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From the President

A Final Word as Council President

By Judge Mary Kay Vyskocil

As I write this column there are only a few weeks remaining in my term as president of the Federal Bar Council. It has been a tremendous honor to serve in this role for the past two years. As I reflect on the privilege of leading the Council, I am struck by the unique times in which my presidency unfolded and the inescapable conclusion that the Council is truly an extraordinary organization that has weathered the challenges and continues to well serve its mission.

I was privileged to work throughout my presidency with an extremely dedicated and talented group of lawyers, a few of whom I want to personally recognize and thank. First and foremost, I am grateful to Jon Moses, our president-elect, who has been a collaborative and constructive partner in all of our endeavors. We also have been well served by our treasurer, Shawn Regan, who has done an outstanding job keeping on top of our finances and helping plan for the necessary contingencies resulting from the cancellation or modification of so many of our events. Finally, I am indebted to Sean Coffey, who has been an energetic and dynamic president of the Federal Bar Foundation. He and the board of the Foundation have done an exceptional job in helping the Foundation to achieve (or surpass) its goal, allowing the Council to continue the good public service in which it is engaged, including support of the Circuit's civic education initiative, Justice For All, the Immigrant Justice Corps, and other efforts. I must also acknowledge the officers and trustees of the Council and the Foundation, and appreciate the advice and counsel of the former presidents of the Council, and the members of the executive committee, who serve the Council so well.

I am enormously grateful to the judges of the courts throughout the Circuit who so ably and readily answer the Council's call for them to participate on our CLE panels and at our conferences, and who participate in our Inn of Court, on our committees, and in our events. The relationship between the Council and the judiciary is very special to the members of the Council and we remain committed to our long-term mission of fostering respectful, cordial relations between the bench and bar.

As I embarked on my term in office, I was keenly aware that the Council, like many bar associations and professional organizations, was facing challenges in terms of membership, declining active engagement in bar associations by lawyers, and reluctance by law firms to support our endeavors financially and to attend our events. In order to address these challenges and plan for our future, one of my first initiatives was to constitute a Strategic Planning Committee, which I asked our president-elect Jon Moses to chair. We are all indebted to the members of the SPC who were hard at work for the past two years, analyzing our historical trends, identifying areas for potential improvement, and formulating recommendations and ultimately a strategic plan that will ensure the vitality and relevance of the Council well into the future.

Our Committees

The backbone of the Council remains its varied committees, through which, behind the scenes, many of our exchanges take place, events are conceived and organized, and our members engage with one another and with the judges of our Circuit. Several of our committees are led by new chairs whom I appointed during my term, including Kathy Marks, chair of the Westchester Committee; Rowena Moffitt, chair of the Connecticut Committee; Jim Wicks, chair of the Long Island Committee; Laura Hall, chair of the Second Circuit Courts Committee; Kieran Doyle, chair of the Intellectual Property Committee; Julian Brod, chair of the First Decade Committee; David Shanies, chair of the newly-formed Civil Rights Litigation Committee; and Andrea Schwartz, co-chair of the Bankruptcy Committee. I want to specifically acknowledge the extraordinary work of our Public Service Committee, led by Saul Shapiro, which has worked to address the difficult issues facing our country and serve so well our

guiding principle of equal access to justice. I also gratefully acknowledge our Program Committee, led by David Siegal, which has done a remarkable job of pivoting to all virtual CLE programs throughout the pandemic and has provided exceptional and timely programs which have been attended by record numbers of participants. I also wish to acknowledge, with warm thanks, the work done for many years now by Bennette Kramer, in serving as editor of this *Quarterly*, and of all our contributing authors who put together this most interesting publication, most especially Pete Eikenberry, who has long worked tirelessly on the *Quarterly*. Finally, I thank the chairs and members for the past two years of our leadership committees, Vilia Hayes who chaired the Nominating Committee (members: Bob Anello, Sheila Boston, Tom Goldberg, Scott Morvillo, Breon Peace, Betsy Plevan, Frank Wohl, and Mark Zauderer) and Bob Giuffra, chair of the Awards Committee (members: Magistrate Judge Sarah Cave, Rita Glavin, Mary Beth Hogan, Christos Papapetrou, Elena Paraskevas-Thadani, Shawn Regan, and Milt Williams).

I am so gratified that during my term the Council was able to host a number of events that afforded warm and memorable opportunities to our members for professional growth and fellowship, including our 2019 Thanksgiving Luncheon (ably chaired by Sharon Nelles) at which I was pleased to present the Emory Buckner Award for Outstanding Public Service to New York Court of Appeals Chief Judge Janet DiFiore; the April 2019 Supreme Court admission weekend, chaired by Miguel Estrada and featuring a keynote address by U.S. Solicitor General Noel Francisco, capped off by the admission to the Supreme Court of 19 of our members; our 2019 Law Day Dinner (chaired by Roberta Kaplan), at which we were privileged to award the Learned Hand Medal for excellence in federal jurisprudence to Second Circuit Judge Guido Calabresi; our wonderful annual tradition of the Fall Retreat, held in 2019 at the Mohonk Mountain House (chaired by Pat Miller and Paul Kingsbery); and our Winter Bench & Bar Conferences in Maui, Hawaii, in 2019 (chaired by Russ Yankwitt) and in Nassau, Bahamas, in 2020 (chaired by Jillian Berman and Eric Franz), at which I had the pleasure of conferring our Whitney North Seymour Award on Ernie Collazo (2019) and Evan Chesler (2020).

I am particularly proud of two new programs that we recently inaugurated. First, over 80 of our members have enrolled in our newly launched Mentoring Circles, an initiative that grew out of our Strategic Planning Committee study. Second, under the sponsorship of the Second Circuit Courts Committee, the Council has launched our new Legends of the Bar program, a series of conversations with legal luminaries in our Circuit, beginning with Bob Fiske.

Virtual Gatherings

The latter half of my term in office surely has been an unprecedented time for the Council, and indeed for our country and the world. The challenges we have faced have highlighted for me how unique the Federal Bar Council remains as a premier bar association for lawyers practicing in the Second Circuit. During 2020, many of our signature events had to be postponed or cancelled. And, so, for example, we did not host our Judicial Reception in the Spring or our annual Law Day Dinner this past May. But, due to the creativity of the Council staff and the active engagement of our members, the Council shifted to virtual gatherings and added new and welcome opportunities for us to engage with one another, including, to name but a few, Trivia Tuesdays, Monday Morning Breakrooms, and a wine tasting social. Rather than gather over dinner to celebrate Law Day, we put together a truly informative and inspirational virtual platform commemorating Law Day, and I am so pleased to confirm that our Learned Hand honoree, Chief Judge Debra Livingston, has graciously agreed to allow us to honor her at the 2021 Law Day celebration, which we hope we will be able to celebrate in person.

As you know, COVID also impacted our annual Fall Retreat. This weekend gathering has grown from a small experiment offering an alternative (or supplement) to our Winter Bench

& Bar Conference for those who cannot afford the time or expense of a week-long conference at a more exotic and remote destination to one of our signature events that now attracts roughly 200 participants each year. This year, representatives of our sponsoring committees, the Second Circuit Courts Committee and the First Decade Committee, led by Erica Wolff and David Livshiz, were adamant that we could not let COVID stamp out our fall gathering. They organized a "virtual fall retreat" which was by all measures a wonderful event, featuring our now well-established Federal Rules Challenge, an inspiring keynote address, two live and two on-demand CLE programs, all built around the theme of The Role of the Courts in Providing Equal Access to Justice, as well as networking opportunities during a virtual cocktail reception, breakfast roundtable discussion groups, and a cooking competition.

Perhaps one of the most moving experiences I have had as president was hosting the Council's virtual tribute to Circuit Judge Robert A. Katzmann at the conclusion of his term as chief of the Second Circuit. I look forward, as well, to presenting our 2020 Emory Buckner Award for Outstanding Public Service to David Patton, Executive Director of the Federal Defenders of New York, at our annual Thanksgiving Luncheon celebration, which will also be virtual this year. I hope that you will plan to join us at this virtual celebration.

Council Staff

I would be remiss if I did not acknowledge and thank the incredibly committed and talented staff of the Federal Bar Council, led by our extraordinary Executive Director, Anna Stowe DeNicola. Anna is creative, thoughtful, and tireless and it has been my pleasure to work with her so closely over the past two years. I am also in awe of the enormous energy and dedication of Aja Stephens (our Manager of Events), John Reynolds (our Manager of CLE), Teresa Ngo (our Manager of Membership and Marketing), Mary DeBernardo, Dilenny Diaz, and Sasha Robertson.

I want to close by thanking the members of the Federal Bar Council for entrusting me with leadership of our great organization these past two years. I am enriched by the many wonderful people I have met and with whom I have worked. The enormous sense of community and fellowship that are hallmarks of the Council are more important in today's world than ever. There is no doubt that our world has changed, and how we practice law has changed – perhaps permanently and perhaps for the better in some respects. But, what has not changed is the need for respect and civility, excellence in what we do, fellowship among practitioners, and engagement in our communities as we each do our part to make the world better and more just. I am confident that under the leadership of Jon Moses, our next president, the Federal Bar Council will continue to thrive and to provide opportunities for us to further the mission of the Council in respect of these important goals.

From the Editor

The Origins of Jim Crow

By Bennette D. Kramer

The Warmth of Other Suns by Isabel Wilkerson (New York, Vintage Books, 2011) deals with the Great Migration of Blacks from the South to Northern cities. Wilkerson describes the restrictions that Blacks lived under in the Jim Crow South and the lack of rights and the unchecked violence that permeated everyday life for them from the mid-1870s to the 1970s.

