# Federal Bar Council News

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## From The President

## The Direction: Forward

**By P. Kevin Castel**

The tragedy continues to bind us together. As the weeks go by, we must remember that the person at the other end of the phone may be experiencing the aftermath differently than you. The pace of personal recovery will vary, but our beliefs and rich traditions dictate that the direction must be forward.

I begin by expressing the Federal Bar Council's heartfelt condolences to hose who lost family and friends. Among those who are suffering are Warren Colodner of Kirkpatrick & Lockhart, who lost his wife, Patti Colodner, an

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## Developments

## Out Soon: *Cass Gilbert, Life and Work: Architect of the Public Domain*

In 1998 the Federal Bar Council extended its long-accustomed role in support of the Second Circuit Committee on History, which for most of its history has been as much a committee of the Council as of the courts. Annual programs have long focused on unsung heroes significant to the work of the courts and the bar, and significant events in the history of the courts. Each annual program, typically, has included an original publication (often authored by an FBC member), a lecture and an exhibit.

The 1998 programs highlighted the career and work of Cass Gilbert, architect of the old Foley Square courthouse, extending a project undertaken several years earlier by John Kenney well before he assumed the office of FBC president. The 1998 programs took off and assumed a life of their own, involving many other organizations in many places. The Alliance for Downtown New York sponsored a downtown walking tour of Cass Gilbert buildings that attracted many thousands of participants to lower Manhattan on a Fall Sunday. The United States Supreme Court (also housed in a Cass Gilbert building, in Washington) developed a remarkable exhibit concerning Gilbert's work with Chief Justice William Howard Taft and the other justices in developing their building.

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## Federal Bar Foundation Relief Fund

***A tax deductible contribution may be made by check payable to the "Federal Bar Foundation, 9/11 Relief Fund" mailed to 370 Lexington Avenue, Suite 1012, New York, NY 10017. Under the direction of former Police Commissioner and Council member, Robert J. McGuire, funds will be disbursed to victims-relief charities.***

## FBC News

## "Court Visits Program"

**By Jason R. Lilien**

Exposing New York City high school students to the inner workings of the federal courts is the goal of an ambitious program recently undertaken by the Public Service Committee of the Federal Bar Council. Through the "Court Visits Program," students from each of the five boroughs will visit Southern District and Eastern District courtrooms, witness trials and other court proceedings and have the opportunity to discuss the proceedings with the presiding judges.

Over 40 judges from the Southern and Eastern Districts have agreed to

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## Developments

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The New York County Lawyers' Association mounted a series of programs concerning its "Home of Law," also designed by Gilbert, so dubbed by William Nelson Cromwell, its major donor. And the Federal Bar Council undertook most of the work that led to the Gilbert exhibit that still may seen in the Foley Square lobby, and provided indispensable intellectual resources as well.

Most previous publications of the history committees have been privately printed, or otherwise undertaken on a modest scale. The Cass Gilbert publication, based upon a November 1998 Symposium co-sponsored by the FBC, will appear in October, published by W. W. Norton. With Barbara S. Christen and Steven Flanders as editors, it is "Cass Gilbert, Life and Work: Architect of the Public Domain." Contributors include Judge Dennis Jacobs and the late Bankruptcy Judge Jeffry Gallet, among many others. The Introduction is by Robert A. M. Stern, Dean of the Yale School of Architecture and principal of a large Manhattan architectural firm.

An adaptation of the Preface by Steven Flanders follows:

The architect Cass Gilbert (1859-1934) lived in several worlds, transforming them as they transformed him and themselves. Born in Zanesville, Ohio just before the Civil War to a military surveyor and his wife, he grew up in St. Paul, Minnesota as it matured from a staging area for settlement of the northern plains into a confident outpost of the Gilded Age. But even as he produced the Minnesota State Capitol, possibly his masterpiece, as the culmination of a career there, he found himself too large a figure to be confined even by the vast expanse of the "Northwest." The New York practice that he gradually established beginning with the Broadway Chambers building at the turn of a confident new century provided the stage of national scope that he sought.

As Dean Robert A.M. Stern suggests in the introduction that opens the volume, its contributions address as many dimensions of Gilbert's work and influence as has seemed possible to assemble. Extending the November 1998 symposium that was the culmination of celebrations in New York, Minnesota and elsewhere over a period extending more than two years, the new book presents perspectives illuminating the life and the work by practicing architects, historians, art and architecture historians,

### From Circuit Clerk Roseann B. MacKechnie

## Second Circuit Practice Tips

Motion practice in the Second Circuit can be trouble free. Here are some reminders:

1. Read Federal Rule of Appellate Procedure 27 and our Local Rule 27. Those rules govern motions. Please keep in mind that Fed. R. App. P. 27 was amended in 1998 and no longer requires a notice of motion. This revised Federal Rule, however, conflicts with our Local Rule 27 (which is in the process of being revised). Although the T-1080 Notice of Motion form is no longer required, we request that attorneys continue to use that form (which we have renamed the "T-1080 Motion Information Form") and to complete all answers to the questions on the form.

2. Under the revised Fed. R. App. P. 27, all legal argument must be contained in the body of the motion and must not exceed 20 pages. This page limit does not include the accompanying affidavit which contains factual information.

3. If you are seeking a stay of a lower court order or judgment, make sure to include a copy of the order or judgment with your motion papers.

4. If your motion in the Second Circuit is filed at the same time a notice of appeal (NOA) is filed in the district court, you must include a copy of the NOA along with the district court receipt or file stamp on the NOA. This establishes jurisdiction in the Second Circuit.

5. You must file an original and four copies of all motion papers.

6. Remember to include proof of service and the telephone numbers of counsel, and to sign the motion.

7. If you have questions, please call (212-857-8500) or visit (40 Foley Square, Room 1803).

and by judges and other outsiders. We have tried to present something of the worlds Gilbert lived in, explored, and transformed through his art and through his highly practical determination that every building must serve not only his clients but all its users.

**Starting Point**

The users have been the starting point. The United States Courts for the Second Circuit, through the Committee on History and Commemorative Events, initiated projects in 1997 through 1999 to draw renewed attention to the architect whose buildings have housed them so well, the old Foley Square courthouse and the United States Custom House at owling Green. Gilbert took a special interest in courts and courthouses; the United States Supreme Court building in Washington is only the best-known example. Gilbert's influence extends across the decades and into the new millennium through the Foley Square Courthouse: the new federal courthouse of Kohn Pedersen Fox, completed in 1994, was the product of a design competition for which Gilbert was an explicit frame of reference. Gilbert's building became central to a process by which the late twentieth century re-learned how to design courthouses appropriate to their functions and their settings that are pleasing and useful to their multiple publics.

The federal courts developed programs on Gilbert because his buildings work, and work pre-eminently well among the vast variety of designs and settings that house the work of the courts. loreover, Gilbert buildings enlarge the lives of those they touch, a fact and a discovery that resulted in a rapid and spontaneous spread of Gilbert programs beyond the courts, through New York and on to many other places he touches. No one enters a Gilbert building designed for public use without realizing that he or she has arrived at a significant place. The school groups that visit the Minnesota Capitol or Foley Square need no coaching as to the sort of place where they find themselves—large, enlarging, yet not forbidding. Reflecting wholly different contexts and experiences, the owners of Cass Gilbert houses, with other owners of Gilbert properties, have recently banded together as the core of a Cass Gilbert Society, based in St. Paul. The public buildings, the residences and the office buildings alike have been notable since the very dawn of Gilbert's career for the humane environment they provide.

As former circuit executive I developed a conviction that Gilbert consistently contributed significantly toward a solution to one of the central problems faced by any court administrator as public employer. The federal courts employ many people who work energetically and enthusiastically for much less than they could command on the outside. Gilbert helps: he makes palpable the message of judges and all supervisors to our employees that they have entered a calling, even if their own role may be relatively modest. A senior lawyer on the Second Circuit staff has long spoken of the "psychic income" he gains from working where he works. The file clerk, the hot-shot young law clerk, and indeed, the judges themselves—Gilbert assists them all in finding the answer to any working stiff's questions: why am I at work here? What am I doing here?

Further, this perspective extends well beyond unique or even exalted institutions or employers like the federal judiciary. Let us consider the problem of the office building, often described as the most boring building type in architecture. Since around the time he came to New York, nearly all of Gilbert's buildings were essentially office buildings, though we rarely think of them that way. The U. S. Custom House at Bowling Green, the site of the symposium upon which the book is based, may in one sense be a poor example because it is so uniquely flamboyant, yet office building it was. Rather more evidently, its contemporaries the West Street Building (90 West Street) and Broadway Chambers were simply the turn-of-the-century equivalents of the generic office building that today goes up on spec. Their builders had little fixed idea of who or what would occupy them, thereby denying their architect the kind of natural access to a symbolic visual language that is available for the office building/courthouse or custom house. Gilbert solved this problem, designing masterpieces nonetheless.

