Federal Bar Council Quarterly

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## *In This 30th Anniversary Issue:*



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**From the President**

# The Rule of Law

**By Jonathan M. Moses**

I have had the privilege for nearly the past two years to serve as president of the Federal Bar Council. It has been a time of growth and change for the Council as we confronted how to serve our members in the time of the COVID-19 pandemic. I am immensely proud of how the Council responded to that challenge. The Council continued to provide leading programming, hold our signature events, and support projects of importance to the bench and bar. A prime focus of our efforts has been to serve our mission of promoting the Rule of Law.

This aspect of our mission was made explicit at the very beginning of the pandemic when, in connection with our strategic planning process, we updated our mission statement to state that not only do we strive to "Promot[e] Excellence In Federal Practice And Fellowship Among Federal Practitioners" and "Encourag[e] Respectful, Cordial Relations Between The Bench And The Bar," but also "To Promot[e] The Rule Of Law." This addition reflected a principle that was always part of our mission. But given increasing attacks on the courts and the rise of civil discord, we felt it was important to make this aspect of our mission express.

You might ask, however: What is the connection between the Rule of Law and an organization that encourages respectful, cordial relations between the bench and the bar and fellowship among federal practitioners? You might even ask: What is the Rule of Law anyway? Turns out the answer to the first question is a pretty good answer to the deeply philosophical second.

## The Symposium

In May 2021, in connection with the annual Law Day Dinner, the Council sponsored a symposium on the Rule of Law. Held virtually, the symposium explored different conceptions of the Rule of Law. It was a fitting tribute to the Council's 90th anniversary and was particularly special as it was held the day after we awarded our highest honor, the Learned Hand Medal, to Chief Judge Debra Livingston of the Second Circuit. Many of Judge Livingston's colleagues graciously volunteered their time to participate in the symposium.

One session that stood out to me was the opening discussion between two of the world's great legal philosophers: Professors Jeremy Waldron and Andrei Marmor. The two professors, far from the courtroom, attempted to answer the question: "What does the 'Rule of Law' Mean, Anyway?" It seemed as good a place as any to start a symposium on the Rule of Law. And Professors Waldron and Marmor discussed different ways of thinking about the issue.

As Professor Waldron explained, the "Rule of Law," a slogan that is often invoked, means different things to different people. It can mean a reasoned and honest legal process, but it can also mean certain kinds of substantive laws that protect basic rights. Finally, some of us use it to mean restrictions on government action or the actions of the powerful: No one is above the Rule of Law. Professor Marmor cautioned that the Rule of Law does not always mean good law and we should remember that often very repressive regimes do so in a manner that appears legalistic.

Judge Livingston started the conversation the prior evening in her address upon receiving the Learned Hand Medal. To Judge Livingston, underpinning the Rule of Law is a willingness to listen to others and have an open mind – to have a recognition that all of us, including judges, do not always have the right answer and that what seemed like the right answer might turn out not to be. Judge Livingston channeled Judge Hand's renowned Spirit of Liberty speech in which Judge Hand famously said the Spirit of Liberty is "the spirit which is not too sure it is right." Judge Hand made his remarks in May 1944, still in the midst of the ravages of war and genocide sparked by Nazism in which, sadly, many lawyers and judges in Germany, applying the

"Rule of Law," took part. And Judge Hand's address was a reminder that no matter what the laws say, it is the spirit of the people who live by them and enforce them that matter. Laws can always be corrupted.

**Fellowship**

So what does the Rule of Law mean anyway? I certainly will not claim to know the answer when great legal philosophers cannot come to one. But I think I lean to the answer that Judge Livingston and Judge Hand presented. Whatever law is, ultimately we must recognize that it is the responsibility of everyone in society, and particularly lawyers and judges, to ensure it is applied fairly, honestly, and with a recognition that its power can be corrupted. And that I think is the answer to the question as to why it is appropriate for a group dedicated to "Fellowship" among legal practitioners, which not infrequently finds excuses to get together to share convivial times, seeks to promote the Rule of Law. Civic groups like ours, committed to sharing ideas, to listening to one another, uphold important norms. For our profession, those norms are that truth and honest application of the law matters, leavened with the humility that experience teaches that we are not always right and hopefully empathy for those affected by the laws we apply. In these contentious times, a group dedicated to open and truly civil discourse may prove to be exactly what is necessary to nurture the Rule of Law, and, in turn, our democracy.

## Council History – Part 3

# Events and Publications

**By Bennette D. Kramer**

In this third installment of the Federal Bar Council history based primarily on interviews with past presidents and others, I am going to look at the beginnings and evolution of Federal Bar Council events and publications.

**Federal Bar Council Events**

*Thanksgiving Luncheon*

The first Federal Bar Council Thanksgiving Luncheon was held in 1943, but the Luncheon did not become an annual event until 1952. When Judge Theodore Kupferman (president 1955-1956) was chair of the Thanksgiving Luncheon in the early 1950s, he said that the Council had to limit reservations to 400 people because that was all the Waldorf's Starlight Roof could hold. Warren Burger (later Chief Justice Burger), New York Governor Nelson Rockefeller and New Jersey Governor Robert Meyner all spoke. The cost was $5 for a turkey lunch. By the time Evelyn Gelman became executive director of the Council in 1964, the cost was $10.

As Whitney North Seymour, Jr., says, Peter Megargee Brown revolutionized the Thanksgiving Luncheon after he became president in 1961. Brown inaugurated the presentation of the Emory Buckner Medal for "Outstanding Public Service" in 1962 with the presentation of the medal to J. Edgar Hoover, head of the Federal Bureau of Investigation. Brown invited the Second Circuit judges to be guests at the Luncheon and also began the practice of seating judges one to a table, which increased the popularity of the luncheon. Attendees from the U.S. Attorneys' Offices all sat together.

Paul Windels, Jr. (president 1965-1966), interviewed in 1987, believed that the Thanksgiving Luncheon was the expression of the Council. He felt a sense of mission surrounding the Luncheon. He was afraid that it would become just another social occasion, rather than the special event that it was.

According to Nathan Pulvermacher, first president of the Federal Bar Foundation, in the 1980s it became trendy to be a member of the Council and the Luncheon became part of the fabric of the New York legal community. Pulvermacher attributed the change in popularity to Brown inviting the judges to attend and seating them one to a table. In the 1980s, about 60 members of the judiciary attended.

The Luncheon has continued to be a popular event in the New

York legal community's calendar. There have been many notable honorees over the years including Senators Jacob Javits, James Buckley, Abraham Ribicoff, Daniel Patrick Moynihan, George Mitchell, Charles Schumer, Alfonse D'Amato and Richard Blumenthal, Ambassadors W. Averell Harriman, Francis Plimpton and George Keenan, Governors Thomas Dewey, Nelson Rockefeller and Mario Cuomo, New York City Mayor Ed Koch, and numerous judges and other dignitaries. (All the honorees are listed in the Redbook.)

In 2001, after the attack on the World Trade Center, Judge P. Kevin Castel, who was president of the Council at the time, said that several members of the executive committee of the Council considered cancelling the Luncheon. They went ahead and held it, honoring former Southern District U.S. Attorney Mary Jo White and featuring live music for the first time. The Luncheon was a huge success.

The Luncheon was held at the Waldorf Astoria Hotel Grand Ballroom for many years until 2016, when the hotel closed. The 2017 Luncheon was held at the Grand Hyatt Hotel where it remained until 2019. The 2020 Luncheon was adjourned due to the COVID-19 pandemic, and in 2021 the Luncheon was at Cipriani 42nd Street, and limited to 500 attendees in an effort to comply with COVID-19 protocols for events and gatherings.

*Law Day Dinner*

When Peter Megargee Brown was president, he inaugurated the Law Day Dinner, the first of which was held in 1962 at the Park Lane Hotel. At Brown's urging, Lawrence Vogel (president 1969-1971) put together the award ceremony for the first Leonard Hand Metal for Excellence in Federal Jurisprudence. The first Learned Hand Medal was awarded at that initial dinner in 1962 to Professor James William Moore, Yale Professor and the author of Moore's Federal Practice. Whitney North Seymour, Jr., described the Park Lane Hotel as down at the heels with mirrors at both ends that made the room look bigger. Seymour characterized the Law Day Dinner as "Brown's greatest achievement." He said that Brown developed its winning formula and made it happen. It had a "judge at every table and a flag at every place." Attendees commemorated patriotism and professional good will. According to Seymour, the dinner with judges and lawyers together at tables created a non-stress environment where members of the profession got together. The first dinner was a smashing success and completely sold out. The dinners became an annual event in 1963.

According to Evelyn Gelman, the first executive director of the Council, Brown was the quintessential organizer. He got young Assistant U.S. Attorneys involved and encouraged law firms to sponsor tables and invite associates.

