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From the President

Chatting with the AP's Larry Neumeister

By Jonathan M. Moses

My introduction to the Second Circuit legal community came not as a lawyer, but as a journalist. Immediately before law school, I spent two years as a legal beat reporter for The Wall Street Journal and for most of that time I sat at a desk in the press room in the federal courthouse at 40 Centre Street, now known as the Thurgood Marshall United States Courthouse. The press room then was on the fifth floor of the courthouse. It was a long narrow room carved out from the hallway by a thin divide of Sheetrocked walls. Across the way was the cafeteria, then also on the fifth floor. This area now is the much more attractive, and impressive, Justice For All Learning Center.

My desk (i.e., the Journal's desk) put me cheek-by-jowl with the reporter for The Associated Press (Larry Neumeister). Nearby was Gail Appleson of Reuters. At a second set of desks sat the longtime reporters for the city's tabloids: Marvin Smilon for the New York Post, who later went on to serve as a public-affairs officer for the U.S. Attorney's Office in the Southern District of New York, and Alex Michelini for the Daily News. Not infrequently, Murray Kempton, a venerable reporter and columnist then at the Post, would bike to the courthouse, stop by the press room and hang out with anyone willing to chat about that day's news or some great story from past. Also present were reporters for Newsday, the New York Law Journal, and later Bloomberg. The one desk usually empty was that of the Times reporter – a little above it all, I guess. We did not sit around playing cards, but at times and with a little imagination it could feel like a scene out of "The Front Page" (or even better, the movie version with Cary Grant and Rosalind Russell, "His Girl Friday").

Every once in a while, a judge's clerk would drop off an opinion that was thought to be newsworthy. If the opinion concerned admiralty law, Michelini would inevitably initiate a rant about the judges not understanding what made news. (More than once, a marshal came by to tell us to quiet down when a particular reporter got a little too loud.) Occasionally, lawyers would stop by seeking attention for their matters. And, I would wander down to the basement once a day where the clerks would let me look at filings before they docketed them!

Thirty years later, everything is filed electronically and the main press room is now an airy space at the Daniel Patrick Moynihan United States Courthouse at 500 Pearl Street. But the press corps remains as busy as ever with newsworthy cases. Larry Neumeister is still The Associated Press reporter and is now the dean of the press room – a ceremonial gavel was presented to him when the prior most senior reporter left. I asked him to reflect on how the press room and courthouse news coverage has changed over these past 30 years. Below are his thoughts.

Q: How has courtroom reporting changed in your three decades? What is the biggest change from your perspective as a journalist?

A: No doubt the biggest change in courthouse reporting has been the expansion of technology in and outside the courthouse, speeded along even more by the pandemic. Getting comment on a breaking news story used to require time-consuming individual phone calls. Now, an email seeking comment can be sent to two dozen lawyers in an instant. Technology has made reporting easier, but it's also made it immediate and much more competitive. With Twitter's rising use, news breaks are now measured in seconds rather than minutes. Dozens of rulings and thousands of documents are instantly available to anyone with a Pacer account. I've frequently joked in the pressroom that if I was teaching a journalism class, I would spend one entire class requiring every student to keep hitting the refresh button every 15 seconds on a major developing story and see who can first shout out each development. Long gone are the days when a

few press room reporters could deem themselves "The Committee to Suppress The News" and agree they'll write tomorrow rather than today about a late ruling that is important enough to write up, but not important enough to miss Happy Hour at the tavern down the street. These days, the dozen or so reporters in the courthouse press room have to worry about dozens of journalists and their editors in their offices and homes spotting the ruling on Pacer and writing it up immediately. And after their stories are published, they are much more apt to hear from subjects of stories about any complaints about their coverage since their work can immediately be seen.

Q: How does today's press room compare to when you started?

A: Overall, we're treated much better now than 30 years ago within the courthouses. We even have separate dedicated pressrooms in the two Manhattan courthouses rather than the weirdly-shaped makeshift pressroom in the fifth floor hallway at 40 Centre that existed in 1992. Though I miss the smell of muffins and cookies in the cafeteria across the hallway. The Second Circuit Executive, the District Executive, the judges, the marshals, and support staff in the courthouse go to surprising lengths to make sure we can get what we need for the public. There are almost always "overflow" courtrooms for major events when it is known there will be more people seeking access than a courtroom can hold. We're allowed to sit in the jury box much more often than before. There have been silly glitches over the years, like when a courthouse employee insisted no interviews were allowed in the courthouse or when a new courthouse employee tried to keep people out of jury selection. But those problems are quickly corrected when we notify courthouse officials or judges. As an aside, I should mention that one of my AP federal court colleagues – Tom Hays – grew up in Riverside, California, where his father as publisher of The Press-Enterprise led the Supreme Court fights that ended in the landmark Riverside I and Riverside II decisions opening up jury selection and pretrial hearings to the public.

In the early 1990s, reporters were still racing for those antique phone booths at 40 Centre Street when news broke. One AP reporter injured his leg in the 1980s on such a quest. Now, we've all got cell phones and can instantly transmit news from the courtrooms except in those few instances where judges ban phones. And, we can also monitor some court proceedings on video screens in the press room, although with strict rules that nothing can be recorded. For lengthy trials where we might only need to cover major witnesses, this frees reporters to write about other things. And the Second Circuit now posts recordings of its hearings, sometimes on the same day, on its website. During the pandemic, anyone can listen live, which is true with most court proceedings too.

I remember the first verdict I delivered by smartphone on a Blackberry in 2001. It was a terrorism trial. And I'm glad for the technology because there were more than 100 counts and it took about 45 minutes to read the verdict. Our bureau chief was so distrusting of sending a verdict electronically that he insisted a secret code word – "blue" – be in any transmission. To this day, I don't understand what that proved. But I did it.

One thing that hasn't changed over the years is press room humor. Unlike Hollywood's portrayal of reporters as unusually earnest, stern and serious in acclaimed movies like "All the President's Men" or "Spotlight," most of the talented ones I've known, including several Pulitzer Prize winners, frequently employ humor. After the September 11 attacks, one colleague put up a sign "A Press Room Challenged" as a spinoff of "A City Challenged" that ran across some pages in The New York Times. As we worked to restore phone service knocked out by the attacks, another sign appeared by the windows encouraging all of us to describe the "Suspicious Van of the Day" seen on the street outside. It was a way to lift spirits in a press room four stories up from armed guards stationed 24-hours-a-day outside a courthouse believed to be a terrorist target because of frequent terrorism trials.

Q: What are some of the best cases you covered?

A: Hard to say where to begin. Martha Stewart. Bernie Madoff. Repeated unsuccessful prosecutions of John Gotti Jr. Bill Cosby, largely cast in a positive light as he testified at a civil trial in the 1990s

and at the extortion trial of Autumn Jackson, a young woman whose mother claimed was Cosby's child and who Cosby admitted paying over $100,000 to support. He showed her no love and she was convicted. I remember that the criminal trial of boxing promoter Don King seemed over before it began when he was introduced to prospective jurors and he turned around, gave a broad smile and waved. Prospective jurors were instantly smitten. Outside the courthouse on a break, a homeless man approached him. With me at his side, King seemed momentarily flustered but – ever the showman – he pulled a $100 bill from his pocket and gave it to the man.

Major terrorism trials were highlights. Individual moments seem like yesterday. Like the day in April 2005 when Sheik Omar Abdel-Rahman and 11 co-defendants seemed gloomy and bewildered as their trial was briefly halted on news of a terror attack on a federal building in Oklahoma City. The jury was warned to ignore news of it. When the blind sheik was convicted, his attorney, Lynne Stewart, cried as the verdict was read. Years later, she was convicted herself for violating special administrative measures by letting a message from the sheik reach his supporters in Egypt.

Or the day when a Jersey City gas station attendant was asked to look around the courtroom and identify the two men who stopped at his station to get gas for the Ryder van that carried the bomb that blew up in a garage beneath the World Trade Center on February 26, 1993, killing six and injuring over 1,000 others. Invited to do so, he got out of the witness chair and walked around the well of the courtroom until he became fixated on the jury box to the horror of prosecutors. He stood looking at each juror before settling on two individuals in the jury box as the men he had seen. His testimony was paused. The next day, he was given an opportunity to return to the task and, remaining seated, quickly and efficiently chose two of the four defendants.

Then there was the day Judge Sonia Sotomayor ended the baseball strike in 1995 with a ruling from the bench in a courtroom so packed that I stood against a wall. Another favorite also involved Judge Sotomayor, when she presided over a trial stemming from a lawsuit by the family that inspired the film "Philadelphia," starring Tom Hanks and Denzel Washington. They maintained Hollywood interviewed them and then stole their story. As part of the trial, the movie was played in court. The mother whose son, an attorney, died of AIDS, cried as the scene played out in which Hanks' character goes to his mother to discuss suing the law firm where he had worked and his mother tells him she never raised him to sit in the back of the bus and remain silent. With Hanks and the film's director, Jonathan Demme, set to testify, the case settled. Terms were secret.

One particularly scary encounter for me came when Hall of Fame running back Jim Brown came to the courthouse in 2015 to get back his 1964 title ring. By then, reporters including myself were encouraged by our companies to use smartphones to get pictures when a staff photographer was not available. It was lightly raining as I snapped photos of Brown as he walked to a waiting car. He politely let me capture several final shots as he sat on a seat and tried to scoot backward, unable to pull one leg in. Frustrated, he asked me to push the leg as hard as I could. Breaking the rule to never get involved in a story, I tried to gently push the leg, all the time thinking: "Oh my, I can't believe I'm in danger of accidentally breaking the leg of an NFL legend." Fortunately, the leg stayed intact.

Some memorable moments occurred after hours, like when Supreme Court Justice Ruth Bader Ginsburg, an opera buff, seemed thrilled as she participated in a fictional courtroom scene featuring opera singers in the ceremonial courtroom at 500 Pearl Street.

