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From the President

The Rule of Law

By Jonathan M. Moses

As I am writing this column – my inaugural contribution to the *Federal Bar Council Quarterly* as president of the Council – the country is a few days away from the constitutional transfer of power to the next president. The past few months have been unlike any in our nation's modern history. Our institutions have been tested in the extreme. In response, praising the importance of the "rule of law" has become standard fare. Years from now, hopefully, we will all have some distance on this period and can better assess its lessons, but one I think is clear is that the "rule of law" must be more than a catch phrase. It must be a principle that transcends politics and ideology.

The Federal Bar Council has long recognized the importance of the rule of law. We are a group of lawyers and judges who revere our courts and the legal process. As part of the recent Strategic Planning Process, we made supporting the rule of law an explicit part of our mission. Last spring, the Council's board approved a revised mission statement that now reads: "The Federal Bar Council is an organization of lawyers who practice in federal courts within the Second Circuit. It is dedicated to promoting excellence in federal practice and fellowship among federal practitioners. It is also committed to encouraging respectful, cordial relations between the bench and bar and to promoting the rule of law."

But as an organization, we have also recognized that the "rule of law" does not exist or survive on its own. It requires commitment of all members of the legal system, as well as others responsible for our constitutional democracy, to honor the principle in their actions and attitudes in order for it to flourish. There are also unwritten norms of behavior that we recognize as crucial to protecting this cherished ideal. Norms such as the idea that there are such things as reasonable disagreements on issues of law, but there is also the requirement to be truthful and not mislead. Norms such as the idea that we can disagree in legal disputes, but still engage with each other in good faith. Norms such as the independence of the judiciary and the recognition that judges may make unpopular decisions and should not face public attack when they do so.

We nurture these norms as an organization when we come together as a legal community and celebrate our legal traditions and our common bond as lawyers. When we honor lawyers and judges for their commitment to the legal profession, we remind ourselves that we share a common interest in the "rule of law" that transcends our political views. We are not a political organization – our politics is this important principle which should know no politics.

Grading the Actors

It is probably worth asking how different actors in our constitutional democracy have fared in terms of supporting the rule of law during this recent period, and more particularly how lawyers and judges have done.

The courts, I think, should be given high marks. Throughout the country, judges applied the law without fear or favor, including judges who ruled against the very president who appointed them to the bench.

The story on lawyers will take some time to unpack. I do not think it is too political to say that more than a few exceeded the bounds of appropriate zealous advocacy. Indeed, it is an understatement to put it in such neutral terms. Was this a sign of significant decay in the norms of the profession, or just a few bad apples?

As for political actors, that is beyond the purview of the Federal Bar Council, but suffice it to say there were those who acted with courage in standing up for the rule of law and those who did not. Again, understatement.

We plan this spring to hold a symposium focused on the rule of

law, reflecting not just on recent events but more generally on a trend in this country to attack and undermine the unspoken norms that buttress this principle. The symposium will take the place of our Winter Bench and Bar Conference which will not proceed this year due to the pandemic.

Every year the Federal Bar Council awards a distinguished jurist the Learned Hand Medal, named for one of the leading judges on the Second Circuit. Hand is well known for many things but in particular his speech "The Spirit of Liberty." That speech, given during the height of World War II, asks the question about what it takes to sustain the rule of law so critical to a constitutional democracy. Hand said:

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it.

Hand's conclusion is clear: it is not enough to have laws, there must be people with the courage to live by them and support them. Written with the rise of fascism in mind, when courts were perverted including in Germany, a country that had a long, independent legal tradition, Hand's words are an important reminder again today.

Our courts and our legal profession passed through this recent period sustaining the rule of law, but we cannot rest easy in protecting this important ideal, which must be more than a catch phrase or a mission statement. It must be something we keep in mind in all of our actions as members of the legal community.

From the Editor

Women and Minorities in Law Firms: An Update

By Bennette D. Kramer

I have written many columns on women in the law and what can be done to ameliorate the disadvantages women and minorities face in law firms. I have concluded, backed by reports over the years, that real changes occur only when firm management supports fundamental changes within law firms in connection with hiring, compensation, promotion, work assignments, client relationship succession, opportunities for business development, and firm management positions.

Although almost all firms have adopted diversity initiatives, including diversity programs, diversity committees, and diversity officers, limited progress has been made in supporting and promoting women, including women of color, over the last three years. Now a global pandemic presents new threats to women and attorneys of color as financial pressures lead to cuts in diversity programs and diverse representation in firms. *See* National Association of Women Lawyers 2020 Survey Report on the Promotion and Retention of Women in Law Firms ("NAWL Report"), p. 3, *available at* https://www.nawl.org/page/nawl-survey.

Several new reports issued by the National Association of Women Lawyers ("NAWL"), Law360, and the American Bar Association examine these issues, analyze what the problems are, evaluate the progress made, and make recommendations for creating an environment that is more welcoming to women and minorities.

The bottom line is that, in confronting the need for diversity, firms are willing to put into place programs that highlight a commitment to diversity, but are reluctant to make structural changes that would standardize the hiring process or otherwise

interfere with the exercise of discretion by decision-makers. *See* NAWL Report p. 4; "Left Out and Left Behind, The Hurdles, Hassles and Heartaches of Achieving Long-Term Legal Careers for Women of Color," Destiny Perry, Paulette Brown, and Eileen Letts (ABA Commission on Women in the Profession, 2020), p. 13 ("Left Out"), *available at* https://www.americanbar.org/groups/diversity/women/initiatives_awards/long-term-careers-for-women/left-out-left-behind/.

The Law360 Glass Ceiling Report observes that firms are great at recruiting women, but have a hard time retaining them. While most firms have policies in place to counteract bias and increase diversity, firms do not effectively use the policies and many women fear that if they actually use the benefits provided by these policies their careers will be negatively affected. *See* "Law360's Glass Ceiling Report: What You Need To Know" ("What You Need To Know"), Jacqueline Bell, *available at* https://www.law360.com/articles/1311218.

Status

White women and diverse attorneys have made slow progress in law firms. Women represent about 47 percent of all law firm associates, while associates of color total about 25 percent. *See* NAWL Report, pp. 27-28. In 2020 and 2019 women were 31 percent of non-equity partners and 21 percent of equity partners (compared to 20 percent in 2018 and 19 percent in 2017). *See* NAWL Report, p. 29. The Law 360 Glass Ceiling report states "Our detailed breakdown of where they place throughout their firms shows a picture that has barely changed from the previous year, with women representing around 25% of partners, 22% of equity partners and 28% of executive committees." *See* "The 2020 Law360 Glass Ceiling Report," *available at* https://www.law360.com/articles/1320417/the-2020-law360-glass-ceiling-report?nl_pk=abc46da5-fbd4-495d-97dd-591d49f4bfbb&utm_source=newsletter&utm_medium=email&utm_campaign=special.

On the bright side, one-third of new equity partners in the last few years have been women.

There is a general belief that women work fewer hours than men; thus, the differences in promotion and compensation of men and women are justified. However, the data collected by NAWL shows "that there are no statistically significant differences between the hours recorded by men and women attorneys at all levels" – associate, non-equity partner, and equity partner. *See* NAWL Report, p. 31.

In spite of this, significant disparities in compensation continue to exist, based in part on these misconceptions. The mean compensation for women associates was 91 percent of that of male associates in 2020 – compared to 94 percent in 2019 and 95 percent in 2018 – showing a depressing decline. Mean compensation for non-equity women partners was 93 percent of men's mean compensation in 2020, 89 percent in 2019, and 96 percent in 2018. Finally, women equity partners' compensation was about 85 percent of mean compensation for male equity partners (compared to 86 percent in 2019 and 88 percent in 2018).

In 2019, the average male equity partner made $132,426 more than the average woman equity partner. NAWL attributes the gap to the fact that women have been underrepresented in law firm leadership positions, such as on the management and compensation committees. The presence of women on leadership committees has increased significantly in the last three years, but diverse attorneys are not similarly represented. *See* NAWL Report, p. 36. Another factor is that male attorneys have higher billing rates, which results in lower total billings for women.

Problems

Women are leaving firms at a disproportionate rate. In the last year, 40 percent of the lawyers who left were female and 13 percent were women of color. Women leave for a number of reasons: Better work/life balance; family concerns; rigid hierarchical structures within firms; frustration with being assigned more office housework; not being fairly evaluated or compensated; limited advancement opportunities; degrading roles, such as being

treated as tokens; being passed over for promotion; and harassment. While many women left firms because of family concerns, "many [who left] also felt that they were not fairly evaluated or compensated and there were limited advancement opportunities." *See* What You Need to Know.

Similarly, women of color leave the legal profession in large numbers because they feel undervalued and that there are barriers to advancement. Women of color who stay in law firms do so because they enjoy the work, for financial reasons, and because of personal or family pressures.

Over the last three years, firms appear to have decreased their bias interruption efforts in connection with recruitment, hiring, and performance evaluations. Instead, firms focus their anti-bias efforts on the early stages of an attorney's relationship with the firm, when the disparities between men and women are much smaller. The NAWL Report observes that firms are not actively engaging in monitoring bias in distribution of work assignments, attorney evaluation, and compensation. All firms did report that they consider gender in client relationships and succession. *See* NAWL Report, pp. 14-17.

Most firms said they had a chief diversity officer who plays a role in attorney development and advancement. Most firms also provide firm-wide implicit bias training, training on microaggressions or microinequities, and diversity, equity, and inclusion training. Nearly all firms have instituted family friendly policies such as family leave, flexible, and part-time work schedules and paid and unpaid family leave; women take more leave than men. *See* NAWL Report, pp. 19-24.

