Federal Bar Council Quarterly

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## *In This Issue:*



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April 2, 2020 – Judges Reception at the Union League Club
(Honoring all Senior Judges in the Second Circuit)

May 6, 2020 – Law Day Dinner at the Grand Hyatt New York
(This year's Learned Hand Medalist will be The Honorable Debra A. Livingston)

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**From the Editor**

# Experienced Women Lawyers Are Leaving Law Firm Practice

**By Bennette D. Kramer**

A report co-authored by Roberta D. Liebenberg and Stephanie A. Scharf for the American Bar Association and ALM Intelligence entitled *Walking Out the Door: The Fact, Figures, and Future of Experienced Women Lawyers in Private Practice* looks at why senior women lawyers are leaving their law firms at what should be the height of their careers. This is not a report about advancement to partnership; rather it is about women who are established in their firms and their perceptions and attitudes, along with those of their male colleagues and firm management.

The report provides a discouraging look at the departure of senior equity and non-equity partners and of counsel. Despite programs developed over the past 20 years, women are leaving firms, and they are doing so for many of the same reasons as before:

- They are not given the same business development opportunities as male colleagues;
- There is a lack of parity in compensation;
- There is a lack of representation on executive committees; and
- Women are subject to explicit bias, double standards, and sexual harassment.

The report is based on a survey that resulted in the collection of data from responses of 1,262 individuals – 70 percent women and 30 percent men from the nation's 500 largest firms – who had been practicing law for over 15 years. Half of the respondents were equity partners and the rest non-equity partners and counsel or senior counsel. Only 28 managing partners participated in the survey.

The numbers are telling: from year to year, surveys have shown a significant underrepresentation of women in equity partner ranks and leadership positions. Women are now approximately 20 percent of equity partners overall, a figure that has crept up slowly over the last 10 years. In 2018, 29 percent of new equity partners were women. However, firms are increasing partnership ranks by lateral hiring; in 2017, 28 percent of lateral hires were women.

In addition, since 2015 the total number of partner promotions declined 29 percent in Am-Law 200 law firms. From 2000 to 2018, the percentage of equity partners declined in order to increase the profit per equity partner. In 2018, firm partnerships were composed of 56 percent equity partners and 44 percent non-equity partners. Because women tend to practice in less lucrative subject areas, they have more difficulty becoming equity partners. They also are less likely to be chosen to be first chairs at trial or leads on corporate deals. Finally, only 25 percent of management committee members, practice group leaders, and office heads are women.

The data from the survey show that men and women are equally satisfied with the intellectual challenge of work, their substantive areas of work, the tasks they perform, their control over how they do the work, their level of responsibility, their relationships with colleagues, and opportunities for building skills. They also had similar levels of satisfaction with control over the amount of work, the value of their work to society, *pro bono* opportunities, the amount of travel required, job security, and balance between personal life and work.

Women, however, reported that they were far less satisfied than men in their levels of satisfaction for recognition received for their work, actual compensation, the methods by which compensation was determined, opportunities for advancement, workplace gender diversity,

leadership of their firms, and the firms' performance evaluation process. The report noted: "One implication of these results is that firms need to do a much better job to make sure that policies are clear, well known, and applied equitably to men and women when it comes to rewarding and advancing lawyers, including experienced women lawyers."

**Negative Work Experiences**

Senior women attorneys reported negative work experiences on account of their gender far more than men. The responders reported that they had been mistaken for a lower level employee (men, zero percent; women, 82 percent); experienced demeaning comments, stories, or jokes (men, eight percent; women 75 percent); experienced a lack of access to business development opportunities (men, 10 percent; women, 67 percent); been perceived as less committed to their career (men, two percent; women, 63 percent); been denied or overlooked for advancement or promotion (men, seven percent; women, 53 percent); been denied a salary increase or bonus (men, four percent; women 54 percent); felt treated as a token representative for diversity (men, one percent; women 53 percent); experienced a lack of access to sponsors (men, three percent; women, 46 percent); missed out on a desirable assignment (men, 11 percent; women 48 percent); had a client request someone else to handle a matter (men, seven percent; women 28 percent); or had a colleague or supervisor ask someone else to handle a matter (men, six percent; women 21 percent).

As noted in the report: "It is clear that too many firms have not addressed the two key impediments faced by their women lawyers (a) unequal access to the experiences that are building blocks for success, and (b) negative gender stereotypes and implicit biases."

In addition, 50 percent of senior women said that they had experienced sexual harassment, compared to six percent of senior men. Senior women believed they had lost work opportunities as a result of rebuffing sexual advances, and 28 percent did not report sexual harassment due to fear of retaliation.

**Top Reasons for Leaving**

The report ranked the top reasons experienced women cited as important influences on leaving their firms: caretaking commitments, level of stress at work, emphasis on marketing or originating business, number of billable hours, no longer wishes to practice law, work/life balance, and personal or family health concerns. The survey showed that experienced women lawyers had a disproportionate load of child care arrangements, raising the policy question: "What will law firms do to devise more effective means of enabling all lawyers, including experienced women, to balance those family and household responsibilities with their professional obligations at the firm?"

According to the report, firm leaders said that they recognized the benefits of gender diversity at senior levels. They also said that they recognized that there are benefits to the quality of the firm, including better decision making, broadening the talent pool at senior levels, and mitigating the costs of female lawyer attrition. In addition, they said that they believed that retaining senior women lawyers improved the firm's reputation and image and was more responsive to the market and the requests of clients.

Firm leaders and male partners said that they believed that their firms were doing well in advancing experienced women, but women did not agree. The leaders and senior men said that:

- Their firms were "active advocates of gender diversity," which was acknowledged as a firm priority;
- Women had been successfully promoted into firm leadership and equity partnership; and
- Their firms had successfully retained experienced women.

**Best Practices**

The report concluded with recommendations for implementation of practices and policies. The report noted: "One key lesson learned from the data here: simply putting policies into place and giving lip service to the goal of diversity appears to have little impact on closing the gap at mid-levels and senior levels of experience. Enacting policies is a basic

first step, but it is not enough." Accordingly, the report continued, "[t]he greatest challenge facing large firms today is whether they will move beyond mere lip service to the goal of greater diversity by taking concrete and specific steps to meet the needs of women lawyers and lawyers of color."

**Despite programs developed over the past 20 years, women are leaving firms, and they are doing so for many of the same reasons as before.**

The report recommended the following best practices:

- Develop a strategy, set targets, and establish a timeline for what the firm wants to achieve.
- Take a hard look at the data. Use gender metrics and gender statistics to measure and track the status of key factors over time.
- Affirm leadership's commitment to take specific actions for gender diversity.
- Own the business case for diversity.
- Take steps to ensure that there is a critical mass of women partners on key firm committees.
- Assess the impact of firm policies and practices on women lawyers.
- Continue to implement implicit bias and sexual harassment training for all partners.
- Increase lateral hiring of women partners.
- Provide resources to relieve pressures from family obligations that women more often face than their male colleagues.

As the report made very clear, male senior partners and firm management think that they are solving the problem of the attrition of senior women lawyers by putting certain programs and policies in place. They appear oblivious to the real needs of women lawyers to have policies that actually provide some support for women who have caretaking responsibilities.

In addition, women have trouble meeting the billing and rainmaking requirements for success in any firm, because they do not have access to the same mentoring and business development opportunities. This results in disparities in compensation.

Finally, gender discrimination and sexual harassment create an atmosphere that men seem unaware of, but which make a huge difference in the working environment for women.

The real solution is for men to make a commitment to embrace the policies and programs necessary to create parity at all levels and create an atmosphere that will make senior women lawyers feel like an integral part of their firms.

## Developments

# Chief Judge DiFiore Is Honored at Thanksgiving Luncheon

**By Travis J. Mock**

On November 27, 2019, the Federal Bar Council held its annual Thanksgiving Luncheon. The Council's president, Judge Mary Kay Vyskocil, presented the Emory Buckner Medal in recognition of outstanding public service to The Honorable Janet DiFiore, Chief Judge of the New York Court of Appeals.

Before the award presentation, Sharon Nelles, chair of the Luncheon, welcomed the capacity crowd. Vilia Hayes, chair of the Council's nominating committee, then installed the new officers, trustees, and directors of the Federal Bar Council and the Federal Bar Foundation.