Another moment to remember came in June 1999 when a defendant in the 1998 bombings of two U.S. embassies in Africa that killed 224 people, including a dozen Americans, abruptly sprang from a jury box where four defendants were being held for a pre-trial hearing and raced across the courtroom. The judge got out of his tall chair and stood behind it, using it as a shield, as it was unclear whether the defendant, Wadih El-Hage, was seeking to flee the courtroom or charge at the judge. Eventually, he was tackled by marshals and slammed against a wall, leaving a large welt on his forehead, where blood trickled

down. "My heart was pounding,'' said Jane Rosenberg, a courtroom artist who was seated in the well near the judge. "I was scared. I was shaking. He leapt like Tarzan."

Rosenberg became a center of attention years later when folks on Twitter objected to her drawing of quarterback Tom Brady before a judge lifted his four-game suspension only to be later overruled by the Second Circuit. (*See* https://www.npr.org/sections/thetwo-way/2015/08/13/432064785/tom-bradys-courtroom-sketch-spawns-internet-gold.)

The Martha Stewart verdict in 2004 was one to remember, too. TV producers created elaborate ways to run out of the courthouse and deliver the verdict to news crews stationed outside because no phones were allowed in the courtrooms or courthouse, including a massive overflow room. So the producers had arranged to wave one color of flag if the verdict was guilty and another if it went the other way. But somehow the colors got mixed up or some TV producers misunderstood them as each verdict was read aloud in the courtroom and some got it wrong, as Jon Stewart gleefully reported. (*See* https://www.cc.com/video/ofu1gc/the-daily-show-with-jon-stewart-jack-ass-reporting.)

Q: What is your view on the quality and extent of court coverage today?

A: It's never been better. When I first got to federal court, I said there were at least 10 great national stories I missed for every one I could find. Now, I'd say reporters are probably finding five to seven of every 10 good national stories. While I'm competitive, I cheer everything everybody unearths in the courts knowing that there are way too many stories for any one of us to do and all of us have different audiences.

Q: What's your advice to lawyers interacting with the press?

A: I'd always say set the ground rules that you can live with and always make sure the ground rules are well defined. And once that's done, assuming it's a reporter with a legitimate news organization, understand that reporters will honor those rules. Nothing would crush a reporter's career faster than a spoiled integrity.

Q: Any pet peeves?

A: I wish some of the big law firms were a little more sophisticated about communicating with the public through the media. There are probably some amazing personal stories at law firms that are never told. Some features worth telling. Some *pro bono* work worth highlighting. The media is not their enemy and they, unlike other professionals, are better educated

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and better equipped to ensure their message is properly delivered by the media to the public.

From the Editor

Thoughts on the Pandemic

By Bennette D. Kramer

In late March 2021, I talked to a friend who lives in Paris. She said that cafes, museums, and virtually everything else in Paris was closed. Plus, there was a curfew from 6 p.m. to 6 a.m., and every time she leaves home she has to carry a form that indicates where she is going and why. She said that her friends were feeling trapped and desperate after a year of on and off shutdowns.

My conversation with my friend took me back to the New York of March 2020.

When I left my office on March 13, 2020, I had no idea that I would not be back for over a year. I spent the first few weeks of the shutdown amassing groceries and adjusting to complete isolation. These were the days before Zoom meetings and walks with friends. As I began to realize that the shutdown was going to continue indefinitely, my friend Steve Edwards became sick with COVID-19. At first, he was at home, emailing and working, and then he went to the hospital. After a few days at the hospital, he was put on a ventilator and then days later he died. Here we were, all separated from each other, afraid to leave the house and hit with terrible grief. The shock was unfathomable. Less than six weeks before we had all been in the Bahamas at the Federal Bar Council Winter Meeting, sensing approaching danger, but unable to comprehend the extent of it.

As we tried to deal with our state of shock, the surrounding city, at least in Brooklyn where I live, was in a state of terror. There were no people on the streets. Traffic was nonexistent. Stores, except food (and liquor) stores, were closed. The city was a ghost town. Even worse, ambulance sirens were constant, and there were makeshift morgues next to the hospital emergency room and at funeral homes.

Getting groceries became a struggle. After a rush on grocery stores that ended in mid-March, ordering groceries became the norm, but it also turned into an effort as online grocery providers became overwhelmed. Sometimes orders would arrive without half the things one needed or with substitutions that made no sense. This was after waiting weeks for a delivery time slot. After several weeks of this, I began sneaking into the grocery store early in the morning, spending no more than 15 minutes. I was lucky because I already had a supply, but many people were caught short of toilet paper, flour, baking powder, and other odd things. It was a relief when the shortages eased up and supplies began to appear again.

Governor Andrew M. Cuomo issued an executive order requiring all people in New York to wear masks or face coverings in public on April 15, 2020. I remember scrambling to find masks that would not deprive the health service workers of the protection they needed. A dry cleaner near me was making and selling masks. Buying one was like going to a speakeasy –knock on the door and a furtive figure opened the door a couple of inches and peeked out. After you announced you wanted a mask, one was put on a lacrosse stick and put out the door; payment was voluntary.

Masks

Following the advent of masks, the sight of an unmasked person struck terror to the heart, prompting a quick duck into the street. During March, April, and May, with the sirens and daily reports of the number of people hospitalized and dying as background, I felt constant anxiety bordering on panic. A bright spot in every day was the 7 p.m. "gathering" of neighbors on their stoops (in Brooklyn), in windows, and in front of our local nursing home to pay tribute to the essential workers who were caring for the sick. People clapped, played drums, sang, and raised the spirits of the neighborhood.

Everyone turned to books and Netflix for diversion. We all figured out how to use Zoom to "see" colleagues and friends again. Working at home became the norm. There were many challenges for parents of young and primary school aged children, including how to manage work and monitor remote school, and other challenges for people who live alone. I remember an Instagram posting by my niece, an occupational therapist working remotely, of a video of her facing her computer with her five-year-old son literally bouncing in the background.

As May turned into June, the weather improved, the sirens slowed down, and we all got more accustomed to the lockdown. On June 8, New York City began the first phase of reopening. Now, we could meet with friends outside. I had many lunches on my deck with friends starting in June and continuing long into the fall. At the same time, people began to relax as the number of new cases dropped. For me the isolation was tempered by weekend visits to my daughter out of the city and a nearly three-week trip to Michigan where we had conversations on the beach and small dinners on the porch.

The summer was overshadowed by the deaths of George Floyd, Breonna Taylor, and others at the hands of the police. The demonstrations and police reaction to them created a tension between those who believed that police violence against Black citizens had become a pandemic of its own and those who tried to paint the demonstrators as left-wing rabble rousers who wanted to do away with the police. The demonstrations were uplifting despite police brutality; the reasons for them were disheartening.

Routines

After September, people seemed to settle into routines. Many kids were back in school at least a few days of the week, Zoom meetings were the norm, and everyone seemed busy. We were partly relieved because the pandemic had seemed to ease over the summer.

That relief disappeared as winter set in and the pandemic worsened as people met indoors and then traveled for the holidays. Then, hope appeared in the form of vaccinations against Covid-19. We now must be patient while we wait for everyone to become vaccinated.

We must also think toward the post-Covid era. I thought that I alone was suffering from fuzzy-headedness until I listened to the Christa Tippet program, "On Being." She said that many people seem to be currently suffering from loss of concentration and memory gaps. I thought, "Aha! I am not alone." Then David Brooks, in an April 1, 2021 column in The New York Times, wrote:

> I've got the same scattered memory issues many others in this Groundhog Day life describe: walking into a room and wondering why I went there; spending impressive amounts of time looking for my earbuds; forgetting the names of people and places outside my Covid bubble.
>
> Now I wonder, What is in the future for us? How can we go back to our old lives?

COVID-19

Remembering Steve

By Robert J. Anello, Bettina B. Plevan, David R. Schaefer, and George B. Yankwitt

March 20 would have been Steve Edwards' birthday. He died almost one year ago, an early victim of COVID-19. His death left a void in the hearts of his loving wife, Robin, and three children. But he also left a void at the Federal Bar Council, where he was indeed a towering figure for a generation and became a close lifelong friend and confidant of many. He also exemplified the spirit that makes the Federal Bar Council the special organization it is to judges and lawyers.

Steve served as treasurer and then president of the Council. But that does not begin to measure his special contributions.

Thirty years ago, the *Federal Bar Council News* (now, the *Federal Bar Council Quarterly*) was Steve's idea. He envisioned a new and effective way to communicate with members. He got that publication started almost by himself and over some objection and went on to serve as its founding editor for

many years to follow. He was also the author of countless articles in the *Quarterly* that were thought provoking and fearless.

Steve was one of the first to suggest that the Council sponsor an Inn of Court and he long served as one of its most active members, usually writing and performing in many of the Inn's presentations.

The planning committee for the Council's Winter Bench and Bar Conference pre-dated Steve's involvement but for 35 years no one was more active than Steve. He typically planned at least one program at each conference, and could always be depended on to write a script. He chaired one of the winter conferences more than 30 years ago. Many of us remember the night at a winter meeting when Steve picked up his guitar and famously sang "Old Time Rock 'n' Roll." Thereafter, Steve could always be depended on to gather friends for a late-night cocktail and song.

When presidents serving after Steve questioned the direction of the Council, Steve would be the first to serve on a long-range planning committee.

Steve's professional contributions outside the Council are too numerous to mention. He was awarded the Council's Whitney North Seymour Award for that service and we recall his memorably saying, in response to a long list of pro-bono activities, that to get something done, ask a busy person.

Unfortunately, a recitation of Steve's contributions to the Council and other organizations does not capture Steve's character, always worrying about others, trying to get others involved both for their benefit and the organization, reaching out to all, knowing the difference between right and wrong, never being afraid to speak on an issue as he saw it, and always trying to be inclusive. We miss him terribly and trust his spirt lives on in those he befriended, mentored, and inspired.

Steven M. Edwards

From the Bench

An Updated View from the Other Side

By Judge P. Kevin Castel

In February 2005, after a year on the bench, I was asked to write a tell-all article for this publication unlocking the secrets of the federal judiciary from the vantage of one who had deep roots in private practice. Recently, I was asked to update my report. I was too embarrassed to tell my friend Judge John F. Keenan about the assignment. He is nearing the 38-year mark. My 18 years doesn't quite make it to half his service.