Other issues that have affected women's promotions and compensation are client relationships, origination credit, and relationship succession planning. Firms were reluctant to respond to NAWL's survey on these issues and even more reluctant to change practices relating to origination credit or change subjective approaches to succession planning. *See* NAWL Report, pp. 25-26

Women of color report bias and stereotyping based on their identities as women, people of color, and women of color – including Asian, Black, and Latinx women. *See* Left Out, p. 4. All women face gender stereotypes, such as being considered less competent, ambitious, and competitive than their male counterparts. However, people, including white women, do not realize that

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women of color face additional biases and stereotyping. Women of color believe that white women prioritize women's issues over issues relating to women of color. *See* Left Out, pp. 5-7. Women of color perceive that white men monopolize access to prime work assignments, the best mentors and sponsors, and information about the workings of the firm gained through socializing with other white male lawyers. *See* What You Need to Know.

Solutions

For women of color, little has changed over the years. The legal profession has developed policies for increasing diversity, but these policies exist only on paper in many cases. Law firms need to change their culture and experience to better support a diverse population of attorneys. Numerous changes need to be made to accomplish this. This need for significant change is echoed in the Glass Ceiling and NAWL Reports.

Structural change: The legal profession needs to examine the decision-making structure within law firms to eliminate inherent bias. There is a high level of subjectivity in promotion standards, selection for assignments, compensation decisions, and performance appraisals, which serves as barrier to institutional and structural change. To reduce the influence of bias, firms should increase monitoring of work assignment distribution, randomize work assignments, and provide equitable distribution of prime assignments and more standardized and less subjective decision making. The ABA Report notes that NAWL has found that firms are "less likely to engage in bias-reduction efforts that require managing the discretion of decision-makers or otherwise checking the decision-making process of these actors." Left Out, p. 21; NAWL Report, p. 4.

The Glass Ceiling Report strongly recommends collecting and analyzing firm data. To get a clear view of how hidden biases affect decisions on promotion and compensation, firms must collect data on "language used in attorneys' reviews, who is tapped for stretch assignments, and the number of partners a junior attorney has a chance to work with." Policies for eliminating bias could then be developed from the findings. "What Big Law Can Do to Actually Retain Female Attorneys" ("What Big Law Can Do"), Emma Cueto, *available at* https://www.law360.com/articles/1312115.

Firms also need to rethink the process for deciding compensation, again using data. Alessandra Simons of Godwin Procter LLP says, "In order to ensure that women are paid equally and their skills and achievements are equally recognized…firms need to reward attorneys' work, not their skills at self-promotion." *See* What Big Law Can Do.

Mentors and sponsors: The process for assigning mentors is very important for equitable treatment of women and women of color. Access to effective, engaged mentors and sponsors needs to be improved for women of color who have the least access to senior attorneys and colleagues. Formal mentoring relationships are not working. If they sincerely want diversity, firms need to work to foster meaningful engaged mentoring relationships and ensure that those relationships are functioning. *See* Left Out, p. 22.

Inclusion throughout careers: Firms must go beyond recruitment in fostering diversity. Legal employers do not understand the need to focus on inclusion and retention after women of color are at the firm. Women of color need to see persons who look like them and experience workplace cultures that value and incorporate them. *See* Left Out, p. 23.

Intersectionality: Women of color believe that white women are blind to intersectionality – that their color creates an additional dimension to bias beyond simply being a woman. Gender plus race creates distinct experiences. Inclusion requires that intersectionality be taken into account. *See* Left Out, pp. 24-25.

Culture: Law firms need to create a more inclusive culture by asking how diversity policies will actually work and whether the workplace culture supports the effective use of the chosen policies, practices and procedures. The current diversity efforts

place too little emphasis on the quality of the work environment or workplace culture. The culture of the legal profession is the biggest challenge to true diversity. *See* Left Out, pp. 25-26.

As part of changing the culture or the working environment, firms need to examine the way they approach flex time and family leave policies. The best way to retain female attorneys is to improve family leave policies and to ensure that women are not penalized for taking advantage of those policies. *See* What Big Law Can Do, p. 3.

Conclusions

There is general agreement that in most cases firms have adopted pro-diversity, anti-bias programs. At the same time, those same firms are not willing to undertake the structural changes necessary to make real changes for women and persons of color. The use of data in evaluations, work assignments, promotion, and compensation decisions has been encouraged across the board, but most firms have not collected the data or used it.

As with anti-bias programs, mentor and sponsor programs look better on paper than in reality, relying on formal programs and relationships rather than on meaningful engaged relationships. Women and people of color want mentors who actually take an interest in their careers and to whom they can relate. In addition, mentors and sponsors should be in a position to actually influence firm decision-making. Simply assigning mentors without considering these needs undermines the value of the mentor.

Most firms have family leave policies, but women often are penalized, or believe they will be penalized, for taking leave or using flex time or working from home (putting aside the fact that we are all working from home now). Women need to be assured that their family needs will be respected, and that all things being equal, their careers will not suffer if they take time for their families.

In sum, law firm management teams need to accept structural changes if they truly want to ameliorate bias and discrimination and increase diversity in their firms.

Developments

Federal Defenders' David Patton Receives Emory Buckner Medal at Thanksgiving Luncheon

By Bennette D. Kramer

On November 25, 2020, the day before Thanksgiving, the Federal Bar Council held its first virtual Thanksgiving Luncheon with the Honorable Mary Kay Vyskocil presenting the Emory Buckner Medal in Recognition of Outstanding Public Service to David Patton, executive director and attorney-in-chief of the Federal Defenders for the Southern and Eastern Districts of New York. The live presentation was preceded by a virtual cocktail party during which attendees could move from table to table to chat with each other.

Judge Vyskocil looked back on her term as Council president and observed that there were several notable attendees, including the judges of the Second Circuit. She said that in spite of the disruptions of the pandemic, there was a lot to be thankful for this Thanksgiving, including the efforts of the judges and staff of the courts of the Second Circuit to keep the courts open.

Before the presentation of the Emory Buckner Medal to Patton, Sean Coffey, president of the Federal Bar Foundation, reported on the annual fund drive; Vilia Hayes, chair of the Nominating Committee, installed the new officers, trustees, and directors of the Federal Bar Council and Federal Bar Foundation; and the Council's incoming president, Jonathan Moses, greeted everyone and said he was looking forward to his upcoming term as president. Moses then presented the Federal Bar Council Eagle to Judge Vyskocil to commemorate her service to the Council.

Public Service

Judge Vyskocil introduced Patton and presented the Emory Buckner Medal to him. She noted that the Council first awarded the Emory Buckner Medal at the

Thanksgiving Luncheon in 1962. Emory Buckner was an Assistant U.S. Attorney in the Southern District of New York, an Assistant District Attorney in Manhattan, and an Assistant Attorney General for the State of New York. He served as U.S. Attorney for the Southern District of New York from 1925 to 1927.

Patton has followed the same tradition of public service throughout his career. He attended the University of Virginia Law School, where he served as an editor of the Virginia Law Review. He clerked for U.S. District Judge Claude Hilton of the Eastern District of Virginia.

Following his clerkship, Patton was an associate at Sullivan & Cromwell. He joined the Federal Defenders Office at the Southern District of New York in 2002 and at the same time was an adjunct professor at New York University School of Law, where he taught in the Federal Defender Clinic.

In 2008, Patton began teaching full time as an assistant professor of law at the University of Alabama. In 2010-2011, he taught at Stanford Law School as a visiting associate professor of law. In 2011, Patton became the executive director and attorney-in-chief of the Federal Defenders of New York. He also teaches professional responsibility at New York University School of Law as an adjunct professor.

Like Emory Buckner, Patton is committed to supporting and mentoring young lawyers, teaching them to vigorously defend poor people charged with crimes. At the Federal Defenders, he oversees staff in four offices in the Southern and Eastern Districts of New York. He is committed to public service and equal access to justice, and is trusted and respected by judges, prosecutors, and clients. COVID-19 has greatly impacted Patton and the lawyers in his office. Judge Vyskocil (virtually) presented Patton with the Emory Buckner Medal.

Servicing the Suffering

In accepting the award, Patton said that he was surprised to be the recipient of the medal and gave credit to the people in his office for all that he had accomplished. He said that the people in his office use their talents and passion to serve people who are suffering. He said that it is challenging to work with clients of the office, knowing that difficult things will happen to them. The work the office has done has been especially meaningful this year because the staff is dealing with the loved ones of incarcerated clients who are anxious about COVID-19 in the prisons. The families want something to be done so that their loved ones do not die behind bars in prisons and jails where the COVID-19 infection rates are much higher than outside, and there is little to no medical care.

Patton said that when he was a law professor at the University of Alabama, people from New York assumed that it was difficult to teach and practice law in the Deep South because of the history of racism and inequality in connection with representing poor people of color in criminal courts. But, he responded, racism and inequality are attributes of the federal courts in New York. He noted that in almost every federal district in the country over 80 percent of the people prosecuted are too poor to hire a lawyer and most are people of color. The lives of people of color are devalued in New York, just as in the South. His office sees this in who is charged in the first place and in the length of the prison sentences, as well as in bail decisions, credibility decisions at hearings, and jury selection at trials (and the lack of trials).

Patton suggested that the Federal Bar Council provides an opportunity to start the discussion about race and justice and lead people to engage with each other. Although the discussions have focused on the breakdown of the rule of law over the last four years, Patton said that decisions have been made for the last several decades by both Democratic and Republican administrations about who to prosecute in federal court and how to do it, that have done much damage to the rule of law. He encouraged the Council to facilitate conversations about how to do better in reinstating the rule of law across the board.

Patton concluded by noting that his friend and former colleague, Ian Yankwitt, had recently died. He was the son of former Council President George Yankwitt and brother of Russell Yankwitt. Also, Roland Thau, a lawyer in the Federal Defender's Office

for 50 years and a Holocaust survivor, died weeks ago. He ended with a toast to them and to happier days with a "Happy Thanksgiving" to all.