Seymour reported that the Law Day Dinners continued and became an annual fulcrum of the Council. Attendance at both the Thanksgiving Luncheon and Law Day Dinner continued to increase and they were considered to be the two premier annual lawyer events in New York, eventually imitated by others, according to George Yankwitt.

George Leisure (president 1996-1998) said that when Justice Lewis Powell was awarded the Learned Hand Medal in April 1977, a group wanted to give the Herbert Hally Award to Judge Edward Weinfeld. Consequently, they presented two awards in the same evening. Judge Adams presented the Herbert Hally Award to Judge Weinfeld. Judge Irving Kaufman, after being introduced by Marvin Schwartz, presented the Learned Hand Award to Justice Powell. Judge Vincent Broderick read the President's Law Day Proclamation in 1977, continuing the tradition of the most recently confirmed district judge reading the proclamation.

Judge David Trager (president 1986-1988) was concerned that recipients of the Learned Hand Medal have national importance. He pointed to Seventh Circuit Judge Richard Posner and Professor Gerald Gunther of Stanford Law School as worthy recipients. Judge Posner and Professor Gunther received the award in 2005 and 1988, respectively.

When Judge Kevin Castel was president in 2002, it was the 40th anniversary of the Law Day Dinner and Second Circuit Judge Wilfred Feinberg and his wife were recognized as having attended the first Law Day Dinner along with the 40th.

In 2021 during the pandemic, the Council held a virtual Law Day Dinner and awarded the Learned Hand Medal to Second Circuit Chief Judge Debra Livingston. This was the first event in a Rule of Law Symposium that continued the next day. The symposium was

a great success. Current President Jonathan Moses said that the Law Day Dinner is better in person, but the symposium and the virtual continuing legal education programs started during the pandemic were among the Council's strongest achievements. In 2022, a scaled down but sold out Law Day Dinner honoring Second Circuit Judge Denny Chin was held in person at Cipriani Wall Street. Everyone was glad to be together again.

*Winter Meeting*

The first Winter Meeting (formally named the Winter Bench and Bar Conference), held in Nassau, the Bahamas, in 1969, had 140 attendees. Coincidentally, the most recent Winter Meeting was also held in Nassau, the Bahamas, in late February 2020, just before everything shut down because of the COVID-19 pandemic. Planning is now beginning for the 2023 Winter Meeting to be held in Puerto Rico.

Lawrence Vogel (president 1969-1970) started the Winter Meetings. According to Evelyn Gelman, he called her and asked whether she wanted to go somewhere warm. She set up the first Winter Meeting in Nassau. The program was put together on the plane going to the Winter Meeting. The Council charged $50 on top of costs and ended up losing money. The practice of putting together panels of people who signed up to attend continued until the 1980s.

Whitney North Seymour, Jr., organized a planning committee to shift planning from the ad hoc method of seeing who planned to attend the Winter Meeting and asking them to sit on panels to organizing a planning committee chaired by a Second Circuit judge to organize panels of leading professionals in advance. This change started at the 1981 Winter Meeting at the Hyatt Cerromar in Dorado, Puerto Rico (closed in 2002 and soon destined for demolition).

Seymour asked Second Circuit Judge Walter Mansfield if he would become chair of the planning committee. Judge Mansfield agreed to do so and the Council has had a Second Circuit judge as chair of the planning committee ever since. Some consider the organization of a planning committee for the Winter Meeting as one of Seymour's greatest contributions to the Council and, beginning in 1982, Judge Mansfield set the standard for the Winter Meeting planning and programs. Seymour's idea included having a circuit judge as chair of the planning committee and a district judge and a magistrate judge also on the committee, all as guests of the Council. Judge Mansfield signed all the letters inviting distinguished guests to be on panels and served as chair for the two years, followed by Circuit Judges James Oakes, Ralph Winter and Daniel Mahoney. After Judge Mansfield's death in 1987, the Council arranged to plant a tree in his honor in front of the



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Second Circuit Courthouse that had a stone from his garden next to it. The Council also published a book about the life of Judge Mansfield after his death.

Seymour recounted that for the Winter Meeting in 1982 in Mazatlán, Mexico, the new planning committee wanted to make the Winter Meeting even more of a success and professionally enriching. They made a list of the people they would like to invite to participate in the programs in order to provide great quality. They also put effort into planning other activities. Seymour also worked hard to develop a group camaraderie, and, to that end, had a blazer patch for attendees to wear at the Winter Meeting. Judge Mansfield arrived at the airport with the patch on his blazer, which led everyone else to quickly sew theirs on. Seymour also had a Federal Bar Council necktie made that exuded subtle power. The members of the Council, including the Chief Judge of the Second Circuit, wore their neckties a great deal.

Seymour said that he went to Winter Meetings because there was no comparable conference for lawyers to attend and relax together. He believed that atmosphere was enhanced by having a judge as chair of the planning committee. Judge Mansfield began his service as chair of the planning committee at the 1982 Winter Meeting in Mexico with George Yankwitt as the conference chair. Yankwitt said that the planning committee changed the nature of the CLE programs dramatically and enhanced attendance by leading members of the bar. The group went to Mazatlán, Mexico, and then to Mexico City. New Second Circuit Chief Judge Wilfred Feinberg attended the conference and presented a framed copy of the Bill of Rights to the Supreme Court of Mexico, reading an address in Spanish. Seymour said that Judge Mansfield was very enthusiastic about his role as chair. The Council started publishing summaries of the programs following the 1982 Winter Meeting, which continue to this day in the *Federal Bar Council Quarterly*.

The way of planning the Winter Meeting started by Seymour continues to this day. Judge Mansfield's agreement to chair the planning committee was key to this transition and enhanced the image of the Council. As Seymour said: "Earlier, when the organization had shifted its focus to the Second Circuit courts, a delegation had waited upon the then-Chief Judge [Irving Kaufman (chief judge 1973-1980)] and offered the Federal Bar Council's resources to help the courts when needed. The Chief had dismissed the offer, branding the group a 'chowder and marching society.' The relationship between the [Council] and the Second Circuit was a stand-off until Judge Mansfield accepted the Chair of the Planning Committee, giving the [Council] credibility." [*Federal Bar Council News*, April 1994.]

It also has been a tradition to invite the Second Circuit Justice to attend the Winter Meeting. Associate Justice Thurgood Marshall attended a number of conferences. Associate Justices Sonya Sotomayor, Samuel Alito and Stephen Breyer have also attended.

Robert Fiske (president 1982-1984) noted that as the quality of the Winter Meeting has been expanded and upgraded, it has become specialized for the federal bar. Bernard Nussbaum (president 1990-1992) said that once the Second Circuit judges got involved in the planning committee, the Winter Meeting became more professionalized, and more people wanted to attend. The goals were to make life easier for federal judges, to make the law a bit more sensible and to be an advocate for the federal courts. Nussbaum said this all began before his term, but he continued the trend. Judge David Trager (president 1986-1988) noted the importance of improving the Council programs, especially the Winter Meeting programs. Judges such as Judge Winter started to attend, along with lawyers from the District of Columbia. Judge Trager said in a 2009 interview that the quality of the programs had continued to improve with presentations by Professor John Coffee of Columbia Law School and presenters from England who spoke about international terrorism and financial regulation. George Yankwitt (president 1992-1994) credits Seymour and Trager for the trend toward professionalization of the Winter Meetings.

Nussbaum said that the uniqueness of the Winter Meetings is really startling. They are much more congenial, social and intellectually stimulating than any other gatherings. Most lawyers and judges who attend have a really great experience. With the budget cutbacks by the Judicial Conference, the Council meetings are even more important.

Mark Zauderer (president 2006-2008) said that he focused on continuing the tradition of making first time attendees at the Winter Meeting feel welcome. For example, the Council developed a system to make sure every attendee, judge and non-judge alike, was included in dinners. Robert Anello (president 2012-2014) said that the benefit of the Winter Meetings was that you could talk to people over the course of a week and then get involved with them in the legal community. Yankwitt said that for him the Winter Meetings led to the development of close and supportive friendships in addition to getting to know people in the legal community.

The Winter Meeting has been held in the Caribbean, Hawaii, Mexico, California and Arizona. The usual schedule includes four mornings of high quality CLE programs with two programs per morning and one free day in the middle. Dinners vary from dinners with the larger group at the resort to "dine-arounds," small group dinners at nearby restaurants. At the welcome and final dinners seats are assigned to provide the opportunity for participants to meet people outside their groups. The slow pace of the Winter Meetings and significant downtime allow those who attend plenty of opportunity to get to know one another.

*Fall Retreat*

When he was chair of the Second Circuit Courts Committee, Peter Eikenberry worked to create a less expensive alternative to the Winter Meeting that he labeled "No frills in the Catskills." Many people, particularly Robert Morvillo, had also advocated during Council meetings for a lower cost event to attract younger lawyers.