Reconstruction

After the Civil War, during Reconstruction, the federal government took over the management of the South, and newly freed slaves were able to exercise

rights previously denied them. They could vote, marry, go to school, attend Black colleges, and run for office. But that all changed in the 1870s. One of the major factors in the dismantling of Reconstruction was the Supreme Court's decision in *United States v. Cruikshank*, 92 U.S. 542 (1876), where the Court held that Blacks must look to the states, not to the federal government, for protection against violence and fraud. The *Cruikshank* decision is a masterpiece of dismantling federal protections for Blacks in the South. I will describe the decision below, but first some background.

Cruikshank

In *The Day Freedom Died: the Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction* (Lane, Charles, New York, Holt Paperbacks, 2008), Charles Lane provides the facts underlying the *Cruikshank* opinion, because in the opinion, "Not once did [Chief Justice Morrison R. Waite] mention the fact that dozens of freedmen had been killed at Colfax [Louisiana] on Easter Sunday, 1873. There was nothing about the burning courthouse; no discussion of Alexander Tillman's desperate flight or the savagery visited upon him as he died; not a word about the way the white men marched their colored prisoners to their deaths, two by two, after dark." (p. 246).

According to Lane, Black men defending the Republican Party's victory for local offices in the 1872 election gathered in the courthouse in Colfax, Louisiana. "When they saw groups of armed whites patrolling the area, they dug a semicircular trench around the courthouse. A large group of white men, mounted and armed with rifles, revolvers, and a small cannon, had arrived in Colfax Easter Sunday, demanding that the colored men surrender, stack their arms and leave. When the Negroes refused, the whites attacked, setting the courthouse ablaze and gunning the colored men down like dogs." (p. 21). Later that night, the whites marched the surviving Black prisoners away in pairs and shot each of them in the head.

The first trial of the murderers ended in a hung jury. As the second trial started, Associate Justice Joseph P. Bradley arrived "riding circuit" to participate in the trial along with Judge William Burnham Woods, a Fifth Circuit judge and a former Union Army officer. The defense moved to challenge the jurisdiction of the federal court to hear the case. Justice Bradley said that the issue was important, but that the judges needed time to consider it, so that the trial could go forward.

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Of the eight defendants, five were acquitted and three were convicted of conspiring to violate the civil rights of the Black men; all were acquitted of murder. Judge Wood denied the defense motion for a new trial, but Justice Bradley, who had gone back to Washington, returned to New Orleans to deliver his opinion, in which he held that the motion "in arrest of judgment" must be granted, and the guilty verdicts overturned.

The Supreme Court's Decision

The case next went to the Supreme Court, which held argument in October 1875 and issued its opinion on March 27, 1876. The opinion was written by Chief Justice Waite, but it tracked Justice Bradley's Fifth Circuit opinion. Justice Waite discussed the First Amendment right to assemble and petition, the Second Amendment right to bear arms, the Fourteenth Amendment prohibition of a state from depriving a person of life, liberty, or property without due process and equal protection under the law, and the Fifteenth Amendment right of suffrage. In each case, the Court determined that, since the actions here were committed by individual citizens of Louisiana, not the state, there was no federal jurisdiction. The powers of the federal government were limited to what is required of a national government.

Concerning the First Amendment right to peaceably assemble, Chief Justice Waite reasoned that it existed before the government of the United States was established. It was the states' obligation to protect their citizens' right to peaceably assemble and "no direct power over it was granted to Congress." Thus, the First Amendment "was not intended to limit the powers of the state governments in respect to their own citizens, but to operate upon the National government alone…. For their protection in its enjoyment, therefore, the people must look to the States." *Cruikshank*, 92 U.S. 542, 551-52. The First Amendment right to peaceably assemble implicated the federal government only when it involved the petitioning of Congress. *Id.* at 552-53.

Similarly, the Second Amendment right to bear arms was also a right that existed before the Constitution was adopted and not a right granted by the Constitution, the Chief Justice wrote. The Second Amendment declaration that "it shall not be infringed" meant only that it shall not be infringed by Congress. The Second Amendment only prohibited infringement by the federal government, not private citizens. *Id.* at 553.

Redress for the deprivation of lives and liberty in Louisiana rested only with the state. "The very highest duty of the States, when they entered into the Union under the Constitution was to protect all persons within their boundaries in the enjoyment of these 'unalienable rights with which they were endowed by their Creator.' Sovereignty for this purpose, rests alone with the State." *Id.* The Fourteenth Amendment due process and equal protection rights accordingly did not enhance the rights of one citizen as against another, only against arbitrary exercise of the powers of government. Additionally, the Court noted that there was "no allegation that this [violation of Blacks' right to equal protection] was done because of the race or color of the persons conspired against." *Id.* at 554.

The *Cruikshank* decision is a masterpiece of dismantling federal protections for Blacks in the South.

Also, the Fifteenth Amendment did not protect the right to vote of citizens of "African descent and colored" in this instance because the elections at issue were state elections, and only federal elections were protected.

The counts brought under the Civil Rights Act of April 9, 1866, which was enacted by Congress to protect citizens of the United States from discrimination on account of race, color, or previous condition of servitude against discrimination, did not apply here because "as has already been stated, it is nowhere alleged in these counts that the wrong contemplated against the rights of these citizens was on account of their race or color." *Id.* at 555.

The counts alleging violations of the Civil Rights Act were also too vague and uncertain, the Court found.

The conspiracy counts thus failed to allege the defendants acted with racist intent, and the counts that did allege a racial motive did not comply with the rules for criminal pleading.

The Court's conclusion was that the 150-page indictment and subsequent trial neither provided the defendants with a sufficient description of the charges against them nor informed the court sufficiently of the facts.

The Upshot

The violence that took place at Colfax spread out over the South. Justice Bradley's Fifth Circuit ruling in 1874, "effectively suspended federal law enforcement in Louisiana and the rest of the Deep South, so that white men could now resist Negro abuses without interference from the likes of James Beckwith [the U.S. Attorney who prosecuted the Colfax case]." *The Day Freedom Died*, at 212. Furthermore, at the time the case was argued in the Supreme Court, the country was turning against Reconstruction. President Grant, who had sent federal troops to keep the peace, ceased doing so. The presidential election of 1876 was rife with violence against Blacks. The election of Rutherford B. Hayes resulted from the elimination of many violence-tainted votes, but Hayes was not to be the salvation that Blacks in the South were looking for. Hayes "had traded the presidency to the [white Democrats of the South] in return for control over their own states. And that meant control of their colored population – because the Supreme Court had decreed that the Negroes must look first to the states for protection against violence and fraud." *The Day Freedom Died*, at 249. This was the end of Reconstruction.

Isabel Wilkerson describes what happened once Reconstruction ended. After the Civil War, the federal government took over the governance of the South. The newly freed slaves were not better off financially, but they could vote, marry, go to school, run for office, and attend Black colleges. But by the mid-1870s, the whites in the South "began to undo the opportunities accorded freed slaves during Reconstruction and to refine the language of white supremacy. They would create a caste system based… solely on race, and which, by law, disallowed any movement of the lowest caste into the mainstream." *Warmth of Other Suns*, at 50. The South defied the Fourteenth Amendment and ignored the Fifteenth Amendment. In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Supreme Court ruled that "separate but equal" accommodations were constitutional. Lynching became widespread, prisoners were abducted from jails and crowds watched as prisoners were murdered. From 1889 to 1929, someone was hanged or burned alive every four days for crimes such as stealing hogs or horses, jumping labor contracts, boastful remarks, or trying to act like a white person. (*Warmth*, at 51). Black people lived with the fact that no Black individual was safe. The Klu Klux Klan was revived in 1915. White people rioted and killed Black residents and set fire to their homes "on rumors of [B]lack impropriety, as authorities stood by or participated." *Warmth*, at 53.

In the 1890s, even though the federal Civil Rights Act of 1875 explicitly outlawed segregation, Southern states began enacting the Jim Crow laws "that would regulate every aspect of [B]lack people's lives, solidify the [S]outhern caste system, and prohibit even the most casual and incidental contact between races." *Warmth*, at 53. Jim Crow laws included outlawing Blacks from sitting next to whites on public transportation, curfews, separate water buckets (later water fountains), and prohibiting Blacks and whites from working in the same room or using the same stairway. The Jim Crow laws were not ended until after the federal enactment of the Civil Rights Act of 1964, which was resisted until well into the 1970s.

The *Cruikshank* case contributed to a violent and oppressive period in the South. Southern Blacks could not look to the federal courts for relief. Although the oppressive Jim Crow laws are gone, the echoes from that era still exist today.

In the Courts

Eric R. Komitee Joins Eastern District Bench

By Travis J. Mock

Eric R. Komitee was confirmed to serve as a U.S. District Judge in the Eastern District of New York on December 3, 2019. He succeeded Judge Vitaliano, who took senior status in 2017. Judge Komitee received his commission on December 5, 2019, and began hearing cases in February 2020.

A native of Long Island, New York, Judge Komitee graduated with a B.A. in political science, with high honors, from Emory University. He received his J.D., *cum laude*, from New York University Law School, where he was a senior editor of the law review.

Judge Komitee then clerked for Judge J.L. Edmondson of the U.S. Court of Appeals for the Eleventh Circuit. The clerkship exposed Judge Komitee to a wide variety of litigants and legal issues, experience he would draw upon for future career decisions.

After his clerkship, Judge Komitee pursued a diverse legal practice that spanned transactional, litigation, and compliance positions within law firms, corporations, and the federal government. The theme that emerges from this varied career is strong experience with securities regulation.

Private Practice

Judge Komitee began his practice as a corporate lawyer with Cravath, Swaine & Moore, where he focused on mergers and acquisitions and securities underwriting. This experience gave Judge Komitee a foundation in contracts, deal making, and secu-

U.S. District Judge Eric R. Komitee

rities law.