Less obviously and more notably, roughly the same was true in principle even of the Woolworth Building, all appearances to the contrary notwithstanding. As that beauty was constructed, Frank W. Woolworth's empire was to occupy only a fraction of the office space. It took a special relationship between architect and client to unfold what today would seem intrinsically a very modest program and extend it as we are privileged to experience it in the company of visitors—still—from all over the world. (Curiously, the federal courts in the 1920s rented several spaces on the lower floors as an addition to Alfred B. Mullet's old Post Office and Courthouse across the street, before it was demolished and replaced by Gilbert's Foley Square courthouse. I have confirmed that Judge Learned Hand had his chambers in the Woolworth Building for several years; one wonders if he noted the connection when he moved

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from one Gilbert building to another when the courthouse opened in 1936.)

I think, then, that Gilbert's courthouses and capitols and other monumental public and private buildings are the paradigm of what the 21st century will learn from him, but they do not by any means exhaust the links he extends across the centuries as we rediscover the importance of design, public and private, in creating and sustaining public spaces. With the help of Senator Daniel Patrick Moynihan, Gilbert has served as an essential link in teaching the federal government how to do civic architecture all over again, and how to think about civic architecture through the troubled aesthetic of our time. The altogether satisfactory new courthouse at 500 Pearl Street in New York is the outcome of a competitive process by which Senator Moynihan insisted that our time must listen to Gilbert—the enabling legislation specified that the new Foley Square Courthouse must be respectful of the old. Gilbert was the frame of reference for the new, and the relationship continues. That effort opened a process that still unfolds, one that truly deserves that over-used word: it is a renaissance. History will compare the federal architecture of the 90s (and especially the federal court architecture) with that of the 1940s and 50s, and find—well, that there's no comparison.

The Bauhaus and the International Style did many wonderful things, but they did at least two very bad things. They caused our century to lose its moorings entirely as it tried to undertake civic architecture. And they derailed perceptions of Gilbert and interest in him, a fact that led many of us to undertake his rediscovery. There are countless demonstrations that through the 1920s, Gilbert's reputation was pre-eminent. For one, the 1928 Encyclopedia Britannica article on Architecture, extending 31 pages and displaying countless images, offers more than twice as much space to the Woolworth building than as to any other building in all history. Yet only a few years later when the U.S. Supreme Court and Foley Square opened, Gilbert had become an instant anachronism. Both buildings were mostly ignored. When they were noticed, reaction was tepid at best and savage at worst.

I had the opportunity in September 1998 to address an international assemblage of architects in Toronto as they considered the future of the courthouse. The displays, slides and presentations that the American Institute of Architects assembled at that event would dispel any doubt that the architectural profession today knows how to solve the problem of the courthouse as a building type. Most heartening was the exhibit and related publication of winners of a student competition, the DuPont Benedictus Awards, showing inventive and effective design solutions of winners representing schools from Hong Kong to Zurich to Chicago. Rediscovering Gilbert has helped this process, thanks mostly to Senator Moynihan.

Thirty to seventy years ago, Gilbert seemed laughably historicist. Indeed, his exuberance in trying on connections to diverse and unrelated visual languages is easy to make fun of today. My late wife likened his successive presentations to the Directors of the New Haven Railroad to playing with paper dolls. Gilbert had a successful plan for the train station in New Haven—also an office building, by the way: it was to be the railroad's headquarters. But it needed adornment and a theme. Let's try on the Palazzo Pubblico of Siena! But McKim, Mead & White had done that for them already in Waterbury. Or some later Italian Renaissance idiom! Or French Gothic! Or Georgian! In the end, the Directors went for the stripped-down version for reasons of economy, leaving the minimum that Gilbert always provided: magnificent

## *Calendar of Events*

***November 7: First Decade Program***

***November 15: Senior Federal Judges of Connecticut reception***

***November 16***
***25th anniversary party for Northern District Judge Howard G. Munson***

***November 21***
***Annual Thanksgiving Luncheon, Waldorf-Astoria***

***February 16-23, 2002***
***Winter Bench & Bar Conference at Westin Rio Mar in Puerto Rico***

***March 4: U.S. Supreme Court Admissions Ceremony***

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

interior spaces and outstanding functionality.

But the historicism is a good deal more than funny or quaint. It is liberating, and I hope it will remain so. For Gilbert and his clients, historicism provided a connection with an adopted past for a new nation, through the present to the future. In less exuberant form, the principle holds today as we seek further solutions to the difficult problems every architect and client find in seeking meaning and a frame of reference for projects that seem intrinsically boring and without moorings.

Today and the future can learn from Gilbert in another way. Every Gilbert building that I know responds to the client's practical needs in a degree that is imply unparalleled. He was interested, in each project, not only in an enlarging vision but in daily use, in the users and in the multiple constituencies of every building. In eighteen years at the federal courthouse at Foley Square I can identify only two functional faults of the building design that Gilbert was in a position to anticipate. And both were remediable and have been remedied rather readily. (The Court of Appeals courtroom, too similar to the trial courtrooms whose design and setting it shares, had to be reconfigured significantly to improve traffic flow and reduce the distraction as people move in and out during argument. And certain minor changes have been made to improve security.) A courthouse is a very complex and difficult program that fails very often, yet solving its intricacies seems to have come naturally to Gilbert.

To take a less familiar example, the unfolding of the New York County Lawyers' Association building in lower Manhattan is a paradigm of what should be done by a sensitive architect working with a committed and passionate (but highly cranky) client. William Nelson Cromwell, President of the Association at the time, was all over the project as it developed toward a ceremonial opening in 1930. The major donor, Cromwell intruded at an astonishing level of detail. Fourteen Vesey Street is a little jewel that realized a large dream as a result. Considerably more important, it is a realization that has always worked as intended.

Gilbert's special genius lay in his capacity to identify and embody the dreams of clients, not an easy task in his day and much harder now. As we turn to the new century and the new millennium, it often seems that architects and their clients have abandoned this quest altogether, for any building that is actually to be used in any functional way that has anything to do with making a living or making the central institutions of our society and economy work. Where are the dreams and dreamers in today's projects? To read the critics, one might imagine that they are to be found only in a single, improbable building type: art museums. There, and there only, in constructing flights of the architect's fancy that often overwhelm the work to be displayed, and at colossal cost that could better have gone to other living artists, we find architect and client dreaming great dreams and realizing them. It is all a remarkable caricature of Gilbert's capacity to identify and enlarge

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and realize the humdrum realities that more often than not were his starting point.

Sometimes it seems that Gilbert's capacity to make everything work in any setting, no matter how unexpected or extended, was little short of superhuman. As biographical chapters in our book make clear, he was only partially educated as a professional architect, and did not even graduate from high school. Certainly he was not an engineer, far less an acoustical engineer. Yet his auditorium for the American Academy of Arts and Letters on Audubon Terrace off upper Broadway is the favorite recording space for most of New York's recording engineers. I personally own a dozen or more of the hundreds of commercial recordings that have been made there. And such buildings as the Woolworth, the tallest building in the world for many years, and the Brooklyn Army Supply Base, the largest reinforced concrete structure in the world when it went up, demonstrate a mastery of novel engineering solutions that might have eluded many trained engineers.

I conclude by returning to the problem of civic architecture, and to civic architecture as a solution. At the time of this conference I was working in Haiti for several weeks—I had come home only for a few days. Of the many countries that I have worked in or visited, Haiti has the most utterly feeble and ineffective public institutions. As a single dimension of this, there was no functioning Government for 18 months—there was no prime minister, legislative activity was at a standstill, there was no appropriations process worthy of the name, and government departments limped along on what we would call continuing resolutions, but they were of questionable legality because they could not pass through the ordinary legislative process.

Another thing that Haiti lacks, a realization that only came to me in assembling the presentations on Gilbert's career, is civic architecture. There are no public buildings of consequence that were constructed by the Republic as its symbols. Astonishingly, the best public buildings—like the national penitentiary—were built during the occupation by U.S. Marines early in the last century, in one of our more inglorious and ineffective imperialistic ventures. I imagine that there is a connection both ways, between an ineffective polity and its failure to create and sustain its civic architecture. It is amazing that a modern republic could be so demoralized that creating public and monumental buildings for its important institutions could not have been achieved at any time in a history that soon will go back two hundred years. It is much less amazing that the institutions of such a republic have never enjoyed the sustained respect or support of their citizenry, even of the fitful kind characteristic of our own or any other functioning democracy. For most of the Republic's history, Haiti's citizens have been plundered and brutalized by their rulers. It is possible to imagine that had things been different, a sounder and more effective polity would have found physical expression that might have helped effective self-government to survive and prosper.