Judge Vyskocil then expressed her gratitude to the Council staff and Sharon Nelles and

welcomed the Luncheon's special guests. Judge Vyskocil also noted the over-75-year history of the Luncheon and of the Council's Emory Buckner Medal.

**Introducing Chief Judge DiFiore**

Judge Vyskocil then introduced Chief Judge DiFiore. A graduate of St. John's University School of Law, Chief Judge DiFiore has answered the call to public service throughout her career. After interning at the Westchester County District Attorney's office during law school, Chief Judge DiFiore served as an assistant district attorney in that office for five years. And after a time in private practice – during which she also served as deputy village attorney in Bronxville – Chief Judge DiFiore returned to the Westchester County District Attorney's office in 1994, serving as chief of its narcotics bureau.

In 1998, Chief Judge DiFiore was elected judge of the Westchester County court, where she presided over both criminal and civil matters and sat by designation on matters pending in Family Court, Surrogate's Court, and New York State Supreme Court. Judge DiFiore was later elected justice of the New York State Supreme Court and served as Supervising Judge of the Criminal Court in the 9th Judicial District. In 2005, Chief Judge DiFiore was elected district attorney of Westchester County. She was re-elected twice and served in that role a total of 10 years.

In each of those posts, Chief Judge DiFiore demonstrated a commitment to the rule of law and the effective administration of the courts. She worked to reduce case backlogs, established specialized courts for mental health and sex offender issues, and led various innovations and reforms focused on reducing crime and enhancing rehabilitation. She also served on numerous taskforces and commissions related to issues including drugs and courts, indigent defense services, public ethics, juvenile justice, and wrongful convictions.

In 2016, Chief Judge DiFiore began her service as Chief Judge of the Court of Appeals and the State of New York, having been nominated by Governor Andrew Cuomo and confirmed by voice vote of the New York State Senate. She has proven herself to be a proactive and energetic chief. She began her signature Excellence Initiative, a comprehensive review of the New York State Unified Court System. And she has proposed a restructuring of the New York State court system intended to enhance efficiency and excellence.

Judge Vyskocil concluded by remarking on the Federal Bar Council's choice to honor a state court judge. The award cel-



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ebrates the strong bond that exists between the state and federal courts within the Second Circuit. Federal courts called upon to interpret and apply state law often look to state courts for guidance in that task. Judge Vyskocil also observed that Judge DiFiore has long been a friend of the Council and has attended past Thanksgiving Luncheons in support of other honorees.

**The Rule of Law**

After accepting the award from Judge Vyskocil, Chief Judge DiFiore offered incisive remarks about the value of the rule of law and the duty of all judges and lawyers to uphold it.

Chief Judge DiFiore acknowledged that she was surprised to learn that she had been selected to receive an award from an organization dedicated to the federal courts. But upon reflection, Chief Judge DiFiore came to appreciate that the courts, state and federal, are bound together. Most lawyers, the judge noted, spend at least some part of their practice in both the state and federal courts. "But what strikes me most," Chief Judge DiFiore said, "and why this award from this federal association has such meaning, is because the bedrock principles that guide our profession transcend any state-federal divide and embrace our shared commitment to the rule of law."

Chief Judge DiFiore exhorted the attendees to vigilance in defense of the rule of law. She cautioned that "[n]ever in the history of our nation has the rule of law or the integrity of our democratic institutions been exposed to, or sustained, such aggressive attack.… All of us, federal and state judges, federal and state practitioners, lawyers of every specialty and practice area, stand on the front line in defense of the rule of law."

**Chief Judge DiFiore worked to reduce case backlogs, established specialized courts for mental health and sex offender issues, and led various innovations and reforms focused on reducing crime and enhancing rehabilitation.**

Chief Judge DiFiore reminded the audience that all lawyers and judges have sworn an oath "to the Constitution, and not any one person, party, or private interest." Emory Buckner, she observed, exemplified that oath, having set aside his private professional interests to spend much of his career "serving the public interest by rooting out corruption at the highest levels of government and serving our profession by instilling the values of honesty, integrity, and good character in generations of lawyers who followed."

Chief Judge DiFiore concluded by expressing her pride at being "counted among the lawyers and judges gathered in this room, leaders in our profession, defending the judiciary from unfair attacks, working institutionally and individually to promote access to justice, and working to reform our democratic institutions, including our judicial systems, to ensure that our nation's courts operate in fair and effective ways worthy of the public's trust and of its confidence."

## Catching Up With...

# Loretta Lynch

**By Steven M. Edwards, with Elizabeth Slater**

Loretta E. Lynch was the 83rd Attorney General of the United States, serving from 2015 to 2017. She now has returned to New York, where she is a partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP, focusing on white collar work, internal investigations, board advising, and *pro bono* matters.

Prior to becoming Attorney General, she was a long-time member of the Federal Bar Council and served as a trustee, secretary, and a member of several committees.

Attorney General Lynch also received the Federal Bar Council's Emory Buckner Award for outstanding public service in 2012 and gave a speech that left many in the audience in tears.

We sat down with her recently and asked about her experiences as Attorney General.

**What Was President Obama Really Like?**

One question we could not resist was the obvious one: What was President Obama really like? Attorney General Lynch said that President Obama was one of the best bosses she ever had. He trusted her to do her job and expected her to keep him informed of issues. He was very much as people saw him. He was warm and had a good sense of humor, "really personable." He was also a quiet person and very thoughtful: "I liked that he was very thoughtful, because it meant that when he sat with you on an issue he had thought about it. He was always the smartest guy in the room, but he never made you feel like it. He would guide the discussion, and when he spoke he would pull in everyone's contributions. As he was, he was one of the kindest people you could ever meet."

Attorney General Lynch noted that President Obama did not have many cabinet meetings, but they were always very productive. President Obama said to every cabinet member, "When I ask you how you're doing, don't tell me the successes – I know about those – I want you to tell me what keeps you up at night, what worries you about your department or agency, and then we'll work on those issues." He could be tough, but never in a way that called anyone out or embarrassed them. If he was disappointed in an answer, he would be quiet. He wanted a full debate and substantive comments, and he wanted people to be prepared. People were always prepared because no one wanted to disappoint President Obama.

Attorney General Lynch also spent a lot of time with Vice President Biden. The Attorney General's father, who was a Baptist minister and a civil rights leader, came up from North Carolina to Washington for her confirmation hearing. (I always tell people, if you want to understand Loretta Lynch, remember that she is a preacher's daughter.)

Attorney General Lynch arranged for her father to go to the White House and meet President Obama and Vice President Biden. This author was supposed to meet "the Rev" on the second day (everyone called Attorney General Lynch's father "the Rev"), and when he showed up late he apologized, explaining that he had gotten into a conversation with Vice President Biden and could not get him to stop talking. Attorney General Lynch explained that her father had known Vice President Biden for some time because each time she was nominated for U.S. Attorney in the Eastern District of New York (she served from 1999-2001 and again from 2010-2015), he would meet with Vice President Biden's staff, as well as with Senator Orrin Hatch's staff. To this day, Attorney General Lynch's father views Vice President Biden and Senator Hatch as his "buddies."

**Is Washington Getting Worse?**

Picking up on the reference to Senator Hatch, who was a very conservative Republican chair of the Senate Judiciary Committee, we asked whether it is true that Washington has become a less friendly place in recent years.

Attorney General Lynch gave a nuanced answer. Echoing President Truman's comment that if you want a friend in Washington, get a dog, Attorney General Lynch stated, "If you come to Washington to be in the political world, you're not there to make friends, you're there to get things done. There is definitely camaraderie, and there are people I met that I think the world of, but you're so busy and so focused, you just don't have time to have the kind of conversations that lead to friendships." She added that because senators and members of the House of Representatives do not live in Washington anymore, their families do not know each other and they do not have the connection they once had outside of the office.

Nevertheless, Attorney General Lynch observed that when she was dealing with people who

had been in Congress a long time, she was able to develop good relationships with them. Lindsey Graham ("I don't know what's happened to him") and John McCain were two senators at the staff level and political level who were always very cordial, and she never had a problem working with them. John Cornyn was that way as well. "These were people who were more senior and were able to put politics aside."