When judges gather for lunches or meetings there is an atmosphere

of joy, sort of a collective appreciation for how fortunate we are to be doing interesting and important work. There is palpable feeling of admiration for a colleague's latest triumph in the Circuit or completion of a difficult trial. There is nothing to feel competitive about. Judges never lose a case.

The camaraderie extends to extracurricular activities. Judge Sid Stein and I raced each other through a Moscow airport juggling luggage to catch a flight to Yerevan, Armenia – he is quite the sprinter. We co-taught seminars for local judges there and on another occasion in Bahrain. The flights are grueling, but the rewards are many, including home cooked meals prepared by new friends. I have had similar teaching adventures in Kuwait, Tunisia, and Morocco. No travel service could provide the warm exchanges with the local judiciary. Judge Loretta Preska and I were able to reciprocate the hospitality when two years ago we hosted, on behalf of the court, 93 judicial visitors from 23 countries for a meeting of the Standing International Forum of Commercial Courts.

Committees

A year ago, during the height of the pandemic, Judges Paul Oetken, Vince Briccetti, and I were appointed as a three-person Ad Hoc Committee on the Resumption of Jury Trials. We developed a strong friendship from our weekly meetings and are very proud that with hard work by Clerk's Office and District Executive staff, our district has conducted 16 jury trials from September 2020 through March 2021 and scheduled well over 100 more trials that have been resolved by plea or settlement. Other committee work (the District's 225th anniversary) turned the late Judge Debbie Batts from a colleague into a dear friend. Judge Stanton and I have been friends and members of the court's Grievance Committee for many years. (He has one of my favorite lines about courtroom advocacy: "It's best not to annoy the mind you're trying to persuade.")

Presently, I serve as chair of the New York State-Federal Judicial Council that addresses issues at the intersection of the two judicial systems. Judges Jenny Rivera and Michael Garcia of the New York Court of Appeals are two of the many state judges with whom I've enjoyed working. The council and its advisory group are at work on judicial security legislation, information sharing between state and federal attorney disciplinary systems, and quality continuing legal education programs.

It is a gift to work with talented law clerks. Thanks to annual turnover, my stories never get stale and jokes never get old. I learn from them about favorite books, great series on Netflix, and what to do if my iPhone seemingly dies. In turn, they learn the folklore of the Mother Court going back to the Old Post Office at the foot of City Hall Park. With each new clerk arrival, there is a meshing of writing styles and work styles. There is an environment of open discussion, and disagreement is welcomed. It invariably leads to a better reasoned opinion. I can now count 40 law clerks as members of my judicial family, with genuine affection flowing in all directions.

That is in addition to my career law clerk and deputy clerk who came with me from "the old country" (as I refer to my former law firm) and provide me with balance, continuity, and friendship. It is hard to describe the good feeling when former clerks gather. They are my collective memory because they remember with precision the mood in the courtroom when a dramatic – or sometimes comedic – moment unfolded.

Sentencing

So it is all peaches and cream? Well, not really. There is something physiological about sentencing. It is not about how smart or compassionate you are. Your core being – all that you have lived and experienced – must be fully present for this moment of singular importance in a human's life. You alone make the call. Reversals on sentencing are rare. There is a swirl of competing considerations – understanding human frailty and fallibility, deterrence, just punishment, acknowledging the direct and indirect victims, realizing the impact of incarceration on innocent families, shades and degrees of remorse or lack thereof. You cannot allow yourself to get too comfortable and let sentencing become routinized. The worst feeling for a judge would be to have lingering regret over unwarranted leniency or harshness.

A word about civil cases. I have learned that lawyers have different expectations for civil conferences. Some would prefer to arrive, have the judge approve a pre-negotiated schedule, and get out with appropriate pleasantries and smiles all around. But Rule 16 places a broader responsibility on the judge. The judge must learn about the claims and their legal and factual support in order to take "appropriate action" in "formulating and simplifying the issues, and eliminating frivolous claims and defenses." (That is a direct quote from Rule 16(c)(2(a).) Most lawyers shine in these conferences. But not all are up to the task, some because of lack of preparation and others because there are no good answers to some questions. Eggs are occasionally broken in making this omelet. This often leads to discussion of a process to get the case resolved. In turn, this may lead to an agreement for a face-to-face meeting of principals and attorneys with a meal served – a meal promotes civility. Other times, parties leave the conference with an agreed date for mediation. When parties save time and money through an early resolution of a dispute, they are achieving Rule 1's goal of a "just, speedy, and inexpensive determination" of an action.

If motions need to be ruled on, so be it. It is an important part of the job. Westlaw tells me I have over 1,500 written opinions, about half of Judge Keenan's number. It is quite liberating being a judge rather than an advocate. As a lawyer, you are constantly trying to fit round pegs into square holes, trying to make the facts meet the legal standard. But a judge need only get it right. If the facts do not fit the controlling law, then you simply must rule accordingly. Judges are paid good money to be indifferent to the outcome.

Trials, civil and criminal, have a way of surprising even the judge. Seemingly simple cases often have fascinating personalities, insights into a world rarely seen or unexpected twists that a high-profile matter may lack. It all depends. I never cease to be amazed at the work of our juries. In a country where 12 people cannot seem to agree on a pizza topping, jurors are usually able to reach a just and prompt verdict. The moments before and during the taking of a jury verdict are always high drama. Our system, even with its flaws, is the envy of many.

Finally, I see many friends in private practice – and now some in the state judiciary – nudged toward retirement at a young age and I realize how fortunate I am to work in a system that allows judges to do productive work as long as they are able. I feel gratitude for the ability to serve in a significant and satisfying way on what Judge Edward Weinfeld described as the "greatest trial court, bar none." I have deep appreciation for the many mentors and friends who guided me along the way. They have inspired me to strive to do the same for members of the next generation of law students and lawyers.

Editor's note: Judge Castel's 2005 article for us is online at https://www.federalbarcouncil.org/FBC/Publications/Quarterly/Federal_Bar_Council_News_-_February_2005.aspx.

In the Courts

Chief Judge Livingston Takes the Reins

By Anna Stowe DeNicola and Pete Eikenberry

Although the elevation of a circuit judge to chief is solely based upon a seniority formulation, no one may quarrel with Chief Judge Debra A. Livingston's academic credentials or relevant experience. She had a superior record at Princeton and Harvard Law where she was an editor of the law review. She had trial experience at the U.S. Attorney's Office in the Southern District, and at Paul Weiss. She was a top-rated law professor at Michigan and still is at Columbia. She

gained administrative credentials as chair of the Budget Committee under Chief Judge Katzmann and was in fact chief operating officer of Columbia Law School as vice dean.

Her diverse interests allow her to engage and be empathetic with almost anyone. Her favorite mentor was Harvard Professor Sally Falk Moore. She took off a year between her 2L and 3L years at Harvard to work for the United Nations High Commissioner for Refugees, on issues related to the resettlement of Cambodian refugees, in Bangkok, Thailand. She was a commissioner on the New York City Civilian Complaint Review Board for almost a decade.

She has all the attributes of a great listener. She calls upon her students by name and loves teaching in part because students challenge and explore ideas, keeping her on her toes. At the Civilian Complaint Review Board there was a controversy as to whether full metal jacket bullets or hollow points should be used in a particular circumstance; she insisted upon an actual demonstration with live ammunition to fully understand the issue.

Her comfort in almost any circumstance was enhanced by her family's frequent relocation to follow her father's career. She attended eight schools in six different cities before graduating from high school. As a young person she always wanted to be a lawyer, although there were no lawyers in her family and she had never met one. Her early determination along these lines came from reading books such as a biography of Clarence Darrow. These diverse experiences and attributes uniquely position her to lead the Second Circuit through a particularly challenging time.

First Impressions: "Debra Livingston Is a Great Person"

Judge Raymond Lohier's opinion encapsulates the feelings of many. He first met Chief Judge Livingston when he was an Assistant U.S. Attorney, while attending one of the circuit's Judicial Conferences in the late 2000s. He worked with Chief Judge Livingston's husband in the U.S. Attorney's Office and was aware he was married to a judge but did not know who she was. They sat together for dinner on the first night – thanks to the traditional open seating – and he recalls a "most wonderful conversation" in which they discussed books, life experiences at the U.S. Attorney's Office, and mutual friends and acquaintances. Judge Lohier reflects on this meeting as a fortuity of career paths, and walked away with the impression that Chief Judge Livingston was personable, willing to sit and talk with anyone, and a kind, down-to-earth, and unassuming person.

Similarly, Chief Judge Livingston's long-time colleague and friend Circuit Judge Gerard Lynch recalls the first time meeting her in the 1990s. Judge Lynch at the time was chief of the Criminal Division in the Southern District. He remembers walking into Courtroom 110 at 40 Foley Square while then-AUSA Livingston was rehearsing her summation for the Imelda Marcos trial. When observing her moot, he thought she was great – she gave "a wonderful performance, magnificent even in its draft form. [It] was obvious that she was a rising star."

Debut During COVID-19

There is perhaps a common misconception that the chief judge is the "chief" of the judges. This is not so. In addition to judging, a chief judge is the head of the administrative side of the courts, distinct from the primary mission of the courts, which is to decide cases. The chief judge sets schedules, manages timetables, and keeps the trains running on the administrative side, overseeing the clerks, library operations, staff attorneys, and this year – most critically – the court's response to COVID-19.

The chief assumed the position during one of the most difficult crises the circuit has faced. In addition to addressing the most obvious challenge, the ongoing pandemic, she is presiding over a "tectonic communications shift." For a court still heavily reliant on fax communications in chambers, the pandemic forced technology changes overnight. From the way judges communicated amongst themselves and with counsel to how to proceed with oral arguments, every aspect of technology has been examined.

When the pandemic first hit, then-Chief Judge Robert Katzmann brought Chief Judge Livingston in immediately. Together they established a COVID Committee, along with Judge Lohier (who will eventually succeed Chief Judge Livingston as chief), Judges Denny Chin and

Richard Sullivan, Circuit Executive Michael Jordan, and Clerk of Court Catherine Wolfe. First and foremost, they had to focus on the safety and health of the entire courthouse family, then figure out how to keep the business of the court moving forward in a remote context.