The Gilbert celebrations result from the efforts of countless enthusiasts. The various events in 1997-1999 were sparked initially by the Second Circuit Committee on History and Commemorative Events, led during the relevant periods by Judges Roger J. Miner, José A Cabranes and Pierre N. Leval. Co-chairs of the Committee on Cass Gilbert Projects were John Haworth of the Museum of the American Indian/ Heye Foundation and the late Judge Jeffry H. Gallet, with Judge Dennis Jacobs representing the Court of Appeals. The Federal Bar Council provided support in many forms: logistical, financial, and intellectual. Curator Gail Galloway of the United States Supreme Court, assisted by Franz Jantzen, undertook the considerable efforts on behalf of the United States Supreme Court. We thank all of these and countless others who made contributions to the rediscovery of Cass Gilbert upon which this volume rests.

## Legal History

# McCarthyism Meets the Law, And Loses

**By C. Evan Stewart**

One of the great examples of legal advocacy in the 20th Century did not take place in a courtroom. Rather, it took place on June 9th in 1954 in a Senate hearing room during the "Army-McCarthy" hearings. Special counsel for the Army, Joseph N. Welch, sucker-punched Senator Joseph R. McCarthy into an exchange which still reverberates today—indeed, I was once a witness to one lawyer attack another lawyer in a deposition with the following: "Jesus Christ. Have you never seen the Army-McCarthy hearings? Have you no decency, sir?"

### Tail-Gunner Joe

McCarthy was elected to the Senate from Wisconsin in 1946. He had run as a member of the energetic, World War II generation, embellishing greatly his insubstantial war record ("Tail-Gunner Joe"). Once in the Senate, he found

himself overwhelmed. He exercised little influence over his colleagues and had no legislative achievements to speak of.

Groping for an issue that would help his re-election bid in 1952, McCarthy was invited to speak before the Ohio County Republican Women's Club of Wheeling, West Virginia, in February of 1950. Fifteen days after Alger Hiss's sentencing for perjury (for lying about engaging in espionage on behalf of the Soviet Union while a State Department official), McCarthy charged that there were 205 known Communists "still working and shaping the policy of the State Department." Although that number varied thereafter (sometimes it was 57, sometimes it was 81; he ultimately identified four), he had caught the wave of a huge issue.

Fueled by the growing rivalry with the Soviet Union, the fact that there was in fact evidence of Soviet espionage, the sagging political fortunes of the Truman Administration, and the conspiratorial tradition in American history (Professor Richard Hofstadter would subsequently term this the "paranoid style" of our politics), McCarthy became an incredibly powerful force. Politicians he supported were elected (e.g., Richard Nixon, Jack Kennedy), and those he openly opposed lost (e.g., Millard Tydings, William Benton). His popularity was so strong that, when Dwight Eisenhower ran for President in 1952 and appeared on a campaign swing in Wisconsin, Ike specifically deleted from a speech a reference in defense of his mentor, George Marshall; McCarthy had previously denounced Marshall as having "propounded a foreign policy...of craven appeasement," having turned the Korean War "into a pointless slaughter," and being the man responsible for the loss of China (not stopping there, McCarthy also linked Marshall to a Communist conspiracy "so immense as to dwarf any previous such venture in the history of man"). (President Truman, who believed that Marshall was the greatest living American, never forgave Eisenhower for his acquiescence to political realities.)

At the height of his political power, McCarthy addressed an adoring crowd at the 1952 Republican National Convention. And after the band had finished playing "The Halls of Montezuma," he set forth a famous litany:

"I say one Communist in a defense plant is one Communist too many.

"One Communist on the faculty of one university is one Communist too many.

"One Communist among the American advisors at Yalta was one Communist too many.

"And even if there were only one Communist in the State Department, that would be one Communist too many."

**The Beginning Of The End**

McCarthy's drinking, which had always been heavy, now (as one of his biographers has noted) "began to spiral out of control." And although he won re-election, McCarthy had political problems as well. He now was faced with an executive branch that was in the hands of the Republican Party for the first time since 1932; more importantly, it was run by a man of whom Richard Nixon later said: "He [Eisenhower] was far more complex and devious than most people realized, and in the best sense of those words."

Even before Eisenhower could use his "hidden-hand Presidency" to good effect vis-á-vis McCarthy, however, the Senator himself took a fateful turn: he hired Roy Cohn as chief counsel to the Senate's Permanent Subcommittee on Investigations ("PSI").

While in many ways a talented lawyer, Cohn had poor political judgment, and turned out to be a disastrous choice. Also hired as part of the PSI staff were Bobby Kennedy (just out of Virginia Law School) and David Schine, a young friend of Cohn's. It was an odd ensemble. Kennedy, like his father, admired McCarthy greatly; he and Cohn, however, grew to have a visceral hatred of each other (they almost came to blows in the Capitol). Schine's only qualification appeared to be his bond with Cohn; and McCarthy became heavily dependent on Cohn.

In the meantime, McCarthy started to go after the "wrong" targets. For example, he attacked nominees of the Eisenhower Administration, with spectacular failure. He attacked the C.I.A., which was being run by Eisenhower's chief-of-staff from World War II, Bedell Smith; he had to back down from that fight as well. After more (and similar) setbacks in his attempts to uncover and/or expose America's enemies, McCarthy settled on a new target: the U.S. Army!

Cohn and McCarthy became convinced that a spy ring existed on an army base at Fort Monmouth, New Jersey (indisputably, the security procedures at the base were very poor). In the midst of both branches of government trying to figure out how best to deal with this matter, Schine was drafted and inducted into the Army. Cohn immediately began lobbying the Secretary of the Army for preferential treatment for Schine. These pressures continued over time, and ultimately presented the administration and its allies in the Senate with ammunition to go after Cohn and, by extension, McCarthy (who refused to part with his "indispensable" counsel). While all this political in-fighting was

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playing out inside "the Beltway" (which did not yet exist), the court of public opinion started to shift. Edward R. Murrow's March 9, 1954 "See It Now" broadcast was a broadside against McCarthy and his tactics—McCarthy's actions "have caused alarm and dismay amongst our allies abroad and given considerable comfort to our enemies." Murrow's show was widely seen and very influential; he concluded the show with: "This is not the time for men who oppose Senator McCarthy to keep silent."

And as many respected voices came forth in response, the newspapers got a hold of the evidence of Cohn's efforts on behalf of Schine. That led to the Senate Democrats on PSI to press for an investigation of the Army's charges against Cohn (and, by extension, McCarthy). McCarthy, as PSI's Chairman, agreed, thinking he would be able to expose the Army's perfidy. He also agreed to one of Cohn's worst ideas: that he and Cohn would act as their own lawyers.

**The Army-McCarthy Hearings**

The circus-like hearings began on April 22, 1954, and lasted longer than the congressional investigation into Pearl Harbor. Senate Democrats (led by Lyndon Johnson) believed that the key to the hearings would be live television, calculating that McCarthy and his tactics would not survive such public scrutiny. (Interestingly, the western half of the United States did not get live coverage because NBC decided not to provide it.)

Also appreciative of the unusual nature of the proceedings and the likely impact of television was the man the Army had hired to represent its interests: Joseph N. Welch, a very experienced trial lawyer from Hale & Dorr in Boston. When Welch was hired in early April, he announced that two of his firm's young associates, James D. St. Clair and Frederick C. Fisher, Jr., would be joining him on behalf of the Army. Two weeks later, Welch (after consulting with White House officials) dropped Fisher from the team upon learning that Fisher had once belonged to the National Lawyer's Guild (a target of, among others, the House Un-American Activities Committee). Welch told the New York Times and other members of the media: "I didn't want a diversionary affair."

As his own lawyer, McCarthy was a disaster. His incessant use of the phrase "point of order" as a means to object, interrupt, or merely attempt to bully a witness or fellow Senator, came to symbolize all that was wrong with his methods and tactics ("Point of Order" became the title of a "documentary" film of the hearings). One example will suffice:

Senator McCarthy. "May I finish my point of order?"

Senator Mundt. "Counsel advises the Chair that the senator is engaging in a statement or cross-examination rather than a point of order."

Senator McCarthy. "I am getting rather sick of being interrupted in the middle of a sentence."

Senator Symington. "I would like to say if this is not a point of order it is out of order. The counsel says it is not a point of order and it is not a point of order, if the counsel says it is not a point of order."