The Legal Profession

The Bar Must Resist the Weaponization of the Profession

By Travis J. Mock

On January 6, 2021, a Confederate flag was unfurled in anger inside the U.S. Capitol for the first time in history. Gallows stood proudly on the National Mall. Symbols of QAnon and the Proud Boys intermingled with the president's campaign posters and misappropriated iconography of American independence. After storming the Capitol, a mob roamed the halls with zip ties and chants of "treason!" while searching for Vice President Mike Pence and Speaker of the House Nancy Pelosi. Five people died. All to prevent Congress from exercising its constitutional obligation to count the states' electoral votes. It was a scene that Americans have grown accustomed to watching unfold in faraway capitals. To witness such an insurrection at home was shocking – and utterly predictable.

The kindling that ignited on January 6 had been heaped for months, bleaching in the heat of relentless cries of "fraud!" and "Stop the Steal!" President Trump may have been the chief architect of the pyre, but the bar must reflect on the indispensable role that certain lawyers played in making it all possible. By lending their professional credibility to the president's political brinksmanship, these lawyers – in court, in Congress, and in public – abetted a cynical assault on democratic institutions and debased their profession in the process.

A Blizzard of Lawsuits

The 2020 election was free and fair. Bipartisan state election officials certified it. Federal election agencies categorically rejected claims of widespread fraud. Journalists and election experts debunked conspiracy theories in real time. Experts opined that the prevalance of paper ballots and early voting improved election security. Many states broadcast public live-streams of their ballot counting rooms. Every recount confirmed the original result.

And yet, President Trump, his surrogates, and his supporters unleashed a blizzard of lawsuits in state and federal courts across the country, alleging myriad claims ranging from petty grievances to unhinged conspiracy theories. The cases were remarkable not only for their utter lack of substance but also for the slipshod way they were prosecuted. Plaintiffs lacked cogent theories of standing. Counsel filed cases too late or in the wrong court, and failed to serve process on defendants. Complaints sought sweeping remedies lacking any reasonable relationship to the plaintiffs' alleged injuries. Witnesses folded under oath. Reams of affidavits failed to support plaintiffs' allegations and, in some instances, were revealed to have been solicited through mass-mail campaigns and online forms. In one case, counsel allegedly added an individual plaintiff to the complaint who had not consented to join the case.

Across the country, judges – many appointed by President Trump and Republican predecessors – heaped scorn on the lawsuits. Judges likened claims to "Frankenstein's Monster, haphazardly stitched together…in an attempt to avoid binding precedent" and said that plaintiffs' legal theories lay "somewhere between a willful misreading of the Constitution and fantasy." Plaintiffs' evidence was rejected as "speculative," "hearsay within hearsay," "incorrect and not credible." Plaintiffs were admonished that "[a]llegations that find favor in the public sphere of gossip and innuendo cannot be substituted for earnest pleadings and procedure in federal court." And requests for relief that would disenfranchise millions of voters were decried as "extraordinary,"

"stunning," "breathtaking," "the most dramatic invocation of judicial power I have ever seen." The attempt, one court held, "would be risible were its target not so grave: the undermining of a democratic election for President of the United States."

Judges keenly understood that the legal viability of these cases hardly mattered; their true aims lay *outside* the courtroom. "This lawsuit seems to be less about achieving the relief plaintiffs seek …and more about the impact of their allegations on people's faith in the democratic process and their trust in our government." In ordering plaintiffs' counsel to show cause why they should not be referred to the disciplinary committee, one judge reminded the bar that "[c]ourts are not instruments through which parties engage in such gamesmanship or symbolic political gestures."

In the final and most brazen attempt to overthrow the election, President Trump, 19 state attorneys general, and over 120 Republican House members filed an emergency petition that invoked the Supreme Court's original jurisdiction to ask the Court to enjoin four battleground states from sending their electors to Congress. The Court summarily declined to accept the case just hours after receiving plaintiffs' final brief, holding that plaintiffs lacked standing to prosecute the claim. (Justices Alito and Thomas wrote that they would have accepted the case but still denied the request for injunctive relief – effectively mooting the suit and implicitly acknowledging that it lacked any reasonable likelihood of success on the merits.)

By lending their professional credibility to the president's political brinksmanship, these lawyers – in court, in Congress, and in public – abetted a cynical assault on democratic institutions and debased their profession in the process.

In the end, even Attorney General Barr and Senator Mitch McConnell distanced themselves from the president's claims. After expanding his department's investigatory mandate on election fraud, Attorney General Barr acknowledged that neither the Justice Department nor the the Federal Bureau of Investigstions had discovered any evidence of material fraud. Senator McConnell (also a lawyer) conceded that the president provoked the violence at the Capitol and that the mob had been "fed lies."

The Judiciary's Integrity

That these lawsuits failed is a relief and a validation of the fundamental integrity of our judiciary. That the claims were brought at all is sobering. By the time these cases were dismissed, the damage was done. They had weaponized the credibility of the bar to elevate conspiracy theories into "claims." In the public sphere – without rules of ethics and procedure and amplified by the media – these lawsuits shifted the burden to the nonmovant to disprove the conspiracy. The simple existence of the lawsuits was cited by President Trump and his supporters as proof of their accusations. And the courts' swift dismissal of those cases, in turn, was cited by those same individuals as proof of the establishment's complicity in the fraud. Just like this, an unfalsifiable feedback loop of grievance and suspicion was formed. Meanwhile, the rest of the public was left wondering just how meaningful lawyers' ethical obligations really are.

Erosion of Public Trust

In early November, an anonymous senior Republican official brushed off questions about the propriety of the president's election challenges, asking, "What is the downside for humoring him for this little bit of time?" The events of January 6 showed us one "downside." The consequences of this cynical erosion of public trust in democratic institutions will manifest for years to come. Lawyers helped to cause this crisis. Lawyers must help to fix it. The moment deserves – *requires* – more than august exasperation from the bench. The cynical weaponization of our profession should find no quarter among the bar – federal or otherwise.

Legal History

Nobody's Perfect: Lincoln and Civil Liberties During the Civil War

By C. Evan Stewart

As Mark Neely so aptly put it in his Pulitzer Prize winning book, "The Fate of Liberty: Abraham Lincoln and Civil Liberties" (Oxford Univ. Press 1991): "War and its effect on civil liberties remain a frightening unknown." The presidency of Lincoln is, of course, justly famous for many things: e.g., saving the Union, emancipating the slaves, etc. Less well known (and certainly not well celebrated) is his administration's track record vis-a-vis constitutional rights during the prosecution of the Civil War. This article highlights two judicial decisions, one by the Chief Justice of the United States and another by an Associate Justice of the Supreme Court, which serve as bookends to help better understand Lincoln's record.

Ex Parte Merryman

Before the Civil War started in earnest, the most dangerous state in the Union was clearly Maryland. Lincoln, faced with numerous well-documented assassination plots awaiting him there on his 1861 trip from Illinois to Washington, had to take a secret train through Baltimore to ensure his safe arrival. Maryland, nearly a border state surrounding the capital, was also a slave state; Lincoln had received only 2,294 votes there in the 1860 election and many of its citizens were decidedly not in favor of the incoming administration (and, conversely, more sympathetic to the deep-South states that had already seceded).

After Fort Sumter was fired upon in Charleston Harbor and shortly thereafter had surrendered, Lincoln on April 15, 1861 called for the states to send 75,000 militiamen to Washington to help suppress the rebellion. Unfortunately, the only railroad access to the District of Columbia from the North came through Maryland.

On April 19, a Baltimore mob attacked the Sixth Massachusetts Regiment as it attempted to get to the capital; many deaths and injuries resulted. As a result, Maryland's governor and other state officials implored the president not to have any more troops sent through the state. Maryland citizens thereafter destroyed the railroad bridges in Baltimore and cut the city's telegraph lines linking it (and the District of Columbia) to the North.

On April 26, the Maryland legislature met to consider secession. The following day, Lincoln authorized the suspension of the writ of habeas corpus for the area between Philadelphia and Washington. The president's order was directed to military authorities only, giving them the right to arrest people aiding the rebels or threatening to overthrow the government (with any arrestee not eligible for release under a writ of habeas corpus).

On May 25, John Merryman was arrested under an order issued by Brigadier General William Hugh Klein. Merryman, a lieutenant in a secessionist drill company in Cockeysville, Maryland, was accused of destroying railroad bridges and planning to take his company south to join the Confederate army. Merryman was imprisoned in Fort McHenry, overlooking the Baltimore harbor.

Merryman's lawyers sought out Chief Justice Roger Taney (author of the odious *Dred Scott* decision; *see Federal Bar Council Quarterly*, "The Worst Supreme Court Decision, Ever!," (March/April/May 2016), *available at* https://www.federalbarcouncil.org/FBC/Publications/Quarterly/Federal_Bar_Council_Quarterly___March_April_May_2016.aspx), whose judicial circuit encompassed Maryland; they asked Taney to issue a writ of habeas corpus, which Taney did on May 26. Taney ordered General George Cadwalader, whose jurisdiction covered Fort McHenry, to produce Merryman before Taney in Maryland federal court on May 27. That day, Cadwalader instead sent an Army colonel with a written explanation stating that he

was acting under presidential authority, detailing the facts underlying Merryman's arrest, and asking for an extension to get more guidance from the president.

Taney, upset that there had been "no official notice" given to the courts or the public of the presidential claim of power, refused the request and held Cadwalader in contempt. On May 28, three things happened:

1. Cadwalader received express instructions from the U.S. Army ordering him, under the president's authority, to continue holding Merryman in custody;
2. A U.S. Marshal appeared at Fort McHenry, attempting (unsuccessfully) to execute on Taney's writ of attachment to seize Cadwalader for purposes of enforcing the contempt order; and
3. Taney issued an oral opinion, which ultimately became *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861).

