Federal Bar Council Quarterly

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In This Second (!!!) 30th Anniversary Issue:

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From the President

In Defense of Bar Association Membership

By Sharon L. Nelles

I write this column, my first, in the glow of the Federal Bar Council's Thanksgiving Luncheon. The event, brimming with holiday cheer and chatter, always affirms the value of coming together to socialize with each other, to learn from each other, and to celebrate the accomplishments of each other. This year's luncheon certainly underscored the joys of in-person connections while we continue to navigate the "new normals" of law practice after emerging from the shut-down of our offices and our courts.

With well over 600 persons in attendance, members and non-members of the Council alike, the luncheon also helps make the case for why bar associations matter. The past years – beginning well before the pandemic but certainly exacerbated by it – have found bar associations facing declining memberships and shrinking funds. Certainly for the Council, this has required focused attention on membership recruitment and retention, an effort I prioritized during my years as president-elect. I would like to report that it has been a simple and successful endeavor. Unfortunately, I cannot. Despite a sustained membership campaign developed and executed as part of the Council's strategic plan with the help of professional membership consultants, a new website, and expanded offerings, membership remains an ongoing struggle.

Community Engagement

When I graduated from law school a long time ago, newly minted lawyers joined bar associations. My firm offered a list of organizations and descriptions of them as part of the new associate welcome package, and asked you to choose two, the dues for which were then paid by the firm. Implicitly and explicitly, I was being told that engagement with the broader legal community was an important component of being a lawyer, that I should do more than be at my desk (though important), and that I should do more than engage with the people in my office (though important). To be a fully formed and fulfilled attorney, I should participate actively in the advancement of the profession. I dutifully joined two organizations, one New York based, one national. As time passed, I became involved with others tailored to my growing interests, served in the leadership of several, and saw how various organizations contributed to the legal community in different ways. This brought me the opportunity to become involved in judicial screening committees, drafting restatements of law, and ensuring the provision of legal services to unique populations in need.

Although the Federal Bar Council was not one of the first two organizations I joined, it too became part and parcel of my experience as a member of the Second Circuit legal community. As an associate, I was invited by partners at Sullivan & Cromwell to join them at the Thanksgiving Luncheon and Law Day Dinners. I saw the camaraderie of the Council and the quality of its offerings. Eventually I began attending Winter Bench and Bar Conferences, where I was able to spend extended time with some of the world's most accomplished lawyers and impressive jurists, and forged some of my most treasured personal and professional relationships and experiences – not to mention a robust contact list and a few client representations.

Bar organizations to this day provide key ingredients in what makes law more than a business, but a profession. Beyond collegiality, they provide opportunities for lawyers at all stages of their careers to engage deeply with each other in becoming more expert in their area of practice. For newer lawyers and those with smaller networks, they can provide critical avenues for encouragement, exposure, and recognition. This can be particularly important to the advancement of diverse lawyers.

Rewards of "Joining"

Given the opportunities bar associations provide for education, engagement, leadership, and business contacts, why does the legal community seemingly place less importance on joining? The laundry list of possible factors includes the rise in the number of organizations and other affinity groups, less support from firms, and the ever increasing demands on our time – including billable hours and business development pressures. And most organizations make access to their events, information and CLEs available regardless of membership, perhaps leading to the conclusion that the rewards of "joining" are available without the cost and time of membership and active participation.

I dissent. The activities of the Council over the past three years, a time of incredible challenges, evidence how membership in bar organizations cements core values and weaves connectivity. During a moment in time when our community was limited in our ability to convene in conference rooms and halls of justice, the Council focused on creative programming to allow lawyers and judges to discuss timely topics, and to deliver that programming virtually – which allowed hundreds to join the discussions. We launched the "Legends of the Bar" series to maintain important connection across generations of lawyers, and offered "Coffee and Conversations with the Court" interviews with new judges as a way to introduce them to the bar in the absence of live events.

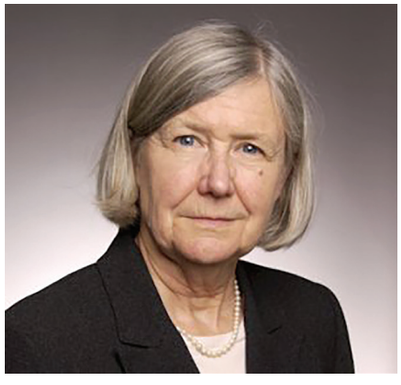
Members also came together to work on issues of particular importance to the judiciary, including a Rule of Law Symposium in 2021, where we discussed issues of utmost concern to all of us – the norms of our profession, respect for the institution and each other, and its critical importance to sustaining our democracy. Members also organized exceptional CLE programming ranging from the ABCs (Antitrust, Bankruptcy and Criminal Appeals) to issues of diversity and inclusion. Among other initiatives, the Council also established the Council's Access to Counsel Project to mobilize the private bar to step in when formal representation of pro se litigants is warranted or needed – filling in the gaps that currently exist in the civil pro se system. And in 2022, in a perfect example of the intersection of fun, community, networking and practice development that bar associations can provide, our Bankruptcy Litigation Committee hosted over 400 members of the restructuring bar at Tavern on the Green for cocktails, music, and tributes to the bankruptcy judges of the Southern District of New York.

What is the future for bar associations? There is no question that the Council, like all membership organizations, will need to adapt to a changing world. But our profession is uncommon. As lawyers we have the ability to provide pro bono service, develop law, educate on legal trends and legal rights, advocate for reforms, and facilitate access to justice. The Federal Bar Council and other bench and bar communities provide a vehicle for all of those activities. For those in a position to do so, please join, engage, and motivate another generation to become part of the community.

From the Editor

Presentation of the Thurgood Marshall Award

By Bennette D. Kramer



On November 23, 2022, before the Thanksgiving Luncheon, the Federal Bar Council presented the Thurgood Marshall Award for Pro Bono Service to Milbank partner Tawfiq S. Rangwala, as the "Veteran Deserving of Recognition" and to Gibson, Dunn & Crutcher associate Lee R. Crain, as the "Rising Star."

The Thurgood Marshall Award was established in 2014 to reward exceptional pro bono service by lawyers in private practice based in the Second Circuit who have demonstrated an exemplary commitment to pro bono legal services.

Saul Shapiro and Jon Moses on behalf of the Federal Bar Council and the Public Service Committee

presented the award to Crain and made brief remarks regarding Rangwala, who could not be present to accept his award.

Over 20 years, since he was a first-year associate at Milbank, Rangwala has undertaken a wide range of pro bono matters, from high-profile death penalty and religious discrimination cases to smaller matters protecting housing rights and appealing criminal convictions. At the same time, he has maintained an active private practice handling both civil litigation and a variety of government investigations originating in the Second Circuit. Rangwala is also a leader in diversity and inclusion at Milbank and in the broader legal community.

Gibson Dunn partner Jim Hallowell said a few words about Crain before Shapiro presented the award. Crain has worked on First Amendment cases, employment litigation for the Legal Aid Society, gun safety issues with the Giffords Law Center to Prevent Gun Violence, and prisoner rights litigation. He has also worked as an associate at Gibson Dunn while maintaining leadership in pro bono cases.

Following the ceremony, Jon Moses raised a toast to the recipients.

Editor's note: The fourth and final part of the Federal Bar Council History will be published in the March/April/May 2023 issue of the *Federal Bar Council Quarterly*. As we happily return to print our space is more limited. This issue has many excellent articles and we have delayed publication of the final installment of the history to make room for them.

Developments

Council Honors Judge Mauskopf at Thanksgiving Luncheon

By Magistrate Judge Sarah L. Cave

The Federal Bar Council held its annual Thanksgiving Luncheon at Cipriani 42nd Street on November 23, 2022. Luncheon Committee Chair Keisha-Ann Gray welcomed the participants to the event. Gray reflected on her personal connection to the luncheon's honoree, Eastern District of New York Judge Roslynn R. Mauskopf, who currently is serving as director of the Administrative Office of the U.S. Courts. Gray recalled Judge Mauskopf hiring her to serve as an Assistant U.S. Attorney for the Eastern District of New York, where Gray had the wonderful opportunity to represent the United States of America. Gray described Judge Mauskopf as "the living embodiment of true devotion to public service." She noted that we are living in a challenging moment for those in public service, with judges facing personal threats to their safety and the courts facing lingering challenges from the COVID-19 pandemic as well as cyberattacks directed at sensitive information. Gray observed that we are fortunate to have Judge Mauskopf in her current role, where she has diligently and energetically addressed these challenges to ensure that the courts have the resources they need.

Seth Levine, president of the Federal Bar Foundation, reported on the Foundation's successes in promoting civics education and rule of law initiatives over the last year. The programs the Foundation supported included student field trips to the courthouses organized by the Justice Resource Center, the Immigrant Justice Corp, and summer internships at the U.S. Attorneys' Offices and the Office of the Federal Defender. With a grant in honor of former Chief Second Circuit Judge Robert A. Katzmann, the Foundation enabled over 200 high school students to attend week-long summer camps in the Eastern and Southern Districts of New York, led by Judge Joseph R. Bianco. Next summer, the Foundation will support extending the summer camp to the District of Connecticut, and will continue to support civic education training for middle and high school teachers to enhance civic education lessons in their classrooms. Levine concluded by thanking the attendees for the

record-level support they gave to the Foundation over the past year.