After a few years of transactional work, Judge Komitee decided that he wanted to pursue litigation, and he joined Skadden, Arps, Slate, Meagher & Flom. At Skadden, Judge Komitee focused on white collar defense, a broad practice encompassing matters such as criminal tax, securities, and public corruption. This practice also gave Judge Komitee a chance to represent individual defendants as well as corporations. That experience gave Judge Komitee a respect for the personal impact of criminal prosecutions on individual litigants.

While at Skadden, Judge Komitee maintained an active pro bono practice, representing victims of domestic violence and assisting the New York Attorney General's Office in seeking back pay for victims of racial discrimination by a local metal workers' union.

AUSA

Looking for ways to deepen his litigation experience, Judge Komitee thought back to the lawyers he had seen in court during his clerkship and decided to pursue a position in the U.S. Attorney's Office. In 2000, he became an Assistant U.S. Attorney for the Eastern District of New York. Building from his experience with securities law, he pursued white collar and corporate cases and rose to become chief of the Business and Securities Fraud Section.

From about 2003 to 2005, Judge Komitee served on one of the largest consumer fraud cases to that date, *U.S. v. LoCascio*, in which the government alleged that members of the Gambino crime family had defrauded victims out of some $750 million using credit cards and fraudulent telephone bills. The case resulted in the convictions of 16 individual defendants and one corporation, as well as the recovery of about $45 million in forfeiture proceeds.

From about 2005 through 2007, Judge Komitee served as co-lead counsel in *United States v. Kumar*, in which the government brought securities fraud and obstruction of justice charges against executives of Computer Associates International, Inc., then the world's third-largest software company. The case resulted in convictions of eight executives and a deferred prosecution agreement under which the company agreed to pay $225 million in restitution.

General Counsel

In 2008, Judge Komitee left the U.S. Attorney's office to become general counsel of the investment advisory firm Viking Global Investors LP. As the company's first general counsel, Judge Komitee handled a wide range of legal, regulatory, compliance, and operations issues, including questions of international law. Judge Komitee enjoyed the variety of the work, but he eventually felt the call to return to public service.

Judge Komitee was seated barely six weeks before COVID-19 temporarily shut down the courthouse, but the court's virtual tools have allowed him to maintain a productive docket. Judge Komitee has enjoyed the opportunity to dig deeply into case law, occasionally calling for supplemental briefing to further explore potentially dispositive issues.

In the Courts

A Short History of Women as Magistrate Judges

By U.S. Magistrate Judge Katharine H. Parker

It has been more than 50 years since the 1968 Federal Magistrate Judge Act ("MJ Act") was passed. I wanted to take a look back to see how women's participation among our ranks has changed by looking at statistics and hearing from some of our colleagues who are recently retired and nearing retirement. Samantha Boyle O'Hara from the Judicial Services Office was kind enough to pull statistics for me, and recently retired Magistrate Judge Lisa Margaret Smith of the Southern District of New York and Magistrate Judge Celeste F. Bremer of the Southern District of Iowa generously shared their thoughts and experiences.

There were 82 full-time magistrates who were appointed under the MJ Act and took office on

July 1, 1971. Three were women. Over the years, the proportion of magistrate judges who were women gradually increased. *See* United States Courts, "Status of Magistrate Judge Positions and Appointments – Judicial Business 2015" (2015), https://www.uscourts.gov/statistics-reports/status-magistrate-judge-positions-and-appointments-judicial-business-2015. Women's growing numbers among the ranks are consistent with the Judicial Conference's selection regulations, which encourage the courts to appoint diverse selection panels and ensure that public notices of vacant magistrate judge positions reach a wide audience of qualified applicants.

In 1985, there were 253 full-time magistrate judges, 40 of whom were women; 190 part-time magistrate judges, 11 of whom were women. FJO Statistics. In 1995 there were 396 full-time magistrate judges, 85 of whom were women; and 92 part-time magistrate judges, six of whom were women. *Id.* Today, there are 536 full-time magistrate judges, 232 of whom are women, and 20 part-time magistrate judges, six of whom are women. *Id.*

In sum, women comprised about 3.5 percent of our ranks when the MJ Act was first passed, and women now comprise almost 43 percent of our ranks. This is substantial progress, especially when remembering that in 1872 the U.S. Supreme Court wrote that "God designed the sexes to occupy different spheres of action, and that it belonged to men

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to make, apply, and execute the laws, was regarded as an almost axiomatic truth." *Bradwell v. State*, 83 U.S. 130 (1873).

(The percentage of women among Article III judges remains lower. In 1979, 23 women were appointed to life-tenured U.S. judgeships – more than doubling the number of women appointed as federal judges in the previous 190 years. Women make up one-third of the courts' full-time, active Article III judges. For more information about pioneering women judges, *see* https://www.uscourts.gov/news/2019/08/14/40-years-later-pioneering-women-judges-savor-place-history.)

Bradwell

In the now infamous *Bradwell* decision, the Court rejected the plaintiff's argument, based on the Fourteenth Amendment, that Illinois be forced to admit her to practice as an attorney and counselor at law based upon the right of every person, man or woman, to engage in any lawful employment for a livelihood. The Court reasoned that it is not one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life. *Id.* at 140 (Bradley, J., concurring). It stated, "[o]n the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life…. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband." *Id.* at 141.

The Court acknowledged that "many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state," but these are exceptions to the general rule that "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adopted to the general constitution of things, and cannot be based upon exceptional cases." *Id*. at 141-42.

I'm sure Justices O'Connor, Ginsburg, Sotomayor, and Kagan would all agree that this was precedent that was rightly overturned. In fact, the late Justice Ginsburg said "[w]omen belong in all places where decisions are being made…. It shouldn't be that women are the exception."

(*Bradwell* was decided under the Privileges and Immunities Clause of the Fourteenth Amendment. During her time as an advocate for the American Civil Liberties Union, Justice Ginsburg was responsible for changing the law as announced in *Bradwell* in her landmark case *Reed v. Reed,* in which the Supreme Court accepted her argument that the Equal Protection Clause of the Fourteenth Amendment prohibited differential treatment based on sex. 404 U.S. 71 (1971).)

Magistrate Judges Bremer and Smith provided insight into the statistical changes, through their lived experiences as lawyers and judges. Each of them had a unique path to becoming a judge.

Magistrate Judge Bremer

Magistrate Judge Bremer majored in criminal justice and sociology at St. Ambrose University with a plan to become an FBI agent. Prior to law school, she worked with pre-trial releasees. Ultimately, she found her way to the University of Iowa College of Law, graduating with a J.D. in 1977.

She then served as an Assistant County Attorney for about 18 months, then as Assistant Iowa Attorney General in Des Moines, Iowa, and then, in 1979, she became a partner in a civil litigation firm in Davenport, Iowa. One of the firm's partners had served as a part-time magistrate, sparking Magistrate Judge Bremer's interest in the position. No magistrate judge positions were available at the time, so Magistrate Judge Bremer continued her litigation practice.

In 1982 she went in-house at Deere & Co., where she defended products liability suits against the company. In 1984, two part-time magistrate positions were consolidated into a half-time magistrate position to work in Des Moines. Magistrate Judge Bremer applied. She was the only woman out of 45 applicants and was selected for the position.

While serving as a part-time magistrate, she also worked half-time at Deere & Co. The position was upgraded to a full-time position in 1989, and Magistrate Judge Bremer was reinterviewed for the position and selected again.

When Magistrate Judge Bremer started there were very few women judges. Only about 12 percent of magistrates were women.

Magistrate Judge Smith

Like Magistrate Judge Bremer, Magistrate Judge Smith characterizes her path to the bench as untraditional. She graduated from Duke Law School in 1980 and, after graduating, worked as an Assistant District Attorney in Kings County (Brooklyn) for five years, with her last few years exclusively in the Appeals Bureau.

Magistrate Judge Smith then took a job in Albany, New York, as an Assistant Attorney General in the Appeals and Opinions Division of the New York State Department of Law. After a year, she returned to the Brooklyn D.A.'s office. Soon thereafter, the U.S. Attorney's Office for the Southern District of New York decided to expand its presence in White Plains, New York, and hire Assistant U.S. Attorneys to be based there.

Like Magistrate Judge Bremer, Magistrate Judge Smith characterizes her path to the bench as untraditional.

Magistrate Judge Smith had the prosecution experience the office needed. In her typical modesty, Magistrate Judge Smith said that she did not have the background of most Southern District of New York AUSAs insofar as she did not go to an Ivy League law school, was not on law journal, was not in the top 10 percent of her class, did not clerk for a federal judge, and had not worked for a white shoe law firm. Nevertheless, she got the job.

She worked as a federal prosecutor from 1987 to 1995. In 1994, the court established a second magistrate judge position in White Plains. The existing magistrate judge (before whom Magistrate Judge Smith practiced) encouraged her to apply. The rest is history.

Magistrate Judge Smith assumed her role in March 1995. At the time, there were 13 full-time magistrate judges in the Southern

District of New York, six women and seven men. Thus, women were well represented in the district notwithstanding that only about 19 percent of magistrate judges nationwide were women.

Within a few years, all of the other women magistrate judges had moved on. Some were elevated to district judge (Naomi Reice Buchwald and Nina Gershon), some left for other jobs (Kathleen Roberts went to JAMS and Sharon Grubin became general counsel of the Metropolitan Opera), and one retired (Barbara Lee). Each of them was replaced by a man, leaving Magistrate Judge Smith as the only female magistrate judge in the Southern District of New York. In 2001, Debra Freeman became a magistrate judge, but it was not until 2012 that another woman was appointed (Sarah Netburn). Since 2012, due to a number of retirements, more women were appointed, such that seven of the 15 magistrate judges in the district are women as of the date of this writing.

