time he became a circuit judge, Thurgood Marshall was perhaps the most famous lawyer in America. He had been received at the highest levels of government and industry, Circuit Judge (and former Marshall law clerk) Ralph K. Winter remembered, and his picture had been on the cover of *Time* magazine. Judge Winter observed, "Measured by his impact on our laws — and more importantly on our culture — Thurgood Marshall was the most significant lawyer of his time." But instead of trading on his fame for material wealth, Thurgood Marshall in 1961 joined the Second Circuit Court of Appeals at 40 Foley — only the second African-American federal appellate judge in the nation's history, and the first here. Despite his preeminence in the legal profession, his confirmation involved a long and bitter fight because of segregationist opposition in the Senate. Consequently, at first he had to bear a temporary appointment, with the status of a visiting judge. As such he had no permanent chambers of his own, and had to borrow facilities of vacationing judges. He and his law clerks lugged all their files from chambers to chambers, about once every two weeks, as those vacationing colleagues returned. "Schlepped" the files would be a better description, Cecilia Marshall remarked as she recalled her husband's days as a nomad in the building that now bears his name.

Mrs. Marshall's recollection characterized another dimension of the ceremony. It was a celebration not only of Thurgood Marshall's accomplishments, but also of his humanity. "He was a person who entertained while teaching basic truths and basic values," said Judge Winter. Chief Judge Walker, who was a district and later circuit judge when Thurgood Marshall was on the Supreme Court, reminded his listeners that Justice Marshall was the Second Circuit's Justice — and as such, he was characterized by Circuit Judge James L. Oakes as the "Conscience of the Circuit." He was also a fierce guardian of judicial independence. Senator Schumer recalled that in a 1981 speech to the Second Circuit Judicial Conference, Justice Marshall declared that it was the courts' role "to stand above political questions in which the other branches are necessarily entangled." His profound concern for the proper function of courts was matched by his general commitment to a worthy role for the legal profession in the larger society. "I remember him for the passion he had for our profession, to his public service, and his strong sense of how both could positively impact on this great nation," said Deputy Attorney General Thompson. "Thurgood Marshall became the embodiment of the spirit of public service."

So great was Thurgood Marshall's prestige, Representative Charles B. Rangel pointed out, that after "T.M." (as he was widely known) had become a member of the court of appeal Rangel — then an Assistant United States Attorney — would slip into an appellate courtroom with some of his colleagues just to see the great man. But the first time Rangel appeared in front of Judge Marshall, the latter subjected him to withering questioning that disabused Rangel of any notion that those who served in government would get special consideration from the famous judge.

Thurgood Marshall was also an individual whose wit could fend off the racial slights he experienced throughout his life. Judge Winter told of the time, soon after Marshall became a circuit judge, that a secretary for one of his colleagues on the court mistook him for an electrician. Later — alluding to the racially exclusionary local craft unions of the time — the newest member of the Second Circuit Court of Appeals told his law clerk, "Boy, that lady must be craz if she thinks I could be an electrician in New York!"

The electrician story also was suggestive of a subtext that had been running throughout the ceremony — the need to repair the famed edifice which was being newly dedicated. Support for that effort flowered into a bipartisan exercise as the program progressed.

Renovation Pledge

GSA Administrator Stephen Perry acknowledged the need for renovation work, and pledged to bring it about. His regional administrator, Karl Reichelt, declared, "We will do whatever we can to protect and preserve it for generations to come."

Democratic members of Congress eagerly seized upon the Bush Administration pledges. Chief Judge Walker — who has long campaigned to ing the courthouse's antiquated operating systems up to modern standards — introduced Senator Hillary Rodham Clinton as being a member of the Committee on Environment and Public Works, "where she's working with us to accomplish a renovation of this landmark building." For her part, the Senator was buoyed by the words of the GSA leaders, and added, "I would hope we have a transcript that can be sent to my colleagues as well as to the OMB." Representative Nadler observed, "Now that it has been named after [Thurgood Marshall] . . . how could we say no?" For his part, the chief judge said his tin cup was out and, "we'll take all we can get."

Throughout the program it was palpable how partisanship had been left outside the courthouse door. Indeed, one of the extraordinary features of the ceremony was its uniting of people from a broad range of political persuasions in praise of the late Justice. The presence of the chorus of 5th and 6th graders from Brooklyn's Public School 123 — which performed three numbers — reminded everyone that children are among the greatest beneficiaries of Thurgood Marshall's legacy.

Plaque Unveiled

The denouement of the program was the unveiling of a huge 500-pound plaque by Mrs. Marshall. Now permanently attached to the lobby wall, designed by Assistant Circuit Executive for Space and Facilities Scott Teman, its text — drafted by Judge Winter — reads:

"Thurgood Marshall United States Courthouse — This Building is Dedicated to an American Hero — The Honorable Thurgood Marshall — Civil Rights Leader — Attorney for the Plaintiffs in *Brown v. Board of Education* — Circuit Judge for the Second Circuit — Solicitor General of the United States — Associate Justice of the United States Supreme Court."

Mrs. Marshall was very grateful. On behalf of her two sons, Thurgood, Jr. and John, who were present with other family members, she expressed her gratitude simply and directly.

"Thank you," she said, "for making it possible for Thurgood to come home again."

*

Editor's note: The author is Assistant Circuit Executive for Public Affairs.

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FBC News

Central Islip Reception Honors Judge Raggi

By Jeanette Redmond

The Central Islip U.S. Courthouse Committee, chaired by Anton J. Borovina, of Borovina & Marullo PLLC in Melville, Long Island, organized a reception to honor Circuit Judge Reena Raggi for her dedication and service to Long Island and to celebrate her elevation to the Second Circuit Court of Appeals. The reception, which was originally scheduled for March 6, had to be rescheduled at the last minute to May 7 due to a sudden late-winter snow storm.

Borovina welcomed those gathered at the reception, which was attended by over 65 members of the bench and bar in Long Island. He commended the members of the Central Islip U.S. Courthouse Committee for helping to organize the reception and subsequent continuing legal education program and noted how the work of this committee as well as that of the many other committees of the Federal Bar Council truly help to foster better relationships between the bench and bar in the Second Circuit.

Guidance

Judge Arthur D. Spatt then addressed the group, recalling that at the time of the hearings on his own appointment to the bench, Judge Francis X. Altimari advised him to seek the counsel of then-District Judge Raggi. On doing so, Judge Spatt said he received some of the best guidance he received as a district judge. Among other things, Judge Spatt noted, Judge Raggi gave him plea, sentencing and other forms that he continues to use to this day. Judge Raggi also suggested that he meet with her then-courtroom deputy, Allen J. Herzfeld, who tutored Judge Spatt on one of Herzfeld's favorite subjects — "how to dispose of cases."

Judge Spatt observed that Judge Raggi has "great knowledge of the law and an ability to control the courtroom while being fair to all and has been a superb federal trial judge — there has been none better." Then, on behalf of the Federal Bar Council and all those present, he asked Judge Raggi to accept a small memento of the high regard in which she is held by members of her profession.



Photo Courtesy Rick Kopstein

Judge Arthur D. Spatt and Judge Reena Raggi

Return To The Island

Judge Raggi thanked those present for the "honor and pleasure" of being back on Long Island. Judge Raggi fondly recalled, among other things, her early days as a district judge in Uniondale together with Judges Pratt, Altimari and Mishler and the "great seminar in judging" she got from all of them. Judge Raggi also thanked Herzfeld for his hard work and dedication and expressed her gratitude to the Council for having her as the honoree at a reception on Long Island.

The reception was followed by a two-hour CLE program on "The Attorney/Client Relationship: The Changing Corporate Landscape After Enron." The program was moderated by retired Second Circuit Judge George C. Pratt,

Professor of Law at Touro College, Jacob D. Fuschberg Law Center. Panelists were Benjamin Brafman of Brafman & Ross, P.C.; Daniel R. Alonso, Chief, Criminal Division, U.S. Attorney's Office for the Eastern District of New York; Jason M. Barnett, Executive Vice President, General Counsel and Assistant Secretary of Reckson Associates Realty Corp.; and C. Evan Stewart, of Brown Raysman LLP. Borovina and Burton T. Ryan, Jr., Assistant U.S. Attorney for the Eastern District of New York, were the program co-chairs. The program was very favorably evaluated by those in attendance, with 100 percent of the attendees rating the program as "Excellent" or "Good."

In addition to extending a special thanks to Borovina and the members of the Central Islip U.S. Courthouse Committee for their work in organizing this event, the trustees and staff of the Federal Bar Council also wish to extend their appreciation to Peter Ausili, Law Clerk to the Hon. Leonard D. Wexler, and Eileen Dorrian, Anton Borovina's assistant, for their efforts in helping to insure the success of both the reception and CLE program.

FBC News

Reception Honors Magistrate Judges

By Jeanette Redmond

On March 27, the Federal Bar Council hosted a reception at The Union League Club in Manhattan to honor the United States Magistrate Judges in the Second Circuit. The event was co-chaired by Sharon E. Grubin, a former United States Magistrate Judge and current General Counsel of The Metropolitan Opera, and Alan Vinegrad, former law clerk to then-Magistrate Judge Naomi Reice Buchwald, former U.S. Attorney for the Eastern District of New York, and now a partner at Covington & Burling.