Judge Lohier stated that Chief Judge Livingston was instrumental in this effort, listening to each concern and eventually persuading everyone to pivot to telephone and eventually Zoom arguments. She focused on the science, and the COVID Committee relied heavily on the counsel of an epidemiologist as it redesigned courtrooms and workspaces. The committee now is shifting focus to how and when to return to the courthouse.

In addition to the immense challenges of the pandemic, the court has confronted enormous personnel transitions on the bench. Three judges have assumed senior status, creating three vacancies on the court, and the court has faced the passing of Judge Ralph Winter and most recently Judge Peter Hall. For a famously collegial and close-knit bench, it was challenging to lead the court through these tragedies in a remote environment.

The chief judge plays a pivotal role in setting the tone of collegiality and collaboration on the court. This begins with nurturing existing traditions and relationships and extends to onboarding new judges. Chief Judge Livingston may be well positioned to play this role, as evidenced by her close friendship with colleagues such as Judge Lohier, despite the fact that they have been on opposite sides in several en banc decisions.

No new judges have joined the court so far during Chief Judge Livingston's tenure as chief judge. Nevertheless, her colleagues observe that she has demonstrated an enviable example, and guided the newest judges, by her leadership at quarterly judges' meetings. In addition, Chief Judge Livingston encouraged members of the bar to meet the new judges by asking the Federal Bar Council to facilitate virtual introductions of the new judges to members of the bar (the impetus for the Council's new "Coffee & Conversations with the Court" series).

How Did She Get Here?

Chief Judge Livingston was brought up in a supportive and very close-knit family. She is the oldest of three children (she has two younger brothers). Her parents, currently in their 80s, married in their teens. Her father worked for AT&T and her family moved a lot for his job and career. Among the many places she lived as a child were Atlanta, Georgia; Louisville, Kentucky; Nashville, Tennessee; Birmingham, Alabama; and Miami, Florida. Chief Judge Livingston found her family's frequent moves to be formative, and she is glad to have been exposed to different parts of the country where she experienced different places and met a lot of people. This helped her gain a sense for the differences between parts of the country and gave her a broader perspective on people. She also feels that the diversity of her childhood helped build her confidence to handle new situations.

Reading has played a central role in her life. She describes herself as an avid reader as a child. Some of her fondest memories are of the bookmobile in the library parking lot in the summertime. Reading and books led to a commitment to making the world a better place (she knew she ultimately wanted to go into law and applied to law school right out of college). On her shelf today are a biography of Winston Churchill and Gerald Gunther's biography of Learned Hand, which she is reading in preparation for the remarks she will give upon receipt of the Council's Learned Hand Medal at this year's Law Day Dinner.

Chief Judge Livingston graduated from high school in Miami, Florida, where she was editor-in-chief of the school newspaper. She spent her summers working as a clerical assistant in the Miami-Dade County State Attorney's Office where she was sufficiently adept at clipping newspaper articles about the office that Janet Reno kept her doing so, as a "remote job" through college. She excelled at Princeton, where she graduated magna cum laude in three years. She was a member of Phi Beta Kappa and a member of the University Press Club. She was a "stringer" for the Associated Press and wrote pieces for several local papers.

She maximized her time at Harvard Law School. She views her year in Bangkok as very meaningful. She was hired by and worked at the United Nations High Commissioner for Refugees for the noted South African civil rights lawyer

Shun Chetty, who represented the family of Steve Biko, along with many anti-apartheid activists, before fleeing South Africa and joining UNHCR. She was hired to observe INS officers interview Cambodians seeking resettlement to the United States under the Refugee Act. It was an eye-opening experience. And in law school, she served as an editor of the Harvard Law Review and graduated magna cum laude.

Several people have served as important mentors for Chief Judge Livingston. In addition to Professor Falk Moore, Judge J. Edward Lumbard, for whom she clerked following law school, helped shape her legal career. Finally, she credits many colleagues from her time at the U.S. Attorney's Office for helping her develop and shape her trial skills.

Teaching

Teaching has always been an important part of Chief Judge Livingston's life. Her affinity for teaching and the academic environment began early and was solidified in law school. She was a teaching assistant at Harvard for Professors Clark Byse, Archibald Cox, and Lloyd Weinreb, teaching students in contracts, moral philosophy, and constitutional interpretation. In her words, she loved it! She currently teaches a course on the Fourth, Fifth, and Sixth Amendments. She has co-taught many seminars over the years, including a seminar with Professor Harold Edgar on national security in the wake of 9/11. She regularly teaches a seminar with her colleague Judge Lynch on appellate advocacy.

In addition to being extremely well-regarded as a teacher (she won the L. Hart Wright Award for excellence in teaching while at Michigan), Chief Judge Livingston is a leading scholar on criminal procedure, a preeminent expert on the Fourth Amendment, and has contributed significantly to scholarship over the years not only with a prominent casebook (currently in its fifth edition, co-authored with Ronald Allen, Joseph Hoffmann, Andrew Leipold, and Tracey Meares), but also with important articles on subjects such as post-9/11 racial profiling and policing. She is known to provide a thoughtful and balanced approach on issues "despite" coming from the prosecution side. Judge Lynch and Professor Edgar describe her as a dream to work with – thoughtful, collaborative, and energizing in the classroom.

Academia provides important balance to her role on the bench. She loved working as a lawyer and is very enthusiastic about the role of lawyers in the appellate process, where she sees effective advocacy helping the judges understand the case more clearly, so as to reach the right result. But teaching provides an avenue for her to think and shape her ideas, because students are predisposed to think openly and deeply about issues, and as such challenge her perspectives.

Service on the Civilian Complaint Review Board

Chief Judge Livingston served on the New York City Civilian Complaint Review Board from 1994-2003. She was a mayoral appointee to the commission and served alongside Eastern District Judge William Kuntz for many of those years. Judge Kuntz remembers her as a sophisticated commissioner, who brought to the table her diverse experiences in the U.S. Attorneys Office, academia, and private practice. He described her "interstellar interactions" with police, public, law enforcement, and the academy.

Service on the CCRB provided fertile ground for developing skills that would serve her on the bench. The ability to observe and be thoughtful about competing points of view was important to her success as a commissioner. Her fluency working with peers was one element of her success, and at the commission she developed an ability to influence them through her integrity, intellect, and analysis. Grappling with the cases before the CCRB was not dissimilar to the role of a district court judge in that the commissioners always had to "start from a clean slate." This baseline required the commissioners to dispense with preconditions or preconceptions as they examined cases because each required the commission to sift through the facts of the situation as often the scenarios and details were very muddled.

Appointment to the Second Circuit

In 2007 then-Professor Livingston was appointed to the Second Circuit, succeeding Judge John Walker. She remains a faculty member at Columbia Law School, and in addition she served as a member of the Judicial

Conference Advisory Committee on Evidence Rules beginning in 2014. Chief Justice Roberts appointed her the chair of that committee in 2017, and she served in that capacity until 2020, when she became chief.

Projects and Initiatives

Chief judges, of course, can have external goals and projects they wish to accomplish during their tenure. Judge Walker oversaw the renovation and revitalization of the Thurgood Marshall Courthouse, and Judge Katzmann established the Justice For All: Courts and the Community initiative. What may we expect from our current chief?

Her clear first priority is to continue guiding the court through the pandemic. She is focused on "COVID operations" and ensuring the court emerges with its docket and relationships intact and in good shape. She is also looking forward to restaffing the court for in-person operations. From meetings with epidemiologists and retrofitting courtrooms, to reimagining workspaces and drafting rules and protocols and guidelines for in-person arguments, this will be a busy period. She is not tackling this alone; the COVID Committee remains intact and continues to work collectively. Chief Judge Livingston also looks forward to resuming other community engagement events such as the Court's lecture series and panel discussions.

Projects she hopes to initiate during her tenure stem from her recognition that we occupy a challenging, polarizing time in history. She is thinking about how the legal community can come together to ensure equal justice before the court, increase access to justice, and demonstrate a commitment to the rule of law. Also on her mind is increasing the bar's commitment to public service and *pro bono* service and increasing opportunities to be in court. An improvement in the adequacy of representation is another goal. She is thinking about ways to marry these ideas to concepts and provide improved access to justice for all.

In her mind, the values that bind us together as a country are a commitment to rule of law and to legal principles. She recognizes the considerable stress our country faces and thinks about how she can support an inquiry into this area in her role as chief judge. Already she is prioritizing this inquiry through co-chairing and participating in the Council's Rule of Law Symposium this May.

Conclusion

Chief Judge Livingston is as prepared as anyone could possibly be to take the helm of the Second Circuit. It is not just her diverse experiences or her stellar credentials, though, that make her so well positioned to lead the court. She is an exceptional listener, colleague, collaborative thinker, and consensus-builder. She leads by example and, as her colleagues have acknowledged, is highly adept in her understanding of people and situations. Perhaps most importantly, especially during this trying time, she is very thoughtful and truly cares about the views of others.

What more could the court ask for in a leader?

In the Courts

Council Celebrates New Eastern District Chief Judge Margo Brodie

By Travis J. Mock

On March 11, 2021, the Federal Bar Council held a celebration of Chief Judge Margo Brodie, the new chief judge of the U.S. District Court for the Eastern District of New York. Chief Judge Brodie replaced Chief Judge Roslynn Mauskopf, who earlier this year was appointed to serve as director of the Administrative Office of the U.S. Courts.

The celebration of Chief Judge Brodie was attended via videoconference by over 230 guests. After opening remarks by the Federal Bar Council's president, Jonathan Moses, Chief Judge Brodie was commemorated by three leaders of the Eastern District's bench and bar: Judge Carol Bagley Amon, Judge Sterling Johnson, and former U.S. Attorney General Loretta Lynch.

Commemoration

Judge Amon began by honoring Chief Judge Mauskopf's service to the Eastern District. Though she served as chief judge for just one year, Chief Judge Mauskopf guided the Eastern District through the turbulent initial response to the COVID-19 pandemic and left the court in a position of strength.

Turning to Chief Judge Brodie, Judge Amon expressed her absolute confidence that Chief Judge Brodie is equal to the challenge of serving as chief judge. Judge Amon praised Chief Judge Brodie's knowledge of the Eastern District and her distinguished career in private and public service. After recounting Chief Judge Brodie's deft handling of the early days of her transition, Judge Amon remarked that Chief Judge Brodie "has our respect not only because of [the judges' respect for the position], but because in the early days of her tenure, she's earned it."