Diversity

I asked both Magistrate Judge Bremer and Magistrate Judge Smith for their views about the impact that increasing diversity of magistrate judges has had on the courts. Magistrate Judge Bremer conveyed that a more diverse bench can better represent diverse communities because there is a deeper pool of experience to draw from when judging, assisting with settlement, and court governance.

Both Magistrate Judge Bremer and Magistrate Judge Smith agreed that it is helpful to have diversity of experiences and viewpoints among judges, as this is helpful to the system as a whole.

Magistrate Judge Smith agreed that it is particularly useful for litigants to see people who look like them at least some of the time when they appear in a courtroom. She told me a story about the child of an Assistant U.S. Attorney who always brought her children to see proceedings before women judges. Then, when she brought her child to a proceeding before a male judge, her child said "but how can he be a judge, aren't judges all women?" That was an "aha" moment for Magistrate Judge Smith.

Magistrate Judge Bremer noted that her antennas are possibly tuned to different issues because of her experience as a working mother. She believes this may have caused her to hear jurors' excuses differently, because she could understand how the court's schedule impacted childcare or school conferences, etc. Magistrate Judge Smith agreed that women bring different experiences and different points of view to the bench. Both agreed that it is helpful to have diversity of experiences and viewpoints among judges, as this is helpful to the system as a whole.

Since both Magistrate Judge Bremer and Magistrate Judge Smith have served so many years, I was curious as to their opinion about what has been the most significant change to the magistrate judge job during their tenures. Magistrate Judge Bremer pointed to the technological changes, not just email and computers in the office, but the Case Management/Electronic Case Files system, new crimes, new modes of investigation of crime, new ways of swearing out warrants, and the like. Magistrate Judge Smith pointed to the increasing numbers of women in leadership positions within the courts and within organizations such as the Federal Magistrate Judges Association. She also pointed to the change in the title of the role from magistrate to magistrate judge.

Bremer is retiring early next year but will be on recall status. She also is planning to teach and continue to be active in the American Bar Association. Magistrate Judge Smith retired in September 2020 and will serve as president of the Westchester Women's Bar Association, in which she has been involved for decades, for the next year.

Impacting Justice

I asked both Magistrate Judge Bremer and Magistrate Judge Smith what advice they had for women magistrate judges following in their footsteps. Both agreed that the magistrate

judge job is the best job for anyone who wants to impact the delivery of justice. Magistrate Judge Bremer noted that magistrate judges are often the face of the courts, for both civil and criminal cases, because they are often the first judge that parties see. She encouraged women to be involved in bar associations and court outreach programs and to mentor others. She said, "Use your seat at the table locally, in your district, in your circuit, and nationally through [the Administrative Office of the U.S. Courts and the Federal Judicial Center] and the FMJA to amplify your voice. Take time to find out why 'we've always done it that way,' because there might be a better, more inclusive, more transparent way to do things. You have to ask, and to notice things going on around you."

Magistrate Judge Smith advised to maintain your dignity, and do your best, always. She also reminded me that, as the saying goes, "Sure [Fred Astaire] was great, *but* don't forget that *Ginger Rogers* did everything he did, *backwards*…and in *high heels*." (emphasis added).

Both Magistrate Judge Bremer and Magistrate Judge Smith leave big shoes to fill for their successors, but will continue to be inspirations to women magistrate judges.

Editor's note: This article was written before the recent confirmation of a fifth female Supreme Court Justice: Justice Amy Coney Barrett.

Legal History

Plessy by Any Other Name? The Supreme Court and the *Insular Cases*

By C. Evan Stewart

In the May 2019 issue of the *Federal Bar Council Quarterly*, I explored a set of infamous decisions of the Supreme Court – untaught to generations of law students: the *Gold Clause Cases*, 294 U.S. 330 (1935). Now, let us examine one more set of linked, troubling decisions – again, not taught to law students: the *Insular Cases* (*e.g.*, *Huus v. N.Y. & P.R.S.S. Co.*, 182 U.S. 392 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901)). By these cases, the Supreme Court defined the applicability and reach of the Constitution to territories acquired by the United States from Spain after the Spanish-American War of 1898.

The U.S. Ambassador to Great Britain (and soon-to-be Secretary of State) John Hay remarked that the conflict with Spain had been "a splendid little war." When it ended (per the Treaty of Paris), the United States had acquired the Philippines, Guam, and Puerto Rico; Cuba became "independent"; and Spain received $20 million. But with the United States now an international empire came the question: What constitutional rights did the people in these new U.S. territories have? Were they U.S. citizens or colonial subjects?

Historical Background

In the odious *Dred Scott* decision (*see Federal Bar Council Quarterly* (May 2016) ("The Worst Supreme Court Decision, Ever!")), the Court – extraneous to its rulings – had written:

> There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by admission of new States…. [N]o power is given to acquire a territory to be held and governed [in a] permanently [colonial] character.

60 U.S. (19 How.) 393, 446 (1856).

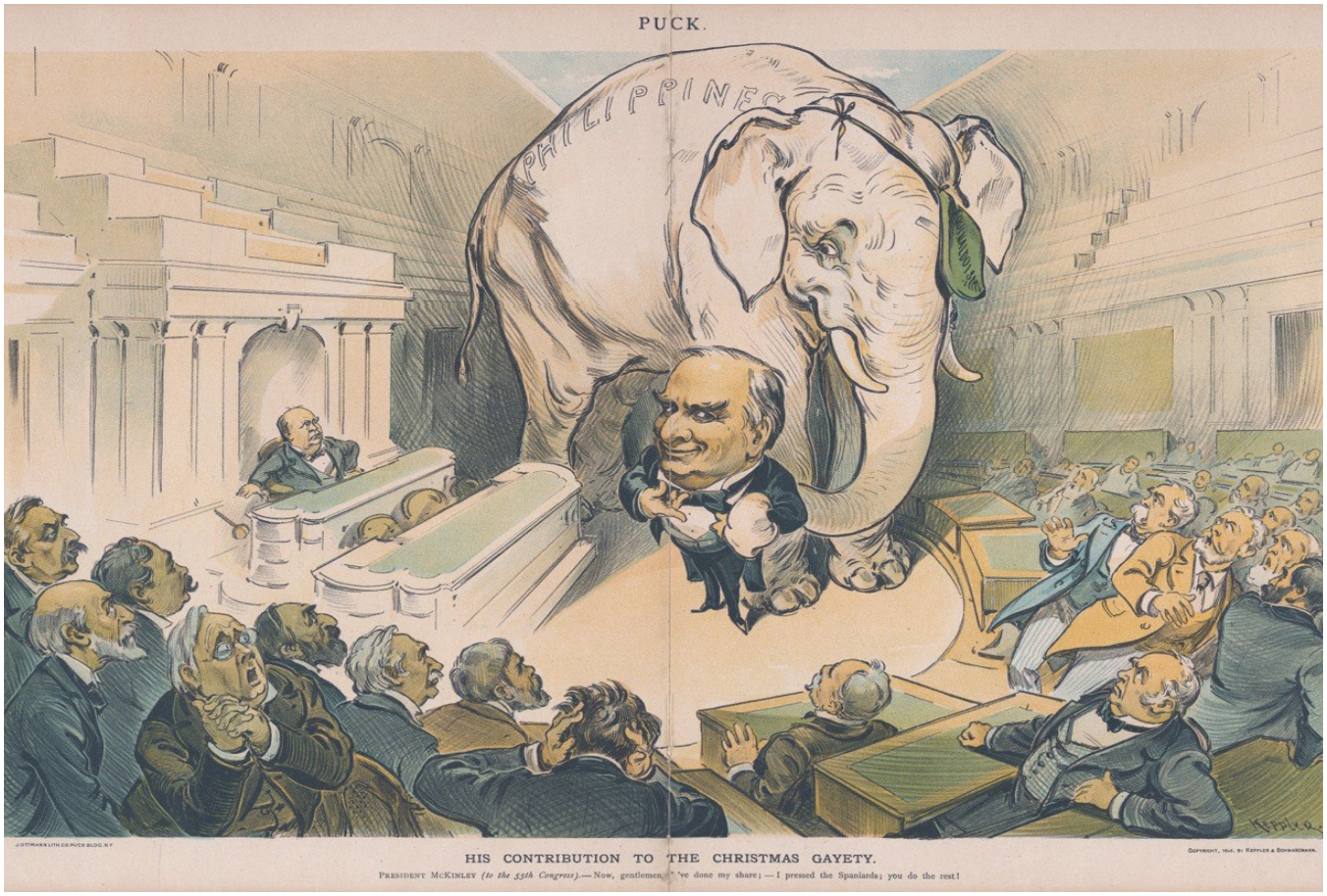
Notwithstanding, as American commerce became increas-

ingly focused on Asia, we acquired the Guano Islands (1856), as well as Alaska (1867) and Midway (1867). This expansion of the country's reach only whetted the appetite of many (e.g., Theodore Roosevelt) to go further and establish an empire akin to what many European nations had done. And the collapsing empire of the Spanish in the Caribbean and in the Philippines seemed a promising choice.

With extensive native rebellions in both Cuba and the Philippines, President William McKinley had stationed the USS Maine off Cuba to pressure the Spanish to end their acts of uncivilized "extermination." After the Maine exploded on February 15, 1898, Roosevelt – then the Assistant Secretary of the Navy – ordered Commodore George Dewey to take the Pacific fleet to Manila Bay. That order was allowed to stand and a reluctant president soon asked for a declaration of war; Congress approved, so long as Cuba would not be taken on as a U.S. possession (the Teller Amendment). Dewey defeated the Spanish in the Battle of Manila Bay in six hours. Thereafter, an army of U.S. troops (including now Colonel Roosevelt) was dispatched to Cuba and Puerto Rico. Within less than four months, the "splendid little war" was over. Not content to stop there, we also acquired Hawaii (1898), and then half of Samoa (1899) as well as Wake Island (1899).