The Luncheon featured an important piece of business: the installation of the new officers, trustees, and directors of the Council and the Foundation, overseen by Frank H. Wohl, chair of the Nominating Committee. As the newly-installed president of the Council, Sharon L. Nelles commemorated her predecessor, Jonathan M. Moses, with the Federal Bar Council Eagle. Nelles observed that Moses was precisely the president the Council needed to steer it through the challenging circumstances of the last two years. Through calm leadership, Moses overcame the limitations of the pandemic to initiate new programs that facilitated the connection between the bench and bar. Moses spearheaded the Legends of the Bar and Coffee and Conversations series and, at the Rule of Law Symposium in 2021, Moses focused the Council on the importance of norms and respect for institutions and other professionals. During Moses' tenure the Council launched its Access to Counsel Project, which mobilized the private bar to join the courts' efforts to fill the gaps in representation for pro se litigants. Last but not least, Moses oversaw the implementation of the Council's strategic plan, which seeks to implement necessary changes without sacrificing important traditions and values.

After accepting the Eagle, Moses, in his first task as president emeritus, introduced Judge Mauskopf, recipient of the 2022 Emory Buckner Medal. Moses reminded the attendees that Buckner had served as U.S. Attorney for the Southern District of New York from 1925 to 1927, and is widely credited with professionalizing the office and establishing the norm that prosecutors must serve the mutual objectives of the rule of law and justice.

Moses shared the milestones in Judge Mauskopf's biography, including her graduation from Brandeis University and Georgetown University Law School, service as an assistant district attorney in Manhattan under Robert Morgenthau, New York State Inspector General, U.S. Attorney for the Eastern District of New York, District Judge for the Eastern District of New York, and her current role as director of the Administrative Office of the U.S. Courts, where she is the first woman to serve in that post. Moses noted that the through-line of her public service career is her commitment to fairness and recognition that the law has deeply human impacts.

When speaking to her clerks about public service, Judge Mauskopf often invokes a speech that Justice Robert J. Jackson – also a Buckner Medal recipient – gave in 1940 when he was U.S. Attorney General to the Second Annual Conference of United States Attorneys. Reminding the prosecutors of their awesome power and risk of

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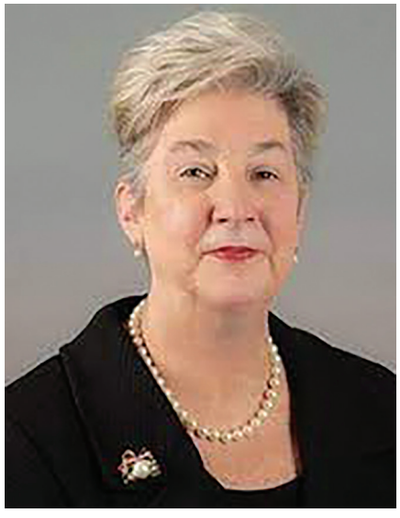
corruption, Justice Jackson observed that, "at times of fear or hysteria," prosecutors "particularly need to be dispassionate and courageous in those cases which deal with so-called subversive activities." The protection for citizens' safety, Justice Jackson observed, "lies in the prosecutor who tempers zeal with human kindness, who seeks truth not victims, serves the law not factional purposes, and approaches the task with humility." Moses observed that Judge Mauskopf carried forward the legacy of Emory Buckner, through Justice Jackson, Robert Morgenthau, and now herself.

"Conscience of America"

Judge Mauskopf began her acceptance remarks by expressing gratitude for the challenging and meaningful roles she has held over the course of her career, each of which represented the ideals and values that form "the collective conscience of America." As U.S. Attorney, she was honored to represent the United States; as a district judge, she acknowledged her solemn oath to administer justice fairly; and now, at the Administrative Office of the U.S. Courts, she supports the fair administration of civil and criminal justice in the federal courts and upholds the integrity and independence of the federal judiciary. She recognized the luxury she has had, knowing that her only client is "the cause of justice," and her mantra, "do the right thing." Recalling the maxim, "make a living by what you get, but make a life by what you live,"



Judge Mauskopf

Judge Mauskopf commented that, by that measure, "public servants are rich indeed."

Judge Mauskopf paused to remember two of the mentors who have shaped her career in public service. First, she recalled "The Boss," Robert Morgenthau, who instilled in generations of prosecutors the highest standards of professionalism and integrity. Second, she learned from former New York Governor George Pataki that through thoughtful, diligent exercise of public authority, each of us can make a difference in the lives of citizens.

The two greatest inspirations for her choice of a life of public service, however, were her parents, Barry and Regina Mauskopf. Both were torn from idyllic lives in the Czechoslovakian countryside and forced into Nazi concentration camps. Regina's mother, father, and every one of her eight siblings perished in the camps, and Barry, too, lost most of his family. Judge Mauskopf poignantly observed that her family members were executed simply because of who they were, without a trial, jury, courtroom, judge, or any measure of justice. Judge Mauskopf's parents were eyewitnesses to one of the greatest perversions of government authority, and their experiences have made her ever mindful of the tremendous power inherent in representing the government in its exercise of lawful authority, as well as the tragic consequences that can result when that authority is driven by misguided principles or evil ideology. In every role she has held and every decision she has made in her public service career, she has carried the lessons of the Holocaust, and the courage and sacrifices of her family.

Judge Mauskopf shared several life lessons she had learned from her parents: one, there is no such thing as a bad day; two, there is no obstacle or hardship so difficult that it cannot be overcome with hope and belief in yourself; three, be grateful for everything that you have; four, tell your family you love them as often as you can; and five, have the courage to start something new, take a bold step, stand up for who you are and what you believe in, and always do the right thing.

Judge Mauskopf closed with a warm childhood memory of touring the White House with her father, a butcher who ran a small shop in Washington, D.C. As the tour led them to the Oval Office, tears filled her father's eyes as he remarked, "Who would have ever thought that Barry would stand in the Oval Office?" These were profound words

from a humble man that sparked her public service career, and embody how she has felt each day since: grateful, privileged, and sincerely humble.

A Lesson in Time

How the Failures of the German Judiciary Facilitated the Holocaust

By Steven H. Holinstat[1]

I write this article in memory of the over six million Jews who were slaughtered in the Holocaust, including members of my own extended family who perished by reason of Hitler's efforts to eradicate the Jewish people – his "Final Solution," as well as in memory of the lucky few, including my father-in-law, Michael Bornstein, who was able to survive the inconceivable horrors of Auschwitz, one of the most heinous of the German death camps, where his father and brother were murdered. His harrowing story is chronicled in "Survivors Club: The True Story of a Very Young Prisoner of Auschwitz." I also write this article as a long-time practicing attorney to highlight the role of the German judiciary, which not only did little, if anything, to prevent this atrocity, but became a willing participant in Hitler's crimes against humanity. Indeed, without the inexcusable silence, acquiescence, and active facilitation of the German judiciary and the German legal system, down to the judges, lawyers, and the bar associations to which they belonged, the Holocaust might possibly have been avoided.

A "Free Profession"

Prior to Hitler's rise to power, the German Bar was a "free profession" independent of state control, with the Weimar Constitution declaring judges to be independent and bound only by the law. Hitler despised lawyers and the check they played against the exercise of unlimited power by the German state, promising to make "every German realize it is a disgrace to be a lawyer," and "every lawyer must be regarded as a man deficient by nature or else deformed by usage." Hitler went on to describe the profession of lawyers as "essentially unclean, for the lawyer is entitled to lie to the court."[2]

On January 30, 1933, Hitler was appointed as German Chancellor by President Paul von Hindenburg to forge a political coalition between the Nationalist Conservative and Nazi parties. About a month later, on February 27, 1933, a Dutch militant set fire to the German parliament building (the Reichstag). Hitler took advantage of this instance to engage in fearmongering. He falsely blamed the attack on his political foes, claiming it was a plot by Communist dissidents to overthrow the state in response to von Hindenburg's appointment of Hitler as Chancellor, decrying that no one would be safe until society was rid of them. Nazi leaders exploited the Reichstag fire to have President von Hindenburg issue the Reichstag Fire Decree, which suspended important provisions of the Weimar Constitution, particularly those safeguarding individual rights and due process of law. It placed restrictions on the right to assembly, freedom of speech and freedom of the press and removed restraints on police investigations. It also gave the central government the authority to overrule state and local laws and overthrow state and local governments, which permitted the rise of the Nazi police state.[3]

Contemporaneously, von Hindenburg declared a national state of emergency, expanding police power to permit searches, arrests and indefinite incarceration without specific charges or judicial review if such individuals were potentially dangerous to the Reich. Such detained persons had no access to a lawyer, no right to trial or appeal and there was no process for judicial review of their confinement. Instead of standing up for the rule of law, on March 19, 1933, the German Federation of Judges' governing board stated that it approved "the will of the new government to put an end to the immense suffering of the German people [and will cooperate in the] task of national reconstruction. . . . May German law hold sway in German domains! German judges have always been

loyal to the nation and aware of their responsibility. . . . German judges place their full confidence in the new government." A potential explanation for the German Supreme Court's palpable failure to act was that it acted as the trial court for all cases of "treason," and taking all of these cases would likely have overwhelmed the court's docket.[4]