As is clear from the citation, Taney's opinion – issued from his Supreme Court chambers – was filed in federal court in Maryland on June 1, 1861. Nonetheless, legal historians continue to debate its jurisdictional basis – some argue it was merely a circuit court decision, while some argue that Taney, as Chief Justice, was acting pursuant to Section 14 of the Judiciary Act of 1789, which grants certain authority to federal judges.

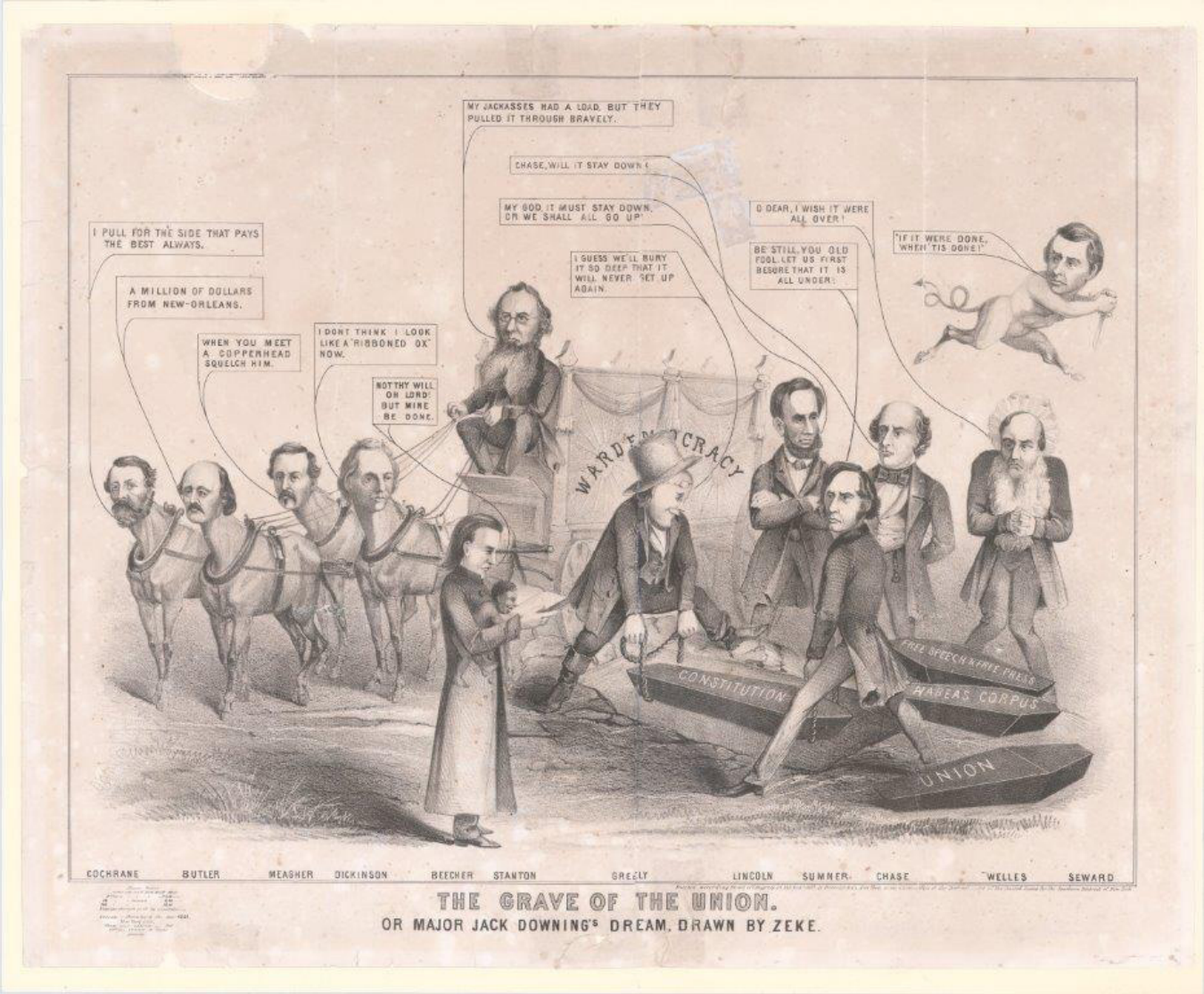
Following up on his oral ruling, Taney wrote that Lincoln had clearly violated the Constitution. More specifically, the problem was that only Congress had suspension authority, pursuant to Article I, Section 9, where the specific language about habeas corpus is located ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."): "This article is devoted to the Legislative Department of the United States, and has not the slightest reference to the Executive Department." Also citing English law (whereby the Parliament, not the King, has that power), Taney further cited Justice Story's "Commentaries," as well as Chief Justice Marshall's opinion in *Ex Parte Bellman*, 8 U.S. 75 (1807) ("If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the Legislature to say so.").

Having found the president in violation of the Constitution, however, Taney did not order Merryman's release; rather, he directed that a copy of his opinion be transmitted to the president, where it would "remain for that high officer, in fulfillment of his constitutional obligation, to 'take care that the laws be faithfully executed,' to determine what response he will take to cause the civil process of the United States to be respected and enforced."

Lincoln, faced with this direct judicial rebuke to his authority and actions, did nothing, at least initially. On May 30, with Merryman remaining in Fort McHenry, Lincoln privately asked Attorney General Edward Bates to prepare "the argument for the suspension of the Habeas Corpus." At the same time, he broadened the suspension to cover the area between New York City and Washington, and placed Secretary of State William Henry Seward in overall charge of the process (under whom it would remain until February 1862, when its oversight shifted to the War Department).

On July 4, with Congress now in session, Lincoln sent on a formal message defending his actions in Congress's absence. Its reasoning was not air-tight and its words and tone were defensive (to say the least). He wrote that "extraordinary measures" had been undertaken post-Sumter, but trusted the Congress would ratify them. Acknowledging that some acts might not have been "strictly legal," Lincoln first assured Congress that while the suspension of habeas corpus "might [be] deem[ed] dangerous to the public safety…[it had] purposely been exercised but very sparingly." (That was not quite true – besides Merryman, among those also arrested and imprisoned at Fort McHenry included the mayor of Baltimore, the entire city council, the police commissioner, and the entire police board.) Responding to Taney's taunt that one charged to "faithfully execute" the laws "should not himself violate them," Lincoln offered the following rhetorical question:

> [A]re all the laws, *but one,* to go unexecuted, and the gov-



Cartoon from the political history collection of the author.

> ernment itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?

Then, having posed that question "directly," Lincoln added (in the passive voice): "But it was not believed that this question was presented. It was not believed that any law was violated." Why not? Because there was obviously a case of rebellion, Congress was absent, the Constitution was silent as to whether Congress or the president could exercise the power, and "it cannot be believed that the framers of the [Constitution] intended that in every case the danger should run its course until Congress could be called together, the very assembling of which might be prevented, as was intended in this case by the rebellion."

In 1861, Congress did not pass legislation ratifying Lincoln's past suppressions or authorizing future ones. Nonetheless, and notwithstanding Lincoln's less than confident arguments for his authority and actions, that did not dissuade him from issuing an-

other order to the military on October 14, 1861. By that order, the area in which the suspension covered now spanned Washington to Bangor, Maine.

On August 8, 1862, the suspension was expanded to cover the entire country. That order (issued by the Secretary of War, pursuant to presidential authority) also added a new provision: those arrested would be "tried before a military commission." Subsequently, on September 24, Lincoln issued a proclamation, publicly announcing the nationwide scope of the suspension.

Congress ultimately got in on the matter with the Habeas Corpus Act of March 3, 1863. That statute gave prospective legal cover, but did not clear up whether the presidential actions prior thereto had always been legal, or were legal now only because of Congressional approval. Later that year came another presidential proclamation, this one issued on September 15. Now the suspension would "continue throughout the duration of the said rebellion."

With that "legal" chapter on civil liberties seemingly closed, attention would now turn to the issue of military commission trials.

First *Vallandigham*

The first prominent military trial of a civilian was that of leading Copperhead politician Clement Vallandigham. Since that episode has already been covered by a prior article (*see Federal Bar Council Quarterly*, "The Trials of Clement Vallandigham" (March/April/May 2015), *available at* https://www.federalbarcouncil.org/FBC/Publications/Quarterly/Federal_Bar_Council_Quarterly_-_March_April_May_2015.aspx?WebsiteKey=da1567e8-b8f4-4228-8b17-e42df31006c8,) it will not be re-covered here. One thing the Vallandigham imbroglio did do was to give Lincoln a chance to present a far more effective public defense of his administration.

In response to what has come to be known as the Corning letter (a June 12, 1863 public letter by a group of Albany Democrats, led by Erastus Corning, head of the New York Central Railroad, condemning the Vallandigham arrest and trial as being "against the spirit of our laws and Constitution…the liberty of speech and of the press, the right of trial by jury, the law of evidence, and the privilege of habeas corpus."), Lincoln published a reply. Because the legislative-executive issue was no longer in play, Lincoln started on stronger footing: obviously the Constitution provided for a suspension of the writ in "cases of Rebellion or Invasion, [when] the public Safety may require it." That the United States faced a rebellion was "clear, flagrant, and gigantic." Then, addressing what had led to Vallandigham's arrest (a vitriolic speech, denouncing the war as an effort to liberate African-Americans and enslave whites), Lincoln – worried about the effect such inflammatory speeches would have on the military draft – wrote that the speaker was arrested "because he was damaging the army, upon the existence, and vigor of which, the life of the nation depends."

Lincoln then posed a rhetorical question that long resonated with the public: "Must I shoot a simple-minded soldier who deserts, while I must not touch a hair of the wily agitator who induces him to desert?" (Thereafter, Vallandigham's well-accepted nickname was the "wily agitator"!)