Senator McCarthy. "Oh, be quiet."

Senator Symington. "I haven't the slightest intention of being quiet. Counsel is running this committee, and you are not running it."

Senator McCarthy. "Mr. Chairman, do I have the floor?"

Senator Mundt. "The Chair has the floor, and nobody is endeavoring to determine whether or not Senator McCarthy is speaking to a point of order. Will you state your point of order and then speak to it?"

Senator McCarthy. "Mr. Chairman, may I suggest that when I start to say something, I not be interrupted in the middle of a sentence, and that Mr. Symington and no one else have the right to interrupt unless he addresses the Chair, and unless the Chair recognizes him. I am getting awfully sick of sitting down here at the end of the table and having whoever wants to interrupt in the middle of a sentence.

* * *

"Call it a point of order or call it what you may, when counsel for Mr. Stevens, and Mr. Hensel, and Mr. Adams makes a statement and he is allowed to do it without interruption, and if that statement is false, do I have a right to correct it, or do we find halfway through my statement that Mr. Welch should not have made his statement and therefore I cannot point out that he was lying?"

In contrast, Welch (who has been described as a "man by turn Pickwickian, avuncular, puckish, stern and righteous") went slowly but surely about his work, giving McCarthy gentle, and not so gentle, needles so as to exasperate the thin-skinned bully into further public tantrums. An example of the latter type of needle came when Welch was examining one of McCarthy's staff and he cleverly introduced a sub-text that was constantly just below the surface of the hearings—the unusually close "friendship" of Messrs. Cohn and Schine:

Mr. Welch. "You did know what hung on Schine's wall when that was handed to you, sir."

Mr. Juliana. "I did not know what hung on Schine's wall."

Mr. Welch. "Did you think this came from a pixie? Where did you think this

picture that I hold in my hand came from?"
Mr. Juliana. "I had no idea."
Senator Mundt. "Senator McCarthy says he couldn't hear the question. It will be reread."
Senator McCarthy. "Will counsel for my benefit define—I think he might be an expert on that—what a pixie is?"
Mr. Welch. "Yes. I should say, Mr. Senator, that a pixie is a close relative of a fairy. Shall I proceed sir? Have I enlightened you?"
Senator McCarthy. "As I said, I think you may be an authority on what a pixie is."

In the midst of all this brouhaha came a serious matter that threatened to sidetrack or halt the hearings. It became known that the White House, through Sherman Adams, Eisenhower's Chief of Staff, and the Attorney General's office had orchestrated the accumulation of evidence regarding Cohn's efforts on Schine's behalf with the Army. When pressed by the Committee for details, Eisenhower issued a directive that none of the individuals would be allowed to testify or be interviewed, citing something that theretofore had never existed: executive privilege. This threatened the hearings themselves, and seemed to generate sympathy for McCarthy.

Unfortunately for McCarthy, however, the decision was made to plow ahead. And next into the witness chair came Roy Cohn, who, by his own assessment, was "a disaster." During a break in his ordeal, Cohn and Welch cut a deal: Welch would not bring up Cohn's avoidance of military service if Cohn did not raise Fisher's membership in the National Lawyer's Guild; McCarthy agreed to this trade-off.

On June 9th, Welch was grilling Cohn on the lengthy delay in actually disclosing the names of Communists at Fort Monmouth, sarcastically asking him to do so "before sundown," and then adding: "May I add my small voice, sir, and say whenever you know about a subversive or a Communist or a spy, please hurry. Will you remember those words?" At that, McCarthy snapped:
Senator McCarthy. "Mr. Chairman, in view of that question. . . ."
Senator Mundt. "Have you a point of order?"
Senator McCarthy. "Not exactly, Mr. Chairman, but in view of Mr. Welch's request that the information be given once we know of any one who might be performing any work for the Communist party, I think we should tell him that he has in his law firm a young man named Fisher whom he recommended, incidentally, to do work on this committee, who has been for a number of years a member of an organization which was named, oh, years and years ago, as the legal bulwark of the Communist party, an organization which always swings to the defense of anyone who dares to expose Communists. I certainly assume that Mr. Welch did not know of this young man at the time he recommended him as the assistant counsel for this committee, but he has such terror and such a great desire to know where anyone is located who may be serving the Communist cause, Mr. Welch, that I thought we should just call to your attention the fact that your Mr. Fisher, who is still in your law firm today, whom you asked to have down here looking over the secret and classified material, is a member of an organization, not named by me but named by various committees, named by the Attorney General, as I recall, and I think I quote this verbatim, as 'the legal bulwark of the Communist party.'"

(As McCarthy launched into this, Cohn mouthed "no, no" to him, and even passed up a note to remind McCarthy of their deal with Welch. But McCarthy went on.)
Senator McCarthy. "I am not asking you at this time to explain why you tried to foist him on this committee. Whether you knew he was a member of that Communist organization or not, I don't know. I assume you did not, Mr. Welch, because I get the impression that, while you are quite an actor, you play for a laugh, I don't think you have any conception of the danger of the Communist party."

Senator Mundt tried to interject, but Welch interposed a "personal privilege" to speak, to which Mundt assented.
Mr. Welch: "Until this moment, Senator, I think I never really gauged your cruelty or your recklessness. Fred Fisher is a young man who went to the Harvard Law School and came into my firm and is starting what looks to be a brilliant career with us.

"When I decided to work for this committee I asked Jim St. Clair, who sits on my right, to be my first assistant. I said to Jim, 'Pick somebody in the firm who works under you that you would like.' He chose Fred Fisher and they came down on an afternoon plane. That night, when he had taken a little stab at trying to see what the case was about, Fred Fisher and Jim St. Clair and I went to dinner together. I then said to these two young men, 'Boys, I don't know anything about you except I have always liked you, but if there is anything funny in the life of either one of you that would hurt anybody in this case you speak up quick.'

"Fred Fisher said, 'Mr. Welch, when I was in law school and for a period of months after, I belonged to the Lawyers Guild,' as you have suggested, Senator. He went on to say, 'I am secretary of the Young Republicans League in Newton with the son of Massachusetts' governor,

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and I have the respect and admiration of my community and I am sure I have the respect and admiration of the 25 lawyers or so in Hale & Dorr.'

"I said, 'Fred, I just don't think I am going to ask you to work on the case. If I do, one of these days that will come out and go over national television and it will just hurt like the dickens.'

"So, Senator, I asked him to go back to Boston.

"Little did I dream you could be so reckless and so cruel as to do an injury to that lad. It is true he is still with Hale & Dorr. It is true that he will continue to be with Hale & Dorr. It is, I regret to say, equally true that I fear he shall always bear a scar needlessly inflicted by you. If it were in my power to forgive you for your reckless cruelty, I will do so. I like to think I am a gentleman, but your forgiveness will have to come from someone other than me."

McCarthy, not willing to quit when he was being routed, kept on.

Senator McCarthy. "Mr. Welch talks about this being cruel and reckless... He was just baiting; he has been baiting Mr. Cohn here for hours. . . ."

Mr. Welch. "Senator, May we not drop this? We know he belonged to the Lawyers Guild, and Mr. Cohn nods his head at me. I did you, I think, no personal injury, Mr. Cohn."

Mr. Cohn. "No, sir."

Mr. Welch. "I meant to do you no personal injury, and if I did, I beg your pardon.

"Let us not assassinate this lad further, Senator. You have done enough. Have you no sense of decency, sir, at long last? Have you left no sense of decency?"

Welch's electrifying confrontation with McCarthy did not end the hearings; they dragged on for another week and a report was ultimately issued on August 31st (which was critical of everyone, ranging from the Army to McCarthy). More important was the fact that the process of censuring McCarthy had been jump started. To McCarthy's peers he had committed the ultimate sin of bringing the Senate into disrespect. On December 2nd, by a vote of 67 to 22, McCarthy was censured by the Senate. McCarthy's immediate reaction was: "I wouldn't exactly call it a vote of confidence, but I don't feel I've been lynched." In fact, he had been. His final years in the Senate were meaningless, and he died a broken man in 1957.

Welch's performance was praised by many (including Eisenhower, who personally thanked him). It was hardly an extemporaneous oration, however. His welling-up eyes and flowing tears while he defended "this lad" were widely commented on and written about, but as Welch left the hearing room with the tears still flowing, he looked over at a young reporter and winked!