The first Fall Bench and Bar Retreat (the "Fall Retreat") took place at the Doral in Princeton, New Jersey, in 2000, while Judge Kevin Castel was president (2000-2002) of the Council. Southern District Judges Sidney Stein, Laura Taylor Swain and George Daniels, along with Eastern District Magistrate Judge Steven Gold, attended that first Fall Retreat, in which 15 people met in a hotel in Princeton. Eikenberry, Michael Considine and Brooks Burdette were instrumental in starting up the Fall Retreat.

At Eikenberry's request, Vilia Hayes organized subsequent Fall Retreats. From then on the chairs of the Second Circuit Courts Committee, including Hayes, chaired the Fall Retreat. Now District Judge Mary Kay Vyskocil and now Magistrate Judge Sarah Cave followed Hayes. The First Decade Committee joined in planning and became co-host of the Fall Retreat in 2005. The First Decade members attend the event, which fulfilled the original goal of having an event that is less expensive and attracts younger lawyers. In fact, the first several Fall Retreats cost less than $1,000 per couple.

While Joan Wexler was president (2004-2006), attendance at the Fall Retreat doubled and a Friday afternoon program was added. By 2013, attendance had increased by over 570 percent, matching attendance at the Winter Meeting. The increase in attendance began after the First Decade Committee became involved in the planning for the Fall Retreat. Gerald Walpin (president 2002-2004) started the First Decade Committee, and Wexler considered it a key achievement of his tenure.

The Fall Retreat has a schedule similar to that of the Winter Meeting in a compressed time frame. Judges are invited to participate in the planning committee and head program subcommittees. Attendees begin to arrive on Friday afternoon, and the early arrivals participate in a CLE quiz program planned by the First Decade Committee called Federal Rules Challenge, followed by dinner. On Saturday there are three CLE programs, followed by a free afternoon and dinner, and on Sunday, there are two CLE programs before everyone departs.

Today, the Fall Retreat continues to be a big draw that regularly sold out before the pandemic. It has been held at the Saybrook Point Resort & Marina in Old Saybrook, Connecticut, Cranwell Resort in Lenox, Massachusetts, Skytop in the Poconos, the Mohonk Mountain House in the Hudson Valley, and other venues. The Fall Retreats are family oriented and usually provide lots of opportunity for outdoor activities.

The 2021 Fall Retreat, the first one following the pandemic, was held at the Gideon Putnam Hotel in Saratoga Springs, New York. A total of 184 people attended, including 53 couples, 54 singles and 24 children.

*Judges Reception*

In the early days, the Council held lunches for new judges and others. As Theodore Kupferman (president 1955-1956) noted, the Council "regularly had a function to welcome new appointees. I particularly remember a very large attendance to welcome new Southern District U.S. Attorney Robert Morgenthau at the beginning of the Kennedy Administration [1960]." (*Federal Bar Council News*, April 1994.)

Subsequently, the lunches for new judges became receptions for groups of judges that were held at The Players, Union League Club, New Haven Lawn Club, Central Islip Courthouse, and the Quinnipiac Club. Different groups of judges have been honored at the receptions, including circuit judges, district judges, magistrate judges and new judges. During David Schaefer's term as president (2016-2018), the Council honored all chief judges of the Second Circuit from all over the circuit.

The first reception since March 2019, after a hiatus due to COVID-19, was held at the Union League Club in June 2022 and honored all the new judges appointed since 2019. Vilia Hayes received the Whitney North Seymour Award at the same reception because the 2022 Winter Meeting had been cancelled.

*First Decade Summer Kick-Off Event*

In 2004, the First Decade Committee began holding a Summer Kick-Off event at the 79th Street Boat Basin in Manhattan. The committee invited summer associates, and it became a popular early summer meeting for younger lawyers.

In 2014, the Council established the Thurgood Marshall Award for Exceptional Pro Bono Service to be given to "lawyers in private practice who have demonstrated an exemplary commitment to pro bono legal services, and who have provided or facilitated the provision of pro bono services in federal courts or agencies within the Second Circuit." The first Thurgood Marshall Award was given to Alan Schoenfeld at the Summer Kick-Off event at the Boat Basin. The following year, thanks to Vilia Hayes, the summer event moved to Battery Gardens, a restaurant in Battery Park, and the 2015 Thurgood Marshall Award was presented there. The event continued at Battery Gardens through 2019. The Summer Kick-Off event was interrupted by the pandemic, but the Thurgood Marshall Award continued to be given out.

*Supreme Court Trip*

Beginning with the first trip in 1955, the Council sponsored Supreme Court Admission Trips to Washington, D.C., although the trips did not continue uninterrupted. After a hiatus the trips were revived in the 1990s.

Council members who want to be admitted to practice before the Supreme Court are sponsored by a Council member who is already admitted to practice before the Court. The ceremony in the Supreme Court courtroom is quite moving. Following the admissions ceremony, the newly admitted lawyers meet in a Supreme Court conference room with the Second Circuit Justice and have their picture taken. It is a very collegial event, which occurs every few years.

**Publications**

*Federal Bar Council Quarterly* (formerly, *Federal Bar Council News*)

Steve Edwards was the inspired genius behind the creation of the *Federal Bar Council News* (now the *Federal Bar Council Quarterly*) which was established 30 years ago in 1992, despite some objection. Edwards, who was the first editor-in-chief, came up with the idea of a newsletter to provide a forum for whatever subjects people might like to discuss. George Yankwitt was president when the *Federal Bar Council News* was created and was (and still is) an enthusiastic supporter.

The *Federal Bar Council News* was preceded by the Second Circuit Digest, which was first published in 1974. The Digest published "Summaries of Principal Opinions of the United States Court of Appeals for the Second Circuit" in the days before the internet made those decisions readily available. Edwards decided to discontinue the Digest in favor of the *Federal Bar Council News* because people could access those decisions on-line. Judge Kevin Castel (president 2000-2002) was involved in producing the Digest and subsequently joined the editorial board of the *Federal Bar Council News*.

Edwards said that the *Federal Bar Council News* has since grown and taken on a life of its own. It provides Council members with information to keep everyone up-to-date on the Council's activities, happenings beyond the Council in the broader Second Circuit legal world, and even spreads its areas of interest further from time to time. Edwards, always the devil's advocate, encouraged contributions from Council members and particularly wanted debates on controversial subjects.

Edwards wanted the *Federal Bar Council Quarterly* to be provocative, a platform for debate, and an airing of issues, and he welcomed op-ed contributions. The new newsletter had a column called "Invitation to Debate" for which Edwards solicited contributions from people on both sides of an issue. Today, 30 years later, Edwards' vision continues with articles focusing on particular lawyers and judges and analyses going below the surface of particular cases. The *Federal Bar Council Quarterly* aims to publish a varied assortment of articles, not all of which will please everyone, but so that each issue will have something for everyone.

In an interview in 2009, Edwards noted that the *Federal Bar Council Quarterly* had continued to be published for 17 years and that the quality of the writing remained high. (*The Federal Bar Council Quarterly* has now been publishing for 30 consecutive years.) He heard that judges enjoyed reading the *Federal Bar Council Quarterly* to get a perspective on the bar they cannot get anywhere else. He was disappointed that there has not been more vigorous debate on issues of the day but attributed this absence to the fact that lawyers are busy. While he was editor, he tried to write articles that would provoke letters or rebuttals, and he often succeeded.

Mark Zauderer (president 2006-2008) said that he was pleased and proud of the effort by Pete Eikenberry and Bennette Kramer to enhance the scope and content of the *Federal Bar Council Quarterly*. Following a breakfast meeting at City Hall (the restaurant), they engineered a transformation.

The editors-in-chief for the past 30 years have been Steve Edwards, the first editor, Charles Platt, Marjorie Peerce, Peter Eikenberry and Bennette Kramer.

Although the Federal Bar Council Quarterly was published only digitally during the pandemic, with this issue we are restarting publication and distribution of a print version.

*Second Circuit Redbook*

The first edition of the Federal Bar Council Second Circuit Redbook was published in 1975. Whitney North Seymour, Jr., reported that Daniel Pollock suggested publishing a book that provided the biography of every judge on the Second Circuit and the district courts including the four districts of New York and the districts of Connecticut and Vermont, along with the Federal Rules and Local Rules. Larry Vogel produced the first edition from scratch. (*Federal Bar Council News*, April 1994.) According to George Leisure (president 1976-1978), the Redbook became a bible in certain circles. It became a tool for people who practiced in the Second Circuit.

Seymour said that putting the Redbook together was a nightmare. Vogel was responsible for the content and Seymour for the publication details. In the end, it was an imposing service project that helped people do their jobs better. Seymour said that he used his a couple of times a week.