Milligan

Lambdin P. Milligan, a Huntington, Indiana, lawyer and disappointed office seeker, joined an organization named Sons of Liberty; its avowed purpose was to open Northern prison camps and foment an insurrection in the Midwest. In October 1864, he (and four co-conspirators) were arrested by the U.S. Army. A military trial followed and, on December 10, 1864, Milligan was found guilty and sentenced to death by hanging.

On May 10, 1865, nine days before Milligan's scheduled execution, his lawyer petitioned the federal court in Indianapolis for a writ of habeas corpus. Importantly, part of that petition included the facts that a federal grand jury had met in January 1865 and had refused to indict Milligan.

Two different judges reviewed the Milligan petition: Associate Supreme Court Justice David Davis (whose circuit court jurisdiction included Indiana), and Judge David McDonald, a federal district judge in Indianapolis. Because they reached differ-

ent conclusions – McDonald was against granting the writ and Davis was in favor, the case was certified to be reviewed by the U.S. Supreme Court, with three specific questions to be addressed:

1. Should the writ be issued;
2. Should Milligan be released from custody; and
3. Whether the military commission that conducted Milligan's trial had jurisdiction to do so.

Lengthy arguments before the Court concluded on March 13, 1866. On April 3, Chief Justice Salmon Chase orally ruled that the military commission did not have jurisdiction over Milligan and ordered that a writ be issued for his release. But it was not until December 17, 1866 that the Court issued a written decision(s). *Ex Parte Milligan*, 71 U.S. 109 (1866).

Justice Davis, an old friend and political ally of Lincoln (he had been his campaign manager at the 1860 Republican convention), wrote the majority opinion. It began by emphasizing that "the importance of the main question presented…cannot be overstated; for it involves the very framework of the government and the fundamental principles of American liberty." At issue were "the rights of the whole people; for it is the birthright of every American citizen when charged with a crime, to be tried and punished according to the law."

Drawing upon the Fourth, Fifth, and Sixth Amendments, Davis used the Bill of Rights for the first time to expand civil liberty, ruling that the Constitution prohibited the trial of citizens by a military commission when civil courts were open and available (as they were in Indiana).

Chief Justice Chase issued a concurring opinion, joined in by two other Justices. Chase agreed that Milligan was entitled to an Article III civil court trial, but disagreed with respect to the relevance of Congress' 1863 legislation. Davis' opinion took the view that the habeas corpus statute overstepped Congress' reach by authorizing trials by military commission. In Chase's view, Congress did have that authority, but the 1863 law had not, in fact, authorized such trials.

Immediate reaction to the Court's decision – a direct repudiation of Lincoln's war-time stewardship – was decidedly mixed.

In the North, especially among those seeking post-war retribution against the South (enforced by the military), there was great consternation, with a number of critics calling Davis's decision "the new Dred Scott."

On the other hand, Southern editorial writers, hoping for a quick end to military trials in their jurisdictions (President Andrew Johnson had ordered them to cease in 1866; in fact, the last one took place in 1869), took a different tack – they viewed the opinions far more favorably ("the Democracy of the nation has now been vindicated.").

While many legal scholars and historians have hailed *Milligan* as "a great triumph for civil liberties in time of war," Neely dismissed the opinion as "irrelevant" and having had "little effect on history."

He has a point.

It was of no moment in stopping President Wilson from engineering thousands of domestic arrests and subsequent trials during World War I (under the Espionage Act of 1917, the Sedition Act of 1918, *and* the Alien Enemies Act of 1798).

It did not stop President Roosevelt's imprisoning 120,000 American citizens of Japanese descent in World War II, with the Supreme Court's subsequent approval of that terrible act – the *Korematsu* decision (*see Federal Bar Council Quarterly*, "Yet Another Awful Decision by the Supreme Court" (Sept./Oct./Nov. 2016), *available at* https://www.federalbarcouncil.org/FBC/Publications/Quarterly/Federal_Bar_Council_Quarterly_-_Sept_Oct_Nov_2016.aspx.)

During that same period, the Court also decided *Ex Parte Quirin*, 317 U.S. 1 (1942) (a military trial of eight Nazi saboteurs arrested in the United States – two of whom were U.S. citizens – was upheld; *Milligan* was ruled not applicable because the German spies were considered unlawful enemy combatants). And in more recent times, with respect to individuals "detained" during the never-ending war against terrorism that began after 9/11, *Milligan* has not seemed to have had much relevance. *See Rasul*

v. Bush, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdon v. Rumsfeld*, 548 U.S. 557 (2006); *Boumodiene v. Bush*, 553 U.S. 723 (2008).

Postscripts

- No one knows with certainty just how many civilians were arrested, held without habeas corpus, and ultimately subjected to military trials during the Civil War. Neely, who has done extensive work in the historical archives, puts the number well north of 10,000.
- During the period that this process was under the jurisdiction of Secretary Seward, he is reputed to have told the British ambassador: "I can touch a bell on my right hand, and order the arrest of a citizen of Ohio; I can touch a bell again, and order the imprisonment of a citizen of New York; and no power on earth, except that of the President, can release them. Can the Queen of England do so much?" This quote (which was widely referred to as "Seward's Little Bell") first appeared in anti-administration newspapers in 1863, but there is little evidence that Seward in fact said these words to anyone, let alone to the British ambassador. Notwithstanding, as one historian has written, "Seward had more arbitrary power over the freedom of individual American citizens all over the country than any other man has ever had, before or since."
- For those wanting to read more on these subjects, besides Neely's excellent book, there is a wonderful compendium of essays in "Ex Parte Milligan Reconsidered: Race and Civil Liberties from the Lincoln Administration to the War on Terror" (edited by Stewart Winger & Jonathan White) (Kansas Press 2020). The best one volume biography on Lincoln is David Donald's 1995 book "Lincoln" (Simon & Schuster); the best multi-volume biography on Lincoln is Michael Burlingame's magisterial "Abraham Lincoln: A Life" (Johns Hopkins Press 2008).

Lawyers Who Made a Difference

Grenville Clark and the Emergence of "The American Century"

By Steven Flanders and Travis J. Mock

Here are a couple of challenges for readers of the *Federal Bar Council Quarterly*: What private citizen contributed more to Allied victory in World War I *and* World War II than Grenville Clark? And what lawyer in private practice today even comes close to Clark's essential role addressing the great problems of public and international affairs of the day? A modest man, Grenville Clark never sought public office, or for that matter, the limelight in any form: "There is no limit to the good a man can do if he doesn't care who gets credit."

Grenville Clark, 1882-1967, was born to unmatched privilege but rose above it, so to speak. Having emerged from what his partner Emory Buckner and then-Professor Felix Frankfurter called the "Gold Coast set," he speedily made his mark first as a first-class lawyer and then also as a counselor of remarkable persuasive power and invention to the top office-holders of the day, even though he never held high office himself.

A ninth-generation New Yorker, Clark was born and raised on Fifth Avenue, son of Louis Crawford Clark, who worked his entire life at his father's Wall Street banking firm, Clark, Dodge & Co. Of at least as much consequence to less-privileged colleagues like Buckner and Frankfurter, he grew up in the mansion his mother's grandfather Colonel LeGrand Bouton Cannon, also a banker, had built for the family. Cannon was a Civil War veteran, friend of Abraham Lincoln, staunch abolitionist, vice president of the Delaware & Hudson Railroad, commercial banker, and a founding Republi-

can – and a formative influence on young Grenville Clark. As a boy, Clark spent several summers at the family compound south of Burlington, Vermont. On one significant occasion he was taken across Lake Champlain and deep into the interior, to visit the weed-grown grave – now a state historic site – of abolitionist John Brown.

As what may have been seen as a matter of course, he followed his father in attending Harvard College, which he reached by private railcar. He graduated and entered its law school in 1903, joining classmates who became life-long friends and colleagues such as Frankfurter, Francis W. Bird, and Elihu Root, Jr. Following an unpaid clerkship with a young lawyer named Franklin Delano Roosevelt at the firm of Carter, Ledyard & Millburn, with two classmates he founded in 1909 the firm of Root, Clark & Bird, which in 1913 merged with Buckner & Howland to form Root, Clark, Buckner & Howland. As this firm grew in the 1920s and 1930s to include countless notables like Henry Friendly and John Marshall Harlan, it became the famous predecessor of the late, lamented Dewey, Ballantine, Bushby, Palmer & Wood, which met its 2012 demise as Dewey & LaBoeuf.

As Martin Mayer describes Root, Clark & Bird as it opened on January 1, 1909, "there never was any serious reason to worry" about its prospects. "Clark was the scion of a very-long-established banking family with infinite connections," and his partner Elihu Root, Jr., carried the name of one of the most famous and honored lawyers and statesmen of the day, who "without thinking about it would in the fullness of time inevitably refer considerable business." The new firm made the most of its ample resources, and Clark speedily established himself as an anchor of the firm as it grew to 70-plus lawyers by the late 1930s, which in that day was almost unheard of. When Roscoe Pound retired in 1936 as Dean of Harvard Law School, Clark was among those proposed as his successor – he had served since 1931 as one of the five Fellows of the Harvard Corporation, along with the university president and the treasurer, a post he held until 1950, at which time he received an honorary doctor of laws degree.

In a letter to Frankfurter, Buckner said, "I am not sure G.C. would accept. If not, it would be for the same reasons he *should*. But how can we go on and not be Root Clark?" Buckner went on to describe Clark as the ablest lawyer he knew. "He is slow." [Context makes clear that this was a compliment; he might have said "methodical."] He is a good judge of men.…He is sound. He is open-minded upon everything and most zealous in a humble search for the right." And this remarkable letter goes on at considerable further length about Clark's eminent qualification to serve as dean.