## Fairways and Foul

# Justice Scalia On Golf

**By Kevin J. O'Brien**

Opinions of the Supreme Court, to borrow a metaphor, are still photographs of a box that has been stuffed full after great effort; nothing in them conveys the labors that went into packing the box, the tensions inside it or the mess that will ensue when its contents burst forth. No one is more skilled at penetrating the tidy surface of legal argument than the Court's most frequent dissenter, Justice Antonin Scalia. Scalia has a keen instinct for tired dogmas, political biases and unexamined sympathies. He is one part priest, who claims the purity of someone who never shrinks from the consequences (no matter how unpalatable) of telling it like it is, and one part satirist, who mocks the emperor's lack of clothes. Scalia's license, like the holy man's and the comic's, is his candor.

But candor is not the only judicial virtue, or even the most important one. The strengths and limitations of Scalia's criticism are illustrated in his dissent in *PGA Tour, Inc. v. Martin*, decided early this Summer, in which the Court upheld the claim of professional golfer Casey Martin under the Americans with Disabilities Act of 1990.

**Two Findings**

Martin, who suffers from a severe circulatory disease that prevents him from walking for extended periods, argued that the PGA Tour's denial of his request to use a golf cart, on the grounds that walking 18 holes a day for four days was an integral part of the competitive challenge of professional golf, unlawfully discriminated against him on the basis of his disability. The seven-member majority, in upholding the judgment in Martin's favor, had to make two findings: first, that the PGA Tour's failure to accommodate Martin's handicap fell within the ambit of the ADA in that the golfer was a "client or customer" seeking to obtain "goods, services [or] privileges" at "place[s] of public accommodation"; and second, that Martin's requested remedy, use of a cart in professional golf tournaments, would not "fundamentally alter the nature of such goods, services [or] privileges."

Scalia, in a dissent joined only by Justice Thomas, had little trouble demonstrating that the Court's first finding was absurd, and the second open to serious question.

Focusing on the PGA Tour's sponsorship of qualifying tournaments, known as the "Q-School," by which professionals such as Martin gain entry to the top level of competition, the majority found that the PGA Tour "simultaneously offers at least two 'privileges' to the public — that of watching the golf competition and that of competing in it. Although the latter is more difficult and expensive to obtain than the former, it is nonetheless a privilege that petitioner makes available to members of the general public." Scalia turned this strained analogy on its head. "[T]he Q-School is . . . no different in principle from casting for a movie or stage production, or walk-on tryouts for other professional sports, such as baseball. . . . [T]he purpose of holding these tryouts is not to provide entertainment; it is to hire. . . . By the Court's reasoning, a business exists not only to sell goods and services to the public, but to provide the 'privilege' of employment to the public; wherefore it follows, like night the day, that everyone who seeks a job is a customer."

**"The Walking Rule"**

The majority's second finding was that "the walking rule" was "not an essential attribute of the game itself" because "[f]rom early on, the essence of the game has been shot-making — using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible." Nor, the Court held, would use of a cart give Martin an unfair competitive edge and thereby "fundamentally alter the nature" of tournament play, for at least two reasons: "golf is a game in which it is impossible to guarantee that all competitors will play under exactly the same conditions or that an individual's ability will be the sole determinant of the outcome;" and it was proven at trial that Martin endures at least as much fatigue even with a cart as his competitors do by walking.

**Serious Concern**

Scalia pounced on the majority's pretension in attempting to answer the "incredibly difficult and incredibly silly question . . . Is someone riding around a golf course from shot to shot really a golfer?" Behind the sarcasm was a serious concern. On what basis could the Court competently determine the "essence" of any practice or activity that is not comprised of legal rules?

Scalia pointed out that the Court never began to answer this question, and its clumsy attempt to define even a relatively simple activity such as golf — "using clubs to cause a ball to progress from the teeing ground to a hole" — reads as though written by a visitor from outer space and does not inspire confidence.

Scalia also was not reassured by the majority's claim that, because the fatigue factor essentially cancels itself out, the relief obtained by Martin would not upset the competitive balance of tournaments he enters. The Court's resort to empirical measurement "means that future cases of this sort will be numerous, and a rich source of lucrative litigation. One can envision the parents of a Little League player with attention deficit disorder trying to convince a judge that their son's disability makes it at least 25% more difficult to hit a pitched ball," entitling him to a fourth strike. Not even a "wild-eyed dreamer," Scalia concluded, would suggest that the governing bodies of competitive sports "take account of the uneven distribution of God-given gifts when writing and enforcing the rules of competition."

Scalia successfully exposed the majority's parsing of the ADA for what it is: a fairly transparent attempt to bend the statute to sustain a judgment that was (in Scalia's mocking phrase) "decent, tolerant and progressive." But to what end? The judgment in favor of Casey Martin — a deserving competitor and a courageous figure, who commanded the respect of everyone throughout the case — *was* decent, tolerant and progressive. Scalia's dismissal of the value of reaching a fair result, of doing justice to the concrete claims before the Court, is difficult to understand except as the consequence of an attitude that prizes theoretical consistency above all else.

**Airtight Logic**

Hard cases, it is said, make bad law. But, all in all, *PGA Tour* wasn't such a hard case, and only in a circular sense did it create bad law. Scalia's scary hypotheticals are credible if one assumes that judges follow an airtight logic in deciding cases, which will inexorably produce absurd results if the premises are faulty. Surely this misstates what judges actually do, which is guided by discretionary considerations of all kinds. If this freedom is leavened with even a modicum of good sense, four strikes will never come to Little League baseball.

Scalia's own practice is sometimes at odds with his strictures in *PGA Tour*. He is no stranger to relaxing the iron grip of legal logic when it suits his purposes. In the words of the majority opinion in *Bush v. Gore* (in which Scalia of course joined): "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." Apparently, clear thinking and plain speaking have their limits, even for this justice.

## In Delaware

# The Tyson Merger

**By Bennette Kramer**

Several months ago, the Honorable Leo E. Strine, Vice Chancellor of the Court of Chancery of Delaware, issued a decision ordering chicken producer Tyson Foods, Inc., to go through with a merger with meat packer IBP Inc. The merger agreement between Tyson and IBP had resulted from a fierce auction for IBP between Tyson and Smithfield Foods, a pork producer. Judge Strine's decision shocked the business and legal communities because relations between Tyson and IBP had become acrimonious and distrustful.

### Meat Products

Tyson sought to acquire IBP to complement its chicken processing business and create the world's "preeminent meat products company." In the years leading up to the merger agreement, IBP had made a series of acquisitions of processed foods companies in support of its strategy to expand into the food processing business. IBP had hoped to build up its profit margins with these acquisitions and offset the cyclical beef and pork markets, which have tight profit margins. In October 2000, IBP discovered that DFG Foods, which it had purchased in 1998, apparently had significant problems with the integrity of its books and records. IBP made initial disclosures about the DFG problem on November 7, 2000, stating that it would have to take a $9 million reduction in previously announced pretax earnings of $83.9 million for the third quarter of fiscal year 2000. IBP made additional disclosures concerning the extent of the problems at DFG throughout December 2000.

The auction for IBP took place during December 2000, ending on December 31, 2000, with a Tyson bid of $30 per share in cash and stock. Prior to the final bidding, the parties negotiated the merger agreement and Tyson conducted due diligence. During the due diligence process Tyson raised a number of questions including questions about the DFG accounting problems. Prior to the final bid, IBP and Tyson representatives held due diligence calls that covered the DFG charges to earnings and issues concerning IBP earnings projections.

On January 1, 2001, Tyson and IBP signed their merger agreement, which was approved by the Tyson Board of Directors and shareholders on January 12, 2001. Tyson made public statements enthusiastically endorsing the merger and the anticipated synergies of the two companies. After extending its cash offer several times, Tyson terminated it at the end of February, referring to IBP's efforts to solve its accounting issues relating to DFG with the SEC. During the Winter, both IBP's and Tyson's earnings fell as a result of reduced beef and chicken supplies due to severe weather.

On March 13, 2001, IBP filed restatements to its financials reflecting a charge to earnings on account of the DFG fraud of approximately $50 million and resolving most of its issues with the SEC. At that time, Tyson indicated it was still proceeding with the merger. However, on March 29, 2001 Tyson sent a letter to IBP stating that it would discontinue the merger because IBP had not turned over comments from the SEC "raising important issues concerning IBP's financial statements and reports filed with the SEC"; IBP had restated its financials making prior financials misleading; and delays had created "breaches of IBP representations, warranties, covenants and agreements contained in the Merger Agreement which cannot be cured." That same day Tyson sued IBP in Arkansas; the next day IBP sued Tyson in Delaware Chancery Court to enforce the Merger Agreement.