By the time George Leisure was president (1976-1978), the Council had already published one edition of the Redbook. The Council published the second edition in 1977 and has published it annually ever since. Judge Castel said that Vince Alexander was involved in the production of both the Redbook and the Second Circuit Digest for approximately 20 years. Judge Castel was involved in the Redbook and the Second Circuit Digest (summaries of key Second Circuit cases), and he became a member of the editorial board of the *Federal Bar Council News* after it was created and Steve Edwards replaced the Second Circuit Digest with the *Federal Bar Council News*. Nathan Pulvermacher said that while the Redbook was paid for by the Federal Bar Foundation, the Foundation did not get involved in producing it. Starting with the 2022-2023 edition, which will be published this fall, the Council is planning to make the Redbook available digitally to members along with the hard copy.

**The Council's 90th Anniversary**

# A Brief History of the History Committee

**By Travis Mock**

In the March/April/May 2022 issue of the *Federal Bar Council News*, Bennette Kramer kicked off a multi-part series on the history of the Federal Bar Council, beginning with the revitalization of the Council throughout the 1960s and 1970s. That revitalization continued through the 1980s, when the Council's president, Whitney North Seymour, Jr., in collaboration with Judge James Oakes, created the Second Circuit Historical Committee.

Patterned on the Supreme Court Historical Society, the Second Circuit Historical Committee organized two principal activities: (1) an annual history lecture, and (2) a series of historical exhibits. The Historical Committee was active for less than a decade, but it played an important role in cementing the Federal Bar Council as a vital institution within the Second Circuit, and it left behind a remarkable historical record that remains vital to this day.

Each of the lectures and projects sponsored by the Historical Committee could be the subject of its own article. The following brief survey celebrates the Historical Committee's output as a whole and provides a guide for those interested in exploring the committee's work in more detail for themselves.

## Annual Lectures

From 1981-1987, the Historical Committee sponsored a series of annual lectures on the history of the Second Circuit by prominent jurists and professors. The lectures were light in tone but weighty in scholarship, with each subsequent lecturer seeming playfully motivated to outdo the previous one. The series was organized around the individual district courts and concluded with capstone lectures on the Second Circuit's role in shaping the U.S. Constitution.

The series began in 1981, with Southern District of New York Judge Edward Weinfeld's lecture on the Southern District of New York. Judge Weinfeld recounted the court's origins – including, of course, its moniker as the "Mother Court" – and described the court's prominence in legal matters ranging from criminal prosecutions to business litigation to civil rights matters.

In 1982, Eastern District of New York Judge Eugene Nickerson lectured on the Eastern District of New York, including its leadership in admiralty matters and some of the particularly colorful characters who previously occupied its bench.

In 1983, District of Connecticut Judge José Cabranes lectured on the history of the District of Connecticut, including the historic *Amistad* case, and the court's claim to have preceded the Southern District as the first U.S. District Court.

In 1984, Northern District of New York Judge Roger Miner lectured on the history of the Northern District of New York, poking fun at the New York Times' regrettable habit of referring to the district's judges and jurors as "farmers" and making a memorably detailed case for the Northern District as the true first U.S. District Court.

In 1985, District of Vermont Chief Judge Albert Coffrin gave a vibrant account of the District of Vermont, highlighting the district's influential jurisprudence and celebrating its fidelity to its place and history. Chief Judge Coffrin noted Judge Harland Howe's moderate approach to sentencing during Prohibition (he once sentenced a man convicted of bootlegging to a fine of one cent and ordered the names of the jurors who had convicted him stricken from the court's rolls) and Judge Bernard Leddy's passion for the outdoors, which necessitated, on at least one occasion, "a long trek through the woods" by counsel seeking the judge's signature on an order.

In 1986, Western District of New York Chief Judge John Curtin spoke on the history of the Western District of New York (the undisputed youngest district in the Second Circuit), discussing its unique origins and its role in important jurisprudence.

Last but not least, 1987 saw two lectures, by Professors Richard Morris and Walter Dellinger, III,

on the Constitutional Convention and the history of some of the most important (and troublesome) provisions of the U.S. Constitution.

**Historical Exhibits**

In tandem with its robust series of annual lectures, the Historical Committee launched an ambitious program of historical exhibitions. Executed in cooperation with museum consultant Jane Clark Chermayeff and exhibit designer Olivia Chernoff, the exhibits were staged in the courthouse at Foley Square, with some of them subsequently traveling to other courthouses and venues within the Second Circuit. The exhibit program was intended, according to Seymour, "to provide the visitors (i.e., jurors, defendants, witnesses) and the professionals (judges, lawyers, clerks) with a sense of history and 'host' – culled from nearly two hundred years of the Second Circuit's operations."

The scope and detail of these exhibitions was such that the Historical Committee formed an Exhibits Subcommittee, co-chaired by Second Circuit Judge Lawrence Pierce and John Gordon, III, to help manage the projects and to interface with courthouse staff on installation and care of the exhibits. The exhibits incorporated borrowed historical artifacts, high-quality prints, original works of art, and richly illustrated booklets. Many artifacts were displayed on pedestals acquired from local museums.

The first such exhibit, premiering on June 16, 1981, was "John Jay, America's First Chief Justice." The exhibit included memorabilia and documents collected from Harvard and John Jay's family. This museum-quality exhibition was later donated to John Jay College.

Next came "The Remarkable Hands," which examined the lives and careers of Judges Learned and Augustus Hand.

After that, "Why Judges Wear Robes" offered historical context for judicial pageantry.

But this series of exhibits did more than just celebrate the judiciary. "Slavery and the Courts: A Paradox of Roles" took an unflinching look at the "paradoxical position" in which the law placed federal courts before the Civil War – repression of the international slave trade on one hand (under statutes such as the Importation Act of 1808) and protection of domestic slavery on the other (under the Fugitive Slave Laws). The power of this exhibit was beautifully articulated by H. Wayne Judge, who said at the exhibit's debut in the Northern District, "We often think of slavery as being the heritage of black Americans. Actually, the descendants of those who wore those chains on display outside the courtroom share the heritage of slavery with the descendants of those who made the chains. Slavery is part of the heritage of all Americans."

Next was "Maritime Law in the Federal Courts," a richly illustrated survey of the Second Circuit's principal role in shaping the maritime law of the United States.

"United States v. T. Harrison Baker" built upon the previous two exhibits by exploring the famous case that saw the prosecution for piracy of the officers and crew of the commissioned Confederate privateer ship "Savannah."

The next exhibit, "Charles Evan Hughes: The Eleventh Chief Justice," explored the life and times of this celebrated statesman, politician, lawyer, and judge.

"The Trials of Ulysses" recounted the infamous obscenity trial over James Joyce's book "Ulysses."

The exhibit series concluded with two exhibits exploring the physical history of some of the circuit's courthouses. "The Successive Locations of the United States District Court and Circuit Courts in the Borough of Manhattan," was, notwithstanding its overwrought title, a fascinating exploration of the federal courthouses in Manhattan from the 1780s to the 1980s. And "The Federal Courthouse at Foley Square" recounted the history of the Second Circuit's home at Foley Square.

**Other Notable Projects**

As if its lectures and exhibits were not enough, the Historical Committee also engaged in several other noteworthy initiatives.

It formed an Art Committee, chaired by William Karatz, that curated multimedia art exhibitions in the courthouses by modern artists of different cultural backgrounds.

In 1982, the committee assisted the Southern District of New York in restoring and displaying portraits of all current and former judges of the court.

Between 1982 and 1986, at the request of Chief Judge Constance Baker Motley, the Historical Committee participated in the creation of a history of the Second Circuit, called "Federal Justice in the Second Circuit – A History and a Guide," by Professor Jeffrey Morris.

And, in 1987, the Historical Committee and the Federal Bar Council Foundation co-sponsored several performances by the New York Lyric Opera Company of "Abigail Adams," a chamber opera composed by Southern District Judge Richard Owen. (Judge Owen was a prolific composer and husband of Met soprano Lynn Owen).

The efforts of the Second Circuit Historical Committee marked a unique period in the history of the Federal Bar Council. The legacy the committee left behind offers insight and inspiration for the benefit of future Council members and the public at large.

**A Chat With:**

## Jean Afterman of the New York Yankees

**By Joseph Marutollo**

With the Fall Classic on the horizon, the *Federal Bar Council Quarterly* had the good fortune of interviewing one of the most influential lawyers in baseball: Jean Afterman, the assistant general manager and senior vice president of the New York Yankees.

As an initial matter, lawyers have played significant roles throughout baseball history. Lawyers have served as baseball commissioners (ranging from the very first commissioner, U.S. District Judge Kenesaw Mountain Landis, to the current commissioner, Robert Manfred), baseball managers (former Chicago White Sox manager Tony La Russa passed the Florida bar exam in 1980), and baseball agents (the well-known Scott Boras, among many others).