The Attorney General noted that Senators Cornyn and Klobuchar often worked on human trafficking issues, and that she had a lot of conversations with them about public-private partnerships, working on support for the victims. "It was a perfectly fine working relationship." But on partisan issues, such as immigration, Attorney General Lynch indicated that it was difficult to make progress. The Senate was intense, and the House was at another level, perhaps because members of the House have to run every two years. By the end of the Obama administration, there was a "wall of resistance" that made it difficult to get anything done. In Attorney General Lynch's view, to ignore a viable Supreme Court nominee who has been sent to the Senate for approval "is a level of obstruction that we have not seen with any president other than Obama."

We asked about the current administration, and Attorney General Lynch responded: "I think things have become more ossified, calcified, harsher." She noted that during her first time as U.S. Attorney, Bill Clinton was president and the tone was "very negative" then. But now, "things have gotten worse and sadly whenever you involve the issue of race things often get worse. There's nothing now about trying to deal with things in an institutional way. I think we're still seeing a backlash to the Obama administration. They're trying to overturn every Obama initiative. It seems like anything that was important to the last administration has to be wiped away."

**The Confirmation Process and Senator Sessions**

We asked about the partisan nature of Attorney General Lynch's confirmation process, which took a record 166 days. During that time, Attorney General Lynch met with as many senators as possible, including members of the Judiciary Committee, women senators, and people who would be responsible for making appropriations for the Justice Department. Initially the meetings were cordial, but the tone changed when President Obama issued his orders on immigration. Instead of talking about criminal justice reform, "we talked about all immigration all the time." Most of the questions had nothing to do with the Department of Justice.

When she asked why she was being questioned about things over which she had no control, one Republican senator responded: "I'm just going by the script that the leader has given me." Attorney General Lynch met with Senator McConnell during her confirmation process. She describes him as "gracious in the Southern way," but she knew that a lot was going on behind the scenes. She heard that Senator McConnell told President Obama, "You'll get the AG that you want, we're just going to make you pay for it in other ways."

One senator who gave Attorney General Lynch a particularly hard time during her confirmation hearings was Jeff Sessions from Alabama, so we asked about him. Attorney General Lynch explained: "We're both former U.S. Attorneys so we have that in common. Behind closed doors, he's a true Southerner, gracious, very warm, and stubborn because that's how we Southerners are. He said 'I won't vote for you, but you'll be confirmed.'"

Most of their conversations concerned the Justice Department and its relationship with Congress through oversight. He said U.S. Attorneys were going to come to her and they were going to want money so she would have to focus on the budget. She pushed back and said it concerned her when people in Congress use the budget to push a political agenda. They had a very candid discussion, and he gave her good, non-partisan advice.

When it came to Attorney Geenral Lynch's confirmation hearing, however, Senator Sessions focused on the immigration issue and moved to a hardline position. He asked her whether she was concerned that immigrants were taking jobs away from the black community. In retrospect,

she is not surprised by the question because Stephen Miller was on Senator Sessions' staff, but she had to hold her tongue because he was suggesting that the only jobs that concerned African Americans were jobs in the field. "The implication that illegal immigrants were taking jobs away from certain sectors of the community tells you where the speaker thinks those sectors should be working," she said.

Every Attorney General leaves a letter to his or her successor, so Attorney General Lynch left a letter for Senator Sessions when he became Attorney General. She did not share the details of the letter with us except to say it was about the Justice Department. She did say that Attorney General Sessions called to thank her for the letter and indicated that he was especially thankful for the tone of the letter.

**Hitting the Ground Running**

The day Attorney General Lynch was sworn in, April 27, 2015, was the day of Freddie Gray's funeral in Baltimore. The funeral led to a lot of unrest and violence broke out. The first thing Attorney General Lynch did was to talk with the governor of Maryland and the U.S. Marshal's service about how to handle the matter. Then she met with President Obama and a congressional delegation at the White House and outlined a plan. The presidential mandate was to make it an interagency response. She had many conversations with representatives of the U.S. Department of Housing and Urban Development, the Department of Labor, and the Department of Education about how to address Baltimore's problems.

One thing that she said she learned was that because there is a transportation grid that divides the poor sections of Baltimore from those that are better off, it is almost impossible to get from one section to the other using public transportation. This creates a ghetto with limited opportunities. The interagency solution addressed this issue.

Attorney General Lynch's focus was to look for ways to de-escalate the situation. Almost immediately, she sent Vanita Gupta, the head of the Civil Rights Division, and Ron Davis, the head of Community Oriented Policing Services ("COPS"), to meet with local community groups. As a result of the violence, a police officer was hit by a brick and hospitalized. The Attorney General directed Gupta and Davis to go to the hospital and meet with the injured officer and make it clear that she was concerned about injuries to both sides. Attorney General Lynch said that the officer was surprised and talked about the difficulty of permitting people to express themselves while keeping people safe. Ultimately, there were no federal prosecutions in Baltimore, but there was a consent decree requiring the police to improve training, community relations, and de-escalation techniques.

The situation was different in Ferguson, Missouri, which Attorney General Lynch also had to deal with even though the Michael Brown shooting had occurred before her tenure. Attorney General Lynch described it as a "horrible shooting," and people were upset because the local prosecutors decided not to bring charges. With characteristic understatement, she said, "I think the way in which they announced it was not helpful."

Even though the Department of Justice concluded that they could not bring a viable criminal prosecution, its investigation enabled them to understand what led to this "tinder box" situation. The police officers were treating the African American community based on directions from city hall. There was a system of incredibly harsh fines and fees that the city of Ferguson imposed for minor offenses such as jaywalking, loitering, and not having one's lawn cut, in an effort to raise money for the city. The fines were higher than most people could afford. The Justice Department tried to get the city to agree to provide better training for the police and modify its system for fees and fines. Ferguson's main concern was the cost of things, and the Justice Department said it could revamp the system over time and the department would help with police reforms. After lengthy negotiations it became clear to Attorney General Lynch that Ferguson was stringing the Justice Department along, so she brought a lawsuit, which was resolved by a consent decree.

The Eric Garner case was another major case in which Attorney General Lynch was involved. She had worked on that case when she was U.S. Attorney in the Eastern District of New York. The Civil Rights Division at main Justice wanted to be involved, which created a tense, difficult working relationship. When she left to become Attorney General, Attorney General Lynch did not want to micromanage her old office from her new office, but she felt she had to do what she could to reach a just conclusion.

In her view, it was important to give the police officer involved every benefit of the doubt, because he was going to raise every possible defense at trial, but she also recognized that many people did not think the officer had acted properly. As Attorney General Lynch put it: "The issue is that someone died, and it is on national TV, and his family has to watch him die, and there's also a police officer whose life has changed forever, and he has a family too. That's why we had to get this right. We had a responsibility to both sides to call balls and strikes, to play this fair. We would do ourselves grave harm if we were seen to be picking sides."

There were a number of leaks that delayed the investigation, and one of her regrets is that she was not able to reach a conclusion before her term ended. In June of last year, the U.S. Attorney in the Eastern District announced that the federal government would not bring charges.

**Police-Community Relations**

A major focus of Attorney General Lynch's tenure was police-community relations. She tried to meet with the police and community groups everywhere she went and to serve as a "convening power."

"Even if the Justice Department could not bring a case, we tried to bring people together," she said. She added: "You can be the neutral voice in the room, you can have the hard conversation, talk about what it feels like to be afraid of someone in your community. You can talk to the police about what it feels like when you feel disrespected or are in danger. Those are things that are uniquely suited for the federal government to do. We can do it. We have done it. And that's when you get people to talk about solutions."

Attorney General Lynch noted: "When you look at these issues, you see police departments who have never been trained appropriately, the training materials are 20 to 30 years old and outdated, and it's not working. Police officers want that training, but there isn't the funding for it because the cities have cut back on their funding so much. So the COPS office in particular had set up a structure whereby they said to the police community, if you have a problem come to us before there's a riot in your city, come to us, and let's set up a program to work on these issues before there's tension. That way you'll at least have tools on hand, or a network of police chiefs who can advise you on what worked and what didn't. We did a lot of this under the radar. We still had consent decrees, but they were always done towards how can we help, not just the city and community, but how can we help this become a better police department. What I always said is that if you have a system where you hold yourself accountable, in the way that you hold people in the street accountable, then you'll never see me again."