Clark's first venture in the great issues of the day may be the most astonishing of the lot, if only because he was so young at the time and somewhat wet behind the ears as a young lawyer who had only recently helped found a new law firm. In 1915, at age 32, he came to realize that America's participation in the Great War was all but inevitable, and that our military was woefully unprepared, especially as to its field leadership. Bucking the tides of isolationism, he conceived and designed what became known as the Plattsburgh Military Training Camp, which attracted young leaders in business and public affairs, and with its counterparts elsewhere in the country trained an estimated 80 percent of America's field officers in the war. Supported by the Army Chief of Staff Major General Leonard Wood, the Military Training Camps Association ultimately established 14 "Plattsburgh Camps" around the country. Though roundly attacked from both the left and the right as a "rich man's patriotic charade," the effort earned Clark the Distinguished Service Medal for his contributions to the war effort. The association was a forerunner of the Reserve Officers Training Corps.

Clark had a curiously mixed role in the unfolding of the New Deal. He evidently was the prime draftsman of the Economy Act of 1933, one of the first of President Franklin D. Roosevelt's acts of Congress, one remembered especially as having suffered less at the Supreme Court than the National Recovery Act and so many others. Less remembered is its content.

As is well known, Roosevelt had run on a platform of economy in government and a further

effort to balance the federal budget, a platform Clark, a staunch Republican, ardently supported. Clark's Economy Act may have helped establish Roosevelt's *bona fides* in this: It instituted drastic cuts in federal salaries and benefits, especially including veterans' benefits, which were immensely unpopular and led to huge demonstrations in Washington. So soon after the Great War and at the height of the Great Depression, big cuts in veterans' benefits must have seemed draconian indeed, and Clark later came to regret those provisions, saying, "I would never again oppose anything in reason that the veterans want." But Clark continued as a central advisor to Roosevelt on economic and other matters, and though a Republican became a confirmed New Dealer. He was no sycophant, however. He vigorously opposed Roosevelt's "court packing" plan, establishing a committee of pro-Roosevelt lawyers for the purpose.

In the 1930s, Clark was the founding chairman of the American Bar Association's Committee on the Bill of Rights. Clark believed that the mantle of civil rights had been unfairly claimed by liberals – and improperly neglected by conservatives – and that support for civil liberties was a conservative cause aimed at resisting government excess. He joined in drafting amicus briefs in defense of free speech before the Supreme Court, asserting in the flag salute cases the right of individuals on conscientious grounds not to salute the flag.

What private citizen contributed more to Allied victory in World War I *and* World War II than Grenville Clark?

Following the rise of Hitler and the opening salvos of World War II, Clark overcame the forces of isolationism once again. Though he had opposed the peacetime draft following World War I, he joined Secretary of War Henry L. Stimson and drafted the 1940 Selective Service Act. He served as unpaid confidential assistant to Stimson throughout America's involvement in the war. Near the war's conclusion, Stimson discharged Clark and exhorted him to "go home and try to figure out a way to stop the next war and all future wars." This charge would come to define the rest of Clark's life.

Grenville Clark retired from his firm in 1945, in response to heart problems and other health issues. But he lived more than 20 more years, and those were among the most active in his life. He was known as a drafter of the United Nations charter, though he came to regard it as insufficient or inadequate. In 1945 he drew more than 40 notables to Dublin, New Hampshire, where he had a summer home, where the conference he developed proposed the "Dublin Declaration," judging the UN Charter inadequate to preserve peace and offering detailed proposals either to rewrite the UN Charter or to form a complementary body adequate to the task of ensuring world peace and fostering prosperity. A second Dublin Conference in 1965 extended this declaration, and he founded the "Grenville Clark Institute for World Law." He and colleagues became active in the United World Federalists and the global World Federalist Movement and Clark wrote, lectured, and traveled the world recruiting world leaders in support of his cause. No fewer than 23 state legislatures passed bills supporting the organizations' goals.

Recalling Colonel Cannon's formative influence, Clark became well known as a supporter of civil rights in the 1950s and 1960s, establishing among countless other efforts a bail fund for imprisoned Freedom Riders. He provided advocacy and financial support to the NAACP, and donated $500,000 to the organization in his will.

A few days before his death in 1967, Clark was nominated for the Nobel Peace Prize. Initially he resisted this suggestion, but reconsidered upon realizing that the award might help draw attention to his World Federalist and other work. Nothing came of it, however; as the supporters of John Updike and Phillip Roth have recently been reminded to their sorrow as to the literature prize, Nobels are not awarded posthumously. But no Nobel Peace Prize was awarded in 1967, and

members of the Nobel committee reportedly later told Clark's family that he was the top contender.

Through his multitudinous activities in law and in government, the cast of characters who were major factors in his life is seemingly without parallel. He was close to both Presidents Roosevelt, both of whom called him "Grenny." His connection to Felix Frankfurter extended for the entire professional lives of both men. The childless Frankfurter was the unofficial "uncle" to Clark's five children. When Frankfurter retired from the Supreme Court, he turned to Clark to handle his personal financial matters. His partners at the firm, before his 1945 retirement from practice, included George Cleary, Henry Friendly, Leo Gottlieb, John Marshall Harlan II, Lloyd Garrison, Robert Patterson, Francis Plimpton, and Marshall Skadden. His co-authors and close colleagues not mentioned already included Eugene Burdick, James Bryant Conant, Norman Cousins, Robert Drinan SJ, John Foster Dulles, Jerome Frank, Henry Luce, Claiborne Pell, Justice Owen Roberts, Louis B. Sohn, and Edgar Snow.

With full benefit of historical hindsight, it is not unreasonable to describe most of Grenville Clark's public efforts in the twilight of his career as tilting with windmills. But it is difficult to fault him if we attempt to place ourselves in his historical moment. After all, he had worked with and lived through the "war to end war" as a young lawyer. Later, having seized his historical moment offered by the Allied victory in 1945 in his participation in drafting the United Nations Charter, it was reasonable enough to try to extend that effort and try to create a real international legislature capable of preventing the unprecedented catastrophe of nuclear war.

It is even possible that Clark's efforts might have succeeded, at least in part, had Stalin died a few years earlier than he did, in 1953. Perhaps a successor, confronted by the devastation wrought by the war, especially in the Soviet Union, and the far greater devastation of nuclear war in prospect, might have agreed to at least some of the components Clark advocated.

Judge Ralph K. Winter

Second Circuit Judge Ralph K. Winter passed away on December 8, 2020. He was 82 years old.

Judge Winter was a good friend of the Federal Bar Council and an active participant in Council activities. He served as judicial chair of the Winter Bench and Bar Conference several times, most recently in Hawaii.

Judge Winter taught at Yale Law School before and after he was appointed to the bench in 1982. He was a mentor and teacher to many law clerks and students. What follows is the eulogy Joan Wexler gave at Judge Wintere's funeral service and a remembrance by Robert Giuffra.

My Friend, My Very Great Friend

By Joan G. Wexler

Ralph Winter was my friend, my very great friend. To me, he was family. First, a few words about his real family. I thank them for giving me the honor and privilege to speak with you today. As Ralph said, his family is small in quantity, but high up there in quality.

Ralph and Kate had one child, Andy, whom they adored. They were somewhat disappointed that Andy ended up going away for high school as well as college. But, as things turned out, at some point after college, Andy came home to live. Ralph and Kate were thrilled. It enabled Andy and his father to continue their sports watching and considerable analysis. Those times were sacrosanct. Nothing interrupted the Giants games.

When Andy chose Kim for his wife, Ralph's view was "she's perfect for him." But she ended up being perfect for Ralph too. I can't count the number of times he told me, "I have the best daughter-in-law. I am so lucky."

Andy and Kim are a formi-

dable team. For one thing, they produced Kiersten. I watched Kiersten grow up. Don't think this was only from afar. Everything she did, from her first words, to the books she read, to her study habits, to her fabulous swimming awards, was reported by Ralph. She is now a freshman at the Rochester Institute of Technology. Ralph told me: "She loves it and she describes herself as a 'nerd.' My kind of student."

Because of COVID-19 regulations, Andy and Kim were not permitted to visit Ralph during his recent hospital and rehab stays, but they nevertheless cared for him with love and devotion.

Ralph and I talked to each other all the time. During these past weeks, it was at least twice a day. In earlier times, when we were on the phone, my husband Lenny would often close the door. He'd say, "The laughing is just too much for me. You two are like high school girls chattering away." Ralph and I covered many topics, some of them quite serious personal, legal, or political ones. My recollection of all these conversations is that they were always hilarious.

Ralph loved his pool. I think some of his best moments, almost spiritual, took place in the pool or sitting outside of it writing memos, drafting opinions, or reading books. He was one of the few people who, at the time, thought my husband and I made a smart move by buying a house with a pool.

Ralph's family and my family shared Thanksgivings together. This year, we were quite a diminished crowd, but we carried on the tradition of going around the table and saying the things for which we are grateful. When it was my 2 1/2 year old grandson's turn, he said, "I'm thankful for my toys, my mommy, my daddy, my sister, the rest of my family, and my pool." I like to think that he was channeling Ralph and taking his place.

Judge Winter was a good friend of the Federal Bar Council and an active participant in Council activities.

Because many people described Ralph as a conservative, they assumed he had particular views about people and issues. Not so. Second Circuit Judicial Conferences used to be held at the Sagamore on Lake George. One year, it appeared that not only were judges and lawyers convening, but so were most of the bikers on the East Coast. Not cyclists. Bikers. I mean the group who wear leather and chains and have tattoos. Ralph, Kate, Lenny, and I went to lunch at a nondescript restaurant on the lake. When we sat at our table, we were surrounded by about 50 bikers. Ralph and Kate immediately struck up a conversation with the people at nearby tables. Where are you from? How has the trip been? And so on.