At the reception, attended by over 200 members of the bench and bar, President Gerald Walpin noted how very much things had changed since he was an Assistant U.S. Attorney many years ago when there were no magistrate judges. Until the enactment of the Federal Magistrate Act, the United States Commissioners (as they were then called) generally kept their own records, had no clerical staff and were not reimbursed for transportation or phone service. Moreover, United States Commissioners were not required to be members of the bar and included among their numbers editors, real estate brokers, insurance agents, miners, photographers, physicians, chiropractors and housewives.

Of the 45 magistrate judges now in the Second Circuit (a number that has grown from 13 in 1980, after the Federal Magistrate Act was passed), Walpin stated, "[W]e, as members of the Second Circuit bar . . . have seen first hand the crucial job our magistrate judges do in each of the cases in which we are fortunate to appear before them, resulting in moving our cases on, by their doing justice." He told the magistrate judges, "Often what you do is unsung. We decided on this evening's honoring of

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Photo Courtesy Rick Kopstein

Chief Magistrate Judge Ronald L. Ellis and FBC President Gerald Walpin

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U.S. Magistrate Judges as long overdue and very appropriate. We thank you for your service to our courts, to our society and to the members of the bar."

Former Magistrate Judge Grubin, echoing Walpin's remarks, commented that a large part of the role magistrate judges play is that they are able to get to the real issue in a case, which is often not what the parties have presented it to be in the heat of litigation, by being able to give the parties more time than the district judges generally have available and to work with the parties out of the spotlight. In this way they achieve, more than is known, resolution of many matters, or at least a narrowing of issues. "Because of the quietness with which this is generally accomplished, though, they are more publicly unsung than they should be. Hopefully, tonight's event will help to ameliorate that in, still in only a small way, offering the bar's gratitude and recognition for the magistrate judges' huge accomplishments in cases every day."

Vinegrad commented that the Second Circuit's magistrate judges play "an indispensable and invaluable part in our federal judicial system." He pointed out that they handle tens of thousands of motions and settlement conferences every year, as well as thousands of pre-trial criminal proceedings.

The Council was privileged to have in attendance more than half of the Second Circuit's magistrate judges, including the Honorable Jerome J. Niedermeier from the District of Vermont. Each of the 45 Second Circuit magistrate judges honored received a small memento — a slim, silver bookmark with a burgundy tassel — with the inscription, "For Dedicated Service as a United States Magistrate Judge." Chief Magistrate Judge Ronald L. Ellis of the Southern District of New York accepted the mementos on behalf of his colleagues on the bench. After thanking his wife, Judge Ellis thanked the district judges with whom he and his fellow magistrate judges work so very closely. Chief Magistrate Judge Ellis stated that he was "proud to be a part of the group" of magistrate judges and observed that it helps every now and then to know that the "hard work and the dedication are appreciated."

Reflections

From The Bench To ADR

By Hon. Stanley S. Harris (Ret.)

I was a most contented Washington lawyer in 1970 during my 17th year at Hogan & Hartson, a well-compensated and intellectually-stimulated partner with no intention or even thought of leaving the firm (indeed, I had declined multiple offers to work elsewhere). Nor had the idea of becoming a judge ever crossed my mind. Then, that year, Congress, in the exercise of its plenary Constitutional authority over the District of Columbia, passed a massive Court Reorganization Act. The legislation created a new Superior Court of the District of Columbia, made the existing District of Columbia Court of Appeals the highest court in the jurisdiction, and transferred to the new court system much of the "local" civil and criminal jurisdiction that quite uniquely had been vested in the U.S. District Court for the District of Columbia.

The legislation in part provided for the selection of 15 judges for the new and enlarged trial court. As a then-relatively young (42) partner in a major firm, I was recruited by the Nixon Administration to fill one of those posts. I declined the offer with thanks a number of times, since I was happy where I was and also was somewhat unwilling to take a large income reduction. In the end, however, I succumbed to both the entreaties that were made and an innate feeling that one should not decline a request to enter public service. I was nominated by the president, confirmed by the Senate and became a judge on the new Article I Superior Court in January 1971. A year-and-a-half later, pursuant to another nomination and confirmation, I became a member of the District of Columbia Court of Appeals.

District Judgeship

In 1982, with three sons sneaking up on college age (and a wife who then was still a stay-at-home mom), I began to think of returning to private practice. Then, out of the proverbial blue, the Reagan Administration asked me to become the United States Attorney for the District of Columbia. I agreed to undertake that job, which proved to be fascinating. The following year, I was offered a judgeship on the U.S. District Court for the District of Columbia, where I remained for more than 17 rewarding years.

Most readers have heard of the Chief Justice's frequent expression of appreciation for the many older judges who "work for nothing" and contribute so much to the ability of the Article III court system to handle its caseloads. A brief explanation may be of interest. Article III judges are subject to what is known as "the Rule of 80." That is, when an Article III judge reaches the point at which his or her age (as long as it is at least 65) plus years of service equals 80, he or she may elect to take senior status (permitting a reduced caseload) or to retire, in the latter

eventuality to receive for life (as provided by the Constitution) the salary to which the judge is then entitled. Thus, once that point has been reached, a federal judge's income would be the same (albeit with no future increases) in retirement as it would be continuing to come to the courthouse to work every day.

Federal judges, like all other professionals, inevitably watch those senior to them as their careers progress. Judges, like all others, are subject to a broad range of the inevitable consequences of aging. Many continue long after their eligibility for retirement to serve admirably into their 80s (or occasionally even older), performing invaluable service to their — and often, pursuant to intracircuit or intercircuit assignments, to other — courts. Others, of course, are not so fortunate. When I met the requirements of the Rule of 80 in 1996, I promptly took senior status (as I think judges should, because that creates an opening for an additional judge on the court). I did so in part because I then was the Chair of the Committee on Intercircuit Assignments of the Judicial Conference of the United States, a rewarding but time-consuming responsibility. I served two three-year terms in that position, with the second expiring in 2000. After careful consideration of many factors, I concluded that I would retire in June 2001, which would be nearly five years after I had taken senior status. I gave notice of that intention well in advance, so that I could dispose of virtually all of my pending cases and minimize the additional burden that otherwise would be visited upon my colleagues by a transfer of my remaining cases (and so that the law clerks whom I had hired in advance could still get the benefits of their clerkships).

ADR

Being of what I considered to be sound mind, I felt that, post-judicial retirement, I still wanted to be intellectually and interpersonally stimulated by law in some capacity, but on a part-time basis. Two people who were young associates at Hogan & Hartson when I was there — Curtis von Kann and Harold Himmelman — had joined JAMS, the country's largest ADR company, in Washington, D.C. After considering it, I agreed to become a JAMS neutral following my departure from the district court.

My sole misjudgment was in underestimating the extent to which a well-functioning former federal judge would be in demand, particularly for arbitration, as well as for mediation, and, somewhat to my surprise, independent evaluations of potential or pending cases through some variation of a moot court presentation. Never good at saying no, I soon found myself considerably busier than I had anticipated when undertaking the newest phase of my career. All of the cases that I was selected to handle (most as a sole arbitrator) have involved very significant amounts of money, have been stimulating, and consistently have had parties represented by first-rate lawyers. The cases essentially have been equivalent to the bench trials that I had handled for many years, with several notable exceptions:

- there is a degree of intimacy and informality with respect to counsel, parties and witnesses that I find to be a welcome change from the necessarily "proper" atmosphere of the courtroom;
- the parties (obviously through counsel) basically control the process and now in a real sense are my clients;
- the procedural aspects of a proceeding are considerably more simple, with significantly less delay and expense; and
- more creative solutions and results often can be achieved.

Do I miss the court and its appurtenances? Assuredly, in some respects I do. I miss the collegiality I shared with my former judicial colleagues. I miss the enjoyable and stimulating succession of talented young people who pass through judges' lives as their law clerks (surely one of the legal profession's great relationships). And, certainly, a federal judgeship is a prestigious and rewarding occupation from which great satisfaction is derived as one strives always to render "equal justice to all."

Are there things I don't miss? Equally assuredly, yes. Seemingly petty, but nonetheless significant among them, was the daily commute to and from the courthouse in the Washington area's dreadful traffic. Not missed too are such things as worrying about jurors' hearing things they shouldn't; sweating out deliberating juries, hoping each jury would do a good job; sentencings; revocation of supervised release hearings for recidivist defendants; the regrettably reduced civility reflected by a significant portion of the bar; all too repetitive drug trials; and, hard though it may be to believe, potential judicial review of every ruling.

Judicial Review

The absence of the judicial review to which I had become accustomed as a trial judge (although some review is possible in arbitrations under JAMS' Optional Appeal Procedure and the Federal Arbitration Act, and arbitrators are bound by ethical guidelines) has in no way reduced my goal of reaching the correct result in every case. Assuredly no cases are 100 percent one way and 0

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percent the other. Many present very close calls, and under JAMS' rules "a concise written statement of reasons" must be prepared in resolving a dispute in arbitration. That, however, is a far cry from writing the findings of fact and conclusions of law required by the Federal Rules of Civil Procedure. While a judge, I was — as would be expected — hopelessly dependent upon my law clerks for research. I confess that concerned me before I actually entered the arbitration field. Once I did, I learned that counsel regularly provide arbitrators with copies of those court opinions that they wish to be considered. That, of course, is enormously helpful, as well as being quite cost-effective for the parties.