**Mass Incarceration**

Attorney General Lynch thinks that mass incarceration is a complicated issue. In her view, mass incarceration can be reduced if an effort is made to focus on the role that different people play in a crime. The goal should be to get the kingpin, as opposed to what Attorney General Lynch called the "mope." "The mopes can be dealt with in a more nuanced way," said Attorney General Lynch. She added, "Our judges support that."

Race is also an issue that deserves focus. When the penalties for crack, as opposed to powdered cocaine, were increased, there was a disparate impact on people of color. "There were collateral consequences that were outsized compared to the intent," said Attorney General Lynch. The Sentencing Guidelines were supposed to eliminate racial disparities, but they had the effect of increasing racial disparities because most crack users were black and the penalties for crack were very harsh. The Sentencing

Guidelines are now advisory, but racial disparities have crept back into sentencings again.

"In evaluating the criminal justice system, people need to think about what they are trying to achieve, the harm they are trying to prevent, and what they are trying to protect. A lot depends on what society values, and this changes over time. There have been times when people thought that more conduct should be criminalized, like evasion of child support, while other people think we have criminalized too much. Some people think we do not federalize white collar crime enough, relative to the way we federalize other crimes, other people think we federalize white collar crimes too much.

"At bottom it depends on what do we need to protect people from? And what is the best way to do that and how do we keep people safe? Just locking people up doesn't make things safer or reduce crime. Crime prevention efforts make a community safe. By investing in the community and then providing law enforcement services on top of that, we will reach a better result. We look at the end point but not at the beginning point and it's all interrelated. The way we decide housing policy, that leads to how schools are still segregated in this country, and that leads to how jobs are unavailable for some. We don't talk about that. "

There are no easy solutions, in Attorney General Lynch's view, and "sometimes progress is followed by backlash, so we can only move forward in small steps." Attorney General Lynch believes it is important to have candid conversations at the outset. "The impact on the community is something that needs to be considered at the beginning of a case. When you look at someone who is in their twenties and you're sentencing them to a life in prison, you need to think about what you're doing. Sometimes a white kid will be punished differently from a black kid, and we need to talk about that and whether it makes sense. "

At the end of the day, according to Attorney General Lynch, the burdens and the benefits of the criminal justice system need to be shared equally. In her view, "law enforcement protects us and looks out for us, but if one part of the community gets the burden of that and another part gets the benefit, it is not going to work. The burdens and benefits need to be shared equally. This is a difficult conversation to have."

**The Death Penalty**

We asked Attorney General Lynch whether she believes in the death penalty, and she answered as follows: "I benefitted from being in office with people who viewed the death penalty as something to be used very judiciously and only as a last resort. I was fortunate enough to work for Janet Reno who said she was personally opposed to it, but she would enforce it as Attorney General. I think that my view on it has been that for whatever reason we have not abolished it in our society. Will we? I truly don't know. From a law enforcement perspective, you have to look at it like if you do certain things, you have to be held accountable. What the death penalty says is that there are certain things that you can do that are so heinous and so beyond the pale that you've forfeited the right to live among us. Can we make that judgment as human beings? I really don't know. I'm not sure it's worth it for us to do that. We have to decide whether we're okay with this. As we apply this system, are we okay with the fact that we might not be right all the time? Is it enough to say the federal system is different, it's better, there are fewer people on death row, and they are all clearly guilty? Does that save the federal system? I don't know."

Notwithstanding her doubts about the death penalty, Attorney General Lynch approved it in the Dylann Roof case. Her view was that what he had done fit with the structure of the death penalty. Many of the victims' families did not want the federal government to seek the death penalty, and she respected that personally. People in law enforcement were split on the issue. It was the view of some that the state was going to convict him, so what did it matter since he would be in jail for life. Attorney General Lynch told us, "You can't absolve yourself of your responsibility by saying that someone else is going to carry out theirs. If we're going to have a death penalty, ultimately it falls on the AG to decide whether it's going to be sought or not. When I looked at the case, I thought

that this was a case for which this penalty was appropriate."

**The Clinton Emails**

We could not let Attorney General Lynch get away without talking about the Hillary Clinton emails. There is much confusion over whether she recused herself in the case, and if so, why she did that. Attorney General Lynch confirmed that she did not recuse herself. In fact, she made the ultimate decision that the Justice Department would not bring a prosecution against Hillary Clinton and other people who were under review. She "took the recommendation" of the FBI on the facts because they had the expertise on the facts. They had the forensic experts and had examined the servers.

The problem occurred when FBI Director James Comey decided to announce the results of the investigation on the facts and the legal consequences at the same time. The original idea was that the FBI would present the results of the factual investigation to the Justice Department, the Justice Department would make a decision, and then Attorney General Lynch, Deputy Attorney General Sally Yates, and Comey would announce the results together. Comey decided to jump the gun, however, and made his own announcement even though a final decision had not been made.

In Attorney General Lynch's view: "Had we all been able to talk about it together, we would have had a better product, something that really explained the legal basis behind our conclusions." She added: "When the AUSAs gave their presentation, I remember Sally turned to me and said 'this is almost a different case than the one Jim described in his press conference.' We would have been more expansive in explaining why we were not bringing charges."

In addition to failing to provide an adequate explanation of the decision not to bring charges, Comey broke the cardinal rule against criticizing the target under circumstances in which the target would not be able to prove her innocence in court, according to Attorney General Lynch. He then compounded that by sending a letter to Congress in October about reopening the investigation when it was discovered that there were emails between Hillary Clinton and her aide, Huma Abedin, on Abedin's husband's computer.

According to Attorney General Lynch, she asked Comey not to send the letter and suggested that they examine the computer first, but he sent the letter anyway. When she met with him afterwards, Attorney General Lynch said, "What happened? Why would you do something so incendiary when you knew I didn't want you to do it?" Comey essentially said that he was worried there was going to be a leak from a dissatisfied faction of agents and that it was going to come out in a really damaging way. Attorney General Lynch responded by saying, "Look I get that, but this isn't the way to deal with leaks."

Attorney General Lynch believes that Comey's actions generally could be explained by a concern that there were many people in the FBI rank and file who did not like Hillary Clinton: "I think Jim felt he had to be critical of her in a way that was public so that his rank and file didn't think that he was capitulating to her impending administration." Comey was in a unique position because his term would have extended into a Hillary Clinton administration if she had been elected, and Attorney General Lynch thinks that Comey wanted to reassure his people that he was independent.

Attorney General Lynch observed: "The problem in my view is that Jim decided he needed to deal with this all by himself instead of coming to us to decide to work together. We would've sat down with him and worked through all these issues as well." On how she feels about it now, she says, "A lot of people say he's attacked you, why don't you go on TV and call him out, not be as nuanced. My view is that I've known him for a long time, and he was part of my management team, and it is my view that if you're on my team, you don't go under the bus."

**Why Did You Let Bill Clinton on Your Plane?**

On June 27, 2016, Attorney General Lynch met with former President Clinton on her plane, which was sitting on the tarmac at the Phoenix airport. Comey has claimed that this meeting led him to make his announcement

regarding the conclusion of the investigation on July 6, 2016, although he had drafted his statement three weeks before. A number of people criticized Attorney General Lynch for meeting with President Clinton, and the Justice Department's Office of Inspector General investigated the matter.

As Attorney General Lynch describes it, they had landed at the airport and her staff got off first, and then her detail followed. As they were walking to the door, the head of her detail said, "President Clinton wants to say hi to you." She did not know President Clinton was going to be at the airport, but it is her practice to be polite if someone wants to say hello (she is a preacher's daughter).

President Clinton materialized at the door about two seconds later and talked to a number of people on the plane, including her security detail, the flight attendants, and her husband, Steve Hargrove. He then sat down and talked to the Attorney General about a variety of subjects, including his grandchildren, his golf game, and Janet Reno, who was in poor health at that point. Attorney General Lynch tried to terminate the discussion several times (which is hard to do with Bill Clinton), and finally said, "Thank you, we gotta go now." She is adamant that they did not talk about the Hilary Clinton email investigation, and none of the many witnesses to the encounter have suggested otherwise. Contrary to what some have suggested, she was not close to the Clintons and had only met them briefly before.

She later joked that she wished Eric Holder had told her where the lock is on the plane door.

**Greatest Accomplishments and Regrets**

We asked Attorney General Lynch what she viewed as her greatest accomplishments. First on her list was the FIFA case. In that case, the United States stood as "a barrier against corruption." A number of her European colleagues have told her it brought back their faith in the rule of law.