The Enabling Act

Emboldened by the utter lack of any judicial effort to enforce its role as a check on the Nazi-controlled legislature, on March 24, 1933, the Reich government issued the Law to Remedy the Distress of the People and Reich (the Enabling Act), delegating to the Nazi government the authority to enact laws, including those in contradiction of the Weimar Constitution, without approval of the German parliament or president. The German Supreme Court again declined to challenge the legitimacy of this act, notwithstanding that the Communist and Social Democratic members of the Reich government had been detained in "protective detention" in Nazi-controlled camps, and thus were unable to have their votes counted to prevent the passage of this law.[5]

On April 7, 1933, the Law on the Admission to the Legal Profession was enacted, prohibiting the admission of Jews and others to the German bar and disbarring existing Jewish, Social Democrat, and Communist lawyers. That same day, the Nazi government enacted the Law for Restoration of the Professional Civil Service, mandating removal of all Jewish, Social Democrat, and other "politically unreliable" judges, public prosecutors, and district attorneys. The German judiciary again took no action to curb or challenge these laws, with Karl Linz (the chair of the German Federation of Judges) incredulously stating that Hitler had assured him that judicial independence would be maintained. In accordance with these laws, all lawyers and judges were required to complete questionnaires tracing their blood lineage and disclosing their political affiliations and beliefs.[6]

Nazi-controlled state bar associations developed their own discriminatory rules of professional conduct:

> The Bar association of Berlin declared that establishing or maintaining a law firm with partners of both "Aryan" and "non-Aryan" descent was unethical. The Bar Association of Düsseldorf decreed that it was a violation of professional standards for anyone to take over the practice of an attorney whose membership in a bar association had been revoked, to employ former "non-Aryan" attorneys, or to take over their clients. It concluded with the sweeping statement: "Every professional contact with disbarred, non-Aryan attorneys is a violation of standards."[7]

Purge of Lawyers and Jurists

With the purging of Jewish and other disfavored lawyers and jurists from the German judicial system, the legal profession was converted from an independent self-regulating regime to one controlled by the Nazi regime. In February 1934, the Law for the Transfer of the Administration of Justice to the Reich granted control over the German bar and legal system to the Reich in Berlin, and in 1936, the statute establishing the bar was rescinded and replaced by the National Lawyer's Code that mandated compliance with Nazi Party doctrine. Lawyers were instructed to "march an army corps of the Führer," and judges and lawyers alike were required to take an oath of loyalty to Hitler.[8]

In 1934, as a result of the German Supreme Court's not guilty verdicts of two defendants in the Reichstag fire, Hitler ordered the creation of the People's Court (staffed by Nazi judges) to remove the German Supreme Court's jurisdiction over treason and other political cases. The People's Court went on to condemn tens of thousands of people to death for treason. The rule of law was warped from protecting individual's rights and freedoms to a single controlling question: "How would the Führer decide in my place?"[9] Reich Justice Carl Rothenberger enunciated this "Führer Principle" as follows:

> [W]ith the [Führer] a man has risen within the German people who awakens the oldest, long forgotten times. Here is a man who in his position represents the ideal of the judge in its perfect sense, and the German people elected him for their judge – first of all, of course,

> as "judge" over their fate in general, but also as "supreme magistrate and judge." . . . The judge is on principle bound by the law. The laws are the orders of the [Führer] (Adolf Hitler).[10]

In addition, security police were installed to supervise judicial decisions and report ultimately to Hitler on any questionable judgments or sentences, with the judges being subject to removal if Hitler disagreed with the result.[11]

On September 15, 1935, Germany's parliament (then consisting solely of Nazi representatives), passed the Reich Citizenship Law and the Law for the Protection of German Blood and German Honor (the Nuremberg Race Laws). These laws sought to define for the judiciary who was a "Jew" not necessarily by any religious belief, but by birth, and paved the way for a future slew of anti-Semitic laws. In November 1936, the then-president of the German Supreme Court at a meeting of justice officials suggested that the court accept the broadest interpretation of the Nuremberg Race Laws because, as the Ministry of Justice State Secretary noted, it "is a regulation that establishes the very foundation of the German people, which we do not seek to narrow but to broaden for the protection of our race." Consistent therewith, on December 9, 1936, the German Supreme Court interpreted the Nuremberg Race Law relating to prohibited "sexual relations" between Jews and non-Jews, which the court previously interpreted to mean sexual intercourse, to include any sexual act where sexual urges are in any way gratified even if there was no bodily contact regardless of whether the act took place in Germany or elsewhere. It was decisions like this by the German Supreme Court that bolstered the "legal" persecution of Jews by the Nazis and presaged the Holocaust.[12]

Not all judges were as pro-Nazi as Hitler demanded. For example, after what he considered an improperly mild sentence, Hitler addressed the judiciary, stating:

> I expect the German legal profession to understand that the nation is not here for them but they are here for the nation. . . . From now on, I shall intervene in these cases and remove from office those judges who evidently do not understand the demand of the hour.[13]

This intimidating proclamation "wiped away the last remnants of judicial independence in Germany."[14] Consistent therewith, on October 1, 1942, Hitler's Reich Minister of Justice issued the first of a series of Letters to All Judges to serve as official sentencing guidelines, and instructed judges to follow Nazi ideology, including providing harsher sentences for Jews and other members of disfavored groups. These letters were classified as "state secrets" due to a concern over the intensification of state control over the judicial system. Judges who refused to comply with these guidelines were threatened with removal from office, disciplinary action or disbarment, and even criminal charges.[15]

Right to Counsel Eroded

These actions paved the way for even further erosion of the basic lawyer-client relationship. For example, in 1944, the right to counsel in death penalty cases (including, political and racially-motivated cases) was severely restricted: counsel needed to obtain permission from the Ministry of Justice, the BNSDJ (the organization for Nazi lawyers) and the court's president; the prosecutor controlled whether and when counsel could speak to his or her client and witnesses and the evidence that could be presented; counsel could not make any arguments critical of the Nazi regime (which could lead to removal, disbarment, and/or criminal sanctions against the attorney); and if the client was deemed to have given untruthful testimony, counsel could be held accountable as an accomplice to the crime for which the client was charged. Not surprisingly, few lawyers were willing to take on such representations. Similar rules were also applied in certain civil suits.[16]

From 1946 to 1949, after the successful defeat of Hitler and the Third Reich, an International Military Tribunal was established and carried out a series of trials in Nuremberg, Germany, against, among others, the surviving leaders of the Nazi judiciary. In the matter of *U.S. v. Altstötter, et al.* (which became known as the Jurists' Trial), a U.S. military tribunal tried high ranking members of the Reich Ministry of Justice as well as several jurists and prosecutors of the People's Court and Special

Court. These defendants were accused of "judicial murder and other atrocities, which they committed by destroying law and justice in Germany and then utilizing the emptied forms of legal process for [] persecution, enslavement, and extermination on a large scale."[17] In passing down a life sentence for Justice Oswald Rothaug (the chief of the Special Court), the military tribunal described the trial, over which he presided, of Leo Katzenberger for "racial pollution," i.e., for having had intimate relations with a non-Jew – a fact denied by both Katzenberger and the woman with whom he was charged with having intimate relations:

> The trial itself, as testified to by many witnesses, was in the nature of a political demonstration. High party officials attended. . . . During the proceedings, Rothaug tried with all his power to encourage the witnesses to make incriminating statements against the defendants. Both defendants were hardly heard by the court. Their statements were passed over or disregarded. During the course of the trial, Rothaug took the opportunity to give the audience a National Socialist lecture on the subject of the Jewish question. . . . Because of the way the trial was conducted, it was apparent that the sentence that would be imposed was the death sentence.
>
> In convicting Rothaug, the military tribunal noted that the Katzenberg case [was] an act in furtherance of the Nazi program to persecute and exterminate Jews. That fact is that nobody but a Jew could have been tried for racial pollution. . . . Katzenberger was tried and executed only because he was a Jew. . . . [His] execution was in conformity with the policy of the Nazi state of persecution, torture, and extermination of these races. The defendant Rothaug was the knowing and willing instrument in that program of persecution and extermination.[18]

Abolition of Rule of Law

In short, the abject failure – and in many cases the willing participation – of the German judiciary resulted in the abolition of the rule of law intended to protect individual rights, particularly minorities whom the government sought to hold up as scapegoats to the German people for the country's political, economic, and social woes. One author eloquently noted that:

> By failing to uphold the integrity and independence of the profession during the Third Reich, lawyers permitted the subversion of the basic lawyer-client relationship, the abrogation of the lawyer's role as an advocate, and the elimination of judicial independence. The basic lawyer-client relationship was disrupted and then eliminated. Lawyers could not advocate on behalf of their clients. Basic ethical duties such as loyalty and confidentiality were superseded by the imposition of a duty to uphold and promote the Nazi regime and "sound popular judgment." Lawyers and judges did not individually or collectively maintain the integrity of the profession as one that promotes justice and the Rule of Law.[19]

In our current age of rising anti-Semitism and open and unabashed discrimination against other minority groups, the abject failing of the German judiciary stands as a stark warning that we can never take for granted the role of our own judiciary (and the lawyers and judges who comprise and are essential to its operation) to enforce the rule of law and the Constitution our forefathers created to protect the freedom and rights of all individuals and institutions from a tyranny by the majority.