Baseball has also been a favorite pastime for many lawyers, including those sitting on the U.S. Supreme Court. Indeed, an outside observer might reasonably think that passionate baseball fandom is a prerequisite for membership on the Supreme Court, given that Justice Samuel Alito is a Philadelphia Phillies fanatic, Justice Sonia Sotomayor is a longtime Yankees fan (who also thankfully ended the 1994 baseball strike as a district judge), Justice Elena Kagan is an enthusiastic Mets fan, and Chief Justice John Roberts memorably said that "judges are like umpires" during his Senate confirmation hearings. And, of course, many lawyers – including members of the Federal Bar Council – are fervent fans of baseball.

### Rules and Regulations

When asked why lawyers seem to have such a special affinity for baseball, Afterman explained that it may be because baseball is a "game of rules and regulations." "So much of baseball," Afterman said, "is based on past practices, similar to the common law." Afterman's own trailblazing career has had an enormous impact on baseball's "common law."

Afterman, a California native, graduated from the University of California-Berkley, where she majored in art history. Following college, she worked as an assistant to the head of a feature film production company. After about 10 years, she decided to attend the University of San Francisco Law School ("USF"), where she planned to pursue a career as a lawyer in the entertainment industry. Since she financed law school on her own, she decided to save money and returned home to live with her parents during the academic year.

While Afterman thoroughly enjoyed law school, she struggled during her first semester despite her endless hours of studying. Crestfallen at the end of the semester, Afterman asked for advice from her father, who gave her a clear choice: she could either drop out of law school, or she could re-focus and find out what was needed to excel in law school. She chose the latter. In her second semester, she methodically evaluated the materials assigned by each professor, while also closely reviewing each professor's prior exam. Sure enough, she aced her exams at the end of the semester. She called it a "great teaching moment," as she realized that, while everyone in law school was going to work hard, she needed to work harder and, importantly, smarter to ensure success.

Afterman said that USF gave her a "fantastic legal education"

and noted that it did a great job in "producing ethical and practical lawyers." She added that she was in the first USF class where 51 percent of the law graduates were women.

**In Japan**

After law school, Afterman worked at a law firm, where she encountered a client, Don Nomura, who would change the course of her career (and, more generally, the course of baseball). Nomura was a baseball agent and the son of the celebrated Japanese ballplayer Katsuya Nomura. Don Nomura came to Afterman's firm and raised a licensing dispute involving baseball cards sold in Japan. A senior partner at the firm asked if any of the associates were willing to take on the matter, which would require travel to Japan. Afterman volunteered and soon began working in Japan.

She enjoyed her legal work in Japan, where she was struck by the differences between Japanese law and American law. While the underlying laws were, in some instances, radically different, she also noted more subtle differences. For instance, in the 1990s, in Japan, it was considered a sign of a lack of trust if a party to a meeting about contracts showed up with a lawyer. In contrast, in the United States, it might be considered malpractice for a party to show up to such a meeting without a lawyer.

During her time in Japan, she worked hard and smart: she learned everything about the unique issues in Nomura's case, while also getting a better sense of baseball in Japan. She attended a Yomiuri Giants baseball game with Nomura and observed that the Giants – essentially, the Yankees of the Nippon Professional Baseball ("NPB") League – seemed to play at a high level. She quickly realized that many of the players (including a young outfielder on the Giants named Hideki Matsui) were of the caliber of Major League Baseball ("MLB") players. Nomura agreed, and they discussed why there were not more Japanese ballplayers in the majors.

The reason, Alterman learned, was that a 1967 working agreement between the MLB and the NPB precluded Japanese ballplayers from leaving the NPB until the player had 10 years of service time in the league. Once the NPB player hit that 10 year mark, however, the player's prime playing seasons were well behind him – rendering him less desirable for a contract with an MLB club.

Working with Nomura, Afterman used her legal acumen to smartly discover a loophole in the 1967 working agreement, to wit: a player who "voluntarily retired" from the NPB was no longer bound to his NPB team outside of Japan. Consequently, the "voluntarily retired" player, who might still be in the early stages of a burgeoning career, was free to sign overseas in the MLB without violating the working agreement. Now serving as general counsel at KDN Sports, Inc. (Nomura's firm), Afterman worked to find the right client to test the loophole. Working with Nomura, she soon found the perfect candidate: NPB pitcher Hideo Nomo.

Nomo became KDN's first client. Nomo "voluntarily retired" from the NPB and joined the Los Angeles Dodgers in the MLB. Most people did not think that Japanese ballplayers would succeed in the United States, but Nomo, and his unique, wrap-around pitching delivery, immediately became a worldwide sensation. He pitched to record crowds in Los Angeles and his starts were covered as breaking news throughout Japan. Afterman noted that Nomo should be credited for the enormous role he played, in 1995, in "saving baseball after the 1994 strike," and added that Nomo was the perfect trailblazer for the Japanese ballplayer in America.

Afterman, a Shakespeare aficionado, referred fondly to her time at KDN as her "salad days." After retaining Nomo, she represented many other ballplayers, ranging from future Yankees Hideki Irabu and Alfonso Soriano (the latter of whom signed in Japan following a bridge contract via the Dominican Republic) to Jorge Toca and Willy Mo Pena. She said that many of her clients' situations presented "law school exam-style" conundrums, including with respect to Pena, whose initial baseball contract proved to be a forgery after Afterman discovered that Pena's father's signature on that document had, in fact, been counterfeit – thereby enabling Pena to be a free agent. (Pena later played for the Cincinnati Reds and Boston Red Sox, among other teams.)

**A Steinbrenner Hire**

Afterman served as a player agent at KDN from 1994 to 2001. The legendary owner of the Yankees,

George Steinbrenner, then hired her in 2001 as assistant general manager, succeeding, for the first time in baseball history, another female assistant general manager, Kim Ng. When she was hired, the general manager of the Yankees, Brian Cashman, noted that they did not want a talent evaluator or a scout in the assistant general manager role; instead, they wanted Afterman to use her legal skills and defend the Yankees as well as she had defended her players as an agent.

Afterman called the late Steinbrenner a "tough," "no-nonsense" leader who "ran a tight ship." She affectionally recalled Steinbrenner telling Afterman to go to Japan to try to sign slugger Hideki Matsui; he told her to "go East," but added that if she did not come back with Matsui, that she should "keep heading East" and not come back to the Bronx. (Matsui, of course, signed with the Yankees and was voted the most valuable player in the 2009 World Series.) She got along well with Steinbrenner because Afterman was not afraid to be candid in providing her opinion to "the Boss," which likely earned Steinbrenner's respect.

Afterman called it "a travesty" that Steinbrenner is not in the Hall of Fame, as he radically changed baseball through his ownership of the Yankees. Afterman said that Hal Steinbrenner, George's son and the current owner of the Yankees, has a much different style than his father. But, like his father, Hal is deeply committed to bringing championships to the Bronx Bombers.

Since 2001, Afterman has handled a large and diverse portfolio of work with the Yankees. While the Yankees general counsel's office handles most legal operations (ranging from mergers and acquisitions to slip-and-falls at Yankee Stadium), Afterman works on a host of baseball operations and legal issues, ranging from arbitration to international scouting to vendor contracts to labor issues around the globe. As assistant general manager and senior vice president, Afterman said that she is like "the on-call doctor in the ER," as she will be brought in for every "legal, or quasi-legal issue" that arises with the team.

**Trailblazer**

The publication "Baseball America" recently awarded Afterman the Trailblazer of the Year award for all of her efforts on behalf of women in the sport. When asked what advice she would give to young women who are seeking legal careers in a sports industry that remains male-dominated, Afterman first noted that sports are changing, and that baseball in particular has made enormous strides in gender diversity. (Afterman said that, while at KDN, she routinely received faxes to "Mr. Afterman"). She said that being a lawyer was critical to her success, and invites other young women interested in sports to pursue legal opportunities with teams as well as with sports agent firms and marketing firms. She continues to mentor younger women (and men) who are now following Afterman's incredible career.

## In the Courts

# Kim Berg Selected as Newest Magistrate Judge in Southern District of New York

**By Lisa Margaret Smith, Magistrate Judge (ret.)**

On July 12, 2022, the Southern District of New York ("Southern District") announced that Kim Berg had been selected to serve as a magistrate judge, part time. She was sworn in to her new position on September 12, 2022, by District Judge Kenneth Karas, at the Charles L. Brieant Jr. U.S. Courthouse and Federal Building in White Plains.

As a part time magistrate judge, Judge Berg will assist the district judges with criminal matters that emanate from certain exclusively federal properties in the northern portion of the Southern District, including the Roosevelt Home National Historic Site, known as Hyde Park, portions of the Delaware Water Gap National Recreation Area, various Veterans Administration Healthcare Facilities, and the U.S.

Military Academy at West Point (civilian matters only).

Magistrate Judge Berg succeeds Magistrate Judge Martin Goldberg, who has served in the part time position since March 1992. As of 2019, there were 549 full time and 29 part time magistrate judge positions across the United States courts.