My husband and I had a long engagement. When I told Ralph that we thought we would get married, I was sure he would say, "It's about time." Instead, his comment was, "Why do you want to do that? Do you realize what that is going to cost you in taxes?" That's one of the reasons the engagement lasted nine years.

Ralph was a loyal friend. He chose friends carefully and he stuck with them. Years ago, Ralph was spending a couple of days in Brooklyn. I suggested that one of the nights, I have a dinner party. "Great idea," he said. "and here is who you are going to invite." One of those people was a fairly recently appointed Second Circuit judge. "I like her very much and she is going to be terrific" was Ralph's view. That person was Debra Livingston, who is now the chief judge. I want to thank her for all that she did for Ralph and for helping to put together this service.

When Ralph was nominated to the Second Circuit, Justice Thurgood Marshall for whom Ralph had clerked, said that Ralph would make a "great judge." He's "got a great heart, and more and more we need it." Justice Marshall got it exactly right. Ralph did become a great judge, but he never became pompous or arrogant. He was a person of towering intellect, but one of universal kindness and warmth to all.

There is a message on my voicemail that I received earlier this week from Ralph. "Just me. Call me." I wish I could.

A Remarkable Life

By Robert J. Giuffra, Jr.

I first met Judge Ralph Winter in 1984 when I arrived at Yale Law School. Over the next 36 years, he became a second father to me. I rarely made an important decision without seeking his advice, which was almost always right, as he liked to remind me. On December 8, 2020, Judge Winter passed, leaving us wonderful memories of his remarkable life.

Judge Winter was a creature of habit. Except for one year in Delaware, when he clerked for Judge Caleb Wright, Judge Winter lived his entire life in New Haven County. So, in retrospect, it's remarkable how he was at the center of so much.

Justice Marshall's Law Clerk

Judge Winter was Thurgood Marshall's first and favorite law clerk. He was a leading professor at Yale during the tumult of the 1960s and 1970s. His 1977 article defending state chartering of corporations as a "race to the top" is widely regarded as one of the most important papers on corporate law in the past 100 years. He argued *Buckley* v. *Valeo*, the seminal Supreme Court decision on campaign finance. And he accomplished all of that before he joined the Second Circuit in 1981, when he was 46.

Very few federal judges are known simply by their first name – Nino, Ruth, and Sonia come to mind. And, then, of course, there's Ralph, which was the perfect name for the judge. He was once described as a truck driver with a 160 IQ.

Ralph did not shop at J. Press or worry about material things. Every day, he closely read *The New York Times*, but also the *New York Post*, including Page Six and the sports pages. One of his proudest moments was when his decision ending the 1995 baseball strike was debated on the Mike and the Mad Dog radio show. He was the timekeeper at his son's hockey games. He attended his granddaughter's swim meets. For many years, he would swim in his pool, which was his only luxury. He had no use for stuffy or self-important people. And he loved to laugh. Oh, did he love to laugh.

My co-clerks and I were, in the best sense of the word, "clerks" to a master judge, who cared deeply about "getting it right" in every case – from the most run-of-the-mill to the most noteworthy. The highlight of every day was lunch. We would generally go to "The Court Restaurant," which was more diner than restaurant, with the occasional Chinese or Italian restaurant thrown in. Judge Winter would opine on the latest news of the day – from the confirmation hearing of his close friend Robert Bork to the Iran-Contra hearings. He was a gifted teacher and storyteller.

Judge Winter's clerks ranged from judges to law professors to law firm partners to a candidate for the U.S. Senate. Not surprisingly, there were a lot of independent thinkers. One of his law clerks (George Conway) was one of President Trump's biggest critics, while another (Laura Ingraham) defended the president every night on Fox. He was usually proud of us, although he frequently worried the way parents do about their children.

A Diverse Caseload

Judge Winter loved the diverse caseload of the Second Circuit. When his name was bandied about for possible appointment to the Supreme Court, he expressed little interest. If the president called, we thought he might decline. He often said that the Second Circuit had a better mix of cases, and that he had no desire for the spotlight.

In keeping with the Second Circuit's caseload, Judge Winter authored hundreds of finely-crafted opinions in virtually every area of law. Judge Winter was a conservative, with libertarian leanings. In some of his most significant cases, he ruled against the government. He wrote precedent-setting decisions in securities and corporate law. He was

perhaps most proud of his decisions touching on sports.

Bob Fiske told me that when he read Judge Winter's decision in the *USFL* v. *NFL* appeal, which Bob had argued, he was struck by Judge Winter's ability to "get to the heart of the issues" better than any of the dozens of lawyers working on the case had been able to do. The chief protagonists were NFL Commissioner Pete Rozelle and Donald Trump. On appeal, the USFL claimed that the trial judge had erred in admitting evidence of the USFL's mismanagement. In rejecting that argument, Judge Winter wrote: "Courts do not exclude evidence of a victim's suicide in a murder trial."

"Sound Judgment"

I was always struck by the deep esteem with which Judge Winter was held by other judges. Chief Justice Rehnquist praised Judge Winter's "sound judgment," which was the highest form of praise from the Chief, and his strong administrative skills. The Chief appointed Judge Winter to some of the important positions within the federal judiciary – chair of the executive committee of the Judicial Conference and chair of the advisory committee on the rules of evidence, to name two. Judge Winter also served as chief judge of the Second Circuit.

When I met the great Justice Marshall, and identified myself as a "Winter clerk," he immediately smiled and said: "Ralph's my favorite knucklehead." Justice Marshall liked to refer affectionately to his clerks as "knuckleheads." It speaks volumes that Judge Winter, appointed by Ronald Reagan, was the Marshall clerk who spoke at the Justice's funeral.

Chief Justice Rehnquist praised Judge Winter's "sound judgment," which was the highest form of praise from the Chief, and his strong administrative skills.

In 2017, during a special ceremony at the Thurgood Marshall Courthouse, Judge Winter received the Edward J. Devitt Distinguished Service to Justice Award, the highest award for a federal judge. Five justices of the Supreme Court traveled to New York to attend the ceremony.

Justice Ruth Bader Ginsburg said: "In the legal academy and as a judge, Ralph Winter is held in the highest regard for his bright mind, lively spirit, sage judgment, and geniality." Justice Clarence Thomas cited Judge Winter's humanity: "He treats everyone, from janitors to Supreme Court Justices, with the same genuine friendliness and concern." And his colleague Judge Jon Newman called Judge Winter "one of the nation's most outstanding judges."

Judge Winter spoke warmly of the Federal Bar Council and its members. He attended many Winter Bench and Bar Conferences. During his last conference in Hawaii, he was the chief fan cheering on his beloved New York Giants to victory in the Super Bowl. On the Sunday before he died, he watched the Giants upset the Seattle Seahawks.

"Kindness and Decency"

Judge Winter led a very simple life, focused on his family, colleagues, clerks, and students. He was a judge of national stature, but never sought public recognition. For all of Judge Winter's brilliance, what set him apart was his kindness and decency. When one of my law partners – a former Ralph student – was diagnosed with early Alzheimer's, Judge Winter made it a point to spend time with him.

I'd like to end with a word about Judge Winter's wife, Kate, who died in 2012. They were best friends in every sense. I can still hear the two of them laughing. Kate loved the portrait of Ralph that hangs in Yale Law School. She said that the painter, Peter Egeli, captured Ralph, particularly his hands. Kate's last years were not easy, but Ralph was always there for Kate, as she had been for him.

RIP RKW. We will all miss you very much. For hundreds of grateful clerks and students, you were our beloved teacher, mentor, and friend.

Law and Leadership

Speaking with Talmage Boston

By Joseph Marutollo

The great Vince Lombardi once said, "Leaders are *made*, they are not born. They are *made* by hard effort, which is the price which all of us must pay to achieve any goal that is worthwhile." How can lawyers be *made* into better leaders? To delve deeper into this issue, the *Federal Bar Council Quarterly* recently interviewed trial attorney and historian Talmage Boston, who has developed a career-long interest in issues related to the law and leadership.

Boston has had a distinguished legal career as a trial attorney. He has been selected as a Texas Super Lawyer for over a decade, and has been named as one of the "Best Lawyers" in America by *BL Rankings*. He is currently a partner in the Dallas office of Shackelford, Bowen, McKinley & Norton, LLP, where he handles commercial litigation in both trials and appeals. In 2019, Boston received the Terry Lee Grantham Memorial Award from the Texas Bar Foundation, which is given annually to the Texas lawyer who is "an accomplished, talented, and dedicated Texas lawyer who is a servant of the profession and a dedicated advocate."

In addition to his legal acumen, Boston is a gifted writer and is the author of four books on topics ranging from baseball to presidential leadership. Boston is also a sought-after interviewer of public officials at various forums around the country. Boston's interviews were collected and published in his book, *Cross-Examining History: A Lawyer Gets Answers from the Experts About Our Presidents*, which featured his interviews with former Secretaries of State James A. Baker III and Henry Kissinger, as well as historians David McCullough, Evan Thomas, David Maraniss, and Jon Meacham. Further, he hosts the podcast *Cross-Examining History*, where he has interviewed many of the nation's leading historians and best-selling authors, including John Grisham, Harold Holzer, and Bob Woodward.

Boston ends each of his podcast episodes by quoting from the late Bobby Bragan, a former major league baseball manager, who would famously tell his ballplayers, "You can't hit the ball with the bat on your shoulder!" Boston has taken Bragan's quote to heart, and encourages lawyers who want to be leaders to take action whenever needed. Boston explains that once a law-

Talmage Boston

yer thoroughly considers the issues presented in a given case, the lawyer should not be afraid to take action. Boston firmly believes that leading by "doing" is essential to being a strong lawyer and leader.