While playing a prominent role in our society, our judiciary is a fragile system that requires constant monitoring and protection to repel forces that insidiously seek to attack and/or exploit it to further political agendas at the expense of the very citizenry that this hallowed institution was intended to protect. It is the very independence of our judiciary, which stands as one of – if not the – most important bulwarks against the potential fall of democracy to the slippery slope of dictatorship.

If we waver in our diligence to protect the independence of our judiciary, including the lawyers and judges that comprise this institution, we may find ourselves being used

as mere tools to facilitate abuses of a tyrannical government, and, even worse, provide a veneer of legitimacy to the acts of a despotic regime.

Notes

1 The views and opinions in this article are the author's alone.

2 *Complicity in the Perversion of Justice: The Role of Lawyers in Eroding the Rule of Law in the Third Reich*, Cynthia Fountaine, St. Mary's Journal on Legal Malpractice & Ethics, Vol. 10, No. 2 ("*Complicity*") (citing to Kenneth C. H. Willig, *The Bar in the Third Reich*, 20 Am. J. Legal Hist.. 1 (1976) (citing Max Domarus, Hitler: Reden Und Proklamationen 1932-1945, at 1874 (1962)).

3 *Complicity, supra* (citing Ingo Müller, Hitler's Justice: The Courts Of The Third Reich (Deborah Lucas Schneider trans., Harvard Univ. Press 1991) (1987)); *Reichstag Fire Decree*, United States Holocaust Memorial Museum, Washington D.C.; Matthew Lippman, *They Shoot Lawyers Don't They?: Law in the Third Reich and the Global Threat to the Independence of the Judiciary*, 23 Cal. W. Int'l L.J. 257 (1993) ("*They Shoot Lawyers*").

4 *Complicity, supra* (citing Ingo Müller, Hitler's Justice: The Courts Of The Third Reich (Deborah Lucas Schneider trans., Harvard Univ. Press 1991) (1987); *Arrests Without Warrant or Judicial Review*, United States Holocaust Memorial Museum, Washington D.C.

5 *The Enabling Act*, United States Holocaust Memorial Museum, Washington D.C.; *They Shoot Lawyers, supra*.

6 *Complicity, supra* (including citing Ingo Müller, Hitler's Justice: The Courts Of The Third Reich (Deborah Lucas Schneider trans., Harvard Univ. Press 1991) (1987); and *See I Will Never Again Complain to the Police*, YAD VASHEM, https://www.yadvashem.org/YV/en/exhibitions/our_collections/siegel/index.asp (https://perma.cc/QJ26-RGS4); *They Shoot Lawyers, supra*.

7 *Complicity, supra* (citing Ingo Müller, Hitler's Justice: The Courts Of The Third Reich (Deborah Lucas Schneider trans., Harvard Univ. Press 1991) (1987))).

8 *Oaths of Loyalty for All State Officials*, United States Holocaust Memorial Museum, Washington D.C.; *Complicity, supra* (including citations to Trials Of War Criminals Before The Nuremberg Military Tribunals: "The Justice Case" (1951); and Kenneth C. H. Willig, *The Bar in the Third Reich*, 20 Am. J. Legal Hist. 1 (1976)).

9 *Law and Justice in the Third Reich*, United States Holocaust Memorial Museum, Washington D.C.; *Law for the Imposition and Implementation of the Death Penalty*, United States Holocaust Memorial Museum, Washington D.C.; *Complicity, supra* (citing William L. Shirer, The Rise And Fall Of The Third Reich: A History of Nazi Germany 140 (1960); and Robert Aitken, *Hans Frank: Hitler's Lawyer*, Litig., Fall 2002).

10 *Complicity, supra* (citing Trials of War Criminals Before The Nuremberg Military Tribunals: "The Justice Case" (1951)).

11 *Complicity, supra*; *They Shoot Lawyers, supra*.

12 *Nuremberg Race Laws*, United States Holocaust Memorial Museum, Washington D.C.; *Supreme Court Decision on the Nuremberg Race Laws*, United States Holocaust Memorial Museum, Washington D.C.

13 *Why Adolf Hitler Spared the Judges: Judicial Opposition Against the Nazi State*, Hans Petter Graver, German Law Journal, Vol. 19 No. 04 (citing *The Justice Case, in* 3 Trials of War Criminals Before the Nuremberg Military Tribunals 50 (1951)).

14 *Why Adolf Hitler Spared the Judges: Judicial Opposition Against the Nazi State*, Hans Petter Graver, German Law Journal, Vol. 19 No. 04 (citing *The Justice Case, in* 3 Trials of War Criminals Before the Nuremberg Military Tribunals 50 (1951)).

15 *First Letter to All Judges*, United States Holocaust Memorial Museum, Washington D.C.; *Complicity, supra*.

16 *Complicity, supra* (citing 3 Trials of War Criminals Before the Nuremberg Military Tribunals: "The Justice Case" (1951)).

17 *Complicity, supra*; *Background: Jurists' Trial Verdict*, United States Holocaust Memorial Museum, Washington D.C.

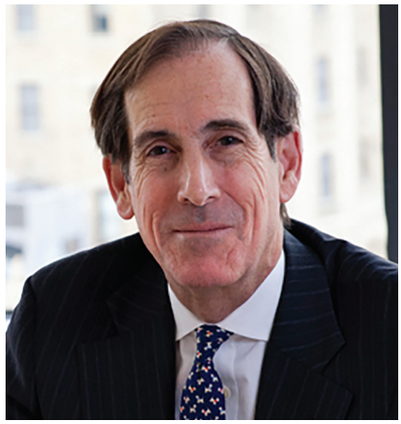
18 *Background: Jurists' Trial Verdict*, United States Holocaust Memorial Museum, Washington D.C.

19 *Complicity, supra*.

Legal History

The Supreme Court Grants the President Immense and Indefinite Powers (and Who Knew?)

By C. Evan Stewart



Today we live in an America where everyone just presumes that presidential power over foreign policy is preeminent; indeed, at least since the Cuban Missile Crisis, Americans have well understood that one person has the ability to destroy the world in a thermo-nuclear holocaust. But that was not always the case, and the constitutional underpinnings for the empowering of the president's on-steroids authority in foreign policy come from three little-known U.S. Supreme Court decisions.

In re Neagle

In 1890, the Supreme Court decided *In re Neagle*, 135 U.S. 1 (1890). The specific holding of *Neagle* is that federal officers acting as bodyguards to the Justices are immune from state prosecution when they are acting within the scope of their federal authority.

David Neagle was a U.S. Marshal appointed by the Attorney General to be Justice Stephen Field's bodyguard while Field was performing his circuit court functions in California. During the course of that tour of duty, Neagle killed a man he determined was about to harm Field. Although Neagle was arrested by a local sheriff, the U.S. Attorney in San Francisco filed a writ of habeas corpus for Neagle's release, which was granted by the circuit court. The sheriff appealed that ruling to the Supreme Court.

By a 6-2 vote (Field recused himself) the Court affirmed the circuit court's decision. In so doing, the Court wrote that presidential duties are not limited to carrying out treaties and congressional acts according to their express terms; rather, those duties are based upon broad implied powers: "the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protections implied by the nature of the government under the Constitution." By that rationale, the Court thus recognized for the first time (in the words of one historian) "immense and indefinite presidential power." Even at the time of the Court's decision it was understood (at least by some) to be very significant. In his highly influential 1895 book "The American Commonwealth," James Bryce wrote that, in foreign affairs, the president "is independent of the House, while the Senate, though it can prevent his settling anything, cannot keep him from unsettling everything." He can "embroil the country abroad or excite passion at home."

And presidents started to do just that. President McKinley's war of choice with Spain in 1898 created an American Empire, which the Court not only ratified in the *Insular Cases* (*see Federal Bar Council Quarterly*, Nov. 2020) but also allowed the federal government to rule the acquired territories unfettered by the Constitution. His successor, Teddy Roosevelt, went even further with his aggressive use of executive agreements. For example, having essentially taken over Santo Domingo in 1904-05, invoking unidentified "police" powers in order to protect U.S. interests, President Roosevelt signed a treaty giving U.S. naval officers control over the country's custom houses (its main revenue source). The Senate, however, rejected that treaty because it wanted no more American protectorates (beyond those it had taken on just a few years before). Undeterred, Roosevelt rejiggered the treaty into an executive agreement, citing a "stewardship" theory (that presidential power was "limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its Constitutional powers").