Attorney General Lynch also cited the work they did on community-police relations, commenting that "we gave people a way to connect and talk through these issues." Also high on the list was the work the Justice Department did on equality, including marriage equality.

Attorney General Lynch observed: "People think that they're not being treated fairly, that they're getting the short end of the stick. I think no community maybe feels that way as strongly as the transgender community does. The bathroom bill, for example. A bill that is marketed to keep kids safe, but that everyone knows is going to do nothing but make transgender kids the target of violence and bullying. I hope that people will look at our efforts to combat that as part of our legacy. I felt like we really changed policy and perception of some important issues for the better. There were people who felt like the government was never on their side, and we turned that around and told them that the government was on their side. We brought many more voices to the table than had ever been there before. "

Attorney General Lynch described the job of Attorney General as "the best job ever." We asked her whether it was fun, and she replied, "Fun is too small a word. I loved it," although she hastened to add, "I don't miss testifying in front of Congress." She even had nice things to say about her critics: "When you're fortunate enough to have a cabinet position, you can't be afraid to evaluate what you have done. It is important to keep that constituent voice open. People who are the maddest at you sometimes have nuggets of truth in there and you need to hear their protest."

**The Current Administration**

Attorney General Lynch used the term "backlash" to describe the current administration, and she noted that she saw the backlash coming during the Obama years: "I saw the sea of backlash growing throughout my term with the administration. There's always a backlash after significant progress in this country."

Attorney General Lynch had this to say about the current administration: "This administration I find very troubling. I find their lack of connection to the truth or any scientific advancement to be really harmful to the country overall. I'm very trou-

bled to see the DOJ turning away from some positions or protections for marginalized groups, people of color and the LGBTQ community in particular. The DOJ is where you go when you feel there is nowhere else to go, to know that there is someone who is looking out for you. With this administration, if you don't support it, you don't get the benefits of it. That's not right. If you are in government, you have to lead everybody whether you like them or not. That's what leading the country is. I do find it troubling that this administration seems to be okay with governing in a narrow sectarian way."

**The Future of Race Relations**

Notwithstanding the backlash and the views of the current administration, Attorney General Lynch thinks that race relations in this country are getting better. She described race relations as "very fluid throughout the country," and she added: "I'm a very optimistic person in general. I really think that we're so much further ahead now than we were. Even with the division and vitriol that we have now that is based in race, it is at least elevating the issue. People who typically didn't see these issues before see them now.

"You have always had a group of people in this country who have been complacent about issues of equality – race and gender. We have always had situations where unarmed black men were shot by the police. We now know more about these incidents because people caught them on their cellphone. All of a sudden, as difficult as it was to watch, and as hard as it was to see someone in this encounter with the police, it told a lot of people that this is what people have been talking about for generations. Prior to the last 10 years, people in the complacent group would say to you it can't be that bad; I can't imagine a situation where someone would do that to another person. But when it's in front of you, the reaction is now, I see what you're saying. Young white people are now seeing what their friends of color go through. That's an advancement in understanding, in knowledge. It's a recognition that these are real issues that impact all of us. People now realize that they are part of a society that treats people in a certain way and they have to choose whether they want to be part of that society or not."

Attorney General Lynch views this as "one way we can use conflict and the level of anger that we see to advance the debate. We have always had periods of intense disagreement – from the founding, people fought duels, people killed each other over stuff like this. People have always been divided but only when you bring that out in the open and talk about it can you really make progress on these issues and this is what we have to do."

Attorney General Lynch describes herself as an optimist when it comes to racial issues. She expounded: "Hopefully I'm not being naïve. I say I'm an optimist with a hard understanding of how painful these issues are and how painfully they can impact people, particularly people of color. But I say I'm an optimist because I've seen the progress that we've made. I never thought that it has to be smooth. Everything we have done in this country has been in fits and starts. As an example, it's been 100 years since women were allowed to vote. Women died for this, but they didn't include black women in the beginning. Black women didn't get the right until the civil rights movement. In the beginning, the women's movement thought that if they added black women to the debate it would kill any chance they had of getting this right. I'm still grateful for what they did; it was still progress. It points out that there is always more to do."

**Attorney General Lynch's Future**

We asked about Attorney General Lynch's future, and she responded: "I like that the Paul Weiss platform lets me have a meaningful and significant practice where I hope to provide wise and effective counsel to companies. I also like that it allows me to do *pro bono* work, where we can use the resources of Paul Weiss to help people who wouldn't normally get those benefits. I think that there are several ways to serve your country. I've been tremendously proud to serve my country."

We pressed her on whether she had a specific dream job, and

she said "I have never gone for a specific dream job. I've gone more to have a certain impact. I didn't join the Eastern District to say 'I came to be the U.S. Attorney.' I came because I believed there was a community that needed protecting," but she added: "I don't know what the future holds."

We asked about rumors that she was a candidate to fill Justice Scalia's seat when he died. She described her reaction as "practical and personal…. I have a tremendous respect for the Court, I have friends on the Court, and the Court tries very hard to get it right. I have always thought that – despite the fact that some people have gone to the Court without having been on the bench before – in my view, you should be on the bench before. Also, I did not want the role of being a sort of cloistered arbitrator. In addition, I knew that if I were to be nominated, having gone through a confirmation before, having to step back a lot from public things, this would render me ineffective for the rest of my term as Attorney General."

I reminded Attorney General Lynch that I had once suggested that the ideal job for her would be U.S. Ambassador to the United Nations. Her eyes lit up, and this was her reply: "I think our place in the world is very important. Although we're still a fairly young country, for a long time we have been an example in terms of democracy. And I mean democracy in a truly messy sense. We fight and we argue, but we have peaceful transitions of power. And we have always been a force in the world and we could continue to do that. I think we're taking a break from that right now, for some reason, but I think the world is still looking to us to be a stabilizing factor and a supporting factor to emerging democracies. And they're looking at us to see how we survive the challenges facing our own democracy. They're looking at us to see how we're going to handle the challenges to our own democracy that we're going through right now. There are a number of ways in which I would like to be helpful in how we do that ultimately."

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## Legal History

# *Bush v. Gore* (Redux)

**By C. Evan Stewart**

Twenty years ago the country almost went through a constitutional crisis, as the presidential election of 2000 went unsettled for 37 days after the nation had collectively voted. Then, on December 12, 2000, the United States Supreme Court decided *Bush v. Gore*, 531 U.S. 8 (2000).

Nineteen years ago in these pages I published my take on the Court's decision. With the 2020 presidential election now in full swing (and promising to be a doozie), and with the publication of Justice Stevens' memoirs and Evan Thomas' biography of Justice O'Connor (both of which give insights into the Justices' views on the decision), it seems like a good time to take a second look at the Court's work as part of my ongoing series on infamous rulings by the Court.

### Setting the Stage

The day after the national election (November 8), 37 electoral votes were still undecided (Florida, Oregon, and New Mexico). The biggest prize was Florida, with 25 electors at stake. On that day, the Florida Division of Elections reported that Texas Governor Bush led Vice President Gore by 1,784 votes. The next day, a machine recount required under Florida's Election Code reduced Bush's lead to 327 votes (ultimately, Bush's lead was determined to be 537 votes). Also on November 9, the Florida Secretary of State (Katherine Harris) declined to waive the statutory November 14 deadline for hand recounting, and Gore petitioned for hand recounts in four Florida

counties in which he hoped to find the necessary votes to defeat Bush (Volusia, Palm Beach, Broward, and Miami Beach).

**Seven Decisions**

The foregoing triggered seven judicial decisions that predated the Supreme Court's December 12 ruling. And that December 12 ruling cannot be understood without an analysis of those earlier seven decisions:

(1) Florida Circuit Judge Lewis' decision upholding the Florida Secretary of State's refusal to extend the deadline for hand recounting beyond November 14 (November 17, 2000);

(2) The Florida Supreme Court's reversal of Judge Lewis (November 21, 2000);

(3) The U.S. Supreme Court's vacation of the Florida Supreme Court's decision (December 4, 2000);

(4) Florida Circuit Judge Sauls' decision dismissing the contest proceeding brought on by Gore (December 4, 2000);

(5) The Florida Supreme Court's reversal of Judge Sauls (December 8, 2000);

(6) The U.S. Supreme Court's stay of the Florida Supreme Court's December 8 decision (December 9, 2000); and

(7) The Florida Supreme Court's decision "clarifying" its November 21 decision (December 11, 2000).