Judge Johnson began by reflecting on the historical significance of Chief Judge Brodie's appointment. He recalled being inspired when, as a young Assistant U.S. Attorney in the 1960s, he appeared before Southern District Judge Constance Baker Motley, the nation's first African-American federal judge. After ascending to the bench himself, Judge Johnson first encountered Chief Judge Brodie when she appeared before him as a young prosecutor about 20 years ago. Even then, he recalled, Chief Judge Brodie exhibited a command and professionalism that reminded him of Judge Motley.

Over the years that followed, Judge Johnson became a mentor to Chief Judge Brodie. He recalled with particular fondness her mentorship of young Assistant U.S. Attorneys. Known to the office as "Mother Margo," Chief Judge Brodie instilled her work ethic and professionalism in everyone who worked for her. "She was there when the young Assistants arrived. She was there when they left. And they adored her."

Loretta Lynch began her remarks by recalling her first meeting with Chief Judge Brodie over 20 years ago. Chief Judge Brodie interviewed with Ms. Lynch when she applied to be an Assistant U.S. Attorney in the Eastern District of New York. Ms. Lynch recalled Chief Judge Brodie explaining, "in no uncertain terms, why she would be an outstanding AUSA. And as so often with Margo's pronouncements, she was absolutely correct."

Lynch praised Chief Judge Brodie's clarity, discernment, and empathy. Lynch also highlighted Chief Judge Brodie's excellence as a mentor and her professionalism as a colleague. Chief Judge Brodie, Lynch said, is like "everyone's favorite aunt. The one you can call on when you need wisdom and support. The one who makes every litigant feel heard. The one who dispenses justice for all. "There is no one," Lynch concluded, "better suited to lead the Eastern District out of the pandemic period."

An Inspiration

Chief Judge Brodie began her remarks by thanking the evening's speakers for their mentorship throughout her career. She also praised her predecessor, saying that Chief Judge Mauskopf's work has left the court operating "at the highest standard."

Chief Judge Brodie expressed her hope that her achievement as the first black woman and first black chief of the Eastern District would serve as an inspiration to others. She recounted that she began her life in Antigua with no ambitions of being a judge. "Anyone who says the American dream is dead doesn't know my story," she said. "I didn't expect to the be the first of anything, just the best lawyer that I could be. But being the first means that the door is open for those who come after me."

After acknowledging individually the many groups who contribute to the work of the Eastern District, Chief Judge Brodie concluded, "I can promise you that you will always have my best work. And all I ask in return is that you give me your best work also. And we will continue to be the family that we are."

Conclusion

In a touching conclusion, the videoconference mics were unmuted and colleagues, friends, and family from around the world clambered to offer their blessings and well wishes.

The Council will compile the speakers' remarks as well as the text chat comments from the event into a commemorative book for Chief Judge Brodie.

In the Courts

Andrew E. Krause Is New White Plains Magistrate Judge

By Lisa Margaret Smith, U.S. Magistrate Judge (ret.)

Andrew E. Krause was sworn in as a U.S. Magistrate Judge for the Southern District of New York on October 8, 2020. He assumed the seat in White Plains previously held by this author, following my retirement on September 30, 2020. Magistrate Judge Krause joins U.S. Magistrate Judges Paul E. Davison and Judith C. McCarthy in the White Plains Courthouse.

Magistrate Judge Krause was raised in Great Neck, on Long Island. He was an only child and was very close to his parents, who inspired him to pursue a career with public meaning and purpose. They modeled the importance of caring about what you do, and fostered in Judge Krause the notion that work should be important both to other people and to society as a whole.

Magistrate Judge Krause laid the foundation for a public service career by graduating *cum laude* from Yale University in 2000; he was awarded the Roosevelt L. Thompson Prize at commencement for commitment to and capacity for public service. Throughout college he worked with different non-profit organizations in various capacities, including positions which addressed low income housing, housing policy issues, and he worked directly with people recovering from addiction, and with persons in need of education and job training. During the summer following Magistrate Judge Krause's sophomore year he undertook a position sponsored by the Yale Alumni Association, living in a halfway house in Chicago with men who were recovering from addiction. He considers that experience to have had formative effect in his life.

Between college and law school Magistrate Judge Krause was selected for the New York City Urban Fellows Program, during which time he worked in the Office of the Mayor of the City of New York. After the fellowship program ended, he extended his stay in the Mayor's Office, where he worked for approximately two years in all.

Magistrate Judge Krause attended Harvard Law School, from which he graduated *magna cum laude* in 2005. While at law school he was a member of the Board of Student Advisers, serving as a mentor for small groups of first year students, as well as performing as a teaching assistant in the first-year legal research and writing program.

Magistrate Judge Krause began his formal legal career as an associate at Davis Polk & Wardwell, LLP, commonly known as Davis Polk. He had also been a summer associate there. He interrupted his time at Davis Polk after a year to work as a law clerk to U.S. District Judge Stephen C. Robinson, then sitting in the federal courthouse in White Plains. After his year with Judge Robinson he returned to Davis Polk, where he continued to work for five more years, until 2012. While at Davis Polk he served as a mentor to junior attorneys, and he followed his interest in *pro bono* work, which included several types of litigation matters, assisting the Legal Aid Society with structural and policy issues, and working on voter assistance issues as part of the Lawyers' Committee for Civil Rights Under Law's Election Protection coalition. His *pro bono* work was acknowledged repeatedly, as he was awarded the Legal Aid Society's *Pro Bono Publico* award for outstanding public service five separate times.

An AUSA

In 2012 Magistrate Judge Krause accepted a position as an Assistant U.S. Attorney in the Civil Division of the U.S. Attorney's Office for the Southern District of New York, where he represented the United States, its agencies, and its employees in all phases of defensive and affirmative civil litigation. His excellent work was acknowledged by his promotion to senior litigation counsel, where he assisted in the supervision of bench and jury trials, advising junior AUSAs regarding all manner of issues, and organizing and coordinating the Civil Division's in-house training program. At various times during his tenure in the U.S. Attorney's Office, Judge Krause also served

Andrew E. Krause

as the professional responsibility officer and e-discovery coordinator for the Civil Division. Among other awards, Magistrate Judge Krause received the Department of Justice's John Marshall Award for Outstanding Legal Achievement for Participation in Litigation in 2018.

Magistrate Judge Krause reports that he feels that his range of work experiences he has had have prepared him for his position as a magistrate judge. In particular his civil practice at Davis Polk and in the U.S. Attorney's Office, including both affirmative and defensive cases in a wide variety of areas, has given him a broad understanding of cases that now come before him. His varied civil practice included appeals, trials, hearings, settlement conferences, and extensive motion practice, as well as work on large corporate matters, securities litigation involving high volume discovery disputes, and a mass tort matter that amalgamated nearly 100 different personal injury cases. He has tried multiple cases and had arguments and settlement conferences before the magistrate judges of the Southern District of New York who are now his colleagues. All of these varied experiences provided him with a clear understanding of what the job of magistrate judge might include, but even with those experiences he has found that he has had to roll up his sleeves and jump into cases presenting new issues; his prior experiences provided him with the tools to do just that.

Trials Scheduled

Magistrate Judge Krause reports that he has had to learn the job of magistrate judge while also dealing with the limits imposed by the COVID-19 pandemic. His chambers at the courthouse are on the second floor, and a new courtroom is being built on the second floor for his use, but is not yet complete. Ordinarily the delay in access to his courtroom would have limited his ability to try cases, but in the world of the pandemic jury trials in White Plains can only occur in certain specified courtrooms, requiring careful scheduling of trials for the five district judges and three magistrate judges. Magistrate Judge Krause has several trials scheduled in the next few months, and he is looking forward to experiencing a trial as a judge rather than as a

litigant. He, like the other judges in the district, conducts most of his civil and criminal matters by telephone or video conference, and has conducted only a few in person matters so far. Despite the challenges of the pandemic, Magistrate Judge Krause is enjoying his new job, and he looks forward to seeing more people in the courthouse in person as soon as it is possible.

What's On Your Wall?

Walter LaFeber: Legendary Historian, Generous Mentor, and Lifelong Friend

By C. Evan Stewart

Dating from the 1960s, Walter LaFeber has been the nation's preeminent scholar in the history of American foreign policy. Recipient of the Beveridge and Gustave Myers awards, the Bancroft and Ellis W. Haley prizes, and the American Historical Association's 2013 Award for Scholarly Distinction, Walt was a legendary teacher of generations of Cornell students. For the last 50 years, I was Walt's student and friend, and the accompanying picture graces my office wall.

In the second semester of my freshman year at Cornell (spring 1971), I had the incredible good fortune of having Professor LaFeber lead my tiny freshman seminar. I did not realize at the time how lucky I was to be in a class with this great scholar every week, having him grade my weekly essays, and to be drawn into his gentle but utterly absorbing approach to the understanding of American history.

That began a procession of LaFeber courses – his famous two semester survey of American foreign policy, his advanced seminar, the history honors program, and finally a tutorial course in my last semester of reading American history books that "had to be read." I will never forget the oral defense of my honors thesis before Walt and my other history mentor, Joel Silbey. Petrified to be under the gun before these two intellectual giants, both men gently fed me softballs and I somehow survived the historical interrogation.

Unlike many of Walt's students who went on to pursue academic or diplomatic careers, I went on to law school. But we never lost touch. Indeed, Walt always remembered how I house-sat for him in the summer of 1977 when I was studying for the bar exam.

Life as a young associate in New York City did not allow for a lot of free time, but with Walt's help I stayed current, not only with his scholarship, but with other leading works in the field. One wonderful side benefit was the sparking of a decades-long written correspondence between us which now fills file drawers (unthinkable in today's email era). Walt encouraged me to join the Society for Historians of American Foreign Relations ("SHAFR"); and in the aftermath of the Enola Gay exhibit disaster, he engineered my going on the board of trustees of the American Historical Association. Walt was also instrumental in my gaining membership in the Council on Foreign Relations.