Curtiss-Wright Export

Fast forward to the 1930s, ironically at a time when the Supreme Court (at least initially) was rejecting wide-scale executive authority in

domestic affairs (*see Federal Bar Council News*, January 2008), the Court was expanding upon what it had written in *Neagle*. The first key decision came in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

At issue in *Curtiss-Wright* was the president's authority to prohibit the sale of arms and ammunitions to belligerents in Latin America, pursuant to a joint resolution of Congress. In a 7-1 vote, the Court upheld that authority. But Justice George Sutherland, writing for the majority, went well beyond the specific dispute at issue by (in the words of one historian) "explicitly separating the Constitution's relationship to domestic policy from its relationship to foreign relations." Sutherland reached his conclusion of untethering foreign relations from the Constitution by three propositions:

- That the federal government's "powers of external sovereignty" pre-dated the Constitution – that these powers were derived from and were "immediately passed" from Great Britain (and its king) to the Union at the time of the Revolution;
- That, as a result of the foregoing, "federal power over external affairs [is therefore] in origin and essential character different from that of internal affairs"; and
- That "in this vast external realm, . . . the President alone has the power to speak or listen as a representative of a nation." On this last point, Sutherland went on to declare that it is "the very delicate, plenary, and exclusive power of the president as the sole organ of the federal government in the field of international relations – a power that does not require as a basis for its exercise an act of Congress." Sutherland added that this "exclusive power" had to be "exercised in subordination to the applicable provisions of the Constitution"; he did not, however, identify what "applicable provisions" he had in mind.

United States v. Belmont

Just one year later, Justice Sutherland authored another majority opinion, in *United States v. Belmont*, 301 U.S. 324 (1937). That opinion held that an executive agreement was the equivalent of a treaty and that, in certain cases, a president's decision making could pre-empt state law.

After the Bolsheviks seized effective control of Russia during the Soviet Revolution, one of the first things they did was to seize the assets of banks and corporations, some of which had assets in the United States. Who owned those assets was unclear until 1933, when President Roosevelt formally recognized the Soviet Union and, as part of that recognition, negotiated the Litvinov Assignment; that was an executive agreement whereby the U.S. government agreed to "assign" assets held by Americans in Russian companies to the Soviet government and the federal government agreed to do the same vis-à-vis assets held by Russians in America.

August Belmont Co., a New York bank holding assets of a Russian company, legally challenged the Litvinov Assignment, arguing that only a treaty ratified by the Senate could constitutionally impair its property rights. The U.S. District Court for the Southern District of New York dismissed the government's case to seize the assets, and the Second Circuit affirmed. These rulings were based upon:

- The fact that the bank deposits had been made in New York;
- Title of such deposits was a matter of New York State law (not federal); and
- A judgment in favor of the United States for the assets would violate the public policy of New York State.

Justice Sutherland, writing for a unanimous Court, reversed the Second Circuit. He wrote that the president had the unfettered power to enter into executive agreements with foreign governments without the advice and consent of the Senate. And to the concerns of the lower courts, Sutherland added that the president's executive agreements are binding over and trump state constitutions, state laws, and state public policies.

By Sutherland's two rulings, in the words of Professor Louis Henkin, in "Foreign Affairs and the Constitution" (Clarendon Press 1972), at 19, the Court had articulated "a singular constitutional history: the powers of the United States to conduct relations with other nations do not derive from the Constitution."

Justice George Sutherland

At first glance, Justice Sutherland was an unlikely architect of presidential power. He was, after all, a leading member of the "Four Horseman" – the group of "conservative" justices who eviscerated much of the New Deal's domestic legislation. Indeed, he was the author of the majority opinion in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), in which the Court, applying the "freedom of contract" theory of due process made famous/infamous in *Lochner v. New York*, 198 U.S. 45 (1995) (*see Federal Bar Council Quarterly*, February 2019), struck down the District of Columbia's minimum wage law for women. (Interestingly, Sutherland's analysis in *Adkins* sounds very much based in modern feminism – i.e., women are not frail, delicate individuals who need extra protection(s); rather they are the equal of men and thus can exercise the right to contract in the marketplace just as much as any men. Sutherland's feminist credentials were, in fact, real: As a U.S. Senator (from Utah), he introduced the 19th Amendment in the Senate, campaigned for its passage, and helped draft the Equal Rights Amendment.) Besides his antipathy for the New Deal, Sutherland also had a very low opinion of President Roosevelt; Sutherland once called him an "utter incompetent."

So why did Sutherland create an extra-constitutional template for the president to exercise power in foreign policy seemingly without constraints?

While in the Senate, Sutherland had written an article in 1910, distinguishing between the "internal and external powers" of the federal government. After leaving the Senate (but before he was put on the Court by President Harding), Sutherland published a book in 1919 that expanded on that theme. While deferring to the states on domestic issues (e.g., child labor laws), Sutherland argued that in "external matters" the states had "no residuary power." And as to the government's obligation under the Constitution to "provide for the Common Defense," Sutherland contended that "[a]lways the end is more important than the means."

This last observation opened up Sutherland to criticism as advocating "executive totalitarianism." Notwithstanding, as Justice Sutherland, he (in the words of one historian) "provided that most important historical and judicial justification for taking the critical step of separating foreign and domestic affairs."

Postscripts

- President Franklin D. Roosevelt certainly felt empowered by Sutherland's rulings. In 1941, when an American destroyer, the *USS Greer*, was attacked by a German submarine, the president issued a "shoot-on-sight" policy for any Axis submarines that "enter the waters the protection of which is necessary for American defense." The historic importance of the *Greer* incident and the "shoot-on-sight" policy cannot be understated. For example, Hitler deemed it to be a de facto "state of war" declaration by the United States, and it was a key factor in his decision to declare war against America after Japan attacked Pearl Harbor. For those who want to know more about the *Greer* incident, *see* "Myron Taylor: The Man Nobody Knew" (Twelve Tables Press 2023).

- President Truman did suffer a rebuke from the Court when he seized the nation's steel mills during the Korean War to prevent a labor strike. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). That there was no congressional declaration of war played a key role in that decision; moreover, that the presidential action was directed at domestic institutions – as opposed to actions/activities abroad – was an important contributor as well. Justice Jackson, in his concurring opinion in *Youngstown Sheet*, identified three zones of presidential authority: (1) maximum authority – acting with express or implicit authority from Congress; (2) a "zone of twilight" – where Congress has been silent; and (3) the "lowest ebb" – acting "incompatible with the express or implied will of Congress." For other Court decisions reviewing presidential authority over foreign policy, *see, e.g., FEA v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976) (presidential restrictions on oil imports upheld based upon open-ended congressional delegation of authority); *Reagan v. Wald*, 468 U.S. 222 (1984) (presidential restrictions on travel

to Cuba upheld given congressional authorization).

- For those who want to get a better understanding of *Neagle* and Justice Sutherland's decisions in the broader context of American foreign policy, *see* Walter LaFeber's "The Constitution and United States Foreign Policy: An Interpretation," *The Journal of American History*, 695-717 (December 1987). For those who want to know more about Justice Sutherland, *see* Joel Francis Paschal's "Mr. Justice Sutherland: A Man Against the State" (Princeton 1951).

From the (Writing) Bench

A Story from a Judge

By Lisa Margaret Smith, Magistrate Judge (ret.)

When I tell people I meet that I am a retired U.S. Magistrate Judge they inevitably ask about how exciting that must have been, and how I must have met many interesting people. As with any job, there were interesting moments, but the most interesting people were quite ordinary, for the most part. Litigants and witnesses alike had interesting stories to tell; I heard many of their stories in confidence, while attempting to broker settlements. I am proud to say that over time I became quite successful in achieving settlements, but of course I cannot tell you those stories.

Over my twenty-five years on the bench I had a very few people in my courtroom who might count as well-known. I once had a former president's brother and sister-in-law testify in a case involving the sister-in-law's manicurist (I could not make this up); I arraigned the husband and brother-in-law of a former Westchester County district attorney on tax charges; I once had a case where the evidence was the famous part, it involved a dispute over memorabilia from an anniversary signing by the undefeated 1972 Miami Dolphins football team, and the disputed items, all bearing signatures, were all displayed in my courtroom; but in truth the most famous person I had in my courtroom over my twenty-five years was not a litigant or a witness, but was a potential juror.

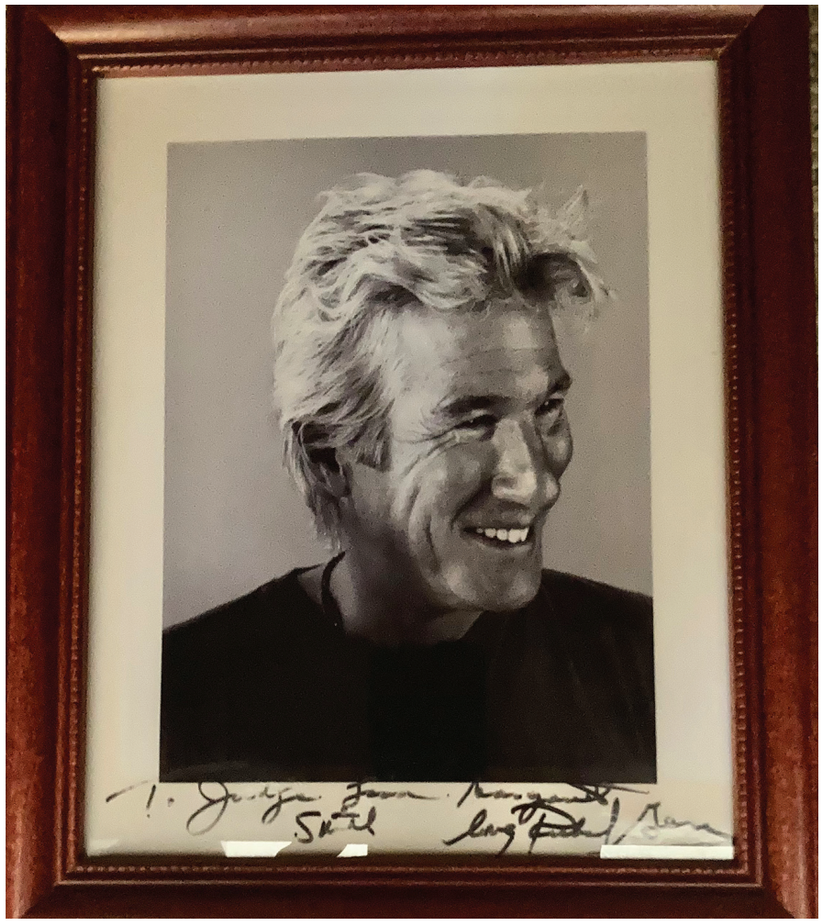
I believe that this happened in around 2008, though I cannot be sure. I had been told by the jury clerk that Richard Gere, who was then a resident of Westchester County in the Southern District of New York, had been called for jury duty. A request had come in to adjourn his service, because he was out of the district shooting a movie (I always thought the movie in question was Nights in Rodanthe, which came out in 2009). Some months later Gere's number came up again, and he actually arrived in the Brieant Courthouse in White Plains to honor his jury notice. To my surprise, he was included in the group of prospective jurors sent to my courtroom for jury selection. Interestingly enough, his presence was of great interest to certain of our courthouse personnel, but the other prospective jurors seemed quite oblivious to his presence.