Under Florida law, vote totals had to be submitted to the Secretary of State by November 14 (seven days after the election). Within that seven day period, a "protest" could be interposed, with a hand recount ordered; if a recount was undertaken but not completed within that period, the Secretary of State "may… ignore" the incomplete results. Once the Secretary of State certified the election winner, a "contest" could be interposed by means of litigation.

By November 14, only one Florida county in which Gore had interposed a protest had completed a recount. Counting an additional 98 Gore votes, the Secretary of State certified Bush the winner of Florida's electoral votes by a 930 vote margin. With respect to the incomplete recounts, the Secretary of State refused to waive the deadline, absent evidence of fraud or some other calamity (for example, an act of God) interrupting the recount. Although Judge Lewis upheld the Secretary of State's discretion and decision, the Florida Supreme Court did not, extending the "protest" period to November 26.

This latter action was wrong on the law, and had profound consequences. As a practical matter, it meant that the inevitable "contest" period could not begin until after November 26, which rendered the amount of time for that process to an almost certain degree to be too short a period; the political, as well as legal, fallout from the resulting compressed "contest" period had much to do with the crisis(es) that ensued (both actual and perceived). Legally, the decision was at odds with the Florida statute because it essentially re-wrote "error in the vote tabulation" (the only statutory grounds for a hand recount – an error of that sort had clearly *not* occurred) to mean "error by the voter," with the latter constituting the basis for extending the certification deadline. The Florida Supreme Court explicitly acknowledged its ex post facto handiwork – criticizing "sacred, unyielding adherence to statutory scripture," and "hypertechnical reliance upon statutory provisions," and citing to "the will of the people [as expressed in the Florida constitution]… [as the] fundamental principle… guid[ing] our decision today."

On December 4, the U.S. Supreme Court *unanimously* vacated and remanded that decision back to the Florida Supreme Court. Although perhaps it was too oblique (or restrained, or unable to agree on a unifying reason), the U.S. Supreme Court's decision signaled to the Florida Supreme Court that its reliance on the *Florida* constitution could not be a vehicle to negate or limit the power granted exclusively to the Florida legislature by Article II of the U.S. Constitution (each state shall pick presidential electors "in such manner as the Legislature thereof shall direct"). The U.S. Supreme Court, besides seeking clarification of the Florida Supreme Court's interpretation of Florida's election law, also sought that court's view of whether the Florida legislature

had wanted to come within the so-called "safe harbor" provisions set forth in the U.S. Code (a deadline – December 12 – by which a state's presidential electors, if certified by that date, could not be challenged when Congress met in January to count the electoral votes). This latter inquiry was a stickier wicket than most observers understood at the time. Beyond the timing issue, a precondition of the safe harbor is the application of the state law existing as of the date of the election (that is, November 7, not November 21 or November 26). If the Florida Supreme Court persisted in its view(s) in re-writing the legislature's election law, the safe harbor could be forfeited; if, on the other hand, the legislature wanted the safe harbor, then the Florida Supreme Court's November 21 decision could well be at odds with state law *and* Article II of the U.S. Constitution.

On the same day as the U.S. Supreme Court's decision, Judge Sauls handed down his decision rejecting Gore's "contest" action, which had been brought against Palm Beach and Miami-Dade Counties. After a two day trial, the judge ruled that the two canvassing boards had not abused their discretion – Palm Beach in its recount methodology, and Miami-Dade in deciding not to complete a recount that it had started. There was no evidence of voter fraud or similar kinds of shenanigans put before Judge Sauls; rather, the trial focused on the questions of voter error(s), the nature thereof, and the methodologies by which recounts to ascertain voter intent could be/would be/should be employed.

Four days later, the Florida Supreme Court (by a 4-3 vote) reversed Judge Sauls. In a remarkable decision, the Florida Supreme Court (i) stripped the county canvassing boards of their discretion in the "contest" period (having already done so previously to the Secretary of State in the "protest" period); (ii) ordered recounted votes that Gore had gained in Palm Beach and Miami-Dade to be added to the totals; and (iii) ordered a hand recount of all remaining "undervotes" throughout the entire state (but not any "overvotes"). "Undervotes" are where the voter seems to have decided *not* to make a specific choice and thus was not detected by voting machines, such as punch card ballots with no holes (or holes only slightly indented). "Overvotes" are where a voter selected more than the maximum number of available options.)

The Florida Supreme Court's December 8 decision offered no standard for how the hand recounts were to be determined, notwithstanding that the trial before Judge Sauls indisputably demonstrated that the various counties employed wildly different standards (with attendant disparate results). This was but one critical flaw in the court's decision. Another was to focus only on undervotes, to the exclusion of overvotes. A third was its mandate that the process be completed and certified as of December 12 (to preserve the safe harbor); there was simply no way the approximately 60,000 undervotes could have been recounted (with the certain legal challenges to follow) by that date. The chief justice of the Florida Supreme Court pointed out these (and other) flaws in his vociferous dissent. He went on to predict (presciently) that the inevitable review the court's decision would receive would not be a pleasant one.

The next day (December 9) the U.S. Supreme Court (by a 5 to 4 vote) stayed the recount ordered by the Florida Supreme Court. The ground for issuing the stay was "irreparable harm" to the petitioning party (Bush). Some/many have argued that only "political" harm would have accrued to Bush if the stay had not been granted; certainly harm of that type might well have been suffered by him, as well as possible harm of that nature to the U.S. Supreme Court itself (if it had waited until after a standardless recount of only the undervotes, and then reversed the Florida Supreme Court). But other "real" harm also loomed for Bush if the "contest" period were to be deemed completed and the aforementioned recount (with all of its flaws) had pushed Gore's totals across the finish line. I believe another reason underlay the U.S. Supreme Court's quick action: the Florida Supreme Court had acted on December 8 without any reference, or response, to the U.S. Supreme Court's earlier ruling. Such institutional insubordination directly manifested in such a charged atmosphere (as we will see) appears to have prompted the

Court's desire to weigh in at that point.

On December 11 (the same day oral argument in the U.S. Supreme Court took place), the Florida Supreme Court finally responded to the U.S. Supreme Court's decision of December 4. The Florida court's "clarifying" opinion set forth that: (i) it had engaged only in everyday statutory construction in its November 21 decision; (ii) it had not changed the Florida statute after the election; (iii) it had not based its decision on the Florida constitution; and (iv) in its view, the Florida legislature wanted to take advantage of the safe harbor. Those first three assertions (as we have seen) were dubious, at best; and the final assertion meant that the Florida Supreme Court believed everything was required to be wrapped up the next day – an obvious impossibility (thanks in large part to its earlier extension of the "protest" period).

**The U.S. Supreme Court Decides**

On December 12 (16 hours after oral argument), the Supreme Court handed down its decision in *Bush v. Gore*. Seven of the nine Justices (Rehnquist, O'Connor, Scalia, Kennedy, Thomas, Breyer, and Souter) believed that the Florida Supreme Court's December 8 decision was unconstitutional because of the recount procedure ordered. And because they believed time had run out (it being December 12), five Justices (Rehnquist, O'Connor, Scalia, Kennedy, and Thomas) basically shut down any further recounts. By those two determinations, Bush's lead in certified votes was allowed to stand; he was subsequently awarded Florida's 25 electoral votes, and thereafter was sworn in as president on January 21, 2001.

The constitutional ground on which seven Justices agreed was that the standardless recount (on the basis of the widely disparate interpretation in play on the ground in Florida) constituted a violation of equal protection. As I wrote in 2001 (and still believe today), this was not a persuasive constitutional argument. Throughout our history (before and after 2000) localities – which control the electoral process – have used (and will continue to use) different methods for voting and for the counting of votes. Undoubtedly recognizing that equal protection could open a litigation Pandora's Box of future challenges to close elections, the Court's per curiam opinion stated that its equal protection analysis was "limited to the present circumstances, for the problem of equal protection in the election process generally presents many complexities."

According to Evan Thomas' biography of Justice O'Connor ("First" (Penguin 2019)), she was the author of this limiting phrase. (p. 332) Justice O'Connor also appears to have played an important role in cobbling together the diverse coalition of seven Justices who signed on to the equal protection analysis (principally authored by Justice Kennedy). (*Id*.) Also according to Thomas, Justice Scalia held his nose and voted for equal protection, but later said that argument was, "as we say in Brooklyn, a piece of shit." (*Id*.)