With respect to the Spanish territories acquired as a result of the spoils of war, those tropical areas were densely populated places that (unlike the American West) did not offer potential farming opportunities for recent European immigrants to move to from crowded Northeastern cities. Suddenly, the United States was a global behemoth, but with new and large groups of people thousands of miles away from the

The cartoon below is from the political history collection of the author.



mainland who had no racial, ethnic, or cultural ties to the American citizenry. How would these acquired territories be governed, and (pertinent to this article) what rights would these eight million people have?

Setting the Stage

Although the U.S. government had exercised authority over various North American territories since the country's founding (in very different ways), to many Americans these far-off tropical territories posed a whole new set of issues. And these issues were formally teed up by Congress' passing of the Foraker Act in 1900. That controversial legislation (the Senate's committee report stated that Congress should withhold "the operation of the Constitution and the laws of the United States" from "people of [a] wholly different character, illiterate, and unacquainted with our institutions, and incapable of exercising the rights and privileges guaranteed by the Constitution to the State of the Union") established the civil government for Puerto Rico. The taxation component of that legislation as to goods flowing to and from Puerto Rico (a tariff was imposed on all such trade) would set the spark for the Constitutional brouhaha. Specifically, did the Uniformity Clause of the Constitution (Article I, Section 8, cl. 1) – "all Duties, Imports and Excises…[shall] be uniform throughout the United States") – apply to the taxation of commerce between the U.S. and Puerto Rico. That is, was Puerto Rico part of or excluded from the "United States"?

By these cases, the Supreme Court defined the applicability and reach of the Constitution to territories acquired by the United States from Spain after the Spanish-American War of 1898.

The *Insular Cases*

The Supreme Court heard oral arguments on the first cluster of *Insular Cases* between early December 1900 and mid-January 1901. Importantly, it was essentially the same Court that had established the "separate but equal" principle in *Plessy v. Ferguson* (*see* "Another Awful Decision by the Supreme Court," *Federal Bar Council Quarterly* (August 2016)). Having already found that African-American citizens could legally be deemed constitutionally inferior, how would the Court treat the inhabitants of these new, far-off colonies?

There was heavy lobbying on the Court's members (e.g., Philippine governor William Howard Taft on Justice John Marshall Harlan); and the economic interests of key American industrial groups (e.g., the Sugar Trust) were also weighing heavily on the Court's deliberations. Most public predictions on the decisions were that (i) the Court would rule that "the Constitution does not follow the flag 'ex proprio vigore'" [of its own force], and (ii) the Court's members, based upon the oral arguments, would likely be quite divided in their views. The cases were decided as a group on May 27, 1901, and the most important was *Downes v. Bidwell*, in which the constitutionality of the Foraker Act was front and center. (*New York World*: "No case [has] ever attracted wider attention.").

Downes v. Bidwell

With five votes, the Court upheld the constitutionality of the Foraker Act, but those five justices differed in their approaches. In the Court's lead opinion, for which there was only one vote, Justice Henry Billings Brown (author of *Plessy v. Ferguson*) took the view that the "United States" was made up only of its actual states; Congress was thus free to impose taxes on Puerto Rico or any other territory (this narrow construction adopted the U.S. government's arguments). Although he distinguished *Dred Scott* and other Supreme Court cases, Brown (warning of "savages" and "alien races") also wrote: "It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people…which may require action on the part of Congress that would be quite unnecessary

in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians."

Justice Edward D. White, in a concurrence joined by Justices George J. Shiras and Joseph McKenna, took a different tack. Adopting an approach advanced by Harvard professor Abbott Lawrence Lowell, White endorsed the "incorporation" doctrine – a territory acquired with the intention of incorporating it into the United States would be treated differently from a territory not acquired for that purpose. By White's calculation, because the Treaty of Paris contained "no conditions for incorporation,… [and] expressly provides to the contrary," until Congress declared that the territory "should enter into and form a part of the American family" Puerto Rico, while "not a foreign country… was foreign to the United States in a domestic sense": "the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession." White's opinion shared the racial bias of Brown's, worrying that the country had acquired territories "peopled with an uncivilized race…absolutely unfit to receive" the rights of U.S. citizenship. (Justice Horace Gray, while concurring with White's opinion, also wrote a separate opinion endorsing the prerogatives of Congress and the president to deal with territories and tariffs.)

Chief Justice Melville Weston Fuller issued a dissent on behalf of Justices Harlan (the lone dissenter in *Plessy*), David Josiah Brewer, and Rufus Wheeler Peckham. Fuller wrote that the Constitution clearly stated that the "United States" included all of its territories, regardless of whether statehood existed. He also directly took on White's new doctrine: "Great stress is thrown upon the word 'incorporation,' as if possessed of some occult meaning…. That theory assumes the Constitution created a government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original states and territories." Giving Congress such "unrestrictive power" was in contravention of Constitutional provisions "too plain and unambiguous to permit its meaning to be thus influenced."

Harlan also wrote a separate dissent, emphasizing that the Constitution "speaks…to all peoples, whether of States or territories, who are subject to the authority of the United States." He went on to criticize the incorporation doctrine as something alien to our republican form of government, it being something more likely to be utilized by "[m]onarchical or despotic governments, unrestrained by written constitutions." And he concluded: "The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces – the people inhabiting them to enjoy only those rights as Congress chooses to accord them…is wholly inconsistent with the spirit and genius as well as the words of the Constitution."

Incredibly (or perhaps not so much), the press coverage of the rulings was a mess, with some newspapers declaring "The Constitution Follows the Flag," and others pronouncing "The Constitution Does Not Follow the Flag." Some wrote that it was a victory for the government, and some the opposite. At the end of the day, two things were clear: those in favor of the new American empire were happy, while those opposed to American "imperialism" were not.

The *Insular Cases* Go On

The *Insular Cases* decided on May 27, 1901 related to various tariff issues, and those decisions all reflected divergent judicial approaches to the newly acquired territories.

What was also clear in these (almost all) 5-4 decisions was that Justice Brown was the swing vote; he sided with the *Downes* minority to form the majority in *De Lima* (duties levied after the Treaty of Paris, but before the Foraker Act, were impermissible because Puerto Rico was not a "foreign country" as defined by the Congressional statute at issue); he would do so again later that year in *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901) (rings brought back from the Philippines by a soldier could not be subject to import duties). (Brown's concurrence was based upon the fact that the tax in question was only reflected in a Senate resolution). And Brown flipped yet again in

Dooley v. United States, 183 U.S. 151 (1901) (taxes on imports into Puerto Rico did not violate the Constitution's ban on taxing state exports: Article, Section 9) (another 5-4 split). With this messy jurisprudence, what did the future hold, especially with a shifting group of Justices?

Many Supreme Court decisions that followed expanded the jurisprudential legacy of the first cluster of *Insular Cases* beyond tariff issues; but at least four stand out. The first was *Hawaii v. Mankichi,* 190 U.S. 197 (1903).

The criminal defendant in *Mankichi* had been found guilty by a petit jury (by a nine to three vote) of murder. He appealed on the grounds that the Fifth, Sixth, and Fourteenth Amendments had been violated because he had not been indicted by a grand jury nor convicted unanimously. Justice Brown, on behalf of Justices Oliver Wendell Holmes Jr. and William R. Day, continued to reject the incorporation doctrine; instead he believed that only some of the Constitution's protections extended to the people in Hawaii: "the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure." Justice White concurred (joined by Justice McKenna), rejecting the defendant's claims on the ground that Hawaii had not been incorporated into the United States at the time of the trial and conviction and thus Mankichi could not invoke constitutional rights.

The following year came *Dorr v. United States*, 195 U.S. 138 (1904). There, the issue was whether the Fifth Amendment guarantees of a jury trial and an indictment process were available in the Philippines. For the majority, Justice Day ruled that the incorporation doctrine resolved the question without further ado. He then added: "if the United States shall acquire territory peopled by savages,…if this doctrine is sound [defendant's argument], it must establish there the trial by jury. To state such a proposition demonstrates the improbability of carrying it into practice."

The people of Puerto Rico, Guam, the Virgin Islands, the Northern Marianas, and American Samoa – while they can serve in the U.S. military – cannot vote, are not represented in Congress, do not have full Constitutional rights, and have federal laws disparately applied to them.

Next came *Rassmussen v. United States*, 197 U.S. 516 (1905). In that case, a convicted criminal in Alaska was ruled to be entitled to constitutional protections because the treaty with Russia (unlike the Treaty of Paris) expressly manifested a "contrary intention to admit the inhabitants of the ceded territory… to the enjoyment of all the rights, advantages, and immunities of citizens of the United States." The real jurisprudential importance of *Rasmussen* was that the Brown versus White conflict over how to not give the territories constitutional protections came to an end. White's incorporation doctrine had now won a seven vote majority; thereafter (and to this day) that doctrine would be the law of the land.

Finally, even after U.S. citizenship had been granted to the residents of Puerto Rico by the Jones Act of 1917, that did not mean they were (or are) entitled to full constitutional protections. In *Balzac v. People of Puerto Rico*, Chief Justice William Howard Taft, for a unanimous Court, wrote that Puerto Ricans did not have a constitutional right to a jury trial under the incorporation doctrine (which had "become the settled law of the court."). While Puerto Ricans were entitled to "fundamental rights," without express Congressional action, the Fifth and Sixth Amendments were not deemed to be "fundamental" due process rights for people in certain territories. ("Alaska was a very different case from that of Puerto Rico. It was an enormous territory, very sparsely settled, and offering opportunity for immigration and settlement by American citizens.")

So Where Are We Today?