### Judge Strine's Conclusions

In his nearly 150-page opinion, Judge Strine examined every factual and legal issue in exceptional detail. First, Judge Strine concluded that the merger agreement and related contracts "were valid and enforceable contracts that were not induced by any material misrepresentation or omission." H rejected Tyson's arguments that IBP had failed to disclose sufficient information concerning the DFG fraud, meticulously setting forth the extent of disclosure provided to Tyson over the course of due diligence. He pointed out that Tyson had declined some requested due diligence because the information also would have to be provided to Smithfield and that IBP had not withheld any information requested by Tyson. He concluded that Tyson's late receipt of an SEC comment letter was inadvertent and, in all events, not material. Finally, he found absurd Tyson's argument that IBP's filing of restated financials with the SEC was a breach of the merger agreement, because the agreement itself contemplated future adjustments to the financials. Instead, Judge Strine concluded that Tyson's desire to discontinue the merger resulted from "buyer's regret" brought on by poor business performances by both IBI and Tyson.

Second, Judge Strine concluded that the merger agreement specifically allocated certain risks to Tyson, including

risks arising from the accounting improprieties at DFG. Thus, the adjustments and charges resulting from the investigation into the DFG books and accounts could not serve as the basis for Tyson to terminate the merger agreement.

Third, none of the non-DFG related issues raised by the SEC were material. Indeed, the court found these issues to be typical SEC nits that did not provide a contractually permissible basis for Tyson to abandon the merger.

Fourth, Judge Strine determined that IBP had not suffered a "material adverse effect" excusing Tyson's failure to close the merger. The court examined the financial performance of IBP during the first quarter of 2001 and determined that, although it did not meet the projections, it was within the range of performance of IBP. Indeed, the beef industry as a whole had erratic performance patterns reflected in the IBP performance for the past five years. Thus, IBP's lower performance, while disappointing, was not unexpected, Judge Strine added.

Finally, Judge Strine held that specific performance "is the decisively preferable remedy for Tyson's breach, as it is the only method by which to adequately redress the harm threatened to IBP and its stockholders." In Judge Strine's opinion the determination of cash damages would be difficult and the amount of any award "staggering huge."

**Subsequent Events**

In granting IBP's claim for specific performance, Judge Strine directed the parties to "collaborate and present a conforming partial final order no later than June 27." Tyson decided not to appeal Judge Strine's decision and sat down with IBP and worked out a deal. Tyson's new offer commenced on Tuesday, July 3. The offer was the same as the prior one, but was worth approximately $500,000 less because of the decreased value of Tyson shares. The parties agreed to a break-up fee of $59 million, in contrast to the break-up fee of $15 million for the original deal. Tyson expects to complete the merger by November 15, 2001. The deal will affect approximately 120,000 employees: 50,000 IBP employees and 68,000 Tyson employees. Consumers will find more pre-packaged beef, and fewer butchers.

## FBC News

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host high school students in their courtrooms as part of the Court Visits Program. In addition, 40 law firms and legal organizations will be visiting the students in their classrooms to introduce the program, discuss the court proceedings that the students will witness, and escort them through their court visit. Southern District Judges Sidney H. Stein and Denny Chin inaugurated the Court Visits Program in March with a visit from students from Brooklyn's Wingate High School, accompanied by attorneys from Kenyon & Kenyon.

**Interactive Experience**

"Our goal is to enable young people to learn more about judges, lawyers and the court system in a positive and educational environment," says Anthony M. Radice, a partner at Morrison & Foerster who is co-chairing the Court Visits Program subcommittee along with Judge Chin. "It is an interactive experience for the students, allowing them to discuss the relevant legal issues directly with the judges and the sponsoring law firms and legal organizations prior to and following the court proceedings. We hope and believe it will make a lasting impression on the students participating in the program."

The Court Visits Program is operating in conjunction with the MENTOR Program run by the New York-based Justice Resource Center, in which law firms and legal organizations are paired with high schools around New York City to provide a wide range of mentoring services. Firms participating in the Court Visits Program are paired with their existing MENTOR Program high school, with the mentoring attorneys accompanying the students and their teacher to the court proceeding and the visit with the judge. The attorneys from each firm meet with the class before their scheduled court visit to give the students an overview of what they will see in court. Following the proceedings, the attorneys have lunch with the students in the courthouse cafeteria and discuss with them what they witnessed in court. Depending on time and availability, students may also tour the presiding judge's chambers and robing room, the jury room, the ceremonial court room, the main jury assembly room and, with assistance of the marshals, the prisoner holding cells.

"The Court Visits Program provides students a unique opportunity to get a behind the scenes look at how our judicial system operates," says Debra Lesser, Executive Director of the MENTOR Program. "In particular, the dialogue between the students and the judges and law firms prior to the proceedings and the debriefing with them following the proceedings sheds light on the judicial process in a way that no textbook can."

**Expanding Program**

According to Richard A. Rothman, Chair of the Public Service Committee

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and a partner at Weil, Gotshal & Manges, "we are so excited about the success the program has enjoyed thus far, that we are now planning to expand the program to include the state courts as well. Judge Chin and Tony Radice deserve wide praise for providing leadership to this effort, and Barbara Nichols of Weil, Gotshal & Manges for administering the program so effectively." Other members of the Court Visits Program subcommittee include: Lauren E. Aguiar of Skadden, Arps, Slate, Meagher & Flom, Anne K. DeSimone of Morrison & Foerster, Kerry C. Foley, Heather R. Goldstein and Jason R. Lilien of Weil, Gotshal & Manges, and Matthew Solum of Sullivan & Cromwell.

## From The President

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enthusiastic attendee at our 2001 Winter Bench & Bar Conference and mother of two wonderful children, ages 8 and 2. Sadly, Marvin Schwartz of Sullivan & Cromwell lost his son, John Burkhart Schwartz. To the families of these and others, we say that your suffering is also ours.

Rightfully, we have focused our honor on those uniformed service members who gave their lives in an effort to save others. Let us also not forget the living heroes — firefighters, police and construction workers — who are, today, working long and arduous hours, day-after-day 12 hour shifts that often begin at 4 a.m.

We are grateful to Bob McGuire, our member and the former Police Commissioner, for chairing our Foundation's Relief Fund. One single solicitation has brought in over $20,000 of relief money. A tax deductible contribution may still be made by check payable to the "Federal Bar Foundation, 9/11 Relief Fund" mailed to 370 Lexington Avenue, Suite 1012, New York, NY 10017.

We have much to admire in our colleagues at firms directly affected by the attacks who are shining examples of the best of New York and of our profession. They are refusing to give into paralysis and they are shepherding their associates and staff back to work and nursing their emotional wounds. There are said to be 14,000 lawyers south of 14th Street. While it varies from unpleasant odors, visual reminders and mild inconveniences to those who are working in borrowed space, please remember that many of your colleagues in lower Manhattan are still experiencing the after effects. Those with more profound personal losses, of course, are geographically dispersed.

### New Amicus Effort

I now proceed with the more mundane. On the heels of our participation, as amicus, on the *Apprendi* issues raised in *United States v. Thomas*, the Federal Bar Council was invited to participate in briefing a fascinating, important and controversial issue. May a non-dangerous defendant found mentally incompetent to stand trial be forcibly medicated so as to render him competent? On one side of the scale is the individual's freedom from unwarranted government intrusion and, on the other, the government's compelling interest in enforcing criminal laws. There is also the issue of whether the medication impairs the defendant's ability to obtain a fair trial because it may destroy demeanor evidence — the defendant may no longer appear as he did at the time of the crime, thereby impairing an insanity defense.

We were fortunate to have a skilled briefing team led by the triumvirate of John Wardin, Frank Velie and Jerry Walpin. The group split in its views and the issue was put to a vote with a majority favoring the position, put ever so briefly, that the medication could not constitutionally be administered. A spirited minority expressed a different opinion. Our brief in *United States v. Gomes* presents the majority view with a two-page summary of the minority position. Our thanks to John, Frank and Jerry and their very fine team of colleagues, including David Wales and Dee Burgman, for a very professional job which we hope will be of great assistance to the court.

### Schedule of Events

Over the next six months, the Counc is filled with activities. On November 7, the First Decade Committee will hold a reception and CLE program at 500 Pearl Street in the 9th floor Ceremonial Courtroom. The reception will begin at 6:00 p.m. and the panel discussion will take place between 7:00-9:00 p.m.

On November 15, from 5:30-7:30 p.m. at the Quinnipiack Club in New Haven, we will sponsor a reception to honor Senior Federal Judges in Connecticut.

As you have no doubt seen from the invitation, on November 21, former FBI Director Louis Freeh will present the Emory Buckner Award (which he had previously received) to Honorable Mary Jo White, our highly respected United States Attorney for the Southern District of New York.