**Her Practice**

As a part time magistrate judge, Judge Berg will continue her law practice as a member of the firm of Gould & Berg, LLP, of which she is a founding partner. The practice focuses in the areas of employment law, civil rights, commercial litigation, wills, and trusts and estates. Judge Berg's routine practice will continue on behalf of employees and small to mid-size employers in state trial and appellate courts, and before administrative agencies, such as the New York State Division of Human Rights, the Equal Employment Opportunity Commission, and the New York State Department of Labor. She will also continue to serve as an administrative law judge for the Westchester County Human Rights Commission, where she presides over employment and fair housing cases.

Judge Berg is a Part 146 certified mediator actively mediating cases for the Southern District, New York Supreme and Surrogate's Courts, and the Westchester County Human Rights Commission. She was recently appointed by the Financial Industry Regulatory Authority ("FINRA") as a Dispute Resolution Services Arbitrator for financial services and securities in the New York area.

Magistrate Judge Berg

Judge Berg has a long record of presenting continuing legal education programs for the bar associations in which she is active, including the Westchester County Bar Association ("WCBA"), the Westchester Women's Bar Association ("WWBA"), the Federal Bar Association, and the Women's Bar Association of the State of New York ("WBASNY"). She has served in numerous leadership positions for the WWBA, including serving as president (2018-2019), president elect (2017-2018), corresponding secretary (2016-2017), vice president (2015-2016), and as co-chair of many of the WWBA's committees, including the Mentorship Committee, which she established during her presidency and which she continues to lead. The Mentorship Committee

matches practicing attorneys with law students from the Elisabeth Haub School of Law at Pace University (formerly Pace University School of Law), thereby providing valuable resources and connections to both students and attorneys. Judge Berg also served as president of the WWBA Foundation from 2011 to 2015, during which time she created the annual fundraiser, known as the "Mocktail Party." She also served as the WWBA Foundation secretary from 2010 to 2011, and as director from 2009 to 2017.

In her spare time Judge Berg co-chairs the WBASNY Employment and Labor Law Committee, as well as having co-chaired WBASNY's ERA Civil Rights Committee from 2019 to 2022. As a WCBA member Judge Berg is a longtime member of the Labor and Employment Committee, and is a co-founder of the Labor & Employment Peer Group as part of an ongoing collaborative effort between the WCBA and the WWBA.

Judge Berg has taken part in numerous community service initiatives in the bar associations of which she is a member. She is also a member and presenter for the Gender Fairness Committee for the Ninth Judicial District since 2010.

Judge Berg is a graduate of Pace University, *magna cum laude*, and Pace University School of Law, *cum laude*.

Judge Berg has told this author that she is thrilled to have joined the bench of the Southern District of New York, especially after having appeared before the court for her entire legal career. This author, who had the benefit of having Judge Berg appear before her as an attorney, can attest that Judge Berg is a worthy addition to the Southern District bench.

## In the Courts

# Jennifer Willis Is New Magistrate Judge in Southern District of New York

**By Sarah L. Cave, Magistrate Judge**

U.S. Magistrate Judge Jennifer Willis was raised to love the law and believe in fairness and justice for all. As a child, she followed her father, a criminal defense attorney in Cleveland, to his office and to courthouses, where she began to see that courtrooms were not always a level playing field. She learned from her mother, a public school principal and evenhanded arbiter of household debates, how to resolve issues by gathering evidence and arguing a position.

Judge Willis' commitment to public service developed throughout high school, when she built homes with Habitat for Humanity and tutored inner-city students, as well as during college at Columbia University, where she worked with elementary students on conflict resolution skills, mentored high school students, and joined a historically black sorority dedicated to public service.

### Public Defender

Although tempted to follow her mother's example as an educator, Judge Willis followed in her father's footsteps to the law, and obtained her J.D. from New York University School of Law in 2000. After graduating, she embarked on a career as a public defender, first as a staff attorney at the Committee for Public Counsel Services in Massachusetts, then as a felony trial attorney in the Law Office of the Cook County Public Defender in Chicago, before joining the Federal Defenders of New York, where she rose to become the Director of Strategic Litigation. During 21 years representing indigent criminal defendants, Judge Willis tried over 100 felony bench trials and 35 felony jury trials.

Judge Willis' service as a public defender reinforced her belief that our legal system "requires equal access in order to function," along with public confidence in its outcomes. The key to that confidence, she believes, is not just zealous advocacy, but also judges, who, through intelligence, patience, civility, and diligence, demonstrate to litigants

Magistrate Judge Willis

that "they had a fair shot, [and] that the process was legitimate."

**Appointed**

On January 28, 2022, Judge Willis was appointed as a magistrate judge for the Southern District of New York. She brings to the bench the "cool head, even temperament, patience and empathy" that she developed over her decades of representing clients, some of whom struggled with mental health or substance abuse issues, "during what is often the worst experience of their lives."

In the cases now before her, she strives to bring the "same level-headedness, professionalism, compassion and sound judgment" to decide all cases fairly, without regard to her personal beliefs. Judge Willis also believes that her identity as a Black woman, mother, daughter, and now judge, will help promote "the appearance of inclusion and fairness" in the proceedings over which she presides.

To prepare for the challenge of her judicial role, Judge Willis has drawn not only on the "people" skills she developed as a public defender, but also from mentoring she has received from friends who are federal and state court judges. In fact, she and two of her closest friends from the Cook County Public Defender are all now on the bench.

**Range of Legal Issues**

Since taking the bench earlier this year, Judge Willis has been impressed and stimulated by the range of legal issues that have come before her. For example, she has had to resolve several complex discovery disputes requiring an analysis of U.S. discovery rules in comparison to international standards such as the Hague Convention and the Swiss secrecy statutes. She has particularly enjoyed conducting naturalization ceremonies, during which she has a chance to meet new citizens on a momentous day in their lives. Judge Willis has also nurtured her commitment to education, as she continues to serve as an adjunct professor at New York University School of Law as well as a mentor to her clerks and interns, with whom she has built strong relationships.

Reflecting on her first few months at the Southern District, Judge Willis expressed her gratitude for the opportunity to be the face of the federal judiciary, and she looks forward to continuing to grapple with difficult issues and decide them in an informed and fair manner.

Legal History

# New York at Its Nadir? The Trial of Bernhard Goetz

**By C. Evan Stewart**

Rampant crime; open drug use in the streets; homeless people lying on the sidewalks; the subways not safe, even in the daytime – common complaints by New Yorkers today (the ones who have not de-camped to Florida). But in the late 1970s and early 1980s, New Yorkers feared those problems on steroids. One legal proceeding seemed to capture that era more than any other: *People v. Goetz*.

## The Subway Vigilante

On Saturday, December 22, 1984, Bernhard Goetz left his apartment in the West Village and got on a subway car at approximately 1:00 p.m. In the subway car were 20 other passengers, including four Black teenagers, who were sitting near Goetz. One asked Goetz: "How are you?" Another approached Goetz and twice demanded five dollars. With that, Goetz pulled out a Smith & Wesson .38 revolver and shot each of the young men. Thereafter, he went over to one of them and said: "You seem to be [doing] all right; here's another"; that fifth bullet severed the young man's spinal cord, leaving him paralyzed.

Goetz then (relatively calmly) left the subway car, telling the conductor: "They tried to rip me off." He subsequently headed to New England to avoid arrest; on December 31, however, he walked into a police station in Concord, New Hampshire. Goetz was thereafter turned over to the New York City police on January 3, 1985. After spending a few days at Riker's Island, he was released on $50,000 bail (with a fairly large swatch of public support for his Charles Bronson-style delivery of "justice" to the young men, all of whom had criminal records and who had been described by witnesses as "boisterous" prior to Goetz's appearance on the subway).

## The Legal Process Begins

On January 25, a 23 person grand jury was convened. It heard Goetz's various taped confessions and the few witnesses who voluntarily came forward; it did not hear from any of the victims. Goetz was subsequently indicted, but only on three counts of gun possession.

The next month, as more of Goetz's racist past was reported in the media (and the police report of Goetz's conduct was made public, including his "You seem to be [doing] all right; here's another."), Manhattan District Attorney Robert Morgenthau petitioned Acting Supreme Court Justice Stephen Crane to convene a second grand jury; Crane granted that petition. This time Morgenthau's office put on a more aggressive case in the star chamber proceeding (including granting two victims immunity). That resulted in 10 new charges (e.g., attempted murder, assault, reckless endangerment), to join the three gun possession charges.