Alaska and Hawaii are, of course, now U.S. states. After World War II, the Philippines became an independent nation. That

leaves Puerto Rico, Guam, the Virgin Islands, the Northern Marianas, and American Samoa. The people in those U.S. territories – while they can serve in the U.S. military – cannot vote, are not represented in Congress, do not have full Constitutional rights, and have federal laws disparately applied to them. Although Supreme Court Justices have (on occasion) mused on whether to re-consider the incorporation doctrine and its impact on the "unincorporated Territories," the basic line of cases discussed herein (*e.g.*, *Downes*; *Balzac*) are (as stated above) still good law. *See*, *e.g.*, *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC.*, No. 18-1324, 590 U.S.____ (June 1, 2020); *Boumediene v. Bush*, 553 U.S. 723, 757-59 (2008); *Harris v. Rorsario*, 446 U.S. 651 (1980); *Tuava v. United States*, 951 F. Supp. 2d 88 (D.D.C. 2017), *aff'd*, 788 F. 3d 300 (D.C. Cir. 2015); *Davis v. Commonwealth Electric Comm'n*, 844 F. 3d 1087 (9th Cir. 2016). *See also* Sam Erman, "Almost Citizens: Puerto Rico, the U.S. Constitution, and Empire" 161 (Cambridge 2019) ("the rare and shocking spectacle of case law as racist as [the *Insular Cases*] remaining largely untouched by time").

Postscripts

- Leading the charge to have the *Insular Cases* jurisprudentially rejected and full constitutional status granted to the U.S. territories has been Juan R. Torruella, a judge on the U.S. Court of Appeals for the First Circuit and chief judge from 1994 to 2001. *See* "Ruling America's Colonies: The *Insular Cases*," 32 Yale Law & Policy Review 57 (2013); "The *Insular Cases*: The Establishment of A Regime of Political Apartheid," 29 U. Pa. J. Int'l L. 283 (2007). For those wanting to understand the *Insular Cases* in a greater historical context, I would recommend Bartholomew H. Sparrow's "The *Insular Cases* and the Emergence of American Empire" (Kansas Press 2006). And for those wanting the best and most comprehensive explanation of America's global expansion in this era, I would recommend Walter LaFeber's "The American Search for Opportunity, 1865-1913" (Cambridge University Press 1993).
- It is important to note that the Court's distinction between "fundamental" and other (less "fundamental") constitutional rights came at a time when the Court had not yet found the protections found in the Bill of Rights to be "incorporated" to the states via the Fourteenth Amendment. *See* Burnett, "United States: American Expansion and Territorial Deannexation," 72 U. Chi. L. Rev. 797 (2005).
- The decisions were called the *Insular Cases* because the territories were islands under the jurisdiction of and administered by the War Department's Bureau of Insular Affairs.

COVID-19

Jury Trials Resume in Second Circuit Courts

By Magistrate Judge Sarah L. Cave

On September 29, 2020, for the first time in over six months, jurors entered a federal courthouse in New York City to participate in a civil jury trial. This milestone was achieved because of the creative thinking of the Ad Hoc Committee on the Resumption of Jury Trials, the cautious advice of experts in epidemiology and air flow technology, the steady leadership of Chief Judge Colleen McMahon, and the hard work of District Executive Ed Friedland and Clerk of the Court Ruby Krajick and countless members of their staff.

On March 16, 2020, within four days of the World Health Organization's classification of COVID-19 as a worldwide pandemic, the last jury trial in the Southern District of New York concluded. Eleven days later, on March 27, 2020, Chief Judge McMahon ordered the suspension of

all jury trials until at least June 1, a date that was subsequently pushed until the Fall of 2020.

The road to the resumption of jury trials in the Southern District began with Chief Judge McMahon's April 2020 appointment of District Judges P. Kevin Castel, Vince Briccetti, and J. Paul Oetken to the Ad Hoc Committee, which was tasked with the open-ended mandate of figuring out how to restart jury trials in the circumstances of the on-going COVID-19 pandemic.

The Ad Hoc Committee met for the first time on May 14, 2020, and its first order of business was retention of epidemiology and public health expert Dr. Amira Roess of George Mason University and her faculty colleague Dr. Rainald Lohner, an expert in fluid dynamics and air flow technology. The Ad Hoc Committee also obtained informal advice from the Centers for Disease Control. Simultaneously, the Administrative Office of the United States Courts convened, as part of its COVID-19 Task Force, a national Jury Subgroup, on which District Judge Denise L. Cote served, to develop guidance for district courts to begin phased-in resumption of petit and grand jury proceedings.

Protocol Established

At this early stage, the Ad Hoc Committee did not know when or how jury trials would resume, but set about establishing a protocol for the order of trials to proceed once conditions allowed. The established hierarchy placed criminal trials before civil, felony trials before misdemeanors, detained defendants before non-detained defendants, and those that had firm trial dates set before March 16, 2020, before those without such prior trial dates. The ordering also considered the date a defendant had first been detained, but did not take into account how long a particular trial was expected to run. The hierarchy sought to balance a defendant's right to a speedy trial under the Sixth Amendment against public health and safety. For example, if the facility in which a defendant was being detained went into quarantine, that defendant would be skipped, and the next available detained, non-quarantined defendant's trial would proceed.

The Ad Hoc Committee next turned to devising a plan for the jury selection process, which was expected to be, in Judge Castel's words, a "chokepoint" for the jury trial process. Under the pre-COVID process, on any given day more than 200 prospective jurors arrived at the Constance Baker Motley Jury Assembly Room for possible selection for as many as four trials per day. Under the new COVID-conscious process, no more than 48 prospective jurors could safely enter the Jury Assembly Room, with additional prospective jurors situated in a large courtroom in the building. To accommodate health and safety requirements, chairs were placed six feet apart, prospective jurors had their temperatures taken on entry, and were provided with "care packages" containing court-issued masks (which jurors were required to use), hand sanitizer, wipes, and other items. In addition, microphone stands were added, with covers replaced in between each juror's questioning.

Next, the Ad Hoc Committee addressed the layout of the trial courtrooms. Although they determined that only the oversized courtrooms on the higher floors of the Moynihan Courthouse would be large enough, even these courtrooms required reconfiguration. The typical criminal jury of 12 plus six alternates could no longer fit in the jury box with sufficient distance between chairs. Thus, benches were removed from the gallery and the District Executive's staff built a multi-tiered supplemental jury box (which was even stained to match the color of the wood elsewhere in the courtroom). Masks were required of everyone present in the courtroom at all times, except for the testifying witness and the examining attorney.

After advice from Dr. Roess and a smoke test under the direction of Dr. Lohner, the District Executive's staff designed a plexiglass box for the testifying witness that featured a HEPA filter and chimney that "cleaned" the testifying witness' expelled air before it entered the courtroom. A similar device was built for the attorney podium to allow the examining attorney to remove his or her mask. Handset-telephones were installed on the counsel tables to permit counsel to speak with his or her client while maintaining social distancing. During each trial,

it would be incumbent on participants to change microphone covers and sanitize plexiglass in between users.

Finally, the Ad Hoc Committee, the Clerk of the Court, and the District Executive considered the needs of the jury for deliberations, given that the typical jury rooms were too small in light of social distancing requirements. As a result, separate courtrooms are being reconfigured, with benches removed and tables arranged in a giant oval with appropriate social distancing. Because jurors were also being provided lunch, separate spaces were arranged in the courtroom to permit jurors to eat comfortably and safely, obviously with their facemasks removed.

The First Trial

With all of these changes in place, the courthouse was prepared to proceed with the first civil jury trial. At 10:30 a.m. on September 29, Judge Castel had the honor of commencing the first trial, involving claims by three drivers for the New York Post alleging that the Newspaper and Mail Deliverer's Union had breached its duty of fair representation. In his introductory remarks, Judge Castel told the prospective jurors that, by showing up for their jury service, they were "sending the message that, even though the threat from Covid 19 has not passed," they wanted "the cherished American institution of trial by jury [to] continue."

Judge Castel's trial lasted four days, and included the remote testimony of one witness via Jabber. All physical evidence was viewed by the jury on a monitor. The jury (comprised of all women) began deliberating on the afternoon of the fourth day, and even asked to stay past the normal 4:30 p.m. dismissal time in order to complete their deliberations and render their verdict. When they did so, the foreperson read the verdict form, which she passed to the courtroom deputy, who, wearing gloves, sprayed it with a sanitizing solution specific for paper before handing it to Judge Castel. Notwithstanding all of the health and safety precautions, Judge Castel remarked that the trial "felt like pre-COVID, with everyone's focus on the arguments, the evidence, and the jury, not on all of the precautions."

Over the following days, Judge Briccetti empaneled a jury in the Charles H. Brieant Courthouse in White Plains, and Judge Gregory H. Woods and Chief Judge McMahon empaneled civil juries in Manhattan, all without incident.

A Trial in Connecticut

At the same time as the first jury trials in New York City since the start of the pandemic were getting underway, District Judge Victor A. Bolden was commencing the first civil jury trial in the District of Connecticut.

During the first day of jury selection, lawyers presented for cause challenges to a venire of 64 potential jurors remotely, using the Zoom platform.

On the second day, 19 jurors participated in the in-person peremptory challenge process, resulting in an eight person jury being impaneled for the insurance coverage dispute.

Three courtrooms were in use for the trial: one for the trial itself, with jurors seated in the gallery, a second for jury deliberations and mid-trial breaks, and a third for witnesses. A fourth room, the court's jury assembly room, was used as the jurors' lunchroom. Witnesses testified using faceshields, without masks, and all physical evidence was presented electronically on screens.

Counsel in this case used separate Elmos for exhibits. To enable the jurors to review evidence during their deliberations, they were provided with a laptop and USB containing all of the admitted exhibits. On the afternoon of the fourth day, the jury reached a verdict, which they delivered to Judge Bolden on a verdict form in a sealed plastic bag. After the trial ended, Judge Bolden questioned the jury about their experience; they reported feeling safe throughout the trial, their only complaint being the "hard" benches in the gallery, an issue to be addressed in the future.