The author and Professor LaFeber at a Cornell graduation.

Generous of Spirit

One of the highlights of my life came when Walt gave his inaugural address as president of SHAFR in 1999. Focusing on the critical role William Henry Seward played in formulating the basic blue-print of American foreign policy, I was stunned to see him publicly cite to an article I had published on Seward (in the *Federal Bar Council News* (April 1998)). When I expressed my (astonished) gratitude, Walt's reaction was typical: "Why are you thanking me? You did the work." As scores of LaFeber disciples can (and will) attest, that graciousness and generosity of spirit was typical of this special man.

For many, many years, on my frequent trips to Cornell one night was always devoted to a visit to Walt's beautiful house (overlooking the gorge), where we would catch up over a glass of wine and then head to dinner at his favorite restaurant. A few years ago, when I had some extra time free, we took a trip to the Auburn, New York, home/museum of our mutual hero, W. H. Seward. The highlight of that experience was our frequent correcting of the tour guide who got historical details not quite right!

As Walt's health was failing, I wanted to do something to honor this man who has been so important to me for so long. Thankfully, he lived to see the establishment of an endowment in his name at Cornell. His response was typical Walt: "Your proposal obviously knocked me out [and is] uncommonly generous. . . . My health is not the best right now, so I cannot try to thank you in person and this will have to do for awhile, but Sandy [his wonderful wife] and I want you to know how much we treasure this place because of you."

Walter LaFeber died on March 9, 2021. He was a wonderful man; I will miss him terribly.

COVID-19

The Show That Did Go On

By Sarah L. Cave, U.S. Magistrate Judge

The lights of Broadway went dark on March 12, 2020, when New York Governor Andrew M. Cuomo ordered all theaters to close due to the COVID-19 pandemic. There is one show that *did* go on, however, despite the pandemic: the Federal Bar Council Inn of Court Program.

Under the leadership of Jamie Bernard, the president of the Inn, and with the dogged assistance of the Council's staff (led by Anna Stowe DeNicola and Aja Stephens), the Inn's eight teams persevered and presented each of their programs notwithstanding the limitations and obstacles arising from operating an interactive, performance-based initiative during a global health emergency. The Inn's success is a testament to the creativity, commitment, and character of the talented Inn teams and their judicial team leaders.

The Inn is dedicated to "fostering collegial interaction between the Bench and Bar through intellectually stimulating programs and informal discussions that promote the ideals of professionalism, mentoring, ethics and legal skills." The Inn strives "to create a community of lawyers and jurists who care about the legal profession and each other," with an eye toward mentorship and friendship across the organization.

The Inn Year

The Inn year begins in September with a guest speaker and runs through May, ending with a final dinner in June. When the pandemic hit in March 2020, three teams had yet to present their planned programs for the 2019-2020 year. The remaining team presentations were put on hold as Inn leadership determined how to move the season forward. In addition, the Inn doubted that it could still hold its annual end-of-year dinner in June, which would feature a traditional celebratory musical presentation. Adopting a "Can we pull this off?" mindset, the Inn's Margie Berman and Sammi Malek sang an enthusiastic, "Yes!" and undertook to create a presentation that would combine the traditional year-end wrap up with a memoriam and tribute to Inn

founding member and past president, and former Council President, Steve Edwards, whom we lost to Covid in April 2020. Margie and Sammi recorded individual video segments from Inn members that they masterfully stitched together with video clips and overlayed with music to create a tapestry for the eye and ear. The Inn then hosted the presentation during a Zoom session in which all members could watch and participate.

It was a watershed moment that, in the words of Inn Team Leader Jillian Berman, "showed us what was possible," and led to the decision to continue the Inn in a virtual format in the fall of 2020. To implement the virtual platform effectively across all eight teams, the Council staff hosted "tech tips" sessions with instruction on recording and splicing video clips, adding visual effects, and inserting background music. In addition, after surveying several platforms, the Council staff deployed the Remo platform, which creates a cocktail party format in which the Inn teams could gather, socialize, and view their presentations. The teams found socializing in the Remo format to be "like a breath of fresh air," in Jillian's words, during an otherwise-isolating period of time.

Team Failla

One of the teams that had found itself held in suspense in March 2020 was the team led by U.S. District Judge Katherine Polk Failla of the Southern District of New York. At that time, Team Failla had already fully prepared a script for its "From the Jailhouse to the Courthouse" program, about pro se litigants who succeeded in bringing their cases all the way to the U.S. Supreme Court. The team worked together to adapt their script, written for a live performance, to one that would work in a virtual format. They divided up scenes among team members to film them individually. Schooled by a previous "tech tips" session with the Council staff, Team Leader Jillian Berman stitched the clips together, embedded photographs between scenes, and added music to round out the production. Jillian commented that she found the experience to be a "different, creative way to use [her] legal skills."

In addition to Team Failla's presentation, the other Inn programs deferred from the spring included: Team Donnelly in November presenting, "Justice John Paul Stevens: In His Own Words," and Team Ramos in December presenting, "Second Opinions: The Spirit of Dissent at the Supreme Court." New programs for the 2020-2021 Inn year included Team Broderick, presenting in February, "The Voice: How You Can Improve Your Courtroom Skills and Become an American (Legal) Idol"; Team Kovner, presenting in March, "The Art of Cross Examination"; and Team Cogan in April presenting, "On the Record: Representing a Notorious Client in the Media." Team Komitee had the fortuitous timing of presenting, "At the Movies, Lawyers' Edition: Reviewing The Trial of the Chicago 7," just days after the January 6, 2021 insurrection at the U.S. Capitol, thus giving them an opportunity to analyze in real time the tools available to federal prosecutors to address public protests and the competing First Amendment rights of speech and protest. In May we are anticipating the presentation of Team Liman.

While managing the Inn through this current year has brought challenges, in other ways, it presented opportunities that would otherwise have been unavailable. For example, with the ability to include video clips, Team Donnelly was able to capture recorded comments of Justice Stevens' former clerks, who likely would not have otherwise participated in a live performance of the program. Similarly, the teams learned to make good use of movie clips, such as Team Kovner's inclusion of several of Hollywood's most famous cross-examinations from "A Few Good Men" and "The Devil's Advocate."

The Inn's president, Jamie Bernard, noted that, while he "hopes it doesn't last, it works amazingly for now." Reflecting on the past year, the incoming president, U.S. District Judge Kiyo A. Matsumoto of the Eastern District of New York, commented that Jamie, Anna, Aja and all of the Inn teams "have done a spectacular job pivoting from a live to a virtual format this past season. Despite the virtual presentations, all of the programs were entertaining and educational." Judge Matsumoto expressed her hope that a live format at the courthouses in the Eastern and Southern District of New York "can resume in the coming season," and she remains "confident that the quality of the programs will not disappoint."

A Chat With:

Clare Cushman of the Supreme Court Historical Society

By Joseph Marutollo

Clare Cushman serves as the Resident Historian and Director of Publications at the Supreme Court Historical Society, a private non-profit organization dedicated to the collection and preservation of the history of the Supreme Court of the United States. Cushman has worked at the Society for over 30 years and has authored or edited several books. The *Federal Bar Council Quarterly* recently spoke with Cushman about her fascinating work and scholarship on the Supreme Court.

Cushman, a journalist by trade, had been working at National Geographic on a journal of Supreme Court history when she received a call from former Chief Justice Warren Burger. Chief Justice Burger, who founded the Society in 1974, lamented to Cushman that the Supreme Court was often overlooked in historical and sociological assessments. While other branches of the federal government were typically the focus of much scholarship (indeed, the White House itself has been the subject of countless books and articles), the Supreme Court seemed to be limited to purely legal scholarship about significant Supreme Court decisions. This was particularly problematic to Chief Justice Burger, since most legal opinions can be inaccessible to non-lawyers and newspapers usually report only on the most high-profile or controversial of Supreme Court decisions.

Chief Justice Burger tasked Cushman with examining the "institutional history" of the Supreme Court – what historians today refer to as "public history," or how an organization functions sociologically. She ended up writing an illustrated book on the lives of Supreme Court justices. And Cushman quickly realized that, while she was not trained as a lawyer, the work of the Supreme Court (and its role in society) was endlessly fascinating. Indeed, she recognized that while most Supreme Court historians looked at the Court through the lens of its jurisprudence or as constitutional historians, Cushman aimed to take a unique look at how the Supreme Court "operates as a social organism."

Cushman soon began working at the Society and began to write a book about the Supreme Court and women's rights with Justice Ruth Bader Ginsburg. She worked with Justice Ginsburg for three years on this important project. Cushman described Justice Ginsburg as "funny," "brilliant," "delightful," and "passionate," especially about gender law. Cushman noted that Justice Ginsburg would be exacting and thorough in her edits and would pour over her proofs of the book with the same meticulousness she employed in writing her opinions. Cushman worked with Justice Ginsburg to try to turn legal jargon into language accessible to the general reader. Cushman and Justice Ginsburg succeeded, and their book, "Supreme Court Decisions and Women's Rights," is widely popular across the country.

In 2011, Cushman authored "Courtwatchers: Eyewitness Accounts in Supreme Court History," with a foreword by Chief Justice John Roberts. Cushman aggregated her many anecdotes about the Court into this entertaining and insightful book. Described as a book about the Supreme Court "without any case law," "Courtwatchers" has chapters devoted to different thematic subjects (ranging from stories about feuds between Justices to how the Court manages its workloads) that showcase how institutional norms have changed at the Court.

For instance, early in the Supreme Court's history, the Justices would actually live together in boarding-houses, where they would share all aspects of their lives while under the same roof. Cushman recounts an amusing anecdote whereby Justice Joseph Story told his friend Josiah Quincy, then president of Harvard University, that the Justices "take no part in the society" around their boardinghouse and that the Justices "even deny ourselves wine, except

in wet weather." As Cushman humorously recounts, Judge Story then admitted to Quincy:

> What I say about wine, sir, gives you our rule; but it does sometimes happen that [Chief Justice Marshall] will say to me, [], "Brother Story, step to the window and see if it does not look like rain." And if I tell him that the sun is shining brightly, [Chief Justice Marshall] will sometimes reply, "All the better for our jurisdiction extends over so large a territory that the doctrine of chances makes it certain that it must be raining somewhere!"