As I began the jury selection process I followed my typical introductory litany, in which I briefly described the case, including how long we expected the trial to last, and the need for our jurors to be fair and impartial. I then asked if, based on anything I had said so far, any of our jurors were unwilling or unable to serve as a juror. Gere's hand went up, so I invited him to sidebar to explain his concern to me and the attorneys for both sides. The conversation I recount here is not exact, but it went something like this:

Me: Mr. Gere, what is your concern about serving as a juror?

Mr. Gere: Well, in my career I have played defendants and I have played lawyers, and I would be concerned that because of my experience the other jurors would pay too much attention to what I might say about the case.

Me: Mr. Gere, as you know, I am a federal judge, and I was recently called to serve on a grand jury in Westchester County. The other grand jurors became aware of my experience not only as a judge but also as a prosecutor, and I was



Richard Gere

also concerned that they might be swayed by anything I would say, so I made certain to wait until everyone else had spoken before I spoke up, and I did not vote on any case until everyone else had voted, to insure that no other grand juror would be impacted by my position.

Although I was interested to hear Gere's response to my words, at that point I became aware that the two attorneys in the case, who were standing behind Gere, were making hand motions to the effect that they both thought he should be excused from service. It was my habit to allow counsel to agree to excuse a particular juror, so I confirmed that they agreed that he should be excused, and I then excused him without hearing his response, on consent of the attorneys. I have always wondered what he might have said.

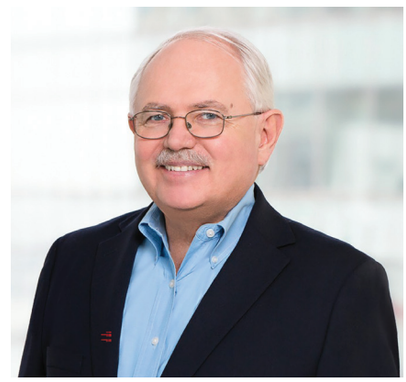
At some time later I received a visit from the jury clerk, who delivered to me an autographed photo of Gere. The clerk told me that he had received a call from Gere's representative, expressing Gere's appreciation for how well he was treated when he was in the courthouse, and asking if there was anything Gere could do to show his thanks. The jury clerk said that it was our pleasure and of course no thanks was necessary; after a moment, however, he did suggest that an autographed picture from Gere would be nice. Three such photos arrived some time later, one for the jury clerk, one for another employee who was a great fan, and one for me. As the value of the photo was de minimis, and I had no part in acquiring it, I believed there was no ethical bar to my keeping it. Until my retirement it held a place of honor in my chambers, and I keep it on my desk at home even now. The inscription reads "To Judge Lisa Margaret Smith love Richard Gere."

That was my most memorable brush with fame during my time as a judge.

A Remembrance

Eleanor Jackson Piel

By J. Christopher Jensen



Eleanor Jackson Piel has passed away at the age of 102. Eleanor was an extraordinary member of

the New York bar and a devoted member of the Federal Bar Council. I chose the adjective extraordinary advisedly because Eleanor was not only a pioneer for women in the legal practice but also dedicated her 70 years of legal practice to representing the underrepresented, including wrongfully convicted death row inmates and victims of racial discrimination. There were many pioneering women of her generation who broke the barrier to women in the legal profession but Eleanor may have been the bravest. As a single practitioner, she handled some of the most important death penalty and civil rights cases during a time when it was rare for women to be lead trial counsel. This included her victory before the U.S. Supreme Court in *Adickes v. S.H. Kress & Co.*, extending the reach of equal protection under the 14th Amendment to persons who were denied service in a restaurant because of their race. To have achieved such legal victories as a woman practicing law alone was extraordinary in every sense.

I first met Eleanor and her husband Gerard Piel at one of the Federal Bar Council winter meetings in the 1990s, when they were regular attendees. On one of the free dining nights, my wife and I had decided to dine alone in one of the resort restaurants, where we were invited by the Piels to join them at their table. They immediately welcomed us as if were old friends and we began exchanging our life stories.

I knew of Eleanor from my own representation of a wrongfully convicted death row inmate. Her work in that field was legendary. We did not know her husband, however, and were astonished by his modest description of his accomplishments. Gerard told us about his journey from an undergraduate in the social sciences at Harvard to becoming the founder and publisher of the revived Scientific American magazine – which he described simply as if this were not a particularly notable achievement. He told us that he was a devoted alumni of Harvard and had served for many years as a trustee of Radcliffe and overseer of the university.

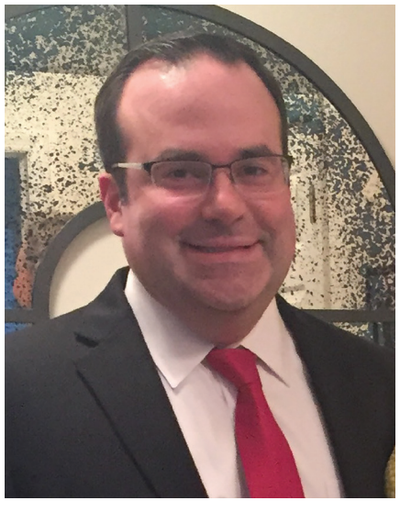
We spoke of our shared interests in death penalty representation and of their commitment to encouraging women's education in the sciences. This had been prompted by our telling Eleanor and Gerard that our daughter was at the time one of the few undergraduate women majoring in mathematics at Harvard. Gerard described his efforts to encourage and support women majoring in math and the sciences through his roles as the founder and publisher of the revived Scientific American magazine and as a trustee of Radcliffe College and overseer at Harvard. They were genuinely delighted to hear about our daughter and wanted us to tell our daughter to persevere in her education. We shall never forget this evening of warm conversation with these delightful people. We continued to look for them at subsequent winter meetings and always enjoyed their company as did many other attendees of the winter meetings.

There never was a more charming and elegant couple than Eleanor and Gerard, whose combined contributions to society over their lifetimes are beyond compare. The Council was honored by their participation in its winter meetings and those fortunate enough to have met them shall always remember Eleanor and Gerard with great respect and affection.

Legal History

Lincoln the Lawyer

By Joseph Marutollo



What type of a lawyer was Abraham Lincoln? That is the question at the center of the acclaimed book, "Lincoln's Ladder to the Presidency: The Eighth Judicial Circuit," by Illinois attorney Guy C. Fraker. The book delves deeply into Lincoln's 23-year legal career spent mostly on the Eighth Judicial Circuit in Illinois. As discussed below, the evidence demonstrates that Lincoln was, in short, an exceptional lawyer.

By way of background, Lincoln embarked on a number of careers before becoming a lawyer, including

serving as a farmhand, storekeeper, postmaster, and surveyor. While working in his role as storekeeper, he became acquainted with John Todd Stuart, an attorney from Springfield, Illinois (and also the first cousin of Lincoln's future wife, Mary Todd). Stuart encouraged Lincoln to pursue the law. Unlike most 19th century lawyers, who studied in law offices before seeking admission to the bar, Lincoln generally studied on his own. He avidly read Blackstone's Commentaries. Lincoln was admitted to the practice of law on March 1, 1837. At that time, no bar exam was required; rather, he was certified by a practicing lawyer that his basic training was complete and that he was of good moral character. He began his legal career in Springfield in partnership with Stuart.

The Eighth Judicial Circuit in Illinois covered over ten thousand square miles (more than twice the size of Connecticut) and was almost entirely made up of prairie lands. The ride across the fourteen counties in the Eighth Judicial Circuit covered close to 500 miles. During this period, lawyers and judges traveled the circuit together on their own horses or in buggies. The living conditions were grueling. Fraker described the inns in which Lincoln stayed as varying "from mediocre to terrible," as lawyers slept two-to-three to a bed, with up to eight lawyers in a room (a nightmare under any circumstances). Inns often "swarmed with flies, mosquitoes, fleas, and bedbugs." Food was frequently served at the inns at long tables where everyone, including the judges, lawyers, and witnesses, crammed together to share a meal.