Judge Bolden commented that his approach to safety during the trial "focused on simplicity," that is, masks and six feet of social distancing, precautions with which he expected jurors would be familiar and comfortable. Nevertheless, a smooth trial required "a lot of work and a lot of planning," including two advance "dry runs" of the initial

remote Zoom jury selection process before the first day of trial.

The next hurdle is, of course, criminal trials. Judge Castel in fact empaneled the first criminal jury on October 14 for a two-defendant trial, which proceeded to verdict one week later.

Thanks to the hard work of the judges and the staff members in each of the courthouses, the experience of jurors in the first trials in the courts of the Second Circuit was a positive – and healthy – one.

COVID-19

Report of the COVID-19 Judicial Task Force

By Joseph Marutollo

On June 4, 2020, the COVID-19 Judicial Task Force Jury Subgroup issued a report entitled "Conducting Jury Trials and Convening Grand Juries During the Pandemic" ("the Report"). In September 2020, the *Federal Bar Council Quarterly* discussed the Report with U.S. District Judge Denise L. Cote of the Southern District of New York, who also served as a member of the Jury Subgroup that worked on the Report.

Task Force Established

By way of background, in February 2020, the Administrative Office of the United States Courts established the Federal Judiciary's COVID-19 Task Force. The Task Force worked to share information and guidance related to the coronavirus outbreak as it relates to the Judiciary. Shortly after the Task Force was formed, it assembled a Jury Subgroup comprised of federal trial judges, court executives, and representatives from the federal defender community and the Department of Justice to work on the issue of jury trials during the pandemic.

Specifically, the Jury Subgroup was comprised of Judge Robert J. Conrad, Jr., of the Western District of North Carolina, who chaired the group; Judge Anthony Battaglia, of the Southern District of California; Chief Judge Philip Brimmer of the District of Colorado; Judge Karen Caldwell, of the Eastern District of Kentucky; Judge Scott Coogler of the Northern District of Alabama; Judge Cote; Judge Noel Hillman of the District of New Jersey; Judge Virginia Kendall of the Northern District of Illinois; Judge Federico Moreno of the Southern District of Florida; Chief Judge Michael Seabright of the District of Hawaii; Robert Farrell, the Clerk of the District of Massachusetts; A.J. Kramer of the D.C. Public Defender's Office; Libby Smith, Circuit Executive of the Ninth Circuit; and G. Zach Terwilliger, the U.S. Attorney for the Eastern District of Virginia. The Jury Subgroup subsequently published its 19-page Report on June 4.

The Report's objective was to provide "guidance to help individual courts consider the multitude of issues that will impact reconvening jury trials in our federal courts" due to the pandemic. Given that the Report was issued in the early phases of the pandemic, it aimed to make "preliminary suggestions and ideas for courts to consider when restarting jury trials." "The intent" of the Report "is to assist each court in devising protocols that will minimize the risks to all participants and spectators, including jurors, attorneys, witnesses, parties, members of the public, the press, and court employees."

The Report

The Report acknowledged that there is "no one-size fits all approach"; it also did not "attempt to analyze or resolve individual constitutional questions" surrounding issues related to jury trials. Instead, the Report suggested that the courts should address the following issues when deciding to resume jury trials, among other things:

- The level of personal protective equipment to be worn by jurors, attorneys, members of the public, and witnesses;

- The need for communication with prospective jurors, particularly in the beginning of the jury selection process, about their health concerns;
- The use of juror COVID-19 questionnaires, including questions related to the potential juror's specific vulnerability to COVID-19 or concerns related to family exposure;
- The need for safety inside the courtroom, including social-distancing and deep-cleaning procedures for courthouse spaces; and
- The need for safety outside the courtroom, including with respect to ways in which jurors travel to and from the courthouse;

The Report also includes general health documents from the Centers for Disease Control to assist courts in making re-opening decisions during the pandemic.

When discussing the Report in September, Judge Cote noted that the Jury Subgroup took the approach of providing general suggestions because of the inherent differences in courts around the country. In addition to the legal differences across various districts (such as the case law surrounding jury trials as well as local court practices), Judge Cote recognized that practical differences needed to be considered as well. Some courthouses, for instance, have visitors who may exclusively take the train or subway; other courthouses may have visitors who rely exclusively on motor vehicles to get to and from the courthouse. The differences in commuting to the courthouse alone may lead to significantly different safety measures from one district to the next.

Ultimately, as Judge Cote explained, the Report tried to "spot issues" that would confront courts as they sought to re-start jury trials in the midst of the pandemic. As courts around the country have begun re-starting jury trials, the issues raised in the Report certainly warrant further review. The full report can be found here: https://www.uscourts.gov/sites/default/files/combined_jury_trial_post_covid_doc_6.10.20.pdf.

What's on Your Wall?

Magistrate Judge Cott's "Peace Wall"

By Anjelica Sarmiento

Many newly minted attorneys pursue clerkships to get a view from behind the bench. One particular view always held my attention during my clerkship with Magistrate Judge James L. Cott of the Southern District of New York: his Robing Room, where a collection of framed images – known as the Peace Wall – serves as a poignant backdrop for those convening.

While walls have been used in history to separate two warring sides, Judge Cott's Peace Wall displays moments in time when division gave way to unity. Defining events in our country, such as the March on Washington in 1963 and the signing of the Civil Rights Act of 1964 by President Lyndon B. Johnson, are captured in photographs. Peaceful negotiations on the international stage are also represented by images depicting Eleanor Roosevelt and the United Nations Commission on Human Rights; President Jimmy Carter bringing Egypt and Israel together to secure the Middle East Peace Accords; a poster of the award-winning play "Oslo" about a group of Israeli, Palestinian, Norwegian, and American men and women who overcame their mistrust of each other to bring about the Oslo Accords; and British Prime Minister Tony Blair and Irish Prime Minister Bertie Ahern with Senator George Mitchell at the signing of the Good Friday Agreement to end decades of violence in Northern Ireland.

In addition, snapshots of unlikely duos, such as Michelle Obama and President George W. Bush in a warm embrace, Justices Ginsburg and Scalia atop an elephant, and baseball players Ben Chapman and Jackie Robinson sharing a bat, are on display.

The peaceful co-existence of differences is further illustrated by Norman Rockwell's "Golden Rule" mosaic featuring people of different nationalities as well as the photograph of Pope Francis at the Western Wall in Jerusalem with his friends Rabbi Abraham Skorka and Muslim leader Omar Abboud. And portraits of trail-blazing lawyers Dovey Johnson Roundtree and Bryan Stevenson highlight their critical roles – al-

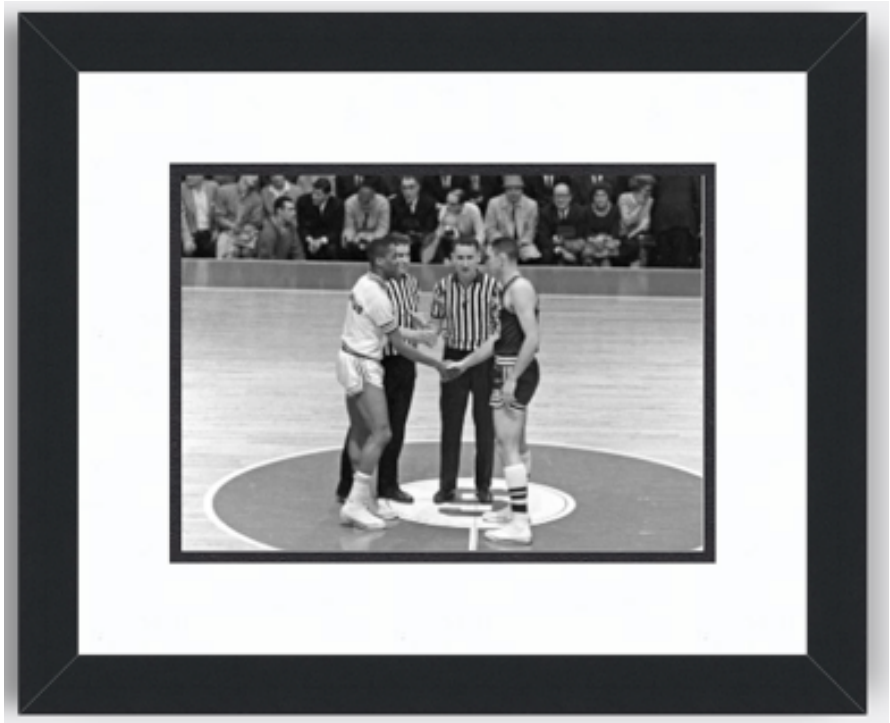
The Peace Wall in Magistrate Judge Cott's Robing Room

beit in different eras – in breaking down racial barriers in the justice system.

The Game of Change

Past clerks have contributed many of the portraits in this collection. And when my clerkship came to an end earlier this year, I gifted Judge Cott with my own contribution to the Peace Wall: a photograph of team captains shaking hands before what would come to be known as the Game of Change.

I am an avid basketball fan, and Judge Cott has often reminded me about the power of sports to bring people together. Indeed, the Peace Wall also features pictures of Muhammad Ali, who famously refused to fight in the Vietnam War; Nelson Mandela, who used rugby to unite and inspire South Africans; Condoleezza Rice, who became the first female and African American member of the Augusta National Golf Club; and the 1971 T. C. Williams High School Titans football team, which set an example for the community by overcoming their differences.