The ADR field also has inherent flexibility. For example, a few months ago I had bilateral knee replacement surgeries. I was able to turn off the spigot on new cases and complete work on all pending matters before entering the hospital. Had I still been on my former court, I would have been greatly concerned about the inevitable delays to my litigants resulting from such a situation. In my present world, no one (but me and my ever-supportive wife) was discommoded. Also, it has been a pleasure to get to know so many fine lawyers, working with them outside of the relative sterility of the courtroom.

All in all, while I am grateful for, and truly have enjoyed, each of the varied prior phases of my career, I am finding the newest — and sixth — stage to be an ideal way to wind down while still serving as a meaningfully contributing member of our profession, simultaneously having a welcomed degree of flexibility. Like most of the other former judges whom I know, my transition into the ADR field has been a smooth, rewarding one.

In The Circuit

School's In Session At Court

By Stephen Young

Karl Bruckner, a teacher at Morris High School in The Bronx, was ecstatic. He thought it was the best class trip he had ever supervised in his teaching career. He was talking about a recent visit he and his students had made to the Brooklyn courtroom of District Judge Frederic Block. A mob trial was taking place. Conversations the students may have thought were limited to cable television dramas were happening in real time, in a real court of law, with real people facing the threat of severe penalties. Instead of playing wiretap conversations solely for juror headphones, they were played out loud so the students could hear them — courtesy of a civic-minded judge eager to show young people the workings of a real trial.

Court Visits

Welcome to the Court Visits Program — a joint effort of the Federal Bar Council Public Service Committee, the Justice Resource Center and the courts of the Second Circuit. Begun over two years ago, but truncated last academic year because of 9/11, the program has since soared. During the 2002-2003 school year, 33 high school classes totaling well in excess of 800 New York City students have met with 30 district and magistrate judges of the Southern and Eastern Districts in their courtrooms or chambers for a private tutoring session about American justice, followed by their witnessing testimony in on-going trials. Each class is accompanied by a volunteer attorney recruited by the Public Service Committee, whose presence helps guide the discussions and who serves as a resource to answer the students' questions.

The three entities responsible for the program are a felicitous troika of shared interests. From the vantage point of the judiciary, Chief Circuit Judge John M. Walker, Jr. has made it a hallmark of his stewardship to demystify the federal courts here by encouraging the public — and especially young people — to become familiar with them. The task of overseeing efforts to achieve this objective was assigned to the Circuit Public Affairs Committee, created in 2001, which consists of both circuit and district judges. The chief judge chairs the committee himself, and is accompanied by Judges Robert D. Sack and Robert Katzmann from the court of appeals, and Judges Shira Scheindlin from the Southern District and John Gleeson and Nicholas Garaufis from the Eastern District. This committee assumed responsibility for the Courts Visit Program in the spring of 2001, after it had been initiated and nurtured within the court system by Southern District Judge Denny Chin, who remains an enthusiastic participant. Judge Chin and Anthony Radice of Morrison Foerster had co-chaired a Court Visits Subcommittee of the Public Service Committee, which had originally conceived the program.

The PSC Committee

The Public Service Committee of the Federal Bar Council was established in 1989 to encourage federal practitioners to become involved in community affairs. Under the spirited chairmanship for the last two and one-half years of Richard Rothman, Anthony Radice and Barbara

Nichols, the committee not only has gotten members of the bar personally involved, but also has secured grants from the CSFB Foundation Trust to support the Justice Resource Center's activities in the program. Said Rothman, "We embarked on the Court Visits Program in the fall of 2000 with the goal of giving public school kids a positive introduction to the judicial system by enabling them to meet and spend time with federal judges and thereby put a human face on, and gain a healthy understanding of, our federal system of justice as they saw it in action."

MENTOR involves students being paired with law firms for training in such areas as moot court and mock trials.

The Justice Resource Center is a unique New York institution. It is a Sec. 501(c)(3) not-for-profit organization that develops and implements law-related projects in the public schools. Perhaps most outstanding is its MENTOR program, founded in the early 1980s by the Federal Bar Council, which the JRC now co-sponsors with the New York City Department of Education. MENTOR involves students being paired with law firms for training in such areas as moot court and mock trials. Because of this link, JRC was a natural to become involved at the very outset of the Court Visits Program, and ever since has provided the crucial link to the City's public high schools. Its Executive Director, Debra Lesser, is a ubiquitous presence in the development of such programs. "The partnership between these legal and educational institutions has enabled the school age population to be involved with law-related programs and allows students to gain a heightened respect for law," explained Lesser. The CSFB grant made possible the services this academic year of coordinator Lana Ebnet, a graduate student at John Jay College of CUNY, who has been sorting out the myriad details associated with each visit under the program.

Law Day Observed

The success of the Courts Visits Program has encouraged the development of additional programs this year that introduce children to the federal courts. One new initiative is a Law Day observance in the Moynihan and Marshall Courthouses, where none had existed. On the morning of May 1, 2003, more than 100 high school students converged in the Moynihan building's ceremonial courtroom. They represented seven schools, including five public ones whose participation had been secured by the Justice Resource Center. Also present were 16 attorneys recruited by the Public Service Committee. Especially for the occasion, a court of appeals argument, *Bronx Legal Services v. Legal Services Corp.*, was held down the block from its usual venue. Thereafter, District Judge Harold Baer, Jr. delivered a scholarly address on the Law Day theme of the American Bar Association, "Celebrate Your Freedom — Independent Courts Protect Our Liberties." Summoning several historical examples in which judges of the federal courts were subject to enormous external pressures while fashioning their decisions, Judge Baer tried to impress upon his youthful listeners the notion that each of us must exercise constant vigilance to assure liberty and an independent judiciary.

Immediately following Judge Baer's remarks, the students split up into groups to visit ten circuit and district judges in the Moynihan and Thurgood Marshall courthouses. These jurists had agreed to hold follow-up discussions with the students to build upon all they had heard earlier in the program. The various volunteer attorneys accompanied the groups — among them some young associates thrilled just to have the opportunity to visit the courthouses, let alone have a private session with a federal judge!

In February of this year, the Circuit Public Affairs Committee approved two new pilot programs, further extending its welcome to young visitors in conjunction with its Federal Bar Council and Justice Resource Center partners. One, called Justice Days, reaches down to the secondary school level. The other, called Classroom in the Courthouse, is for high school students. An inaugural effort was organized on February 14 by Jim Walden of O'Melveny & Myers at the Brooklyn courthouse for Brandeis High School students. It featured speakers from several law enforcement vocations as well as participation from the bench by District Judge Sterling Johnson, Jr. and Magistrate Judge Robert M. Levy. Following that program, the concept was revised to include a seminar-like program with a judge. The first Justice Days effort in this mold occurred May 12, when Southern District Magistrate Judge Michael H. Dolinger led the discussion with 8th graders from P.S. 122, in Queens. The students had prepared a number of reports on topics of public interest, such as drug addiction, underage drinking, tobacco use and traffic congestion. They, two attorneys from Cahill Gordon (Victoria Schnure and Scott Walker) and the judge used their time in courtroom 6A to determine which of these problems might properly become the subject of

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federal litigation, and if so, how this could come about.

Justice Days

Two other Justice Days complete the pilot effort, both with fifth grade classes: May 21, with Magistrate Judge Debra Freeman emphasizing civil cases and drawing on studies about due process with pupils from P.S. 85 in Queens, and May 28, with Magistrate Judge Gabriel W. Gorenstein considering federal criminal cases with children from P.S. 122, in Queens.

Meantime, in the Classroom in the Courthouse effort, Court of International Trade Chief Judge Gregory W. Carman held a seminar on May 16 for Midwood High School students on the role of the federal courts in resolving disputes in our society. On May 20, Circuit Judge Robert D. Sack held forth with a class of Stuyvesant High School students on the procedures the court of appeals uses in considering and deciding cases brought to its docket. As with the program for the lower grades, the seminars are intended to be based on concepts the students have been studying in their classes, allowing the judge — in the role of teacher — to elaborate upon, rather than initiate, topics for examination.

In years past, many judges in the Second Circuit have graciously devoted their time and effort to hosting various student groups. But this was done on an ad hoc basis, which tended to limit the number of youngsters who might benefit. Now, with a series of regular programs in place, managed by specific entities as part of their missions, the federal courts here should be a familiar venue for large numbers of young people every year.

Editor's note: The author is Assistant Circuit Executive for Public Affairs.

FBC News

Fourth Annual Fall Bench & Bar Retreat

By Jeanette Redmond

The Federal Bar Council will hold its Fourth Annual Fall Bench & Bar Retreat at the Saybrook Point Inn & Spa in Old Saybrook, Connecticut from Friday, October 17, through Sunday, October 19, 2003. The Fall Bench & Bar Retreat was started as a shorter, closer (in other words, more convenient and less expensive) alternative to the Council's Annual Winter Bench & Bar Conferences, but offers attendees much of the same benefits — opportunities to attend high-quality continuing legal education programs as well as social events designed to facilitate meeting and mingling with new and old friends and colleagues on the bench and bar. We are delighted that Vilia Hayes, a veteran chair of the 2001 Fall Retreat Subcommittee of the Second Circuit Courts Committee, has agreed to chair the 2003 Fall Retreat.