Our Winter Bench & Bar Conference to be held at the beautiful Westin Rio Mar in Puerto Rico fron February 16-23, 2002 is well along in its planning. The panels, under the leadership of Judge Pierre Leval, will be an intellectual feast. New SEC Chairman

Harvey Pitt will be among those presenting. Louis Freeh will make a presentation on Homeland Security legislation. There are a few spaces still available to those interested.

Finally, now is the time to make reservations and submit your admissions papers if you would like to be admitted at the March 4, 2002 Supreme Court Admission Ceremony. Circuit Justice Ruth Bader Ginsburg and historian Professor Maeva Marcus will address a private reception of our members and guests. Also, thanks to excellent planning by Bob Giuffra, our group will be addressed the evening before by Assistant Attorney General Viet D. Dinh, who is in charge of the Department of Justice Office of Policy Development.

## A Personal Opinion

# September 11

**By Steven M. Edwards**

On September 11 our lives were changed forever. It is no longer possible to feel completely safe — as though the terrorist acts that have plagued the rest of the world could never happen here. It has happened, and many of us are confronting it for the first time.

In the aftermath of this tragedy, I found myself glued to my television set. I felt that if I continued to watch the story unfold, I might be able to get to the end. There was also the thought that if I continued to watch, without diverting my attention, maybe something good would happen.

Nothing good happened, and the question that preoccupies many of us now is what are we going to do about it. That question is actually two questions: What are we going to do to prevent attacks like this in the future, and what are we going to do in response to this attack?

The first question raises a number of difficult and awkward issues. It appears that there was ample warning of the possibility of such an attack in materials captured from terrorist groups as well as popular fiction. If that is so, then it must be the case that we either failed to take adequate steps to prevent the attack or the attack was not preventable.

If we failed to take adequate steps, how did that happen? If the attack was not preventable, then it could happen in the future. Both possibilities are unsettling.

**Security Measures**

In the wake of the attack, extensive and somewhat onerous security measures have been adopted at airports and in buildings. Notably, most of these measures would have been insufficient to prevent this particular attack, since plastic weapons are not picked up by metal detectors and no one has suggested (nor should they) that people should be prevented from boarding airplanes simply because of their appearance or ethnicity. If anything, some of the new security measures may make it more difficult to detect potential hijackers by forcing them to use fake identifications (as most parents of high school children know, they are readily available) and preventing them from buying tickets in a way that can be tracked by computer (a security measure that could have worked in the World Trade Center disaster).

I suppose these measures are nevertheless worthwhile because they might deter certain wrongdoers — even if they would not have deterred these wrongdoers — and, in any event, they make us feel better. I predict, however, that we will soon grow tired of them and eventually revert to the systems that have been in place for the last few years. The question remains: Is there any effective way of preventing these attacks in the future?

The best suggestion I have heard for airplanes is to make the cockpit inaccessible from the cabin. Not only would this entail an impenetrable barrier, but the pilots and the passengers would have to enter the plane through separate doors. Separate entrances and doors that do not open would eliminate the possibility of using threats against hostages in the cabin to get the pilots to open the door. This approach seems preferable to pistol packing pilots and marshals, although the two approaches are not mutually exclusive.

Even if we could solve the hijacking problem, what about terrorists in vehicles, terrorists who plant bombs and terrorists who might attempt to poison the food or water supply. We can't search every truck and every suspicious character standing on a street corner with a suitcase. We presently inspect and monitor everything we eat and drink; it's difficult to imagine what more we can do on that front, except perhaps do more of it.

**The Money**

One thing we could do far better than we have in the past is to follow the money. Efforts such as those directed at the World Trade Center and the Pentagon require financing. Money has to be transferred through financial institutions, and when that happens there are records and patterns that could provide clues to the existence of clandestine activity. This may be the end of bank secrecy as we know it. The U.S. could simply say to all of its banks and to banks throughout the

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world: If you want to do business in the U.S. or with U.S. companies you must give us access to your computer systems so that we can monitor the activities of your customers. If it is possible to write computer programs that monitor healthcare claims for patterns suggesting fraud, it should be possible to write computer programs that monitor fund transfers for patterns suggesting more nefarious activities.

Another major technique that could be effective is simulation. Ask yourself — if I wanted to engage in these activities, how would I go about doing it — and then send out operatives to look for evidence indicating whether the activity is taking place (i.e., if I wanted to fly a plane into the World Trade Center, I would have to take flying lessons). It is difficult to believe this is not already happening, but the apparent lack of warning of the World Trade Center disaster suggests that it is being done poorly or not at all.

At bottom, we may have to face the reality that terrorist attacks are not completely preventable. Most of us are willing to live with risk — indeed we do so every day — so long as we are comfortable that all reasonable steps are being taken to limit that risk. I suspect many of us do not have that comfort level at this point and will not until we are assured, at least, that an attack such as the one that destroyed the World Trade Center could never happen again.

That brings us to the second question: What are we going to do in response? President Bush has vowed to track down Bin Laden and the vast network of terrorists that seems to be operating worldwide and to bring them to justice. He has also issued a warning to countries who may be assisting or harboring terrorists that they must cooperate in their apprehension or face military action. This is reminiscent of the rallying call of the 1960s that you are either part of the problem or part of the solution.

**The History**

In considering the benefits and risks of this approach, a number of historical precedents come to mind. Is this going to be like World War I, where a terrorist act was met with retaliation, which in turn gave rise to a series of alliances and countermeasures that plunged the entire world into war? Is it going to be like World War II, where the biggest mistake the Japanese made was to attack Pearl Harbor, waking the sleeping giant? Or will it be like the war in Vietnam, or even more on point, the Soviet invasion of Afghanistan—where a war of attrition was abandoned when it could not be won.

Another useful precedent may be the Arab oil embargo. When the embargo was launched in the 1970s, the United States did not take military action—which virtually every other superpower that preceded the United States would have done. Rather, the United States sought to solve the problem through diplomatic means, aligning itself with major oil producers such as Saudi Arabia and achieving a kind of equilibrium in which both the oil producers and the oil consumers prospered.

When Iraq attempted to upset that equilibrium by invading Kuwait and threatening to invade Saudi Arabia, which would have given it more than 62 percent of the world's proven oil reserves, the United States had no choice but to intervene militarily. Any other result would have plunged the West into a debilitating recession. As a consequence of the equilibrium achieved in the 1970s and maintained in the Persian Gulf War, the West (and much of the world) has enjoyed years of prosperity.

The Persian Gulf War was perhaps the most successful war in history. Not only were the losses on our side minuscule, but we spent months carefully building a worldwide consensus to support it. The end result was broader and closer alliances than we had before.

The current situation presents the United States with a unique challenge. The persons ultimately responsible for the attacks on the World Trade Center and the Pentagon must have assumed that there would be retaliation, and they are undoubtedly hoping that the retaliation will drive our allies in the Middle East into the arms of the outlaws. The name of the game from our standpoint should be to bring those responsible to justice while preserving (or improving upon) the equilibrium that has existed since the Persian Gulf War.

It would be disastrous if, as a result of our retaliatory strikes, we lost the support of our allies in the Middle East — or worse, the governments of those countries were overthrown. We could easily find ourselves at the crossroads we faced with the Arab oil embargo, but without the middle ground of a diplomatic solution. We should remember that, in the real world, results are seldom achieved without compromise. At all times, we should preserve our ability to compromise consistent with the goal of achieving our ultimate objective.

**Economic Interdependence**

In the long run, the only real solution may be economic interdependence. In the last 50 years, our economic interests have become so intertwined with those of Europe and Asia that the notion of a conflict such as World War II is unthinkable. We need to do the same thing in the Middle East.

More than two centuries ago, the founders of this country believed that America should take advantage of its geographic isolation by staying out of the wars that plagued Europe. Let them tear each other apart, was the thought, while we develop our vast natural resources. That approach has served us well, but it does not work in the modern world. At the risk of resorting to cliches, not only are economies becoming more globalized, terrorism has become more globalized as well. Global problems require global solutions, and global solutions are best achieved through cooperation driven by interdependence. The goal should not simply be fighting terrorism; the goal should be building a world in which terrorism is unthinkable.

## New Appointments

# Dennis Milton Sworn In As Bankruptcy Judge

**By Stacey Creem and Louis Barragan**

Dennis Milton has been sworn in as a United States Bankruptcy Judge for the Eastern District of New York. Judge Milton brings to the bench more than 25 years of experience as a litigator in numerous areas, including criminal defense and prosecution, municipal law, bankruptcy, intellectual property and labor law.

Prior to his appointment, Judge Milton served as Special Counsel to the Chief Investigators of the Independent Review Board overseeing the International Brotherhood of Teamsters pursuant to a consent order in the Southern District. From 1992 to 1996, Judge Milton was a partner at Bryan, Levitin, Franzino & Rosenberg, where he represented clients in both civil bankruptcy proceedings and in state and federal criminal investigations.