Lincoln typically carried a carpetbag with him, in which he crammed, according to Fraker, "a change of underwear, a fresh shirt, a long, yellow night shirt, and a few books." He would carry documents in his coat and in his legendary stovepipe hat. He would frequently carry a fold-up desk for writing and a folding shaving mirror, as he was – at this time in his life – clean shaven.

Despite the hardships on the circuit, Lincoln "loved the life," according to Fraker. Judge David Davis – Lincoln's political ally and future Supreme Court Justice – recalled that, in his opinion, he thought "Mr. Lincoln was happy – as happy as *he* could be, when on this Circuit – and happy no other place. This was his place of enjoyment." Davis added that when, on Saturday evenings, lawyers would leave the circuit and return to their families, Lincoln would remain on the circuit. Fraker argues that this time away from home – including his time in solitude, away from the other lawyers in the inns – allowed him time to read and study. As Stuart later said, by 1860, Lincoln was a "well educated man."

As a lawyer, Lincoln was a general practitioner. Fraker states that his work consisted "primarily of litigation of a mundane and routine nature, overwhelmingly civil, not criminal." The work ranged from "debt collection to lobbying to murder trials to wills and beyond." Historian Don Fehrenbacher noted that Lincoln "moved facilely from one kind of case to another and came to know government, business, and society in a wide variety of aspects."

The cases themselves were demanding, particularly due to the rushed nature of the proceedings and the limited opportunity to prepare. As Fraker explains, "each day brought new cases involving a wide range of subject matter and people. The hurried drafting of pleadings, interviewing of witnesses, and development of trial strategy were challenges." There was generally no pre-trial discovery on the Eighth Circuit, and indeed, there was little advance knowledge of the opponent's case. Lincoln's second partner, Stephen T. Logan, was a meticulous and highly respected lawyer. According to Fraker, "Logan taught Lincoln not to be discouraged by his lack of training, which could be overcome by hard work and preparation, and to analyze both sides of a case to anticipate the opponent's strategy." Lincoln learned from Logan that he had to be more methodical and more dedicated in his preparation in the courtroom.

Lincoln preached hard work to those around him. He told a young lawyer that "the leading rule for the lawyer, as for the man, of every calling, is diligence. Leave nothing for tomorrow, which can be done today. Never let your correspondence fall behind. Whatever piece of business you have in hand, before stopping, do all the labor pertaining to it which can then be done."

By all accounts, Lincoln devoted himself fully to his cases, which led to outstanding results. One adversary

wrote, "[t]he truth is, Mr. Lincoln had a genius for seeing the real point in a case at once, and aiming steadily at it from the beginning of a trial to the end." A newspaper reporter remarked that Lincoln would routinely "emphasiz[e] only the most vital points in a case." The same reporter stated that Lincoln typically did not take notes during the trial; instead, he relied on his own strong memory to help explain what occurred to the jury. (Lincoln said that his mind was similar to a piece of steel: it was hard to scratch anything on it, but once there, it was there for good.) The Illinois Citizen newspaper once reported that Lincoln's summations were known for their wit, simplicity, and insight.

Lincoln also knew that integrity was critical to his success as a lawyer. He wrote, "Let no young man choosing the law for a calling for a moment yield to the popular belief – resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer." Lincoln's friend and fellow attorney, Judge John Scott, said that Lincoln "knew much of the law as written in the books, and had that knowledge ready for use at all times." But, importantly, Lincoln also "knew right and justice and knew how to make their application to the affairs of everyday life. That was an element in his character that gave him power to prevail with the jury when arguing a case before them. Few lawyers ever had the influence with a jury [that] Mr. Lincoln had." Lincoln's integrity was quickly recognized by his peers, and his devotion to fairness helped nurture his burgeoning political career.

Lincoln also admonished lawyers to do something that, at first glance, may appear counterintuitive. In his words, he "discourage[d] litigation." He said that the lawyer must "persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man." As Lincoln added, "[t] here will still be business enough." Lincoln would often tell clients with whom he had won trial verdicts to accept less than the verdict to avoid an unnecessary appeal, as they would inevitably waste more of their money on attorneys' fees.

Fraker's book also discusses Lincoln's litigation in the years immediately before becoming a national figure. In 1858, with Lincoln assessing his chances to upset Stephen A. Douglas for a U.S. Senate seat from Illinois, he defended Duff Armstrong in a murder trial that later became known as the "Almanac Trial." Lincoln adroitly cross-examined a witness who claimed that the light of the full moon led him to identify Armstrong; Lincoln used the almanac to show that the moon was near setting at the time of the murder. Lincoln won his client an acquittal.

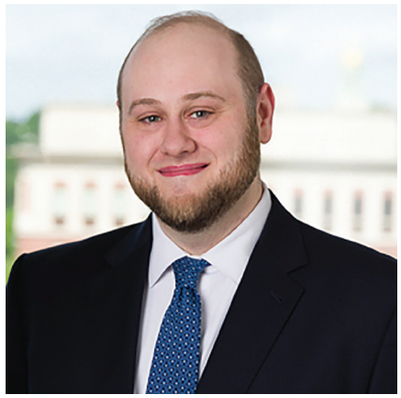
While the focus of Fraker's book was on Lincoln's legal prowess in Illinois, this author would be remiss if he did not mention that Lincoln's excellent legal judgment extended into the presidency and his decision, among many other legal achievements, to create a second federal district court in New York City. With President Lincoln's support, on February 22, 1865, the U.S. Senate, by a vote of 26 to 7 (with 17 abstentions) passed a House bill "facilitating proceedings in the admiralty and other judicial proceedings in the port of New York and increasing the number of district courts in New York," to wit, the Eastern District of New York. *See* 13 Stat. L. 438. Both New York senators voted for this new district court (although one senator from New Jersey and both senators from Connecticut voted against creating the bill). On February 25, 1865 – only 48 days before his assassination – President Lincoln approved an Act of Congress recommending the formation of the Eastern District of New York. On March 6, 1865, President Lincoln appointed Benjamin D. Silliman as the district's first U.S. Attorney. Over 150 years later, the U.S. Attorney's Office in the Eastern District of New York prominently features a portrait and bust of Lincoln in its main lobby (among other Lincoln paraphernalia in the office).

Ultimately, Fraker contends that Lincoln's "travels on the Circuit and time with its residents from all walks of life enhanced his understanding of human nature, and he developed an extraordinary ability to listen and understand, without rancor, opposing viewpoints." The development of these skills unquestionably contributed to his later successes as president.

The Westchester Committee

An Informal Evening with District Judge Cathy Seibel

By Ross M. Keiser

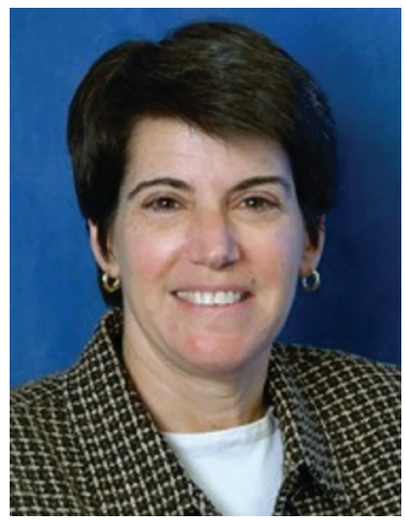


On October 26, 2022, the Federal Bar Council's Westchester Committee hosted an evening with District Judge Cathy Seibel of the Southern District of New York, who sits in the Charles L. Brieant Federal Building and Courthouse in White Plains. This event marks the third in a series, having previously featured District Judge Philip Halpern and Magistrate Judge Andrew E. Krause earlier last year. These informal events have been fantastic opportunities to meet and socialize with the judges sitting in the White Plains courthouse.

The event was held at the White Plains office of Yankwitt LLP. The firm's managing partner, Russell Yankwitt, is the founder and chair of the Westchester Committee and serves as vice president of the executive board of the Federal Bar Council. Alicia Tallbe, a partner at Yankwitt and one of Judge Seibel's first law clerks, introduced the judge and moderated the discussion.

Judge Seibel spoke candidly and openly about her background and path to the bench, as well as about some of her pet peeves and practice pointers for those who appear before her and in federal court generally. Following the judge's opening remarks, the floor was open to questions from those attending in person and remotely. The discussion was lively and engaging, as Judge Seibel offered interesting anecdotes from her 14 years on the federal bench. She also expressed her gratitude to lawyers who are willing to provide legal assistance to pro se litigants, particularly when a case is heading to trial.

The event was well-attended and much appreciated by members of the Federal Bar Council. The Westchester Committee will continue to host similar events to give members the unique opportunity to interact informally with the federal judges before whom they appear.