The annual Fall Retreat has quickly become an event that is growing in popularity among our membership: the inaugural Fall Retreat, held at the Doral Forrestal in Princeton, New Jersey in November of 2000, was chaired by Brooks Burdette and had about 38 attendees; the 2001 Fall Retreat was held at the Dolce Heritage in Southbury, Connecticut and had a total of approximately 80 attendees; and last year's Fall Retreat, held at the Hudson Valley Resort & Spa in Kerhonkson, New York, was chaired by Robin Zablow and had about 90 attendees.

This year, the retreat will offer participants the opportunity to attend four CLE programs. Although some of the details regarding the CLE programs are still in progress, Hayes has advised that the subcommittee thus far has settled on the following working titles for the four programs: "Perception and Misperception of Lawyers in the Media," "Judicial Independence," "Thorny Ethical Issues in Litigation" and "Punitive Damages After State Farm v. Campbell." The programs will offer attendees a total of six CLE credits over the weekend.

Judicial Participants

Judicial participants will include: the Honorable Dennis Jacobs, U.S. Circuit Judge, U.S. Court of Appeals for the Second Circuit, the Honorable Edward R. Korman, Chief Judge, U.S. District Court for the Eastern District of New York, the Honorable Janet Bond Arterton, U.S. District Judge for the District of Connecticut, the Honorable Richard M. Berman, U.S. District Judge for the Southern District of New York, the Honorable Charles L. Brieant, U.S. District Judge for the Southern District of New York, the Honorable Victor Marrero, U.S. District Judge for the Southern District of New York, and the Honorable Shira A. Scheindlin, U.S. District Judge for the Southern District of New York.

We hope you will join us in October for what is certain to be yet another successful and very interesting event. Registration forms and additional information regarding the 2003 Fall Retreat will be mailed in June. You may also obtain a registration form by calling the Federal Bar Council at (212) 883-1777 or sending us an e-mail at federalbar@federalbarcouncil.com Details also will be posted at the Council's Web site: www.federalbarcouncil.org.

Enemy Combatants

Habeas Corpus Rights Of Detainees

By Bennette Kramer

The issue of how much process is due in connection with habeas corpus petitions brought by detainees labeled "enemy combatants" following 9/11 was addressed recently by Judge Michael Mukasey in the Southern District of New York and by the Fourth Circuit. Although the two courts appear to have reached opposite decisions, the two decisions are based on different facts and their similarities are greater than their differences.

Padilla

In *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) ("Padilla I"), Judge Mukasey held that Padilla's lawyer could pursue the petition as "next friend" to Padilla; the President of the United States is authorized under the Constitution and by law to detain enemy combatants under the circumstances; Padilla may consult with counsel to pursue his habeas petition and submit facts and arguments in support of the petition; and "to resolve the issue of whether Padilla was lawfully detained on the facts present here, the court will examine only whether the President has some evidence to support his finding that Padilla was an enemy combatant." Judge Mukasey rejected the government's two principal arguments that Padilla should not be allowed to consult with counsel and that the evidence the government had submitted was sufficient without more to meet the court's standard requiring "some evidence" to support the president's finding that Padilla was an enemy combatant.

Background

On May 8, 2002, Jose Padilla, a United States citizen, was arrested in Chicago by the Department of Justice on a material witness warrant issued by the Southern District of New York to enforce a subpoena summoning Padilla to testify before a grand jury. Padilla was brought to New York and detained in the custody of the Justice Department at the Metropolitan Correctional Center. When he appeared before the court, Donna R. Newman was appointed to represent him. At that time, Padilla conferred with Newman and moved to vacate the warrant. However, before the court could decide the motion, the government withdrew the warrant and disclosed to the court, ex parte, that the president had designated Padilla an enemy combatant and directed the Secretary of Defense to detain Padilla and transfer him to South Carolina. Newman filed the habeas petition on behalf of Padilla as his "next friend" after learning that she would not be permitted to visit him in South Carolina or speak with him.

Padilla was transferred to the Department of Defense and remains detained pursuant to an order of the president dated June 9, 2002 addressed to the Secretary of Defense, which sets forth the basis of the president's conclusion that Padilla is an enemy combatant: Padilla is "closely associated with al Qaeda," engaged in "hostile and war-like acts" including "preparation for acts of international terrorism" directed at this country, possesses information that would be helpful in preventing al Qaeda attacks, and represents "a continuing, present and grave danger to the national security of the United States." The declaration submitted by the government in opposition to Padilla's habeas petition stated that Padilla had been in prison in Illinois and Florida, and then had moved to Egypt, Saudi Arabia and Afghanistan, and in Afghanistan had plotted with al Qaeda to steal radioactive material within the United States to build and detonate a "dirty bomb."

The Decision

Judge Mukasey permitted Newman to act as Padilla's "next friend" based on her preexisting relationship with him and the acquiescence of his family. The court determined that Defense Secretary Rumsfeld was the proper respondent because the president charged him with detaining Padilla, but dismissed the petition against the president. In addition, Rumsfeld had sent Defense Department personnel into the Southern District to take custody of Padilla, sent him to the brig in South Carolina and continue to detain and interrogate him.

Next, Judge Mukasey concluded that Padilla's detention was lawful because the president had the authority to designate an American citizen captured on American soil as an "enemy combatant" and detain him without trial. The president, in designating Padilla as an "enemy combatant," "necessarily meant that Padilla was an unlawful combatant, acting as an associate of a terrorist organization whose operations do not meet the four criteria necessary to confer lawful combatant status of its members and adherents." Judge Mukasey based his finding that the president had the authority to order detention of an unlawful combatant from the broad Joint Resolution issued by Congress, which authorized the president to use all necessary force to prevent future acts of international

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terrorism against the United States by the organizations or persons who planned 9/11, and from his constitutional authority as Commander-in-Chief.

In opposing Padilla's habeas corpus petition, the government did not contest Padilla's right to bring the petition; however, it maintained that the petition should be decided only on the basis of the facts the government submitted. Judge Mukasey concluded that the language of 18 U.S.C. §§ 2241 and 2243 (procedures to be followed in a § 2241 case) indicated that:

"Congress intended habeas corpus petitioners to have an opportunity to present and contest facts, and courts have the flexibility to permit them to do so under proper safeguards. Padilla's need to consult with a lawyer to help him do what the statute permits him to do is obvious."

Judge Mukasey exercised discretion under the All Writs Act to direct that the government permit Padilla to consult with counsel to aid him to respond to the government's contentions.

In opposition, the government argued that the detention of enemy combatants had two main purposes, gathering intelligence about the enemy and preventing the detainee from aiding in further attacks, and affording Padilla access to counsel would jeopardize these goals. In response, the court stated that the Sixth Amendment would require any member of al Qaeda facing trial access to counsel; the government's arguments concerning the transmission of information were based on conjecture; Padilla had already met with counsel prior to his transfer to the Department of Defense; Padilla's contacts with counsel could be monitored by the government; and Padilla's lawyers were known to the court and had always conducted themselves as officers of the court.

Finally, Judge Mukasey noted that the president's determination that Padilla was an "enemy combatant" was due considerable deference, and that he had both constitutional and statutory authority to exercise his powers of Commander-in-Chief, "including the power to detain unlawful combatants, and it matters not that Padilla is a United States citizen captured on United States soil." Indeed, Judge Mukasey concluded, in his decision to detain Padilla as an unlawful combatant, the president was "operating at maximum authority, under both the Constitution and the Joint Resolution."

Judge Mukasey directed the government and counsel for Padilla to discuss and arrange the conditions for counsel's consultation with Padilla.

Padilla II

Following Padilla I, the government refused to work out conditions and made a motion for reconsideration of Judge Mukasey's December 4, 2002 opinion and order. In an opinion and order dated March 11, 2003, in *Padilla v. Rumsfeld*, 243 F.Supp.2d 42 ("Padilla II"), Judge Mukasey reiterated his direction to the government to consult with counsel for Padilla and attempt to agree on conditions under which Padilla could consult with counsel and submit facts in support of his habeas corpus petition in response to the government.

The government continued to refuse to consult with Padilla's counsel and notified Judge Mukasey by letter "that there were no conditions to which it could agree," and reiterated its previously expressed view that "such consultation could endanger national security and prevent effective interrogation of Padilla." In light of the government's continued refusal to even discuss allowing Padilla access to counsel, Judge Mukasey granted the government's motion to certify the controlling questions of law to the Second Circuit as the "more straightforward course." The questions Judge Mukasey certified are:

1. Is the Secretary of Defense, Donald Rumsfeld, a proper respondent in this case?
2. Does this court have personal jurisdiction over Secretary Rumsfeld?
3. Does the president have the authority to designate as an enemy combatant an American citizen captured within the United States, and, through the Secretary of Defense, to detain him for the duration of armed conflict with al Qaeda?
4. What burden must the government meet to detain petitioner as an enemy combatant?
5. Does petitioner have the right to present facts in support of his habeas corpus petition?
6. Was it a proper exercise of this court's discretion and its authority under the All Writs Act to direct that petitioner be afforded access to counsel for the purpose of presenting facts in support of his petition?