Boston discussed an October 13, 2020 virtual C-SPAN interview he conducted about law and leadership with former Secretary of State and Secretary of the Treasury James Baker. Secretary Baker was interviewed by Boston shortly after the release of *The New York Times*' best-selling biography, *The Man Who Ran Washington*, by Peter Baker and Susan Glasser, which recounts Secretary Baker's decades-long run as the capital's consummate dealmaker. During the interview, Boston asked Secretary Baker about how lawyers can become strong leaders. Secretary Baker – who practiced law prior to becoming chief of staff to President Ronald Reagan and then a cabinet official – answered by explaining that, in his view, "the really difficult part of leadership is the doing"; "the knowing is really important, but it's not as tough as the doing."

Boston agreed with Secretary Baker's advice. "The doing" is critical to a lawyer's success. Boston noted that clients have high expectations. Lawyers are expected to achieve their client's desired result, such as a favorable outcome in litigation or getting a deal completed in a transaction. Lawyers must be able to carry out a plan to "get the job done."

In the same interview, Secretary Baker added that, "a lawyer-leader has got to be able to persuade." Boston reiterated this point, as lawyers – by their very training – need to be able to speak and write in a way that clearly articulates their client's position in a way favorable to their client, while still being mindful of the law. According to Boston, to be successful leaders, lawyers need to be effective communicators who know how to resolve disagreements.

Boston noted that lawyers who want to be leaders should also be "mindful of the nudges" that life throws at them. For instance, as a young boy, Boston became fascinated by baseball history and statistics. Even as a law career flourished, Boston felt a "nudge" to continue engaging with his love of baseball. As a result, he soon started submitting articles to a baseball publication, which led to other opportunities in baseball publishing. Before he knew it, he published two books on baseball. Then, in 2014, Boston coordinated and moderated a C-SPAN discussion entitled "Baseball and American Life" that featured Supreme Court Justice Samuel Alito and columnists George Will, Christine Brennan, Tim Kurkjian, and David Brooks as panelists. Had Boston not responded to the "nudge" of following baseball, he may not have had the opportunity to be involved in such unique and enlightening events.

Boston's career certainly reflects the merits of his insights on law and leadership.

What's On Your Wall (and Bookcase)?

Documents and Certificates

By Lisa Margaret Smith

Now that I am retired, I no longer have office walls to look at. Just as many are isolated at home, I am isolated due to COVID-19 (and retirement); some of the more interesting things on my walls at home are documents from my great-grandmother.

My great-grandmother was named Rosabell Armentrout. She was born in 1861 in Marion, Iowa. She had seven siblings and four half-siblings. She added the name Butterfield in 1879 when she married my great-grandfather, Marshall Butterfield, a young man from her neighborhood. One of the documents on my wall is a decorative marriage certificate from their union. It originally had photos of the bride and groom, but those have been lost.

Following their marriage, Rosabell and Marshall entered the University of Iowa, Rosabell to study medicine and Marshall to study law. I like to think that

Dr. Rosabell Armentrout with the author's mother.

they were a couple well ahead of their time, with two professional careers. When Rosabell's young nephew died she decided to become a doctor devoted to caring for women and children; she had a low opinion of male doctors, except for her older brother, John, whom she idolized.

On May 14, 1907, Rosabell received her diploma from the Keokuk Medical College of Physicians and Surgeons, located in Keokuk, Iowa. The Keokuk Medical College had been founded in 1890. In 1899 it merged with the College of Physicians and Surgeons of the Upper Mississippi. In 1907 the college had 141 students, and 30 graduates, one of whom was Rosabell. (In 1908 the Keokuk Medical College moved to Des Moines to become the medical department at Drake University).

Rosabell was the first woman doctor in the State of Iowa outside of Des Moines. On July 18, 1907, she received a physicians' certificate from the State of Iowa. This is the second Rosabell document on my wall. It certifies that she passed an exam in medicine, surgery, and obstetrics before the State Board of Medical Examiners.

On November 1, 1907, Rosabell was awarded a certificate from the Post Graduate Medical School and Hospital of Chicago, establishing her successful completion of a general course of clinical instruction. This is the third Rosabell document on my wall.

It is worth noting that the physicians' certificate from the State of Iowa allows for the possibility that the awardee could be a woman; in two places it references "_he," allowing for "s" to be added to make it "she," and that was done on Rosabell's certificate. By contrast, the certificate from the Post Graduate Medical School and Hospital of Chicago only refers to "him" as receiving the certificate.

In 1886, before medical school, my great-grandmother Rosabell had a daughter, Mary, who became my grandmother. Sixteen years later Rosabell and Marshall adopted a son, Hollis. In other words, like so many professional women today, Rosabell had a small child at home when she was in graduate school.

After graduation Rosabell was a hospital anesthetist in Keokuk, Iowa, and she later opened a private practice in her home in Indianola, Iowa. In 1923 Rosabell's

The author's wall.

daughter, Mary, had my mother, Rosalind, born in Keokuk. Rosabell assisted with the birth. Accompanying this article is a photo of Rosabell with my mother on her lap (this photo is on my bookshelf rather than on my wall).

Dr. Rosabell Armentrout Butterfield died in July 1948, the same month that her first great-granddaughter, my older sister, was born.

Awards

Council Presents Thurgood Marshall Award

By Bennette D. Kramer

On January 21, 2021, by Zoom, the Federal Bar Council presented the Thurgood Marshall Award for Exceptional Pro Bono Service to "Rising Star" Chanwoo Park of Morrison & Foerster and to "Veteran Deserving of Recognition" Neil A. Steiner of Dechert.

Council President Jonathan Moses and Public Service Committee Chair Saul Shapiro made opening remarks. Jennifer Brown of Morrison & Foerster introduced Park, and Cara McClennan of the NAACP Legal Defense Fund described some of his work. Park has done pro bono work on cases involving tenant rights, asylum, right to federal disability benefits, the First Amendment (representing a Mexican journalist), and invasive searches of girls by a school nurse because they appeared giddy. He has engaged in a vast array of representations. In accepting the award, Park talked about how rewarding it was to be able to represent people who otherwise could not afford representation.

Linda Goldstein of Dechert introduced Steiner and talked about his voting rights litigation, along with litigation on behalf of clients of the firm. Dale Ho of the Voting Rights Project at the American Civil Liberties Union talked about working with Steiner on voting rights cases. He described him as a brilliant litigator and an expert on voting rights. In accepting the award, Steiner talked about how important voting rights are.

The program ended with remarks by Robert Fiske of Davis Polk & Wardwell about the importance of pro bono representation. He said that it is also an excellent way for associates to get litigation experience.

Awards

Lawyers and the Presidential Medal of Freedom

By Pete Eikenberry

On January 11, 2021, the White House announced:

> Today, President Donald J. Trump will award the Presidential Medal of Freedom to Jim Jordan. This prestigious award is the Nation's highest civilian honor, which is awarded by the President to individuals who have made especially meritorious contributions to the security or national interests of the United States, to world peace, or to cultural or other significant public or private endeavors.

In contrast to the award to Jim Jordan, other recipients have been Rosa Parks, Margaret Mead, Pablo Casals, Mother Teresa, John Lewis, Irving Berlin, Joe DiMaggio, and Martin Luther King Jr.

Our presidents have awarded the Presidential Medal of Freedom to very few lawyers. Of almost 1,000 recipients, I count only four receiving the award primarily for their work as lawyers. I count many judges and several senators, secretaries of state, and a couple of attorneys general, including Elliot Richardson.

Among the judges awarded the medal were Supreme Court Justices Thurgood Marshall, Earl Warren, Felix Frankfurter, Warren Burger, Sandra Day O'Connor, and Antonin Scalia.

There have also been appellate judges John Minor Wisdom, Irving Kaufman, and Patrick Higginbotham. Among the senators receiving the medal were Edward Brooke of Massachusetts and Orrin Hatch of Utah.

The lawyers that I count are John Doar, Marian Wright Edelman, Cyrus Vance, and John H. Adams. Although Cyrus Vance was Secretary of State, he was awarded the Medal of Honor eight years before he became Secretary of State.

John H. Adams was the founder of the Environmental Defense Fund. Most lawyers know that John Doar was head of the U.S. Justice Department Civil Rights Division in the South in the mid-1960's. It is difficult to forget the photograph of his face as he determinedly escorted James Meredith to class at the University of Mississippi. He was also counsel to the U.S. House Judiciary Committee during the impeachment proceedings against Richard Nixon.

Marian Wright Edelman was executive director of the NAACP Legal Defense and Educational Fund, Inc. Thereafter, Edelman left to work on children's rights issues, later forming the Children's Defense Fund.

What other lawyers are qualified to be awarded the medal? First, the lawyers who are or were primarily public officials; death does not disqualify. Ruth Bader Ginsburg and Presidents John Adams and Thomas Jefferson are choices. Barack Obama is also a worthy candidate as are Justice Sonia Sotomayor, former Secretary of State Hillary Clinton, the late Senator Robert Kennedy, and Judge Robert Katzmann for his recent leadership ensuring legal representation for thousands of immigrants in danger of being deported.

As to those who were primarily lawyers, Judge Constance Baker Motley of the Southern District of New York is a natural. She was the first black woman federal district judge after being a long time lawyer in the South with the NAACP. Among other New York lawyers with a national impact is Darren Walker, president of the Ford Foundation, for his insightful leadership including utilizing the foundation's resources as seed money to ensure that the pension fund for Detroit public workers was preserved in its bankruptcy. Also, Peter Neufeld and Barry Scheck must be recognized as founders of the Innocence Project. Conrad Harper, the former president of the New York City Bar Association, has suggested Bryan Stevenson, a seemingly can't miss candidate. Why not James Meredith for his March?

Do you have people to recommend to President Biden? The ceremonies would give the nation a lift in these COVID times. I await your responses.