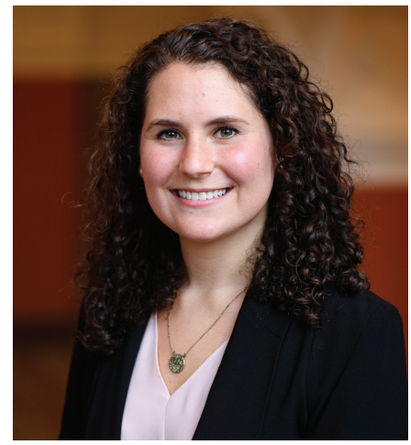


District Judge Cathy Seibel

Lawyers Who Make a Difference

Mary Beth Hogan, President of the Board of Nazareth Housing

By Pete Eikenberry and Isabel Feldman



When he accepted the Learned Hand Award at the Federal Bar Council's Annual Law Day Dinner in 1989, U.S. District Judge Morris E. Lasker delivered a speech urging lawyers to engage in the great social justice issues of the day:

> [T]he problems of homelessness, AIDS and drugs are not matters which . . . can be solved or alleviated by courts or by litigation alone, they are issues of such magnitude that a profession charged with the administration of justice . . . cannot regard them with equanimity. . . . What can the legal profession do to contend with such intractable forces? . . . The present degree of organization of the profession is not sufficient to deal with the *extra-legal* impact of AIDS, drug use, and homelessness. At the very least . . . the profession can organize for the purpose of determining what it can do to help conquer these adamantine enemies.

The morning after the judge's presentation, Richard Rothman, then chair of the Council's Second Circuit Courts Committee, called me and, on behalf of the Council, asked me to organize and chair a public service committee to respond to Judge Lasker's challenge. The committee was dutifully formed and met on a regular basis. Judge Lasker habitually arose at 5:30 a.m. and came from Westchester to participate in the 7:30 a.m. meetings. Since homelessness, drug addiction, and AIDS were more than a full plate, the committee determined to focus on homelessness.

Thereafter, the committee routinely invited speakers to meetings, including Rick Higgens, a member of Governor Mario Cuomo's cabinet, in an attempt to identify a project. After a year or more of frustration because the committee had not identified a suitable task, I telephoned my son David, who was a first-year associate at Simpson Thacher, and asked him to find some young people for the committee who could come up with fresh ideas which we could implement to make a difference. David recommended three people, and I invited them all to membership on the committee, including Mary Beth Hogan.

At the time, Mary Beth was a second-year associate at Debevoise. Thereafter, for many years, she was the youngest person on the committee. Early on, Mary Beth told me she had met David Besada from Nazareth Housing. Nazareth Housing was a tiny community-based organization founded in 1983 by Sister Marion Agnes Daniel as part of the urban homesteading movement on the Lower East Side of Manhattan, which was committed to promoting housing stability and economic mobility among vulnerable families and individuals on the Lower East Side. At the time, Nazareth was renovating one building at a time for use by homeless people. At Mary Beth's suggestion, I asked her to invite David Besada to speak at a committee meeting. After hearing David, the late Steve Edwards became involved with Nazareth by resolving tax issues. Steve was subsequently invited to become a board member and soon became president of the board of Nazareth, in which capacity he served for twenty years. Mary Beth reports that:

> Steve's perseverance, creativity, and strategic vision enabled the organization to grow and serve more people. Steve led a seven-year-long effort to build the Nazareth House Housing Development Fund Corporation. From 2005 to 2012, Steve worked tirelessly to secure a lease, loans from the city, and tax exemptions to complete this project. It created 15 permanently affordable apartments for families in financial need.

Mary Beth says Steve persuaded many friends to contribute to Nazareth, and those contributions kept it afloat in the early years and have continued to be an important source of support. Steve also recruited Bennette Kramer, who has served as a director and the secretary for decades. Mary Beth says that:

> Her meticulous minutes all these years are a road map to the history of the organization. As Secretary and co-chair of the Nominations and Governance Committee, Bennette attracted and vetted talented and committed board members. Her legal and compliance insights, as well as her strong governance skills, make her an invaluable member of the board.

Steve also recruited Mary Kilbourn to serve as a board member. Mary subsequently became executive director of Nazareth following Founder Sister Marion Agnes Daniel.

In 2012, Mary Beth succeeded Steve as president of the board. As one of 11 children growing up in suburban New Jersey, Mary Beth compares her childhood to

"growing up in a summer camp. Dinner time was always a crowd, and everyone had a household job or jobs starting at about age five." By the time Mary Beth turned eight years old, her family was experiencing economic hardship as her father tried to start his own business. As Mary Beth explained:

> We always had a home, but I wouldn't ask for things that cost money. I had a paper route, baby sat, and worked each summer in high school and college to earn spending money for the following school year. I received financial aid, scholarships, and took out loans to cover college and law school tuition.

Mary Beth's belief in Nazareth's mission to stabilize families well before they become homeless is informed by her upbringing and personal experience with financial insecurity. She states "having a safe place to live is an essential building block of success. It makes it possible to get to school, to be stable enough to do well in school, and to find mentors who can help you get to the next step."

Conclusion

Since the early 1990s, when Mary Beth, Steve, and Bennette went on Nazareth's board and provided leadership, it has become a leader in the fields of homelessness prevention, supportive housing and emergency shelter for low-income families in New York City. In 2022, Nazareth helped 600 households on the verge of eviction keep their housing and fed nearly 100,000 people through its food pantry. Through Nazareth's financial empowerment program, 350 individuals had their tax returns prepared for free in 2022, resulting in $450,000 in refunds to low-income families.

One hopes that judges will continue to step outside of their normal roles to challenge lawyers to help solve intractable problems as Judge Lasker did, and that young women and men will take up the challenges as Mary Beth Hogan did.

Editor's note: Isabel Feldman is a first-year associate at Debevoise & Plimpton LLP.

Lives Risked

Murder Mysteries to Solve

By Pete Eikenberry

Most lawyers I know "give back" in service to bar associations and in other ways and endeavor to "do justice," as Judge Katzmann explained we are licensed to do. Yet there are others who have risked their lives by being lawyers, and some who have lost their lives. I hope to spend some time trying to help solve two mysteries concerning murders of lawyers I have known.

Cleve McDowell

Mississippi lawyer Cleve McDowell, a resident of Drew, Mississippi, was murdered and his files relevant to his investigation of the murders of Black people in Mississippi were burned, yet the investigative files for both the murder and the arson have always been sealed. Why are the files sealed?

The McDowell Case

During Memorial Day weekend in 1971, I determined to visit Grenada, Mississippi, the small town where I had served as civil rights lawyer in 1966. By happenstance, I added a side trip after hearing on the radio that a Black girl was murdered in Drew, Mississippi. She was shot walking on the street on the night of her high school graduation by two white men in a pickup truck. From Grenada, I drove to Drew and met attorney Cleve McDowell, who was in charge of her funeral preparations. He asked me to help a high school classmate of the girl write a eulogy to be given at her funeral. I spent the night at the boy's home, and I slept on the only bed in the house; the residents slept on flattened cardboard boxes on the floor.

Cleve also gave me directions to the home of Fannie Lou Hamer, then the head of the Mississippi Freedom Party, whom I interviewed on her front porch swing. The next day, he introduced me to legendary civil rights leaders Aaron Henry and Charles Evers, with whom I talked at a picnic table in Cleve's backyard prior to the funeral. Years later, I googled Cleve and found that he had not only been the second Black person admitted to the University of Mississippi after James Meredith, but that he had become a lawyer for the NAACP Legal Defense Fund, then a judge and then as a sole practitioner he spent years

investigating the murders of Black people in Mississippi.

I also learned that more than 20 years after I met him, Cleve had been murdered, allegedly by a young Black man who was tried, convicted and sentenced to prison. The alleged murderer recanted his confession, saying he had been coerced. Also, the three bullets that ended Cleve's life were apparently shot by different people since the angles of entry were different for each bullet. The files of Cleve's murder were sealed on the first day of the investigation of it and remain sealed to this day. The files on the arson of Cleve's files concerning his investigation of murders of Blacks in Mississippi also remain sealed.

Rosemary Nelson

Who killed Northern Ireland solicitor Rosemary Nelson, who was blown up by a car bomb within the vicinity of her children on a school playground?

The Nelson Case

In 1998, I was a member of an Association of the Bar Human Rights Mission to Northern Ireland, the members of the Mission included Judge Sidney Stein, then-Judge Barbara Jones, former City Bar President Barbara Paul Robinson, and Gerald Conroy. A young solicitor, Rosemary Nelson, drove 25 miles from Lurgin to meet with the Mission in Belfast. She drew from her purse at lunch a small violet colored envelope and from the envelope a violet colored small piece of paper with a handwritten message stating that she was going to be killed.

When the members of the Mission met with the Lord Chief Justice of Northern Ireland, I asked him what should be done about this letter; I asked was she not a member of his justice system? He replied that she should go to see Ronnie Flanagan, the Chief Constable of Northern Ireland. I stated that she had gone to him twice but had not received any assistance.

Approximately six months after the Mission returned to New York, Rosemary Nelson was killed by a car bomb. During the Mission while we were in London, we talked to Jane Winters, who was head of the British-Irish Rights Watch. She said Rosemary revealed to her that she was scared to continue to represent Catholic defendants, but she felt she could not let them down.

Conclusion

There must be people who can explain why the files relative to Cleve McDowell's murder and the arson of his files are sealed. There must be people to be interviewed to finally determine who was responsible for the murder of Rosemary Nelson. Writing this article will help motivate me to work to help to solve these mysteries.

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