Hamdi

In *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), the Fourth Circuit held that the government's submission in opposition to Yaser Esam Hamdi's habeas corpus petition was sufficient to support Hamdi's detention, stating:

"Because it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, we hold that the submitted declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the

United States Constitution. No further factual inquiry is necessary or proper, and we remand the case with directions to dismiss the petition."

The key difference between the facts underlying *Hamdi* and *Padilla* is that, according to the government, Hamdi, an American citizen, was captured when his Taliban unit surrendered to Northern Alliance forces in Northern Afghanistan, and he possessed an AK-47 rifle at the time of surrender. Hamdi was transported to prison in Afghanistan, moved around in Afghanistan, then sent to Guantanamo Bay and eventually to the Norfolk Naval Brig in Virginia. According to the government affidavit, Hamdi confirmed details of his capture and his status as an enemy combatant. Basing its decision on the "unchallenged fact that Hamdi was captured in a zone factive combat operations abroad," the Fourth Circuit determined that Hamdi was not entitled to challenge the facts presented by the government. The Fourth Circuit stated:

"[F]urther judicial inquiry is unwarranted when the government has responded to the petition by setting forth factual assertions which would establish a legally valid basis for the petitioner's detention. Because these circumstances are present here, Hamdi is not entitled to habeas relief on this basis."

The Fourth Circuit distinguished the situation in *Padilla*:

"We have no occasion, for example to address the designation as an enemy combatant of an American citizen captured on American soil or the role that counsel might play in such a proceeding. See, e.g., Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002). We shall in fact go no further in this case than the specific context before us — that of the undisputed detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces."

Judge Mukasey took pains to distinguish the factual circumstances underlying *Hamdi* from those present in *Padilla* in his December 4, 2002 decision, stating:

"I do not believe that the decision in *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002), alters the balance in the government's favor. In that case, the Court of Appeals for the Fourth Circuit reversed the order of a district court directing the government to permit unmonitored access by counsel to a detainee captured in Afghanistan and held at a Navy brig in Norfolk, Virginia. The order was rendered without benefit of briefing or argument, and with little indication in the order (or elsewhere in the record for that matter) that the court gave proper weight to national security concerns.

"According to the Fourth Circuit, '[t]he peremptory nature of the [district court's] proceedings st[ood] in contrast to the significance of the issues before the court.' Id. No such access is to be granted here, and the court has had the full benefit of the government's submissions, both sealed and unsealed. Further, Padilla's situation appears to differ from Hamdi's in that he had access to counsel after his capture but before his designation as an enemy combatant, and thus no potential prophylactic effect of an order barring access by counsel could have been lost."

In Padilla II, Judge Mukasey again emphasized that the Fourth Circuit based its conclusion that Hamdi was lawfully detained on the government's establishment of a valid basis for Hamdi's detention:

"The Court in *Hamdi* took pains to point out that its holding was limited to 'the specific context before us — that of the undisputed detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces.' Hamdi, 316 F.3d at 465. That wise restraint is well worth following in this case by recognizing explicitly the limits of the current holding, and thereby recognizing as well the contrast between this case and Hamdi. Unlike Hamdi, Padilla was detained in this country, and initially by law enforcement officers pursuant to a material witness warrant. He was not captured on a foreign battlefield by soldiers in combat. The prospect of courts second-guessing battlefield decisions, which they have resolutely refused to do, . . . does not loom in this case."

Second Circuit Decisions

Apprendi Claims After *Coleman*

By Elizabeth Cronin and Noelle Stern

In *Apprendi*, the U.S. Supreme 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 the jury, and proved beyond a reasonable doubt." Although *Apprendi* itself dealt with the enhancement of a sentence for weapons possession by a judge because it was bias-related, petitioners quickly came to rely on *Apprendi* to challenge their federal convictions for drug crimes where evidence of quantity had either not been charged in the indictment or had not been submitted to a jury. This was true whether there was a plea of guilty or conviction after trial.

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One of the questions that developed after the *Apprendi* decision was issued was whether it applied retroactively. Under the gatekeeping provisions of AEDPA, until the U.S. Supreme Court rules that *Apprendi* can be applied retroactively to cases on collateral review, it cannot be raised in a second or successive application.

In 2001, the Second Circuit held, in *United States v. Thomas*, that *Apprendi* may be retroactively applied to a direct appeal if it was pending prior to the issuance of *Apprendi*. The stickier issue was whether the circuit court would find that it applied retroactively to cases on collateral review. Of course, even assuming that *Apprendi* was found to apply to cases on collateral review, there would be no *Apprendi* error if the sentence was below the statutory maximum, as the court had stated in *United States v. Garcia* and *United States v. White*.

In 2001, the Second Circuit ruled, in *Forbes v. United States*, that *Apprendi* claims could not be raised in successive habeas petitions because the Supreme Court had not determined that it could be applied retroactively to cases on collateral review. But *Forbes* left open the question of how it applied to first habeas petitions. Other cases that were considering the issue were disposed of on procedural grounds without reaching the ultimate issue, and so the issue remained unsettled until last month.

On May 7, the Second Circuit issued an important decision, *Coleman v. United States*, which held that the Supreme Court ruling in *Apprendi* does not apply retroactively to first 28 U.S.C. § 2255 motions for habeas corpus relief, joining every other circuit that has addressed the issue.

Section 2255 Motion

The petitioner had filed a first § 2255 motion and argued that his sentence violated *Apprendi* because it was based upon the sentencing court's finding of a quantity of cocaine base by a preponderance of the evidence. The Second Circuit held in *Coleman*, first, that under the 1989 Supreme Court decision *Teague v. Lane*, *Apprendi* is a new rule of law because prior to *Apprendi*, every circuit that had considered the issue had found that quantity of drugs in a 21 U.S.C. § 841 offense was simply a sentencing factor that did not need to be included in the indictment or submitted to the jury.

However favorable the first part of the holding may have seemed to petitioners, the circuit court then found that *Apprendi* does not apply retroactively on collateral review. In its holding, the appellate court held that although new rules of substantive law apply retroactively, new rules of procedural law, with two narrow exceptions, do not. The court stated that *Apprendi* announced a procedural rule, relying on the fact that in *Apprendi*, the Supreme Court defined the dispute and articulated the holding in procedural terms. *Apprendi* did "not determine which facts are 'elements' of a crime nor refer to any substantive norms. . . . It does not concern that scope of the criminal statutes, the relationship between the defendant's conduct and the severity of punishment, nor anything else of substantive import."

Coleman argued that it was a substantive rule because it made drug quantity an element of a § 841 offense rather than a sentencing factor. In rejecting this argument, the court stated that, in prior cases interpreting *Apprendi*, when it had stated that drug quantity was an "element" of a § 841 offense, the court had "meant only that it must be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt." Essentially, the substance of the crime remains the same — it is only the trier of fact and standard of proof that have changed.

The court also found that the rule announced in *Apprendi* did not fall within one of the two exceptions allowing the retroactive application of new procedural rules, specifically that *Apprendi* was not a new watershed rule of criminal procedure, necessary to the fundamental fairness of a criminal proceeding. Unlike in cases such as *Gideon v. Wainwright*, *Apprendi* only applied to the right to a jury trial, and the government's burden of proof beyond a reasonable doubt only applied to "facts that are not formally defined as 'elements' by criminal statute but are nonetheless 'the functional equivalent of elements.'"

In a concurring opinion, Judge B.D. Parker found Coleman's *Apprendi* claim to be meritless, but concluded that *Apprendi* did create a substantive change in the law that must apply retroactively. Judge Parker explained that *Apprendi* resulted in redefining what constitutes an element of a crime and that while "the possession of an undetermined quantity of cocaine base is still a crime, it is, after *Apprendi*, a different crime from the possession of a determined quantity."

The bottom line is that the series of opinions issued by the Second Circuit over the last two years have defined and limited the parameters of *Apprendi*, and, most importantly, have clarified its applicability. While there are a few outstanding questions, such as whether *Apprendi* claims may be brought in a 28 U.S.C. §2241 petition, for the most part the *Apprendi* storm should be over.

Editor's note: Elizabeth Cronin is

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Legal Practice

The Attorney-Client Relationship After Sarbanes-Oxley

By Diana D. Parker

Section 307 of the Sarbanes-Oxley Act of 2002 required the Securities and Exchange Commission to begin federal government regulation of attorneys. In January 2003, the SEC adopted certain final rules (effective August 5) and published other revised proposed rules setting standards of professional conduct for attorneys who appear and practice before the Commission on behalf of issuers, including the right of such attorneys to waive the attorney-client privilege in the absence of any such waiver by the client. The SEC has acknowledged that its proposed rules go beyond that "required" by Sarbanes-Oxley, enthusiastically embracing its new role as the federal government's arbiter of the professional conduct of its adversaries and other attorneys who appear before it. Indeed, in spite of the lack of legislative authority for many of the rules, the first section states, "Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern." The SEC also has provided that, "An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices." Whether state disciplinary boards will agree is yet to be seen.