During that second grand jury's deliberations, Morgenthau's deputy, Gregory J. Waples, gave an explanation of self-defense that caused a major legal hiccup. At issue was whether Goetz "reasonably believed" (i) that he was about to be killed or robbed, and (ii) that it was necessary to use deadly force. Was that a subjective test (what Goetz himself believed) or an objective test (what a "reasonable person" would have believed)? Waples, on this key point (on which the grand jury focused with great particularity), instructed them that they "should consider whether the defendant's conduct was that of a reasonable man in the defendant's situation." At that time, however, there were a number of cases in the Appellate Division, First Department, that had rejected an objective standard and had, instead, endorsed a subjective test.

Justice Crane, in his review of the grand jury minutes, recognized that Waples had not properly instructed the grand jury on the First Department's standard. When Crane released relevant portions of the minutes to Goetz's defense team, they promptly moved for a dismissal of all charges relating to the improper instruction.

On January 16, 1986, as required by the First Department precedent, Justice Crane dismissed nine counts of the indictment (leaving reckless endangerment and the three possession charges). That was a correct, and courageous, decision by Crane – the latter adjective apt because he was pilloried in the press as "soft on crime" (with other, even less savory phrases, also employed). The result looked like a huge victory for the defense; but it proved so only in the short run, for it allowed the Manhattan D.A.'s office to appeal Justice Crane's decision.

Not surprisingly, the Appellate Division, First Department, saw fit to approve its prior decisions on the proper standard. Before the Court of Appeals, however, it was a different story. The prosecution argued that allowing a subjective test to be the law would be giving "a license to kill for any subway rider like [Goetz] who is asked for money – or the time – by black youths, simply because he honestly, but totally unreasonably, believes that every such encounter with young members of a racial minority is potentially life-threatening."

In a unanimous decision, the Court of Appeals agreed, determining that New York State's public policy required the objective standard for self-defense. (The court never grappled with the thorny issue of resolving how the objective standard – a test grounded in tort law – squared with criminal law, which has a fundamental requirement of mens rea. (Perhaps this is because New York law provides for negligent assault and negligent homicide.)) In any event, the nine dismissed counts were reinstated, and the prosecution's burden became infinitely lighter.

**The Trial Begins: Picking a Jury**

On December 12, 1986, the trial of *People v. Goetz* officially began. But not really. The first several months were devoted to prescreening potential jurors. Ultimately, over 300 New Yorkers were whittled down to 135 potential jurors in advance of the public voir dire, which began on March 23, 1987. That phase was not concluded until a jury was impaneled on April 6.

Voir dire proved challenging for both sides. The prosecutors wanted (i) politically left "Greenwich Village types," and (ii) those who had not been victims of a crime or crimes. While the first criteria was fairly easy to meet, the second was near impossible – too many New Yorkers had been victims of a crime. (At various points, Justice Crane would ask groups of 18 potential jurors if they had been victims of a crime or crimes; when so many hands went up, he would reverse the question: raise your hand if you have not been a crime victim!).

This problem for the prosecutors obviously pleased the defense team, which was faced with a different challenge: what to do about Black jurors? New York law at the time (even with *Batson v. Kentucky*, 476 U.S. 79 (1986)) did not bar the defense from making a concerted effort to prevent Blacks from serving on juries (i.e., prosecutors were barred, but defense counsel were not (yet)). Being very sensitive to the media, however, the defense team actively sought to have some Black jurors who (they hoped) would be sympathetic to the victims-of-street-crime theme (ultimately the defense accepted a Black police department administrative aide and a Black mid-50s bus driver).

At the end of the process, the jury selected had 10 whites and two Blacks. Both sides had tried out various trial themes over the course of selecting this last-standing group (e.g., the objective standard of self-defense, the presumption of innocence, the distinction between possession and use of a gun). Even Justice Crane got involved when a defense lawyer asked if the jurors would allow their feelings to trump legal instructions they received; the judge jumped in to shut down any notion of jury nullification – he told them if Goetz were guilty on the law he instructed, they must convict. Once the twelfth juror was agreed to, a visibly relieved Justice Crane said: "We have a jury. Mazel Tov. Thank you."

On April 27 (after Easter and Passover), the trial of *People v. Goetz* began in earnest.

**The Trial Itself**

Several things happened during the trial that seem to have influenced its outcome. The first related to the prosecution's calling the two victims with immunity. Victim one testified without incident, and he appeared not to have helped or hurt either side. The second victim – James Ramseur – was a very different story. On May 5, he was escorted into court in prison garb (in May 1985 – after being released from the hospital for

his gunshot wound – he held a gun while a friend raped, sodomized, and robbed a pregnant 18 year old woman; he subsequently was sentenced to 8 1/2 to 25 years in prison). Ramseur was a young man angry at the world and, although he had been granted immunity, his presence boded ill for the prosecution. In front of the jury, he twice refused to take the stand and testify. With Goetz's defense team milking this drama for all it was worth, Justice Crane finally held Ramseur in contempt and had him physically removed from the courtroom.

For reasons that remain unclear, the judge offered Ramseur a chance to vitiate his contempt citation; so he was back in court on May 19 (this time in a coat and tie). His testimony for the prosecution was straightforward – none of his group had threatened Goetz. But on cross, Ramseur turned back into the surly, angry (and potentially violent) young man the jury had seen two weeks before. He taunted and attempted to fence with Goetz's lawyer (at one point asking: "When was the last time you got a drug dealer off?") Thereafter, Ramseur removed one of his shoes and various police guards moved toward him to ensure he would not hurl it. With his anger and frustration growing, Ramseur, when asked about his whereabouts days before the shooting, simply shut down and refused to answer any more questions. Justice Crane implored him not to stonewall such innocuous questions, but Ramseur replied: "Take me out of here."

Faced with this situation, Justice Crane again cited Ramseur for contempt. At his May 22 sentencing hearing, the judge made clear to Ramseur how damaging his conduct had been:

> [You] conveyed viciousness and selfishness more efficiently than words could. . . . Your conduct has played right into the hands of Mr. Goetz's lawyer. He owes you a vote of thanks. . . . The jurors saw your contemptuous conduct. That can never be erased from their minds.

Besides fining Ramseur $1,500 and adding six months to his jail time, Justice Crane would also have to strike all of Ramseur's testimony (since Goetz's lawyer was unable to finish his cross-examination), and so informed the jury of that fact.

A sort-of counterbalance came with respect to another one of the other victims, Barry Allen. Allen had not been given immunity and it was believed likely that he would plead the Fifth Amendment if called to testify (fearing a risk of prosecution for conspiracy to rob Goetz). Justice Crane therefore ruled that Allen must first come into court – without the jury present – and answer questions. When Allen appeared (sans jury) and took the Fifth to every question, the judge ruled that the jury would not be allowed to see the spectacle of Allen pleading the Fifth.

This was a seeming victory for the prosecution. But the Goetz defense team pressed Justice Crane to compel the prosecutors to grant immunity to Allen (an unsympathetic character who had a criminal record, which only got longer after the subway shooting). The judge declined that "novel" theory, but later did instruct the jury that (i) Allen was a "missing witness," (ii) the absence of whom the prosecution had failed "adequately to explain," and (iii) the jury could infer Allen's likely testimony would not have been helpful to the prosecution.

Then came three important evidentiary rulings by Justice Crane regarding hearsay. The defense wanted a paramedic to testify about a statement a non-testifying victim had made to him on the way to the hospital ("The guys I was with were harassing this guy, asking him for money. The guy threatened us and then shot us."). They argued this hearsay should come in on the "penal interest" exception and/or the "excited utterance" exception. Justice Crane correctly ruled that neither exception applied (i) because it was not an express admission of that victim's guilt, and (ii) it took place an hour after the shooting and thus it was not close enough in time to the event.

The prosecution then sought to have two victims' "exculpatory" statements made to a subway passenger admitted ("He shot me for nothing. I didn't do anything, I only asked for five dollars"; and "I didn't do anything, he shot me for nothing."). Before those were allowed to come in, however, Goetz's lawyer skillfully elicited from the subway passenger her agreement that the statements were "clear and concise" and that "the people you spoke to were coherent and of sound mind and were out of the state of incident and were able to talk to you." With that testimony and given his prior ruling on the statement to the paramedic,

Justice Crane declined to allow the hearsay statements to come in before the jury.

That left the "punks" testimony. Andrea Reid and her husband Garth Reid (both Black) were on the subway, and before the shooting, she said to her husband: "Look at those punks bothering that white man." While that statement, in and of itself, was not relevant to the issues at trial, the defense team desperately wanted the jurors (for obvious reasons) to hear it. When the prosecution called Mr. Reid, the defense on cross asked a leading question: "Isn't it true that the reason you took notice of those four individuals is because someone said, 'Look at those four punks bothering that man'?" The prosecution jumped up and objected and Justice Crane appeared sympathetic to that objection (at first). But prior questioning by the prosecution into subway passengers' state-of-mind now proved a double-edged sword; the judge (upon reflection) ruled that the door was now "open and [defense counsel is] going into it." Thus, the jurors heard the "punks" hearsay from a Black man (via his wife).