Cushman's book drolly adds a corollary about this tale: she notes that years later, when the Justices were re-telling the "Brother Story" anecdote, a court official questioned its authenticity; in response, Justice David Brewer replied to the official, "[T]he story is not only true, but you ought to know that the Court sustained the constitutionality of the acquisition of the Philippines so as to be sure of having plenty of rainy seasons."

Cushman's book also devotes a captivating chapter, titled "Silver Tongues and Quill Pens," to the history of oral argument at the Supreme Court. She notes that in the beginning, Supreme Court oral arguments would often take full days. The oral advocacy was akin to theatrical performances, and the lack of time limits caused clogged dockets and wasted time for the Justices. Only in 1970 did Chief Justice Burger limit arguments to 30 minutes per side, with some Justices then stopping advocates mid-sentence if they went over their allotted time. Cushman explains that the tone of the argument – and the frequency with which Justices interrupted advocates – has changed considerably over the course of Supreme Court history as well. Given the current framework of telephonic oral arguments during the pandemic, oral advocacy at the Court will undoubtedly continue to evolve in the future.

Cushman encouraged Federal Bar Council members to consider joining the Supreme Court Historical Society, and to participate in the Society's many virtual programs in the months ahead.

A Remembrance

Vernon Jordan: On the Shoulders of a Giant

By Judge Ann Claire Williams (ret.)

When Vernon Jordan walked into a room, you knew it. His tall, dignified, magnetic presence commanded the room. The energy swirled around him, and while many were in awe of him, he always expressed deep appreciation, gratitude, and awe for those who paved the way for him. He often said, "I'm here because I stand on so many shoulders." As I reflect on the passing of a civil rights, legal, and American giant, I cannot help but think that Vernon had those broad shoulders for a reason – because so many people would be standing on them, including me.

Over and over again, Vernon spoke out, lifting his eloquent, unique, and powerful voice in the face of inequality and injustice. He urged all of us, in the words of the Black National Anthem, *Lift Every Voice and Sing*, which he loved, to "march on 'til victory is won." To march on, to stand up and to fight for justice – for Black people and for all people facing injustice, for all those denied access to the American Dream. And not just in courtrooms, boardrooms, and ballrooms, but in all rooms where systemic and pervasive racism deprives us of our fundamental rights as human beings.

Gifted Orator

I first met Vernon Jordan in my last year of law school when he was the executive director of the National Urban League and came to the Notre Dame Center For Civil Rights to give the keynote speech. I had the privilege of driving him around in my Volkswagen convertible, although his tall frame could barely fit. Mesmerized by his brilliant speech, delivered with the passion of a Baptist preacher, my classmates and I all recognized

how blessed we were to be in the presence of this civil rights warrior icon and to be enlightened by him. He was so smart, so eloquent, and so real as he shared stories and lessons from his journey as a lawyer and leader who stood up for equal justice. He touched me deeply, just as he has touched everyone who had the blessing of hearing his words and understanding the extraordinary journey of his life's work. A gifted orator, his words crafted and delivered like no other, I witnessed many audiences hang on his every word.

I am often asked to give speeches for a variety of organizations and audiences. I always know where to turn for inspiration. I closely studied Vernon's speeches as I worked on my own speaking style. There was no better role model. I still have my marked-up copy of "Make It Plain: Standing Up and Speaking Out," a compilation of Vernon's speeches that I have turned to so many times.

My Mentor

I was very fortunate that later on, particularly after I joined the federal bench, my role model also became my mentor. He reached out to a young Black woman federal judge and welcomed me into the multitude of people from all races, genders, and creeds that he took under his wing.

This man who was called upon regularly by politicians, ministers, educators, and business moguls made time for me and for so many others of all ages and from every background. We would meet for breakfast or lunch, and he always had a smile and kind word for the people who were waiting on him in restaurants and driving him to appointments, calling them by name and asking about their families. From the cleaning staff to presidents, he never let his extraordinary accomplishments get in the way of his humanity and the lessons he learned from his beloved mother. And although he was incredibly busy and always overbooked, he had a laser-like focus on what was going on in my life when we met. I have such fond memories of his reflections on politics and current events and of the stories he told, with great drama, wit, and humor. I will always treasure his directness, honesty, advice, and wise counsel.

Vernon's love of history and gratitude to all those who paved the way for his success was always with him. And so he is with us – always. Vernon lifted his voice and his actions, on so many levels, and paved the way for the success and achievements of so many. Thank you, beloved Vernon, for letting me stand on your shoulders. I shall continue to march on . . . no matter how difficult the road . . . 'til victory is won.

Editor's note: The author served as a federal judge on the U.S. District Court for the Northern District of Illinois and then as the first judge of color on the U.S. Court of Appeals for the Seventh Circuit. She served on many judicial committees and, as treasurer and president of the Federal Judges Association, was the first person of color to become an officer. She now leads Jones Day's *pro bono* efforts to advance the rule of law in Africa.

A Remembrance

U.S. Magistrate Judge Hugh B. Scott

By David R. Hayes, Sr.

Hugh Benjamin Scott, Sr., was born in 1949. When he graduated from the University of Buffalo Law School in 1974, Buffalo law firms were not hiring African-American graduates. As a result, Hugh Scott turned to a career in public service. He was appointed in 1995 as a U.S. Magistrate Judge – the first African-American magistrate judge in the Western District of New York – and he served for 26 years. He also achieved a series of professional firsts, including the first African-American Assistant U.S. Attorney in the Western District of New York and Assistant Attorney General-in-Charge of the Buffalo Regional Office.

Magistrate Judge Scott died on February 29, 2021.

I served as the career confidential law clerk for Magistrate Judge Scott for 16 years. I met Magistrate Judge Scott in Minority Bar Association of Western New York circles and in appearances in cases before him. A settlement conference in a case arising from an amendment to the Buffalo city charter that eliminated at-large councilmembers and redrew council districts led to my clerkship with him. Many of the at-large members were African-American. Citizens

sued the city council, the mayor, and others to reverse the charter revisions. Magistrate Judge Scott held a settlement conference that I attended. I represented the African-American Council members who opposed the charter change along with the plaintiffs. My clients successfully sought to have me removed from representing them despite my protest that it was in their best interests. My later motion to dismiss the complaint was successful.

An Inspiration

Several months later, Magistrate Judge Scott called me and offered me a job as a second career clerk. I readily accepted and stayed for 16 years, which was the second-longest tenure in his chambers. Magistrate Judge Scott was an inspiration to me in many ways.

Magistrate Judge Scott assisted district judges in preparing civil and criminal cases for trial or other disposition. He conducted criminal intake of new cases (including authorizing search and arrest warrants, conducting initial appearances, and rendering reports and recommendations for suppression motions); handled case management in civil cases (from initial scheduling conferences and scheduling orders to, when referred, reports and recommendations on summary judgment motions); and held settlement conferences. He often did all of these on the same day, which made the job interesting.

In the Western District of New York, each district judge referred different types of cases at varying frequency to magistrate judges. The district judges readily referred matters (dispositive motions and settlement conferences) to Magistrate Judge Scott. One example was the referral by the late Judge John T. Curtin of the big city charter and reapportionment case that I worked on. This referral showed Judge Curtin's reliance on Magistrate Judge Scott's powers to resolve even the thorniest matters. Although Magistrate Judge Scott applied his skills of mediation to that case, it proved too intractable for resolution even for him.

As a magistrate judge, Magistrate Judge Scott provided the first judicial review of motions to dismiss or to suppress evidence, but it was certainly not the last. Although he had experienced plenary jurisdiction as a Buffalo city court judge, as a magistrate judge his role was to recommend dispositions to other judges. He would rule as he saw the law and evidence warranted even as he recognized that the reviewing district or appellate courts might disagree. The district judges referred a constant stream of civil and criminal matters for him to handle. Even judges who otherwise reluctantly referred cases to magistrate judges referred cases to him for settlement or for decision on motions for summary judgment.

Eliminating Backlogs

Judge Scott instructed his clerks to eliminate case backlogs and to avoid the dreaded six-month lists of pending civil motions in March and September. Magistrate Judge Scott resolved discovery disputes and motions. His goal was to resolve discovery disputes promptly and move the overall case toward resolution whether he was dealing with a single motion or a series of disputes between the parties. For example, he heard motions in a contract dispute over licensed technology to the point where he understood the issues and then decided the patent issues and the infringement issues so that the parties dropped the patent aspects of that case.

Parties also consented to have Magistrate Judge Scott try their cases. He presided over bench and jury trials although some of these cases eventually settled on the eve of trial. He heard a full range of civil cases – a baby who had coffee spilled on her at a thruway service area; a little girl who fell from a ski lift; a couple who had been stopped at the international border asserting violations of their civil rights; numerous inmates asserting civil rights violations – and included a jury misdemeanor tax trial. In one *pro bono* inmate case, the plaintiff claimed his eyes were so sensitive to light that he could not leave his cell even for brief telephone conferences with the court or counsel. Rather than dismiss the case or stall it, Magistrate Judge Scott ordered the Department of Corrections and Community Services to furnish protective, light blocking goggles for the plaintiff's court appearances.

On the criminal side, Magistrate Judge Scott presided at the initial

appearances of the Spring of Life anti-abortion protestors and dangerous escaped felon Ralph "Bucky" Phillips. During the War on Drugs, Magistrate Judge Scott's typical criminal cases involved drugs or weapons possession.

Civility Award

Magistrate Judge Scott ran an informal and respectful courtroom. He had a gavel, but I never saw him use it. He treated all before him with dignity and respect, including litigants, attorneys, witnesses, jurors in the consent cases he tried, and court staff. Magistrate Judge Scott was patient with litigants who tried to represent themselves. In 2011, the Bar Association of Erie County acknowledged Judge Scott with the Charles Dougherty Civility Award.

Magistrate Judge Scott was always impartial. He decided matters by following the law and mediated in settlement conferences to get the parties to reach acceptable compromises. He was not fazed when a self-represented litigant unsuccessfully argued the continued validity of *Dred Scott*, the Fourteenth Amendment notwithstanding.