This article addresses the effects of these new rules on attorney-client relationships between public corporations and their outside counsel. In sum, although Section 307 contains no indication that Congress intended that the SEC enact rules dictating when an attorney must terminate an attorney-client relationship, the SEC has done so; although Section 307 contains no indication that Congress intended that the SEC enact rules providing for the waiver of the attorney-client privilege, the SEC has done so.

The Rules

The SEC apparently believes that officers and employees of public corporations always tell outside counsel "the truth" about every event in a corporation's life, and that outside counsel is able to assess that "truth" in the same light as the SEC and a future judge or jury would. Even if that were ever true — and it never was — the SEC's new rules make it likely that outside counsel for public corporations will know less in the future about their clients' conduct than ever before.

In order to protect themselves from liability under the Sarbanes-Oxley Act and its implementing regulations, outside counsel must at a minimum investigate information they receive from any source concerning a violation of the securities laws, a breach of fiduciary duty, or a violation of undefined "similar" state and federal laws, whether related to the scope of the representation or not. Outside counsel must then determine whether their investigations have resulted in "credible" evidence of a "material" violation. Outside counsel's assessment of possible violations must take into consideration that their judgments may be reviewed not just by their clients but also, with the benefit of hindsight, likely by others, including very possibly their adversaries at the SEC, which can seek penalties against counsel for an incorrect assessment.

Attorneys who find "material" evidence must report their findings at least to the chief legal officer of the company. The chief legal officer then must cause an "appropriate" inquiry to be made. Agreeing with outside counsel's conclusion that credible evidence of a material violation exists raises further issues. Outside counsel must evaluate whether the client's response is "appropriate" and taken within a "reasonable" time, and that includes public disclosure, unless the violation is not ongoing and has no ongoing effect, including on past public filings. While the rules require outside counsel to determine whether the client has "substantially implemented" remedial recommendations or may assert a colorable defense, the rules appear to be silent on how or for how long outside counsel must monitor the client's response.

If the client rejects outside counsel's advice, its chief legal officer must notify outside counsel, giving reasons. The chief legal officer must defend that decision by demonstrating a "reasonable" belief that no material violation has occurred, is ongoing or is about to occur or that "appropriate" steps have been taken or will be taken to remedy the violation within a "reasonable" time.

Under Sections 205.3(b)(3) and (9), if outside counsel "reasonably believes" that their advice concerning a material violation has not been heeded or not heeded within a "reasonable" time or by an "appropriate" response, outside

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counsel must then report the possible violation to the board of directors or an appropriate committee thereof. Alternative Proposed Sections 205.3(d)(1) and (2) provide that if counsel reporting under paragraph (b) continues to believe that advice has not been heeded within a "reasonable" time or by an "appropriate" response concerning an ongoing or future violation or a past violation that has an ongoing effect, including on past filings, and is likely to result in "substantial" injury to the company or investors, outside counsel must resign in writing stating the reason for the resignation, unless prevented from doing so by a court or similar order. With this resignation rule alone, the government will dictate the very existence of the attorney-client relationship. Nothing in Section 307 indicates any intent by Congress that the SEC enact rules mandating under what circumstances attorneys are required to resign.

When the rules have required outside counsel to resign, the corporation will simultaneously have had to seek new outside counsel, a task made considerably more difficult by these new rules. Even if potential new counsel failed to question the reason for the change in representation, Alternative Proposed Section 205.3(d)(4) of these new rules require the corporation to notify any new attorney that the prior attorney resigned because of the requirements imposed by these rules.

The revised proposed rules adopt the idea that notification to the SEC by the issuer that outside counsel has resigned — instead of notification by that attorney, as previously proposed — is a significant change. While it is true that outside counsel's notice of withdrawal to a client is not a waiver of the attorney-client privilege, Alternative Proposed Sections 205.3(d)(1)(A) and (B)(2) and (e)) dictate the statement that must be made by outside counsel to the client upon withdrawal and by the client to the SEC, requiring disclosure that withdrawal has been made pursuant to the new rules and the related circumstances. This notification, with disclosure of the "circumstances related thereto," alone discloses much, beginning the process of unwinding the privilege, and the SEC rules do not claim that this notification is not a waiver of the privilege. Nothing in Section 307 indicates any intent by Congress that the SEC enact rules mandating under what circumstances — if any at all — the attorney-client privilege should be waived.

In two situations the subsection (b) reporting and withdrawal requirements do not apply to outside counsel aware of credible evidence of a material violation. First, the reporting and withdrawal requirements do not apply when the credible evidence of a material violation was discovered by in-house or other counsel and the chief legal officer only then retained outside counsel to investigate that evidence, if that counsel reports the results of that investigation to the chief legal officer and (1) they report credible evidence of a material violation to the board of directors or an appropriate committee thereof, or (2) the outside counsel was retained to assert a colorable defense and the board or an appropriate committee thereof is provided with "reasonable and timely" reports. Even under this rule, outside counsel will apparently have to be careful not to discover a violation other than the one that they were retained to investigate, since such a discovery would appear to place that outside counsel back in the subsection (b) category.

Second, public companies may establish "Qualified Legal Compliance Committees." In the event that a company has established a QLCC, outside counsel who reports evidence of a material violation to such a committee is not required to withdraw as counsel, and the company therefore has no withdrawal to report to the SEC. In fact, outside counsel who reports to a QLCC is not even required to assess the company's response to legal advice concerning the "appropriateness" of a remedy of the violation. Thus, while the SEC's proposed rules contain no explanation for the difference between reporting a material violation to the board of directors and reporting such a violation to a QLCC — comprised of members of the board — establishing a QLCC is a "no-brainer." Indeed, outside couns conducting internal investigations would be well advised to accept representation only of public corporations that have established QLCCs, since the establishment of such a committee after the retention of outside counsel to investigate a possible violation is unavailing under the rules.

However, regardless of whether reporting and withdrawal requirements apply to outside counsel, and regardless of whether the client agrees to waive the attorney-client privilege, the proposed rules permit outside counsel to waive the privilege under a variety of circumstances. Outside counsel may disclose privileged communications to the SEC to prevent a company from committing a material violation likely to result in substantial injury to the company or investors, perjury, or fraud on the SEC or to rectify similar consequences of violations in which the attorney's servic were used or to defend against charges against counsel.

The Present

As every practicing attorney knows, lawyers have a great deal of difficulty persuading their clients to confide sufficient facts for their attorneys adequately to advise and represent them. However, at present, attorneys have a number of tools with which to achieve that objective. First and foremost, of course, is building a trusting relationship in which the client knows that the attorney is loyal to the client — barring ongoing or new illegal activities.

Even when that difficult task has been achieved, outside counsel often threaten to and do resign if clients are not forthcoming with document production or make frivolous excuses as to why their attorneys should not participate in that process. Outside counsel also threaten to and do resign if required disclosure of ongoing fraud is not forthcoming, as required by current rules. Outside counsel often also tell clients under criminal investigation that they will resign if an obstruction charge is added to the indictment concerning clients' actions after their attorneys were retained. In these and other ways, attorneys are able to be zealous advocates for their clients in an adversarial system within the confines of present ethical and legal obligations. Attorneys do not, however, threaten to violate the attorney-client privilege or to take actions that may require the client to do so in order to force clients to follow their advice.

The new rules are not required in order to give most attorneys incentives to compel their clients to comply with the law. A multitude of incentives, including loss of reputation and livelihood, already exist. State disciplinary committees have no duty other than to investigate allegations of misconduct by attorneys. Federal courts may also suspend an attorney from practice. And, of course, federal criminal statutes include obstruction and misprision of a felony, among other possible charges. Few attorneys are willing to subject themselves to these penalties for the benefit of a client. Undoubtedly for this reason, no outside counsel, and few attorneys at all, have even been alleged to have been involved in the criminal conduct of recent corporate scandals that gave rise to Sarbanes-Oxley.

The current system enables in-house counsel routinely to retain outside counsel to conduct internal investigations in order to insure objectivity and distance that in-house counsel may not have. Outside counsel investigate allegations in order to determine whether they have any merit and to chart a remedial course, in consultation with their clients, without the expectation of Monday-morning quarterbacking from prospective and current adversaries. The vast majority of attorneys conducting such investigations have historically reported substantiated allegations to both the chief legal officer of the corporation and the Board of Directors. The chief legal officer and the Board often decide to report serious wrongdoing to the appropriate authorities. In the past 10 years, Department of Justice policies have more frequently compelled public corporations then voluntarily to waive the attorney-client privilege — at least to the extent of sharing internal investigations with law enforcement — even when the corporations themselves are under investigation.

Notwithstanding this erosion of the previous inviolability of the privilege, the advantages of this system to the public and to public corporations are numerous. But the system cannot work unless the client knows that its counsel has no conflict of interest — absent ongoing crimes that a client ignores even after receiving legal counsel.