Thomas' biography also revealed (as I suspected 19 years ago) that many of the Justices were not pleased by the Florida Supreme Court's institutional insubordination. For example, Thomas wrote that Justice O'Connor (who, by all accounts, was one of the most collegial and least confrontational of all the Justices) "did not disguise her annoyance at the Florida Supreme Court…. [T]he judges on the Florida high court had essentially ignored the gentle nudge from the [J]ustices in Washington to come up with a fair method of counting votes and a rationale for doing so. Now time was running out." (*Id*. at 330)

As I also wrote in 2001 (and continue to believe today), the Article II concerns identified in Chief Justice Rehnquist's concurrence would have been a far better ground upon which to base the Court's decision. Clearly, the Florida Supreme Court (despite what it said on December 11) had in fact voided the legislature's law – after the election – and put in place its own view of what the law should have been (acting in the name of "the will of the people"). But in the 16 hour, rushed process imposed on the Court, the Chief Justice could only get two other Justices (Scalia and Thomas) to sign on to that view.

The remedy ordered by the

five Justices has usually taken the biggest hit from critics. Ironically, in my view, this has always been the least objectionable part of what the Court did.

First, the Florida Supreme Court had indicated that December 12 was the drop dead day for the safe harbor; and December 12, of course, was the date of the U.S. Supreme Court's decision.

Second, even if December 18 was viewed (by some) as an alternative date (the date on which the Electoral College met and voted for president), there was no way a recount (based upon a single standard – acceptable to both candidates, or ordered by a court – after the issue had been litigated), with subsequent litigation challenges, etc., could have been completed by December 18.

Third, if the issue went unresolved by December 18 and/or competing slates of electors had been submitted to Congress, the country would have been faced with the very likely result of the Speaker of the House (Dennis Hastert) or the President Pro Tem of the Senate (Strom Thurmond) becoming Acting President of the United States (or, if those two declined the honor, Secretary of the Treasury Lawrence Summers), while Congress decided the winner – a complicated (to say the least) process, for which the 1876-77 precedent provided little historically helpful guidance.

The two Justices who found an equal protection violation dissented on the remedy (Breyer and Souter), in large measure because they saw nothing magical about December 12 and believed that it was possible to meet the December 18 date. As set forth above, however, and even putting aside Florida's view of the safe harbor, it just seems a virtual impossibility that an accepted, orderly recount process (with subsequent challenges thereto) could in fact have been finalized in six days.

The two Justices who did not agree with either part of the Court's decisions (Ginsburg and Stevens) wrote dissenting opinions that were especially bitter and cast aspersions particularly upon the good faith of the remedy resolution determined by the five Justices. One quote from Justice Stevens' dissent should suffice on this score: "[The decision] by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land…. Although we may never know with complete certainty the identity of the winner in this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."

In his memoirs "The Making of a Justice" (Little Brown 2019), Justice Stevens spent most of his time on *Bush v. Gore* with a critique of the Court's equal protection analysis; he also attacked "the Majority's second guessing the Florida Supreme Court's interpretation of its own state's law," quoted the above-cited language from his dissent, and on page 374 closed with he "remain[s] of the view that the Court has not fully recovered from the damage it inflicted on itself in *Bush v. Gore*."

**Conclusion**

I believed in 2001 (and continue to believe) that the Court's decision saved the country from an immense political and constitutional crisis. That it did so under a less-than-perfect constitutional rationale is also clear to me. But given the gross liberties that the Florida Supreme Court took in rewriting (after the election) its own state's election law, if that court's decisions had been left standing Vice President Gore would likely have become President Gore; and that kind of Banana Republic precedent would have been far worse than the one set by *Bush v. Gore*.

Over 70 years ago, Justice Robert Jackson wrote: "I do not think we can run away from the case just because Eisler has." *Eisler v. U.S.*, 338 U.S. 189, 196 (1949). I am thankful that the Supreme Court did not "run away" from the case which was presented to it.

**Postscripts**

- Not surprisingly, a lot of ink has been spilled on (and over) *Bush v. Gore*. Professor Alan Dershowitz published "How the High Court Hijacked Election 2000" (Oxford University Press 2001); in it, he wrote that the ruling "may be ranked as the single most corrupt decision in Supreme Court history." Vincent Bugliosi, a

former Los Angeles deputy district attorney, published "The Betrayal of America: How the Supreme Court Undermined the Constitution and Chose Our President" (Thunder's Mouth Press 2001); in it, he wrote that the Justices in the majority were "criminals in the very *truest* sense of the word" (and as to public comments by Chief Justice Rehnquist and Justice Thomas that politics played no part in the outcome, Bugliosi wrote: "Well, at least we know they can lie as well as they can steal.").

- On the other hand, Judge Richard Posner wrote "Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts" (Princeton University Press 2001); in it, he criticized the equal protection analysis, argued that Article II was the better basis for reversing the Florida Supreme Court, and contended that the Court acted (on balance) appropriately (rendering "a rather good" decision) and averted a national crisis (if the matter had ended up before Congress). Obviously, I come down on Judge Posner's side of things.
- Regardless of how one views the various opinions handed down on December 12, 2000, most (if not all) should agree that they do not reflect the Justices' best work. But given the median age of the Court at the time and the fact that the Justices had to pull (essentially) all-nighters to get their opinions written and finalized (within the 16 hour window), is that surprising?
- I will give the last word to the late Justice Scalia. Noting that post-election analyses have confirmed that Bush actually did win Florida (in large part because of confusion caused by Florida's butterfly ballot – which was *not* a litigated issue in the various decisions discussed above), Justice Scalia's final comment to critics was: "I say nonsense. Get over it. It's so old by now."

## In the Courts

# RISE-ing in the Southern District

**By Joseph Marutollo**

On October 24, 2018, the Southern District of New York Board of Judges approved a two-year pilot program called the Re-entry through Intensive Supervision and Employment ("RISE") Court. The RISE Court's objective is to reduce recidivism, encourage employment, and assist in the successful re-entry of certain at-risk individuals on supervised release.

To learn more about the RISE Court, the *Federal Bar Council Quarterly* recently spoke with District Judge Denise L. Cote, who helped inaugurate the RISE Court, and Frederick Schaffer, who served as the first RISE Court liaison.

**Development of the RISE Court**

The RISE Court grew out of concerns from the Southern District's Judicial Conference's Criminal Law Committee regarding employment resources available to those on supervised release. Southern District judges – including Judges Cote, Paul A. Engelmayer, and Ronnie Abrams – looked at a similar re-entry court in the Eastern District of Pennsylvania ("EDPA") as a model. The EDPA re-entry court has successfully been in operation for over 12 years. Judge Cote and members of the Southern District traveled to Philadelphia to see the EDPA re-entry court in person. Judge Cote noted that she was truly inspired by what she witnessed in the EDPA. Following the visit, the Southern District judges – along with, as Judge Cote described, "many helping hands" – worked

to construct a new re-entry court in the Southern District.

The Southern District judges partnered with professors at Columbia Law School and the City University of New York to design an equal selection process to measure recidivism and employment metrics in the new re-entry court. The Southern District judges also worked closely with Southern District Chief of Probation Michael Fitzpatrick and Supervisory U.S. Probation Officer Elisha Rivera to ensure that the RISE Court would meet the high standards of the U.S. Probation Office.

Judge Cote explained that the RISE Court targeted participants in their first year of supervised release who have an elevated risk of recidivism. The RISE Court is completely voluntary; no one can be compelled to join. Since one of the dynamic risk factors for recidivism is a participant's employment status, the RISE Court aimed to make a real difference by connecting its participants with employment opportunities.

**The RISE Court Process**

Participants in the RISE Court meet regularly with their probation officers and biweekly with their assigned RISE Court judge.

To successfully complete the RISE Court program, participants can earn up to two credits at each biweekly RISE Court session. At each session, the participant directly addresses the judge and discusses what has occurred over the prior two weeks. Participants earn credits by reaching certain benchmarks, including negative drug tests, at each session. When a participant accumulates 52 credits, he or she has successfully completed the RISE Court. At that point, the assigned RISE Court judge makes a recommendation to the judge assigned to the participant's criminal matter, which typically can amount to a full 12-month reduction of a participant's term of supervised release.