Team captains shaking hands before the Game of Change

During the March Madness of 1963, Loyola University of Chicago competed against Mississippi State in an NCAA tournament game that helped put an end to segregated basketball. In that era, college basketball was still predominantly white, with usually no more than two Black players appearing on the floor at a time. But that year, Loyola's starting lineup had four Black players. Banned by its segregationist state government from playing against teams with Black players, Mississippi State's all-white team had never

played an integrated team before the opening-round game of the NCAA tournament in East Lansing, Michigan. But Mississippi State flipped the script, sneaking out of town just ahead of the service of an injunction prohibiting its coach and school president from leaving Mississippi.

On game day, team captains Jerry Harkness, a Black Loyola player, and Joe Dan Gold, a white Mississippi State player, defied the court order with a show of sportsmanship: they shook hands. Loyola won the game 61-51 and ultimately the entire NCAA tournament, but the final score is just a footnote. In a defining moment in sports amidst the Civil Rights Movement, the game pointed to an end to the Jim Crow laws of the past, marking a change in the way of life. Although perhaps not as prominent as Texas Western's NCAA title game win over Kentucky in 1966 when it became the first championship team with an all-Black starting lineup (inspiring the 2006 film "Glory Road"), the Game of Change signaled the beginning of the end of racial barriers in college basketball.

A Fitting Reminder

One of the most enlightening aspects of my clerkship has been observing Judge Cott, a skilled mediator, at work during court-supervised settlement conferences. *See* Hon. James L. Cott, "From the Bench: The Dos and Don'ts of Settlement Conferences," ABA J. (Winter 2016). Occasionally, when parties are at an impasse, Judge Cott invites them to the Robing Room for more direct discussions. In the background, the Peace Wall is a fitting reminder to the negotiators that even the most rigid barriers can be overcome. Indeed, Harkness' statement in one interview highlights an important lesson for parties and attorneys alike: "We did it together…. We showed you could do it together, without a fight." Litigation is a taxing endeavor for everyone involved, but as the Game of Change demonstrated, no riots, fights, or drama need be had. A subtle and peaceful change in the right direction can be enough to break the ice.

Lawyers Who Have Made a Difference

Heidi Reavis

By Pete Eikenberry

Millions of women across over 40 developing countries suffer a tragic childbirth injury called obstetric fistula. The women are simply unaware they need a C-section, and are remote from medical assistance. When they go into obstructed labor, tragedy ensues; the baby cannot be saved and the mother suffers internal injuries, rips, and tears. When such a woman loses her baby, soon afterwards she can lose her husband and family as well, and become a pariah in her community. She is physically injured, uncontrollably leaking urine or feces or both, and starts to stink. With no means of support, she may also lose her home, the rest of her family, and her self-respect, and eventually become homeless. Yet, the problem can be fixed with just a few stiches.

In 2007, Heidi Reavis and her husband Steve Engel borrowed money on their apartment to produce a human rights documentary film, *A Walk to Beautiful,* about obstetric fistula to inform people about the affliction, its simple cure, and the free hospital in Addis Ababa, Ethiopia, where these women and girls can receive treatment and a new life. It has probably saved the lives of hundreds of thousands of young women and made countless other women's lives worth living.

A Walk to Beautiful was featured in over 35 international film festivals, was broadcast on national television, and was distributed publicly. The film received scores of coveted international awards, and Heidi was awarded an Emmy for the film's "excellence in production of a film for a television documentary." Heidi has gone on to co-executive produce (without compensation) numerous additional human rights documentaries and important

public service announcements, most recently as an executive producer on the film, *Missing in Brooks County,* about the dramatically high rate of fatalities and missing persons in Mexican/U.S. border crossings.

Heidi has also been chair of the WCC (Women Creating Change) formed in 1915 as the Women's City Club of New York. It gave early impetus to the passage of the 19th Amendment giving women the right to vote in 1920. (My granddaughter, Hayden Lamson, who assisted with the interview, is entering Smith this year, from which Heidi and her mother graduated.)

Hayden: I am currently in a biomedical class focusing on reproduction, birth control, and reproduction technology. What can you say about the subject?

Heidi: A column in *The New York Times* by Nicholas Kristof about a free hospital in Ethiopia inspired Steve and me to produce *A Walk to Beautiful.* The hospital offers surgery to "close the hole" – a childbirth injury that women and girls get from obstructed labor, resulting in a tear that causes them to leak urine and feces for the rest of their lives. Obstetric fistula ("fistula" meaning a hole in Latin) results from women going into labor without knowing they require a C-section, and living too far from the roads and the medical attention they need. Usually, the child dies, unable to exit the mother. After days of futile labor and extreme exhaustion, often the woman dies too.

In many developing countries, women and girls do the heavy labor – carrying water, sticks, and stones, while the men tend to animals and serve other village functions closed to women. Once a girl is able to walk, she is often given physically heavy and demanding tasks which over time inhibit her physical growth. This pattern leads to girls "growing short," from the constant external pressures on their skeletal frame – a condition which can be fatal when a genetically larger baby is fighting to exit its disproportionally smaller mother.

In cases where the pregnant mother is young and still in her own growth period, the fetus will still develop at a relatively normal rate and size regardless of whether the mother is as yet too small to give birth. Without a C-section when the mother goes into labor, the infant trying to get out causes great internal pressure and friction, and a puncture (or "fistula") is created between the pelvis and the bladder or rectum of the mother. When the baby cannot exit, it suffocates and dies; if the mother manages not to die of exhaustion or blood loss, sometimes she wishes she had. These once-hopeful women and girls who suffer from untreated obstetric fistula are thus sentenced to lives of misery and poverty, with gross leakage, physical and psychological isolation, and early death – often by suicide.

A Walk to Beautiful follows the paths of five courageous women who make their difficult journey across the rugged hills of Ethiopia to the free Hamlin Fistula Hospital in Addis Ababa for treatment to stich their open wounds – after which healing and care, their lives are transformed. The film is inspiring, humoristic, upbeat, and reflects hope. The portrait of Ethiopia is breathtakingly beautiful. In times of war and hostility in nearby areas, we suspended production and regrouped. We assembled a crew of women producers who were skillful, empathetic, and nurtured trust and intimacy with the women and girls they interviewed for the film.

The award-winning feature length version of the film was also converted into a 52 minute television version which was broadcast on NOVA. *A Walk to Beautiful* has been widely distributed for free to millions of people in an effort to continue informing the world about the issue of obstetric fistula, the usually simple cure, and the free hospital where the subjects of our film traveled at their peril to be treated.

In addition to raising awareness for countless women and girls so that they could seek treatment, the film raised money for the Fistula Hospital and broadened understanding at the United Nations, in the U.S. Congress, in the medical community, and abroad concerning women and girls' acute maternal and infant health care needs. Indeed, U.S. Congressional legislation to fund the treatment of obstetric fistula in developing countries is currently pending.

The Fistula Hospital has

greatly expanded since production of the film. It now also has a free school and offers other support services to the women and girls who make the journey. Remarkably, some of its former patients have become nurses in the field, since they care and know so much about the medical problem and are skilled in treating it. It is amazing to consider how a girl traveling across Ethiopia, on foot in the hope of having her obstetric fistula treated, could now be working as a skilled nurse at the free Fistula Hospital, treating and caring for others with the affliction.

Hayden: That is a great result. Now, what is the mission of Women Creating Change?

Heidi: The Women's City Club of New York, Inc., now known as Women Creating Change, was founded over a century ago as a progressive and safe place for women at a time of great hostility against our civic participation. Over the decades, WCC has been behind progressive change in New York, both large and small, from improving safe shelters for women, to promoting voting rights, to fighting for civil rights, to supporting women and people of color in political life.

Eleanor Roosevelt and Frances Perkins were early members of WCC. Perkins was the first woman appointed in a presidential cabinet, serving under F.D.R. as his Secretary of Labor over four terms (to this day, the longest serving member of any presidential cabinet). With the support of WCC and its focus on civic participation, women's rights, and workers' protection, Perkins was the architect of the minimum wage, fair labor standards, child labor laws, Social Security, and more. I was inspired by these great women and followed in my mother's footsteps in getting involved with WCC.

WCC's main mission today is to work with underrepresented and underserved women to encourage and support their participation in civic life, which can also mean political life. For example, WCC helps provide tools for participation on community boards, learning about civic engagement, voter registration, and more. WCC is also focused on making sure women understand the importance of taking the census and exercising the right to vote in their communities.

In addition to being the centennial in 2020 of the ratification of the 19th Amendment granting women the right to vote (August 18, 1920), 2020 is also the bicentennial of Susan B. Anthony's birth (February 15, 1820); so there is a lot to recognize this year, in addition to the 2020 census and the presidential election. The Census ultimately determines the number of representatives each state has in Congress over the next 10 years, determined by the number of people in a state in proportion to the national population. For states, the census unlocks billions of dollars in federal funding.

People have to get counted to be counted. New York State was at its high water mark of House representatives with 45 in the U.S. Congress in 1950. It now has only 27 representatives. This decline in representation has resulted from a combination of low census response in New York, and higher population growth in other states. Also, even though people are stuck at home, the New York State census response rate, this year and historically, is lower than the national average. Since New York State is such a large portal for immigration, we have many new and foreign residents who are unaware of the census, who question or do not understand it, or who are fearful of taking it, particularly in this fraught election year. [Heidi and Steve also produced gratis a free public service announcement on the census which they distributed to tens of thousands of people through social media.]

Hayden: Do you see progress being made in the work that you are doing; if so how?

Heidi: Absolutely, there is progress, particularly in view of the #MeToo and Black Lives Matter movements which have prompted many initiatives for the advancement of women and people of color. However, much of that is topical – not organic or lasting in terms of long term structural change. An idea whose time has come can start a movement. If the women and girls in Ethiopia can reach a free hospital on foot hundreds of miles away, to achieve life changing transformation, we can achieve our dreams too.