The Future

The primary immediate effect of the new rules will be to require outside counsel in the future — beginning in August — to advise every public company seeking counsel of that attorney's obligations under Sarbanes-Oxley and its far-reaching implementing regulations. Outside counsel must disclose that they now have the power to waive the attorney-client privilege — even after they have been terminated or have withdrawn as counsel, if they determine that the client has not followed certain advice. Outside counsel must also disclose that in the event they conclude that their advice has not been followed, they may be required to withdraw and that withdrawal may require the client to waive the privilege.

It is indisputable that upon receiving notification of the withdrawal of outside counsel, the SEC must promptly begin an investigation. At this point, the SEC may not know the details of the dispute between the attorney and client — or indeed whether the possible violation is ongoing or historical. Therefore, the SEC is likely to begin its investigation by simultaneously requesting privileged work-product and legal advice from both the attorney and the corporation.

Even if the attorney and/or the corporation were successful in defeating subpoenas, the corporation knows that a failure to cooperate with the SEC by refusing to waive the attorney-client and work-product privilege may be the death knell for the corporation. The Department of Justice may put additional pressure on any corporation that has changed representation or on its former outside

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counsel, particularly when the corporation notified the SEC using the required language from the new rules, including disclosure of the circumstances of outside counsel's withdrawal.

Attorneys must also disclose to their clients that in order for the attorneys to protect themselves from penalties they will be required to take detailed notes both of anything the client tells them and of any advice that the attorney gives — all of which may come into the possession of the government and their clients' competitors and other adversaries. The likelihood of an inquiry into their work, and penalties should the SEC disagree with their conclusions, will compel outside counsel to record everything they are told as well as every speck of advice they give, even though the final rules eliminated written reports as a requirement in recognition of the tension such reports place on the attorney-client relationship. These records of course will be the attorneys' interpretation both of "the facts" and the advice. Knowing from the get-go the conflict of interest created by these rules and the likelihood of a waiver for one reason or another, clients will have simultaneously recorded their versions of "the facts," their interpretations of their attorneys' advice, the actions they took, and their reasons.

Public corporations that change attorneys will be assailed on all fronts — while struggling to find new representation. Class action attorneys as well as competitors will keep a close eye on changes in representations of corporations, immediately seeking this wealth of information using the Freedom of Information Act and other avenues of discovery. Ultimately they may be successful. In that event, it will be no more difficult to predict the effect on the stock of corporations whose outside counsel have resigned than it will be to predict the altered nature of the attorney-client relationship. And if these rules do have unwarranted effects on the stock of public corporations, then the rules would violate the explicit mandate of Congress in Section 307 that such rules must be "in the public interest and for the protection of investors."

These rules are certainly likely to cement the inherent distrust most clients have of their outside counsel from the first meeting, insuring a solid wall between the corporation and the attorney retained to give it advice. That wall will make it significantly more difficult for public companies to share with their attorneys the facts necessary to obtain needed legal advice. The far-reaching effects of the change in the relationship created by the new conflict of interest between attorneys and their clients are impossible to predict or to underestimate. Indeed, it is unlikely that public companies without QLCCs will continue to retain outside counsel to conduct internal investigations, unless the credible evidence of the violation was discovered by in-house counsel alone and outside counsel was retained pursuant to Section 205.3(b)(6). Even then, the possibility that outside counsel will discover information beyond the scope of the representation and thus apparently not covered by the (b)(6) exemption makes the retention of outside counsel risky.

Another immediate effect of the implementing regulations will be to insure significant increases in legal expenses for public companies. Public corporations will have to retain additional counsel to give them second opinions on whether an event is "material" that has been determined by initial outside counsel to be "material"; whether initial outside counsel has given the issuer a "reasonable" time to cure the possible violation; whether the issuer's chief legal officer has a "reasonable" belief that no material violation has occurred, is ongoing or is about to occur; whether steps taken to cure any possible violation are "reasonable;" whether the response by the issuer is "appropriate;" etc.

The public, of course, will bear the expense. The financial expense public corporations will incur to hire lawyers to second-guess other lawyers is an obvious one. The more subtle expense is the further erosion of the adversarial system of justice grounded in the relationship of trust and confidence between attorney and client and the attorney-client privilege, which have served us well.

Developments

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Federal Bar Council President Gerald Walpin introduced Judge Jacobs and presented him with the Learned Hand Award. He noted that there is a unanimity of respect and admiration for Judge Jacobs as a person and as a judge across the entire spectrum of the bar. "His colleagues tell me that disagreements with him are much fun because, while he is persistent, he is never disagreeable," said Walpin.

Lifetime New Yorker

Describing Judge Jacobs' background, Walpin observed that he is a lifetime New Yorker, educated through college in public schools, and that Judge Jacobs obtained a Masters Degree in English Literature at New York University, specializing in Victorian novels. He spent time teaching at Prairie View A&M College in Texas and then went to NYU Law School. After law school, Judge Jacobs spent 20 years at Simpson Thacher & Bartlett before his appointment to the Second Circuit.

Notwithstanding his reputation as a conservative, Judge Jacobs has granted more habeas petitions than any other judge on the Second Circuit, according to Walpin. Judge Jacobs' guiding principal is the integrity and sanctity of our system of justice, Walpin observed. He added that the decisions of Judge Jacobs reflect a strong interest in the rights and worth of individuals.

In presenting the award to Judge Jacobs, Walpin compared him to Learned Hand, of whom Katherine Griffith said in her 1973 biography:

"A common thread ran through his decisions — his deep concern for justice according to the rules as he understood them. This unifying and guiding theme makes it impossible to classify his opinions in the ordinary categories of liberal and conservative and denies the easy ssumption that they reflect his personal predilections. He was liberal in the classic sense of being humane and loving freedom but respectful of the limits of the judicial function, and he was capable of great intellectual detachment, which permitted him to distinguish between his personal and official positions."

In accepting the award, Judge Jacobs quipped: "I am not always enveloped by the kind of warm embrace that I feel tonight." He noted that, some months ago, he received an e-mail arranging a surprise 87th birthday party for a colleague, to which he responded: "Save the date — my 87th birthday will be February 28, 2031." He immediately received a response from another colleague who apologized and stated that he would be busy that day.

Power Of Pardon

Judge Jacobs focused his remarks on the power of pardon, which he described as "a wonderful, integral, nifty device." He noted that the pardon power is a procedural safeguard that can be used to correct errors, reconcile historical national divisions and avoid criminalization of political disputes. Some people are uncomfortable with it, he observed, because it is not subject to due process or review. Nor is there any required form — during the Civil War, President Lincoln sent a handwritten message to an Army Colonel stating, "If you haven't shot Barney D. yet, don't."

Judge Jacobs pointed out that the pardon power has fallen into relative disuse. George Washington pardoned participants in the Whisky Rebellion; Thomas Jefferson pardoned all persons prosecuted under the Alien and Sedition Act; Presidents Harrison and Cleveland pardoned Mormon bigamists; President Coolidge pardoned World War I deserters; President Kennedy pardoned violators of the 1956 Narcotics Act; and President Ford pardoned Vietnam Era draft resisters.

There were very few pardons in the 1980s and 1990s, by contrast. President Reagan pardoned Junior Johnson, a stockcar racer, for moonshining; the first President Bush pardoned a man convicted of stealing 12 six-packs of beer as a teenager; President Clinton pardoned members of the FALN; and the current President Bush has pardoned yet another moonshiner.

Judge Jacobs speculated that one reason for the decline in use of the pardon power is the limited upside for the executive. Yet another reason is that the executive is not well positioned to identify persons who may be worthy candidates for relief. Judge Jacobs suggested that perhaps judges should propose pardon candidates for the executive because they are in a very good position to identify misfires in the legal system.

Judge Jacobs noted that judges issue opinions that advise Congress when a statute seems to be misguided, and they make recommendations to the Bureau of Prisons. "I do not think that judges should hesitate much to identify likely candidates for pardon or commutation to the executive — in the sentencing transcript, in opinions denying habeas corpus and in other post conviction remedies," he said. Judge Jacobs suggested that the pardon power could be a vehicle for dealing with the sentencing disparity between drug offenses involving crack and powder cocaine.

Judge Jacobs concluded his remarks by stating:

"In a nutshell, the pardon power is a majestic instrument to correct unavoidable oversights and misjudgments. What a shame that it should lie neglected, or be put to trivial or unworthy uses."

Judge Jacobs also thanked his colleagues on the court and noted that the seat he holds was filled before him by Thurgood Marshall and Wilfred Feinberg, both of whom had received the Federal Bar Council's Learned Hand Award. "So easy to fill the seat; so hard to fill the shoes," he declared.

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The guidelines provide for a presumptive sentencing range based on a number of factors, such as the crime itself, how it was accomplished, the defendant's role in the offense, whether the defendant has accepted responsibility for his or her actions and the defendant's criminal history. Absent "extraordinary" circumstances, the district judge's discretion is limited to deciding where

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within that relatively narrow range the defendant should be sentenced. However, if an "extraordinary" circumstance is present, or there is a factor that the Sentencing Commission has failed to consider in establishing the particular guideline, the court may "depart" — either upwardly or downwardly — from the presumptive range and sentence the defendant as the court sees fit. As defense attorneys well know, the availability of these "departures" — many of which are enumerated in the guidelines and many of which have been developed through caselaw — is often the most important factor in representing a client, since they may provide the only relief from the often harsh presumptive sentencing range otherwise applicable.