Before working in private practice, Judge Milton served the public sector as an Assistant United States Attorney for the Eastern District of New York Criminal Division and later as Chief Deputy County Attorney for the County of Suffolk Department of Law. As Chief Deputy County Attorney, Judge Milton was the chief administrative officer for an office of 57 municipal attorneys and was the chief liaison officer with county agencies in contract, labor and tax matters. As Assistant U.S. Attorney, Judge Milton prosecuted various offenses including tax evasion, bank fraud, money laundering, illegal sales and transfers of firearms, trademark infringement and obstruction of justice. Judge Milton obtained the indictment, extradition and conviction of defense contractors selling military helicopter parts to a European supplier for trans-shipment to Iran in violation of the Arms Export Control Act.

Prior to working at the U.S. Attorney's office, Judge Milton was an associate at the white-collar criminal defense firm of McGuire & Lawler.

Judge Milton approaches his 14-year term as a bankruptcy judge with both enthusiasm and an appreciation for the particular challenges faced by a judge in a specialized court. "Not getting stale" in the face of repetitive claims and arguments, Judge Milton says, is important to him. He also believes that all those who come into his court must "leave feeling as though they have been heard."

Since 1998, Judge Milton has served as a faculty member of the Association of the Bar of the City of New York in its continuing legal education Litigation Skills Workshop: Taking and Defending Depositions.

Judge Milton was admitted to practice in the State of New York in 1977. He also is admitted to practice in the Eastern and Southern Districts of New York and in the U.S. Circuit Courts of Appeals for the Second and Federal Circuits. Judge Milton received his bachelor's degree from Columbia University in 1973 and his law degree from Fordham University School of Law.

## The Back Page

(continued from p. 20)

who fears the soldier whose rifle is
trained
on the boy with his hands raised over his
head
in Warsaw.

I am the man in the overcoat
who loves the woman with lowered
gaze
who fears the soldier whose rifle is
trained
on the boy with his hands raised over his
head
in Warsaw.

I am the stranger who photographs
the man in the overcoat
who loves the woman with lowered
gaze
who fears the soldier whose rifle is
trained
on the boy with his hands raised over his
head
in Warsaw.

The crows, of which I am each part,
moves on
beneath my window, for I am the crone
too
who shakes her sheets
over every street in the world
muttering
*What's this? What's this?*

(continued on p. 18)

Southern District of New York Judge Richard Owen, a distinguished composer of opera and other works (the FBC produced his chamber opera "Abigail Adams" several years ago) was sufficiently taken with the following to write a charming short work for soprano and cello to this text. His wife, the fine soprano Lynn Owen, and Steven Flanders performed it at a judicial conference and at a chamber music concert at the New York County Lawyers' Association.

*A Cello as the Other Woman*

She has a few scruples,
She didn't come to the wedding.
But after he carried me over the threshold
He went back and got her.

His friends called her "Gert".
Seeing her flat bosom and bulbous belly,
I thought she was a joke,
Stuck in her case in the corner.
At first when he took her out
His new wedding ring felt heavy.
He wanted to put it in his pocket,
I still didn't catch on.

When he said one night they'd be late
And he carried her home in his arms
Humming snatches of song,
Falling on the bed
Like some doped Argonaut;
When I saw his fingers pressing
The tendons along her neck
Till she whined ecstatically,
When she went along on our vacation,
I began to understand.

They've been together a long time now,
Longer than we have.
I sit with them as he oils her slick curves,
Waxes her horsehair bow,
Brings her strings to a true pitch,
And talks about her high lineage,
Her beauty, her antiquity,
Of course, they still go off
To some melodious reef
Where I can't get at them
But I'm getting used to her.

As time passes I even find it comforting—
His preference for old ladies.
Sometimes, the morning after,
I find on his coat a long white hair.

Many of Jane's poems draw together several of the arts: literature, painting, music, and others. Some examples follow:

*Picasso's Blue Period*

blue-grey eyes
your Yugoslavian shirt
sea-water the color of moss agates
cerulean sky

white paper with thin blue lines
the plum-covered bruise on your neck
your name in blue script

borage, flax, forget-me-nots
pale horizon
the blue-green veins in your hand

today the sea is indigo
the hills drift away like smoke
your milky breasts
larkspur, hyacinth
your lips
delphinium

and the sky is full of sapphires

cobalt streets
lilacs, lavender
a blue wash over everything

the ship sails off on an azure field
steel-blue shadows
turquoise fish
under the ashen trees
is that all?

no, the faint blue aura of your smile
tidal pools
aquamarines, lapis lazuli

there are bachelor's buttons in the garden

is that all?

no, I remember your blue thighs
blue china
treacherous blue-black water

* * *

*After Manet*

After Manet came Monet,
("This is a joke!" raged Edouard,
when they complimented him on "his"
seascapes
at the Academy.) And after Monet
stubbornly sacrificed everything for light,
came Sisley, Renoir, Degas, Morisot;
came
Cézanne and wild Van Gogh, the engines,
the lilies.

After Manet even you and I
could give up masquerades. We appeared
in ordinary dress with sleeves rolled up or
took off our clothes and bathed
in speckled shade, eyes focused
on the indistinguishable future and past.
We learned, after Manet, to analyze
the scarlet traces in the bullring's dust.

And after that
the line that separated us from each
other
and from the rest of the world
became blurred / was recognized
as fiction after all. And ordinary sadness,
in delicate shades of peach or plum,
descended upon our very real lives.

*The Water-Garden, Giverny*

*(As if in the voice of Alice Hoschedé, Claude Monet's second wife. His first wife, Camille Doncieux, died at the age of 31.)*

Claude, the lilies
are spreading their skirts
for bees and dragonflies. They remind
me
of all our girls—Suzanne,
Blanche, Marthe, Camille—yes, even
Camille
seems like one of them. She alone
has not grown stout and grey
but flits, mothlike,
over the garden in pale,
impeccable gowns,
'r eyes averted or coyly masked
_y violet silk, green leaves.

You said (I never forgot it) each leaf
was as important as each face.
I disagreed but understood;
she never did,
drifting relentlessly
over the poppies while you watched
her eyes grow murky like the pond
and added more viridian to your palette.

It has taken almost a lifetime but now,
at last, we have gone away—
she, I, even your Jean
(oh yes, I know you grieved).
There is no one left to keep you
from knowing that always
you loved light best, wooing it constantly
as it flared
across Argenteuil, Trouville,
the landscapes of our hats and parasols.

'oday the odor of death
ıangs over the lilies.
Perhaps even they would rather be
loved
for themselves—not for their pallor,
tinged with chrome yellow, vermilion—
not for their small-gloved
fingers reaching
out with rare, diaphanous sighs.

Jane Flanders was born in Waynesboro, Pennsylvania in 1940, and died at home in Pelham, New York on April 12, 2001 following a battle with cancer that extended more than two years. Her teaching career embraced every level from seventh grade to graduate students. Winner of many poetry prizes and fellowships, she held a number of endowed visiting professorships for poets. A similar program is being established in her honor at Bryn Mawr College. Contributions may be made "in memory of Jane Flanders" to the Resources Office, Bryn Mawr College, 101 North Merion, Bryn Mawr, PA 19010.

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# Poet Jane Flanders Dies

If the Second Circuit has ever had an official poet, it certainly would have been Jane Flanders, who found herself making literary and musical contributions to at least three judicial conferences. Indeed, her husband Steven Flanders reports, one of his particular pleasures at a conference several years ago followed her poetry reading, which had been requested by then-Chief Judge Wilfred Feinberg. Southern District of New York Chief Judge-to-be Thomas P. Griesa came up to Jane and Steve after the program and declared, "This is exactly the sort of event we should have at the Judicial Conference." The special place Jane Flanders occupied in the Federal Bar Council was manifested rather clearly after her death in the generous and unexpected contributions many officers and other members made to a poetry fund in her honor.

Possibly her best-known and most widely reprinted poem is "The House that Fear Built: Warsaw, 1943," first published in the journal Chelsea, and in her third book, Timepiece (University of Pittsburgh Press, 1988).

*The House that Fear Built: Warsaw, 1943*
*"The purpose of poetry is to remind us*
*how difficult it is to remain just one person,*
*for our house is open, there are no keys in the doors."*
—Czeslaw Milosz

I am the boy with his hands raised over his head
in Warsaw.

I am the soldier whose rifle is trained
on the boy with his hands raised over his head
in Warsaw.

I am the woman with lowered gaze

(continued on p. 17)

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