Separate from the potential for a reduced period of supervision, the RISE Court provides an incentive to participants by providing them with a range of employment resources, including access to an employment specialist in the probation office. Judge Engelmayer has spearheaded the RISE Court's civil legal assistance component, which connects participants with *pro bono* legal assistance to help resolve employment-related issues. This legal assistance includes access to civil legal services from top law firms. Participants often have a host of non-criminal legal problems to confront, such as obtaining a driver's license, maintaining child support payments, or seeking disability benefits for family members. Schaffer explained that although these problems may, at first glance, appear to be relatively minor, they can become serious obstacles to participants obtaining and keeping employment. The RISE Court aims to help participants navigate these issues so that they can better focus on their employment responsibilities. In short, Schaffer contended that the RISE Court "gives services to people who need it the most."

Participants in the RISE Court are separated into "cohorts" of approximately 20 participants on supervised release. The first cohort – RISE I – started in January 2019 and is assigned to Second Circuit Judge Denny Chin. Matthew Benjamin of Gibson Dunn & Crutcher provided *pro bono* legal assistance for RISE I participants; Jeremy Creelan of Jenner & Block will succeed Benjamin when the new cohort begins in June 2020. Schaffer served as the first liaison for RISE I. He described the liaison role as akin to a "utility infielder" on a baseball team, whereby he helped to perform a variety of tasks on a daily basis, such as coordinating the many resources and programs available for RISE I participants. Schaffer's successor as liaison on RISE I is James A. Moss. Lisa Faro serves as the probation officer of RISE I. The RISE I participants are represented by Peggy Cross-Goldenberg of the Federal Defenders.

Two additional cohorts have been established. RISE II began in 2019 before Judge Deborah Batts. Rise II receives *pro bono* assistance from Benjamin, and Schaffer serves as the liaison. Lauren Blackford serves as the probation officer for RISE II. The RISE II participants are represented by Zawadi Baharanyi of the Federal Defenders.

RISE III began in Janu-

ary 2020 before Second Circuit Judge Raymond Lohier. William Silverman of Proskauer Rose LLP serves as the *pro bono* counsel, and Daniel Beller acts as the liaison to RISE III. Pierre Reyes serves as the probation officer of RISE III. The RISE III participants are represented by Julia Gatto and Tamara Giwa of the Federal Defenders.

Alexi Mantsios, Law Enforcement Coordinator at the U.S. Attorney's Office for the Southern District of New York, has worked with each of the RISE cohorts. Vilia Hayes of Hughes Hubbard has also worked to implement the RISE Court.

Judge Cote noted that the three RISE Court cohorts allow for participants to remain in the program for an 18-month cycle, so that a new cohort can essentially start each January and July.

### The RISE Court's Future

In an effort to quantify the results of the RISE Court, the Southern District has retained a group of lawyers, empiricists, and sociologists to collect data from the RISE Court participants and a control group of non-RISE Court participants to assess the effect of participation in the RISE Court. But thus far, Judge Cote noted that the results of the RISE Court were "encouraging."

The practical impact of the RISE Court will be on display at the RISE I graduation session, which is scheduled to take place on March 24, 2020 before Judge Chin.

**Lawyers' Lives**

## The Controversial Career of Wall Street Lawyer Madison Grant

**By Pete Eikenberry**

Madison Grant (born in 1865) has been credited with the formation of the New York Zoological Society and the Bronx Zoo. He was the force behind the construction of the Bronx River Parkway, a pioneering piece of urban design, and he reputedly saved the American Bison.

Grant attended Columbia Law School after graduating early with honors from Yale. It would appear that he was a "lawyer who made a difference."

Grant, however, had a very dark side because of his efforts to limit immigration.

From 1900 to 1910, there were over 12 million European immigrants to the United States, and less than one percent were turned away. Over two million were from Sicily and southern Italy, most of whom were poor and illiterate.

On his way to work on Wall Street, Grant was put off by his being "jostled" by "Armenian boot blacks, Greek rag pickers and Jewish carp salesmen." He felt that "The Jews of the Lower East side…were a curse…draining off into this country [from] the great swamp of Jewish Poland."

In 1900, after the lost papers of the monk Gregor Mendel were discovered, a school of "scientific racism" emerged. It purportedly was based on Mendel's discoveries in genetics. Grant became a leader of the Nativist or Eugenics ("the science of improving the human race by controlled breeding to increase the occurrence of desirable characteristics") movement. Eugenicists believed that by eliminating the immigration of "inferior" populations into the United States, they would improve the U.S. genetic stock.

In 1916, Grant published his book, *The Passing of the Great Race*. In it, Grant contended that the "Nordic" was the "white man par excellence" of a "master race." He stated that the United States was a "dumping ground for Italians" and that its "fine old stock" was being "driven off the streets by Polish Jews." Grant wrote that:

> [I]f the white man were to share his blood with, or entrust his ideals to, brown, yellow, black or red men… [t]his is suicide pure and simple, and the first victim of

> this amazing folly will be the white man himself…. The result of the mixture of two races, in the long run, gives us a race reverting to the more ancient, generalized and lower type. The cross between a white man and an Indian is an Indian; the cross between a white man and the negro is a negro; …and the cross between any of the three European races and a Jew is a Jew.

Through the efforts of Grant and fellow Nativists (as assisted in the 1920s by four to six million Northern Ku Klux Klan members), the 1924 Johnson/Reed law was passed by Congress. It limited immigration from different countries according to their respective percentages of the existing population. For example, Germany had a quota of 50,000, Italy had one of 2,200, and Africa a quota of 1,100.

Prior to passage of the law in 1924, about 50,000 European Jews immigrated into the United States per year. In the years 1924 through 1938, only an average of 9,000 were able to fit into one of the quotas. Before he died, Congressman Albert Johnson, one of the authors of the Johnson/Reed law, acclaimed his success in preventing 18 million immigrants from coming to the United States. Many of them undoubtedly died of Nazi persecution in World War II.

**Hitler's Bible**

In a 1930 letter to Grant, Adolf Hitler informed him that *The Passing of the Great Race* was his "bible." Nazi writer Hans F. K. Günther identified Grant as a "spiritual father" of America's immigration policies, which Günther advocated for implementation in Germany. In 1935, the Reichstag passed a law depriving Jews of citizenship. As a reward for assisting the Nazis to codify their racist principles into law, 45 German lawyers were awarded a cruise to New York to study the American legal system. (They were given a reception at the New York City Bar Association.) During his lifetime, Grant stayed in touch with Nazi authorities. In 1937, he was one of the planners of a three week event in Berlin entitled, "The International Hunting Exposition." A fellow planner, leading Nazi official Hermann G**ö**ring, invited Grant to be a member of his hunting party during the Exposition, but Grant was too infirm to attend and died the same year.

There have been eight new editions of Grant's book since 2010. Rioters at Charlottesville chanted, "Jews will not replace us." The white supremacist slogan of "14 words" is, "We must secure the existence of our people and a future for white children." In Pat Buchanan's book, "Suicide of a Superpower," he wrote, "White America is an endangered species." In 1965, the Johnson/Reed law was revoked. It is undisputed that it was based upon a racist ideology. (The 1882 Chinese Exclusion Act was repealed in World War II as part of a deal between President Franklin D. Roosevelt and Chiang Kai-shek.)

**American Policy**

Since 1980, over 1,500,000 Vietnamese have been admitted into the United States. Compared to the average immigrant, they have had a lower than average fluency in English and a poorer than average education, yet they are employed in a greater percentage than non-immigrants. Should the American policy be that of unlimited immigration, or, if not, what should immigration policy be in the United States, which "welcomes the poor and the downtrodden to our shores"?

**For Further Reading**

For a more detailed look at the nativist' movement, including its connections with Nazis, you may wish to read:

- *The Guarded Gate*, by Daniel Okrent (Scribner 2019);
- What America Taught the Nazis, by Ira Katznelson (*The Atlantic*, November 2017);
- The 100-year-old rallying cry of "White Genocide," by Cynthia Levine-Rasky (*The Conversation*, July 8, 2018);
- White Extinction Anxiety, by Charles M. Blow (*The New York Times*, June 24, 2018); and
- How American Racism Influenced Hitler, by Alex Ross (*The New Yorker*, April 23, 2018).

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