In 2007, the Judicial Conference of the United States appointed Magistrate Judge Scott to the Codes of Conduct Committee as the magistrate judge representative. He served on that advisory body until 2013. On the committee he responded to ethical questions posed by federal judges and members of the judiciary staff. Often he was required to advise them that the proposed activity probably should not be done.

Magistrate Judge Scott was a dedicated mentor. He taught a trial technique class at the University at Buffalo Law School during most of his service on the bench. He was generous with his time and experience. He mentored scores of law students and attorneys, urging us to strive to achieve. He opened his chambers to waves of interns who observed proceedings, worked on cases, and listened to his sage advice.

Re-Entry Court

In addition to his normal civil and criminal caseload, Magistrate Judge Scott created Re-Entry Court, a court that monitored federal convicts following their release from prison. He developed a one-stop process to assist recently released convicts to become responsible citizens and help them restore their lives. Job training and placement, education, psychological testing, drug counseling, and other resources were provided to these defendants. In return for their participation and increased scrutiny by the Probation Department and the court, these defendants could reduce their supervised release by a year. The participants reported their progress every two weeks to Magistrate Judge Scott. After a year of good behavior and progress, Magistrate Judge Scott held a graduation ceremony – for most of the participants, the first graduation they celebrated in their lives – acknowledging their achievements. Magistrate Judge Scott gave guidance to the (mostly) male defendants to overcome the obstacles for reentry following incarceration. Magistrate Judge Scott was so enthusiastic about the program and its success that he used his extensive connections to urge the New York State courts to enact a similar program for the far larger reentry population.

Magistrate Judge Scott was active in the community. He served on countless corporate boards, including his alma mater, Niagara University. Magistrate Judge Scott was an inspiration professionally and as an African-American. He went out of way to make his chambers a family and a home.

In 2021, Magistrate Judge Scott was to be honored by the University at Buffalo School of Law, with its highest alumni honor – the Edwin F. Jaeckle Award for alumni who have exemplified the highest ideals of the law school. Unfortunately, he died before the scheduled award ceremony, so the award will be bestowed posthumously. The Minority Bar Association of Western New York also established a career achievement award in his honor and presented the inaugural award to him. That association's foundation also established a scholarship in his honor.

That Magistrate Judge Scott will be missed is an understatement. In the spring of 2019, he hosted Boy Scouts touring the courthouse. Months later, when Magistrate Judge Scott was away, the Scouts came back and left a note that concluded "Sorry we missed you! Appreciate your service to the Community. Hope to see you soon."

Legal History

The Supreme Court Gets It Wrong (Again): The Civil Rights Cases

By C. Evan Stewart

By 1875, the federal government's efforts to compel the Southern States that fought the Civil War to grant former slaves even a modicum of "life, liberty, and the pursuit of happiness" were coming to a disastrous conclusion. Mainly because of Southern whites' intransigence (and widespread acts of terrorism against African-Americans who sought to live as free men, vote, etc.), and partly because of weariness on the part of the Northern population, the Reconstruction Era was on its last legs. In a final legislative gasp at doing something, Congressman Benjamin Butler (a/k/a "Beast Butler" – his nickname stemming from his oversight of New Orleans during the Civil War) introduced the Civil Rights Act of 1875.

The Origins and Passage of the Civil Rights Act

Butler's legislative proposal had its direct antecedent in the civil rights legislation first offered by Massachusetts Senator Charles Sumner in 1870. Initially designed to "protect all citizens in their civil and legal rights" across every conceivable aspect of civilian life, Sumner's bill went nowhere. In successive congressional sessions, the re-introduced legislation got watered down – ultimately eliminating all references to schools, churches, cemeteries, etc. – leaving protection only for places of "public accommodation." Notwithstanding, the legislation remained bottled up in Congress; and Sumner died in March of 1874.

The congressional election of 1874 was a historic disaster for the Republican party – in some part because it was a referendum on Sumner's proposed bill. Returning to a lame-duck session of Congress in December 1974 were 100 Republican Congressmen (including Butler) who had been defeated at the polls – the entire House at that time had only 273 members. Apparently with many legislators now not fearing their constituents' wrath, the public accommodation law moved toward passage, also in large part thanks to parliamentary maneuvering in the House by Speaker James G. Blaine and Congressman (and future President) James A. Garfield.

The bill passed the House on February 4, 1875 (by a 162-100 vote) and the Senate on February 27th (by a 38-26 vote). President U. S. Grant signed the legislation into law on March 1. The new law, on the one hand, represented (in the words of historian Eric Foner) "an unprecedented exercise of national authority, and breached traditional federalist principles more fully than any previous Reconstruction legislation." At the same time, however, it also was an example of the Republican Party's loss of appetite for governmental interference in and control of the day-to-day oversight of Southern affairs: enforcement of the law would primarily be in the hands of former slaves seeking redress in federal court.

Public Accommodation and the Supreme Court

As historian John Hope Franklin has written, the Civil Rights Act of 1875 did not amount to much in practice. Public opinion (in both sections of the country) was opposed to the law, and there were not that many court cases brought. Nonetheless, by the early 1880s, five separate cases did make their way up to the U.S. Supreme Court. Challenging hotels, theaters, and railroads for discriminatory treatment, the five cases (*U.S. v Stanley*; *U.S. v. Ryan*; *U.S. v. Nichols*; *U.S. v. Singleton*; and *Robinson v. Memphis & Charleston Railroad*) were consolidated together as the *Civil Rights Cases*, 109 U.S. 3 (1883).

Writing for the Court's majority was Justice Joseph P. Bradley. This was significant because, although he dissented from the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873) (the Privileges and Immunities Clause of the 14th Amendment was held to protect only federal citizenship rights, not those relating to state citizenship), Bradley had firsthand judicial experience with the Colfax massacre of 1873 (what historian Eric Foner has described as "the bloodiest single act of carnage in

all of Reconstruction" – 60 African-Americans were killed at a political rally in Louisiana by a white mob). Presiding at a second trial of the accused conspirators as a federal circuit judge for the Fifth Circuit, Bradley dismissed the convictions, ruling (among other things) that the charges violated the state action doctrine and failed to prove a racial motive for the slaughter. On appeal to the Supreme Court as *United States v. Cruickshank*, 92 U.S. 542 (1876), the Court affirmed Bradley's dismissal, holding that the Enforcement Act of 1870 (the Congressional statute utilized to prosecute) applied (via the 14th Amendment) only to state action and not to acts of private individuals (the Court also ruled that the First and Second Amendments did not apply to the acts of state governments or individuals). This decision opened the door in the South to heightened terrorism that suppressed black voting, forced Republicans from office, and ultimately put in place solid Democratic state legislatures. (*See* Bennette Kramer's "The Origins of Jim Crow," *Federal Bar Council News* (November 2020).)

At the outset of the *Civil Rights* opinion, Bradley declared that "[i]t is obvious that the primary and important question in all the cases is the constitutionality of the law, for if the law is unconstitutional, none of the prosecutions can stand." After an extensive discussion, he ruled that the Civil Rights Act of 1875 was indeed "unconstitutional and void." In Butler's view (on behalf of himself and seven other Justices), the 13th Amendment "simply abolished slavery"; and the 14th Amendment only "prohibited the States" from depriving citizens of due process or equal protection. Nothing gave Congress the authority to govern the conduct (discriminatory or otherwise) of individuals: "Can the act of a mere individual, the owner of an inn, . . . refusing an accommodation, be justly regarded as imposing a badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State and presumably subject to redress by these laws until the contrary appears? . . . [W]e are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude. . . . It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to guests he will entertain . . . or deal with in other matters of intercourse or business." Former slaves, Bradley reasoned, had achieved the "rank of mere citizens"; they were not entitled "to be the special favorite of the laws." And since "[m]ere discriminations on account of race or color were not regarded as badges of slavery [by free African-Americans before the Civil War]," there was no reason to view them as "badges" now.

Just as the foregoing language prefigures/foreshadows the Court's even more odious ruling in *Plessy v. Ferguson*, 163 U.S. 537 (1896) (*see* "Another *Awful* Decision by the U.S. Supreme Court," *Federal Bar Council Quarterly* (August 2016)), as in *Plessy* the single dissent came from Justice John Marshall Harlan, the only Southerner on the Court and a former slaveholder (Bradley was from New Jersey).

Harlan began his dissent by observing "that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism." In his view, the Court had "departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted."

According to Harlan, the 13th and 14th Amendments gave Congress the authority to enact laws to protect people from deprivations "on account of their race, of any civil rights enjoyed by other freemen." With respect to the state action argument, Harlan demonstrated that, by the Court's own jurisprudence, railroads, theaters, and inns operated under the color of state law. With the Court ignoring those decisions and rejecting the usual "broad and liberal connection" given to constitutional provisions, that left "the civil rights under discussion [of African-Americans] practically at the mercy of corporations and individuals wielding power under public authority." Harlan concluded presciently: "Today it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time it may be some other race that will fall under the ban."

Postscripts

- The *Civil Rights Cases* fed the fire started by *Cruikshank* and soon the Southern States had codified a system of economic and social discrimination that

the Supreme Court officially blessed in *Plessy*. Amazingly, the Court's *Civil Rights* ruling has never been overturned, and its analysis on the reach of the 14th Amendment was re-affirmed in *United States v. Morrison*, 529 U.S. 598 (2000). While the Civil Rights Act of 1964 banned discrimination in public accommodations, it was found to be constitutional because the law was based upon the Commerce Clause. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

- The starting point for anyone wanting to know more about the Reconstruction Era is Professor Foner's magisterial work: "Reconstruction: America's Unfinished Revolution (1863 - 1877)" (Harper & Row 1988). Professor Franklin's article on the Civil Rights Act is: "The Enforcement of the Civil Rights Act of 1875" *Prologue Magazine* (Winter 1974).
- Besides his role in effectively nullifying the 14th Amendment (at least in the 19th and early 20th centuries) (the Ku Klux Klan and the Knights of the White Camelia publicly thanked Justice Bradley for his jurisprudential work), Bradley is best known to history as the deciding vote in the 1876 Electoral Commission that voted (8-7) to rule that Rutherford B. Hayes had won the disputed presidential election over Samuel J. Tilden.