*The Jurors Decide*

While the lawyers focused mightily over the charges to the jury (especially on self-defense), the legal nuances between the objective and subjective tests likely were of little moment given what actually happened in open court. As such (and not surprisingly), the jurors found Goetz not guilty of the most serious of the crimes charged. At the same time, Justice Crane went ahead with his "must" instruction, and the jurors did convict Goetz of criminal possession of a weapon in the third degree. That "must" instruction was upheld on appeal. Goetz ultimately served eight months in prison.

**Postscripts**

- Darrell Cabey, the young man paralyzed by Goetz's last bullet, did not testify. But he later filed a civil suit against the "Subway Vigilante." A jury awarded him $43 million; Goetz never paid a penny.
- Goetz, after leaving prison, ran for New York City Mayor (in 2001) and Public Advocate (2005). On Larry King Live, he claimed that his conduct had made the city safer. It is statistically true that, as of 2006, New York City was one of the safest cities in the country.
- Notwithstanding the political and public heat he took presiding over the trial, Acting Justice Crane was subsequently elected a justice of the Supreme Court in Manhattan. He later served as administrative judge of that court; in 2001, he was appointed an associate justice in the Appellate Division, Second Department. In 2008, he retired from the bench to join JAMS; since that time, has been one of the country's leading mediators. I am honored that Stephen Crane has been my friend for many decades.
- For those wanting more details on *People v. Goetz*, please consult George Fletcher's "A Crime of Self-Defense: Bernhard Goetz and the Law on Trial" (The Free Press 1990).

## Federal Bar Council News

# Council Calls on Members of Congress to Co-Sponsor Judicial Security Act

**By Mitchell McCloy**

The Federal Bar Council recently wrote to members of Congress within the Second Circuit urging them to support the Daniel Anderl Judicial Security and Privacy Act of 2021, which addresses the security and privacy of judges.

The Council's letter reminded the members of Congress that the Council membership includes more than 2,000 judges and lawyers practicing in the Second Circuit, including "many of the leading lawyers in the Circuit and the nation," and that it is dedicated to "promoting the rule of law and supporting the federal judiciary in its fair administration of justice." The letter emphasized that "judicial security is essential to the rule of law and the fair, efficient administration of justice" and that "[f]ederal judges must be able to

make decisions, no matter how unpopular, without fear of harm."

The bill is named for the son of New Jersey U.S. District Judge Esther Salas, who was murdered on July 19, 2020 by a pro se litigant-attorney who had cases before Judge Salas, the first Latina to serve as a U.S. District Judge in New Jersey, "an identity for which she and her family appear to have been targeted," the Council wrote. The former litigant shot both Judge Salas' son and husband in the family home. Judge Salas' husband was grievously injured but survived the attack.

The tragedy that Judge Salas and her family experienced "is only the most recent act of violence against federal judges amidst a disturbing and steep trend that implores Congressional action," the Council wrote. Over the past five years, security incidents targeting judicial personnel have risen by more than 480 percent, from 926 threats in 2015 to more than 4,200 annually in both 2019 and 2020, according to the U.S. Marshals Service. "For judges and their families, better security is a matter of life and death" as judges regularly interact with "the fiercest criminal enterprises as well as highly emotional personal matters of civil law," the letter stated.

The letter noted that the Second Circuit and Federal Bar Council have particular experience with attacks on judges. In 1988, Southern District of New York Judge Richard Daronco was murdered while gardening at his home in Pelham, New York, by the father of a pro se plaintiff whose case Judge Daronco had dismissed. Another former litigant targeted Southern District of New York Chief Judge Charles J. Brieant by tracking down Judge Brieant's home address and mailing a poisoned box of chocolates and a Valentine's Day card to the judge's home. Judge Brieant's wife ate the chocolates and was hospitalized for four days but survived the attack. The man had been convicted of drug manufacturing before Judge Brieant.

The bill, first introduced in the House and Senate last year, responds to the threat that disclosure of judges' personal information poses to judicial security. The Council wrote that judges are "increasingly targeted by persons who disclose detailed personal information about judges, their families and friends, then disseminate such information trying to incite others to bring violence to bear against those judges." For example, the man who killed Judge Salas' son had found the judge's personal information on the internet and traveled to her family home to attack her family.

The bill proposes measures to prohibit government agencies from disseminating judges' personal information online, incentivize state and local governments to do the same, and prohibit commercial data collectors from purchasing or selling personally identifiable information of federal judges. The bill would also permit injunctive relief and a private right-of-action for violations.

The National Law Journal and the New York Law Journal highlighted the Council's letter and the bill's goals in their August 25, 2022 and August 30, 2022 editions, respectively. The publications noted that a version of the bill failed to pass last year mainly due to procedural hurdles. At the time, Judge Salas told reporters that "all we ask is that members of Congress work together in a bipartisan way to see that legislation is passed that protects all federal judges across this country."

The Council called on every member of Congress in New York, Vermont, and Connecticut who had not already sponsored the bill to join nearly 100 other members of Congress in co-sponsoring the bill in order to "help lead this sensible effort to protect our federal judges." The letter made it clear that failing to respond to threats against judges would have far-reaching consequences given the essential role that federal judges play in American life. The Council emphatically asserted that "[t]he federal government has a responsibility to protect all federal judges because safety of judges is foundational to our great democracy."

Federal Bar Council President Jonathan Moses and Treasurer Shawn Regan, who spearheaded the Council's support of the legislation over the past year in coordination with the judiciary, also appeared on a podcast about the Council's efforts regarding the Act and judicial security. It can be found here at the ALM website, https://www.law.com/2022/09/09/the-rise-of-threats-and-attacks-on-the-judiciary/, and on Spotify under Legal Speak at, https://open.spotify.com/episode/3XyZy8sepAL1YJxMMwlQib?si=-utkRnS1R7qAQae8alFNlA

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As of late September, 112 members of Congress had joined as sponsors and co-sponsors of the Bill, with support coming from a diverse array of political party affiliation and geography.

## Lawyers Who Make a Difference

# Vince Chang, President of the N.Y. County Lawyers Association

**By Pete Eikenberry**

Vince Chang, born in Topeka, Kansas, is the son of Chinese immigrants. At the time of his birth, his parents worked at the Veterans Administration Hospital in Knoxville, Iowa. Vince attended high school in Knoxville, where he was on the debate team. However, the Des Moines Register enabled Vince to finish high school at Phillips Exeter Academy in New Hampshire. From there, he was admitted to and graduated from Harvard College and Harvard Law School. He clerked for a federal judge in Ohio and then joined the litigation practice at Davis Polk.

As the first Asian American president of the New York County Lawyers Association (the "NYCLA"), he tries to ensure that it stands for the proposition that all lawyers have a civic duty to better the justice system. Under Vince's leadership, the NYCLA has litigated to ensure "18(b) lawyers" are fairly compensated. As a result of the litigation, compensation for 18(b) lawyers has been doubled to more than $150 per hour.

**Pro Bono Programs**

As part of its effort to promote access to justice, during Vince's presidency the NYCLA has maintained a variety of pro bono programs that served nearly 2,000 people last year and that will likely serve even more people in the future. These programs include the NYCLA's Legal Counseling Project, which provides counseling to individuals four times a month in the areas of family, employment and landlord/tenant law. Similarly, the NYCLA's Manhattan Civil Legal Advice and Resource Office provides a free, weekly walk-in clinic that provides limited legal advice to pro se litigants with consumer debt matters in the New York Civil Court.

From his position as a diverse president of a major bar association, Vince has worked on efforts to advance diversity. Under his leadership, the NYCLA has ushered in a Special Master's Program in which NYCLA attorneys provide assistance on discovery and other matters to state court judges, to provide assistance to overworked judicial chambers. Most of the members of the program are from minority groups and the hope is that some of these members will be inspired by their Special Master experience and become judges themselves.

**Addressing Gun Violence**

During Vince's presidency, the NYCLA has also taken a leadership role in addressing gun violence and will continue to do so in the future.

The NYCLA was the only bar association in New York to file an amicus brief in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ___ (2022). The NYCLA supported upholding New York's laws regarding the concealed carry of firearms and has further supported New York's law on concealed carry enacted in the aftermath of the *Bruen* decision. The NYCLA has supported the enactment of legislation that would hold the gun industry accountable for irresponsible marketing practices. And it has urged the Bureau of Alcohol, Tobacco, Firearms and Explosives to adopt enhanced regulations enabling it to regulate so-called "ghost guns" and other kits that do not contain serial numbers and do not fall within the definition of "firearms."

Finally, during Vince's presidency, the NYCLA has issued statements supporting the independence of the judiciary and the rule of law. In particular, the NYCLA recently criticized efforts to attack the Chief Judge of New York and to politically interfere with the state's judicial nominations commission. Vince has assured that in the future the NYCLA will remain vigilant to address attacks on the independence of the judiciary.

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