Over the years, the Sentencing Guidelines have been amended over 600 times. The amendments have responded to various concerns, such as that the guidelines were too harsh or too lenient for certain crimes, or that they over- or under-valued the weight to be given a particular sentencing factor. Until the Feeney Amendment, the guidelines were amended only after the commission, pursuant to the Reform Act, carefully studied numerous sentencing decisions and trends, drafts of the proposed amendment were circulated for public comment and debate, and legislative action was taken. The Feeney Amendment, however, represents the first time that Congress has amended the guidelines by direct legislative action, completely bypassing the Sentencing Commission and the well-established amendment process.

The Original Amendment

In addition to increasing the penalties for certain crimes against children and sex offenses, the original proposed amendment drastically reduced the availability — in all criminal cases — of "downward departures" from the applicable guidelines. Of the many departure grounds subject to elimination were those based on aberrant behavior; military service and good works; family responsibilities and community ties; age or physical impairment; gambling dependence; and circumstances that are "out of the heartland" of the criminal activity contemplated by the specific guideline. The amendment further provided that, upon remand from the court of appeals, the district court could not depart for a reason not articulated in its original sentence, and imposed a two-year moratorium on the implementation of new grounds for departure. Moreover, a defendant who timely notified the government of his or her intention to plead guilty could receive the extra one-level "acceptance of responsibility" reduction only upon motion of the government.

The Feeney Amendment also included wide-ranging procedural changes to departure decisions. For example, it provided for de novo review of guidelines decisions by the courts of appeals. That provision would effectively have overruled *Koon v. United States*, in which the Supreme Court held that a district court's decision to depart should be reviewed under the more deferential "abuse of discretion" standard. By changing the standard of review, the amendment sought to limit the sentencing discretion afforded district judges that is long recognized as an important facet of our criminal justice system. Finally, perhaps the most controversial aspect of the amendment was the requirement that the Attorney General report to Congress, within 15 days, whenever a district judge downwardly departed from the guidelines for reasons other than a defendant's cooperation.

By eliminating or severely restricting many departure options, the Feeney Amendment, if it had been adopted in its original form, would have greatly reduced district judges' sentencing discretion and would have effectively transformed the guidelines into a rigid scheme of mandatory minimum sentences.

Criticism Of The Proposal

Criticism of the proposed amendment began on the floor of the House, which spent only 15 minutes debating the measure. Virginia Representative Robert C. Scott objected to the uniquely truncated process by which the guidelines were to be amended, noting that "We have not had hearings or markups on this matter; and this is not the way we should amend the sentencing guidelines, without thought or consideration." Rather, he suggested, the Sentencing Commission should examine whether the incidence of downward departures was indeed problematic. "If this is such a good idea," he stated, "then let us do it through the regular order. Let us have some hearings, subcommittee markup, committee markup, and then we can slowly and deliberately consider such an amendment. The purpose of the Sentencing Commission is to get away from the floor amendments and the sound bites so you can have intelligent sentencing." Notwithstanding these sound objections, the Feeney Amendment passed by a vote of 357 to 58.

As news circulated of the amendment, widespread disbelief turned to outright fear that the world of federal criminal practice would be turned upside-down. Criticism of the amendment came from all directions. The ABA, in a letter to Senate Judiciary Committee Chairman

Orrin Hatch, complained that the Feeney Amendment "would fundamentally alter the carefully crafted and balanced system established by the Sentencing Reform Act, without any of the customary safeguards of the legislative process." The amendment, it was argued, "would all but eliminate the discretionary power of federal judges to achieve justice in individual cases, and effectively transform the Sentencing Guidelines into a system of mandatory minimum sentences."

An impressive array of law school professors concurred. In a joint letter to Senator Hatch and Senator Patrick Leahy, the ranking members of the Judiciary Committee, they wrote that "the Feeney Amendment would radically impair the ability of federal judges to consider even the most extraordinary mitigating circumstances . . . [and] would turn the Sentencing Reform Act on its head."

The Sentencing Commission, which was notably sidestepped in the legislative process, voiced its dissatisfaction with the truncated deliberations afforded the amendment. Chairperson Judge Diane Murphy, joined by her two predecessors, observed in a letter to Senators Hatch and Leahy that "[n]o hearing has been held on a number of significant provisions in the current legislation. Congress enacted the Sentencing Reform Act of 1984 only after considerable study and public debate. The sweeping provisions proposed . . . however, have not been exposed to the same type of examination and debate." The voting members of the Sentencing Commission echoed these sentiments, imploring the Senate Judiciary Committee at the very least to allow the commission six months to review the proposed changes and report back to Congress.

Even Chief Justice Rehnquist objected to both the process by which the amendment was shepherded through Congress and the far-reaching implications of its changes. He wrote to Senator Leahy that the Judicial Conference of the United States believed that the amendment "would do serious harm to the basic structure of the guideline system and would seriously impair the ability of courts to impose just and responsible sentences. Before such legislation is enacted there should, at least, be a thorough and dispassionate inquiry into the consequences of such action."

The Revised Amendment

Perhaps responding to the above criticism, the revised bill — which was signed into law on April 30 — emerged from the Senate scaled back, but still relatively problematic. Although the moratorium on new departures is still in place, gone is the curtailing of existing departures, other than for child-victim and sex crimes. (The provision requiring a government motion for a third acceptance of responsibility point survived.) This prompted Senator Kennedy to claim partial victory, stating that, "[o]ther than in certain child-related cases, this legislation does not limit or lessen the myriad potential grounds for departure currently available to district courts in making sentencing decisions."

Most of the procedural changes in the original amendment, however, remained in the final version. Thus, appellate courts will now review a sentencing judge's fact-specific decision to depart downward under the more exacting de novo standard. In addition, the appellate court must reverse if it finds that a departure "is not justified by the facts of the case" or "does not advance" statutory sentencing objectives, such as punishment and deterrence. Taken together, these changes significantly shift sentencing authority from the district courts, where that authority has traditionally resided, to the courts of appeals, and will undoubtedly reduce the incidence of departures.

The final bill also retains the most controversial provision — that which requires the Attorney General promptly to report to Congress all non-cooperation downward departures. Chief Justice Rehnquist, commenting on the recently-enacted legislation at a Federal Judges Association Board of Directors meeting, implored Congress to use these reports only to gather data on sentences in furtherance of Congress's proper legislative function and not "to intimidate individual judges in the performance of their judicial duties." Otherwise, he cautioned, these reports might "trench upon judicial independence."

Conclusion

It is perhaps ironic that the Feeney Amendment — which represents the greatest threat to judicial independence in the sentencing of federal criminal defendants in the last 20 years — was enacted on the eve of Law Day 2003, whose theme was "Independent Courts Protect Our Liberties." As President Bush stated in his Law Day proclamation, "Independent Federal judges have the autonomy to make decisions and interpret the law unfettered by outside influences. In this way, we are assured that our laws will be interpreted justly and applied with uniformity." Congress should heed those words and not use the new sentencing reforms as an opportunity for legislative comment on particular sentencing decisions of individual judges.

Editor's note: Karin Klapper, an associate at Stillman & Friedman, P.C., assisted in the preparation of this article.

Congress Passes Sweeping Changes To U.S. Sentencing Guidelines

By Nathaniel Marmur

On March 27, Representative Thomas Feeney of Florida tacked on a little-noticed amendment to the Child Abduction Prevention Act. The "Feeney Amendment," as originally drafted, provided for wide-ranging substantive and procedural changes to the United States Sentencing Guidelines. By the end of April, a modified version of the amendment had been signed into law.

Among other things, the original amendment severely curtailed the ability of federal district judges to "depart" from the guidelines under the facts of a particular case. It also made appellate review of departure decisions less deferential to district courts, and provided for exacting reporting requirements whenever a judge did depart for reasons other than a defendant's cooperation with the government. According to Representative Feeney, the amendment was intended to respond to a perception that "liberal judges" were circumventing the guidelines by imposing departures at increasing rates.

What is striking about the original amendment is not only the breadth of the proposed changes, but also the manner in which it was rushed through Congress with little public awareness, much less debate. No doubt due to forceful last-minute objections from all corners of the legal profession, including Chief Justice Rehnquist, the changes that were enacted did not sweep as broadly as those initially proposed. Nevertheless, what remains of the law encroaches upon federal district judges' discretion in sentencing defendants, and even threatens the very independence of the judiciary.

The Sentencing Guidelines

A brief background on the Sentencing Guidelines sheds light on Congress's attempt to alter dramatically the basic structure of federal sentencing. Federal criminal statutes generally provide only for broad ranges of possible punishments — for example between zero and 20 years in prison. As a result, before the guidelines were adopted, sentences for similar conduct varied greatly depending on the district in which a defendant was prosecuted and the particular sentencing judge. In response to the disparate treatment given similarly-situated defendants, Congress passed the Sentencing Reform Act of 1984. The Sentencing Reform Act called for the establishment of the United States Sentencing Commission — an independent agency in the judicial branch of government — and the promulgation of "sentencing guidelines." The guidelines took effect on November 1, 1987.

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